

Remembering and reconsidering roe law medical essay

Law



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" Remembering and Reconsidering Roe" 2013 marks the fortieth anniversary of the Supreme Court's landmark protection of abortion. In *Roe v. Wade* (1973), the Supreme Court ruled that the states cannot prohibit a woman from having an abortion, in the first trimester of her pregnancy. The states, however, can regulate second trimester abortions and can even ban third trimester abortions, according to the *Roe v. Wade* decision. Later, in *Planned Parenthood v. Casey* (1992), the Court reaffirmed a woman's right to privacy in making her reproductive decisions and designated fetal viability as the point at which the interest of the state in protecting the life of the fetus overrides the desire of the mother to have an abortion. The Court ruled that the states can ban abortion after the fetus has reached viability and can restrict abortions, before and after fetal viability. According to the Court, these restrictions should not " impose an undue burden on women" ("*Planned Parenthood v. Casey*".) In the years since this decision, state legislatures have passed an onslaught of measures restricting abortion. The determination of whether these regulations are unconstitutional remains to be made, and while the Supreme Court hesitates to act, it becomes increasingly more difficult for a woman to have a legal abortion. Prior to the decision in *Roe v. Wade*, abortion policies varied widely among the states. Most states only allowed abortions for women whose lives would be endangered by childbirth. In 1957, the American Law Institute began to develop a " model penal code" for abortion cases. This code advised the legalization of abortion for victims of rape or incest, for mothers whose lives would be endangered by childbirth, for mothers whose physical or mental health would be endangered by childbirth, and for mothers whose children

would have a physical deformity or a mental defect. The first state to use the American Law Institute's penal code as a model for its own abortion policy was Colorado in April 1967. " By 1973, thirteen states had passed laws similar to or based on the American Law Institute's model..." (Abortion History Timeline). Before 1973, several states, including Alaska, Hawaii, New York, and Washington, legalized all abortions, performed prior to fetal viability. During this period of liberalization, many hospitals, in states that followed the American Law Institute's model, appointed committees to review abortion requests for the required conditions. Many of these committees required that a law-enforcement officer verify that a woman had filed charges for sexual assault before they would grant her an abortion for rape or incest. Many committees required that a physician's recommendation of an abortion to protect a patient's health be confirmed by multiple other physicians or by a licensed psychiatrist, before authorizing an abortion. " A woman's ability to navigate this process successfully generally required having a long-standing relationship with a physician. In practice, this meant that the option was only available to those who were able to pay for the review process, in addition to the procedure itself" (Gold, Rachel). Even in the short period of relaxation of anti-abortion laws in many states before the decision in Roe v. Wade, legal abortions were difficult to acquire for women who met the requirements, especially for those who were poor. Illegal abortions were common in the United States, prior to Roe v. Wade. " Back-alley" abortions were provided by unlicensed doctors and untrained practitioners, and many women performed self-induced abortions. " Estimates of the number of illegal abortions in the 1950s and 1960s range

from 200, 000 to 1. 2 million per year" (Gold, Rachel). Before Roe v. Wade, an inestimable number of women were hospitalized with incomplete abortions and infections caused by abortions performed in unsanitary conditions, and many of these women died. With the Supreme Court's decision in Roe v. Wade (1973), elective abortions, performed in the first trimester, were made legal. The court ruled that, by outlawing first-trimester abortions, the states were violating the Liberty Clause of the Fourteenth Amendment, which affirms that " no state can deprive any person of liberty, without due process of law" (" The Right of Privacy"). The Court asserted that a woman's right to privacy is included in her guaranteed liberty and cannot be denied by the states. A citizen's right to privacy had been previously acknowledged, by the Warren court, in the case of Griswold v. Connecticut (1965). In Griswold, the Supreme Court struck down a state law prohibiting the possession, sale, and distribution of contraceptives, established the freedom of privacy- a freedom unmentioned by the Constitution, and decided that citizens could choose how many children to have, without interference from the government. All concurrent justices proffered that citizens are entitled to privacy, and all concurrent justices cited different parts of the Constitution as the basis for this right. Concurrent Justice Douglas believed that the right to privacy was ensured by the " penumbras" and " emanations" of the Bill of Rights, concurrent Justice Goldberg believed that the right to privacy was one of " the other rights retained by the people", mentioned in the Ninth Amendment to the United States Constitution, and concurrent Justice Harlan believed that states' passage of laws that outlawed contraceptive use and authorized the

