



MEMORANDUM

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Introduction

No issue other than slavery has divided the nation more than abortion. In 1973, the U.S. Supreme Court held in *Roe v. Wade*, that abortion is a right protected, at least to a certain broad extent, by the federal Constitution.¹ Since *Roe*, over 56 million unborn children have been killed in the United States, with a high of 1.6 million killed in 1990 alone.² However, the number of abortions per year has decreased over the past twenty years.³ In 2010, only about 1.2 million abortions took place.⁴ This decline is due in no small part to a drastic switch in public opinion. A recent Gallup Poll conducted in May 2009 found that 51% of Americans identified themselves as pro-life, while only 42% said they were pro-choice.⁵ “This is the first time a majority of U.S. adults have identified themselves as pro-life since Gallup began asking the question in 1995.”⁶ The ACLJ is committed to the sanctity of human life and opposes abortion in all circumstances. It is further the position of the ACLJ that unborn children should enjoy the equal protections of the Fourteenth Amendment, which prohibits any state from “depriv[ing] any person of life, liberty, or property, without due process of law.”⁷ Because the U.S. Supreme Court has failed to recognize these fundamental protections, the ACLJ is committed to the

¹ 410 U.S. 113 (1973).

² *Abortion Statistics: United States Data and Trends*, NAT’L RIGHT TO LIFE COMMITTEE, (Feb. 2014), <http://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf> (numbers were compiled from the Guttmacher Institute).

³ *Id.*

⁴ *Id.*

⁵ Lydia Saad, *More Americans “Pro-Life” Than “Pro-Choice” for First Time*, GALLUP (May 15, 2009), <http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx>.

⁶ *Id.*

⁷ U.S. CONST. amend. XIV, § 1.

mission of changing the law, as well as protecting unborn children to the fullest extent allowed by existing law.

How the Law Has Changed Since *Roe v. Wade*

Fortunately, the law has improved significantly since *Roe v. Wade*, starting with the landmark decision of *Planned Parenthood v. Casey*.⁸ A central premise of the plurality opinion in *Casey* was that the Court's rulings after *Roe* had "undervalue[d] the State's interest in [protecting] potential life."⁹ As a result, the Supreme Court has ruled that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman," and that the state has an "interest in promoting respect for human life at all stages in the pregnancy."¹⁰

These later decisions represented a dramatic departure from *Roe v. Wade*, even though they did not overturn *Roe* entirely. Under *Roe v. Wade*, the "right" to an abortion was judged by a "strict scrutiny" test (the highest level of Constitutional protection) with the State having compelling interests only before the end of the first trimester.¹¹ But in *Casey*, the test for abortions before viability shifted to an "undue burden" test,¹² in which the state may bar certain abortion procedures and substitute others if "it has a rational basis to act, and it does not impose an undue burden" on the woman seeking an abortion.¹³ This created a balance, where states may enforce "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."¹⁴

Under this new test for abortions, numerous restrictions are available to the pro-life movement. Although not perfect, it is imperative to embrace the tools that recent Supreme Court decisions allow in defending life. Therefore, the ACLJ encourages the following regulations on abortion.

⁸ 505 U.S. 833 (1992).

⁹ *Id.* at 873; *see also* *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

¹⁰ *Gonzales*, 550 U.S. at 157, 163.

¹¹ *Roe*, 410 U.S. at 154, 162–63.

¹² *Casey*, 505 U.S. at 874.

¹³ *Gonzales*, 550 U.S. at 158.

¹⁴ *Casey*, 505 U.S. at 877; *reaffirmed in* *Gonzales*, 550 U.S. at 146.

