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The Supreme Court, Liberty, and Abortion

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LEGAL ISSUES IN MEDICINE

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ABORTION has aroused intense personal and political passions for almost two decades in the United States, and demeaning sloganeering has long substituted for reasoned discourse. Just as few people have actually read the 1973 ruling in *Roe* v. *Wade*,[1] few people who have expressed their opinion on the Supreme Court's ruling in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*,[2] which has been condemned by activists on both sides of the debate about abortion rights, have read it. In one poll, however, more than 70 percent of Americans agreed with the restrictions upheld by the Court as they understood them.[3]

As in *Roe* v. *Wade*, to which it is faithful in spirit if not in letter, the Court in *Casey* recognizes the constitutional right of pregnant women to make the ultimate decision about continuing or terminating a pregnancy without substantial government interference before the time the fetus becomes viable. There are real differences between *Roe* and *Casey*, but Justice Harry Blackmun is correct in observing that "now, just when so many expected the darkness to fall [on *Roe*], the flame has grown bright."[2] In this column I will summarize the opinion in *Casey*, its differences from the *Roe* decision, and its implications for medical practice.

ROE v. *WADE*

In its controversial 1973 opinion in *Roe* v. *Wade*, the Supreme Court declared unconstitutional a Texas statute that made it a crime to perform or attempt to perform an abortion, except to save the life of the pregnant woman. The Court held that there was a constitutional "right of privacy" that was "fundamental" and "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[1] The state was required to show a "compelling state interest" in order to restrict this right, and it could do so only to protect the health of the pregnant woman when abortion became more dangerous than carrying the fetus to term (in 1973, this was considered to be after the first trimester) or to preserve fetal life after viability (in 1973, after the end of the second trimester).[1] In 1989, in *Webster* v. *Reproductive Health Services*, four members of the Court wrote that they were ready to abandon *Roe*, and Justice Sandra Day O'Connor wrote separately that she too was ready to reconsider that decision.[4,5] Since then, two of the four justices who favored upholding *Roe* (Justices William Brennan and Thurgood Marshall) have resigned and been replaced by justices who were expected to join in reversing it (Justices David Souter and Clarence Thomas), thus setting the stage for *Casey*.

THE PENNSYLVANIA STATUTE

At issue in *Casey* was a series of provisions of the Pennsylvania Abortion Control Act of 1982 (as amended in 1988 and 1989).[6] These provisions required that all women seeking an abortion give informed consent after being told, at least 24 hours before the abortion, by the referring physician or the physician who would perform the abortion, about the nature and risks of the procedure and about alternatives to it, the probable gestational age of the "unborn child" at the time the abortion would be performed, and the medical risks of carrying "her child" to term. Either the physician or an assistant was also required to inform the woman (again, 24 hours before the abortion) that the state had prepared printed materials that described the "unborn child" and about agencies that offered alternatives to abortion; that medical assistance might be available for prenatal care, childbirth, and neonatal care; and that the father of the "unborn child" is legally required to assist in the support of her child. The printed materials had to be made available to the woman, and she had to certify in writing that she had been given the above information orally and had been given a chance to review the printed materials if she chose to do so.

There were also provisions in the Pennsylvania law for parental consent, notification of husbands, and reporting requirements. As a general rule, an unmarried, financially dependent pregnant girl under 18 years of age had to have the consent of a parent or a guardian, a judge's certification of her maturity, or a finding that the abortion was in the girl's best interest. A married woman had to notify her husband of her intention to have an abortion (unless the spouse was not the father, could not be located, or had criminally assaulted her or she feared bodily injury as a result of such notification). As with informed consent, any physician who failed to obtain written confirmation from the woman that she had so notified her husband or that her case met one of the specified exceptions would be guilty of "unprofessional conduct" and subject to revocation of his or her license. In addition, the physician would be civilly liable to the husband "who [was] the father of the aborted child" for any damages caused, for punitive damages in the amount of $5,000, and for reasonable attorney's fees. The information required to be reported to the Health Department about each abortion included the name of the physician performing the abortion, the facility where it was performed, the name of the referring physician, agency, or service, the county and state where the woman resided, the woman's age, the number of previous pregnancies and abortions, the gestational age of the "unborn child," the type of procedure used, and the weight of the "aborted

child."[6] Finally, all these requirements would be waived in a "medical emergency," defined as

