Essays

Roe v. Wade To Planned Parenthood v. Casey: The Politics of Choice

by Corrie L. Ayers

Law is an evolving set of rules and standards by which society is governed. As our society develops and progresses, new laws are written and established laws amended. There are two methods by which law is introduced: legislative (state) action or judiciary (court) decision. Court decisions, especially those opinions issued by the Supreme Court, shape both federal and state laws. Precedent set by a court decision is respected by future courts. "The principle of adherence to settled cases...as authoritative in similar subsequent cases" is *stare decisis* (Biskupic 236). Through *stare decisis*, the court has defined the law, although the legislature may not contain specific statutes defining the law. If a court decided an issue previously, future cases would not have merit for trial.

Many times, due to the acceptance of precedent, an individual or group will seek relief through the federal court system. The federal court system is particularly effective when relief is unattainable through the legislature. This is especially true in instances where existing laws presumably prohibit constitutional rights. Because the Supreme Court is the highest court in the federal system, the opinions it has issued have had historic ramifications.

Possibly the most important and controversial Supreme Court cases of this century have been the abortion cases, namely, Roe v. Wade and Planned Parenthood v. Casey. Roe v. Wade with the companion case Doe v. Bolton made history in 1973 when the Supreme Court's opinion legalized a woman's right to abortion. The larger, if not subtler victory, control over a woman's body, was now in the hands of the woman not the State. Planned Parenthood v. Casey is significant because the Supreme Court opinion issued in 1992 severely undermines a woman's ability to obtain an abortion, minimizing control over her body. Whereas Roe v. Wade empowered women, Planned Parenthood v. Casey lessened the power of women. Through comparison to Roe v. Wade, the impact of the pro-life movement and the changing political and social climate that contributed to the opposing Supreme Court opinion in Planned Parenthood v. Casey may be evaluated.

Simone de Beauvoir, as quoted in Roe v. Wade, The Untold Story, "wrote prophetically in 1945 that without the right to choose when they would bear children, women would

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never consider themselves truly free" (qtd. in Faux 26). Not until 1963, with the publication of Betty Friedan's The Feminine Mystique and the formation of the National Organization for Women(NOW), did women begin to meet openly and discuss the abortion issue. Sarah Weddington, the lawyer who argued Roe v. Wade before the Supreme Court, was a member of a consciousness raising group. Although Weddington did not realize it, her involvement in the women's movement would lead to the legalization of abortion.

Weddington, who was active in NOW and Planned Parenthood while living in Austin, Texas, also worked with a group of activists involved in an abortion referral project. The Women's Liberation Birth Control Information Center was a clearinghouse for information concerning birth control, sexually transmitted diseases, and safe abortion. The basic principals of the referral project included:

> The belief that every woman, whatever her income level, whatever her color or background, who wanted to terminate a pregnancy should have access to the safest services possible. (Weddington 29)

Originally established for students at the University of Texas, word spread quickly about the referral project. The possibility of prosecution concerned project participants. Although Texas law did not expressly prohibit abortion referral, referral project members were cautious. Weddington began her research into the history of the anti-abortion laws of Texas. As the number of women seeking abortion information continued to increase, the referral volunteers became aware of the overwhelming need to reform Texas law.

It became evident to Weddington and other members that challenging the Texas anti-abortion statute in court was the best route to take. "Around the nation, big advances seemed to be coming from the courtrooms, not the legislative halls" (Weddington 44). Judy Smith, the referral project member who suggested the idea of a court case, thought Weddington the best choice for attorney. Weddington's research efforts impressed Smith and other group members. They thought only a woman should handle the case. Also, group members knew Weddington would take the case *pro bono*.[1] Although inexperienced, Weddington reluctantly agreed to take the case.

After consulting with Professor Bernie Ward, of the University of Texas Law School, Weddington decided to test the constitutionality of the Texas anti-abortion laws in a federal three-judge court.[2] Planning the case and what strategy to pursue was time consuming. Weddington enlisted the help of former law school classmate, Linda Coffey. Coffey provided the judicial experience Weddington lacked. They filed the case in Dallas County, against District Attorney, Henry Wade. Weddington continued to look for appropriate plaintiffs. They looked for individuals who would characterize the debilitating impact of the Texas anti-abortion laws.

Weddington and Coffey quickly agreed upon a married couple, later known as John and Mary Doe. Mary Doe had a neurochemical disorder. Her doctor advised her not to become pregnant and not to use birth control pills. Mary Doe contended that risk of pregnancy would be dangerous to her health. Without reliable means of birth control and choosing not to become celibate, Mary Doe wanted the right to choose an abortion. "She felt strongly that the Texas anti-abortion statutes kept women from making decisions that were right-

fully theirs" (Weddington 50). In Texas, abortion was illegal. The illegality of abortion was therefore a danger to her health. In addition to John and Mary Doe, it was important to have a plaintiff who was pregnant.

