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Revisiting Roe: The Language of Privacy and Isolation in U.S. and Vermont Case Law

"The pregnant woman cannot be isolated in her privacy," Justice Blackmun wrote in the landmark decision of *Roe v. Wade*, the U.S. Supreme Court case that legalized a woman's right to choose abortion.¹ While this is by no means *Roe's* most recognizable quotation, it has proven increasingly ominous for those trying to prevent the erosion of women's privacy rights. Indeed, as the courts, legislatures, and advocates on both sides have engaged in continual framing and reframing of the abortion debate, a pregnant women's right to be at all "isolated" in her decision has become increasingly less assured. "Cannot" is slowly and disturbingly becoming "will not."

January 22, 2008, marked the thirty-fifth anniversary of the *Roe* decision and many have taken the opportunity to reflect on the abortion debate. One thing is clear: we disagree—in courtrooms and legislatures, in classrooms and around kitchen tables. We disagree. These disagreements, as Blackmun noted at the beginning of *Roe*, arise from "one's experiences, one's exposure to the raw edges of human existence, one's religious training, [and] one's attitudes toward life and family."²

One might assume that acknowledgement of these differences would move the courts and legislatures to afford the person most intimately involved more privacy when making these personal and private decisions. Instead, individual judges and legislators have moved in the other direction—codifying and enshrining their own morals, religious beliefs, and experiences. So strong it seems is their desire to define a woman's experience that—as their voices have become louder and more controlling—the doctor's offices and kitchen tables where women have sought refuge to make private decisions have grown increasingly less isolated from their reach.

As the Court has shifted and reframed its logic in the last thirty-five years, a telling trend has emerged: the more

willing justices are to invade and describe a pregnant woman's private experience, the more likely they are to restrict access to abortion. The language that courts—in particular the U.S. Supreme Court—use to describe women's private plights has invariably become the measure of how much these judges will substitute their own decision-making power for ours.

To Roe or to Wade

Many incorrectly assume that abortion was illegal before *Roe* and, if *Roe* is overturned, will be illegal again. In fact, state restrictions on abortion formed a patchwork of laws before *Roe* and, importantly, if *Roe* is ever overturned, we will return to the status of our state law prior to *Roe*.

Roe stands as the matriarch of the abortion cases protecting a woman's right to choose—holding this right absolute in the first trimester and outlining the parameters of state regulation in the second and third trimesters. It was *Griswold v. Connecticut*³ and *Eisenstadt v. Baird*,⁴ however, that set the stage for the Court to extend the zone of privacy to include the decision to terminate a pregnancy. *Griswold* and *Eisenstadt* created a constitutional privacy that protected the right of, first, married couples, and then unmarried people, to use contraception. *Roe* was followed by a series of cases that sought to test the power of government to restrict the right to abortion; in the majority of these cases, restrictive laws, in light of *Roe*, were held unconstitutional.⁵ In 1992, however, *Planned Parenthood v. Casey*⁶ upheld the essential holding of *Roe* while establishing a new test for abortion regulations. After *Casey*, regulations would only be unconstitutional if they imposed on women seeking an abortion an "undue burden"—a term Justice O'Connor chose without regard to the inherent subjectivity of what constitutes a "burden."

The Texas statute that criminalized abortions, at issue in *Roe*, was far from

unique in its time. The majority of states that criminalized abortions did so either by criminalizing a woman's act of procuring an abortion and/or criminalizing the doctor's act in providing her with one. As *Roe* was decided, states across the country were considering challenges to their own criminalization statutes.

The Vermont Supreme Court, in fact, had already invalidated Vermont's criminalization statute in 1972 in *Beecham v. Leahy*,⁷ a year before *Roe*.⁸ The Vermont Legislature had enacted a law that penalized doctors for providing abortions, but was silent on a woman's right to receive an abortion. The Vermont Supreme Court invalidated the statute because of the duplicity inherent in the law. The Court explained that it was "hypocrisy" to allow women the right to obtain an abortion and yet criminalize the act of providing the procedure safely. The Court held that "the legislature, having affirmed the right of a woman to abort, cannot simultaneously, by denying medical aid in all but cases where it is necessary to preserve her life, prohibit its safe exercise."⁹

Doctor v. Patient

Two days after the *Gonzales v. Carhart*¹⁰ decision was issued, a letter appeared in the *New York Times*:

I am a rheumatologist caring for a patient whose lupus nephritis is flaring. Her creatinine is rising as her platelet count falls, and she has failed to improve with pulse methylprednisolone and intravenous cyclophosphamide. I am contemplating using rituximab. I would like to refer this case to the United States Supreme Court for its guidance.¹¹

The letter was ironic, but the sentiment was shared by many—the Supreme Court, it seemed, had given Congress and itself authority to play doctor.

