

## RECYCLING WRONGS: ALL OVER AGAIN

Catherine W. Short<sup>\*†</sup>

### INTRODUCTION

In reading Ms. Strossen's article on reproductive rights,<sup>1</sup> I was struck less by what she said than what she left unsaid. It amazed me that Ms. Strossen could say as much as she did about the battles over and threats to "reproductive freedom" without once alluding to the question at the heart of these issues. She prides herself on using each side's preferred labels, "pro-choice" and "pro-life," but never gives the reader a hint as to the meaning behind the labels.<sup>2</sup> What is the choice she is "pro"? Whose is the life in "pro-life"? Rather than define her terms, Ms. Strossen merely repeats a snide joke that being pro-life means not caring about people after birth.<sup>3</sup>

I am perfectly happy being called "anti-abortion," particularly when abortion is accurately explained. Abortion is the deliberate killing of a living human being in the womb; I'm against it. That abortion ends a human life is not a matter of opinion, religious or otherwise, but of scientific fact. As Ron Fitzsimmons, Director of the National Coalition of Abortion Providers said, "The abortion-rights folks know it, the anti-abortion folks know it, and so, probably, does everyone else . . . . One of the facts of abortion . . . is that women enter abortion clinics to kill their fetuses. 'It is a form of killing . . . . You're ending a life.'"<sup>4</sup>

Consider this 1970 editorial in the journal of the pro-abortion rights California Medical Association. The topic was the displacement of the traditional Western ethic emphasizing the intrinsic worth of every human life with a more pragmatic ethic in which "demographic, ecological, and social realities" come into play.<sup>5</sup> The clearest example of where this was already occurring was in the area of abortion. The editorial states,

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\* Legal Director, Life Legal Defense Foundation, Napa, California; J.D. 1983, University of California at Berkeley School of Law (Boalt Hall); B.A. 1980, Thomas Aquinas College.

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1. Nadine Strossen, *Reproducing Women's Rights: All Over Again*, 31 VT. L. REV. 1 (2006).

2. *Id.* at 3.

3. *Id.* at 5. *But see* ARTHUR C. BROOKS, WHO REALLY CARES: THE SURPRISING TRUTH ABOUT COMPASSIONATE CONSERVATISM 10–12 (2006) (noting that, on average, religious conservatives (i.e., the Religious Right) give several times more money to charity than secular liberals (e.g., card-carrying ACLU members)).

4. David Stout, *An Abortion Rights Advocate Says He Lied About Procedure*, N.Y. TIMES, Feb. 26, 1997, at A12.

5. Editorial, *A New Ethic for Medicine and Society*, CAL. MED., Sept. 1970, at 67, 68.

The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary. . . . Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.<sup>6</sup>

For Ms. Strossen, apparently, the question of whether abortion kills a human being is simply irrelevant. Throughout her entire essay, she not only fails to address the question; she doesn't even acknowledge its existence. The closest she comes is a glancing reference to the alleged enormity of "protecting the fetus's potential life even at the cost of the pregnant woman's actual life."<sup>7</sup> However, there is no such thing as a fetus's "potential life." Any fetus in the womb either is actually alive or was actually alive and is now dead. If an obstetrician ever told a woman that her unborn child was "potentially alive," she'd be looking for a new obstetrician. By avoiding the sticky issue of what abortion actually is, Ms. Strossen can reduce the abortion debate to an argument between those who would grant women equality versus those who would enslave them. It is all so simple when you avoid mentioning the life in "pro-life."

Along that line, in 1995 the ACLU ran a series of advertisements purporting to show that the majority of Americans agreed with the ACLU on a number of contentious issues; specifically, drug decriminalization, prayer in schools, homosexual rights, and legalized abortion.<sup>8</sup> In three of the ads, the ACLU's name appeared resting on a black box with white

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6. *Id.*

7. Strossen, *supra* note 1, at 23. This is the only reference to "fetus" in the entire essay. Moreover, the word "embryo" never appears, nor, needless to say, does "unborn child" or "baby."

8. ACLU Advertisements, *NEW REPUBLIC*, July 17, 1995, at 15, 17, 19, 21 [hereinafter ACLU Advertisements I]; ACLU Advertisements, *NEW REPUBLIC*, July 24, 1995, at 15, 17, 19, 21 [hereinafter ACLU Advertisements II].

lettering reading: “Live and Let Live.”<sup>9</sup> A worthy sentiment: “Live and Let Live.” But even for the ACLU, such tolerance has its limits. In the ad about abortion, the words “Live and Let Live” were missing, replaced by—nothing.<sup>10</sup> The ad was thus a metaphor for abortion itself: life was removed, leaving behind a dark, empty space.

I think it is safe to say that Ms. Strossen, the ACLU, and many other abortion advocates have fully embraced the new ethic discussed in the California medical journal above. It doesn’t matter that abortion takes human lives because there are more important values at stake, such as women’s equality. In order for women to be equal, they must be able to be sterile. They must be able to be sexually irresponsible. They must be able to be like men, when men are at their worst.

Ms. Strossen assumes, with little attempt at proof, that abortion is necessary for women’s equality, not just economic equality but equality with regard to sexual license.<sup>11</sup> Women must be able to control their fertility so that they don’t have to control their sexuality. She mocks abstinence-only programs for teaching young people that “sexual activity outside of [marriage] is likely to have harmful psychological and physical effects.”<sup>12</sup>

But that statement is true, especially for women. When a man and woman engage in a sexual relationship outside marriage, the smart money says that the woman will end up sorry, much sorer than the man. Leaving aside emotional harm, the woman is the one at greater risk of a sexually transmitted infection and the one whose future fertility is most in jeopardy from such infections;<sup>13</sup> she is the one who risks pregnancy; she is the one expected to ingest hormonal cocktails to disrupt her body’s normal reproductive functioning; she is the one who will have to decide whether to undergo an abortion in the all-too-likely event of a contraceptive failure;<sup>14</sup> and she is the one who would be responsible for raising an out-of-wedlock child, most likely living below the poverty level. For Ms. Strossen, however, it is still the heady 1970s, with more sex and fewer consequences;

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9. ACLU Advertisements I, *supra* note 8, at 15, 17, 19; ACLU Advertisements II, *supra* note 8, at 15, 17, 19.

10. ACLU Advertisements I, *supra* note 8, at 21; ACLU Advertisements II, *supra* note 8, at 21.

11. Strossen, *supra* note 1, at 4.

12. *Id.* at 10.

13. ANONYMOUS, M.D., UNPROTECTED 14–17, 107–11 (2006); Univ. of Chi. Med. Ctr., Sexually Transmitted Diseases (STDs), <http://www.uchospitals.edu/online-library/content=P01561> (last visited Jan. 23, 2008).

14. See Haishan Fu et al., *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth*, FAM. PLAN. PERSP., Mar.-Apr. 1999, at 56, 56. “About three million pregnancies in the United States (48%) were unintended in 1994. Some 53% of these occurred among women who were using contraceptives.” *Id.* “Unmarried cohabitating women exhibit the highest overall failure rate (17%) during the 12 months of [contraceptive] use.” *Id.* at 61.

not for her are the lessons of the last thirty years.

But isn't legal abortion necessary to protect women's lives? As Ms. Strossen says, "[W]e know from the bad old days, before abortion was legalized, that women will still have abortions anyway."<sup>15</sup> But how many women will still have abortions? I always find it interesting that abortion rights supporters state so emphatically that women will be undeterred from getting abortions just because they are illegal. But these same abortion rights supporters insist that laws simply requiring twenty-four-hour reflection periods pose, for many women, an insurmountable obstacle to obtaining a legal abortion.<sup>16</sup> They also imply that many women would be unaware they could get legal abortions and unable to find a legal abortion provider in the phone book on their own, without direction from federally funded clinics.<sup>17</sup> Apparently they believe women are better able to access illegal abortions than legal ones.

