***Colautti v. Franklin* (1979) - Justice Blackmun -** 6/3.

The *Colautti* Court:
The Court has not changed since *Danforth*.
Majority (6): Blackmun, Brennan, Stewart, Marshall, Powell & Stevens.
Minority (3): White, Burger & Rehnquist.

Issue: At issue here is the constitutionality of a Pennsylvania statute that subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or when there is "sufficient reason to believe that the fetus may be viable." A three-judge Federal District Court declared §5(a) unconstitutionally vague and overbroad...

Held: The statue is unconstitutional...judgment affirmed.

Reasoning: Justice Blackmun...Section 5 reads in pertinent part:

> "(a) Every person who performs an abortion shall prior thereto have made a determination that the fetus is not viable and if the determination is that the fetus is viable or if **there is sufficient reason to believe that the fetus may be viable**, shall exercise that degree of professional skill 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 in order to preserve the **life or health** of the mother...

> "(d) Any person who fails to make the determination or who fails to exercise the degree of professional skill required shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

Section 2 defined "viable" as "the capability of a fetus to live outside the mother's womb albeit with artificial aid." And **§6 prohibited abortion subsequent to viability except where necessary to preserve the life or health of the mother...**

In *Roe v. Wade*, we indicated that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy. After viability, the State may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman. We did not undertake in *Roe* to examine the various factors that may enter into the determination of viability. We simply observed that a fetus is considered viable if it is "potentially able to live outside the mother's womb, albeit with artificial aid." We added that there must be a potentiality of "meaningful life," not merely momentary survival. And we noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

...Viability is reached when, **in the judgment of the attending physician** on the particular facts of the case before him, there is a **reasonable likelihood** the fetus will survive outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim any of the elements entering into the ascertainment of viability as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point.

I just have one simple question: If no legislature and no court can define viability by any parameter and, therefore, its definition is defined on a patient by patient basis with the **physician making the judgment call**, how could the State's interest in protecting the fetus **ever** have any real significance?

The attack on these statutes centers on both the viability-determination requirement and the stated standard of care. The former provision, requiring the physician to observe the care standard when he determines that the fetus is viable, or when "there is sufficient reason to believe that the fetus may be viable," is asserted to be unconstitutionally vague because it fails to inform the physician when his duty to the fetus arises and **because it does not make the physician's good-faith determination of viability conclusive**.

The defendants assert that the Pennsylvania statute is concerned only with post-viability abortions and with prescribing a standard of care for those abortions. They assert that the terminology "may be viable" correctly describes the statistical probability of fetal survival associated with viability; that

the viability-determination requirement is otherwise sufficiently definite to be interpreted by the medical community; and that **it is for the legislature, not the judiciary, to determine whether a viable but genetically defective fetus has a right to life**. They contend that the standard-of-care provision preserves the flexibility required for sound medical practice, and that it simply requires that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus. We agree that the viability-determination requirement of §5(a) is ambiguous and that its uncertainty is aggravated by the absence of a scienter requirement with respect to the finding of viability.

A criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" or is so indefinite that "it encourages arbitrary and erratic arrests and convictions" is void for vagueness as a violation of due process.

This statute requires every person who performs or induces an abortion to make a determination "**based on his experience**, judgment or professional competence" that the fetus is not viable. If such person determines that the fetus is viable, or if "there is sufficient reason to believe that the fetus may be viable," then he must adhere to the prescribed standard of care. This requirement contains a double ambiguity. First, it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard. Second, it is uncertain whether the phrase "may be viable" simply refers to viability, as that term has been defined in *Roe* and in *Planned Parenthood*, or whether it refers to an undefined penumbral or "gray" area prior to the stage of viability.

What if this is the physician's first abortion? No experience, at least no solo experience. Everybody has to have a first time. Or, what if the physician is incompetent? Is the test subjective or objective?

Apparently, the determination of whether the fetus "is viable" is to be based on the attending **physician's "experience**, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center.

The intended distinction between the phrases "is viable" and "may be viable" is even more elusive. Appellants argue that no difference is intended, and that the use of the "may be viable" words "simply incorporates the acknowledged medical fact that a fetus is 'viable' if it has that statistical 'chance' of survival recognized by the medical community." The statute, however, does not support the contention that "may be viable" is synonymous with, or merely intended to explicate the meaning

of, "viable."

Section 5(a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable." The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care.

Furthermore, the suggestion that "may be viable" is an explication of the meaning of "viable" flies in the face of the fact that the statute already defines "viable." This, presumably, was intended to be the exclusive definition of "viable" throughout the Act. In this respect, it is significant that §6(b) of the Act speaks only of the limited availability of abortion during the stage of a pregnancy "subsequent to viability." The concept of viability is just as important in §6(b) as it is in §5(a). Yet in §6(b) the legislature found it unnecessary to explain that a "viable" fetus includes one that "may be viable."

