Roe's Mid-Life Crisis
Protecting Reproductive Health Rights

By Ann Farmer

When lawyer Sarah Weddington, adjunct professor at the University of Texas in Austin, accepted an award for her outstanding professional achievements at the ABA's Annual Margaret Brent Awards Luncheon in August, she recalled an incident that fairly sums up how far things have come since she argued and won *Roe v. Wade* (410 U.S. 113), the 1973 landmark Supreme Court case that made abortion legal for women in the United States.

Standing at the podium before hundreds of lawyers, Weddington described how she was on an airplane in early 2003, almost exactly 30 years from the day that Justice Harry Blackmun read the Court's decision in *Roe*. The events of that historic moment were occupying her mind because she'd been asked by *Time* magazine to contribute an article for a special section entitled "80 Days That Changed the World." What's more, she was wearing a button whose template of a coat hanger with a red slash across it harkened to the time when abortion was illegal.

"A flight attendant kept coming around to look at it," recalled Weddington, describing how the woman returned again and again to scrutinize the button. "Finally, she stopped and asked me, 'What do you have against coat hangers?'" said Weddington, pausing as the audience erupted.

As funny as this scenario sounds, it is also completely understandable that some women (and men) don't automatically connect coat hangers with illegal abortions. Today's young women were not yet born when many women in the United States had to resort to back-alley abortions. And many of them are also unaware to the degree that reproductive rights, as established by *Roe*, and which so many Americans take for granted, have been steadily losing ground ever since January 22, 1973.

A Short History of *Roe v. Wade*

The Court's 1973 ruling in *Roe v. Wade* recognized the constitutional right to privacy and a woman's right to choose abortion. In subsequent years, an explosion occurred in terms of available reproductive health education and services. But it also marked

the beginning of a campaign by anti-choice adherents to overturn the high court's decision and to find ways to curtail women's access to abortion, contraceptives, and birth control services.

A major setback to *Roe* occurred in 1992, when the Supreme Court's decision in *Planned Parenthood v. Casey* (505 U.S. 833) adopted an undue burden test. Pro-choice lawyers have been on the defense ever since. "It changed the equation so that plaintiffs have the burden of proof and have to show a substantial obstacle in order to prevail on a challenge to an abortion restriction," says Janet Crepps, a reproductive rights lawyer, explaining that because the undue burden clause in *Casey* is ill defined, it doesn't provide the courts with a lot of guidance. "And it gives all the federal courts a lot of discretion in deciding whether or not something is constitutional."

During the eight years of the Bush administration, in particular, there's been a quickening in the appointments of generally conservative judges. "So when you put a standard that incorporates a lot of discretion into the hands of a conservative judge, or district court, or even at the court of appeals, you tend to see decisions that are not supportive of reproductive rights," says Crepps. "And in some ways, I think we've suffered worse harm in the court of appeals level than at the district court level."

Reproductive Rights Battles

These days, women seeking abortions are forced to undergo state-mandated sonograms, biased counseling, and waiting periods. Many abortion providers have been threatened or regulated out of business, creating a vacuum for their services in many places. Young girls are subjected to abstinence-only education instead of comprehensive, medically accurate information. Even contraceptive use is at risk. Pharmacists, claiming it's against their religious beliefs, refuse to refill women's birth control pill prescriptions. And the Bush administration recently drafted a regulation that equates many contraceptives with abortion.

"The truth is, reproductive rights litigators have mostly lost in the last two decades," says Sylvia Law, a leading scholar in the field of law and women's rights and codirector of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law. "They've not been successful in challenging the exclusion of abortions in the otherwise comprehensive Medicaid program. They've not been successful in protecting teenagers who have abusive parents from having to go to court to get an abortion," says Law, emphasizing that it's primarily the most vulnerable in society who are affected by these restrictions. "The people who are really left out in the cold are the poor, the young, and people who live in rural areas. They really have no choice."

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This isn't to say that reproductive rights lawyers haven't experienced numerous successes in the courtroom. The New York–based Center for Reproductive Rights, for instance, successfully argued last year that an Alaska parental consent law, which required teens under 17 to obtain either their parents' or a judge's permission for an abortion, violated the right to privacy guaranteed by the state's constitution. During the same year, however, the Center tracked 61 bills introduced in 27 states, which similarly restricted minors' access to abortion and reproductive health care.

Although an uphill battle, reproductive rights litigation remains essential. "I think it is tremendously important in the sense of developing facts in a judicial forum where there's slightly more attention to facts," says Law. "But, by and large, what is needed are cultural and political changes."

In that regard, the anti-choice movement has, in recent decades, waged a more successful campaign to curtail women's reproductive freedom, mainly by turning reproductive health care into a moral issue. Law notes that the right wing's initial opposition to abortion, for instance, "was all about the fetus. It was all about unborn innocent life." In the last decade or so, she says, anti-choice adherents have been getting a lot of traction out of the notion that it's women who need protection from their own decision making, whether it's regarding abortion, having sex before marriage, or using contraceptives.

