A NEW PRESCRIPTION FOR ABORTION

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> I am a 60 year old woman deeply troubled by the possibility that women's constitutional right to determine their own reproductive rights is being threatened and may be taken away. . . .
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> When I was in my twenties I had an illegal abortion. . . . [The doctor] was unclean, he joked a lot, his hands were rough, his breath was bad. He forcefully approached me to have sex with him because "what harm would there be under the circumstance?" . . . So, on top of the fear for my physical safety, the agony of the decision about what I was doing, the need to keep this secret away from everyone I knew and face it alone, there was the disgust, repulsion and deep fear that if I didn't do what he wanted he would send me away . . . .
>
> —Anonymous[1]

INTRODUCTION

In 1973, the Supreme Court put an end to illegal abortions. The Court determined in *Roe v. Wade*[2] that the right of privacy embedded in the Fourteenth Amendment's concept of personal liberty mandates that women have the right to terminate an unwanted pregnancy. Since this decision, abortion has been one of the most divisive and emotionally charged issues in American politics. A bare majority of Americans believe that abortion should be legal with some restrictions, and nineteen

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1. Brief of Amici Curiae Women Who Have Had Abortions at 19, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605). This brief, referred to as the "Voices Brief," is a compilation of personal experiences based on 2,887 letters from women who had abortions. The Voices Brief attempted to convey, through storytelling, that abortion can be a civilized and justifiable choice.

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

percent of Americans think that it should never be legal.[3] Like *Brown v. Board of Education of Topeka*,[4] the *Roe* decision was decided at a time when it was unclear whether a majority of Americans approved of the Supreme Court decision. While *Brown* is now viewed as a Constitutional stronghold, *Roe* continues to be extremely controversial.[5]

Clearly, a change in the makeup of the Supreme Court could alter the law concerning abortion. Only three current Supreme Court Justices—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—however, have stated that they would overturn *Roe*.[6] While President George W. Bush has not had an opportunity to appoint a new Supreme Court Justice, he has taken steps to chip away at the right to abortion using more indirect means. Three days after taking office, President Bush signed an executive order overturning the Clinton administration policy of giving federal funding to overseas family planning groups that offer abortion or abortion counseling.[7] More recently, the Bush administration declared that a developing fetus should be entitled to government-funded health insurance under the Children's Health Insurance Program.[8] Al-

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3. Lydia Saad, *Public Opinion About Abortion—An In-Depth Review*, Gallup Org., Inc., *at* http://www.gallup.com/poll/specialreports/pollsummaries/sr020122iii.asp (last visited Apr. 11, 2002). The question asked was, "Do you think that abortions should be legal under any circumstances, legal under certain circumstances, or illegal in all circumstances?" *Id.* The selected years were 1975 to 2000, and the sample sizes varied from year to year. *Id.* The data for March 2000, which was used here, is based on telephone interviews with a randomly selected national sample of 998 adults. *Id.*

4. 347 U.S. 483 (1954).

5. The Court compared abortion to school segregation in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry." *Id.* at 866–67.

6. *Id.* at 944. A 5–4 majority of the Supreme Court refused to overturn *Roe*'s essential holding in *Planned Parenthood v. Casey*, deciding "*Roe* was based on a constitutional analysis which we cannot now repudiate." *Id.* at 869. In *Casey*, Justice Blackmun, the author of the *Roe* opinion, acknowledged the divisiveness of the abortion debate: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor may well focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made." *Id.* at 943.

7. David E. Rosenbaum, *Bush Rules! It's Good To Be the President*, N.Y. TIMES, Jan. 28, 2001, § 4, at 16.

8. Alan Cooperman & Amy Goldstein, *HHS Proposes Insurance for Fetuses; Opponents Call It a Ploy to Pave Way for Ban on Abortion*, WASH. POST, Feb. 1, 2002, at A1. Previously, the program only covered children from birth to age

though this is the first time that a federal program has attempted to define childhood as beginning at conception, administration officials urge that the new regulation would extend coverage to low-income pregnant women.[9] These tactics do impact the abortion debate, but the Supreme Court, itself, has noted that overruling a "watershed" decision like *Roe* would require much more than just "a surrender to political pressure."[10]

Despite the divisiveness of the abortion issue, the Food and Drug Administration (FDA) approved mifepristone, also know as the early abortion pill or RU 486, on September 28, 2000.[11] Pro-choice supporters applaud the FDA's approval of mifepristone because it provides women with another means of having an abortion.[12] Moreover, it increases the privacy of the abortion decision by allowing a woman to abort her unwanted pregnancy in her own home with a prescription from her doctor.[13] This Comment suggests that all but the staunchest pro-life advocates, who see abortion as an immoral choice to end a human life, should embrace mifepristone as a positive alternative to clinical abortions. In the years following the *Roe* decision, pro-life groups have gained momentum by focusing on the extreme and graphic aspects of abortion, indicating that the immorality of the decision is greater when the abortion is performed later in the pregnancy.[14] Hopefully, pro-life supporters will view mifepristone as a less offensive alternative since it must be taken within the first seven weeks of pregnancy to be effective.[15]

Part I of this Comment examines the history of abortion politics since the *Roe* decision recognized abortion as a fundamental liberty. It examines the legal attempts to overturn the *Roe* decision and the efforts of the right-to-life movement to make abortion physically impossible with violence and harass-

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nineteen. *Id.*

9. *Id.*

10. *Casey*, 505 U.S. at 867.

11. Gina Kolata, *U.S. Approves Abortion Pill; Drug Offers More Privacy, and Could Reshape Debate*, N.Y. TIMES, Sept. 29, 2000, at A1.

12. *See, e.g., Mifepristone: Expanding Women's Options for Early Abortion, at* http://www.plannedparenthood.org/library/ABORTION/Mif_fact.html (last modified Oct. 2000).

13. *See id.*

14. *See* discussion *infra* Part II.

15. Nancy Gibbs, *The Pill Arrives*, TIME, Oct. 9, 2000, at 41, 44.

ment. Abortion opponents have had greater success with legal and political strategies that make abortion more inconvenient and harder to obtain, but these fringe issues do not address the real goal of the pro-life movement—to make abortion completely illegal. Part II discusses the partial-birth abortion campaign and brings the reader up to date on the status of abortion rights. Anti-abortion activists have focused on partial birth abortion because of the greater moral dilemma that is involved in late term abortions when the fetus is closer to viability. Part III discusses the responsive strategies of the pro-choice movement. Finally, Part IV suggests that the FDA's approval of mifepristone should alleviate some of the concerns that accompany the decision to have an abortion because it enables a woman to end her pregnancy privately, safely, and before the embryo even resembles a human life.

I. HISTORY OF THE ANTI-ABORTION STRATEGIES SINCE *ROE V. WADE*

This Part analyzes the evolution of abortion politics. It begins by discussing the nation's attitudes toward abortion before the Court's landmark decision in *Roe v. Wade*.[16] Then, it goes on to discuss abortion politics during the Reagan era, the violent tactics of the right-to-life movement, and finally, some state strategies to interfere with access to abortion.

