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Privacy: Drug Use Reporting Requirements Unconstitutional

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PRIVACY: DRUG USE REPORTING REQUIREMENTS UNCONSTITUTIONAL —*Roe v. Ingraham*, 403 F. Supp. 931 (S.D.N.Y. 1975) *prob. juris. noted sub nom., Whalen v. Roe*, 44 U.S.L.W. 3471 (U.S. Feb. 24, 1976).

In *Roe v. Ingraham*,[1] the United States District Court for the Southern District of New York held that sections of the New York Public Health Law[2] requiring reporting of names and addresses of persons receiving prescriptions for specific drugs to a central data bank were unconstitutional in that they intruded upon and interferred with the constitutional right of privacy inherent in the doctor-patient relationship. The decision extends the constitutional right of privacy beyond the range thus far established by the United States Supreme Court and appears to protect a different kind of privacy from that which the Court has found protected under the Constitution.[3] While the Court has protected a right of privacy in a line of cases beginning with *Griswold v. Connecticut*,[4] this kind of privacy, perhaps better termed "personal autonomy," can be distinguished from the right of privacy protected in the instant case, which might better be termed "the right of selective disclosure."[5]

I. THE INGRAHAM DECISION

The New York Public Health Law[6] classifies drugs into five

1. 403 F. Supp. 931 (S.D.N.Y. 1975), *prob. juris. noted sub nom.*, Whalen v. Roe, 44 U.S.L.W. 3471 (U.S. Feb. 24, 1976). The plaintiffs have appealed under 28 U.S.C. § 1253: Direct appeals from decisions of three-judge courts.

2. N.Y. PUB. HEALTH §§ 3330, 3331(6), 3332(2)(a), 3334(4) (McKinney 1971).

3. The United States Constitution contains no express reference to the right to privacy, but the Court has inferred its existence from several amendments to the Constitution, including the first, fourth, fifth, and ninth amendments; the *penumbras* of the Bill of Rights; and the liberty guaranteed by the fourteenth amendment. Griswold v. Connecticut, 381 U.S. 479 (1965). Precisely where authority for the right of privacy lies is not, however, significant to this discussion.

4. 381 U.S. 479 (1965).

5. Elisabeth L. Beardsley's article *Privacy: Autonomy and Selective Disclosure*, in PRIVACY 56 (J. Pennock & J. Chapman ed. 1971), [hereinafter referred to as Beardsley], develops the clarifying terminology. The writer of Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973), terms selective disclosure "privacy in the strong sense." Selective disclosure is the "privacy" right Alan F. Westin defines as "the claim of individuals, groups, or institutions to determine . . . when, how, and to what extent information about them is to be communicated to others." A. WESTIN, PRIVACY & FREEDOM 7 (1967).

6. The state has the power to regulate the health of its populace. "The enactment and enforcement of health measures find ample support in the police power which is inherent in the state." 39 AM. JUR. *Health* § 1 (1968). "It is elemental that a state has broad powers to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police powers." Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954).

schedules. Schedule II drugs are useful in pain relief and behavior modification, but have a high potential for abuse.[7] The state is to furnish Schedule II prescription forms to physicians. Among other data, the numbered forms require reporting of the name and address of the patient. The professional filling the prescription, whether physician or pharmacist, is to mail a copy of the form to a computer center of the State Bureau of Controlled Substances, Licensing and Evaluation. The state's interest in the reporting requirement is the prohibition of over-prescribing and overbuying, forgeries, and counterfeit prescriptions, with consequent diversion of Schedule II drugs to illegal uses.[8] In twenty months of operation, only two names were discovered that merited investigation; one was cleared, the other was still being investigated at the time of the trial of this case.[9]

When the plaintiffs[10] first sought relief from the reporting requirements, the complaint was dismissed for want of a substantial federal question.[11] The Second Circuit Court of Appeals reversed with instructions to the district court judge to request convening of a three-judge court.[12] After denial of motions for a preliminary injunction and for dismissal,[13] a three-judge court heard the case.