Ms. Strossen continues: "But that means too many women will become victims of dangerous back-alley abortions, which too often cause infertility or even death."<sup>18</sup> Ms. Strossen does not hazard any citation for this claim, leaving one to ask, How many is "too many"? And how often is "too often"? Could it not with equal fairness be said that "too often," "too many" women die, are injured, or are made sterile by legal abortions and that therefore abortion should be criminalized?

Becky Bell, the seventeen-year-old girl who allegedly was killed by a parental notification law, is cited as a case in point of the dangers of illegal abortions.<sup>19</sup> Ms. Strossen reminisces about a rally in 1992 where the crowd was chanting, "No more Becky Bells! No more Becky Bells!"<sup>20</sup> They must be happy to know that the sky has not fallen after all: fifteen years later, and

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15. Strossen, *supra* note 1, at 6. Ms. Strossen's recollection of when these "bad old days" were is a little muddled. She states that she was at college in Massachusetts, before *Roe* was decided, when the Boston District Attorney prosecuted Kenneth Edelin for performing an abortion. *Id.* at 12. In fact, the abortion and the prosecution both took place after *Roe*. See *Commonwealth v. Edelin*, 359 N.E.2d 4, 5, 18 (Mass. 1976) (overturning conviction for insufficient evidence of live birth and wanton or reckless conduct). Dr. Edelin was prosecuted not for an illegal abortion, but for manslaughter—for deliberately holding the unborn child inside the mother's womb for three minutes, after detaching the placenta from the uterine wall, until the child died. *Id.* at 9–10.

16. Strossen, *supra* note 1, at 28.

17. See *Rust v. Sullivan*, 500 U.S. 173, 195–96, 202–03 (1991) (rejecting petitioners' argument that restricting distribution of family planning funds will infringe on the woman's right to receive "[a]bortion counseling as a 'method of family planning'"). See generally Am. Civil Liberties Union, *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, <http://www.aclu.org/reproductiverights/gen/16463res20031201.html> (last visited Mar. 19, 2008) (providing a synopsis of *Rust v. Sullivan*).

18. Strossen, *supra* note 1, at 6.

19. *Id.* at 19.

20. *Id.*

despite the adoption of many more parental notification laws, there have been no more Becky Bells. In fact, Becky Bell wasn't even a Becky Bell.

Becky Bell was a young woman with a history of drug abuse.<sup>21</sup> Although she had been pregnant shortly before her death, the autopsy showed no signs of infection in her uterus, but rather in her lungs.<sup>22</sup> She apparently died of an acute respiratory infection, possibly brought on by ingestion of drugs at a party.<sup>23</sup> However, learning of the pregnancy after her death, her parents jumped to the conclusion that she had had an illegal abortion, and thus a myth was born.<sup>24</sup>

Ms. Strossen calls Becky “an all-American teenager.”<sup>25</sup> What does this mean? Was she “all-American” rather than African-American, like Dawn Ravenell, the thirteen-year-old girl from Queens, New York, who died following a “safe, legal” abortion in 1985?<sup>26</sup> A school counselor had advised Dawn how to get an abortion so her parents wouldn't know.<sup>27</sup> While on the operating table, she started choking.<sup>28</sup> The abortionist put a tube down her throat and left her there, as she lapsed into a coma.<sup>29</sup> She died three weeks later, her heartbroken parents at her side.<sup>30</sup> Why not “No more Dawn Ravenells”?

Is Jane Reeves as “all-American” as Becky Bell? Jane, a mentally challenged twelve-year-old girl, was secretly taken to an abortion clinic by the older man who had impregnated her.<sup>31</sup> The clinic provided a “safe, legal” abortion and sent her on her way, back to be sexually abused again and again, until she became pregnant again, and the same man brought her in for another abortion.<sup>32</sup>

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21. See J.C. WILLKE & BARBARA WILLKE, WHY CAN'T WE LOVE THEM BOTH 228–33 (1997), available at [http://www.abortionfacts.com/online\\_books/love\\_them\\_both/why\\_cant\\_we\\_love\\_them\\_both\\_28.asp](http://www.abortionfacts.com/online_books/love_them_both/why_cant_we_love_them_both_28.asp) (stating that “her parents admitted her to the hospital for an almost two-month detoxification program”).

22. *Id.*

23. *Id.*

24. *Id.* Even if one believes that Becky died of infection following an induced abortion, there would be no reason to believe it was an illegal abortion. Becky was considering going to Kentucky, which had no parental notification law, for a legal abortion. *Id.* at 230.

25. Strossen, *supra* note 1, at 19.

26. Emily Sachar, *Abortion Team Told to Pay \$1.2M in Teen's Death*, NEWSDAY (New York), Dec. 11, 1990, § News, at 6.

27. James A. Miller, “Safe & Legal”—*In New York*, PROLIFE ISSUES, Apr. 1, 1996, <http://www.ebtn.org/library/PROLIFE/SAFN.Y.TXT>.

28. Sachar, *supra* note 26, at 6.

29. *Id.*

30. *Id.*; Feminists for Life in Am., Dawn Ravenell, <http://www.feministsforlife.org/weremember/dravenel.htm> (last visited Feb. 9, 2008).

31. Brief of Harlon Reeves, Individually, and as Next Friend of His Minor Daughter as Amicus Curiae in Support of Petitioner and in Support of Reversal at 1–2, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2004) (No. 04-1144).

32. *Id.*

Or is “all-American” Becky Bell like fifteen-year-old Tamiia Russell, who died on January 7, 2004, following a second-trimester abortion?<sup>33</sup> Unbeknownst to her mother, Tamiia was taken to the clinic by the sister of the twenty-four-year-old man who had impregnated her.<sup>34</sup> Later, Tamiia came home and told her family she “had begun the abortion procedure.”<sup>35</sup> After the final procedure, Tamiia began bleeding heavily; the clinic told her family this was “normal” and not to take her to the hospital.<sup>36</sup> However, her mother and guardian called the paramedics, and Tamiia died in the ambulance on the way to the hospital.<sup>37</sup>

Aren’t Dawn, Jane, Tamiia, and others “too many” and “too often”? Or do those terms only apply to harm from illegal abortions? As long as it happened during a legal abortion, are they just some of those broken eggs it takes to make an omelet?

Satisfied that she has made the case for the necessity of abortion on demand, Ms. Strossen relates how some jurisdictions acted to restrict abortion in the wake of the Supreme Court’s 1989 decision in *Webster v. Reproductive Health Services*<sup>38</sup> in 1989,<sup>39</sup> and how the ACLU swung into action in response to these “threats to reproductive freedom.”<sup>40</sup> Each of her discussions of these post-*Webster* laws provides an instructive glimpse into the rhetorical workings of the abortion rights movement.

### I. UTAH’S POST-*WEBSTER* LAW

Ms. Strossen erroneously claims that Utah’s post-*Webster* law made it a felony for women to have illegal abortions.<sup>41</sup> In fact, that law explicitly exempted women from any penalties.<sup>42</sup> Ms. Strossen also mistakenly asserts that eight years earlier, the Utah Legislature “apparently passed for essentially symbolic reasons” a law making illegal abortions a capital

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33. Paul Nowak, *Family of Detroit Girl Who Died from Abortion Speaks Out*, LIFENEWS, Apr. 9, 2004, <http://www.lifenews.com/state504.html>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

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

39. See Strossen, *supra* note 1, at 20–23 (discussing Louisiana’s, Utah’s, and Guam’s anti-*Roe* laws).

40. *Id.* at 3.

41. *Id.* at 20.