For many, this realization hit home with the Supreme Court's language in its decision last year regarding *Gonzales v. Carhart* (550 U.S. ___, 127 S. Ct. 1610 (2007)) and its companion piece *Gonzales v. Planned Parenthood* (*see id.*, No. 05-1342). By upholding the federal Partial-Birth Abortion Ban Act of 2003, the Court majority ruled that the statutes did not impose an undue burden on the due process right of women to obtain an abortion. They also decided that they were constitutional despite their lack of an exception for when a woman's health is in danger. This was the first time that the Court upheld a ban on a specific abortion procedure. But what pro-choice advocates found further troubling was when Justice Anthony Kennedy, in his argument, talked about the potential for women to experience "psychological harm" following an abortion.

"I think young people really saw that as scary, that the Supreme Court could essentially think that they could

make decisions for women based on the idea that women might make bad decisions," says Eve C. Gartner, who served as lead counsel on *Gonzales v. Planned Parenthood*. "It was such a paternalistic, outmoded, archaic idea that women somehow needed to be protected from making a bad decision."

Crepps, cocounsel on *Carhart*, was also taken aback by Justice Kennedy's comment. "Even though there is no reliable evidence, he just kind of agrees with an amicus brief that abortion can cause women psychological harm," says Crepps. "The troubling thing about that," she adds, "aside from the fact that he accepts the premise without evidence, is the signal it sends to state legislators and to Congress—to bring it on. You can start passing all sorts of things based on this presumption of psychological harm."

Legislative Trends

Crepps is also the deputy director of the domestic legal program for the Center for Reproductive Rights, which is one of the country's leading nonprofit organizations dedicated to preserving *Roe* and advancing reproductive freedom around the globe. Composed primarily of women lawyers who believe that reproductive rights are a fundamental human right, a big part of the Center's mission is to try and overturn restrictive bills. They also lobby on Capitol Hill and track anti-choice legislation on the state level.

In its 2007 annual report, the Center noted that state lawmakers promoted more than 500 anti-choice bills last year, compared with 300 pro-choice bills, including an array of restrictions and outright bans on abortion. Furthermore, in the first quarter of 2008, and following the major precedent set in *Carhart*, 11 states introduced 23 bills banning partial-birth abortions, according to statistics by the Guttmacher Institute, a research organization.

A South Dakota ban on abortion takes it to extremes, outlawing all abortions except in cases involving rape or incest, or to protect a woman's health or life. It will appear on the state ballot this fall. If passed, it could pose a direct challenge to *Roe*. "I would like to think that we still have five votes to support *Roe*," says Crepps. "But Justice Kennedy's opinion in *Gonzales v. Carhart* is really troubling. And this idea of taking another case up to the Court to challenge *Roe* is definitely a trend. That's one line of concern."

Another type of anti-choice legislation that has gathered momentum in the wake of Justice Kennedy's remarks are beefed-up state abortion counseling provisions aimed at dissuading women from having abortions by requiring them to undergo a sonogram prior to the procedure or, minimally, requiring that they be given the option of having a sonogram.

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Fifteen states had such laws on the books as of March 31. Sometimes the state law allows a woman to avert her eyes from the ultrasound image, sometimes not. Oklahoma's new measure makes the sonogram mandatory at least one hour beforehand for any woman who elects to have an abortion. And it requires the doctor to review the image with her, describing the condition of the fetus including its facial features and beating heart.

Doctors in South Dakota, where only one clinic in the state offers abortions, must keep a record of patients who accept and/or refuse a sonogram, along with their signatures, and submit this annual report to the state health department. They are also required to tell their patients that her choice to have an abortion "will terminate the life of a whole, separate, unique, living human being."

When asked about these ever more invasive policies, Crepps says, "What we've always had is some states that are so anti-choice that there's very little that anyone can do to stop that legislation. And that's depressing. That's frustrating. Louisiana. Mississippi. South Dakota. These are states that are only limited by the decisions of the anti-choice people as to how far they go."

Limiting Access to Contraceptives

The administration is also not sitting idle in the final months of President Bush's last term. "This Health and Human Services rule is a real eye-opener," says Gartner, who is the deputy director of the Public Policy Litigation and Law Department for Planned Parenthood Federation of America. She was referring to a draft regulation by the Bush administration that surfaced this summer, which would classify some of the most common forms of contraception, including most birth control pills and intrauterine devices, in the same category as abortion.

In its current state (it was still being shaped and debated at the time this article was written), this regulation suggests that pregnancy occurs at conception, rather than, as many medical experts say, a few days later, when the fertilized egg has implanted itself in the uterine wall. Therefore, it would open the door for insurers, hospitals, HMOs, and people who work in the health-care industry, and who are opposed to abortion, to refuse to administer certain contraceptives to patients on grounds that it discriminates against their religious convictions opposing abortion.

