The Supreme Court, Abortion, and the Jurisprudence of Class

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ABSTRACT

The US Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v Casey* both protects a woman's liberty to choose to terminate her pregnancy and permits the state to make it more difficult for her to exercise her choice. In their opinion on the case, Justices O'Connor, Kennedy, and Souter eloquently defend constitutional protection of the right to make intimate decisions like continuing or ending a pregnancy. At the same time, they permit the state to try to persuade pregnant women not to have abortions and to make abortion harder to obtain and more costly, as long as the state's methods do not create an "undue burden" on the decision.

Any restriction on abortion is a burden; whether it is "undue" (and therefore unconstitutional) depends on one's circumstances. The Court appears to view the difference between an undue burden and mere inconvenience from the perspective of privilege. The restrictions that were upheld may not significantly affect middle-class access to abortion, but they could prove insurmountable for many less privileged women. (*Am J Public Health.* 1992;82;1556–1562)

The US Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*[1] will undoubtedly provide both jurists and political action committees with ample ammunition for continuing the contentious battle over the availability of abortion. But it has also narrowed the battleground. Unless one of the justices who favors abortion rights is replaced by someone with strong antiabortion views, it is unlikely that, in the next 5 years, the Court will rescind its constitutional protection of a woman's liberty to choose to terminate her pregnancy. Rather, future debate is likely to focus on how difficult a state can make it for a woman to carry out a decision to have an abortion. *Casey* affects not only individual women but also the family planning clinics, hospitals, physicians, nurses, and counselors on whom the women depend. It also signals a much more significant role for the public health community in future abortion services. To see why this is so, it is important to examine the Court's rather complicated decision in *Casey*.

The Pennsylvania Statute

The Pennsylvania statute that was challenged in the case did not criminalize abortion. Rather, it imposed conditions on obtaining abortions. A majority of seven of the justices—O'Connor, Kennedy, Souter, Rehnquist, White, Scalia, and Thomas—upheld four of the five challenged statutory provisions. These provisions require that a woman be given certain information about abortion and childbirth[2]; that she give her informed consent at least 24 hours before the abortion is performed[2]; that a minor may not obtain an abortion without either the consent of one of her parents or a judge's decision that she is mature enough to make the decision alone or that the abortion is in her best interests[3]; and that records of abortion be kept and, in the case of publicly funded clinics, be made public.[4] None of these provisions need be complied with, however, in the case of "medical emergency,"[5] which a majority of the justices agreed is defined broadly enough to permit abortions in any case in which a woman's health was threatened, even if not imminently. Further, a majority of five justices—O'Connor, Kennedy, Souter, Stevens, and Blackmun—struck down the fifth provision, which required a married woman to certify that she has notified her husband of her intended abortion, subject to certain exceptions.[6]

Reaffirmation of the Freedom to Choose

Three justices—O'Connor, Kennedy, and Souter—coauthored a joint opinion that endorses the Court's power and authority to interpret the Constitution, offers a novel rationale for adhering to precedent, and restates the "essential holding" of *Roe v Wade,* the 1973 Supreme Court decision that first recognized a woman's right to decide to terminate her pregnancy.[7] In view of the challenges to *Roe* in the past 19 years and of recent Court decisions casting doubt on its meaning, the plurality justices found it necessary to return to first principles defining "the rights of the woman and the legiti-

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mate authority of the State respecting the termination of pregnancies by abortion procedures."[1(p2804)] They summarize *Roe*'s "essential holding" in three parts as follows:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State . . . . 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.[1(p2804)]

The Source of Liberty

The joint opinion grounds the woman's right solidly in the liberty protected by the Fourteenth Amendment to the US Constitution. The due process clause of the Fourteenth Amendment states that no state shall "deprive any person of life, liberty or property, without due process of law."[8] This is, of course, the very constitutional liberty that has supported what *Roe* and subsequent Court decisions have called the "right to privacy."[9-12] While the joint opinion avoids the term "privacy," it embraces much of *Roe*'s constitutional reasoning.

