



# I Am Roe, Hear Me Roar

FEATURED SERIES

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## I am Roe, Hear Me Roar

### *Ep 2: WHAT DOES ROE V. WADE ACTUALLY SAY?*

This episode two of I am Roe, hear me roar.

Like any good story, we always start at the beginning ... but I'm going to do it a bit differently for this story.

Although this podcast is about the legal history of abortion in America, which history begins in earnest in the second half of the 19th century, we're going to start in 1973 by unpacking Roe v. Wade, the famous Supreme Court decision that effectively legalized abortion nationwide for the first time.

Welcome back to the podcast!

I'm your host, attorney Kelley Keller, and I take the awe out of the law. I'm passionate about demystifying the law for ordinary people so they can better understand and access the law, know the rights it protects, and learn to advocate effectively, for things that matter. Thank you for joining me on this fascinating journey as we unpack and explore the legal history of abortion in America.

Starting in the middle-ish of this history seems appropriate since, when it comes to abortion in America, all roads lead to Roe.

Therefore, it's critical we get on the same page and have a clear understanding of what Roe actually says, and perhaps as importantly, what it doesn't say about a woman's right to terminate a pregnancy.

Let's set the stage - the legal stage that is.

In 1970, Jane Roe (a pseudonym for a woman named Norma McCorvey - we'll chat about her in a different episode) filed a lawsuit in the federal district court in Dallas, Texas arguing that an 1854 Texas law criminalizing abortion, except in cases to save the life of the mother, was unconstitutional.

The case was filed against Henry Wade who was at that time the district attorney for Dallas County, Texas. Basically, Wade was the head lawyer for the county so it was his name on the lawsuit. He wasn't being sued personally, but in his capacity as the legal representative for Dallas County.

Here's a rundown of the facts.

Jane Roe was pregnant with her third child and wanted to have an abortion, but she couldn't because of a Texas law saying that any doctor who performs an abortion, or furnishes the means for performing an abortion, for any reason except to save the life of the mother, is committing the crime of abortion and will be prosecuted by the state for that crime. If convicted, the doctor will be put in jail for 2 - 5 years. Suffice it to say, few doctors were willing to risk their licenses and livelihoods by performing abortions in Texas. So, unless Roe went to a different state, she was out-of-luck.

In the lawsuit, Jane Roe was asking the court to do 2 things:

- 1 - to declare the Texas criminal law unconstitutional; and
- 2 - to issue an injunction requiring Texas to stop enforcing the criminal law.

Here's how it went down.

Jane Roe argued that the Texas law was unconstitutional because it invaded a woman's right to choose to terminate her pregnancy at any time before a live birth, which she believed arose from 1, 2, or 3 different sources in the Constitution.

Here are the three sources she outlined:

One - Roe argued that the right to choose to terminate a pregnancy emanates from the concept of personal liberty embodied in the 14th Amendment's due process clause.

Two - Roe argued that the right comes from the unenumerated rights with respect to personal marital, familial, and sexual privacy which the court previously found in the so-called penumbras, or shadowy edges, of the Bill of Rights.

Three - Roe argued that the right may also emanate from the 9th Amendment, where unenumerated rights may be identified by the people and therefore protected by the Constitution.

Worry not, we'll explore these "sources" in greater detail in a moment.

Before I do that, Roe also claimed, as a fail safe argument, that the statute was void on the grounds it was unconstitutionally vague, irrespective of the rights it violated. Vagueness is a constitutional rule that requires criminal laws to state explicitly and definitely what conduct is punishable by the criminal law.

In its defense, Texas, via Wade, asked the court to keep the Texas law intact because an abortion denies the fetus of its constitutional right to life, which Wade argued begins at conception. As such, the pregnant mother cannot have an abortion without the physician committing murder. There is, of course, still massive debate regarding when life begins for purposes of recognizing legal rights for the unborn. That's for a different episode.

Roe's first request was granted.

The federal court deemed the Texas law unconstitutional under Roe's option 3. The court agreed generally that a woman's right to terminate a pregnancy is protectable under the 9th amendment. The court also deemed the law void for vagueness, so it was a double punch.

