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THE TRUTH ABOUT WOMEN'S RIGHTS

JANET BENSHOOF*

In their article, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?*, the authors Lynne Marie Kohm and Colleen Holmes launch a wide-ranging attack on women's reproductive freedoms and target not only myself but topics as diverse as gay and lesbian rights, the Vagina Monologues, and sexual freedom (without guilt or shame) for women.

This Essay is not meant to be a comprehensive response to the article. Rather, this Essay will counter Kohm's and Holmes's asserted premise—that fighting for reproductive freedoms has left feminists without the strength to fight for other rights. By doing so, the authors' true agenda will be revealed. I trust that the reader's own common sense will lend a healthy skepticism to an examination of the article's other and, at times, even more egregious claims.

This Essay will establish the centrality of reproductive rights to women's equality and will describe the well-financed, politically sophisticated, and increasingly successful attack on those rights by the religious right. The goal of the religious right is to remove the constitutional protections embodying the values of a pluralistic secular government, to disparage the constitutional values of individual conscientious choice, to halt the advancement of a living constitution toward the protection of equality, and instead to substitute one religious viewpoint as the state-sponsored ideology. A key component to their overall strategy is an attack on the right to choose abortion. Thus, it is imperative that feminists continue to fight the numerous encroachments that are being made on women's reproductive freedoms.

The last part of this Essay is drawn from remarks I made at the Third Annual Blackmun Lecture, *Countering the Religious Right: Legislative and Legal Strategies*, on March 5, 1999, in Washington D.C., presented by the Center for Reproductive Law and Policy (CRLP) and the People for the American Way Foundation.

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I.

Kohm and Holmes assert at the start of their article that feminists have sacrificed their commitment to women's economic security in order to safeguard women's reproductive rights.¹ As a result, according to the authors, women have not made the strides toward economic equality that the authors expected. The authors lay the blame for this failure squarely on pro-choice feminists who, according to the authors, must take responsibility for the gap between men's and women's salaries and the glass ceiling that halts women's professional progress.²

Even a cursory examination of the article reveals that the authors fail to provide any demonstrable proof of their initial sweeping assertion. Instead, they rely on the naive and unsupported assertion that any time or attention given to reproductive freedom actually harms other types of work for gender equality, and that an interest in reproductive rights, by its very nature, "gobble[s] up and swallow[s]" all of the "other aspects of equality."³

The authors ignore the numerous advancements in women's legal equality achieved by feminists, including those in organizations that stress pro-choice legal work. These advancements in economic and educational equality for women, as well as enhanced protections from gender-related violence, were achieved by women's organizations, concerned state and federal lawmakers, and courageous individuals and are in no way undermined by ongoing reproductive rights work. In fact, the interconnectedness of the advocates for all types of advances for women (reproductive, economic, and protection against violence) demonstrates the centrality of the ability to make reproductive choices to any equality gains. For example, how can a woman earn a living or compete in a sports scholarship in college if she cannot control her reproduction?

In 1994, federal legislators passed the Violence Against Women Act (VAWA).⁴ VAWA gives "[a]ll persons within the United States

1. See Lynne Marie Kohm & Colleen Holmes, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?*, 6 WM. & MARY J. WOMEN & L. 381, 381-82 (2000).

2. See *id.* at 381-87.

3. *Id.* at 398; see also *id.* at 385 (equating concern that medical schools do not teach abortion with a lack of concern over the number of women entering the medical profession); *id.* at 406 (equating doctors' concern for diagnosing fetal defects with doctors' neglect of domestic violence).

4. Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 (codified as amended in scattered sections of 18, 28 and 42 U.S.C.).

. . . the right to be free from crimes of violence motivated by gender."⁵ Individuals injured by gender motivated crimes of violence may sue their attackers for damages and other appropriate relief.⁶ VAWA also earmarks substantial federal funds for use in preventing violence against women,⁷ makes it a federal crime to commit certain types of violence against women,⁸ and enhances penalties for federal crimes committed because of a gender animus.⁹

VAWA's laudable effort to protect women from violence is currently under constitutional attack. The National Organization for Women's Legal Defense and Education Fund (NOW LDEF), an organization criticized by Kohm and Holmes,¹⁰ is currently defending VAWA's constitutionality, in part, by participating in the appeal of the Fourth Circuit case of *Brzonkala v. Virginia Polytechnic Institute & State University*.¹¹ In *Brzonkala*, the Fourth Circuit declared that parts of VAWA are unconstitutional.¹² The United States Supreme Court recently accepted certiorari in the case.¹³ Additionally, the amicus list in *Brzonkala* is quite extensive and includes a number of national and local organizations that fight for employment equality and economic security for women¹⁴—organizations that Kohm and Holmes overlooked in their article.¹⁵

5. 42 U.S.C. § 13981(b) (1994).

6. *See id.* § 13981(c).

7. *See id.* §§ 300w-10, 3796gg, 10402(a) (1994).

8. *See* 18 U.S.C. §§ 2261, 2262 (1994) (punishing those who cross state lines to commit domestic violence or to violate a protective order).

9. *See* 28 U.S.C. § 994 (1994) (enumerating sentencing guidelines and enhanced penalties for hate crimes).

10. *See* Kohm & Holmes, *supra* note 1, at 382 n.5, 395-96 & n.99, 412 nn.207-08.

11. 169 F.3d 820 (4th Cir. 1999), *cert. granted*, 1999 U.S. Lexis 4745 (Sept. 28, 1999); *see also* NOW LDEF, *Complete Listing of Recent Cases* (visited Jan. 20, 2000) <<http://www.nowldef.org/html/courts/docket.htm>> (listing additional VAWA cases NOW LDEF is litigating).

12. *See Brzonkala*, 169 F.3d at 826.

13. *See supra* note 11.

14. The amicus list includes law professors, The Anti-Defamation League, Center for Women Policy Studies, The DC Rape Crisis Center, Equal Rights Advocates, The Georgetown University Law Center Sex Discrimination Clinic, Independent Women's Forum, Jewish Women International, The National Alliance of Sexual Assault Coalitions, The National Coalition Against Domestic Violence, The National Coalition Against Sexual Assault, The National Network to End Domestic Violence, National Organization for Women, Northwest Women's Law Center, The Pennsylvania Coalition Against Domestic Violence, Virginia National Organization for Women, Virginia NOW Legal Defense and Education Fund, Virginians Aligned Against Sexual Assault, Women Employed, Women's Freedom Network, Women's Law Project, and Women's Legal Defense Fund. *See Brzonkala*, 169 F.3d at 821.

15. For example, Equal Rights Advocates is a highly regarded national organization that "works to achieve women's economic security through litigation, public education, legislative advocacy, public policy analysis and advice & counseling." Equal Rights Advocates, *Home Page* (visited Jan. 20, 2000) <<http://www.equalrights.org/>>. As stated on its website, Equal

In 1993, Congress enacted the Family and Medical Leave Act (FMLA).¹⁶ The FMLA granted employees the right to take twelve weeks leave from their jobs for family or medical reasons with the guarantee that, at the end of their leave, they could return to their prior position or an equivalent position without any loss of benefits.¹⁷ In passing the FMLA, Congress made several significant findings:

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.¹⁸

In light of these findings, Congress passed the FMLA in order to ensure gender equality in the workplace, stating that the purposes of the FMLA are:

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for

Rights Advocates "focuses on: welfare reform that leads to self-sufficiency, promoting equal opportunity/affirmative action for all women and girls, stopping sexual harassment in the workplace and at school, [and] improving the terms and conditions of women's employment, including the balance between family and work responsibilities." *Id.*

In direct contradiction to Kohm's and Holmes's assertion that women's rights activists pay only minimal attention to the wage gap between men and women, see Kohm & Holmes, *supra* note 1, at 384, the Equal Rights Advocates has participated in litigating a number of cases related to the Equal Pay Act. See Equal Rights Advocates, *Relevant Cases* (visited Jan. 20, 2000) <<http://www.equalrights.org/LEGAL/AMICUSBR.htm>>.

16. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, Title I, § 101, 107 Stat. 7 (codified as amended at 29 U.S.C. §§ 2601-2654) (1994).

17. See 29 U.S.C. §§ 2612, 2614.

18. 29 U.S.C. § 2601(a).

medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

....
 (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.¹⁹

Lastly, Congress prohibited interference with employees' rights under the FMLA and discrimination based on the exercise of those rights.²⁰ The FMLA largely was drafted by feminist lawyers from the National Partnership for Women and Families (formerly Women's Legal Defense Fund),²¹ who also do reproductive choice work.

As another example of feminists' recent advancements for women, in 1998 and 1999, legislators in nine states passed contraceptive equity laws that prohibit medical insurance plans that provide coverage for prescription drugs, devices, and/or outpatient services from excluding prescription contraceptives, devices, or outpatient services from their coverage.²² The laws were passed in response to the fact that women of reproductive age spend sixty-eight percent more money than men on out-of-pocket health care costs based largely on the sums women pay for reproductive health

19. *Id.* § 2601(b).

20. See 29 U.S.C. § 2615.

21. See Donna R. Lenhoff, *Reflections on Five Years of the FMLA*, NAT'L PARTNERSHIP FOR WOMEN & FAM. NEWSLETTER (Nat'l Partnership for Women & Families, Washington, D.C.), Summer/Fall 1998, at <<http://www.nationalpartnership.org/news/newsletter/fal98/newsletter3.htm>> (describing the development of the FMLA).

22. See S.H.B. 5950, Jan. Reg. Sess., 1999 Conn. Legis. Serv. P.A. No. 99-79 (West); H.B. 374, 145th Gen. Assem., 1999-00 Reg. Sess. (Ga. 1999) (enacted and codified at GA. CODE ANN. § 33-24-59.6 (Supp. 1999)); S.B. 822, 20th Leg., Reg. Sess. (Haw. 1999) (enacted and codified at HAW. REV. STAT. § 432:1-604.5 (1999)); S.P. 389, 119th Leg., 1st Reg. Sess. (Me. 1999) (enacted and codified at ME. REV. STAT. ANN. tit. 24, § 2332-J (West Supp. 1999) and ME. REV. STAT. ANN. tit. 24-A, §§ 2756, 2847-G, 4245 (West Supp. 1999)); H.B. 457, Reg. Sess., 1998 Md. Laws 117 (enacted and codified at MD. CODE ANN., INS. § 15-826 (Supp. 1999)); A.B. 60, 70th Leg., Reg. Sess. (Nev. 1999); S.B. 175, 156th Leg., 1st Gen. Sess. (N.H. 1999) (enacted and codified at N.H. REV. STAT. ANN. §§ 415:18-i, 420-A:17-c, 420-B:8-gg (Supp. 1999)); S.B. 90, Reg. Sess., 1999 N.C. Adv. Legis. Serv. 231 (enacted and codified at N.C. GEN. STAT. §§ 58-3-176, 58-50-155 (1999)); H.B. 189, 65th Leg., Reg. Sess. (Vt. 1999) (enacted and codified at VT. STAT. ANN. tit. 8, § 4099c (Supp. 1999)).

services²³ and the fact that most insurance plans routinely exclude contraceptives from coverage.²⁴ Thus, contraceptive equity laws work to promote economic equality between the sexes. My organization, along with many other women's rights organizations, actively promoted these bills.

In the courts over the last twenty-five years, feminists have achieved advances in economic areas for women while suffering losses in the area of reproductive rights. In recent years, the Court issued a number of opinions that clarified the standards for employer liability for sexual discrimination under Title VII,²⁵ reasserted the principle that states may not fund male-only colleges,²⁶ and opened the door to suits against schools under Title IX for failing to protect their students from sexual harassment at school.²⁷ Lastly, the Court spoke assertively on the right of states to proscribe discrimination on the basis of sexual orientation.²⁸ Many women's rights organizations and courageous individual women participated in these suits.

This brief and very cursory overview of some current efforts to ensure women's economic and educational equality and safety unquestionably belies Kohm's and Holmes's assertion that "the current women's rights movement has promoted a feminist agenda

23. See WOMEN'S RESEARCH & EDUC. INST., WOMEN'S HEALTH INSURANCE COSTS AND EXPERIENCE 5-6, 16-17 (1994).

24. Forty-nine percent of large-group plans do not routinely cover any contraceptive method and only 15% of the plans cover all five of the most common reversible contraceptive methods—oral contraceptives, diaphragms, Depo-Provera, IUDs, and Norplant. See ALAN GUTTMACHER INST., UNEVEN & UNEQUAL 13-14 (1994). Whereas 97% of large-group plans cover prescription drugs, only 33% of these plans cover oral contraceptives, the most popular reversible birth control method among American women. Whereas 92% of large-group plans cover prescription devices, only 15% of these plans cover diaphragms, 18% cover IUDs, and 24% cover Norplant. See *id.* at 11, 16.

25. See, e.g., *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118 (1999) (clarifying standard for punitive damages); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (clarifying employer's vicarious liability for a hostile work environment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (same); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that same sex sexual harassment is actionable under Title VII); *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997) (discussing whether employer met minimum employee requirement for Title VII liability); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (clarifying standard for abusive work environment claims).

26. See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that state violates Equal Protection Clause by maintaining a military college exclusively for men).

27. See, e.g., *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999) (permitting student to sue school under Title IX for failure to remedy a classmate's harassment); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (permitting student to sue school for damages under Title IX for sexual harassment by teacher).

28. See *Romer v. Evans*, 517 U.S. 620 (1996) (holding that Colorado's amendment to its constitution barring all state and local action designed to protect the status of persons based on sexual orientation violated the federal Equal Protection Clause).

that has focused solely on reproductive freedom to the detriment or exclusion of freedom and equality for women in other areas."²⁹

II.

By basing their article on the false and inflammatory premise that women's economic equality is being sacrificed by women's desire for reproductive freedom, the authors try to camouflage their underlying attempt to legitimate, through academic discourse and scare tactics, their own discomfort with abortion and female sexuality due to their personal religious views.³⁰

Although the article focuses primarily on abortion, the authors do spend substantial portions of their article discussing other topics including what they consider to be vulgar displays by feminists, such as the Vagina Monologues,³¹ and what they consider to be feminist defenses of vulgarity, such as feminists' refusal to support the impeachment of President Clinton based on his affair with Monica Lewinsky.³² The authors also comment negatively on lesbian rights,³³ same sex partnerships,³⁴ sex for pleasure,³⁵ sex outside marriage,³⁶ adultery,³⁷ pornography,³⁸ witchcraft,³⁹ and goddess worship (which somehow includes the use of "dark sexual power").⁴⁰

The authors' decision to devote large portions of an article on so-called harmful influences within the feminist movement to various aspects of female sexuality illustrates their discomfort with, and ultimately their attempt to deny, female sexual desire. The authors' unexplained inclusion of such a wide range of diverse topics, seemingly unrelated to each other, demonstrates their own

29. Kohm & Holmes, *supra* note 1, at 381-82.

30. The authors' personal discomfort with a wide range of issues related to female sexuality is driven by their religious views. The authors make repeated references to biblical doctrine and plead with feminists to return to the faith of early feminists. *See id.* at 387, 389, 392, 402, 414-15 n.218. I will discuss the danger and the consequences of the authors' attempt to disguise their personal and religious discomfort with sexuality with the inflammatory statement that reproductive rights work sets women back near the end of this Essay. *See infra* notes 86-113 and accompanying text.

