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The Pennsylvania Abortion Case

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THE PENNSYLVANIA ABORTION CASE

Hon. Leon D. Lazer:

There have been a few comments made here that perhaps this was not as productive a Term of the Supreme Court as some other years. I am not sure about that. It certainly seems to me that there were some very significant cases in the area of the First Amendment, as well as in other areas. Certainly, the most sensational case of the Term was *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ the so-called "Pennsylvania Abortion Case."

We are fortunate in having today as one of our speakers a co-counsel on that case. Janet Benshoof is one of the leading American experts on reproductive rights and privacy law. She is the President of the Center for Reproductive Law and Policy which is dedicated to the defense of reproductive rights. As president, she has been involved, not only in this most recent Supreme Court case, but in challenges involving the abortion laws in Louisiana, *Sojourner v. Roemer*;² Utah, *Jane L. v. Bangerter*;³ and Guam, *Guam Society of Obstetricians & Gynecologists v. Ada*.⁴ She was director of the Reproductive Freedom Project of the American Civil Liberties Union for fifteen years, has appeared in a large number of cases, and has argued before the Supreme Court.⁵ She was a graduate of Harvard Law School, and graduated *summa cum laude* from the University of Minnesota. We are also very proud since she is married to one of our very distinguished professors in this law school, Professor Richard D. Klein.

It is my pleasure now to introduce Janet Benshoof.

1. 112 S. Ct. 2791 (1992).

2. 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom.* *Sojourner v. Edwards*, 974 F.2d 27 (5th Cir. 1992).

3. 794 F. Supp. 1528 (D. Utah 1992).

4. 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

5. *See* *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

Janet Benshoof:

Abortion politics creates an entire crisis of unpredictable ramifications in our political system. The same thing happens with the Supreme Court. Certainly, the abortion jurisprudence has turned Supreme Court constitutional law upside down on occasions and created very strange alliances on the Court as well.⁶ I was interested in listening to Judge Pratt talk about petitions for certiorari. He said, "The key to the Supreme Court is its discretionary jurisdiction. They take cases where they want to make an adjustment of some sort."⁷ That may be generally true, but I think that sentence implies that there is some sort of unity on the Court. In the case of abortion statutes, the Court has taken every single petition for certiorari involving a state statute that has come up to it in the last eighteen years, which is certainly an unprecedented record.⁸

6. See generally Christopher A. Craig, *Judicial Restraint and the Non-Decision in Webster v. Reproductive Health Services*, 13 HARV. J.L. & PUB. POL'Y 263, 274-75 (1990).

7. See Schwartz, *Section 1983 Litigation*, 9 TOURO L. REV. 177, 209.

8. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (upheld four provisions of Pennsylvania Abortion Control Act of 1982: (1) labeled "informed consent," requires that the attending or referring physician give the woman state-mandated information concerning abortion at least 24 hours before the procedure may be performed; (2) stipulates that if the woman seeking abortion is a minor, the physician must obtain the "informed consent" of both the woman and one of her parents unless a judicial bypass is obtained; (3) enumerates public disclosure reporting requirements; and (4) defines the medical emergency exception required to bypass the above provisions); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upheld state statutory provision requiring that no federal funds appropriated for family planning services be used "in programs where abortion is a method of family planning"); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upheld requirement that minor seeking an abortion notify both of her parents 48 hours prior to procedure, unless she declares herself a victim of parental abuse or neglect, or if a court allows abortion to take place without notice upon crediting minor with being "mature and capable of giving informed consent" or if it finds that proceeding without notice would be in best interest of woman); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (held unconstitutional ordinance requiring that: (1) all post first trimester abortions be performed in hospital; (2) prohibiting abortions performed on unmarried minors under age 15 without

It only takes four votes of the Court to take a case.⁹ In the area of abortion, there is such a strongly divided Court that every petition for certiorari, which does not rest on an individual petitioning on a private grievance, has been taken by the Court.¹⁰ In the fifteen years that I have been litigating abortion and birth control

parental consent or court order; (3) requiring physician inform patient of certain facts regarding her medical condition, options, and risks associated with pregnancy and procedure; (4) prohibiting physician to perform abortion until 24 hours after woman has given her "informed consent"; and (5) requiring fetal remains be disposed of in "humane and sanitary matter"; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (upheld Missouri statutory provisions requiring pathology report for each procedure and presence of second physician at post-viability procedures, and mandating that minors obtain either parental consent or consent from Juvenile Court, but struck down provision of statute which required that post first trimester abortions be performed in hospital); *Beal v. Doe*, 432 U.S. 438 (1977) (Title XIX of the Social Security Act does not require funding of non-therapeutic abortions in framework of Medical Assistance (Medicaid) program); *Sendak v. Arnold*, 429 U.S. 968 (1976) (struck down Indiana statute requiring that first trimester abortions be performed by physician in a hospital or equivalent licensed health facility); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (*Roe v. Wade* does not render null and void a Connecticut statutory provision prohibiting abortion by non-physicians); *United States v. Vuitch*, 402 U.S. 62 (1971) (District of Columbia statute placing burden on prosecution to prove that abortion was not "necessary for the preservation of life or health" was not unconstitutionally vague).

Editor's Note: Subsequent to the Symposium, the Supreme Court did deny certiorari on two abortion cases. *See Barnes v. Moore*, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

9. Act of 1925, 43 Stat. 936 (certiorari or discretionary review was created for the Supreme Court by the Evarts Act, 26 Stat. 826). The Supreme Court Rules are quite explicit in stating that "review on writ of certiorari is not a matter of right, but of judicial discretion." SUP. CT. R. 10. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." *Id.* Reasons for granting certiorari include: (1) decisional conflicts among federal appeals courts; (2) conflicts between the decisional law of a lower state court and a court of last resort; (3) conflicts between state court and Supreme Court decisional law; and (4) a state court decision addresses a federal question that should be decided by the Supreme Court. SUP. CT. R. 17.1(a)-(c).

10. *See supra* note 8.

cases before the United States Supreme Court, there has not been a case involving a statewide policy or law that has not been accepted either on appeal or by petition for certiorari.¹¹

Planned Parenthood of Southeastern Pennsylvania v. Casey requires some background explanation. I think one of the most important constitutional phenomenon of that case is why it was before the Court in the first place.

Casey did not involve a question of whether or not states can ban abortion; rather, it involved the constitutionality of some restrictions passed by the State of Pennsylvania on abortion practices in that state.¹² What is unique about this case is that these very same restrictions were heard by the Court in 1985, with the exception of mandatory spousal notice.¹³

In 1985, in *Thornburgh v. American College of Obstetricians & Gynecologists*,¹⁴ the United States Supreme Court, in a 5-4 decision, struck down the Pennsylvania restrictions.¹⁵ What is unique about that decision is that the person who argued that case, Kathryn Kolbert,¹⁶ who is the Vice-President of the Center, also argued the *Casey* case. Interestingly, these cases involved the same lawyer, the same clients, the same statute, and the same defendant coming to the Supreme Court seven years later. The only thing that had changed is that the *Thornburgh* decision was a 5-4 decision, with the four dissenting Justices declaring, quite

11. *Id.*

12. The relevant provisions of the Pennsylvania Abortion Control Act are provided at the end of this article [hereinafter APPENDIX].

13. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). The Court in *Thornburgh* considered the constitutionality of four provisions of the Pennsylvania Control Act of 1982: § 3205 "informed consent," § 3208 "printed information," § 3214(a) and (h) "reporting requirements," § 3211 (a) "viability determination" *Id.* at 758. The Court did not consider the 24-hour waiting period and physician-only counseling (§ 3205), public disclosure of reports (§ 3207(b) and 3214(f)) nor the parental consent provision (§ 3206). *Id.* at 758 n.9; *see also* APPENDIX.

14. 476 U.S. 747 (1985).

15. *See supra* note 13.

16. Vice President, Center for Reproductive Law and Policy; formerly State Coordinating Counsel for the American Civil Liberties Union Reproductive Freedom Project.

adamantly, that they would vote in varying ways, but they would all vote to overturn *Roe v. Wade*.¹⁷

What happened between 1985 and 1992 was that there were four more appointments to the Court, most notably, Justices Souter and Thomas.¹⁸ Everyone believed, and to an extent they were correct, that Justices Souter and Thomas would change the balance on the Court.¹⁹ More specifically, as a result, the restrictions and standards of constitutional review that were applied in 1985 would not be applied in 1992.²⁰ Hence, what we had before the Court was not just an ordinary constitutional case, although none of them were really ordinary because they

17. Justice White, joined by then Justice Rehnquist, stated, "I was in dissent in *Roe v. Wade* and am in dissent today . . . I would return the issue to the people by overruling *Roe v. Wade*." *Thornburgh*, 476 U.S. at 786, 797 (White, J., dissenting). Justice Burger stated, "I agree we should reexamine *Roe*." *Id.* at 785 (Burger, J., dissenting); Justice O'Connor, joined by Justice Rehnquist, reaffirmed her views expressed in her dissent in *Akron*, 462 U.S. at 459-66, where she stated that "The fallacy inherent in the *Roe* framework is apparent . . ." *Id.* at 460.

18. Justices Scalia and Kennedy were appointed in 1986 and 1987, respectively, by President Ronald Reagan with the retirement of Justices Burger and Powell; Justices Souter and Thomas were appointed in 1990 and 1991, respectively, by President George Bush with the retirement of Justices Brennan and Marshall. See 2 ALMANAC OF THE FEDERAL JUDICIARY (Stephen Nelson et. al. eds., 1991).

19. See generally Marcia Coyle and Mariane Lavelle, *Clarence Thomas Isn't as Inscrutable as David H. Souter Was Last Year*, NAT'L L.J., July 15, 1991, at 1, col. 4 ("Since neither man has faced head on, as judge or justice, constitutional challenges to the right to choose abortion . . . [Souter or Thomas] may be more important together than alone."); Marcia Coyle, *They Hew to Scriptum with Some Ad-Libbing*, NAT'L L.J., Sept. 23, 1991, at 8, col. 1 (many believed that Justice Thomas' belief in the theory of natural law could be used as a justification for outlawing abortion); Donna Halvorsen, *With Roe Under Fire, Abortion Polarizes Voters*, STAR TRIB., Oct. 11, 1992, at 23A; David G. Savage, *How a Dramatic Change of Heart by a Supreme Court Justice Affirmed the Right to Abortion*, L.A. TIMES, Dec. 13, 1992, at A1, col. 1; William Schneider, *Abortion Still an RNC Problem*, CNN NEWS, Aug. 18, 1992, at Transcript # 7-12; Mark Sherman, *Election '92 U.S. Senate Fowler's Vote on Hill*, ATL. J. & CONST., Oct. 28, 1992, at C5.

20. See Rachel L. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 429 (1992).

governed the kind of constitutional democracy that we have. This is especially true in the reproductive privacy area, dealing with state control over a person's intimate decisions.²¹ What we had, therefore, was a crisis regarding whether or not a Court, which some people believe had Justices picked on this very issue,²² would turn around and reverse a precedent that upheld, declared, and enumerated a fundamental liberty. If *Roe* were to be overturned in 1992, as many people predicted in the *Casey* case,²³ then it would have been the first time in the history of the Court that a personal liberty right would have been reversed. The issue before the Court was not really the Pennsylvania restrictions because they had previously been stricken.²⁴ Rather, the issue concerned whether *Roe* would fall or be upheld by this newly reconstituted Court.

The *Roe v. Wade*²⁵ decision was the 1973 decision in which the Supreme Court declared that the right to choose abortion, like the right to make decisions about birth control,²⁶ was part of a liberty or privacy right protected by the Fourteenth Amendment²⁷

21. See generally Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625 (1991).

22. See *supra* note 19.

23. See *Three Sides in Abortion Argument Urge Re-Examination of Roe v. Wade*, 60 U.S.L.W. 1165 (Apr. 28, 1992); Henry J. Reske, *Is This the End of Roe?*, 78 A.B.A. J. 64 (1992).

24. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

25. 410 U.S. 113 (1973) (landmark case in which Supreme Court held unconstitutional Texas statute which criminalized all abortions except those necessary to save the mother's life).

26. See *Griswold v. Connecticut*, 381 U.S. 479 (1964) (right of marital privacy, found within Bill of Rights, includes right of married couples to use contraceptives); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives is same for unmarried persons as for married persons).

27. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* The United States Supreme Court has interpreted this protected liberty interest as follows: "Only where state regulation imposes an undue burden on a woman's decision to make this

from government intrusion.²⁸ The vote in this case was 7-2. What is important to realize is that the *Roe* case, although it was an abortion case, established that reproductive privacy extends much further than abortion.²⁹ The rights declared under *Roe* have been cited over 2,500 times by various judges and various opinions in this country. *Roe* has been used as a precedent for medical integrity in the right-to-die cases.³⁰ It has also been used by judges who have prevented parents from forcing an abortion on children or on teenagers who are sixteen or seventeen years old.³¹ Therefore, it has been used to protect individual liberties both in the right to have an abortion and the right not to have one, as well as in other contexts.

The one primary criticism of *Roe* is that it does not state where in the Constitution is the right to choose an abortion.³² However, I would not quite frame it that way. I do not think there is any right to choose abortion. Rather, I think the Fourteenth

decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 112 S. Ct. at 2819.

28. See *Roe v. Wade*, 410 U.S. 113, 168 (1973). The Supreme Court ruled that a fetus is not a "person" entitled to Fourteenth Amendment protection. *Id.* at 158. However, the Court found that the state's interest in protecting the potential life of the fetus becomes compelling enough to regulate at viability. *Id.* at 160.

29. *Id.* at 168 n.2 (citing *Katz v. United States*, 389 U.S. 347, 350 (1967)).

30. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (the Court assumed, but did not decide, that an individual's decision to refuse life-sustaining medical treatment implicates a constitutional liberty interest); *Doyle v. Syracuse Veterans Admin. Medical Ctr.*, 729 F. Supp. 231 (N.D.N.Y. 1990) (relying on principle in *Roe*, that individual has right to control his or her own body subject to certain governmental interests, Court held that patient's constitutional right to refuse life-sustaining treatment outweighed government's interest in protecting life); *Gray v. Romeo*, 697 F. Supp. 580, 585 (D.R.I. 1988) ("A person has the right, subject to important state interest, to control fundamental medical decisions that affect his or her own body . . .").

