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Abstract

Plaintiffs brought a class action on behalf of all licensed physicians performing abortions or wishing to perform abortions, and on behalf of their patients desiring the termination of pregnancy,' to have declared unconstitutional House Bill 1211 of the Missouri General Assembly, 2 and seeking an injunction against its enforcement.

KEYWORDS: parenthood, planned, pregnancy

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Plaintiffs brought a class action on behalf of all licensed physicians performing abortions or wishing to perform abortions, and on behalf of their patients desiring the termination of pregnancy,[1] to have declared unconstitutional House Bill 1211 of the Missouri General Assembly,[2] and seeking an injunction against its enforcement.

Plaintiffs challenged Section 3(2),[3] which required the patient, prior to submitting to an abortion during the first trimester (twelve weeks) of pregnancy, to certify in writing her free and informed consent to the operation;[4] Section 3(3),[5] which required, during the first trimester of pregnancy, the written consent of the woman's spouse, unless the abortion was deemed necessary by a licensed physician to preserve the life of the mother;[6] and Section 3(4),[7] which required written consent of one parent or person in *loco parentis* of the woman if she was unmarried and under eighteen, unless the abortion was certified by a licensed physician as necessary to preserve the life of the mother.[8] A three-judge

1. 96 S.Ct. 2831 (1976).

2. H.R. 1211, 77th Missouri General Assembly (1974). *Later codified as* MO. ANN. STAT. §§ 188.010 *et seq.*; 188.015; 188.020; 188.035; 188.050; 188.060 (1974).

3. *Id.* § 3 (2). *Later codified as* MO. ANN. STAT. § 188.020 (2) (1974).

4. 96 S.Ct. at 2836.

5. § 3(3) H.B. No. 1211, 77th Missouri General Assembly (1974). *Later codified as* MO. ANN. STAT. § 188.020(3) (1974).

6. 96 S.Ct. at 2836.

7. § 3(4) H.B. No. 1211, 77th Missouri General Assembly (1974). *Later codified as* MO. ANN. STAT. § 188.020(4).

8. 96 S.Ct. at 2836. Although not relevant to the point of this article, plaintiffs also challenged MO. ANN. STAT. § 188.015(2) (1974), defining viability; § 188.035(1), requiring physicians to exercise reasonable care to protect the fetus' life and health; §§ 188.010 *et seq.*, § 188.040, declaring an infant who survives an abortion, which was not performed to preserve the health of the mother, a ward of the state; § 188.050, prohibiting saline amniocentesis as deleterious to maternal health; §§ 188.050, 188.060, establishing record-keeping requirements to preserve maternal health. Plaintiffs attacked these provisions on the grounds (among others) that they violated "the right to privacy

federal district court[9] upheld the statute[10] and denied injunctive relief against its enforcement.[11] On appeal, the United States Supreme Court[12] reversed,[13] and HELD, the State may not require the consent of a spouse[14] or parent[15] as a condition to an abortion during the first twelve weeks of pregnancy.

Historically, one of the earliest cases establishing one's right to privacy of his physical being was *Union Pacific Railway Co. v. Botsford.*[16] There it was noted by the Court:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[17]

The Court termed this the right "to be let alone."[18]

In early fundamental rights cases, the courts applied the "rational

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in the physician-patient relationship"; the female patient's right to determine whether to bear children; the physician's right to due process of law under the Fourteenth Amendment by requiring him to make decisions "beset . . . with inherent possibilities of bias and conflict of interest."

9. 28 U.S.C. § 2281 (1970) provides for a three-judge district court to determine questions of the constitutionality of state statutes where, as here, a permanent injunction restraining the operation of such a statute is sought.

10. Planned Phd. of Cent. Mo. v. Danforth, 392 F.Supp. 1362 (E.D. Mo. 1975).

11. However, the court did find the first sentence of MO. ANN. STAT. § 188.035(1) (1974) unconstitutional because it failed to exclude the stage of pregnancy prior to viability, and as such was overbroad. *Id.* at 1371.

12. 28 U.S.C. § 1253 (1970) authorizes direct appeal to the Supreme Court from the order of a three-judge panel in a federal district court.