A. The Political Climate Before Roe

In *Roe v. Wade*[17] and its companion case, *Doe v. Bolton*,[18] the Supreme Court declared that women possess a fundamental right to have an abortion. *Roe* and *Doe* were only two of more than a dozen constitutional challenges to state anti-abortion laws on the Court's docket during the 1971–1972 term.[19] This phenomenon concerning the abortion debate was just developing, however, as little public controversy over mak-

16. 410 U.S. 113 (1973).
17. *Id.*
18. 410 U.S. 179 (1973).
19. David J. Garrow, *Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 ALB. L. REV. 833, 837 (1999).

ing abortion rights constitutionally protected existed prior to the *Griswold v. Connecticut*[20] decision in 1965.[21]

The *Griswold* decision cleared the path for the *Roe* and *Doe* decisions.[22] In *Griswold*, the Supreme Court held that a state law banning the use of contraceptives and a state law forbidding the aiding or counseling of others in the use of contraceptives were unconstitutional.[23] The Court reasoned that several of the Bill of Rights guarantees, including those found in the First, Third, Fourth, Fifth, and Ninth Amendments, create a "penumbra" of privacy for married couples that is "protected from governmental intrusion."[24] From *Griswold*'s fundamental right to marital privacy grew the idea that all women should have a fundamental right to choose whether or not to terminate an unwanted pregnancy.[25]

B. The Reagan Era and the "Human Life" Legislation

In the years immediately following the *Roe* decision, abortion foes decided to focus not on the core constitutional issue but on fringe issues such as public funding for abortion.[26] Before *Roe*, presidential candidates saw abortion as a states' rights issue and did not propose any federal action to repeal abortion laws.[27] When Ronald Reagan was elected president in

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20. 381 U.S. 479 (1965).

21. *See* Garrow, *supra* note 19, at 836. The struggle first began in New York City in 1910 where advocates like Margaret Sanger and Katharine Houghton Hepburn wanted less-privileged women to have the same access to abortion as women of means who could afford private physicians. *Id.* at 835. Even in the 1960s, abortion reformers sought to liberalize state anti-abortion laws; few held the belief that abortion would ever be a constitutional right. *Id.* at 836.

22. *See* Garrow, *supra* note 19, at 835.

23. *Griswold*, 381 U.S. 479 (holding that Connecticut could not prohibit access to birth control or to counseling on the matter).

24. *Id.* at 483.

25. Garrow, *supra* note 19, at 835–36.

26. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980). Both the California and Massachusetts Supreme Courts, however, rejected the United State Supreme Court's decision in *Harris* and relied on state constitutional grounds to provide public funding for abortion. *See* Comm. to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252 (1981); Moe v. Sec'y of Admin. and Fin., 382 Mass. 629 (1981). In *Myers*, the California Supreme Court decided that "[o]nce the state furnishes medical care to poor women in general, [the state] cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion." 29 Cal. 3d at 284–85.

27. Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 305 (1994) (book review).

1980, however, the abortion issue became highly politicized, and the pro-life attack shifted to the constitutional core of *Roe* and *Doe*.[28]

The abortion issue came to the forefront of American politics in 1981 when abortion opponents in Congress attempted to pass a "human life" bill, a statute establishing "personhood" at conception, to overturn both *Roe* and *Doe*.[29] Most legal commentators, including many who were opposed to abortion like former Solicitor General Robert Bork, believed that the legislation would be unconstitutional and would effectively undermine the Supreme Court's role in interpreting the Constitution.[30] At the same time, conservative forces in Congress also tried to pass several versions of a "human life" constitutional amendment that would either allow the states to determine the legality of abortion for themselves or proclaim that fetuses were constitutional persons.[31] By the end of the Reagan administration, however, neither the "human life" bill nor a "human life" amendment managed to make its way through Congress.[32] These setbacks for abortion opponents created considerable frustration within the movement and thus helped spawn the radical and violent pro-life faction.[33]

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28. *See* Garrow, *supra* note 19, at 842. Reagan campaigned on a platform that supported a constitutional amendment that would overturn *Roe* and *Doe*. 1980 REPUBLICAN PARTY PLATFORM, *reprinted in* 36 CONG. Q. ALMANAC 58-B (1980). Even today, the Republican Party platform calls for the "appointment of judges on all levels of the judiciary who respect . . . the sanctity of innocent human life." REPUBLICAN PLATFORM 2000, *at* http://www.cnn.com/ELECTION/2000/conventions/republican/features/platform.00/ (last visited Apr. 23, 2002).

29. DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 638–39 (1994). Most legal commentators agreed that the human life bill would be unconstitutional, but eight days of Senate subcommittee hearings were scheduled nonetheless. *Id.* at 639. In July 1981, the subcommittee approved the bill with a partisan three to two vote; the bill went on to the full Judiciary Committee, but it eventually died because attention shifted to Constitutional amendments aimed at overturning *Roe*. *Id.*

30. *Id.*

31. *Id.* Utah Senator Orrin Hatch held nine days of Senate subcommittee hearings on an amendment that would authorize each state to regulate abortion. The subcommittee approved Hatch's proposal and the full Senate Judiciary Committee approved the amendment by a vote of ten to seven. *Id.* at 639–40. The full Senate rejected the proposed amendment, falling short of the necessary two-thirds support needed for a Constitutional amendment by eighteen votes. *Id.* at 643. Before Hatch's amendment was rejected, the Senate had also voted down North Carolina Senator Jesse Helm's proposed amendment to establish personhood for fetuses by a tally (vote) of 47 to 46. *Id.* at 640.

32. *Id.* at 644.

33. Garrow, *supra* note 19, at 843.

C. *The Strategical Switch from Making Abortion Illegal to Making It Impossible*

Since the legal and political opposition to abortion failed to yield the results that abortion foes expected, abortion opponents switched from trying to make abortion illegal to trying to make it impossible.[34] By intimidating clinic patients, clinic employees, and abortion providers and their families, pro-life activists sought to create such a deterrent that no one would want to get, or give, an abortion.[35] Abortion foes claimed their first victim with Dr. David Gunn in March 1993.[36] Since 1977, there have been seven murders, seventeen attempted murders, one hundred acid attacks against abortion providers, forty-one clinic bombings, 165 cases of arson, and 971 cases of vandalism.[37] The newest form of harassment is bio-terrorism. In 2001, over 550 letters claiming to contain the deadly anthrax bacteria were sent to abortion clinics.[38]

Pro-life activists also created a Web site called the Nuremberg Files to set up dossiers on abortion doctors.[39] The site's creator, Neal Horsley, argues that the site seeks to document evidence in preparation for the day when abortion is declared illegal and abortion doctors are put on trial like Nazi war criminals.[40] The information, however, is compiled in "wanted-style" posters and lists names, addresses, license plate numbers, and the names of the children of abortion providers.[41]

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34. Angela Christina Couch, *Wanted: Privacy Protection for Doctors Who Perform Abortions*, 4 AM. U. J. GENDER SOC. POL'Y & L. 361, 368 (1996).

35. Intimidation takes on both violent and non-violent forms. Ed O'Loughlin, a Planned Parenthood abortion provider, has been dealing with picketing outside of his Denver home for the last seven years. As a result, he wears a bulletproof vest and carries a gun. Even the protesters are aware that they are harassing Dr. O'Loughlin: "We are harassing him. If police were to charge us with something, it should be harassment or stalking. But it's not right for a murderer to live in a neighborhood and live peaceably." Ginny McKibben, *Picket Law Gets First OK*, DENV. POST, May 31, 2000, at A1.

36. National Abortion Federation, *Clinic Violence*, *at* http://prochoice.org/ (last visited Apr. 12, 2002).

37. *See id.*

38. *See id.*

39. Jennifer Gonnerman, *The Terrorist Campaign Against Abortion*, VILLAGE VOICE, Nov. 10, 1998, at 36. The Nuremberg Files Web site is located at http://www.christiangallery.com/atrocity/ (last visited Mar. 12, 2002). *See infra* Part III.A for a discussion of the pro-choice response to the Nuremberg Files.

