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**A Progressive Agenda for Women's Reproductive
Health and Liberty on *Roe v. Wade's*
Thirty-Fifth Anniversary**

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A Progressive Agenda for Women's Reproductive Health and Liberty on *Roe v. Wade*'s Thirty-Fifth Anniversary

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I. Reproductive Liberty: A Status Report

On this thirty-fifth anniversary of *Roe v. Wade*,¹ the state of women's reproductive liberty is at best mixed. Those who would like to see the Supreme Court overrule *Roe* and the government once again criminalize abortion have at least as much to celebrate as those who value the right of women to make their own decisions about when and whether to have children. To begin with the good news and reason for hope: a majority of Americans continue to support the Court's decision in *Roe* and want to keep abortion legal. The November 2008 elections offer a realistic opportunity to break from eight years of a strongly anti-*Roe* Administration and to elect a President, and perhaps even a Congress, supportive of judges, laws and programs that will safeguard and advance women's reproductive health and liberty.

On the other hand, the high water mark for reproductive liberty (at least to date) came and went more than two decades ago. Since the 1980's opponents of *Roe*, led politically by a Republican Party with a new "family values" agenda, have worked diligently and with substantial success to transform the country's legal, political and social landscapes. Decades of mounting legal restrictions combined with harassment and stigmatization of health care providers have made abortion services increasingly less available to growing numbers of women. During the same years, programs to prevent unintended pregnancy, which aim to reduce the need for abortion, have suffered their own losses as "abstinence only" programs have replaced comprehensive sexuality education. Even as tax dollars flow to these dangerously incomplete and inaccurate programs, funding for reproductive health care for low-income women has failed to keep up with inflation, growing populations, and need.

Perhaps most ominous, over the last decade the anti-abortion movement has made substantial strides in changing the nature of the public discourse. Opposition to abortion since *Roe*, of course, has been framed largely in terms of the moral and religious imperative of safeguarding the developing embryo and fetus. The interests of pregnant women—their ability to protect their own health and lives, to care for their children, to control their futures—have generally been either ignored or dismissed as secondary to the value of the unborn at all stages of development.

Beginning in the 1990's the anti-abortion movement began a new campaign to enact criminal bans on what were labeled "partial birth abortions"—an invented and intentionally provocative political term previously unknown to the medical profession. This campaign in the end proved very successful in shifting the focus to the fetus and away from the woman. The

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

U.S. Code and most state legislative codes, as well as the official reports of Supreme Court decisions and every first year law student's constitutional law casebook, now contain gruesome descriptions designed to make abortions sound like infanticide, to obscure the fact that ninety percent of abortions are performed in the first twelve weeks, and to shift the focus entirely away from the pregnant woman by describing the fetus as a separate "partially born" person.

In April 2007, a newly constituted Supreme Court—with Justice Samuel Alito in the seat formerly occupied by Justice Sandra Day O'Connor and Justice Anthony Kennedy the new swing Justice—reversed course on the constitutionality of criminal bans on "partial birth" abortions. The Court had struck down a Nebraska ban in 2000,² but in its 2007 decision in *Gonzales v. Carhart*, the Court upheld a very similar federal statute.³ Although some commentators have downplayed its importance, *Carhart* signals a reframing of the Court's approach to abortion with potential major implications for additional abortion restrictions that would inflict greater harm on more women.

Justice Kennedy's opinion for the five-Justice majority bears little resemblance to the joint opinion he coauthored with Justices O'Connor and David Souter in *Planned Parenthood v. Casey*.⁴ There, these three key Justices reaffirmed *Roe*'s "essential holding," including that state regulation of abortion must protect women's health. They eloquently described the centrality of reproductive autonomy to women's equality, dignity and self-determination. Kennedy's *Carhart* opinion does not contain any similar recognition of women's essential interests, but instead uses anti-abortion terminology to describe the banned procedure's harm to fetal, ethical and moral interests⁵—and ultimately to uphold the criminal ban notwithstanding its intentional omission of an exception to safeguard pregnant women's health. The four dissenting Justices in *Carhart* charge that the majority "dishonors our precedent,"⁶ and that "the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court"⁷

If the *Carhart* Court had stopped there, the anti-abortion movement's progress in the fifteen years since *Casey* in shifting the debate from women to the fetus would have been remarkable. But the decision goes further by echoing a new line of attack on *Roe*: abortion harms women by breaking the natural bond between woman and child, and therefore the government should deprive women of a choice that they might later regret. In an important article written shortly before the *Carhart* opinion, Yale Law School Professor Reva Siegel chronicled and evaluated this new anti-abortion strategy,⁸ which was developed quietly and then launched to support a 2006 criminal ban on abortion enacted by the South Dakota legislature.⁹ Siegel compellingly argued that, even if the Supreme Court in the future were to overrule *Roe*

² *Stenberg v. Carhart*, 530 U.S. 914 (2000).

³ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (joint opinion).

⁵ See *Carhart*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting) (criticizing the Court for its "hostility to the right *Roe* and *Casey* secured," as revealed in its choice of language).

⁶ *Id.* at 1647.

⁷ *Id.* at 1652.

⁸ Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV 991.

⁹ S.D. CODIFIED LAWS § 22-17-5.1 (2006).

completely, laws like the South Dakota ban nonetheless would be unconstitutional. By seeking to protect women from themselves—from making a decision that the legislature has determined would violate “the mother’s fundamental natural intrinsic right to a relationship with her child”—the South Dakota law, according to Siegel, reflects and enforces sex stereotypes in violation of the constitutional guarantee of equal protection. No court ever ruled on the constitutionality of this law, however, because the voters repealed it in a ballot measure in 2006.

The truly astounding—and most ominous—aspect of the Supreme Court’s *Carhart* decision is its parroting of the anti-abortion “abortion harms women” argument that Siegel decimated. *New York Times* Supreme Court reporter Linda Greenhouse described the Court’s decision as suggesting that “a pregnant woman who chooses abortion falls away from true womanhood.”¹⁰ The Court acknowledged that it had no evidence to support its claim that abortion causes some women mental harm—including “severe depression and loss of esteem”¹¹—and Justice Ginsburg’s dissent for four Justices details extensive evidence to the contrary.¹² But the Court found it “self-evident” and “unexceptionable” to assume such harm because, in its words, “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”¹³ In commenting on the decision, Siegel noted the “enormous” shift in the Court’s discourse, which she described as “beyond Alice in Wonderland: criminalize abortion to protect women.”¹⁴

II. The Need for a Progressive Vision and Strategic Plan

One important lesson pro-choice progressives should take from recent setbacks is the value of developing a vision and a long-term strategic plan. The anti-abortion road to undermining *Roe* has been long, with significant and sometimes surprising setbacks (notably, *Planned Parenthood v. Casey*). Progressives should now take the time to take the long view and formulate ambitious goals, informed by deep ideological commitments and not unduly constrained by present realities. In short, progressives should think big in defining objectives and devise effective strategies for moving toward these objectives.

The progressive agenda should aspire to protect genuine reproductive liberty and reproductive health for all. Toward this ideal, I would suggest three shifts in strategic priorities, to augment ongoing efforts to persuade courts to invalidate abortion restrictions. First, focus more on persuading the public to support meaningful reproductive options through political action, grassroots organizing and public education. Second, focus relatively less on the threat of criminal abortion bans that would be enforceable if the Court were to overrule *Roe* and more on abortion restrictions already in place or on the immediate horizon, obstacles both legislative and extra-legal that cumulatively deprive growing numbers of women of access to abortion services. Finally, situate abortion within the full range of progressive policies essential to genuine reproductive health and liberty, policies that empower women and men to prevent unintended pregnancies and to bear and raise healthy and wanted children.

¹⁰ Linda Greenhouse, *Adjudging a Moral Harm to Women From Abortions*, N.Y. TIMES, Apr. 20, 2007, at A18.

¹¹ *Carhart*, 127 S. Ct. at 1634.

¹² *Id.* at 1648 n.7 (Ginsburg, J., dissenting).

¹³ *Id.* at 1634.

¹⁴ Greenhouse, *supra* note 10.

These recommendations entail not a radical change in direction, but significant shifts in emphasis. They will be familiar to pro-choice advocates, who long have led efforts against all manners of abortion obstacles and in favor of pregnancy prevention, maternal health and family leave. Yet in the public's eye, the pro-choice effort is associated far more with extremism and "abortion on demand" than with healthy childbearing and reductions in the rate of unintended pregnancy. Effective strategies must target this public misperception and emphasize political action, the harm caused by incremental abortion obstacles, and a broad range of policies that promote reproductive choice and health. Finally, even while working on this broadened and more politically focused agenda, progressives must affirm and reinforce the vital place of legal and accessible abortion services on that agenda and resist any temptation to avoid the controversy of abortion.

