

FEMINIST JUDGMENTS AND THE FUTURE OF REPRODUCTIVE JUSTICE

*Sarah Weddington**

I am thrilled to take part in the discussion of this important project, a large-scale feminist rewriting of major U.S. Supreme Court cases.¹ *Roe v. Wade*² is one of the twenty-five Supreme Court cases that has been rewritten from a feminist perspective by an imaginative group of law professors and lawyers.

I found Professor Kimberly M. Mutcherson's rewrite of the *Roe* opinion to be interesting and informative.³ She indicated in the panel discussion that she was not sure if I was the one who had suggested the trimester approach to pregnancy that was included in the *Roe* opinion. The answer is, "No, I did not." Justice Harry Blackmun, who wrote the majority opinion, was the counsel to Mayo Clinic before he joined the Supreme Court. I cannot give you a source that proves this, but I know for a fact that he spent time at Mayo Clinic the summer before *Roe v. Wade* was announced. I presume that he spent time talking to doctors there, and that part of their discussions involved suggestions for how the opinion could best be written, taking into account the development of pregnancy.

Also, the Supreme Court Justices were not unanimous in *Roe*. There were substantial divisions regarding how the opinions should be written. In fact, I argued it twice. The Supreme Court first heard the case on December 13, 1971 with seven Justices but did not issue its opinion at the end of that session. Instead the Court

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¹ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

² 410 U.S. 113 (1973).

³ Kimberly M. Mutcherson, *Rewritten Opinion in Roe v. Wade*, in FEMINIST JUDGMENTS, *supra* note 1, at 151, 151–67.

noted that the case should be set for reargument. The second argument was set for October 11, 1972 with nine Justices. The decision was announced on January 22, 1973.

I have been told that after the first argument, Justice William O. Douglas was opposed to setting the case for reargument. He believed that the move to set the case for reargument was intended to attract votes to generate a very different opinion in *Roe v. Wade* than the one we finally received (and certainly not a more feminist version, along the lines of what Professor Mutcherson has written). When the majority set the case for reargument, Justice Douglas filed a dissent. I have been told by Court insiders that it was at first a very long dissent, but that by the time he was ready to file it, and after other Justices had talked to him, his dissent was simply “I Dissent.”

In looking back on the period when *Roe* was argued and decided, I want to mention two other considerations. One is that I am feeling the disadvantages of age. It has been forty-five years since I received the Supreme Court’s decision. When I look at a group like you who are law students, younger students, college students, and young adults, I think you all are going to be front and center in the future on women’s reproductive issues. I am happy to share what I know, what I have experienced, and what I have been through with this group because I think you are in the future going to be central to what happens on these issues.

The second is that I feel that you are beginning to take your places in the continuous line of people who have had central roles in regard to the issues we are considering. For example, some of you have probably read the story of the seventeen-year-old woman from Mexico who came across the border into Texas and was immediately picked up by legal authorities. It turned out she was pregnant. Our media called her Jane Doe. Everything possible was done by federal officials to keep her from having an abortion even though she made it very clear that her choice was to abort and a court held that she should be allowed to have the abortion if that was what she wanted.⁴ Additionally, the head of the particular part of federal health and human services is someone who is personally very opposed to abortion and who flew to where Jane Doe was being held to try to talk her into choosing to continue the pregnancy. The people at the particular place where Jane Doe was being held would often say to her, “What’s the name of your child?” and exert all kinds of other strategies to try to intimidate her, none of which worked. She was a very strong individual; she eventually received the abortion procedure that she wanted.

The person who came up with the legal strategy in that case is one of my former students, Susan Hays, who is a very talented lawyer and one who is absolutely dedicated to winning for young women the right to make their own decisions, rather than letting the government make key personal decisions. I believe that Ms. Hays is going to be a person with increasingly important influence. Another former student of mine is Dilen Kumar. Mr. Kumar graduated from law school and got a wonderful

4 *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017) (per curiam) (Judge Brett M. Kavanaugh was one of three circuit judges on this case); *see also* Manny Fernandez, *U.S. Must Let Undocumented Teenager Get an Abortion, Appeals Court Says*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/undocumented-immigrant-abortion.html>.

job in the Dallas office of a big firm headquartered in New York City. He called me one day and said: “The firm that hired me upon law school graduation has told several of us that they hired too many people this year, so they need some of the new hires to begin work at the firm a year from now. The firm has offered me a good sum to do that, so I’m inclined to accept. However, a condition of that offer is that I must find something interesting to do for a year.” I helped him get hired by the White House Counsel’s office. He was put in charge of three other young lawyers in that office, and the four of them together were given the responsibility of getting Justice Elena Kagan confirmed as a U.S. Supreme Court Justice. As you know, they were successful in accomplishing that task.

