RHODE ISLAND: THE LEGAL CLIMATE FOR PROTECTION OF LIFE

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Roe v. Wade[2] has prevented states from developing laws that protect innocent unborn life. As Justice Scalia observed in his dissent in *Planned Parenthood v. Casey*,

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.[3]

With speculation that the tyranny of *Roe* may be close to its end, attention naturally turns to the states. Before assuming the overruling of *Roe* (or at least a substantial departure from the sweeping effect previous courts have attributed to it) will lead to dramatic changes in the protection of human life, we must pay closer attention to the climate in the individual states. If the statutory law of the state is inhospitable to the protection of life, or if the courts have imposed (or are likely to impose) a substitution for *Roe*, based on state constitutional or statutory grounds, then the displacement of *Roe* will have a much more limited effect.

This study reviews both the statutory climate and the judicial climate in Rhode Island to provide a more accurate expectation for a post-*Roe* Rhode Island

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[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting).

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I. LIFE ISSUES

Abortion

Rhode Island has not enacted legislation granting a right to abortion. Instead, it is one of the many states whose law prohibiting abortion[4] was declared unconstitutional[5] as a result of *Roe v. Wade*. Not only has Rhode Island never recognized, by statute, a right to abortion; there are a number of statutes that reflect, at most, a grudging acceptance of the constitutionally-imposed right to abortion. For example, health insurance policies are statutorily prevented from providing insurance coverage for elective abortion[6] unless an additional premium is paid, and cities and towns are similarly prohibited from providing health insurance for elective abortion.[7]

Rhode Island passed a strong parental consent law that required a woman below the age of eighteen to obtain the consent of at least one parent before a lawful abortion could be performed.[8] The statute provided for judicial bypass in the event that the minor established grounds for failing to obtain consent and the judge found that an abortion would be in the minor's best interests.[9] However, the constitutional validity of this requirement has been called into question by a federal case that challenged other provisions of Rhode Island law restricting the availability of abortion.[10]

As with the law regarding parental notification, Rhode Island adopted a statute that required physicians, after obtaining informed consent from a woman who sought an abortion, to inform the woman's husband "if reasonably possible."[11] However, like the parental notification statute, this provision was struck down as unconstitutional in 1984.[12]

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[4] R.I. GEN. LAWS § 11-3-1 (2007).
[5] Doe v. Israel, 482 F.2d 156 (1st Cir. 1973).
[6] R.I. GEN. LAWS § 27-18-28 (2007) (permitting coverage for pregnancies resulting from rape or incest, and imposing no restriction on coverage for health care services provided to treat adverse consequences of abortion).
[7] § 36-12-2.1.
[8] § 23-4.7-6.
[9] Id.
[10] Women's Med. Ctr. of Providence, Inc. v. Roberts, 530 F. Supp. 1136 (D.R.I. 1982).
[11] R.I. GEN. LAWS § 23-4.8-2 (2007). The statute relieves the physician of this duty if the physician knows the husband has already been notified, if the patient informs the physician in writing that she has notified her husband,

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Protection of the Unborn from Criminal Violence

Rhode Island's criminal statutes classify as manslaughter the act of willfully causing the death of a viable unborn child, either by injuring the mother in such a way that, if the mother had died it would be considered murder, or by acting directly to cause the death of the child.[13] The statute limits this punishment to the case of a "quick child," which is further defined as an unborn child "whose heart is beating, who is experiencing electronically-measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state."[14] However, the fetus is not considered a "person" for purposes of other statutes outlawing homicide.[15]

Though Rhode Island does not recognize a cause of action for wrongful death for a nonviable fetus,[16] it does provide that a viable fetus is a "person"[17] within the meaning of the Wrongful Death Act.[18] As such, the beneficiaries of a viable fetus may sustain an action for recovery against a party who caused the death of the fetus by a wrongful act, neglect, or default.[19]

Furthermore, Rhode Island prohibits experimentation on human fetuses.[20] Although similar statutes in other states have been challenged on constitutional grounds,[21] the Rhode

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if the woman is living apart from her husband, or if an emergency requires immediate action. Id. On the other hand, failure to comply with the statute is grounds for finding that a physician has engaged in "unprofessional conduct," justifying adverse licensure action. § 23-4.7-7.