31. *See Kohm & Holmes, supra* note 1, at 407.

32. *See id.* at 405-06.

33. *See id.* at 395 n.92.

34. *See id.* at 411 n.201.

35. *See id.* at 407.

36. *See id.* at 411.

37. *See id.*

38. *See id.* at 408.

39. *See id.* at 418.

40. *See id.*

obsession with, and fear of, female sexuality and desire. Seeing sex everywhere, the authors fail to notice that they have failed to prove their underlying premise.⁴¹

III.

The authors conclude their discussion of female sexuality by proposing that women embrace the theory of "complimentarity"⁴² and, thereby, reject all aspects of female sexuality except for those that fit within the authors' idea of "complimentarity." At the heart of the authors' "complimentarity" thesis is the concept that women should be defined by their maternal capacity.⁴³ Thus, the authors' call for "complimentarity" merely reinforces the stereotype of motherhood being the primary proper role for women—a stereotype that the movement for equality (including reproductive freedom) is trying to combat.

Under "complimentarism," both women and men would limit themselves to "roles [to which] they are best suited given their own natural inclinations, desires, and convictions."⁴⁴ Clearly, the authors believe that the core of women's natural inclinations is motherhood. Thus, central to their "complimentarity" thesis is "distinctive roles for men and women based primarily on women's actual or potential maternity."⁴⁵ As for all other aspects of a woman's sexuality not related to maternity, the authors merely comment that "[i]t is the sometimes painful and exhilarating discovery of God's power to fight free from the bondage of our sinful selves."⁴⁶

By defining women by their maternal capacity, the authors contradict their major criticism of the reproductive rights movement. Throughout the first portion of their article, the authors repeatedly state that the reproductive rights movement damages women by improperly defining women by, and limiting women to, their reproductive roles⁴⁷—a point I will refute shortly. Yet the

41. See *supra* text accompanying note 1.

42. See Kohm & Holmes, *supra* note 1, at 414.

43. See *infra* note 44 and accompanying text.

44. Kohm & Holmes, *supra* note 1, at 419.

45. *Id.* at 416 (quoting OLIVE BANKS, *FACES OF FEMINISM* 77 (1981)); see also *id.* at 391 n.67 (touting the "privileges of motherhood"); *id.* at 421 (claiming that the "complimentarity" model gives women "familial ecstasy and fulfillment").

46. *Id.* at 416-17 (quoting John Piper, *A Vision of Biblical Complimentarity*, in *RECOVERING BIBLICAL MANHOOD & WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM* 31, 47-48 (Wayne Gruden & John Piper eds., 1991)).

47. See *id.* at 384-85, 410-11, 418.

authors then take the position that women should be defined by their maternal function. The authors do not even attempt to explain how their suggestion of defining women by their "maternal function" is any different than defining women by their "reproductive function."

IV.

As Justice Sandra Day O'Connor recognized in her plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁸

[F]or two decades of economic and social developments, [women] 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.⁴⁹

Unless women in the United States continue to control their childbearing capacity, they will not be able to participate fully in society. Indeed, reproductive freedom is so central to women's rights in general that over one hundred and eighty countries around the world have declared "reproductive rights" to be a "human right."⁵⁰

In the United States, the Supreme Court's privacy doctrine grounds reproductive choice in concepts fundamental to individual constitutional rights. In *Casey*, the Court noted that a woman's constitutional right to terminate her pregnancy is based on two

48. 505 U.S. 833 (1992).

49. *Id.* at 856.

50. These countries adopted the Programme of Action written in 1994 at the United Nations' International Conference on Population and Development (ICPD) in Cairo. See *Report of the Int'l Conference on Population and Development*, U.N. Doc. A/Conf. 171/13 (1994). The Programme of Action states:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other [relevant United Nations] consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence . . .

Id. ¶ 7.3. The Programme of Action further recognizes the centrality of reproductive rights to women's empowerment. See *id.* ¶ 4.1.

different and well-settled aspects of the right to privacy: the right to decisional autonomy and the right to bodily integrity.⁵¹ Thus, the right to privacy guarantees that a woman can make intimate decisions, including decisions about abortion, free from improper government intrusion and also guarantees that a woman has sufficient control of her own body that she will be free from unwanted pregnancies.

In order to make sure that these guarantees are not empty rhetoric at home and abroad, my organization, the Center for Reproductive Law and Policy, works to ensure access to contraception and abortion, to support adolescent reproductive health care, to guarantee that low-income women have access to a full range of reproductive health care, and to counter violence against women's reproductive freedom.⁵²

51. "It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted); see also *id.* at 857 (stating that *Roe* is in "no jeopardy" because subsequent cases recognized privacy rights in "intimate relations, family, and whether or not to beget or bear a child").

52. For more details, see Center for Reprod. Law and Policy, *Affirmative Plan for Reproductive Rights* (visited Jan. 20, 2000) <<http://www.crlp.org/>>.

As demonstrated by our work, we are deeply committed to women's health and safety, contrary to Kohm's and Holmes's scandalous accusation. See Kohm & Holmes, *supra* note 1, at 404. The anti-choice movement, on the other hand, continues to place the post-viability fetus over women's health in violation of the Constitution, despite the Court's consistent holding that it is impermissible for the State to do so. See *Casey*, 505 U.S. at 880 ("[T]he essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768-69 (1986) (finding that the challenged statute unconstitutionally required a "trade-off" between a woman's health and fetal survival), *overruled in part on other grounds*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (stating that during an abortion procedure, the physician's paramount duty is to ensure the woman's health); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (holding that the State must ensure, even post-viability, that the woman's health takes precedence); *Jane L. v. Bangerter*, 61 F.3d 1493, 1504 (10th Cir. 1995) (finding unconstitutional a statute that required the life of the fetus to be put before the life or health of the mother), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 863 (8th Cir. 1981) (holding that the State may regulate post-viability abortions "as long as it does not interfere with medical judgments as to the method necessary for the preservation of the life or health of the mother"), *aff'd in part & rev'd in part on other grounds*, 462 U.S. 476 (1983).

For example, neither the 1995 nor the 1997 federal bans on "partial birth abortion" contains exceptions for a woman's health. See H.R. 1122, 105th Cong. (1997) (stating that a partial birth abortion may be performed only to save a mother whose life is endangered by a physical complication); H.R. 1833, 104th Cong. (1995) (stating that partial birth abortions can be performed only if necessary to save the life of the mother). Although both bans were vetoed by President Clinton, see *infra* note 95 and accompanying text, the language of the federal bans is used as the basis for most of the "partial birth abortion" bans passed by state legislatures.