I have another former student who started a program called Unlocking Doors. It helps people who have been in prison to have a place to stay when they are released, a place to work, and to have all kinds of things that people who have returned to public life need.⁵ In essence, she is working to open doors for released prisoners. I have another former student who has already argued a case in the U.S. Supreme Court. Seth Kretzer did a great job and I was very proud of him.

I believe that you all, like these former students of mine, are going to have a great deal of impact on the world. I am glad you have the U.S. Feminist Judgments Project as a model for how to reimagine justice as you want to see it in the world. That work tells us that the precedent is there for us to use. The arguments can be made. But we need creative young people like you to be the ones who take up the mantle of the Feminist Judgments Project and lead the way on reproductive justice and many other issues.

Kathryn “Kitty” Kolbert has been a friend of mine for years. I was in the Supreme Court while she was arguing *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶ Kitty did a great job in arguing that case, even though all the abortion restrictions in that case were upheld.⁷ But the provision that she won—spousal notification—was critically important.⁸ Professor Lisa Pruitt’s reimagined feminist majority opinion provides inspiration to any attorney who seeks to persuade a court that a law is unjust, with her opinion’s emphasis on the law’s impact on women who are poor, rurally isolated, or Native American (or perhaps a member of two or three of these groups).⁹

Roe started because of a group of people about your age, who looked a lot like you, who were graduate students at the University of Texas in Austin. These students were upset because the University of Texas Health Center did not provide information about contraception and did not provide contraceptive methods. That group of students decided that they would organize a volunteer effort and that they would start offering counseling regarding contraception. They arranged to use space in a building that was right across the street from the University of Texas. They functioned in part of the upper story there; people could go there and get

5 UNLOCKING DOORS, <https://www.unlockingdoors.org/index.html> (last visited Sept. 13, 2018).

6 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

7 *Id.* at 901.

8 *Id.* at 896–98.

9 Lisa R. Pruitt, *Rewritten Opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 365, 365–83.

contraceptive information. One of the things the students did was to go to New York City and get a copy of *Our Bodies, Ourselves*.¹⁰ The information was thought to be so scandalous that they read it in closets with flashlights (now, I exaggerate slightly). But those students were working hard to have the best information to share as part of their efforts to help others. Now, of course, you go and get a book or contraceptive counseling without thinking anything about how prior students had to work hard to have that information and to share it with others.

It happened that women began to come to the contraceptive counseling center and say they were already pregnant and that they did not want to continue the pregnancy. The volunteers were often asked by people seeking information, “Where can I go for an abortion?” The volunteers began to research the answer to their questions. In California, abortion was legal. There was a flight that left every Thursday evening from Dallas going to California for women seeking an abortion; often ten women were on that flight. New York became legal during the time that *Roe v. Wade* was pending. Colorado was partially legal. There were also a number of people who were illegally providing abortion services. For example, there were some really fine doctors who were doing abortions in New Mexico. My guess is that those doctors paid the police, but I cannot prove that. There were a variety of people providing abortion services in Texas or other states, but most of them were not skilled. Judy Smith, who was head of the volunteer group, died recently; I am feeling the loss of a lot of the people who were most important in that effort. Under Judy’s leadership, the volunteer group started telling people where to go for abortions and raising money so that people who did not have the means could get the services they needed.

Judy came to me one day and said, “Sarah, we’re really worried that one day we will be prosecuted as accomplices to the crime of abortion. We think the only way to not feel afraid is to get the law overturned.” I was then a licensed attorney and was working at the University of Texas School of Law. So, they said, “Would you please do a case challenging the Texas statute?” First, I tried to convince them that I was not the best lawyer to do so. I told them they needed to get someone with more federal litigation experience than I had. I had done uncontested divorces, wills for people with no money, and one adoption for my uncle. That was not exactly the best background for a federal litigator. I explained all that to them. They said “How much would you charge us to do this case?” And I said, “Oh, I’ll do it for free.” And they said, “YOU are our lawyer.” So, I became their lawyer. Several of the people in that group were law students who volunteered to help me with research and writing.