First, the three justices strongly endorse the concept of substantive due process. This is the idea that government does not have the power or authority to interfere with certain individual rights, and that laws that do so are simply invalid.[13] The three justices found that the Constitution promised "a realm of personal liberty which the government may not enter."[1(p2805)] This view has come under attack by conservative scholars and by Justice Scalia in particular.[14-16] Roughly summarized, the conservative argument is that the only rights that are protected against government interference are those expressly stated in the text of the Constitution or those historically protected as part of the original understanding of constitutional rights.

The joint opinion correctly states, however, that the "Court has never accepted that view."[1(p2805)] Rather, the Court has recognized important rights that are nowhere to be found in the words of the Constitution but that are essential to its construct of democracy. Many of these rights are derived from the concept of liberty embodied in the due process clause, such as the right to marry someone of a different race,[17] the right to send one's children to private schools,[18] and the right to teach a foreign language to young schoolchildren.[19] The joint opinion emphasizes that the recognition of these rights is not a matter of the justices' personal preferences but a necessary interpretation of the concept of liberty. The liberty guaranteed for all generations by the Constitution cannot be confined to a narrow list written down in 1787 or 1868. As Former Justice Harlan wrote:

> This "liberty" is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .[20]

The *Casey* opinion insists not only that the Constitution was created to protect essential liberties that cannot be limited to the terms in its text, but also that the Court has the power and the duty to decide the meaning of those terms by the application of principles based on reasoned logic and precedent. This represents a striking rejection of the narrow vision of the Constitution subscribed to by Justices Rehnquist, Scalia, and Thomas.[21]

The three justices (O'Connor, Kennedy, and Souter) found that a woman's right to choose to terminate her pregnancy is an inseparable part of her constitutionally protected liberty to make "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. These matters," they continue, "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[1(p2807)] The abortion decision was seen as having the same character as the decision to use contraception. No justice wished to overturn the right to use contraception recognized in *Griswold v Connecticut*,[22] *Eisenstadt v Baird*,[23] and *Carey v Population Services International*.[9]

The personal nature of a decision to continue or terminate pregnancy is underscored by the first mention in all the Court's abortion decisions of the physical impact pregnancy has on women:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.[1(p2807)]

These few sentences begin to capture what may be the real reason that the majority of justices saw the abortion decision as an essential part of personal liberty. Abstractions about the interest of the state in protecting potential life mask the real suffering endured (albeit willingly in most cases) by pregnant women.

Nonetheless, the most persuasive reason the joint opinion gives for protecting the right to choose is also its most valuable contribution to constitutional jurisprudence. This is its insistence that each individual must be free to develop and believe in her own idea of life itself and to define her own conception of the Good: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[1(p2807)] This sounds like an Enlightenment-era vision of freedom. Without such freedom, all other liberties become acts of subservience to the state.

The joint opinion rejects state-compelled conceptions of personhood. If government may not tell people how and why to value life, people are free to disagree about the moral status of a fetus and the reasons for having children. Thus, personal liberty encompasses the freedom to believe that abortion is "an act of violence against innocent human life"[1(p2807)] or that childbirth without the ability to care for the child is "a cruelty to the child and an anguish to the parent."[1(p2808)] This best explains why a state that compels a woman to act against her own deeply held beliefs in matters pertaining to family and procreation violates her constitutional liberty.

The Role of Precedent

No significant new facts about abortion have been discovered in the years since *Roe v Wade* was decided. Thus, although the political environment has changed, giving greater voice to those opposed to abortion, the Court could offer no reason for rejecting *Roe*'s principles except the personal views of individual justices that the Constitution does not protect a woman's right to choose after all. Whereas the Bush administration, Chief Justice Rehnquist, and Associate Justices White and Scalia, among others, have called for abandoning precedent and over-

ruling *Roe v Wade,* the joint-opinion authors feared that overruling *Roe* would appear to be nothing more than a "surrender to political pressure" and would "subvert the Court's legitimacy."[1(p2815)] The Court would forfeit its credibility as the principled interpreter of the Constitution, which the justices believe critical to the preservation of American democracy.