III. Reproductive Liberty in the Courts

The concerted attack on *Roe* began in earnest in the late 1970's and gained tremendous force with the election of Ronald Reagan. The Reagan administration sought to transform constitutional law on many of the great issues of the day, including by overruling dozens of Supreme Court opinions.¹⁵ Although the substance of the Reagan administration's agenda in my view was wrong, its breathtaking ambition and subsequent successes demonstrate the value of having a long-term vision. The Reagan administration targeted *Roe v. Wade*, as well as earlier landmark cases that applied substantive due process analysis to protect fundamental liberties. Under the Reagan view, the constitutional guarantee of "liberty" should create no obstacle to laws that ban abortion from the earliest stages of pregnancy, criminalize the use of contraception,¹⁶ or forcibly sterilize people as a form of punishment.¹⁷ The Reagan agenda also warned against future expansions of liberty that would, for example, protect same-sex physical intimacy. This opposition to fundamental liberties was situated within a broad framework that sought both diminished judicial protection for a range of rights and liberties (justified by the "original intent" of the Framers) and judicial enforcement of an approach to "federalism" that would narrow Congress's authority to safeguard rights.

One approach to formulating a progressive reproductive rights agenda would identify Supreme Court decisions "consistent" and "inconsistent" with the desired vision of reproductive liberty, just as the Reagan administration did. Such a list obviously is of most direct use when prepared by an administration that seeks to direct government litigators and advisors on judicial selection, again as the Reagan administration did. But progressives, too, can benefit from their own list, both to prepare for a future sympathetic administration and, in the meantime, to inform ongoing work in other arenas. The progressive list should begin with an acknowledgment of losses—principally that *Roe v. Wade* no longer governs the constitutionality of abortion

¹⁵ See, e.g., OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988); see also Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (discussing the Reagan blueprint for radical constitutional change).

¹⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁷ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

restrictions. Instead the Court’s 1992 decision in *Planned Parenthood v. Casey* controls.¹⁸ *Casey* is best known for its reaffirmation of *Roe*’s “essential holding,” which confounded expectations that the Court would overrule *Roe* expressly and completely. *Casey* therefore brought tremendous relief to *Roe*’s supporters.

Far less noted, the *Casey* Court allowed the government substantially greater authority to interfere with women’s reproductive choices. The Court, in fact, upheld restrictions it previously had held unconstitutional, and in the process overruled in part protective rulings from the 1980s.¹⁹ Chief Justice William Rehnquist’s *Casey* dissent noted that “*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”²⁰ *Carhart* confirms the harm *Casey* did to *Roe*. Justice Kennedy, a swing fifth vote and author in both of the later cases, emphasized in *Carhart* that *Casey* “struck a balance”²¹ that centrally included the government’s “substantial interest in preserving and promoting fetal life” from the outset of pregnancy.²² To that very great extent *Casey* (and, even more, *Carhart*’s reading of *Casey*) is inconsistent with a progressive notion of liberty.

A progressive list of wrongly decided cases also should include several that upheld harmful and deceptively reasonable-sounding restrictions on access to abortion services. Chief among them are decisions that upheld the exclusion of abortion from health care the government provided the poor, the prohibition of abortion services at publicly funded medical facilities (even when no public funds subsidized the services), parental notice and consent requirements, and most recently, *Gonzales v. Carhart*.²³ Progressives also should anticipate future controversies, including those that might arise from medical and scientific advances.

Most critical, just as conservatives promoted “federalism” and “originalism” in the courts and even more effectively in political arenas, progressives should develop improved understandings of the constitutional bases for reproductive liberty. Progressives need to rethink the theoretical underpinnings of *Roe*—and what is left of *Roe* after *Casey* and *Carhart*—and also situate access to abortion, contraception and reproductive health care within a broader progressive constitutional vision. Although the majority in *Carhart* included a shocking reliance on gender stereotypes about women’s natural role as mother, the four dissenting Justices made significant progress in this regard by resting reproductive liberty for the first time on a theory of equal protection and equal citizenship. Justice Ginsburg wrote for the dissenting Justices: “Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate

¹⁸ 505 U.S. 833.