42. See UTAH CODE ANN. § 76-7-314(1)(b) (2003) (“[A] woman who seeks to have or obtains an abortion for herself is not criminally liable.”); see also *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1547–48 (D. Utah. 1992) (noting that “a woman who seeks or obtains an abortion does not risk criminal prosecution”).

offense.<sup>43</sup> In fact, the earlier law was an expansion of the criminal homicide statute enacted in response to a Utah Supreme Court case holding that an unborn child could not be a victim of vehicular homicide under the then-existing statute.<sup>44</sup> In amending the statute to include unborn children as potential victims of homicide, the Legislature exempted lawful abortion because of the obvious conflict with *Roe v. Wade*.<sup>45</sup>

In amending the criminal homicide statute, the Utah Legislature was not making a symbolic statement about abortion. Rather, it was doing what two-thirds of the states have done; namely, to grant unborn children recognition and protection from criminal violence in their own right.<sup>46</sup> As in Utah's case, passage of these laws is often unrelated to efforts to restrict abortion, but instead reflects the public's common sense that the unborn child is also a member of the human race and thus deserves protection. The public knows that when Scott Peterson killed his pregnant wife, he killed two people, not just one.<sup>47</sup> They know that when Robert Keeler told his pregnant ex-wife that he was going to "stomp" the fetus out of her and proceeded to do so, he had committed murder.<sup>48</sup> They know that when Manishkumar Patel slipped his pregnant girlfriend RU-486 in a drink, he was attempting to murder their unborn child.<sup>49</sup> That is the truth that is reflected in homicide statutes such as Utah's.

These were the laws—a law restricting abortion but specifically exempting women from liability, and a homicide law aimed at protecting unborn children from criminal violence—that the ACLU proclaimed constituted a covert attempt to put women in front of firing squads if they

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43. Strossen, *supra* note 1, at 20.

44. See *State v. MacGuire*, 84 P.3d 1171, 1175 (Utah 2004) (providing the legislative history of amendments to the Utah criminal homicide statute; specifically, the inclusion of "unborn child" within the definition of "human being").

45. *Id.* at 1182 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

46. See, e.g., NEB. REV. STAT. § 28-389 (Supp. 2006) (defining "unborn child" as "an individual member of the species *Homo sapiens*, at any stage of development in utero, who was alive at the time of the homicidal act and died as a result thereof whether before, during, or after birth"); S.C. CODE ANN. § 16-3-1083(C) (Supp. 2006) (defining "unborn child" in similar manner as above statute); *People v. Taylor*, 86 P.3d 881, 884–85 (Cal. 2004) (holding a fetus is a "person" for the purposes of California's implied malice doctrine).

47. Kimberly Edds & Amy Argetsinger, *Peterson Convicted of Double Murder*, WASH. POST, Nov. 13, 2004, at A01.

48. See *People v. Davis*, 872 P.2d 591, 594 (Cal. 1994) (discussing the legislative history of California's feticide law, spurred by the court's decision in *Keeler v. Superior Court*, 470 P.3d 617 (Cal. 1970)).

49. See Dinesh Ramde, *Records Allege Abuse Before Miscarriages*, FOX NEWS, Dec. 7, 2007, <http://www.foxnews.com/wires/2007Dec07/0,4670,MiscarriagesCharges,00.html> (reporting that a man was charged "with seven felony counts, including first degree intentional homicide of an unborn child," for secretly putting RU-486 in pregnant girlfriend's drink).

obtained illegal abortions.<sup>50</sup> However, as soon as the ACLU raised this issue, the Utah Legislature met in special session to amend the criminal homicide statute to clarify that neither women *nor* doctors *nor* anyone else would be prosecuted for homicide for illegal abortions.<sup>51</sup>

This episode illustrates the abortion rights movement at its demagogic worst: running an advertisement telling the country that Utah planned to execute women who have illegal abortions, knowing this was utterly false. Adding injury to insult, ACLU attorney Janet Benshoof included the time spent crafting the ad in her attorney fee application in the case challenging the abortion law.<sup>52</sup>

But the dishonesty doesn't end there. Abortion rights supporters imply that any abortion restriction that would impose a penalty on the woman who procures the abortion demonstrates how callous and hard-hearted anti-abortionists are. What has been lost in the mist of history is that the lack of criminal penalties for women in pre-*Roe* statutes was a major part of the argument for declaring them unconstitutional. The ACLU's Sarah Weddington argued that the absence of criminal penalties for women who obtain illegal abortions showed that the laws were not directed at the state's interest in protecting unborn children, but were intended to serve only the interest in protecting maternal health, an interest that has since been reversed by medical advances.<sup>53</sup> She also argued that the failure to treat illegal abortion like murder was evidence that abortion restrictions were not premised on the state's interest in protecting the life of the unborn child.<sup>54</sup>

In other words, abortion rights advocates are ready to pounce on the failure to prosecute women and to treat abortion as murder as evidence of the insincerity of anti-abortion convictions about when human life begins. These omissions, they claim, show that the anti-abortion movement is simply anti-woman—not pro-child. However, they also pounce on laws that would in fact treat abortion like murder as evidence of how heartless,

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50. See Tamar Lewin, *Harsh Loophole in Utah Abortion Law*, N.Y. TIMES, Mar. 9, 1991, § 1, at 8 (“I call this the dupe statute, because on its face, it pretends that women will face no criminal penalties, but really it makes them subject to the death penalty,” asserted Janet Benshoof, the A.C.L.U. lawyer who plans a constitutional challenge to the law this month.”).

51. Act of Apr. 18, 1991, ch. 2, 1991 Utah Laws 1st Spec. Sess. 1322 (codified as amended at UTAH CODE ANN. § 76-5-201(b) (Supp. 2007)).

52. See *Jane L. v. Bangerter*, 828 F. Supp. 1544, 1550 & n.8 (D. Utah 1993) (striking the hours spent working on the advertisement), *rev'd*, 61 F.3d 1505 (10th Cir. 1995).

53. Transcript of Oral Argument, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), available at [http://www.oyez.org/cases/1970-1979/1971/1971\\_70\\_18/argument](http://www.oyez.org/cases/1970-1979/1971/1971_70_18/argument).

54. *Id.*; see also *Roe*, 410 U.S. at 151 (“Parties challenging state abortion laws . . . point out that in many States . . . the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.” (citing *e.g.*, *Smith v. State*, 33 Me. 48, 55 (1851))).



misogynistic, and extreme the anti-abortion movement is. Heads they win, tails we lose.

## II. GUAM'S POST-*WEBSTER* LAW

In her discussion of Guam's post-*Webster* law, Ms. Strossen relates how the indefatigable Janet Benshoof flew to Guam, where, following a speech announcing the ACLU's plans to challenge the law, "Janet found herself in jail," because the new law "criminalized advocacy of abortion rights."<sup>55</sup> It makes a great story, but it's not true.

The Guam law did not criminalize advocacy of abortion rights, but soliciting women to have abortions (i.e., soliciting a crime).<sup>56</sup> Ms. Benshoof did not merely announce the ACLU's intent to challenge the law; she gave out the name and phone number of a clinic in Hawaii where women could get abortions.<sup>57</sup> She did not end up in jail for this; instead, she was asked to appear voluntarily at an arraignment, which she did.<sup>58</sup> The charges were subsequently dismissed, someone in the Attorney General's office apparently realizing that as abortions were not illegal in Hawaii, it was not solicitation to advise women how to get abortions there.

I would not find it worthwhile to set the record straight about this incident had Ms. Strossen not used it to make her larger point; namely, that Ms. Benshoof, and by implication other reproductive rights supporters, have and will face imprisonment for advocating their cause if anti-abortionists get their way.<sup>59</sup> Give these anti-abortion extremists an inch with our rights, and next they'll be going after our freedom of speech.

This is a very ironic argument to be making in light of the unceasing erosion of the First Amendment rights of abortion opponents over the last three decades that has been taking place with only sporadic opposition from the ACLU. I personally receive an average of one or two phone calls a month from activists who have been arrested or threatened with arrest for engaging in lawful free speech activity in public forums. Within the past year, I personally have been threatened by a police officer with going to jail

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55. Strossen, *supra* note 1, at 21.

