

Life Insight

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Signs of Hope in 2006

Public Opinion

Let not your hearts be troubled by polls showing support for *Roe v. Wade* or a “pro-choice” majority of Americans. Results like these are produced by questions that are biased (implying, for example, that *Roe* legalized only first-trimester abortions), imprecise or confusing. Sometimes all three.

Many polls ask whether abortion should be legal under most or only a few “*circumstances*” or “legal in most *cases*” versus “illegal in most *cases*.” Words like cases, circumstances, most, some, and few can mean very different things to different people in the context of abortion. Under today’s “dictatorship of relativism” (as Pope Benedict calls it), many Americans are apt to tell pollsters they can imagine valid exceptions to any moral norm.

A question such as “Would you like to see the Supreme Court overturn its 1973 *Roe v. Wade* decision concerning abortion, or not?” assumes that the respondent knows what *Roe* really entails and what the impact of its being overturned would be. A whopping 66% answered “no, do not overturn” (CNN/USA Today/Gallup, January, 2006). Either two-thirds of Americans really do support abortion on demand throughout pregnancy or (much more likely) many of them do not realize that is what *Roe* produced. And many may think that the impact of overturning *Roe* would be automatically to outlaw all abortions throughout the United States. Advocacy groups exploit such misunderstandings to portray a future in which women are suddenly sent off to die from “coat hanger” or “back alley” abortions.

Why can we assume that most of the 66% of respondents expressing support for *Roe* are ill-informed? Because polls with precisely-worded questions based on identified circumstances, which are far better measures of public opinion, show waning support for the policy of *Roe*. A CBS News poll in January 2006, for example, asked “What are your personal feelings about abortion?” and offered four specific choices:

- abortion should only be permitted to save the woman’s life (17%)
- it should be permitted only in cases of rape, incest and to save the woman’s life (33%)
- it should be permitted, but subject to greater restrictions than it is now (15%) and
- it should be permitted in all cases (27%).

Alert readers will notice a category missing. The poll did not even offer the choice of “should never be permitted,” which has garnered as much as 17% in other polls. Nevertheless, 5% of respondents volunteered that answer.

So the composite result is that (at least) 55% of Americans would ban all abortion, or restrict its legality to cases where the mother’s life is at risk or the pregnancy resulted from rape or incest – all of which together make up less than 1.5% of abortions. [See “Reasons Why U.S. Women Have Abortions” at <http://www.agi-usa.org/pubs/journals/3711005.html>.] And 70% of Americans want abortion to be subject to greater restrictions than it is now, whereas 27% who would keep abortion as it is under *Roe*.

These pro-life results are encouraging. This poll – by not offering the choice “should never be permitted” – even undercounts pro-life sentiment. An April 2005 poll by the polling company, inc.™ offered these six choices:

- never legal (17%)
- legal only when mother’s life is in danger (14%)
- mother’s life at risk plus cases of rape and incest (31%)
- legal for any reason during first 3 months only (21%)
- legal through 6 months (4%) and
- legal any time, any reason (10%).

To summarize, 62% of respondents would restrict abortion to the 1.5% of “hard cases,” and only 10% favor the abortion regime established by *Roe* and *Planned Parenthood v. Casey*. And that’s how we know that the 66% of Americans who answered “don’t overturn *Roe*” in the poll mentioned earlier do not know *Roe*.

The most recent, and extraordinary, poll was conducted March 10-14, 2006, by Zogby International. The survey is unusual for the number and specificity of its questions on abortion, and for its breadth – 30,117 respondents in the 48 contiguous states. Due to its size, the margin of error (MOE) was only 0.6%, significantly less than the standard 3-4% MOE in surveys of 1,000 people.

One reason for the survey was to test the relative strengths of the pro-life and pro-choice positions vis-à-vis hypothetical candidates in the 2006 and 2008 elections. Zogby concluded that “Democrats will have trouble gaining a political advantage by using the emotionally charged issue of abortion,” as almost every question elicited a majority or plurality pro-life response.

The survey results are useful markers pointing to where the pro-life community has succeeded, where it can expect to be successful in the near future, and where greater educational efforts are needed.

One recent success: The pro-life outcry against a litmus test for judicial nominees based on allegiance to *Roe v. Wade* – widely reported and seconded by many national commentators – resonated with public opinion. By a margin of better than two-to-one (59% to 28%), respondents oppose the use of a filibuster based on a nominee’s position on abortion. Only 18% of respondents say that *only* pro-choice

nominees should be confirmed to the U.S. Supreme Court; 71% disagree.