Ok, as for Roe's second request, the court declined to order an injunction requiring Texas to stop enforcing the criminal law. An injunction is an order from a court requiring someone to either start doing something or stop doing something.

In this case, an injunction would have ordered the state of Texas to stop prosecuting doctors under the law. The federal court didn't believe that it was the proper forum for issuing an injunction against the state and deferred instead to Texas to address how to handle enforcement in light of the court's decision. As a practical matter, this meant that Henry Wade could keep prosecuting doctors for performing abortions.

So, Jane Roe got half of what she asked for, but it wasn't really worth the paper it was written on.

Without an enforcement mechanism, the decision was just a pyrrhic victory for Roe - a symbolic "win" so to speak, without any teeth.

Therefore, Roe appealed - directly to the U.S. Supreme Court. Wade appealed as well.

Enter SCOTUS - SCOTUS is an acronym for the Supreme Court of the United States.

In her appeal, Roe was asking the Supreme Court to (1) affirm the holding from the lower court that the Texas law was not constitutional, and (2) to overturn the lower court's decision not to issue an injunction.

Wade was asking for just the opposite.

The Supreme Court agreed to hear the appeal and, after a series of delays, they scheduled the case for oral argument.

The lawyers for Roe and Wade argued the case before the court on December 13, 1971. But, two of the justices had resigned a few months earlier due to poor health, so the case was heard by just 7 justices, not the typical 9. Given the importance of the issues, the court ultimately held the case over to the next term so a full bench of 9 justices could weigh in on the issue. Roe was re-argued before the full court on October 11, 1972.

The judgment of the court and accompanying opinion was announced on Monday, January 22, 1973, ironically the same day former President Lyndon Johnson passed away. Newswise - it was a bit of a nothing burger, at least initially.

Obviously, we know the Supreme Court sided with Roe, but its reasoning for agreeing with Roe was different than that of the lower court, and that's part of why the decision has been extremely controversial.

The Supreme Court held that the Texas criminal law was unconstitutional because it denied a woman of her constitutional "right to privacy" which, the court claimed, was guaranteed by the due process clause of the 14th amendment.

The due process clause of the 14th amendment says that no State shall deprive any person of life, liberty, or property, without due process of law.

Now, life and property are relatively straightforward concepts.

Liberty, however, is less so. What "liberty" means beyond its ordinary meaning of physical freedom has been (and still is) the source of great debate. So, inferring a right to privacy from the term liberty was a pretty big leap at the time, especially when the privacy right included the right to terminate a pregnancy.

Legal recognition of the "right to privacy" was a relatively new idea in 1973.

In *Griswold v. Connecticut*, a 1965 decision about contraception, the Supreme Court held that a right to marital privacy, while not expressly stated or enumerated in the Constitution, is implied by the Bill of Rights if one looks to the penumbras, or shadowy edges, of the various amendments. As such, the right to marital privacy should be recognized as a fundamental Constitutional right alongside the other enumerated rights, such as freedom of speech.

This line of thinking was pretty controversial then, but it was new, and seemingly helpful to Roe's argument, so she invoked it nonetheless.

As indicated above, the Roe opinion didn't specifically adopt the penumbral reasoning set out in the Griswold case, but it did conclude that the "right to privacy" is embedded in the definition of liberty in the 14th amendment, and that the right to privacy includes a limited right to have an abortion.

So, when read in the context of the due process clause of the 14th amendment and swapping out the term liberty, Roe v. Wade says that no state can deprive a woman of her right to terminate a pregnancy (with several caveats) without due process of law.

Whether the court had (or has) the power to expand the definition of liberty to include a right of privacy, or right to an abortion, or any unenumerated rights for that matter, or whether that power rests solely with the political branches of government, is a source of huge disagreement even today.

Ok - back to Roe ...

So, the court said that women have a right to privacy, which includes the right to have an abortion, but it also said that the privacy right is not absolute. It must be balanced against the state's interest in safeguarding maternal health and fetal life.

