Landmarks

Roe v. Wade: 35 Years Young, and Once Again a Factor in a Presidential Race

VICTORIA PRUSSEN SPEARS

Revered and reviled as perhaps no other Supreme Court ruling of the 20th Century, Roe v. Wade *was a privacy law decision that has had important ramifications over the years for privacy jurisprudence independent of its result upholding abortion rights.*

A little more than 35 years ago, the U.S. Supreme Court decided *Roe v. Wade*,[1] the so-called "abortion rights" case. Since that time, the decision has played an important role in numerous political races and is, once again, a focus of presidential politics: Barack Obama supports the decision; John McCain believes that it should be overturned.[2]

Although a great deal has been written about *Roe v. Wade* over the years, much of the discussion has focused only on the result or perceptions about the result based on people's political, religious, or personal views. While Justice Harry A. Blackmun's role as author of the majority

Victoria Prussen Spears is an attorney in Miller Place, N.Y. She may be contacted at victoriapspears@aol.com.

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opinion in *Roe v. Wade* is well-remembered, fewer recall that that opinion was joined in by six other Justices — Chief Justice Warren E. Burger (who had been appointed by President Richard M. Nixon) and Justices William O. Douglas, William J. Brennan, Jr., Potter Stewart, Thurgood Marshall, and Lewis F. Powell, Jr. — making it a 7 to 2 ruling. Justices Byron R. White and William H. Rehnquist dissented.

As this column explains, *Roe v. Wade* had a significant privacy law basis that has had important implications for other privacy disputes over the years.

BACKGROUND

The Texas statutes that were challenged in *Roe v. Wade* made it a crime to "procure an abortion" or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."[3] Jane Roe (a pseudonym), a single woman who was residing in Dallas County, Texas, instituted a federal lawsuit in March 1970 against the county's district attorney. Roe sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint, he alleged that he had been arrested previously for violations of the Texas abortion statutes, and that two such prosecutions were pending against him. He described con-

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ditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception "for the purpose of saving the life of the mother." He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe (also pseudonyms), a married couple, filed a companion complaint to that of Roe. They also named the district attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that, if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a three judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. The district court held that Roe and members of her class and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the district court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth

Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief.

The plaintiffs Roe and Doe and the intervenor Hallford appealed to the U.S. Supreme Court from that part of the district court's judgment denying the injunction. The defendant district attorney purported to cross-appeal from the district court's grant of declaratory relief to Roe and Hallford. The Court decided it would review both the injunctive and the declaratory aspects of the case.

STANDING

Preliminarily, the Court determined that Roe, as a pregnant single woman "thwarted by the Texas criminal abortion laws," had standing to challenge those statutes, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy had not rendered her case moot. It ruled, however, that because Dr. Hallford had not alleged any "substantial and immediate threat to any federally protected right" that could be asserted in his defense against the state prosecutions, his complaint in intervention had to be dismissed. The Court also ruled that the Does were not appropriate plaintiffs, finding their claim that "sometime in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and, at that time in the future, she might want an abortion that might then be illegal under the Texas statutes," to be "speculative."

THE CLAIM

Justice Blackmun noted that the principal thrust of Roe's attack on the Texas statutes was that they improperly invaded a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Roe

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contended that this right was found in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its "penumbras,"[4] or among those rights reserved to the people by the Ninth Amendment.[5]

Justice Blackmun observed that the Constitution did not explicitly mention any right of privacy. He added, however, that in a line of decisions going back perhaps as far as the 1891 decision in *Union Pacific R. Co. v. Botsford*,[6] the Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." In varying contexts, Justice Blackmun explained, the Court or individual Justices have found "at least the roots of that right" in the First Amendment;[7] in the Fourth and Fifth Amendments;[8] in the "penumbras" of the Bill of Rights;[9] in the Ninth Amendment;[10] or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.[11] These decisions, Justice Blackmun stated, made it "clear" that only personal rights that could be deemed "fundamental" or "implicit in the concept of ordered liberty,"[12] were included in this guarantee of personal privacy. He added that they also made it clear that the right has some extension to activities relating to marriage,[13] procreation,[14] contraception,[15] family relationships,[16] and childrearing and education.[17]

