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September 27, 1985

ATTORNEY GENERAL OPINION NO. 85- 131

The Honorable Eric Yost
State Senator, 30th District
104 Post Oak Road
Wichita, Kansas 67206

Re: Constitution of the United States -- Fourteenth
Amendment -- Right to Privacy; Ability of State to
Regulate or Prohibit Abortion

Synopsis: The decision of the United States Supreme Court in
Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35
L.Ed.2d 147 (1973), permits a state to regulate or
even prohibit abortion after the stage of
viability, except where it is necessary, in
appropriate medical judgment, to preserve the life
or health of the mother. Such regulations must be
narrowly tailored to fit the precise state interest
at stake. As a result, attempts to specify a
particular time during a pregnancy when viability
occurs or to interfere with the judgment of the
attending physician have been struck down as
unconstitutional, although general prohibitions on
post-viability abortions have been upheld. Cited
herein: U.S. Const., Fourteenth Amend.

* * *

Dear Senator Yost:

As State Senator for the 30th District, you request our
opinion concerning the ability of a state to regulate or
prohibit abortions after the time the fetus reaches

viability. You state that it is your reading of the cases in this area that such actions on the part of a state have been sanctioned by the courts, and request our opinion accordingly. As there are no Kansas statutes involved, we must direct our inquiry to the pertinent federal court decisions which have been rendered on this subject since 1973.

As is universally recognized, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), is the landmark case in this country dealing with abortion. The Supreme Court in Roe found that women possess fundamental rights of privacy under the Fourteenth Amendment to the United States Constitution, and that a woman's "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. Because the abortion decision involves a fundamental right, "the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'." Id. at 155 [citing Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969)].

However, the decision in Roe did not give a woman an absolute right to an abortion, but rather balanced her rights against the state's interests. These state interests are defined in relation to the different stages of pregnancy. From the stage prior to the end of the first trimester, the abortion decision is left to the woman and her physician; during this stage there is no compelling state interest that justifies regulation. Id. at 163. But cf. Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 462 U.S. 416, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983) (requirement of pathology report for first trimester abortions upheld because it furthered important state health objectives without interfering with a woman's exercise of her right); Planned Parenthood Association v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (minor informed consent and record keeping requirements in first trimester upheld). From the stage subsequent to the end of the first trimester but prior to viability, the state may regulate abortion procedures in ways that are reasonably related to maternal health, because of the state's compelling interest in promoting the health of the mother. It is the the third stage, that subsequent to viability, which is relevant to the question you present. Roe, 410 U.S. at 163.

In discussing viability, the Roe court stated: "With respect to the state's important and legitimate interest in potential life, the 'compelling' point is at viability. This is because the fetus then presumably has the capability of meaningful life outside the mother's womb." Id. at 163. The Court defined "viable" as "potentially able to live outside the womb, albeit with artificial aid," and noted that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160. Because of the state's compelling interest at the point of viability, it may "regulate, and even proscribe, abortion, except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id. at 163-164. Since the decision in Roe, several state statutes defining viability or regulating abortions during the final stage have been challenged as unconstitutional.

One of the first cases to be decided in response to Roe occurred in Kentucky. The decision appears in the case law as Wolfe v. Schroering, 388 F.Supp. 631 (W.D. Ky. 1974), and involves a number of the sections of Kentucky law enacted after Roe. One such section provided that once it can reasonably be expected for the fetus to have reached viability, no abortion shall be performed except to preserve the life or health of the mother. In upholding this section (although others were struck down), the federal district court found:

"The Roe decision clearly gives the state the right to regulate the abortion procedure or even proscribe abortions after the point of viability of the fetus has been reached. This Court finds no objection to the wording of this section. The words ' . . . may reasonably be expected to have reached viability' are within the scope of the Supreme Court decision and are sufficiently narrow to permit medical judgment to determine viability. Viability cannot be determined by the state; the decision is a medical one and must be left to the professional medical judgment of the woman's physician just as in any other medical procedure. As medical technology advances, the point at which viability may be determined will change. Therefore, as

long as viability is the standard or the compelling point, a definite period of weeks cannot be set by the state or the courts." Id. at 637.

In Planned Parenthood of Missouri v. Danforth, supra, Missouri's abortion law was challenged. One of the challenged provisions was the definition of "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems." The court upheld this definition, saying it was in accord with the definition in Roe. The court went on to conclude: ". . . it is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." Id. at 64. Accordingly, no time limit may be assigned to define the point of viability, and the efforts of states to do so have been held invalid. See, e.g., Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976) (Minnesota statute presumed viability after 20 weeks; held invalid), Margaret S. v. Edwards, 488 F.Supp. 181 (E.D. La. 1980) (24 weeks; same result).

The next Supreme Court case to deal with the question of viability was Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). In this case, the court held that a Pennsylvania statute which required a doctor to make a determination of viability before performing an abortion was void for vagueness. The statute read as follows:

"Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is a sufficient reason to believe the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in

order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary to preserve the life and health of the mother." (Emphasis added.)

The second part of the statute subjected doctors who failed to make the determination or to exercise professional care in doing so to criminal and civil liability.

