inks

IN THE SUPREME COURT OF THE UNITED STATES

PLANNED PARENTHOOD OF CENTRAL MISSOURI, et al., Appellants, v. JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI, et al., Appellees.	No. 74-1151
and	
JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI, Appellant, v. PLANNED PARENTHOOD OF CENTRAL MISSOURI, et al., Appellees.	No. 74-1419

Washington, D. C.,

Tuesday, March 23, 1976.

The above-entitled matter came on for argument at 10:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANK SUSMAN, ESQ., Susman, Schermer, Willer & Rimmel, 7733 Forsyth Boulevard, Suite 1100, St. Louis, Missouri 63105; on behalf of Planned Parenthood, etc., et al.

JOHN C. DANFORTH, ESQ., Attorney General of Missouri, Supreme Court Building, Jefferson City, Missouri 65101; on behalf of John C. Danforth, Attorney General of Missouri.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 74-1151 and 1419, Planned Parenthood against Danforth, and Danforth against Planned Parenthood.

Mr. Susman, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANK SUSMAN, ESQ.,

ON BEHALF OF PLANNED PARENTHOOD, ETC., ET AL.

MR. SUSMAN: Mr. Chief Justice, and may it please the Court:

Just a little over three years ago this Court spoke firmly and clearly, not as an advocate of abortion but as an advocate of each individual woman's right under her then existing particular circumstances, and in consultation with her physician, to terminate her pregnancy.

Subject to certain and delineating compelling State interest, the right to abortion was then recognized as equal to the right to bear children.

In the intervening three years, many things have remained static and many other things have changed.

Unchanged, in particular, are certain fundamental observations that were made by this Court in its decision in Roe vs. Wade. These include:

One, the fact of the sensitive and emotional nature of the abortion controversy, the deep and seemingly absolute convictions that the subject inspires; noted by the Court at

page 116.

Secondly was the support of the Court's position by broadly based and concerned organizations, which included and still include today things such as the American Medical Association, American College of Obstetricians and Gynecologists, American Public Health Association, and the American Bar Association. Also noted in the Court's opinion at pages 144 to 146.

And thirdly was the relative safety of abortion when compared to the mortality risk normally associated with childbirth. Noted by the Court at page 149.

And lastly was the observation that those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any concensus of the question of when life begins. Noted by the Court at page 159.

But I would suggest that even more dramatic are those changes which had been directly wrought by the Court's decisions of that day.

The first is that septic abortions in the United States have decreased by fifty percent.

Secondly, maternal mortality associated with pregnancy has decreased by 80 percent in the United States.

And, thirdly, illegitimate births have also dramatically decreased.

It is somehow cruelly ironic that that area of

medical practice afforded the greatest constitutional protection by this Court is the same area of medical practice over which the State of Missouri has seen fit to exercise the greatest legislative control.

In 1971, just five years ago, approximately 38 percent of the world's population had access to safe medical and legal abortions. Only five years later now, in 1976, two-thirds of the world's population enjoys that right.

No democracy has ever reversed the trend of liberalizing abortion, once accomplished. And yet the district court's opinion below has severely throttled and restricted this Court's opinions of Roe vs. Wade and Doe vs. Bolton. And has hampered the medical progress and the reproductive freedom for women granted by this Court in 1973, and which was over a hundred years in coming to pass.

In addition, there is a side effect of restrictive abortions, and particularly those in the second trimester, and that is that it threatens to cripple all of the advances made in amniocentesis by which today approximately 60 serious genetic chromosomal disorders can now be diagnosed.

We would also point out that the district court's opinion below is the only federal court challenge to uphold major legislation or policy in the area of abortion, since January 22nd of 1973. In all other cases in which policy or legislation was challenged, it was voided as not meeting the

requirements of Roe and Doe.

The jurisdiction of this Court is clear under the holdings in Gonzales and MTM.

This Court, in Roe and Doe, and subsequent courts which have had little difficulty in understanding the opinions rendered by this Court, have set up certain standards and tests by which abortion legislation and abortion policy is to be judged. And they include, among others, No. 1, the delineation of the period of gestation into various periods, frequently called trimesters, but not truly so; that the first trimester and then the second period running up to the point of viability and the period afterwards.

They have consistently held that regulations not observing these distinctions as set forward in the Court's opinions are invalid.

Secondly is the test of equating abortion with other procedures. A test first enunciated by the Eighth Circuit in a case entitled Doe vs. Poelker. In that case, the Eighth Circuit pointed out that any time the State seeks to single out abortion from among the hundreds and thousands of other medical and surgical procedures for special attention. It has imposed an extra layer of regulation and an extra burden, and thus is invalid.

Thirdly, of the tests referred to by the Court itself, those of compelling State interest, placing a stronger

burden upon the State who attempts to pass such regulation.

Along with the compelling State interest test, of course, is the fact that any regulations enacted which conform to those tests must be narrowly drawn, and we suggest, as we will go through each of these sections that are challenged here this morning, that they are not so narrowly drawn.

Again is a test which is required that abortion be treated equally with childbirth, that it not be legislatively disfavored by the legislation which is enacted, particularly in light of the fact that abortion for periods well into the second trimester are still safer than the mortality rates for childbirth.

And lastly is the observation, the effect of any restrictions upon access to abortion are more onerous for the poor and for the young. It is basically, of course, very difficult to go into any great detail in any of these sections, due to the time that is allotted. Therefore, we will attempt to only take them in order as they appear in the statute.

