# ARTICLES

## ABORTION BEFORE AND AFTER *ROE v. WADE*: AN HISTORICAL PERSPECTIVE

*David J. Garrow**

I.

Having spoken at a number of events similar to this one with Sarah Weddington, I now know from experience that it is always better to go before Sarah rather than after. But I am certain that there also is one reason, not listed in your program, for why I am here today, and that is that there are several things that I am going to say that probably will allow *all* of our upcoming speakers—no matter what their views on abortion—to agree unanimously that, if nothing else, Garrow is wrong.

I am going speak largely as a historian this evening, in part because the recent murder in Buffalo of Dr. Barnett Slepian[1] requires us to appreciate all the more so how the present-day realities regarding the availability of abortion services are not all that fundamentally different from what history tells us were the realities of abortion even back before *Roe v. Wade*[2] itself.[3]

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[1] *See* Janice L. Habuda & Carl Allen, *Abortion Doctor Shot Dead by Sniper*, BUFFALO NEWS, Oct. 24, 1998, at A1.

[2] 410 U.S. 113 (1973).

[3] *See* discussion *infra* Parts VI-VII.

Before *Roe*, and before abortion was first legalized here in New York in 1970,[4] and even before the first abortion liberalization statutes were passed in Colorado, North Carolina, and California in 1967,[5] abortion was very widely available in many places all across the United States *if* you were a woman who had both good medical contacts and sufficient money.[6] If you lacked either those contacts or the money, then abortion was either not available or available only under exceptionally unsafe circumstances.[7] It is a tremendously under-appreciated part of the history of this issue just how many fully credentialed and well-respected doctors were, "under the table," so to speak, providing abortion services prior to 1967 for women patients whom they knew or who were referred by mutual acquaintances.[8] Even before *Roe*, even before the landmark change in New York State law, there were hundreds upon hundreds of doctors in this country who secretly performed abortions for women whom they knew and who could pay.

But that bifurcation in availability—that a medical abortion was reasonably easy to obtain for women who had money and connections, and extremely difficult for women who did not have money and connections—is a consistent thread across the course of this century from the early 1900s right up to the present time. Indeed, as Sarah alluded to in mentioning *Griswold v. Connecticut*,[9] it is important for us also to remember that the entire first two generations of women's health clinics all across this country were created precisely to eliminate that bifurcation or discrimination in access to services, not with regard to abortion, but with regard to contraception and birth control.[10]

The entire history of the struggle to legalize access to contraception—first here in New York,[11] then in Connecticut and in Massa-

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[4] *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE v. WADE* 418-21 (University of Cal. Press 1998) (1994).

[5] *See id.* at 323-25 (Colorado); *id.* at 327-30 (North Carolina); *id.* at 330-32 (California).

[6] *See generally* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (1997); CAROLE JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE v. WADE* (1995); *see also* NANCY HOWELL LEE, THE SEARCH FOR AN ABORTIONIST (1969); Peter K. Manning, *Fixing What You Feared: Notes on the Campus Abortion Search*, *in* STUDIES IN THE SOCIOLOGY OF SEX 137-66 (James M. Henslin ed., 1971).

[7] *See* Kenneth R. Whittemore, *The Availability of Nonhospital Abortions*, *in* 1 ABORTION IN A CHANGING WORLD 212-17 (Robert E. Hall ed., 1970).

[8] *See* REAGAN, *supra* note 6, at 4, 105, 132-33, 159.

[9] 381 U.S. 479 (1965).

[10] *See generally* GARROW, *supra* note 4, at 1-195.

[11] *See id.* at 13; *see also* People v. Sanger, 118 N.E. 637 (N.Y. 1918).

chusetts, starting in the 1910s and going right up to *Griswold* in 1965, and then to *Eisenstadt v. Baird*[12] in 1972, was in essence about that very same issue. Even in the 1910s when Margaret Sanger first began work in New York City, women of means who could afford private doctors had quite easy and utterly private access to diaphragm fittings and other reproductive health services.[13] But what Mrs. Sanger and her early compatriots, like Katharine Houghton Hepburn (mother of actress Katharine Hepburn) in Connecticut, all sought was to make that very same access available to less-privileged women who could not afford private physicians.[14] Since that equal access was not offered by traditional or establishmentarian medical institutions, the birth control activists of the 1920s and 1930s worked to create the same sort of separate and very publicly identifiable women's health clinics that are the focus of the abortion rights struggle today.[15]

First in New York in the 1920s,[16] then in Massachusetts and Connecticut in the late 1930s,[17] those early birth control clinics became the target of predominately Roman Catholic religious forces which were unwilling to tolerate the publicly advertised availability of birth control services.[18] No one truly denied the fact that these services were privately and invisibly available all across those states to women who could afford private physicians and who did not need to depend upon publicly visible clinics.

## II.

As Sarah very nicely described, the early origins of *Roe* grew very directly out of the constitutional precedent of *Griswold*. To my mind, perhaps the most wonderful story in twentieth-century American constitutional law involves the way in which, between 1966 and 1969, and without any sort of NAACP Legal Defense and Educational Fund coordinating and bringing everyone together, multiple sets of young attorneys, all operating not just independently of each other, but, in all frankness, oftentimes in ignorance of each other's existence, all started to utilize the argument that

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12 405 U.S. 438 (1972).

13 *See generally* ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA (1992).

14 *See* GARROW, *supra* note 4, at 1-78 *passim*.

15 *See id.*

16 *See id.* at 23-24.

17 *See id.* at 2-8 (Connecticut); *id.* at 44-48 (Massachusetts).