For examples of state bans based on the 1997 federal language, see ALASKA STAT. § 18.16.050 (Lexis 1998), *found unconstitutional* in *Planned Parenthood v. Alaska*, No. 3AN-97-6019 CIV (Alaska Super. Ct. Mar. 13, 1998); ARIZ. REV. STAT. ANN. § 13-3603.01 (West 1989 & Supp. 1999), *found unconstitutional* in *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997); FLA. STAT. ANN. §§ 390.011-.0111 (West Supp. 2000), *found unconstitutional* in *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); GA. CODE ANN. §§ 16-12-141, 16-12-144 (Lexis 1999), *limited by* *Midtown Hosp. v. Miller*, No. 1:97-CV-1786-JOF (N.D. Ga. 1998); IDAHO CODE § 18-613 (Supp. 1999), *found unconstitutional* in *Weyhrich v. Lance*, No. CV98-0117-S-BLW (D. Idaho Oct. 12, 1999); 720 ILL. COMP. STAT. 513/1, 5, 10, 15, 20, 99 (West 1993 & Supp. 1999), *found unconstitutional* in *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998), *vacated by* 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U. S. Jan. 10, 2000) (Nos. 99-1152 & 99-1156); IOWA CODE ANN. § 707.8A (West 1993 & Supp. 1999), *found unconstitutional* in *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157 (S. D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); LA. REV. STAT. ANN. §§ 14:32.9, 40:1299.35.16 (West 1997 & Supp. 2000), *permanently enjoined by* *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999); MICH. COMP. LAWS ANN. §§ 333.17016, .17516 (West 1992 & Supp. 1999), *permanently enjoined by* *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997); MONT. CODE ANN. § 50-20-401 (1999), *found unconstitutional* in *Intermountain Planned Parenthood v. Montana*, No. BDV 97-477 (Mont. Dist. Ct. June 29, 1998); R.I. GEN. LAWS §§ 23-4.12-1 to -6 (1996 & Supp. 1999), *enjoined by* *Rhode Island Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288 (D.R.I. 1999); W. VA. CODE §§ 33-42-3, -8 (1996 & Supp. 1999), *temporarily enjoined by* *Brancazio v. Underwood*, No. 2:98-0495, slip op. at 3 (S.D. W. Va. June 11, 1998).

For examples of state bans based on the 1995 federal language, see ALA. CODE §§ 26-23-1 to -6 (1992 & Supp. 1998); ARK. CODE ANN. §§ 5-61-201 to -204 (Michie 1997), *found unconstitutional* in *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999); IND. CODE ANN. § 16-34-2-1 (Michie 1993 & Supp. 1999); NEB. REV. STAT. §§ 28-326(7), 28-329 (1995), *permanently enjoined by* *Carhart v. Stenberg*, 11 F. Supp. 2d 1109 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted in part*, 68 U.S.L.W. 3338 (U.S. Jan. 14, 2000) (No. 99-830); N.J. STAT. ANN. §§ 2A:65A-5 to -7 (West 1987 & Supp. 1999), *found unconstitutional* in *Planned Parenthood of Cent. N.J. v. Vernieo*, 41 F. Supp. 2d 478 (D.N.J. 1998); S.B. 2254, 56 Leg., Reg. Sess. Ch. 135 (N.D. 1999); VA. CODE ANN. § 18.2-74.2 (Michie 1996 & Supp. 1999), *found unconstitutional* in *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999). *But see* KAN. STAT. ANN. § 65-6721 (1998) (including a health exception in its ban on partial birth abortions).

Additionally, laws that used to contain life or health exceptions are now being amended to limit the exception to physical health or physical life endangerment situations, excluding women's mental health concerns. Compare Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 103, 110 Stat. 3009-17 (1996) (including a life exception on a ban for the use of federal funds to pay for abortions under the Medicaid program), with Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. No. 105-277, Title V, §§ 508-509, 112 Stat. 2681-385 (1998) (narrowing life exception to instances in which a woman's life is endangered by a physical condition); compare KAN. STAT. ANN. § 65-6721 (Supp. 1998) (containing a general health exception to a partial birth abortion ban), with David Miles, *House to Debate Late-term Abortion Bill*, AP WIRE (Topeka, Kansas), Apr. 6, 1999, available in WESTLAW, APWIREPLUS database (describing attempt to remove mental health from health exception found in the Kansas law). This "attack upon the mental health exception enables conservative policy-makers to appeal to deeply held suspicions about the psychological fitness of women who refuse the role of motherhood." Janet Benshoof & Laura Ciolkowski, *Abortion Foes Aim at Mental Health*, N.J. L.J. Jan. 25, 1999, at 27, available in LEXIS, News Library, Njlaw File.

V.

Kohm and Holmes disagree with these worthy goals based on their concept of morality, which, in turn, is based upon their religious beliefs. This morality is one that rejects abortion specifically and female sexuality generally.⁵³ Through their article, the authors attempt to impose their own religious structure on others by using inflammatory and unsupported rhetoric.

Their words strike a familiar refrain with me. During the course of my work, I have determined that abortion is the key component to the political strategy of the religious right—a strategy that has as its goal the imposition of one particular view of morality upon all.⁵⁴ I make a clear distinction, however, between the religious beliefs themselves and the attempts to make those particular religious beliefs the basis of fundamental laws under which we all must live.

Why is abortion the defining issue? There are two reasons. First, abortion is the glue for a strong, active, one-issue minority grassroots movement in which others who oppose abortion can join even if these individuals and groups do not agree with the religious right on other issues.⁵⁵

Second, abortion prompted the religious right to enlist the Republican Party's aid in restoring morality to the nation. The imprimatur of the Republican Party tends to mainstream the anti-choice issue.⁵⁶ Additionally, the association of the party with the religious right has led to one of the most consistent and reliable voting blocs within the Republican Party. This dependable constituency has lead, in turn, to deference within the party to the concerns of the religious right in matters ranging from who gets elected, to who gets appointed to important posts, to policy matters in the international family planning area.⁵⁷

53. *See supra* note 29.

54. Although eliminating the right to choose abortion is the focus, for some, like Kohm and Holmes, abortion is just one of a number of behaviors considered objectionable which include contraception, extramarital sex, sex education, gay and lesbian rights, and pornography (broadly defined). *See* CENTER FOR REPROD. LAW AND POLICY, *TIPPING THE SCALES* 3, 8 (1998) [hereinafter *TIPPING THE SCALES*]; *see also* Kohm & Holmes, *supra* note 1, at 408-09 (condemning these behaviors as contrary to early feminists' goals).

55. *See* *TIPPING THE SCALES*, *supra* note 54, at 3, 31 n.22.

56. *See id.* at 3.

57. *See id.* at 3, 12, 19, 29 n.6. During the Reagan and Bush years, the Executive Branch actively supported a Human Life Amendment to the Constitution both as a piece of the Republican platform and in Congress. The Human Life Amendment sought to overturn *Roe v. Wade*. No other liberty right given protection by the Supreme Court has been subjected to this type of legislative overruling. *See id.* at 3, 30 n.7.

Because of the key role that abortion plays in this overall strategy, finding a way to overturn *Roe v. Wade* has become the most focused and best financed aspect of the morality campaign. As a result, it also has been the most successful.⁵⁸ The protection given by the Supreme Court's 1973 decision of *Roe v. Wade* has been seriously diluted since then by the efforts of the religious right in the ensuing twenty-five years.

