

The Antiabortion Campaign To Personify the Fetus: Looking Back to the Future

By Heather Boonstra

In preparation for a day in the not-distant future when there may be a president and U.S. Supreme Court majority more sympathetic to their cause, antiabortion leaders are stepping up their historic campaign to elevate the status of the fetus to that of a child, both in the public's mind and as a matter of law. The purpose of "personifying" the fetus, of course, is to set up an inevitable conflict, conceptually and legally, between a woman's right to choose abortion, as defined by the court in *Roe v. Wade*, and a fetus's "right to life."

Somewhat astonishingly, however, the seriousness of the current effort has not been fully recognized, even by some prochoice policymakers, perhaps because in its latest incarnation the debate is playing out in the context of two measures whose antiabortion sponsors deny are designed to pose a threat to *Roe* at all. But by pushing to change the rhetorical and legal lexicon around abortion—specifically, by declaring later abortion "infanticide" in advocating the Partial-Birth Abortion Ban Act and labeling the fetus even in its earliest stages an "unborn child" in the Unborn Victims of Violence Act—antiabortion strategists are seeking to lay critical groundwork for *Roe*'s eventual demise.

Getting There from Here

Overturing *Roe*—and going further to make abortion illegal nationwide—has always been the antiabortion movement's ultimate goal. For a decade following the 1973 decision, the primary focus of its public relations and legislative agenda was persuading Congress to pass a "human life amendment" to the Constitution

that would grant full "personhood" to the fetus from "the moment of fertilization." (In holding that a woman has a right to choose abortion, the Supreme Court said in *Roe* that it did not need to resolve the essentially philosophical question of when life begins to determine that the fetus was not, in a legal sense, a "person" within the meaning of the Fourteenth Amendment.)

Even following the 1980 election of a strongly antiabortion president, Ronald Reagan, and a Republican-controlled Senate, however, supporters of the amendment were far short of the required two-thirds majority. This prompted some advocates to line up behind a highly controversial attempt to achieve the same ends by simple statute, which would require only majority support, and others to favor a less-extreme constitutional amendment that would simply return the issue to the states. In the end, the Senate defeated both the Human Life Statute, championed by Sen. Jesse Helms (R-NC) and Rep. Henry Hyde (R-IL), and Sen. Orrin Hatch's (R-UT) Human Life Federalism Amendment in 1982.

Following these defeats, most antiabortion leaders acknowledged that the country was not "ready" to overturn *Roe*. The issue of abortion's basic legality was relegated to the back burner for a decade, in favor of an agenda aimed at withdrawing public funding and otherwise restricting access to the procedure. By the early 1990s, that strategy—albeit with much greater success—had also largely run its course. When the Supreme Court, in *Planned Parenthood of Southeastern*

Pennsylvania v. Casey, reaffirmed "the essential holding" of *Roe* only months before the country elected its first openly prochoice president in 1992, it appeared the antiabortion movement had nowhere to go. But its leaders regrouped again, and a renewed strategy to undermine *Roe* eventually emerged. This time, however, there was general consensus, based on recent experience, that the campaign against abortion should not be frontal but "incremental" in the context of a long-term effort to change public opinion about the legitimacy of abortion.

From Abortion to 'Infanticide'

The first major increment has been a national campaign against "partial-birth" abortion at both the federal and the state levels. Written in highly inflammatory and entirely nonmedical language, the federal Partial-Birth Abortion Ban Act, originally introduced in 1995, would criminalize any procedure in which a doctor partially "delivers" a living fetus before "killing" it and completing the "delivery."

Passed twice by Congress and vetoed by President Bill Clinton, the ban has been enacted to date in similar form in 30 states. Supporters would have the public believe that these laws are aimed at only one particularly gruesome abortion procedure performed

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very late in pregnancy. Opponents argue that they are so broadly written as to potentially criminalize several types of procedures, including some commonly performed well before the fetus is viable. Challenged in 21 states, these bans have been blocked in a large majority of cases by lower federal courts. However, with recent conflicting decisions by two federal appeals courts, the issue is apparently

headed to the Supreme Court (see *For the Record*, page 12).

In debating the bill prior to its passage for the third time by the Senate earlier this year, lead Senate sponsor Rick Santorum (R-PA) flatly asserted that the legislation “comports with and, in fact, falls outside the con-

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cerns of *Roe v. Wade* because the baby is outside of the mother.” Pressing the rhetoric considerably, Santorum declared, “This is a rogue procedure that is infanticide....Once the baby is in the process of being born, we have to say: Wait a minute; this baby is now outside the mother, almost outside the mother. This is not about abortion anymore.”

The image of the fetus as a “baby in the process of being born” is an effective public relations device that has convinced many members of Congress that “partial-birth” abortion is, as Santorum says, more akin to infanticide than to abortion. Upping the stakes a considerable step further, lawmakers in some states have taken to embodying that rhetoric in actual legislative language. Missouri this year, for example, passed a statute entitled the Infant’s Protection Act that uses the word “infanticide”—rather than “abortion”—to describe a procedure that causes the death of a “living infant” who is “partially born or born.” Whether the courts will draw any legal distinction between such a law and “conventional” “partial-birth” abortion bans remains to be seen, but its rhetorical and legal purpose seems clear.