Thus, the joint opinion's explication of constitutional liberty is buttressed by *stare decisis,* the doctrine that precedent should be followed. Adhering to precedent is often justified because a dramatic change in the law would adversely affect plans made in reliance on earlier case law. Although it is difficult to argue that individual women rely on the availability of legal abortion in specific instances, given that pregnancy is so often unplanned or the result of failed contraception, the joint opinion recognizes that society as a whole may justly rely on the freedom protected by past decisions:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. 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.[1(p2809)]

In other words, it is not just individual reliance on the availability of abortion, but reliance by the social community on the liberty protected by *Roe v Wade* that would render its rejection so disruptive to the social fabric. People have "ordered their thinking and living around that case," says the joint opinion. Contrary to most cases in which the Court has abandoned precedent, overruling *Roe* would mean taking away previously protected rights.

This remarkable idea of social reliance expresses a truth about women's perceptions of their personal and civic roles and about their freedom to participate fully in the world around them. Control of reproduction has been seen as the fundamental building block of women's social progress. The availability of abortion, whether or not one would wish to take advantage of it, has been a reassuring symbol of personal integrity in a country whose Constitution contains no explicit statement that women have the same rights as men.

Comparison with Roe v Wade

Ironically, the joint opinion's creative argument for adhering to the precedent set by *Roe* rings somewhat hollow in light of its discussion of *Roe* itself. On the one hand, the joint opinion adheres to *Roe*'s principle that a woman has the right to choose to terminate a pregnancy until the time of fetal viability. On the other hand, it does not call that right "fundamental" as *Roe* had done. This is significant because, until the last few years, the Court had granted special protection to "fundamental" rights, forbidding government from restricting such rights without a very strong justification (termed a "compelling state interest").[13]

Under this test, called strict scrutiny, it has been next to impossible to justify any law that infringed on a fundamental right, particularly since the law had to be narrowly drawn to achieve an exceptionally important purpose that could not be achieved otherwise. If a right is not fundamental, government can restrict its exercise merely by claiming that the restriction serves a legitimate governmental purpose and that the restrictive law bears a rational (not a necessary) relationship to that purpose.[24] Although several justices have argued that even nonfundamental rights deserve greater protection against arbitrary governmental action, in practice the Court continues to grant both state and federal government substantial discretion to limit nonfundamental rights.

In *Roe,* the Court found that the state has two legitimate interests in regulating abortion: protection of the pregnant woman's health during a medical procedure, and protection of potential life embodied in the developing fetus. Justice Blackmun's opinion for the majority in *Roe* found that the state's interest in a woman's health becomes compelling when undergoing an abortion carries about the same risks to the woman as carrying a pregnancy to term.[7] In 1973, this was about at the beginning of the second trimester of pregnancy. Thus, the state could regulate the medical aspects of the abortion procedure to ensure the woman's safety after the first trimester. *Roe* also found that the state's interest in protecting fetal life does not become compelling until the fetus is viable—capable of living independently outside the woman's body—which, in 1973, was about at the end of the second trimester. At that point, the state could regulate abortion in ways intended to protect the fetus and could even prohibit abortion, except in cases when abortion was performed to protect the life or health, broadly defined, of the pregnant woman.

The joint opinion in *Casey* rejects what it calls this "rigid" trimester framework. Although it retains viability as the bright line between a woman's right to choose and the state's authority to intervene, it holds that both state interests can justify governmental regulation throughout pregnancy.

The justices obviously disliked the trimester framework, although its rigidity appears more in their eyes than in the *Roe* opinion itself. After all, the trimesters were used originally as shorthand for defining both the time at which undergoing abortion is safer than completing pregnancy and the time of viability.[25] It was those moments, not the trimesters themselves, that governed abortion regulation. But that framework did prohibit any state interference with the woman's decision to have an abortion until the fetus attained viability, generally between 22 to 26 weeks of gestation. Thus, since most abortions take place during the first trimester, the state could not attempt to influence a woman's choice in all but a handful of cases.

