

TWO STEPS FORWARD AND ONE STEP BACK

Kathryn Kolbert

Historians often remind us that landmark battles do not always end the war. Particularly after a heinous conflict, one side may declare victory. But who ultimately wins and loses is not always easy to document. More often than not the skirmishes and the suffering continue well beyond the landmark events and the underlying strife that ignited the conflict remains.

On this, the thirtieth anniversary of *Roe v. Wade*,¹ ten years after the Supreme Court's seminal ruling in *Planned Parenthood v. Casey*,² pro-choice advocates are widely perceived as the victors. Nevertheless, the skirmishes continue and the causes of the underlying conflict remain. It's probably too soon to know who won or who lost the abortion war.

In 1992, in *Planned Parenthood v. Casey*, the Supreme Court, in large part, reaffirmed the central tenets of *Roe*, resolving, after years of bitter debate, that the initial landmark ruling would remain the law of the land. The ruling surprised those of us who worked on the case as well as Court watchers and media commentators. Court-packing by the Reagan and the first Bush administrations had strengthened the hand of those who opposed abortion. Three years before the petition for certiorari in the case was even filed, four Justices (Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy) had declared their hostility to *Roe*.³ Although since joining the Court, Justice Thomas had not yet participated in any abortion cases, no one seriously believed that he would support reproductive choice. Because almost everyone had expected the Court to overrule *Roe*, commentators immediately declared victory for the pro-choice cause when the Court refused to take that reckless step. The "abortion war" was over, lamented many Court watchers and talk show hosts. Americans who were tired of the entire debate lost interest in the

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¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ See *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

continuing drama. In fact, following the ruling in *Casey*, the saliency level for the abortion issue—the importance of the issue to Americans—was probably the lowest it has been in the last twenty-five years.

In the ten years since the Supreme Court issued its ruling in *Casey*, very little has changed. State legislatures have continued to enact restrictions on abortion. Twenty-one states now have waiting period laws similar to the ones that were upheld in *Casey*.⁴ States also continue to place limits on how doctors perform abortions. These laws, known as “partial-birth abortion bans,” make criminal the way that physicians perform some abortion procedures, particularly those performed beyond the first trimester of pregnancy.⁵ State legislatures continue to target young women with laws that require parental notification or consent prior to the performance of abortion⁶ and low-income, politically disenfranchised women are also targets. State legislators continue to pass laws that prohibit the use of state Medicaid programs or state health insurance for the performance of abortion.⁷ These state restrictions are in part responsible for the decreasing the number of women obtaining abortions and the decreasing the number of doctors willing to perform them.⁸ Abortion remains available today only in thirteen percent of the counties in the nation.⁹

Although regulations of abortion have traditionally been left to the states, Congress has joined the fray and, as most of you know, the House and the Senate today are overwhelmingly controlled by those

⁴ ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF, MANDATORY COUNSELING AND WAITING PERIODS FOR ABORTION 1-2 (Apr. 1, 2004), http://www.guttmacher.org/pubs/spib_MWPA.pdf.

⁵ See CTR. FOR REPROD. RIGHTS, BRIEFING PAPER, SO-CALLED “PARTIAL-BIRTH ABORTION” BAN LEGISLATION: BY STATE (Feb. 2004), http://www.reproductiverights.org/pub_bp_pbasate.html; ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF, BANS ON “PARTIAL-BIRTH” ABORTION 1-2 (Apr. 1, 2004), http://www.guttmacher.org/pubs/spib_BPBA.pdf.

⁶ See ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF, PARENTAL INVOLVEMENT IN MINORS’ ABORTIONS 1-2 (Apr. 1, 2002) (listing states where parental consent laws and parental notification laws are enforced), http://www.guttmacher.org/pubs/spib_PIMA.pdf; CTR. FOR REPROD. RIGHTS, DOMESTIC FACTSHEET NO. F010, RESTRICTIONS ON YOUNG WOMEN’S ACCESS TO ABORTION SERVICES (Nov. 2003) (same), http://www.reproductiverights.org/pub_fac_restrictions.html.

⁷ See CTR. FOR REPROD. RIGHTS, DOMESTIC FACTSHEET NO. F003, PORTRAIT OF INJUSTICE: ABORTION COVERAGE UNDER THE MEDICAID PROGRAM (Nov. 2003), http://www.reproductiverights.org/pub_fac_portrait.html.

⁸ State laws do not account for the entire story however. A number of possible factors have been cited including the “aging of the population, greater acceptance of unwed childbearing, more effective use of contraception (including the back-up birth control method ‘emergency contraception’), shifts in attitudes, laws restricting abortion access, and a decrease in the number of abortion providers.” HENRY J. KAISER FAMILY FOUND., FACT SHEET: ABORTION IN THE U.S. (Jan. 2003) (footnote omitted), <http://www.kff.org/womenshealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14273>.