The Court in *Carhart* upheld a federal

abortion law that made it illegal for providers to use a specific procedure, even when they felt it was necessary to preserve a woman's health. In addition to retreating from an unbroken line of precedent holding that a woman's health must always be protected, the Court created a fissure between doctor and patient. The morals and dubious findings of Congress took the place of medical judgment. "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context," the Court wrote.¹² And so providers were left to weigh the fear of prosecution with their ethical responsibility to provide the best care for women.

The Vermont Supreme Court, in contrast, had recognized a reality that present-day courts have all but ignored: criminalizing does not prevent a pregnant woman from seeking an abortion; it prevents her from obtaining one safely. The Vermont Court acknowledged the real health risks that criminalization statutes create when providers and patient are put at odds: "the law leaves her only to the recourse of attempts at self-induced abortion, uncounselled [sic] and unassisted by a doctor, in a situation where medical attention is imperative."¹³

Beecham recognized that the doctor vs. patient mentality will always fail. Unfortunately, the framework of pitting of doctors against patients has been embraced by the "pro life" movement, and increasingly by the U.S. Supreme Court. As *Carhart* clearly illustrates, the current Court is unafraid to deprive women and their doctors of their rights to make independent decisions. And, of course, the Court's willingness to penalize doctors—preventing them from acting in the way they feel is safest for their patients—is a clear indication of the new Court's willingness to uphold any restriction on abortion.

Justice Ginsburg's voice in *Carhart* sounded clearly in her dissent. "Today's decision is alarming," she wrote, also chastising the majority's disregard for precedent.

It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no

exception safeguarding a woman's health.¹⁴

To criminalize abortion there are two options: penalize the provider or penalize the pregnant woman. Few, even in the "pro life" movement, seem to be willing to throw a woman in jail for seeking or obtaining an unsafe abortion. Penalizing providers has much more appeal for those who seek to outlaw abortion—despite the risks that the scenario creates for women. This was, of course, the question that presented itself to the Vermont Supreme Court in 1972 and it is impossible to ignore the question that the Court asked: "Where is the concern for the health of the pregnant woman when she is denied the advice and assistance of her doctor?"¹⁵

Ignoring History, We Are Doomed to Repeat it

A look back at the pre-*Roe* era reveals a public health epidemic that was cured when abortion was legalized, but in the ensuing thirty-five years has largely been forgotten. As two leaders in the Vermont movement to legalize abortion recently wrote "*Roe* [and *Beecham*] ... did not make abortion available. It made it safe. Before *Roe*, abortion was illegal but still very common, and every day women risked their lives and future fertility to end a pregnancy."¹⁶ The pioneers in the abortion movement remember well what drove them to fight for legalizing abortion. They remember the septic-abortion wards that were filled with woman who had sought unsafe illegal abortions. Before *Roe*, these beds were constantly filled. After *Roe* legalized safe practice by trained individuals, the beds were immediately emptied.¹⁷

The *Beecham* case, like *Roe*, emerged from the realities of the time. Abortion was illegal and yet women sought abortions. The assumption that penalizing those who seek or perform abortions would reduce the number of abortions has proved misguided, time and again. And frighteningly, if women today are again pitted against the counsel of their trusted providers, they have another avenue for instruction—the Internet—a source frequently used, yet so unmonitored.

Women Deserve Better

"Women Deserve Better." This is the slogan of the "Feminists for Life"¹⁸ and a new marching cry for many in this new

generation of "pro life" activists. Now, thirty-five years after *Roe*, a generation has arrived that is naively unaware of the images and stories of women who desperately sought clandestine abortions when they were outlawed.

