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Family Law -- Constitutional Right of Privacy: The Father in the Delivery Room

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North Carolina businessmen who associate themselves with national franchisors and would provide the North Carolina courts with an ascertainable standard by which to scrutinize franchisor abuses.

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Family Law—Constitutional Right of Privacy: The Father in the Delivery Room

Eleven years ago in *Griswold v. Connecticut*[1] the United States Supreme Court gave full constitutional recognition to a broad and fundamental realm of protected human conduct. This conflux of rights was termed generally by the Court as the right of "privacy."[2] With the source of this newly developed right ambiguously stated and its scope extremely uncertain, lower courts have had little guidance in determining the bounds of its practical application. In the recent case of *Fitzgerald v. Porter Memorial Hospital*[3] Judge John Paul Stevens of the United States Court of Appeals for the Seventh Circuit (now Justice Stevens of the United States Supreme Court) was presented with the problems of determining the breadth of the right to privacy and the limits placed upon it by countervailing societal interests. At stake were the important, if not fundamental, rights of a father, mother and doctor[4] in having the father present in the delivery room at childbirth.[5] The court, unwilling to entangle itself in a medical dispute,[6] held that the parents' interest in having the father present was of insufficient magnitude to invalidate hospital regulations forbidding fathers from entering the delivery room.[7]

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1. 381 U.S. 479 (1965).
2. *Id.* at 484.
3. 523 F.2d 716 (7th Cir. 1975).
4. Plaintiffs argued that the hospital regulations improperly restricted their doctors' rights to practice medicine. Although the trial court found no standing in plaintiffs to assert their doctors' rights, the court of appeals found standing under *Griswold* in which a doctor was allowed to assert his patient's rights. The appellate court ruled that since plaintiffs had no protected rights in themselves they had no greater claim when standing in their doctors' stead. *Id.* at 721-22 & n.23.
5. *Id.* at 717.
6. *Id.* at 721.
7. *Id.*

Plaintiffs in *Fitzgerald* were married couples who had completed training[8] in the psychoprophylactic method, or as it is more commonly known, the Lamaze method of natural childbirth.[9] At the filing of the complaint in federal district court,[10] each couple, with one exception, was either expecting a child or had recently had a child at Porter Memorial Hospital,[11] the public hospital named as defendant.[12] Seeking injunctive and declaratory relief and damages[13] on the ground that their constitutional rights of privacy had been violated,[14] plaintiffs[15] challenged the official hospital policy that prohibited the "presence of

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8. Plaintiffs presented in their brief a summary of their required childbirth preparation:

> This method requires a serious commitment on the part of those participating. Husbands and wives must attend a series of classes that include lectures, films, question and answer periods, instruction in controlled breathing and relaxation techniques, and discussions on various pregnancy-related topics. This advance preparation and training serve to prepare the couples for the events that take place during pregnancy, labor and delivery, and enable them to function as a team during labor and delivery, with the husband supplying physical and emotional support to his wife. 523 F.2d at 717 n.2.

9. The Lamaze method is a recognized "method of analgesia (pain relief)" in childbirth that was "evolved" in the West by the French scientist Lamaze. It is traceable to its original developer, the famous Russian scientist Pavlov. Olds & Witt, *New Man in the Delivery Room—the Father*, TODAY'S HEALTH, Oct. 1970, at 52, 55.

The theoretical basis of the method has been described as giving "a woman's brain so much to think about consciously and so many new reflexes to deal with subconsciously, that whatever pain might occur cannot register on the brain." Part of the husband's role is "to keep his wife's brain busy coordinating the breathing rhythms and relaxing techniques she has learned." *Id.*

10. The district court's decision and opinion were given in an unreported memorandum decision on September 10, 1974. 523 F.2d at 718.

Jurisdiction was claimed under 28 U.S.C. § 1343(3) (1970). 523 F.2d at 718 n.4. An alternate basis of jurisdiction was set forth in the complaint under 28 U.S.C. section 1331 (1970) with the requisite statement of amount in controversy. 523 F.2d at 718 n.5.

11. 523 F.2d at 717.