The first section that was challenged is Section 2(2), which involves the definition of viability. The statute provides that viability is defined as follows: that stage of fetal development when the life of the unborn child may be continued indefinitely outside of the womb by a natural or artificial life-supportive systems. This section needs to be read, of course, in conjunction with Section 5, providing that

no abortion, not necessary for life or health, may be performed after the period of viability as statutorily defined.

This Court, in speaking of viability, spoke about it in several different ways and on three separate occasions. First, on page 160 of the decision in Roe, they refer to viability as usually being placed about seven months, 28 weeks, but may occur earlier, even at 24 weeks.

Secondly, on page 163, the Court said: That point of time in which the fetus then presumably has the capability of meaningful life outside the mother's womb.

And in a third place, also on page 160, the Court referred to: when the fetus is potentially able to live outside the mother's womb, albeit with artificial aid.

We do not believe, as the State contends, that the Court may only look to one of these meanings and thereby incorporate it statutorily into the statute. We believe that all three must be looked at and taken as a group.

First of all, this restriction in definition invades the first trimester. By the mere addition of the word "indefinitely", which did not appear in the Supreme Court's decision, which dictionaries define as "indeterminate". It provides for a remote possibility, even for seconds of survival. And yet the idea of brief respiratory gasps or fleeting heartbeats are not considered by the American College of Obstetricians and Gynecologists as life.

Fleeting heartbeats and respiratory gasps are still considered to qualify as a stillbirth under those definitions.

Three courts, three federal courts have held that in fact this Court's language as to 28 weeks, but perhaps occurring at 24, was not dicta; that, in fact, it was to be a lower limit beyond which States could not allow viability to occur under the then existing medical evidence before this Court in 1973.

The problem of defining viability involves whether you're talking about a remote possibility of survival as opposed to, perhaps, a probability.

This was a problem in the now celebrated trial of Dr. Even in Boston.

We would suggest that the standard be as follows: that there be an irrebutable and conclusive presumption that viability does not occur before 24 weeks. And we agree with the three federal courts that have interpreted the Court's decision as saying that this was not intended to be dicta or was to be a holding.

And we further believe that in those cases of the fetus being beyond 24 weeks in gestation, that the State has the burden to prove beyond a reasonable doubt that that particular fetus in question would have survived, and not the possibility. The fact that one in a thousand at that particular stage of gestation might survive is no answer to the doctor who is faced with making the decision at the time

as to whether the particular fetus is viable.

We also feel that it is necessary to have some form of absolute lower limit, because in practice it has been shown that the physician, of course,would intend to err on the side of safety for himself in the legal processes and not necessarily with only the woman's interest in mind.

The second section challenged is that, Section 3(2), requiring patient's consent. This makes it a crime to perform an abortion without requiring the woman to certify in writing that her consent is informed, freely given and not the result of coercion. It applies to all stages of pregnancy, and it singles out abortion from all other medical and surgical procedures, and makes the physician obtain a specific form of consent at the peril of being convicted of a crime.

QUESTION: What is the traditional obligation of the physician, with respect to a patient -- independent of abortions -- just patients?

MR. SUSMAN: The obligation --

QUESTION: What is his obligation with respect to the measures he must take, even if he thinks the patient may be probably dead but possibly may have life that can be preserved? What is the traditional obligation of the physician?

MR. SUSMAN: I assume, Mr. Chief Justice, you're referring to normal patients or --

QUESTION: Yes.

MR. SUSMAN: -- fetuses surviving birth. I believe the obligation --

QUESTION: No, no, I'm not talking about fetuses at all; I'm talking about people.

MR. SUSMAN: I believe the obligation --

QUESTION: A man run down by an automobile, and a physician happens to come, and all of the vital signs appear to be negative; but he sees somethat might indicate the possibility of survival. What's his obligation?

MR. SUSMAN: Legally, I do not -- if we're trying to -- I don't think we're getting into the Good Samaritan type of --

QUESTION: No, no, just as a doctor; a doctor isn't just a Good Samaritan, he's a specialist.

MR. SUSMAN: I think he has an obligation under the normal manslaughter type statutes to use the ordinary means to preserve life. I do not believe that he has the obligation -- and most religious groups would agree that there is no obligation to use extraordinary methods of continuing heartbeat or respiration. He certainly has the obligation to use -- assuming he is that patient's physician, he has the obligation, under the normal manslaughter statutes, to use all ordinary means to preserve life.

In normal consent, physicians always, whether minors or adults, have an obligation to obtain an informed consent.

The reason, of course, is physicians normally, in any surgical procedure, obtain written consents from the patients, is to have some record and to protect themselves from future potential civil liability.

But this is the only statute making it a crime not to obtain a certain type of consent. The fact that the statute requires the consent in this case be in writing, informed, freely given and not the result of coercion, im no manner accomplishes that fact. It does not in any way guarantee that that consent is informed, freely given or not the result of coercion. It merely requires that the woman so state.

QUESTION: Well, would you have any objection to a simple requirement that the consent be informed, freely given and so forth, if it were not required to be in writing?

MR. SUSMAN: If the requirement were to single out abortion from all the hundreds and thousands of other medical and surgical procedures, I would. I think this is --

QUESTION: But I thought you said this was the general standard by which consent was judged for any sort of an operation.