Informed Consent Laws

Every State should have an informed consent law. In *Casey*, the Supreme Court explained, “What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”¹⁵ Informed consent laws properly require doctors and assistants to disclose to women the nature and risks of the procedure, as well as the effect of the abortion on the unborn child. Proper informed consent legislation should inform women of alternatives to abortion and counsel them accordingly. It should also require a 24-hour waiting period, mandatory ultrasound with a physician’s explanation, and playing the heartbeat of the unborn child for the mother. Considering that “approximately 40 percent of post-aborted women were still hoping to discover some alternative to abortion when going for counseling at the abortion clinic,” the importance of informed consent laws cannot be stressed enough.¹⁶

In *Casey*, the Supreme Court ruled that the state has a profound, valid interest in taking “measures to ensure that the woman’s choice is informed, and that measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”¹⁷ The Court further explained,

[The] lack of information concerning the way in which the fetus will be killed . . . is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.¹⁸

Parental Consent and Notification

The ACLJ urges every state to adopt legislation requiring minors to inform their parents and obtain consent before getting an abortion. The Supreme Court has articulated that parents can play an important role in defending the lives of their daughters’ unborn children. In fact, even in *Casey*, the Supreme Court reaffirmed the rule “that a State may require a minor seeking

¹⁵ *Casey*, 505 U.S. at 877.

¹⁶ David C. Reardon, *Informed Consent: The Abortion Industry’s Achilles’ Heel*, ELLIOT INSTITUTE, http://www.afterabortion.org/PAR/V2/n2/INCONSNT.htm#N_34_.

¹⁷ *Casey*, 505 U.S. at 878.

¹⁸ *Gonzales*, 550 U.S. at 159–60 (citations omitted).

an abortion to obtain consent of a parent or guardian, provided there is an adequate judicial bypass procedure.”¹⁹ This judicial bypass procedure allows minors to “bypass” parental notification and consent, but only if a court grants special permission.²⁰

Spousal Notification and Consent

Historically, common law recognized that a husband and wife were a single, unitary partnership—that “[m]an is, or should be, woman’s protector and defender,” that there is a “harmony, not to say identity, of interests and views which belong, or should belong, to the family institution,” as “founded in the divine ordinance.”²¹ Although this principle has long been abandoned,²² its foundation in “the divine ordinance” can never be abolished.²³ Because of the intimate union between a husband and a wife, the ACLJ maintains that a husband’s notification and consent should be an essential prerequisite to an abortion.

Unfortunately, the Supreme Court rejected this view in *Planned Parenthood v. Casey*. *Id.* This rule was ironic, since *Casey* expressed that “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.” *Id.* at 877. Under this logic, the Supreme Court should at least permit laws requiring spousal notification. The ACLJ emphasizes the right of the father to be involved in such a crucial decision.

Health Standards for Abortion Clinics

Even after the legalization of abortion, abortion clinics throughout the United States frequently maintain atrocious health standards, and are grossly under-regulated.²⁴ The abortion industry has ridden on corruption and unsanitary conditions, which has resulted in the deaths of women and their unborn children alike, and has advanced abortionist profits at the expense of women’s health.²⁵ Because of this epidemic of low standards, the ACLJ supports regulations that hold abortion clinics to the same standards as other hospitals. Such regulations are

¹⁹ *Casey*, 505 U.S. at 899.

²⁰ *See Zbaraz v. Madigan*, 572 F.3d 370, 376 (7th Cir. 2009).

²¹ *Bradwell v. State*, 83 U.S. 130, 141 (1873), Bradley, J., concurring.

²² *See Casey*, 505 U.S. at 896–97.

²³ *Genesis* 2:24.

²⁴ *See generally*, William Saletan, *The Back Alley: How the Politics of Abortion Protects Bad Clinics Part 4*, SLATE MAGAZINE (Feb. 22, 2011), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/thesunshinestate.html.

²⁵ William Saletan, *The Back Alley: How the Politics of Abortion Protects Bad Clinics Part 2*, SLATE MAGAZINE (Feb. 17, 2011), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/the_abortion_industry.html.

constitutional and valid, according to the Supreme Court. In *Gonzales v. Planned Parenthood*, the Court held that “[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.” *Gonzales*, 550 U.S. at 878.

Conclusion

Abortion is not only harmful to the child who is killed by it, but to the mother carrying the child. Until abortion is abolished in the United States, the ACLJ will fight to ensure that this heart-breaking decision is well-informed, executed as safely as possible, and made with proper counsel and consent. In the long run, the ACLJ will always seek for the day when the promise of life, guaranteed by our Constitution,²⁶ is secured for every human being, born and unborn.

²⁶ U.S. CONST. amend XIV, § 1.