FROM THE PAGE TO THE PILL: WOMEN'S REPRODUCTIVE RIGHTS AND THE LAW*

Panel 2–Reproductive Healthcare Legislation: Where We've Been and Where We're Going

REMARKS OF ANNA FRANZONELLO**

Reproductive health care is itself an expansive health topic. In my remarks today I'm going to really center on what that term is often euphemistically used to mean – abortion. Then I'm going to put contraception in quotes to refer to drugs, chemicals, and procedures that are aimed at halting the reproductive process. When you listen to speeches at the Democratic National Convention this year, or if you've received e-mail from any policy group or any politician, you have heard a lot of heightened rhetoric about where we are and where we're going on the topic of reproductive health care legislation. Though phrased in admittedly catchy slogans and always delivered with much passion, it's often divorced from the actual reality of the landscape of legislation.

While the focus of this panel is legislation, in order to understand where we've been and where we're going, it is

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important to understand the governing abortion jurisprudence. How has it evolved and where it may go. I would love to give a line-by-line critique of the decisions that I'm going to talk about, but what's most important for our discussion today is not whether the Court's reasoning was proper in these cases but what the outcome of those cases was and their practical effect on enacting legislation regarding abortion. In 1973, the U.S. Supreme Court in *Roe v. Wade*[1] and its companion case *Doe v. Bolton*[2] did not legalize abortion, but constitutionalized abortion. It nullified state laws in all 50 states; as you might know from New York history, New York already had legal abortion in 1970. *Roe*, is often talked about as legalizing abortion, but it did not, it constitutionalized it. For the four decades after *Roe* was decided, it still remains controversial. However, while the majority of Americans will say that they are familiar with *Roe*, most of them do not understand the extent of what the Court's decision permits. In *Roe*, the Court struck down a Texas law that prohibited abortion except in cases where it was necessary to save the life of the mother.[3] The opinion, written by Justice Harry Blackmun, held that the right to privacy supposedly found in the 14th Amendment's liberty interest, includes the right of a woman to decide whether or not to terminate her pregnancy.[4] In *Doe v. Bolton*, decided the same day as Roe and also written by Justice Blackmun, the Court invalidated a Georgia abortion law.[5] Significantly, the *Doe* opinion created an unlimited definition of maternal health. The Court wrote, the medical judgment, and it's talking about what constitutes health, "the medical judgment may be exercised in light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health[,]"[6] and the Court decided that the abortionist alone was allowed to make that judgment.[7] Thus, although the majority in *Roe* claimed that it did not agree that a woman's right is absolute and

[1] Roe v. Wade, 410 U.S. 113 (1973).
[2] Doe v. Bolton, 410 U.S. 179 (1973).
[3] *Wade,* 410 U.S. at 117-18, 164.
[4] *Id.* at 153-54.
[5] *Bolton,* 410 U.S. at 201.
[6] *Id.* at 192.
[7] See *id.* at 198 (holding that the Georgia abortion statute's requirement of a hospital abortion committee, which approved the abortion procedure, interfered with the rights, and medical needs of pregnant women, which had already been defined by her physician).

she is entitled to terminate her pregnancy at any time, in any way, and for whatever reason, she alone chooses, as what certain people are arguing that they wanted the court to hold, and the majority in *Roe* says, "oh no we're not holding that." However, because *Roe* constitutionalized abortion even after fetal liability for the life or health of the mother, *Doe's* expansive definition of health actually made abortion on demand available through all nine months of pregnancy.

Harvard Law School professor, Mary Ann Glendon, who conducted a landmark study in 1987 on abortion in Western law, has written about *Doe's* significance in creating a more radical abortion policy in the United States than in most other liberal democracies.[8] To quote Professor Glendon:

> Though *Roe* got all the attention, I think it is fair to say that *Doe,* decided on the same day, was the more ominous of the two decisions. It was *Doe* that signaled the doom of legislative efforts to provide even modest protection of unborn life—statutes of the type that are in force in most other liberal democracies (where the regulation of abortion has largely been left to be worked out in the ordinary democratic process of bargaining, education, persuasion, and voting).[9]

