

# Lifeline

*A Legal Network  
in Support of Life*

A PUBLICATION OF THE LIFE LEGAL DEFENSE FOUNDATION

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## Gonzales v. Carhart: A “Partial” Victory

One of the best lines in *Gonzales v. Carhart*, the Supreme Court decision upholding (5-4) the federal partial birth abortion ban, came in Justice Ginsburg’s dissent. She states: “Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman’s health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.”



To which one can only respond: RIGHT ON!

Justice Ginsburg’s reference to “safeguarding a woman’s health” and “a woman’s reproductive choices” is telling. This case wasn’t about this or that particular woman, or women in general. Rather, “a woman” whose health is supposedly not safeguarded by this statute never existed. She was the hypothetical construct of the plaintiff abortion providers and promoters who challenged the ban.

“A woman” has or may have every life- and health-threatening condition known to medicine, in every possible combination. Despite her precarious condition, she has shown remarkable longevity. For over two decades, she has appeared in case after case challenging abortion restrictions. And in each case, any law which even arguably threatened “a woman’s” health was struck down. More importantly, these laws were struck down before they had a chance to take effect, to test whether there was any real woman who had the health problems that “a woman” had.

*One area in which the partial birth abortion campaign fell short was in allowing the procedure to be classified as an abortion at all.*

“A woman’s” chokehold on abortion legislation first ran into trouble in *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), the Supreme Court decision involving New Hampshire’s parental notification law. The lower court enjoined the law in its entirety before it went into effect, because it did not contain an exception for “a [minor] woman’s” health.

The Supreme Court granted review, unleashing a torrent of amicus briefs from pro-life and pro-family organizations experienced in parental

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## GENERAL RECAP & UPDATE

**People’s Advocate v. Independent Citizen’s Oversight Committee** (Calif.)—Suit for declaratory and injunctive relief to prevent expenditure of public funds for research focused on embryonic stem cells and cloning. Adverse ruling from trial court, upheld by court of appeals. Petition for review to state supreme court denied.

**Roe v. Planned Parenthood** (Cincinnati, Ohio)—Civil action for damages and injunctive relief filed against PP for performing abortion on fourteen-year-old girl in violation of Ohio law. Claims on behalf of girl and parents include violation of parental notice and consent statutes, informed consent statute, and law requiring reports in cases of suspected child abuse. PP’s motion to dismiss four of the claims was overruled, and PP unsuccessfully appealed that decision. Plaintiffs proceeded with discovery seeking redacted records of abortion on other minors. PP objected, but court ruled that records must be produced. PP appealed, and decision from Ohio Court of Appeal is pending.

**Pedigo v. Hershey** (Calif.)—Amniocentesis detrimentally used on pre-born child with (RECAP CONT. ON PAGE 2)

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improper consent. Civil suit filed. Case proceeding in trial court.

**Rader v. Akins** (Calif.)—Suit against Riverside Community College for arrest of pro-lifers engaged in free speech activity. Settled for damages and attorney fees.

**Logsdon v. Hains** (Ohio)—Federal civil rights lawsuit for damages filed against two Cincinnati police officers for arresting sidewalk counselor at abortion clinic without probable cause. Lower court dismissed based on qualified immunity, but Sixth Circuit reversed, holding that a “prudent” officer would listen to witnesses on both sides, rather than only listening to clinic employee and telling pro-lifers to “tell it to the jury.” Case remanded for further proceedings in trial court.

**Storms, et al. v. CSU Los Angeles**—Pro-lifers arrested for remaining on campus after being told they could only hold signs in a deserted area near campus police station. Charges dismissed. Civil rights action filed against university police officers. Case settled with damages, attorney fees and expungement of arrest record.

**Mason v. Sullivan**—Pro-lifers arrested for engaging in free speech activity on Santa Barbara City College campus and engaging in free speech activity. After charges dismissed, civil rights action filed, District court granted motion to dismiss. Appeal to Ninth Circuit filed, and decision is pending.

**Moreno v. Los Gatos** (Calif.)—Pro-lifers arrested for picketing and distributing literature on public sidewalk outside high school. Police told them they had to stay 1,000 feet from the school. No charges filed. Complaint for civil rights violation filed. Town has agreed to permanent injunction and payment of attorney fees. Appeal pending re statutory damages for plaintiffs.

**National Tax Limitation Foundation v. Westly** (Calif.)—Suit challenging grants for training in embryonic stem cell research made pursuant to Prop 71, a California initiative providing \$3 billion in funding for embryonic stem cell research. Grants violated Prop 71 in that University of California employees were permitted to vote on grants to UC. Case dismissed where appellate decision in *People’s Advocate v. ICOC* decided issue adversely to plaintiffs.