18 *See id.*

*Griswold*'s fundamental right to marital privacy in the use of contraception could be extended to cover a woman's fundamental right to choose whether or not to continue an unwanted pregnancy.[19]

Prior to *Griswold*, there really had never been *any* public contention *ever* in this country that abortion should be any sort of fundamental or constitutionally protected right.[20] The early abortion reformers or law-reform advocates of the 1960s were people who almost without exception envisioned liberalizing state anti-abortion laws so that on a wholly case-by-case basis, individual women could petition for medical approval of a legally permissible abortion only because their particular pregnancy posed some specific threat to their health or involved a potentially defective fetus.[21] But growing out of those earliest "reform" efforts came a very rapid evolution, starting essentially only in 1968 and 1969, toward the far more liberal or indeed radical idea of abortion law "repeal." An increasing number of young attorneys came to grasp the *Griswold*-based idea that abortion law change did not have to be put forward simply in terms of liberalizing existing statutes by legislatively adding one or more new statutory exceptions that would cover women with health-threatening pregnancies, but that instead the issue could be argued in court as a question of challenging those existing statutes as violative of women's—and doctors'—constitutional rights.[22]

In late 1969 and early 1970, there was really a sort of nationwide legal groundswell, in which *Roe v. Wade* in Texas and its eventual Supreme Court companion case of *Doe v. Bolton*[23] from Georgia, were only two out of approximately fifteen to twenty roughly simultaneous cases.[24] If Judy Smith and other students in Austin, and Linda Coffee in Dallas, along with Sarah, had somehow not launched *Roe* in early 1970,[25] or if Judith Bourne and Margie Hames and other women in Atlanta had not instigated *Doe v. Bolton*,[26] the U.S. Supreme Court nonetheless would have had to confront the case of Jane Hodgson[27] from Minnesota, or a case from New Jersey, or one from Connecticut, or half-a-dozen or more cases

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[19] *See id.* at 335-88.

[20] *See id.* at 272-97.

[21] *See id.* at 290-303.

[22] *See id.* at 335-88.

[23] 410 U.S. 179 (1973).

[24] *See* GARROW, *supra* note 4, at 389-460.

[25] *See id.* at 389-407; *see also* SARAH WEDDINGTON, A QUESTION OF CHOICE (1992).

[26] *See* GARROW, *supra* note 4, at 422-28.

[27] *See* JOFFE, *supra* note 6, at 8-26; *see also* GARROW, *supra* note 4, at 428-30, 466-80 *passim*.

from a variety of other states.[28] Whenever anyone out of ignorance happens to suggest that the Supreme Court's ruling in *Roe v. Wade* was just a happenstance accident of one woman's case[29] forcing Justice Blackmun and his colleagues to resolve an issue which they otherwise could have "ducked" or significantly postponed, that simply was not the historical situation or the litigation scene that was confronting the Supreme Court during the 1971-1972 term.[30] From the vantage point of the Court, *Roe* and *Doe* were simply the first two of what eventually became more than a dozen constitutional challenges to state anti-abortion laws that were pending on the Court's own docket, with all of the additional cases being "held" for the resolution of *Roe* and *Doe*.[31] In the weeks following the announcement of the *Roe* and *Doe* decisions, the Court handed down rulings resolving all of those additional constitutional challenges in accord with *Roe* and *Doe*.[32] Thus, Sarah Weddington's role in litigating *Roe v. Wade* was just one example of what was truly a nationwide movement of young lawyers who brought the fundamental issue of a woman's constitutional right to choose abortion to the Supreme Court's doorstep from state after state after state.

## III.

The second very important development that took place between 1967 and 1970 was the political groundswell which came to its most important fruition here in New York State with the April 1970 legislative passage of the repeal statute which then took effect on July 1, 1970.[33] That day represented the first time there ever had been nondiscriminatory access to abortion services in this country. But it is also crucially important to appreciate how the service-delivery choices that pro-choice activists initially made when abortion did

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[28] *See* GARROW, *supra* note 4, at 389-460.

[29] *See generally* NORMA MCCORVEY WITH ANDY MEISLER, I AM ROE: MY LIFE, *ROE v. WADE*, AND FREEDOM OF CHOICE (1994). *But see* NORMA MCCORVEY WITH GARY THOMAS, WON BY LOVE (1997).

[30] *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) [hereinafter Ginsburg, *Thoughts on Autonomy and Equality*]; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) [hereinafter Ginsburg, *Speaking in a Judicial Voice*]. *But see* David Garrow, *History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About* Roe, WASH. POST, June 20, 1993, at C3.

[31] *See* GARROW, *supra* note 4, at 607-08.

[32] *See id.*

[33] *See* Act of Apr. 11, 1970, ch. 127, 1970 N.Y. Laws 170 (codified as amended at N.Y. PENAL LAW § 125.05(3) (McKinney 1998)).

first become legal here in New York have turned out to be choices that now, three decades later, most ironically have proven in some ways to be extremely *deleterious* to women's real access to nondiscriminatory reproductive health services.[34]

In that summer of 1970, with their eyes first and foremost on how to offer modestly-priced rather than potentially overpriced abortion services to the thousands of women who were expected to flock to New York State, and particularly New York City, from all across America, pro-choice activists almost unanimously concluded that the establishment of separate or "free-standing" clinics providing principally just abortion services was the only economically-advisable way to proceed. Thus, the service-delivery pattern that quickly developed during the latter half of 1970, especially in New York City, featured a number of large free-standing clinics which before long were performing the great majority of all New York abortions.[35] This pattern also meant that in stark contrast to the secretive and undocumented pre-1970 world where scores and scores of individual doctors had found themselves performing abortions, legalization of abortion ironically served to diminish the number of doctors performing abortions as a very high number of pregnancy terminations came to be performed by the relatively small number of physicians working at the large free-standing clinics.[36]

That was pro-choicers' chosen model because it was far and away the lowest-cost method for providing medically-safe abortions to a large number of women, most of whom would not have been able to afford the dramatically higher fees charged by hospitals or any other non-specialty provider.[37] That decision, made in New York more than two years before *Roe* with regard to how legalized abortion ought to be implemented, with the primary concern being how to minimize women's costs, is what led, in turn, to abortion services being so heavily concentrated in free-standing clinics staffed by a relatively small number of doctors.[38] Indeed, since legalization meant that most abortions now were being performed by such a relatively small number of doctors, a large proportion of the medical population no longer had to worry about or concern themselves with being in any way responsible for providing abortion services to

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[34] *See infra* notes 47-65 and accompanying text.

