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ANALYSIS OF RECENT DECISIONS INVOLVING ABORTIONS

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Oliver Wendell Holmes once gave us the aphorism that law is prophecy as to what the courts will do. While the gift of prophecy may not be sufficient to complete the practitioner's art, it is doubtless a necessary feature of creative practice of law.

The purpose of this paper is to determine what the legal effect of the abortion decisions has been with a view to understanding the direction the legal issues are likely to take. Let us assume agreement with respect to the policy implications of these decisions, so that we may concentrate on the legal implications of the 1973 decisions as they affect certain fundamental concepts.

It must be assumed primarily that law is inherently didactic: that is, that law has a teaching as well as a coercive effect. If one remembers that there are over 200 million people in this country, it is clear that the effect of the law as a teaching instrument is what really makes the system work. There is no way that any government can force its will upon all people without some basic agreement among those people as to the function of the law and the values to which the law addresses itself. This is something to keep uppermost in mind in consideration of this issue. These abortion decisions do more than simply regulate the practice of abortion; they do more than simply describe the behavior of the majority. They teach us something about the values to which we subscribe.

If the didactic function of law is a reality, then the question that follows is: What is the substance of the teaching? How does one determine what is to be taught?

A strictly legal adjudication is an adjudication predicated on the application of certain rules of procedure and substantive rules to specific factual situations. A purposive adjudication is, on the other hand, an adjudication of a conflict on the basis of arriving at some end, some goal, some purpose. The purposive type of adjudication is well known to American lawyers as the public policy argument. It is not an uncommon experience for the practitioner to argue a case in a legal context, with reasonable assurance of success, only to have rules of law put aside on the basis of public policy.

The difficulty with any public policy adjudication is that it is directly

related to the didactic function. The judge has identified a purpose. We know he has the power to use his office as a teaching office, but how does he arrive at the purpose that is going to motivate him? How does he determine what specific goal he is going to work toward? The judge, like the rest of us, partakes of the intellectual climate of opinion of his own culture and the values which he finds there work to shape his view of public policy. It is in this manner that it can be said that law follows philosophy. The legal thought of the twentieth century has been profoundly marked by the philosophy of the nineteenth century.

It is in this context that the abortion cases have to be viewed as growing not out of a vacuum, but rather out of a historic libertarian effect to be traced as far back as Mills' essay *On Liberty*.

The legal significance of this movement is very pervasive. One of the most important aspects of it for the understanding of the abortion conflict is the glorification of an atomistic individualism. Prior to *Eisenstadt v. Baird*, the right to privacy was consistently and uniformly viewed as a familial right. The cases which form the root of the present privacy concept are cases which deal with the limitation of government action on the rights of families. *Myers v. Nebraska*, and *Pierce v. Sisters*, are always cited, even in *Roe v. Wade*, as being the root of the present privacy concept. These cases historically recognize the government's obligation to respect familial structures and to heed certain prerogatives with the familial structure was presumed to have attendant to it. Marriage was recognized as an institution, something that was substantially greater than the union of two people, and that when there was a marriage an institution was formed that was cognizable at law.

In *Eisenstadt*, Justice Brennan changed all that with one sentence. In a reference to the institution of marriage he stated the institution was the free association of two individuals. With that one stroke, he rewrote the constitutional law of the family which had been in existence for almost a century.

It is generally true that women do not become pregnant by themselves. And it is for this reason that much abortion litigation which has followed from the 1973 decisions has touched upon relationships between husbands and wives, mothers and fathers, girlfriends and boyfriends. The legal relationships of these people have all figured into the calculus of abortion practice. Had the Supreme Court recognized any inherent legal significance in these relationships, it would have been required to balance those interests and those rights over and against the rights of the woman to practice abortion. On the contrary, the Court is really committed to a view of society in which the basic unit is not the family but the individual. Individuals may associate in various groups, including families and marriages. However, these relationships are always characterized as being in the nature of an aggregation. The unit is simply a group without any higher cohesive or legally cognizable internal structure.