Another Harvard Law School professor, Laurence Tribe, who is recognized as a leading liberal law constitution scholar, wrote in 1973 that *Roe* and *Doe* "impos[ed] [the] limits permissible abortion legislation so severe that no [abortion] law in the United States remained valid."[10] Villanova law professor Joseph Dellapenna, who in 2006 published perhaps the most substantive history of abortion, Dispelling the Myths of Abortion History, which is a must read if you're interested in this topic, he notes that "[t]he Supreme Court's haste to decide these cases, *Roe* and *Doe*, imposed a more extreme approach to abortion on the United States than is found in almost any other nation."[11] "The United States is currently one of only nine nations that allow abortion

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[8] *See* Mary Ann Glendon, *The Women of Roe v. Wade,* 134 FIRST THINGS 14, (June/July 2003), *available at* http://www.firstthings.com/article/2007/01/the-women-of-roe-v-wade-34 ("It was *Doe* that signaled the doom of legislative efforts to provide even modest protection of unborn life—statutes of the type that are in force in most other liberal democracies.").

[9] *Id.*

[10] Laurence H. Tribe, The Supreme Court, 1972 Term, *Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1, 2 (1973).

[11] JOSEPH DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (Carolina Academic Press 2006).

after 14 weeks . . . ."[12] "Even among this group, however, the United States is one of the most permissive in its treatment of abortion, placing it in the company of Canada, North Korea, and China, the only other countries in the world that permit abortion after fetal liability for any reason."[13]

In 1992, the Supreme Court revisited *Roe* to some degree in the plurality decision that was delivered by Justices Kennedy, O'Connor and Souter, in *Planned Parenthood v. Casey*,[14] which did shift the Court's rationale and framework for assessing abortion legislation. Instead of grounding the right to abortion in the Constitution, the plurality concluded that societal reliance on abortion prevents the court from overruling *Roe*. They asserted, without evidence, that for two decades of economic and social developments, people have organized intimate relationships, made choices that define their views of themselves and their place in society in reliance on the availability of abortion in the event that contraception should fail. The Court said the ability of women to participate equally economically and socially in the nation has been facilitated by abortion. The plurality in *Casey* did not uphold *Roe,* because *Roe* was rightly decided, but because *Roe* was, in the plurality's estimation, relied upon.

In his dissent, Justice Rehnquist took on this claim that abortion is relied upon and he said that this was an unconventional and unconvincing notion of reliance. He explained that the joint opinion assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure what economic, and social developments the opinion is referring to. Surely it is dubious to suggest that women have reached their places in society in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in a job market, and society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. This is an important point that is often lost in the hyperbolic rhetoric used in defense of *Roe*. Abortion proponents generally cast overturning *Roe* as setting women back for decades. This notion demeans the actual achievements

[12] Memorandum from Americans United for Life Legal Term to Interested Parties (Aug. 1, 2012) *available at*, http://www.aul.org/united-states-abortion-policy-in-the-international-context.

[13] *Id.*

[14] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869-79 (1992).

made by women, and in a 2004 essay, Paige Cunningham echoed Rehnquist's dissent writing, *Roe v. Wade* is not essential for any Constitutional right save the right to abortion itself. Women's increased access to economic and legal equality has come by way of thousands of laws passed at the national state and local levels, and by court rulings as well as through the determination, and hard work of individual women. Indeed, none of the very substantial legal process that has opened new possibilities for women over the last 30 years rests on *Roe*.

Justice Ginsburg, who joined the court a little over a year after *Casey* was decided, would actually like to take this reliance holding of *Casey* a step further, and she would grant the right to abortion in an equal protection clause. While the view of *Casey* and Ginsburg's desire to take *Casey* even further are espoused in the name of women's equality, I just want to challenge all of you to contemplate what that actually means. The rationale of *Casey* and of Ginsberg is based in an idea that women were created inferior with a design flaw that can only be corrected by a drug or surgery.

If *Roe* was overturned, abortion would still be legal in 42 or 43 states.[15] While many Americans pro-life and pro-choice alike don't understand the scope of *Roe*, they are equally ignorant as to what overturning that decision would do. The four dissenters in *Casey* that would have overturned *Roe* agreed that states may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. Those dissenters and the new members of the Court, who are believed to have gone on the same lines of overturning *Roe*, always simply held that abortion policies should be returned to the states. Yet at my metro stop in DC, I walk by three signs every morning telling me that Mitt Romney is too extreme for Virginia because he supports overturning *Roe*. This is an absurd statement, regardless of what you think about Mitt Romney and his political beliefs. The statement that he's too extreme for Virginia is absurd considering that overturning *Roe* would simply return the determination of Virginia's abortion policy back to Virginians.

