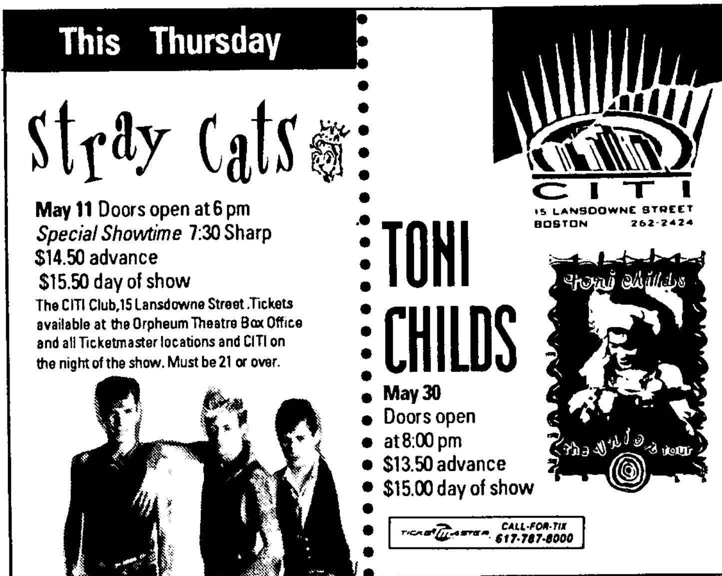
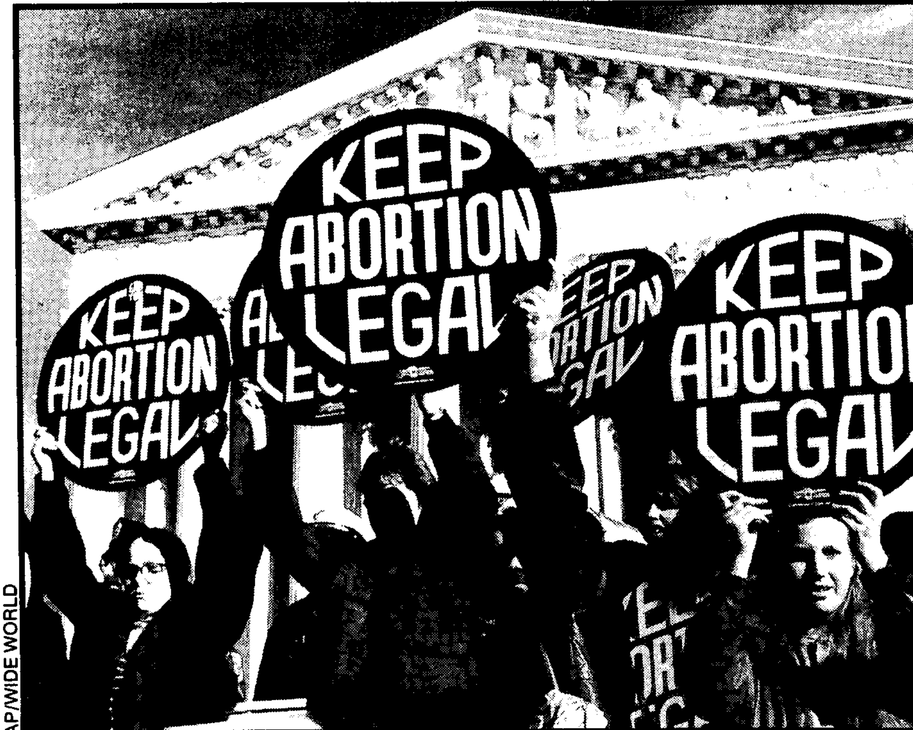




AP/WIDE WORLD

The issue is nothing less than liberty.

BRIEF CASES

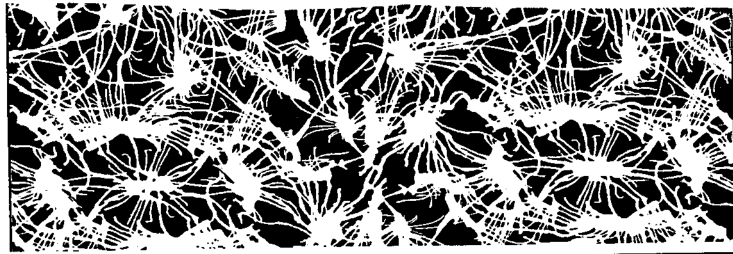
Mixed messages on *Roe v. Wade*

BY HARVEY SILVERGLATE

Judging from the recent oral arguments in the US Supreme Court case that zealous anti-abortion activists hoped would result in the total elimination of a woman's right to choose abortion over childbirth, there is both good news and bad news for pro-choice advocates. The good news is that it seems the majority of the justices believe, at least to some extent, that a woman has the right to choose whether to procreate. The bad news is that this right may be eroded to the point where it will become a cruel hoax to the majority of women.