An area where greater educational efforts are called for: half of Americans have forgotten a basic lesson from high school biology:

- only 50% think human life begins at conception
- 9% think life begins at 3 months
- 8% at 6 months and
- 19% at birth.

Responding to another question, 59% of respondents agree (29% disagree) that abortion ends a human life. It appears that 29% of Americans define the beginning of a human life according to some standard other than biological reality. In doing so, they fail to see the danger of defining life based on outward appearance, or on some social or philosophical criteria like self-awareness or the ability to feed oneself. Efforts to correct such fallacies and to communicate the basic facts of human development would not be wasted.

The Zogby survey also gauged support for various pro-life laws. Support continues to be strong for the most common state restrictions on abortion.

Requiring parental notification for a minor to have an abortion is favored almost 2-to-1 (59% approved, 32% opposed). Where such laws apply to all minors under 18, support drops slightly (55% vs. 36%); support rises to a 3-to-1 margin where such laws apply to minors under 16 years of age – 69% vs. 23%.

Respondents approve of informed consent laws by a margin of 55% to 37%, and support 24-hour waiting period laws by an almost identical margin – 56% to 37%.

In a question referring to a generic law along the lines of the Unborn Victims of Violence Act, 64% of respondents believe a person who murders a pregnant woman and her unborn child is guilty of two murders; 23% disagree.

By a margin of 69% to 21%, respondents favor a U.S. policy prohibiting the use of foreign aid money for abortions in countries that permit sex selection abortions. An astonishing 86% believe sex selection abortions should be illegal in the United States.

The pro-life sentiment of the public is reflected in the composition of state legislatures and governorships. The 2006 annual report by NARAL Pro-Choice America (NARAL) on the status of reproductive rights (www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides) identifies twenty-four states as having pro-life legislatures, and 19 of them as also having a pro-life governor. NARAL found that only 9 states currently have a majority pro-choice legislature (only 4 of which also have a pro-choice governor – CT, ME, NJ, and WA).

That elections have consequences can be seen in measures regulating abortion that have been enacted, or at least considered, in 2005.

State Laws: When D-minus is a Great Grade

NARAL reports that in 2005 alone 614 pro-life measures were considered by states and 58 of them passed. This flurry of pro-life activity earned the nation an overall grade of D- in NARAL's estimation.

Health and safety regulations for abortion clinics, mandatory reporting, restricting Medicaid funding,

prohibiting insurance coverage of abortion, and the recent South Dakota ban on all abortion except when the mother's life is endangered are among the ways states are attempting to restrict or regulate abortion.

The most common regulations relate to women's informed consent (usually coupled with a mandatory waiting period) and parental involvement statutes. Thirty-one states currently require abortion providers to offer women information on topics such as the procedure, risks, alternatives, and fetal development, for example, although courts have enjoined nine of these laws in whole or in part.

Concerning abortions on minors, 26 states currently require the *consent* of one or both parents; 18 require parental *notification* only. In either case, laws generally contain an expedited judicial bypass procedure allowing the minor girl to avoid parental involvement. Courts have struck down four parental consent laws and five parental notice laws.

Do Such Laws Make a Difference?

The abortion lobby is adept at arguing "in the alternative." Logic and consistency have never been its hallmarks. Sometimes they say: Parental involvement laws unduly burden young women, preventing them from getting needed reproductive health care [read: abortion]. Then they turn around and say: Parental involvement laws are a waste of time because they do *not* reduce abortions among minors. A recent *New York Times* front-page headline took the latter view, declaring "Scant Drop in Abortion Rates if Parents Are Told" (March 6, 2006). Plausible-looking statistics were presented to support this thesis. So what is it – waste of time, or an effective tool to reduce abortions?

Thanks to Michael New, Ph.D., economist and assistant professor at the University of Alabama, the answer is clear, and we also know where the *NY Times* went wrong in its analysis. The answer is that parental involvement laws *do* reduce teen abortion rates, by as much as 25% (Texas) and over 33% (Virginia and South Dakota). Where the *NY Times* went wrong: Staff writers looked at data from only 6 of the 12 states which passed parental involvement laws since the mid-1990s, and they obtained the data from state health departments (which even the authors admitted are an unreliable source). They also analyzed the percentage of pregnancies ending in abortion, rather than the percentage of teens having abortions. Because relatively few teens under 18 give birth each year, that ratio can fluctuate widely. The pregnancy-to-abortion ratio also fails to take into account the fact that parental involvement laws can discourage teen sexual activity, thereby reducing *both* pregnancies and abortions among teens. Dr. New's most recent research on the impact of parental involvement and informed consent laws can be found at <http://www.heritage.org/Research/Family/cda06-01.cfm>.

