ORIGINAL

In the

Supreme Court of the United States

FRANK S. BEAL Secretary of Welfare of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General of the Commonwealth of Pennsylvania, THE COMMONWEALTH OF PENNSYLVANIA, and F. EMMETT FITZPATRICK,	)	
Appellants,	)	
v.	)	No. 77-891
JOHN FRANKLIN, M. D., and OBSTETRICAL SOCIETY OF PHILADELPHIA,	)	
Appellees.	)	

Washington, D. C.
October 3, 1978

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Washington, D.C.
Tuesday, October 3, 1978

The above-entitled matter came on for argument at 11:07 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:

MRS. CAROL LOS MANSMANN, Special Assistant Attorney General, Sixth Floor, Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania 15219; for the Appellants.

ROLAND MORRIS, Esq., 1600 Land Title Building, Philadelphia, Pennsylvania 19110; for the Appellees.

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 next in No. 77-891, Beal against Franklin.

Mrs. Mansmann, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. CAROL LOS MANSMANN

ON BEHALF OF THE APPELLANTS

MRS. MANSMANN: Mr. Chief Justice, and may it please the Court:

I am specially appointed Assistant Attorney General for the Commonwealth of Pennsylvania. I served as trial counsel with co-counsel and husband, Jerome Mansmann, who is also specially appointed; and we have been representing the Commonwealth's interests in this litigation since its inception in 1974.

The case that we bring before you today involves only one section of Pennsylvania's Abortion Control Act, which was passed in 1974. All other challenges and issues have been resolved upon remand by this Court to the lower court.

In a nutshell, Pennsylvania law provides or prohibits all abortions after viability except where the abortion is necessary to preserve the mother's life or health. This particular section, which is 6(b), is not in dispute, is not an issue here before this Court.

Q And the cutoff time is after viability?

MRS. MANSMANN: Yes, Your Honor, that is correct.

Q Is that defined in terms of length of pregnancy or how?

MRS. MANSMANN: No, it is not, Your Honor. It is the capability of the fetus to survive outside the mother's womb although with artificial aid.

Q It says after viability, not after likelihood or possibility of viability?

MRS. MANSMANN: That is correct, Your Honor. In Section 5(a), which does not prohibit but which is the subject of this appeal, the physician is required prior to performing an abortion to make a determination that the fetus is not viable, based on his own experience, judgment, or professional competence.

Q Does that mean that his judgment and experience must be exercised in terms of reasonable medical certainty?

MRS. MANSMANN: Certainly it would, Your Honor. I think what the legislature clearly intended there--and it exemplifies that in the section that immediately follows that particular phrase in giving an objective standard for physicians to follow because if a physician in his determination finds that the fetus is viable--and here is the offending language, which forms the basis now of this appeal--quote, "or if there is sufficient reason to believe that the fetus may be viable," end quote, then the physician must utilize

a standard of care--that is, an abortion method--which would provide for the rights of the unborn child so long as another method is not necessary to preserve the life or health of the mother.

Q Would you say that language also must be read as meaning that the decision must be based on reasonable medical certainty as medical opinions are always gauged in litigation?

MRS. MANSMANN: Absolutely, Your Honor. Absolutely, Your Honor. And I think the point I am trying to make is that by adding the words "or if there is sufficient reason to believe that the fetus may be viable" the legislature clearly intended to say to physicians in this type of practice and performing this highly specialized skill that an objective standard will be placed upon them, and that is reasonable medical certainty. We are not judging physicians in hindsight after an autopsy might show that, for example, the fetus might have been of greater weight or of longer gestational age. What we are doing is saying to the physician, "Here is an objective standard for you to follow. That is sufficient reason to believe that the fetus may be viable."

Q May I ask a question?

MRS. MANSMANN: Yes, Your Honor.

Q What does "may be viable" add to "viable"? What is the difference?

MRS. MANSMANN: Your Honor, in a sense it adds nothing to the concept of viability. It does not intend--and the legislature clearly did not intend--to add an additional time period. It is a semantical discussion attempting, as Mr. Justice Marshall said in Grayned v. Rockford--we are condemned to expressing ourselves in language. And in the hiatus between law and medicine we are attempting not to carve out a time period but to say semantically this particular fetus has the statistical probability that medical science deals with. And that probability, statistical probability, is one of survival.

Q "May be" does not imply probability; it just implies possibility, does it not?

MRS. MANSMANN: No, Your Honor. Medical statistics--

Q It does as I read the dictionary and as I understand the English language. It does not say it is likely to be, it says may be.

