

INTRODUCTION

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All of the papers included in this issue of the *Columbia Journal of Gender and Law* were presented at the first feminist issues workshop sponsored by the Feminism and Legal Theory Project at Columbia Law School.¹ This workshop, entitled "Reproductive Issues in a Post-Roe World," was organized in response to the changing political shape of the United States Supreme Court which made it apparent that there were some urgent questions to be considered. Over the space of two days, twelve presentations were made on diverse issues related to reproduction.² As the papers in this issue indicate, the workshop was intended to take in a broad range of reproductive issues, for example, exploring how the changing world of reproductive technology affects women's rights, as well as considering the regulation of midwifery.

Nonetheless, given the political and social climate that still surrounds the fragile gains in regard to choice, it was not surprising that many of the papers and much of the discussion at the November 1991 workshop specifically centered on contemporary speculation about how the Supreme Court might decide the fate of abortion. In light of the Court's increasingly conservative membership, some participants considered the most pressing task to be a consideration of possible strategies which could be developed in order to increase the societal commitment to abortion as a non-contested right.

While there remains a great need for an expanded exploration of reproductive issues beyond the abortion question, even within it there are important questions which have implications beyond the simple existence of a "right." Access to the procedure is one example. For instance, when

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¹ The Feminism and Legal Theory Project was begun in 1984 at the University of Wisconsin Law School. The Project initially sponsored summer conferences on issues of interest to feminist scholars from a multiplicity of disciplines. Selected papers from the first four years of the conferences are collected in *At the Boundaries of Law: Feminism and Legal Theory* (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

In 1991, upon moving to Columbia Law School and recognizing the enormous success of the conference and the increase in the numbers of people interested in participating, workshops held during each semester were added to the Project's undertakings. The first workshop, held in November 1991, produced the papers for this volume.

² A paper presented by Sylvia Law and Rachel Pines had already been committed for publication elsewhere and is not included in this collection. Martha Fields' paper was not completed and revised in time for inclusion.

federal funding for the procedure is denied, questions involving issues of class and race discrimination in the provision of abortion services are clearly defined. Furthermore, we must constantly be reminded that our concern about "reproduction" must be broad enough to encompass women's health care needs in general—needs that may change but nonetheless continue for an entire lifetime. The workshop participants brought these concerns into much of the discussion, but the focus remained on the future of *Roe*.³

PLANNED PARENTHOOD V. CASEY AND THE SHAPE OF FUTURE DEBATES

The papers for which abortion is the central issue had to be somewhat rewritten after the Supreme Court handed down its decision in *Planned Parenthood v. Casey*.⁴ At issue in that case were four provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989, that regulated the decision-making process: 1) a woman must give "informed consent" prior to the abortion procedure; 2) a woman is required to wait twenty-four hours before having the procedure; 3) a minor seeking an abortion must have parental consent, although the provision provides for the possibility of judicial bypass; and 4) a married woman must sign a form indicating that she has notified her husband of her intended abortion.⁵ In addition, several reporting requirements were placed on facilities that provide abortions.⁶

Casey was resolved by a vote of five to four in which the majority reaffirmed what it called the "essential holding" of *Roe v. Wade*—a woman has a constitutional right to an abortion before the fetus attains viability.⁷

³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴ 112 S. Ct. 2791 (1992).

⁵ 18 Pa. Cons. Stat. Ann. §§ 3205-06, 3208-09 (1983 & Supp. 1992).

⁶ *Id.* §§ 3207, 3214. The requirement that a woman give her informed consent prior to the abortion procedure was upheld. The requirement that a woman must wait 24 hours after having decided to have an abortion before she can undergo the procedure was upheld. The requirement that a minor seeking an abortion must have parental consent was upheld. The requirement that a woman notify her husband of her intention to have an abortion was struck down. *Casey*, 112 S. Ct. at 2822-32.

Justices Blackmun and Stevens would have struck down all four restrictions, while Chief Justice Rehnquist and Justices Scalia, Thomas, and White would have overturned *Roe v. Wade* and upheld the Pennsylvania law in its entirety. *Id.* at 2841-43, 2850, 2855, 2875.