I am not referring to the protection of a right to abortion, because that was never the basis of the *Roe* decision. Rather, *Roe v. Wade* protected a woman's individual choice about whether to continue a pregnancy free from governmental interference.⁵⁹ *Roe* left that choice with the individual woman and her family. That aspect of *Roe* has been overturned, for the government is no longer under an obligation to act neutrally when it comes to a woman's individual choice.⁶⁰

Starting in 1983, the Solicitor General consistently asked the Supreme Court, in cases in which he was appearing even if the federal government was not a defendant in the case, to overturn *Roe v. Wade*. See, e.g., Brief for the United States as Amicus Curiae at 8, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902) (filed by Solicitor General Kenneth Starr) (arguing that "*Roe v. Wade* was wrongly decided and should be overruled"); Respondent's Brief at 13, *Rust v. Sullivan*, 500 U.S. 173 (1990) (Nos. 89-1391 and 89-1392) (filed by Solicitor General Kenneth Starr) (arguing that "the Court's conclusions in *Roe* that there is a fundamental right to an abortion . . . find[s] no support in the text, structure, or history of the Constitution" and concluding that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled"); Brief for the United States as Amicus Curiae at 11-12, *Hodgson v. Minnesota*, 497 U.S. 417 (1989) (Nos. 88-1125 and 88-1309) (filed by Solicitor General Kenneth Starr) (arguing that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled"); Brief for the United States as Amicus Curiae at 24, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1985) (Nos. 84-495 and 84-1379) (filed by Acting Solicitor General Charles Fried). Fried argued:

We respectfully submit that by these criteria *Roe v. Wade* is extraordinarily vulnerable. It stands as a source of trouble in the law not only on its own terms, but also because it invites confusion about the sources of judicial authority and the direction of this Court's own future course. *Stare decisis* is a principle of stability. A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment.

Id. These actions carried with them the prestige of the office of the Solicitor General. These are examples of the enormous power that the anti-choice movement has—a power that can influence political culture and, ultimately, public opinion.

58. See *TIPPING THE SCALES*, *supra* note 54, at 19, 24-25.

59. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician").

60. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869 (1992) (stating that "[t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted"); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980)

Women who choose childbirth still have the full range of constitutional protection. Women who choose abortion, however, now have lesser constitutional protection. The government can tell a woman contemplating abortion that her decision is wrong.⁶¹ The government can make the woman's private doctor try to talk her out of the decision.⁶² In sum, the government can burden her choice as long as that burden does not become something which is "undue."⁶³ Thus, now, the majority of the states have restrictions on abortion that would not have been constitutional under *Roe v. Wade* as it was decided in 1973.⁶⁴

The result is that a movement related to morality, which is focused on politics and changing public opinion, has successfully influenced the Supreme Court. The Court has accepted the stereotype that women who choose abortion should be accorded less constitutional protection because those women are not doing the "God-based natural thing."

VI.

What is not understood is that this strategy to overturn *Roe v. Wade* is still in place today.⁶⁵ In order to describe what the attack

(holding that the government can favor childbirth over abortion by covering childbirth services under Medicaid and refusing to fund medically necessary abortions); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (declaring that the state can refuse to fund elective abortions for indigent women while funding childbirth services).

61. See *Casey*, 505 U.S. at 881-87 (upholding requirement that, before performing an abortion, physician must counsel patient with certain information developed by the state which expresses a preference for childbirth over abortion).

62. See *id.*

63. See *id.* at 876-77. What is an "undue burden"? The most conservative members of the Court would say that an undue burden is nothing less than a complete obstacle to abortion. See *id.* at 945 (Rehnquist, C.J., concurring in part & dissenting in part) (stating that "our decision in *Roe* is not directly implicated by the Pennsylvania statute, which does not prohibit, but simply regulates, abortion").

64. Compare *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (recognizing a legitimate state interest in both proscribing abortions post-viability and protecting minors seeking abortions, but finding provisions requiring parental consent, informed consent, twenty-four hour waiting periods, and a mandate for hospital treatment for all second-trimester abortions unconstitutional), *overruled by* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (finding informed consent, second physician presence requirements, and degree of care provisions for post-viability abortions unconstitutional), *overruled by* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), with *Planned Parenthood of Southeastern Pa. v. Casey* 505 U.S. 833 (1992) (holding "undue burden" standard, informed consent, twenty-four hour waiting period, and parental consent provisions constitutional).

65. This strategy undeniably originates from anti-choice forces, see generally TIPPING THE SCALES, *supra* note 54, not from the pro-choice community as suggested by Kohm and

on *Roe* currently is, I want to describe how this attack has changed over time. In the mid-1970s, the attack on *Roe* was overt. Activists tried to have the Supreme Court explicitly overrule *Roe* and also tried to overturn *Roe* by amending the Constitution with a Human Life Amendment, which would give fetuses (the unborn) the status of born people and would give embryos the same rights as the readers of this Essay.⁶⁶

As previously indicated, the Republican Party has played an important role in this strategy. In 1976, the Republican Party adopted a platform calling for far reaching restrictions on abortion—a platform that has been followed and promoted ever since.⁶⁷ The anti-choice plank of the Party's platform has four pieces. First, starting in 1976 and continuing to this day, the platform calls for the passage of a Human Life Amendment.⁶⁸ In

Holmes. See Kohm & Holmes, *supra* note 1, at 404-05.

66. See TIPPING THE SCALES, *supra* note 54, at 3, 30 n.7.

67. See REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM, PRINCIPLES OF THE 1996 REPUBLICAN PLATFORM, reprinted in 52 CONG. Q. ALMANAC D-21, D-28 (1996) [hereinafter 1996 REPUBLICAN PARTY PLATFORM] ("reaffirming respect for 'the sanctity of innocent human life'"); REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM 22 (1992) [hereinafter 1992 REPUBLICAN PARTY PLATFORM] ("We believe the unborn child has a fundamental individual right to life which cannot be infringed."); REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM—AN AMERICAN VISION: FOR OUR CHILDREN AND OUR FUTURE 31 (1988) [hereinafter 1988 REPUBLICAN PARTY PLATFORM] ("Deep in our hearts, we do believe . . . That the unborn child has a fundamental individual right to life which cannot be infringed."); REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM, reprinted in 40 CONG. Q. ALMANAC 41-B, 55-B (1984) [hereinafter 1984 REPUBLICAN PARTY PLATFORM] ("[T]he unborn child has a fundamental individual right to life which cannot be infringed."); REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM, reprinted in 36 CONG. Q. ALMANAC 58-B, 62-B (1980) [hereinafter 1980 REPUBLICAN PARTY PLATFORM] ("There can be no doubt that the question of abortion, despite the complex nature of its various issues, is ultimately concerned with equality of rights under the law. While we recognize differing views on this question among Americans in general—and in our own party—we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children."); REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM, reprinted in 2 NATIONAL PARTY PLATFORMS 965, 974 (1976) [hereinafter 1976 REPUBLICAN PARTY PLATFORM] ("Because of our concern for family values, we affirm our beliefs, stated elsewhere in this Platform, in many elements that will make our country a more hospitable environment for family life [including] a position on abortion that values human life . . .").

68. See 1996 REPUBLICAN PARTY PLATFORM, *supra* note 67, at D-28 ("The unborn child has a fundamental individual right to life which cannot be infringed. We support a human life amendment to the Constitution and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."); 1992 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 22 ("We therefore reaffirm our support for a human life amendment to the Constitution and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."); 1988 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 31-32 ("We therefore reaffirm our support for a human life amendment to the Constitution, and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."); 1984 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 55-B ("We therefore reaffirm our support for a human life amendment to the Constitution,

the early 1980s, nineteen states called to convene constitutional conventions on the topic.⁶⁹

Second, the platform calls for federal legislation giving more rights to the fetus.⁷⁰ This, too, has been successful, as Congress has passed legislation such as the ban on partial birth abortion⁷¹ and the Unborn Victims of Violence Act.⁷²

Third, the platform calls for a ban on federal funding, not to organizations that advocate abortion rights, but to organizations that have something to do with abortion or whose affiliated branches have something to do with abortion.⁷³ This portion of the platform also has been successful. Congress instituted both a domestic gag rule by prohibiting health care professionals in institutions receiving federal funds from talking about abortion⁷⁴ and an international gag rule by creating the so-called Mexico City

and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."); 1980 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 62-B ("[W]e affirm our support of a constitutional amendment to restore protection of the right to life for unborn children."); 1976 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 976 ("The Republican Party favors a continuance of the public dialogue on abortion and supports the efforts of those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children.").