At trial, plaintiffs expressed fears they would be stigmatized by having their names in a drug-related computer file. Some testified they had sought alternative treatment or sources of supply to avoid having their names recorded as having received Schedule II drugs.[14] Although the court declined to deal with the issue, there appeared

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7. *E.g.*, ritalin, codeine, Percodan, morphine, Hycodan. 403 F. Supp. at 933.
8. *Id.* at 934.
9. *Id.*
10. Plaintiffs were:

> three infants receiving prescriptions for medications listed under Schedule II, two physicians who prescribe drugs listed under that schedule, and the Empire State Physicians Guild, Inc. A post-operative cancer patient who receives Hycodan and Percodan, both Schedule II drugs, and a woman suffering from migraine who receives Demerol, a physician who prescribes for one of these patients, and the American Federation of Physicians and Dentists were permitted to intervene as plaintiffs and also to file a separate complaint. 480 F.2d 102, 104 (1973).

The physicians claimed infringement of their right to prescribe treatment solely on the basis of medical considerations. 480 F.2d 102, 104 (1973). They were asserting not merely the rights of their patients, but an independent violation of protected constitutional rights. The doctors were granted standing to sue in line with Doe v. Bolton, 410 U.S. 179 (1973). The Physicians Guild's claims were taken to be repetitive of the doctors' and standing to sue on behalf of its members was granted. 364 F. Supp. at 540 n.6 (S.D.N.Y. 1973). This grant of standing is consistent with present Supreme Court standards. *See*, Planned Parenthood v. Danforth, 44 U.S.L.W. 5197, 5200 (U.S. July 1, 1976).

11. 357 F. Supp. 1217 (S.D.N.Y. 1973).
12. 480 F. 2d 102 (2d Cir. 1973).
13. 364 F. Supp. 536 (S.D.N.Y. 1973).
14. 403 F. Supp. at 934-35.

to be a basis for fears that the computer records might not remain confidential.[15]

The district court held that the doctor-patient relationship is one of the zones of privacy accorded constitutional protection.[16] Noting that the right of privacy is limited by compelling state interests, the court held that the regulatory scheme had a needlessly broad sweep and that the state did not have a compelling interest[17] in learning the names and addresses of those who had received Schedule II drugs.[18] The district court found reporting of names and addresses for computerization and instant retrieval entirely different from old regulations[19] that had allowed inspection of pharmacists' shop records and rejected the state's argument that the new regulations did no more than the old.[20] The court held that the intrusion was "not only more immediate, its impact is greater."[21]

II. ANALYSIS

A. *The Content of the Constitutional Right of Privacy*

The cases cited by the court in *Roe v. Ingraham* as establishing a constitutional right of personal privacy or a "guarantee of certain areas or zones of privacy"[22] define a particular kind of right which some authorities have referred to as a right of "personal autonomy." This right, perhaps unfortunately termed "privacy" by the Supreme Court, can be distinguished from the right to restrict what one reveals of his personal affairs, which is best termed the "right of

15. The matter of privacy within the data bank, best referred to as "record confidentiality" is unrelated to the constitutional right of privacy, but is protected by the privacy tort of public disclosure of private facts. For a useful article on record confidentiality in a medical treatment context, *see*, Boyer, *Computerized Medical Records and the Right to Privacy: The Emerging Federal Response*, 25 BUFFALO L. REV. 37 (1975).

16. 403 F. Supp. at 936.

17. For a state to interfere with a right deemed to be "fundamental," such as the constitutional right of privacy, the traditional test has been to determine whether there was a "compelling state interest" in limiting the right. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154-63 (1973); and Stanley v. Georgia, 394 U.S. 557, 568 n. 11 (1969).

18. 403 F. Supp. at 937.

19. The plaintiffs conceded their rights were not violated by former Public Health Law § 3301(32) (McKinney 1971) requiring prescriptions for narcotic drugs to bear the full name and address of the patient, and the name, address, registration number and signature of the physician; or by former Public Health Law § 3322(1)(c) requiring pharmacists to retain copies of prescriptions for two years; or by former Public Health Law §§ 3322(1)(c) and 3334(1) allowing inspection of the prescriptions by state and federal law enforcement authorities as well as by the Department of Health.

20. 403 F. Supp. at 938.