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.[6]

The Joint Opinion

In a highly unusual move, Justices O'Connor, Souter, and Anthony Kennedy wrote a joint opinion reframing *Roe* and, under *Roe's* new contours, upheld the constitutionality of all the provisions of the Pennsylvania law except that requiring the notification of the husband. Since Justices Blackmun and John Paul Stevens agreed that the aspects of *Roe* that these three justices endorsed should be retained (they would have retained it all), there were five votes for retaining what the joint opinion called the "essential holding" of *Roe*. As recast by the authors of the joint opinion, *Roe* now stands for the proposition that pregnant women have a right under the Constitution's protection of "personal liberty" to choose to terminate a pregnancy before the time of viability that the state cannot "unduly burden."

The nature of the constitutional right to choose an abortion is seen as derived not only from the "right of privacy" in making decisions about family and personal matters, but also from cases restricting the government's power to mandate medical treatment or to bar its rejection, such as *Cruzan*.[7] Such cases, brought since *Roe*, in which the rulings have protected bodily integrity in matters of medical treatment "accord with *Roe's* view that a state's interest in the protection of life falls short of justifying any plenary override of individual liberty claims"[2] and prohibit the state from forcing either continued pregnancy or abortion on a pregnant woman.

The joint opinion concludes that a woman's constitutional "right to choose to terminate her pregnancy" continues to the point of fetal viability. Viability has been chosen because it was the most important line drawn in *Roe*, because "there is no line other than viability which is more workable," and because when fetal viability begins "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman,"[2] although the fetus is not considered a person under the Constitution. The joint opinion continues: "The woman's right to terminate her pregnancy before viability is the most central principle in *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce."[2]

The joint opinion rejects, however, the Court's rulings in cases brought after *Roe* that struck down most attempts by states to ensure "that a woman's choice contemplates the consequences for the fetus" as misconceiving "the nature of the pregnant woman's interest; and . . . undervalu[ing] the state's interest in potential life."[2] In this regard, the authors of the joint opinion insist that not every law that makes a right more difficult to exercise "is, *ipso facto*, an infringement on that right,"[2] even if such laws make the actual exercise of the right more difficult by increasing its expense or even decreasing the availability of the procedure. "Only where state regulation imposes an undue burden on the woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." The phrase "undue burden" is "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

Applying the "Undue Burden" Test

In the joint opinion the justices found that the definition of an emergency permitting waiver of the requirements of the law did not pose an "undue burden," because the lower court had properly interpreted the confusing words "serious risk" to mean anything that "in any way pose[s] a significant threat to the life or health of a woman."[2]

As to informed consent, the justices held that it is not unconstitutional to require physicians to present "truthful, nonmisleading information," not only about the procedure itself, as required to gain informed consent to the abortion, but also about the probable gestational age of the fetus, in order to attempt "to ensure that a woman apprehends the full consequences of her decision." Making available additional materials relating to the fetus is also acceptable, much as the justices writing the joint opinion believe it would be acceptable "for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself."[2] None of these requirements present a "substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden."

The 24-hour waiting period was found by the lower court to be burdensome for poor women from rural areas who must travel long distances to a clinic. The joint opinion, however, stated that a "particular burden is not of necessity a substantial obstacle" and that the waiting period, as part of the requirement for informed consent that "facilitates the wise exercise" of the right to choose, is not an undue burden on the exercise of that right. Similarly, the requirements for consent by one parent or for judicial review in the case of a girl under 18 years of age and for the reporting of certain information to the Department of Health were found not to be undue burdens on the woman's right to choose.