‘A Back-Door Response to *Roe*’

The Unborn Victims of Violence Act, portrayed by its supporters as a “crime” bill unrelated to abortion, is another attempt by antiabortion forces to establish a foothold, in public opinion and in the law, for the idea of treating the fetus as a person. But while the rhetoric surrounding the Partial-Birth Abortion Ban Act is focused on the fetus in the later stages of pregnancy, the Unborn Victims of Violence Act would, as a matter of law, treat all fetuses at all stages of development—and even before, whether zygote (fertilized egg), blastocyst (preimplantation embryo) or embryo (through week eight of pregnancy)—as persons distinct from the women who carry them.

Introduced in July 1999 by Rep. Lindsey Graham (R-SC) and passed by the House of Representatives, 254–172, the bill would establish separate penalties for those who harm an “unborn child,” either knowingly or unknowingly, while committing a federal crime. An often-cited example of the need for the legislation involves the case of an airman who, while living in Air Force housing, beat his pregnant wife so severely that she lost her pregnancy at 34 weeks. The airman was convicted under the Uniform Code of Military Justice of the attacks on his wife. Had the Unborn Victims of Violence Act been enacted, a separate crime for the murder of the fetus could have been charged, with a maximum penalty of life in prison if convicted. (Thirty-nine states have laws or court decisions imposing criminal penalties when a pregnant woman or her fetus is harmed. The policies in 28 of these states—like the Unborn Victims of Violence Act—treat the fetus as a separate victim of crime, although most do not do so at all stages of fetal development.)

Between proponents and opponents of the Unborn Victims of Violence Act, there is no dispute that violent

acts against a pregnant woman that result in a miscarriage are terrible and that they should be punishable under the law over and above that meted out when harm is done to a woman who is not pregnant. But from the point of view of those who oppose the legislation, it has less to do with crimes against pregnant women than with abortion. “This bill is a back-door response to *Roe v. Wade*,” said prochoice Rep. Sheila Jackson Lee (D-TX). “It undermines a woman’s right to choose by recognizing for the first time under federal law that an embryo or fetus is a person, with rights separate from and equal to that of a woman and worthy of legal protection.” Indeed, when pressed during the House Committee on the Judiciary debate, antichoice Hyde candidly conceded that a major purpose of the bill is to recognize the existence of a separate legal person. “A pregnant woman is two special persons,” he said.

By defining the fetus as a separate legal entity, the Unborn Victims of Violence Act would give antiabortion advocates a powerful tool against women’s choice. To be sure, the bill is loaded with “exceptions”—for women who choose to have an abor-

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tion, for medical treatment of the woman or fetus and for conduct by the woman that might result in harm to or termination of her pregnancy. But the bill’s framers know that the law cannot simultaneously hold that the fetus is truly a “person” and subject to being aborted. The Unborn Victims of Violence Act is a clear break from American legal and constitutional tradition designed to set up a conceptual collision course with abortion rights.

More than Semantics

In its reinvigorated campaign to personify the fetus, now being played out in debates over the Partial-Birth

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Abortion Ban Act and the Unborn Victims of Violence Act, the antiabortion movement is looking back to the future. As a public relations matter, the campaign is an

effective one, and what is especially disturbing is how well the insinuations that these bills have nothing to do with *Roe v. Wade* are working. When the Senate voted on the “partial-birth” abortion bill this fall, for example, 16 senators who consider themselves prochoice apparently saw no conflict in voting for the ban and for a resolution that reaffirms *Roe*. During House debate on the Unborn Victims of Violence Act, the incongruity of asserting that the fetus is a separate being with “rights” and yet subject to being aborted was largely ignored.

Opponents of abortion can only welcome this “cognitive dissonance.” Certainly they understand that they are engaged not in semantic exercises but in an effort to lay real building blocks for an eventual overturn of *Roe*. ☉

HPV...

continued from page 2

the few places where people can get full, honest, legitimate information about their risk for contracting HPV,” she says. “We educate people in a confidential, safe environment on how to limit and restrict their risks, including their risk of reinfection. We help them to assess their risks, in terms of their own behaviors and that of their partners, so they can choose healthy lifestyles and figure out how best to minimize their risks. That may include getting themselves out of risky relationships. We also teach them to be meticulous about both male and female condom use” so that they can better protect themselves against STDs, including HIV, as well as unintended pregnancy.

Clark notes that as a major provider of reproductive health care for low-income women and teenagers who are often uninsured or lack another source of care, family planning clinics

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ics today serve a significant proportion of women in need of Pap smears and testing and treatment for STDs. In fact, according to AGI estimates, the 7,000 publicly funded family planning clinics in this country

serve one in seven of the women of reproductive age who obtain Pap smears and pelvic examinations, as well as one in three who obtain STD testing or treatment and one in four who obtain HIV testing.

Clark adds that not only are clinics providing these services, but “some clinics are also engaged in research to help identify strains of HPV, including those linked to cervical cancer.” She continues: “Ironically, at a time when opponents of subsidized family planning programs attack the clinic system for turning its back on HPV, clinics are not part of the problem but part of the solution. These are the very places we should be putting our resources in the fight against cervical cancer and STDs.” ☉