⁹ Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States*, 2001, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 22 (2003), available at <http://www.agi-usa.org/pubs/journals/3501603.pdf>.

who oppose a woman's right to choose. They exercised their might in November 2003, when President Bush signed into law the first national statute directly restricting how abortions are performed: the Partial Birth Abortion Ban Act of 2003.¹⁰ This year, Congress is expected to take scores of votes on the abortion issue, restricting both abortion and family planning for women in the U.S. and around the world.

Congressional activism on this issue dramatically raises the stakes for those of us who care about these issues. With one vote, Congress can impose a twenty-four-hour waiting period or parental consent requirements that will restrict the rights of every woman in the nation. While we have been successful in fighting national restrictions in the past, with both houses of Congress controlled by those who oppose abortion, this task becomes much more difficult.

The fact that the President adamantly opposes abortion raises additional concerns. The Bush administration has appointed anti-abortion activists to key posts in the Department of Health and Human Services, the Food and Drug Administration ("FDA"), and in other administrative jobs that affect reproductive health policy. The Bush administration also has adamantly worked to appoint those who oppose abortion to all levels of the federal courts and may soon have an opportunity to appoint another justice to the U.S. Supreme Court. Although the Bush administration has been preoccupied by other kinds of wars—the war on terrorism, the war on drugs, the war in Iraq, and skirmishes against gay marriage—don't be misled. If not at the top of the administration's agenda, attacks on abortion will certainly be launched by this administration, as the 2004 presidential race heats up and President Bush needs to solidify his support on the right.

The trends in the courts are equally ambiguous. There is no clear winner or loser. Under *Planned Parenthood v. Casey*¹¹ the lower courts must determine whether or not a particular restriction imposes an undue burden in the path of women choosing to seek abortion. These courts have a tremendous opportunity therefore, to give meaning to those words, which are difficult to apply except on a case-by-case basis. To date, several lower courts have upheld as constitutional many of the restrictions that were upheld as constitutional in the 1980s and 1990s, such as parental involvement and waiting period laws.¹² They have rejected new arguments that these types of

¹⁰ 18 U.S.C. § 1531 (2004).

¹¹ 505 U.S. 833 (1992).

¹² See CTR. FOR REPROD. RIGHTS, DOMESTIC FACTSHEET NO. F037, MANDATORY DELAYS AND BIASED INFORMATION REQUIREMENTS (July 2003), http://www.reproductiverights.org/pub_fac_manddelay1.html.

restrictions impose undue burdens. On the other hand, pro-choice litigators have been successful in challenging and invalidating partial-birth abortion bans that restrict abortion methods.¹³ The Supreme Court's decision in *Stenberg v. Carhart*, finding the Nebraska Partial-Birth Abortion ban unconstitutional was the most significant of these decisions.¹⁴

Nor is technology going to resolve this issue for us. In the last several years, nonsurgical abortion methods, including mifepristone (used with a second drug misoprostol) have been approved by the FDA and are being used by more and more women.¹⁵ Some have argued that these new methods that do not require surgical training will increase the number of physicians who are willing to perform abortions. Unfortunately, for a variety of complicated reasons, the availability of medical abortions has not significantly increased the number of abortion providers nor the number of women obtaining procedures. While I am pleased that women have another nonsurgical option, the "promise of medical abortions" has not yet been fulfilled.

On the other hand, we have seen a significant increase in the use of emergency contraception. Emergency contraception is a regime of birth control pills that can be taken up to seventy-two hours after unprotected intercourse. These pills, if administered according to a special regime, will prevent an unintended pregnancy. Its increased use has led to a significant decrease in the rate of unintended pregnancy, particularly among younger women. This is excellent news. It may not end the conflict over abortion, but it will significantly improve the lives of many women.

Several years ago I had the opportunity to meet Justice Blackmun, the author of *Roe*. I was Vice President of the Center for Reproductive Law and Policy in New York (now named the Center for Reproductive Rights) and he came to a dinner we sponsored to celebrate our opening. I asked him at the time, "Why is there such a battle over *Roe v. Wade*? Do you think the issue will ever be resolved?" Justice Blackmun responded quite philosophically: "You know the fight over abortion requires advocates to take two steps forward and one

¹³ ACLU, FACT SHEET, ABORTION BANS: IN THE STATES (Mar. 26, 2004), <http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=12281&c=148>.

¹⁴ 530 U.S. 914 (2000).