13. The Supreme Court upheld § 188.015(2), defining viability, 96 S.Ct. at 2838. The Court also upheld § 188.020(2), requiring free and informed consent by the patient, *id.* at 2840; § 188.050, 188.060, pertaining to making and keeping of records of all abortions performed, *id.* at 2847. The Supreme Court declared § 188.050, proscribing saline amniocentesis as a method of abortion, unconstitutional as an "unreasonable or arbitrary regulation designed to inhibit . . . the vast majority of abortions after the first twelve weeks." *Id.* at 2845.

14. *Id.* at 2842 (White, J., Berger, C.J., Rehnquist, J., dissenting).

15. Id. at 2844 (White, J., Berger, C.J., Rehnquist, J., dissenting).

16. 141 U.S. 250 (1891). In this case, the Court upheld the refusal to require Mrs. Botsford to submit to surgical diagnosis as a result of her suit for personal injuries against the Union Pacific Railway for damage sustained when an upper berth in a sleeping car fell on her head.

17. *Id.* at 251.

18. *Id.*

relationship test"[19] as the standard to determine whether exercises of state police powers were proper. Under this test, the states were allowed broad discretion in exercising their police power, but were required to maintain a reasonable connection between a statute's effect and a state's interest in restricting rights of its citizens.[20]

More recent fundamental rights cases have held that a compelling governmental interest is required where the state seeks to restrict an individual's fundamental rights.[21] In addition to the enumerated rights, such as the right of free speech, the right to a jury trial, and the right of freedom from self-incrimination, the Supreme Court, in *Griswold v. Connecticut*,[22] established that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help

19. *See* Comment, *Equal Protection of the Laws: Education Is Not a Fundamental Right*, 26 U. FLA. L. R. 155 (1973) (hereinafter cited as *Education Is Not a Fundamental Right*). *See also Constitutional Law—Abortion Parental and Spousal Consent Requirements Violate Right to Privacy in Abortion Decision*, 24 KAN. L. REV. 446, note 17 at 448 (1976).

20. *Id.* An example of the rational relationship test arose in the 1923 Supreme Court case Meyer v. Nebraska, 262 U.S. 390 (1923). In this case, a man was convicted for violating a Nebraska statute prohibiting the teaching of any subject in any language other than English, and the teaching of any foreign language to any student before the eighth grade. In overturning the conviction, the Supreme Court relied on the Fourteenth Amendment, noting:

> Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . to marry, establish a home and bring up children and generally to enjoy those privileges long recognized at common law as the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or *without reasonable relation to some purpose within the competency of the State to effect* (emphasis added). *Id.*

21. "It is basic that no showing merely of a reasonable relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses endangering paramount interest give occasion for permissible limitation." Sherbert v. Verner, 374 U.S. 398, 406, *citing* Thomas v. Collins, 323 U.S. 516, 530 (1945). *See Education is Not a Fundamental Right*, note 19 *supra*, citing Skinner v. Oklahoma, 316 U.S. 535 (1942) as the first case to distinguish between strict judicial scrutiny and a "reasonable relationship" standard.

22. 381 U.S. 479 (1965). In *Griswold*, appellants gave information, instruction, and medical advice to a married couple for the prevention of conception. Upon examination, appellant prescribed, to the wife, the best means suited to her. As a result, appellant was arrested and convicted for violating a Connecticut statute prohibiting the use of, or assisting in the use of, any drug or device to prevent conception. The Supreme Court reversed the conviction and found the statute to be unconstitutional as a violation of the right of privacy. *Id.* at 485.

give them life and substance. Various guarantees create zones of privacy."[23] In *Griswold,* appellant, a licensed physician, was convicted for giving information, instruction, and medical advice to married persons concerning the means of preventing conception.[24] The Court reversed the conviction and established the right to privacy as fundamental, noting that it was "no less important than any other right carefully and particularly reserved to the people."[25]

Faced with the question of the right to an abortion, the Supreme Court, in *Roe v. Wade,*[26] established that a woman's decision to terminate her pregnancy lies within the "zone of privacy,"[27] and as a result, regulation of abortions must be narrowly drafted to express only legitimate state interests.[28] While *Roe v. Wade* established the right to an abortion as fundamental, it was silent as to whether requirements of spousal or parental consent were within the scope of compelling state interests.[29]