MR. SUSMAN: I believe it is. But if abortion again is to be singled out at the risk of criminal peril, I do not think it can be sustained.

A general statute requiring informed consent of all procedures would be acceptable.

QUESTION: Well, what if the Legislature had determined, or had some basis for deciding that in a particular type of operation there was more reason to question the consents that were given, than in another type; wouldn't it be permitted to address that problem?

MR. SUSMAN: I believe it would, but I do not believe that this particular statute addresses that problem, because it does not, in any way, define what constitutes "informed". It merely states that it must be informed, but it does not state as to whether it should be informed as the procedures, the risks, the complications, the results. It gives no indication, again at the risk of criminal peril to the physician, what constitutes an informed consent.

And an informed consent, basically in civil liability cases, requires expert testimony, at least in Missouri, of other doctors as to whether or not the consent given was informed.

QUESTION: And why is this invalid?

MR. SUSMAN: This particular -- this patient consent clause, we believe, is invalid; No. 1, because it applies to all trimesters, contrary to the Court's decisions in Roe; secondly --

QUESTION: But the Court didn't deal with this in Roe, did it?

MR. SUSMAN: Did not deal specifically with the

consents, but we believe that the Court stated that there was to be no regulation during the first trimester. This, we believe, falls into the area of regulation.

QUESTION: Would you include in that no regulation language you're referring to that the State could not require a medical report to be filed with the health department?

MR. SUSMAN: Yes, we would, and that is because --

QUESTION: Can't file -- the State can't demand a report?

MR. SUSMAN: If abortion is being singled out for reporting and recordkeeping considerations, we do not believe they can be. These are --

QUESTION: And what provision of the Constitution do you rely on there?

MR. SUSMAN: Well, I think all these rights have to go back to the Fourteenth Amendment, the right of privacy upon which the Court based its decision in Roe.

This is -- these recordkeeping requirements, the patient consent requirements, have been judged by previous courts and also voided based on the decisions in Roe and Doe, of infringing into the first trimester.

In a Kentucky case, a three-judge federal court panel, a case entitled Wolfe vs. Schroering, specifically held in regard to patient consent that it was overbroad, because it also involved the first trimester.

In addition, the Hodgson panel in Minnesota voided the same type of patient consent for the reasons that it affected the first trimester and also it singled out abortion and it was unnecessary for either maternal or fetal health.

I hope I've answered the question.

The second section challenged is Section 3(3), which is that requiring the consent of the woman's spouse for the procedure.

This question is really whether or not the husband has the right to control the medical treatment of his wife. The question of course was not decided in Roe; in fact, there is a footnote saying there was no need to decide the question at that time.

Approximately, nationwide, 30 percent of the women obtaining abortions are married. We believe that this requirement unduly interferes with physician-patient relationship, and injects unnecessarily the husband into the medical consultation.

There is no other statute in the State of Missouri which requires spousal consent for a medical act.

Also, there is no room for compromise in such a section. It is an all-or-none type of situation. The husband -- either he's given the veto right or he has no rights. Unfortunately, there is very little room for compromise in this type of a situation. And yet --

QUESTION: Do you think the State of Missouri could lawfully require the consent of the spouse to any major surgical procedure on the other spouse?

MR. SUSMAN: No, I do not. They have not chosen to do so --

QUESTION: Well, I'm not worried about whether they did. Can they do so constitutionally?

And you say they can't.

MR. SUSMAN: I think it is less -- I think it would be harder to void such statutes than it would in this area. There has been constitutional guarantees to reproductive medicine in many ways, whether it be contraception, sterilization, abortion; and that type of constitutional protection guarantees have not yet been extended to other types of medical procedures.

While I personally believe that requiring spousal consent for any type of surgery is invalid, I do not believe the decisions of this Court have thus -- have gone that far.

But I would personally object to them.

This provision also requires and applies to all stages of pregnancy. It allows the decision of the spouse to override the decision of a woman and her doctor.

All the doctors at trial testified it was not normal medical practice to obtain the consent of the spouse in order -- for medical procedures upon the wife, including items such

as sterilization.

There is also, we would suggest, no compelling State interest for maternal health requiring the spouse's consent.

The State suggests that the reason to require it is the husband's interest, not in the fetus, not in the child, but the husband's and the State's compelling State interest in the marital relationship. A new compelling State interest, and one not mentioned in Roe and Doe.

First of all, of course, the reason that the husband's interest is in the marital relationship and not in the fetus is that the statute does not require that the husband be the father of the fetus. He need not have fathered this particular pregnancy, but yet his consent is still required.

In addition, he may not even be locatable. He may have deserted his spouse ten years previously. And if she does not know where he is, she still must require his consent, and no exceptions are made.

We would also suggest that you may well have the case where a father has not fathered the pregnancy or the fetus, and yet he withholds his consent from the woman and then would have no legal liability for the upbringing or raising of the child, because it would not be his child.

There is a unanimous line of cases dealing with spousal consent, both in State courts -- and one State court case, mainly being Jones vs. Smith in Florida. Putative fathers

have also been held, in the decision by Justice Stevens in Doe vs. Bellin Memorial Hospital, not to be indispensable parties to a case in which a woman sought an abortion at a private hospital. Other federal courts, panels, in Doe vs. Rampton, Coe vs. Gerstein, and three or four others, the most recent not cited in the Appellants' brief is a case entitled Weeks vs. Carnick?, decided in the district court in Louisiana in January of this year.