MRS. MANSMANN: With all due respect to the Court, Your Honor, we are not dealing here with dictionary definitions. We are concerned with--

Q But we are dealing with the English language, are we not?

MRS. MANSMANN: Of course, Your Honor.

Q And if something may be so, then it possibly is so, not probably so.

MRS. MANSMANN: Except that for physicians who deal with this problem all the time, statistical probabilities is the reasonable medical certainty that they deal with. No physician will say--

Q That is not what the legislative language says.

Q Are you saying the language means the same, that "viable" and "may be viable" means the same thing?

MRS. MANSMANN: Your Honor, I do not wish to just take out the terms "may be viable." I would like to use the entire phrase as the legislature did. If there is sufficient reason to believe--sufficient reason to believe--that the fetus may be viable.

Q May be, possible.

Q Sufficient reason for whom to believe? Does this mean for the doctor who is going to perform the abortion or somebody looking at it later?

MRS. MANSMANN: Certainly, Your Honor, he is on notice that an objective standard is there, and it puts him on notice ahead of time.

Q Let me just be sure I get--supposing he makes a determination that it is not viable. He says, "I am satisfied it is not viable." And later on three other doctors say he made a wrong determination. It might have been viable. How do you handle that?

MRS. MANSMANN: Your Honor, what we would be judging

is not so much that initial determination. We are judging now the standard of care he should have utilized.

Q So, it is not his subjective determination that is controlling.

MRS. MANSMANN: It is his determination with a reasonable degree of medical certainty, based upon the facts known to him in judging whether or not this fetus is viable. And we realize that the whole medical terminology of the word "viability" expresses a very fluid concept. It expresses certainly the potential capacity of the fetus to survive outside the mother's womb, what was expressed by this Court in Roe and Doe, and none of the physicians in the lower court on either side of the issue disagreed with that definition. What they disagreed upon was the gestational age at which that is achieved. And this Court in Danforth and the legislature of Pennsylvania clearly chose not to accept gestational age.

Q What do you do with the difference between the small one doctor in the town, in Philadelphia and Pittsburgh hospitals, on what may be? Does that rural doctor have what the word was yesterday? The answer is no; is that not right?

MRS. MANSMANN: If I understand your question, Your Honor, are you saying, "Are the standards of a big city hospital and a big practice to be imposed on some physician in a small town who does not have available to him, let us say, a neo-natal center or something right available"? Of course

not. We are judging him by what is available to him.

Q Does the statute say that?

MRS. MANSMANN: Clearly it does, Your Honor. It says it judges him by his own professional competence and judgment and says, "And if there is sufficient reason to believe that the fetus may be viable." It is our position that those words are no less unclear to the medical profession because it is the medical profession--it is not every practitioner, medical practitioner--

Q What happens if you call in three experts, real experts, and they do not agree?

MRS. MANSMANN: Your Honor, it is our belief they will not disagree, that as far as the viability of this--

Q My hypothetical is that they did disagree. What do you do?

MRS. MANSMANN: I think that there would not be sufficient evidence upon which to convict in the criminal law, and that is what the statute calls into play. It does not say, "Well, if that is the situation, then a first degree murder charge will lie or manslaughter will lie." It calls into play the criminal statute maintained in that situation--

Q So, the only way as a doctor I can be sure is to get three experts and they all agree? Is that right?

MRS. MANSMANN: The question is, Has the prosecution proven its case against the defendant?

Q Would that not be the only way I could be sure?

MRS. MANSMANN: Certainly, Your Honor, and I am sure you probably get experts to testify on any side of any issue.

Q I just happen to know some people who could not afford three experts.

MRS. MANSMANN: We are talking about--

Q I know some people who could not afford three experts; and if you push me, I know some that could not afford one. How do they get their abortions?

MRS. MANSMANN: I would certainly have to agree with you, Your Honor. I probably could not afford three experts as well. But my point is that we do not have a battle of the experts here. The experts agree that with respect to viability--yes, it is a subjective judgment--yes, the physician is being asked to take statistical probabilities and place that whole matrix of medical research upon his particular patient. We are looking at what is known to him, what is known to the medical profession in his community and in his practice. We are talking about a highly specialized--

Q Mrs. Mansmann, I think you have taken inconsistent positions. You said a moment ago that you could get three experts to testify to anything. Is there not a risk that a doctor in good faith could conclude that the fetus is not viable and nevertheless that the prosecutor might be able to get three experts who would disagree?

