Opinion

Abortion Before *Roe*

Russell Hittinger

Less than two years after the citizens of Washington voted by referendum to uphold the state's prohibition of physician-assisted suicide, a federal judge invalidated the statute as unconstitutional. In *Roe v. Washington*, decided on May 3, 1994, Judge Barbara Rothstein cited the Supreme Court's definition of "liberty" in *Planned Parenthood v. Casey* (1992): "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Judge Rothstein reasoned that if the due process clause of the Fourteenth Amendment recognizes such "liberty" in the matter of abortion, liberty must also include the right of a mentally competent, terminally ill adult to commit suicide. From this conclusion, it would seem to follow that a physician does nothing wrongful in assisting a perfectly legal act.

It was perhaps inevitable that the definition of "liberty" in *Casey* would not remain an inert piece of legal dictum but would begin to move like a juggernaut through various sectors of the law. We certainly have not seen the last application of this dictum, for which we probably have Justice Anthony Kennedy to thank.

Yet what is especially troublesome about Judge Rothstein's decision is that it followed just a few months after the citizens of Washington had declared otherwise. Washington is one of the least-churched states in the country, so this was not a matter of the religious right clamoring for the enforcement of an outmoded statute. Nor was it a question of a court's intervening in the political process in order to facilitate the legislative will of the majority. Rather, Judge Rothstein clearly and baldly ruled that the majority of the citizens of Washington have no constitutional right to be self-governing in this matter. In short, they have no political competence over the private use of lethal force against innocent members of their community—at least not when a person is ill and gives his consent to be killed. How it is that, lacking such power, they remain a political community in any ordinary sense of the term is a question that was neither raised nor answered in the case.

In Federalist 45, James Madison assured critics of the Constitution that "the power reserved for the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state." By no stretch of the historical imagination can we believe that the Constitution would have been ratified had the people known that they would lack the legal and political competence, as Madison said, "in the ordinary affairs," to keep the invalid from being killed by physicians. *Roe v. Washington* raises once again the problem of federal courts abrogating democratic self-governance guaranteed by the Constitution.

Justice Harry Blackmun, of course, will admit no embarrassment over the fact that in *Roe v. Wade* the Court overturned the laws of the states on an issue of homicide. "Roe against Wade," he opines, "was not such a revolutionary opinion at the time." In other words, the Court only ratified social evolution on the question. Similarly, Justice Ruth Bader Ginsburg has said that *Roe* was unnecessary because society of its own accord was moving toward the same result. Whether the Court acted rightly or clumsily, conventional wisdom has it that no damage was done to the common good because the Court was only acting slightly ahead of the legislative curve.

The real history, however, does not support this view. Rather, legal abortion came into existence much the same way as physician-assisted euthanasia is coming into existence today: via the federal judiciary in direct opposition to the will of the citizens in the states.

One of the chief virtues of David Garrow's book *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Macmillan) is that he uncovers the legislative history of the debate over "reproductive rights." Garrow himself is clearly a partisan of the movement for constitutionalizing "reproductive rights." But he does manage to relate the facts. And these facts are interesting indeed. Over the course of six decades, whenever the new principle of liberty elucidated in the *Casey* decision has been placed before the people for a vote, the people have rejected it. The principle has migrated from issue to issue; but it is always the same principle, and it always meets with the same result.

Prior to *Griswold v. Connecticut* (1965), when the Supreme Court "invented" (Garrow's word) the right of privacy, the opponents of state laws prohibiting or restricting contraceptive devices had failed to win a single significant legislative victory. The Connecticut and Massachusetts statutes on the subject, adopted in the late 1870s, were supported by the New England Society for the Suppression of Vice, an organization that counted among its members the presidents of Amherst, Brown, Dartmouth, and Yale.

This legislation followed in the wake of the so-called Comstock anti-contraceptive and anti-obscenity statutes of 1873, which dealt with the interstate shipment or importation of goods, articles, or literature concerning sexuality or reproduction.