40. *Id.*

41. *Id.*

Additionally, the site is decorated with severed baby arms and legs, and each time an abortion provider is killed or injured, the site puts a line through the name, making it look like a "hit" list.[42]

There have been no murders since Dr. Barnett Slepian was shot and killed in his home in 1998.[43] The overall number of violent incidents, however, increased from 2000 to 2001.[44] As a result of the violence and harassment, clinics continue to lose staff and physicians,[45] and today, no abortion providers exist in eighty-six percent of United States counties.[46] Therefore, the violent tactics of extreme anti-abortion protesters continue to impact the availability of abortion.

D. State Legislative Strategies: Rationing Abortion Through Inconvenience

Pro-life strategists have also attempted to ration abortion through inconvenience by encouraging the enactment of state laws that make abortions more difficult to obtain. In the year after the *Roe* decision, "260 bills aimed at restricting abortion rights were introduced in state legislatures and thirty-nine were enacted,"[47] indicating that the states were not prepared to accept the Court's decision in *Roe*. The effort continues to restrict a women's right to choose at the state level. Currently, seventeen states require a mandatory delay following state directed counseling,[48] thirty-two states require parental involvement before a minor can have an abortion,[49] and forty-four states require abortion reporting to the state.[50]

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42. *Id.*

43. *See* National Abortion Federation, *supra* note 36.

44. *Id.*

45. Feminist Majority Foundation, *Monitoring Clinic Violence, at* http://www.feminist.org/rrights/clinicsurvey.html (last visited Apr. 12, 2002).

46. Gina Kolata, *As Abortion Rate Decreases, Clinics Compete for Patients*, N.Y. TIMES, Dec. 30, 2000, at A1.

47. *See* Devins, *supra* note 27, at 310.

48. *See Mandatory Waiting Periods for Abortion*, STATE POLICIES IN BRIEF (Alan Guttmacher Institute), *at* http://www.guttmacher.org/pubs/spib_MWPA.pdf (last modified Apr. 1, 2002). The states are Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and Wisconsin. *Id.*

49. *Parental Involvement in Minors' Abortion*, STATE POLICIES IN BRIEF (Alan Guttmacher Institute), *at* http://www.guttmacher.org/pubs/spib_PIMA.pdf (last modified Apr. 1, 2002). The following states require parental consent: Alabama, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Missis-

The Supreme Court has acknowledged that the states have broad authority to regulate second and third trimester abortions, effectively whittling away the constitutional right to choose created by *Roe*.[51] *Webster v. Reproductive Health Services*[52] was the first abortion case in which the Supreme Court failed to explicitly reaffirm the essential holding of *Roe*.[53] *Webster* addressed the constitutionality of the preamble to a Missouri statute, which declares that the "life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well being."[54] In addition, the statute requires fetal viability testing if the physician has reason to believe that the fetus is twenty weeks or older and prohibits the use of public employees, facilities, or funds to perform an abortion not necessary to save the mother's life.[55]

When presented with arguments by both the State of Missouri and the George H. Bush administration's Department of Justice, a five-Justice majority[56] reversed the circuit court's invalidation of the statute's preamble[57] and upheld a statutory ban on the use of public employees or facilities for non-

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sippi, Missouri, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Wisconsin, and Wyoming. The following states require parental notification: Arkansas, Delaware, Georgia, Iowa, Kansas, Maryland, Minnesota, Nebraska, Ohio, Oklahoma, South Dakota, Texas, Utah, Virginia, and West Virginia. *Id.*

50. *See Abortion Reporting Requirements*, STATE POLICIES IN BRIEF (Alan Guttmacher Institute), *at* http://www.guttmacher.org/pubs/spib_ARR.pdf (last modified Apr. 1, 2002). The District of Columbia, Maryland, New Hampshire, New Jersey, and West Virginia collect statistics on a voluntary basis. *Id.* Only Alaska and California do not compile abortion data. *Id.* Most of the states that require abortion reporting have adjusted their forms to specifically include questions about medical abortions. *Id.*

51. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

52. 492 U.S. 490 (1989).

53. *See* GARROW, *supra* note 29, at 674–77. The Court had explicitly reaffirmed *Roe* in *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) and in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 419–20 & n.1 (1983). Justice O'Connor concurred in the judgment in *Webster*. She chose not to reexamine the constitutionality of *Roe*, but said that she would "[w]hen the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*." *Webster*, 492 U.S. at 526.

54. *See* MO. REV. STAT. §§ 1.205(1)–(2) (2000).

55. *See* MO. REV. STAT. §§ 188.029, 188.205, 188.210, 188.215 (2000).

56. The majority included Chief Justice Rehnquist, Justice White, Justice Kennedy, Justice O'Connor, and Justice Scalia.

57. *Webster*, 492 U.S. at 506.

therapeutic abortions.[58] The majority noted: "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government . . . may not deprive the individual."[59] Even though the same five Justices held that the fetal viability testing requirement was constitutional,[60] Justice O'Connor refused to read the portion of the Missouri statute mandating fetal viability testing as overturning the essential holding of *Roe*.[61] Technically, the *Webster* holding produced little or no change in the constitutional law on abortion.[62] The decision, however, clearly indicated the fragility of *Roe* and helped rally the pro-choice movement.[63]

Like *Webster*, *Planned Parenthood v. Casey*[64] also focused the abortion debate on state politics. The plurality opinion of *Casey* reaffirmed the constitutional core of *Roe*,[65] but it also upheld the informed consent and mandatory twenty-four-hour waiting period,[66] as well as the parental consent provisions of the Pennsylvania Abortion Control Act.[67] The Court held that those provisions do not impose an "undue burden" on a woman's right to choose.[68] Abortion was not referred to as a "fundamental right" that garners strict scrutiny, but instead as a "liberty claim" that is subject only to the deferential "undue burden" test.[69]

While the *Casey* plurality made it clear that a state "may express profound respect for the life of the unborn,"[70] abortion rights were still intact. *Stare decisis* is an important concept in constitutional law, and it appears to be working to the advantage of those who support abortion rights. As the Court itself noted:

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58. *Id.* at 511.
59. *Id.* at 507.
60. *Id.* at 519–20.
61. *Id.* at 526.
62. Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 410 (1992).
63. *See id.*
64. 505 U.S. 833 (1992).
65. *See id.* at 846.
66. *Id.* at 887.
67. *See id.* at 899.
68. *Id.* at 887.
69. *See id.* at 857.
70. *Id.* at 878.

> For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[71]

Even though the Court refused to overrule two decades of *stare decisis*, the Court did condone the political strategy of making abortion more difficult to obtain through state interference.

Before *Roe*, abortion was always available; women just needed enough money and the right connections to get one.[72] Therefore, the early abortion movement sought to make abortion accessible for all women.[73] *Casey* decreases the options available to poor women, working women, and women who live in rural areas because it forces these women to take more time off of work, possibly deal with the expense of an overnight stay, and confront hordes of protesters not once, but twice. Though the Court upheld the twenty-four-hour waiting period provision as constitutional, the Justices acknowledged that this could amount to an undue burden on a woman's right to choose if conclusive evidence was presented and, therefore, left the question open for reconsideration.[74]

Casey also presumes that women need informed consent laws and legalizes society's historically paternalistic approach to women.[75] Mandatory twenty-four hour waiting periods further increase the already traumatic experience of having an abortion by prolonging the experience and allowing the state to influence a woman's decision with anti-abortion propaganda. *Casey* made it apparent that a state can attempt to protect an unborn fetus by "enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."[76] Parental consent, like partial birth abortion, is a fringe issue that garners heated debate from both sides. Pro-life strategists

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71. *Id.* at 856.
72. *See* Garrow, *supra* note 19, at 834.
73. *See id.* at 834–35.
74. *See Casey*, 505 U.S. at 886.
75. *See* Pine & Law, *supra* note 62, at 425.
76. *See Casey*, 505 U.S. at 883.

have focused on these issues in their effort to weaken mainstream views.