[12] Planned Parenthood of R.I. v. Board of Med. Review, 598 F. Supp. 625 (D.R.I. 1984).

[13] R.I. GEN. LAWS § 11-23-5 (2007).

[14] Id. § 11-23-5(c).

[15] State v. Amaro, 448 A.2d 1257 (R.I. 1982) (holding that trial court erroneously denied defendant's motion to dismiss charge of vehicular homicide filed against defendant who collided with vehicle whose driver was nine months pregnant and who subsequently gave birth to stillborn child).

[16] Miccolis v. AMICA Mut. Ins. Co., 587 A.2d 67 (R.I. 1991).

[17] Presley v. Newport Hosp., 365 A.2d 748 (R.I. 1976).

[18] R.I. GEN. LAWS § 10-7-1 (2007).

[19] Id.

[20] R.I. GEN. LAWS § 11-54-1(a) ("No person shall use any live human fetus, whether before or after expulsion from its mother's womb, for scientific, laboratory research, or other kind of experimentation.").

[21] Forbes v. Napolitano, 236 F.3d 1009 (9th Cir. 2000).

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Island version of the statute has been identified as one less likely to be successfully challenged for vagueness.[22]

Assisted Suicide

In 1996, Rhode Island made it a felony to provide the physical means to commit suicide or to participate in the physical act by which another committed or attempted to commit suicide, when done with the purpose of facilitating a suicide.[23] There are no cases interpreting this statute.

Healthcare Rights of Conscience

Rhode Island includes protection for physicians or medical staff or employees who refuse to participate in abortion or sterilization procedures on moral or religious grounds, if the objection is stated in writing.[24] Failure to participate may not be grounds for any claim for damages or for disciplinary or recriminatory action.[25] In the only case that mentions this statute, a federal district court rejected the notion that this statute could be used to prevent the removal of life-sustaining treatment from a patient diagnosed in a "persistent vegetative state."[26] The patient's family claimed she had made it clear prior to her illness that she did not wish "artificial measures" to be used to keep her alive, but the hospital treating her refused to follow their instructions, believing they were asking the hospital to commit a form of euthanasia. In ordering the hospital either to carry out the family's wishes or transfer the patient to a hospital that would, the federal judge found the conscience statute had no application, since by its terms it was limited to abortion and sterilization procedures.[27]

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[22] Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990).
[23] R.I. GEN. LAWS § 11-60-3 (2007).
[24] R.I. GEN. LAWS § 23-17-11 (2007).
[25] Id.
[26] Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988).
[27] Id. at 590.

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Cloning

Rhode Island law prohibits human cloning.[28] It is unlawful to use somatic cell nuclear transfer "for the purpose of initiating or attempting to initiate a human pregnancy"; it is also illegal to "create genetically identical human beings by dividing a blastocyst, zygote, or embryo."[29] Violators of the statute face fines of up to $1 million.[30] There is no case law interpreting this statute.

Destructive Embryo Research

In banning experimentation on human fetuses, Rhode Island prohibits offering to perform an abortion where part of the consideration for the procedure is the right to use fetal remains for experimentation or other kinds of research or study.[31] In addition, it is illegal to "sell, transfer, or give away any fetus" for purposes of experimentation. "Fetus" includes an embryo or neonate.[32] Again, there are no cases interpreting this statute.

Rhode Island has enacted numerous statutes designed to protect innocent human life. Some of those statutes have been declared unconstitutional in light of *Roe v. Wade*, but none of the cases that either found or suggested unconstitutionality were decided by judges who now sit on the Rhode Island Supreme Court.

