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The Future of an Illusion: Reconstituting Planned Parenthood V. Casey

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THE FUTURE OF AN ILLUSION: RECONSTITUTING *PLANNED PARENTHOOD v. CASEY*

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On Thursday, February 28, 1985, a 9 mm bullet pierced the window of Justice Harry Blackmun's high-rise apartment. Whether by chance or design, the bullet that missed a mark took on symbolic importance—*Roe v. Wade*[1] was still very much under attack. That attack continues to manifest itself in a variety of ways, from proposed constitutional amendments to clinic bombings to assassinations of doctors. Those, of course, are among the most extreme and blatant attacks by anti-*Roe* zealots.

Roe has also been besieged by other attacks, more subtle but nonetheless significant, which were facilitated by three Supreme Court Justices who proclaimed that they were defending it and, we assume, acted in good faith. We refer, of course, to the plurality opinion in *Planned Parenthood v. Casey*,[2] jointly authored by Justices O'Connor, Kennedy, and Souter.

What if *Casey* had been decided differently? What if Justice O'Connor and/or Justice Kennedy had joined Chief Justice Rehnquist and Justices Scalia, White, and Thomas to overrule

* Professor of Law at New York Law School and President of the American Civil Liberties Union. (It should be noted that the ACLU represented Planned Parenthood in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, urging the Supreme Court to reaffirm *Roe v. Wade* in its entirety.) The authors gratefully acknowledge the assistance of Professor Strossen's Chief Aide, Amy L. Tenney, and her Research Assistant, César DeCastro. An online version of this commentary may be found on the Jurist website (online articles) at <http://jurist.law.pitt.edu>.

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1. 410 U.S. 113 (1973).
2. 505 U.S. 833 (1992).

Roe v. Wade outright,[3] as O'Connor and Kennedy had previously suggested they might be inclined to do?[4]

Rather than leaping headlong into the politics of 1992-1993 and the fate of the Freedom of Choice Act, then pending in Congress, we prefer to begin with some observations about *Casey* and how it has affected public perceptions of reproductive freedom in America.

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"[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed," declared the *Casey* plurality opinion.[5] That opinion reiterated the "unbroken commitment by this Court to the essential holding of *Roe*."[6] As if two such professions of constitutional fidelity were not enough, the joint opinion further proclaimed: "[O]ur . . . analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding."[7] With Orwellian facility, *Roe's* essence had been redefined. Never mind that what was once a "fundamental right,"[8] triggering strict judicial scrutiny of any restrictions, was relegated to constitutional limbo as a "liberty claim [ ]," [9] warranting judicial review of any restrictions only under the deferential, malleable "undue burden" rubric.[10] Never mind, also, that government officials were licensed to circumscribe women's "liberty claims"[11]

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3. The *Casey* dissenters may well have had a fifth vote if that 1985 bullet had hit and killed Justice Blackmun. In such a tragic event, President Reagan likely would have sought to nominate an anti-*Roe* candidate.

4. See *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 517 (1989) (per Rehnquist, C.J., joined by White and Kennedy, JJ.) ("[T]he doubt cast on the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that [*Roe*'s] rigid trimester analysis" has proved to be unsound and unworkable in practice); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814-15 (1986) (O'Connor, J. dissenting) ("That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*. . . .").

5. *Casey*, 505 U.S. at 846.

6. Id. at 870.

7. Id. at 879.

8. *City of Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416, 420 n.1 (1983) ("Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.") (citations omitted).

9. *Casey*, 505 U.S. at 857.

10. Id. at 876. To its credit, the *Casey* plurality opinion eschews the approach of *Webster*, 492 U.S. 490 (cited in note 4), which had remitted the *Roe* right to the even more debased status of a mere "liberty interest," whose infringement triggers only the highly deferential rational basis review. See id. at 520.

11. *Casey*, 505 U.S. at 857.

in controlling their own bodies, lives, and health through restrictions that, in practice, demonstrably preclude abortion as a feasible option for many women—in particular, those who are young, poor, or live far from an abortion provider.