It appears that the justices rejected the trimester system in order to permit the state to intervene in the woman's decision-making process at any time. If the state's interest in protecting fetal life can justify some limited regulation from the beginning of pregnancy, then the state can act to discourage women from choosing abortion at the time when most women are in the midst of this painful decision. The joint opinion emphasizes the importance of deciding whether to continue a pregnancy and the value of ensuring that a woman's decision is thoughtful and fully informed. But the trimester framework never precluded fully informed decision making. Indeed, earlier Court decisions that reaffirmed *Roe* insisted on fully informed consent regardless of the time the decision is made.[10,11] For at least two decades, women have been counseled in detail about the medical, social, and psychological consequences of both childbirth and abortion as part of the informed consent process. What *Roe* and the decisions following it precluded was governmental manipulation of information and efforts to persuade a woman to make a decision against her own best interests, one that she would not otherwise make. This is what *Casey* now permits. The joint opinion endorses the state's power to express a preference for childbirth over abortion,

as described in its 1989 decision in *Webster v Reproductive Health Services.*[12] Although in *Casey* the three justices strongly uphold women's right to choose abortion, they also hope that women will not exercise this right and have approved measures intended to discourage women from doing so.

Liberty to Choose under Casey

The Undue Burden Test

Having implicitly rejected *Roe*'s holding that the right to choose is fundamental and its trimester shorthand, the Court was obliged to come up with some alternative standard for determining when and how the state is justified in regulating abortion. The joint opinion authors chose an "undue burden" test. Noting that liberty is never absolute, the three justices found that state regulation violates the constitutionally protected liberty to choose abortion only if it "imposes an undue burden on a woman's ability to make this decision."[1(p2819)] Justice O'Connor had advocated such a test in past decisions,[10,11,26] but the meaning of "undue burden" was never clear. Here the joint opinion attempts to explain it:

> An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.[1(p2821)]

This definition is not enlightening. Defining an undue burden as a substantial obstacle seems to repeat, not clarify, the ambiguity. The problem lies in the fact that what is a minor inconvenience to one woman may be a substantial obstacle to another. This would make the validity of any law vary with its practical effect on each individual to whom it applies. Ignoring any such objection, the joint opinion expresses its view of what is and is not an undue burden for all women in its application of this test to the provisions of the Pennsylvania statute.

Husband Notification

The Court struck down the requirement that a woman sign a statement that she has notified her husband of her intent to have an abortion. Justices Blackmun and Stevens joined with Justices O'Connor, Kennedy, and Souter to form a 5–2 majority on this issue. Justices Rehnquist, White, Scalia, and Thomas dissented on this point and would have upheld the husband notification requirement. Indeed, they would have overruled *Roe* and allowed states virtually unlimited discretion to regulate or outlaw abortion.

The joint opinion relies on detailed factual findings by the federal district trial court and on a body of research to conclude that most women who do not tell their husbands about an abortion (a minority among women who seek an abortion) have good reason for not doing so. Many women are the victims of physical or psychological abuse by their husband, and they fear violence against themselves or their children if their husband is opposed to the abortion. Or the pregnancy may be the result of an extramarital affair.

The Pennsylvania statute excuses a woman from notifying her husband about an intended abortion if he is not the father of the baby, if he cannot be located, if the pregnancy is the result of sexual assault by him and she has reported the assault to the police within 90 days, or if she believes her husband will cause her bodily injury if he is notified. But the joint opinion authors found that the exceptions did not cover all the cases in which notifying the husband could injure the wife. For example, many battered women fail to report rape and other violence against them out of fear of retaliation or lack of confidence that the authorities can protect them. Women whose husbands subject them to nonphysical (i.e., psychological, emotional, or economic) forms of abuse also would not qualify for an exception. Such women could be deprived of subsistence resources for themselves or their children, their personal lives could be made unbearable, or their children could be abused. Women in these circumstances are likely to be deterred from having an abortion they fervently believe to be in their best interests in order to avoid notifying their husbands. The notification requirement thus creates an undue burden and is unconstitutional.