12. Also named as defendants were members of the board of directors and the administrator of Porter Memorial Hospital. *Id.* at 718.

13. *Id.*

14. In particular it was alleged that the first, fourth, ninth and fourteenth amendments to the Constitution were violated. *Id.* 42 U.S.C. section 1983 (1970) was used as a remedial basis, 523 F.2d at 718 & n.4. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The court of appeals noted that there was no question that Porter Memorial Hospital was "a public hospital and that its actions are 'under color of state law' within the meaning of § 1983." 523 F.2d at 718 & n.4.

15. Plaintiffs sued on behalf of others similarly situated as well as on their own behalf, *id.* at 718; however, no ruling was rendered by the district court on the request that the suit be certified a class action. *Id.* at 718-19. The court of appeals did not touch upon this issue.

any person . . . in the Delivery Rooms . . . other than . . . Medical . . . and Nursing Staff."[16]

The district court dismissed the complaint, finding no constitutional violation since plaintiffs were not denied access to the hospital facilities. Nor were they totally prohibited from using a medically approved operation.[17] In addition it was held that plaintiffs had no standing to assert the rights of their physicians.[18] On appeal, Judge Stevens, writing for the Seventh Circuit, upheld the district court's dismissal of the complaints.[19]

Although the court of appeals acknowledged that the decision to have or not to have a child is constitutionally protected, the court held that the decision of "where, by whom, and by what method" a child is delivered is of a lesser magnitude.[20] Based upon this conclusion, the court found that the parents' interest in their children gave them no "greater right to determine the procedure to be followed at birth than that possessed by other individuals in need of extraordinary medical assistance."[21]

Having found in this manner that the parents' rights were not of fundamental importance, the court noted two policy considerations that it used to justify its dismissal of plaintiffs' case. First, the court expressed concern that a decision in plaintiffs' favor would require a holding grounded in the rights of the individual as opposed to rights that have their origin in marriage.[22] Since these rights could not be limited to the marriage relationship, the court feared that such a decision could be easily extended to create new rights of "companionship" in unwed parents and patients in stress about to undergo serious surgery,[23] and

16. *Id.* at 717.
17. *Id.* at 718-19.
18. *Id.* at 719.
19. *Id.* at 722. By the time the case was reviewed by the court of appeals all plaintiffs had given birth to their children; however, the court found that the case was not moot under Roe v. Wade, 410 U.S. 113, 125 (1973): "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition yet evading review.'" Fitzgerald v. Porter Memorial Hosp., 523 F.2d at 717-18 n.3, *quoting* Roe v. Wade, 410 U.S. at 125 (1973).
20. 523 F.2d at 721.
21. *Id.*
22. *Id.* at 720. The court recognized that the Supreme Court placed emphasis upon "the private aspects of the institution of marriage" in Griswold v. Connecticut, 381 U.S. 479 (1965); however, Judge Stevens noted that *Griwsold* was not limited narrowly to marital rights. 523 F.2d at 720. The court's concern is borne out by the fact that in Roe v. Wade, 410 U.S. 113 (1973), Jane Roe's right to abortion was based on a "privacy" right though she was not married when pregnant.
23. 523 F.2d at 720 n.16.

additionally, could be extended to a patient claiming a right to choose surgical procedures to be used.[24] Secondly, the court observed that there were "valid medical reasons for exclusion in individual cases."[25] Consequently, the court found it too unpalatable a result to impose an "inflexible rule upon all hospitals" by substituting its own judgment for the "professional judgment" of the hospital staff.[26]

The weight that should be given the parents' interest in choosing delivery procedures must be determined by reference to the Supreme Court "privacy" decisions preceding *Fitzgerald.* As long ago as 1891 the Supreme Court gave protected status to a form of personal privacy right, which it articulated in *Union Pacific Railway Company v. Botsford* as the "inviolability of the person."[27] Various later decisions found that rights of personal autonomy deserved constitutional recognition in equal protection or due process contexts in activities relating to marriage,[28] family relationships,[29] control over one's children's education,[30] and procreation.[31] These family related rights were deemed "fundamental"[32] or "implicit in the concept of ordered liberty,"[33] the threshold prerequisites to constitutional protection and close judicial scrutiny.[34]