Ironically, the illusory nature of *Casey's* so-called "reaffirmation" of *Roe's* "central holding"—which had already been devalued by pre-*Casey* rulings[12]—was immediately assailed not only by pro-choice advocates, but also by that staunch opponent of *Roe*, Chief Justice Rehnquist. While his opinion in *Casey* deplored the plurality's failure to overturn *Roe* explicitly and directly, it simultaneously derided the plurality's handiwork as having, in effect, achieved that result covertly and indirectly. While the plurality protested—perhaps, to quote the Bard, "too much"—that what it had preserved was the "essential" or "central" holding of *Roe*, the Chief Justice dismissed these remains as *Roe's* "outer shell."[13] In his mocking terms: "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[14] In the same vein, he caustically commented: "*Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent."[15]

The hopes of Chief Justice Rehnquist and the fears of pro-choice activists have indeed been substantially realized. The *Casey* plurality opinion facilitated various and devastating attacks on reproductive freedom. In that sense, insofar as it was intended to reinvigorate the real *Roe* right, the plurality opinion has been a failure. But insofar as it was designed to convince the public that *Roe* is safe and working, the plurality opinion has been a success—with dismaying consequences for the reproductive freedom movement and for the actual rights of real women. What has proven to be important has been the broad public (mis)perception of the plurality's constitutional handiwork—the idea that some common ground had been discovered, and that the *actual* right vouchsafed in *Roe* really had survived, albeit with some few and not overly burdensome qualifications.

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12. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster*, 492 U.S. 490; *City of Akron*, 462 U.S. 416; *Harris v. McRae*, 448 U.S. 297 (1980). In our view, the *Casey* Court extended existing deviations from *Roe's* core principles.

13. See *Casey*, 505 U.S. at 944 (cited in note 2) (Rehnquist, C.J., concurring in part and dissenting in part).

14. Id. at 954 (Rehnquist, C.J., concurring in part and dissenting in part).

15. Id. at 966 (Rehnquist, C.J., concurring in part and dissenting in part).

Casey thus fostered a "*Roe* was saved" public mindset. Such mantra magic has buttressed the belief that the realities of abortion do or will coincide with the bold declarations of the plurality opinion. Yet, unfortunately, that has not occurred.

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Casey's lip-service to *Roe's* "essential holding" must be judged against the realities of reproductive freedom. Consider the following examples (pre- and post-*Casey*) of real-world constraints on meaningful access to a range of reproductive services and options, including abortion. As of this writing:

- Only twelve percent of all residency programs in obstetrics and gynecology require routine training in first-trimester abortions;
- Over eighty-five percent of all U.S. counties, which are home to a full third of all women of childbearing age, have not a single abortion provider;
- Almost one in four abortion clinics has faced severe anti-abortion violence, making it ever more difficult for any such clinics to obtain insurance and rental property;
- There are ninety-one counties where a Catholic hospital, which provides no abortion services, is the sole health care provider. Ninety-five percent of those hospitals are in counties with a minority Catholic population;
- Mergers between Catholic and non-Catholic hospitals are rising sharply, with a total of 127 between 1990 and 1998. In almost half of the cases studied during this period, all or some of the reproductive health services that previously had been provided by the non-Catholic hospital (including birth control, emergency contraception (the "morning-after pill"), sterilization, and abortion) were eliminated following the merger;
- Over twenty-five percent of all states prohibit all or some types of insurance coverage for abortion; four states prohibit any such coverage, while ten prohibit such coverage for public employees using public funds;
- Thirty-two states do not fund abortions for women receiving Medicaid (although they do fund pregnancy and perinatal services for those women) unless a pregnancy endangers the woman's life or is the result of rape or incest;
- At least fourteen states require a delay following state-directed "counseling"—which is skewed to discourage

abortion, often through misleading propaganda—before a woman may obtain an abortion. Eight additional states require such "counseling" (without a mandatory delay) before a woman may obtain an abortion;

- At least twenty-nine states require parental consent (fifteen states) or notification (fourteen states) before a minor may obtain an abortion;
- At least eleven states enforce bans against so-called "partial-birth" abortions (eight apply at all stages, three apply post-viability only). Despite the distorted, inflammatory label and rhetoric, most of these laws are so broadly and vaguely written that they threaten all abortion procedures throughout pregnancy;
- Several states are attempting to impose cumbersome, expensive, and unwarranted requirements on abortion clinics, under the guise of health and safety regulations;[16] and
- The House of the 106th Congress passed a bill granting legal status to a fetus by establishing criminal penalties for anyone who injures or harms a fetus.[17]

The aforementioned facts highlight the attenuated status of reproductive freedom in America, a reality at odds with the spirit, as well as the letter, of *Roe*. However well-intended, the *Casey* joint opinion provided at least political encouragement, and at worst judicial sanction, for such real-world threats and restrictions on reproductive freedom. What is becoming increasingly apparent, however valuable the judicial check on legislation, is that meaningful access to abortion continues to be eroded while the "essential holding of *Roe*" continues to be reaffirmed.[18]

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To return to the call of the question: What if *Planned Parenthood v. Casey* had been decided differently? What if *Roe* had been reversed outright and completely, rather than, as Chief Justice Rehnquist charged, indirectly and evasively? Here are a few of our guesses:

16. All of the data come from The Alan Guttmacher Institute (Wash., D.C.) except for the data on clinic violence (Feminist Majority Foundation, Arlington, VA.), on ob/gyn residency programs (Medical Students for Choice, Wash.,D.C.), and on Catholic hospitals and their mergers with other hospitals (Catholics for Free Choice, Wash., D.C.).