THE RIGHT OF PRIVACY

This right of privacy, Justice Blackmun then held, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, "as we feel it is," or, as the district court determined, in the Ninth Amendment's reservation of rights to the people, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Justice Blackmun declared that the "detriment" that the state would impose upon a pregnant woman by denying this choice altogether was "apparent," adding that "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved." Justice Blackmun added that "[m]aternity, or additional offspring, may force upon the woman a dis-

tressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care." Justice Blackmun added that there was "also the distress, for all concerned, associated with the unwanted child," and the problem "of bringing a child into a family already unable, psychologically and otherwise, to care for it." He also noted that in other cases, as in this one, "the additional difficulties and continuing stigma of unwed motherhood may be involved." All these were factors the woman and her responsible physician "necessarily" would "consider in consultation."

The Court then rejected the argument that a woman's right was absolute and that she was entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chose. It rejected Roe's arguments that Texas either had no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination. Justice Blackmun pointed out that the Court's decisions recognizing a right of privacy also acknowledged that "some state regulation in areas protected by that right" was appropriate. Justice Blackmun then declared that a state may properly assert "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." At some point in pregnancy, he explained, these respective interests became sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, could not be said to be absolute. The Court therefore concluded that the right of personal privacy included the abortion decision, but that this right was not unqualified, and must be considered against important state interests in regulation.

The pregnant woman, the Court declared, "cannot be isolated in her privacy." The Court noted that a pregnant woman "carries an embryo and, later, a fetus," and as a result, it stated, the situation was "inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned." The Court stated that it was "reasonable and appropriate" for a state to decide that, at some point in time another interest, that of the health of the mother or that of potential human life, became signif-

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icantly involved, and that the woman's privacy was no longer sole and any right of privacy she possessed had to be measured accordingly.

Then, the Court stated, with respect to the state's interest in the health of the mother, the "compelling" point, "in the light of present medical knowledge," was at approximately the end of the first trimester. This was so, Justice Blackmun continued, because of the "now-established medical fact" that, until the end of the first trimester, mortality in abortion may be less than mortality in normal childbirth. It followed that, from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably related to the preservation and protection of maternal health.[18] Accordingly, the Court stated that this meant that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, was free to determine, without regulation by the state, that, in the physician's medical judgment, the patient's pregnancy should be terminated. If that decision was reached, the judgment "may be effectuated by an abortion free of interference" by the state, the Court held. Moreover, the Court ruled that if a state was interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it was necessary to preserve the life or health of the mother. The Court therefore concluded that the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," swept too broadly. The statute made no distinction between abortions performed early in pregnancy and those performed later, and it limited to a single reason, "saving" the mother's life, the legal justification for the procedure. The Court therefore ruled that the Texas abortion statutes had to fall.

OTHER OPINIONS

A number of Justices wrote opinions in *Roe v. Wade* and its Georgia companion, *Doe v. Bolton*.[19] Neither Chief Justice Burger's concurring opinion nor Justice White's dissenting opinion mentioned the word "privacy." Justice Stewart's concurring opinion only briefly referred to "privacy," stating in footnote 2:

> There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U. S. 347, 350-51 (footnotes omitted).

In his concurrence, Justice Douglas (who was the author of the majority opinion in *Griswold*), focused extensively on privacy, declaring that Roe involved "the right of privacy, one aspect of which we considered in *Griswold v. Connecticut*, 381 U.S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy." He observed that *Griswold* involved a law forbidding the use of contraceptives and that the Court held that law as applied to married people unconstitutional, noting "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." He added that aspects of the right of privacy were rights "retained by the people" in the meaning of the Ninth Amendment and noted that in *Eisenstadt v. Baird*, 405 U.S. 438, another contraceptive case, the Court expanded the concept of *Griswold* by saying:

> It is true that, in *Griswold*, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Justice Douglas also declared that the "right of privacy" had "no more

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conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship."