Luckily, I had access to the professors at the University of Texas School of Law. One of them was Charles Alan Wright, one of the foremost professors

10 BOSTON WOMEN’S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES: A BOOK BY AND FOR WOMEN* (1973). Extolled as the most important work to come out of the women’s movement, *Our Bodies, Ourselves*, when first published, was a revolutionary book that spoke frankly about women’s medical issues and bodies, including the then-controversial topics of contraception and abortion. The book began as a stapled pamphlet in 1970, when abortion was still widely illegal. Because of its controversial content, it passed from woman to woman largely by underground channels and by word of mouth. See *History*, *OUR BODIES OURSELVES* <https://www.ourbodiesourselves.org/history/> (last visited July 8, 2018).

nationally on civil procedure. When I began law school he would not admit women in his class; he started out saying he would be putting a lot of time and effort into people who would probably never use that training. Then it got to where women could be in his class, but, as I remember, he would only ask them questions one day a semester. He imposed several other restrictions on women students, but after he had daughters who became lawyers, he changed his attitudes and became more welcoming to women students by the end of his life.

Bernie Ward was our top professor of procedure; he really helped me with the whole issue of a class action and how to set one up. Jane Roe was pregnant at the time she came to us as the plaintiff. I was worried that no woman could stay pregnant long enough for me to get the case through the various court procedures. Pursuant to Professor Ward's advice, Linda Coffee and I filed the case as a class action on behalf of all women who were or might become pregnant and want an abortion. Our first hearing was before a three-judge federal court in Dallas. The decision of that court was that the Texas law was unconstitutional, but the court refused to grant an injunction to keep Henry Wade, the District Attorney of Dallas who had been reelected many times, from prosecuting doctors. Linda and I worried about whether Wade would continue to prosecute doctors; if he did, we could not get doctors to help women. Well, Henry Wade the next day had a press conference. He said he did not care what any federal court said, he would continue to prosecute. I do not think he meant to help us; it was not in his character, but he did help us. The announcement of his press conference gave us a direct appeal to the U.S. Supreme Court.

We filed a protective appeal to the Fifth Circuit, but we did not argue there. Instead we filed an appeal to the U.S. Supreme Court. Our first argument in the U.S. Supreme Court was December 13, 1971.

There were many different issues to deal with regarding a Supreme Court hearing. One issue was: Who is going to argue the case? Kathy Stanichi explained that she had read that when you are going to the Supreme Court, lots of firms will offer to argue it for you because that has become a big money-raiser and attention-getter for firms. She asked whether this had happened to me. Well, it did. I called the Supreme Court when I had been notified of a hearing date (which was October 11, 1972) and said, "I'm trying to decide who should argue this case." The person in the clerk's office said, "We know who's going to argue it." I said, "You do? Who is it?" And they said Mr. Lucas has sent a letter saying he would be arguing the case. Oh, that made me mad because I did not get a copy of such a letter, and I was not happy about it. So, I called the clerk's office again and said, "Who decides who will argue a case?" The response I received was, "the plaintiffs." Lucas did not know the plaintiffs, but I did. So, I called the plaintiffs, John and Mary Doe, and they said, "We want you to argue it." I was certainly willing to do that.

The day before oral arguments in the Supreme Court, the lead attorney—a woman—for the national Planned Parenthood organization pulled together many of the lawyers from across the country who were litigating similar cases in order to conduct a moot court of our argument. A moot court refers to a situation where lawyers play like they are U.S. Supreme Court justices. They ask questions of the counsels who will be arguing in the U.S. Supreme Court and make suggestions about a better way to phrase something or indicate something they left out. The moot was

held in the Press Club in D.C. Those lawyers played like they were the Supreme Court Justices, which they loved, and they would ask the plaintiffs' attorneys for *Roe* and *Doe*¹¹ questions, and then they would say, "We think you should emphasize this a little bit more, or that a little bit more." The session was very helpful to me.

