

25 Years After *Roe*: New Technological Parameters For an Old Debate

By Susan A. Cohen

A quarter-century after the U.S. Supreme Court handed down its landmark decision in *Roe v. Wade*, there is little, at its core, that is “new” about the political abortion debate. Antiabortion activists continue to insist that the focus properly should be on the rights of the fetus, while prochoice advocates stress the beneficial impact that safe, legal abortion has had on the rights and health of women and their families.

One thing that has changed since *Roe*, however, is technology—and advances in this area have given something to each side over the years. On the one hand, the presumed point of fetal viability has declined. Contrary to popular opinion, the decline has been slight, only a few weeks; but it has been enough for the antiabortion movement to mount a credible public relations and legislative campaign around the small fraction of abortions performed around the point at which the typical fetus is capable of living outside the woman’s body and plausibly could be considered a “baby.” Meanwhile, at the other end of the continuum, technologies are now in place, although not yet widespread, that offer women the option of extremely early abortion, as well as contraception after unprotected intercourse but before a pregnancy might actually begin.

While “late,” and specifically “partial-birth,” abortion currently dominates the political debate, it is these other developments that hold the potential for significantly improving the lives and health of women. Combined with

a major public education and public policy campaign around making abortions less necessary by reducing unintended pregnancy through contraceptive use—as proposed forcefully on the January 22 anniversary of *Roe* this year by both President Bill Clinton and Vice President Al Gore—they also may offer the best hope for moving the abortion and reproductive rights debate in a new and positive direction.

Legal—But Hard to Get

Ever since *Roe* was decided, public opinion has held fairly steadily to the position that abortion in the early stages of pregnancy should remain legal, but that a woman’s ability to obtain one should not necessarily be easy. This view is reflected in a recent New York Times/CBS News poll, which found that 61% of adults support the right to abortion during the first trimester, and more than three-quarters oppose a constitutional amendment outlawing abortion. According to the poll, however, approval of legal abortion after the first trimester drops off dramatically, and there is overwhelming support for restrictions on abortion access, such as parental consent and waiting-period requirements, which affect all stages of pregnancy.

Antiabortion activists have capitalized on the public’s “permit but discourage” attitude with a successful legislative campaign to make abortions, at least for certain categories of women, more difficult to obtain. Public funding of abortion for women who depend on government for their health care has been terminated at

the national level except in the most extreme circumstances and exists at the state level only in selected places and often by order of state courts. Insurance coverage for abortion also has been eliminated by the federal government for its own employees, and 12 states have followed suit, restricting either private insurance coverage or public and private both. Further, 29 states are enforcing laws limiting access to abortion for minors, and 12 are requiring a delay between the time a woman seeks an abortion and when she may actually have one, along with state-directed “counseling” designed to discourage having the abortion.

As onerous as these restrictions are, none directly challenges the underlying legality of abortion. Yet, while the antiabortion leadership advocates these laws as ends in themselves, the primary motivation behind them has been the hope that they would cause the prochoice majority to rethink its basic position on abortion legality. It hasn’t.

To the contrary, the core right to abortion, at least in the near term, seems secure both politically and constitutionally as a result of two important events. Following a period

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in which the U.S. Supreme Court appeared poised to overturn *Roe*, a majority of justices reaffirmed their commitment to it in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Later that same year, the election of the country’s first avowedly prochoice president reassured the public that any nominees to the Supreme Court during his term would support the retention of *Roe*.

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Late Versus Early

By the early 1990s, with the issue of legality *de facto* “settled,” it was clear that activism on the issue—in either direction—was going to require something radical. That moment arrived with the 1994 Republican takeover of Congress, which elevated lawmakers antagonistic to abortion rights into leadership positions in both bodies. Once in control of the process, they were well-positioned to catapult to the top of the agenda the issue of “partial-birth” abortion. What had been previously considered a fringe issue was now the main event.

In terms of public relations, “partial-birth” abortion has worked spectacularly well in comparison with earlier attempts by the antiabortion movement to shift attention toward the “baby” and away from the woman. And, as a legislative matter, passage of the Partial-Birth Abortion Ban Act represents the first time Congress ever has endorsed criminalizing an aspect of abortion practice.

But for all its sound and fury, this campaign has failed so far to make major inroads in terms of new law. This is so, in part, because its proponents refuse to make the legislative compromises—such as allowing the procedure in cases where it might be needed to save a woman’s health as well as her life—necessary to avert presidential vetoes. This year, Congress will attempt to override the president’s second veto of the legislation. An override majority is assured in the House, but three senators would have to switch their positions from a year ago in order for the bill to become law over the president’s objection.

Similar dynamics have thwarted enactment of the ban in several states. In others, where the ban has become law and been challenged, it

has been blocked in federal court. Various courts have deemed the ban unconstitutional on the grounds that it would interfere even with pre-viability abortions and that the legislation is so vaguely written it would outlaw not just one procedure but an entire category of abortion procedures (see related story, page 6).

It is undeniable, nonetheless, that “partial-birth” abortion’s domination of the political agenda has put the prochoice movement on the defensive. Even more significantly, it has seriously hampered the movement’s ability to refocus public attention on early abortion—when, in fact, nine in 10 abortions take place—and on the need to avoid unintended pregnancy in the first place through family planning.

In practice, however, the fact remains that the option of a medical, nonsurgical abortion is increasingly available around the country, at least on a trial basis. Both methotrexate and mifepristone (RU 486) can be used within the first seven weeks of pregnancy. At the same time, new surgical techniques are coming into use as early as ten days gestation—virtually as soon as a woman can confirm her pregnancy with a home pregnancy test. Finally, so-called emergency contraception, which involves taking a high dose of oral contraceptive pills within 72 hours of unprotected intercourse, is just becoming available on a widespread basis.

What’s on the Horizon?

In his remarks commemorating the 25th anniversary of *Roe*, President Clinton recommitted his administration to efforts to keep abortion safe and legal, and, in a significant departure from his standard mantra, he also emphasized the importance of keeping it “accessible.” He reiterated that abortion should be rare, and for the first time he expanded on that statement to say that the surest way to accomplish this is “to prevent

unintended pregnancy by making comprehensive family planning and sex education programs more widely available.”

Vice President Gore elaborated on this message in his *Roe* anniversary speech at an event hosted by the National Abortion and Reproductive Rights Action League. Gore invoked the importance of family planning no fewer than eight times as “the single most effective tool for reducing abortions in America.” He also backed up his rhetoric by announcing that the administration will propose to Congress a \$15 million increase for the beleaguered Title X family planning program (see related story, page 1). He added that the administration pledges to “expand our commitment to international family planning and to research on contraception here at home.”

There is little reason to doubt that the public would support making “prevention” a central theme in the ongoing discussion over women’s

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reproductive rights and health. From the viewpoint of the prochoice movement, this would mean minimizing the number of late abortions by increasing access to early abortion and, at the same time, making abortions less necessary by reducing unintended pregnancy itself through increased contraceptive availability and use. Clearly and understandably, the antiabortion leadership never will embrace the first half of that agenda. The only question is whether they ever will embrace the second.