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Legal Issues in Medicine

“PARTIAL-BIRTH ABORTION” AND THE SUPREME COURT

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ABORTION has long been, and remains, the most politicized medical procedure in the United States. It has been the subject of more state and federal legislation than all other medical procedures combined. The U.S. Supreme Court, which almost never hears cases about medical procedures, has regularly heard cases over the past 25 years concerning the constitutionality of various state laws designed to limit abortion. Thus, it was only a matter of time before the Court would hear a case on the constitutionality of laws restricting so-called partial-birth abortion.¹ When the Court heard a challenge to Nebraska’s law, statutes relating to partial-birth abortion had been enacted in 30 states, and two bills banning such abortions had been passed by Congress. All the appeals courts except one, the Seventh Circuit Court of Appeals, had found these laws unconstitutional, and the opinion of that court rested on an extremely narrow interpretation of the law.²

The controversies surrounding partial-birth abortion are over how to describe the procedure and whether physicians ever need to use it to protect the health of a pregnant woman. The Supreme Court confronted these issues in the case of *Stenberg v. Carhart* last summer.³

THE NEBRASKA PARTIAL-BIRTH ABORTION LAW

The Nebraska law provides that “no partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”⁴ Like the federal acts twice passed by Congress and vetoed by President Bill Clinton, the Nebraska law defined partial-birth abortion as “an abortion in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” The law further defines the phrase “partially delivers vaginally a living unborn child before killing the unborn child” to mean “deliberately and intentionally delivering into the vagina a living un-

born child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.”⁴ Violation of the law is a felony that carries a prison term of up to 20 years, a fine of up to \$25,000, and automatic revocation of a medical license.

Dr. Leroy Carhart, a Nebraska physician who performs abortions, sued in federal court to have the law declared unconstitutional. U.S. District Court judge Richard G. Kopf reviewed abortion procedures in detail, using a drawing of female pelvic anatomy as an attachment to his opinion, before holding that the statute was unconstitutional because it endangered women’s lives and health and was void for vagueness because physicians could not know what conduct it proscribed.⁵ The Court of Appeals for the Eighth Circuit affirmed the District Court ruling.⁶ By a five-to-four vote, the Supreme Court ruled on June 28, 2000, that the Nebraska law and all other laws banning partial-birth abortion are unconstitutional.

THE MAJORITY DECISION

The opinion of the Court was written by Justice Stephen Breyer, one of only two current justices (the other is Ruth Bader Ginsburg) who had not previously expressed an opinion in a major decision about abortion. The opinion is best understood as a direct application to the Nebraska law of the principles articulated in the 1973 decision in *Roe v. Wade*⁷ and the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸ In *Roe* the Court held that because a woman’s right to privacy is “fundamental,” states must demonstrate a “compelling interest” in order to restrict abortion, and they are unable to demonstrate such an interest before the time when the fetus becomes viable. Moreover, *Roe* made it clear that the state could not favor the life of the fetus over the life or health of the pregnant woman. The Court in *Casey* affirmed the core holding of *Roe*, that states cannot outlaw abortion before the time of fetal viability and can do so thereafter only if the woman’s life and health are protected. States were permitted, however, to regulate abortions so long as any restriction did not impose an “undue burden” on the pregnant woman’s liberty interest in terminating her pregnancy.

The Nebraska ban applies throughout pregnancy and has no exception to preserve a woman’s health. Under *Roe* and *Casey*, the state of Nebraska had to demonstrate that the state had at least a legitimate interest in outlawing partial-birth abortions and that doing so would not place an undue burden on women. Because it is a criminal statute, the legislature had to be very clear about what exactly the statute prohibited. In order to determine exactly what was and was not prohibited, Justice Breyer, like the trial court judge, devoted nearly the entirety of his opinion

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to describing various abortion procedures and comparing them with the language of the Nebraska law.

HOW ABORTIONS ARE PERFORMED

Justice Breyer introduced his descriptions of abortion procedures by stating that they may seem “clinically cold or callous to some, perhaps horrifying to others,” but that he saw no other way “to acquaint the reader with the technical distinctions among different abortion methods and related factual matters, upon which the outcome of this case depends.” Breyer noted, among other facts, that 90 percent of abortions in the United States are performed before 12 weeks of gestation, and almost all the rest are performed between 12 and 24 weeks. Almost all second-trimester abortions are performed by means of dilation and evacuation, with variations depending on the stage of gestation. Breyer quoted a report from the American Medical Association (AMA) as saying that at 13 to 15 weeks of gestation, “D&E [dilation and evacuation] is similar to vacuum aspiration except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue.” After 15 weeks, the AMA report continues, because of the increased size of the fetus and the rigidity of its bones, “dismemberment or other destructive procedures are more likely to be required . . . to remove fetal and placental tissue.” And after 20 weeks, “some physicians use intrafetal potassium chloride or digoxin to induce fetal demise . . . to facilitate evacuation.”³