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## FROM THE EDITOR

Dana Cody

## Life After Proposition 71 (That Is, for Some of Us)



***The case of the People’s Advocate and the National Tax Limitation Foundation v. the Independent Citizen’s Oversight Committee (ICOC) has ended with the California supreme court denying LLDF’s petition to review the case.<sup>1</sup> One justice, Kennard, indicated she was of the opinion the case should be reviewed. Unfortunately for the unborn, the California taxpayer and the women who will be exploited for their eggs and put in harm’s way in order to facilitate such research,<sup>2</sup> Justice Kennard’s was the lone vote to hear the case.***

What is next for Californians who oppose the funding of embryonic stem cell research and cloning with the use of state funds?

The issue of state funding for controversial clone and kill research<sup>3</sup> could potentially be settled without controversy due to a recent development in stem cell research. The Associated Press recently reported that “three independent teams of scientists” produced the equivalent of embryonic stem cells in mice without the use of embryonic stem cells.<sup>4</sup> Ordinary skin cells were manipulated by these scientists to behave like stem cells. The AP article speculates that if the procedure could be replicated using human stem cells, it could lead to treatments while eliminating the debate surrounding the use of embryonic stem cells.

Time will tell how the California Institute for Regenerative Medicine (CIRM) will act in response to this recent development.<sup>5</sup> For the taxpayer, it will be telling to monitor the disbursement of three billion dollars in public funds approved for expenditure by the ICOC’s Finance Committee for CIRM’s “scientific research.”

The amicus brief filed in the trial court in support of the plaintiffs in this case may give us the information needed to make an educated guess as to the direction CIRM will head in light of this recent development.<sup>6</sup> One of the issues presented in the brief was the financial motivation of Proposition 71 proponents:

“Some of the same scientists from the field of gene delivery research, having made millions of dollars from university faculty start-up companies, are now the entrepreneurs of hESC research. Previously, scientists were also touting miracle cures of single-gene, single-disease cures, including cure for diabetes through insulin gene delivery. Even one of the most studied of the single-gene, single-disease candidates, hemophilia, has not been successfully treated by gene delivery. Enthusiasm for gene “therapy” was dampened by the unfortunate death of Jesse Gelsinger in 1999. In 2002 the FDA halted several gene therapy trials after a boy in France developed a leukemia-like disease three years after receiving gene therapy bringing this line of research to a virtual dead end.

During the public debate on Prop 71 Stanford Professor Irving Weissman, co-founder of Systemix (Novartis) and Cellerant, a noted supporter of the initiative and a stem cell researcher stated that the intent of the proponents was to “corner the market” on “products” derived from hESC, either obtained by cloning or from *in vitro* fertilization (IVF) clinics. His statement shone a light on the troubling language of the proposition that granted the ICOC the right to modify federal guidelines of human subjects protections to “suit the

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## DEATH ON DEMAND

Wesley J. Smith

## The assisted-suicide movement sheds its fig leaf.

**Should laws against assisted suicide be rescinded as “paternalistic?”**  
**Should assisted suicide be transformed from what is now a crime (in most places) into a sacred “right to die”?** **Should assisted suicide be redefined from a form of homicide into a legitimate “medical treatment” readily available to all persistently suffering people, including to the mentally ill?**

According to Brown University professor Jacob M. Appel, the answer to all three of these questions is an unequivocal yes. Writing in the May-June 2007 *Hastings Center Report* (“A Suicide Right for the Mentally Ill?”), Appel argues in that assisted suicide should not only be available to the terminally ill, but also to people with “purely psychological disease” such as victims “of repeated bouts of severe depression,” if the suicidal person “rationally might prefer dignified death over future suffering.”

Given the emphasis assisted suicide advocates and the media normally give to the role of terminal illness in the assisted suicide debate, it might be tempting to dismiss Appel as a fringe rider. But he most definitely is not. Over the last several years, advocacy for what is sometimes called “rational suicide” has been growing increasingly mainstream, discussed among the bioethical and academic elite in mental health publications, academic symposia, and books. Indeed, it is worth noting that Appel’s essay appeared in the world’s most prestigious bioethics journal.

As disturbing as Appel’s proposal is—it is essentially a call for death-on-demand—it is refreshing that Appel has written so candidly. After years of focus group-tested blather from the political wing of the euthanasia movement claiming that legalizing assisted suicide would be strictly limited to the terminally ill, we finally have a clearer picture of where the right-to-die crowd wishes to take America.

Moreover, unlike a restricted right to assisted suicide, Appel’s call for near death-on-demand is logically consistent. There are two weight-bearing

intellectual pillars that support euthanasia and assisted suicide advocacy: (1) a commitment to a radical individualism that includes the right to choose “the time, manner, and method of death” (often called “the ultimate civil right” by assisted suicide aficionados); and (2) the fundamental assumption that killing is an acceptable answer to the problems of human suffering. Appel describes these conjoined beliefs succinctly as the “twin goals of maximizing individual autonomy and minimizing human suffering” by avoiding “unwanted distress, both physical and psychological” through creation of a legal right “to control ... when to end their own lives.”