69. See Albert P. Blaustein et al., *Amici for Appellants: The Role of Stare Decisis in the Reconsideration of Roe v. Wade*, 15 AM. J.L. & MED. 204, 208 (1989) ("[A]t least nineteen state legislatures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.").

70. See 1996 REPUBLICAN PARTY PLATFORM, *supra* note 67, at D-28 ("[W]e endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children. Our purpose is to have legislative and judicial protection of that right against those who perform abortions."); 1992 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 22 ("[W]e endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."); 1988 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 32 (same); 1984 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 55-B (same).

71. Congress has passed two bills banning "partial birth abortion," one in 1995 and one in 1997. See H.R. 1122, 105th Cong. (1997); H.R. 1833, 104th Cong. (1995). Both were vetoed by President Clinton. See *infra* note 95 and accompanying text.

72. H.R. 2436, 106th Cong. (1999) (passed House of Representatives on Sept. 30, 1999).

73. See 1996 REPUBLICAN PARTY PLATFORM, *supra* note 67, at D-28 ("We oppose using public revenues for abortion and will not fund organizations which advocate it."); 1992 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 22 (same); 1988 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 32 ("We oppose the use of public revenues for abortion and will eliminate funding for organizations which advocate or support abortion."); 1984 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 55-B (same); 1980 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 62-B ("We also support the congressional efforts to restrict the use of taxpayers' dollars for abortion.").

74. See 42 C.F.R. §§ 59.7, 59.8 (1988) (promulgating regulations of the Department of Health and Human Services under the Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C. §§ 300-300a-8 (1988)). Although the gag rule was found constitutional, see *Rust v. Sullivan*, 500 U.S. 173 (1991), President Clinton suspended its operation in 1993. See Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462, 7463 (1993).

policy.⁷⁵ During the Reagan era, the Mexico City policy barred organizations in countries that received U.S. aid from receiving population assistance funds if the organizations used their own funds to provide legal abortion services or if they participated—consistent with their own laws—in efforts to alter laws or governmental policies with any connection to abortion.⁷⁶ Both bans, domestic and international, were halted by President Clinton,⁷⁷ not by the Supreme Court, which upheld such gag rules.⁷⁸ A modified version of the Mexico City policy, however, has just been reinstituted this year in a compromise between President Clinton and anti-choice members of Congress.⁷⁹

Legislation also has been passed banning the use of federal Medicaid dollars for virtually all abortions, including medically necessary abortions.⁸⁰ Tied into the funding bans is legislation prohibiting women in the military from receiving abortions from their regular doctors⁸¹ and barring federal employees and women

75. The Mexico City policy prohibited overseas NGOs from receiving U.S. funds, either through USAID or indirectly through U.S.-based NGOs that received U.S. funds, if, with their own funds and in accordance with their own laws, they "performe[d]" or "actively promote[d]" "abortion as a method of family planning." The name is derived from the fact that the U.S. announced the policy at the 1984 U.N. International Conference on Population in Mexico City.

CENTER FOR REPROD. LAW AND POLICY, CAIRO +5: ASSESSING U.S. SUPPORT FOR REPRODUCTIVE HEALTH AT HOME AND ABROAD 16 n.9 (1999) (quoting the Policy Statement of the United States of America at the United Nations International Conference on Population, 2nd Sess., Mexico City (Aug. 6-13, 1984)).

76. *See id.* at 4, 16 n.9.

77. *See* Standards of Compliance for Abortion-Related Services of Family Planning Service Projects, 58 Fed. Reg. at 7463.

78. *See Rust*, 500 U.S. at 203.

79. The modified proposal is found in the Fiscal Year 2000 Commerce, Justice, State and the Judiciary Appropriations Bill. For further information on this proposal, see Center for Reprod. Law and Policy, *Press Release: United Nations Dues Paid, but Not Without a Price* (Nov. 15, 1999) <<http://www.crlp.org/111599UNdues.html>>.

80. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. No. 105-277, Title V, §§ 508-509, 112 Stat. 2681-385 (1998). Legislation of this type has been enacted annually since 1976. *See* *Planned Parenthood v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996) (describing the enactment of this uncoded legislation, popularly known as the Hyde Amendment, each year from 1976-1994, as a substantive modification of the Medicaid program); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 845 & n.1 (N.M. 1998) (describing how the Hyde Amendment has been enacted annually from 1994-1998).

81. *See* 10 U.S.C. § 1093 (1994 & Supp. III 1997) (prohibiting the use of Department of Defense funds for abortions except if the life of the woman is endangered by the pregnancy and prohibiting the performance of abortions in any medical facility run by the Department of Defense except in cases of rape or incest or if the life of the woman is endangered by the pregnancy).

living on reservations from receiving abortion coverage from their medical insurance.⁸²

Fourth, the platform calls for the appointment of judges who believe in the sanctity of unborn life,⁸³ and that is precisely what has happened. Former Presidents Reagan and Bush appointed six Supreme Court Justices, thus changing the viewpoint of the Court with respect to reproductive rights.⁸⁴ For example, starting with her appointment in 1983, Justice O'Connor advocated for the Court to change *Roe*—to state that abortion is not a clearly fundamental right.⁸⁵

VII.

Today, twenty-five years after *Roe*, the attack on *Roe* is much more covert and sophisticated. Its attackers no longer use an obvious and frontal strategy. The contours of the current attack can be discerned from the increasing number of lawyers⁸⁶ and non-

82. See Treasury and General Government Appropriations Act of 2000, Pub. L. No. 106-58, tit. 5, §§ 508-09, 113 Stat. 430 (1999) (restricting federal employees); 42 C.F.R. §§ 36.51-36.57 (1999) (detailing restrictions on federal abortion options for Native American women on reservations). No federal employee health benefit program can provide coverage for abortions unless the pregnancy endangers the woman's life or is the result of rape or incest. See Treasury and General Government Appropriations Act of 2000 §§ 509-10. Similarly, no abortion may be performed at an Indian Health Services Facility or Program unless the woman's life is endangered by the pregnancy. See 42 C.F.R. §§ 36.53-54, 36a.53-54.

83. See 1996 REPUBLICAN PARTY PLATFORM, *supra* note 67, at D-28 ("We support the appointment of judges who respect traditional family values and the sanctity of innocent human life."); 1992 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 22 ("We reaffirm our support for the appointment of judges who respect traditional family values and the sanctity of innocent human life."); 1988 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 32 ("[W]e reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."); 1984 REPUBLICAN PARTY PLATFORM, *supra* note 67, at 55-B to 56-B (same).