Efforts to modify the state statutes, usually in the form of an exception for doctors prescribing contraceptives for therapeutic purposes, were voted down in Connecticut in 1932 and once again in 1933. A 1931 bid by Margaret Sanger to gain Congressional approval for a doctor's amendment to the federal laws was rejected overwhelmingly in the U.S. House and Senate. John W. McCormack, future Speaker of the House, commented: "I can conceive of no more dangerous piece of legislation to the future of America."

In 1938, a Massachusetts court unanimously upheld its state laws, as did the Connecticut Supreme Court in 1940 (a court, incidentally, consisting of four Congregationalists and one Baptist). Just six years before *Griswold*, in 1959, the Connecticut Court upheld the laws once again. In 1942 and in 1948 Massachusetts voters rejected by large percentages referenda that would have slightly liberalized the anti-contraceptive statutes. Connecticut voters rejected liberalization in 1953 and 1957. Every time that liberalization, much less repeal, came before the people in the form of referenda or legislative bills, the votes were not even close.

Garrow makes it clear that the "reproductive rights" movement won its victories in the federal courts, not in the legislatures. Interestingly, in the first Supreme Court case dealing with contraception, *Poe v. Ullman* (1961), Justice Felix Frankfurter was so astonished by the conservative legislative history that he asked, at oral argument, whether some "outside authoritarian power" had coerced the Connecticut legislature. Even after the Court struck down the Connecticut statute in 1965, other states adamantly retained various kinds of anti-contraceptive statutes. The Supreme Court ripped these out of the states, one by one, until they finally managed to invalidate New York's law against the sale of contraceptives to minors in 1977. Even in the middle of the sexual revolution, states did not willingly relinquish their authority to exercise moral police powers in this matter.

Those working to repeal state abortion laws did not fare much better. In 1963, Alan Guttmacher admitted that any change in the abortion laws that suggested the non-humanity of the fetus would "be voted down by the body politic." The facts bear him out. In 1967, "reform" measures, usually concerning therapeutic exceptions, were turned aside in Arizona, Georgia, New York, Indiana, North Dakota, New Mexico, Nebraska, and New Jersey. In 1969, such bills failed to emerge from committee in Iowa and Minnesota, and were defeated outright in Nevada and Illinois. In 1970, exceptions based on therapeutic reasons were defeated in Vermont and Massachusetts.

In 1971, on the eve of *Roe v. Wade*, repeal bills were voted down in Montana, New Mexico, Iowa, Minnesota, Maryland, Colorado, Massachusetts, Georgia, Connecticut, Illinois, Maine, Ohio, and North Dakota. In 1972, even as *Roe* was under consideration by the Supreme Court, the Massachusetts House by a landslide vote of 178 to 46 passed a measure that would have bestowed the full legal rights of children on fetuses from the moment of conception. At the same time, the supreme courts of South Dakota and Missouri upheld their states' anti-abortion laws. It was surely telling that during the very month that Justice Blackmun finished the draft of his *Roe* opinion, 61 percent of the voters in Michigan and 77 percent in North Dakota by referenda voted down repeal.

To be sure, reformers and repealers won a few legislative victories prior to *Roe*. In 1967, Colorado liberalized its law. But it placed restrictions on abortion that were much more severe than anything permitted by post-*Roe* federal courts. Reform legislation also passed in North Carolina (1968), but with the rejection of mental health exceptions. California (1967), Georgia (1968), and South Carolina (1970) changed, but did not repeal, their abortion laws. The two most significant legislative victories for the repealers took place in 1970 in New York and Hawaii. These victories, however, were narrow and contentious, and did not approximate the percentages of pro-life victories in other states at the same time. At the time of *Roe*, there was evidence that the tide of opinion in New York had shifted back toward laws protecting the unborn.

A few weeks before the 1972 referendum in Michigan, the polls showed that 56 percent of the people in Michigan supported the proposal to repeal laws against abortion. However, when the votes were counted, 61 percent voted down the repeal proposal. This was the last statewide test of abortion on demand before the Supreme Court imposed its own solution, and it represented an overwhelming rejection of the idea that individuals are answerable to no one other than themselves in the matter of abortion.

