

PARTIAL-BIRTH ABORTION: A BRIDGE TOO FAR

By Susan E. Wills, J.D., LL.M.

In 1992, Martin Haskell, MD presented a paper called “Dilation and Extraction for Late Second Trimester Abortion”¹ at a National Abortion Federation (NAF) seminar. There he explained the “D&X” abortion method he “routinely” used to kill unborn children at 20- to 24-weeks’ gestational age (and sometimes through 26 weeks). Within a year, D&X abortion became known outside the abortion industry. In March 1996, in riveting eyewitness testimony to Congress, a nurse gave “partial-birth abortion” (as it came to be known) a face – specifically the “most perfect angelic face” of a baby boy at 26 1/2 weeks’ gestational age. Dr. Haskell had delivered the boy alive, feet-first, up to his neck, then stuck scissors into the base of his skull, inserted a suction tube and vacuumed out his brain.²

The abortion industry’s defense of this grotesque procedure brings to mind the disastrous Allied attempt to break through German lines at Arnhem. It was the Nazis’ last victory on the Western front, resulting in 18,000 Allied casualties. Shortly before the operation, an Army deputy commander had told Field Marshall Montgomery: “I think we may be going a bridge too far.”

It’s not likely that anyone cautioned Dr. Haskell before he took the stage at the NAF seminar, but partial-birth abortion is undoubtedly the “bridge too far” for the abortion industry. And while Montgomery’s miscalculation of Nazi strength did not change the outcome of World War II, the defense of partial-birth abortion is already undermining the regime established by the U.S. Supreme Court in *Roe v. Wade*. Ultimately, partial-birth abortion may be *Roe*’s undoing.

MURDER MOST FOUL, OR ONLY AS FOUL AS OTHER ABORTION METHODS?

Some have been admirably clear about the nature of partial-birth abortion. The late Senator Daniel Patrick Moynihan, for example, called it “not just too close to infanticide; it is infanticide, and one would be too many.”³

But many others disagree. In philosophical terms, partial-birth abortion is the *reductio ad absurdum* of the premise that a woman has a Constitutional right to have a doctor kill her offspring for economic or social reasons at the earliest stage of pregnancy. Once you accept the premise that the law must allow for living, developing unborn children to be killed, there is no logical end point – not “viability,” not 4/5th of the way through delivery, not after the child is born, and not even during the tumultuous toddler and teenage years. In fact, comparing the short-term inconvenience of pregnancy to the very pro-

longed challenge of living in close quarters with one’s teenaged children, one could plausibly argue for extending the abortion license up to, say, the 83rd trimester!

Some judges have *defended* partial-birth abortion on the ground that there is no moral or logical difference between it and the alternative, equally gruesome second-trimester abortion method of dismembering a child in the womb and removing his body parts piecemeal. As Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has stated:

From the standpoint of the fetus, and, I should think, of any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus. Yet the position of the feet is the only difference between committing a felony [had the states’ partial-birth abortion ban become effective] and performing an act that the states concede is constitutionally privileged.⁴

Supreme Court Justice John Paul Stevens seconded this viewpoint in his concurring opinion in *Stenberg v. Carhart*, the 2000 U.S. Supreme Court case which struck down Nebraska’s partial-birth abortion ban. Justice Ruth Bader Ginsburg joined him in observing:

Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me with a reason to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of ‘potential life’ than the equally gruesome procedure Nebraska claims it still allows. ... [T]he notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational [Emphasis in original].

Perhaps it *is* irrational to oppose partial-birth abortion and not try equally hard to ban mid- and late-trimester dismemberment abortion. But it was not the pro-life community or the American public that created a law permitting the dismemberment of unborn children in the first place. That policy was foisted on the country by the Supreme Court in its 1973 decisions *Roe v. Wade* and *Doe v. Bolton*, which drew an arbitrary line between human life and (merely) “potential” life at the birth canal.