84. Former Presidents Reagan and Bush appointed Justices O'Connor, Scalia, Kennedy, Souter, and Thomas to the Supreme Court and appointed Justice Rehnquist to the position of Chief Justice. By the end of Bush's term in office, the Supreme Court issued *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), in which Justice O'Connor authored a plurality opinion joined by Justices Kennedy and Souter reducing the standard by which abortion regulations are analyzed from the "strict scrutiny" described in *Roe v. Wade* to the "undue burden" standard. In her opinion, Justice O'Connor criticized and overruled several decisions that had been issued by the Court post-*Roe*. See *id.* at 871, 882 (plurality opinion) (O'Connor, J., concurring) (criticizing various opinions following *Roe*). Chief Justice Rehnquist authored a dissent in which White, Scalia, and Thomas joined arguing that *Roe v. Wade* should be overruled. See *id.* at 944 (Rehnquist, C.J., dissenting).

85. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 465 n.10 (1983) (O'Connor, J., dissenting) (suggesting that the nature of the fundamental right to abortion is a "limited" one).

86. Many of these lawyers receive their training at Regent University Law School where Kohm teaches. Founded in 1986, and accredited in 1996, Regent University is a self-

profit groups formed to do legislative and policy work to counter reproductive choice, namely abortion. In the last ten years, the number of such groups rose from two to over eighteen.⁸⁷ Currently, annual funding for these legal advocacy groups totals about forty million dollars.⁸⁸

According to the anti-choice groups themselves, this covert siege of *Roe* seeks to cause an inner erosion of the decision, thus allowing the government to inflict mortal wounds without ever saying that *Roe* is being overturned. To accomplish their task, the anti-choice legal advocacy groups focus on three things: (1) the fetus itself, (2) the expansion of states' legitimate interest in the abortion decision, and (3) regulations purportedly outlawing late-term abortions.⁸⁹ Also, to achieve their goals, anti-choice advocates must overcome two major legal concepts that bar much of their proposed legislation: the viability line⁹⁰ and the requirement of a health exception.⁹¹

A covert strategy is, by its nature, more elusive to counter and has, at times, caught the pro-choice community unprepared. A prime example of the covert strategy at work is the "partial birth abortion" legislation that began to be introduced in Congress and state legislatures in 1995.⁹²

The "partial birth abortion" legislation is a sophisticated piece of criminal legislation drafted in part by the National Right to Life Committee (NRLC).⁹³ The legislation has been passed by Congress twice,⁹⁴ only to be vetoed by President Clinton.⁹⁵ Legislatures passed similar measures in thirty states.⁹⁶ Each bill criminalizes

described evangelical Christian institution whose mission is "to bring to bear upon legal education and the legal profession the will of almighty God, our Creator." *TIPPING THE SCALES*, *supra* note 54, at 22 (quoting REGENT UNIVERSITY GRADUATE CATALOG, 1994-96, at 128). The end goal is to train lawyers "to change the course of human history." *Id.* (quoting evangelist Peter Marshall, Jr.). Regent University is closely associated with the American Center for Law and Justice, one of the newest, largest, and best-funded anti-choice law firms. *See id.* at 22-23.

87. *See id.* at 7-9, 30 n.18 (listing many of these non-profit groups).

88. *See id.* at 24.

89. *See infra* notes 97-104 and accompanying text.

90. *See Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (defining the viability point as the moment when the fetus has a reasonable chance of survival outside the womb, before which a woman has a right to terminate her pregnancy).

91. *See id.* (stating that, at any time during her pregnancy, a woman is entitled to terminate her pregnancy in order to preserve her own health); *see also supra* note 52.

92. For examples of such laws, *see supra* note 52.

93. *See TIPPING THE SCALES*, *supra* note 54, at 121 (detailing how the NRLC worked with Republican legislators in drafting partial birth abortion legislation).

94. *See* H.B. 1122, 105th Cong. (1997); H.B. 1833, 104th Cong. (1995).

95. *See TIPPING THE SCALES*, *supra* note 54, at 126.

96. *See* KAN. STAT. ANN. § 65-6721 (Supp. 1999); KY. REV. STAT. ANN. §§ 311.720, .765,

performing an abortion upon a "partially born" fetus⁹⁷ with penalties as high as life imprisonment for a doctor who performs this so-called procedure.⁹⁸ Only two of the bans contain an exception for the health of the mother,⁹⁹ and none of the bans serve any legitimate state interest recognized by the Supreme Court.¹⁰⁰

.990 (Lexis Supp. 1998); MO. ANN. STAT. § 565.300 (West Supp. 2000); MISS. CODE ANN. §§ 41-41-71, -73 (1997); OHIO REV. CODE ANN. § 2919.15 (Banks-Baldwin 1997 & Supp. 1998), *declared unconstitutional in* Women's Med. Prof. Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995), *aff'd*, 103 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); OKLA. STAT. ANN. tit. 21, § 684 (West Supp. 2000); S.C. CODE ANN. § 44-41-85 (West Supp. 1998); S.D. CODIFIED LAWS §§ 34-23A-27 to -33 (Lexis 1999); TENN. CODE ANN. § 39-15-209 (1997); UTAH CODE ANN. § 76-7-310.5 (1999); WIS. STAT. ANN. §§ 895.038, 940.16 (West Supp. 1999); *see also supra* note 52.

97. *See supra* notes 52-96.

98. *See* WIS. STAT. ANN. §§ 939.50(3)(a), 940.16(2) (West Supp. 1999) (imposing penalty of life imprisonment on any doctor who performs a "partial birth abortion").

99. *See* KAN. STAT. ANN. § 65-6721 (Supp. 1998); UTAH CODE ANN. § 76-7-310.5(2)(a) (1999).

100. The Supreme Court recognizes only two legitimate state interests which may be used to justify abortion restrictions, as long as the restrictions do not impose an undue burden on the right to an abortion—maternal health and potentiality of life. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 162-64 (1973). Bans on "partial birth abortions" do not serve either interest. The bans prohibit doctors from using a procedure that they deem safest for particular women. A statute that imposes increased risks on the woman seeking an abortion does not serve any state interest in maternal health. *Cf.* Jane L. v. Bangert, 61 F.3d 1493, 1502-06 (10th Cir. 1995) (striking post-viability choice of method ban), *rev'd on other grounds sub nom.* Leavitt v. Jane L., 520 U.S. 1274 (1997); Summit Med. Assocs. v. James, 984 F. Supp. 1404, 1457-59 (M.D. Ala. 1998) (same), *aff'd in part, rev'd in part sub nom.* Summit Med. Assocs. v. Pryor, 180 F.3d 1326 (11th Cir. 1999), *rehearing en banc denied*, 196 F.3d 1263 (11th Cir. 1999), *petition for cert. filed*, 60 U.S.L.W. 3411 (U.S. Dec. 20, 1999) (No. 99-1041). Additionally, banning a particular procedure when others remain available serves no interest in potential life and does not influence women's decisions on whether or not to abort. Thus, such bans are unconstitutional. *See* Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999), *cert. granted in part*, 68 U.S.L.W. 3338 (U.S. Jan. 14, 2000) (No. 99-830); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794, 797 (8th Cir. 1999); Planned Parenthood of Greater Iowa v. Miller, 195 F.3d 386, 388-89 (8th Cir. 1999); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 200-02 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) (No. 97-934); Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 304-05 (D.R.I. 1999); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 613-14 (E.D. La. 1999); Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 493-94 (D.N.J. 1998); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1154-56 (S.D. Fla. 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1033-34 (W.D. Ky. 1998); Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 475 (E.D. Va. 1999); Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 1369, 1378 (D. Ariz. 1997); Evans v. Kelley, 977 F. Supp. 1283, 1316-17 (E.D. Mich. 1997). *But see* Hope Clinic v. Ryan, 195 F.3d 857, 865, 871 (7th Cir. 1999) (holding that injunctions on "partial-birth abortion" statutes were premature as they could be interpreted in a manner that was not unconstitutionally vague and that prohibitions on dilation and extraction (D & X) abortion procedures, even without a health exception, do not unduly burden the right to abortion), *vacating* 995 F. Supp. 847 (N.D. Ill. 1998), *stay denied*, 197 F.3d 876 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (Nos. 99-1152, 99-1156).