II. THE "PARTIAL BIRTH" ABORTION CAMPAIGN

Since 1995, the right-to-life movement has focused its energy on the partial birth abortion campaign.[77] Pro-life supporters have found that they garner the most support when they focus on edge or fringe issues, like parental consent and partial birth abortion, rather than trying to overrule the constitutional core of *Roe*.[78] "We think it basically shows the American public that *Roe v. Wade* means that it's all right for you to take a living baby from a womb and suck its brains out," said Julie Schmit-Albin of Nebraska Right-to-Life.[79] This highly emotional and politically charged rhetoric is designed to make people who believe in the right to have an abortion question their beliefs by focusing attention on the extreme aspects of abortion.

The Supreme Court put a damper on this legislative and public relations avenue—the partial birth abortion campaign—with its ruling in *Stenberg v. Carhart*.[80] Dr. Leroy Carhart, a Nebraska physician who performs abortions, brought suit in federal district court to challenge a Nebraska statute that

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77. *See* Garrow, *supra* note 19, at 847. "Partial birth" abortion is the politically charged term given to previability, second trimester abortions that are performed using the Dilation and Extraction (D & X) method. *See* Stenberg v. Carhart, 530 U.S. 914, 915 (2000). The D & X method involves drawing the fetus partly out of the uterus so that the physician can puncture the skull, vacuum out its contents, and bring the now smaller skull safely through the birth canal. Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion*, *reprinted in* 139 CONG. REC. E1093 (daily ed. Apr. 29, 1993). The most commonly used procedure for second trimester abortion, the Dilation and Evacuation (D & E) method, dismembers the fetus and extracts the parts. *Id.* at E1092.

78. *See* Garrow, *supra* note 19, at 847. Abortion opponents have used similar public relations avenues in the past. For instance, in the winter of 1985, *The Silent Scream*, an anti-abortion propaganda film that portrays fetal development, was widely distributed by various pro-life organizations to television stations, religious organizations, state legislators, and every member of Congress and the Supreme Court. *See* Claudia Wallis, *Silent Scream: Outcry Over an Anti-Abortion Film*, TIME, Mar. 25, 1985, at 62. The film is referred to as "a twenty-eight minute, shock-the-viewer indictment of abortion." *Id.*

79. *See* Pat Wingert, *The Next Abortion Battle: Shifting from the Court to the Streets and the Ballot Box*, NEWSWEEK, July 10, 2000, at 24.

80. 530 U.S. 914 (2000). Justice Breyer delivered the opinion of the Court and was joined by Justices Souter, Stevens, O'Connor and Ginsburg. Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Thomas all filed dissenting opinions.

made partial birth abortions illegal.[81] The statute banned abortions that occurred when a physician "partially deliver[ed] vaginally a living unborn child before killing the unborn child and completing the delivery."[82] The majority declared the Nebraska statute unconstitutional because it did not contain an exception allowing the procedure if necessary to protect the health of the mother.[83]

Specifically, the majority held that when the dilation and extraction method (D & X) is found to be safer than the principal late-term method, dilation and evacuation (D & E), the abortion provider must be allowed to use her judgment to protect the mother's best interest.[84] The *Stenberg* Court addressed the reality that "responsible differences in medical opinion" exist but understood that "the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence."[85] Experts have noted that the D & X procedure is safer under some circumstances, especially when the fetus has been diagnosed with hydrocephaly or other anomalies making it nonviable.[86] Therefore, the Ne-

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81. *Id.* at 922. Interestingly, Dr. Carhart has never performed a dilation and extraction procedure. Pam Belluck, *After Abortion Victory, Doctor's Troubles Persist*, N.Y. TIMES, Nov. 7, 2000, at A18. According to the *New York Times*, "[dilation and extraction] is a procedure that Dr. Carhart has never performed and one he says he finds 'distasteful,' but he believed that the law was so broad that it could criminalize other types of abortions." *Id.* Dr. Carhart is also a member of the Republican Party, and he attends Methodist Church. *See id.*

82. NEB. REV. STAT. § 28-326(9) (2000 Cum. Supp.). Additionally, "[n]o partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.* § 28-328(1). The law classified a violation of the statute as a class III felony carrying a prison term of up to twenty years, and a fine of up to $25,000. *Id.* §§ 28-105(1), 28-328(2). It also provided for automatic revocation of doctor's license to practice medicine in the state of Nebraska in the case of conviction. *Id.* § 28-328(4).

83. *See Stenberg*, 530 U.S. at 938.

84. *See id.*

85. *Id.* at 937.

86. *Id.* at 929. Hydrocephaly is a congenital fetal anomaly that is estimated to occur in 0.3 to 0.8 per 1000 births. *Id.* (quoting AM. MED. ASS'N, REPORT OF THE BOARD OF TRUSTEES ON LATE-TERM ABORTION, App. 490). It is characterized by a dilation of the lateral ventricles of the brain, making it difficult for the enlarged head to fit through the birth canal. *Id.* (quoting David A. Grimes, *The Continuing Need for Late Abortions*, 280 JAMA 747, 748 (1998)). The condition is difficult to detect until mid-pregnancy. Grimes, *supra*, at 748. The neurological outlook for these babies is bleak, but specialists have had limited success placing a shunt or tube in the brain to drain off some of the fluid. *Id.*

braska statute required a maternal health exception as proscribed by *Casey*.[87]

The majority also found that the possibility of the D & E procedure being construed as illegal placed an undue burden on a woman's right to choose.[88] The Nebraska Attorney General argued that the statute only banned the D & X procedure, not the D & E procedure in which a foot or arm is drawn through the cervix instead of the head.[89] The Court reasoned that the wording of the statute, "delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child,"[90] did not adequately distinguish between the D & E procedure and the D & X procedure.[91] Therefore, doctors may have hesitated or refused to perform the D & X procedure, even when the woman's health was at risk, because they feared prosecution. Justice O'Connor indicated in her concurrence that she would uphold a statute that banned only D & X abortions and included an exception for the life and health of the mother.[92]

Interestingly, Justice Stevens, in a concurrence joined by Justice Ginsburg, pointed out that the dissenters' arguments were pure rhetoric.[93] Even though both procedures were seen as "gruesome," neither procedure was infanticide, as Nebraska argued.[94] They also supported Seventh Circuit Chief Judge Posner's comment that, "if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."[95] Therefore, in the eyes of Justice Stevens and Justice Ginsburg at least, a statute can-

87. *Stenberg*, 530 U.S. at 938.

88. *Id.* at 938.

89. *Id.* at 940.

90. NEB. REV. STAT. ANN. § 28-326(9) (Supp. 2000).

91. *Stenberg*, 530 U.S. at 938.

92. *Id.* at 951 ("[A] ban on partial birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.").

93. *See id.* at 946 (Stevens, J., concurring).