The most significant change from *Roe* to *Casey* is that the Court in *Casey* chose not to give credence to *Roe* was trying to

[15] Clarke D. Forsythe, et. al., *Constitutional Law & Abortion Primer,* ADVOCATES FOR LIFE 18, http://law.studentsforlife.org/files/2011/01/Constitutional-Law-and-Abortion-Primer.pdf.

say, that there is some legitimate state interest in protecting unborn life, and therefore that the strict scrutiny standard should apply. Instead, the Court in *Casey* created what's called the 'undue burden' standard. This undue burden standard completely mutes any Constitutional cases. Under this standard, there will be a finding of an undue burden if it is concluded 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 non-viable fetus. This has been widely criticized as actually being just as unclear if not more unclear than what strict scrutiny would be. Justice Kennedy has provided a little bit more clarity as to what is meant by those words, and what the undue burden standard means. First in 2000, Justice Kennedy wrote a scathing dissent in *Stenberg v. Carhart*,[16] in which the Supreme Court struck down a state ban on partial birth abortions. Kennedy's dissent, I think, can be fairly paraphrased as, "this is not what I signed up for in *Casey*," in all caps and with a bunch of exclamation points after that. Seven years later, the Court evaluated the constitutionality of the partial birth abortion ban again in *Gonzales v. Carhart*.[17] This time, Kennedy wrote that the majority opinion in which he noticed that a central premise of *Casey's* holding was that the government has the legitimate and substantial interest in preserving and promoting fetal life. The Court held in *Gonzales,* that the government may use its voice as its regulatory authority to show its profound respect for the life within the woman. So, taken at its word, *Gonzales* didn't actually alter *Casey*, but it clarified what *Casey* meant and is trying to give some teeth to that undue burden standard.

40 years into our experience of constitutionalized abortion, we now understand why we actually needed those abortion regulations. The uncovering of Kermit Gosnell's house of horrors abortion clinic in Philadelphia back in January of 2011, brought some national attention to the fact that legal abortion has not been safe abortion for women.[18] The harm to women at his hands

[16] Stenberg v. Carhart, 530 U.S. 914 (2000).

[17] Gonzales v. Carhart, 550 U.S. 124 (2007).

[18] At the time of press Dr. Kermit Gosnell was convicted of three counts of first-degree murder for cutting the spinal cords of aborted babies with scissors, and sentenced to three consecutive life sentences. In January of 2011 remains of aborted fetuses, many from late term abortions, stored in water jugs, pet food containers, and freezers were found in Dr. Gosnell's office. The doctor entered into an agreement with the Philadelphia District Attorney to give up his right to appeal in order to avoid the death penalty. The doctor was also sentenced to 2

was not an isolated incident. There are unfortunately several horrifying recent examples of substandard clinic conditions. At my organization, Americans United for Life (AUL),[19] we do a lot of legislative drafting, and one area that we've worked in is clinic regulations. We have one bill called the Abortion Patients Enhanced Safety Act,[20] which requires abortion clinics to meet the same health safety staffing and other standards as ambulatory surgical centers - health care facilities that specialize in providing outpatient surgeries. We've been there to defend these common sense regulations when they've been challenged in the courts. In 2000, AUL joined with Arizona state officials to defend clinic regulations which were enacted after a young mother, Lou Anne Herron, was left to bleed to death while the abortionist who botched the procedure ignored requests to help, then ate lunch in the break room, then left to visit his tailor.[21] After being held up in the courts by repeated challenges for over ten years, the regulations have finally gone into effect in Arizona, and women now have more protection against the all-too-frequent substandard conditions, and practices at abortion clinics.

Substandard abortion clinics are not the only cause of abortion-related injury and death. Abortion itself carries inherent risks. The undisputed risks of immediate complications for abortion include blood clots, hemorrhage, incomplete abortions, infection, and injuries to the cervix and other organs. Abortion can also cause ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, and shock. Immediate complications affect approximately 10% of women undergoing abortions, and approximately 1% of these complications are life-threatening.[22]

½- 5 years in prison for the death of a female adult patient, who died from an anesthetic overdose, and will also serve 10 to 20 on two counts of conspiracy to commit murder, and an additional 10 to 20 years for running a corrupt organization. *E.g.*, Sarah Hoye, *Gosnell Sentenced to Life in Third Baby's Death,* CNN (May 15, 2013 1:42 PM), http://www.cnn.com/2013/05/15/justice/pennsylvania-abortion-sentences/index.html?iref=allsearch.