All have held that spousal consent is a void requirement. There has been no case upholding a spousal consent clause.

Missouri has not seen fit to require spousal consent for either artificial insemination, sterilization, hysterectomy, or any other procedure, for that matter.

The next section would be Section 3(4), which is the parental consent. This also interferes with the doctor-patient relationship. Again, no other criminal statute singles out parental consent as necessary for the treatment of minors.

Minors in Missouri may specifically be treated for VD, drugs, and pregnancy, excluding abortion, by statute without knowledge or without consent of the parents. In other words, they may perhaps be sterilized, receive contraceptions, bear children, and do all the other pregnancy related acts without the consent of the parents, with the sole exception of abortion.

In fact, minors, for example, who already have children

who are now widowed and divorced, with children under eighteen, would still require consent of the parents for any future pregnancy in order to terminate it.

QUESTION: Hasn't the State of Missouri recognized the doctrine of the emancipation of a person by marriage?

MR. SUSMAN: Once the minor would be married, the only -- the parental consent clause only applies to unmarried minors under eighteen. If she became married, then she would switch over to the spousal consent clause. So she --

QUESTION: Then if she became -- your point is, then, if she became widowed and were still under eighteen, the parental consent clause would --

MR. SUSMAN: Even if she already had children.

QUESTION: -- come back into operation?

MR. SUSMAN: That is right. Spring back.

QUESTION: You mean the death of the husband cancels out the emancipation?

MR. SUSMAN: Yes. Particularly in light of the specific statute --

QUESTION: Has the Supreme Court of Missouri ever held that?

MR. SUSMAN: Well, the Supreme Court of Missouri, of course, has never ruled on this statute. They had --

QUESTION: Well, it might come up in other areas. Emancipation would come up in many situations, would it not?

MR. SUSMAN: We have no real -- to my knowledge -- no real emancipation cases. This has been a problem in child support cases arising out of dissolutions of marriages, and there are no hard-and-fast cases dealing with what makes a minor emancipated in the State of Missouri.

We also suggest there is no compelling State interest. In regard to both the spousal and the parental consent clauses, the State suggests that somehow marital harmony will be preserved by requiring the consent of the spouse or the consent of the parents for a minor.

It is difficult to balieve how marital harmony is better preserved by requiring a child or a wife to have a child she does not want than to preserve it by allowing her to terminate that pregnancy when the parents or the husband does not desire her to do so.

Neither one, we suggest, contributes to marital harmony; that neither one contributes to more or less marital harmony.

In regard to parental consent, we would also note that the morbidity and mortality rates for minors having -- being pregnant are much greater than they are for adults. And all of the factors that this Court recognized at page 150 of its decision are adversely, and multiplied for minors, than they were for the adults then under consideration. All of the emotional distress and psychological burdens that an unwanted

pregnancy places.

Again, in the case of parental consent, while they can require, by withholding their consent, a child to have, to give birth, the parents would have no legal obligation or responsibility to raise that child or that grandchild. it would solely be the responsibility for her life of the minor, the unwed minor.

In analogous situations, minors have been held in two recent federal court cases not to require parental consent to receive contraception. And we suggest that these cases are very much on point.

QUESTION: Mr. Susman, do you disagree with Judge Webster's view on the parental consent; namely, that it depends on the ability of the mother to give consent, rather than a specific age? Or do you say no consent at all?

MR. SUSMAN: I do. I think every informed consent -- doctors face the same question when treating an adult. The mere fact that the adult is over 21 does not really mean, automatically, that she is capable of giving an informed consent.

I think informed consent, regardless of age, has to be based in each individual case upon the age, maturity, education, intelligence and judgment of the individual then confronting the physician. And each case must be looked at independently, whether over or under the age of majority.

I would --

QUESTION: Well, your view, just to be sure I understand, is that the parental consent should never be required for any age or any state of mentality or anything else in life?

MR. SUSMAN: That is not correct. If the physician, in talking with the child and the patient, the minor patient, determines that she is incapable, based upon the various factors I have delineated, is incapable of giving parental consent, then I think, of course, the right to give or withhold must pass to some other responsible individual; whether or not it should be the parents, whether or not it should be a guardian appointed by the court is another question. But if the minor is incapable, certainly someone else, rather than to have the decision made through default.

I will reserve whatever remaining time I have for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Susman.

Mr. Attorney General.

ORAL ARGUMENT OF JOHN C. DANFORTH, ESQ.,

ON BEHALF OF JOHN C. DANFORTH, ET AL.

MR. DANFORTH: Mr. Chief Justice, may it please the Court:

The one overriding issue in this case is whether State Legislatures still retain the power to regulate in major

areas traditionally within their power.

In resolving this issue, the Court is faced with several very important sub-questions.

First, does the State Legislature still have the power to define the terms and obligations of marriage?

Second, does the Legislature still have the power to protect minors from their own immaturity, where stressful and tenuous decisions must be made?

Third, does the Legislature still have the power to enact reasonable regulations of a trade or profession for the sake of public health, safety and welfare?

It is the position of the State of Missouri that the answer to each of these questions is yes.

First, with respect to spousal consent, the Legislature of our State has, in effect, said, through the statute, that inherent in marriage is that certain decisions are made jointly by husband and wife or they're not made at all. That this is the very definition of what marriage is all about.