31. See, e.g., *In re Cindy Lou Smith*, 295 A.2d 238 (Md. App. 1972) (pregnant underaged female placed in custody of her mother did not have to submit herself to procedures which might lead to abortion).

32. See *Roe*, 410 U.S. at 152.

Amendment, and certainly the Liberty Clause³³ in the Fourteenth Amendment, contain very strong protections against government control. More specifically, the *Roe* decision stood more for what the government cannot do to an individual rather than what individuals have certain rights to do.³⁴

One aspect of this which is worth examining, but is probably a different discussion, is what happens with enforcement if there is the ability for states to criminalize abortion.³⁵ In order to enforce a law criminalizing abortion, you have to particularize a certain regime where the government would be allowed to engage in an examination of the bedroom, which was the basis, I believe, of the Court's upholding the right for married persons to use contraceptives in the *Griswold v. Connecticut*³⁶ decision. Some of the Justices were quite appalled at the fact that we would have to enforce anti-contraceptive laws in very intrusive ways.³⁷ Therefore, to look at how you would enforce a particular prohibition that strikes at such private behavior, I would submit, is part of an evaluation of substantive due process.

In the *Casey* decision, the Court did reverse itself and upheld four out of the five Pennsylvania restrictions that were before it,

33. See *supra* note 27; see also *Casey*, 112 S. Ct. at 2819.

34. See *Roe*, 410 U.S. at 153-54.

35. See, e.g., *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992); *Barnes v. Moore*, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992); *Sojourner v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom. Sojourner v. Edwards*, 974 F.2d 27 (5th Cir. 1992) (Fifth Circuit Court of Appeals struck down Louisiana's law that banned abortions, except in some cases of rape and incest or when required to save the woman's life).

36. 381 U.S. 479 (1965) (right of marital privacy, found within Bill of Rights, includes right of married couples to use contraceptives).

37. *Id.* at 485-86. The Court stated: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* Furthermore, in his concurring opinion, Justice Goldberg could not believe that the Constitution would not protect the fundamental right of marital privacy. *Id.* at 495 (Goldberg, J., concurring).

directly overturning two precedents, the *Akron*³⁸ case involving abortion restrictions in 1983 and the *Thornburgh*³⁹ decision in 1986. The one provision which the Supreme Court struck down in *Casey* was mandatory spousal notice.⁴⁰ They found that this kind of requirement imposed on each and every woman seeking an abortion, with a few exceptions, was an undue burden.⁴¹ Justice O'Connor and Justice Souter found that such a requirement, when imposed by criminal sanctions, was demeaning for women because over ninety-five percent of all women do inform and discuss with their husbands the decision of whether or not to have an abortion.⁴² Justice O'Connor's feelings about this relate back to her decision in an earlier case in 1990, *Hodgson v. Minnesota*.⁴³ *Hodgson* was a case which I argued and

38. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983). The Court held the following provisions of the Ohio abortion statute unconstitutional: 1) requirement that all abortions performed after the first trimester of pregnancy be performed in a hospital; 2) parental consent for minors; 3) informed consent; 4) a 24-hour waiting period after woman signs consent form; and 5) disposal of fetal remains in "humane and sanitary manner." *Id.* at 422-24.

39. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). The Court reaffirmed *Roe v. Wade* and struck down the following Pennsylvania statute requiring that a woman who is seeking an abortion be told: 1) the name of the physician who will perform the abortion; *id.* at 2181-82; 2) the "particular medical risks" of the abortion procedure and of carrying the child to term; *id.* at 2182-84; 3) the possibility of "detrimental physical and psychological effects" of abortion; *id.* at 2178-81; 4) that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care; *id.*; 5) that the father is liable for child support; and 6) that printed materials are available from the state that describes the fetus and list agencies that offer alternatives to abortion. *Id.*

40. *Casey*, 112 S. Ct. at 2830; see Abortion Control Act of 1982, 18 PA. CONS. STAT. § 3209 (1990) (See APPENDIX).

41. *Casey*, 112 S. Ct. at 2830.

42. *Id.* at 2829. See also Brief for Respondents at 20, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). "Section 3209 affects few women. Only 20% of women who obtain abortions are unmarried . . . 95% [of married women] notify their husband[s] . . . The most common reasons for nondisclosure are the husband's illness, the failure of the marriage, or the husband's opposition to abortion." *Id.*

43. 497 U.S. 417 (1990).

for which Justice O'Connor provided the winning vote.⁴⁴ The decision struck down mandatory parental notification for minors involving two biological parents, regardless of whether they were the custodial or non-custodial parent, regardless of whether the parents were divorced or separated, and regardless of whether the parent had ever seen the child.⁴⁵

In *Hodgson*, Justice O'Connor seemed to identify with, not the teenager who was pregnant and seeking an abortion, but rather, the divorced mother raising the teenager.⁴⁶ Perhaps the mother had been in a physically abusive relationship and had to seek out an ex-husband; the mother's only recourse was to go into court and disclose this behavior, possibly provoking real disunity in the family that she was trying to raise.⁴⁷ Justice O'Connor found that the imposition of notice⁴⁸ on single mothers, mothers trying to raise children in a dysfunctional family, or a battering situation, was a burden upon the mother.⁴⁹ This issue was brought forward again under Pennsylvania law, where Justice O'Connor managed to gather another vote⁵⁰ besides her own, to strike down and hold

44. The *Hodgson* decision was the first time Justice O'Connor voted to strike down a state restriction on abortion. See *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 522 (1989) (O'Connor, J., concurring in part and concurring in the judgment); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting); *Diamond v. Charles*, 476 U.S. 54, 71 (1986) (O'Connor, J., concurring in part and concurring in judgment); *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (O'Connor, J., concurring in part and concurring in the judgment); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in the judgment in part and dissenting in part); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

45. *Hodgson*, 497 U.S. at 450; see also MINN. STAT. ANN. § 144.343 (2), (3) (West Supp. 1990).

46. See generally *Hodgson*, 497 U.S. 458, 461 (O'Connor J., concurring).

47. *Id.* at 2938, 2950.

48. MINN. STAT. ANN. § 144.346(2) (West Supp. 1990).

49. See *Hodgson*, 497 U.S. at 460. (Justice O'Connor agreed with majority that Minnesota offered no legitimate justification for imposition of two-parent notification).

50. *Casey*, 112 S. Ct. at 2803 (Justice Kennedy, who did not agree with Justice O'Connor's concurring opinions in *Hodgson*, joined her in *Casey*).

unconstitutional the mandatory spousal notice provision that was not part of the 1985 law. The result of this is that all over the country those states which passed such laws will be presumably unconstitutional, such as in Utah.⁵¹

The Court upheld four restrictions in the Pennsylvania case.⁵² The cumulative effect is unduly burdensome on women and on the providers who will have to operate under them when and if they go into effect. The first provision involves the physician-only counseling provision.⁵³ This provision requires that a woman who seeks an abortion in a hospital or with her doctor must have all her counseling enumerated by the doctor.⁵⁴

The physician-only provision was not objectionable in general. However, there was concern that there was no discretion for doctors to determine in a particular case when it would not be appropriate to give information.⁵⁵ For example, informing a rape or incest survivor that there is child support available and agencies that would help her seek out the father and get him to support the child could have very negative psychological effects.⁵⁶ Doctors have argued that it is not only inappropriate, but traumatic for some women.