94. *Id.*

95. *Id.* at 952 (Ginsburg, J., concurring) (quoting Hope Clinic v. Ryan, 195 F.3d 857, 881 (7th Cir. 1999)). In addition, Justice Ginsburg noted that, "Chief Judge Posner commented, the law prohibits the procedure because the state legislators seek to chip away at the private choice shielded by *Roe v. Wade*, even as modified by *Planned Parenthood v. Casey*." *Id.* (citations omitted).

not stand if the intent of the legislature is really to "chip" away at a fundamental liberty protected by the Constitution.[96]

The "partial birth" term itself is rhetoric. Justice Thomas admitted in his dissenting opinion in *Stenberg* that opponents and proponents disagree over the appropriate term for this procedure.[97] Like the other dissenting Justices, he chose to use the term "partial birth abortion"[98] even though it is politically charged and wrought with negative connotations. Admittedly, Congress and twenty-eight state legislatures use the term to describe the D & X procedure; however, Dr. Martin Haskell, one of the developers of the procedure, refers to the procedure as dilation and extraction.[99] The Executive Board of the American College of Obstetricians and Gynecologists uses the hybrid term "intact dilation and extraction,"[100] and this terminology has been adopted by the American Medical Association.[101]

The pro-life movement portrays "partial birth" abortion as the paradigmatic case. Of the 1,365,730 abortions performed in 1996, however, only an estimated 0.03% to 0.05% used the D & X procedure, the procedure commonly referred to as partial birth abortion.[102] Today, eighty-eight percent of all abortions are performed during the first twelve weeks of pregnancy, and ninety-five percent take place during the first fifteen weeks of pregnancy.[103] Only one percent take place past twenty weeks.[104] Abortion foes have chosen to focus on this very graphic, but rare, late-term procedure to force mainstream pro-life advocates to question their beliefs. The current Supreme

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96. *See id.*

97. *Id.* at 986 n.5 (Thomas, J., dissenting) ("There is a disagreement among the parties regarding the appropriate term for this procedure.").

98. *Id.*

99. *Id.*

100. *Stenberg*, 530 U.S. at 985 n.5. *See also* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS EXECUTIVE BOARD, STATEMENT ON INTACT DILATION AND EXTRACTION (1997).

101. *Stenberg*, 530 U.S. at 985 n.5 (quoting AM. MED. ASS'N, REPORT OF THE BOARD OF TRUSTEES ON LATE-TERM ABORTION, *supra* note 86).

102. Stanley K. Henshaw, *Abortion Incidence and Services in the United States*, 30 FAM. PLAN. PERSP. 263, 268 tbl. 6, 287 (1998).

103. The Alan Guttmacher Institute, *Facts in Brief: Induced Abortion*, *at* www.agi-usa.org/pubs/fb_induced_abortion.html (last visited Apr. 11, 2002).

104. *See id.* In 1973, only thirty-six percent of abortions were performed at or before eight weeks of pregnancy. CENTERS FOR DISEASE CONTROL, ABORTION SURVEILLANCE: ANNUAL SUMMARY 1981, at iv tbl. (1985).

Court, however, appears to be resolved to uphold a woman's right to terminate her pregnancy.[105]

III. THE RESPONSIVE STRATEGIES OF THE PRO-CHOICE MOVEMENT

It is questionable whether the responsive strategies from the pro-choice camp have been adequate to counter the multi-faceted attacks on abortion rights. Abortion proponents have had a legal stronghold to defend since 1973, so their strategies have been largely reactive to the pro-life movement. Certain events have nevertheless elicited a strong pro-choice reaction, especially where the right-to-life movement has attacked the constitutional core of *Roe* rather than focused on fringe issues.[106] For instance, when Judge Robert Bork was presented as a nominee to the Supreme Court in 1987, freedom of choice supporters became alarmed because he was an outspoken opponent of both *Griswold* and *Roe*.[107] The National Association for the Repeal of Abortion Laws (NARAL) and other pro-choice groups mounted a full-scale attack against Bork's nomination.[108]

Judge Bork testified that he did not agree with the legal reasoning of *Roe* or *Griswold*: "If *Griswold v. Connecticut* established or adopted a privacy right on reasoning which was utterly inadequate, and failed to define that right so we know what it applies to, [then] *Roe v. Wade* contains almost no legal reasoning."[109] Not only was Bork's nomination to the Supreme Court rejected, in large part because of the public outcry, but also, more importantly, the advocates of choice realized the effectiveness of a unified front.[110]

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105. It is unclear, however, what could happen to reproductive freedom as new justices are appointed to the Court. Three Justices dissented in the *Stenberg* decision, and Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, declared opposition to abortion per se. *See Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting) ("As some of my colleagues on the Court, past and present, ably demonstrated, [the *Roe v. Wade*] decision was grievously wrong.").

106. *See* GARROW, *supra* note 29, at 668–71.

107. *See id.*

108. *See id.* at 668.

109. *Hearings on the Nomination of Robert H. Bork Before Senate Judiciary Comm.*, 100th Cong. (1987).

110. *See* GARROW, *supra* note 29, at 671.

As noted in Part I.D, a plurality of the Court in *Webster v. Reproductive Health Services*[111] rejected *Roe's* holding that abortion is a fundamental right, and like the nomination of Judge Bork, this holding sparked a pro-choice response.[112] Even though there was no constitutional change in the law on abortion, pro-choice supporters became acutely aware that the fate of abortion rights is in the hands of only nine Supreme Court Justices. In response, abortion proponents began targeting high-impact political campaigns like their ideological adversaries.[113] This section discusses the Freedom of Access to Clinic Entrances Act that was passed by Congress to deal with clinic violence.[114] In addition, the United States Supreme Court upheld a law making it a crime for anyone to come within eight feet of an abortion clinic visitor without their permission, making floating buffer zones a viable means for states to protect a woman's privacy.[115]

A. The Freedom of Access to Clinic Entrances Act

Increased clinic violence compelled Congress to pass the Freedom of Access to Clinic Entrances Act (FACE) in 1994.[116] The congressional intent behind FACE was to "protect and promote the public safety and health and activities affecting interstate commerce."[117] FACE did decrease the violent attacks on clinics.[118] Although bomb threats, arson, death threats, and stalking still persist at twenty percent of clinics, the figure is down from fifty-two percent of clinics in 1994.[119] FACE also

111. 492 U.S. 490 (1989).

112. *Id.*

113. *See* Pine & Law, *supra* note 62, at 443.

114. 18 U.S.C. § 248 (2000).

115. Hill v. Colorado, 530 U.S. 703 (2000) (upholding Colorado's "bubble law").

116. *See* 18 U.S.C. § 248 (2000); *see also* discussion *supra* Part I.C.

117. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (2000)). Senate findings include determinations that the "methods used to deny women access to [abortion and abortion clinics] include blockades of facility entrances; invasions and occupations of the premises; vandalism and destruction of property in and around the facility; bombings, arson, and murder; and other acts of force and threats of force." 139 CONG. REC. 29357 (1993).

118. *See* FEMINIST MAJORITY FOUND., 1999 NAT'L CLINIC VIOLENCE SURVEY REPORT (Jan. 19, 2000), *at* http://www.feminist.org/research/cvsurveys/1999/1999ClinicSurvey.htm.

119. *Id.*

had another, less obvious effect. It took radicalism and violence out of the public eye because it reduced the overt violence that took place at abortion clinics across the country.[120] Mass attacks were not featured on the nightly news as often, and pro-life leadership shifted back to the mainstream lobbyists and legislators.[121]

The numerous courts that have addressed whether FACE violates the First Amendment have determined that FACE is content-neutral legislation.[122] While the United States Supreme Court has repeatedly denied certiorari for constitutional challenges to FACE, the lower courts have reasoned that the First Amendment does not protect the three types of activities that FACE seeks to prohibit—use of force, threats of force, and physical obstruction.[123] FACE does not violate the First Amendment when there is a violent confrontation, physical obstruction of a clinic, or a direct person-to-person threat,[124] but it is unclear whether FACE can be used to challenge Web sites that look like abortion provider "hit-lists" such as the Nuremberg Files Web site, discussed above in Part I.C. In 1996, Planned Parenthood filed suit against the American Coalition for Life, the Oregon-based extremist group believed to have originally created the Nuremberg Files.[125] Planned Parenthood challenged the Web site as a violation of FACE, arguing that

120. Garrow, *supra* note 19, at 846.

121. *Id.*

122. *See, e.g.*, United States v. Gregg, 226 F.3d 253 (3d Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); United States v. Hart, 212 F.3d 1067 (8th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001); United States v. Weslin, 156 F.3d 292 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999); United States v. Wilson, 154 F.3d 658 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999); Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996).

