

Partial-Birth Abortion on Trial

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President
Family Research Council

Partial-Birth Abortion on Trial

BY CATHY CLEAVER RUSE
& WILLIAM L. SAUNDERS, JR.

In November 2003, President George W. Bush signed the Partial-Birth Abortion Ban Act (the “Act”), which outlaws partial-birth abortion except where “necessary to save the life of the mother.” But no prosecutions have been launched under it, because immediately upon its enactment into law the giants of the abortion lobby filed suit. Planned Parenthood, the National Abortion Federation, and a number of doctors, aided by the American Civil Liberties Union, challenged its constitutionality in federal lawsuits filed in New York, Nebraska, and California.

The trials commenced in March 2004. At the conclusion of the trials, each district court ruled against the Act. At the time of publication, each ruling is under appeal by the Department of Justice.

The purpose of this pamphlet is to provide excerpts from the abortion doctors’ trial testimony.¹ Never in the years since *Roe v. Wade* (see sidebar on the history of abortion in America) has such extensive evidence about the practice of abortion been placed in the public record from the mouths of the very doctors who perform them.² It is nothing less than a collection of admissions by the abortion industry, under oath, about the reality of abortion.

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BY CATHY CLEAVER RUSE & WILLIAM L. SAUNDERS, JR.

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The Extent of the 'Right' to Abortion in America

Though *Roe v. Wade*, 410 U.S. 113 (1973), is often invoked as a “shorthand” summary for the “right to abortion” in America, this is very misleading. In the companion case to *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973), the Supreme Court introduced the requirement for a “health exception” that allows abortion for any reason, *emotional* and *psychological* as well as physical, throughout pregnancy. As Professor Mary Ann Glendon pointed out in her 1987 book, *Abortion and Divorce in Western Law*, the “right to abortion” in the United States has long been the broadest in the Western world. It remains so. Though the Supreme Court acknowledged a state’s “interest” in protecting unborn human

life in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000), struck down a Nebraska statute that banned partial-birth abortion because, in part, that statute lacked a “health exception.” Justice Kennedy, who had joined the plurality opinion in *Casey* but dissented in *Stenberg*, criticized fellow Justice Sandra Day O’Connor, who had also joined the plurality in *Casey*, for joining the majority in *Stenberg* and abandoning *Casey*’s recognition of an important state interest in protecting unborn life. In a case currently before the Supreme Court, *Ayotte v. Planned Parenthood of Northern New England*, it is even being argued that a state law that requires, in certain circumstances, that parents be notified before a *minor* obtains an abortion is unconstitutional because it does not contain a “health exception.” (FRC’s brief in this case may be found at www.frc.org.) In fact, it took an act of Congress – the Born-Alive Infants Protection Act, Public Law No. 107-207 – to ensure that a baby who *survives* an abortion is considered a human being under the law. Like the “collective amnesia” that is said to occur when a culture forgets a common experience, *Roe v. Wade*, *Doe v. Bolton*, and subsequent cases have made the Constitution blind to the personhood of children not yet born, and this blindness was exhibited in all its pitiless brutality in the trials on the federal partial-birth abortion ban.

Performing a Partial-Birth Abortion

When partial-birth abortion was first discussed in public, many people refused to believe it existed. Some in the “pro-choice” movement even accused the pro-life movement of fabricating it. Yet it was no fabrication: Dr. Martin Haskell discussed the procedure at a 1992 conference of abortion providers in Dallas, Texas titled: “Second Trimester

Abortion: From Every Angle.” As Dr. Haskell’s description of the procedure became more widely known, and the existence of partial-birth abortion could no longer be credibly denied, proponents of the method made new claims. They claimed it was extremely rare, or used only in emergencies, or that the baby is already dead when it is performed. But these claims, too, collapsed in the face of investigative reports by the *American Medical News*, the *Bergen Record*, and others.³ In fact, in 1997

the Executive Director of the National Coalition of Abortion Providers admitted publicly that the method was actually common, not rare, and that the vast majority of these abortions are done on a healthy mother with a healthy fetus that is 20 weeks or more along.⁴

Dr. Stephen Chasen, associate professor of obstetrics and gynecology at the Weill Medical College of Cornell University, is one of the plaintiffs against the Act. On cross-examination, counsel for the Government inquired into each element of a partial-birth abortion:

Q. You wrap a small sterile towel around the fetus, because it is slippery, and after the legs are out you pull on the sacrum, or the lower portion of the spine, to continue to remove the fetus, right?

A. Right.

Q. When the fetus is out to the level of the breech, you place another, larger towel around the first small towel, right?