Since we must reject appellants' theory that "may be viable" means "viable," a second serious ambiguity appears in the statute. On the one hand, it may be that "may be viable" carves out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability. On the other hand, it may be that "may be viable" refers to viability as physicians understand it and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question. The crucial point is that "viable" and "may be viable" apparently refer to distinct conditions and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in *Planned Parenthood*.

How does “may be viable” differ from “potentially viable”?

Because of the double ambiguity in the viability-determination requirement, this portion of the Pennsylvania statute is readily distinguishable from the requirement that an abortion must be "necessary for the preservation of the mother's life or health," upheld against a vagueness challenge in *United States v. Vuitch* and the requirement that a physician determine, on the basis of his "best clinical judgment," that an abortion is "necessary," upheld against a vagueness attack in *Doe v. Bolton.* The contested provisions in those cases had been interpreted to allow the physician to make his determination in the light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient. **The present statute does not afford broad discretion to the physician. Instead, it conditions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application and chilling effect on the exercise of constitutional rights.**

Again, if broad discretion is to be afforded the physician, when, if ever, would there be a successful prosecution under one of these statutes?

The vagueness of the viability-determination requirement of §5(a) is compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault. Under §5(d), a physician who fails to abide by the standard of care when there is sufficient reason to believe that the fetus "may be viable" is subject "to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." To be sure, the Pennsylvania law of criminal homicide, made applicable to the physician by §5(d), conditions guilt upon a finding of scienter. The required mental state, however, is that of "intentionally, knowingly, recklessly or negligently causing the death of another human being." Thus, the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus. But neither the Pennsylvania law of criminal homicide, nor the Abortion Control Act, requires that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable. Section 5(a) does provide that the determination of viability is to be based on the physician's "experience, judgment or professional competence." A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard. Moreover, it is ambiguous whether this subjective language applies to the second condition that activates the duty to the fetus, namely, "sufficient reason to believe that the fetus may be viable." Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith."

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. **In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have 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.**

Practically, it now appears the Court is saying to prosecutors that a crime will not be considered as having been committed until a point "after" viability when no expert would disagree. In other words, in the "gray zone," so as not to "chill" the doctor's decision, doctor wins/fetus dies. Of course, when a doctor aborts beyond the gray zone when unnecessary to preserve the life or health of the woman, doctor loses/fetus still dies.

Because we hold that the viability-determination provision of §5(a) is void on its face, we need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. **We reaffirm, however, that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.**" *Planned Parenthood v. Danforth.* State regulation that impinges upon this determination, if it is to be constitutional, must allow the attending physician "the room he needs to make his best medical judgment." *Doe v. Bolton.*

If the "judgment" of the physician controls, his "judgment" turns out to be wrong and the fetus could have lived but died in the process, how could the physician ever be charged with criminal abortion? After all, his defense will be, "in my judgment, this fetus could not have lived with the best of care" and, right or wrong, he wins. It does not appear that the "State's interest" in proscribing abortion after viability carries much weight, does it?

We also conclude that the standard-of-care provision of §5(a) is impermissibly vague. The standard-of-care provision, when it applies, requires the physician to "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 in order to preserve the life or health of the mother."

Plaintiffs-appellees focus their attack on the second part of the standard, requiring the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother.

When the plaintiffs' and defendants' physician-experts respectively were asked what would be the method of choice under §5(a), opinions differed widely.

Does an exception for the "health" of the mother mean avoiding procedures "that involve **some disadvantage**" to the woman? Again, if so, why are we spending so much time on this issue? The fetus has no chance under rules that give the doctor and woman all the cards at any stage.

The appellants submit that the only legally relevant considerations are that alternatives exist among abortifacients "and that the physician, mindful of the state's interest in protecting viable life, must make a competent and good faith medical judgment on the feasibility of protecting the fetus' chance of survival in a manner consistent with the life and health of the pregnant woman." We read §5(a), however, to be much more problematical.

The statute does not clearly specify that the woman's life and health must always prevail over the

fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures. Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother." The word "necessary" suggests that a particular technique must be indispensable to the woman's life or health before it may be adopted. And "the life or health of the mother," as used in §5(a), does not necessarily imply that all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision. *United States v. Vuitch; Doe v. Bolton.*

Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

DISSENT: Justice White/Burger/Rehnquist...The Court now withdraws from the States a substantial measure of the power to protect fetal life that was reserved to them in *Roe* and reaffirmed in *Planned Parenthood v. Danforth*.

In *Roe*, the Court defined the term "viability" to signify the stage at which a fetus is "**potentially** able to live outside the mother's womb, albeit with artificial aid" and to be the point at which the State's interest in protecting fetal life becomes sufficiently strong to permit it to "go so far as to proscribe abortion, except when it is necessary to preserve the life or health of the mother."

The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is ***potentially*** able to survive. In the ordinary usage of these words, being *able* and being *potentially able* do not mean the same thing. **The Court's definition of viability in *Roe* reaches an earlier point in the development of the fetus than that stage at which a doctor could say with assurance that the fetus *would* survive outside the womb**.