His findings were recently validated in a study by Theodore Joyce, Ph.D., *et al.* ("Changes in Abortions and Births and the Texas Parental Notification Law," *New England Journal of Medicine* 2006; vol. 354, 1031-8).

Mandatory informed consent/ counseling laws have also been shown to reduce abortions. One recent example is from Minnesota, where abortions dropped to their lowest level since 1975 in the first full year after Minnesota passed a mandatory counseling and 24-hour waiting period law

(http://wcco.com/health/local_story_193124236.html). In 2004, 15,859 women contacted abortion providers and received requested information about abortion. At least 2,000 of them decided against an abortion. The 2004 abortion toll in Minnesota was 13,788. This figure compares to 14,186 abortions in Minnesota in 2002.

The Courts

As the last three decades have shown, it is not enough to have a majority pro-life citizenry, or even for state and federal legislators to enact scores of pro-life laws. Once the U.S. Supreme Court constitutionalized the abortion issue in 1973, the Court effectively took many questions relating to abortion out of the hands of the people and their elected representatives, leaving them little leeway in crafting restrictions. Even popular common-sense laws like those mandating parental involvement in minors' abortion decisions sometimes have been struck down or made unenforceable during years of challenges and frivolous appeals.

The pro-life movement is not the only group frustrated by abortion rulings. Lower court judges, too, have taken issue with the vagaries of the Supreme Court's abortion policy. A recent example is a concurring opinion by Chief Judge John M. Walker, Jr. of the Second Circuit Court of Appeals in *National Abortion Federation v. Gonzales* (one of the three challenges brought against the federal Partial-Birth Abortion Ban Act of 2003). Believing that the facts presented in this case are essentially similar to those in the Supreme Court's 2002 *Stenberg v. Carhart* decision (striking down Nebraska's ban on partial-birth abortion), Judge Walker reluctantly conceded:

[I]t is my duty to follow that precedent no matter how personally distasteful the fulfillment of that duty may be. ... I write separately, however, to express certain concerns with the Supreme Court's abortion jurisprudence generally and with Stenberg in particular.

I can think of no other field of law that has been subject to such sweeping constitutionalization as the field of abortion. Under the Supreme Court's current jurisprudence, the legislature is all but foreclosed from setting policy regulating the practice; instead, the federal courts must give their constitutional blessing to nearly every increment of social regulation that touches upon abortion. ... In the process, the Supreme Court has sanctioned a mode of constitutional analysis in abortion cases that has removed the lower courts from their traditional role as arbiter of specific factual disputes and instead asked them to exercise their "gravest and most delicate duty," the invalidation of a statute, ... based upon a speculative showing that a statute might, in some yet-to-be-presented circumstance, have an unconstitutional application.

The Supreme Court's decision in Stenberg exemplifies these larger problems. Faced with a statute that sought to ban a single method of abortion that many Americans – probably most Americans – find exceedingly offensive on moral grounds, the Court determined that, even though other methods of abortion are safe, a state cannot ban the procedure as long as it might be significantly safer for some unproven number of women. ... The Stenberg holding is flawed in at least three respects.

Chief Judge Walker then offers the Justices who comprised the 5-person majority in *Stenberg v. Carhart* a very candid critique of that decision (<http://www.ca2.uscourts.gov:8080/>, enter Docket No. 04-5201). He concludes with an observation and a question:

In the end, I cannot escape the conclusion that, in these abortion cases, the federal courts have been transformed into a sort of super regulatory agency – a role for which courts are institutionally ill-suited and one that is divorced from accepted norms of constitutional adjudication. In today's case, we are compelled by precedent to invalidate a statute that bans a morally repugnant practice, not because it poses a significant health risk, but because its application might deny some unproven number of women a marginal health benefit. Is it too much to hope for a better approach to the law of abortion – one that accommodates the reasonable policy judgments of Congress and the state legislatures without departing from established, generally applicable, tenets of constitutional law?

Today, we have many reasons to hope that the structure of current abortion law will be shaken down to its rickety foundations.

Reason 1: Changes in the membership of the U.S. Supreme Court may lead the Court, at least incrementally, out of the morass that is current Court-made abortion law.

