

BEECHMAN v. LEAHY AND THE DOCTRINE OF HYPOCRISY

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INTRODUCTION

It was wonderful to have Nadine Strossen speak at the Vermont Law School during the Women's Law Group's celebration of its first quarter-century. Her lifelong dedication to ensuring basic constitutional rights inspires us all to pursue our passions. Whether or not one agreed with her positions, having a speaker of her prominence, ability, and infectious enthusiasm was provocative and enlightening. Personally, I greatly appreciated Strossen's optimistic message about the future of women's rights. It is that optimism that helps those of us who care about the future of women and girls to keep going. Since Strossen's speech, however, some may find it hard to maintain such optimism.

In *Gonzales v. Carhart*, the Supreme Court upheld a federal ban on a certain late-term abortion procedure.¹ In particular, the decision calls into question whether *Roe v. Wade*² will survive given the changes on the Supreme Court.³ Yet, like Strossen, I too remain optimistic. While the Roberts Court may not protect reproductive rights to the extent previous courts have, this decision provides an opportunity for us to reflect upon the history of women's progress and compels us to rethink fundamental issues as we move forward. As we reproduce women's rights all over again, we will hopefully do so in a way that more meaningfully reflects the realities of women's lives.

Strossen concluded her speech by stating: "History has shown that human-rights struggles can never be finally won in the courts. Instead, they must be won at the ballot box and, ultimately, in the hearts and minds of women and men."⁴ This statement got me thinking about how, in the future, we might begin to reframe some of the fundamental tensions around

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1. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

2. *Roe v. Wade*, 410 U.S. 113, 166 (1973).

3. See *Carhart*, 127 S. Ct. at 1618 (involving new members of the Roberts Court in first partial-birth abortion decision).

4. Nadine Strossen, *Reproducing Women's Rights: All Over Again*, 31 VT. L. REV. 1, 37 (2006).

reproductive rights in order to more fully capture the hearts and minds of Americans. One aspect of women's lives that remains at the center of the abortion debate is the extent to which women are autonomous agents or victims when it comes to exercising their reproductive rights. Two important interests are at stake in this debate. The first is the right of women to exercise their own liberty and decision-making, to be the drivers of their own destiny, uninhibited by state-imposed conceptions of the appropriate role of woman as wife and mother. The other is the right of women to both be protected from and seek redress against those who do them harm. Implicit in this second interest is the understanding that women are sometimes victimized or so materially constrained in their decision-making as to render the exercise of their autonomy meaningless. Both interests are real and important in the context of women's lives. Yet, within the abortion debate, the question is often framed as to pit these interests against each other rather than to understand that both must, by necessity, coexist.

In this Essay, I humbly suggest that one way to reframe this debate is to examine more deeply the law's specific treatment of women in the regulation of abortion. If what we really care about is the well-being of women, as those on both sides of this debate claim, then allowing women to make their own decisions within this context is the most crucial aspect to women's full rights of citizenship. We must acknowledge, however, that some women are harmed within this context and have a right to access legal remedies—for example, restraining orders against intimate partners who sabotage birth control or coerce them into terminating a pregnancy, or the ability to sue doctors who engage in malpractice. And, most important, we must improve the material conditions of women's lives so as to prevent unwanted pregnancies and to ensure that no woman has to make the trade-off between motherhood and education, a career, or basic survival. These two strategies, both promoting autonomy and preventing victimization, can and must be equally pursued as we reproduce women's rights.

Of particular concern are those who argue that prohibitions on access to safe and legal abortions are in the best interest of women. Such arguments are at best misguided, and at worst, disingenuous. Indeed, as the likelihood increases that reproductive rights will be decided at the state level, arguments that abortion is bad for women can have enormous impact on the hearts and minds of legislators and voters. For example, as Reva Siegal has documented, protecting women from coerced or ill-informed abortions, as well as protecting them from an aftermath of emotional and physical distress, was the explicit rationale behind a recent abortion ban in

South Dakota,⁵ and was clearly at the heart of the *Carhart* decision.⁶ Siegal explains:

In the last several decades there has been an important shift in the dominant forms of antiabortion argument. In the 1970s and 1980s, arguments against abortion commonly focused on the unborn. . . .