¹⁹ See *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

²⁰ *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting).

²¹ *Carhart*, 127 S. Ct. at 1627.

²² *Id.* at 1626.

²³ See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (upholding restriction on minors); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding restriction on minors); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upholding public facility ban); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding restriction on minors); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding public funding ban); *Bellotti v. Baird*, 428 U.S. 132 (1976) (upholding restriction on minors).

some generalized notion of privacy; rather they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."²⁴

IV. Priority One: Enhance Public Education and Political Action

Thus formulated, the progressive agenda would focus on the courts as the vehicles for desired change. To date, litigation has served as the primary and most effective weapon against dangerous abortion restrictions. Progressives should continue to secure whatever protections are achievable from judicial enforcement of both state and federal constitutions and to develop constitutional theory for the long haul. Litigation, however, should not remain progressives' principal means of safeguarding reproductive rights. A court-centered strategy for the coming decades would be dangerously inadequate. The Supreme Court is unlikely, under any plausible scenario in the near future, to overrule *Casey's* undue burden test in favor of *Roe's* more protective approach (or a new protective theory), let alone overrule earlier rulings that upheld onerous parental consent requirements and discriminatory funding provisions. Progressives will count it a considerable success if the Court retains the *Casey* compromise and holds the line by not adding to the list of harmful abortion restrictions it upholds.

Many progressives, it should be acknowledged, have criticized *Roe* over the years on the grounds that (over)reliance on the Court has inadvertently energized opponents and falsely reassured supporters of *Roe*, thereby ultimately harming efforts to secure reproductive rights. In my judgment, *Roe's* enormous and immediate benefits to women and families—and its positive effect on expectations about women's rights—outweigh any resulting loss in political momentum.²⁵ Regardless, though, of differences in judgment about the past, progressives should agree in the coming decade to dedicate relatively greater resources to build public and political support at every level of government.

Progressives also should agree—and should endeavor to persuade others—that restrictive abortion laws do violate women's constitutional rights, whether or not the Court protects those rights. Even in political arenas, pro-choice aspirations can be strengthened by appeals to the Constitution and to the notion that compulsory pregnancy and childbirth are beyond the government's authority. Given *Roe's* stature and the Court's prior vigorous protection of reproductive liberty, an appeal to the Constitution in political battles over abortion seems particularly helpful. It is far more effective (and to my mind more accurate) to emphasize that the Court protected the constitutional right to choose until the ideological right took over the Court, rather than it is to argue that the Court went too far and that the debate is now where it belongs, in the legislatures.

Pro-choice advocates, with national organizations headquartered in Washington, D.C. and New York, have done more to supplement litigation with national political work than they

²⁴ *Carhart*, 127 S.Ct. at 1641 (Ginsburg, J., dissenting) (citing articles by Professors Reva Siegel and Sylvia Law that argued the constitutional guarantee of equal protection, and not only liberty, should be considered a source of constitutional protection against abortion restrictions); see also WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin, ed., 2005); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming 2007).

²⁵ See DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 609-617 (1998).

have expanded efforts at the state and local levels. Notwithstanding the good work of the NARAL Pro-Choice America, Planned Parenthood and American Civil Liberties Union affiliates throughout the country, the greatest reproductive rights need for the coming decades is the building of strong grassroots political organizations with public education capabilities. Progressives must work effectively outside the courts not only in Washington, D.C., but also in state legislatures, local communities, political parties, and elections at every level of state and local government. Electing representatives who will safeguard reproductive health and liberty also promotes a more protective judiciary, both directly through judicial appointments and less directly, for history instructs that the courts will not stay very far ahead of political and public opinion. The dramatic political, legislative and judicial successes of opponents of *Roe* result directly from their decades-long attention to public persuasion and grassroots organizing.

