Hastings Law Journal

Volume 45 | Issue 4 Article 8

1-1994

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The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of *Casey*

by
ROBIN L. WEST*

Introduction

In *Planned Parenthood v. Casey*,[1] the Supreme Court let stand a Pennsylvania statute that significantly (whether or not unduly) burdens the ability of poor and young women to procure a legal abortion. One effect of this law, it is fair to speculate, will be some increase in the number of desperate decisions made by terrorized and terrified girls and women in violent or threatening home environments. The long-term effect, no doubt, will be an increase in the number of state regulations that will significantly, whether or not unduly, burden what was once regarded as a fundamental right to obtain an abortion. Accordingly, the ultimate effect of this case will be detrimental to women's lives.

Professor Brownstein has directed our attention to a different question—the effect of the decision on constitutional theory and doctrine and, more specifically, on our understanding of the nature of rights.[2] The crux of his argument, as I understand it, is that, contrary to the complaints of both the liberal and the conservative dissenting justices, the plurality opinion in *Casey* did not really effectuate a change in constitutional doctrine.[3] Rather, the fundamental-right, strict-scrutiny formula that *Casey* appears to reject has always been something of a mirage. Truth is, we don't have any fundamental rights not subject to state regulation, and all *Casey* does, and entirely to its

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1. 112 S. Ct. 2791 (1992).

2. Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994).

3. *Id.* at 872.

credit, is give us a workable formula that better fits the reality of what we do have—rights of varying degrees of importance that can be regulated, limited, or defined by state action so long as the burdens thereby imposed are not undue.[4] The jurisprudential importance of *Casey*, in other words, is that it forces us to a newly explicit acknowledgement of what in reality is a quite old conception of rights: The assertion of a right operates not as a trump, but rather as the opening to a regulatory conversation, in which the collective, or the community, or the society, through the mechanism of state regulation, *defines*, as well as limits and burdens, the content of the right.

I have two responses to *Casey* and to the somewhat communitarian conception of rights on which it rests, that initially pull in opposite directions. First, I fear that while it was not an unmitigated disaster, this opinion will hurt women. Women need the old-fashioned, liberal right-as-trump: a trump that can defeat paternalistic, hostile, or well-intentioned but intrusive state regulation of reproductive choice. On the other hand, the jurisprudential reorientation of our understanding of rights suggested by *Casey*—which, if Brownstein is right, is deeply entrenched, although perhaps somewhat hidden, in prior case law—is appealing in a number of ways. It suggests not only a coupling of rights with responsibilities, but also suggests a departure from a way of thinking about the social world that is loaded down with false and sometimes damaging oppositions—between individual and state, right and interest, freedom and regulation. If *Casey* is moving us toward a more communitarian and hence more nuanced understanding of the nature of individual rights, then perhaps it should be applauded.

In this Commentary I will first suggest that the ambivalence in my reaction to *Casey* is hardly peculiar to me. Indeed, ambivalence is a quite general characteristic of discussions of the "right" to an abortion, even among ardent defenders of *Roe v. Wade*. This ambivalence is rooted in the fact that the "right" to an abortion is somewhat anomalous—it does not fit well within even the conceptions of rights held by theorists who are demonstrably pro-choice. Second, I will put forward an alternative conception of rights, different from both standard liberal models and the rather different communitarian conception suggested by *Casey*, within which abortion rights do not seem so exceptional or anomalous. Lastly, I will use that conception of rights as a way to critique the abortion right defined by *Casey* and explicated in Professor Brownstein's fine article.

4. *Id.*

I. The Problematic Right to an Abortion

Let me describe impressionistically the exceptionality, or simply the difficulty, of the abortion right. Again, my limited claim is that abortion rights simply do not "fit well" into the various conceptions of rights held by even pro-choice legal theorists.