This slip in our collective memory has allowed the "pro life" movement to gain increasing momentum as it pushes for legislation and regulations that establish fetal personhood, and values it over the life and health of women. The true story of what actually happened to women before legal abortions is, quite simply, being forgotten. And with this lapse in memory, the courts (in particular those with judges who have long affirmed their desire to overturn *Roe*) have become increasingly free to insert their own morals into their holdings.

A filmmaker recently went to an anti-abortion rally and posed a question to the protestors: "What should happen to women if abortion is made illegal?"¹⁹ Surprisingly, several had never considered the question; very few answered that the woman herself should be penalized or imprisoned; several more answered that the doctor should be punished, but the woman should not be.

The holdings in *Beecham*, *Roe*, and many others of their time are not just about respecting women enough to permit them to make their own decisions. They are also intrinsically about trusting the medical profession and those who provide counsel to be able to do so for women who trust them—without fear of prosecution. It is these people—the counselors, family members, clergy, and health providers whom legislators are increasingly targeting with laws that penalize any and all from helping a woman who faces state restrictions on abortion from seeking one elsewhere.²⁰ State legislative activity has recently focused on bills that require providers to perform and show pregnant women an ultrasound prior to performing an abortion and dictates specific predisposed information that doctors must tell women seeking abortions.²¹ While this legislative activity rarely targets women themselves, it quickly strips them of the ability to consult openly with those whom they trust and to whom they would turn to help make these personal decisions.

Women Deserve Better Dicta

The questions that courts must wrestle with in abortion cases are perhaps the weightiest in judicial practice. As their

opinions and public response indicates, whenever the court chooses to act in an abortion case, many will be unhappy with the result. Many wonder what is next in the abortion debate. Will the Court, as many assume, simply overrule *Roe*? Or will the justices continue in their piecemeal approach—an approach Justice Ginsburg, in her dissent in *Carhart*, found deplorable, saying it “cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.”²²

A brief scan of the holdings regarding contraception and abortion illustrates the gradual tiptoe of the Supreme Court into women’s decisions. A deeper scan of the language used, illustrates the larger steps the Court is taking. As the Court moves from determining the scope of privacy afforded to each woman to actually defining her experience, we should all be concerned.

In *Roe*, Justice Blackmun wrote “[t]he right of privacy ... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.”²³ In *Casey*, Justice O’Connor stated, “Her suffering is too intimate and personal for the State to insist ... upon its own version of the woman’s role, however dominant this vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”²⁴ Yet in *Carhart*, Justice Kennedy argues that

[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child ... Whether to have an abortion requires a difficult and painful moral decision ... While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained ... Severe depression and loss of esteem can follow.²⁵

Your Sphere of Privacy Doesn’t Actually Include You

Justice Blackmun did not view the right to abortion as universal. He clearly stated: “We, therefore, conclude that the right of personal privacy includes the

abortion decision but that this right is not unqualified.”²⁶ In effect, the Court in *Roe* constructed a sphere around a woman’s privacy rights to abortion. Recognizing that the pregnant woman was truly not “isolated” in her right to privacy, the Court provided her with a sphere of privacy that was not absolute but was strong enough to keep out any personal assumptions the justices, and the public, might have about her experience.

O’Connor unzipped this sphere, choosing instead a fence intended to keep “undue burdens” away—ignoring, of course, the burdens of expense, travel, and the risk of familial violence that create very real and, sometimes, insurmountable barriers for many who seek abortions. The Court in *Casey* actually began to look through the fence and situate itself in the private world of pregnant women. The Court became a quasi-decision-maker, separating what it determined to be acceptable burdens for women (waiting periods, parental notification) from unacceptable ones (spousal notification).

It was Kennedy, however, in the 2007 Supreme Court’s new majority, who took the biggest step. With a new majority looking on in approval, he gingerly stepped over O’Connor’s fence, sat himself down at our kitchen tables and placed a hand on our collective shoulders, offering help when none was asked for. Kennedy said, in no uncertain terms, that women need to be protected from our doctors’ best judgment and from ourselves.