The Court found the statute unconstitutionally vague for three reasons. First, it was unclear whether the physician was to apply an objective or subjective standard in determining viability. *Id.* at 391. Secondly, the phrase "may be viable" could refer either to viability or to some point prior to viability. This provision was found to have a chilling effect on physicians who might perform abortions near the point of viability. *Id.* at 391. Third, the vagueness was aggravated by "the absence of a scienter requirement." Although a physician may be subject to civil or criminal penalties for failure to comply with the requirements, there was no mention of intent. The Court saw "a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." *Id.* at 396. See also Margaret S. v. Edwards, supra, (statute requiring doctor to use method most likely to preserve life of fetus impermissible, as it did not give consideration to preservation of maternal health). Colautti also reinforces the holding of Danforth that viability is to be determined solely by the physician. 439 U.S. at 389.

It should not be assumed, however, that the federal courts have never permitted some regulation of post-viability abortions. In Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, supra, the court upheld a second physician requirement during abortions of a viable fetus. The requirement was upheld because it reasonably furthered the state's compelling interest in protecting the lives of viable fetuses. However, there is an important qualification to this holding, for Ashcroft is based on an assumption that the Missouri statute had an implied exception to the second

physician requirement when there is an emergency situation.
Id. at 485, n. 8.

Further, in American College of Obstetricians v. Thornburgh, 737 F.2d 283 (3rd Cir. 1984), several of Pennsylvania's abortion laws were again challenged. Abortions after viability were prohibited, with the statute making it a felony to "intentionally, knowingly or recklessly perform or induce an abortion when the fetus is viable." Constitutional challenges were raised to the two permitted defenses: (1) the unborn child was not viable at the time of the abortion; or (2) the abortion was necessary to preserve the life or health of the mother. Both of these defenses relied on the doctor's "good faith" and "best medical judgment."

The first defense was challenged as unconstitutional with the argument that it placed the burden on the physician to prove his innocence. In response, the court cited Simopolous v. Virginia, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983), which held that while a state can place the burden on the defendant to invoke medical necessity as a defense, the burden of proof of lack of medical necessity must then shift to the prosecution. Thus the court rejected the challenge to the first defense. As to the second challenged defense, the court was careful to take cognizance of the Supreme Court's definition of maternal "health," which is broadly defined and includes "all factors - physical, psychological, familial, and the woman's age - relevant to the well-being of the patient." Doe v. Bolton, 410 U.S. 179, 192, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). Those challenging the statute argued that the Pennsylvania Legislature did not include all of these factors in its definition of maternal health. While another part of the statute expressly excluded psychological and emotional impact from the definition of health, because no such qualifications were stated in the viability section the court construed the statute as constitutional, relying on the Supreme Court of Pennsylvania to construe "health" as does the Supreme Court of the United States. 737 F.2d at 299. While the court expressly stated its concern over the chilling effect of criminal sanctions, because there was no evidence of such an effect it did not determine the issue. Id. at 299-300.

Another recent case dealing with the regulation of abortion after viability is Charles v. Daley, 749 F.2d 452 (7th Cir. 1984). That case involved an Illinois statute which

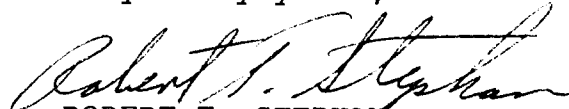
imposed a standard of care on physicians performing abortions on fetuses which are "viable" similar to that found in Colautti, supra. The statute did not specify who was to make the viability determination, the physician or an assistant. The court held that: "when the state prescribes such standards, it must afford due deference to the conclusive viability determination of the attending physician. In addition, the state must precisely tailor its standards of care to the particular state interest at stake, so that its statute precisely notifies physicians and their assistants as to what conduct by them the state purports to condemn." Id. at 460. Another invalid section of the statute imposed criminal liability on physicians who perform abortions on a fetus that may possibly be viable. Because the state's interest in fetal life become compelling only at or after viability, its interest in protecting fetal life cannot justify a statute which could apply to some pre-viability abortions. Id. at 461.

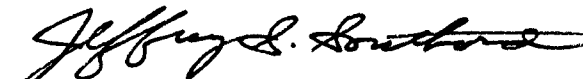
From a review of the above cases, it may be observed that all decisions subsequent to Roe have merely applied or "fine-tuned" principles which were laid out in the 1973 decision. This is true in all aspects of the abortion question, including the issue of viability. While Roe set forth, and subsequent cases have reaffirmed, the power of a state to prohibit abortions after the stage of viability, this power is limited to such an extent that most state efforts to put it into practice have been deemed unconstitutional. Federal courts have remained steadfast to the Roe doctrine which places the life and health of the mother in a paramount position, so that even a total prohibition on post-viability abortions must contain an exception for such considerations. Further, both the decision as to the status of the mother's life and health and the viability of the fetus must be left to the professional medical judgment of the woman's attending physician. Accordingly, except where a state enacts a general prohibition, as did Kentucky (see Wolfe v. Schroering, supra), or defines viability in general terms (Danforth, supra), it will be difficult for any statute imposing concrete limits on abortion to pass constitutional muster given the current state of the federal law.

In conclusion, the decision of the United States Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), permits a state to regulate or even prohibit abortion after the stage of viability, except where it is necessary, in

appropriate medical judgment, to preserve the life or health of the mother. Such regulations must be narrowly tailored to fit the precise state interest at stake. As a result, attempts to specify a particular time during a pregnancy when viability occurs or to interfere with the judgment of the attending physician have been struck down as unconstitutional, although general prohibitions on post-viability abortions have been upheld.

Very truly yours,


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