[19] AMERICANS UNITED FOR LIFE, http://www.aul.org (last visited May 26, 2013).

[20] AMERICANS UNITED FOR LIFE, ABORTION PATIENTS' ENHANCED SAFETY ACT (2013), *available at* http://www.aul.org/wp-content/uploads/2012/11/Abortion-Patients-Enhanced-Safety-Act-2013-LG.pdf.

[21] Denise Burke, Arizona Abortion Clinic Regulations Finally Go into Effect, AMERICANS UNITED FOR LIFE (Oct. 29, 2010), http://www.aul.org/2010/10/arizona-abortion-clinic-regulations-finally-go-into-effect.

[22] *See Women's Health Defense Act (Late-Term Abortion Ban),* AMERICANS

Studies revealed that there are also long-term physical and psychological consequences to abortion. Though the abortion lobby wants you to think that after four decades of experience with abortions they are a common medical procedure, as common as a tooth extraction, abortion is substantially different than any other amount of medical procedure. As the Supreme Court has noted, this is because the procedure actually involves the taking of a human life. So, as common as it may be, it is still a different category than any other medical procedure that we have.

Our four decades of experience with abortion has also led to other things such as the enactment of informed consent legislation, which Planned Parenthood routinely opposes. However, these laws are the lynchpin of true choice. The women who are going to have an abortion should be informed of the rights of that abortion so that they can exercise true choice. On the same token, the type of legislation that AUL wants to have enacted is often called incremental legislation. We are criticized by people in the pro-life movement, because this type of legislation fails to outlaw abortion 100%. Some might see this as a failure of the pro-life movement. However, it is important to make sure that women are safe. This viewpoint doesn't take into account the fact that as far as overturning *Roe* goes, you don't need a silver bullet case to get before the Court. Any of these regulations that are challenged all the way up to the Supreme Court could ask the Court to revisit its ruling in *Roe*.

Notably, and I'm going back to the health risks for women, medical studies have revealed that serious medical risks associated with abortion, including death, increase markedly as pregnancy progresses. Several states, including Arizona, have now enacted 20-week abortion bans.[23] These types of laws are controversial pieces of legislation even though polling shows that the majority of Americans, pro-life and pro-choice alike, oppose late-term abortions and would be in favor of late-term abortion bans.[24] Arizona's 20-week abortion ban is a little bit different than some of the other late-term abortion plans, in that it provides a dual rationale for the legislation. A number of these bills have promoted banning abortions at 20 weeks, based on the

UNITED FOR LIFE, http://www.aul.org/womens-health-defense-actlate-term-abortion-ban.

[23] H.B. 2036, 50th Leg., 2d. Reg. Sess. (Ariz. 2012).

[24] *See Abortion,* GALLUP, http://www.gallup.com/poll/1576/abortion.aspx (last visited May 26, 2013).

idea of fetal pain. The Arizona bill describes fetal pain and those findings, but also the increased risk to women's health from an abortion at that stage.

Other legislation has responded to the changing nature of the abortion industry. In 2000 the abortion drug RU-486 was fast-tracked for approval by the Food and Drug Administration.[25] In the last ten years, we've witnessed what I've considered chemical abortion revolution. A recent Guttmacher Institute report noted that though incidents of abortion are decreasing there has been a significant increase in the percentage of abortions that are achieved by chemical rather than surgical means.[26] These chemical means have received thousands of reports of serious adverse events, including several deaths. Abortion legislation has sought to ensure that abortionists, in the case of chemical abortions, do not place a profit, lower overhead, or convenience over women's health and safety. Regulations surrounding RU-486 came to prevent deaths like that in Holly Patterson, a teenager in California who died after taking the abortion drug not according to FDA regulations, but according Planned Parenthood's off-label use.[27]

Moving on to discuss the Constitutionality of sex selection in relation to abortion, if you start to get into talking about sex selection when it comes to embryos it must be acknowledged that the process inherently requires the destruction of a unique living human being if they're not the sex that you were choosing. There have been some sex selection bans enacted in a couple of states, which would maybe suggest the idea that we have abortion on demand for any reason isn't really true, and these have not been challenged before the court. So as far as the jurisprudence stands, we still have under the framework of *Roe* and *Casey*, abortion on demand through all nine months.