Breyer then made a series of observations and factual conclusions that determined the outcome of the case. He found, first, that the various dilation-and-evacuation procedures have in common the dilation of the cervix, the removal of at least some fetal tissue with the use of surgical instruments, and (after the 15th week) the potential need for dismemberment of the fetus. When dismemberment does occur, it typically occurs “as the doctor pulls a portion of the fetus through the cervix into the birth canal.” Breyer noted that a variation of dilation and evacuation, which the physicians who testified at the trial referred to as “intact D&E” or dilation and extraction, is used at 16 weeks at the earliest, when vacuum aspiration is ineffective and the fetal skull is too large to pass through the cervix. Dilation and extraction may proceed in two ways: if the fetus presents head first, the physician collapses the skull and then extracts the intact fetus through the cervix; if there is a breech presentation, the physician pulls the fetal body through the cervix, then collapses the skull, and then extracts the fetus.³

On the basis of information from medical textbooks and the position taken by the American College of Obstetricians and Gynecologists,⁹ Breyer concluded that “intact D&E and D&X [dilation and extraction] are sufficiently similar for us [the Court] to use the

terms interchangeably.” There are no accurate statistics available on the number of dilation-and-extraction abortions performed in the United States, and Breyer cited estimates ranging from 640 to 5000 cases per year. He found that such abortions are performed for a variety of reasons, including reducing the danger caused by the passage of sharp bone fragments through the cervix, minimizing the number of surgical instruments used (and thereby decreasing the likelihood of uterine perforation), reducing the likelihood of infection, and helping to ensure the removal of all fetal tissue. Dilation and extraction is also the preferred method for fetuses with hydrocephaly and anomalies incompatible with fetal survival.³

All this was much more detail about a medical procedure than had ever appeared before in a Supreme Court opinion. The factual conclusions, however, were necessary to answering the two major constitutional questions posed by Nebraska’s ban: Must a law prohibiting the use of a medical procedure for abortion contain an exception to protect the health of the pregnant woman as defined in *Roe*? And does the Nebraska law “unduly burden” a woman’s right to choose to terminate her pregnancy as defined in *Casey*? Justice Breyer’s answer to both of these questions was yes.

WOMEN’S HEALTH

Justice Breyer recited the rule, as stated in *Roe v. Wade*, that a state may outlaw abortion after the fetus is viable in order to promote its interest in protecting potential human life, “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” Breyer logically concluded that if *Roe* requires an exception for the mother’s health after fetal viability, it must require one before viability, when the state has less of an interest in protecting fetal life.

Would the ban in fact adversely affect the health of pregnant women who want to terminate their pregnancies? Breyer concluded that it would, on the basis of the belief of “significant medical authority” that “in some circumstances, D&X would be the safest procedure.” Breyer found especially persuasive the brief to the Court in which the American College of Obstetricians and Gynecologists stated specifically that dilation and extraction “may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman.”^{3,9} Nebraska relied on a contrary statement of the AMA that “there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion.”³

Breyer rejected the argument that the word “necessary,” as used in the opinion *Planned Parenthood v. Casey* — “necessary, in appropriate medical judgment, for the preservation of the life or health of the mother”⁸ — means an “absolute necessity” or requires

“absolute proof.” He concluded that the words “‘appropriate medical judgment’ must embody the judicial need to tolerate responsible differences of medical opinion.” Breyer, who has special expertise in administrative law and risk assessment, went on to say that “the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence.” He concluded that “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’”³

DISTINGUISHING BETWEEN DILATION AND EXTRACTION AND DILATION AND EVACUATION

The second constitutional issue was whether the statute imposed an “undue burden” on a woman’s liberty to terminate her pregnancy before the fetus was viable. The answer to this question depended on whether the statute was precisely written so as to apply only to the rare dilation-and-extraction procedures and not to the more routine dilation-and-evacuation procedures as well. On the basis of the statute’s descriptions of the procedure, Breyer concluded that its language “does not track the medical differences between D&E and D&X.”

Breyer stated that it would have been a simple matter for the state legislature to provide an exception for dilation-and-evacuation procedures, but given the medical material he quoted in his opinion, it is difficult to see how this could be effectively done. The attorney general of Nebraska, for example, argued unpersuasively that the two procedures were actually distinguished by the words “substantial portion” of the fetus, which the attorney general interpreted as meaning “the child up to the head” and thus not including “a fetal arm or leg or anything less than the entire fetal body.” Because of the vagueness of the statute, Justice Breyer concluded that the statute threatened physicians who would otherwise perform dilation-and-evacuation procedures, but who would not now perform them because they would “fear prosecution, conviction, and imprisonment.” This results in placing “an undue burden on a woman’s right to make an abortion decision.”