Insofar as *Roe* v. *Wade* was concerned, Pennsylvania could have defined viability in the language of that case -- "potentially able to live outside the mother's womb" – and could have forbidden all abortions after this stage of any pregnancy. The Pennsylvania Act, however, did not go so far. It forbade entirely only those abortions where the fetus had attained viability, defined as "the *capability* to live outside the mother's womb albeit with artificial aid." But the State, understanding that it also had the power under *Roe* v. *Wade* to regulate where the fetus was only "potentially able" to exist outside the womb, also sought to regulate, but not forbid, abortions where there was sufficient reason to believe that the fetus "may be viable"; this language was reasonably believed by the State to be

equivalent to what the Court meant in 1973 by the term "potentially able to live outside the mother's womb." Under §5(a), abortionists must not only determine whether the fetus is viable but also whether there is sufficient reason to believe that the fetus may be viable. If either condition exists, the method of abortion is regulated and a standard of care imposed. Under §5(d), breach of these regulations exposes the abortionist to the civil and criminal penalties that would be applicable if a live birth rather than an abortion had been intended.

The *Danforth* Court plainly reaffirmed what it had held in *Roe* v. *Wade*: Viability refers not only to that stage of development when the fetus actually has the capability of existing outside the womb but also to that stage when the fetus *may have* the ability to do so. That Court also reaffirmed that at any time after viability, as so understood, the State has the power to prohibit abortions except when necessary to preserve the life or health of the mother. Affirmance of the District Court's judgment is untenable. The District Court said that the "may be viable" standard was invalid as an impermissible effort to regulate a period of "potential" viability. But this is the very ground that was urged and rejected in *Danforth*, where this Court sustained the Missouri provision defining viability as the stage at which the fetus "may" have the ability to survive outside the womb and reaffirmed the flexible concept of viability announced in *Roe*.

Only those with <u>unalterable determination to invalidate</u> the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between "viability" defined as the ability to survive and "viability" defined as that stage at which the fetus may have the ability to survive. It seems to me that, in affirming, the Court is tacitly disowning the "may be" standard of the Missouri law as well as the "potential ability" component of viability as that concept was described in *Roe*. This is a further constitutionally unwarranted intrusion upon the police powers of the States.

Justice White is suggesting that the liberal wing of the Court has a pre-ordained agenda to strike down any laws that even hint at supporting the right of a fetus to live.

Apparently uneasy with its work, the majority has searched for and seized upon two additional reasons to support affirmance, neither of which was relied upon by the District Court. The Court first notes that under §5(d), failure to make the determinations required by §5(a), or otherwise to comply with its provisions, subjects the abortionist to criminal prosecution under those laws that "would pertain to him had the fetus been a child who was intended to be born and not aborted." Although concededly the Pennsylvania law of criminal homicide conditions guilt upon a finding that the defendant intentionally, knowingly, recklessly, or negligently caused the death of another human being, the Court nevertheless goes on to declare that the abortionist could be successfully prosecuted for criminal homicide without any such fault or omission in determining whether or not the fetus is viable or may be viable. This alleged lack of a scienter requirement, the Court says, fortifies its holding that §5(a) is void for vagueness.

This seems to me an incredible construction of the Pennsylvania statutes. The District Court

suggested nothing of the sort, and appellees focus entirely on §5(a), ignoring the homicide statutes. The latter not only define the specified degrees of scienter that are required for the various homicides, but also provide that ignorance or mistake as to a matter of fact, for which there is a reasonable explanation, is a defense to a homicide charge if it negatives the mental state necessary for conviction. Given this background, I do not see how it can be seriously argued that a doctor who makes a good-faith mistake about whether a fetus is or is not viable could be successfully prosecuted for criminal homicide. This is the State's submission in this Court; the court below did not address the matter; and at the very least this is something the Court should not decide without hearing from the Pennsylvania courts.

Secondly, the Court proceeds to find the standard-of-care provision in §5(a) to be impermissibly vague, particularly because of an asserted lack of a *mens rea* requirement. I cannot join the Court in its determined attack on the Pennsylvania statute. As in the case with a mistaken viability determination under §5(a), there is no basis for asserting the lack of a scienter requirement in a prosecution for violating the standard-of-care provision. **I agree with the State that there is not the remotest chance that any abortionist will be prosecuted on the basis of a good-faith mistake regarding whether to abort, and if he does, with respect to which abortion technique is to be used**.

Although it seems to me that the Court has considerably narrowed the scope of the power to forbid and regulate abortions that the States could reasonably have expected to enjoy under *Roe* and *Danforth*, the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother. Nor has it yet ruled that the abortionist's determination of viability under such a standard must be final and is immune to civil or criminal attack.

What the Court has done is to issue a warning to the States, in the name of vagueness, that they should not attempt to forbid or regulate abortions when there is a chance for the survival of the fetus, but it is not sufficiently large that the abortionist considers the fetus to be viable. This edict has no constitutional warrant, and I cannot join it.