I would now like to briefly touch on the HHS mandate because I have written a lot about the mandate and was at all the Institute of Medicine panel meetings. One thing that was not

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[25] *See Mifeprex (mifeoristone) Information,* U.S. FOOD AND DRUG ADMIN., http://www.fda.gov/drugs/drugsafety/postmarketdrugsafetyinformationforpatientsandproviders/ucm111323.htm, (last visited May 26, 2012).

[26] Rachel K. Jones and Kathryn Kooistra, *Abortion Incidence and Access to Services In the United States, 2008*, 43 PERSP. ON SEXUAL & REPROD. HEALTH 41, 41–50 (2011), *available at* https://www.guttmacher.org/pubs/journals/4304111.pdf.

[27] *E.g.*, Tatiana Morales, *Talking to Kids About Abortion,* CBS NEWS, (Feb. 11, 2009, 8:20 PM), http://www.cbsnews.com/2100-500166_162-574495.html.

covered this morning is that the HHS mandate is not just a question of sexual ethics. Certain people oppose the HHS mandate because they oppose contraception in the true sense of that word, or preventing procreation, but the HHS mandate also ties into the changing nature of the abortion industry. In 2010, the Food and Drug Administration approved a new drug called Ella.[28] Ella is a selective progesterone receptor modulator, it's the same kind of drug as RU-486 and works the same way. However, Ella is marketed as regular contraception, and RU-486 as emergency contraception. When we talk about emergency contraceptive, it doesn't mean just preventing conception. It could also prevent implantation and it could also end the life of an embryo after it has been implanted, because it blocks progesterone, a hormone that's necessary to build and maintain your uterine law. Look at Planned Parenthood's documents on how the abortion drug works, and they say because it blocks progesterone. That's exactly how Ella works, it blocks progesterone. So, part of the controversy around the HHS mandate is about how the mandate actually provides coverage for an abortion-causing drug. Now, a lot of women do take Ella with the intention of using it as contraception whereas women take RU-486 with the intention of ending a human life. However, they are consequentially the same, and that's why a lot of people don't want to be forced to facilitate and pay for these drugs. The second thing about the HHS mandate is about the health care payers freedom of conscience on contraception. Even if you take Ella, take IUDs, and take Plan B out of the equation, and just talk about true contraceptives you're still staying that a health care payer has no conscience right on contraception, which is the same legal principal for abortion.

To wrap of this overview of where we've been, where we're going depends not only on who wins the election in November. Although, with a closely divided court and several aging justices, who wins the election could ensure whether *Roe* is insulated from adequate review for years to come, or that its legal reasoning will actually be assessed in the not-too-distant future. However, *Roe* is not the end of the story. When abortion policy is returned to the states, which I think will happen at some point, the direction

[28] News Release, FDA, FDA Approves Ella™ Tablets for Prescription Emergency Contraception (Aug. 13, 2010), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm.

the discourse will take will depend on a lot more. It depends on whether we're willing to go beyond platitudes, heightened rhetoric, and knee-jerk reactions, and if we're willing to instead engage in intellectually honest discussion about the underpinnings and implications of abortion. It will depend on whether we want to fully embrace being a culture that views convenience as paramount, or whether we believe that human life, all human life, by virtue of being human life, is worth of care and dignity. It will depend on if we're willing to reject the view of the human person that has been enhanced by *Roe* and her progeny, that you are only protected if you are wanted. To me, this view seems quite opposite of the American way, and what the poem of the Statue of Liberty says, "[g]ive me your tired, your poor, your huddled masses yearning to breathe free . . . .[29] It really depends on whether we are satisfied with a jurisprudence that declares fundamentally that women were created inferior. Finally, it depends on whether societal response to admittedly tough situations is to pit a mother against her child, or if we believe that women deserve better than abortion.

[29] EMMA LAZARUS, THE NEW COLOSSUS, *available at* http://www.poetryfoundation.org/poem/175887.