Breaking with the tradition of piecemeal cataloguing of fundamental personal rights, *Griswold v. Connecticut*[35] recognized that there were "zones of privacy" formed by the "penumbras" of specific guarantees listed in the Bill of Rights,[36] in particular, the first, third, fourth, fifth and ninth amendments.[37] Justice Douglas, writing for the Court in *Griswold,* found that the marriage relationship was embraced by one of

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24. *Id.*
25. *Id.* at 721.
26. *Id.* at 721-22.
27. 141 U.S. 250, 252 (1891).
28. Loving v. Virginia, 388 U.S. 1 (1967) (statutes prohibiting marriages between races violative of equal protection and due process).
29. *See id.; cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to single people violative of equal protection).
30. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute preventing parents from sending children to religious schools violative of due process "liberty"); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute forbidding teaching of foreign language violative of due process "liberty").
31. Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization law violative of equal protection).
32. *See, e.g., id.* at 541.
33. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).
34. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
35. 381 U.S. 479 (1965).
36. *Id.* at 484.
37. *Id.*

these constitutionally preserved "zones of privacy" and that it thus required close judicial scrutiny, which in *Griswold* resulted in invalidation of the offending legislation.[38] The difficulty in determining the source, meaning and scope of the marital right to privacy, as well as in determining the balancing test to be utilized when the right is present, is compounded by the diversity of viewpoints on each aspect of the issue expressed by the individual concurring justices in *Griswold.*

Justices Goldberg, Warren and Brennan, in a concurring opinion in *Griswold,*[39] identified the ninth amendment as the source of the marital right to privacy, an additional, fundamental personal right reserved to the people.[40] Accordingly, this ninth amendment right was viewed as being within the sheltering concept of "liberty" in the fourteenth amendment's due process clause.[41] With such a right in question, Goldberg, Warren and Brennan required that the state show an interest that was "compelling" or the statute could not be sustained.[42] Justices Harlan and White, who wrote separate opinions concurring in the result,[43] found the due process clause to be sufficient in itself to establish the marital right to privacy.[44] While Harlan would seemingly require the state to show a compelling interest,[45] White demanded that there be a showing of "substantial justification" before a state can enter into this "realm of family life."[46] These divergent notions have left many unanswered questions concerning the right of privacy.[47] However, it is clear that regardless of its origins or its breadth, there *is* a constitutional right to privacy that attaches to at least some family relationships, particularly the marriage relationship.[48] Furthermore, when it is present and is threatened there must be, at a minimum, a

38. *Id.* at 485-86. Douglas expressly rejected a return to the substantive due process approach present in Lochner v. New York, 198 U.S. 45 (1905). In addition to citing the cases that overruled the *Lochner* approach, Douglas wrote: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

39. 381 U.S. at 486.

40. *Id.* at 488, 491-92.

41. *Id.* at 493.

42. *Id.* at 497.

43. *Id.* at 499, 502.

44. *Id.* at 500, 502.

45. *See id.* at 499-502.

46. *Id.* at 502.

47. Plaintiffs in *Fitzgerald* appeared unsure of the source of the right of privacy themselves since they based their claim on both the penumbral rights from the Bill of Rights and the word "liberty" in the due process clause. 523 F.2d at 719.

48. *See* text accompanying notes 62-69 *infra.*

showing of "substantial justification" for the encroaching statute or regulation.[49]

The nature and the limits of this marital or family-related zone of privacy are the critical factors in determining whether parents have the right to assure the father's presence at childbirth. The cases used by the *Griswold* Court to illustrate the application of the right to privacy show that this right encompasses two general, separate catagories of rights.[50] First, there is the "right to be let alone."[51] Secondly, there is an affirmative, "activist"[52] right possessed by people generally that is characterized best as the right to the "orderly pursuit of happiness."[53] It was this latter category of rights that plaintiffs pressed upon the appellate court in *Fitzgerald.* Judge Stevens described this right as "the individual's right to make certain unusually important decisions that will affect . . . [a person's] own, or his family's, destiny."[54]