There was also a twenty-four hour waiting period imposed between the time of counseling and the time of the actual

Justice Souter, who was not yet appointed to the Court to hear *Hodgson*, also joined Justice O'Connor in *Casey*).

51. See UTAH CODE ANN. § 76-7-302 (1990). Utah's abortion law permits abortions only when there is a grave threat to the woman's life or health, when the pregnancy is a result of rape or incest, or where an abortion will prevent the birth of a child suffering serious birth defects. *Id.*

52. See *supra* note 8.

53. *Casey*, 112 S. Ct. at 2824; see also Abortion Control Act of 1982, 18 PA. CONS. STAT. § 3205(a) (1990) (See APPENDIX).

54. *Casey*, 112 S. Ct. at 2824.

55. *Id.*

56. See Brief for Petitioners at 9, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (petitioners argued that much of the information which the statute required was considered "inflammatory and misleading" and "beyond the expertise of medical professionals").

abortion.⁵⁷ That may not seem very onerous when you say it, but considering the paucity of providers in this country, it is quite onerous in practice. For example, the same restrictions have been passed in North Dakota where there is only one clinic.⁵⁸ In that state, a doctor comes once a week from Minnesota and many women travel up to 400 miles to get to the clinic.⁵⁹ In those cases, women are forced to travel 400 miles to get counseled on one Friday, then they will have to go home and come back 400 miles the next Friday. The result is a minimum of a one week delay.

A delay in having an abortion for one week increases a woman's mortality risk by fifty percent⁶⁰ and the risk of complications by thirty percent with each additional week after the twelfth week of pregnancy.⁶¹ In other cases, the Supreme

57. Abortion Control Act of 1982, 18 PA. CONS. STAT. § 3205(a) (1990) (See APPENDIX). See *Casey*, 112 S. Ct. at 2822. (finding 24-hour waiting period between time of informed consent and abortion is not an undue burden and "[i]f the information the state requires to be made available to the woman is truthful and not misleading, the requirement may be permissible").

58. N.D. CENT. CODE § 14-02.1-02(5)(b) (1991). The statute provides in pertinent part: "The woman is informed, by the physician or the physician's agent, at least twenty-four hours before the abortion" *Id.*

59. Dr. Susan Wicklund, who was featured on *60 Minutes* (CBS television broadcast, Feb. 1992), is the only physician who is willing to fly to Fargo, North Dakota to provide abortion services there. Dr. Wicklund was forced to hire armed body guards because of anti-abortion groups who blockaded her driveway, made threats on her life, and harassed her daughter. See *News Conference with Patricia Ireland, President NOW Concerning the Pro-Choice March this Weekend, National Press Club, Washington D.C.*, FEDERAL NEWS SERVICE, Apr. 3, 1992; Ellyn Ferguson, *Bill Introduced to Ban Abortion Workers' Harassment*, GANNETT NEWS SERVICE, Mar. 17, 1992; Lida Poletz, *Measure Aims to Enforce Protection of Doctors who Perform Abortions*, STAR TRIB., Mar. 18, 1992, at 6B.

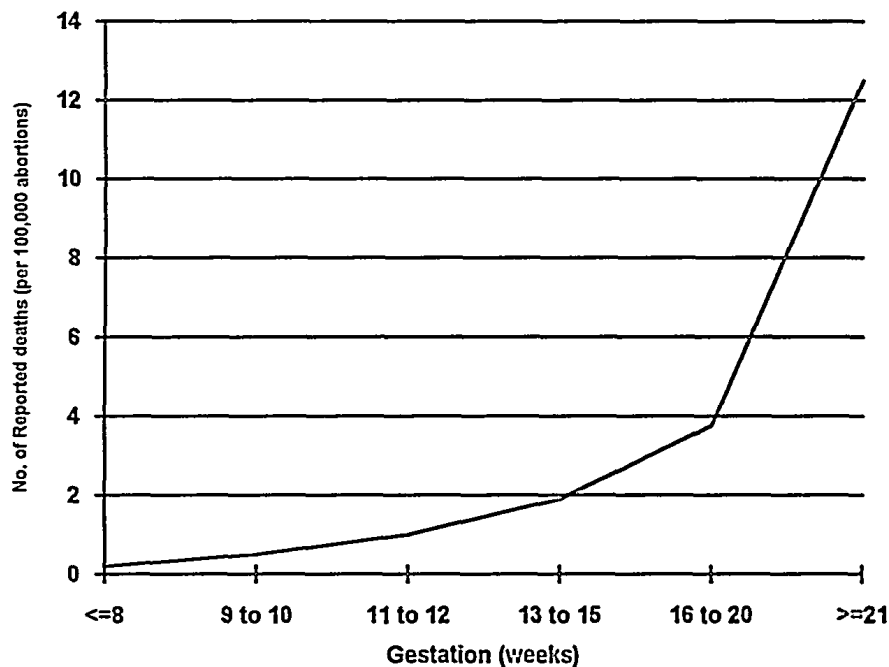
60. The timing of an abortion is one of the most critical factors of risk for woman. See MARIE COSTA, *ABORTION: A REFERENCE HANDBOOK* 98 (1991) ("Estimates of the increase in the maternal mortality rate for abortions range from 30 percent to 50 percent with each additional week of gestation after the twelfth week.").

61. RACHEL BENSON GOLD, *ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA?* (1990). According to the author:

Court has considered this significant.⁶² When you get down to fact-finding on these provisions, which the Court is going to have

The death rate from an abortion performed at or before eight weeks of pregnancy is 0.2 deaths per 100,000 procedures. This risk rises as gestational age increases. Abortions performed at eleven or twelve weeks of pregnancy are three times more dangerous for the woman than abortions performed at or before eight weeks, although the rate of death from an abortion at eleven or twelve weeks was only 0.6 per 100,000 procedures during 1981-1985.

Id. at 29.



Sources: Deaths from Legal Abortion - S.K. Henshaw, special tabulations of 1981 - 1985 data from the Centers For Disease Control (CDC). Number of abortions by gestation age - S.K. Henshaw and J. Van Vort, eds., *Abortion Services in the United States*. Each State and Metropolitan area, 1984 - 1985. The Alan Guttmacher Institute (AGI), New York, 1988, p. 90, updated for 1985 from CDC and AGI data.

62. See *Hodgson v. Minnesota*, 497 U.S. 417, 442 (1990) ("A delay . . . increased the medical risk associated with the abortion procedure to a statistically significant degree."); *H.L. v. Matheson*, 450 U.S. 398, 439 (1980) (Marshall, J., dissenting) ("the threat of parental notice may cause some minor women to delay past the first trimester of pregnancy, after which the health risks increase significantly"); *Roe v. Wade*, 410 U.S. 113, 150 (1972) ("the risk to the woman increases as her pregnancy continues").

to do extensively under their new standard in *Casey*, the facts vary from state to state. What might not seem so onerous in New York City, or outside of the northeast, in particular, is extremely onerous to the point of becoming a complete obstacle for some populations.