Doctors who perform late-term abortions have made their view clear – the difference between killing a partially-born child and one who is fully delivered is a legal technicality. Dr. Mitchell Creinin, for example, testified candidly in 2004, (in a case the U.S. Supreme Court has agreed to review):

“If I had a fetus at 24 weeks and I had enough dilation to bring it out intact, I would hold it in to perform the act that would kill the fetus.” [Commenting on the testimony in closing arguments, a Justice Department attorney observed:] ... “[A]nd so you wonder why Congress concluded that this procedure comes close to infanticide in its practice. Dr. Creinin’s testimony is proof of that. A 24-week fetus that could come out might have a chance of survival [and] he would hold it in[,] in order to kill it.”⁵

Thanks to eight years of hearings and debates in Congress, pro-life educational efforts, and the proliferation of alternative news sources, particularly the Internet, Americans did learn about partial-birth abortions, and over 70% want to ban them. Dr. Haskell’s 1992 presentation has had far-reaching consequences, including the following.

TEN CONSEQUENCES OF PARTIAL-BIRTH ABORTION

1. At least one wire service, one major polling company and a number of major newspapers still misrepresent *Roe* as legalizing abortion only “in the first three months of pregnancy.”⁶ So for many Americans, the fact that abortions are being done in the second and third trimesters of pregnancy, and are legal for any reason throughout pregnancy, came as shocking news.⁷
2. The gruesome particulars of partial-birth abortion shifted the focus of the public debate away from the sometimes difficult social and economic circumstances women may face due to an unplanned pregnancy, toward the act itself. Aided by this debate and the growing use of ultrasound, many Americans began to see the child (routinely described by abortion supporters as an insignificant “mass of tissue” or “products of conception”). The child’s obvious humanity changed the debate from a woman’s “right to choose” to the question: How can *any* circumstances a pregnant woman may face justify killing her child?
3. As a result of Americans taking a second look at abortion, nationwide polls have recorded a seismic shift toward pro-life positions. From 1991 to 1995, polls showed that 32% of Americans, on average, favored unrestricted abortion.⁸ In mid-1996, as public knowledge of partial-birth abortion spread, such support dropped to 25%.⁹ In an April 2005 poll by the polling company, inc.TM which offered six possible views on abortion’s legality, only 10% said abortion should be “legal any time, for any reason.” That compared to 17% who responded “never legal,” 14% who said “only legal when the mother’s life is in danger,” and 31% who would permit abortion only when the mother’s life is at risk and in cases of rape and incest.
4. For years it appeared that journalists had been writing news stories based almost entirely on press releases from Planned Parenthood and the National Abortion Federation. Initially, some journalists obligingly reported that the partial-birth abortion procedure was extremely rare and performed only in cases of severe fetal anomalies or for serious maternal health reasons.¹⁰ However, skeptical journalists at publications like *American Medical News* and *The [Bergen County] Record* did their own research, and discovered that thousands of partial-birth abortions were being done annually, primarily on healthy mothers and healthy babies.¹¹ Americans began to realize that biased or lazy journalists had not given them the full truth about abortion in general.
5. The strong public reaction against partial-birth abortion (over 70% in many polls) resulted in the enactment of laws banning the procedure in 30 states between 1996 and 2000. Congressional efforts to ban partial-birth abortion nationwide were stymied by two vetoes by President Clinton and, in June 2000, by the Supreme Court when it declared Nebraska’s law unconstitutional. Americans saw how some in government can disregard and thwart the will of the people on this issue.
6. Partial-birth abortion has also had a probable influence on elections. In the 1994 Congressional races, not one pro-life incumbent lost his or her seat to a pro-abortion challenger. NARAL Pro-Choice America (NARAL), in its 2006 report on reproductive rights, identifies twenty-four states as having pro-life legislatures, nineteen of which also have a pro-life governor; the report states that nine states have a majority pro-choice legislature, and only four of them also have a pro-choice governor. A March 2006 poll by Zogby International, polling over 30,000 respondents in 48 states, caused John Zogby to conclude that pro-choice candidates “will have trouble gaining a political advantage by using the emotionally charged issue of abortion,” because almost every question elicited a majority or plurality pro-life response.
7. NARAL’s report also describes a flurry of pro-life legislative activity at the state level. Fifty-eight pro-life measures passed in 2005 alone, of the 614 pro-life measures considered that year. Because of this, NARAL gave the nation a grade of D-minus in protecting “reproductive rights.”

