Women: Collateral Damage in the Abortion War

By James C. Nelson, Justice Montana Supreme Court, retired

On December 1st, The U.S. Supreme Court heard oral argument in the Mississippi abortion case, *Dobbs v. Jackson Women's Health Organization*. We likely won't know the result of the Court's decision until sometime early next summer. But from the Justices questions and comments during the argument, it appears that the Court will, basically, gut *Roe v. Wade*, and allow the states to impose whatever abortion restrictions their legislatures can come up with.[1]

It goes without saying that Judges should be immune from partisan and sectarian pressures when deciding cases involving a woman's right to make decisions about her own body and her private reproductive choices free from government interference. Notwithstanding, however, it appears that a majority of the Court has adopted Republican and religious right conservative ideology; and that will likely result in a decision against these women's rights.

Recall that, historically, abortion has been a part of American history since its inception. States began to criminalize it the 1870s, with the result that by the 1960s there were hundreds of thousands of illegal abortions a year endangering women. Based on sound medical practice, states began to de-criminalize pregnancy terminations, leaving the matter to the woman and her doctor. By 1972, (the year *Roe v. Wade* was handed down) 64% of Americans (59% of Democrats and 68% of Republicans) agreed with this medical model.

The politicization of the medical model began before *Roe*, however. In 1972, Republican Richard Nixon was up for re-election and he and his advisors were paranoid about his chances of winning—fearful that Democrats and traditional Republicans would take power. Nixon formerly had no problem with the medical model (he directed military hospitals to perform abortions regardless of state law). However, in 1971, seeking to woo Catholic/Democrat and Evangelical voters and split the party's votes, Nixon reversed course and adopted the Catholic "sanctity of human life" doctrine.[2] Ronald Reagan followed suit.

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[1] https://www.nbcnews.com/politics/supreme-court/supreme-court-set-dive-mississippi-abortion-case-challenging-roe-v-n1285114; https://www.nytimes.com/live/2021/12/01/us/abortion-mississippi-supreme-court

[2] See, *How the South Won the Civil War*, Heather Cox Richardson, Oxford University Press, 2020, pp. 174-75, 177, 181-182.

The rest is history; abortion turned from being a medical issue and became, instead, a political/religious one—women became the collateral damage in an ideological struggle for partisan/sectarian power driven by males.

While the U.S. Constitution's Article VI prohibits any religious test for federal public office, the Constitution seemingly does not stop some federal Judges and Justices from bowing to political and religious pressure in ruling on cases that would otherwise offend the Republican Party and, here, the Catholic Church.

Sitting on the present U.S. Supreme Court there are six Roman Catholics: Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Brett Kavanaugh, Amy Coney Barrett and Sonia Sotomayor. Of these, only Justice Sotomayor is considered a progressive, the other five being generally regarded as conservative.

Had they followed federal law, these six Catholic Justices should have never sat in deciding *Dobbs*. Here's why.

Federal statute, 28 U.S.C. § 455,[3] requires a federal judge or justice to recuse himself or herself (that is, to not participate in a case) where, for among other reasons, the judge's impartiality might be questioned or for reasons of personal bias or prejudice.

It is obvious that the impartiality of the six Catholic Justices sitting on a case involving abortion is questionable, at best. Indeed, every justice on the Court has previously expressed an opinion on abortion rights, for or against.[4] So, to be fair, all nine should have recused themselves.

To the religion point, however, before being appointed to the federal bench in 2017, now Justice, Barrett co-authored a law review article, *Catholic Judges in Capital Cases.* 81 Marq. L. Rev. 303 (1997-1998). In her article, Barrett focused on 28 U.S.C. § 455.

Barrett concluded that because the Catholic Church condemns practices whose point is taking life, for example, in death penalty cases: "Judges cannot-nor should they try to-align our legal system with the Church's moral teaching

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3 Because of its length, this statute is included as a separate end note at 3.

[4] https://www.washingtonpost.com/politics/interactive/2021/supreme-court-abortion-stances/

whenever the two diverge. They should, however, conform their own behavior to the Church's standard." "[W]e believe that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty. This means that they can neither themselves sentence criminals to death nor enforce jury recommendations of death." Accordingly, the moral impossibility of enforcing capital punishment requires recusal under the federal statute. To be sure, though, Ms. Barrett's law review article concedes that "the church's [death penalty] teaching requires a few qualifications."

However, she recognized no such "qualifications" when it comes to abortion. Indeed, she stated *"[t]he [Church's] prohibitions against abortion . . . are absolute; those against . . . capital punishment are not . . . abortion take(s) away innocent life."*

The Catholic Church's "absolute" condemnation of abortion would make it morally impossible for Catholic Justices to fairly and impartially consider any abortion case. Any Catholic Justice would be "morally precluded" from upholding an abortion case, and *would have to "conform their own behavior to the [Catholic] Church's standard."*

Thus, the dictates of their faith require a Catholic Justice to have personal bias against any abortion case; the jurist would have to conform his or her behavior to the Church's standard, not to precedent or to the law. His or her impartiality would be, per se, subject to question; his or her bias against abortion is hardwired into the jurist's moral code.

Notwithstanding, in violation of the clear requirements of the federal recusal statute, six Catholic Justices participated in and will decide *Dobbs*. Will those Catholic Justices decide the case impartially, according to law and precedent, or will a majority conform their decision to the sectarian doctrines of the Catholic Church—and incidentally to ideological platform of the Republican Party since 1971? Who knows? But, as Bob Dylan said, "the answer my friend is blowin' in the wind."

And what of the women who will likely lose their access to abortion services; who will be forced to terminate unwanted pregnancies illegally, often at the hands of butchers and quacks; who will be the victims of vigilante justice in some states; and who will have their reproductive choices dictated by males?

Make no mistake, these women will be the victims of the Supreme Court's adoption of the platform of the Republican Party and the doctrines of the Catholic Church. They will be the victims of the Court's failure to follow the federal recusal statute. Politics and religion win; women lose at the hands of Justices who had no business sitting on the case.

In short, women will be the collateral damage in the abortion war.

3 28 U.S. Code § 455 - Disqualification of justice, judge, or magistrate judge

(a)

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1)

Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2)

Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3)

Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4)

He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i)

Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii)

Is acting as a lawyer in the proceeding;

(iii)

Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv)

Is to the judge's knowledge likely to be a material witness in the proceeding.

(c)

A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1)

"proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2)

the degree of relationship is calculated according to the civil law system;

(3)

"fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4)"financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i)

Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii)

An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii)

The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv)

Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e)

No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f)

Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial

interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, ch. 646, 62 Stat. 908; Pub. L. 93–512, § 1, Dec. 5, 1974, 88 Stat. 1609; Pub. L. 95–598, title II, § 214(a), (b), Nov. 6, 1978, 92 Stat. 2661; Pub. L. 100–702, title X, § 1007, Nov. 19, 1988, 102 Stat. 4667; Pub. L. 101–650, title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)