Reason 2: In a rare 9-0 decision in a case involving abortion, the Supreme Court ruled in *Ayotte v. Planned Parenthood of Northern New England* that lower courts may have gone too far in invalidating a parental involvement law in its entirety where it may have raised constitutional concerns only in narrow circumstances hypothetically affecting few women. The absence of a "health exception" – which would have allowed a minor to avoid parental notice and the judicial bypass procedure should she face a medical emergency – did not justify invalidating the entire New Hampshire statute. The Court sent the case back to the lower court to determine if the legislature intended to allow the statute to remain in effect with its supposedly unconstitutional applications enjoined or whether it intended no statute at all to one with a health exception. Although the Court did not explain how narrow a health exception may be (e.g., danger of bodily impairment vs. any factor affecting her "well-being") or what standard of review courts should apply in evaluating challenges to laws on abortion, the Court may have put an end to the practice of routinely rejecting abortion laws (even laws against grotesque partial-birth abortions) on the Ripley's-Believe-It-or-Not "fact" situations concocted by the abortion industry. A fuller discussion of these points can be found at <http://www.nationalreview.com/comment/wills200601230839.asp>.

Reason 3: As noted earlier, in *National Abortion Federation v. Gonzales*, decided January 31, 2006, the U.S. Court of Appeals for the Second Circuit struck down the federal Partial-Birth Abortion Ban Act in a 2-1 decision. But three noteworthy aspects of the decision give reason for hope. First, the final ruling was deferred pending briefs by the parties on the possible effect of *Ayotte* on the outcome. In other words, could enjoining supposedly unconstitutional applications relating to health save the statute? Second,

Chief Justice Walker's frank concurring opinion illuminates the Supreme Court's errors in *Stenberg v. Carhart*, pointing the way for some aspects of that decision to be reconsidered. Third, a dissent by Judge Straub presents cogent reasons why the federal statute should be found constitutional notwithstanding the *Stenberg v. Carhart* precedent. The Supreme Court cannot fail to take notice of the rebuke and the sound reasoning in these opinions as they consider the pending case on partial-birth abortion (Reason 4).

Reason 4: On February 21, the Supreme Court granted the government's request to review a decision of the Eighth Circuit Court of Appeals in another challenge to the Partial-Birth Abortion Ban Act, *Gonzales v. Carhart*. This Fall, the Court will have the opportunity to end the repugnant practice of partial-birth abortion and begin to introduce some clarity and reason into abortion jurisprudence. Should Justice Kennedy rule consistent with the principles he expressed in his dissenting opinion in *Stenberg v. Carhart*, the outcome of *Gonzales v. Carhart* may be different.

Reason 5: On February 24, the U.S. Court of Appeals for the Sixth Circuit ruled, in *Planned Parenthood Cincinnati Region v. Taft*, that a lower court erred in holding that federal law mandates the inclusion of a general health exception in every abortion law. The case challenged an Ohio law which requires abortion doctors to strictly follow the FDA protocols in dispensing RU-486 for abortion. In particular, the FDA permits RU-486 abortions only through 49 days' gestation. The pill is much less effective and carries far greater health risks after this time period. But Planned Parenthood adopted an "off-label" use, permitting the pills to be taken up to 63 days' gestation. And while the Appeals Court accepted the lower court's (erroneous) factual record that an RU-486 abortion after 49 days may be a safer alternative to surgical abortion for some unidentified number of women, the Appeals Court asked the lower court to reconsider the case in light of its opinion and the *Ayotte* decision. Given the mounting FDA record of adverse events involving RU-486, and two more, recent, deaths of American women who took RU-486, the claim that this drug is safer than surgical abortion for some women between 49-63 days' gestation is implausible at best.

Medical studies estimate that RU-486 results in ten times the fatalities to women, from infection alone, than surgical abortion in early pregnancy – and that was calculated before the most recent deaths (Michael F. Greene, MD and J.L. Ecker, MD, "Abortion, Health, and the Law," *New England Journal of Medicine* 350;2, 184-186, Jan.8, 2004).

Reason 6: On February 28, the Supreme Court ended a 20-year travesty in which the National Organization for Women (NOW) and others tried to punish pro-life activist Joe Scheidler on the basis of federal laws against racketeering and extortion. They argued that abortion clinic protests and counseling were a form of racketeering activity, designed to obstruct the commerce of abortion clinics. They lost; those who demonstrate peacefully and counsel women outside clinics, and the women and children whose lives are saved, are the real winners.

After 33 years of "raw judicial power" depriving the most vulnerable Americans of all legal respect or protection, are we seeing the end of this regime of abortion on demand? Perhaps only the beginning of the end. The advent of a culture of life, where all the weak are protected and pregnant women are accepted and supported *with* their unborn children, may still seem a long journey. But we can be forgiven if we think we can detect the first hint of the dawn.

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