[35] *See* GARROW, *supra* note 4, at 874.

[36] *See id.*

[37] *See id.*

[38] *See id.*

women whom they knew or women who were referred to them by some personal acquaintance. Now the clinics were visibly and publicly available, and available at a decidedly lower cost.

Nowadays, very few people will remember the name of the late Dr. Robert E. Hall, but Dr. Hall, along with Dr. Alan Guttmacher, was one of the two most important and outspoken medical voices advocating abortion law liberalization, especially in New York, during the 1960s.[39] Alan Guttmacher, who first began speaking out for abortion law change in the early 1940s, before becoming the president of national Planned Parenthood in the early 1960s, may well have done more than any other single human being to help create an elite professional climate that finally allowed for women to be free to make their own choices concerning unwanted pregnancies.[40] Bob Hall, a Columbia Presbyterian physician who was some twenty years younger than Guttmacher, emerged in the mid-1960s as the publicly prominent head of New York State's first abortion reform interest group, the Association for the Study of Abortion.[41] Year after year, here in Albany before the New York State legislature, starting in 1966 and continuing on into 1969-1970, Bob Hall was one of New York's most outspoken doctors.[42]

But when the law in New York changed in July of 1970, and free-standing clinics became the centerpiece of legal abortion, Bob Hall argued that abortion rights advocates were making a huge mistake to concentrate abortion services in the free-standing clinics and in the hands of what quickly became a very small number of abortion providers. In so doing, Hall argued, pro-choice forces were in essence declaring that organized medicine, which had become an important participant in abortion liberalization efforts, no longer had to hold itself responsible for helping to provide actual abortion services.[43] Leading medical institutions like Columbia Presbyterian and Mount Sinai Hospital, where Alan Guttmacher had performed a significant number of "therapeutic" abortions, no longer needed to

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[39] *See id.* at 270-72, 275-85 *passim*, 288-99 *passim*.

[40] *See id.*

[41] *See id.* at 285-304.

[42] *See id.* at 291, 294-98.

[43] *See id.* at 456, 483; *see also* Robert E. Hall, *Realities of Abortion*, N.Y. TIMES, Feb. 13, 1971, at 27; Robert E. Hall, *Pregnancy Termination: The Impact of New Laws*, 6 J. REPROD. MED. 45 (1971).

take any active interest in the matter.[44] It was, for better or for worse, now in the hands of the free-standing clinics.

## IV.

Between the victory here in New York in 1970, and the Supreme Court rulings in *Roe* and *Doe* in January 1973, the most important development which took place subsequent to the New York victory was the mobilization of a significant right to life movement. Prior to the 1970 victory in New York, pro-choice forces had encountered surprisingly little well-organized or outspokenly vocal opposition.[45] The Roman Catholic Church's hierarchy had been relatively inactive on the issue prior to 1970, but the legalization of abortion in New York led to a very rapid mobilization of right to life opposition.[46] We could fill a very long shelf with writings that claim that it was *only* the Supreme Court's action in *Roe v. Wade* that created an intensely energized right to life movement, and that if the Court had not gone as "far" as it did in *Roe*, then anti-abortion forces would not have mobilized in the ways that they did during the 1970s and 1980s.[47] Instead, there supposedly would have been extensive but more gradual abortion law liberalization stemming from less shrill debates in countless state legislatures.[48] Thus, in this fictionalized but nonetheless widely-accepted version of history, the Supreme Court, and particularly Justice Blackmun, are faulted for committing an act of "heavy-handed judicial intervention" that spurred the right to life movement and engendered much of the political strife America has witnessed over the past twenty-five years.[49]

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[44] *See* GARROW, *supra* note 4, at 277; *see also* Alan F. Guttmacher, *The Genesis of Liberalized Abortion in New York*, 23 CASE W. RES. L. REV. 756, 760-61 (1972); Michael S. Burnhill, *Humane Abortion Services: A Revolution in Human Rights*, 42 MT. SINAI J. MED. 431 (1975).

[45] *See* GARROW, *supra* note 4, at 329-30.

[46] *See id.* at 483-84, 510-12, 561; *see also* TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 54-57 (1991).

[47] *See, e.g.*, Ginsburg, *Thoughts on Autonomy and Equality*, *supra* note 30, at 381 ("The sweep and detail of the [*Roe*] opinion stimulated the mobilization of a right-to-life movement."); Ginsburg, *Speaking in a Judicial Voice*, *supra* note 30.

[48] *See* Ginsburg, *Thoughts on Autonomy and Equality*, *supra* note 30, at 381; Charles Krauthammer, *Back to Bork*, WASH. POST, Feb. 9, 1999, at A17 (erroneously asserting that states "were" legalizing abortion, "one after another, before the Supreme Court preempted the whole process in 1973").

[49] *See* Ginsburg, *Thoughts on Autonomy and Equality*, *supra* note 30, at 385-86 ("Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.").

This view is simply and utterly wrong.[50] Not only did the New York legalization energize right to life forces, but it so energized them that they almost succeeded in legislatively repealing the New York legalization statute; only a 1972 gubernatorial veto by Nelson Rockefeller prevented such an anti-abortion triumph and kept legal abortion available in New York in the months immediately preceding the decision in *Roe*.[51] But that New York upsurge helped stimulate a very politically influential right to life upsurge all across the country, in state after state after state, throughout 1971 and 1972. During 1971 and 1972, pro-choice forces won *no* political victories,[52] and New York activists were worried as to whether they could continue to protect their statute from legislative repeal after Nelson Rockefeller left the governorship.[53] In the two states that held 1972 popular vote referenda on abortion, pro-choice measures went down to heavy defeats,[54] and in many others, legislators took the position that they could let the courts resolve the problem, that they did not need to go out on any political limbs by confronting the issue themselves.[55] Thus, by November 1972, when Richard Nixon was overwhelmingly re-elected to the presidency after mounting a very explicitly anti-abortion general election campaign, prospects for making any sort of non-judicial headway with abortion law liberalization looked very bleak indeed. Pro-choice activists feared that more setbacks might be ahead.

