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The Reach of Roe
Despite the 'Partial-Birth' Furor, Abortion Foes Are Losing in Court

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What more could you possibly need to know about abortion? You've heard it all before, and just because the pundits and the interest groups want to milk Thursday's 25th anniversary of the 1973 Supreme Court decision in Roe v. Wade for everything they can get doesn't mean you need to pay any attention, does it?

You're right, of course. You don't need to pay attention. You already know all you need to, if you can correctly:

a) Specify the 1997 batting average of abortion-rights lawyers in cases challenging "partial-birth abortion" ban laws in 11 different states;

b) Explain why one of the most important 1997 cases the Supreme Court decided not to hear was Ieyoub v. Causeway Medical Suite; and

c) Identify both Bruce S. Steir and Richard T. Andrews.

Piece of cake? Probably not, but don't be embarrassed even if you know none of the answers. The truth is that most outside-the-Belt way abortion developments get a whole lot less media attention than they should.

Perhaps you thought that a legal ban on "partial-birth" abortions -- a procedure some doctors have used for a relatively small number of both pre- and post-viability late-term (after 20 weeks of pregnancy) abortions -- was what the Congress and President Clinton have been tussling over for much of the last two years. Clinton has twice vetoed partial-birth abortion ban bills that allow for such a procedure only if a woman's life, but not her health, is in danger. Congress will vote on whether to override the second of those vetoes this spring.

But Congress versus the president is only one part of the partial-birth ban struggle. The National Right to Life Committee, the prime sponsor of the effort to ban the procedure, has also been championing the enactment of similar measures in most of the 50 states. To date, the committee has succeeded in 19 states, with more yet to come.

The most important -- and overlooked -- aspect of the partial-birth ban story is what has happened to these state laws when they've been challenged in court by abortion-rights lawyers.

In six states -- Indiana, Mississippi, South Carolina, South Dakota, Tennessee and Utah -- no doctors or clinics have yet contested the laws. In Alabama, the state attorney general has averted a face-off by declaring that the statute does not pertain to pre-viability procedures, and in Illinois, a courtroom challenge is pending.

But in every one of the other 11 states where a federal or state court has ruled on the constitutionality of partial-birth ban measures, judges have blocked implementation of the new laws.

In some states, like Michigan, judges have invalidated the prohibitory laws because of how "hopelessly ambiguous" they are. Abortion-rights litigators have contended successfully that statutory descriptions criminalizing the partial-birth procedure are inherently vague and could easily be read to prohibit all abortions after the first trimester and perhaps even earlier ones. Were any such law to take effect, doctors would be discouraged and deterred from performing abortions.

But such "void for vagueness" holdings have targeted only one of the new laws' glaring infirmities. The even more troubling threat, abortion-rights lawyers have argued, is how such laws would deprive some women of the safest possible medical treatment available to them, and instead would force them to undergo decidedly more risky procedures.

U.S. District Judge Richard G. Kopf, ruling in a challenge to Nebraska's partial-birth ban law brought by abortion doctor LeRoy Carhart, found last August that Nebraska's prohibition would have "the effect of subjecting Carhart's patients to an appreciably greater risk of injury or death than would be the case if these women could rely on him to perform his variant of the banned procedure on nonviable fetuses when medically advisable."

Kopf, a 1992 George Bush nominee to the federal bench, found that "credible medical evidence" showed that the partial-birth method is "appreciably safer" than fetal dismemberment inside the womb. Thus Nebraska's law unconstitutionally "subordinates maternal life and health to the life and health of a nonviable fetus," for "nonviable fetal life cannot constitutionally be considered superior to maternal life or health," Kopf ruled.

Six other federal district courts -- in Arkansas, Arizona, Georgia, Louisiana, New Jersey and Rhode Island -- also have blocked implementation of pre-viability partial-birth bans, and Alaska and Montana state courts have done likewise.

The best known of the 11 overall rulings was handed down in Ohio last November. The U.S. Court of Appeals for the 6th Circuit affirmed an earlier district court injunction. Ohio's vaguely worded prohibition, the appeals court said, not only threatened to criminalize the very common dismemberment procedure in addition to partial-birth abortions, but also imperiled women's health. As Judge Cornelia Kennedy wrote, even "a post-viability abortion regulation which threatens the life or health of even a few pregnant women should be deemed unconstitutional."