These questions were first answered by the Fifth Circuit Court of Appeals in *Poe v. Gerstein,*[30] wherein the court was faced with the question of the constitutionality of a Florida statute[31] requiring parental consent for a minor to obtain an abortion and spousal consent for a married woman to obtain an abortion. The court acknowledged that a state has broader authority over children's activities than over the similar activities of adults.[32] However, the court found fundamental privacy rights established under *Roe* to apply also to minors,[33] and found the interests set forth by the state in *Poe* insufficient to establish a compel-

23. *Id.* at 484.
24. *Id.* at 480.
25. *Id.* at 485.
26. 410 U.S. 113, 153 (1973).
27. *Id.* at 153.
28. *Id.* at 155.
29. *Id.* at 165 note 67.
30. 517 F.2d 787 (5th Cir. 1975).
31. § 458.22(3), FLA. STAT. (1975). This statute provides in part: "One of the following shall be obtained by the physician prior to terminating a pregnancy: (a) [I]f she [the pregnant woman] is married, the written consent of her husband unless the husband is voluntarily living apart from the wife, or (b) If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the written consent of the custodian or legal guardian must be obtained."
32. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975). The court cited as an example "the power of state to prohibit children from viewing material to which an adult would have a constitutional right." *Id. citing* Mckeiver v. Pennsylvania, 403 U.S. 528 (1971).
33. *Id.* at 791.

ling state interest in requiring parental consent.[34] As a result, the court found the statute unconstitutional.[35]

The court, in *Poe,* also struck down a portion of the statute which inquired consent of the spouse for a married woman to obtain an abortion.[36] The court held the state's interest in protecting the rights of the husband,[37] or in maintaining the stability of society,[38] insufficient in light of the fundamental rights of the woman.

The present case was the first opportunity[39] for the Supreme Court to resolve the issue concerning the legitimacy of state interests in requiring consent, either spousal or parental.[40] While the Court did not specifically say that the state's interests in protecting the husband's rights were not legitimate, it did find that these interests were not sufficiently "compelling" to warrant restriction of the woman's fundamental personal right of privacy.[41]

The Court noted its awareness of the "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."[42] However, the Court expressed the opinion that the strength of a marriage or family will not be benefited by providing the husband the power of ultimate decision over his wife's actions with regard to abortions.[43] Balancing the interests of the wife and husband, the Supreme Court held that the wife's interest is greater, noting: "Since it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[44] Since the rights of the state are not sufficient to merit

34. *Id.* at 792-94. The interests deemed as sufficient by the state to justify restricting the minor's right were: preventing illicit sexual conduct among minors; protecting minors from their own improvidence; fostering parental control; and supporting the family as a social unit.

35. Poe v. Gerstein, 517 F.2d 787, 794 (5th Cir. 1975).

36. § 458.22(3)(a) FLA. STAT. (1975).

37. Poe v. Gerstein, 517 F.2d 787, 795 (5th Cir. 1975).

38. *Id.*

39. *See* text accompanying note 27 *supra.*

40. The issue was a very real one in light of the fact that *Poe v. Gerstein* had held Florida's consent requirements invalid, while the three-judge district court upheld those of Missouri in the instant case. See text accompanying notes 6 and 7 *supra.*

41. 96 S.Ct. at 2842.

42. *Id.* at 2841.

43. *Id.* at 2842. "It seems manifest that ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband."