8. In the past two years, many pro-choice pundits and legal scholars have published scathing analyses of *Roe v. Wade*'s legal and political deficiencies. They now recommend that abortion be regulated at the state level, as it was before the Supreme Court's wrenching it away in 1973.¹²
9. A growing number of federal judges are openly criticizing the Supreme Court's abortion jurisprudence for, among other things, unclear and inconsistent standards which often contradict the standards applied in other legal contexts. Among those critical of the Supreme Court's handling of abortion are: Judge Edith Jones¹³ of the 5th Circuit Court of Appeals; Judge J. Harvie Wilkinson III¹⁴ and Judge Paul Niemeyer¹⁵ of the 4th Circuit; and Chief Judge John Walker, Jr.¹⁶ and Judge Chester Straub¹⁷ of the 2nd Circuit.
10. Abortion supporters have long urged Senators to impose a "litmus test" on judicial nominees, requiring that they demonstrate wholehearted allegiance to *Roe v. Wade*. Because *Roe*'s system of abortion on demand throughout pregnancy is not well grounded on the Constitution or public sentiment, preserving it demands the approval of Justices who favor that decision. But Americans now strongly disagree with such a litmus test and oppose using a filibuster to keep qualified nominees who are not pro-abortion off the bench.¹⁸ Public opinion against the litmus test and filibuster may well have contributed to the recent Supreme Court confirmations of Chief Justice John Roberts and Justice Samuel Alito, as neither jurist is known for publicly supporting *Roe v. Wade*. And given the disposition they've already demonstrated to decide cases on the basis of what the Constitution actually says, *Roe*'s shaky foundations may be in for renewed scrutiny.

THE PROSPECTS OF BANNING PARTIAL-BIRTH ABORTION

The Supreme Court's 2000 decision in *Stenberg v. Carhart*¹⁹ found Nebraska's partial-birth abortion ban unconstitutional, with the result that state bans in 29 other states were voided. Three federal district courts later found the federal Partial-Birth Abortion Ban Act of 2003 unconstitutional on the basis of *Stenberg*. Three federal appellate courts have agreed (although the decision in the 2nd Circuit was not unanimous). While no one can predict Supreme Court rulings, particularly in the abortion area, there is reason to hope that the Supreme Court will *uphold* the federal ban on partial-birth abortion when it hears the case of *Gonzalez v. Carhart* this fall. Here's why.

First, the abortion procedure is defined in a more precise and limited way in the federal ban. Nebraska's law prohibited taking an infant's life after a substantial portion of the child's body was delivered into

the vagina. In contrast, the federal ban prohibits killing the infant after he or she is delivered "substantially *outside* the mother's body at specified anatomical points"²⁰ – "in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother."²¹ There can be no confusion between this procedure and any other abortion method; it is as close to infanticide as it can be.

Second, neither *Roe v. Wade* nor the 1992 decision which affirmed and modified it, *Planned Parenthood v. Casey*, provides Constitutional protection for killing a child who is substantially outside his or her mother's body. Footnote 1 of the *Roe* decision explicitly exempts from that ruling a section of the Texas Penal Code ("Art. 1195. Destroying unborn child") which provides: "*Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.*"

Third, when Congress enacted the federal partial-birth abortion ban, it made specific factual findings. Eight years of Congressional hearings and debate demonstrated that partial-birth abortion "is never medically necessary" to preserve the mother's health and, in fact, "poses significant health risks" to women. Congress' finding that the ban requires no "health" exception is entitled to judicial deference here as in any other context.