21. *Id.*

22. *Id.* at 935. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

selective disclosure." In each of the principal cases cited by the district court as establishing a constitutional right of privacy, there had been a governmental attempt to regulate personal activities, not an attempt to get acquainted with them.[23] In each, the Court dealt with whether the state could regulate the activity, not whether the state was entitled to be advised that it was occurring.

This line of privacy cases beginning with *Griswold*, then, protects a right to do what one wishes in some kinds of circumstances without unwarranted prohibition by the state. But, the Court has yet to protect "privacy in the strong sense"; *i.e.*, to establish any right and set any limits to selective disclosure of personal information to the state. *Ingraham* refers to concurring and dissenting opinions in *California Bankers Ass'n. v. Shultz*[24] as supporting a right of privacy in the sense of selective disclosure, but Justice Rehnquist's plurality opinion does not lend support to this right, and defers judgment to other branches of government on collection of data when a tenable law enforcement justification can be made.[25] The reporting statute was upheld in *California Bankers Ass'n.*; thus, no precedential limit was established by the Court as to the state's right to collect data.

Although the plaintiffs in *Ingraham* testified that they had altered their intended behavior as a result of the law, they had altered it not because of any statutory prohibition (for there is no such prohibition on prescribing or receiving Schedule II drugs), but be-

23. *See*, Doe v. Bolton, 410 U.S. 179 (1973) (having an abortion); Roe v. Wade, 410 U.S. 113 (1973) (advising and accepting an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (receiving a contraceptive device by an unmarried person); Stanley v. Georgia, 394 U.S. 557 (1969)(viewing obscenity in the solitude of one's home); Loving v. Virginia, 388 U.S. 1 (1967)(marrying one of a different race); Griswold v. Connecticut, 381 U.S. 479 (1965) (prescribing and receiving a contraceptive device).

24. 416 U.S. 21 (1974).

25. While Justice Douglas in dissent makes a constitutional right of privacy argument against the regulations, Justices Powell and Blackmun, concurring with the majority, say only that "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon those areas would implicate legitimate expectations of privacy." 416 U.S. at 78-9. The majority opinion in *California Bankers Ass'n.* treats the case strictly as a fourth amendment (search and seizure) and fifth amendment (self-incrimination) case and does not base its decision on the constitutional right of privacy. Fourth amendment search and seizure cases involving government eavesdropping, *e.g.*, Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967), clearly concern a different protection from the right protected as the constitutional right of privacy. Had *Ingraham* arisen with a fact situation involving a prescription user accused of a crime where the prosecution sought to introduce the prescription form into evidence, it would have been a much different case.

For further guidance on problems involving a conflict between the constitutional right of privacy and the fifth amendment protection against self-incrimination, *see*, Annot., 43 L.Ed. 2d 871, 893 (1976).

cause of requirements which merely report permitted behavior. It does not appear that a majority of the Court has ever protected the right of selective disclosure as an aspect of the constitutional right of privacy. If the Supreme Court upholds the rule of this case, then the constitutional right of privacy will be greatly expanded, extending beyond protection of autonomy to protection of refusal to reveal information about oneself even when the information does not concern prohibited behavior.[26]

Two rights described as "privacy" in constitutional law have been discussed so far: the right of personal autonomy and the right of selective disclosure.[27] There is a third kind of right or rights which is the collection of causes of action in tort that goes by the name of "privacy," including the rights to be free from intrusion by others, public disclosure of private facts, placement in a false light, and commercial exploitation.[28] Perhaps the court would have been well advised to treat the matter as a tort case and deal frankly with the plaintiffs' expressed fears of public disclosure of the reported facts. The injury would lie in the fact that many members of the public would find the taking of behavior-modifying drugs immoral, even though the use of such drugs was not illegal.[29] Perhaps issuance of an order to the state to either operate its data bank so that it is perfectly secure or cease collection of data until such security is established would have been a proper and adequate remedy to deal with the plaintiffs' fears.[30]

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26. A similar case makes the same extension at the district court level. Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973), found a drug abuse questionaire for public school students to be a violation of the constitutional right of privacy inherent in a family situation.