The Legislature has done this elsewhere, not only in the State of Missouri, but in other States as well. For example, if a woman has given birth to a child and then decides that she wants to place the child for adoption, if the woman is not married, she alone can make that decision. If the woman is married, her husband must join in that decision to place the child for adoption.

The right to consent is not in the putative father in the State of Missouri. The right to consent to an adoption is in the husband, because this is a fundamental decision relating to what the family is all about.

With respect to artificial insemination, those States which have legislated on this subject -- and Missouri is not one of them -- have provided specifically that in the case of a married woman the legitimatization of the child depends upon the consent of the husband, if the woman is married.

In the case of sterilization, two or three States that have legislated in this area have provided expressly that if the woman is married, her husband must join in approval of sterilization. Missouri is not one of those States.

Obviously, Legislatures have provided all over the country that where real property is conveyed during a marriage the husband or wife must join in consent to that conveyance. The fact of the matter is that it has historically been the job and the province of State Legislatures to provide by legislation that certain fundamental decisions for the marital entity have to be made by both parties, especially where change is required.

And this definition of marriage, this power of Legislatures rather than the courts, to define what marriage is all about, has been recognized by this Court for at least the last one hundred years.

Expressly, in the case of Reynolds vs. United States, which, incidentally, involved a fundamental constitutional right -- namely, religion -- where the Court held that a statute prohibiting polygamy was not unconstitutional.

Likewise, in the case of Maynard vs. Hill, decided by this Court in 1888, the Court expressly said in that case that it is the job of the Legislature and not the courts to define the meaning of marriage and the terms and the obligations of marriage, and what marriage is.

And we believe that this power, which has always been in the Legislature, should be in the Legislature now as well.

QUESTION: Mr. Attorney General, is there any other statute in Missouri that requires the consent of a spouse to a medical procedure?

MR. DANFORTH: No, sir.

QUESTION: This is the only one?

MR. DANFORTH: That's right.

This is also the only medical procedure, or the most striking medical procedure, Mr. Justice Marshall, that would alter the nature of the family, and would change a direction which the family has taken.

QUESTION: That's your conclusion.

MR. DANFORTH: Pardon me?

QUESTION: That's your conclusion.

MR. DANFORTH: That is my conclusion, sir.

QUESTION: What about hysterectomy?

MR. DANFORTH: No, sir, not -- no consent is required by the Legislature.

QUESTION: Well, how do you reconcile that with what you've just said?

MR. DANFORTH: Well, I don't believe, Mr. Justice Blackmun, that it's necessary for the General Assembly to cover every possible type of medical situation in a series of statutes to render one particular statute constitutional.

Furthermore, you have a case where the woman is pregnant and is married, where something has happened in the marriage itself, and that condition is either going to yield to an addition to the family, which is proximate and immediate, or it's going to be aborted. And it's our position that it is for the State Legislature to say that that kind of decision can be and must be jointly made, and that there is no constitutional provision which provides that the woman and the woman alone, without the consent of the husband, can make that kind of decision.

QUESTION: In your answer to Mr. Justice Blackmun, were you implying that the State of Missouri has the right and still has the reserve right to legislate in these other areas to require, for example, spousal consent for sterilization or any other procedure?

MR. DANFORTH: I think it does, Your Honor. I believe

that the Legislature could so provide. It hasn't in this case. I think that the issue becomes elevated to a much different plane when the birth of a coming child is involved.

And I would also say that, whereas Mr. Susman said that if the husband isn't the father of the child, he has no legal obligations; I think that's just wrong. I think that's a misstatement of law. If the husband approves of the wife having the baby, he assumes responsibility for that baby. In fact, there is no stronger presumption in the law than that a husband is in fact the father of any child born of that marriage.

QUESTION: Mr. Attorney General, I'm not sure I understood your answer to Justice Blackmun's question about hysterectomy.

Is it your answer that that procedure would not have a profound effect on the long-run family situation?

MR. DANFORTH: I think that -- yes, I think it would. I think that --

QUESTION: Well, then, how can you -- previously I thought you said that the distinguishing feature of this statute was that it involved the only procedure which would have that kind of effect on the family. It seems to me it is a little inconsistent.

MR. DANFORTH: Well, I think that this type of statute involving an abortion is a change in a family situation

which has already been commenced. That is, the future baby is on the way in this case, and I think that the Legislature could reasonably say that unlike a hysterectomy, which may or may not be called for any number of medical reasons, an abortion which is essentially an elective procedure by the woman, which terminates the pregnancy, is one that the husband has a particular interest in.

I would point out also that the Legislature obviously does regulate the institution of marriage in a number of different ways. It provides the statutes under which people become married. It provides the grounds for divorce, and the procedures for the divorce. The criminal laws of the State do prohibit the way in which people can use their own bodies during a marriage. Adultery and bigamy are both criminal offenses in the State of Missouri.

QUESTION: When last did you have a conviction of adultery in Missouri?

MR. DANFORTH: I don't know, Your Honor. I don't know.

With respect to the requirement of parental consent, the Legislature has in effect said in this statute that where decisions are to be made, minors -- those people under the age of eighteen -- simply don't have the maturity to make this kind of stressful and tenuous decision.

The statute provides only for the consent of a parent

if a child has not yet reached her eighteenth birthday.

QUESTION: In Missouri, under contract law, is a parent, as in most States, liable for necessary obligations incurred by a minor child?

MR. DANFORTH: I think that's correct, Your Honor.