In the *Danforth* case which is styled *Planned Parenthood v. Danforth*,

the Court took the position that a spouse had no rights with respect to the abortion practice because the *state* could not give any right to the spouse that the state did not itself have. There were two assumptions on which this is grounded: first, that the only right that a spouse *could* have with regard to abortion is that right which the state gives it, and that the only legally cognizable relationship that any individual may have is vis-à-vis the state itself.

The Court used the same rationale in striking down the statutory consent provision of the Missouri law, which required parental consent for a minor who is attempting to have an abortion. There is no recognition in the *Danforth* opinion that there may be some legally cognizable obligation which the minor has to her parents which arises out of the nature of the relationship between them. Implicit in the *Danforth* decision is the conception that the only rights that parents and spouses have vis-à-vis the abortion patient are the rights which the state gives them in a relationship also given to them by the state.

In *Baird v. Bellotti*, which was argued and decided on the same day that the *Danforth* decision came down, the Supreme Court sent a Massachusetts law back to the state court for adjudication of the question whether or not the statute could be construed as merely giving notice to parents, rather than a "veto." The state court subsequently construed the statute to be in fact a notice statute. The question then went before the federal district court in Boston as to whether or not the notice statute was constitutional and the district court found that the statute was in fact unconstitutional. That matter is on appeal at the Supreme Court at this writing.

The most remarkable feature of the glorification of the individual which has taken place during the last 10 years is the fact that the individual who is being glorified here does not exist. The individual who is supposed to benefit from this protection is an abstraction. All of us have a past, we have a family, we have other important relationships with other people with whom we interact. Many psychologists (among them Harry Stack Sullivan and Rollo May) have argued that human personality is really found in interaction between people; it is the relationship between people that delineates and sharpens their respective personalities. We may at least accept the idea that it is the perception of connections of necessity that gives rise to our legal definition of "person." However, we have learned from the past 10 years in the abortion controversy that we are faced with a legal system that is geared to accommodate what is essentially an abstraction. This trend is not likely to be reversed as society rushes to fit the mold which the abstractions have formed.

To return to Justice Holmes' definition of law as prophecy as to what courts will do, it is reasonable to predict that the courts will continue in the near future to advance the aggregation concept of social and familial relationships and to emphasize the individual rather than the relationships which they might be engaged in.

Another significant legal development of the abortion cases is the Court's separation of the notion of personhood from biology. Prior to the *Roe v. Wade* decision, there was the presumption that the term "life" as used in the fourteenth amendment should be construed to be human life as defined by biology. The Supreme Court created a distinction when it used the term "potential human life" describing human life, which biology itself does not make. In biology the fetus is a human life, but Justice Blackmun, and the members of the Court who agreed with him, have argued that there is something more needed in order to be protected by the fifth amendment than simple biology. They have argued that life must be meaningful and that the source of such meaning is provided by a consensus. The Court never specified who has the right to vote on this particular case. Mr. Justice Blackmun said there seemed to be a consensus that "viable" fetal life was meaningful. This consensus is vital to the invocation of constitutional protection of life, because this consensual element is what provides the meaning.

The significance of that can be seen in the definition of death bill that talked about meaningful life, the termination of life which is not meaningful. Professor Gayman, writing for the Hastings Institute of Bioethics, has pointed out that statutes designed to facilitate transplants ought to be centered around a conception of personhood which is separate from that of biology. He argues that the same approach that was taken with respect to fetal life ought to be taken with respect to the dying patient. Where the higher functions are no longer in effect, that life cannot be meaningful and therefore the person can be presumed to be dead.

Until the decision in *Roe* and *Doe*, the line drawing evidenced in the death with dignity and definition of death legislation could not exist. These line drawing problems are a product of the abstraction of personhood from biology. We are going to see a continuation of this line drawing and of this separation at both ends of the life spectrum.

For instance, courts will find that when children are defective at birth, there is some question as to whether their life is meaningful.

Sociological and consensual elements will be churned into the legal definition and review of what is to be protected and what is not to be protected. That is perhaps the most important legal result of the abortion decisions, notwithstanding the policy application—the principle of separating personhood from biology will be applicable in many areas.