The court of appeals' finding in *Fitzgerald,* that the interests put forward by plaintiffs did not represent " 'basic values' . . . dignified by history and tradition,"[55] was based upon two conclusions: that the father's presence was of less importance than the protected right to have a child,[56] and that privacy rights did not grow out of family relationships but out of the individuals' rights.[57] Asserting that the source of any privacy rights in marriage is the right of privacy in the individual, the court attempted to justify its refusal to give special consideration to the marital and family relationships.[58] Although it is unquestionably true that rights in marriage stem from individual

49. For an in-depth study of *Griswold,* the right to privacy and its historical roots see Emerson, *Nine Justices in Search of a Doctrine,* 64 MICH. L. REV. 219 (1965); Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410 (1974); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case,* 64 MICH. L. REV. 235 (1965).

50. *See* cases listed at 381 U.S. 482, 484 and note 51 *infra.*

51. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). A more recent case illustrating this principle is Stanley v. Georgia, 394 U.S. 557 (1969) (a state's power to regulate obscenity does not extend to mere possession by individual of obscene material in his own home).

52. The "activist"/"passive" rights dichotomy was considered in Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?,* 64 MICH. L. REV. 197 (1965).

53. Loving v. Virginia, 388 U.S. 1, 12 (1967). It was held in *Loving* that freedom to marry was one of these essential personal rights.

54. 523 F.2d at 719.

55. *Id.* (footnotes omitted).

56. *Id.* at 721.

57. *See id.* at 720-21.

58. *See id.*

rights,[59] the appellate court ignored a great many cases that have held that the "private realm of family life"[60] is an area of particular importance and sensitivity.[61]

The cases that have dealt with family relationships portray a "private *realm* of family life which the state cannot enter."[62] The right of privacy consists of more than a parent's right to have or not to have children.[63] It is more than a parent's right to send a child to religious schools[64] or to have his children study a particular subject.[65] The right to privacy is more than the right to marry freely[66] and more than the right to "establish a home and bring up children."[67] These are simply the landmarks of a "zone of privacy" that surrounds "family life,"[68] "something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[69] In light of this history of the fundamentality of family life, Judge Stevens has left the question of parental rights unresolved by writing that the right to determine the manner in which one's child is born is less important than the right to decide to have the child.[70]

If the hospital has entered into this realm of family affairs, the court was obliged to seek out some form of "substantial justification" if it were to uphold the restrictions.[71] The court need not have upheld plaintiffs' case, but it was obliged to examine plaintiffs' claims in

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59. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

60. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

61. *See* cases cited notes 62-69 *infra.*

62. Griswold v. Connecticut, 381 U.S. 479, 495 (1965), *quoting* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasis added).

63. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

64. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

65. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

66. *See* Loving v. Virginia, 388 U.S. 1 (1966).

67. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

68. Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting). It should be noted that reference was made in *Griswold* to this dissenting opinion as authority. 381 U.S. at 484.

69. Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

70. An appropriate analogy exists in Meyer v. Nebraska, 262 U.S. 390 (1923). In *Meyer* the Court said that liberty "denotes . . . the right . . . to marry, establish a home and bring up children." *Id.* at 399. The Court did not stop at that point but held that the parents had a right to have their children study German, contrary to the Nebraska statute. Bringing up one's children in a chosen *manner* (to learn German) in effect was included within the more important right, the right to have and bring up children generally. Although the right to choose the manner in which one's child will be born is a less important right, it appears to be part and parcel of the larger right, the right to have and to rear children.

71. *See* text accompanying notes 45-49 *supra.*

relation to the "medical" interests asserted by defendant hospital. In short, the court was duty-bound to scrutinize the conflicting interests and balance them in reaching its decision.[72] If after careful examination the court had dismissed plaintiffs' case it would have done so on firmer ground. However, direct judicial review of the hospital rules was refused.[73]

The court refused review of the regulations in deference to the medical profession.[74] The dissent in *Fitzgerald* argued strongly for at least a hearing of the evidence.[75] If the court had weighed the evidence carefully it might have been unable to support soundly its decision upholding the hospital regulations.