QUESTION: Then if the child, without the knowledge or consent of the parent, contracted for this surgical procedure, the parents would be liable to pay --

MR. DANFORTH: I don't know, because I don't know if this would be construed as being necessary.

QUESTION: Well, I say liable if -- I hadn't finished -- liable if there could be a showing that this was -- fell within the category of necessaries?

MR. DANFORTH: Yes. However, I think that the whole point in what the Court stressed in Roe vs. Wade is that abortion, unlike most medical procedures, is generally elective. That is, it's one where the woman makes a decision, and the evidence at trial is that that decision is a stressful and a tenuous decision. It's a difficult decision.

In Roe vs. Wade, and I think this is a very important point, the Court indicated that the decision to have an abortion was a decision that the woman should make in consultation with her responsible physician. But the facts in this case are that there is no consultation with a physician whatever; that the physican makes no decision whatever. That,

in fact, what happens is that the physician is one of a number of doctors on a roster, who shows up for, say, one morning a week and performs in a period -- and this is the case, the evidence in the trial, Reproductive Health Services, which is the abortion clinic in the City of St. Louis -- the physician shows up and in a period of three and a half hours performs eight abortions on total strangers. And there is absolutely no counseling or medical input from the physician. There is a degree of counseling from people who appear to have no special expertise in counseling, no knowledge of what they're doing, and I would say a strong presumption in their case that they have some axe to grind in seeing that abortions are conducted.

The State, in the case of minors, does, in a number of different ways, regulate and limit what minors can do. Minors are not treated by the State of Missouri in the same manner as adults. Minors in our State may not vote. Minors may not buy liquor. Minors may not buy cigarettes. Minors may not sue or be sued without a guardian ad litem or a next friend. Minors may void contracts. Minors after they reach majority may set aside real estate conveyances.

The consent of a parent is required when a minor marries. The consent of a parent is required in Missouri when a minor buys firearms; when a minor sells property to a pawn broker; and even when a minor goes into a pool hall in our State,

the consent of a parent is required.

QUESTION: Under Missouri law, if an abortion were performed, let us say, on a 12-year-old or a 13-year-old girl in this clinic, in the process you describe, and if afterwards she said that her -- that she was incapable of giving consent because of her immaturity and youth, that is, her chronological age and immaturity, which she under Missouri law have a malpractice suit against the doctor on an assault type of theory?

MR. DANFORTH: I think it would be a battery.

QUESTION: Battery, I meant to say, yes; a battery type of theory, yes.

MR. DANFORTH: Yes, sir, and then the question is, Well, what -- then why have a criminal statute? And of course the reason is that a girl between the ages of ten and seventeen -- and there is evidence that children ten years old have sought abortions in our State -- between the ages of ten and, at the oldest, the eighteenth birthday, going off secretly to have an abortion and having it and not telling the parent, the parent would be none the wiser, and there would be no battery, there would be no lawsuit brought.

QUESTION: Do you know whether in Missouri, or any other States, any such actions for malpractice on a battery theory have been brought by minors who -- is there any history of that anywhere, do you know?

MR. DANFORTH: I don't know; I'm sorry. I don't know

the answer to that.

QUESTION: Does the doctor, in those circumstances -- let's say a 12-year-old girl -- under Missouri practice as distinguished from statutory requirements, get a signed consent from the girl?

MR. DANFORTH: Yes. The --

QUESTION: Without any other -- the intervention of any other person?

MR. DANFORTH: The standard practice -- and this was the evidence at the trial -- the standard practice was prior to the passage of the law, and of course now the effectiveness has been stayed by this Court, so I think it's probably still the case, is that the standard practice was to obtain the written consent of the individual and also the written consent of the parent if the individual was a minor.

Now, an argument has been made here that, well, why not judge each case on its own? Why presume that every child under the age of eighteen is incapable of an informed consent?

But the Legislature, as a matter of fact, provides age levels for voting, for drinking, for everything else. It doesn't say that -- there is no constitutional right for a bright mature person, who is sixteen or seventeen years old, to vote in the State of Missouri, even though voting is a fundamental right.

It would be absolutely unworkable to try to judge

the maturity of each person; and if the maturity of each individual minor is to be judged, we would submit that the parent is the only person who is qualified to make that judgment. I think anyone who has ever had a teen-aged child will know that the child one minute can act very mature, and the next minute can act very immature. And an amateur counselor, on the basis of one hour of amateur counseling, I don't think can make that kind of judgment as to whether or not the child is mature enough to have an abortion.

QUESTION: What is the age of minority -- majority in Missouri?

MR. DANFORTH: Well, it's changing, Justice Blackmun. It was twenty-one, and it's been in the process of change in our Legislature to eighteen now. The Legislature purported to change the age of majority in one fell swoop by simply deleting the word "twenty-one" and rewriting "eighteen". That was held unconstitutional by our State courts. So now it's taking the statutes seriatim and changing them from twenty-one to eighteen.

QUESTION: Is the general pattern the same for males as for females?

MR. DANFORTH: Yes. I think it would -- I think there is an exception for age to agree to be married. That is, the age where parental consent is required for marriage. And the statutory rape, I believe, is different.

QUESTION: Well, what is -- is there a statutory rape that can be committed on a man in Missouri?

MR. DANFORTH: I'm sorry, I don't know the answer to that question.

QUESTION: What is the statutory age again of consent, in the statutory rape area?

