

FROM THE WAKE OF *GONZALES v. CARHART*

Allan E. Parker, Jr.*

I. SUPREME COURT LISTENS TO WOMEN ON ABORTION

Despite the panic-stricken response by some abortion advocates, one of the most hidden things about the recent Supreme Court decision *Gonzales v. Carhart*, which upheld the federal ban on partial-birth abortion,¹ is that the Supreme Court listened to real women rather than the abortion industry.² The decision has been portrayed by its detractors as an attack on women, but the main plaintiffs in the case were three male abortionists and only one woman.³ The other plaintiffs were Planned Parenthood, the largest commercial provider of abortions in America,⁴ representing the abortion industry, and the City of San Francisco,⁵ which is not exactly a mainstream plaintiff. There were no real women seeking abortions in *Carhart*.

The Court appeared to listen to real women, instead of being captured by the abortion industry, the regulated industry in question. The Supreme Court cited the amicus brief of Sandra Cano for the proposition that abortion actually hurts “some women.”⁶ Sandra was the “Doe” of *Doe v. Bolton*,⁷ the companion case to *Roe v. Wade*.⁸ *Doe* originally created the health exception,⁹ which was at the heart of the dissent’s view in *Carhart* that women’s health was not protected by a ban on partial-birth abortion.¹⁰

* President, The Justice Foundation; J.D. 1979, University of Texas School of Law; B.A. 1974, University of Oklahoma. The Justice Foundation represented Sandra Cano and 180 women hurt by abortion in an amicus brief cited by the Supreme Court in the *Gonzales v. Carhart* decision.

1. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

2. *See id.* at 1634 (referencing amicus brief submitted by Sandra Cano).

3. *Id.* at 1619.

4. Gardiner Harris, *2 More Women Die After Taking Abortion Pill*, N.Y. TIMES, Mar. 17, 2006, at A18.

5. *Carhart*, 127 S. Ct. at 1619–20.

6. *Id.* at 1634 (citing Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 22–24, *Carhart*, 127 S. Ct. 1610 (No. 05-380)).

7. *The Consequences of Roe v. Wade and Doe v. Bolton: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. (2005), available at <http://judiciary.senate.gov/hearing.cfm?id=1553> [hereinafter *Hearing*] (statement of Sandra Cano); *Doe v. Bolton*, 410 U.S. 179, 181 (1973).

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

9. *See Doe*, 410 U.S. at 192 (stating that the health exception, allowing doctors to determine if an abortion is necessary for the health of the woman, is not vague and operates “for the benefit, not the disadvantage, of the pregnant woman”).

10. *See Carhart*, 127 S. Ct. at 1642–43 (Ginsburg, J., dissenting) (arguing that the statute, which lacks a health exception, should be declared unconstitutional).

Sandra Cano was joined on her brief by 180 women injured by abortion.¹¹ Citing to the brief, the Court concluded:

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. Severe depression and loss of esteem can follow.¹²

The Court, having read sworn testimony about women's post-abortive experiences,¹³ found that it was not the liberating, life-fulfilling answer to the "meaning of existence" that seems to have been envisioned by *Roe* and the pro-abortionists.¹⁴ Examples of post-abortive feelings and experiences detailed in the amicus brief include: Tami from Wyoming: "Stripped [of] my self-esteem"; Cathy from Utah: "Depression, low self-esteem, guilt, condemnation, and shame, sleepless nights, nightmares and torment, thoughts of self-hate and suicide, lost, confused, destroyed relationships throughout my life, unloved, unlovable"; Teresa from North Carolina: "Depression, nightmares, hospitalizations, suicidal thoughts and actions, guilt, anger at myself and those who forced the abortion, fear, eating disorder, alcoholism, low self-esteem, anxiety, stress"; and Camelia from Texas: "I have suffered with low self-esteem, self-hatred, suicidal impulses, [and] constant anxiety (especially about sex and about making decisions)."¹⁵

11. Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner, *Carhart*, 127 S. Ct. 1610 (No. 05-380).

12. *Carhart*, 127 S. Ct. at 1634 (citations omitted) (citing Brief of Sandra Cano, *supra* note 11, at 22–24).

13. *See id.* (referencing amicus brief submitted by Sandra Cano); *see also* Brief of Sandra Cano, *supra* note 11, at 22 (discussing the sworn affidavits of post-abortive women).

14. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (stating "that the right of personal privacy includes the abortion decision").

15. Brief of Sandra Cano, *supra* note 11, at 21–22 n.78. Further examples include: Cynthia (Oklahoma): "For 23 years, I went into crying spells, depression, suicidal thoughts. Emotionally it devastated me."; Elizabeth (California): "I suffered from depression, migraine headaches, low self-esteem. No self-worth . . ."; D.Q. (Tennessee): "It has completely messed up my life. It was not the best way to start out in marriage. I was depressed, didn't want my husband to touch me, felt guilty, had suicidal thoughts, cried a lot, *terribly* depressed!"; S.O. (Florida): "For twenty-eight years, I have mourned, gone [through] depression around Victoria's [(the aborted child)] birth-date, became angry as the years passed." *Id.* at 22 n.81 (alteration in original). In another footnote, the brief gave examples of post-abortive suicidal thoughts, including: Donna (Florida): "Deep regret—initially I was suicidal—as the years have progressed I have developed a heightened level of bitterness and anger and self-hate."; Brandie (Arkansas): "Abortion turned a 14-year-old school girl into a suicidal teenager that lived with feelings of guilt, rejection, and helplessness." *Id.* at 23 n.82.

“The real life experiences of the post-abortive women also confirm what the research has discovered.”¹⁶ Women were simply asked: “How has abortion affected you?”¹⁷ Typical responses from approximately 2000 sworn affidavits in The Justice Foundation’s possession include “depression, suicidal thoughts, flashbacks, alcohol and/or drug use, promiscuity, guilt, and secrecy.”¹⁸

The Court’s opinion that abortion itself actually hurts some women is unremarkable. It is supported by a government health booklet published by the Texas Department of Health entitled, “A Woman’s Right to Know,”¹⁹ and the first government study in thirty years to examine the actual effects of abortion on women, “The South Dakota Task Force Report on Abortion.”²⁰ These reports should be studied by anyone who wants to know the actual consequences of abortion on real women.

II. WHAT HAPPENS WHEN *ROE* v. *WADE* FALLS?

There was much weeping, wailing, and fear mongering in the last election about what would happen if George W. Bush were elected President and *Roe* fell. Those that said *Roe* would fall if President Bush was elected again were right. *Roe* is going to be reversed because it has failed to obtain a consensus of the American people after thirty years of law. It is not, and it will never be, accepted by a majority of Americans. The Court can no longer continue to keep the lid on this democratic opposition to abortion. Will the sky fall if *Roe* is overturned? The obvious answer is *no*. *Roe* opponents, like Justices Scalia, Thomas, and Rehnquist,²¹ and *Roe* supporters, like the Center for Reproductive Rights,²²

16. *Id.* at 22.

17. *Id.*

18. *Id.* at 22–24 (footnotes omitted).

19. See TEX. DEP’T OF HEALTH, A WOMAN’S RIGHT TO KNOW 15–16 (2003), available at <http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf> (providing information specifically related to both the physical and emotional effects of abortion on a woman). It was published by the Texas Department of Health as a result of the Woman’s Right to Know Act (House Bill 15) passed by the Texas Legislature in 2003. See TEX. HEALTH & SAFETY CODE ANN. § 170.012 (Vernon Supp. 2007) (requiring physicians to inform women seeking abortions about certain information and obtain their consent before performing the procedure).

20. See S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 41 (2005), available at http://www.voteyesforlife.com/docs/Task_Force_Report.pdf (“[T]here is a substantial discrepancy between current medical and psychological information and the medical and psychological information conveyed by abortion facilities . . . to their abortion patients.”).

21. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (“Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.”) (emphasis omitted); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 954 (1992) (Rehnquist, C.J.,

all admit and agree that when *Roe* is reversed it will simply return the matter of abortion, like every other medical issue in society, to the normal world of medical regulation and normal legislation. According to the Center for Reproductive Rights, abortion will still remain legal in at least twenty states, which is their worst case scenario.²³ Thus, abortion would still be widely available in the United States even if *Roe* is overturned.²⁴

In fact, reversing *Roe* at this time would actually be a win-win situation for all of the various interest groups involved. First, it would be a victory for women. Forty-six states now have laws called “Baby Moses” or “Safe Haven,” which allow a woman to turn a child into a fire station or hospital within a fixed period of time after the child’s birth.²⁵ Thus, society is now willing to help the woman take care of the child rather than forcing the woman to bear the guilt, shame, and suffering that comes from killing the child on her own.