THE TOPPLING OF *Roe*?

Partial-birth abortion has not only exposed the depravity of late-term abortion and its similarity to infanticide. It has also exposed flaws in our legal system which have prevented the American people from stopping this appalling practice. These flaws have prevented the country from protecting unborn children consistent with the Constitution and with the moral aspirations of the American people, guided by the self-evident truths in our Declaration of Independence.

We have learned a great deal about abortion since the *Roe* and *Casey* decisions, not least about the physical and emotional toll it exacts from women. The frustration has been that the facts, the truth, did not seem to matter when it came to abortion.²² We can hope that the Supreme Court will review *Gonzales v. Carhart* with minds attuned to the Constitution, and hearts open to the truth about human life.

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ENDNOTES

- ¹ Available at http://www.vanderbilt.edu/SFL/partial-birth_abortion.htm; last visited May 20, 2007.
- ² Testimony of Brenda Pratt Shafer, R.N. to the U.S. House Judiciary Committee, Subcommittee on the Constitution, March 21, 1996, available at <http://judiciary.house.gov/legacy/215.htm>; last visited May 21, 2006.
- ³ Meet the Press, NBC television broadcast, March 2, 1997.
- ⁴ Dissenting in *Hope Clinic v. Ryan*, 195 F.3d 857, 879 (7th Cir. 1999) [emphasis in original].
- ⁵ Transcript, *Carbart v. Gonzales*, Final Argument, 119-120 (June 2, 2004).
- ⁶ For documentation, see <http://www.nrlc.org/abortion/Roedistort112904.html>; last visited May 20, 2006.
- ⁷ Virtually every time the USCCB Secretariat for Pro-Life Activities has tried to place transit ads to educate the public on the legality of abortion throughout pregnancy, staff has had to provide documentation to transit lawyers to convince them that our claim is accurate.
- ⁸ <http://www.nrlc.org/abortion/Roedistort112904.html>; last visited May 20, 2006.
- ⁹ *Ibid.*
- ¹⁰ *Los Angeles Times*' reporter Edwin Chen stated that only two hundred partial-birth abortions were performed annually, "typically ... to save a mother's life or after the detection of severe fetal anomalies." Chen, "House Votes to Ban Rare Form of Abortion," *LA Times*, Nov. 2, 1995, p.A1; see also Tamar Levin, "Study on a Late Term Abortion Finds Procedure Is Little Used," *New York Times*, Dec.11, 1998, p.A12.
- ¹¹ See, e.g., Diane Gianelli, "Shock-tactic ads target late-term abortion procedure," *American Medical News*, July 5, 1993. Dr. Haskell told an interviewer for *American Medical News*: "probably 20% are for genetic reasons. And the other 80% are purely elective." Available at <http://www.nrlc.org/abortion/pba/AmericanMedicalNews1993.pdf>; last visited May 22, 2007). See also Ruth Padawer, "The Facts on Partial-Birth Abortion," *The Sunday Record* (Bergen County, N.J.), Sept. 15, 1996. At least until recently, Kansas has been the only state requiring abortion providers to submit annual reports on the partial-birth abortions they have performed, including the number, reason and gestational age (pre- or post-viability). Of the 182 partial-birth abortions reported in Kansas in 1999, 182 were performed post-viability and for "mental health" reasons.
- ¹² Excerpts from their articles can be seen at <http://www.usccb.org/prolife/issues/abortion/roevwade/index.shtml>; last visited May 20, 2006.
- ¹³ *McCormey v. Hill*, 385 F.3d 846 (5th Cir. 2004) (Jones, J., concurring).
- ¹⁴ *Richmond Medical Center v. Hicks*, 422 F.3d 160 (4th Cir. 2005) (Wilkinson, J., concurring).
- ¹⁵ *Richmond Medical Center v. Hicks*, 409 F.3d 619 (4th Cir. 2005) (Niemeier, J. dissenting).
- ¹⁶ *National Abortion Federation v. Gonzales*, 437 F.3d 278, 291 (2nd Cir. 2006) (Walker, C.J., concurring).
- ¹⁷ *National Abortion Federation v. Gonzales*, 437 F.3d 278, 296 (2nd Cir. 2006) (Straub, J., dissenting).
- ¹⁸ The March 2006 Zogby poll found Americans oppose the use of a filibuster because of the nominee's position on abortion by better than two-to-one (59% to 28%). Only 18% of respondents say that only pro-choice nominees should be confirmed to the Supreme Court; 71% disagree.
- ¹⁹ 530 U.S. 914 (2000).
- ²⁰ "Brief Amicus Curiae of the United States Conference of Catholic Bishops and Other Religious Organizations in Support of Petitioner," May 20, 2006, p. 4.
- ²¹ 18 U.S.C. sec. 1531(b)(1)(A).
- ²² *McCormey v. Hill*, supra note 13 (Jones, J., concurring).