The proceedings concern the Missouri case *Webster v. Reproductive Health Services, Inc.*, which just a few weeks ago was assumed — by both friends and foes far from questioning that central prohibition, instead focusing on such tangential and esoteric questions as how to cleanse an eating utensil that has touched meat before it may again be used for dairy.

Similarly, at the oral argument in *Webster*, it became clear that the debate was centering not on whether to repeal the constitutional right to control procreation, and not even on whether to reverse *in its entirety* the right to choose an abortion, but rather on the degree to which states would be allowed to erect barriers to the exercise of that right. Observers who care about human rights were pleasantly surprised to learn that just about every member of the Court seemed to accept the proposition that the



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of a woman's right to choose — to be the Court's chosen vehicle for reversing the 1973 *Roe v. Wade* decision.

Roe, of course, was the case in which the Court, by a 7-2 majority, declared a woman's absolute right to obtain an abortion during the first trimester of pregnancy, with some state regulation permitted later in the pregnancy as the fetus reached the stage of viability outside the womb. It seems reasonably clear, after the oral argument, that the Court will not reverse longstanding precedents that establish a right to control procreation, and will retain at least that part of the *Roe* case that grants women some degree of liberty in the decision to terminate a pregnancy.

The threat to abortion rights in the Missouri case lies in the possibility that the Court will allow states to erect so many barriers to a woman's obtaining an abortion that the situation for a large number of them will, as a practical matter, return to the pre-*Roe* days, when the procedure was available only to those of a certain social class. A further danger if the Court takes this route is that pro-choice advocates will have difficulty mobilizing both themselves and public opinion in order to turn back the anti-abortion tide, for the issues will not be clear enough to serve as the basis for a mass political movement.

The oral argument, held on April 26, was an example of a Jewish Talmudic principle known as "building a fence around the law." Under this theory, if proponents of a particular legal principle can direct all argumentation at the periphery of the law, then the core principle will remain unquestioned. A good example is the area of *kashruth*, the set of rules and rituals governing food and eating. The Old Testament contains a couple of lines to the effect that a calf should not be stewed in its mother's milk (an old pagan ritual considered cruel by the Hebrews). Over the centuries, rabbis argued and eventually built up an elaborate set of rules, including the admonition that meat products not be eaten in proximity with dairy products. By prohibiting any mixing of milk and meat, one assures that no calf will ever be stewed in its mother's milk. The arguments over the years have moved very Constitution does indeed play a role in protecting liberty, that the Supreme Court has an institutional role in seeing to it that those constitutional rights are enforced, and that there is such a thing as a right to procreate or to refuse to do so. This did not seem so evident a short time ago, at the height of the Reagan-Meese administration's efforts to re-make the Court in its own image by naming right-wing justices to replace those who were retiring.

The justices during the *Webster* arguments seemed fully to accept the Warren Court's 1965 decision *Griswold v. Connecticut*, which struck down a Connecticut law that made it a crime for even a married couple to use birth control. The Court declared a right of marital privacy grounded in offshoots of a number of constitutional provisions. The *Roe* decision flowed directly from the *Griswold* precedent since there could be no right to terminate a pregnancy if there were no right to prevent one in the first place.

During the *Webster* argument, Harvard professor and former solicitor general (under Reagan and Meese) Charles Fried, arguing for the Department of Justice as a "friend of the court," started out his argument by making it clear that the federal government was *not* asking the Court to reverse *Griswold* but seeking only to reverse *Roe* since "abortion is different" from contraception. It was a good thing for Fried that he decided not to try to take on the contraception issue and insist that the Court throw out *Griswold* if it were going to throw out the right to choose an abortion, for it very soon became clear that no member of the Court would likely have bought it. Indeed, some of the most insistent questions were from Reagan appointees Justices Sandra Day O'Connor and Antonin Scalia, who pressed Fried to explain how one could be sure that the *Griswold* contraceptive case would remain intact if the Court were to reverse *Roe*.

