

# A new tilt for Roe vs. Wade

**F**ormer Supreme Court Justice Benjamin Cardozo said that law unfolds to the limits of its logic. This is now happening to Roe vs. Wade.

In 1973 and again in 1992, the Supreme Court upheld abortion on the grounds that a woman has a fundamental right of privacy to control the use of her body. The court spoke of the "urgent claims of the woman to retain the ultimate control over her destiny and her body" and affirmed that "personal decisions that profoundly affect bodily integrity, identity and destiny should be largely beyond the reach of government."

This broadly based ruling is now impacting elsewhere. A Florida woman calling herself Jane Roe II has challenged the constitutionality of Florida's law against prostitution. She states her case clearly and logically: If a woman's right to control the use of her reproductive organs permits her to enter into a cash transaction with an abortionist, then how can this fundamental right of privacy not apply to other transactions involving her use of her body?

Some might reply that prostitution is illegal, but so was abortion until the court declared it a constitutional right. Others might say prostitution is immoral. But this argument also goes nowhere. In his book, "Crime and Punishment in American History," Lawrence Friedman wrote that abortion has been against the law and restricted with greater intensity for more of our history than prostitution, reflecting social norms that abortion, viewed as infanticide, is more immoral than prostitution.

In exercising her right to abortion, the woman also impacts the "bodily integrity, identity, and destiny" of the fetus by obliterating it. The unborn is not a consenting party to the transaction. In contrast, prostitution is entirely an act between consenting parties that does not impact the bodily integrity, identity and destiny of a third party.

Under the privacy right ruling of Roe vs. Wade, prostitution is obviously within the woman's rights to control the use of her own reproductive organs. This privacy right can only expand. It is legal non-

sense that privacy conveys the right to abort, but not the right to ingest drugs or engage in sodomy.

The Supreme Court has put the country in this conundrum because the 1954 Brown vs. Board of Education desegregation ruling created a precedent for the court to base its rulings on sociology and not law. In their book about the Supreme Court, "The Brethren," Bob Woodward and Scott Armstrong document the sociological basis of the court's abortion decision. Rather than consult the lawbooks in his court chambers, Justice Harry Blackmun concocted Roe's "right to privacy" rationale in the Rochester, Minn., library of the Mayo Clinic, where he immersed himself in the latest sociological and medical writings on abortion.

An argument can be made that law should follow the practices of people and, therefore, take guidance from sociology. However, genocide is also a human practice, and if sociology evicts the moral dimension of law, there can be no more Nuremberg Trials.

According to William Blackstone, the genius of the English common law was that it mirrored the behavior of people who were infused with the spirit of Christ. In an amoral climate, decisions based on sociology will overturn traditional law.

The Supreme Court's sociology-based rulings will give us more than the justices bargained for. More than abortion, prostitution and drugs will become rights. Already judges are arguing that racial rage is a mitigating factor in racial murders. Federal Appeals Court Judge Rosemary Barket interpreted the murder of a white by a black as a "social awareness case." The murder "was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. . . . The victim was a symbolic representative of the class causing the perceived injustice."

From the sounds of this, judicial sociology is coming close to running away with the laws against murder, too. As Blackstone noted, if judges substitute their feelings for law, as many different rules of action would be "laid down in our courts as there are differences of capacity and sentiment in the human mind."

The result, he said, would be the "most infinite confusion," a result we now have. It will be interesting to watch the court sort out on the basis of Roe vs. Wade why it is legal for a woman to contract for a vacuum to be inserted into her sexual organs, but nothing else.

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# COMMENTARY