56. See Tamar Lewin, *Guam's Abortion Law Tested by A.C.L.U. Lawyer's Speech*, N.Y. TIMES, Mar. 21, 1990, at A24 (explaining that the Guam abortion law made it "a misdemeanor for a woman to solicit or have an abortion, and a misdemeanor to solicit a woman to have an abortion").

57. See *id.* (reporting that Benshoof stated "I told them to go to Planned Parenthood [in Hawaii], and I gave them the address and telephone number"); see also *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1426 (D. Guam 1990) (stating that Benshoof notified her audience that abortions could be obtained in Hawaii and gave out the name and telephone number of an abortion provider in the state), *aff'd*, 962 F.2d 1366 (9th Cir. 1992).

58. Lewin, *supra* note 56.

59. Strossen, *supra* note 1, at 21.

for leafleting and holding a pro-life sign on a public sidewalk. I've watched the steady accumulation of laws targeting anti-abortion speech, such as signage restrictions, residential picketing restrictions, and "Mother, May I" laws, which require speakers to ask permission before handing someone a leaflet in front of an abortion clinic.<sup>60</sup> I've had a front row seat at some of the most outrageous abuses of courts' equitable power to impose injunctions targeting anti-abortion picketers.<sup>61</sup>

In several jurisdictions, it is now illegal to approach someone on a public sidewalk to hand a leaflet or talk to him or her without consent if this activity takes place within specified distances of health care facilities, usually specified to be "reproductive health care" facilities.<sup>62</sup> Let me repeat

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60. For signage restrictions, see, e.g., MENLO PARK, CAL., MUNICIPAL CODE ch. 8.44.020-.030 (1999) (prohibiting signs "displayed in the public right-of-way" with an exception for handheld signs not exceeding three square feet in diameter), *invalidated by* Foti v. Menlo Park, 146 F.3d 629 (9th Cir. 1999). For residential picketing restrictions, see, e.g., Frisby v. Shultz, 487 U.S. 474, 488 (1988) (upholding a restriction on focused residential picketing); Douglas v. Brownwell, 88 F.3d 1511, 1513 (8th Cir. 1996) (upholding an ordinance restricting residential picketing within three-house zone); City of San Jose v. Superior Court, 38 Cal. Rptr. 2d 205, 207, 213 (Ct. App. 1995) (upholding a restriction on "picketing within 300 feet of a targeted residence"). For "Mother, May I" laws, see, e.g., Hill v. Colorado, 530 U.S. 703, 719 (2000) (upholding COLO. REV. STAT. § 18-9-122(3) (1993), which prohibited approaching without consent within eight feet of a person seeking access to health care facility for the purpose of protest, education, counseling, displaying a sign, or handing out a leaflet); McGuire v. Reilly, 260 F.3d 36, 38-39 (1st Cir. 2001) (upholding MASS. GEN. LAWS ch. 266, § 120(E)(1/2) (2000) (amended 2007), which was a *Hill*-type law that was narrowed to apply to persons outside reproductive healthcare facilities), *aff'd*, 386 F.3d 45 (1st Cir. 2004); BOULDER, COLO., REV. CODE § 5-3-10 (2001) (prohibiting demonstrators from coming within eight feet of another without consent when that person is within one hundred feet from an entrance of a health care facility); PHOENIX, ARIZ., CODE OF THE CITY art. 1, div. 1, § 23-10.1 (2007) (making it unlawful for a person to demonstrate within eight feet of an individual once that individual has requested that the demonstrator withdraw); SACRAMENTO CAL., CODE § 12.96.020 (2004) ("No person shall knowingly approach another person within eight feet of such other person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred (100) feet from any entrance door to a health care facility."); S.F., CAL., POLICE CODE art. 43, § 4303 (2003) (same, limited to reproductive health facilities); SANTA BARBARA, CAL., MUNICIPAL CODE § 9.99.020 (1993) (prohibiting demonstrators from protesting within eight feet of the driveway of a health care facility or blocking a driveway to such facility).

61. See, e.g., Williams v. Planned Parenthood Shasta-Diablo, Inc., 520 U.S. 1133, 1135 (1997) (Scalia, J., dissenting) ("This is a record so devoid of threatening physical confrontation it would make an old-fashioned union organizer blush. Yet the trial court entered—and the Supreme Court of California approved—an injunction severely curtailing the speech rights of clinic protesters in a public forum."); Bering v. Share, 721 P.2d 918, 921 (Wash. 1986) (en banc) (upholding injunction prohibiting free speech activity on public sidewalk in front of abortion business, and prohibiting use of terms "murder" and "killing" or "their derivatives" in the presence of children).

62. See, e.g., COLO. REV. STAT. § 18-9-122(3) (1993) (prohibiting demonstrators from coming within eight feet of another without consent if that individual is within one hundred-foot radius from the entrance of a "health care facility"); MASS GEN. LAWS ch. 266, § 120E(1/2)(b) (2006) (prohibiting a demonstrator to come within six feet of an individual approaching a "reproductive health care facility").

that for emphasis: Today, in many places in America, approaching people on a public sidewalk to hand them leaflets or speak to them can land you in jail for up to two years, as well as exposing you to substantial monetary penalties, both civil and criminal. Massachusetts has taken it a step further: it just passed a law creating a thirty-five-foot no-entrance zone on public thoroughfares around all abortion clinics in the state.<sup>63</sup> The penalty for a violation is up to two and a half years in jail and a \$5000 fine.<sup>64</sup>

But those are just the upfront risks anti-abortion activists run into for their free speech activity. Even worse are the *ex post facto* penalties imposed in the form of injunctions, damages, and attorney's fees for speech activity that individuals would have had no reason to know is unlawful. For example, in 2002, the Ninth Circuit affirmed a multi-million dollar verdict against anti-abortionists who had published two posters that named several abortion providers as "guilty of crimes against humanity."<sup>65</sup> The posters indisputably contained no threatening language and in fact disavowed violence, and those who published them never attempted to communicate directly or indirectly with the plaintiff abortion doctors.<sup>66</sup> Yet they were found liable on the grounds that the "format" of the posters constituted "true threats" directed at the doctors.<sup>67</sup>

In a bizarre split decision, six members of an *en banc* panel of the Ninth Circuit found that a "reasonable person" in the defendants' position would have known that the posters were threats.<sup>68</sup> But five other members of the panel dissented, with four arguing that the posters were *not* threats but "clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment."<sup>69</sup> Thus, the defendants, none of whom were lawyers, were held liable for a crushing monetary judgment because, after the fact, six out of eleven judges said "a reasonable person" would have known their speech was unlawful when four other

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63. See Act of Nov. 13, 2007, ch. 155, 2008-11 Mass. Adv. Legis. Serv. 792 (Lexis Nexis) (codified as amended at MASS. GEN. LAWS ch. 266, § 120E(1/2)(b) (2006)) (stating that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility").

64. § 120E(1/2)(e).

65. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1064 (9th Cir. 2002).

66. See *id.* at 1063-64 (stating that the posters only called for prayer, fasting, calling, and writing the physicians, and urging the physicians to leave their jobs and stop doing abortions); *id.* at 1072 (stating that the posters contain no language that is "literally" a threat); *id.* at 1099 (Reinhardt, J., dissenting) (stating that the posters at issue were expression of speech as "public protest" rather than "communicated directly to the target").

67. *Id.* at 1079, 1085-86.

68. *Id.* at 1088.

69. *Id.* at 1101 (Berzon, J., dissenting).

judges, looking at the same facts and law, said it was not only lawful but constitutionally protected. Speech doesn't get more chilled than that. The ACLU Foundation of Oregon filed an amicus brief supporting affirmance of the multi-million dollar verdict.<sup>70</sup>

### III. LOUISIANA'S POST-*WEBSTER* LAW

Ms. Strossen asserts that the abortion law passed in Louisiana in 1991<sup>71</sup> “banned almost all abortions as well as many forms of contraception” but was denounced by anti-abortion activists as a compromise because of the single exception contained for the life of the mother.<sup>72</sup> Both parts of this statement are false.