## V.

*Roe v. Wade* and *Doe v. Bolton*, in January 1973, thus judicially mandated a pro-choice statutory stance that pro-choice activists had little, if any, contemporaneous hope of attaining or preserving anywhere other than in three far western states and perhaps in New York.[56] Ergo, it is absolutely essential to appreciate, relative to a longer-term historical perspective, that the legal position that *Roe* and *Doe* gave pro-choice activists to "defend," as it were, was from the very beginning an over-extended position that reached far beyond where the political battle lines on the issue were then located. Therefore, in the aftermath of *Roe* and *Doe*, when opposition

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[50] *See* Garrow, *supra* note 30.
[51] *See* GARROW, *supra* note 4, at 545-47.
[52] *See id.* at 538.
[53] *See id.* at 547, 578.
[54] *See id.* at 576-77.
[55] *See id.* at 576-79.
[56] Those states are Hawaii, Alaska, and Washington. *See id.* at 412-14, 431-32, 466.

forces both in the states and especially in the United States Congress focused their political efforts not on the "core" constitutional mandate of *Roe* and *Doe*, but instead on boundary or "edge" issues such as the question of public funding for poor women's abortions, they unsurprisingly triumphed again and again. Both the congressional success of the Hyde Amendment[57] and the Supreme Court decisions upholding such legislative prohibitions of public funding for abortion services were very much in accord with predominant American political sentiments in the mid- and late 1970s, and those events in all frankness should not be viewed, especially in retrospect, as having been astonishing or in any way surprising setbacks.[58]

When Ronald Reagan became President in 1981, that political pattern understandably accelerated, but it is important to appreciate that as it accelerated, and right to life forces moved *beyond* a focus on such "boundary" issues as public financing of abortions and instead targeted the constitutional core of *Roe* and *Doe*, they undertook a battle fundamentally different than those where they had always held the stronger political hand. During the first three years of President Reagan's first term, the primary right to life focus was on passing some form of a constitutional amendment that would set aside *Roe* and *Doe*.[59] Abortion opponents in the Congress, however, were unable to reach widespread agreement on precisely what kind of an anti-*Roe* constitutional amendment they should champion.[60] In the end, both a "human life" amendment declaring that fetuses were constitutional persons, and a decidedly different measure simply allowing each individual state to decide upon the legality of abortion for itself, fell far short of winning the necessary two-thirds support in the United States Senate.[61]

The fact that abortion opponents were unable to make any notable headway in their constitutional assault on *Roe* during the entire eight-year Reagan presidency is a momentous but often overlooked chapter in the post-1973 history of America's abortion battles. When one looks carefully at the history of the right to life movement in this country since 1970, the tremendous level of internal frustration that was generated during the Reagan years as a result of that inability to fundamentally undercut *Roe* is a crucial genera-

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[57] *See id.* at 626-35.

[58] *See* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[59] *See* GARROW, *supra* note 4, at 638-40, 643-44.

[60] *See id.*

[61] *See id.*

tive force underlying the emergence of both the far more aggressive Operation Rescue-type mass assaults, and the explicitly criminal bomb and arson attacks, that began to target more and more free-standing abortion clinics during the mid- and late 1980s.[62] The anger and fury that underlay both the clinic blockades and the out-and-out violent terrorism connect directly back to the widespread frustration that was generated when lobbyists and legislators were unable to make any significant progress toward ending legalized abortion through the normal channels of the political system.[63]

## VI.

During the late 1980s and very early 1990s, abortion opponents repeatedly made the fundamental error of believing that their consistent ability to win politically on "edge" issues such as public funding and parental involvement measures for pregnant minors meant that they could also win the core constitutional struggle. First, the 1987 Supreme Court nomination of Judge Robert H. Bork went down to defeat perhaps more because of the widespread public perception that he was an opponent of constitutional protection for privacy and personal choice than for any or all other reasons.[64] Judge Bork had been a very outspoken critic of both *Griswold* and *Roe*,[65] and his insistent reiterations of those criticisms at his confirmation hearings played a large role in strengthening public opinion against his nomination.[66]

Second, the 1989 case of *Webster v. Reproductive Health Services*,[67] in which the Supreme Court eventually in effect simply postponed a decisive reconsideration of *Roe*'s constitutional merits,[68] nonetheless generated such a nationwide hue and cry that millions of voters all across the nation realized perhaps for the first time that the rights protected by *Roe* and *Doe* were under very direct and sustained assault.[69] And third, when the Operation Rescue-type mass assaults on clinics became a sometimes nightly nationwide television news story as "OR" mounted a sustained campaign

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[62] *See generally* JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR (1998); *see also* DALLAS A. BLANCHARD & TERRY J. PREWITT, RELIGIOUS VIOLENCE AND ABORTION (1993).

[63] *See generally* RISEN & THOMAS, *supra* note 62; BLANCHARD & PREWITT, *supra* note 62.

[64] *See* GARROW, *supra* note 4, at 668-71.

[65] *See id.* at 264-68, 639, 649-50.

[66] *See id.* at 671.

[67] 492 U.S. 490 (1989).

[68] *See* GARROW, *supra* note 4, at 677-80.