My remaining two recommendations will elaborate on the desirable content of the largely political reproductive rights agenda, but first a caution. As attention to state and local politics increases, progressives should take care not to concede the legitimacy of gross inequalities determined by a woman's physical location. A 2006 *New York Magazine* article illustrates the danger. The article celebrated a state court decision that declined to find a right to same-sex marriage, opining that the court had avoided the problems the *Roe* Court created by getting too far ahead of the public. The article concluded: "With the right ascendant, it's clear that states' rights is an essential American principle without any inherent ideological tilt. . . . If letting Georgia and Indiana and Utah go their own way is the price for Massachusetts and California and New York's being free to go ours, I'm willing to pay it."²⁶ As a former New Yorker now living in Indiana, I urge against this view of "states' rights." Fundamental liberties essential to equality should not vary state-by-state, despite the necessity for state-by-state efforts to protect them. States' rights should entail the opportunity to expand, not curtail, rights guaranteed by the federal Constitution (whether those rights involve racial equality, freedom of expression, or reproductive liberty). Progressives should aim for uniform nationwide protection of the fundamental right of all women, regardless of their state of residence, to meaningful access to legal abortion services.

V. Priority Two: Oppose Incremental Obstacles

Since the Republican Party began calling for the appointment of anti-*Roe* Justices and President Reagan began replacing Justices in the *Roe* majority, one question has drowned out virtually all others in the abortion debate: Will the Court overrule *Roe*? And the natural follow-up: Will states once again criminalize abortion, forcing many women to risk their lives and health with illegal "back-alley" abortionists? That was the proper focus for the 1980's—indeed, any other seems almost unimaginable—but it is increasingly inadequate.

With each appointment, the Court's support for *Roe* diminished, from a solid, bipartisan seven Justices in *Roe* itself, to a bare majority of five in 1986. But *Roe* proved remarkably resilient. Many court watchers expected *Roe*'s demise in the 1989 *Webster* case. The Court upheld all the restrictions before it, but the Justice in the middle—Sandra Day O'Connor—declined to join the four Justices who wanted to go further and strike at *Roe*'s heart. Justice Harry

²⁶ Kurt Andersen, *The Gay-Wedding Present*, NEW YORK MAGAZINE, July 24, 2006.

Blackmun, *Roe*'s author, warned in dissent that the reprieve likely was temporary and that "a chill wind blows."²⁷ When by 1992 Presidents Reagan and Bush had replaced five of the seven Justices in the *Roe* majority, *Planned Parenthood v. Casey* was widely expected to deliver the final blow. The *Casey* Court's partial (and eloquent) reaffirmation of *Roe* shocked supporters and opponents of *Roe* alike.

Looking ahead, the risk remains real that the Court will overrule *Roe*. But more likely is a continued death by a thousand cuts, with any express overruling occurring only after the Court has rendered the formal protections practically useless. This alternative scenario for a complete gutting of *Roe* has been apparent at least since *Casey* authorized increased governmental restriction while purporting to reaffirm *Roe*. *Carhart* eliminated any doubt about the severity of this threat.

Rather than seek to outlaw abortion directly, abortion opponents pursue an incremental, multi-tiered strategy to create "abortion-free" states and to deter women from having abortions, often through deception. In the years since *Casey*, states have adopted literally hundreds of abortion restrictions.²⁸ With its ban on so-called "partial birth" abortions, Congress joined this state-centered effort, which previously had been justified with appeals to federalism and states' rights.²⁹ The cumulative effect of these efforts—restrictive legislation that the courts will uphold, diminished abortion training in medical schools, the stigmatization of women who have abortions and physicians who perform them, harassment and violence directed at abortion service providers, at work and at home—has been a dramatic reduction in the number of abortion providers. Many women live in parts of the country where abortion services are unavailable within hundreds of miles, while anti-abortion "crisis pregnancy centers" flourish (often with the assistance of public funding). Indeed, abortion services are less available in the United States than at any time since 1974.³⁰ Legislative and extra-legal obstacles combine to thwart women's access to the clinics that do remain open: mandatory twenty-four hour waiting periods translate into multiple long-distance trips often over weeks, "informed consent" requirements amount to state-mandated anti-abortion propaganda, and two-parent consent requirements for minors thwart the wishes not only of the pregnant girl but of her custodial parent. Abortion opponents in three states are just one clinic away from rendering the state "abortion free."³¹

One of those single-provider states, South Dakota, achieved instant fame when it outlawed abortion in all cases except when necessary to save a woman's life: no exceptions were allowed even for rape, incest, severe fetal abnormalities or threats to a woman's health.³² The fact that only one abortion clinic existed in the entire state was far less publicized. The abortion ban was controversial even among some strong opponents of legal abortion (and ultimately was repealed by a November 2006 ballot measure) because of its lack of a rape or

²⁷ *Webster*, 492 U.S. at 560 (Blackmun, J., dissenting).