In a footnote Judge Stevens listed several medical articles illustrating the split in medical opinion and supporting his conclusion that there were valid "medical reasons" for sustaining the hospital rules.[76] The strongest argument made in these articles against a father's presence consisted of a list of "medical reasons" that may be summarized in part as follows (some of which apparently influenced and were incorporated into the court's opinion):[77] (1) anything can go wrong in the delivery room; (2) "using the tactics of this lobby [*i.e.*, persons seeking to enforce these rights of privacy through legislative or other legal means], and with similar reasoning" the principle may be extended to other operations; (3) intimacy has its limits—"a girl simply is not at her romantic best in a delivery room;" (4) the training of doctors and other medical personnel is more difficult and less effective with the father present; (5) the increased threat of malpractice suits growing out of a husband's account of the doctor's actions; (6) risk of infection—every person whose presence is not essential should be excluded.[78]

There are several difficulties with using such reasoning as exemplary of valid "medical reasons" as the court did in *Fitzgerald*. A couple's romantic concerns clearly are beyond the range of a doctor's expertise in delivery room procedure. The fact that parents' rights may be extended to future cases is primarily a legal matter, not a medical

72. Roe v. Wade, 410 U.S. 113 (1973), is an example of such a balancing approach.

73. 523 F.2d at 720.

74. *Id.* at 721.

75. *Id.* at 722.

76. *Id.* at 721 n.22.

77. *See id.* at 720 n.16 & 721 n.22.

78. Morton, *Fathers in the Delivery Room—An Opposition Standpoint*, HOSPITAL TOPICS, Jan. 1966, at 103-04.

issue. Assuming that there is a real threat of an increase in the number of malpractice suits, which is in itself questionable,[79] again it is a legal argument, not a medical justification. Additionally, questions arise as to the seriousness and the urgency of the claim that student doctors may have trouble learning about delivery procedure when the father is present. The only specific "medical reason" listed in the article cited by the court is the possibility of infection caused by the father's presence (this concern was also raised as a "medical reason" by the defendant hospital). However, that possibility is not based upon a greater likelihood of a properly prepared father causing infection, but a greater likelihood of infection generally with the increased number of persons present during childbirth.[80] Ironically, no such concern was expressed about increasing the chance of infection by the presence in the operating room of a number of student medical personnel. Although the court did not expressly accept all of the listed reasons in its rationale, it implicitly recognized them as valid medical justifications and as evidence of a medical dispute.[81]

It is probable that there are valid and important medical reasons beyond those noted by the court in its footnote of medical authority, but it is clear that Judge Stevens bowed too easily to those persons within the medical profession who voiced objections to the Lamaze or related procedures. In addition, there was an impressive array of "uncontradicted" evidence within the record that included surveys that reported more than 45,000 births without a single infection "traceable to the practice [of childbirth with the father present] and not one malpractice suit."[82] Also, the record of the district court contained affidavits by a Clinical Professor of Obstetrics and Gynecology of the Chicago School of Medicine who found "no evidence in current obstetrical literature indicating that the presence of husbands . . . (assuming proper safeguards are taken) would be hazardous . . . ."[83] The benefits of the method were summarized by the professor (who had delivered approximately one thousand babies in the past four years with fathers present) as follows: (1) "the father's presence . . . has an extremely stabilizing effect on the mother;" (2) the mother is able to "bear down more

79. The dissent noted surveys contained in the trial court record that showed that in over 45,000 births with the father present, no malpractice suit arose. 523 F.2d at 722.

80. Morton, *supra* note 78.

81. *See* 523 F.2d at 721 & n.22.

82. 523 F.2d at 722.

83. *Id.* at 723.

intensively," shortening labor; (3) the shortened labor increases the chance of a baby being healthy and decreases the possibility of hypoxia (insufficient oxygen); (4) "no greater number of hospital personnel are in attendance when the father is present . . . ."[84] Also, the doctor stated that he had had no serious incident occur due to the father's presence in approximately one thousand births. In light of this evidence the dissenting judge was surely justified in his view that an evidentiary hearing was required.