123. *See id.*

124. Melanie C. Hagan, *The Freedom of Access to Clinic Entrances Act and the Nuremberg Files Web Site: Is the Site Properly Prohibited or Protected Speech?*, 51 HASTINGS L.J. 411, 418 (2000).

125. Three opinions have been published regarding this suit. Planned Parenthood v. Am. Coalition of Life Activists, 945 F. Supp. 1355 (D. Or. 1996) (denying defendants' motion to dismiss); Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) (denying the defendants' motion for summary judgment); Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999) (enjoining defendants from maintaining the Web site).

the Web site constitutes a threat in violation of the federal law.[126]

Originally, the federal trial court for the District of Oregon held that it was a question for the jury whether or not the Web site constituted a threat under FACE.[127] The court took into account the violent context of anti-abortion activism and held that government intervention was necessary.[128]

> In the absence of an injunction, plaintiffs will continue to live as they did before the trial: clad in bulletproof vests and disguises, borrowing cars and varying routes to avoid detection, and constantly in fear of the bodily harm with which they have been threatened. By contrast, the prohibition of unlawful activities imposes no burden on defendants. Defendants may protest abortion using legitimate, lawful means.[129]

A Ninth Circuit panel disagreed with this reasoning, however, and has since vacated the lower court's judgment, ruling that the Web site was not a direct threat to abortion providers.[130] Writing for a majority of the panel that heard the case, Circuit Judge Kozinski decided that the Web site was protected by the First Amendment because the speech was not a direct threat to any abortion provider.[131] Simply because the information provided in the Web site increased the risk of harm did not make it impermissible.[132] Further, the court found it "significant that all the statements were made in the context of public discourse, not in direct personal communications," and believed that the public nature of this speech decreased the likelihood that this sort of speech would be interpreted as a threat.[133]

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126. 18 U.S.C. § 248 (1998). "Whoever . . . by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . ." § 248(a)(1).

127. Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1189 (D. Or. 1999).

128. *See* Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1154 (D. Or. 1999).

129. *Id.*

130. Planned Parenthood v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).

131. *Id.* at 1017.

132. *Id.* at 1015.

133. *Id.* at 1018.

Subsequent to this decision, the Ninth Circuit has agreed to rehear the case en banc.[134]

In light of the extremely violent anti-abortion tactics that have been used since the murder of Dr. Gunn, courts reviewing decisions similar to *Planned Parenthood v. American Coalition of Life Activists* should consider the context of where the speech is made to determine whether a First Amendment violation has occurred.[135] Clinic violence is furthered by Web sites such as the Nuremberg Files, and violence significantly limits access to abortion. FACE was enacted to curtail the violence that frequently takes place at abortion clinics and to protect a woman's right to choose. Therefore, FACE should be upheld when applied in contexts such as the Nuremberg Files, especially when the Internet provides worldwide access to photos, addresses, and other personal information about individuals who believe that abortion should remain legal and accessible.

B. Floating Buffer Zones

In 2000, the Supreme Court ruled in *Hill v. Colorado* that an eight-foot floating buffer zone was not an unlawful restraint on free speech.[136] Referred to as the "bubble law," the Colorado statute makes it a misdemeanor for a person, within a one-hundred-foot radius of a health care facility, to come within eight feet of another person without their permission, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling."[137] More generally, the law recognizes the need to balance "a person's right to protest or counsel" against abortion with "another person's right to obtain medical counseling and treatment in an unobstructed manner."[138]

Soon after the law's passage in 1993, abortion protestors sought to have the legislation declared facially invalid under the First Amendment.[139] The plaintiffs alleged that the law was overbroad, infringing more speech than was necessary to

134. Planned Parenthood v. Am. Coalition of Life Activists, 268 F.3d 908 (9th Cir. 2001).

135. *See* Hagan, *supra* note 124, at 436.

136. 530 U.S. 703 (2000).

137. COLO. REV. STAT. § 18-9-122(3) (2001).

138. *Id.* § 18-9-122(1).

139. Hill v. Lakewood, 911 P.2d 670, 672 (Colo. Ct. App. 1995).

accomplish the legislature's stated goal of protecting access to health care facilities.[140] While noting that "the right to free speech, of course includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience,"[141] a 6–3 majority upheld the statute even though the Supreme Court had previously struck down a fifteen-foot floating buffer zone in *Schenck v. Pro-Choice Network of Western New York*.[142] Because of the "captive audience" problem,[143] "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[144] The Court declared that an eight-foot floating buffer zone was not a violation of the First Amendment because it was narrowly tailored to recognize the state's substantial interest in regulating activity around certain public and private places.[145]

No matter how large the buffer zone is, the very private matter of abortion is rarely private in practice. State reporting requirements, mandatory waiting periods, informed consent, and clinic violence and harassment all burden a woman's fundamental right to privacy. In contrast, the FDA's approval of mifepristone changes the terms of the debate by making abortion easier to obtain and easier to hide.

IV. CHANGING THE TERMS OF THE ABORTION DEBATE

The FDA's approval of mifepristone, the drug touted as the "early abortion pill," should lead to fewer late-term abortions[146]

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140. *Id.* at 673.

141. *Hill*, 530 U.S at 716.

142. 519 U.S. 357 (1997).

143. For a discussion of the "captive audience" concept and how it relates to *Hill*, see James J. Zych, Note, Hill v. Colorado *and the Evolving Rights of the Unwilling Listener*, 45 ST. LOUIS U. L.J. 1281 (2001).

144. *Hill*, 530 U.S. at 716.

145. *Id.* at 728.

146. This thesis presumes that the results in the United States will be similar to those in France. *See* Population Council, *Medical Abortion: Frequently Asked Questions*, *at* http://www.popcouncil.org/faqs/abortion.html (last modified Jan. 30, 2002) ("There has been no increase in the total number of abortions in France since the method was introduced in 1989. The main impact of availability of medical abortion has been that more women have sought abortions earlier in their pregnancies."). Furthermore, since the number of abortions in the United States has declined by 17.4% in seven years, from 1.608 million abortions in 1990 to 1.328 million in 1997, it does not appear that adding another alternative will

and help to temper the extreme emotion that stems from the topic of abortion. As explained below, mifepristone essentially nullifies many pro-life arguments because it enables women to end a pregnancy before the embryo even resembles human life. Consequently, the decision to terminate a pregnancy can be less about morality and more about reproductive freedom.

A. What Is Mifepristone?

The FDA approved mifepristone, known as RU 486 in Europe, on September 28, 2000.[147] Mifepristone blocks the hormone progesterone and causes the uterus to shed its lining if taken within the first seven weeks of pregnancy.[148] Another drug, misoprostol, is taken two days after the mifepristone to induce contractions to expel the embryo.[149] To prescribe mifepristone in the United States, the doctor must be able to date the pregnancy conclusively and provide surgical intervention if the treatment fails or there are any severe and unexpected side effects.[150] As indicated in studies, the pills only fail to work one percent of the time, and in the rare case of failure, a surgical abortion is required.[151]

Mifepristone was first synthesized in 1980 by the French drug company Roussel Uclaf and was subsequently approved by the French Health Ministry in September 1988.[152] One month following its release in France, Roussel Uclaf withdrew RU 486 from the market because of pressure from anti-abortion

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increase the total number of abortions. Kolata, *supra* note 46. Some argue that the decrease is due to informed consent laws and parental notification, but others argue that better and more accessible birth control is the reason. *Id.*

147. Kolata, *supra* note 11.

148. Gibbs, *supra* note 15, at 41, 44. This procedure is referred to as medical abortion. Surgical abortion is the invasive technique performed by doctors to terminate a pregnancy. *See Early Options—A Provider's Guide to Medical Abortion*, *at* http://www.earlyoptions.org/w_guide.html#publicservicecampaign (last visited Apr. 11, 2002).