II. JUDICIAL RESTRAINT

In two cases decided in June 2006, the Rhode Island Supreme Court spoke strongly in defense of the principle of judicial restraint. First, in *Pastore v. Samson*,[33] the Court unanimously rejected an invitation by defendant doctors in a hospital negligence case to "revisit"

[28] R.I. GEN. LAWS § 23-16.4 (2007).
[29] Id. § 23-16.4-2.
[30] Id. § 23-16.4-3.
[31] R.I. GEN. LAWS § 11-54-1(e).
[32] Id. § 11-54-1(f).
[33] 900 A.2d 1067 (R.I. 2006).

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previously adopted principles regarding the scope of privilege granted to proceedings of a peer review board. Affirming the principle of *stare decisis*, Chief Justice Williams identified *stare decisis* as a key component of the virtue of judicial restraint. Quoting Justice Lewis F. Powell, he wrote:

> 'Perhaps the most important and familiar argument for *stare decisis* is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions.'[34]

In addition, to the extent the defendants were seeking to use an expression of statutory intent to alter a common-law rule, the court placed a higher priority on the principle that statutes in derogation of the common law are to be construed strictly.[35]

A second case, *State v. Lead Industries Ass'n*,[36] decided just two weeks prior to the *Pastore* case, also expressed respect for the principle of judicial restraint. The case arose when the Rhode Island Attorney General entered into an agreement with private counsel to assist in prosecuting public nuisance actions against lead pigment manufacturers. Pursuant to the agreement, the private counsel was to receive a contingency fee. The defendants challenged the practice as an unconstitutional delegation of authority. The trial judge ruled the agreement would be void unless the attorney general retained continuing control of the litigation but did not strike down the portion of the agreement that promised payment to private counsel of 16⅔% of monies recovered from the defendant(s). Defendants petitioned for a writ of certiorari to review the trial judge's decision. In denying the writ, a unanimous court held the issue was nonjusticiable; Chief Justice Williams wrote, "A constitutional rule of strict necessity long has

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[34] Id. at 1077 (quoting Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 13 J. SUP. CT. HIST. 16 (1991), *quoted in* State v. Musumeci, 717 A.2d 56, 68-69 (R.I. 1998) (Weisberger, J., concurring in part and dissenting in part)).
[35] *Id.* at 1078.
[36] 898 A.2d 1234 (R.I. 2006).

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been recognized in this jurisdiction. Most often it has manifested itself in our reluctance to adjudicate constitutional questions when a case is capable of decision upon other, non-constitutional grounds."[37]

While these are only two opinions of the court, they evoke a cautious optimism that the relatively young members of the court will continue to affirm (and practice) the virtues of judicial restraint. Particularly in light of Rhode Island's history of extensive statutory protection for innocent life, the prospects for a post-*Roe* turnaround in Rhode Island seem particularly bright.

Recent cases by the Rhode Island Supreme Court have affirmed the commitment of the courts to follow the language of the constitution rather than speculate upon what the authors of the constitutional provision might have intended. In *McKenna v. Williams*,[38] an attorney and his law practice sued to remove Chief Justice Williams, arguing he had vacated his seat on the Court by accepting a position as a member of a Department of Defense military review panel.[39] In dismissing the claim, the court quoted a statement from a previous case, "[W]e follow the well-established rule of construction that words in a constitution are to be given their usually accepted meaning."[40] They went on to say, "Constitutions, just like statutes, have an effect *by what they say*."[41]

Rhode Island also recognizes the general principle that legislative enactments are entitled to a presumption of constitutional validity.[42] A party challenging the constitutionality of

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[37] *Id*. at 1239.
[38] 874 A.2d 217 (R.I. 2005).
[39] *Id.*
[40] *Id*. at 232 (quoting Davis v. Hawksley, 379 A.2d 922, 923 (1977)).
[41] 874 A.2d at 232 (emphasis in original).
[42] *In re* Advisory Opinion to House of Representatives (Casino II), 885 A.2d 698 (R.I. 2005) (holding that proposed casino bill violated state constitutional provision requiring state to have operational control over casinos); Mosby v. Devine, 851 A.2d 1031 (R.I. 2004) (holding that state Firearms Act did not violate constitutional guarantee of due process).