[69] *See id.* at 680-81.

in Wichita, Kansas, during August 1991,[70] many Americans saw for the first time the extent to which some anti-abortion tactics seemed to feature anger and hatred rather than the quiet nonviolent humility that African-American "sit-in" activists had manifested three decades earlier.[71]

In each one of these instances, abortion opponents committed the fundamental error of trying to reach well beyond the limited set of "boundary" issues over which they long had exercised political dominance.[72] But their biggest and most fundamental mistake of all, and which became the definitive turning point in the entire post-*Roe* struggle, was in convincing themselves—and many others too—that when forced to recommit itself one way or the other on the constitutional merits of *Roe v. Wade*, the Supreme Court would choose to act as a fundamentally political body rather than a court of law. That was very much the operative presumption under which *Planned Parenthood of Southeastern Pennsylvania v. Casey*[73] came to be argued before the Court in April 1992.[74]

Three important things need to be said about *Casey*. First, the trio opinion co-authored by Justices O'Connor, Kennedy and Souter was one of the two or three most powerful statements ever made by the Supreme Court in our entire history about the Court's own role and responsibilities within the American system of government.[75] Second, while that opinion of course upheld the constitutional core of *Roe*, *Casey*'s "undue burden" test *has* allowed states such as Mississippi, Pennsylvania, Louisiana, Utah, and Wisconsin to impose new twenty-four hour mandatory waiting periods for women who seek abortions.[76] Those state statutes require that a woman receive *in person* counseling a full day or more prior to any abortion, and at a totally practical pragmatic level they are thereby requiring the woman to make two separate clinic visits, irrespective of how great a travel distance that clinic or doctor may be from her home or place of work.[77]

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[70] *See id.* at 688.

[71] *See* RISEN & THOMAS, *supra* note 62, at 323-38.

[72] *See* discussion *supra* Part V.

[73] 505 U.S. 833 (1992).

[74] *See* GARROW, *supra* note 4, at 689-93.

[75] *See* David J. Garrow, *A Landmark Decision*, 39 DISSENT 427 (1992) [hereinafter Garrow, *A Landmark Decision*]; David J. Garrow, *From* Brown *to* Casey*: The U.S. Supreme Court and the Burdens of History*, *in* RACE, LAW, AND CULTURE: REFLECTIONS ON *BROWN v. BOARD OF EDUCATION* 74-88 (Austin Sarat ed., 1997).

[76] *See* GARROW, *supra* note 4, at 708, 722-23, 733.

[77] *See* Theodore Joyce et al., *The Impact of Mississippi's Mandatory Delay Law on Abortions and Births*, 278 JAMA 653 (1997); *see also* Frances A. Althaus & Stanley K. Henshaw,

But the third and most important point of all about *Planned Parenthood v. Casey* is that *Casey* resolved the basic constitutional question of abortion *for all time*. The Court has made crystal clear that after *Casey*, there is simply no going back. Anyone who is attracted to or tempted by the "pipe dream" argument that *Roe v. Wade is* potentially reversible by some future Supreme Court ought to be required to explain why, for example, *Brown v. Board of Education*[78] *also* could be reversed by some future Court. For the three "trio" justices, O'Connor, Kennedy, and Souter, *Casey* was not first and foremost an abortion case. It was instead a case about the role and stature and institutional responsibilities of the Supreme Court. It ought to be very difficult for anyone to read the *Casey* opinion with any sort of independent or quasi-objective attitude toward this question and come away from that opinion with *any* doubt about whether this is a declaration on which the Court somehow could ever go back. The rare and special gesture of making that opinion a *joint* opinion, formally co-authored by all three justices rather than by one individual author, as is the Court's regular style, was only the second time in the entire history of the Court that such a device has been employed. The one prior time occurred in *Cooper v. Aaron*,[79] the famous Little Rock school desegregation case of 1958, in which the Court reaffirmed its 1954 ruling in *Brown v. Board of Education* in the strongest possible terms. *Casey*'s implicit invocation of *Cooper*'s reaffirmation of *Brown* was something those three justices did very purposefully in order to send a clear symbolic message, and the explicit manner in which the trio opinion compared the constitutional import of *Roe* to the constitutional import of *Brown*[80] should leave no one uncertain as to how strong and unbreakable an institutional commitment the Supreme Court has made to constitutional protection for women's right to choose.[81]

## VII.

But while *Casey* was without any doubt a tremendous pro-choice victory,[82] *Casey* nonetheless is one of two such pro-choice victories which ironically have had the effect of giving the political "upper

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*The Effects of Mandatory Delay Laws on Abortion Patients and Providers*, 26 FAM. PLAN. PERSP. 228 (1994).

78 347 U.S. 483 (1954).

79 358 U.S. 1 (1958).

80 505 U.S. 833, 867 (1992).

81 *See id.*

82 *See* Garrow, *A Landmark Decision*, *supra* note 75.

hand" back to anti-abortion forces over the course of these past six or seven years. First, by reaffirming the constitutional core of *Roe* in such a lasting way, the *Casey* Court did abortion opponents the favor of compelling them to refocus their efforts on the "boundary" or edge issues where they have always been able to win. By starkly displacing those opponents from their ultimate constitutional obsession, which has always enticed them toward defeat, the Court forced them to return to the far more modest agenda with which they succeed far better.

The second important pro-choice victory which has had perhaps even more ironic consequences was the 1994 enactment of the federal "FACE" statute, the Freedom of Access to Clinic Entrances Act.[83] The FACE law quickly and dramatically reduced the number and extent of obstructive assaults mounted against abortion clinics and virtually eliminated the mass blockades that had previously symbolized the "glory years" of Operation Rescue.[84] Harassment of both clinics and their staff members declined significantly because of the potentially stiff federal criminal penalties provided by FACE.[85]

But the irony is that just as *Casey* did right to life proponents the favor of pushing them back from their weakest to their strongest anti-abortion turf, FACE did respectable or "mainstream" abortion opponents the favor of taking the histrionic Randall Terrys and the intimidating Joseph Scheidlers off of the nightly television news shows.[86] By eliminating the dramatic, confrontational scenes outside clinic doorways, the FACE statute removed figures such as Terry and Scheidler from the camera's eye and thereby *deprived* pro-choice forces of the benefits *they* had reaped from such a long-standing display of the most threatening and least attractive "faces" of anti-abortion activism. Most importantly, however, the virtual disappearance of one-time Operation Rescue media celebrities like Terry from the public eye effectively handed leadership of right to life efforts back to more mainstream lobbyists and legislators for the first time since the congressional failure to pass an anti-*Roe* constitutional amendment in the mid-1980s.[87] Thus, FACE effectively brought about both a change in leadership and a

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[83] *See* 18 U.S.C. § 248 (1994); *see also* GARROW, *supra* note 4, at 706-07.