149. *Id.*

150. *Id.* at 43.

151. John Thor-Dahlberg, *Pill Doesn't Alter Abortion Ethics, RU-486 Creator Says*, L.A. TIMES, Oct. 29, 2000, at A1.

152. Gibbs, *supra* note 15, at 42–43. The National Right-to-Life Committee refers to mifepristone as "a death pill." Judy Foreman, *France Orders Sale of Abortion Pill*, BOST. GLOBE, Oct. 29, 1988, at 1. After approval of the drug, the group vowed to boycott Roussel Uclaf, its parent company Hoechst AG of Frankfurt, and all of Hoechst's subsidiaries. *Id.* In addition, many of the wives of Roussel Uclaf executives received threats, photographs, and anonymous letters. *Id.*

groups.[153] The French Health Minister soon directed the company to resume distribution of the pill because of widespread condemnation of the decision.[154] In particular, doctors at the World Conference in Gynecology and Obstetrics signed a petition urging Roussel Uclaf to reconsider its decision to take RU 486 off of the market.[155] Additionally, the World Health Organization, the World Bank, and the Rockefeller Foundation pressured the company to resume distribution.[156]

As in France, the approval process in the United States was long and hard-fought. In June 1989, President George H. Bush banned the import of RU 486, "citing safety concerns."[157] On his third day in office, however, President Bill Clinton called for a reexamination of the ban on RU 486 and ordered the FDA to begin safety testing.[158] In 1994, Roussel Uclaf donated the United States patent rights for mifepristone to the Population Council, a New York City-based nonprofit reproductive rights organization, because the pressure from both right-to-life and right-to-choice groups was becoming overwhelming.[159] The Population Council assumed the burden of filing a new-drug application with the FDA and performed the necessary multi-center study of 2,100 women.[160] The Council licensed the distribution and manufacturing of mifepristone to Danco Laboratories in 1995, and the FDA agreed not to disclose Danco's address or the name and address of the manufacturing facility for security reasons.[161]

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153. *Id.*

154. *Id.* Incidentally, the French government owned thirty-six percent of the shares of Roussel Uclaf. Both Roussel Uclaf and the French government were pressured by the international organizations. *Id.*

155. *Id.*

156. *Id.* The World Heath Organization (WHO) "estimates that about 200,000 women worldwide die every year from botched abortions." *Id.* In 1988, the WHO was "already testing RU 486 in at least 10 countries." *Id.*

157. Gibbs, *supra* note 15, at 43.

158. *See* Robin Toner, *Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, at 1.

159. Gibbs, *supra* note 15, at 43. *See also* Population Council, *supra* note 146.

160. Gina Kolata, *Abortion Pill Tests Well in United States, Drug's Sponsor Says*, N.Y. TIMES, Apr. 30, 1998, at A24. *See also* Population Council, *supra* note 146.

161. *See* Robert Ingrassia, *Spotlight Shines on Secretive Drug Co.*, N.Y. DAILY NEWS, Sept. 29, 2000, at 6. The company has an unlisted phone number, no public office, and refuses to release the names of its investors. *Id.* Danco was formed to specifically market mifepristone and expects to make about $34 million in profits by 2004. *Id.*

A number of other countries have authorized the use of mifepristone. China began testing in 1986 and approved mifepristone in 1988.[162] The United Kingdom approved mifepristone in 1991, Sweden followed suit in 1992, and numerous other European countries approved the drug in 1999.[163]

B. Ensuring Privacy

As early as May 1993, the *New England Journal of Medicine* reported that medical abortions caused by taking mifepristone in conjunction with misoprostol were both safe and effective.[164] Nonetheless, the FDA did not approve mifepristone until September 28, 2000.[165] Before mifepristone was actually approved, the FDA indicated that it would only allow doctors who currently perform surgical abortions to prescribe mifepristone.[166] These doctors would have needed some sort of state certification,[167] which would have given anti-abortion activists a person and a place to target.

Although the FDA decided not to require a registry, there are still other requirements that might deter physicians from prescribing mifepristone. Doctors must administer mifepristone within forty-nine days of the patient's last menstrual period, and it is questionable exactly what doctors have to do to date the pregnancy conclusively to comply with the FDA's rules.[168] The FDA's language can be read to require an ultrasound, but many doctors do not have ultrasound equipment in their offices.[169] Doctors will also have to locate the woman if she does not show up for her last office visit to make sure that

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162. Population Council, *Mifepristone: A Chronology*, MOMENTUM (Jan. 2001), *at* http://www.popcouncil.org/publications/momentum/momentum1200F1b.html.

163. *Id.*

164. Remi Peyron et al., *Early Termination of Pregnancy with Mifepristone (RU 486) and the Orally Active Prostaglandin Misoprostol*, 328 NEW ENG. J. MED. 1509 (1993).

165. Kolata, *supra* note 11.

166. Gibbs, *supra* note 15, at 43. State governments may be able to implement a similar restriction, "[e]xercising their traditional authority to regulate the practice of medicine." Lars Noah, *A Miscarriage in the Drug Approval Process?: Mifepristone Embroils the FDA in Abortion Politics*, 36 WAKE FOREST L. REV. 571, 599 (2001).

167. *Id.*

168. *See id.* at 44.

169. *Id.*

the pregnancy is in fact terminated.[170] Finally, malpractice insurance rates may also increase because of the possibility of complications.[171] It is unclear how many doctors will be deterred by these obstacles, but in order for the advantage of mifepristone to be fully realized, enough doctors must prescribe mifepristone so that women can have the option of making a truly private choice.

In addition to the dating requirement and the emergency backup, individual state laws still apply to medical abortions. Forty-four states require doctors to report every abortion performed, and since the approval of mifepristone, twenty-six states have adjusted their reporting forms to specifically include medical abortions.[172] In some states, parental notification requirements and twenty-four-hour waiting periods will automatically apply to medical abortions.[173]

The advantage of mifepristone is that it gives women another option for abortion—one that is non-invasive and can be done without anesthesia—and it allows for the privatization of abortion.[174] To keep abortion out of the public eye, states should not allow any abortion records to be made public. Before the approval of mifepristone, ninety-one percent of abortions were performed in clinics.[175] Now there is hope that many women can avoid abortion clinics altogether, and the angry protesters and fear of violence that go with them, but only if states do not make abortion records public.

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170. *Id.*

171. *Id.*

172. *See Abortion Reporting Requirements, supra* note 50. The states are Delaware, Idaho, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See id.*

173. Some state abortion restrictions explicitly refer to pharmaceuticals. *E.g.*, GA. CODE ANN. § 16-12-140(a) (1999); 305 ILL. COMP. STAT. ANN. 5/5-8 (West 2001); N.C. GEN. STAT. § 90-21.6(2) (1999).