MR. DANFORTH: I think it's fifteen for a -- but I don't have that at my fingertips.

I would also point out --

QUESTION: And what's the age for a minor getting married?

MR. DANFORTH: Eighteen. Eighteen.

QUESTION: Well, now, if a 15-year-old boy or girl wants to get married, what --

MR. DANFORTH: It would require the consent of a parent.

QUESTION: I suppose -- what in Missouri law would be the status of the marriage if, in fact, a clergyman or a justice of the peace performed it, laying aside their possible criminal violation? Would it be a valid marriage?

MR. DANFORTH: I don't think so. I would guess it would be void.

Now, that section of the statute on which most of the evidence was presented at trial had to do with the prohibitio of one of the various mid-trimaster means of abortion, called

saline amniocentesis. And what happened in this case was that the Missouri General Assembly, on the basis of hearings that were held and medical evidence that was presented, both orally and written medical journals that were presented, determined that the saline method of abortion was the most dangerous of the two fundamental alternative methods of mid-trimester abortion.

Saline is not a first trimester method of abortion; it's purely a post first trimester abortion.

There are other post-trimester methods. Hysterectomy and hysterotomy are two. They are concededly more dangerous than saline. However, where hysterectomy and hysterotomy are called for, there is no alternative to them. And therefore, if the General Assembly had outlawed hysterectomies and hysterotomies, it would have outlawed abortions during the second trimester. And it did not do so.

With respect to saline there is an alternate method of abortion in mid-trimesters, called prostaglandin. Prostaglandin is a different kind of method. It is readily available, and it is safer. And there was substantial evidence presented to the General Assembly for this point. There was substantial evidence presented at trial for this point, including the testimony of the Chief of Obstetrics at the Yale-New Haven Hospital, who said that in his opinion if a doctor used saline instead of prostaglandin that the doctor

would be liable for malpractice.

Roe vs. Wade, of course, allows --

QUESTION: Was there any opposing testimony?

MR. DANFORTH: I'm sorry, sir?

QUESTION: Any opposing testimony?

MR. DANFORTH: There was testimony from a Dr. Kerenyi in New York, who is probably the leading practitioner and expert in the field of saline, and he felt that saline was a very safe method, and the safest method.

Before the -- that was at trial -- before the General Assembly, there was certainly notice, I think representatives of the pro-abortion groups were present at the hearing. I'm not sure whether or not evidence was presented at the legislative hearing on the relative safety of prostaglandin and saline.

QUESTION: Is there some evidence in this record about the unavailability of the other procedure?

MR. DANFORTH: In our record?

QUESTION: Yes.

MR. DANFORTH: Yes, sir, there is. The testimony of Dr. Anderson, about the availability of it. Dr. Anderson testified that prostaglandin had been approved after a trial period, approved by the FDA for use as of January 1974. That the Upjohn Company, which is the manufacturer of prostaglandin, restricted its sale to certain medical centers and teaching

hospitals for the first six months of 1974, so that, as he put it, information as to its use could trickle out to the medical community.

As of July 1974, when the trial of -- or when Dr. Anderson's deposition was taken, he said that this was available in small hospitals also throughout the country. So, as of July '74, it was available in small hospitals. The decision of the district court was predicated on the finding of alternative methods for mid-trimester abortion.

There are certain very rare cases, statistically very rare cases, where prostaglandin is contraindicated. In those very rare cases, substantially less than one percent of all mid-trimester abortions, the testimony of Dr. Anderson was that the person, the patient could be treated and then given prostaglandin after the treatment.

Also, in addition to prostaglandin, there are other alternative methods called mechanical stimuli, which can be used to accomplish a mid-trimester abortion.

Roe vs. Wade, of course, allowed the State to promulgate reasonable regulations for maternal health after the first trimester. The State of Missouri, our State Legislature did in fact take the court up on that, on that statement, and this is exactly what the prohibition of saline is all about.

The government -- one point is made by the Appellants in this case that there is a constitutional right to practice

medicine, I take it, free from governmental regulation.

We simply reject that theory. And the Court rejected that theory in the case of United States vs. Moore, which you decided last December, involving the use of -- whatever the substitute for heroin is called -- to treat heroin addiction.

QUESTION: Methadone.

MR. DANFORTH: Methadone, yes; thank you.

And in that case the Court said that the Department of Health, Education, and Welfare, together with the Justice Department, the Attorney General could set forth the permissible standards for treating heroin addiction.

QUESTION: Mr. Attorney General, can I be sure -- I want to be sure I have something straight. Did I correctly understand you to say that the hearings before the Legislature did not include any testimony about the relative safety of the saline procedure?

MR. DANFORTH: Yes, it did, sir.

QUESTION: Oh, it did?

MR. DANFORTH: I most definitely did. Both oral testimony and written material, medical journal articles and the like, were presented comparing saline with prostaglandin. And those medical journals were presented to the district court in this case; introduced at the district court level in this case.

And, furthermore, there were public hearings; both sides had an opportunity to present evidence as to --

QUESTION: Well, what you said, I guess, was that you weren't sure there was any testimony in those hearings that the alternative procedure was safer. That's --

MR. DANFORTH: No, that's right. That's correct.

QUESTION: I see.

MR. DANFORTH: But there certainly was every opportunity to and this was a two-year process in passing this law; it went through two legislative sessions. And the question of saline was debated both in hearings and on the Floor of both Houses of the State Legislature. So it was not a kind of a secret move to push across prostaglandin.