A. Right.

Q. You gently pull downward on the sacrum until the shoulder blades appear, right?

A. Right.

Q. Then, with your hand on the fetus's back, holding it with the towel, you twist in a clockwise or counterclockwise motion to rotate the shoulder, right?

A. Right.

Q. The shoulder in front or the arm in front is swept out with your fingers, and then you rotate the other side of the fetus to sweep out the other arm, right?

A. Right.

Q. Then the fetus is at a point where only the head remains in the cervix, correct?

A. That's correct.

Q. That is when you make the decision based on gestational age and the amount of cervical dilation, whether the head will fit out intact, whether you can tuck the head of the fetus to its chest, or whether you have to decompress the skull to remove the fetus's head, right?



A. It is based on the size of the fetal head and the cervical dilation. I don't directly consider the gestational age.

Q. If you are able to deliver the head by flexing the chin against the fetal chest – and you have been able to do this several times ... Doctor?

A. There have been a few occasions, yes.

Q. Then you remove the fetus with the towel, you put it on the table, and you turn back to the woman to deal with the placenta, right?

A. That's right.

Q. If you can't do that, you know you are going to have to crush the head, and so you take a clamp and you grasp the cervix to elevate it, and then your assistant there in the operating room will pull down on the fetus's legs or back, gently lowering the fetus's head toward the opening of the vagina, right?

A. Right.

Q. That is when you put two fingers at the back of the fetus's neck at the base of the skull where you can feel the base of the skull, and then you puncture the skull with the scissors, right?

A. I can usually see it as well as feel it. But yes.

Q. At that point you see some brain tissue come out, and you are 100 percent certain that you are in the brain, so you open the scissors to expand the hole, remove the scissors, and put the suction device in the skull, right?

A. Correct.

Q. You turn on the suction, and typically the fetus comes right out with the suction device still in its skull, right?

A. Right.

Dr. Timothy Johnson, another plaintiff, is chair of the department of obstetrics and gynecology at the University of Michigan Medical School.⁵ Dr. Johnson testified from his own experience about performing dismemberment abortions,⁶ and gave his opinion about the partial-birth abortions he had observed. Dr. Johnson described observing how doctors who did partial-birth abortions "used a crushing instrument to deliver the head." This provoked further questions from Judge Casey.

The Court: Can you explain to me what that means?

The Witness: What they did was they delivered the fetus intact until the head was still trapped behind the cervix, and then they reached up and crushed the head in order to deliver it through the cervix.

The Court: What did they utilize to crush the head?

The Witness: An instrument, a large pair of forceps that have a round, serrated edge at the end of it, so that they were able to bring them together and crush the head between the ends of the instrument.



The Court: Like the cracker they use to crack a lobster shell, serrated edge?

The Witness: No.

The Court: Describe it for me.

The Witness: It would be like the end of tongs that are combined that you use to pick up a salad. So they would be articulated in the center and you could move one end, and there would be a branch at the center. The instruments are thick enough and heavy enough that you can actually grasp and crush with those instruments as if you were picking up salad or picking up anything with—

The Court: Except here you are crushing the head of a baby.

The Witness: Correct.



Dr. Marilynn Fredriksen, an associate professor in clinical obstetrics and gynecology at Northwestern University Medical School, was offered by plaintiffs as an expert witness. In her testimony about performing a partial-birth abortion, she described how she does not always need to pierce the baby's skull before completing delivery; sometimes "grasping forceps" is sufficient. Judge Casey inquired further:

The Court: Excuse me. Grasping forceps, does that mean you crush the skull?

The Witness: You compress the skull, yes.

The Court: You crush it, right?

The Witness: Yes.

The Court: Yesterday you mentioned sometimes you use your finger, right, rather than using scissors?

The Witness: No, that is not my testimony.

The Court: That's not what you said?

The Witness: No, that is not. I said the scissors would be important to make an incision at the base of the skull, but I don't use suction. I use my finger to disrupt the contents of the cranial cavity, to thereby collapse the skull and allow delivery of the fetus.

The Court: So you use your finger to get the contents of the skull out rather than sucking the contents of the skull out, is that correct?

The Witness: Yes.

The fact that the baby is alive during the partial-birth procedure – a fact formerly contested by abortion activists – was confirmed by a number of plaintiffs' witnesses. Dr. Carolyn Westhoff, professor of epidemiology and population and family health in the School of Public Health at Columbia University, is a plaintiff in the case who testified that there is "usually a heartbeat" when she commences delivery in a partial-birth abortion, and that when she collapses the skull, the fetus is living.