With the help of Dallas attorney, Henry McClusky, Weddington and Coffey learned of a possible plaintiff. The woman, later known as Jane Roe, was twenty-one, pregnant, and unwed. Jane Roe was working as a waitress and staying "wherever a friend had a spare bed or corner for the night or, if she got lucky, for a few nights" (Faux 6). Jane Roe also had, from a previous marriage, a child of five whom she was unable to raise. Jane Roe wished to have an abortion and legally that was impossible in Texas. In the affidavit which was filed in the Federal District Court, Jane Roe stated:

> ...that because of her pregnancy she had experienced difficulty in securing employment of any kind; and that she wanted to terminate her pregnancy because of the economic hardship it entailed and because of the social stigma attached to the bearing of illegitimate children in our society. (Weddington 60)

Securing a pregnant woman for the case was crucial for two reasons. First, to challenge the Texas statute properly, it was necessary to involve a woman, currently pregnant, who sought an abortion. A pregnant woman seeking an abortion presented an immediate need for the court's attention. Thus, the woman would have standing to challenge the law (Spaeth 80).[3] Alternately, Mary Doe, who was not pregnant, represented an abstract position. Designed to resolve actual conflicts, the court is unable to remedy possible controversies. Consequently, the Federal District Court ruled John and Mary Doe did not have standing to file a lawsuit and dismissed their case.

Second, a pregnant woman and her interests were transferable to all pregnant women in Texas. Because of the potentially large number of pregnant women throughout Texas at any given time, Weddington and Coffey amended the original petition to a class action suit. A class action suit is "a lawsuit brought by an individual on behalf of [herself] and all other persons similarly situated" (Spaeth 80). Jane Roe represented all women who sought reproductive freedom and freedom of choice.

Weddington and Coffey argued Roe v. Wade before the United States District Court for the Northern District of Texas, May 22, 1970. Obviously, when the Court heard the case Jane Roe was at least midway through her pregnancy. The defense counsel tried, unsuccessfully, to have the court dismiss the case on the grounds of standing. The defense contended Jane Roe was "...too far along in her pregnancy to undergo an abortion even if abortion were legal" (Weddington 65). The court recognized her standing to participate in the lawsuit:

> That Roe v. Wade was a class action suit gave us a strong response to [the defense] argument, because we represented women who were pregnant or who in the future might find themselves pregnant and want the option of a legal abortion. (Weddington, 66)

Theoretically Weddington and Coffey won Roe v. Wade when the Federal Court announced its decision June 17, 1970. The Court upheld the claim that Texas abortion laws were unconstitutional:

> Texas abortion laws must be declared unconstitutional because they deprive sin-

> gle women and married couples of their right, secured by the Ninth amendment, not to have children ...freedom to choose in the matter of abortions has been accorded the status of 'fundamental' right in every case. (Roe v. Wade. 314 F.Supp. 1221)

The Court, however, did not order the discontinuance of prosecution in abortion cases. Without expressly prohibiting prosecution, the Court's decision was merely a statement in reference to the constitutionality of the law. Wade's public position was to "continue to prosecute, regardless of what the federal court said" (Weddington 68). Doctors were afraid to perform abortions for fear of prosecution, thus making abortion unavailable. Women were in the same position as before the trial. They still did not have reproductive control, nor did they have freedom of choice. Due to Wade's public statements concerning prosecution, a direct appeal to the Supreme Court was possible. Weddington and Coffey filed an appeal. December 13, 1971 was the scheduled date for oral argument.

The amount of time and money required to prepare a Supreme Court case is enormous. Reportedly, Brown v. Board of Education cost $240,000 to prepare (Faux 170). Weddington and Coffey were young and relatively inexperienced lawyers. They possessed limited legal expertise and financial resources. In contrast, Wade's defense counsel was the Texas Attorney General. A veritable legal battalion united with the vast financial resources of Texas represented Wade. Essentially, Weddington and Coffey were competing with the state of Texas, not Wade. They were "up against the combined forces of the [Attorney General's] experienced legal force of ... 130 attorneys and the DA's legal staff" (Weddington 59). Weddington and Coffey only had the support of volunteers and the donations of friends.