As the 1964 Congressional civil rights legislation indicates, these same citizens supported repeal of segregation and racial discrimination. The fact remains, however, that they would not willingly do the same for sexual "rights." Provided a level playing field, without any intervention by federal courts, citizens in almost every state and region rejected the absolute claims of sexual liberty. Remarkably, into the 1970s, the sexual revolution notwithstanding, citizens voted on these matters more or less the same as had their grandparents.

Earlier in this century Margaret Sanger claimed a right to be "a free, self-directed, autonomous personality." But when put to referendum, and when debat-

ed in democratic assemblies, the American people have not approved such a "right." Whether it was the contraception debate of the WWI period, the abortion debate prior to *Roe*, or the homosexual and euthanasia debate today, whenever the people have had a chance to exercise their judgment, and whenever the terms of the debate are clear and not hidden behind judicial proceedings, the people have not and still will not buy this "right."

Perhaps the opinion polls are correct in reporting that Americans are "conflicted" over abortion. Garrow's account of the legislative history, however, shows that Americans never have been conflicted over the principle that anyone has a unilateral right such as the one asserted by the Supreme Court. Of course, this is not the lesson that Garrow wants us to draw from his book. But it is the one we ought to draw.

For the historical record, it should be remembered that on the eve of the federally compelled abortion "right" the citizens of Michigan voted overwhelmingly against it; and let the historical record show that twenty-one years later, on the eve of a federally mandated "right" to physician-assisted euthanasia, the citizens of Washington voted it down. The idea that the federal courts have merely facilitated the social and political agenda of the people is a myth. The idea that the issues of abortion, euthanasia, and homosexuality are politically unmanageable, and must therefore be reserved for sub-political "cultural" discourse, is a myth. Regrettably, the pundits continue to overlook the most obvious and historically consistent datum: namely, the abrogation of the people's legislative judgment by federal courts. Before we condemn the people for their moral decline and insensitivity, the judicial violation of the political order must be fully considered.

Whatever injustice and moral harm is done to the unborn and the terminally ill, the political harm done by the federal courts is unforgivable. The courts have not only taken advantage of the uncertainties and doubts of the people concerning issues of major importance, but have taken away from them the political freedom of self-governance.

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The Balnibarbian Heresies

J. Budziszewski

The human mind has no more power of inventing a new value than of imagining a new primary color, or, indeed, of creating a new sun and a new sky for it to move in. — C. S. Lewis

Far away on the other side of the world is a marvelous land named Balnibarbi. As we learn from Mr. Gulliver, its capital is the great city of Lagado, and in this place is an even greater Academy, filled with the most brilliant people in the world. Unfortunately, Gulliver was able to stay at Lagado Academy for only a short while, and there were many interesting things about the Academy that he did not have an opportunity to find out. Having recently taken the opportunity for a longer visit, I offer my findings to readers in the Western hemisphere.

The oldest and most honorable department in the entire Academy of Lagado is devoted to the study of color. Indeed, the philosophy of color has been studied in Balnibarbi for something like twenty-four centuries. It was the Balnibarbian scholars, for instance, who first discovered that all of the colors in the universe come from just three primaries—yellow, red, and blue. The details are well-known even in our part of the world: orange is derived from red and yellow, green is derived from blue and yellow, purple is derived from blue and red, and so on. Of course the primary colors themselves are not derived from anything.

Unfortunately, over the last few hundred years the great tradition of Balnibarbian color philosophy has degenerated, as wave upon wave of intellectual revolution has swept the Lagado Academy. Those few scholars who still believe in the doctrine of primary colors are now considered reactionary, retrograde, regressive; in a word, not smart. The three main parties of Progress are the Monochromes, the Antichromes, and the Neochromes.

The Monochromes object to the theory of primary colors because they don't think it goes far enough. In their view, it's all well and good to say that orange comes from the primary colors red and yellow, purple comes from the primary colors red and blue, and so on, but what, they ask, is the ultimate basis of color? They reason that there must be an even more primary color than yellow, red, or blue—a fundamental color from which even the primary colors are derived. For instance, some of the Monochromes think the color from which all colors come is char-