. . . .

. . . [H]owever, there is another form of argument that is widespread in the antiabortion movement today. Gender-based arguments against abortion contend that restrictions on abortion protect both women and the unborn. . . . [T]he new gender-based arguments against abortion define women's needs and interests through motherhood, and so insist that there is no conflict of needs or interests between women and the children they bear. If the mantra of the fetal-focused argument is "abortion is murder," the mantra of the gender-based argument is "abortion hurts women."⁷

This woman-protection motive also had a powerful impact on Justice Kennedy in the *Carhart* case.

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.⁸

This argument rests on gender-based assumptions that women need to be protected from the decisions they make for themselves. Saving women from regret, as Kennedy essentially argues, justifies overriding an informed decision a woman makes in consultation with her doctor. Such reasoning, as Justice Ginsburg argues in dissent, strikes a blow to women's autonomy,

5. Reva B. Siegal, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1014–15 (2007); S.D. CODIFIED LAWS §§ 22-17-7 to -12 (2006) (repealed 2006).

6. *Carhart*, 127 S. Ct. at 1634.

7. Siegal, *supra* note 5, at 1014–15.

8. *Carhart*, 127 S. Ct. at 1634 (citation omitted).

undermining their ability to make life decisions for themselves.⁹ “This way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”¹⁰ Thus, as Ginsburg stresses, despite Kennedy’s insistence that the law protects women, it controls them.

Historically, statutes outlawing abortion were justified to protect women from medically unsafe abortions. Yet, as the decision in *Roe* points out, this argument no longer rings true given the advances in medical technology.¹¹ The argument that abortion regulation is justified to protect women from their own psychological sense of regret, despite the Court’s acknowledgment to support the proposition that most or all women suffer some psychological damage,¹² is what I find most troubling. While good people can and do honestly disagree about when life begins and what a state’s role ought to be in protecting potential life, I find the Court’s embrace of women-as-victims, while completely denying their autonomy, shocking. This line of argument is deeply rooted in the argument that any deviation from the traditional role of wife and mother is harmful to women themselves, even if they don’t know it. Yet, were we really to be honest about the purpose behind abortion regulation, the hearts and minds of the public would be difficult to capture.

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The question then becomes how might advocates encourage courts to engage in a more honest analysis of the motives behind abortion laws, thereby encouraging legislators and voters to do the same? To answer that question, we might turn to *Beecham v. Leahy*, the 1972 case in which the Vermont Supreme Court struck down the state’s abortion law.¹³ It provides a compelling example of one court’s insistence that the state be honest in its rationale for abortion legislation. I should note that one of the consequences, and arguably silver linings of *Carhart*, has been the re-examination of state law in light of further potential assaults on the basic premise of *Roe v. Wade*.¹⁴ Thus, even though I have discussed *Beecham*

9. *Id.* at 1641 (Ginsburg, J., dissenting).

10. *Id.* at 1649.

11. *Roe v. Wade*, 410 U.S. 113, 151 (1973) (“Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest.”).

12. *Carhart*, 127 S. Ct. at 1634.

13. *Beecham v. Leahy*, 130 Vt. 164, 170–71, 287 A.2d 836, 840 (1972).

14. For an examination of state laws striking down abortion statutes, see, e.g., Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U.

with legislators and others, I have gained a new appreciation for it in light of *Carhart*.