The fact that the baby is still living at this point in the abortion was also confirmed vividly by Dr. Johnson in a series of questions from Judge Casey:

The Court: An affidavit I saw earlier said sometimes, I take it, the fetus is alive when they crush the skull?

The Witness: That's correct, yes, sir.

The Court: In one affidavit I saw attached earlier in this proceeding, were the fingers of the baby opening and closing?

Judicial Activism, Abortion, and the Constitution

There is no language about abortion in the Constitution. A “right to abortion” was found by the Supreme Court to be implied both from a “privacy” right (likewise unmentioned in the Constitution) and from a “liberty” interest under the 5th and 14th Amendments. The Court intended to remove abortion from public debate by “constitutionalizing” it (note, for instance, the plurality’s express plea to end the debate in *Casey* at pages 865-866 of the ruling in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). This judicial effort to remove abortion from the ordinary public debate of important issues – by citizens through their elected representatives in the state and national legislatures – has included the judiciary striking down even the most minimal regulation of abortion. Further, the courts have gone so far as to create new evidentiary protections when abortion is at issue, giving abortionists a more extensive right to withhold records than is granted to defendants



in other medical trials.⁷ As the current fight over partial-birth abortion demonstrates, however, the people are not inclined to resign decision-making over this fundamental issue to “that eminent tribunal,” to use Abraham Lincoln’s phrase for the Supreme Court.

The Witness: It would depend where the hands were and whether or not you could see them.

The Court: Were they in some instances?

The Witness: Not that I remember. I don’t think I have ever looked at the hands.

The Court: Were the feet moving?

The Witness: Feet could be moving, yes.

What Do Abortion Doctors Tell Their Patients?

Judge Casey displayed a keen interest in learning whether, and to what extent, abortion doctors inform their patients about the details of the

abortion procedures they will perform. The following is an exchange between Judge Casey and Dr. Westhoff:

The Court: I want to know whether that woman knows that you are going to take a pair of scissors and insert them into the base of the skull of her baby, or her fetus. Do you tell her?

The Witness: I do not usually tell patients specific details of the operative approach. I’m completely—

The Court: Do you tell her that you are going to then, ultimately, suck the brain out of the skull?

The Witness: In all of our D&Es the head is collapsed or crushed and the brains are definitely out of the skull but those are—

The Court: Do you tell them that?

The Witness: Those are details that would be distressing to my patients and would not—information about that is not directly relevant to their safety.

The Court: Don't—whether it's relative to their safety or not—don't you think it's since they're giving authorization to you to do this act that they should know precisely what you're going to do?

The Witness: That's actually not the practice I have of discussing surgical cases with the patients.

The Court: I didn't ask you that. I said don't you think they ought to know?

The Witness: No, sir, I don't.

The Issue of Fetal Pain

Questions to plaintiffs' abortion experts about fetal pain produced some of the most disturbing testimony in the trial. Judge Casey pursued the issue of pain with Dr. Westhoff:

The Court: Do any of [the patients] ask you whether or not the fetus experiences pain when that limb is torn off [referring to a dismemberment abortion]?

The Witness: I do have patients who ask about fetal pain during the procedure, yes.

The Court: And what do you tell them?

The Witness: I, first of all, assess their feelings about this, but they of course, even notwithstanding the abortion decision, would generally tell me they would like to avoid the fetus feeling pain. I explain to them that in conjunction with our anesthesiologists that the medication that we give to our patients during the procedure will cross the placenta so the fetus will have some of the same medications that the mother has.

The Court: Some.

The Witness: Yes, that's right.

The Court: What do you tell them, does the fetus feel pain or not when they ask?

The Witness: What I tell them is that the subject of fetal pain and whether a fetus can appreciate pain is a subject of some research and controversy and that I don't know to what extent the fetus can feel pain but that its—



The Court: Do you tell them it feels some pain?

The Witness: I do know that when we do, for instance, an amniocentesis and put a needle through the abdomen into the amniotic cavity that the fetus withdraws so I certainly know based on my experience that the fetus [will] withdraw in response [to] a painful stimulus.

Judge Casey also discussed the issue of fetal pain with Dr. Johnson:

Highlighting the Issue of Fetal Pain



The issue of the pain felt by the unborn during abortion came to the fore during the state and national legislative debates over, and the journalistic coverage of, partial-birth abortion. It graphically illustrates that a living human being is experiencing torture unto death. Congress is considering legislation

that would require abortionists to inform women about the possibility of fetal pain during abortions at 20 weeks and later.

The Court: I heard you talk a lot today about [the] dismemberment D&E procedure, second trimester; does the fetus feel pain?

