aclu position paper
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The Right to Choose

A Fundamental Liberty

points

A woman's decision whether or not to bear a child is one of the most intimate and important she will ever make. Like choices about contraception, marriage, and child-rearing, the decision to continue or end a pregnancy is protected from government interference by the U.S. Constitution.

The ACLU's mission is to ensure that every person can make informed, meaningful decisions about reproduction free from intrusion by the government. Through litigation, advocacy, and public education, we aim to protect access to the full spectrum of reproductive health care, from sexuality education and family planning services to prenatal care and childbearing assistance to abortion counseling and services.

We are particularly committed to ensuring that women's reproductive rights are not compromised because of their age, their race, their economic class, or the part of the country in which they happen to live.

THE ROAD TO A woman's right to choose has been long and arduous. Although abortion was not a crime in this country until the mid-1800s, by the century's end, it was banned in every state. By 1930, an estimated 800,000 illegal abortions were taking place annually, resulting in 8,000-17,000 women's deaths each year.

Many other women experienced serious complications as a result of illegal practices, including hemorrhaging, infection, and fertility loss. The terrible suffering of tens of thousands of women and their families from botched, back-alley abortions moved early reformers to call for legalization.

A major breakthrough in reproductive rights occurred in 1965 when the U.S. Supreme Court struck down a Connecticut law that made it illegal even for married couples to obtain birth control devices. In *Griswold v. Connecticut*, the Court ruled that the ban on contraception violated the constitutional right to "marital privacy." In 1972, the Court extended the right to use contraceptives to all people, married or single. These cases laid the foundation for a constitutional challenge to abortion bans.

Between 1967 and 1971, under mounting pressure from the women's rights movement, 17 states decriminalized abortion. Public opinion also shifted during this period. In 1968, only 15 percent of Americans favored legal abortions; by 1972, 64 percent did. When the Court announced its landmark 1973 ruling legalizing abortion in *Roe v. Wade*, it was marching in step with public opinion.

But the backlash was swift and fierce. Anti-choice forces quickly mobilized, dedicating themselves to reversing *Roe*. In 1974, the ACLU established its Reproductive Freedom Project to advance a broad spectrum of reproductive rights.

The Post-*Roe* Struggle

Basing its decision on the constitutional right to privacy, the *Roe* Court found this right "broad enough to encompass a woman's decision whether or not to terminate her preg-

nancy." Characterizing this right as "fundamental" to a woman's "life and future," the Court held that the state could not interfere with the abortion decision unless it had a compelling reason to do so. And even then, the state could assert an interest in protecting the potential life of the fetus only once it became "viable" (the point at which the fetus can survive outside the woman's body, usually at the beginning of the third trimester of pregnancy). Moreover, the Court held that a pregnant woman had to have access to an abortion if it were necessary to preserve her life or health, regardless of the stage of fetal development.

The Supreme Court's 1992 decision in *Planned Parenthood v. Casey* was the next legal milestone for reproductive choice. In the face of massive anti-choice pressure, the Court preserved constitutional protection for the right to choose. The Court wrote: "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."

At the same time, however, the Court adopted a new, weaker test for evaluating abortion laws: instead of holding laws regulating abortion to a "strict scrutiny" standard, the highest level of judicial review, *Casey* established an "undue burden" test. Under this principle, state regulations are constitutional unless they place a "substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."

This decision has forced the ACLU and other pro-choice groups to fight legal battles throughout the country over whether or not a particular restriction constitutes an "undue burden." In many cases, the courts have been cruelly insensitive to the problems of real women.

Targeting Low-Income Women

Even before *Casey*, abortion laws placed special burdens on the poorest women. Medicaid, through which the government provides health services to the poor, has long covered all pregnancy-related services, except abortion. Since the late 1970s, the federal government and most states have severely restricted Medicaid funding for abortion. As a result, low-income women – who are disproportionately women of color – often find it difficult or impossible to obtain safe, legal abortions.

In 1980, the Supreme Court upheld this discriminatory scheme. In a series of state constitutional cases, however, advocates for low-income women have successfully argued that when the government provides funding to support the exercise of a constitutional right, it must fund all options evenhandedly, leaving the ultimate choice where it belongs – in the hands of the pregnant woman.

Unfortunately, women who rely exclusively on the federal government for their health care coverage cannot benefit from state constitutional arguments. Congress denies abortion coverage to most federal employees and their dependents, military personnel and their dependents, federal prisoners, Peace Corps volunteers, Native American women, and low-income women who reside in Washington, D.C. Women who depend on the government do not have the same rights as those who can afford an abortion or who have private insurance.