MRS. MANSMANN: I think that is probably an underlying question to all of this, the fear that maybe / responsible physicians--

Q What is your answer to my question?

MRS. MANSMANN: Yes--and I think, Your Honor, that that is not the position here. I think that what a responsible physician will do--

Q You think that could happen or could not happen? That is my question.

MRS. MANSMANN: I think that could not happen and the reason being--

Q It could not happen that a doctor in good faith concluded that the fetus was not viable and that there would be three doctors who could be found who would testify on the witness stand that he was wrong; you do not think that could ever happen?

MRS. MANSMANN: I think, Your Honor, with respect to the whole range--the whole possibility of finding experts is one whole distinct problem. My point is that a responsible physician--

Q The prosecutor is not short for funds to find experts, is he?

MRS. MANSMANN: That is right.

Q You are saying that he could not find three experts who could ever give such testimony whenever a doctor

in good faith was satisfied that the fetus was not viable; that could never happen. Is that what you are saying?

MRS. MANSMANN: Your Honor, it is very difficult to make that judgment. What I am saying is--

Q Is that not the doctor's problem?

MRS. MANSMANN: --the responsible physician who makes a good faith determination on the medical evidence in front of him with a reasonable degree of medical certainty will not be in that particular position of being faced with a criminal law. What the appellees are arguing here and especially what the amicus briefs are arguing is that physicians are immune to the law. Their judgments, and their jdugments alone, ought to govern.

Q You have a number of different standards that are traditionally imported into the law. One is good faith. The other is negligence. Another is gross negligence or recklessness. Another is intent to kill. What standard does this statute apply?

MRS. MANSMANN: This statute sends to the criminal law a determination based on the particular facts. So, if in fact the Commonwealth could prove scienter and could prove, for example, under Pennsylvania law a specific intent to kill, there may in fact be a murder indictment.

Q I do not think anybody quarrels with that. I think the difficulties are when you begin going down the scale

from an actual intent to kill. And I think the questions some of my colleagues have asked reveal some puzzlement as to just what standard it is the Commonwealth is imposing here.

MRS. MANSMANN: With respect to the statute, certainly it is the objective standard based on reasonable medical certainty. When we call into play the criminal law, then the criminal law of the Commonwealth of Pennsylvania will govern with respect to each individual action.

Q What standard does that law impose?

MRS. MANSMANN: It depends, Your Honor, upon the particular facts and what category they fall into, whether it is a homicide of the first degree, murder of the first degree, the third degree, or manslaughter. Each individual case must be judged separately, and that is what this particular statute was designed to do.

Q What standard is required for a conviction of a physician of manslaughter in Pennsylvania? Is simple negligence sufficient?

MRS. MANSMANN: No, it is not, Your Honor. It is wilful and wanton misconduct, gross misconduct, which brings about the death.

Q Something more than simple negligence but less than actual intent to kill?

MRS. MANSMANN: That is precise, Your Honor. That is precise.

Q That would embrace, would it in your view, a bad judgment? Suppose you have a general practitioner who does not specialize in obstetrics, but he finds himself in a situation where he must make the judgment under this statute. Is he not at risk, on the basis of your suggestion about the experts, that in making the judgment he made, not three but 12 obstetricians might say he was wrong? And, meanwhile, he is at least open possibly to a criminal prosecution, is he not?

MRS. MANSMANN: Theoretically he might be. Under this statute, judging him, his professional competence and expertise, what is known to him about his patient at the time, he would not be in any difficulty, Your Honor.

Q He might not be convicted, but that is not the only question that we deal with in a criminal statute, is it?

MRS. MANSMANN: But the real problem here is that we keep referring to the responsible physician. And in the time period between the invalidation of Pennsylvania's original and maybe 100-year-old abortion statute--the invalidation of that--and the passage of this, the Pennsylvania legislature and the governor as well held hearings, public hearings, to determine the state of medical arts and problems dealing with abortion in Pennsylvania. And one conclusion came to the forefront. With respect to abortion practice, physicians were in many respects creating a crisis with medical care in so far as the woman patient is concerned. These same physicians

bitterly fought in the court below the requirement that they had to test for pregnancy before they would perform an abortion.