Hoping to whistle past the graveyard, some might dismiss all of this as mere theoretical posturing. Were it so. Assisted suicides for the mentally ill are already taking place in euthanasia-friendly locales. Indeed, nearly every jurisdiction that has legalized assisted suicide for the seriously ill—as well as those that have refused to meaningfully enforce anti-assisted suicide laws—has either formally expanded the legal right to die to those suffering existentially, or shrugged in the face of illegal assisted suicides of the depressed. To wit:

**Switzerland:** In February, the Swiss Supreme Court ruled that the mentally ill have a constitutional right to assisted suicide, because, as reported in the *International Herald Tribune*, “It must be recognized that an incurable, permanent, serious mental disorder can cause similar suffering as a physical (disorder), making life appear unbearable to the patient in the long term.”

**The Netherlands:** The Dutch Supreme Court issued a similar ruling back in 1993 when it approved a psychiatrist assisting the suicide of his chronically depressed patient who wanted to die due to unremitting grief caused by the deaths of her adult children—even though the doctor never attempted to treat the woman. The basis for the ruling followed the above described logic of euthanasia: Suffering is suffering and it



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**Berkeley v. Blythe**—Pro-lifer arrested for holding signs and literature on main plaza at UC Berkeley. Case dismissed. Civil suit pending to challenge constitutionality of trespass ordinance used.

**South Dakota School of Mines v. Cox**—One pro-lifer arrested and others forced off campus immediately upon arriving to engage in free speech activity. Charges dismissed. School is evaluating speech policy change.

**Fairbanks v. Planned Parenthood** (Ohio)—Lawsuit filed alleging that PP violated Ohio law by failing to report the sexual abuse of minors. The suit alleges that Fairbanks was brought to PP by her father, who had been sexually assaulting her since she was thirteen. He sought an abortion for his daughter at PP to cover up the sexual abuse and resulting pregnancy. Although minor attempted to tell PP personnel of abuse, they ignored her and failed to report, allowing abuse to continue.

**Jackson v. Weimer** (Miss.)—pro-life picketer charged with local sign ordinance violation. Trial pending.

**St. John’s Church in the Wilderness v. Scott** (Colo.)—Pro-lifers who picket church with abortion ties enjoined from demonstrating on all sidewalks in the vicinity of the church, because signs upset churchgoers. LLDf filed amicus brief in support of pro per defendants’ appeal.

**Spitz v. Chesapeake** (Virginia)—Police confiscated and destroyed pro-life signs. Lawsuit pending.

**Cypress College v. Blythe** (Cypress, Calif.)—Pro-lifers arrested for not staying in “free speech area” on public campus, when “free speech area” was in construction zone. Charges dismissed.

**Sonora College v. Lord** (Calif.)—Pro-lifers arrested for “trespass” on public college campus after complaints from pro-abort. Charges pending.

**Logsdon v. Cincinnati Women’s Services**—Civil action in Ohio court for defamation and conversion against Cincinnati abortion clinic and clinic owner for interfering with sidewalk counselor’s pro-life signs and for false reports to police that led to two arrests. Clinic closed and clinic owner filed for bankruptcy and was

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granted final bankruptcy discharge. Case was recently reactivated and placed on the active docket. **L**

## Update

A year ago, *Lifeline* reported on the efforts of attorney Michael Sharman to close a Planned Parenthood facility in Charlottesville, Virginia, for violation of local zoning laws. (*Lifeline* Vol. XV, No. 2) Mr. Sharman recently sent this update:

On July 25, 2007, the circuit court judge denied Planned Parenthood's summary judgment motion, on the basis of a prior default judgment entered against it. The combined effect of the declaratory judgment Decree of April 2006 and the July 25, 2007 summary judgment ruling is that Planned Parenthood: a) is judicially deemed to be operating a medical center or hospital in an area without the proper zoning to do so, and b) cannot deny those charges in this case. It is the plaintiff landowners' firm belief that with those powerful rulings now securely lodged in the case file, they are now only one or two more hearings away from finally closing Planned Parenthood's doors in Charlottesville.

[Previous issues of *Lifeline* are available at <http://lldf.org/newsletter.htm>, the article referenced may be found under Summer 2006.—Ed.]