[84] *See* GARROW, *supra* note 4, at x.

[85] *See id.* at 726, 729, 735-36.

[86] *See* RISEN & THOMAS, *supra* note 62, *passim*.

[87] *See supra* note 63 and accompanying text.

shift of initiative within the right to life movement.[88] Out of that change and shift have stemmed two developments, one a political godsend for abortion opponents and the other a political catastrophe.

The right to life godsend has been the nationwide legislative focus on "partial birth abortion" ban statutes since that now-famous label was first publicly introduced by abortion opponents in June, 1995.[89] In its own way, the "partial birth" slogan moved from obscurity to prominence just as quickly as abortion law "repeal" had supplanted abortion law "reform" in 1968 to 1970. "Partial birth" has been the legislative and public relations path by which the right to life movement has regained mainstream respectability and has separated itself from the politically self-destructive personas of people such as Terry and Scheidler. The "partial birth" campaign has put pro-choice supporters on the defensive both in Washington and in most of the fifty states, and even in the spring of 1999, abortion opponents continue to seek enactment of both a federal "partial birth" ban bill and similar statutes in state after state after state.[90] Just as with public funding for abortions and proposals for mandatory parental involvement in pregnant minors' abortion decisions, right to life advocates have again discovered that they succeed most fully when they focus on an ancillary aspect of abortion, such as one relatively infrequent late-term medical procedure,[91] rather than on the crux of the issue itself.[92]

A second result of the pro-choice successes registered in both FACE and *Casey* is unfortunately in some degree the seven terrorist murders of abortion clinic workers that have taken place since 1993: David Gunn, James Barrett, John Bayard Britton, Shannon Lowney, Lee Ann Nichols, Robert Sanderson, and Barnett Slepian.[93] It is crucially important to appreciate how the rise of anti-abortion terrorism and assassination has reflected more than any-

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[88] *See id.*

[89] *See* GARROW, *supra* note 4, at 719-20, 721-22, 727-28, 729-32, 733.

[90] *See, e.g.*, Judy Packer-Tursman, *House to Tackle Abortion Issue Again; Measure to be Reintroduced on 'Partial Birth'*, PITT. POST-GAZETTE, Jan. 21; 1999, at A8; Will Sentell, *Bill Labels Abortion Procedure Infanticide*, KAN. CITY STAR, Feb. 12, 1999, at B8; *'Partial-Birth' Bill Stalls in House*, ALBUQUERQUE J., Mar. 20, 1999, at A3; Emmet Meara, *State Approves Petition to Ban Some Abortions*, BANGOR DAILY NEWS, Feb. 23, 1999; Dale Wetzel, *Partial-Birth Abortion Ban Passes House*, BISMARCK TRIBUNE, Mar. 27, 1999, at A8.

[91] *See* Tamar Lewin, *Study on a Late Term Abortion Finds Procedure Is Little Used*, N.Y. TIMES, Dec. 11, 1998, at A18.

[92] *See supra* notes 72-74, 82 and accompanying text.

[93] *See* GARROW, *supra* note 4, at 702-03, 705, 706, 710-13, 713-14, 736; Habuda & Allen, *supra* note 1, at A1.

thing else the fundamental legal and political *failures* of mainstream anti-abortion efforts and *not* any increase in their strength or success. One historical comparison that emerges very starkly from the history of the southern civil rights movement makes this painful point most succinctly and most memorably: the most intense period of post-1954 Ku Klux Klan terrorism directed against civil rights activists in the South came not at the peak of Klan power and influence in the late 1950s and early 1960s, but instead in 1964 to 1966, in the immediate aftermath of the passage of the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965, when segregation's gunmen unmistakably knew that their war to maintain the racial oppression of Black southerners was indeed lost. The killings of 1964 through 1966—James Chaney, Michael Schwerner, Andrew Goodman and Vernon Dahmer in Mississippi, Jimmie Lee Jackson, James Reeb, Viola Gregg Liuzzo and Jonathan Daniels in Alabama, and Lemuel Penn in Georgia—represented a lashing out by terrorist hoodlums whose rage and fury paralleled that which Michael Griffin, Paul Hill, John Salvi, Eric Rudolph, and James Kopp came to feel about the failure of their war against abortion in the mid-1990s. One must absolutely *not* make the fundamental interpretive mistake of perceiving those killings as evidence that the terrorist side is in any way "winning" or expanding its influence. Instead, both with anti-abortion terrorism in the 1990s, just as with anti-civil rights terrorism in the 1960s, the descent into a politics of ambush and assassination reflects a realization of defeat.[94]

## VIII.

Let me close with several final, present-day points. First, the most important good news for pro-choice supporters is that the "partial birth" ban boomlet is just about over. As court decision after court decision after court decision has reflected, virtually every single state-enacted "partial birth" ban statute which has been constitutionally challenged in either federal or state courts has been restrained or enjoined.[95] Most recently and most notably, the

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[94] *See* David J. Garrow, *A Deadly, Dying Fringe*, N.Y. TIMES, Jan. 6, 1995, at A27.