In its opinion, the court set forth a trimester framework for balancing these competing interests.

Here's how it works.

In the first trimester, a woman's right to privacy is superior to any state interest. The abortion decision must be left to the medical judgment of the pregnant woman's attending physician.

In the second trimester, a woman's right to privacy may be deferred to a state interest. The State, in promoting its interests in the health of the mother, may regulate the abortion procedure in ways that are reasonably related to maternal health. It doesn't have to, but it may.

In the third trimester, or after viability, the woman's right to privacy is fully subordinated to the State's interest in the potentiality of human life. So, the state may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

That's a mouthful.

The court also said the State may define the term 'physician' to mean only a physician currently licensed by the State, and prohibit anyone else, including a physician licensed in another state, from performing an abortion in that state.

So basically, under Roe, the state can place increasing restrictions on abortion as pregnancy progresses, provided those restrictions are specific to the state interests of protecting maternal health and fetal life.

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After 3 years, 3 oral arguments, and hundreds of pages of legal briefs, the Supreme Court held that a Texas criminal law proscribing abortion except to save the life of the mother was unconstitutional because it violated a Constitutionally protected right of personal privacy, which includes the right to choose to terminate a pregnancy during the first trimester without any government interference. After the second trimester, regulation is permitted provided it is related to maternal health. And in the third trimester, states can prohibit abortion except when required to save the life of the mother.

By striking the entire Texas statute down and not just the parts that violated the new rules established by Roe, the court effectively overturned 46 state laws with varying degrees of abortion restrictions overnight. Justice Blackmun, who wrote the majority opinion, naively thought the state legislatures would fall in line and adopt new laws in compliance with Roe. Not only was he wrong, he was dead wrong.

In the late 60s and 70s, the social climate in the U.S. was beginning to change and 13 states had already liberalized their abortion restriction laws, and others were in process. But Roe stopped that progress in its tracks.

According to the late Justice Ruth Bader Ginsburg, the court's opinion in Roe erred because it was too broad and disrupted too much social infrastructure too fast. Without the buy-in of the people, judicially mandated social change usually fails and the blowback begins.

Roe then did not settle the abortion issue, it was simply the opening shot in the new abortion wars ... and they were just starting to roar.

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OK - Let's recap ...

In 1973, the Supreme Court held in Roe v. Wade that a Texas law criminalizing abortion, except in cases to save the life of the mother, was unconstitutional because it violated the due process clause of the 14th amendment.

The due process clause says a state can't deny someone of their life, liberty or property without due process of law. The Supreme Court reasoned that the Texas law denied women of their "liberty" without due process of law and, in doing so, the court broadened the definition of liberty to include the right to have an abortion.

Texas argued that the law was enforceable because the fetus also had a right not to have its right to life be denied without due process of law. The court declined to recognize fetal rights prior to viability, so the Texas argument failed.

Now, although the Roe court acknowledged a right to privacy, it also said the privacy right is not absolute. It has to be balanced with the state's interest in protecting maternal health and fetal life. The court created a trimester framework for how the interests are to be managed.

Here's the framework.

In the first trimester, the state can't regulate abortion. The woman's right to privacy is superior to any state interest.

In the second trimester, a woman's right to privacy begins to diminish in favor of the state's interest in safeguarding maternal health and fetal life.

In the third trimester, a woman's privacy right is fully subordinated to the state's interest in protecting maternal health (abortions are less safe as the pregnancy continues) and fetal life (once a fetus is viable, the state has an interest in protecting its life as well). As a result, states can ban abortion for any reason, except to save the life of the mother, during the third trimester of pregnancy.

This trimester framework has since been replaced by a pre and post-viability test, but the privacy right, albeit changed a bit, remains, at least for now.

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With that, my friends, you have the legal story of Roe.

Thank you, as always, for tuning in.

Next, we'll tackle *Planned Parenthood v. Casey*, the 1992 decision that made significant changes to Roe and remains, as the date of this recording, June 2, 2022, the "law of the land" on abortion.

So, stay with me, and I'll see you in episode three of *I am Roe, Hear Me Roar*.