¹⁵ See Irving M. Spitz et al., *Early Pregnancy Termination with Mifepristone and Misoprostol in the United States*, 338 NEW ENG. J. MED. 1241-47 (Apr. 30, 1998) (concluding that the mifepristone-misoprostol regimen is an effective way to terminate some pregnancies, especially those with durations of forty-nine days or less). The distributor of mifepristone, Danco Laboratories, reports on its website that 200,000 medical abortions were completed in the three years after it was approved by the FDA. Danco Laboratories, LLC, *Using Mifeprex, Frequently Asked User Questions*, http://www.earlyoptionpill.com/may_faqs.php3 (last visited Apr. 30, 2004).

step back.” We’ll make progress, he implied, as long as we are patient. Like Justice Blackmun, I am confident that as the generations pass, we will continue to make progress. Nevertheless, it has been thirty years since *Roe* was decided and we’ve been doing this “forward and back” two-step for much too long. I am exhausted by it and don’t think it’s fair that we have to impose this dance upon another generation of Americans. Therefore I will spend the rest of my time here this afternoon to share with you several ways that I think we can move in a new direction in order to end the seemingly interminable dance over abortion.

One of the difficulties with making progress on the abortion issue is that the two sides—those who believe in choice for all American women and those who oppose abortion—have been literally screaming at each other for a very long time. Convinced that we each are right, we don’t listen to each other’s arguments and we don’t respect each other’s views. As someone who has been at the forefront of the public fight on this issue, it seems to me that pro-choice leaders—in a knee-jerk response—reject most, if not all of the values espoused by those who oppose us. To truly end the battle over abortion, we must stop that automatic response. There are several goals put forth by the anti-abortion movement that I agree with and respect. Although I strongly disagree with the ways they propose to achieve those goals, recognizing that we have common goals is a good first step in trying to tone down and eliminate the war that has been waged in our name. Please note, that I am not advocating efforts to achieve common ground which I find to be a cumbersome and unnecessary step. We do genuinely disagree with our opponents about the steps we must take to implement social policy in this area. I am only advocating that we recognize common values and begin, as a movement, to make our policy solutions in these areas a higher priority.

For example, I believe—along with those who oppose abortion—that too many women in the United States obtain abortions. In 2000, 1.3 million women in the nation had an abortion, making it one of the most common medical procedures in the country.¹⁶ While I firmly believe that any woman facing an unintended pregnancy should have the choice about whether to carry that pregnancy to term and access to affordable medical attention, we—as a movement—have an obligation to put many more of our resources into reducing the number of women who face unintended pregnancies.

For example, if we are serious about preventing unintended pregnancies, we should be talking about making contraception

¹⁶ Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 8 tbl.1 (Jan./Feb. 2003), available at <http://www.guttmacher.org/pubs/journals/3500603.pdf>.

universally available. Those of us who have been working on this issue for many years will remember discussions about universal health care. In the 1970s, the demand for universal access to the full range of reproductive health services was commonplace. But pro-choice leaders have not been talking about universal access to reproductive health services, or even the more limited demand of universal contraception and we need to do so. For less than \$1.50 per person, per month, every health insurance plan in America, including all public programs, could provide coverage for all forms of FDA approved birth control, including emergency contraception and hundreds of thousands of women could be spared the trauma of unintended pregnancies.¹⁷ Pushing pharmaceutical companies to make contraceptive choices available to the uninsured at reduced or low cost is both reasonable and achievable. Requiring manufactures to repackage the pill for emergency use and making it available over the counter so that women can obtain emergency contraception without going back to her doctor, will reduce unintended pregnancy and eliminate the need for abortion more dramatically than any twenty-four-hour waiting period, parental notification statute, or other restrictions on abortion that have been the focus of legislative debate over the last thirty years.

Similarly, like those who oppose abortion, I also believe that society has a general interest in supporting women who choose to have children. Not surprisingly, there are many ways for policy makers to support families and children without making abortion more difficult to obtain. These policies are cost effective and compassionate alternatives to those put forward by the anti-abortion activists over the last two decades. For example, improving health counseling and nutrition services to pregnant women who cannot otherwise afford maternity care will support child bearing much more than denying Medicaid funding for abortion—a policy based on the view that government ought to support childbirth over abortion. Similarly, infertility research and the prevention of sexually transmitted diseases will be remarkably more successful at encouraging childbirth than any legislation that bans partial-birth abortion. But because we have been fixated with discrediting all of our opponent's values in the effort to defend abortion, I think that we have lost an opportunity to shift the public debate on maternity care services.