Another provision that was upheld involved a vague medical emergency section,⁶³ which was reinterpreted by the Court.⁶⁴ We do not really know what will happen when it goes into effect. Doctors believe that reporting requirements, which in some instances will allow the public to view the names of doctors who do abortions,⁶⁵ in this day and age are very dangerous to their profession. It also involved additional restrictions on minors which forced them to make up to three visits to the clinic, accompanied by a parent, for the biased counseling.⁶⁶ Anyone who has ever counseled teenage patients knows that requiring a parent to accompany their daughter would be a major obstacle for that population since they tend to find out they are pregnant too late and tend to be too scared to tell their parents in the first place. Furthermore, since only fifty percent of teenagers, at least in Minnesota, live with both biological parents,⁶⁷ it tends to be very difficult to get both parents involved in the actual abortion provision services.

Chief Justice Rehnquist, in a separate written dissent, declared that *Casey* overturned *Roe*.⁶⁸ He said, "*Roe* continues to exist,

63. Abortion Control Act of 1982, 18 PA. CONS. STAT. § 3203 (1990) (See APPENDIX). *Casey*, 112 S. Ct. at 2822 (holding that medical emergency section does not impose undue burden on a woman's right to have an abortion).

64. *Casey*, 112 S. Ct. at 2822 ("While the [medical emergency] definition could be interpreted in an unconstitutional manner," the Court deferred to the Court of Appeals' interpretation of the section which "construed the phrase 'serious risk' to include [many significant health risks.]").

65. Abortion Control Act of 1982, 18 PA. CONS. STAT. § 3214(a)(1) (1990) (See APPENDIX).

66. *Id.*

67. See Brief for Petitioner at 21 n.47, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (more than 9% of minors in Minnesota live with neither parent).

68. See *Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., dissenting) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled

but only in the way a storefront on a western movie set exists: a mere facade to give an illusion of reality."⁶⁹ Justice Blackmun, who was part of the five-member majority said:

I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light⁷⁰ I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.⁷¹

These are very unusual and personal statements for a Justice on the Supreme Court to make. So what you have is one side saying that *Roe* has been preserved and the other side saying that *Roe* has been overturned. The newspapers in the country, the day after the decision was handed down, were absolutely split down the middle and were based on no ideological proclivities. One half was saying that *Roe* was saved by one vote and the other half was saying that *Roe* was overturned.⁷² It is no wonder that doctors, clinics, and patients are confused by the ramifications of the *Casey* decision.

In the last two months, we have been finding out that judges are also confused about litigation under the new standard. The majority in *Casey* was formed by sort of a strange combination of Justices: Kennedy, Souter and O'Connor, who wrote the joint opinion, which is very revealing. They saw the *Casey* decision as provoking a crisis on the Court.⁷³ They saw the legitimacy of the

consistently with our traditional approach to *stare decisis* in constitutional cases.").

69. *Id.* at 2860 (Rehnquist, C.J., dissenting).

70. *Id.* at 2844 (Blackmun, J., concurring).

71. *Id.* at 2854-55 (Blackmun, J., concurring).

72. See, e.g., Dick Lehr, *Emerging Middle Seen in Decisions at Supreme Court; Impact Uncertain as Justices Convene*, BOSTON GLOBE, Oct. 5, 1992, at 1; John Leo, *The Quagmire of Abortion Rights*, U.S. NEWS & WORLD REP., July 13, 1992, at 16; Nat Post, *The Fading Freedom of Choice*, WASH. POST, Sept. 12, 1992, at A19; Dorothy E. Roberts, *Casey and Rust: America's Two Abortion Laws*, N.J. L.J., July 27, 1992, at 18.

73. *Casey*, 112 S. Ct. at 2814-16 ("Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters Like the character of an individual, the legitimacy of the

Supreme Court at stake because the Court would be hearing something so political as parties coming before it and litigating the same body of constitutional law, with the only difference being new appointments. The Court stated that "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."⁷⁴ Which indeed, it was. They were then joined by the two Justices who were part of the original seven extremely strong on substantive reproductive privacy rights, Justices Stevens and Blackmun. I do not believe this five-member majority⁷⁵ will stay together on the issue when they start hearing other abortion cases.

In previous decisions, Justice O'Connor and Justice Kennedy have sharply split as to what really is a burden on women. I gave one example, which is Justice O'Connor finding a two-parent notification with no recourse to go into court as an undue burden,⁷⁶ although I believe that she felt it was more of a burden for the teenager's mother than for the teenager herself.⁷⁷

This five-member majority changed *Roe* in three ways and certainly severely undermined *Roe* by these changes. First, there was an abandonment of the principle of government neutrality.⁷⁸ In *Roe*, the Court found an exception to the general rule that the government must be neutral in any of its laws when the statute

Court must be earned over time The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation which it is responsible.").

74. *Id.* at 2815.

75. The plurality opinion was written by Justices O'Connor, Kennedy and Souter, with whom Justices Blackmun and Stevens concurred. The dissent was written by Chief Justice Rehnquist, joined by Justices Scalia, White and Thomas.

76. *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990) ("It is equally clear that the requirement that both parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest.").

77. *See supra* notes 46-49 and accompanying text.

78. *Casey*, 112 S. Ct. at 2821.

deals with funding,⁷⁹ such as Medicaid funding or funding of family planning clinics. However, the government must be neutral in any of its laws between childbirth and abortion. Moreover, the government cannot try to influence a person's decision when that decision deals with an individual's fundamental right.⁸⁰ For example, an individual has a fundamental right to join the church of his order. The government cannot say that you can join the church of your choice, but first you must read this pamphlet on Christianity, or that you can vote for anybody you want to, but you must first read this book on being a Democrat.⁸¹

The government cannot try to influence an individual in that way because the power of the state is indeed a very complete power. However, this principle announced in *Roe* was effectively extinguished by the *Casey* decision because the Court permitted governmental influence over an individual's decision regarding abortion.⁸² Therefore, I would submit that the right to choose abortion or childbirth is no longer the same kind of fundamental right that was announced in *Roe*.⁸³

79. *Roe*, 410 U.S. at 163 (1973) (states may regulate "the qualifications of the person who is to perform the abortion; as to licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be in a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like").

80. *Id.* at 152-53.

81. See generally *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (no official may "prescribe what shall be orthodox . . . in matters of opinion or force citizens to confess by word or act their faith therein"); *Texas v. Johnson*, 491 U.S. 397, 415 (1989) (state could not criminally sanction flag burning).

82. *Casey*, 112 S. Ct. at 2821 ("Unless it has effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.").

83. *Roe* held that the right to choose an abortion is a fundamental right which subjected state laws that limited that right to strict scrutiny of the compelling interest test. *Roe*, 410 U.S. at 155; see also *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983) (citing *Roe v. Wade*), overruled in part by *Casey*, 112 S. Ct. 2791. The majority in *Casey* applied

One cannot try to influence a woman. Information provided to a woman must be truthful information,⁸⁴ but we are not quite sure what that means because many people, as you know, based on religious or other moral reasons, believe that abortion is murder. One can try to give women information that would discourage her, regardless of her circumstances. Therefore, the abandonment of government neutrality is a principle which I think in *Casey* removed the core of *Roe*'s protection on the decision-making ability of women.