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choice with respect to abortion. In addition, we have a great team of five lawyers, which is one of the reasons we have a reasonably good chance of winning. All of us are very experienced litigators. Among the four more experienced team members, the one with the least amount of litigation experience has been in practice 27 years. We have an opportunity to make a lasting impact—a chance to help protect minors from abuse as required by the law. I hope that LLDF supporters will continue their generous support for these two potentially precedent-setting cases. **L**

## ASK THE ATTORNEY

### An Interview with Brian Hurley, Esq.

**Brian E. Hurley, an Ohio litigator who helped win the only criminal conviction against a Catholic archdiocese in the U.S. for failure to report sex abuse crimes against children, is leading two cases against Planned Parenthood for allegedly ignoring laws that require reporting suspected or known abuse of minors. The Legal Life Defense Foundation is providing support to Mr. Hurley and his co-counsel on these two cases.**

Mr. Hurley and a team of four other litigators represent clients who have alleged that Planned Parenthood clinic staff members, who as health care workers must report suspected sexual abuse of minors, failed to do so in two separate cases when girls came to the agency for abortions. His clients have alleged that, in violation of the law, clinic personnel failed to report the abuse and returned the teens to their adult male abusers.

Mr. Hurley, who has been practicing law since 1979, is recognized by Law & Politics as one of the Top 100 Lawyers in Ohio and one of the Top 50 Lawyers in Cincinnati, and has been named an Ohio "Super Lawyer" (the top 5 percent) every year since 2004. He focuses on litigation, including governmental, commercial, insurance, product liability, personal injury, legal and medical malpractice, civil rights, employment and law enforcement litigation. The managing partner of the Cincinnati office of Crabbe, Brown & James, LLC, he is a former First Assistant with the Hamilton County, Ohio Prosecutor's Office. During his time in the prosecutor's office, he helped establish the first local witness protection program in Ohio. He earned his J.D. at the Ohio State University College of Law and was an adjunct professor at the University of Cincinnati College of Law and Northern Kentucky University. He teaches, consults, and writes in his field, and his volunteer work includes coaching youth basketball and baseball and providing legal and financial advice to his parish. He and his wife, Monica, have been married 29 years and are the parents of three adult sons: Kevin, Michael, and Thomas Hurley.

**What was the result of your prosecution of the case against the Catholic Church in Ohio?**

In 2003, the Catholic Archdiocese of Cincinnati

was convicted of five misdemeanor counts of failing to report sexual abuse of children, after pleading no contest to charges. It was the first, and I believe the only, criminal conviction of a diocese in connection with the scandal relating to the abuse of minors. I am a Catholic, and several people have asked me if it was difficult for me to work on the case. My answer is that it was not. Although the Church has done and continues to do many wonderful things, when it comes to the law, people who hide abuse don't get a pass. The Catholic Church will ultimately be stronger when it apologizes and takes full responsibility for the role of certain of its leaders in this tragic situation.

**Many people believe that Planned Parenthood provides valuable health care services. Have you heard complaints about the two cases you are leading against that organization?**

Yes. This is certainly one of the more significant problems we face in these two cases. Many people think very highly of Planned Parenthood. But I ask these people, how do my cases differ from the abuse cases against the Catholic Church? Should Planned Parenthood get a pass merely because it may provide some services that help people? It really is quite simple; the Catholic Church is not above the law and neither is Planned Parenthood. There is no intellectually honest way to distinguish between the two situations.

**Are there other hurdles in the two cases?**

Yes. Planned Parenthood hires very talented lawyers and will fund the cases to enable it to litigate for years. In addition, Planned Parenthood has a history of being very successful in the courts. We intend to win these cases, but I grossly underestimated the amount of time and money it will take to do so. The first case was filed two years ago, and far too

much time has already been spent litigating and re-litigating virtually every possible issue that could be raised. It is my opinion that this is part of a strategy to make it prohibitively expensive and time-consuming for us to prosecute the claims. Planned Parenthood has also tried to present this case as a challenge to *Roe v. Wade*, but it is not. This case is about Planned Parenthood being required, like every other business in Ohio, to follow the law of Ohio. Quite simply, Planned Parenthood doesn't get special treatment merely because it is part of the abortion industry.

### Why did you take these time-consuming cases?

It is extremely important that the most vulnerable in our society are protected, and the young and poor are very vulnerable. In both cases we are representing individuals who were teenagers when they became pregnant and were poor. One is now a young woman who was 16 years old when she came to Planned Parenthood for an abortion. She was accompanied by her father, who was also the father of her unborn child and had been sexually abusing her for four years. She states that she told a Planned Parenthood employee that she was the victim of sexual abuse, but a report of that abuse was never made. Tragically she was sent home, and her father continued to abuse her for another almost two years. When someone finally listened to her, her father was arrested and convicted. He is now serving a 5-year prison term. Our other client was 13 years old when she became pregnant by her 21-year-old soccer coach. Someone needed to stand up for these young women because, quite frankly, it was the right thing to do. It still is the right thing to do.