[95] *See* GARROW, *supra* note 4, at 734-38; *see also* Brancazio v. Underwood, No. 2:98-0495 (S.D. W. Va. June 11, 1998) (LEXIS, Genfed Library, Current File); Planned Parenthood v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa 1998); Planned Parenthood v. Miller, 30 F. Supp. 2d 1157 (S.D. Iowa 1998); A Choice for Women v. Butterworth, No. 98-0774, 1998 U.S. Dist. LEXIS 18433 (S.D. Fla. Nov. 23, 1998); Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998); Little Rock Family Planning

United States Court of Appeals for the Seventh Circuit, in an opinion written by its prolific and well-known Chief Judge Richard A. Posner, struck down Wisconsin's "partial birth" ban statute in what is arguably the single most important and impressive judicial ruling on this issue to date.[96] Perhaps because the decision was handed down on Election Day 1998, it did not receive anywhere near the amount of news media attention that it deserved.[97]

Let me also add, and this is particularly appropriate at a law school that sponsors an annual symposium on state constitutional law,[98] that when anyone looks carefully and comprehensively at abortion litigation in this country over the last ten or twelve years, perhaps the single most underappreciated development is the extent to which tremendously good state constitutional law on abortion issues is increasingly being made by state courts and especially by courts in states such as Montana and Alaska that understandably are not thought of as left-wing political bastions.[99] Above and beyond the meaning of *Casey* and the intensity of the Supreme Court's commitment to *Casey*, there increasingly is an additional layer of constitutional protection for abortion rights claims in state supreme courts reaching from Florida[100] to New Mexico[101] to California[102] to Alaska,[103] that is talked about and highlighted far too infrequently.

Another tremendously overlooked aspect of the battling over "partial birth" ban measures was the most important abortion-related election result in November 1998. In both of the states where initiative measures aiming to ban "partial birth" abortions

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Servs. v. Jegley, No. LR-C-97-581 (E.D. Ark. 1998); Planned Parenthood v. Verniero, 1998 WL 849763 (D.N.J. 1998); Causeway Med. Suite v. Foster, No. 97-2211, 1999 U.S. Dist. LEXIS 2756 (E.D. La. Mar. 4, 1999); Nadine Strossen & Caitlin Borgmann, *The Carefully Orchestrated Campaign*, 3 NEXUS 3, 18-19 (1998). *But see* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998).

[96] *See* Planned Parenthood v. Doyle, 162 F.3d 463 (7th Cir. 1998).

[97] *See* Meg Jones, *'Partial-Birth' Abortion Law Blocked*, MILWAUKEE J. SENTINEL, Nov. 4, 1998, at 1; Cary Segall, *Court Bars Abortion Law Enforcement*, WIS. ST. J., Nov. 4, 1998, at C1.

[98] *See, e.g.*, Albany Law School of Union University, *State Constitutional Commentary*, 61 ALB. L. REV. 1391, 1391-1724 (1998); 60 ALB. L. REV. 1509, 1509-1983 (1997); 59 ALB. L. REV. 1539, 1539-1940 (1996).

[99] *See* Steven A. Holmes, *Right to Abortion Quietly Advances in State Courts*, N.Y. TIMES, Dec. 6, 1998, at A1.

[100] *See In re* T.W., 551 So. 2d 1186 (Fla. 1989).

[101] *See* New Mexico Right to Choose v. Johnson, No. 23,239, 1998 WL 959993 (N.M. Nov. 25, 1998).

[102] *See* American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997).

[103] *See* Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska 1997).

were on the ballot, Colorado and Washington State voters rejected both measures by very clear margins.[104] In light of those results, it may very well be time for even anti-abortion politicians to realize that they have to move on from "partial birth" to something new. The combination of almost total unanimity by federal and state courts, plus the quite striking Colorado and Washington State popular vote outcomes, ought to suggest to just about everyone that we indeed are close to the end of the "partial birth" abortion scam campaign.

## IX.

Where will the next abortion battles come? Most probably the next public focus will be on the so-called Child Custody Protection Act,[105] a bill which would make it a federal crime for anyone to aid a minor pregnant female in crossing a state line to get an "out of state" abortion in order to avoid the strictures of a "home" state parental involvement—either parental consent or parental notice—statute.[106] This bill came close to attaining congressional passage in the fall of 1998, but its postponement nonetheless makes it a very likely candidate for prominent congressional consideration sometime in 1999 or otherwise prior to the 2000 elections.[107] Given the history of success that abortion opponents long have had in placing obstacles and constraints on minors' abortion choices, it is difficult to imagine such a measure failing to win majority support in both houses of Congress and perhaps difficult to envision it being successfully challenged on constitutional grounds in the federal courts if indeed it is enacted into law.

Lastly, the tragic murder of Dr. Slepian again reminds us how the physical reality of abortion services being identifiably concentrated in highly visible free-standing clinics makes those structures and their staff members *so* vulnerable to the very tiny terrorist underground of abortion opponents whose slogan is not "a right to life"

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[104] Sam Howe Verhovek, *The 1998 Elections: The States—Initiatives*, N.Y. TIMES, Nov. 5, 1998, at B1; Patrick O'Driscoll, *Voters Had Their Say in 44 States*, USA TODAY, Nov. 5, 1998, at A8; Kim Murphy, *Decision '98—The Final Count*, L.A. TIMES, Nov. 5, 1998, at S1.

[105] *See* S. 1645, 105th Cong. (1998); H.R. 3682, 105th Cong. (1998).

[106] *See* S. 1645, 105th Cong. (1998); H.R. 3682, 105th Cong. (1998); *see also* GARROW, *supra* note 4, at 973-74 & n.73.