Secondly, they also bitterly fought any regulation that would require them to explain the procedure and the complications to their patient. And one witness in particular presents a rather dramatic story. Her name is Mary Ellen Gallagher. She was a news reporter for WCAU TV in Philadelphia. And she posed as a teenager who feared that she was pregnant. She went to numerous abortion clinics and hospitals and spoke with doctors there. She absolutely certifiably was not pregnant. But to a one they put her up on the table and were beginning an abortion before she stepped down. No pregnancy testing for the most part, no responsible medical care that we are talking about here. So, Pennsylvania has come to the conclusion--the legislature has--that we need legislation in this area to, first of all, prior to viability, to protect maternal health. And now we are seeing, by the position taken by appellees and the amicus, as far as being immune from prosecution in this area, a crisis with respect to the viable but maybe defective child.

Q Counsel, we are not primarily concerned here with the good faith of the people who have presented views on this. Is not our task limited to determining whether the State of Pennsylvania has undertaken to protect human life

with the kind of precision that is traditionally required in criminal penal statutes; is that not the only question before us?

MRS. MANSMANN: Yes. Will men who have to deal--men and women, I should say--who have to deal with this problem on a daily basis understand what is prescribed of them. And we maintain that for the physicians who deal with this, the responsible physicians, they understand what the terminology is. And I point to the American College of OBGYNs and their statement twice in the last few years with reference to what they call ethical considerations in abortion cases.

Q I am not interested in ethical abortions. I am interested in the law which tells the doctor that if you made a mistake, you go to jail. That is what I am worried about.

MRS. MANSMANN: Your Honor, the mistake that we are talking about--

Q That is what I am worried about.

MRS. MANSMANN: We are talking about the criminal law. We have to show scienter, Your Honor. The responsible physician who merely makes a mistake, merely makes a mistake, based on later an autopsy--

Q What happens if he makes a mistake and cuts your head off instead of your foot; is there a statute that punishes him for that?

MRS. MANSMANN: I would presume that decapitation

would bring about his death, and certainly--

Q Is there a statute that punishes that?

MRS. MANSMANN: Absolutely. He is judged by--

Q What statute is there that says a doctor--

MRS. MANSMANN: Manslaughter, Your Honor.

Q No, but this one does not--

MRS. MANSMANN: Falls right into place.

Q This one is not a general statute. This one only applies to people who perform abortions.

MRS. MANSMANN: And it calls into play--

Q Is that correct? Is that correct?

MRS. MANSMANN: Yes, Your Honor, but it calls into play--

Q Well, what--

MRS. MANSMANN: --all of the criminal laws. It does not set forth that this would be manslaughter--

Q I give up. I mean, I like to get a question out. So, just go right ahead.

MRS. MANSMANN: I am sorry, Your Honor. If I have been disrespectful, I certainly apologize for that.

Q Oh, not at all.

MRS. MANSMANN: The second provision, which requires the standard of care a physician might use, was not ruled upon by the lower court. And although we repeatedly asked the Court to consider problems of severability and the possibility of

severing, if in fact they were correct, that it carves out an additional time period in which the state has no interest that is compelling in fetal life, we ask them to severe the offending language, thereby leaving intact all the wording with respect to viable life. For some reason, the court refused to do that and on remand from this Court simply said, "We stand by our prior position." And we are saying to this Court that if you are not convinced that the wording is correct, if we lose this over a poor choice of words, we are saying, remain intact the rest of the statute; there are correlative clauses that can be read certainly apart from each other. That is what has been proposed here by the appellees. So, read them in light of the viable unborn child.

Q Criminal statutes not infrequently fail because of the choice of words, do they not?

MRS. MANSMANN: Oh, that is correct, Your Honor, absolutely. And we would grant that. And we say here, though, physicians know what is prescribed of them. And I began to mention the American College of OBGYNs. They recognize what they call the duty and obligation of the physician to what they describe as the possibly viable fetus. So, I am saying they recognize their duty and obligation. But my concern here is that we are going to walk out of here and lose this case because of a poor choice of words, and physicians now will feel themselves in the position of being able--as the amicus

are arguing and the appellees have argued in the lower court, that it is only parental choice that governs when we are talking about viable life.

A rather--what I consider to be a rather shocking statement that I would like to read to you from the appellees' brief says that a fetus is not viable unless it has meaningful life. They are asking this Court to extend the concept. So that if through amniocentesis and quite possibly a failure of the original culture to grow and testing, a couple finds themselves after viability soon to be the parents of a deformed child and they do not want the child, they are asking this Court to say that life is not meaningful. Therefore, the child is not viable. And consequently the parents now have the choice to destroy that child in utero. And they said a child doomed to lose all function and become a vegetable by the age of three and to die by the age of seven or eight is hardly capable of, quote, "meaningful" life, from their discussion on viability.