The *Fitzgerald* decision is important in three respects. First, it provides one court's answer to the broader issue presented—when there is a dispute within the medical profession the courts should not intervene. Secondly, it establishes an unfortunate but influential precedent in its denial of the parents' interest in having the father in the delivery room. Thirdly, *Fitzgerald* provides an interesting view of the approach of Justice Stevens toward the right of privacy, a right championed by his predecessor, Justice Douglas. If *Fitzgerald* is an indication of how Justice Stevens views the right of privacy, it is unlikely that this right will be extended beyond the facts contained in the cases that have espoused it.

If this right to privacy is a right that has been created and expanded to meet the needs of a changing society, which it apparently is,[85] *Fitzgerald* presents an ideal case for its application. Childbirth with husband participation is of growing significance[86] and comes easily within the realm of the marital and family relationships. It is not the final decision reached in *Fitzgerald* that is worrisome, for there may be truly weighty medical or other reasons for upholding the hospital rules. However, the court should have looked at the strength of the medical evidence and applied it to the particular case before it, keeping within its consideration less drastic alternatives.[87] If in the balance the same

84. *Id.* at 722-23.

85. This point is presented very convincingly in Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1427-31 (1974).

86. The American Society for Psychoprophylaxis in Obstetrics (ASPO) has estimated that approximately 247,500 couples were trained in the Lamaze technique in 1975. Letter from Melba A. Gandy, Executive Director of ASPO to NORTH CAROLINA LAW REVIEW, Jan. 22, 1976, on file in U.N.C. Law Library.

Ms. Gandy also expressed concern that new dangers would arise with hospital rules restricting a father's presence: a danger that is becoming more and more evident is that when hospitals do not permit the father to be present, couples are choosing to have their child at home, physically separated from hospital facilities that may be vital in the event of difficulties during delivery. *Id.* at 2.

87. Possible compromise measures were suggested in Goetsch, *Fathers in the Delivery Room—'Helpful and Supportive,'* HOSPITAL TOPICS, Jan. 1966, at 104,

decision were reached it would have been a better result than shying away from the right because the balance was difficult or controversial or because it called into question medical opinions. Constitutional rights can be dealt with and medical concerns may at the same time be given due weight and respect.

ERIC M. NEWMAN

Hospitals—A Current Analysis of the Right to Abortions and Sterilizations in the Fourth Circuit: State Action and the Church Amendment

The United States Supreme Court in *Roe v. Wade*[1] found that the right of privacy guarantees a woman the prerogative of having an abortion "free of interference by the State."[2] The right of privacy also includes the fundamental right to decide whether to bear or beget a child[3] and therefore implicitly encompasses the sterilization decision.[4] However, in *Roe*'s companion case, *Doe v. Bolton*,[5] the Court let stand a section of the challenged Georgia abortion statute that allows a hospital to refuse to admit a patient for an abortion. The Court noted that the purpose of this provision was "obviously . . . to afford appropriate protection . . . to the denominational hospital."[6] Thus an enigma remains: how valuable is the *Roe* guarantee to an abortion or sterilization free of state interference if under *Doe*[7] some hospitals may absolutely refuse to admit patients for such operations?[8]

As *Roe* guarantees abortions "free of interference by the State," an initial inquiry must concern the scope of the duty thus imposed. Clear-

1. 410 U.S. 113 (1973).
2. *Id.* at 163. The absoluteness of the right depends on the trimester of pregnancy concerned.
3. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
4. Compare the sterilization decision with the personal rights listed in Roe v. Wade, 410 U.S. at 152-53 that have been held to be part of the right of privacy.
5. 410 U.S. 179 (1973).
6. *Id.* at 198. However, the Court generally spoke in terms of "hospital" without any qualification.
7. The *Roe* and *Doe* opinions are to be read together. Roe v. Wade, 410 U.S. at 165.
8. *See* Note, *Hill-Burton Hospitals after Roe and Doe: Can Federally Funded Hospitals Refuse to Perform Abortions?*, 4 N.Y.U. REV. L. & SOC. CHANGE 83, 84 (1974).