First, abortion rights are clearly problematic for "pro-choice" radical feminists.[5] Doctrinally and in public discourse, abortion rights rest precariously on an assertion of the value of privacy, which for the most part radical feminists have gone to great lengths to question. The private sphere is indeed, for many women, a grim world of terror, abuse and violence, and it has been the central contribution of radical feminism to highlight that fact. The triumph of abortion rights, justified by a further sanctification of private choice and the insular private sphere, is thus a bittersweet victory at best.

Second, abortion rights are problematic to pro-choice communitarians and civic republicans who have grown accustomed to applauding, if not glorifying, collective, normative processes and the values that emerge from those processes, and accustomed to denigrating the isolated, pre- or anti-social individual.[6] The "right to an abortion," standing against the collective moral judgment of the community, is simply antithetical to the communitarian or republican ideal of collective democratic choice.

Third, abortion rights are problematic for pro-choice relational, cultural, or difference feminists.[7] The decision to terminate fetal life, whatever prompts it, is hardly emblematic of the act of care or relationality celebrated as at the heart of women's distinctive moral sensibility.

Fourth, abortion rights are problematic for pro-choice liberals, as they do not fit traditional liberal justifications for rights. Unlike the cerebral, cultural, and intellectual activities of the mind celebrated by Mill[8] and his followers as central to self-development, autonomy, and self-identity, the activity protected by this right—abortion—is profoundly of the body: physical, messy, quite painful, bloody, and end-

5. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 93-102 (1987).

6. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

7. For a critique of relational feminism on the grounds that it jeopardizes abortion rights, see Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 117 (1992).

8. *See* JOHN STUART MILL, *On Liberty, in* THREE ESSAYS 5 (Oxford Univ. Press 1975) (1859).

ing in a death. Nor does the right fit well within the liberal conceptions of "sexual autonomy" at least arguably recognized by the Supreme Court in *Eisenstadt*[9] and *Griswold*.[10] Lastly, although well beyond the scope of these comments, the abortion right does not seem to express a universal value without which liberal society could not function in identifiably liberal ways.

Fifth, abortion rights are problematic for constitutional purists, of which some number are undoubtedly pro-choice. Reproductive rights are, after all, unenumerated.

Sixth, abortion rights are problematic for pro-choice progressive or critical rights critics, some of whom are pro-choice, and all of whom view rights as a manifestation of a possessive individualism that is itself an inextricable component of an acquisitive and unduly materialist society.[11] The right to an abortion—basically a contract right—partakes of these unpalatable general attributes of rights and of a rights culture.

Seventh, the abortion right is problematic to pro-choice egalitarian, green, vegetarian, ecological, spiritual, pacifist, and otherwise gentle feminists, for whom the perspective and experience of the sentient fetus, who (post-viability) does feel pain, can never be subordinated to a position of total irrelevance.[12]

My limited point here is that all of these people come to their support of abortion rights somewhat reluctantly, or with some measure of inconsistency, or in some way by compromising their overriding conception of rights.

In the next Part, I will propose a conception of rights that might provide a stronger justification for abortion rights, and might also clarify the inadequacy of the Supreme Court's decision in *Casey*.

II. An Argument for Abortion Rights

The general account of rights I propose is a modified Rawlsian one. We all fundamentally possess a right to live in a just society. Thus, the rights we have follow directly from the nature of justice. I would modify this Rawlsian account of rights as follows: To whatever degree we fail to create the minimal conditions for a just society, we

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

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

11. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 23-34 (1993).

12. For a general discussion, see Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in* William L. Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137 (1990).

also have a right, individually and fundamentally, to be shielded from the most dire or simply the most damaging consequences of that failure.