The second change from the *Roe* decision was that the Court no longer classified a woman's right to choose as a fundamental right, thereby removing laws involving this right from strict scrutiny analysis.⁸⁵ Under strict scrutiny, the burden is on the state to show a compelling interest which justifies infringing upon individual fundamental rights.⁸⁶ There are very limited reasons why a state can infringe on rights. For example, infringement on First Amendment rights requires something such as a "clear and present danger."⁸⁷ Under *Casey*, abortion restrictions and some

the "undue burden" standard whereby states may regulate abortion so long as the regulation does not impose an undue burden on a woman's ability to decide whether to carry her child to term. *Id.* at 2820.

84. *Casey*, 112 S. Ct. at 2800, 2823.

85. *Id.* at 2860 ("the Court was mistaken in *Roe* when it classified a woman's [right to choose] as a 'fundamental right' that could be abridged only in a manner which withstood 'strict scrutiny'").

86. *See Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."); *see also Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *see generally* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

87. *See, e.g., Schenck v. United States*, 249 U.S. 47, 52 (1919) ("whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("any attempt to restrict those liberties [speech or free assembly] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger"); *Terminello v. City of New York*,

birth control restrictions are removed from strict scrutiny analysis.⁸⁸ Instead, the Court evaluated such laws under an undue burden standard.⁸⁹ In other words, laws can burden and create obstacles for people seeking abortions, but they cannot do so unduly.

Under this standard, the Court found that four of the Pennsylvania provisions were not unduly burdensome.⁹⁰ The only provision which was unduly burdensome was the mandatory spousal notice.⁹¹ I would submit, based on my experience during the last two months, that this standard is really "standardless." Courts do not really know what an "undue burden" is. It involves extensive fact-finding based on, *inter alia*, where people live, how they live, what the clients are seeking, and the kind of abortions involved. So in a way, *Casey* opened more legal questions than it answered.

If one function of the Supreme Court is to provide clarity, the Court failed in *Casey*. For example, the Fifth Circuit Court of Appeals was the first circuit to interpret the *Casey* undue burden standard.⁹² In that case, the Fifth Circuit said, in effect, "Well, I'm looking at some Mississippi restrictions we just let sit on the desk here until after *Casey*. We find these are not unduly burdensome and they should go into effect by midnight today."⁹³ The undue burden standard precluded preliminary injunctions and other mechanisms which would prevent statutes from going into effect.⁹⁴ After the statutes have been in effect for some unspecified period of time, claimants can challenge the statute

337 U.S. 1, 4 (1949) (freedom of speech protected against censorship or punishment unless shown likely to produce a clear and present danger).

88. *Casey*, 112 S. Ct. at 2817.

89. *Id.* at 2820.

90. *See supra* note 8.

91. *Casey*, 112 S. Ct. at 2831. Pennsylvania Abortion Control Act of 1982, 18 PA. STAT. ANN. § 3209 (1992) (*See APPENDIX*).

92. *Barnes v. Moore*, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992).

93. *See* MISS. CODE ANN. § 41-41-31 (1972).

94. *See Barnes*, 970 F.2d at 15 (finding that this type of law could not satisfy the heavy burden required for a court to enjoin a statute, i.e., that there were no circumstances under which the statute could be upheld).

alleging that it is unduly burdensome because every doctor in the state stopped doing abortions. Practically, this means that you lose your constitutional rights forever because these decisions must be timely. Declaring the law invalid years or even months later, is a hollow victory. This really shuts down complete relief for women and doctors in the Fifth Circuit. Since the Fifth Circuit permitted that Mississippi law to go into effect, the number of women able to get abortions, which was already low because Mississippi is such a poor state, has diminished fifty percent.⁹⁵

We are going to petition the Supreme Court next week to take the Mississippi case⁹⁶ because we believe it is sort of a no-lose situation. Either *Casey* meant that in order to do the fact finding required by the undue burden standard, a law would have to go into effect, at which point, we have very strong reasons to seek another kind of solution, or *Casey* did not mean that at all.⁹⁷ It did mean that you can still seek prima facie relief on statutes, which we certainly will need to do in the Fifth Circuit and other circuits. In Louisiana, where although we won the ban case⁹⁸ two days ago, legislators will now attempt to pass every restriction in the world. If we cannot go in and get an injunction immediately, all the providers will leave the state. I know they will because I represented them for fifteen years and they are barely hanging in there. We will petition the Court for certiorari and I have reason

95. See Alissa Rubin, *The Abortion Wars Aren't Over Beyond the Court, Battles Over Access and Restrictions Have Just Begun*, WASH. POST, Dec. 13, 1992, at C2.

96. *Editor's Note*: The petition for certiorari was filed on Oct. 2, 1992 by Rachel N. Pine, Kathryn Kolbert, Andrew Dwyer, Simon Heller, Ellen K. Goetz, Roger K. Evans, and Carole Chervin, all of New York, N.Y., and John G. Jones, Susan McDonald, and Cupit, Jones & Fairbank, all of Jackson, Miss. See 61 U.S.L.W. 3375 (Nov. 17, 1992). The petition for certiorari was subsequently denied. *Barnes v. Moore*, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992).

97. See *supra* notes 90-94 and accompanying text.

98. *Sojourner v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom.* *Sojourner v. Edwards*, 974 F.2d 27 (5th Cir. 1992) (striking down Louisiana's law that banned abortions except in some cases of rape, incest, or threat to mother's life).

to believe they will take this case as they take every case that comes to them in this area involving state statutes.⁹⁹

The third way that *Casey* overturned *Roe* is that it struck down the trimester system which had been put in place by *Roe*.¹⁰⁰ The *Casey* Court said the state is permitted to promote fetal life throughout pregnancy.¹⁰¹ It is not clear what the complete dimensions of that elevation of the state's interest, although it could extend beyond the abortion context. One alarming piece of dicta in the opinion is that the definition of abortion, in some statutes, includes acts undertaken after the point of fertilization.¹⁰² This means that anything done after fertilization

99. See *supra* notes 8-11 and accompanying text.

100. *Roe v. Wade*, 410 U.S. 113, 163-65 (1973), *overruled in part by Casey*, 112 S. Ct. 2791, 2818 (1992). The trimester system established in *Roe v. Wade* was as follows:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to material health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life 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.

410 U.S. at 164-65.

The Court in *Casey* felt that the trimester system was "problematic" and that it "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." *Casey*, 112 S. Ct. at 2818. However, the Court reaffirmed the view that pregnancy should be bifurcated into a pre-viability period, during which the state has no power to proscribe non-therapeutic abortions, and a post-viability period during which the state does. *Id.* at 2811.

101. *Casey*, 112 S. Ct. at 2821.