²⁸ NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES (16th edition 2007). For an electronic version, see <http://www.prochoiceamerica.org/whodecides>.

²⁹ Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

³⁰ The Alan Guttmacher Institute, TRENDS IN ABORTION IN THE UNITED STATES, 1973-2002, at 14 (Jan. 2003, updated May 2005), available at <http://www.guttmacher.org/presentations/trends.pdf>.

³¹ See Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma*, WASH. POST, Dec. 27, 2005, at A1.

³² S.D. CODIFIED LAWS § 22-17-5.1 (2006).

incest exception, and also because it faced almost certain judicial invalidation (at least absent the appointment of one additional anti-*Roe* Justice). Prominent national anti-abortion organizations even refused to endorse the ban, favoring instead the incremental approach of more reasonable-sounding and limited restrictions tailored to shut down the one remaining clinic.³³

A 2005 *Frontline* documentary, *The Last Abortion Clinic*, illustrates the effectiveness of the incremental approach. Concerted anti-abortion efforts reduced Mississippi, like South Dakota, to just one clinic that provides abortion services.³⁴ *Frontline* interviewed Mississippi women who described their utter lack of any meaningful right to decide whether to terminate a pregnancy. They lived many hours of travel from the nearest clinic, which for many women was located in a neighboring state and might as well have been in another country. As in the years before *Roe*, the women who most suffer from legal and practical obstacles to safe abortion services are those without the resources and ability to travel. These include women who never have traveled out of their home town, who cannot afford the travel, do not own cars or have access to any other transportation, who would lose their jobs if they missed the days of work required to make multiple long-distance trips, who cannot arrange childcare, or who have abusive husbands they cannot escape. The litany is familiar: Poverty, location, and abuse are the same circumstances that prior to *Roe* determined which women had to risk their lives to terminate a pregnancy.

The *Frontline* episode also described efforts to close that last Mississippi clinic, including “TRAP” or “targeted regulation of abortion providers” laws that impose medically unnecessary, extremely expensive regulations, such as building specifications that mandate hallway widths and room sizes that mirror hospitals. Another new restriction would require physicians who perform abortions at the clinic to have admitting privileges at the local hospital, a requirement that is both medically unnecessary (the clinic already has a transfer agreement with the hospital) and, as those who devised the restriction well know, unattainable: the hospital will not confer admitting privileges to an out-of-state physician and no in-state physician is willing to work at the clinic because of the continual anti-abortion protests and harassment. Given the effectiveness of ingenious, reasonable-sounding options, why bother with a highly contentious abortion ban? In Indiana, anti-choice legislators introduced two bills in 2006: one to ban abortion and one a TRAP law that would have closed every abortion clinic in the state, unless and until they could implement expensive renovations or relocate (leaving hospitals or newly built hospital equivalents as the only lawful possibility). The criminal ban went nowhere, but the legislature came extremely close to enacting the TRAP law and shutting down every one of Indiana’s seven abortion clinics.³⁵

Both sides understand the true intent and serious costs behind such regulations. Pro-choice advocates have not, however, found effective ways to communicate those harms to a public that favors keeping abortion legal, but not too easily available. Some progressives speculate that preserving meaningful access to abortion would be easier if the Court expressly

³³ See Cynthia Gorney, *Reversing Roe*, NEW YORKER, June 26, 2006, at 46.

³⁴ *Frontline: The Last Abortion Clinic* (PBS television broadcast Nov. 8, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/clinic/>.

³⁵ See Greg Hafkin, *Abortion Clinics May Have to Close*, INDIANAPOLIS STAR, Feb. 3, 2006, at B1; Mary Beth Schneider & Michele McNeil, *Lawmaker’s Goal: Overturn Roe v. Wade*, INDIANAPOLIS STAR, Jan. 6, 2006, at A1.

overruled *Roe* and galvanized pro-choice Americans who currently do not vote based on the abortion issue. Because of that potential political awakening, the speculation continues, many self-proclaimed anti-choice Republicans actually do not want the Court to overrule *Roe*. In my view, bad as the restrictions are, an express overruling of *Roe* would be far worse. The obstacles to abortion, though, that are most underappreciated and in need of attention are those already in place or soon to come: the protests, harassment and violence directed at abortion clinics, providers and their families; the lack of abortion training opportunities in medical school; and the literally hundreds of state abortion restrictions that are designed both to sound reasonable and to stop the performance of abortions as effectively as a criminal ban.

