BURGER, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

410 U.S. 179

Doe v. Bolton

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70-40 Argued: December 13, 1971 --- Decided: January 22, 1973

MR. CHIEF JUSTICE BURGER, concurring [*]

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using [p208] the term health in its broadest medical context. See United States v. Vuitch, 402 U.S. 62, 71-72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortion procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course, States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. I do not believe that such a procedure is unduly burdensome, as are the complex steps of the Georgia statute, which require as many as six doctors and the use of a hospital certified by the JCAH.

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the

standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand. [p209]

* [This opinion applies also to No. 718, Roe v. Wade, ante p. 113.]

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While I join the opinion of the Court, [n1] I add a few words.

I

The questions presented in the present cases go far beyond the issues of vagueness, which we considered in United States v. Vuitch, 402 U.S. 62. They involve 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. [n2] [p210]

The Griswold case involved a law forbidding the use of contraceptives. We held that law as applied to married people unconstitutional:

> 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.
>
> Id. at 486.

The District Court in Doe held that Griswold and related cases

> establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion.

319 F.Supp. 1048, 1054.

The Supreme Court of California expressed the same view in People v. Belous, [n3] 71 Cal.2d 954, 963, 4&8 P.2d 194, 199.

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them, in my view, come [p211] within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

These are rights protected by the First Amendment and, in my view, they are absolute, permitting of no exceptions. See Terminiello v. Chicago, 337 U.S. l; Roth v. United States, 354 U.S. 476, 508 (dissent); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 697 (concurring); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (Black, J., concurring, in which I joined). The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs, Watkins v. United States, 354 U.S. 178, 196-199, is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail, United States v. Van Leeuwen, 397 U.S. 249, 253. All of these aspects of the right of privacy are rights "retained by the people" in the meaning of the Ninth Amendment.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

These rights, unlike those protected by the First Amendment, are subject to some control by the police power. Thus, the Fourth Amendment speaks only of "unreasonable searches and seizures" and of "probable cause." These rights

are "fundamental," and we have held that, in order to support legislative action, the statute must be narrowly and precisely drawn, and that a "compelling state interest" must be shown in support of the limitation. E.g., Kramer v. Union Free School District, 395 U.S. 621; Shapiro v. Thompson, 394 U.S. 618; [p212] Carrington v. Rash, 380 U.S. 89; Sherbert v. Verner, 374 U.S. 398; NAACP v. Alabama, 357 U.S. 449.

The liberty to marry a person of one' own choosing, Loving v. Virginia, 388 U.S. 1; the right of procreation, Skinner v. Oklahoma, 316 U.S. 535; the liberty to direct the education of one's children, Pierce v. Society of Sisters, 268 U.S. 510, and the privacy of the marital relation, Griswold v. Connecticut, supra, are in this category. [n4] [p213] Only last Term, in Eisenstadt v. Baird, 405 U.S. 438, another contraceptive case, we 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.

Id. at 453.

This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (dissenting opinion). That right includes the privilege of an individual to plan his own affairs, for,

> "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."

Kent v. Dulles, 357 U.S. 116, 126.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest." We stated in Papachristou v. City of Jacksonville, 405 U.S. 156, 164, that walking, strolling, and wandering "are historically part of the amenities of life as we have known them." As stated in Jacobson v. Massachusetts, 197 U.S. 11, 29:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will [p214] and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.

In Union Pacific R. Co. v. Botsford, 141 U.S. 250, 252, the Court said, "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."

In Terry v. Ohio, 392 U.S. 1, 8-9, the Court, in speaking of the Fourth Amendment stated,

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.

Katz v. United States, 389 U.S. 347, 350, emphasizes that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion."

In Meyer v. Nebraska, 262 U.S. 390, 399, the Court said:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

The Georgia statute is at war with the clear message of these cases -- that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the [p215] discomforts of pregnancy; to incur the pain, higher mortality rate, and after-effects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

II

Such reasoning is, however, only the beginning of the problem. The State has interests to protect. Vaccinations to prevent epidemics are one example, as Jacobson, supra, holds. The Court held that compulsory sterilization of imbeciles afflicted with hereditary forms of insanity or imbecility is another. Buck v. Bell, 274 U.S. 200. Abortion affects another. While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one.

One difficulty is that this statute as construed, and applied apparently does not give full sweep to the "psychological, as well as physical wellbeing" of women patients which saved the concept "health" from being void for vagueness in United States v. Vuitch, 402 U.S. at 72. But, apart from that, Georgia's enactment has a constitutional infirmity because, as stated by the District Court, it "limits the number of reasons for which an abortion may be sought." I agree with the holding of the District Court, "This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy." 319 F.Supp. at 1056.