27. Beardsley, *supra* note 4, at 65 argues that the right of selective disclosure is but another aspect of the right of personal autonomy: that one has the right to determine what she will disclose just as one has the right to determine whether she will have an abortion. But, in the context of this case, it seems more correct to view the two rights as being on different levels. The right to do an act is on a different level from the right not to reveal that the act has been done. *Ingraham* is concerned with communication about the commission of acts. That is fundamentally different from communication of personal beliefs. The relationship between autonomy and selective disclosure may be less distinguishable in the arena of what one believes, but that is not pertinent to this discussion. *See*, Law Students Research Council v. Wadmond, 401 U.S. 154 (1971).

28. *See*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 802-18 (4th ed. 1971).

29. Too, as the court of appeals noted, "most people simply do not want their ailments generally known." Roe v. Ingraham, 480 F.2d 102, 108 n.7 (1973).

30. In Menard v. Mitchell, 328 F. Supp. 718 (D.C. 1971), the FBI was enjoined from public dissemination of fingerprint and arrest records, but was allowed to keep them in its files for use in law enforcement. For discussion of *Menard* read as a privacy case, *see* Note, *Constitutional Law-Maintenance & Dissemination of Records of Arrest versus the Right to Privacy*, 17 WAYNE L. REV. 995 (1971).

B. *The Zone of Privacy to be Protected*

Roe v. Wade[31] was read as holding implicitly and *Doe v. Bolton*[32] as holding explicitly that the doctor-patient relationship is one of the zones of privacy accorded constitutional protection.[33] The *Ingraham* court cited Justice Douglas' concurring opinion in *Roe* as support.[34] However, Justice Blackmun, writing for the Court in *Roe*, did not need to find a doctor-patient relationship as the zone of privacy protected, for he said "this right of privacy . . . is broad enough to encompass *a woman's decision* whether or not to terminate her pregnancy."[35] The woman's own body seems the more likely zone for the right in *Roe* than the doctor-patient relationship.[36]

Alan F. Westin[37] explains four states of privacy: solitude, intimacy, anonymity, and reservation of information about oneself.[38] Tort law protects all of these. The right to freedom from intrusion protects solitude, intimacy, and reservation of information about oneself. The rights to freedom from public disclosure of private facts and commercial exploitation especially protect anonymity; *i.e.*, the right to choose to be nothing but a face in the crowd.

The constitutional right of privacy explained in *Griswold* and *Roe* seems to be applied to protect solitude and intimacy; that is, to protect one's autonomy to do what he wishes in solitude or in an intimate relationship with another without undue intrusion and interference by the state. In *Stanley v. Georgia*[39] the right protected was one strictly of solitude. It is questionable whether even *Griswold*

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31. 410 U.S. 113 (1973).

32. 410 U.S. 179 (1973).

33. 403 F. Supp. at 936.

34. *Id.*

35. 410 U.S. at 153 (emphasis added).

36. While the woman's own body seems the more logical zone, the Court has not yet made that clear. The latest decision on abortion and the right of privacy, Planned Parenthood v. Danforth, 44 U.S.L.W. 5197 (U.S. July 1, 1976), continues to mention the doctor-patient relationship: "It is true that *Doe* and *Roe* clearly establish that the state may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy." 44 U.S.L.W. at 5201. However, in reference to the role of a woman's spouse in the decision to terminate pregnancy, the Court declares that "The woman is the one primarily concerned . . . ." 44 U.S.L.W. at 5201. It seems clear, too, that the woman is the key person in the joint decision by her doctor and her with respect to abortion, for he is employed to carry out her decision. The Second Circuit Court of Appeals read Doe v. Bolton as "recognizing a pregnant woman's constitutional right to make the abortion decision on the basis of *advice* from her own physician." Roe v. Ingraham 480 F. 2d 102, 107 (1973) (emphasis added).

37. Westin, *Science, Privacy & Freedom: Issues & Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1020-22 (1966).

38. Solitude differs from intimacy in that solitude is the privacy that inheres in one's person while intimacy is the privacy that inheres in a relationship with another person. *Id.* at 1020-26.

39. 394 U.S. 557 (1969).

involved, at its heart, an intimate relationship, rather than the right of the individual to be free from unwanted governmental intrusion.[40] Since the constitutional right of privacy does not require an intimate relationship, for solitude is also worthy of protection, all the *Ingraham* court needed to consider was the solitude of the patient in filling the prescription.