⁷ *Id.* at 2804. The Court reaffirmed the tripartite holding of *Roe v. Wade*.

First is a recognition of the right of the woman to choose to have an abortion

Justices O'Connor, Kennedy, and Souter, in a joint opinion, identified this right as part of the right to liberty protected by the constitutional guarantee of substantive due process. They were supported in this position by Justices Blackmun and Stevens.⁸

In affirming a constitutional basis for the freedom to "terminate her pregnancy," however, the Court made it clear that

[t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.⁹

The interest of the state is very much the object of what must be understood as the "evolutionary language" of the O'Connor, Kennedy, and Souter opinion.

Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgement and implementation by the Court in its subsequent cases.¹⁰

This attention to the state's interest in the fetus animated much of the subsequent reasoning of Justice O'Connor in formulating the "undue burden" standard, which replaced the requirement that restrictions on abortion serve a "compelling state interest."¹¹

Nevertheless, the decision in *Casey* seems as much a product of adherence to the doctrine of stare decisis as it is a commitment to the

before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id.

⁸ Id. at 2804, 2838, 2844.

⁹ Id. at 2804.

¹⁰ Id. at 2817 (quoting *Roe*, 410 U.S. at 163).

¹¹ Under *Casey*, the state is required only to show that the restrictions do not create an undue burden or place in front of the woman a "substantial obstacle." Id. at 2820-21.

principles of individual liberty. Justice Blackmun conclusively linked the two concerns.

[F]ive Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages."

A fervent view of individual liberty and the force of stare decisis have led the Court to this conclusion.¹²

On a more pragmatic rendition of the same theme, Justices O'Connor, Kennedy, and Souter stated:

The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.¹³

The joint opinion further suggested that

[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; *and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips.*¹⁴

The majority of the Court also accepted the explanation in *Roe* that the state's obligation to protect the life or health of the woman must take precedence over any duty to the fetus because the fetus is not a person.¹⁵ And as Justice Stevens stated:

[A]s a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.¹⁶

¹² Id. at 2844 (Blackmun, J., concurring in part, dissenting in part) (citation omitted).

¹³ Id. at 2809.

¹⁴ Id. at 2812 (emphasis added).

¹⁵ Cf. id. at 2821, 2830-31.

¹⁶ Id. at 2839 (Stevens, J., concurring in part, dissenting in part).

This fundamental premise is under contest in the larger society as opponents of choice increasingly take to the streets to impose their religious position on others. The federal courts have recently been hampered in responding to such civil disobedience with their potent injunctive powers.

At the time that the Court decided *Casey* it deferred deciding *Bray v. Alexandria Women's Health Clinic*,¹⁷ a case considering whether federal judges had authority under a Reconstruction-era civil rights law to order anti-abortion protesters to stop blocking access to abortion clinics.

On January 14, 1993, the week before President Clinton was to be inaugurated, the Supreme Court handed down its decision in the *Bray* case. The Court ruled, six to three, that the Ku Klux Klan Act *does not* give federal judges jurisdiction to bar anti-abortion protestors from blockading abortion clinics.¹⁸

Like the papers in this volume, *Bray* represents another series of points for further discussion about the dimensions of reproductive freedom for women. In his majority decision in *Bray*, Justice Scalia revealed sympathy with the protesters and reluctance to see the questions in terms of discrimination.

Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class—as is evident from the fact that men and women are on both sides of the issue¹⁹

The timing of this decision (within the last week of the Bush Presidency) is probably not insignificant. The result underscores the need for continued vigilance and increased social and political action to ensure that the right to meaningful reproductive decision making exists in more than the abstract.

¹⁷ See 112 S. Ct. 2935 (1992).

¹⁸ *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). The majority opinion was written by Justice Scalia with Justices Stevens, O'Connor, and Blackmun dissenting.

¹⁹ *Bray*, 113 S. Ct. at 760.