Justice Ginsburg’s dissent in *Carhart* calls attention to the unabashedly patronizing language of the new majority and to the collapse it signals for the future of women’s privacy: “Though today’s majority may regard women’s feelings on the matter as ‘self-evident,’ ... this Court has repeatedly confirmed that “[t]he destiny of the woman must be shaped ... on her own conception of her spiritual imperatives and her place in society.”²⁷ Of course, Ginsburg, now the only woman on the court, finds herself outnumbered in her desire to protect women’s capacity to make decisions for themselves.

The surrogate decision-making that the Court has taken on all but stifles the entire decision-making process for women and those they trust to help her. We each have our own counselors and confidants whom we seek out for guidance in our personal struggles. It is doubtful that Supreme Court justices and legislators ever rank high on that

list.

Capable of Repetition and Perpetual Review²⁸

In the last thirty-five years, women have taken incredible strides into the public sphere, becoming equals with men in education and employment as well as in the home. Yet for all of these advances, which are undeniably due in part to our ability to plan and control our reproductive lives, we have fallen terrifyingly behind in the eyes of the Supreme Court’s new majority.

Blackmun foresaw that a pregnant woman’s decisions would be scrutinized and that she could never isolate herself from the judgment of others when choosing abortion. But it is doubtful that when the Court in *Roe* protected this new sphere of privacy that the justices ever imagined finding women isolated outside of their own private decisions while judges and legislators battled it out within.

The tug of war that began with *Roe* has no end in sight and the new Supreme Court’s goal to overturn *Roe* is hardly surprising. Rather, it is the decision to ignore judicial precedent and social history that is both brazen and myopic. Abortion is a contested and complex issue specifically because it is so personal, so private. The Court’s decision to ignore the diversity of women’s actual experiences and instead base its holdings on hypothetically constructed ones will doom us to return to the often stunted and sometimes dangerous destinies that existed before *Roe*.

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¹ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

² *Id.* at 116.

³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁵ See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

⁶ *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).

⁷ *Beecham v. Leahy*, 287 A.2d 836, 839 (1972).

⁸ *Beecham* was actually cited in the appellant’s brief to the U.S. Supreme Court in *Roe*.

⁹ *Beecham*, 287 A.2d at 840.

¹⁰ *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007).

¹¹ Richard Zweig, M.D., Letter to the Editor, Re “A Sharp Turn for the Supreme Court on

Abortion," N.Y. TIMES, Apr. 20, 2007, available at <http://www.nytimes.com/2007/04/24/opinion/124abortion.html>.

¹² *Carhart*, 127 S.Ct. at 1618.

¹³ *Beecham*, 287 A.2d at 839.

¹⁴ *Carhart*, 127 S.Ct. at 1641.

¹⁵ *Beecham*, 287 A.2d at 839.

¹⁶ *Two Vermont Doctors Reflect on Roe v. Wade*, TIMES ARGUS, Jan. 22, 2008, available at <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20080122/OPINION04/801220367/1024/OPINION04>.

¹⁷ Amy Lily, *Choice, Before and After*, SEVEN DAYS, Jan. 16, 2008, available at <http://www.7dvt.com/2008/choice-and-after>.

¹⁸ www.feministsforlife.org.

¹⁹ http://www.youtube.com/watch?v=Uk6t_tdOkwo.

²⁰ See, e.g., Child Interstate Abortion Notification Act, H.R. 1063, 110th Cong. (2007).

²¹ See, e.g., S. 40 (Ky.), passed out of the Senate Feb. 7, 2008, and S. 146 (Ind.), passed out of the Senate Jan. 29, 2008.

²² *Carhart*, 127 S.Ct. at 1652.

²³ *Roe*, 410 U.S. at 153.

²⁴ *Casey*, 505 U.S. at 852.

²⁵ *Carhart*, 127 S. Ct. at 1634.

²⁶ *Roe*, 410 U.S. at 155.

²⁷ *Carhart*, 127 S. Ct. at 1649 (quoting *Casey* 505 U.S. 833 (1992)).

²⁸ *Roe* was determined not to be a moot case, although the plaintiff was no longer pregnant at the time it was heard, because the short nature of pregnancy would cause cases to be "capable of repetition, yet evading review." *Roe*, 410 U.S. at 125.