One particular exchange between Justice Scalia and attorney Frank Susman (representing Reproductive Health Services) indicated just how closely tied the fate of abortion might be to the degree to which the Court sticks to its

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judge, where fines can go as high as $10,000 for the first offense. If the case then goes to federal court, federal lawyers will represent the victims; judges can hand down fines of $50,000 for the first offense, and $100,000 for each successive violation. Punitive damages, meanwhile, are unlimited.

And as word of costly settlements gets out, fair-housing officials are hoping real-estate agents will realize the financial risk of discriminating. The BFHC last year mediated a $20,000 settlement for one discrimination victim. And Joseph Vera, chief of fair-housing enforcement in the Boston HUD office, tells of a whopping $325,000 settlement for a black woman discriminated against in Washington, DC.

"It's no longer going to be a slap on the wrist for discriminating," notes Nadine Cohen, staff counsel at the Lawyers Committee for Civil Rights Under Law. "It's going to be more costly to get caught discriminating and lose your license and get hit with all sorts of damages than it will be to tell a landlord, 'No, I'm not going to take your listing.' "

— SF

Spill

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Congressman George Miller's subcommittee on water, power, and off-shore energy resources, his subcommittee has asked for and received the right to subpoena evidence in its investigation of the spill.

Stressing that the committee has not felt it necessary to have subpoena powers in the past because it has enjoyed cooperation from witnesses in most cases, Beard said the request for subpoena power "sets the tone, lets

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guns on the issue of contraception. Scalia posed this critical problem to Susman: "I don't see why a court that can draw that line [between the first, second, and third trimesters of pregnancy] can't separate abortion from birth control quite readily."

Attorney Susman responded with one of those rare answers that change a justice's mind. The right to contraception is not distinct from the right to abortion, argued Susman; the once "bright line" between the two has disappeared. Now there is only one right, and that is "the right to procreate" or not to procreate. The reason for this, he pointed out, is that the most common forms of contraception today are IUDs and birth-control pills, all of which achieve contraception by acting as abortifacients, for they act not by preventing conception but by preventing the fertilized egg from attaching itself to the uterine wall. If the term "life" is defined as commencing at conception, as the anti-abortion forces and the Missouri statute at issue in *Webster* declare, then the use of these common contraceptives is, in reality, abortion. "We are no longer just talking about condoms and diaphragms," said Susman, as was the case in the days when *Griswold* was decided. Those methods actually prevented conception.

There was another principle that all the justices, and all parties as well, seemed to agree upon — that if the life of the woman is in danger, an abortion could not be constitutionally prohibited by statute or regulation. This lets the pro-choice advocates get their foot in the door, since it concedes that there is at least *some*

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Brief Cases

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provision of the Constitution setting forth a right to choose in at least some circumstances.

Yet there remains the disturbing possibility that even though certain central assumptions of the pro-choice movement seem safe — the sanctity of the decision to use contraceptives and the notion of personal privacy that it presupposes, and the role of the Constitution to protect at least to some extent a woman's right to terminate a pregnancy — the right to choose abortion may in the end become next to meaningless for millions of women if the Court's decision eats away at *Roe*.

My law partner Nancy Gertner, who has argued some of the more important abortion cases in Massachusetts, describes the abortion battlefield as a "continuum" running from outright prohibition of all abortion to giving affirmative support to abortion (including, even, public funding of the procedure for indigent women). The Supreme Court has generally said no to the question of states' being forced actively to support or encourage abortion. Thus, the Court upheld as early as 1977 a Connecticut statute that limited Medicaid funds for abortions for poor women to those considered medically necessary. Yet on the other end of the spectrum, ever since the *Roe* decision the Supreme Court has consistently knocked down state-erected restrictions to the right to choose an abortion. If the states have not been required to aid a woman in getting an abortion, neither have they been allowed to stand in her way.

According to Gertner, the *Webster* case is particularly dangerous because some of the dissented from *Moe* in 1982, would have given the anti-abortion forces enough votes to overrule *Moe* (by a vote of 4-3) were that or a related issue to have come before the Court in the intervening years.