government to search citizens' homes for evidence of contraceptive use was "inconsistent with a government based 'on the concept of ordered liberty'" ("The Right of Privacy"). By the time of the decision in *Roe v. Wade*, the members of the Court consensually agreed that the Fourteenth Amendment's protection of liberty ensures a citizen's right to privacy and that a violation of a citizen's privacy, by the government, is tantamount to denial of liberty. The Court found the state of Texas's law, prohibiting first-trimester abortions, to be a violation of a citizen's right to privacy. According to the Court, in *Roe v. Wade*, reproductive decisions should be made by a woman and her doctor, but this independence should be "balanced by the state's role in protecting prenatal life and protecting women's rights" ("*Roe v. Wade*"). The court attempted to achieve this balance by empowering states to regulate second- and third- trimester abortions and to ban third-trimester abortions. *Roe* was heralded by some as the proper solution for the abortion conflict and denounced by others as a misinterpretation of a constitutional principle. Some have criticized the decision for terminating the movement to liberalize abortion laws by legislation-which may eventually have legalized abortion in a way more congruous with national consensus ("*Roe v. Wade*"). Others claim that the states should be allowed to write their own abortion laws because opinions on this issue are so diverse. *Roe v. Wade* was a major turning point in the history of abortion in America. Immediately after the Supreme Court's decision in *Roe v. Wade*, abortion rates intensified, until they leveled off in the 1980s. *Roe v. Wade* has undoubtedly prevented many deaths of women in grisly, unsanitary "back-alley" abortions. Many oppose *Roe v. Wade* because they believe killing a

fetus is an act of murder. These opponents of legalized abortion have formed the pro-life movement and are determined to cause the verdict of *Roe v. Wade* to be overturned. Many members of the pro-life movement oppose abortion because they believe that human life begins with fertilization and that embryos have the same natural rights as humans. Prior to the Supreme Court's decision in *Roe v. Wade*, the pro-life movement was comprised almost entirely of the Catholic Church. The modern pro-life movement was mobilized by the Supreme Court's decision in *Roe v. Wade* and began with the creation of the National Right to Life Committee ("United States Pro-life Movement"). The Southern Baptist Convention officially supported the Supreme Court's decision in *Roe v. Wade*, until 1980, the year in which pro-life planks were first used to construct the Republican Party platform. Since that time, the Republican Party has espoused a pro-life position, and many members of its ranks have called for a Human Life Amendment to the United States Constitution, banning abortion. The pro-life movement is strengthened by the support of the Catholic Church and many Protestant denominations, and most members of the pro-life movement cite religious convictions as the basis of their pro-life stance. There is an exclusively secular-humanist minority, within the pro-life movement, that opposes abortion "on the basis of human rights and biology, rather than religion" ("United States Pro-life Movement"). The Hyde Amendment is a "rider" that has been affixed to numerous federal appropriations bills, in various forms, since 1976. The current form of this amendment was signed into law, by President Bill Clinton, as part of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, on October

22nd, 1993, and prohibits the use of appropriated funds for the Department of Health and Human Services to pay for abortions, except for those of victims of rape and incest and those whose lives would be endangered by pregnancy and/or childbirth. This prohibition primarily affects the Medicaid program. The version of the Hyde Amendment, in effect from 1981 until 1993, prohibited the use of federal funds to pay for abortions, except for those that would protect mothers whose lives would be threatened by pregnancy and/or childbirth. The Hyde Amendment is widely considered to be the first legislative achievement of the American pro-life movement, the group of Americans who believe that abortion should be banned and seek to overturn *Roe v. Wade*. The Hyde Amendment has incited intense debate in Congress, when it has come up for renewal. Many pro-choice politicians and activists, the National Abortion Federation, and the American Civil Liberties Union oppose the Hyde Amendment, on the grounds that it discriminates against low-income women, by banning them from obtaining abortions, through the Medicaid system, the federal healthcare system that was designed to meet their healthcare needs. These organizations continue to call for repeal of the Hyde Amendment ("Hyde Amendment"). Legalized abortion is controversial for many Americans, and public opinion remains nearly split on this issue. In 1992, in *Planned Parenthood v. Casey*, the Court examined the constitutionality of several restrictions on abortion, imposed by the Pennsylvania state legislature. "The Court upheld the informed consent rule, requiring doctors to inform women about detriments to health in abortion procedures, the parental notification procedures, requiring minors to receive consent from a parent or guardian prior to having an abortion, and