102. *Id.* at 2817. At least 11 states, like Pennsylvania, define protected life as beginning at fertilization. These states include, Illinois, ILL. REV. STAT. ch. 38, § 81-22 (1989); Kentucky, KY. REV. STAT. § 311.720 (1990); Louisiana, LA. REV. STAT. ANN. § 40:1299.35.1 (West 1992); Massachusetts, MASS. ANN. LAWS ch. 112, § 12K (West 1983); Minnesota, MINN. STAT. ANN. § 144.343 (West 1989); Missouri, MO. ANN. STAT. § 188.015 (Vernon

of the sperm and egg is considered an abortion. In Louisiana, for example, the anti-abortion statute explicitly says that and therefore, it would criminalize birth control pills and IUDs by considering them abortifacients.¹⁰³

The Association of Reproductive Health Professionals filed a brief in the Fifth Circuit supporting this interpretation.¹⁰⁴ Louisiana's former Governor, Buddy Roemer, although he is anti-abortion,¹⁰⁵ vetoed the law because it would prohibit IUDs, but the legislature did not accept his amendment. His veto was overridden.¹⁰⁶ The Supreme Court recognized this kind of fine line between what is an abortion and what is contraception.¹⁰⁷ In

1992); Nebraska, NEB. REV. STAT. § 28-326 (1989); Oklahoma, OKLA. STAT. ANN. tit. 63, § 1-730 (West 1984); South Carolina, S.C. CODE ANN. § 44-41-10 (Law Co-op 1991); Wisconsin, WIS. STAT. ANN. § 940-04 (West 1982); and Wyoming, WYO. STAT. ANN. § 35-6-101 (1990).

103. LA. REV. STAT. ANN. §§ 40:1299.35.1, 14:87 (West 1992); *see also*, Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980). The District Court held that the provision of § 40:1299.35.1 which defines abortion as "the deliberate termination of a human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn caused by a spontaneous abortion" is not "impermissibly vague" even though it covers at least two methods of birth control, the IUD and the "morning-after" pill. *Id.* at 190-91.

104. Brief for Association of Reproductive Health Professionals at 6-13, *Sojourner v. Edwards*, 974 F.2d 27 (5th Cir. 1992).

105. *See generally* Ed Anderson, *Roemer: No Abortion Ban*, NEW ORLEANS TIMES PICAYUNE, Mar. 28, 1990, at AA, A1; Bill Walsh, *Abortion Issue Hugs Spotlight in Governor's Race*, NEW ORLEANS TIMES PICAYUNE, Oct. 7, 1991, at National, A1; Jack Warden, *Abortion Issue is Quiet at the Gubernatorial Level*, NEW ORLEANS TIMES PICAYUNE, Oct. 9, 1991, at Metro, B7; Jack Warden, *Abortion is Back on the Agenda*, NEW ORLEANS TIMES PICAYUNE, Jan. 28, 1990, at BB, B9.

106. LA. REV. STAT. ANN. 14:87 § 87 (West 1992). The Act was passed by the State Legislature on June 4, 1991, and was vetoed by Governor Roemer on June 14, 1991. On June 18, 1991, both Houses of the Louisiana Legislature overrode the veto. (*Historical Notes*). Furthermore, the State Legislature felt that any attempt to modernize or liberalize the State's abortion laws would "provoke a very serious theoretical and controversial discussion" and it felt that "any potential difficulty of this nature should be avoided by retaining the former Louisiana statute in substance. (*Reporter's Comment*).

107. *Casey*, 112 S. Ct. at 2807.

dicta, the Court recognized that some forms of birth control could be encompassed under this standard.¹⁰⁸ Therefore, the requirement of government neutrality and the requirement of strict scrutiny could be abandoned in birth control cases that are coming up under the precedent of the 5-4 decision in *Casey*.

There are two other cases, also my cases, which are pending in the Court.¹⁰⁹ One is a case coming from the Territory of Guam where the Ninth Circuit struck down a Guam abortion ban.¹¹⁰ The Governor of Guam petitioned for certiorari and we replied two weeks ago saying that *Casey*, whatever else we do not know it did, it certainly said that abortion bans were unconstitutional.¹¹¹ So if this is true, why did the Governor of Guam petition the Court? I think the Governor of Guam petitioned the Court hoping there would be another appointment to the Court. If Justice Blackmun resigns this November, as is rumored, the Governor was hoping that four members of the Court would vote to take the case, and that the outcome would be different. They are gambling in effect on the election, which shows how political these cases really are.

The Governor of Louisiana, where we won the ban case¹¹² two days ago, has said that he is waiting to see what happens with the election and with *Guam*.¹¹³ So it is a political gambling roulette

108. *Id.*

109. See *infra* notes 110 and 112.

110. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

111. *Casey*, 112 S. Ct. at 2816. While *Casey* did hold that an absolute ban on pre-viability abortions was unconstitutional, the majority maintained that states do have an interest in the fetus at all stages of the pregnancy. *Id.*

112. *Sojourner v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom. Sojourner v. Edwards*, 974 F.2d 27 (5th Cir. 1992).

113. See *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992). The Supreme Court, in refusing to hear this case, left intact a decision striking down the nation's toughest anti-abortion law, that would have outlawed virtually all abortions in the territory of Guam. This decision appears to end any likelihood that the Supreme Court would grant the Louisiana ban case full review because Louisiana's anti-abortion law was not as restrictive as that of Guam. See David G. Savage, *High Court Affirms Right*

game, not only in the Supreme Court on the issue of choice, so important to women, but players in that game, the governors and attorney generals who make decisions about what cases to take when they involve state statutes.

Thank-you.

Professor Eileen Kaufman:

I wonder if you would comment on whether there is something awfully distinctive about the way the abortion debate is framed in this country. Let me explain what I mean. It seems as if the battle lines are very sharply drawn, with both sides articulating their position in very absolute terms. In fact, Larry Tribe spoke on abortion, and subtitled it, "The Clash of Absolutes."¹¹⁴ Apparently, there are other models. Mary Glendon has written about systems in some European countries that have laws permitting abortions, but fairly extensively regulating them.¹¹⁵ However, those schemes are coupled with very extensive social welfare programs, far more extensive than anything we would have here, that offers assistance in terms of child care and other benefits for children and for families. I suppose one could view that as a middle ground position and one that is really not articulated in this country, at least as far as the public debate goes.

I wonder what accounts for the absolute nature of the debate here, and whether it has anything to do with a view that the abortion laws in this country, perhaps, have less to do with fetal rights than they do with enforcing some traditional and stereotypical gender roles. I just read Sylvia Law and Rachel Pine's new article on reproductive freedom,¹¹⁶ and let me just read one sentence from it. They say, "[h]istorically, opposition to women's reproductive choice centered not on a concern with fetal

to Abortion, but Allows Some Restrictions by States, L.A. TIMES, June 30, 1992, at A1.

114. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

115. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

116. Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407 (1992).

life, but on the desire to keep women in their biologically defined and subordinate place, and on a moralistic condemnation of all non-procreative sexual activity.”¹¹⁷ I wonder if you agree with that assessment, and if so, whether if that serves to explain, in part, the absolute nature of the debate.

Janet Benshoof:

I think there are a couple of questions here. First of all, one question is about Mary Ann Glendon’s theory that western democracies seem to achieve a so-called middle ground, opposed to the extreme position in the United States.¹¹⁸ I take sharp issue with that. First of all, we are a constitutional democracy and our rights are not determined by the legislatures here in general. It is sort of like saying, “In Sweden can there be a vote to have the Lutheran religion be the theology of the state?” Why not try that here because people fight over religion so much?