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair "health" in [p216] the broad Vuitch sense of the term, or which may imperil the life of the mother, or which, in the full setting of the case, may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the "health" factor of the mother as appraised by a person of insight. Or they may be part of a broader medical judgment based on what is "appropriate" in a given case, though perhaps not "necessary" in a strict sense.

The "liberty" of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be "narrowly drawn to prevent the supposed evil," Cantwell v. Connecticut, 310 U.S. 296, 307, and not be dealt with in an "unlimited and indiscriminate" manner. Shelton v. Tucker, 364 U.S. 479, 490. And see Talley v. California, 362 U.S. 60. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.

There is no doubt that the State may require abortions to be performed by qualified medical personnel. The legitimate objective of preserving the mother's health clearly supports such laws. Their impact upon the woman's privacy is minimal. But the Georgia statute outlaws virtually all such operations -- even in the earliest stages of pregnancy. In light of modern medical evidence suggesting that an early abortion is safer healthwise than

childbirth itself, [n5] it cannot be seriously [p217] urged that so comprehensive a ban is aimed at protecting the woman's health. Rather, this expansive proscription of all abortions along the temporal spectrum can rest only on a public goal of preserving both embryonic and fetal life.

The present statute has struck the balance between the woman's and the State's interests wholly in favor of the latter. I am not prepared to hold that a State may equate, as Georgia has done, all phases of maturation preceding birth. We held in Griswold that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception. As Mr. Justice Clark has said: [n6]

> To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity -- the known, rather than the unknown. When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of [p218] life takes time to develop, and, until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. [n7] This would not be the case if the fetus constituted human life.

In summary, the enactment is overbroad. It is not closely correlated to the aim of preserving prenatal life. In fact, it permits its destruction in several cases, including pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth.

III

Under the Georgia Act, the mother's physician is not the sole judge as to whether the abortion should be performed. Two other licensed physicians must concur in his judgment. [n8] Moreover, the abortion must be performed in a licensed hospital; [n9] and the abortion must be [p219] approved in advance by a committee of the medical staff of that hospital. [n10]

Physicians, who speak to us in Doe through an amicus brief, complain of the Georgia Act's interference with their practice of their profession.

The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship.

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy -- the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment -- becomes only a matter of theory, not a reality, when a "multiple physician approval" system is mandated by the State.

The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. He is entitled to procedural due process before professional disciplinary sanctions may be imposed. See In re Ruffalo, 390 U.S. 544. Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

The right to seek advice on one's health and the right to place reliance on the physician of one's choice are [p220] basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relationship is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty," viz., their right of privacy, without any compelling, discernible state interest.

Georgia has constitutional warrant in treating abortion as a medical problem. To protect the woman's right of privacy, however, the control must be through the physician of her choice and the standards set for his performance.

The protection of the fetus when it has acquired life is a legitimate concern of the State. Georgia's law makes no rational, discernible decision on that score. [n11] For under the Code, the developmental stage of the fetus is irrelevant when pregnancy is the result of rape, when the fetus will very likely be born with a permanent defect, or when a continuation of the pregnancy will endanger the life of the mother or permanently injure her health. When life is present is a question we do not try to resolve. While basically a question for medical experts, as stated by Mr. Justice Clark, [n12] it is, of course, caught up in matters of religion and morality.

In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring [p221] her health are standards too narrow for the right of privacy that is at stake.

I also agree that the superstructure of medical supervision which Georgia has erected violates the patient's right of privacy inherent in her choice of her own physician.

* [This opinion applies also to No. 70-18, Roe v. Wade, ante p. 113.]

1. I disagree with the dismissal of Dr. Hallford's complaint in intervention in Roe v. Wade, ante p. 410 U.S. 113"]113, because my disagreement with 113, because my disagreement with Younger v. Harris, 401 U.S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

2. There is no mention of privacy in our Bill of Rights, but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is Boyd v. United States, 116 U.S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Mr. Justice Bradley, for the Court, found that the measure unduly intruded into the "sanctity of a man's home and the privacies of life." Id.. at 630. Prior to Boyd, in Kilbourn v. Thompson, 103 U.S. 168, 190, Mr. Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Of Kilbourn, Mr. Justice Field later said,

> This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee.