Friends of the case turned into an immense asset. The James Madison Constitutional Law Institute of New York City assisted with preparation of the main brief and helped defray the cost of printing. Further, many organizations contributed *amicus* briefs. Presented by friends of the court, *amicus* briefs reflect the position of an interested and affected third party but not a formal litigant (Spaeth 25). Jimmye Kimmey, executive director of the Association for the Study of Abortion, was instrumental in the organization of the *amicus* brief effort. Included among organizations that filed *amicus* briefs were the American Psychiatric Association, American College of Gynecologists, the Unitarian Universalist Association, the California chapter of NOW, and Planned Parenthood Federation of America (Planned Parenthood). NOW, with its philosophy on the freedom of choice has been a constant supporter of reproductive freedom. NOW's Statement of Purpose, issued in 1966 contained the following passage:

The time had come to confront, with concrete action, the conditions that now prevent women from enjoying the equality of opportunity and freedom of choice which is their right as individual Americans, and as human beings. (Norton 397)

The *amicus* brief filed by the California chapter of NOW represented 20,000 members (Faux 225). Naturally, "Betty Friedan made her first visit to the Supreme Court" the day oral arguments were presented (Weddington 109).

Harriet Pilpel, counsel for Planned Parenthood, filed an *amicus* brief on behalf of the organization. Pilpel also took part in moot trial sessions in preparation of the oral argu-

ments before the Supreme Court. Planned Parenthood has continuously supported reproductive freedom and the right to choose. Because of this support, anti-abortion groups targeted Planned Parenthood chapters across the nation. The anti-abortion campaign against Planned Parenthood has run the gamut from peaceful demonstrations to acts of violence, such as fire bombings. Planned Parenthood has also participated in several lawsuits brought before the Supreme Court, most recently, Planned Parenthood v. Casey.

Weddington and Coffey presented oral arguments for Roe v. Wade in December, 1971. Each side had thirty minutes to persuade the Supreme Court justices of the merits of their case. Wedington and Coffey sought "[t]o make [the justices] hear the voices of women who had been through illegal or legal abortions and the eloquence of their strivings..." (Weddington 108). Normally, the Supreme Court decides a case during the same term of presentation. Roe v. Wade, however, was scheduled for reargument October 11, 1972. Weddington and Coffey would have to present their case one more time.

The Supreme Court handed down its decision in Roe v. Wade January 22, 1973. The Court decided in favor of Roe, by a seven to two majority. The Supreme Court's opinion declared Texas anti-abortion laws unconstitutional. This decision had immense ramifications:

> Supreme court decisions set the supreme law of the land; the decisions in Roe ... affected the laws of every state...abortion was no longer illegal. (Weddington 108)

Finally, women across the nation had control over their bodies. The opinion empowered women with the basic right to make their own decisions and choices without government intervention.

A significant portion of the opinion, written by Justice Blackmun and joined by Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall and Powell, is based on the right to privacy guaranteed by the Constitution.[4] The opinion supports the initial complaint of Roe v. Wade that Texas anti-abortion laws "infringed upon the fundamental right of all women to chose whether to bear children" (Weddington 54). Listing citations dating from 1891, Justice Blackmun, following the tradition of *stare decisis*, demonstrated precedent established by the Supreme Court in reference to privacy and personal liberty. Previous Supreme Court decisions held "a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution" (Roe v. Wade. 93 S.Ct. 705). The citations supported the tenet that certain personal rights are fundamental and embodied in the right to privacy.

Among these fundamental rights are activities pertaining to contraception, family relationships, and child rearing. "This right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (Roe v. Wade. 93 S.Ct. 705). Justice Blackmun did stipulate, however, this right is not absolute and recognized the need for regulation. The type of regulation referred to allowed the State to establish safe medical practices and health guidelines. Also, the opinion allowed room for the State to impose certain limitations, however vague:

> The right to privacy, however based, is broad enough to cover the abortion decision; that right, nonetheless, is not absolute and is subject to some limitations; and

> that at some point the state interests as to the protection of health, medical standards, and prenatal life, become dominant. (Roe v. Wade. 93 S.Ct. 705)

To facilitate the state interest, Justice Blackmun outlined the trimester framework. Medical evidence suggests viability of the fetus occurs sometime after the first trimester of pregnancy. Within the trimester framework, the state interest grows more compelling as the pregnancy continues:

> The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. (Roe v. Wade. 93 S.Ct. 705)

Chief Justice Burger and Justices Douglas and Stewart wrote concurring opinions highlighting both the right to privacy and need for regulation. Chief Justice Burger's opinion was, however, restrained. He concluded with "the court today rejects any claim that the Constitution requires abortion on demand" (Roe v. Wade. 93 S.Ct. 705).