PROGRAM MODELS

In their *Pastoral Plan for Pro-Life Activities* (2001), the U.S. Catholic bishops call on all those in the Church to pursue a four-prong program on behalf of human life: Information & Education; Pastoral Care; Public Policy; and Prayer and Worship.

Education

Get informed and stay up-to-date on critical pro-life issues facing our nation. Educate yourself, have family discussions on these topics, and suggest your parish group take it on as an activity. Share what you've learned with friends, neighbors, and colleagues. Start at: www.usccb.org/prolife, and visit the sections on partial-birth abortion and *Roe v. Wade*.

Helping Pregnant Woman and Those Harmed by Abortion
Does your parish currently help pregnant women in need? The Gabriel Project is an excellent parish-based program to assist pregnant women (see www.gabrielproject.com; contact Marcella Colbert, at 866-4AN-ANGEL or mcolbert@diogh.org).

Help your diocesan post-abortion ministry by placing bulletin inserts, pamphlets in vestibule racks, answering phones, etc.

Volunteer at a local pregnancy care center.

Fundraise with a Luau for Life

Plan a *luau for life*, a multi-parish fundraiser for a local pregnancy care center. Advertise the event in parish bulletins and in the diocesan newspaper; pre-sell tickets after Mass. Rent a large outdoor municipal pool (with kiddie and wading pools) for several hours on a Friday summer evening. Make sure to arrange for a "rain date" for the next afternoon/evening. Hire a Hawaiian dancer for an hour; the rest of the time play taped Hawaiian music. Give plastic leis to each person on arrival. Workers will want to wear Hawaiian shirts or muumuu. Serve grill-type food supplied by local merchants, and give out lots of family-friendly door prizes.

Bumper stickers and lapel pins also are easy ways to witness to life. *Americans On Call* is a nationwide grassroots effort to connect women in crisis pregnancies to local resources which can provide help in bringing their pregnancies to term. "Americans On Call" identify themselves by wearing a small lapel pin of a white cross on a purple background. Visit www.americansoncall.org.

Advocate for Life in the Public Square

NCHLA
The National Committee for a Human Life Amendment tracks federal legislation and voting records on abortion and related issues, and assists people in building effective grassroots programs to support pro-life legislative policies. Consult www.nchla.org for more information, and contact your Diocesan Pro-Life Director. Ask to be included in their pro-life legislative network. Suggest your diocese invite NCHLA to talk with parishioners and lay groups about effective organizing.

Register now, vote, and suggest your parish conduct a voter registration drive.

Prayer and Worship

Pray the Rosary for the cause of life with your family or circle of friends. Pro-life meditations on the mysteries of the rosary can be found at www.usccb.org/prolife/liturgy.