Interestingly, in footnote 2 of his opinion, Justice Douglas acknowledged that there was "no mention of privacy in our Bill of Rights," but added that the Court's decisions "have recognized it as one of the fundamental values those amendments were designed to protect."

JUSTICE REHNQUIST'S DISSENT

Then Justice, and late Chief Justice, Rehnquist dissented in *Roe v. Wade*. He stated that he had "difficulty in concluding," as the Court did, that the right of "privacy" was involved in this case. In Justice Rehnquist's view, an abortion was not "private" in the ordinary usage of that word. Nor was the "privacy" that the Court found here "even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy."

Justice Rehnquist stated that if the Court meant by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there was no doubt that similar claims have been upheld in earlier decisions on the basis of that liberty. That liberty, however, was not guaranteed absolutely against deprivation, only against deprivation without due process of law. He added that the test traditionally applied in the area of social and economic legislation was whether or not a law such as the Texas abortion statutes has a "rational relation" to a valid state objective.[20] Justice Rehnquist then stated that if the Texas statutes were to prohibit an abortion even where the mother's life was in jeopardy, "I have little doubt that such a statute would lack a rational relation to a valid state objective." But, he added, the Court's "sweeping invalidation of any restrictions on abortion during the first trimester" was "impossible" to justify under that standard, and the Court's decision was "far more appropriate to a legislative judgment than to a judicial one."

CONCLUSION

Justice Blackmun's reasoning relied extensively on privacy rights. In the event the Court were to decide to overrule *Roe v. Wade*, it is not clear whether it would do so by finding that no such privacy right exists, perhaps limiting the scope of privacy rights under the Constitution, or by applying a Due Process rationale as proposed by Justice Rehnquist or otherwise. It seems clear today, however, that *Roe v. Wade* now stands as a strong pillar in U.S. privacy jurisprudence.

NOTES

[1] 410 U.S. 113 (1973).

[2] *See, e.g.,* http://elections.nytimes.com/2008/president/issues/abortion.html.

[3] As Justice Blackmun noted, similar statutes were in existence at the time in a majority of the states. Many of these laws had been in effect for more than a century; Texas, for example, had first enacted a criminal abortion statute in 1854. Interestingly, however, Justice Blackmun's opinion pointed out that the restrictive criminal abortion laws in effect in a majority of the states were "not of ancient or even of common law origin." Indeed, Justice Blackmun stated that it was "undisputed" that, at common law, abortion performed before "quickening," the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy, was not an indictable offense, but instead derived from statutory changes effected, for the most part, in the latter half of the 19th century.

[4] *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *id.* at 460 (White, J., concurring in result); *see also* Victoria Prussen Spears, "*Griswold v. Connecticut* and the 'Penumbra' of Privacy," *Privacy & Data Security Law Journal* (Aug. 2008).

[5] *Griswold v. Connecticut*, 381 U.S. at 486 (Goldberg, J., concurring).

[6] 141 U.S. 250 (1891).

[7] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[8] *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886), *see Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[9] *Griswold v. Connecticut*, 381 U.S. at 484-485.

[10] *Id.* at 486 (Goldberg, J., concurring).

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[11] *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
[12] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).
[13] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[14] *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942).
[15] *Eisenstadt v. Baird*, 405 U.S. at 453-454; id. at 460, 463-465 (White, J., concurring in result).
[16] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
[17] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska, supra*.
[18] Examples of permissible state regulation in this area, the Court explained, were requirements as to the qualifications of the person who was to perform the abortion; as to the licensure of that person; as to the facility in which the procedure was to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.
[19] 410 U.S. 179 (1973).
[20] *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).