The Ohio attorney general has asked the U.S. Supreme Court to review and reverse the 6th Circuit's ruling, but the high court -- which is likely to rule in late February -- is almost certain to deny Ohio's petition.

Ever since the landmark 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey that reaffirmed the constitutional reasoning of the Roe v. Wade decision, the big news about abortion law has been how consistently the Supreme Court has refused to hear cases that abortion opponents have brought to its door. Ieyoub v. Causeway Medical Suite is both the most recent and arguably the most notable.

Causeway, an abortion clinic in Metairie, La., challenged a state law that would have allowed a juvenile court judge to notify both parents of an immature teenage minor that the young woman wanted to end a pregnancy and was seeking judicial approval in lieu of parental consent. Both a federal district judge and a three-judge panel of the U.S. Court of Appeals for the 5th Circuit ruled that the Louisiana measure contravened earlier Supreme Court decisions governing such "judicial bypass" procedures. The entire 16-member court refused to consider the case "en banc." Judge Edith H. Jones filed an unusual dissent, declaring "I trust the Supreme Court will disavow this unwise interpretation."

Louisiana Attorney General Richard Ieyoub petitioned for Supreme Court review. Last Oct. 20, he -- and Jones -- got their answer. Not only did the Supreme Court announce that it would not hear the case, but only one justice, Antonin Scalia, dissented from the denial.

Additionally, more and more state courts are protecting abortion rights under their state constitutions. In Alaska, not known as a liberal state, the Supreme Court unanimously held in late November that the state constitution protects a woman's right to an abortion and prohibits a "quasi-public" hospital from refusing to provide abortion services. Few newspapers outside of Alaska mentioned the ruling.

But these court decisions aren't the only important abortion developments you haven't read about. Consider the stories of Richard Andrews and Bruce Steir.

Ever since the 1994 passage of the federal Freedom of Access to Clinic Entrances (FACE) law, the size and intensity of obstructive protests outside of abortion clinics have declined markedly. FACE has helped redirect antiabortion efforts from sidewalks to legislatures, but with some radical abortion opponents still advocating violence, it hasn't totally eliminated domestic terrorism from abortion clinic face-offs.

And that's why you ought to know about Andrews. A 59-year-old former insurance agent from Wenatchee, Wash., Andrews became well-known in West Coast abortion protests during the 1980s. Eighteen months ago, he was pulled over during a routine traffic stop. Materials found in his vehicle -- including butane torches and red gasoline containers, plus directions to three abortion clinics -- spurred detectives to investigate Andrews in connection with eight separate arson attacks on clinics ranging from Helena, Mont., to Redding, Calif., between 1992 and 1995.

Andrews's lawyer denies his involvement, and to date Andrews has been charged in only three of the fires. Why neither the news media nor pro-choice groups haven't devoted more attention to Andrews is puzzling.

It is also baffling that neither journalists nor antiabortion groups have publicized Steir's story. In recent years, the 66-year-old San Francisco doctor has worked at a number of different California abortion clinics. On Dec. 13, 1996, Sharon Hamptlon, a 27-year-old patient whose 20-week pregnancy Steir had aborted earlier that day at a Riverside County clinic, bled to death from a uterine perforation. Three months later, Steir surrendered his license to practice medicine in California -- just as he had done nine years earlier in Florida. This past summer, the woman's family filed a wrongful death suit against Steir.

On Oct. 22, however, Steir was arrested and charged with murder. "He knew he perforated the woman's uterus," a prosecutor told the San Francisco Chronicle, but Steir nonetheless left the clinic to return to San Francisco before Hamptlon was sent home. She died on the way, in the backseat of her mother's car.

Steir was handcuffed and jailed, first in San Francisco, then in Riverside County, before being released on $ 250,000 bail. Steir denies knowing that he had perforated Hamptlon's uterus, and says he believed Hamptlon "was okay" at the time he left for San Francisco. Some California clinic directors praise both his medical abilities and his courage, particularly for traveling to the Redding clinic that Richard T. Andrews has been charged with burning. Trial dates for both Steir and Andrews have not yet been announced.

Neither antiabortion legislators nor antiabortion protesters nor medical tragedies are going to disappear anytime soon. However, the legal superstructure of Roe, Casey and the federal clinic protection law is firmly in place, even if political battles are going to go on forever.

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