First, what Ms. Strossen should have said is that the ACLU *claimed* that the law would ban some forms of contraception, though others dismissed this contention as a “red herring.”<sup>73</sup> The law prohibited the performance of acts “with the specific intent of terminating a pregnancy.”<sup>74</sup> Contraceptives act prior to conception, so by definition, the use of contraceptives cannot act to terminate a pregnancy.

What Ms. Strossen was referring to was the fact that the law defined “unborn child” as “the unborn offspring of human beings from the moment of conception until birth.”<sup>75</sup> The term “unborn child” was used only once in the statute, in one of the exceptions to the abortion prohibition (i.e., to save the life of an “unborn child”), and not in the prohibition itself.<sup>76</sup> Thus, in no way did it undercut the requirement of a specific intent to terminate a pregnancy.

70. *Id.* at 1071 n.6 (majority opinion).

71. Act of June 18, 1991, No. 26, 1991 La. Sess. Law. Serv. 26 (West), *invalidated by* Sojourner v. Roemer, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom.* Sojourner v. Edwards, 974 F.2d 27 (5th Cir. 1991).

72. Strossen, *supra* note 1, at 21–22. While the Louisiana statute refers to the “life of the mother,” LA. REV. STAT. ANN. § 14:87(B)(2) (2004) (amended 2006), Ms. Strossen follows Justice Ginsburg’s stylebook, in which all references to “mother” are changed to “pregnant woman.” Strossen, *supra* note 1, at 23. Justice Ginsburg takes this to the extreme of altering quotations from prior cases to avoid ever referring to a pregnant woman as a mother. *See, e.g.,* Gonzales v. Carhart, 127 S. Ct. 1610, 1644 (2007) (Ginsburg, J., dissenting).

73. *See* Gina Kolata, *Opponents of Louisiana’s New Law Say It Could Limit the Use of Some Contraceptives*, N.Y. TIMES, June 21, 1991, at A11.

You can go over it state by state—[the ACLU has] raised the same issue . . . I think the A.C.L.U. is raising the contraceptive red herring in the hope that many people who would oppose abortion on demand could be persuaded that the pro-life movement is filled with extremists who are opposed to birth control.

*Id.* (quoting statement of Burke Balch of the National Right to Life Committee).

74. § 14:87(A)(1).

75. *Id.* § 14:87(D)(3).

76. *Id.* § 14:87(B)(1).

The ACLU's reading of this statute shows the perils of defining things the way we want them to be, rather than how they are. Over the past two decades, abortion advocates have succeeded in redefining pregnancy as beginning not at fertilization, but rather, at implantation of the fertilized ovum in the womb, an event that occurs about six days after fertilization.<sup>77</sup> In other words, implantation is the new conception, allowing abortion advocates to define as "contraceptives," rather than "abortifacients," various drugs and devices that operate to prevent implantation, rather than preventing fertilization. They also scoff at anyone who says that drugs such as the "morning-after" pill have an abortifacient effect.<sup>78</sup> However, when faced with a law like Louisiana's, they deftly switch positions and proclaim that these drugs and devices may indeed terminate a pregnancy and therefore would be banned as a form of abortion.

In other words, where the issue is expanding the availability of certain drugs or devices, including forcing hospitals, doctors, and pharmacists to provide them, abortion advocates label them contraceptives.<sup>79</sup> When the issue is a proposed restriction on abortion, they point out that these "contraceptives" may in fact operate *after* fertilization, and, therefore, they are definitionally indistinguishable from abortion.<sup>80</sup> Again, heads they win, tails we lose. In any event, various drugs and devices acting after conception, rather than preventing conception, would not have been banned under the Louisiana statute, which requires a specific intent to terminate a pregnancy.<sup>81</sup>

Ms. Strossen also erroneously implies that the Louisiana law contained only one exception, for the life of the mother.<sup>82</sup> In fact, the law also had exceptions for rape and incest.<sup>83</sup> Ms. Strossen asserts, without citation to any authority, that some anti-abortion activists called for protecting the life

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77. See, e.g., T.H. Milby, *The New Biology and the Question of Personhood: Implications for Abortion*, 9 AM. J.L. & MED. 31, 35 (1983) (stating that implantation into the uterine wall occurs five or six days after fertilization); Sherylynn Fiandaca, Comment, *In Vitro Fertilization and Embryos: The Need for International Guidelines*, 8 ALB. L.J. SCI. & TECH. 337, 345 (1998) (explaining that the embryo begins to nest or implant into the uterus after six or seven days).

78. Strossen, *supra* note 1, at 8 ("[A] small but vocal minority . . . insists on labeling emergency contraceptives as abortion, which is completely contrary to the scientific, medical facts.").

79. See *id.* (condemning the Food and Drug Administration for resisting the sale of emergency contraceptives, which Strossen asserts have no connection with abortion except that they can prevent the need for one).

80. See Kolata, *supra* note 73 ("Although the [Louisiana] law says nothing about birth control, it defines pregnancy as beginning at conception, and the civil liberties union said the IUD and the low-dose pill work by thwarting pregnancy after conception.").

81. See § 14:87(A)(1) (stating that for a procedure to fall under the definition of abortion, it must be performed "with the specific intent of terminating the pregnancy").

82. Strossen, *supra* note 1, at 22–23.

83. § 14:87(B)(3)–(4).

of the unborn child even at the cost of the pregnant women's life.<sup>84</sup> To the extent there is any truth to this statement, it is more likely that anti-abortion activists were concerned about the lack of specificity in the wording of the exception, rather than its concept.

And they had good reason to be concerned, given the track record of abortion advocates and providers in shamelessly exploiting every type of exception, particularly those for the life and health of the mother. One tactic is to challenge any exception as vague and use it as a vehicle to get the entire law struck down.<sup>85</sup> If that does not succeed, abortion practitioners simply use the lack of oversight of abortion practice and the impenetrable veil of patient privacy to turn any exception into a gaping loophole.<sup>86</sup>

For example, when California's abortion law was liberalized in 1967, six years before *Roe v. Wade*, it still had some fairly strict-sounding requirements, including a finding by a hospital committee that there was either "a substantial risk that continuance of the pregnancy [would] impair the mental or physical health of the prospective mother," or "the pregnancy resulted from rape or incest."<sup>87</sup> However, a report by the California Department of Public Health found that, during the first two years the new law was in effect, 90% of applications for abortions were for mental health reasons, constituting 98.5% of the total number of applications approved.<sup>88</sup>

Or take the case of state funding for "medically necessary abortions" in Alaska.<sup>89</sup> After the State attempted to limit taxpayer funding of abortion to cases of rape, incest, or life of the mother, the ACLU successfully challenged the regulations, arguing that "medically necessary" abortion services should be funded on the same basis as other health services.<sup>90</sup> The

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84. See Strossen, *supra* note 1, at 23 (stating that the Louisiana anti-abortion law, which contained an exception when it was necessary to save the mother's life, "earned the ire of some ardent pro-life advocates who expressly called for protecting the fetus's potential life even at the cost of the pregnant women's actual life").

85. See *United States v. Vuitch*, 402 U.S. 62, 64 (1971) (holding that exceptions in criminal abortion statute for abortions "necessary for the preservation of the mother's life or health" were not unconstitutionally vague). The Court noted that "[i]n the last several years, abortion laws have been repeatedly attacked as unconstitutionally vague in both state and federal courts with widely varying results." *Id.* at 66; see also *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1541 (D. Utah 1992) (addressing ACLU challenge to an abortion statute that the terms "necessary to save the mother's life," "grave damage to the woman's medical health," and "grave defects" were unconstitutionally vague).