The attack on low-income women's access to abortion has extended even to attempts to deny them complete and accurate information about this legal option. In 1991, the Supreme Court upheld regulations forbidding the staffs of federally funded family planning programs from mentioning abortion to their patients. This "gag rule" on abortion counseling and referral never took effect because President Clinton rescinded the regulations.

Similar "global gag rules," however, have been enforced against organizations that receive U.S. dollars to provide family planning services overseas.

In a paradox, the government also pressures poor women *not* to have children. As part of "welfare reform," state governments are imposing "child exclusions" or "family caps," which deny subsistence benefits to children born into families already receiving aid. Because the government has no more business discouraging childbearing than restricting abortion, the child exclusions violate low-income women's right to choose.

Restricting Teens' Rights

More than 30 states require minors to notify or get permission from their parents or from a court before they can obtain abortions. Yet many state and local governments also deny teenagers the information and services they need to avoid unwanted pregnancies.

Parental involvement laws only deepen the desperation of teenagers already in crisis. Most teens considering abortion talk to their parents about their decision, but some cannot or will not, no matter what the law says. The alternative of going to court for judicial authorization for an abortion is often daunting or logistically impossible. In addition, going to court inevitably delays the abortion, forcing

some teens into later and therefore riskier procedures. As a result, more minors are traveling across state lines for abortions or resorting to dangerous illegal or self-induced procedures.

Some parental involvement laws are susceptible to constitutional challenge. When courts strike such laws under the federal constitution, it is usually because of flaws in the process for judicial authorization. In a handful of states, courts ruling under state constitutions have held that mandatory parental involvement is simply inconsistent with the teenagers' right to privacy and equal protection.

Minors' access to contraception and sexuality education is also at risk. Proposals to require parental consent for contraceptive services to minors are repeatedly debated in Congress and have been cropping up in the state legislatures. If these proposals become law, they will scare many sexually active teenagers away from the family planning clinics that may be their only source of confidential reproductive health care, leaving them more vulnerable to unintended pregnancy and sexually transmitted diseases, including HIV/AIDS.

The proponents of "abstinence-only" sexuality education made gains in 1996 when Congress appropriated $250 million over five years for abstinence-until-marriage programs. Because they must omit any instruction on contraception or safe sex, these programs leave sexually active teenagers unprepared to protect themselves and their partners. While it is important to stress the benefits of abstinence, it is equally important to address the pressing needs of students who have sex anyway.

Policing Pregnancy

In the past several years, some government officials have zealously embraced a misguided mission to protect fetuses by attempting to control the conduct of pregnant women. Pregnant women have been forced, sometimes against their religious beliefs, to undergo unwanted cesarean sections; ordered to have their cervixes sewn up to prevent miscarriage; been incarcerated for consuming alcohol; and detained, as in the case of one young woman in Wisconsin, simply because authorities found that she "tended to be on the run" and to "lack motivation or ability to seek medical care."

Fortunately, in many of these cases the invasive state actions have been rescinded by higher officials or rejected by the courts. Unfortunately, many of these decisions came too late: women had already suffered and been deprived of their rights.

Recent studies show that when women fear prosecution or forced medical intervention, they avoid seeking critical prenatal care. Thus, rather than protecting fetuses, punitive and intrusive measures have the opposite effect.

Pregnant women have the same constitutional right to privacy, bodily integrity, and fair treatment under the law as other free adults. Women do not become wards of the state or forfeit their constitutional rights just because they are pregnant.

The overwhelming majority of pregnant women subjected to punitive state actions have been women of color. Many factors contribute to this fact, with race and class prejudices playing a major role in all of them.

Eroding Access to Reproductive Health Services

Over the past decade, states have enacted restrictions that make it more complex and costly for women to obtain abortions. These include mandatory waiting periods; excessive, medically unnecessary regulation of abortion providers; and

Combating Bans on Safe Abortion Procedures

In the mid-1990s, anti-choice forces launched a campaign to ban what they deceptively called "partial-birth abortions." They passed two federal bans that were later vetoed by President Clinton, and enacted copy-cat bans in more than 30 states. These bans are the most widely debated – and most misunderstood – abortion restrictions of the past decade. The bans' proponents portray them as directed against a "single," "late," "gruesome" abortion procedure. The media often adopt and parrot this description. Yet it is wholly inaccurate.