I don't believe, and it's the position of our State, that Roe vs. Wade and Doe vs. Bolton so exalted the constitutional right to an abortion that all of these traditional areas of State legislative action have somehow been suddenly wiped out as a result of Roe and Doe.

And I find it difficult to imagine how the rights to an abortion can be used to wipe out the State traditional authority to regulate in the case of marriage, in the case of protecting minors, and in the case of the operation of a trade or a profession, without having a series of Pandora's boxes opened with respect to State powers.

I would think, for example, that if the State cannot

define the terms of marriage in this circumstance, it would equally fall that the State statute requiring spousal consent for adoption, placing a child for adoption would fall, and that any State restraint on using your body as you like, in adultery or bigamy, that those prohibitions would fall as well.

If a minor cannot be protected from her own improvidence and immaturity where this kind of stressful and tenuous decision is called for, I don't see how any State statute treating minors differently from adults could pass constitutional muster.

And if the State cannot regulate the practice of medicine, I think that we're right back in the box of Blackmer vs. New York, and the cases which followed it.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Susman, in your view do the statutory provisions in Missouri fall -- those relating to the necessity of parental consent for marriages of persons under age eighteen, and others like it?

REBUTTAL ARGUMENT OF FRANK SUSMAN, ESQ.,

ON BEHALF OF PLANNED PARENTHOOD, ETC., ET AL.

MR. SUSMAN: While realizing that marriage, voting are also fundamental rights upon which the State has imposed certain age limits, I cannot put those personally in the same

class as an abortion. Because those rights to marriage and those rights to vote are only postponed for a limited and small number of years, they are rights that are postponed, and the damanage for -- excuse me?

QUESTION: Your answer is that the statutory rape age limits will survive and --

MR. SUSMAN: That's correct. If you look at the alternatives or the disastrous consequences of postponing for three years the right to vote or the right to marriage as opposed to the right to terminate a pregnancy because your religious beliefs may differ from those of your parents, who are given a veto right for any reason or for no reason whatsoeven to say no; I cannot put them into the same class.

QUESTION: And you put the statutory rape age limit in the same category? That that's a valid --

MR. SUSMAN: Yes, I do.

QUESTION: What do you have -- do you have any comment on the problem of a malpractice suit against a doctor based on the claim that the State by statute has said that a minor, of the age of twelve or thirteen, cannot legally consent in a rape case; therefore, it should follow -- that would be the argument -- she cannot consent to an abortion and therefore render the doctor, the aborting doctor liable to malpractice?

MR. SUSMAN: I think the malpractice civil liability problems in regard to giving abortions to minors is no more nor

no less than those of deciding on whether or not any patient, regardless of age, is giving an informed consent based on the procedure at hand.

QUESTION: In effect you're saying that a 12-year-old girl is capable of giving an informed consent --

MR. SUSMAN: I think certainly the number --

QUESTION: -- to an abortion?

MR. SUSMAN: -- the number of 12-year-old girls is much less than the number of 13-year-old girls; but I would not be willing to make a blanket statement that there are no 12-year-old girls who are capable of giving consent to an abortion.

QUESTION: And you say the Legislature can't draw any line on the basis that there are a lot more 13-year-olds who are capable than there are 12-year-olds who are capable?

MR. SUSMAN: I do not believe that they can, particularly in light of this particular statute, the parents can say no for any reason or for no reason whatsoever. Even a difference in religious beliefs -- there are no guidelines under which their consent can be withheld. It's completely arbitrary.

QUESTION: Well, can you tell that without the State courts ever having construed the statute?

MR. SUSMAN: I think you can, because I think the statute is so literal that it can't be read any other way.

You must have a parent -- parental consent, or else it is a crime for the doctor to perform the procedure.

In the few -- I have no time left.

MR. CHIEF JUSTICE BURGER: Well, you may --

MR. SUSMAN: Thank you. I'd like to say just a few words, if I could, about saline, which has arisen, and which I was not able to reach due to the time factor.

MR. CHIEF JUSTICE BURGER: You may have another two minutes at this time.

MR. SUSMAN: Thank you.

First of all, the testimony was unequivocal that saline is the procedure of choice for post first trimester in over 75 percent of all cases in this country. There was no evidence whatsoever in the record that prostaglandins were available, much less in use anywhere in the STate of Missouri. And, as a matter of fact, as a fact they are not presently being used by anyone in the State of Missouri as a procedure.

In addition, all of the evidence, also without exception, showed that saline is still safer than -- I'm sorry. That saline mortality rates are less than those of natural childbirth.

Dr. Anderson, the Appellees' -- the only medical witness of Appellees who had any experience in the abortion field, testified that if confronted with a case in which prostaglandins were contraindicated, saline would be his

procedure of choice.

I would only conclude by saying that the sole exception, again, of this case, all other statutes in each and every one of these sections has been reviewed by other courts, adopted by other States, and on each and every occasion was struck down.

We would implore this Court to stand by the language and intent of its 1973 decisions, and not to allow the unwarranted encumbrances upon the rights of women and their physicians, to drive women back to the septic and illegal avenues of relief, which were so prevalent prior to 1973, and which then existed as the only avenues of relief for the poor and the young and the unsophisticated.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:11 o'clock, a.m., the case in the above-entitled matter was submitted.]

- - -