The law in question requires reporting by one filling the patient's prescription. The patient's privacy is not intruded upon until he chooses to fill the prescription, for the law does not become operative until that time.[41] The doctor-patient relationship, a relationship of intimacy which the *Ingraham* court holds to be the protected zone of privacy, is simply not necessary to either constitutional protection of the patient's own privacy or to the *Ingraham* holding that the patient's right of privacy had been violated.

C. *The Test to be Applied, If Any*

Were it true, as the *Ingraham* court believed, that a constitutional right of privacy in the sense of selective disclosure was protected in *California Bankers Ass'n.*, then it would appear that the court applied too strict a test to the Public Health Law. The law was struck down because the state failed to show a compelling interest in gathering name and address data.[42] The *California Bankers Ass'n.* plurality opinion would accept data collection laws when a tenable law enforcement justification can be made.[43] Perhaps the

40. It appears the Court in *Griswold* may have intended "intimacy" to include both solitude and a relationship with another person. The confusion is clarified in *Eisenstadt*:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (emphasis in original) (Brennan, J., for the Court in *Eisenstadt*). 405 U.S. at 453.

41. Stretching the point, if one considers the use of a stolen prescription form, there is no need for a doctor-patient relationship at all for the solitude of the person giving the form to a pharmacist to be compromised by the law. Even one caught by the computer in this situation would seem to obtain little fourth amendment assistance from *California Bankers Ass'n.*

42. 403 F. Supp. at 938.

43. The stated purpose of the Bank Secrecy Act of 1970's transaction reporting requirement is to obtain information having a "high degree of usefulness in criminal, tax or regulatory investigations or proceedings." 12 U.S.C. § 1829 b (a)(2); 31 U.S.C. § 1051 (1970). The Court said:

> The [reporting] regulations are sufficiently tailored so as to single out transactions found to have the greatest potential for such circumvention and which involve substantial amounts of money. They are therefore reasonable in light of that statutory purpose and consistent with the Fourth Amendment. 416 U.S. at 63.

limited success of the New York program does show a lack of compelling interest, but it is questionable whether the legislature's law-enforcement justification is unreasonable. If *California Bankers Ass'n.* is the precedent for protection of this sense of privacy, "compelling state interest" demands too much of the state. And, if *California Bankers Ass'n.* can be read as establishing selective disclosure as a protected right, it does so with a lesser standard than that for protecting autonomy.

D. *A Difference in Mechanics, Not Rights*

In requiring reporting of data for computerization, the state argued unsuccessfully that it was doing no more than it had under an old law[44] that required pharmacists to maintain name and address information at their stores for inspection by state agents. The *Ingraham* court found a distinction in that "the intrusion here is not only more immediate, its impact is greater."[45] This is a distinction without a legal difference. Under the old law, disclosure was still required; it just cost the state more to collect the data. The legal relationship between the state and the patient's privacy was no different; only the mechanics of collection were different. Once the state can compel access to the data, it makes no difference to the patient's privacy how the state collects and deals with the data, so long as the information is not disclosed to persons outside the Bureau.

III. Impact of the Latest Supreme Court Privacy Case

Planned Parenthood v. Danforth[46] would seem to severely weaken the precedential value of *Ingraham*. *Planned Parenthood* involved a challenge to the constitutionality of the Missouri abortion statute.[47] Two physicians and the Planned Parenthood of Central Missouri organization brought the suit. The recordkeeping and reporting statute sections upheld as constitutional[48] require hospitals and doctors to keep confidential abortion records on state-supplied forms which may be inspected by public health officers. The stated purpose and function of the requirements are:

Even allowing an interpretation of the case as based on the constitutional right of privacy, the Court used the lesser test of "reasonableness" rather than of "compelling interest."

44. N.Y. Pub. Health §§ 3301(32), 3322(1)(c), 3334(1) (McKinney 1971).
45. 403 F. Supp at 938.
46. 44 U.S.L.W. 5197 (U.S. July 1, 1976).
47. Mo. Ann. Stat. §§ 188.010-.085 (Vernon Supp. 1974).
48. Mo. Ann. Stat. § 188.055 (Vernon Supp. 1974).