86. See, e.g., Complaint/Information at 1-13, *State v. Tiller*, No. 06CR2961 (Kan. Dist. Ct. filed Dec. 21, 2006) (charging Kansas doctor with repeatedly exploiting the health exception of the Kansas State abortion laws).

87. *Ballard v. Anderson*, 484 P.2d 1345, 1349 (Cal. 1971).

88. *Id.* at 1355 n.2. (Sullivan, J., dissenting).

89. *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001).

90. *Id.* at 911.

Alaska Supreme Court agreed and struck down the limitation.<sup>91</sup> In so doing, the court stated, “This case concerns the State’s denial of public assistance to eligible women *whose health is in danger*. It does not concern State payment for elective abortions; nor does it concern philosophical questions about abortion which we, as a court of law, cannot aspire to answer.”<sup>92</sup>

Why then does the ACLU count Alaska as a state whose courts “have declared broad and independent protection for reproductive choice and have ordered nondiscriminatory public funding of abortion”?<sup>93</sup> Because, as every abortion activist knows, allowing “medically necessary” abortions is the same as abortion on demand, with perhaps a little more paperwork. Alaska abortion provider Jan Whitefield, the ACLU’s client in the abortion funding case, testified in a subsequent case that his definition of “medically necessary” included any “theoretical hazard to [a patient’s] mental health,” including potential difficulties with education and employment.<sup>94</sup>

Attempts to tighten the language of health exceptions have proved difficult to enforce. For example, Kansas prohibits post-viability abortions unless the “abortion is necessary to preserve the life” of the mother, or if “a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman.”<sup>95</sup> As stringent as that sounds, it has been interpreted by the state courts to include a mental health exception.<sup>96</sup> A review of records subpoenaed from one abortionist in Kansas revealed that several post-viability abortions a month were done all for the same reason: “Major Depressive Disorder, Single Episode.”<sup>97</sup> How convenient. The record of abortion advocates and providers is clear—exceptions to abortion restrictions exist to be exploited.

And so we come to *Gonzales v. Carhart*, upholding the federal law banning the partial-birth abortion procedure.<sup>98</sup> As Ms. Strossen notes, the

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91. *See id.* at 915 (holding that the funding limitation violated the equal protection guarantee of the Alaska Constitution).

92. *Id.* at 905–06 (emphasis added).

93. Am. Civil Liberties Union, Public Funding for Abortion, <http://www.aclu.org/reproductiverights/lowincome/16393res20040721.html> (last visited Jan. 22, 2008).

94. Brief Amici Curiae of Loren Leman, Lieutenant Governor of the State of Alaska et al. in Support of Petitioner at 87a–88a, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2005) (No. 04-1144).

95. KAN. STAT. ANN. § 65-6703(a)(1)–(2) (2002).

96. *See* *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 378–79 (Kan. 2006) (stating that because the U.S. Supreme Court has interpreted “health” to “include the mental or psychological health of the pregnant woman,” then it “remains a consideration necessary to assure the constitutionality of the Kansas criminal abortion statute”).

97. Complaint/Information, *supra* note 86, at 2–8, 10, 12.

98. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

term “partial-birth abortion” is a misnomer.<sup>99</sup> The correct term should be partial-birth homicide. The procedure is an abortion only in its intent, i.e., ridding a woman of an unwanted child. The process, however, differs from other abortions in that the child is not killed while inside the womb, but while he or she is in the process of being delivered.<sup>100</sup>

Euphemisms powerful enough to sanitize this procedure do not exist. Even the clinical description provided by its most famous practitioner, Dr. Martin Haskell, cannot disguise its horror. The procedure starts with the doctor reaching into the uterus and drawing out the still-living fetus.<sup>101</sup> He pulls the fetus down and out, using forceps or hands, until only the head remains inside the mother’s body, lodged in the cervix.<sup>102</sup> Dr. Haskell described the continuation of the process:

““At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and “hooks” the shoulders of the fetus with the index and ring fingers (palm down).

““While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

““[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

““The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.””<sup>103</sup>

The existence of the partial-birth abortion procedure first came to the public’s attention in 1992 after Dr. Haskell gave this description of it to

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99. Strossen, *supra* note 1, at 5.

100. *Gonzales*, 127 S. Ct at 1622.

101. *R.I. Med. Soc’y v. Whitehouse*, 66 F. Supp. 2d 288, 297 (D. R.I. 1999), *aff’d*, 239 F.3d 104 (1st Cir. 2001).

102. *Id.*

103. *Gonzales*, 127 S. Ct. at 1622 (alterations in original) (quoting H.R. REP. No. 108-58, at 3 (2003)).



other abortion doctors at a trade convention.<sup>104</sup> Word of his presentation leaked out. Realizing the public relations debacle they were facing, abortion advocates first tried to deny that the procedure existed and, failing that, claimed that it was rarely used.<sup>105</sup> When those lies were exposed, and legislatures began passing laws banning partial-birth abortion, abortion advocates took a completely different tack: almost every abortion, and particularly every second-trimester abortion, is or can be a partial-birth abortion (i.e., the partial delivery of a living fetus that is then killed). This served them well in the courtroom, as courts struck down ban after ban as being vague and overbroad.<sup>106</sup>

The unpleasant side effect was a legacy of sworn testimony by abortion doctors detailing the barbarity of every type of surgical abortion procedure. Doctors coolly discussing the fact that they start by twisting or vacuuming a leg off a fetus, which is then still living in the womb with its leg “delivered” outside the womb, may win court cases, but it’s not going to win any popularity contests.<sup>107</sup> As Justice Stevens himself said in his concurrence in

104. *Id.*

105. For examples where the medical community has commented about the frequency of the procedure, see, e.g., Diane M. Gianelli, *Medicine Adds to Debate on Late-Term Abortion: ACOG Draws Fire for Saying Procedure ‘May’ Be Best Option for Some*, AM. MED. NEWS, Mar. 3, 1997, at 3; Ruth Padawer, *Abortion: Activists Lied*, RECORD (Bergen County, N.J.), Feb. 27, 1997, § News, at A1; Stout, *supra* note 4; Barbara Vobejda & David Brown, *Harsh Details Shift Tenor of Abortion Fight; Both Sides Bend Facts on Late-Term Procedure*, WASH. POST, Sept. 17, 1996, at A1; *Media Matters: Partial Truths* (PBS television broadcast Jan. 1997).

106. See, e.g., *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794, 797–98 (8th Cir. 1999) (holding that Arkansas partial-birth abortion ban was unconstitutionally vague); *R.I. Med. Soc’y*, 66 F. Supp. 2d at 312 (holding a Rhode Island partial-birth abortion ban unconstitutionally overbroad); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 494 (E.D. Va. 1999) (finding Virginia Abortion Act void for vagueness), *aff’d*, 224 F.3d 337 (4th Cir. 2000); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 619 (E.D. La. 1999) (finding Louisiana’s partial-birth abortion ban to be “facially unconstitutional and vague”), *aff’d*, 221 F.3d 811 (5th Cir. 2000); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1158 (S.D. Fla. 1998) (finding Florida Act void for vagueness for failing to define prohibited conduct with “required degree of certainty”); *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 495 (D. N.J. 1998) (finding that a New Jersey partial-birth abortion ban “should be struck as unconstitutionally vague”), *aff’d sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3rd Cir. 2000); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1037 (W.D. Ky. 1998) (finding Kentucky partial-birth abortion unconstitutionally overbroad), *aff’d*, 224 F.3d 576 (6th Cir. 2000); *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1380 (D. Ariz. 1997) (finding an Arizona statute void for vagueness for “not sufficiently defin[ing] the conduct which it attempts to proscribe”); *Evans v. Kelley*, 977 F. Supp. 1283, 1311 (E.D. Mich. 1997) (finding a Michigan partial-birth abortion ban unconstitutionally vague). *But see Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 331–32 (4th Cir. 1998) (finding a Virginia abortion ban constitutional and not vague).