VI. Priority Three: Advance a Comprehensive Agenda

The progressive reproductive rights agenda must include not only meaningful access to abortion services, but also the full range of policies essential to genuine reproductive liberty and health. Advocacy for the right to decide whether to continue or terminate a pregnancy—for keeping the government out of highly personal, life-altering decisions about when and whether to have a child—should be paired explicitly with the endorsement of policies that support women in all their reproductive decisions. Being pro-choice means not only keeping the government out of people’s private lives, but also defining and promoting the right role for government and society in supporting women and families.

The progressive agenda should include policies that support healthy pregnancies and healthy families. Among the policies most directly relevant are universal health care, public funding for childcare, paid family leave, and other workplace support for employees who need to care for children and other family members.³⁶ Pro-choice progressives also should address the full range of economic justice issues, from the minimum wage to taxation policy to financial support for struggling families. Also key are policies and practices that protect women from violence, including in their own homes.

Reproductive liberty also obviously requires the ability to prevent unintended pregnancy. Progressive priorities should include support for comprehensive and age-appropriate sexuality education, universal access to reproductive health care, and new contraceptive technologies. Also critical is opposition to all forms of politicization and distortion of reproductive health care information and services: inaccurate “abstinence only” programs that mislead and endanger children, government support for anti-abortion “crisis pregnancy centers,” lengthy delays and continued restrictions on the over-the-counter availability of emergency contraception, national protocols for the treatment of rape victims that omit any mention of emergency contraception, pharmacists’ refusals to fill prescriptions for contraception, biased reproductive health counseling, and costly anti-abortion “TRAP” laws that burden clinics that provide not only (or even primarily) abortion services, but also pregnancy prevention and other reproductive health

³⁶ For a comprehensive description of a broad pro-choice agenda, see JESSICA ARONS, *MORE THAN A CHOICE: A PROGRESSIVE VISION FOR REPRODUCTIVE HEALTH AND RIGHTS* (CENTER FOR AMERICAN PROGRESS 2006), available at http://www.americanprogress.org/issues/2006/09/more_than_a_choice.html/more_than_a_choice.pdf.

services.³⁷ All of these so-called “conservative” policies actually increase the rate of unintended pregnancy and thus abortion—not coincidentally because many abortion opponents also oppose contraceptive use.

Every major pro-choice organization has undertaken substantial efforts in these broader directions—especially to champion pregnancy prevention. Planned Parenthood long has focused on pregnancy prevention services: eighty-one percent of its clients receive services to prevent unintended pregnancy, while ten percent receive abortion services.³⁸ These efforts have borne real fruit, including significant reductions in unintended pregnancy and abortion rates and the enactment of the Family and Medical Leave Act. It remains, however, a difficult and critical task to convey that pro-choice candidates and advocates are not pro-abortion, but pro-prevention, pro-family, and progressive. This is a challenging message but also a promising one, for it seeks to substitute a true picture for a caricature, offers an affirmative agenda around which to organize, and addresses anti-abortion sentiment in ways that empower rather than burden vulnerable women and families.

As greater emphasis is given to pregnancy prevention and healthy childbearing, some cautions are warranted. First, progressives must resist the temptation to portray all abortions as tragedies. Beginning in 1992, President Bill Clinton popularized the saying “abortion should be safe, legal and rare,” which reflects the worthy aspiration for policies that emphasize prevention and make abortion less necessary. And yet absent dramatic and unforeseen technological and medical changes, abortion is unlikely to become truly “rare.” An estimated one-third of all women will choose to terminate a pregnancy by age forty-five. Our nation can and should significantly reduce that number by reducing unintended pregnancy (roughly half of all pregnancies).³⁹ But abortion will remain a necessary option, for example, when contraception fails and a woman is not ready to have a child, when women conceive following rape or incest, when pregnant women develop serious medical problems that require pregnancy termination, and when severe fetal abnormalities are detected.