> the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.[49]

It is not clear from the statute whether the forms may ask the name of the patient or whether the form which the state supplied required the identity of the patient. However, one provision of the abortion law that the forms were intended to enforce is a requirement of written consent to abortion by the patient and her husband or parents.[50] It would be difficult to keep a record of such written consents without names.

The Court made reference to "privacy":

> Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible. This is surely so for the period after the first stage of pregnancy, for then the state may enact substantive as well as recordkeeping regulations that are reasonable means of protecting maternal health.[51]

It appears, though, that the Court was concerned with "privacy" not in the sense of selective disclosure, but in the sense of autonomy, for later the Court stated "we see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship."[52] The impact of the reporting regulations on the patient's right to decide to have an abortion seemed to be the major concern of the Court when it spoke of "privacy." However, even if *Planned Parenthood* is read to protect the right of selective disclosure, the test for the regulations is not *Ingraham's* "compelling state interest," but that they merely be "reasonably directed" to the legislative purpose.

IV. The Future of Selective Disclosure

Justice Douglas' majority opinion in *Griswold* specifically dec-

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49. *Id.*

50. Consent of the patient was held to be a reasonable requirement. Mo. Ann. Stat. § 188.020(3) (spousal consent), § 188.020(4)(parental consent for minors) were held to be unconstitutional interferences with the patient's constitutional right of privacy. The reporting requirements are also intended to aid in enforcement of other aspects of the abortion law, such as the requirement that abortions shall be performed only "[b]y a duly licensed, consenting physician in the exercise of his best clinical, medical judgment." Mo. Ann. Stat. § 188.020 (1).

51. 44 U.S.L.W. at 5205.

52. *Id.* at 5206.

lined a substantive due process approach to the case,[53] declaring that the Court is not a super-legislature. But, in the future, it might be more consistent if a case such as *Ingraham* were approached on a substantive due process basis rather than on a privacy argument.[54] One would argue that the right to control access to personal information is a substantive liberty protected by the due process clause of the fourteenth amendment.[55] In light of the fact that the appellant's argument in *Roe v. Wade* was partly based on substantive due process and the Court's opinion in part accepted that argument,[56] and in light of Justice Stewart's concurring opinion which finds that the rights the Court mentions under "privacy" are protected by the due process clause,[57] this might be a wise line of attack. Most recent support for a substantive due process attack appears in *Planned Parenthood* in which the Court showed no reluctance to act as a super-legislature and overrule the determination of the Missouri legislature that saline aminocentesis was unsafe and should be prohibited as a means of abortion.[58] Pursuing a substantive due process attack, the plaintiff would show lack of valid governmental purpose and relevant need for all the information requested by the state.

The holding in *Ingraham* is unwarranted. It is based on an incorrect understanding of precedent. By protecting "privacy" in the sense of selective disclosure, the decision is out of line with Supreme Court cases recognizing a constitutional right of "privacy" in the sense of personal autonomy. If the Supreme Court sustains the holding, then the constitutional right of privacy will be significantly expanded.[59]

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53. Justice Douglas specifically rejected Lochner v. New York, 198 U.S. 45 (1905), as the Court had in West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

54. Alternatively, one could approach the matter as a privacy case in tort, as suggested at p. 131, *supra*. That would not put the constitutional question squarely, but might provide adequate relief.

55. U.S. CONST. amend. XIV.

56. 410 U.S. at 164.

57. *Id.* at 167.

58. 44 U.S.L.W. at 5204-5.

59. If such is the case, then the constitutional right of privacy will be well on its way to becoming the same muddled collection of causes of action as are presently lumped together under the tort law of "privacy." A better course would be for the Court to abandon the "privacy" label altogether, and either utilize substantive due process in both autonomy and selective disclosure cases or use such distinct titles as autonomy and selective disclosure for the two distinct rights. It appeared for a time that the Court was on its way toward abandoning the "privacy" title. In Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), Justice Stewart's majority opinion cited most of the principal privacy cases as precedent, but did not use the word "privacy." The decision's basis was substantive due process. Privacy, however, with respect to the challenged reporting requirements, is the basis for decision in the latest case, *Planned Parenthood*.