To know what rights we have, then, we must first know what justice requires. Rawls's account of justice[13] famously and powerfully accounts for a goodly number of our rights. The theory of justice propounded by Rawls, however, is seriously incomplete, as a good deal of feminist scholarship from various disciplines has attempted to show.[14] One way to put the insight behind much of that scholarship might be this: In addition to having the qualities described by Rawls, a just society is a society in which being a mother with attached, connected, or simply dependent children, does not unduly burden participatory citizenship. Indeed, I would take this insight further: A just society is one in which "connected relationality"—whether through motherhood, fatherhood, sisterhood, brotherhood, intimacy, friendship, or whatever—not only does not unduly burden participatory citizenship, but is central to our conception of participatory citizenship. Such a world would be more just than the world we presently inhabit. It would also be a very different world; it would require not only a displacement, but a transformation of our prevailing norms of citizenship.

In the meantime, we have a right, I would argue, to be shielded from the harshest consequences of our failure to secure such a world. The abortion right partakes of this second-best, residual, transitional form. We must have the right to opt out of an unjust patriarchal world that visits unequal but unparalleled harms upon women with wanted and celebrated children, and even more serious harms upon women with unwanted pregnancies.

It is the defensive, second-best nature of this right that accounts for our ambivalence, as well as for the exceptionality of abortion in rights discourse. Dominant liberal as well as communitarian conceptions of rights have little room for these defensive rights against manifestly unjust societal orderings. Feminism, like other liberationist movements, however, forces a recognition of their centrality. Catharine MacKinnon's defense of the abortion right, for example, as a

13. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

14. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); CAROLE PATEMAN, THE PROBLEM OF POLITICAL OBLIGATION: A CRITICAL ANALYSIS OF LIBERAL THEORY (1979); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

transitional right that we must have as long as the sexual subordination of women continues,[15] partakes of this structure. The existence of the right depends upon the fact of women's subordination, and when that fact changes, MacKinnon adds, so will the contours of the right. The argument sketched here is structurally similar. The existence of the right depends in part on the continuing existence of patriarchal injustice, one consequence of which is that the participatory rights and obligations of mothers are unequally burdened. Until that fact changes, we must continue to have the reproductive freedom to avoid those undue burdens.

III. The Problem With *Casey*

Finally, this focus on prevailing injustice as the logical precondition of the right highlights the inadequacy of the contours of the abortion right suggested by *Casey*. I take the undue burden test as saying something like this to pregnant women: "Your right to choose abortion is a right to make these choices in a just manner—considered, informed, communally. We (the state) can regulate the conditions within which you exercise that right in order to insure that your choice is a just one." As mentioned above, the general approach to rights suggested by such a formula—that rights imply responsibilities, that they have communal as well as individualistic implications—has some virtues. But at the same time, the account of the abortion right suggested above—that it is a defensive right against patriarchy—suggests its vice.

If the "defensive rights" account is correct, then the collective's right to encumber the individual's exercise of the right with the burden of responsibility is *itself* contingent and defeasible. The individual pregnant woman might, in other words, respond to the state of Pennsylvania something like this: "Your right to demand that I be just in my decision to abort or not is a right that carries with it reciprocal obligations and responsibilities, namely, that you, the state of Pennsylvania, be just. And justice requires the end of patriarchy, which in turn requires that maternity, and more broadly parenthood, not be a state of being that unduly burdens participatory citizenship. That, in turn, is a condition you have not yet met."

To elaborate slightly, in a world in which motherhood is not dangerous, unduly costly, or too often forced upon us, the right to abort

15. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1326-27 (1991).

could indeed justifiably look quite different, and might very likely be circumscribed by a legitimate demand that decisions to abort be made justly, caringly, and communally, if made at all.

Conclusion

Until this dialogue is truly two-way—until the societal demand that the woman's right to choose be exercised justly and responsibly is circumscribed by a requirement that society itself be minimally just—the imposition by the state of a requirement that the woman make the decision to abort justly (which is what *Casey*'s undue burden test at heart is) constitutes, itself, an arrogant act of injustice. It is indeed an infringement of a basic, fundamental right—the right to submit only to regulation that originates from a just society. It is *also,* however, an infringement accompanied by absolutely no concession in the direction of correcting the societal injustice that gives rise to the right's necessity. For that reason, I would conclude, the undue burden test itself is undue.