Although such cases represent only a tiny fraction (perhaps 1%) of those involving women seeking abortion—only about 20% of women who have abortions are even married—the law must be judged, as the joint opinion correctly notes, by its effect on the people it targets. Since the vast majority of married women discuss the possibility of abortion with their husbands, the statute requires nothing special of them. Rather, the statute targets only women who would not otherwise notify their husbands, and it coerces them to act against their own interests or to give up the option of abortion. Thus, the state unduly interferes with the woman's liberty to make her own personal decision.

Beyond this empirically based rationale, the joint opinion offers a more fundamental reason for its conclusion: that adult women are free to make their own decisions by themselves, regardless of their marital status. The three justices acknowledged the interest of a husband in future children, but they emphatically rejected the idea that he has any authority over his wife's decisions or any right to advise her before she makes her own choices. Referring to old common law principles that "a woman had no legal existence separate from her husband"[27] and to a 1961 Supreme Court decision precluding women from full and independent legal status under the Constitution,[28] the joint opinion holds that the husband notification statute

> embodies a view of marriage consonant with the common-law status of married women but repugnant to the present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.[1(p2831)]

Moreover, it adds a pointed reminder that adult women are not to be treated as children: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."[1(p2831)]

Informed Consent and the 24-Hour Waiting Period

The forceful nature of the opinion on husband notification contrasts with its idealistic treatment of the informed consent issue. The joint opinion authors had little trouble upholding Pennsylvania's requirements that, at least 24 hours before performing an abortion, a physician inform the woman of the nature of the procedure, the health risks of abortion and childbirth, and the "probable gestational age of the unborn child." They also uphold a requirement that a woman be informed that state materials are available describing the fetus and the father's responsibility for child support, and listing adoption and childbirth support agencies. Except in a medical emergency, the woman must state in writing that she has been told of these materials and has had an opportunity to see them if she wished. She is not obliged to see or read them.

None of these requirements was found to impose an undue burden on the woman because, the Court determined, they were intended to promote fully informed decision making. In this respect,

the decision overrules part of the Court's earlier decisions in *Akron*[10] and *Thornburgh*,[11] which prohibited the state from interposing a "message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."[11] The Court found that the state is entitled to express a preference for childbirth over abortion by providing the woman with information about the disadvantages of abortion. This follows the trend in *Webster* and *Rust v Sullivan*[29] allowing government to discourage abortion by banning public funding of abortion services and information about abortion.[30]

The Court did insist that the materials be "truthful and not misleading."[1(p2823)] But its opinion on this point evinces a condescending attitude toward women's ability to think through the difficult decision about pregnancy and abortion. It emphasizes the need for women to take into account the consequences of abortion on the fetus, as if women do not appreciate that abortion entails the ending and removal of fetal life. The joint opinion justifies protecting the *individual* woman's right to make this decision as part of procreational and family liberty because of the intensely personal nature of that decision. But it suggests that women cannot be trusted to make a thoughtful decision without outside assistance from the state.

Of more importance to family planning and abortion services in general is the Court's acceptance of the requirement that only a physician and not any other health care provider or counselor can provide the information about the abortion procedure to the woman. Offering little explanation, the court found that this imposed no undue burden.

The 24-hour waiting period was also upheld as presenting merely additional expense and inconvenience, not a substantial obstacle to obtaining an abortion. It was justified as providing time for reflection, in furtherance of the state's interest in protecting the life of the unborn. The Court appears to hope that if women have an additional day to think about their plight, they will not choose abortion. But there is no reason to assume that, by the time a woman who seeks an abortion has an informed consent discussion with her physician, she has not already thought through her options. The idea that 24 hours will make a real difference seems like wishful thinking on the justices' part.

It also departs dramatically from the empirical approach used in discussing husband notification. In some cases, the 24-hour waiting period is likely to deter women from obtaining an abortion, not because they have discovered the value of pregnancy and childbirth but because they cannot manage a second trip to the abortion provider. This may be because they cannot afford the additional expense or because they cannot arrange to be away from school, work, or home the next day. Although similar practical effects were sufficient to invalidate the husband notification requirement, the joint opinion did not consider whether, in practice, the 24-hour waiting period could create a substantial obstacle to a woman's decision.