The case was brought by Dr. Jack Beecham and one of his patients challenging Vermont's abortion statute.¹⁵ Dr. Beecham requested a declaratory judgment testing the validity of Vermont's abortion statute.¹⁶ The statutes proscribed all abortions except when necessary to save the life of the mother.¹⁷ It criminalized only those who performed abortions, specifically exempting the woman from liability.¹⁸

Dr. Beecham argued that while his patient's life was not in danger, termination of the pregnancy was necessary to preserve both her physical and mental health.¹⁹ He was willing to perform such a procedure, but for the expectation that he could be prosecuted if he did so.²⁰ Furthermore, because his patient was a welfare recipient, she could not afford to travel outside the state to obtain a legal abortion.²¹

After finding the case justiciable, the court engaged in a line of reasoning that is particularly noteworthy. First, the court focused primarily on the interests of the pregnant woman and found that with respect to the statute, because the Legislature had failed to hold women liable for terminating a pregnancy, it had left her personal rights to her. The court reasoned: "[T]here is no legislative declaration saying that her own concerns for her personal integrity are in any way criminal or proscribed."²²

L.J. 611, 611 (2007); Paul Benjamin Linton, *The Legal Status of Abortion in the States If Roe v. Wade Is Overruled*, 23 ISSUES L. & MED. 3, 3 (2007).

15. *Beecham*, 130 Vt. at 166–68, 287 A.2d at 837–38. It is an interesting fact in Vermont history that the defendants happened to be Patrick Leahy, then serving as State's Attorney for Chittenden County, and Jim Jeffords, then serving as Vermont's Attorney General. *Id.* at 166, 287 A.2d at 836. Both went on to serve as United States Senators, with voting records that were strongly pro-choice.

16. *Id.* at 166, 287 A.2d at 837.

17. *Id.* at 167, 287 A.2d at 838.

18. The court quoted the statute in full:

A person who willfully administers, advises or causes to be administered anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, if the woman dies in consequence thereof, shall be imprisoned in the state prison not more than twenty years nor less than five years. If the woman does not die in consequence thereof, such person shall be imprisoned in the state prison not more than ten years nor less than three years. However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section.

Id. at 167, 287 A.2d at 838 (quoting VT. STAT. ANN. tit. 13, § 101 (1971) (amended 1979)).

19. *Id.* at 166–67, 287 A.2d at 838.

20. *Id.*

21. *Id.*

22. *Id.* at 168, 287 A.2d at 839.

What then, was the nature of that right? The court found that her rights were the same as at the founding of the Vermont Constitution.²³ At that time, proscriptions on the termination of a pregnancy began, if at all, at the time of quickening.²⁴

Next, finding that the Legislature had granted women this “implicit” right, it next turned to the purpose behind the statute, which was for the protection of women themselves.²⁵ To the extent that the statute prevented unskilled and untrained persons from performing abortions, the statute was valid.²⁶ But, the court found, to the extent that the law also prohibited trained and competent medical professionals from performing abortions, the law was invalid.²⁷ The court reasoned:

Indeed, the asserted purpose of protecting the pregnant woman’s health rings seriously false. On the one hand the legislation, by specific reference, leaves untouched in the woman herself those rights respecting her own choice to bear children now coming to be recognized in many jurisdictions. Yet, tragically, unless her life itself is at stake, the law leaves her only to the recourse of attempts at self-induced abortion, uncounselled and unassisted by a doctor, in a situation where medical attention is imperative.

This situation is subject to the charge of hypocrisy, where the right reserved in words is so circumscribed by the provisions of the statute as to amount to its withdrawal in fact. Where is that concern for the health of the pregnant woman when she is denied the advice and assistance of her doctor?²⁸

Thus, since the Legislature had granted the woman a right to abort, it could not simultaneously deny her medical aid and expect to save her life. By granting her the right to abort, it must also grant her the right to safely exercise it.²⁹

What is particularly noteworthy about *Beecham* is that it invokes what I refer to as the “Doctrine of Hypocrisy.” In the decision, the court cites two cases to support the contention that the statute was invalid.³⁰ Both of

23. *Id.* at 169, 287 A.2d at 839.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 170, 287 A.2d at 839.