One of the statutory provisions challenged in the *Danforth* argument was the duty of the physician to protect the life of the child who survived an abortion. During questioning of the attorneys in that case, Chief Justice Burger asked whether the care to be given there would be extraordinary or ordinary. At the time I was amused by the use of those terms because they really come out of theological context and there is no historical legal framework to which those terms relate. I see now, though, that when the decision was rendered these terms were very important, for the court did rule in *Danforth* that an infant survivor of an abortion is entitled to

“ordinary” care as opposed to “extraordinary” care. Thus, for the aborted fetus, who parenthetically does not have the opportunity to execute a living will, the Supreme Court has decided that (s)he will receive a different standard of care than other neonates might receive under similar circumstances.

There is a case in North Carolina involving the starvation death of an infant who survived abortion. While the laws governing the use of abortion had the effect, prior to 1973, of restricting medical use of abortion and enforcing the highest available standard of care in our hospitals, today the law and current practice cannot be said to abide by the highest standard of care. While “extraordinary” care for a fetus may be presumed to include all means at one’s disposal, what are the lower limits of care beneath which “ordinary” care is no longer being provided to one who has endured an abortion and survived?

From the foregoing it should be clear that the abortion decisions have removed the anchor of constitutional protection of life from biology. Legally, the fifth amendment is construed to protect the kinds of life about which there is a consensus, that they are meaningful. As the consensus as to what is meaningful moves and changes, so will the law and so will the protection provided by it.

There are three cases presently pending before the Court, Medicaid cases essentially: one out of the Third Circuit, one out of the District Court of Connecticut, and one out of St. Louis.

The Connecticut case calls into debate whether or not the concepts of pregnancy and of abortion can be constitutionally separated at all. The state of Connecticut has a Medicaid plan which serves necessary medical problems only, and prohibits coverage for *any* elective treatment including elective abortion. That distinction was found to be violative of equal protection. The Court now has under submission the question whether elective abortion can be treated differently in law than any other treatment relating to pregnancy.

The same result was found in the Pennsylvania case. The Third Circuit, however, reached that result through a statutory construction of the Social Security Act. The issue presented before the Supreme Court is whether or not the proper statutory construction of the Social Security Act requires payment for abortion.

The famous Hyde Amendment case is also before the court on a motion to obtain jurisdiction under direct appeal. The Court has not acted on the jurisdictional question. Most observers suspect that this is because the Court seeks to resolve the equal protection question in *Maher*. If the Court does rule that there is a constitutional requirement to treat abortion and pregnancy as the same thing, then there will be only one surviving issue in the *Hyde* case, and that will be the issue relating to the government’s separate power argument: that the Congress cannot be subject to judicial review for appropriations. That question may in fact be moot because the bill to which the restriction on appropriations is appended will

expire by October of this year, that is, before the Court's next term. It may well be that if the Court recognizes a constitutional obligation to treat abortion and pregnancy the same way, it will then wait and see whether or not the Hyde Amendment is reenacted this year. If it is, then the mootness question will be resolved. The Court will have to deal only with the separation of powers question.

Throughout the debate that has raged back and forth over the abortion question, we have been confronted with the charge that the Church's opposition to abortion constitutes an imposition of the Church's religious belief on the body politic. If a man should come to me and say that the sun rises in the west, I would say to him, "no, it rises in the east." Might he not reply in the same vein, "you are trying to impose your religious beliefs on me?" From the empirical evidence, biology, it is well accepted that human life goes forward as a process, we do not trip between adolescence and old age, that we are somehow mysteriously the same person, and somehow we are different. What we are contesting is, indeed, truth. We bear witness to the fact that democratic government presupposes the ability of all participants of society to speak as to what they believe to be the truth. The fact that one can persuade someone that something is true is not necessarily an imposition. We should go forward as we have with the witness that we have carried on in the last four years.

In the face of the atomistic individualism which has produced the aggregation view of the family, we must work to develop a basis in legal theory for the renewal of protection for the family. We must devote more effort to restructuring or reconstructing some of the basic legal concepts respecting the individual, society and the family. The task—not only of church members but of the body politic as a whole—is to engage in the democratic process with an eye towards moving society closer to the truth. If anything is to grow out of this effort it may be an appreciation for the fact that law must ultimately yield not to mere consensus but to some realities that are evident. The protection of human life is a value for which we must continue to work.