Justice White authored the dissenting opinion and was joined by Justice Rehnquist. The thrust of their dissent surrounded the interpretation of the constitutional right to privacy. Justice White suggested the Court had created a new right for women, not upheld precedent:

> I find nothing in the language of the constitution to support the Court's judgement. The Court simply fashions and announces a new constitutional right for pregnant women. (Roe v. Wade. 93 S.Ct. 705)

Additionally, he suggested the court overstepped its limitations of authority. Justice White maintained the court's majority opinion was at odds with the state's interest in protecting life. It was his belief that the court remain out of the fray and the decision be left to the individual states:

> This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs. (Roe v. Wade. 93 S.Ct. 705)

The opinion issued by the Supreme Court did, in fact, legalize abortion. Also, however, the opinion served as a launching pad for the pro-life movement. The pro-life movement developed prior to the 1973 Roe v. Wade decision, although it was a loosely organized, grass roots effort. Immediately following the release of the Supreme Court decision in 1973, Cardinal Cooke, Archbishop of New York and Chairman of the United States Bishops Pro-Life Activities Committee, issued a joint statement with Cardinal Krol, Archbishop of Philadelphia and President of the National Conference of Catholic Bishops (NCCB). Cardinals Cooke and Krol denounced the Supreme Court decision as a national tragedy. "In spite of this horrifying decision the American people must rededicate themselves to the protection and sacredness of all human life" (Van Gelder 20A). Thus, the pro-life movement began to coalesce and prepared to overturn Roe v. Wade.

The NCCB advocated strategy that pressured all levels of government. The three points of attack were: 1)Introduction of a Constitutional Amendment recognizing the fetus as a person 2)Lobbying of state legislatures to pass restrictive abortion laws 3)Prohibition of national funding of abortion. In 1975, the NCCB presented its "Pastoral Plan for Pro-Life Activities." This document detailed "a systematic organization of the Church's resources

of people, institutions and finances and for unity with non-Catholic foes of abortion, with the goal of ending abortion" (Weddington 54). Seemingly, the Catholic Church intended to turn their enormous resources into a well organized political action machine.

During the same period, another activist group emerged. This group included evangelical Protestants and right wing Republicans who, like the members of the Catholic movement, wanted to amend the constitution and effect state laws. They "understood the political importance of the abortion issue" (McKeegan 6). They targeted political candidates and would only endorse those candidates who were pro-life. The extent of their political influence extended to the presidency. Evangelist Jerry Falwell's political action committee, the Moral Majority, supported Ronald Reagan's bid for election in 1980. Falwell worked with "72,000 churches across the country to urge evangelicals to register to vote" (Weddington 197). The political process, maneuvered by the Religious Right, was attempting to deprive women of the liberty and freedom previously secured in Roe v. Wade.

After the election of President Reagan in 1980, an era of conservativism began. President Reagan, an adamant pro-life president, openly challenged the Roe v. Wade decision. "Republicans hardened their opposition of abortion and pledged to appoint new justices to the Supreme Court who respect traditional family values and the sanctity of all human life" (Weddington 197). At the end of his first term President Reagan published "Abortion and the Conscience of a Nation," which originally appeared in the Spring, 1983 issue of "The Human Life Review." The article outlined the steps he had taken to undermine Roe v. Wade. President Reagan argued the social conscience of the nation was outraged and reaffirmed his commitment to challenging Roe v. Wade. "As we continue to work to overturn Roe v. Wade, we must also continue to lay groundwork for a society in which abortion is not an accepted answer to unwanted pregnancy" (Reagan 34). Nominating judges at both the federal and Supreme Court level was a main avenue of attack on Roe v. Wade. A majority of these justices espoused conservative, pro-life positions. "The federal judiciary seems likely to have a conservative bent for many years to come ... the number of judges chosen by Bush or Reagan is now sixty percent of the total" (Greenhouse 1A). During the twelve years of republican control, five Supreme Court justices have been appointed. To the chagrin of pro-choice activists, the issue of abortion had become a litmus test for potential nominees. Also, President Reagan appointed Justice William Rehnquist as Chief Justice. He was one of two dissenters in Roe v. Wade. Presently, there is potentially a five to four majority in opposition to Roe v. Wade.[5] The change from a liberal to conservative majority is "primarily effected by President Reagan's appointments to the Supreme Court who have tended to be more pro-life" (Beckwith and Geisler 63). A woman's right to reproductive freedom has never been more threatened than now. The current Supreme Court composition, with its conservative majority, announced its decision June 29, 1992 in Planned Parenthood v. Casey. A portion of the opinion, written by Chief Justice Rehnquist, opened with "We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our approach to stare decisis in constitutional cases (Planned parenthood v. Casey. 112 S.Ct. 2791).