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legislation must persuade the court beyond a reasonable doubt that the enactment violates either the state or federal constitution.[43]

There is reassuring language in at least some court opinions that the Rhode Island courts will not substitute their own policy preferences under the guise of constitutional interpretation. In *In re Advisory Opinion to the Governor*,[44] the court was asked by Governor Almond to provide an advisory opinion concerning the authority of an ethics commission established by a state constitutional amendment. In their response, the court stated:

> The ethics commission is not a constitutional convention. It does not have the power to amend the constitution of this state, nor could it be given such a power. It is not the function of this Court to determine whether the United States federal system is preferable to that of legislative supremacy. We take no position on that issue. It is our function to determine what the Rhode Island Constitution as interpreted by this Court permits or commands. When the language and history are clear and unambiguous, as they are with respect to our response to Your Excellency's first question, it is not the role of this Court to render an interpretation fabricated from interstitial constitutional modifications. As is clearly enunciated in article 1, section 1, of our state constitution, only the people of Rhode Island may change the structure of their government, having reserved to themselves such a fundamental and paramount function of government. Article 14, section 1, of the Rhode Island Constitution provides the exclusive means of amending the constitution and such an alteration requires approval 'by a majority of the electors voting thereon[.]' We suggest that the sole and proper procedure for restricting legislators from serving on or appointing 'any other person' to executive boards and commissions is through an amendment to the constitution approved by the electorate, not by an ethics regulation.[45]

In summary, while Rhode Island courts have not explicitly rejected arguments that there might be a constitutional right to privacy or some other basis upon which legislation protecting

[43] Mosby v. Devine, 851 A.2d 1031, 1045 (R.I. 2004); *See* Seibert v. Clark, 619 A.2d 1108 (R.I. 1993) (requirement that out-of-state truckers purchase and display decal did not infringe Privileges and Immunities clause or offend federal power to regulate interstate commerce).
[44] 732 A.2d 55 (R.I. 1999).
[45] *Id*. at 72.

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human life could be invalidated, there appears to be helpful precedent to permit the legislature's determination of these issues to survive constitutional challenge.

III. THE COURT

The Court consists of five members, who are appointed by the governor. The Judicial Nominating Commission (JNC) identifies a minimum of three and a maximum of five nominees and publicly submits those names to the governor. The JNC was created by statute in 1994 and is composed of nine members, of whom five, at this time, are lawyers. The members of the JNC are appointed by the governor (4) and by Senate and House leaders (5). The JNC screens applicants for vacancies on all Rhode Island courts. After selecting a name from the list forwarded to him by the JNC, the governor must then secure the advice and consent of both the Rhode Island Senate and the Rhode Island House of Representatives. Once approved, a Supreme Court justice serves for life (or until retirement), with no mandatory retirement age.

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Biographical information of the justices currently sitting on the Supreme Court of Rhode Island

Member	Appointed by/ Year	Term Expires	Miscellaneous
Frank J. Williams, Chief Justice	2001	N/A	- Biographical information: Masters in Taxation Bryant College 1986; J.D. Boston College Law School 1970; B.A. Boston University 1962; U.S. Army, 1962-1967 (Various Honors). - Professional/Political affiliations: Member of the Rhode Island Bar Association; Rhode Island Arbitration Association; American Bar Association; American Judicature Society; President of the Abraham Lincoln Association, Springfield, IL, 1976-present; President of the Ulysses S. Grant Association, Carbondale, IL, 1990-present; President of the Lincoln Group of Boston, 1976-1988; Board of Trustees, South County Hospital; Member of The John F. Fogarty Foundation for the Mentally Retarded; Executive Board of the Narragansett Council for the Boy Scouts of America; chairman of the Rhode Island Housing & Mortgage Finance 1995; Solicitor of the towns of Coventry, West Greenwich, Hopkinton, Barrington, Bristol of South Kingstown; Town Moderator of Richmond; member and past chairman of the Board of Bar Examiners; Delegate to the Rhode Island Constitutional Convention 1986. - Articles: Lincolniana Journal of the Abraham Lincoln Association, Annually;