44. *Id.*

unreasonable restrictions of the woman's privacy, at least in the first trimester, the Court held that the state could not give authority to the husband which the state itself did not have.[45]

The Supreme Court, by its decision in the present case, affirms the conclusion reached by the United States Court of Appeals, Fifth Circuit, in *Poe v. Gerstein*.[46] In *Poe*, the court discussed various interests which the father may have in the fetus, and analyzed these rights as they exist throughout the term of the pregnancy. The court also analyzed a state's interest in protecting the father's rights.[47] By citing *Griswold v. Connecticut*,[48] the Fifth Circuit disposed of the state's assertion of an interest in the stability of society and the well-being of its citizens and concluded that no case has "sanctioned state determination of intrafamilial decision making process with regard to child bearing decisions."[49]

While the Court refused to sanction state interference with family decisions, it did hold the state's interest in protecting the husband's rights regarding the fetus to be more substantial, noting that his interest "would most logically emanate from his paternity of the fetus, and thus appear analytically as a precursor of the father's relational interest in his child."[50] The Court noted, however, that "since a fetus is not a person," as established in *Roe v. Wade*,[51] "neither is it a child."[52] The logic of paternal interest was further weakened by the fact that the statute did not require the husband to be the father of the potential child in order to give him the power of consent.[53]

The findings by the district court in the present case are contradictory to those of the Fifth Circuit in *Poe*.[54] While the court did not directly address the issue of paternal rights, the court did analyze the state's interest in protecting the marriage and familial relationship. The

45. *Id.*

46. Poe v. Gerstein, 517 F.2d 787, 794-96 (5th Cir. 1975).

47. *Id.* at 795. The Court noted two interests which the father might have that would be endangered by his wife's abortion. First, an interest in the fetus with which his wife is currently pregnant; and, secondly, an interest in the procreation protential of the marriage.

48. 381 U.S. 479 (1965).

49. Poe v. Gerstein, 517 F.2d 787, 795 (5th Cir. 1975).

50. *Id.*

51. 410 U.S. 113, 156-58 (1973).

52. Poe v. Gerstein, 517 F.2d 787, 796 (5th Cir. 1975).

53. *Id.* at 796.

54. Planned Phd. of Cent. Mo. v. Danforth, 392 F.Supp. 1362 (E.D. Mo. 1975). However, Webster, J., in the dissent finds agreement with *Poe* and supports its conclusions. *Id.* at 1374.

district court held that the only state interests involved in *Roe*[55] were the protection of maternal health and the protection of the fetus.[56]

In upholding the Missouri consent statutes, the district court relied on a series of cases which regard marriage as an institution,[57] and establish the right of procreation as fundamental to a marriage.[58] The court stated: "The interest of the state in protecting the mutuality of decisions vital to the marriage relationship is compelling at all times during the marriage."[59]

As noted previously,[60] the Supreme Court in the instant case was in accord with the reasoning of *Poe*.[61] However, the Court did not find the spouse to be without an interest in the abortion decision. The Court simply found that any interest of the spouse was not sufficiently compelling for the state to restrict the woman's right to privacy.[62] The Court noted that the decision to have an abortion should be made jointly by the husband and wife, noting: "No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue."[63] While supporting a mutual decision by the parties, the Court concluded that this mutuality would not be enhanced "by giving the husband a veto power exercisable for any reason, or for no reason at all."[64] When disagreement exists it should be the woman who determines the outcome, since she physically bears the burden of carrying the child.[65]

The decision reached in the present case resolves but a few of the many questions arising from the abortion issue. For instance, how

55. Roe v. Wade, 410 U.S. 113 (1973).

56. Planned Phd. of Cent. Mo. v. Danforth, 392 F.Supp. 1362, 1369 (E.D. Mo. 1975).

57. *See* Reynolds v. United States, 98 U.S. 145, 165 (1878), finding marriage to be a social contract usually regulated by law, with which government is necessarily required to deal. Maynard v. Hill, 135 U.S. 190 (1888), noting marriage as creating the most important relation in life, and as having always been subject to the control of the legislature.

58. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), holding procreation to be a fundamental aspect of marriage.

59. Planned Phd. of Cent. Mo. v. Danforth, 392 F.Supp. 1362, 1370 (E.D. Mo. 1975).

60. *See* text accompanying note 46 *supra*.

61. 96 S.Ct. 2831.

62. *Id.* at 2842.

63. *Id.*

64. *Id.*

65. *Id.*

broadly does the right of privacy extend in preventing the necessity of parental consent for medical treatment requested by a minor? Florida Attorney General Robert Shevin has pointed out that the instant decision is "limited strictly to abortions and only because of the right of privacy issue . . . you can't say that in terms of an operation or any other surgical procedure."[66] Still, consent provisions appear valid for some operations.[67]

While it is clear that the present decision is based on the private nature of abortion, it would seem illogical to assume that control over certain parts of the body is within the realm of the right of privacy while control over other parts, such as the ears, face, or even the genitals,[68] is not.