And with all due respect to this Court, I do not think that any of us are in a position to say that life is not meaningful because it suffers a handicap. Our legislature has clearly chosen to, regardless of handicap or birth defect or race or sex or whatever, represent the interests of the viable child in utero, the viable child. And we are asking this Court to recognize that and make a positive statement

with reference to the right of the state, where it has now chosen, to represent the interests of that viable but maybe defective unborn child.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Mansmann.

Mr. Morris.

ORAL ARGUMENT OF ROLAND MORRIS, ESQ.,

ON BEHALF OF THE APPELLEES

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

The lower court in this case chose two distinct if interrelated lines of analysis with which to approach this statutory language. Their first line was based upon an assessment of the substantive legal architecture which this Court--mainly through Mr. Justice Blackmun's opinions--has accorded the abortion question as a whole.

The second line of analysis which the lower court employed related to that doctrine generally known as the void-for-vagueness concept as applied by this Court to its work. The lower court found--and, I submit to you here, correctly--that with respect to both lines of analysis the Pennsylvania statute failed its constitutional test.

First, it carved out areas in which the state intruded its interest in the abortion context, which areas precede that time within which this Court has found a state

had a compelling interest.

Secondly, the court found that the statute, as applied to an individual, under whatever source you use in the void-for-vagueness analysis, failed to provide sufficiently precise information with respect to which an individual could judge his criminal liability--and, I might add, there is a civil liability concept in this statute, as you will see in paragraph two.

Let me first, if I may, address myself to the substantive abortion question as it has been described by this Court. I think the major two cases, we would all agree, were Roe and Danforth as they apply in this case. We do not have here a Meyer case or a Bellotti case. We have here a straight Roe statute, passed after Roe, which was very similar to the statute in Danforth.

The Court will remember that Danforth also included, as did the Pennsylvania statute, issues of consent. But they are not now before the Court.

The Danforth court likewise was faced with a question respecting what protection had to be given to the fetus. And the Danforth statute provided, somewhat more sweepingly than the Pennsylvania statute, that if an abortion were to be performed, the fetus had to be accorded that method of performance which would most certainly assure its life if it were viable. That was the way the Danforth statute approached

the situation. Incidentally, both the Danforth statute and the Hodgson statute provided that if you did deliver such a viable fetus, for the fact that the parents did not want it and it provided a sort of an escape clause--the state would take over the fetus. So, the motive was acknowledged by the statutes

This Court in Danforth held that to require the fetus to be delivered in that fashion, even though it were in the first trimester, for example, carved out an area to which this Court had denied states entrance, and properly so, because a state entering an area of individual liberty, of individual privacy, intrudes as a rather blunt instrument. And you have laid out areas in concept at least in which a state may not intrude. It is these areas which the "may be viable" language the lower court found--and I submit on the face of the language, let alone its interpretation--clearly intrudes.

Q Are you speaking of an intrusion on the parents' rights or the intrusion on the physician?

MR. MORRIS: I am speaking of an intrusion on both rights, sir. And of course under Doe I come before you asserting the rights of the parents. However, I think that was decided in that fashion by the lower court properly under Doe and remains the concept in this Court. I therefore assert both rights.

I think that underlying what Mr. Justice Blackmun said in connection with those rights was an acknowledgment by the Court that as you dealt with this area and that kind of private consultation, it was probably impossible and definitely unwise to seek to pull those interests apart for the purpose of legal analysis. So, I come before you asserting both rights, sir.

I would like to direct the Court's attention, in connection with the "may be" language and what kind of area it carves into under the abortion architecture, to the actual evidence of record. It is not true that there was anything which could be called a consensus regarding the definition of viability, let alone "may be viable."

The appellee Dr. Franklin in this case placed viability at approximately 28 weeks. Dr. Gerstley, who testified on behalf of the plintiffs, here the appellees, put viability at about 24 weeks. Dr. Keenan, who testified on behalf of the appellants here, put viability at 20 to 26 weeks and was fairly soft in his judgment.

Dr. Mecklenburg the lower court read as fairly placing viability, or at least a high possibility of viability, at 20 weeks.

Dr. Hervada, who was called by the--

Q Mr. Morris, I am not sure that these differences in time periods necessarily reflect a difference in definition

of viability, do they? The statute attempts to define it in terms of capability of surviving and so forth.

MR. MORRIS: I give you those, sir, for this reason--

Q I think your opponent conceded this, that there were different time periods.