Abortion undoubtedly is a complex, important, highly personal issue, and often a difficult and painful decision with which many women struggle. But emphasizing the terrible tragedy of any and all abortions stigmatizes women who have abortions. To be sure, some abortions involve tragic circumstances, and many women do consider abortion a personal tragedy. But many do not, especially when the abortion is performed early in pregnancy, as about ninety percent are. The tragedy label also promotes shame and silence, when protecting choice critically depends instead upon women’s willingness to talk publicly about their personal experiences.

³⁷ See UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENT REFORM—MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, *THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS* (Dec. 2004); CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 205-221 (2005).

³⁸ Planned Parenthood by the Numbers, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/pp-numbers-17300.htm> (updated Nov. 14, 2007); see also NATIONAL COMMISSION ON AMERICA WITHOUT ROE, *FACING A FUTURE WITHOUT CHOICE: A REPORT ON REPRODUCTIVE LIBERTY IN AMERICA* (NARAL 1992).

³⁹ Guttmacher Institute, *An Overview of Abortion in the United States*, <http://www.guttmacher.com/media/presskits/2005/06/28/abortionoverview.html> (last visited Jan. 12, 2008).

Stigmatizing abortion also feeds anti-abortion efforts to portray women as victims who make deeply tragic and wrong choices only because they are misled by physicians, clinics and laws that promote abortion. And it brands physicians who perform abortions as engaged in (at best) morally questionable work, at a time when they should be affirmed for their willingness to meet a desperate health need often at high personal costs, in the face of harassment, ridicule and even risk of physical violence. These dangers now are alarmingly more real and immediate, because of the Supreme Court's recent endorsement of the patently false "anti-abortion shibboleth"⁴⁰ that abortion is bad for women and the government therefore must protect women from their own decisions by restricting abortion. Even leading pro-choice organizations should take care, as they pursue political implementation of a broad progressive agenda, that their actions do not indirectly contribute to the stigma. Planned Parenthood, for example, is right to educate the public, as it increasingly does, that only a small percentage of its work involves abortion services. But it should continue to remain proud of and vocally committed to those vital services, and resist any temptation to downplay them because of their controversial nature.

Progressives also should oppose inaccurate and incomplete "abstinence only" sex education and other treatments of sexuality issues that instill negative attitudes about sexuality itself. A century ago, Margaret Sanger, in opposing governmental restrictions on contraception for married couples, talked of "the joys of the flesh." She proclaimed that "[a] mutual and satisfied sexual act is of great benefit to the average woman."⁴¹ Such frank recognition of the natural, healthy and valuable role of sex in a loving relationship rarely is heard in today's public debate over issues of sexuality. Instead, what we teach our young people in sexuality education courses often can be summarized as: "Sex is dirty, nasty and dangerous. Save it for the one you love and marry." When nonprocreative sex, even within marriage, is not valued as one of humanity's gifts, government-compelled pregnancy and childbearing can seem more reasonable. Progressives should encourage public policy premised on what Planned Parenthood lists first among its values: "Sexuality is a natural, healthy, lifelong part of being human."⁴²

VII. Conclusion: Looking Beyond our Borders

None of the recommendations outlined above is akin to a silver bullet, or a pro-choice version of the wildly successful—and intentionally deceptive—"partial birth abortion" ban. Far from it. Effective advocacy and reform inescapably will require hard and disciplined work over time, in the face of great challenges. Nor do my suggestions directly address the women most devastated by anti-choice policies, for they pertain only to reproductive choice here in the United States. To conclude, I offer a final recommendation for beyond our borders. Women suffer far greater harms to their reproductive health and liberty in places across the globe, where contraception as well as abortion services are illegal or unavailable, health care is nonexistent, AIDS is rampant, and rape routine. More than half a million women die each year because of unsafe abortion and childbirth practices. Progressives must address the harms inflicted by our nation's foreign policy and the important work of nongovernmental organizations abroad, even as we struggle to avert similar tragedies here at home.

⁴⁰ *Carhart*, 127 S. Ct. at 1648 (Ginsburg, J., dissenting).

⁴¹ Margaret Sanger, *Family Limitation* 6 (1914).

⁴² Planned Parenthood Federation of America, *WE BELIEVE* (2003) (on file with author); statement of values reprinted at <http://www.plannedparenthood.org/files/PPFA/education-REAL-WhatYou.pdf>.