107. See, e.g., *R.I. Med. Soc’y*, 66 F. Supp. 2d at 296–97 (“While dismembered parts of the fetus are suctioned out of the uterus, part of the fetus remains in utero and may have a heartbeat. . . . [T]he doctor may inject poison into the fetus’ heart; the doctor might crush the skull; or the doctor could wait for the fetus’ blood supply to be strangled as the umbilical cord is compressed between the skull and the uterine wall.”); *Richmond Med. Ctr. for Women*, 55 F. Supp. 2d at 452.

*Stenberg v. Carhart*, which struck down Nebraska's partial-birth abortion ban, there is little to choose between partial-birth abortion and a standard dilation and extraction, the other favored late-term abortion method, in terms of the gruesomeness and brutality of the two procedures.<sup>108</sup>

The Court struck down Nebraska's partial-birth abortion ban not only on the grounds that it might be construed to ban other equally barbaric abortion procedures, but also because it did not contain a health exception.<sup>109</sup> As the dissenters noted, and as noted above, a health exception is nothing less than a free pass to abortion providers to disregard the law. Justice Kennedy remarked, "Requiring Nebraska to defer to Dr. Carhart's judgment is no different from forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people."<sup>110</sup>

When, three years later, Congress passed the federal partial-birth abortion ban, it resolved the vagueness and overbreadth issues by specifying exactly how far and how much of the child could be removed from the womb before the procedure would be considered to fall under the

The physician knows at the outset of a suction curettage abortion that the procedure will kill the fetus. . . .

It is quite likely that, after fetal parts start to become disarticulated and begin to be suctioned out of the uterus and into the vagina during the suction curettage, the portion of the fetus remaining in the uterus is still living (in the sense that it has a heartbeat). . . .

. . . .  
 . . . [A]t the later stages of gestation, . . . [t]he physician, therefore, must then reach into the uterus with forceps and avulse into the vagina, and then out of the body, pieces of the still-living fetus, such as the extremities, parts of the trunk, and the head. . . .

. . . .  
 . . . At the time the part detaches, it is not unusual that the fetal extremities or body may already be outside of the uterus and in the vagina. . . . [O]f course, the physician knows that disarticulation of the fetal leg (or other body part), standing alone, will kill the fetus, although it may take several minutes because (in the case of a disarticulated extremity) the mechanism for causing death is excessive blood loss.

*Id.* at 452–54 (citations omitted); *see also, e.g., A Choice for Women*, 54 F. Supp. 2d at 1152 ("During the procedure, the fetus may travel through the suction tube intact or it may be dismembered. It is possible that in performing this procedure part of the fetus could remain in the uterus and continue to have a heartbeat."); *Verniero*, 41 F. Supp. 2d at 484 ("[I]t may happen that part of the intact fetus will be in the vagina and part in the uterus or a disarticulated part of the fetus will be in the vagina while the remainder of the fetus is in the uterus. In either of these situations, that part of the fetus which remains in the uterus may still have a heartbeat."). For a summary of trial testimony about the federal partial-birth abortion ban, see Cathy Cleaver Ruse, *Partial Birth Abortion on Trial*, HUMAN LIFE REV., Spring 2005, at 87, available at <http://www.nrlc.org/abortion/pba/RusePBAonTrial.pdf>.

108. *Stenberg v. Carhart*, 530 U. S. 914, 946–47 (2000) (Stevens, J., concurring).

109. *Id.* at 945–46 (majority opinion).

110. *Id.* at 965 (Kennedy, J., dissenting).

ban.<sup>111</sup> But, while including an exception for the life of the mother, Congress declined to include an exception for the health of the mother, understanding that this would, in practice, nullify the law.<sup>112</sup>

Abortion providers and advocates in several jurisdictions immediately brought facial challenges to the federal law. Relying on *Stenberg*, federal courts in California, Nebraska, and New York struck down the federal ban because of the lack of a health exception.<sup>113</sup> The government attempted to subpoena medical records of patients who had undergone partial-birth abortions to test the plaintiffs' claims about the medical necessity of any of these abortions, but courts refused to allow access to these records.<sup>114</sup> Plaintiffs and their expert witnesses were allowed to hypothesize about the relative safety and effects of various procedures and various techniques, without having any of their speculations tested against reality. Testimony from opposition experts was dismissed because, for the most part, these experts either did not perform abortions or did not use the methods at issue (as if a police forensics expert must commit crimes in order to qualify as an expert on them).<sup>115</sup> Armed with findings supporting their position that partial-birth abortions are necessary for "a woman's" health, plaintiffs could feel confident of another victory in the Supreme Court.

However, in *Gonzales v. Carhart*, Justice Kennedy's opinion became the opinion of the Court, and the federal law was upheld in a five-to-four decision.<sup>116</sup> With regard to the absence of an explicit health exception, the Court held that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends," and that "[m]edical uncertainty

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111. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531 (Supp. V 2005)).

112. 18 U.S.C. § 1531(a).

113. *See, e.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1176 (9th Cir. 2006) (finding that the federal statute was unconstitutional for lack of a health exception and because it placed an undue burden on a women's right to obtain an abortion), *rev'd sub nom.* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007); *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 287 (2d Cir. 2006) ("The result we are obliged to reach is that the statute is unconstitutional for lack of a health exception."), *vacated*, 224 F. App'x 88 (2d Cir. 2007); *Carhart v. Gonzales*, 413 F.3d 791, 803 (8th Cir. 2005) ("Because the Act does not contain a health exception, it is unconstitutional."), *rev'd*, 127 S. Ct. 1610 (2007).

114. *See* *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 928 (7th Cir. 2004) (quashing the subpoena and finding the medical records irrelevant); *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft*, No. C03-4872 PJH, 2004 WL 432222, at \*2 (N.D. Cal. Mar. 5, 2004) (denying government motion to compel production of redacted patient records).

115. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 982 (N.D. Cal. 2004), *aff'd sub nom.* *Planned Parenthood Fed'n of Am., Inc. v. Gonzales* 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

116. *Gonzales*, 127 S. Ct. at 1618-19, 1638.

does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”<sup>117</sup>

The Court did not foreclose the possibility of another challenge to the law based on the lack of a health exception. A “preenforcement, as-applied challenge[]” could be brought to show that, “in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.”<sup>118</sup> In that type of challenge, “the nature of the medical risk can be better quantified and balanced than in a facial attack.”<sup>119</sup>

The availability of this sort of remedy, however, does nothing to serve the purposes of abortion rights proponents. In fact, it calls their bluff. In her dissent, Justice Ginsburg anticipated that “such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the intact D & E prohibition.”<sup>120</sup> In fact, no such challenge has been mounted. It will be interesting to see, as the post-*Gonzales* years roll by, if any doctor ever challenges, much less successfully challenges, the ban as imposing an “undue burden” on the right to an abortion of a particular woman or group of women because of a clearly defined medical condition for which the inability to have a partial-birth abortion endangers their health. Having held up enforcement of partial-birth abortion restrictions for a decade on the basis of a hypothetical threat to “a woman’s health,” will they ever try to show that the procedure is necessary to protect any particular woman’s health?

The Court rejected the facial challenge to the statute because it concluded that the plaintiffs had not met the “heavy burden” of showing that it would be unconstitutional in “a large fraction of relevant cases.”<sup>121</sup> This formulation of the requirement for a facial challenge for abortion restrictions is looser than the general standard for non-First Amendment facial challenges set out in *United States v. Salerno*.<sup>122</sup> The *Salerno* test requires the challenger to establish that “no set of circumstances exists under which the [law] would be valid.”<sup>123</sup>

While laxer than the *Salerno* standard, the “large fraction of relevant cases” test, as interpreted by the majority in *Gonzales*, is considerably more

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117. *Id.* at 1637–38.

118. *Id.* at 1638.

119. *Id.* at 1639.