Parental Consent

In three short paragraphs, the joint opinion upholds the statute forbidding an adolescent under age 18 from obtaining an abortion unless she and one of her parents (or her guardian) give informed consent as required by the informed consent statute. The Pennsylvania statute contains a judicial bypass procedure, whereby a young woman who does not wish to ask her parent for consent can seek judicial authorization. If a judge finds her to be mature and capable of giving informed consent, she may act on her own. Otherwise, the judge must determine whether the abortion is in her best interests.

The Court had approved similar statutes as recently as 1990[26,31,32] and saw no reason to reconsider its stance in *Casey*. Those decisions expressed a charming belief that all families are loving and mutually supportive. They also found that the judicial bypass procedure offered an effective alternative in cases in which a parent's reaction to an admission of pregnancy might be less than caring.

Unlike its analysis of husband notification, the joint opinion does not consider the possibility that the judicial bypass procedure can be intimidating to even the most mature adolescent. A young woman who fears telling her parents must not only go to court, which may entail an initial meeting with court-appointed counsel as well as an appearance before one of a limited number of judges willing to hear such cases on designated days, but also make at least two trips to the physician for informed consent discussions and the procedure itself. If the expense of the process is not prohibitive, the time and logistics of arranging it may be. It is clear, however, that a majority of the justices regard women under the age of 18 as in need of adult protection and are not prepared to grant these women the same degree of freedom they guarantee to adults.

Record Keeping and Reporting

The statute requires every facility that performs abortions to report detailed information to the state. A provision requiring a referring physician to be identified is particularly controversial because many physicians would prefer to keep their abortion referrals confidential. Another provision that was specifically challenged requires all information from state-funded institutions, including the identity of related organizations, to be made public. This is seen by its challengers as facilitating antiabortion picketing and disruption of clinic procedures.

The joint opinion strikes down the reporting of the reasons why a husband was not notified. But it upholds all the remaining requirements—without discussing any of them specifically—as promoting health and medical research by collecting medical information, with the understanding that the identity of all patients remain confidential. Although the justices recognized that the level of detail might increase the cost of abortions, they did not find the increased expense to impose a substantial obstacle to a woman's choice.

The Jurisprudence of Class

The joint opinion contains an interesting mix. On the one hand, it sets forth a strong vision of the Court as protector of essential freedoms embodied in the Constitution:

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations . . . . We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.[1(p2833)]

On the other hand, the Court's vision of liberty seems to be a peculiarly American privileged-class ideal. The husband notification provision is struck down as an undue burden on the freedom to make decisions, while the 24-hour waiting period, parental notification provisions, and extensive reporting requirements are upheld as creating merely inconvenience and additional expense. Any restriction on abortion is a burden, but whether it is an undue burden depends upon one's circumstances.

It is easy to imagine that Justice O'Connor, for example, instinctively would object to Pennsylvania's husband

notification requirement. But the reason is not because it creates an undue burden on her decision whether to bear a child. It is because her personal choices about pregnancy are nobody's business—not the state's and not her husband's (unless she chooses to involve him). This is certainly a more principled rationale for striking down the husband notification provision than the undue burden test. It seems reasonable to believe that the undue burden test was not really applied to this statute because the Court would have invalidated husband notification whether or not it posed a realistic burden on anyone. If the statute had permitted exceptions in all the instances the Court found important, it still would have been struck down. Even if all husbands were loving and supportive and never mistreated their wives so that notifying husbands clearly posed no threat to any woman, the result undoubtedly would have been the same. If so, what the joint opinion should recognize is that women have the right to make these decisions by themselves.

One can also conclude that the undue burden test was applied only to economic burdens—to uphold those statutes that did not threaten the exercise of personal liberty by the middle class. The 24-hour waiting period is the best example. Middle-class women may find the delay irritating, but it is unlikely to make any significant difference in their lives. For less privileged women, however, abortion delayed may be abortion denied. It may be difficult for the justices, in their privileged positions, to appreciate the problems created by extra time and expense. For many poor women, the question is not whether they have a right to choose abortion but whether they can get one.