One thing that has bothered me since these cases were commenced is the disdain with which Planned Parenthood has treated our clients. It reminds me of a line from an old Irish ballad: "They scorned us just for being what we are." Planned Parenthood has shown scorn for our clients' merely because of who they are. By doing so, it has shown scorn for the very people who comprise such a large percentage of its customer base.

### What inspired you to stand up for these vulnerable teens?

As I said earlier, our clients are part of a group

that is the most vulnerable in our society. They need the most, not the least, protection. If no one stands up for them, others like them will be abused. I attribute this attitude directly to the lessons I learned from my parents. I had a younger brother, Terry, who at the age of six months contracted meningitis. He was left blind, mentally diminished, and bed-ridden. It would have been so easy, as some doctors advised, for my parents to put him in an institution. But if you ever met my parents, you would know that would never happen. They cared for him at home. He was not expected to survive infancy, but he lived for 38 years. At the same time, my parents, who had 11 children and were not wealthy, took in my dad's brother, Jack, who had Down syndrome. My parents are humble people, and if you mentioned how they made sacrifices and put love into action, they would be embarrassed. My parents did not talk about caring for family members—they simply did it, and my brothers and sisters saw it. When friends would come to the house, they would naturally meet my brother and my uncle. The unspoken message was, "This is our brother. This is our uncle. This is who we are, and Terry and Jack are part of our family." When my brother died in 2000, hundreds of people came to the funeral. It was packed, just packed. I joked with my brother, Tim, who is also an attorney, that even though Terry never said a word and was bed-ridden his entire life, there were probably twice as many people at Terry's funeral as would come to either of our funerals. I see the impact of my uncle's and brother's lives and my parents' example on our family: among my siblings are two teachers, a missionary in Haiti, a nurse, a sister involved in the Cerebral Palsy Foundation. All of my sisters helped care for my brother Terry. Unbeknownst to them, my brother and uncle were mentors to me and helped me form my beliefs about protecting those in our society who need the most protection. Today I try to be a staunch defender of the least protected of our society: the disabled, the infirm, the young, and the poor.

### Given Planned Parenthood's successful track record in court, what keeps you going?

We have received a great deal of support from so many people, including many who are pro-

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mission and objectives" of the CIRM, making clear that the initiative was a drive to commercialize these "products" for the financial benefit of selected interests."<sup>7</sup>

Will the CIRM continue with controversial embryonic stem cell research or will it choose to quell the debate and take the road that might just lead to cures in deference to hESC objectors? Not likely, based on the financial boon associated with Proposition 71. Add to the mix the fact that only stem cell research not funded by federal tax dollars can be funded with CIRM funds, and seems the predictable course for CIRM will be to continue to fund hESC.<sup>8</sup>

To learn more about the issues that Californians now face due to publicly funded embryo farming, you can attend a discussion panel on November 9, 2007, which is sponsored by LLDF and the Center for Bioethics and Culture, "Trading on the Female Body." Or you can come to our annual dinner the following evening and hear David Prentice speak on the issue of cloning. Details are available in this edition of *Lifeline* and more information will be available as these events draw near. Keep your eye on [www.lldf.org](http://www.lldf.org).

### L

<sup>1</sup> *People's Advocate v. ICOC* was a suit for declaratory and injunctive relief to prevent expenditure of public funds on embryonic stem cell research and cloning, spawned by Proposition 71, an initiative passed by the California voters in the 2004 general election.

<sup>2</sup> Conservative estimates mean millions of donated eggs, which for women can mean Ovarian Hyper-Stimulation Syndrome, the side effects of which can include organ failure, stroke and death. Other side effects are reproductive cancers and infertility. See <http://www.handsoffour ovaries.com/pdfs/handsoffbrochure.pdf>.

<sup>3</sup> "Embryonic stem cell research requires cloned human embryos." *Ethics and Medicine*, Vol. 22:3, p. 133, Fall 2006, C. Ben Mitchell, PH.D., Human Egg "Donation".

<sup>4</sup> [www.livescience.com/health/ap\\_070607\\_stem\\_cells.html](http://www.livescience.com/health/ap_070607_stem_cells.html)

<sup>5</sup> As of the date of this publication, California's Institute for Regenerative Medicine has not issued a news release regarding this recent development.

<sup>6</sup> The brief was submitted by five pro-choice scholars and practitioners from a variety of backgrounds representing sociology, economics, history, medicine, science and technology transfer.

<sup>7</sup> Alameda Superior Court, Case No. HG05 206766, *Beeson Amicus Brief*, p. 6 [Attorney Steven N.H. Wood of Stoddard, Bergquist, Wood & Anderson, LLP].