Another aspect of the draft regulation states that reproductive health-care providers would be denied aid from any program directed by the Department of Health and Human Services unless they certify in writing that they will not refuse to hire people opposed to abortion and certain types of contraception. Health-care workers who find the usage of contraceptives immoral, therefore, could not be punished for refusing to make appointments with any patients seeking birth control pills.

Law finds it appalling that there is not more outcry regarding this initiative. "Now the Right [Wing] is shameless about being opposed to birth control as well as abortion," she says. "And they're opposed to birth control because it interferes with the notion that sex should be limited to marriage and open to the possibility of procreation. So that's a new theme. Anti-sex."

Refusals of Reproductive Health Care

Some women already face hurdles trying to fill birth control prescriptions at their local pharmacy. In its 2007 report, "Accessing Birth Control at the Pharmacy," the Reproductive Freedom Project of the American Civil Liberties Union (ACLU) recounts the story of a Wisconsin resident who went to the drug store to fill her birth control prescription one Saturday. Jane (a pseudonym) was asked by the pharmacist on duty, Neil Noesen, if her reason for using the medication was for contraceptive purposes. She answered "yes," and he refused to refill her prescription, saying it was against his religious convictions. When she asked him where she should go instead, he wouldn't answer. He also refused to transfer her prescription. Jane had to wait until Monday, consequently missing her first dose, to have her prescription filled by another pharmacist.

The state's Pharmacy Examining Board subsequently disciplined Noesen. He appealed. At that point, the ACLU, among other organizations, filed an amicus brief arguing that the patient's right to obtain legally prescribed medication should come before the religious beliefs of the pharmacist. In March 2008, the Wisconsin Court of Appeals upheld the Board's disciplinary measure.

The Reproductive Freedom Project has also been successful in aiding women in jails and prisons. "We are interested in ensuring that reproductive rights are available to those most vulnerable," says Director Louise Melling, describing, for instance, how, in early August, the ACLU filed a motion to hold an Arizona sheriff in contempt for disobeying a court order that ensures women prisoners in that county the right to a timely, safe, and legal abortion. The sheriff's staff failed to inform a woman prisoner that she had a right to be transported without a court order, delaying her procedure by four weeks.

Melling says it's difficult to tell if there is an increase in refusal-type cases or whether there's simply "more public attention to the notion of refusals." But a potentially important one is *North Coast Women's Care Medical Group v. Superior Court of San Diego* (2008 WL 3822791 (Cal., Aug. 18, 2008)). In this case, doctors at North Coast denied Guadalupe Benitez infertility treatment after learning that she is a lesbian. They claimed it was against their religious beliefs. The ACLU filed an amicus brief, which argued that religious freedom cannot be used to justify discrimination. On August 18, a unanimous California Supreme Court reversed a lower court decision and ruled that medical providers cannot violate nondiscrimination laws by asserting religious objections to providing services that are based on a patient's sexual orientation or gender.

Abstinence-Only Before Marriage Education

Since 1982, $1.5 billion in federal and state funds have been spent on abstinence-only sex education programs across the United States. In its recent publication, *Sex, Lies and Stereotypes* (2007), the New York–based nonprofit, Legal Momentum, in partnership with the Human Rights Program at Harvard Law School and the Harvard Public School of Health, outlined some of the ways that abstinence-only programs can harm girls. For instance, its anti-condom message may discourage girls from practicing safe sex, putting them at higher risk of contracting a sexually transmitted infection or becoming pregnant. The report also criticizes the programs for presenting stereotypical information that can harm girls' development and future relationships, such as the curricula that teach that women need "financial support," while men need "admiration."

Planned Parenthood Federation has found it useful to approach state executive branches and educate them on the need for more comprehensive, meaningful, and medically accurate education. "We've been very successful in getting states to reject federal abstinence-only funds," says Gartner, describing how state participation in the abstinence-only programs is down 40 percent from two years ago.

At the same time, she worries that the linchpin for women's reproductive freedom, *Roe v. Wade*, is more at risk than ever, especially with the imminent retirement of Justice John Paul Stevens, who is 88 and one of only four remaining Supreme Court justices who appear firmly in support of *Roe*.

Thirty-five years ago, when the decision regarding *Roe v. Wade* was announced, Weddington was working at her Texas law firm. Her phone started ringing off the hook. Then a telegram arrived collect from the Supreme Court, notifying her of its decision. "I can't remember what I paid for it," Weddington said during her Margaret Brent Award speech. "But I'd do it again."

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WORDS OF CHOICE

"A woman's right to choose soars in a tapestry of 14 powerful 'shorts'—serious and comic," describes the pro-choice play, *Words of Choice*, which has traveled to 20 states and was created by Cynthia L. Cooper, a lawyer, playwright, and journalist (her articles frequently appear in *Perspectives*).

Learn more by going to www.wordsofchoice.org.
Click on "blog" and discover what other pro-choice artists are doing.