In 2000, the Supreme Court – like the overwhelming majority of lower courts to review these laws – saw through the deceptive rhetoric and underscored the paramount importance of women's health in any law regulating abortion. The case, *Stenberg v. Carhart*, reviewed Nebraska's so-called "partial-birth abortion" ban. The Court struck the ban on two independent grounds, either of which alone would have been sufficient to condemn it: the ban 1) impermissibly endangered women's health by failing to include a health exception; and 2) placed a substantial obstacle in the paths of women seeking an array of constitutionally protected abortions, including the most widely used procedure for second-trimester surgical abortions.

Despite this Supreme Court holding, Congress continues to consider a federal ban, and some states have persisted in defending their laws or in proposing new ones, even when they suffer from the same constitutional flaws as does Nebraska's ban.

Although *Carhart* stands as a critical bulwark against bans on safe abortion procedures, the decision rests on an uncomfortably narrow margin. The Court split 5-4, illustrating again the precariousness of federal constitutional protection for this right.

requirements that women seeking abortions receive materials or counseling aimed at dissuading them from terminating their pregnancies.

What is more, throughout the 1980s and '90s, harassment of patients and acts of violence against clinics and clinic employees escalated. Anti-choice protesters physically blocked the entrances to hundreds of

clinics and destroyed property and equipment. In 1993 and 1994, extremists assassinated two doctors who performed abortions, two clinic workers, and one volunteer escort. Abortion providers and patients demanded federal protection, and in 1994 Congress passed the Freedom of Access to Clinic Entrances Act (FACE). The statute prohibits the use of force, threats of force, physical obstruction, and property damage intended to interfere with people obtaining or providing reproductive health services. FACE does not apply to peaceful praying, picketing, or other free speech by anti-choice demonstrators – so long as these activities do not obstruct physical access to clinics.

FACE has been a valuable tool, but it has not stopped anti-choice violence. In 1998, a bomb detonated at an Alabama clinic killing a security guard and gravely injuring a nurse. And in New York, a doctor who provided abortions was shot to death while standing in his kitchen with his family.

This anti-choice violence has deterred doctors from providing abortions. Since 1982, the number of abortion providers in the U.S. has declined by 30 percent. By the end of the 1990s, 86 percent of U.S. counties had no known abortion provider and only 12 percent of U.S. ob/gyn residency programs required training in first-trimester abortions. This dearth of training leaves few young doctors willing and able to step into the provider void and reverse this ominous trend.

Many hospitals have also ceased to provide abortions. Mergers between religiously affiliated hospitals and non-sectarian hospitals, which have become widespread, exacerbate the problem. Such mergers often result in the reduction of reproductive health services because the religiously affiliated partner imposes its religious directives on the secular one. Typically, these doctrinal restrictions prohibit abortion, sterilization, contraceptive services, AIDS prevention services, many types of infertility treatments, and even dispensing the "morning-after pill" for rape victims.

In recent years, moreover, legislative sessions at the state and federal levels have produced a rash of provisions—known as non-compliance or "conscience" clauses—that permit health care facilities, medical personnel, insurers, and/or pharmacists to withhold treatment, coverage, or even important medical information on the basis of their religious or moral objections to these services.

Although such exemptions may be appropriate in limited circumstances, a health care facility serving and employing people of all faiths generally has no right to impose its religious views on patients and health professionals. Broad non-compliance clauses threaten women's reproductive health.

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Promising New Choice for U.S. Women

In September 2000, the Food and Drug Administration approved mifepristone (RU-486), a safe and effective early-option abortion pill. The approval of this drug represents a significant breakthrough in reproductive health care for women in the United States. Most significantly, it promises to give women who live far from an abortion provider better access to a safe, private, and less invasive early option for ending unwanted pregnancies.

The great potential of this drug, however, may be lost if anti-choice forces succeed in their efforts to restrict its use and intimidate doctors, especially those who do not already perform surgical abortions, from administering it. In the last decade, more than half a million women in Europe have safely used this drug as have thousands of U.S. women in clinical trials. We cannot let politics interfere with medical advances that will benefit the lives and health of American women. This is a battle that will surely be waged in the courts as well as in the public arena.

What the Future Holds

In 1989, Justice Harry Blackmun, who wrote the majority opinion in *Roe v. Wade,* issued an eloquent dissent from a decision upholding an array of abortion restrictions. He wrote that, in allowing such restrictions, the Court "casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children."

The darkness has not yet descended. But the defense of women's reproductive freedom requires constant vigilance.