28. *Id.* at 169, 287 A.2d at 839 (citation omitted).

29. *Id.* at 170–71, 287 A.2d at 840.

30. *Id.* at 170, 287 A.2d at 840 (citing *Vt. Woolen Corp. v. Wackerman*, 122 Vt. 219, 224, 167 A.2d 533, 541 (1961); *State v. Quattropani*, 99 Vt. 360, 363, 133 A. 352, 355 (1925)).

those cases involve statutes that were challenged for being unreasonable or arbitrary.³¹ Yet the court in *Beecham* doesn't use the language of reasonableness or arbitrariness. Rather, it goes one step further in arguing that the Legislature was engaged in a pretense that it was concerned with the well-being of women.³² The Legislature wasn't simply being short sighted, sloppy, or ill-informed when passing the legislation, but was, in fact, perpetuating a fiction.

I have sometimes heard folks suggest that *Beecham* holds that in Vermont there is a state constitutional right to abortion. Such an interpretation of *Beecham* is clearly wrong. The Vermont Supreme Court never examined whether there is an independent constitutional right, such as a right to privacy, to terminate a pregnancy. Rather, the decision rests on an interpretation of the power of the Legislature to implement only those laws which, at a minimum, reasonably accomplish their intended purpose.

Beecham does not prohibit the Vermont Legislature from proscribing abortion. However, were it to do so, it would arguably have to criminalize women along with providers in order for the law to be deemed reasonable. It is this result that makes *Beecham*, at its core, a case about women's equality. The opinion by Justice Barney makes two implicit and correct assumptions. The first is that women do not need to be protected from their own decisions about terminating a pregnancy.³³ The decision rejects the kind of paternalism that Justice Kennedy embraces in *Carhart*.³⁴ Second, it implies that if, for the sake of argument, women have no right to terminate a pregnancy, then they do have a corresponding responsibility to be held accountable for their decisions to do so.³⁵ The decision treats women as fully autonomous decision-makers, while acknowledging, when upholding the portion of the statute that applied to unskilled and untrained persons, women can be harmed. The decision thus recognizes the interrelated aspects of autonomy and victimization that are essential for women's equality.

While many legal scholars have argued that the failure of abortion statutes to hold women criminally liable amounts to hypocrisy,³⁶ *Beecham*

31. See *Wackerman*, 122 Vt. at 224, 167 A.2d at 537 (stating that statutes are "subject to judicial review to test the reasonableness and appropriateness of the legislation to accomplish the result intended without oppression or discrimination"); *Quattropani*, 99 Vt. at 363, 133 A. at 353 ("[The statute's] scope . . . is not unlimited, and the validity of any mandate promulgated under it is for judicial determination.").

32. *Beecham*, 130 Vt. at 169–70, 287 A.2d at 839–40.

33. *Id.*

34. See *supra* text accompanying note 8.

35. *Beecham*, 130 Vt. at 169–70, 287 A.2d at 839–40.

36. See, e.g., Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE*

is unique in that it is the only case decided before *Roe v. Wade* to make such an argument.³⁷ It is also the only decision to hold that by failing to criminalize women, the Legislature implicitly grants them the right to terminate a pregnancy. Without diminishing the arguments set forth in *Roe*, the reasoning in *Beecham* is quite satisfying in its simplicity. It requires only that the law be reasonably related to its intended purpose and that the Legislature be honest about what that purpose is.³⁸ If the purpose is to protect women, they must have safe access to abortion. If it is to accomplish something else, such as fetal protection, then women must be held liable for the consequences of their decisions. Since the changing legal landscape requires us to reproduce women's rights all over again, perhaps *Beecham* can provide some guidance in how to reframe the questions legislatures, courts, and voters ask, especially in those states in which it is unlikely the state constitution would protect reproductive rights under fundamental rights or gender equity framework.