MR. MORRIS: I suggest that to the Court for this reason. I think it is perfectly proper, as the Court has, to define viability in the sense that it does. That does not mean a la Connally or Winters that a state legislature may take that concept and use that language to apply it to an individual. It may not be sufficiently precise for that purpose, although it may be sufficiently precise for this Court to use it as a concept which will, in Palco language, provide ordered liberty.

Q Is not the only question before this Court now--

MR. MORRIS: Yes, sir.

Q --whether this statute provides sufficient guidance, informs the physician when he will be transfgressing the criminal law, as distinguished from any other liability he may have?

MR. MORRIS: Yes, sir.

Q Is that not the only question?

MR. MORRIS: I believe it is, sir. And one might bear in mind that if Dr. Franklin avoided a 28-week fetus, he might well be faced with a subsequent criminal prosecution by

Drs. Mecklenburg and Keenan, who might well be more articulate to a jury than he was and who might well convince that jury that it was at least wanton disregard, if not knowledgeable disregard, of life, and he should not be so inhibited. That inhibition also applies in the vagueness concept, that that inhibition is what is carving out in this--

Q What if the doctor was attending the mother in a normal birth and the baby died? I suppose the doctor faces the possibility of criminal negligence. And if two doctors testified against him at the trial, they might be more articulate than he was. That is the standard, is it not, that is applied in this case, the same standard as if he were attending a normal birth.

MR. MORRIS: You are coming, however, sir--

Q Is that right or not? Is that the standard the statute applies?

MR. MORRIS: The language of the standard is the same. The method of its application is different.

Q That may be, but nevertheless in all sorts of situations, including attending a normal birth, a doctor might be charged with criminal negligence--

MR. MORRIS: Yes. May I explin--

Q --and have to face a jury trial on it. Is that right?

MR. MORRIS: The language of the standards you use is

precisely correct, sir. May I explain why in application it is different? We are speaking now of an area that is not only highly emotionally charged but also of an area in which there is more--

Q Like attending a normal birth.

MR. MORRIS: Considerably, sir. The evidence in this record shows, and the lower court found, a wide disparity in the time periods, but that is not all one is faced with when making this judgment, unlike a live birth. With a live birth you have and can look at a baby whose chances of living are reasonably well established. Here we are dealing with exactly that period of time when it is impossible, I submit on this record, to establish the viability, let alone the "may be viable," and you cannot even look at the fetus directly, although there are some new techniques which are providing that.

If I may, sir, bear in mind that the doctor takes at least four steps, each of which involves an estimate. The doctor makes an estimate.

Q Are we not talking about, under the statute, if the doctor makes a determination that the fetus may be viable, then he performs the abortion in a manner that would be best calculated to preserve life. Is that what the statute requires?

MR. MORRIS: The difficulty, sir--oh, yes, it does.

Q But if he makes the determination that it will not be viable, then he need not do the abortion in that manner.

MR. MORRIS: Yes.

Q Does he not have another alternative: If he determines on reasonable medical certainty that the fetus may be viable, he can decline to perform the operation, can he not?

MR. MORRIS: Yes, and in each of those cases--

Q But he can also perform it as long as he used the methods best calculated to preserve the life of the fetus.

MR. MORRIS: In both your case, Mr. Justice White, and the case of the Chief Justice, I ask you to look carefully at what you are doing to that area in which you said the state should not and may not intrude.

Q Cannot the doctor always protect himself though by using what perhaps would not be so questionable or arguable--use the aborting method best calculated to preserve the life of the fetus? Is that not what is at issue or not?

MR. MORRIS: It is at issue, and I submit to you that at that point in time you are clearly inhibiting, clearly carving out, an area which may run well into--

Q That may be, but all you are requiring the doctor to do is use that method best calculated to preserve the life of the fetus.

MR. MORRIS: In that case, I would have to ask--

Q You have been talking the entire time about the decision about viability.

MR. MORRIS: Whether it is.

Q But even if that is a difficult question, if he determines that it may be viable, he merely has to use some-- I know you do not think the word "merely" would be appropriate, but he nevertheless just has to use that method best calculated to preserve the life of the fetus.

MR. MORRIS: I think, Mr. Justice White, the case which settles that issue is the Danforth case because you could ask the same question of the Danforth case and say, "Why do we not just require every doctor to deliver every fetus in that way which will most likely save the life of a fetus?" That resolves the entire problem if you adopt that line of reasoning. But that is a line of reasoning which the Court has not adopted, and I submit it would be tragic if they did adopt it.