We also had several amicus curiae briefs from women's organizations, and these were helpful in terms of getting ready. We also had the support of doctors and medical organizations. Part of the reason we had the fervent support of the American Medical Association and the Texas Medical Association was that most of the doctors in Texas had been interns or residents in Dallas at John Peter Smith Hospital, which was the leading trauma hospital in Texas. It was where U.S. President John F. Kennedy was taken when he was shot. All of those doctors had worked in a ward there called the I.O.B.—Infected Obstetrics—ward. Their job was to save the lives and the fertility of women who had had illegal abortions, bad abortions, self-abortions or similar issues. Those doctors knew that if abortion were made illegal, it did not prevent abortions, it often resulted in very serious medical problems for women.¹² Another group supporting us was the American College of Obstetricians and Gynecologists.

I got to the Supreme Court, and I argued the case against the Texas law.¹³ I had no idea what the Justices were going to decide—very seldom can an attorney tell. You can hear the oral arguments online.¹⁴ I decided to run for the Texas Legislature because I did not know if I was winning or losing in the Supreme Court. I felt I had to do something to get into a position where I could try to change the law in Texas if we did not win *Roe* in the Supreme Court. I had been sworn in a couple of weeks earlier. The rumor was going around that President Nixon did not want the Court to decide the case while he was running for re-election.¹⁵ He had appointed Warren Burger as the Chief Justice. Justice Burger and Justice Blackmun were very close. In fact, Justice Blackmun had been the best man at Justice Burger's wedding.

On the 20th of January, Nixon was reinstated as President. On the 22nd, I was over at the Texas Capitol, and I got a call from the *New York Times*. The *Times* reporter said, "Does Ms. Weddington have a comment today about *Roe v. Wade*?" My assistant said, "Should she?" The reporter said, "It was decided today." My assistant said, "How was it decided?" The reporter answered, "She won it, 7–2."

11 *Doe v. Bolton*, 410 U.S. 179 (1973) (a Georgia case challenging the validity of a Georgia abortion statute which became a companion case to *Roe*).

12 The law in Texas at the time made it a crime to "procure an abortion" except for "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." *Roe v. Wade*, 410 U.S. 113, 117–18 (1973). Yet no one knew exactly when the exception applied. As a result, almost no doctor would do an abortion. SARAH WEDDINGTON, *A QUESTION OF CHOICE* 45 (The Feminist Press ed. 2013).

13 "Supreme Court personnel were referring to December 13 as 'Ladies' Day.' Three of the four attorneys who would be arguing on that day were women." WEDDINGTON, *supra* note 12, at 118.

14 Recordings of the arguments are available at OYEZ, <https://www.oyez.org/cases/1971/70-18> (last visited Sept. 13, 2018).

15 The case was ultimately decided with nine justices with two new justices, Lewis Powell and William Rehnquist, confirmed at the end of the 1971 Term. MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 279 (Cooper Square Press ed. 2001).

Soon after that I got a telegram from the Supreme Court saying a copy of the opinion would be faxed, and then I would receive a copy of the entire opinion later via express mail. Now you know you cannot send a telegram today—they do not even exist anymore. You would not wait until you got an airmail copy with the opinion. You would go to your smartphone or computer and look up the opinion. I called a friend and asked her to go to the Supreme Court and read the opinion, then to call me and tell me in detail what it said. I had to know the decision in detail in order to be able to take press questions.

I look back on that day, and if you had said to me then—I had started working on *Roe* in 1969 and got the opinion on January 22, 1973, or forty-five years ago—that I would still be working on the choice issue this much later, I would never have believed that. I have been working on this for a long time, and now it is your turn. I am excited that there are a lot of people, women and some men too, who are helping to work on these issues. The book *Feminist Judgments: Rewritten Decisions of the United States Supreme Court* helps us see, in a real and practical way, that feminist reasoning and arguments can make a difference.

Recently, I heard from a student who attended an institutional dinner of sorts at which Justice Ruth Bader Ginsburg was present. The student was assuring us that Ruth Bader Ginsburg is really spry. You probably know that you can buy the book that reveals that she has a personal trainer come to her chambers three times a week. It is called *The RBG Workout* by Bryant Johnson. Exercise helps keep her in good shape so she will be able to continue as a Justice. I do not think she wants to leave at all, and—thankfully—she usually does what she wants.

For all of the young people who care about reproductive justice, I hope to see your name in print sometime in the future. That may be as a lawyer on an important brief or a piece of fantastic scholarship or a contribution to a creative blueprint for future litigation, like the *Feminist Judgments* book.