[107] *See Cloture Vote Falls Short on Abortion Measure*, National Journal's CongressDaily, Sept. 23, 1998, *available in* LEXIS, News Library, Cngdly; *Abortion Agenda Goes Awry*, National Journal's CongressDaily, Oct. 1, 1998, *available in* LEXIS, News Library, Cngdly.

but "a time to kill."[108] Nonetheless, it also is important not to exaggerate too much the size of that terrorist underground or the long-term danger that its members pose. If one looks at the annual "White Rose Banquet" that Michael Bray hosts each January in suburban Washington, D.C., to celebrate the accomplishments and sacrifices of those who believe in killing abortion providers, one rightly can conclude that this is a network composed of only about seventy-five people.[109]

Now emphasizing how modest that number really is does not make either an Eric Robert Rudolph[110] or a James Charles Kopp any less dangerous,[111] but that also is about the same size network that featured people such as J. B. Stoner and Robert E. "Dynamite Bob" Chambliss and Sam H. Bowers when they were bombing churches or ordering the deaths of civil rights workers in the Deep South in the 1950s and 1960s.[112] We should not overstate or overestimate the strength of a terrorist underground that is both finite and relatively small. Just as with Sam Bowers's Ku Klux Klan and Stoner's National States' Rights Party in the 1960s, such groups may very well never evaporate completely, but history shows that across time they *are* indeed quite controllable by means of aggressive and thorough criminal investigation and prosecution.[113]

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[108] *See* MICHAEL BRAY, A TIME TO KILL (1994); *see also* Jennifer Gonnerman, *The Terrorist Campaign Against Abortion*, VILLAGE VOICE, Nov. 10, 1998, at 36.

[109] *See* Patrick McMahon, *Abortion Opponents' Banquet to Honor Militants*, USA TODAY, Jan. 21, 1999, at A5; Philip P. Pan, *In Name of Life, Defending Violence; Banquet Honors Abortion Foes Who Killed, Burned for Cause*, WASH. POST, Jan. 22, 1999, at B8.

[110] *See* Rick Bragg, *As Clinic Blast Is Recalled, Chilling Evidence Emerges*, N.Y. TIMES, Jan. 30, 1999, at A7.

[111] *See* Michael Beebe et al., *Man Sought in Slepian Probe Tied to Radical Groups*, BUFFALO NEWS, Nov. 5, 1998, at A1; James Risen, *Tracing the Path of a Hard-Line Foe of Abortion*, N.Y. TIMES, Nov. 6, 1998, at B5; Lou Michel & Dan Herbeck, *Discovery of Car Linked to Kopp Gives Authorities New Leads in Case*, BUFFALO NEWS, Dec. 24, 1998, at C1; Lou Michel & Dan Herbeck, *Hair Found Near Slepian Home Linked to Kopp*, BUFFALO NEWS, Jan. 22, 1999, at A1; Dan Herbeck & Lou Michel, *FBI Seeks Mexican Aid to Find Kopp*, BUFFALO NEWS, Jan. 30, 1999, at A1; David Samuels, *The Making of a Fugitive*, N.Y. TIMES, Mar. 21, 1999, § 6 (Magazine), at 47.

[112] *See Conviction in Bombing in Alabama Is Upheld*, Aug. 14, 1982, at 8 (Stoner); *Bomber Behind Bars*, N.Y. TIMES, June 5, 1983, § 4, at 8 (Stoner); Bill Richards & Andrew Kilpatrick, *Alabamian is Guilty in 1963 Fatal Bombing; Chambliss Convicted*, WASH. POST, Nov. 19, 1977, at A1; Howell Raines, *The Birmingham Bombing*, N.Y. TIMES, July 24, 1983, Sec. 6 (Magazine), at 12; *Robert Chambliss, 81; Klansman Killed Girls in '63 Church Bombing*, L.A. TIMES, Nov. 2, 1985, part 4, at 7; Bartholomew Sullivan, *Bowers Convicted of Killing Dahmer; Ex-Klan Leader Gets Life Term in '66 Murder*, COM. APPEAL (Memphis), Aug. 22, 1998, at A1; Rick Bragg, *Jurors Convict Former Wizard in Klan Murder*, N.Y. TIMES, Aug. 22, 1998, at A1.

[113] *See* Garrow, *supra* note 94.

But what pro-choice supporters ought to focus on is not the law, for legal protection of a woman's right to choose abortion is in all honesty in perfectly acceptable shape.[114] Nor should people focus first and foremost on the politics of abortion, for the politics too is in adequate if nonetheless far from ideal shape.[115] What has to be focused on instead are the internal—internal to pro-choice organizations, internal to the pro-choice "movement," if one can truly call it that—realities of service provision and to what extent greater availability of "medical" abortions, for example, RU-486 (mifepristone) or methotrexate may be able to disperse the *physical* availability of abortion beyond the highly visible and easily identifiable free-standing clinics and to disperse the provision of abortion services among a significantly greater number of doctors.[116]

Over time, those developments likely will lead to some improvement in the accessibility and safety of abortion services.[117] But those will be only part of an ideal solution, for what ideally needs to be done is to repair the mistake that was made here in New York in 1970, of embracing the concentration and segregation of abortion services within an easily identifiable and readily targetable world.[118] If and when we can get to the point of having doctor after doctor after doctor stand up and say, "I provide abortion services," that is when the terrorists will be fully and finally defeated. Just as with civil rights workers in Mississippi, terrorists can believe in the utility of their tactics only if the number of people whom they believe they need to kill in order to "win" is a fairly finite and easily identifiable set of people.[119] When it becomes undeniably clear that American physicians, just like American courts and American voters, stand both resolutely and abundantly in support of a woman's right to abortion, then and only then will our historical legacy of reproductive freedom be finally and securely attained.

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[114] *See* GARROW, *supra* note 4, at 734-38.

[115] *See id.* at 738-39.

[116] *See* David A. Grimes, *Medical Abortion in Early Pregnancy: A Review of the Evidence*, 89 OBSTETRICS & GYNECOLOGY 790 (1997).

[117] *See* GARROW, *supra* note 4, at 738-39.

[118] *See id.* at 739.

[119] *See supra* notes 93-94, 108-16 and accompanying text.