We established this country for one reason, to have a very unique government, a constitutional democracy where certain rights are fundamental and absolute, like your right to speak, your right to religion, and your right to privacy. That is the nature of our government against majorities. Mary Ann Glendon’s sort of majoritarian rule would certainly eviscerate not only a right to make choices for some women, but many other rights, which even those of you who do not cherish the right to abortion, probably do cherish.

The other comment I would like to make about the so-called middle ground is that, as I think we see in the Pennsylvania case, it is really not a middle ground for most women. When you put restrictions on abortion, what you do is you do not restrict abortion for each and every woman, rather, you divide it into classes of women who can jump over obstacles and those who cannot. This creates not only a two-tiered system of health care, but a two-tiered system of constitutional rights. The women in North Dakota who live in Fargo, for example, can navigate, probably, a twenty-four hour waiting period. However, the

117. *Id.* at 423.

118. See generally MARY ANN GLENDON, *supra* note 115.

women who live in Sioux Falls, South Dakota and Pierre, South Dakota who have to go Fargo, will never be able to navigate it.¹¹⁹ Therefore, it is not a middle ground for those people who are excluded.

The beauty of our constitutional system is that we are supposed to reach out and protect minorities. It is designed to protect the one Jehovah Witness who does not want to salute the flag,¹²⁰ and those minorities who are particularly oppressed by certain laws which do not really affect the majority. The Constitution is supposed to give special cognizance for the rights of minorities and the courts are supposed to examine with strict scrutiny. That goes back to the famous *Carolene Products* footnote,¹²¹ where you look at which groups of people should get special consideration.

I think the third item which you asked me to comment on is really a motivational item. Why is there such a split? Why are we divided into absolutes? I think, of course, it is a question really of women, and women being in power to make certain choices. In looking at the political nature of the fight over abortion in this country, I think there is a correlation between the defeat of the ERA and the rise of the anti-abortion movement. There was a very strong backlash. Certainly, the right to make the choice about abortion became part of that backlash. However, I would be hesitant to say that it is totally centered on removing power from women and giving it either to husbands or states, depending on the statute. I think there are very sincere beliefs in this country, mostly religious beliefs, that the fetus is a person. I think that having *Roe v. Wade*, having privacy rights, and having religious rights held absolute by the Court, protects those people who do believe that the fetus is a person.

119. See *supra* notes 58-59 and accompanying text.

120. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

121. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

If you give power to the government, the power can be used in various ways. Certainly, religious pluralism is one aspect. I represent, for example, the single rabbi in Utah who counsels his parishioners about religious duties of pregnant women under Jewish law, who would be a criminal if the Utah law¹²² went into effect because one cannot conspire, talk or advocate with people without breaking the law.¹²³ Since the Utah law is pretty prohibitory, a rabbi could not advise a Jewish woman of her reproductive choices when her life was at stake.¹²⁴ Under Jewish law it would be mandatory for a woman to choose an abortion if she could not continue providing for her existing family.¹²⁵ Therefore, there are very strong strands of religion which should be an absolute under our Constitution in the carrying out of anti-abortion laws to protect religion on both sides.

Our country is divided theologically on the issue of abortion. On the one hand, there are many evangelicals, and certainly Catholics, who have certain theologies about the fetus. On the other hand, you have most mainstream Protestants and most Jews, but not completely. The Orthodox Jewish tradition is a bit different. But even the Orthodox Jewish law is violated by the Utah law.¹²⁶ Therefore, I believe that religious tradition, as well as privacy tradition, is protected by the absolute nature.

122. UTAH CODE ANN. §§ 76-2-202, 76-7-314, 76-7-314(1)(b) (1990 & Supp. 1992).

123. *See* Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992).

124. Utah's accessorial liability statute provides:

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

UTAH CODE ANN. § 76-2-202.

125. *See generally* ROSNER, MEDICINE AND JEWISH LAW 118 (1990); *see also* McRae v. Califano, 491 F. Supp. 630, 696-97 (E.D.N.Y. 1980) (testimony of Rabbi Feldman). Rabbi Feldman's views are also set forth in FELDMAN, MARITAL RELATIONS, CONTRACEPTION, AND ABORTION (1976).

126. *Id.*

APPENDIX

Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3202-3220 (1990 & Supp. 1992). The act provides in pertinent part:

§ 3203. Definitions.

"Medical emergency." That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

§ 3205. Informed Consent.

(a) General Rule.--No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

- (1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
 - (i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
 - (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
 - (iii) The medical risks associated with carrying her child to term.
- (2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:
 - (i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
 - (ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.
 - (iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

- (3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.
- (4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.
 - (b) **Emergency.**—Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.
 - (c) **Penalty.**—Any physician who violates the provisions of this section is guilty of ‘unprofessional conduct’ and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. Any physician who performs or induces an abortion without first obtaining the certification required by subsection (a)(4) or with knowledge or reason to know that the informed consent of the woman has not been obtained shall for the first offense be guilty of a summary offense and for each subsequent offense be guilty of a misdemeanor of the third degree. No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.
 - (d) **Limitation on Civil Liability.**—Any physician who complies with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P.L. 390, No. 111), known as the Health Care Services Malpractice Act.

§ 3206. Parental Consent.

- (a) **General rule.**—Except in the case of a medical emergency, or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa.C.S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the in-

formed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

- (b) **Unavailability of parent or guardian.**--If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.
- (c) **Petition to court for consent.**--If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.
- (d) **Court order.**--If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.
- (e) **Representation in proceedings.**--The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel.

§ 3207. Abortion Facilities.

- (b) **Reports.**--Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and up-

date immediately upon any change, a report with the department, containing the following information:

- (1) Name and address of the facility.
- (2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.
- (3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.

The information contained in those reports which are filed pursuant to this subsection by facilities which receive State appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of \$500 for each day it is in violation hereof.

§ 3209. Spousal Notice.

- (a) **Spousal notice required.**—In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.
- (b) **Exceptions.**—The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:
 - (1) Her spouse is not the father of the child.
 - (2) Her spouse, after diligent effort, could not be located.
 - (3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.
 - (4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

- (c) **Medical emergency.**--The requirements of subsection (a) shall not apply in case of a medical emergency.
- (d) **Forms.**--The department shall cause to be published forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.
- (e) **Penalty; civil action.**--Any physician who violates the provisions of this section is guilty of "unprofessional conduct," and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of \$5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs.

§ 3214. Reporting.

- (a) **General rule.**--For the purpose of promotion of maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:
 - (1) Identification of the physician who performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.
 - (2) The county and state in which the woman resides.
 - (3) The woman's age.
 - (4) The number of prior pregnancies and prior abortions of the woman.
 - (5) The gestational age of the unborn child at the time of the abortion.
 - (6) The type of procedure performed or prescribed and the date of the abortion.

- (7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and, if known, any medical complication which resulted from the abortion itself.
 - (8) The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).
 - (9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).
 - (10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.
 - (11) The information required to be reported under section 3210(a) (relating to determination of gestational age).
 - (12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her spouse was given, the report shall also indicate the reason for failure to provide notice.
- (b) **Report by facility.**—Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives State-appropriated funds.