<sup>8</sup> Rumor has it that the Bush Administration is considering funding this new stem cell methodology which replicates embryonic stem cells without the attendant destruction of human life.

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involvement laws. One brief pointed out that, in the states that had reporting requirements in conjunction with their parental involvement laws, there were a minuscule number of reports, if any, of abortions being performed for medical reasons, never amounting to more than hundredths of a percent of the total number of minor abortions. Other states have had parental involvement laws lacking health exceptions in effect for years, with no reported ill effects on minors. Another brief walked the justices through the scenario of a minor facing a major pregnancy-related medical emergency. In any other health-related crisis a minor might face, the doctor, while doing what was immediately medically necessary, would be clamoring to get a parent to the girl's side, or at least on the phone. Why, just because this particular health crisis relates to pregnancy, do the courts say that a medical emergency is a license for a doctor *not* to consult parents? There is certainly the appearance that the "emergency" would be an excuse for a secret abortion, not the reason for it. And the lack of such an exception was the excuse for striking down the law, not the reason for it.

In a unanimous opinion, the Supreme Court reversed and remanded the decision in *Ayotte*, directing the lower court to consider a less drastic remedy than invalidating the entire statute. Unfortunately, during the time it took for the case to reach the Supreme Court, the political landscape in New Hampshire had shifted, and the legislature has voted to repeal the law altogether.<sup>1</sup> In effect, "a woman's" health ran out the clock on the New Hampshire law.

Meanwhile, "a woman" had succeeded in preventing the federal partial birth abortion ban from going into effect. Relying on the Supreme Court's earlier decision, *Stenberg v. Carhart*, 530 U.S. 914 (2000), striking down Nebraska's partial birth abortion ban, federal courts in California, Nebraska, and New York struck down the federal ban because of the lack of a health exception. Lawyers for the government attempted to subpoena medical records of women patients who had undergone partial birth abortions, to test the plaintiffs'

claims about the medical necessity of any of these abortions, but a federal appeals court refused to allow access to these records. Once again, it was "a woman's" health at issue, not any particular woman. Plaintiffs and their expert witnesses were allowed to hypothesize about the relative safety and effects of various procedures and various techniques, without having any of their speculations tested against reality. Testimony from opposition experts was dismissed because, for the most part, these experts either did not perform abortions or did not use the methods at issue (as if a police forensics expert must commit crimes in order to qualify as an expert on them). Armed with findings supporting their position that partial birth abortions are necessary for "a woman's" health, plaintiffs could feel confident of another victory.

The Supreme Court's decision in *Gonzales*, authored by Justice Kennedy, consists of two main parts. The first part rejected the contention that the Act was vague and overbroad. This part (discussed more fully below) was really at the heart of why partial birth abortion had emerged as a national issue. The second part dealt with the lack of a health exception. Without providing any rationale for departing from its holding in *Stenberg*, Kennedy rather abruptly rejected the plaintiffs' contention, quoting from *Stenberg* itself, that a health exception is required if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health." On the contrary, Kennedy wrote, "considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." In sum, "medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."<sup>2</sup>

But the biggest surprise came at the end of the decision, where it stated that "these facial attacks should never have been brought in the first place. . . . [A preenforcement, as-applied challenge] is the proper manner to protect the

health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the act must be used." With that holding, the Court firmly booted "a woman" out the courthouse door. From now on (barring some initial "did we hear you correctly?" decisions from the more obstinate circuits), abortion providers seeking to enjoin a statute before it is enforced must bear the "heavy burden" of showing that it would be unconstitutional in a "large fraction" of the relevant cases, or content themselves with enjoining its enforcement only in "discrete and well-defined" circumstances.

This sea-change in abortion jurisprudence—the clear imposition of new, stricter standards for challenges to abortion restrictions—is an unambiguous, and unexpected, victory for the pro-life cause. The extent of the victory on other fronts, which has been the subject of some heated discussions, must be considered from the perspective of what pro-lifers hoped to accomplish in challenging partial birth abortion in the first place.

Abortionist Martin Haskell first described partial birth abortion (also known as "intact dilation and evacuation," or "intact D&E") at a presentation to fellow abortionists in 1992. Word of this barbaric procedure leaked out, and pro-lifers saw an opportunity, both educational and legal, to tear the mask of euphemisms off the "medical procedure" of abortion and reveal it in all its subhumanity. It raised the question: when is abortion no longer abortion, but infanticide? Can we use this practice to make the Court draw a line between the "right" to abortion and the crime of infanticide, and then push that line back?