In re Pacific Railway Comm'n, 32 F. 241, 253 (cited with approval in Sinclair v. United States, 279 U.S. 263, 293). Mr. Justice Harlan, also speaking for the Court in ICC v. Brimson, 154 U.S. 447, 478, thought the same was true of administrative inquiries, saying that the Constitution did not permit a "general power of making inquiry into the private affairs of the citizen." In a similar vein were Harriman v. ICC, 211 U.S. 407; United States v. Louisville & Nashville R. Co., 236 U.S. 318, 335; and FTC v. American Tobacco Co., 264 U.S. 298.

3. The California abortion statute, held unconstitutional in the Belous case, made it a crime to perform or help perform an abortion "unless the same is necessary to preserve [the mother's] life." 71 Cal.2d at 959, 458 P.2d at 197.

4. My Brother STEWART, writing in Roe v. Wade, supra, says that our decision in Griswold reintroduced substantive due process that had been

rejected in Ferguson v. Skrupa, 372 U.S. 726"]372 U.S. 726. Skrupa involved legislation governing a business enterprise; and the Court in that case, as had Mr. Justice Holmes on earlier occasions, rejected the idea that "liberty" within the meaning of the Due Process Clause of the Fourteenth Amendment was a vessel to be filled with one's personal choices of values, whether drawn from the laissez faire school, from the socialistic school, or from the technocrats. Griswold involved legislation touching on the marital relation and involving the conviction of a licensed physician for giving married people information concerning contraception. There is nothing specific in the Bill of Rights that covers that item. Nor is there anything in the Bill of Rights that, in terms, protects the right of association or the privacy in one's association. Yet we found those rights in the periphery of the First Amendment. 372 U.S. 726. Skrupa involved legislation governing a business enterprise; and the Court in that case, as had Mr. Justice Holmes on earlier occasions, rejected the idea that "liberty" within the meaning of the Due Process Clause of the Fourteenth Amendment was a vessel to be filled with one's personal choices of values, whether drawn from the laissez faire school, from the socialistic school, or from the technocrats. Griswold involved legislation touching on the marital relation and involving the conviction of a licensed physician for giving married people information concerning contraception. There is nothing specific in the Bill of Rights that covers that item. Nor is there anything in the Bill of Rights that, in terms, protects the right of association or the privacy in one's association. Yet we found those rights in the periphery of the First Amendment. NAACP v. Alabama, 357 U.S. 449"]357 U.S. 449, 462. Other peripheral rights are the right to educate one's children as one chooses, 357 U.S. 449, 462. Other peripheral rights are the right to educate one's children as one chooses, Pierce v. Society of Sisters, 268 U.S. 510"]268 U.S. 510, and the right to study the German language, 268 U.S. 510, and the right to study the German language, Meyer v. Nebraska, 262 U.S. 390. These decisions, with all respect, have nothing to do with substantive due process. One may think they are not peripheral to other rights that are expressed in the Bill of Rights. But that is not enough to bring into play the protection of substantive due process.

There are, of course, those who have believed that the reach of due process in the Fourteenth Amendment included all of the Bill of Rights but went further. Such was the view of Mr. Justice Murphy and Mr. Justice Rutledge. See Adamson v. California, 332 U.S. 46, 123, 124 (dissenting opinion). Perhaps they were right, but it is a bridge that neither I nor those who joined the Court's opinion in Griswold crossed.

[5.] Many studies show that it is safer for a woman to have a medically induced abortion than to bear a child. In the first 11 months of operation of the New York abortion law, the mortality rate associated with such operations was six per 100,000 operations. Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 1971) (U.S. Dept. of HEW, Public Health Service). On the other hand, the maternal mortality rate associated with childbirths other than

abortions was 18 per 100,000 live births. Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969). See also Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J.A.M.A. 1149, 1152 (Apr.1961); Kolblova, Legal Abortion in Czechoslovakia, 196 J.A.M.A. 371 (Apr.1968); Mehland, Combating Illegal Abortion in the Socialist Countries of Europe, 13 World Med. J. 84 (1966).

[6.] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L.A.) L.Rev. 1, 9-10 (1969).

[7.] In Keeler v. Superior Court, 2 Cal.3d 619, 470 P.2d 617, the California Supreme Court held in 1970 that the California murder statute did not cover the killing of an unborn fetus, even though the fetus be "viable," and that it was beyond judicial power to extend the statute to the killing of an unborn. It held that the child must be "born alive before a charge of homicide can be sustained." Id. at 639, 470 P.2d at 630.

[8.] See Ga.Code Ann. § 26-1202(b)(3).

[9.] See id. § 26-1202(b)(4).

[10.] Id. § 26-1202(b)(5).

[11.] See Rochat, Tyler, & Schoenbucher, An Epidemiological Analysis of Abortion in Georgia, 61 Am.J. of Public Health 543 (1971).

[12.] Supra, n. 6, at 10.