I want to focus, however, on the viability point. The supporters of the ban claim, to politicians and to the public, that the ban reaches only a type of procedure that is performed on viable fetuses.¹⁰¹ They put a lot of money and effort into barraging the public with images of near-term perfect babies abruptly and needlessly aborted.¹⁰² Yet only two of the bans are limited to post-viability procedures.¹⁰³ All other bans proscribe some type of procedure performed on non-viable fetuses.¹⁰⁴

This campaign has been conceived of by anti-choice legal groups who decided the best way to erode the core of the constitutional protections of *Roe* is to focus the public on late abortion and then draft legislation that undermines *Roe*'s guarantees without any reference to late abortion. These advocates never admit that they are attempting to corrupt *Roe*.

The intent to impair *Roe* becomes clear, however, when examining how these types of bans are defended. In lawsuits challenging the bans, states and anti-choice activists argue that these bans are not about procedures within the scope of *Roe*. This assertion is premised on their further argument that there are three types of people in this world—the unborn, the fully born, and the partially born. They argue that *Roe* covers only the unborn.¹⁰⁵

What these laws really do, therefore, is give rights to fetuses—any fetus that is “partially born”—at all stages of pregnancy, and they do so in a covert way that does not acknowledge that the laws seek to change the Constitution to favor the rights of fetuses over the rights of women. This tactic is much worse than the earlier frontal attacks on *Roe* that were honest about their intent, such as the Human Life Amendments of the early 1980s. The honesty of these earlier attempts permitted the American public to easily understand that the Amendments were wrong.

101. See *TIPPING THE SCALES*, *supra* note 54, at 121.

102. See B. Drummond Ayres, Jr., *Abortion Issue Raises Red Flags*, N.Y. TIMES, Oct. 31, 1999, at 24 (describing how some ads in support of Maine's partial birth abortion ballot initiative were rejected by television stations because they deceptively “left the impression that abortions routinely involved healthy late-term fetuses”); Paul Carrier, *Absentee Ballots May Lift Turnout*, PORTLAND PRESS HERALD, Nov. 2, 1999, at 1A, available in 1999 WL 26287620 (estimating that one million dollars was spent by each side in campaigning for Maine's partial birth abortion ballot initiative); Marie Cocco, *Psst: Don't Tell the Voters They Are Nincompoops*, NEWSDAY, Nov. 11, 1999, at A57, available in 1999 WL 8197966 (describing referendum campaign seeking to ban partial birth abortion in Maine).

103. See KAN. STAT. ANN. § 65-6721; UTAH CODE ANN. § 76-7-310.5.

104. See *supra* notes 51, 95.

105. See, e.g., Brief of State Appellants at 70-73, *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999) (Nos. 98-3245, 98-3300).

Partial birth abortion bans completely disrespect any rule of law. These bans are the very antithesis of the constitutional liberty guarantees of *Roe*. In *Roe*, the Supreme Court stated that a fetus is not a person "within the meaning of the Fourteenth Amendment."¹⁰⁶ The Court in *Roe* came to this conclusion after analyzing the use of the word "person" in the Constitution. The Court found that "the use of the word [person] is such that it has application only postnatally. [No use of the word in the Constitution] indicates, with any assurance, that it has *any possible prenatal application*."¹⁰⁷ "Postnatal," of course, means "after birth;"¹⁰⁸ prenatal means "before birth."¹⁰⁹ Therefore, under *Roe*, personhood attaches only after birth. These bans seek to overturn this aspect of *Roe*.

In defending these bans, states and activists also suggest that the bans serve a laundry list of state interests including "preventing unacceptable disrespect for potential human life; . . . preventing cruelty to unborn children; preserving the integrity of the medical profession; maintaining a civilized society; . . . promoting public safety, health, morals, and the public welfare; . . . and preventing brutality, barbarism, atrocities and depravity."¹¹⁰

Yet, the Supreme Court in *Roe* held that the state has only two legitimate interests that it can use to justify abortion regulations: the interest in protecting maternal health and the interest in potential life.¹¹¹ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹² the Supreme Court reaffirmed this limited number of interests upon which a state may rely.¹¹³ Again these bans seek to overturn *Roe* and *Casey* as they relate to the permissible justifications for abortion restrictions.

In sum, the "partial birth abortion" ban is not legislation thoughtfully drafted because of abortion abuse, the imperiled safety of women, or even because there is some new kind of abortion technique that is particularly gruesome or awful. Rather, it is a concerted public relations campaign to confuse the public, to scare politicians, and to focus attention away from the woman to the fetus. As bizarre as the whole "partial birth" discussion has been, it has desensitized legislators and courts to the next wave of

106. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

107. *Id.* at 157 (emphasis added) (footnote omitted).

108. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 910 (10th ed. 1993).

109. *Id.* at 920.

110. Brief of State Appellants at 46, *Carhart* (Nos. 98-3245, 98-3300).

111. See *Roe*, 410 U.S. at 162-63; see also *supra* note 100.

112. 505 U.S. 833 (1992).

113. See *id.* at 877-78.

proposed legislation that would accord constitutional personhood to fetuses and would not advance any legitimate state interest recognized by the Supreme Court. Thus, desensitization is a political victory for anti-choice forces—an end in itself.

VIII.

The final question is what should be the pro-choice community's response. As part of the above-described public relations campaign by anti-choice activists, the pro-choice community is portrayed as extreme, radical, unwilling to compromise, immoral, not religious, and selfish—names echoed by Kohm and Holmes in their article. On the other hand, anti-choice activists portray themselves as moderates.

Our response must be to expose their agenda as extreme, as deceptive, and as unconstitutional. Earlier attempts such as the Human Life Amendments honestly acknowledge that these drafters wanted to give fetuses certain rights. We must demonstrate that current attempts are merely Human Life Amendments in disguise. They are giving fetuses rights and interests contrary to the woman's interests throughout pregnancy and in contradiction to *Roe*.

Second, the pro-choice community must not be defeatist and defensive about abortion. We must acknowledge the wave of the future, which will be found in proposals such as the partial birth abortion bans, and confront the fact that such proposals are not going away. The pro-choice community has not been countering the bans with helpful suggestions that would change the playing field. Instead we have been countering with proposed legislation that joins them on their playing field. We must abandon that tact and engage in affirmative campaigns that change the public discourse on abortion. Rather than allowing pro-choice legislators to introduce their own bans on post-viability abortions, we should encourage such legislators to expose these anti-choice laws for what they are. We must focus on questions such as why we are not overturning the bans of spending federal funds for medically-necessary abortions for Medicaid recipients and why we are not demanding access to abortion, even life-saving abortions, for women overseas. We must change the playing field, we must change the dialogue.

Third, the pro-choice community must shift the focus back to the women—the fully born. We should start having a dialogue about legislation that would really help women. We must reclaim

what is rightfully ours—the moral high ground and women's conscience choice.

In sum, we must not give up in the face of an increasingly successful campaign to overturn *Roe* and a woman's right to choose an abortion, as Kohm and Holmes suggest. Instead, we must redouble our efforts in order to protect this fundamental right that is, contrary to Kohm and Holmes assertions, an integral part of, and not a detraction from, women's freedom.