Second, there is a great benefit for women. Norma McCorvey, the former “Roe” of *Roe v. Wade*, is evidence that millions of women are now afflicted with the guilt and shame of having killed their own children.²⁶ This can be a deeply destructive force in a woman’s life if not handled properly. No woman wakes up from any other medical procedure and says, “My God, I

dissenting) (“*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”).

22. See CTR. FOR REPROD. RIGHTS, WHAT IF *ROE* FELL? (2007), available at http://www.reproductiverights.org/pdf/Roe_PublicationPF4a.pdf (“The Center for Reproductive Rights is a nonprofit legal advocacy organization dedicated to promoting and defending women’s reproductive rights worldwide.”).

23. See *id.* at 9. “[T]wenty-one states are likely to ban abortion almost as soon as *Roe v. Wade* is reversed. In only twenty states would abortion rights be safe. The remaining nine states would be battlegrounds.” *Id.*

24. EDWARD T. MECHMANN, FAMILY LIFE/RESPECT LIFE OFFICE, ARCHDIOCESE OF N.Y., ABORTION AND THE LAW—A JOURNEY TO A LAND OF MYTH (2005), available at http://www.flrl.org/PDFs_and_Docs/Abortion%20and%20the%20Law.pdf.

More than two-thirds of the states have changed their abortion laws to copy the standards of *Roe* and *Doe* Most of the other states . . . have laws or court decisions that would permit abortion under virtually all circumstances. Only six states have enforceable laws that would significantly restrict abortions. And only one—Arkansas—has a law that would prohibit them entirely.

The saddest fact, however, is that over 90% of current abortions . . . would still be legal, even if *Roe* were overturned today.

Id.

25. See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., INFANT SAFE HAVEN LAWS: SUMMARY OF STATE LAWS 2 (2004), available at www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm (stating that as of 2004, “46 States have enacted safe haven legislation to provide a vehicle for the safe relinquishment of unwanted newborns”) (footnote omitted).

26. See *Hearing, supra* note 7 (statement of Norma McCorvey) (“I am a real person named Norma McCorvey, and I want you to know the horrible and evil things that *Roe v. Wade* did to me and others.”).

have killed my children!” This can, and frequently does, happen with abortion.²⁷

Third, it is a win situation for millions of families in America who are waiting to adopt children. It is a win situation for children since they will be cared for by the states until a loving home can be found to adopt them.

Fourth, it is a win for the judicial system, which will no longer be racked by the controversy surrounding abortion and can go back to the business of strictly interpreting the Constitution.

Finally, it is a win for society because the bitterness and divisiveness will be shifted throughout society and our system of federalism will help diffuse this anger. Both Democrats and Republicans agree that abortion should be rare.²⁸ This will reduce the number of abortions, as most Americans want, but it will not eliminate all abortions, which can be obtained by going to states where it is legal.

I personally believe that the destruction of abortion will become so well known that society should and will ban it and provide better help to women. Extreme positions on both sides will not be satisfied, but this middle ground presents the useful social solution after thirty years of abortion wars.

27. See Brief of Sandra Cano, *supra* note 11, at 24 n.88 (giving testimony of a woman who was depressed and “emotionally torn apart” after realizing that she “had killed [her] child!”).

28. See, e.g., George W. Bush, President of the U.S., Second Presidential Candidates’ Debate at Washington University, St. Louis, Missouri (Oct. 8, 2004), available at <http://www.debates.org/pages/trans2004c.html> (“This is an issue that divides America, but certainly reasonable people can agree on how to reduce abortions in America.”); Hillary Rodham Clinton, First Lady of the U.S., Remarks at NARAL Anniversary Luncheon, Washington, D.C. (Jan. 22, 1999), available at http://clinton2.nara.gov/WH/EOP/First_Lady/html/generalspeeches/1999/19990122.html. (“[D]espite our differences, there are certain core beliefs and values that tie us together and set us apart. And it is those beliefs that can guide us in reaching our goal of keeping abortion safe, legal and rare into the next century.”).