However, Hennessey just retired from the Court, and Governor Dukakis will soon be making another appointment to that bench. Since it is likely that Dukakis will appoint a justice who will favor liberty interests over state regulation of private life, the pro-choice forces may regain a 4-3 majority on the SJC. Hence, the right to choose in Massachusetts may be protected regardless of what the US Supreme Court does in *Webster*.

Although somewhat comforting, the situation of women in Massachusetts cannot disguise the fact that, as a recent *Newsweek* magazine survey indicates, in the absence of a strong federal constitutional pro-choice protection, 22 state legislatures would be likely to restrict the right to choose an abortion, and another 15 states would become battlegrounds on the issue.

At the *Webster* oral argument, Fried stated that such concepts as "the right to control one's body" and "the right to be let alone" were mere "abstractions" and hence were useless as a basis for determining whether and how the Constitution protects the right to choose an abortion. Contrary to what the Frieds of the world would have us believe, there *is* such a thing as personal autonomy. And if liberty means anything, it means that we — man and woman alike — have the right to retain control over our bodies. □

Culture

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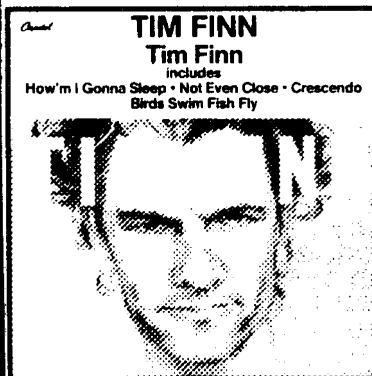

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provisions of the Missouri statute move so far along the continuum as to create serious and practical obstacles to freedom of choice. Once the vitality of *Roe* is sapped, state legislatures likely would erect ever more stringent barriers, until the right to choose, especially for poor women, would become virtually nonexistent. Perhaps most important, the Missouri statute prohibits the use of any public hospital or public medical facility for performing an abortion, even if the woman is able and willing to pay for the procedure, and even forbids the doctor from recommending it. (This last provision of the law has been attacked in the *Webster* case as violating the free-speech provisions of the First Amendment.)

Beyond all this potential for disaster, however, there's a bright spot for women living in Massachusetts. In the 1982 case of *Moe v. Hanley*, attorney Gertner persuaded the Massachusetts Supreme Judicial Court (SJC) to rule 6-1 that the state could not cut off Medicaid funding for abortions while such funding was available for other medical procedures since that would inhibit a woman's exercise of her procreational and privacy rights, thereby violating provisions of the Massachusetts *state* Constitution. Our state's highest court, in other words, found a state constitutional right to support affirmatively the right to choose even while the US Supreme Court refused to find a similar right in the federal Bill of Rights.

Since *Moe* was decided, there have been three new appointments to the SJC by former governor Edward King, who reportedly made a fervent anti-abortion philosophy a litmus test for appointment. According to the vote-counters who have been observing the SJC over the years since *Moe*, those three appointments, combined with Chief Justice Edward Hennessey, who

state have sought and found some financial relief from local arts-lottery councils, which award grants to community-based cultural organizations. In Boston, though — the place where a majority of Massachusetts artists live and work — arts-lottery money has dwindled rapidly over the past two years.

Under state arts-lottery guidelines enacted in 1987, the amount of money each Massachusetts community receives to distribute to cultural groups and projects is determined by a formula based on population and property values. As a city's or town's property values increase, its arts-lottery appropriation goes down.

Boston's residential and commercial real-estate boom of the last few years has driven up property values here — driving hundreds of cultural organizations out of their performing and exhibition spaces as the cost of space per square foot has risen. As a result of its inflated real-estate values, the city's arts-lottery appropriations have been cut in the past two years by 50 percent of what they were in the mid 1980s, according to Larry Murray, executive director of the ARTS/Boston and a member of the Boston Arts Lottery Council, which awards grants from the arts-lottery funds. (Arts-lottery revenues comprise the first $4 million collected each year from the Megabucks and Mass Millions lottery games.)

The arts-lottery council has asked the state to review its distribution formula and consider changing it to reflect population and per capita income rather than property values. But though the Boston council made its request a year ago, the state has yet to take action.

"The arts lottery is often the only way a fledgling arts group can get some money," notes Murray. Funders tend to give grants only to organizations with

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