17. See Unborn Victims of Violence Act of 1999, H.R. 2436, 106th Cong. (1999).

18. *Casey*, 505 U.S. at 846.

- Criminal bans on abortion—such as the ones in Louisiana, Utah, and Guam—might well have been upheld, with more states following suit, putting women's health in serious jeopardy;
- There would have been considerable pressure on the then-Democratically-controlled Congress to pass the Freedom of Choice Act (FOCA), which was intended to codify *Roe's* principles as a matter of federal statutory law. President Bush, however, probably would have vetoed such legislation with a slim likelihood of his veto being overridden;
- Bill Clinton's margin of victory in 1992 might well have been greater if *Roe* had been reversed and FOCA vetoed;
- In 1993, a Democratically controlled Congress and a Clinton Administration with a pro-choice mandate would have had a clear political imperative to pass FOCA, and they might well have succeeded; and
- The outcomes of the 1994 congressional races might have been notably different if pro-choice voters perceived that it was essential to keep pro-choice lawmakers in office. Then again, the passage of FOCA might have led, in time, to an anti-abortion backlash.

If nothing else, such speculation suggests a reasonable assumption—namely, that had *Roe* been reversed outright, the politics of abortion would have reflected a significant mobilization of pro-choice forces, a development that *Casey* deterred. The formal reversal of *Roe*, in other words, might well have strengthened the reproductive rights movement in much the same way that *Roe* itself galvanized the anti-abortion movement. If so, this suggests a possible repeat phenomenon, a cyclic back-and-forth campaign between the respective forces. Under our scenario, accordingly, the passage of FOCA in turn might have stimulated a re-energization of the anti-abortion movement, perhaps leading to a Congressional repeal of FOCA, or at least to a scaling-back of its protections. When the political dust finally settled, the national legislative result could well have mirrored the status quo post-*Casey*.

We can speculate until the proverbial cows come home as to which "result" would prove most rights-protective in the long run. That there can be some degree of doubt on this point—and we stress that there can be—calls to mind a more important lesson. It is this: Civil libertarians proceed at their peril if they assume that the protection of rights is exclusively or even primarily

the responsibility of the judiciary. Living as we do in what remains of the legacy of the Warren Court, too many civil libertarians have become too accustomed to leaving too much to the courts and too little to the legislatures when it comes to safeguarding rights. This is not—and we emphasize this point—some Borkean call for judicial abdication. Rather, it is a call for a more proactive rights-protective legislative agenda to complement the gains made by judicial review. It is a lesson in progressive reform—a lesson long ago put into practice by Louis Brandeis with significant support from Josephine Goldmark and Florence Kelly.[19] Sadly, however, it is a lesson that too many civil libertarians have unlearned.

To some extent, judicial declarations have blinded some civil libertarians to the realities of life; to the realities of everything from abortion rights post-*Roe* to custodial rights post-*Miranda*.[20] Life is not always what the law, or a plurality of Justices, says it is. *Roe* is being deconstructed year-in and year-out, law after law, decision after decision, regulation after regulation, and all of this buttressed by the ongoing hostilities toward reproductive service providers. Meanwhile, *Casey* assures us that all is "essentially" well, that *Roe* is "essentially" safe. While *Roe's* reversal would have gravely endangered women's rights and bodies, such a declaration of war would have been seen for what it was and would not have invited the false security fostered by *Casey*.

The essential problem with *Casey*—i.e., creating illusory perceptions that camouflage reality—is that it encourages the supporters of reproductive rights to fiddle while their Rome burns. But, given today's realities, they cannot afford to be Neronian. If they are, they may only be "excused by two facts: [they do] not know that [they] fiddle[ ], and [they do] not know that Rome burns."[21]

19. These two women were an essential part of the Brandeis campaign for progressive legislative reform (and also played a major role in writing the famous "Brandeis brief"). See Ronald K.L. Collins and Jennifer Friesen, *Looking Back on* Muller v. Oregon*: Part I*, 69 A.B.A. J. 294 (1983); Jennifer Friesen and Ronald K.L. Collins, *Looking Back on* Muller v. Oregon*: Part II*, 69 A.B.A. J. 472 (1983).

20. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

21. Leo Strauss, *Liberalism Ancient and Modern* 223 (Basic Books, 1968).