120. *Id.* at 1652 (Ginsburg, J., dissenting).

121. *Id.* at 1639 (majority opinion).

122. *United States v. Salerno*, 481 U.S. 739 (1987).

123. *Id.* at 745.

restrictive than the same test as interpreted by Justice Ginsburg and other dissenters. Justice Ginsburg would use as the denominator of the fraction the number of women “who, in the judgment of their doctors, require an intact D & E [partial-birth abortion] because other procedures would place their health at risk.”<sup>124</sup> In other words, the denominator of the fraction is defined as the number of women whose health will be jeopardized by the ban—which also happens to be the numerator.<sup>125</sup> This approach would always result in the restriction being unconstitutional in “a large fraction of relevant cases,” and thus in the law being struck down, even if it cannot be shown that a single real (as opposed to hypothetical) woman actually falls into that category.

With the rejection of the *Stenberg/Ginsburg* brand of arithmetic in *Gonzales*, it appears that at least for the time being, in the courts the days of abortion rights activists hiding behind “a woman’s health” are over. And hide they do. For all the talk about the right to abortion being grounded in “a concern for women’s equality and empowerment,”<sup>126</sup> when the going gets tough, abortion advocates play the health card.<sup>127</sup> Whenever convenient, woman as mistress of her fate easily gives way to woman as victim of circumstances.

We can fully expect that they will continue to play the victim card if *Roe v. Wade* is overruled and the issue of abortion is “de-constitutionalized” and moves back to the states. Ms. Strossen professes some eagerness to fight and win these battles “at the ballot box and, ultimately, in the hearts and minds of women and men.”<sup>128</sup> This is quite ironic, considering that the primary modus operandi of the ACLU and its allies is to use the courts to achieve counter-majoritarian results. They employ the courts not simply to rein in rogue public officials or to strike down laws that are arguably vague and could be cured by further legislative action. Nor do they use the courts as a stopgap measure to hold back the reactionary force of male-dominated legislatures until women can assert more control. Rather, wherever possible, they argue that abortion is a

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124. *Gonzales*, 127 S. Ct. at 1651 (Ginsburg, J., dissenting).

125. Justice Ginsburg herself acknowledged this mathematical identity. *Id.* at 1651 n.10.

126. Strossen, *supra* note 1, at 31.

127. Or even before the going gets tough. Ms. Strossen states that Kenneth Edelin was prosecuted for performing an abortion “even though this was a therapeutic abortion to preserve the pregnant woman’s health.” *Id.* at 12. In a recent interview, Dr. Edelin stated that the reason for the abortion was that the young woman wanted to stay in school and feared her father’s reaction to the pregnancy. Planned Parenthood, Meet Dr. Kenneth Edelin – Part One, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/public-affairs/dr-edelin-part-one-15691.htm> (last visited Jan. 21, 2008).

128. Strossen, *supra* note 1, at 37.

constitutional right that may not in any way be restricted by the will of the legislature or the people. In short, the ACLU is profoundly anti-democratic.

Take, for example, those areas in which the Supreme Court has permitted legislative action to restrict or regulate abortion, such as public funding and parental involvement for minors.<sup>129</sup> The ACLU has successfully argued in various state courts that there is a state constitutional right to abortion, invisible in the actual text, that is broader than, and independent of, the federal constitutional right, thus once again placing abortion beyond the reach of popular legislative action.<sup>130</sup> The ACLU admits that only four of fifty states voluntarily fund abortion, while thirteen states are compelled to do so because of state court decisions.<sup>131</sup> Similarly, over forty states have enacted laws requiring parental involvement in the form of notification or consent before a minor undergoes an abortion.<sup>132</sup> Thanks to the ACLU, several of those laws have been found unconstitutional under state constitutions that do not contain any mention of pregnancy or abortion.<sup>133</sup>

*Pace Ms. Strossen*, neither the ACLU nor other abortion advocates want abortion-related issues to be decided in hearts and minds or at the

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129. For cases upholding state restrictions on the use of public funds and facilities for abortion, see, e.g., *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980); *Maher v. Roe*, 432 U.S. 464, 480 (1977); *Beal v. Doe*, 432 U.S. 438, 447 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977). For cases upholding state laws requiring parental notification or consent before abortion by a minor, see, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 448–49, 458 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 519–20 (1990); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981); *Bellotti v. Baird*, 443 U.S. 622, 649–51 (1979).

130. See, e.g., *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998) (striking down a New Mexico abortion-funding restriction under the state constitution); Steven A. Holmes, *Right to Abortion Quietly in State Courts*, N.Y. TIMES, Dec. 6, 1998, § 1, at 1 (documenting state cases broadly interpreting state constitutions to allow greater abortion rights).

131. Am. Civil Liberties Union, *supra* note 93.

132. See *Parental Involvement in Minors' Abortions*, STATE POLICIES IN BRIEF, (Guttmacher Inst., New York, N.Y.), Mar. 1, 2008, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf) (noting that seven of the forty-two states that required some form of parental involvement no longer enforce such policies).

133. See *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 585 (Alaska 2007) (holding that the Parental Consent Act violates the Alaska Constitution's right to privacy); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 831 (Cal. 1997) (“[D]efendants have failed to demonstrate adequate justification for the statute's intrusion upon a pregnant minor's right of privacy under the California Constitution.”); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 640 (Fla. 2003) (approving “trial court's decision permanently enjoining enforcement of the Parental Notice Act”); *Wicklund v. State*, No. ADV 97-671, 1999 Mont. LEXIS 1116, at \*21–23 (Mont. Dist. Ct. Feb. 11, 1999) (holding that state failed to show compelling state interest for parental notification statute); *Planned Parenthood of Cent. N.J., Inc. v. Farmer*, 762 A.2d 620, 638 (N.J. 2000) (“The State has failed to demonstrate a substantial need for the Parental Notification for Abortion Act, or even that the asserted need is capable of realization through enforcement of the Act's provision.”).

ballot box.<sup>134</sup> They want to hang onto the intellectually indefensible *Roe* decision at all costs,<sup>135</sup> precisely because the alternative is making a convincing argument for abortion on demand in the public square. And in that forum, they can't even count on the women's vote, as most women oppose abortion except in cases of particular hardship.<sup>136</sup>

Overturing *Roe* will not criminalize abortion. It will simply leave the question of its restriction to be worked out by the people and their representatives, in statutes and popular referenda and initiatives. Ms. Strossen and I would then do battle for hearts and minds, and it would finally make some sense to do so. She can argue that women's equality demands legal abortion, that I'm trying to outlaw contraception and put women before firing squads, and that "too many" women will die without legal abortion. And I can respond to those arguments and present the indisputable facts that abortion kills children and that no one in our society—man, woman, or child—is better off when we tolerate killing children as a means to an end.

Let the struggle begin. See you at the ballot box.

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134. See Strossen, *supra* note 1, at 37 ("[Human-rights struggles] must be won at the ballot box and, ultimately, in the hearts and minds of women and men.").

135. For criticism of *Roe* from abortion supporters, see, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973); Lawrence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973); Edward Lazarus, *Liberals, Don't Make Her an Icon*, WASH. POST, July 10, 2005, at B3.

136. See, e.g., John Leo, *At Last, the Sexual Counterrevolution*, DALLAS MORNING NEWS, Mar. 6, 1999, at 31A ("Support for abortion may be eroding because sexual attitudes in general have been moving in a conservative direction throughout the 1990s."); Press Release, Ctr. for Gender Equality, As Religions Increase Political Involvement, New National Survey Finds Women Are Becoming More Religious and More Conservative (Jan. 27, 1999), available at <http://www.hi-ho.ne.jp/taku77/refer/gender.txt> ("Seventy percent of women now favor more restrictions on abortion, including 40% who think it should only be allowed in cases of rape, incest, or to save the woman's life, and 13% who would not permit it under any circumstances.").