a twenty-four hour hold period before obtaining an abortion, and the imposition of reporting mandates on abortion facilities." The Supreme Court reaffirmed the basic principle of *Roe v. Wade*, that a woman's reproductive choices are her own, but "overturned the formula used in *Roe v. Wade* to weigh the woman's interest in obtaining an abortion against the state's interest in the life of the fetus" ("*Planned Parenthood v. Casey*"). The Court held that "viability is the point at which the state interest in the life of the fetus outweighs the rights of the woman" and that "abortion may be banned entirely, at this point" ("*Planned Parenthood v. Casey*"). The Court also supported the power of the states to regulate abortion, before and after viability, as long as state regulations do not "impose an undue burden on women" ("*Planned Parenthood v. Casey*"). The Court's decision, in *Planned Parenthood v. Casey*, has allowed for the impediment of access to legal abortion by state legislatures. Many pro-life groups view the *Casey* decision as an indication that a Conservative Supreme Court might overturn *Roe v. Wade* and return the responsibility to regulate abortion to the states. In the years following the decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, access to abortion services has become increasingly restricted. Conservative state legislatures have used their power to marginalize abortion patients and providers. Ninety-two abortion-restricting measures were passed by state legislatures in 2011 alone. These measures include mandatory parental notification or consent for minors, the use of Medicare funds only if the mother's life is endangered or in cases of rape or incest, a mandatory waiting period, mandatory counseling on the fetus's ability to feel pain, and mandatory ultrasound. The Supreme Court has not decided

whether these restrictions impose an undue burden on women or are simply methods, used by the states to uphold their responsibility of protecting prenatal health. Many state legislators could not deny that their regulations place an undue burden on women because this is the exact intent of their policies. " Pro-life politicians enacting laws to limit abortion are now testing the limits of the Planned Parenthood v. Casey ruling. Their ultimate goal is to land another abortion case before a sympathetic Supreme Court in an attempt to overturn Roe v. Wade" (Pickert, Kate). " Along the way, in what Charmaine Yoest, president of the anti-abortion group Americans United for Life, describes as a strategy to ' work around Roe,' pro-life activists hope to severely-or completely- curtail access to abortion at the state level" (Pickert, Kate). It shouldn't be long before the Supreme Court makes a definitive ruling on whether the states can continue to abrogate a woman's ability to have a legal abortion. Such a decision could nullify a woman's right to have an abortion, if the Court rules that the states' interest in protecting fetal life overrides a woman's desire to have an abortion, regardless of her stage in the pregnancy. Such a decision may reflect the loosening grip of the pro-choice camp on American public opinion. Could it be that graying pro-choice activists have lost touch with American women? Could it be that the horrors of the " back-alley" abortion have slipped from our collective consciousness? The answer is yes, according to a Gallup survey conducted in May 2012. " Even though three-quarters of Americans responded that abortion should be legal under some or all circumstances, just forty-one percent identified themselves as pro-choice...In this age of prenatal ultrasounds and sophisticated neonatology, a sizable majority of Americans supports

restrictions like waiting periods and parental consent laws" (Pickert, Kate). Theories, regarding the cause of this tilt in American public opinion, abound. Some believe that advanced sonograms and other such technologies have worked to the advantage of the pro-life cause. One analysis suggests that, since pro-life families may be expected to have fewer abortions (and more children) than their pro-choice counterparts and they may pass on their beliefs to their children, this will change the voter demographic of future generations. In this way, legal abortion-on-demand may also serve to increase the dominance of the pro-life position in society. This hypothesis has been called the 'Roe effect' and may explain the trend towards more widespread support of the pro-life movement ("United States Pro-life Movement"). Abortion-rights advocacy groups have noticed this shift in attitudes and are doing their best to respond. But some pro-choice leaders are frustrated with the movement's direction, or lack thereof. "Pro-choice activists' failure to adapt to the shift in public attitudes on abortion has left their cause stranded in the past", says Frances Kissling, a longtime abortion-rights advocate and former president of Catholics for Choice. Kissling is part of a small group within the pro-choice movement trying to push the cause toward more nuanced stances. 'The established pro-choice position- which essentially is abortion should be legal, a private matter between a woman and her doctor, with no restriction beyond what is absolutely necessary to protect the woman's health- make fifty percent of the population uncomfortable and unwilling to associate with us, she says" (Pickert). The seemingly contradictory aspects of American public opinion, regarding abortion- the abortion should be legal in all or most cases but should be