January 22 (or Jan. 23, when the 22nd is a Sunday) has been designated by the U.S. bishops as a day of prayer and penance for life. Highlight these observances in your parish. Ask your pastor to hold a Holy Hour for Life, with readings, intercessions, a litany and meditations found at www.usccb.org/prolife/liturgy.

RESOURCES

Teaching Documents

The Gospel of Life, Pope John Paul II (1995)

Living the Gospel of Life: A Challenge to American Catholics
National Conference of Catholic Bishops (1998)

Pastoral Plan for Pro-Life Activities
United State Conference of Catholic Bishops (2001)

Print

Books

The Cost of Choice. Erika Bacciochi (ed.) San Francisco: Encounter Books, 2004.

Defending Life 2006: Proven Strategies for a Pro-Life America. Americans United for Life, Denise Burke (ed.). Chicago: Americans United for Life, 2006.

Detrimental Effects of Abortion: An Annotated Bibliography with Commentary, 3rd ed. Thomas W. Strahan (ed.). Springfield, Ill.: Acorn Books, 2001.

Dispelling the Myths of Abortion History. Joseph W. Dellapenna. Durham, N.C.: Carolina Academic Press, 2006.

Women's Health After Abortion: The Medical and Psychological Evidence. Elizabeth Ring-Cassidy and Ian Gentiles. Toronto: The deVeber Institute for Bioethics and Social Research, 2002.

Other Print

Roe Reality Check
USCCB Pro-Life Secretariat, 2005
A full-color 8-page booklet, rebuts myths and lies concerning *Roe* with well-documented facts.

Roe v. Reason
Professor Richard Stith, Esq., Ph.D., 2005, 4 pp.
Critique of *Roe v. Wade* focusing primarily on the Court's "deeply arbitrary description of reality" in mandating that everyone assent to the falsehood that a child before birth is not a child.

Roe v. Wade: Questions and Answers
USCCB Pro-Life Secretariat, 2005
One-page bulletin insert.

Ten Legal Reasons to Reject Roe
Susan E. Wills, J.D., LL.M., 2003, 6 pp.
Summarizes major legal and historical errors of *Roe v. Wade*.

Partial-Birth Abortion On Trial
Family Research Council, 2006
Pamphlet contains chilling excerpts from the partial-birth abortion trial transcripts.

Life Insight

Secretariat for Pro-Life Activities
Newsletter, published six times a year.

Life Issues Forum

Secretariat for Pro-Life Activities
Bi-weekly columns on abortion and other pro-life issues, available at www.usccb.org/prolife/publicat/lifeissues/index.htm.

Posters

From the Secretariat for Pro-Life Activities
Second Look Project posters: "9 Months" and "The Supreme Court Says" 11" x 17". Can be viewed at www.secondlookproject.org.

"Something Inside Dies after an Abortion" (22" x 17") and four mini-posters (11" x 12") on abortion aftermath. (see www.hopeafterabortion.org/ and click "The Jubilee Program").

CDs/ Videos

"God's Miracle of Life." (DVD, 2005) Dr. William R. Lile, FACOG. Produced by S.J.B. Productions, Ft. Lauderdale, FL. Excellent lecture on abortion and partial-birth abortion by an ob-gyn/fetal surgeon.

Visit www.lifecyclebooks.com for great pro-life videos, especially "Dear Children" and "After the Choice."

Internet

www.usccb.org/prolife USCCB Secretariat for Pro-Life Activities.

www.nchla.org National Committee for a Human Life Amendment. See link to USCCB's "End the Roe Litmus Test" campaign at www.endroe.org.

www.nrlc.org National Right to Life Committee.

www.ru486facts.org factual medical and other information on the abortion drug RU-486.

www.hopeafterabortion.org Supports the Church's Project Rachel outreach to women and men suffering from an abortion. Personal stories and contact information.

www.noparh.org National Office of Post-Abortion Reconciliation & Healing (Project Rachel national office).