I also believe that pro-life advocates are correct when they assert that young people ought to talk to their parents about sex and

¹⁷ Jacqueline E. Darroch, *Cost to Employer Health Plans of Covering Contraceptives* (June 1998), http://www.guttmacher.org/pubs/kaiser_0698.html (finding that it would cost employers \$1.43 per employee, per month to provide reversible contraceptives under insurance plans to the same extent that prescription drugs and supplies are covered).

pregnancy. Given that many teenagers won't share a civil word with their parents about just about anything and that many adults won't talk about sex with their own partners, heaven forbid their children, it seems unrealistic to believe that law alone, particularly laws that mandate that parents talk to their children about sex and sexuality, are going to increase dialogue. On the other hand, providing age-appropriate sex education and finding ways to bring parents and their teenagers together in protective settings to have these discussions (if not with their parents at least with other interested adults), can improve communication and prevent unintended pregnancy as well.

And lastly, although I can't imagine that I share all the values of the Christian Coalition or many of the groups that are working to oppose abortion, I do believe that the discussion of values in public policy debate is very, very important. While this is often hard to do, it seems to me that focusing on the similarities *and* differences in our values would be more productive than the charges of "murderer" or "baby killer" or "right-wing extremist" or misogynist that now go back and forth in public dialogue.

So on this, the thirtieth anniversary of *Roe v. Wade*, I am here today to turn in my dancing shoes and to challenge both sides of the abortion debate—the leaders of the pro-life and the pro-choice movements—to have an honest discussion about pregnancy prevention, reproductive health care, sex education, and the values we each hold. It is my hope that through this public discussion, can we begin to end the continuing civil war over abortion.

I am often asked what motivated me to spend so much energy on these legal questions and fight the same battles year in and year out. Defending *Roe* and preserving its protections has meant that millions of women have been able to obtain safe medical care. This is an important accomplishment and I am thrilled to have participated in the effort. But the true heroes of the fight for reproductive rights are not the lawyers. It is the women who have risked their lives to make reproductive choices. Thus, before we turn to the rest of today's program, I would like to share with you a letter from Sherry in Peoria, Illinois. I know some of you have heard this letter before because I read it whenever I have the opportunity. She says:

Let me begin by saying that I have been married for 38 years; I am the mother of 5 wanted and thoroughly loved children; the grandmother of 3; and the victim of a rapist and an illegal abortionist.

In the mid-1950's I was very brutally raped, and this act resulted in a pregnancy. At first suspicion that this might be the case, I went immediately to my doctor, told him what had happened and pleaded for help. But, of course, he couldn't give it. To have performed an abortion would have meant chancing up to 20 years in prison, both for him and for me.

Turned away by this reputable physician, I went to another that was considerably less reputable. This second doctor's sense of ethics left much to be desired—his practice consisted primarily of pushing amphetamines; but even he felt that performing an abortion, no matter what the reason, was just too risky an undertaking.

Knowing nowhere else to turn, and completely terrified by all I had heard about the local abortionist, I went home and proceeded to try all the sundry "home remedy" things that I had heard of—things like deliberately throwing myself down a flight of stairs, scalding the lower half of my anatomy in hot tubs, pounding on my abdomen with a meat mallet, and even drinking a full pint of castor oil (which I assure you is no enviable feat).

The single notable effect of all these efforts and more was that I became very black and blue and about a month more pregnant than I had been when I started. And so, as a final desperate measure, I took the only option left. I went to see the local back alley abortionist—the man who had no cause to fear the police because he was paying them off.

I think the thing I will always remember most vividly was walking up those three flights of darkened stairs and down that pitchy corridor and knocking on the door at the end of it, not knowing what lay behind it, and not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it; more than my fear that I would surely become infected; more than the fact that the man was an alcoholic, and was drinking throughout the procedure—a whisky glass in one hand, and a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subjected to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'—ha!ha!—kept 'em on before"; more than the degradation of being asked to perform a deviant sex act after he aborted me (he offered me 20 of my 1,000 bucks back for a "quick blow job"); more than the hemorrhaging and the peritonitis and the hospitalization that followed, more even than the gut-twisting fear of being "found out" and locked away for perhaps 20 years; more than all those things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chill my blood still.

I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; I might never again see my two children, my husband, or anything else of this world.

And still, knowing this, knowing that my 24th birthday might never be, I had no choice. . . . Thirty years later, I still have nightmares about those dark stairs and that dark hall and what *was* on the other side of that door. And I resent them. I resent them more than any words can say what I had to endure to terminate an unbearable pregnancy. But, I

resent even more the idea that ANY WOMAN should, for ANY REASON, ever again be forced to endure the same.¹⁸

On this the thirtieth anniversary of *Roe*, I ask that you join with me and other reproductive health activists around the world to ensure that no woman will ever have to seek her medical care in a back alley. Thank you.

¹⁸ NATIONAL ABORTION RIGHTS ACTION LEAGUE, THE VOICES OF WOMEN, ABORTION: IN THEIR OWN WORDS 5-6 (n.d.).