Justice Scalia, in a scathing dissent from the joint opinion's reasoning, claimed that the undue burden test is without content. On this point, he is correct. Sooner or later, the Court will have to explain what is "undue." Presumably, anything that forecloses obtaining an abortion, like a 9-month waiting period, would be undue. Would a 1-month or 1-week delay be acceptable? Tennessee's abortion statute (which is being challenged in court) requires a 3-day waiting period. If a 24-hour delay is acceptable, is a 72-hour delay also constitutional? If not, why is 24 hours a mere inconvenience and 72 hours an undue burden? When do the additional expenses created by restrictive regulations become a substantial obstacle to abortion? Does the economic burden become undue at $10, $100, or $1000?

The justices who wrote the joint opinion felt they could tell an undue burden when they saw one. But their conclusions can be interpreted as defining an undue burden to be something the middle class finds intolerable. When the Court confronts future cases, it will need a more principled standard for judging legislation.

Conclusion

The *Casey* decision both protects a woman's liberty to choose abortion and permits the state to make it more difficult for her to exercise her choice. The joint opinion's reasons for accepting most of Pennsylvania's restrictions on abortion while rejecting husband notification reveal a Jeffersonian view of freedom, one that seeks sensible rules to preserve liberty for all but, by virtue of its privileged vantage point, may not see how those rules undermine liberty for some.

The decision reinforces the trend toward a two-tiered system of abortion and family planning services in the United States. Women who are wealthy or well insured will not find the type of abortion restrictions upheld in *Casey* insurmountable. But women, especially adolescents, without such advantages may be unable to overcome a new array of obstacles.

In *Casey,* the petitioners claimed that the Pennsylvania law was unconstitutional on its face. The joint opinion justices were not convinced (except in the case of husband notification) that the evidence presented proved that the law would inevitably impose undue burdens. But their opinion leaves open the possibility that when the law takes effect, it might operate in practice as a serious obstacle to women's choices. The joint opinion suggests that if any of the provisions it upholds prove to be an undue burden in the future, those provisions could be struck down as unconstitutional. Justice Blackmun saw some hope for reality testing in this. Significantly, however, this approach requires women to shoulder the burden of proving that a restriction is an undue burden. Without explanation, the opinion excuses the government from having to prove that a regulation is not undue or to provide empirical evidence that the regulation actually helps women to make decisions.

More states are enacting new restrictive laws regulating the performance of abortions and informed consent, testing the limits of governmental power to influence a woman's choice. Women will need help complying with these new laws. In addition, since both the number of abortion providers and the amount of insurance coverage for abortion are declining, women will need more assistance in identifying providers and paying for abortions. The public health community is well suited to offer necessary aid to women in need. It has the knowledge and ability to organize and strengthen necessary services. Moreover, it contains the expertise to assess whether new laws create undue burdens on the exercise of choices—that is, whether women are being deterred from acting on their decisions or otherwise burdened because of waiting periods, residency requirements, judicial bypass procedures, or other restrictive regulations.

It should be noted that the Court remains divided on the reasons for upholding some abortion restrictions and rejecting others. Although at least five justices agreed on which Pennsylvania statutes were constitutional and which were not, no majority agreed on the reasons for their conclusions. Chief Justice Rehnquist and Justices White, Scalia, and Thomas, dissenting, rejected the joint opinion's eloquent arguments for protecting the liberty to choose, following the "essential holding" of *Roe,* and applying the undue burden test. Instead, they would reverse *Roe* and allow the states to regulate or ban abortion as they see fit. Justice Blackmun's opinion reminds us that he, at age 83, "cannot remain on this Court forever."[1(p2854)] The next justice to be appointed is likely to provide the fifth vote to preserve or overrule the concept of liberty upheld in *Casey.*

Public health professionals should share the joint opinion's vision of the Constitution as a covenant promising liberty for all. It is this liberty that protects the "health values" that, as Dr. Mervyn Susser noted, guide the public health field.[33] But if public health professionals are true to their health values, they cannot be satisfied with the jurisprudence of class. They must act to ensure that no one's health is threatened by lack of access to important health services, including abortion. □

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