The countervailing question, the countervailing pull-- and there are many of course in this case--is that privacy pull wherever you find the source of it. That decision that at some point should and does under the decisions that you have written to date belong to the woman and her doctor. And that decision, as Danforth made it clear--and I think Roe--

Q So, you are suggesting that Danforth held that the putative mother and the doctor are entitled to have any method of abortion they want even though the fetus may be viable?

MR. MORRIS: Yes, sir. For one reason, "may be viable" is a point which I think the record discloses cannot be determined in a precise enough way to permit the state with its panoply of power, its policemen, its judges, to intrude on that decision.

Q Would you go so far as to say that the woman and the doctor at a certain stage are entitled to decide that they want the fetus to die even though it might be made viable?

MR. MORRIS: I would, sir, in the first trimester--

Q How about beyond the first trimester?

MR. MORRIS: Yes, I would, sir, but I do not think--

Q You have to say that in this case, do you not?

MR. MORRIS: I do not think you face that issue in this case, for this reason. There is enough--you can face it, and I will, and I will go that far. However, in diagnosing that particular standard which will support a criminal statute, you have a whole separate problem. How do you determine it? How--

Q Would you be making this argument if the statute were limited to civil liability? The statute does say civil or criminal, as might be applicable in the case of a normal birth.

MR. MORRIS: Yes, it does, sir.

Q So, would you be making this argument if it were

just a civil suit?

MR. MORRIS: Yes, I would, sir, although again I do not address myself here to that argument. I submit to you--

Q Mr. Morris.

MR. MORRIS: Yes, sir.

Q May I ask this question: If the clause that includes the "may be viable" language were omitted from this section of the statute, would that meet your objection?

MR. MORRIS: No, sir, but on a ground, for a reason, that I do not believe is before this Court. I think I suggested a moment ago--

Q Would the remaining language be subject to an attack for avoidance?

MR. MORRIS: Yes, sir, that is precisely where I would now go with my argument.

Q Would the mere requirement that a doctor determine viability, in view of all that you have said about the difficulty of that, present avoidance issue in any of these statutes?

MR. MORRIS: It would depend on whether there were a criminal sanction--

Q Yes.

MR. MORRIS: --and what he had to do when he determined viability. If you assume that he had to determine viability and you applied a criminal sanction for reasons not

before you in this case but based on Winters and Screws, I would have to say that that would be unconstitutional. It is not to say--

Q Are you saying--I want to understand you--that the question of viability would have to be left to the good-faith discretion of the physician in every case, that he could not be held liable criminally, regardless of whether or not he exercised his judgment with gross recklessness?

MR. MORRIS: Your Honor, that is not how I reach that result. That result I would not concur with. I reach the result for this reason. You do not sit here as a legislature drafting the precise language. Under Palco and Griswold I see your work as defining the concepts. But that does not mean the adoption of your language in a statute will satisfy the requirements of certainty, and I believe--although this question is not before you, it having been asked--that a state legislature implementing the concept which you have structured would be required to be more precise than your language is and would also be required, under Winters--and Keyishian is another one--to move or weight its language to provide a breathing space for that privacy right which we are discussing here today.

Q Do you think that a doctor cannot be held to the same responsibility in the performance of an abortion that he could be held to in the performance of an appendectomy?

MR. MORRIS: I believe that he could be held to the same performance, sir.

Q Would you say there is breathing space necessary in the case of an appendectomy too?

MR. MORRIS: I think, at least in the cases I saw your question, I was looking to a civil liability, and in the case of civil liability this penumbra surrounding the Bill of Rights, this Fourteenth Amendment due process right, I do not think has the same impact; in fact, it has no impact in my estimation.

Q How about criminal liability?

MR. MORRIS: In a criminal liability case, sir, I think to the extent that you found it to be a private area--and I would have to think about an appendectomy--I would think you would have to give some consideration to moving the test, the precise test, sufficiently out so that it was clear that there was a criminal act, so that there was not a vagary of distinction. But I do not think that is as personal an area here.

Q You say it is clear that it is a criminal act. I would like to ask you the same question I asked your opponent. Is the state entitled to make criminal gross negligence on the part of a physician performing a recognized medical procedure, whether it is abortion, appendectomy, or heart surgery?

MR. MORRIS: Yes, I would think so, if it were

precise enough on what the guidelines were.

Q What if a state passed the very same law with respect to the third trimester?

MR. MORRIS: If it may be viable during the third trimester?

Q The doctor has to make that determination and then use the best method available to save the life of the fetus.

MR. MORRIS: This requires me--and I am quite willing to do so--

Q Is that vague or not?