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			Afterword *Lincoln on Democracy*, November, 1990.
Maureen McKenna Goldberg	1997	N/A	- Biographical information: J.D. Suffolk University Law School 1978; B.A. Providence College 1973; Assistant Attorney General for the state of Rhode Island 1978-1984 (Criminal Division); private legal practice 1984-1990; Town Solicitor of South Kingston 1984-1986; Town Solicitor of Westerly 1986-1990; Associate Justice for R.I. Superior Court 1990-1997. - Professional/Political affiliations: Member of the American Bar Association; Rhode Island Bar Association; Pawtucket Bar Association, and the National Association of Women Judges.
Francis X. Flaherty	2003	N/A	- Biographical information: J.D. Suffolk University Law School 1975; B.A Providence College 1968; U.S. Army 1968-1970; member of the Warwick City Council 1978-1985; Boys and Girls Club 1981-1985; Mayor of the City of Warwick 1985-1990; chairman of the Rhode Island Interlocal Management Trust 1986-1989; President of the Rhode Island League Cities and Towns 1989-1990; private legal practice 1990-2003. - Professional/Political affiliations: Member of the Rhode Island Bar Association; American Bar Association; Association of Trial Lawyers of America; School Board Member of the Bishop Hendrickson School Board 1990-present; Special Olympics 1991-present; Big Brothers of Rhode Island 1986-present.
Paul A. Suttell	2003	N/A	- Biographical information: J.D. Suffolk University Law School 1976; B.A. Northwestern University 1971; private legal practice 1976-1990; State Representative,

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			Deputy Minority Leader 1983-1990; Delegate to the Republican National Convention 1988; Rhode Island Family Court Judge 1990-2003. - Professional/Political affiliations: member and past president of the Sakonnet Preservation Association; Director of the Friends of Sakonnet Lighthouse; Deacon of Little Compton Congregational Church; National Council of Juvenile and Family Court Judges; American Bar Association; Rhode Island Bar Association; past Director of the Rhode Island Agricultural Lands Preservation Commission; past Director of the Stopover Services of Newport County; Past Director of Newport County Convention and Visitors Bureau.
William P. Robinson III	2004	N/A	- Biographical information: J.D. Boston College Law School 1975; Ph.D. University of Connecticut (French and Spanish literature) 1971; M.A. University of Rhode Island 1966; B.A. University of Louvain, Belgium 1962; Clerk in 1st U.S. Circuit Court of Appeal 1975-1977; National Delegate, Boston College Law Alumni 1986-1988; Edwards & Angell, Attorney at Law 1977-2004. - Professional/Political affiliations: Volunteer Speaker, Jesuit Volunteers International; Elected member of the East Greenwich, Rhode Island School Committee (Vice Chairman, 1990-present); Travelers Aid Society of Rhode Island 1987-1989; member of the East Greenwich, Rhode Island Democratic Town Committee; Member of the Rhode Island Association of School Committees; Chair, Legal Subcommittee, East Greenwich School Committee; member of the Rhode Island Bar Association; member of the Libel

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			Defense Resource Center; Rhode Island Board of Governors for Higher Education. - Articles: Tort Liability of Landowners Annual Review of Massachusetts Law Boston College Law Review, Vol. 20, 1973; Testimonial Privilege Syracuse Law Review, Vol. 25, 1974; The Nihilism of La Rochefoucauld, University Microfilms, Ann Arbor, Michigan, 1971.

CONCLUSION

Rhode Island's legislature has done as much as any state in the country to try to protect innocent human life. Its Supreme Court has for the most part avoided any direct role in adjudicating claims for rights to "privacy" or "substantive due process" that would suggest how it might respond to claims under Rhode Island law that would override post-*Roe* protection of life. In addition, because the members of the Court have assumed their positions in the relatively recent past, and have stated with some conviction a commitment to judicial restraint, there is reason to be optimistic that the Court would be unlikely to overturn well-crafted legislation to protect life.

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