On the other hand, the authors of the joint opinion found that the requirement that the husband be noti-

fied could not meet the test of undue burden. Because its exceptions were so narrow (not including, for example, psychological abuse or assault not reported to the police), it would "likely prevent a significant number of women from obtaining an abortion."[2] This is so because "the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." As for the husband's undoubted interest in the pregnancy (when he is the father), the joint opinion concluded: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children. . . . Women do not lose their constitutionally protected liberty when they marry."

The Concurring and Dissenting Opinions

Justices Stevens and Blackmun both wrote opinions concurring in the affirmation of *Roe*, but dissenting from the approval of the provisions of the Pennsylvania law. The remaining four justices would have overturned *Roe* and upheld all the provisions of the Pennsylvania law. They expressed themselves in two opinions, one written by Chief Justice William Rehnquist and the other by Justice Antonin Scalia, each of which was concurred in by the author of the other and by Justices Byron White and Clarence Thomas.

Of these two opinions, the most illuminating portions are their remarks on *Roe* and on the undue-burden test. In the Rehnquist opinion, the four dissenters say bluntly: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[2] In their view, the state should be able to prohibit abortion, or to regulate it in any "rational" way, throughout pregnancy. The undue-burden test is dealt with in detail in Justice Scalia's opinion. He argues (persuasively, I think) that the test is ultimately "standardless" and "has no principled or coherent legal basis," and he notes that "defining an 'undue burden' as an 'undue hindrance' (or a 'substantial obstacle') hardly 'clarifies' the test."[2] Justice Scalia then tries to define the test operationally. He concludes that as applied in the joint opinion, the undue-burden standard means that "a State may not regulate abortion in such a way as to reduce significantly its incidence."

The Focus of the Opinions

Justice Scalia's reading of the undue-burden test seems correct: under *Casey*, states cannot regulate abortion in ways that will prevent a substantial number of women from obtaining one. It is in this sense that the Court has affirmed *Roe* v. *Wade* in its ruling on *Casey*. In addition, the always problematic emphasis in *Roe* on the right of the physician to practice medicine has been replaced by an emphasis on the pregnant woman and her right to make the decision about abortion. In *Roe*, for example, the Court said:

> The decision [in *Roe*] vindicates the right of the physician to administer medical treatment according to his professional judgment [prior to viability]. . . . The abortion decision in all its aspects is inherently and primarily, a medical decision, and basic responsibility for it must rest with the physician.[1]

It is primarily for this reason, I believe, that in the past the Court consistently struck down detailed requirements for informed consent, waiting periods, and reporting[8,9]; they were seen as interfering with the physician's judgment and discretion.

The joint opinion in *Casey* properly focuses on the pregnant woman. It is her decision that the Constitution protects, not her physician's. This shift in emphasis makes requiring a conversation between the woman and the physician that focuses on informed consent perfectly reasonable:

> Whatever constitutional status the doctor-patient relationship may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy.[2]

This shift in emphasis, from doctor to patient, should be applauded by physicians. It is the woman, not the physician, who is pregnant, the woman who is making the decision, and the woman who is responsible for the decision. The problem with the joint opinion is not its emphasis on women, but its view of women. The Pennsylvania requirements for obtaining informed consent are based on the supposition that women who decide to have abortions do not think much about the decision and that if they had some additional information about the procedure and the development of the fetus, as well as 24 hours to think about it, many would continue their pregnancies to term. This view is extraordinarily patronizing to pregnant women, it is supported by no empirical data, and the consent requirements apply to no other medical procedure. Furthermore, since it must be assumed that the authors of the joint opinion understand the undue-burden test as well as do the four dissenters, the approved requirements are expected to have little effect on the actual number of abortions in Pennsylvania. If they do affect a considerable number of women, the Court will hear a further challenge to the restrictions on the basis of their practical influence on the rate of abortion, rather than, as here, solely on the basis of theory.