MR. MORRIS: No.

Q Is that an impossible determination?

MR. MORRIS: No, sir, but it requires me to take a step under Roe--and one always hesitates to interpret the language of Mr. Justice Blackmun who wrote it--

Q And you have been in your entire argument.

MR. MORRIS: I am trying, sir. Trying to. And I read Roe, sir, originally as requiring a flexible standard. And you made that clear in Danforth. As flexible as it is, whatever line the state legislature draws must be one that is clearly not invasive. That is why I answered Mr. Justice Powell the way I did.

Q So, you say in my hypothetical, the third trimester, that it would not be vague.

MR. MORRIS: No, I think we could establish now, although I do not believe this record does it--

Q Even though a doctor might determine this fetus will not be viable and two doctors might disagree with him before a jury?

MR. MORRIS: I believe--and I speak extra record now--that we have reached a medical point, given ultrasound, where a definition placed at the third trimester would probably stand up and properly so. I think it would inevitably have to be subjected to constitutional testimony at a legislative hearing and probably in the court. But I think it would stand up because I think it is sufficiently definite.

You are making two decisions there. It is clearly definite if you can get the age close. The other decision is, Have you invaded that area which, I submit to you, Roe and Danforth established as protected? And I think now we can demonstrate that in the third trimester you would not be invading that area.

Q Do you agree, Mr. Morris, that in both Section 5(a) and in the other sections the judgment is one that requires reading into the statute that it is based on reasonable medical certainty on what is then known about the subject?

MR. MORRIS: Yes, I do, sir, if what you are asking me is, Is there an objective legal test as opposed to the doctor's judgment being controlling? The doctor's judgment can

be questioned under this statute, and that has never been questioned by the--

Q It is the same test, the same general standard, as would apply to a live birth.

MR. MORRIS: Yes.

Q Whatever standard of care the doctor is held to there he is held to under this statute.

MR. MORRIS: Yes, sir, I agree.

Q What is that standard, reasonable medical--

MR. MORRIS: Reasonable medical certainty. The difficulty, sir, is that with a live birth you have a situation where it can be determined--

Q I understand, but that is the standard.

MR. MORRIS: Yes, sir.

Q However difficult it might be to apply it, that is the standard.

MR. MORRIS: Yes. And when subjecting a man, I submit to the Court, to a situation which, if he makes the wrong judgment, invokes criminal penalty, then I think the judgment must be made at least humanly possible, and I submit in this case it is not.

Finally, let me turn, if I may, from the area which is carved out of Roe and Danforth by the "may be viable" language--and, incidentally, in Hodgson the Eighth Circuit so found on the words "potentially viable," the appeal was

dismissed in that case--and move then to what I think you must do on a vagueness analysis. And I will make this brief, but I want to call to the Court's attention that starting with Thornhill and moving through Connally and Winters and Keyishian now, you have clearly when an individual right was inhibited or circumscribed or threatened held the statute or the state officer to a high standard of certainty. It is not sufficient, when threatening an individual right as you do here with respect to both the doctor and the mother, both of which rights we assert, to say as you might to a state officer, "Your actions must be constitutional." You may say that to a state. Indeed, under civil rights statutes you have convicted state officers for that. But that I think you have been unwilling to say--and I ask you to remain continuingly unwilling to say--that you may make a private citizen, operating in an area which may be protected and which is private, subject to the same standard. And this statute, if any statute, accomplishes precisely that goal.

I think Roe suggested the conclusion. I think Danforth and Hodgson make it clear. Thank you, sirs.

REBUTTAL ARGUMENT OF MRS. CAROL LOS MANSMANN

ON BEHALF OF THE APPELLANTS

MRS. MANSMANN: There was a question that underlay a great deal of testimony in the lower court, and it was a fundamental question, and that was, What really is an abortion?

Is it determination of a woman's impending motherhood? Or is it that, plus destruction of the fetus or viable child? And it is our position that with respect to the methods applicable, the appellees failed to show that there was not a safe method. But their arguments are all based on what plaintiff, Dr. John Franklin, said, and that is it is his belief, and he said, "I thought about this a great deal, and it is my belief that the right to live is that somebody wants you to live. And if the mother does not want you to live, then the physician should be able to perform an abortion"--and he meant at any time-- "for the purpose not just of terminating the pregnancy, but destroying the fetus as well." And I leave you with that thought and ask you again to recognize the state's interest in the rights to the viable child. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[The case was submitted at 11:55 o'clock a.m.]

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