A second issue arising is that, in being provided the right to obtain an abortion without spousal consent, the wife now has the ability to determine whether procreation will take place within the marriage. In a discussion of *Doe v. Doe*[69] it was noted that "the assertion of a legal right by the wife, by obtaining an abortion may establish new ground for divorce."[70] If the denial of procreation were not allowed as the basis for a divorce action, then assertion of the wife's right would control any potential right of procreation which the husband might have, since adultery generally is illegal[71] and socially disfavored.[72]

A third result of the present decision is the potential power of extortion given to a pregnant woman. If an unmarried woman becomes pregnant, for example, she has the option of giving birth to the child and forcing the father to provide for its support or of having an abortion and freeing the father from any obligation to support. To extend this a step further, the woman could bargain with the father for a certain sum as consideration for her undergoing an abortion. Since the "compensation" would be hers, with no cost of maintaining the child

66. Miami Herald, July 16, 1976, Sec. AA at 1.

67. *Id.* For example, a person under eighteen years of age who chooses to have his or her ears pierced must produce a consent form signed by his or her parent.

68. *Id.* The article points out that sterilization of a boy or girl under eighteen still requires the consent of a parent.

69. Doe v. Doe, 314 N.E. 2d 128 (1974).

70. Comment 11 NEW ENGLAND L. REV., 205, 222 (1975). This proposition is based on the notion that procreation is fundamental to marriage.

71. *Id.* at 222. *See* § 798.01 FLA. STAT. (1975), and § 798.03 FLA. STAT. (1975), proscribing adultery.

72. *Id.*

(since there would not be a birth, and the father could pay a large amount and still not incur the expense of supporting a child for the period of minority), this could become a lucrative proposition on the part of the mother. This "bartering" for an abortion would enable potential parents to circumvent the holding in *Shinall v. Pergeorelis*,[73] that "a release executed by a mother is invalid to the extent that it purports to affect the rights of the child."[74] This enables the mother to bargain away any rights the fetus might have if it were to become a child.

To carry the implication of the present case to a logical extreme, it might be argued that since the choice of bringing the child into the world is ultimately that of the mother, she should bear full responsibility for, and have full control over, the child. This argument could be made in the following manner: The decision of *Roe* held that a fetus is not a person during the first trimester of pregnancy. As a result, the woman has total determinative power over whether the fetus becomes a child.[75] Since the father only helped to set in motion the biological functions which created the fetus, his responsibility (and liability) should extend only that far. He should be responsible only for damages incurred because of his actions up to and including the abortion. Any decision to proceed beyond the fetal stage of pregnancy is that of the mother, and she should therefore accept responsibility for the birth of the child and its support.

Four basic problem areas have been presented which result from the decisions reached by the Court in *Planned Parenthood:* the scope of the consent requirement for minors; the power of the wife to determine the occurrence of procreation in the marriage; the potential extortionary power given to the pregnant woman; and the argument for the mother's liability for a child after the first trimester of pregnancy. These four areas illustrate some of the critical issues to be dealt with in the

73. Shinall v. Pergeorelis, 325 So.2d 431 (Fla. 1st DCA 1975). In this case, a single woman who had become pregnant initiated an action against the putative father. As a result of pre-trial negotiations, the mother executed a release to the putative father, in return for $500 and a signed admission that the child was the father's. Soon thereafter, the mother again instituted paternity proceedings against the father. The court held that the release was invalid on the principle that an illegitimate child's right to support from its putative father cannot be contracted away by its mother.

74. *Id.* at 433, *citing* Walker v. Walker, 266 So. 2d 385 (Fla. 1st DCA 1973).

75. Based on the present holding that the abortion decision is ultimately that of the mother. 96 S.Ct. 2381.

complex framework of abortion. The burden is now placed on the individual states to provide the constitutional protection to which the mother is entitled, as well as protection for the potential father and child.

David F. Holmes