Realizing the public relations debacle they were facing, pro-abortion forces first tried to deny that the procedure existed, and, failing that, claimed that it was rarely used. When those lies were exposed, and legislatures began passing laws banning partial birth abortion, the pro-aborts switched to a different tack: almost every abortion is, or can be, a partial birth abortion, i.e., the delivery of part of a living fetus. This

served them well in the courtroom, as courts struck down ban after ban as being vague and overbroad. The unpleasant side effect was a legacy of sworn testimony by abortion doctors detailing the barbarity of every type of surgical abortion procedure. Abortionists coolly discussing the fact that they start by twisting or vacuuming a leg off a fetus, which is then still living in the womb with its leg “delivered”—well, that may win court cases, but it’s not going to win any popularity contests.<sup>3</sup>

The campaign against partial birth abortion had political as well as educational benefits. Before partial birth abortion, the media lexicon allowed all pro-abortion politicians to be called “moderates.” But when politicians had to go on the record as being either for or against partial birth abortion, that term was no longer available to hide behind. If a politician tried to claim he occupied some sort of “moderate” middle ground on abortion, he could easily be tripped up by the question, “But isn’t it true that you voted against the partial birth abortion ban?”

One area in which the partial birth abortion campaign fell short was in allowing the procedure to be classified as an abortion at all. What if, instead of passing a ban, with its own code section and penalties, Congress had simply declared that, past the specified “anatomical landmark,” as Justice Kennedy termed it, this was no longer a matter of abortion at all, but of killing a person protected under the Fourteenth Amendment. In effect, Congress would be saying to the Supreme Court, “You said in *Roe v. Wade* that an unborn child is not a person. We say that, at or past this point, he or she is born, and is therefore a person.”

Because partial birth abortion was treated as abortion, not infanticide, the “ban” is hedged in with so many qualifications about alternative methods for killing babies (and what to do if you find yourself unexpectedly holding a partially delivered

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doesn’t matter whether the cause is physical or emotional, meaning that Dutch mercy killing need not be limited to the sick and disabled.

**The United States:** We saw a similar phenomenon in America’s reaction to the decade-long assisted suicide campaign of Jack Kevorkian. Not only were the majority of Kevorkian’s “patients” not terminally ill (most were disabled)—but several were not even sick. For example, Marjorie Wantz, Kevorkian’s second assisted suicide who died on October 23, 1991, complained about severe pelvic pain. Her autopsy revealed that nothing was wrong physically. It turned out that she had been hospitalized previously for mental problems. In 1996 Rebecca Badger went to Kevorkian complaining of having multiple sclerosis. Her autopsy proved that she was disease free. It was later reported that she had been depressed and addicted to pain pills. Despite these and other such cases of his assisting the depressed to kill themselves, Kevorkian remained publicly popular until he was finally jailed in 1999 after he videotaped himself murdering Lou Gehrig’s patient Thomas Youk by lethal injection.

**Oregon:** Advocates for legalizing assisted suicide frequently tout Oregon’s law as proving that assisted suicide can be restricted to the terminally ill. In actuality, little is known about what is happening in the state because it gets information about these practices almost exclusively through self-reporting by participating doctors.

Even so, the curtain was pulled back briefly when a peer-reviewed article in the June 2005 *American Journal of Psychiatry* appeared describing a potential assisted suicide of a psychotic man that was disturbingly similar to what is happening in the Netherlands and Switzerland. After cancer patient Michael J. Freeland received a lethal prescription, he had to be hospitalized for mental illness. Despite being delusional, his psychiatrist permitted him to keep the fatal overdose, in the doctor’s words, “safely at home”—even though this same doctor advised a court that Freeland would “remain vulnerable to periods of delirium” and would “be susceptible to periods of confusion and impaired judgment.” (Freeland died naturally nearly two years after receiving his lethal prescription—meaning he was also not terminally ill as defined by Oregon’s law when he was prescribed the lethal overdose in the first place.) Needless to say, nothing was done to remedy this apparent breach of law.

The natural trajectory of assisted suicide advocacy leads to such ever-widening expansions of killable categories: from the terminally ill, to the disabled and chronically ill, to the “tired of life” elderly, and eventually to the mentally ill. Appel understands this and approves. He writes:

Contemporary psychiatry aims to prevent suicide, yet the principles favoring legal assisted suicide lead logically to the extension of these rights to some mentally ill patients. But now that several Western nations and one U.S. state have liberalized their laws, it seems reasonable to question the policies that universally deny such basic opportunities to the mentally ill.

With the truth now clearly in view, the time has come to have real debate about the so-called right to die. This debate should not pretend that the practice will be limited and rare and it should fully address the societal implications of transforming assisted suicide into a mere medical treatment.

So, let’s argue openly and frankly about the wisdom of permitting near death-on-demand as a method of ending serious and persistent suffering. Let’s discuss whether “choice” and “individual autonomy” requires that we permit licensed and regulated euthanasia clinics to serve anyone who has made an irrevocable decision to die.