The Court's approval of the Pennsylvania requirements for informed consent highlights two major flaws of the approach embodied in the joint opinion. First, the joint opinion seems to rest on the proposition that it is acceptable for the state to require physicians to inform women that childbirth is much preferable to abortion, as long as their providing this information does not inhibit many women from actually choosing

abortion. This suggests that making this value judgment and inculcating the guilt feelings arising from it are legitimate state functions in the area of abortion — an inconsistent, bureaucratic, and pointless position. Second, the Pennsylvania rules will affect some women — notably the rural poor and the very young. This result is, however, consistent with earlier opinions of the Court in cases related to abortion. Government action that in its application is restrictive only to the poor and disadvantaged has been assumed to be constitutionally acceptable in the absence of very specific evidence of its effect on these groups. The only way to avoid this disproportionate effect on the poor is to ensure that birth-control services as well as abortion are fully covered in any national system of health care.

Implications of the Decision

The decision in *Casey* has important implications for physicians. Its most important holding is that states cannot outlaw abortion before viability, although they can greatly increase the "hassle factor" for patients and their physicians. Record keeping and consent requirements for abortion similar to those approved in *Casey* will be enacted in other states. Indeed, they could be required for any medical procedure. No other medical procedure is as constitutionally protected as abortion; thus, any restriction a state can place on a physician who performs an abortion, it can also place on a physician who performs any other medical procedure. In the same way, the holding that it is constitutionally acceptable to require physicians to present certain information to patients in obtaining their informed consent for abortion could be applied to any medical procedure. The holding that physicians can be required to tell patients specific "truthful, nonmisleading information" is particularly troublesome in that it assumes that the state has some objective way to define these terms.[10]

The Future of *Roe*

Efforts to overturn *Roe* will continue. Should one of the members of the five-person majority in *Casey* retire, the next Supreme Court justice would be able to join the four dissenters to overturn *Roe* v. *Wade*. Because of this fact, Congress seems likely to pass a version of the Freedom of Choice Act, which is designed to codify the elements of the 1973 ruling in *Roe* in statutory form. Using its authority to legislate for the country under the interstate commerce clause of the Constitution (because a patchwork of state regulations would cause some women to cross state lines to obtain abortion services), its primacy under the supremacy clause, and the power of Congress to adopt laws enforcing the 14th Amendment, the federal government could preempt the Court's influence in the area of abortion and write uniform standards for the country. President George Bush would be likely to veto such legislation, but candidate Bill Clinton has said he would sign it. There is no constitutional prohibition against such legislation, since all nine justices agree that the fetus or unborn child is not a person under the Constitution. With or without such legislation, some states will continue to try to regulate abortion in ways that discourage it — either by adopting the approved Pennsylvania restrictions or by expanding on them to test the limits of the vague and unsatisfactory undue-burden test. They may also test the language of the Freedom of Choice Act, should it be passed. In short, the justices' attempt in the joint opinion to call "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution" will, sadly, fail.

References

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BOOK REVIEWS

Laser Surgery in Ophthalmology: Practical applications

Edited by Thomas A. Weingeist and Scott R. Sneed. 206 pp., illustrated. Norwalk, Conn., Appleton and Lange, 1992. $80. ISBN 0-8385-7903-5.

This is a good overall review of common and accepted applications of the laser in ophthalmic care. The initial chapters are devoted to a brief and concise review of the anatomy of the eye in relation to laser surgery and the lenses used in conjunction with lasers. These are followed by a series of concise, practically oriented chapters that review the many categories of laser treatment. These categories include the treatment of retinal disorders (retinal breaks, diabetic retinopathy, diabetic macular edema, other retinal vascular disorders, and age-related macular degeneration), glaucoma, and posterior capsular opacification after cataract surgery. Each chapter begins with a brief review of the pathogenesis of a given condition, followed by the indications for therapy and the methods of treatment. The laser settings are well presented in highlighted tables for convenient review. Each chapter has a thorough list of references. Illustrations, photographs, and fluorescein angiograms are plentiful. This is particularly true of the chapters dealing with photocoagulation in retinal disorders, which contain pretreatment and post-treatment photographs and angio-