Of course, it is highly unlikely that Vermonters would pass any regulation on abortion that criminalized women. Indeed, as South Dakota and the United States Congress understood, laws that exempt women from criminal liability are far more politically viable than those that hold women responsible for the decisions that they make. It is far easier to persuade voters that such laws are needed to protect women than it is to persuade them that laws are justified to protect unborn children or keep women in a proper place. Thus, if other courts insist on the criminalization of women to justify extreme restrictions or prohibitions on abortion, the demise of *Roe* may not be as punishing as it otherwise could be.

In thinking about this question, I did a little further research on pro-life groups and their position on holding women who have abortions criminally responsible. I find it interesting that only Feminists for Life (FFL) has a stated position. On their website, it states, "FFL has never advocated prosecuting women seeking abortion, although we believe that women are

SHOULD HAVE SAID 18–22 (Jack M. Balkin ed., 2005) (explaining different approaches taken by constitutional scholars when answering the question of what *Roe* should have said); Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 918 n.28 (1991) ("[I]f we refuse to hold a woman liable for having an abortion if her life is in danger . . . , we would simultaneously refuse to hold liable any person who performed that abortion or assisted the woman in obtaining it."); Jean Rosenbluth, Note, *Abortion as Murder: Why Should Women Get Off? Using Scare Tactics to Preserve Choice*, 66 S. CAL. L. REV. 1237, 1263–64 (1993) (providing examples of various tactics used to preserve women's right to choose); Jeffrey Rosen, *A Viable Solution: Why It Makes Sense to Permit Abortions and Punish Those Who Kill Fetuses*, LEGAL AFF., Sept.-Oct. 2003, at 20, 22 (discussing fetal homicide laws).

37. See, e.g., *People v. Belous*, 458 P.2d 194, 206 (Cal. 1969) (striking down abortion statute on the ground that the right to abortion is a fundamental right).

38. *Beecham*, 130 Vt. at 166–67, 287 A.2d at 838.

capable of following the law.”³⁹ While the statement is ambiguous (Is there a distinction to be made between those who *seek* and those who *have* abortions, for example?), it does strike me that any organization that advocates women’s equality and full citizenship would by necessity have to accept the criminalization of women if abortion is proscribed. While I do not agree with FFL’s position that the availability of legal abortion is harmful to women, I do respect the consistency of its position, especially given its political unpopularity within the pro-life movement generally. Such consistency allows for a more genuine debate over what is really at stake for women when we further limit access to safe and legal abortions.

CONCLUSION

One of the reasons voters are unlikely to accept the criminalization of women who obtain abortions, especially those early in pregnancy, is that we all understand that no woman makes such a decision under perfect circumstances.⁴⁰ Thus, as we think about reproducing women’s rights, we must keep working, as I mentioned earlier, on improving women’s lives more generally. We also must remember that when we talk about reproductive rights, we are not just talking about the right to contraception and safe and legal abortion. We are also talking about the right to safely have children and actively parent them. To that end, the law must continue to hold accountable those who perpetrate sexual and physical violence against women. Schools and workplaces must continue to provide family flexibility and stop discriminating against women on the basis of motherhood.⁴¹ And we need to value each woman for her unique strengths and give her the freedom and support to make those decisions that are best for herself and her family. So I thank Strossen for her continued optimism, as I too believe that the future for women and their families grows brighter when we are honest about our goals and genuine in our aspirations.

39. Feminists for Life of Am., FFL’s Frequently Asked Questions, <http://www.feministsforlife.org/FAQ/index.htm#criminalize> (last visited Jan. 19, 2008).

40. For an article examining the reasons why legislatures did not impose criminal liability on women, see James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 58–60 (1985).

41. See generally JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 5 (2000) (arguing that much discrimination in the workplace is against women in their roles as mothers); WorkLife Law, Family Responsibilities Discrimination, <http://www.worklifelaw.org> (last visited Jan. 19, 2008) (discussing “discrimination against workers who have family responsibilities”).