Indeed, let’s argue whether or not society owes a duty of prevention to the self-destructive who are not acting on mere impulse. But finally, let’s stop pretending that assisted suicide legalization would be just a tiny alteration in public policy restricted only to the terminally ill. That clearly isn’t true. **L**

[This article was originally published July 5, 2007 by *The Weekly Standard* ([www.weeklystandard.com](http://www.weeklystandard.com)) and is here reprinted by the kind permission of the author. Wesley J. Smith ([wesleyjsmith.com](http://wesleyjsmith.com)) is a senior fellow at the Discovery Institute ([discovery.org](http://discovery.org)), an attorney for the International Task Force on Euthanasia and Assisted Suicide ([iaetf.org](http://iaetf.org)), and a special consultant to the Center for Bioethics and Culture ([thebc.org](http://thebc.org)). He is the author most recently of *Consumer’s Guide to a Brave New World*. He is currently researching a book on the animal-liberation movement.]

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baby), that one almost wishes the subject had never come up. It is chilling to read the opinion's detailed, clinical descriptions, not only of partial birth abortion, but ordinary dilation and evacuation, where a baby is dismembered in the womb, and lethal injections that can be given to kill a baby before delivery. One cannot cherish any illusion that Kennedy and the other justices are operating under any misunderstanding. The decision says it is permissible to ban this gruesome way of killing a baby, but that there are other methods, more or less as gruesome, still legally available.

For this reason, one comes away from reading the decision, not with any feeling of elation, but of great sadness and even fear for our country, and for our souls. I think the best practical reaction to the decision came from Mark Crutcher, of Life Dynamics: "My advice is (a) pause for a moment to celebrate the victory, (b) don't read more into it than is actually there, and (c) get back to work. Babies are still dying."

**L**

<sup>1</sup> Fraud alert: the New Hampshire situation is already being cited by abortion advocates as one in which a parental involvement law has been reconsidered and repealed, by which they imply that it was found in practice to be a bad law. As detailed above, the law never took effect. Its repeal resulted simply from the shift of power in the legislative and executive branches.

<sup>2</sup> Elsewhere in the opinion, Kennedy took aim at abortion exceptionalism: "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."

<sup>3</sup> For an excellent summary of the testimony in those trials, see "Partial Birth Abortion on Trial" by Cathy Cleaver Ruse. [<http://www.nrlc.org/abortion/pba/RusePBAonTrial.pdf>]

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## MARK YOUR CALENDARS

*LLDF together with Center for Bioethics and Culture will be hosting a seminar with panel speakers "Trading on the female body" 7:00 p.m. Friday, November 9, 2007 in Oakland, Calif. (Lake Merritt area) Regeneration Church, 238 E 15th Street ([www.regenerationweb.com](http://www.regenerationweb.com)). Speakers will include David Prentice, Ph.D., Family Research Council [see below], Jennifer Lahl, National Director, The Center for Bioethics and Culture, Dana Cody, Esq., Executive Director, Life Legal Defense Foundation as well as a speaker from Hands Off Our Ovaries ([www.handsoffourovaries.com](http://www.handsoffourovaries.com)).*

This event is sponsored by Center for Bioethics and Culture ([www.cbc-network.org](http://www.cbc-network.org)). For more information, please telephone Robyn Spitzer (510) 645-9080.

**L**

**Life Legal's Annual Fall Banquet** will be Saturday, November 10, 2007, at the Bellevue Club in Oakland, California. Our featured speaker will be Dr. David A. Prentice, Senior Fellow for Life Sciences at Family Research Council and a Founding Member of *Do No Harm: The Coalition of Americans for Research Ethics*, a Fellow of the Wilberforce Forum Council for Biotechnology Policy, a Fellow of the Institute on Biotechnology and the Human Future, and

an Advisory Board Member for the Center for Bioethics and Human Dignity. He has provided scientific advice for U.S. Sen. Sam Brownback, U.S. Rep. Dave Weldon, other Members of Congress and the Administration, and international legislators and organizations.

Dr. Prentice is an internationally-recognized expert on stem cell research and cloning, and has testified before the U.S. Congress and numerous state legislatures, the U.S. National Academy of Sciences, the President's Council on Bioethics, European Parliament, British Parliament, Canadian Parliament, Australian Parliament, German Bundestag, French Senate, Swedish Parliament, the Vatican, and the United Nations.

Dr. Prentice was selected by the President's Council on Bioethics to write the comprehensive review of adult stem cell research for the Council's 2004 publication "Monitoring Stem Cell Research".

Please join us for no-host cocktails at 5:00 p.m. Dinner will be served at 6:00 p.m. A map and directions for the Bellevue Club may be found at [www.bellevueclub.org/contact-location.html](http://www.bellevueclub.org/contact-location.html)

**L**

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