The Witness: I guess I—

The Court: There are studies, I'm told, that say they do. Is that correct?

The Witness: I don't know. I don't know of any—I can't answer your question. I don't know of any scientific evidence one way or the other.

The Court: Have you heard that there are studies saying so?

The Witness: I'm not aware of any.

The Court: You never heard of any?

The Witness: I'm aware of fetal behavioral studies that have looked at fetal responses to noxious stimuli.

The Court: Does it ever cross your mind when you are doing dismemberment?

The Witness: I guess whenever I—

The Court: Simple question, Doctor. Does it cross your mind?

The Witness: No.

The Court: Never crossed your mind.

The Witness: No.

Judge Casey also questioned Dr. Fredriksen about partial-birth abortion and fetal pain:

The Court: Do you tell them whether or not that hurts the fetus?

The Witness: I have never talked to a fetus about whether or not they experience pain.

The Court: I didn't say that, Doctor. Do you tell the mother whether or not it hurts the fetus?

The Witness: In a discussion of pain for the fetus

it usually comes up in the context of how the fetus will die. I make an analogy between what we as human beings fear the most—a long, protracted death.

The Court: Doctor, I didn't ask you—

The Witness: Excuse me, that's what I tell my patients.

The Court: But I'm asking you the question.

The Witness: I'm sorry.

The Court: And I'm asking you whether or not you tell them that.

The Witness: I feel that [the] fetus dies quickly and it's over quickly. And I think from a standpoint of a human being our desire is that we have a quick death rather than a long, protracted death—

The Court: That's very interesting, Doctor but it's not what I asked you. I asked you whether or not you tell them the fetus feels pain.

The Witness: I don't believe the fetus does feel pain at the gestational ages that we do, but I have no evidence to say one way or the other so I can't answer the question.

Judge Casey also questioned Dr. Chasen about partial-birth abortion and fetal pain:

The Court: Does it hurt the baby?

The Witness: I don't know.

The Court: But you go ahead and do it anyway, is that right?

The Witness: I am taking care of my patients, and in that process, yes, I go ahead and do it.

The Court: Does that mean you take care of your patient and the baby be damned, is that the approach you have?

The Witness: These women who are having [abortions] at gestational ages they are legally entitled to it—

The Court: I didn't ask you that, Doctor. I asked you if you had any care or concern for the fetus whose head you were crushing.

The Witness: No.



Conclusion

The testimony was a bracing, if brief, reprieve from the layers of euphemism that cloak the truth about abortion. For abortion doctors on the witness stand, removing those layers was not always an easy process. Perhaps the best example of this was Dr. Westhoff's tortured explanation for why she does not like the new law against partial-birth abortion:

I mean, I know what my purpose is...to empty the uterus in the safest way possible. Yet, this language implies that I have this other purpose, which is to kill the fetus. So, to me, it's like—kind of like there is an elephant in the room besides me and my patient... there is somebody judging what my purpose is in bringing the fetus out a certain way.

On this point she was quite right: There is “someone else” in the room. Congress and dozens of states, with overwhelming public support, have voted to ban partial-birth abortion precisely because of what happens to that “someone else.” FRC hopes this pamphlet will educate the public about the reality of abortion in America and the need for good laws that protect both the health of the unborn and their mothers.

FOOTNOTES

¹ Portions of this pamphlet were adapted from Cathy Cleaver Ruse, “Partial Birth Abortion on Trial,” *Human Life Review* 31 (Spring 2005), pp. 87-104. (All citations to the trial transcripts may be found in that article.)

² The following excerpts were taken from the trial in a case brought by the National Abortion Federation and several abortion doctors, which was presided over by Judge Richard Conway Casey in the Southern District of New York.

³ “Medicine adds to debate on late-term abortion,” *American Medical News*, American Medical Association, Vol. 40, No. 9 (March 3, 1997); “Abortion: Activists Lied,” *Bergen Record* (February 27, 1997); Barbara Vobejda and David Brown, “Discomforting Details of Late-Term Abortions Intensify Dispute,” *Washington Post* (September 17, 1996).

⁴ “An Abortion Rights Advocate Says He Lied About Procedure,” *New York Times*, A11 (February 26, 1997).

⁵ Not to be confused with the medical editor of the same name who appears on ABC-TV’s *Good Morning America*.

⁶ A dismemberment abortion, also known as Dilation and Evacuation or D&E, refers to a procedure where the child is dismembered inside the womb and taken out piece by piece.

⁷ See, e.g., Shannen Coffin, “The Abortion Distortion,” *National Review*, July 12, 2004.

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