restricted- reflect a " middle-of-the-road" attitude towards abortion. Most Americans believe that a woman's right to have an abortion should be protected but feel that abortion should not be used as birth control. Because this second aspect of public opinion is similar to the belief of the pro-choice movement- abortion should only be allowed in cases of rape, incest, fetal abnormality, and danger to the mother, politicians and activists will claim a public mandate for their attacks on Roe v. Wade and legal abortion. This extremism will surely repel most Americans who share " a more nuanced stance." What type of policy can properly concretize the majority of Americans' views on abortion? Well, increased numbers of petitioners for adoption would lessen the number of mothers using abortion as birth control. " Only one state, Kansas, requires an adoptive parents' private insurance to cover the birth mother's prenatal care" (Miller, Lisa). If adoption was cheaper, more people would be seeking to adopt and fewer abortions would be necessary. The results of a study, conducted by Marianne Bitler and Madeline Zavodny to determine the effect of legalization of abortion on adoption rates, led Bitler and Zavodny to conclude that " the estimated effect of abortion legalization on adoption rates is sizable and can account for much of the decline in adoptions during the early 1970s. In our sample, the number of adoptions of children born to white women was forty-two percent lower in 1975 than in 1970" (Bitler, Marianne, and Madeline Zavodny). This trend of decline in adoption rates, after the legalization of abortion, indicates that increased promotion of adoption by governments, national and local, and private organizations would be likely to encourage some women, carrying unwanted fetuses, to choose adoption, instead of

abortion. For a pregnant woman, adoption is a less expensive option than abortion because the adoptive parents pay for the birth mother's prenatal care (This is the case, in every state except for Kansas, where the adoptive parents' private insurance is required to pay for their birth mother's prenatal care.). If all states passed laws, like Kansas's, compelling all private insurance companies to pay for the prenatal care of birth mothers, who will give their children to adoptive parents, more couples would petition for adoption, and the number of abortions would be lessened. This increased ease of adopting a child would mean that more babies would be adopted and fewer babies would be aborted because the couples who wanted them couldn't afford the birth mother's prenatal care. Another example of a measure reflective of the American people's "nuanced stance" is President Obama's recent executive order, prohibiting the use of federal funds "to pay for any abortion or to cover the costs of any health plan that includes coverage of abortion except in cases of rape, incest, or danger to the life of the mother" ("Stupak-Pitts Amendment"). This policy means that federal funds won't be used to provide a service that violates the beliefs of many tax-paying Americans and, in compelling mothers to pay for their own abortions, will hopefully engender the sense of responsibility for one's actions and choices that most Americans value. This executive order is essentially an extension of the restriction of the Hyde Amendment and another legislative victory for pro-choice Americans. Another way to lessen the incidence of abortion, while protecting a mother's right to choose, is to lessen the number of unplanned and unwanted pregnancies. By ensuring that birth control is available to all women and helping economically

disadvantaged women to go to college and to get jobs, the government can reduce the number of women who find themselves in an economic or emotional situation that necessitates abortion. A new emphasis on abstinence as the birth-control method of the twenty-first century will certainly reduce the number of unwanted pregnancies. Abortion will undoubtedly continue to be an important part of politics in America, as its legality continues to be debated. The passage of a Human Life Amendment, banning abortion, or a reversal of the Supreme Court's decision in *Roe v. Wade*, turning over the regulation of abortions to the states, would be one of the most dramatic transformations of legal policy in American history. Amid all of the chaos of the abortion debate, Americans can be sure of one thing: that they will soon have to determine what they are willing to risk to preserve their right to make their own reproductive decisions.