174. *See* Kolata, *supra* note 11. Mifepristone does make abortion more private, but it does not decrease the cost. In 1997, the average cost of a surgical abortion was $316. *Id.* It costs $270 for the three-pill regimen, but that does not include the three office visits, the lab work, and the counseling. *Id.* Some clinics are offering one pill, instead of three, and requiring the patients to sign a form saying that they understand that one pill is not the approved dose, but studies have shown that one is still effective. *Id.* An abortion clinic in Detroit is charging $450 for a medical abortion with the three-pill dose. *See id.*

175. Gibbs, *supra* note 15, at 43.

C. Mifepristone's Effect on the Abortion Debate

Opponents of mifepristone argue that its approval will cause women to view the decision to have an abortion more casually and, therefore, increase the total number of abortions performed.[176] President George W. Bush "fear[s] that making this abortion pill widespread will make abortions more and more common rather than more and more rare."[177] This does not appear to be the case though, based on the experience in France. Between 1990 and 1995, the overall number of abortions declined in France after the approval of mifepristone in 1988.[178] Some even argue that because a woman has to terminate the pregnancy herself, in her own home, the decision will actually be harder.[179]

While the total number of abortions in France did not increase, women have sought abortion earlier in their pregnancies since the approval of mifepristone.[180] Thus, only those nineteen percent of Americans who staunchly believe that life begins at conception should object to a medical procedure that has that result.[181] For those steadfast opponents of abortion, abortion is morally indefensible, and mifepristone is merely another avenue to get an abortion. Alternatively, for individuals who believe abortion is less offensive if performed early in the pregnancy, when the fetus is less like a human life, the approval of mifepristone should be a step forward.

The *Roe* Court recognized the difference between a first, second, and third trimester abortion,[182] and so do most Ameri-

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176. *Id.* at 46.

177. *Id.* at 43.

178. See Stanley K. Henshaw et al., *Recent Trends in Abortion Rates Worldwide*, 25(1) INTERNATIONAL FAMILY PLANNING PERSPECTIVES 44–48 (1999).

> In developed countries with high abortion rates, use of abortion is likely to fall rapidly when a range of contraceptive methods become widely available and effectively used. Legalization of abortion and access to abortion services do not lead to increased reliance on abortion for fertility control in the long term; in developed countries with these conditions, the predominant trend in abortion rates has been downward.

179. *See, e.g.*, Andrew Sullivan, *RU 4 Life*, NEW REPUBLIC, Oct. 16, 2000, at 12. The author of this editorial analogized the patient's experience with medical abortion to being the one to "pull the switch" when the death penalty is given. *Id.*

180. *See* Population Council, *supra* note 146.

181. Saad, *supra* note 3.

182. Roe v. Wade, 410 U.S. 113 (1973).

cans.[183] Even though the introduction of the abortion pill will probably lead to fewer late-term abortions, opponents who do not see a gray area when it comes to abortion have vowed to "[t]arget the doctors who agree to prescribe it" and are lobbying Congress to ban it.[184] "We will have to personalize the egg," says the president of the Virginia-based American Life League.[185] The group stresses that even though the expelled embryo does not look like a fetus, it is still an unborn child.[186] Either Congress or the states could ban medical abortions, but only the courts can decide if such a ban will be an undue burden on a woman's right to choose to terminate her unwanted pregnancy.[187]

FDA approval can be revoked if mifepristone is found to be unsafe or ineffective.[188] Pro-life advocates are issuing warnings about the health risks associated with the drug: "A healthy woman who takes this drug may end up coming out on an ambulance gurney and being rushed to the hospital."[189] But, there have been no deaths caused by the mifepristone/misoprostol regimen.[190] Furthermore, abortion proponents contend that

183. *See* Saad, *supra* note 3. "[A] majority of Americans are tolerant of abortion in the first trimester (averaging 62% across several polling organizations since 1996), a majority oppose it in the second trimester (67%) and most oppose it in the third trimester (82%)." *Id.* Despite this approval for first trimester abortions, "only 39% of Americans in a March 2000 Gallup poll said they favored [RU 486] approval for use in the United States while 47% objected. At most, the major polling firms have found 50% of Americans supporting the use of RU-486 in the United States (CBS/New York Times in January 1998)." *Id.*

184. Gibbs, *supra* note 15, at 42.

185. *Id.* at 46.

186. *Id.*

187. Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) ("Only when state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."). When a pregnant woman sought to have her single dose of RU 486 returned after United States airport officials confiscated it, the Supreme Court upheld the seizure because the drug was not yet approved by the FDA. Benten v. Kessler, 505 U.S. 1084 (1992). The majority declined to comment on whether the government's confiscation unduly burdened the woman's right to have an abortion. *Id.* at 1085. According to Justice Stevens, however, she had a constitutional right to select the method for terminating her pregnancy, and "the relevant legitimate federal interest [was] not sufficient to justify the burdensome consequence of this seizure." *Id.* at 1085–86 (Stevens, J., dissenting).

188. *See* 21 C.F.R. § 314.530 (2001) (specifying the grounds and procedures for summary withdrawal of a drug by the FDA).

189. Sarah Lueck, *Abortion Foes Face Tough Battle Against RU-486 Drug*, WALL ST. J., Feb. 12, 2001, at A28.

190. *See* Population Council, *supra* note 146.

"carrying a baby to term is six times as dangerous as ending a pregnancy," either surgically or with mifepristone.[191] Additionally, because surgery is not required with mifepristone, the risk of infection is lower than in surgical abortions.[192] The Department of Health and Human Services could attempt to take mifepristone off of the market if the federally-mandated regimen for distribution is not followed or if Danco fails to complete the required post-marketing studies, but any move to withdraw the drug could upset the Bush administration's relationship with the drug industry.[193]

The approval of mifepristone is a step forward for women's rights. Not only does mifepristone provide another safe option, but it also increases the amount of privacy available to women who choose to have an abortion. The right to have an abortion comes from the right to privacy guaranteed by the Constitution, and mifepristone furthers that right by allowing a woman to have an abortion in her own home without anesthesia and without a visit to an abortion clinic. Therefore, any developments that make abortion more accessible and more private, but are not likely to increase the overall number of abortions, should be widely available.

In addition, if the moral debate is truly about taking a human life, as the partial birth abortion campaign suggests, then mifepristone should alleviate the ethical qualms for some individuals because it enables a woman to end her pregnancy before the embryo even resembles a human life. Medical abortions are very similar to natural spontaneous abortions that often occur early in pregnancy, and they occur when the fetus is like a grain of rice, not like a human being.[194] More moderate pro-life advocates recognize the value of the early abortion pill—it makes *early* abortion a more safe and accessible option.[195] A chance to diffuse the violence and get to the core issue should be welcomed by anyone involved in abortion politics. Women need the right to choose so that they can have control over their own bodies, and with mifepristone, the decision to

191. Gibbs, *supra* note 15, at 49.

192. Christine Gorman, *The Chemistry of Abortion*, TIME, Oct. 9, 2000, at 44.

193. Lueck, *supra* note 189. The drug industry would be alarmed if drugs were taken off of the market only because of political opposition. *See id.*

194. Gibbs, *supra* note 15, at 43.

195. *See* Sullivan, *supra* note 179. The idea is that if abortion is inevitable, mifepristone will provide an earlier, less immoral alternative for termination.

have an abortion can be less about morality and more about reproductive freedom.

CONCLUSION

A woman's right to choose to have an abortion stems from the right to privacy found in the Supreme Court's interpretation of "liberty," which is guaranteed by the Due Process Clause. Ironically though, abortion is not a private decision. Many women are forced to endure angry protesters, mandatory waiting periods, and informed consent requirements if they want to terminate their unwanted pregnancies. Abortion providers also perform abortions knowing that their lives, and the lives of their families, are in danger.

The arena of abortion politics has been significantly altered by the FDA's approval of mifepristone, the early abortion pill. For many Americans, mifepristone creates less of an ethical dilemma because the abortion takes place very early in the pregnancy, when many people have fewer qualms that they are taking the life of an unborn child. The early abortion pill helps keep a woman's personal decision to have an abortion out of the public eye. Therefore, pro-choice advocates should fight to keep mifepristone an option. In addition, those in favor of choice should continue to lobby state legislatures to ensure that states keep abortion records confidential to protect the privacy of the doctors who prescribe mifepristone. Mifepristone allows abortion advocates to get to the core issue: women need reproductive freedom and the only way to achieve this is for women to have access to safe and private abortions.