The pro-life effort had politicized the issue of abortion. The Supreme Court was galvanized into a practical reversal of Roe v. Wade.

Although, Planned Parenthood v. Casey did not actually overturn Roe v. Wade, the majority opinion enforced the restrictive abortion laws of the state of Pennsylvania. "An ambiguous ruling that preserves Roe v. Wade in name only while rendering it powerless as a practical matter, by making abortion unattainable for many women" (Greenhouse 1A). The court upheld the Pennsylvania statutes in a majority opinion issued by Justice O'Connor.[6]

Justice O'Connor, with Justices Kennedy and Souter, attempted to balance state interest with a woman's fundamental liberty of choice. Planned Parenthood v. Casey replaced the trimester framework with the undue burden test: "The undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability (Planned Parenthood v. Casey. 112 S.Ct. 2791). The majority opinion invites further restriction by the state, minimizing a woman's control over her body.

The Pennsylvania statutes are restrictive in nature because they present an undue burden to the woman. Two areas of the Pennsylvania law which are especially burdensome are the twenty-four hour waiting period and parental consent. The twenty-four hour waiting period, in itself, is extreme. For many women, this would entail overnight accommodations, meals, time away from work, and child care. As related by a clinic representative:

> I've seen women travel ten hours to get here, have the procedure, then immediately travel ten hours to get back home. Adding twenty-four hours—a minimum actually, because we have so few doctors—is intolerable for them. (New York Times: 18A)

Parental consent requirements restrict the rights of young women. Judicial bypass is an alternative, but can prove a daunting experience: "With our help she went through the multiple legal hoops, only to collapse when she got to the court. The clerk was her next-door neighbor and now he knows the secret she'd been trying to spare her parents" (New York Times: 18A).

The Supreme Court's majority opinion, however, maintained both requirements did not pose an undue burden:

> Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the women's exercise of the right to choose. (Planned Parenthood v. Casey. 112 S.Ct. 2791)

The centrist opinion tried to find a middle ground for extremists on both sides of the abortion debate. The opinion upholds Roe v. Wade, recognizing "the importance of women's reproductive freedom as reason to reaffirm [Roe v. Wade's] bottom line right to choose" (Hume 23). Simultaneously, the court limited that right by upholding Pennsylvania's restrictive abortion laws through the undue burden test. The justices fail to address the issue that "one person's inconvenience is another's obstacle" (Hume, 26). Justice Blackmun, who boldly wrote the majority opinion in Roe v. Wade, eloquently dissented in part from the majority opinion:

> While there is much to be said about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. (Planned Parenthood v. Casey. 112 S.Ct. 2791)

Prior to the election of Bill Clinton to the presidency in 1992, there was cause for great concern. It seemed inevitable that the political machine would surely overturn Roe v. Wade. If President Bush had been re-elected, he would have completed what President Reagan started: building a conservative block in the Supreme Court. But, with the election of President Bill Clinton, there is hope that the corrections necessary to return reproductive freedom to women will begin.

President Clinton's first opportunity to effect the Supreme Court arose during the summer of 1993. He nominated Ruth Bader Ginsberg to replace Justice Byron White. Although not a liberal jurist (she is described as a moderate), as an attorney, Justice Ginsberg argued and won several women's rights cases before the Supreme Court. She will most likely maintain a centrist position relative to abortion. Justice Ginsberg has been critical of the legal foundations for Roe v. Wade; however, she pointedly maintains the belief that abortion is a fundamental right.

Although, the social and legal battle will continue to rage, it was the doctrine of stare decisis that kept Roe v. Wade alive: "The doctrine of stare decisis requires reaffirmation of Roe v. Wade's essential holding recognizing a woman's right to choose an abortion..." (Planned Parenthood v. Casey. 112 S.Ct. 2791).

Ultimately, it is a change in the social atmosphere and political landscape of this country that leaves women secure in the control of their destinies.

Notes

1. Done or performed free of charge.
2. Three-judge courts are made up of one circuit court judge and two federal court judges. During the 1960's the three-judge court was frequently used to hear civil rights cases because of direct appeal to the Supreme Court, therefore, bypassing federal appellate courts.
3. The opinion includes several other major considerations, namely, personhood of a fetus, historical and contemporary framework of abortion, the intent of nineteenth-century abortion laws, and the philosophical question of when life begins. For consideration of this paper, however, the focus is the right to privacy.
4. The majority is not decisive. Justice O'Connor continues to provide a swing vote.
5. The Pennsylvania restrictive measures include: twenty-four hour waiting period; parental consent; informed consent; and spousal notification.

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