THE CONCURRING OPINIONS

Justices John Paul Stevens, Sandra Day O’Connor, and Ruth Bader Ginsburg each wrote brief concurring opinions. Stevens emphasized that the extent of the rhetoric surrounding abortion often obscures the fact that, during the past 27 years, the core holding of *Roe v. Wade* “has been endorsed by all but 4 of the 17 justices who have addressed the issue.” He also

argued (persuasively, I think) that “the notion that either of these two equally gruesome procedures [dilation and extraction and dilation and evacuation after 15 weeks] 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.” Justice O’Connor agreed with Breyer but added that she thought “a ban on partial-birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional.” Justice Ginsburg emphasized that the Nebraska law would “not save any fetus from destruction” nor “protect the lives or health of pregnant women” and that therefore the state had no legitimate interest in enacting it.³ She also cited Chief Judge Richard Posner, who had made this point in an extremely cogent dissent to the opinion of the Seventh Circuit Court. “These statutes,” wrote Posner, “are not concerned with saving fetuses . . . [or] with protecting the health of women. . . . They are concerned with making a statement in an ongoing war for public opinion. . . . The statement is that fetal life is more important than women’s health.”²

THE DISSENTING OPINIONS

There are four dissenting opinions, the two major ones written by Justices Anthony Kennedy and Clarence Thomas; Chief Justice William Rehnquist joined both of them, and Justice Antonin Scalia joined the Thomas dissent. Justice Kennedy objected to the majority’s use of medical textbooks and terminology to describe abortion procedures, arguing that this technical language “views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life . . . [and] may obscure matters for persons not trained in medical terminology.” He did not refer to physicians as physicians, instead calling them “abortionists,” and proceeded to describe the dilation-and-extraction procedure in lay terms. His version included such descriptions as the following: “with only the head of the fetus remaining in utero, the abortionist tears open the skull [using] . . . a pair of scissors.”³ Kennedy concluded that permitting an exception to preserve the health of the woman would be the equivalent of forbidding Nebraska to ban partial-birth abortion. In his words, “A ban which depends on ‘the appropriate medical judgment’ of Dr. Carhart is no ban at all.”³

Kennedy’s central argument was that under *Casey*, states “have an interest in forbidding medical procedures which, in the State’s reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.” But this argument could apply to all abortions, and it is not, in fact,

what *Casey* held. Moreover, he argued that it is irrelevant that the majority of the justices cannot see the difference between dilation and evacuation and dilation and extraction. “The issue is not whether members of the judiciary can see a difference between the two procedures,” Kennedy wrote. “It is whether Nebraska can.” Regardless of whether physicians can distinguish between legal and illegal medical procedures, Kennedy argued that the state of Nebraska has a “right to declare a moral difference” between two medical procedures.

Kennedy also believes that there is a real difference, arguing, for instance, that “D&X perverts the natural birth process to a greater degree than D&E, commandeering the live birth process until the skull is pierced”; that the fetus is “killed outside of the womb”; and that dilation and extraction bears a “stronger resemblance to infanticide.” Finding that the state has a legitimate interest in outlawing this abortion procedure, Kennedy then argued that the Court has no medical expertise sufficient to second-guess the Nebraska legislature on its determination that abortion by dilation and extraction is no safer than other methods of abortion and is therefore never medically necessary. In this view, outlawing dilation-and-extraction abortions (which Kennedy believes are the only type affected by the statute) would deprive no woman of access to a safe abortion, and thus cannot, under the terms set forth by *Casey*, place an undue burden on the pregnant woman.

Justice Thomas, like Kennedy, was upset by Breyer’s “sanitized” medical descriptions, noting that since *Roe*, “this Court has never described the various methods of aborting a second- or third-trimester fetus.” Thomas also argued that the statute’s plain language can and should be interpreted as including only abortions by dilation and extraction, and not by dilation and evacuation. To the argument that “partial-birth abortion” is not a medical term, he replied simply and accurately, “There is, of course, no requirement that a legislature use terminology accepted by the medical community.” Thomas disagreed that the state cannot second-guess physicians who believe use of a particular abortion method is necessary to preserve a woman’s health. He argued that the majority opinion “eviscerates *Casey*’s undue burden standard and imposes unfettered abortion on demand.” In his view, the resolution of differences among physicians regarding the safety of abortion procedures should be left to the state legislatures.³ The dissenters, in short, do not believe that physicians can be trusted to make good-faith decisions about the health of their patients.

CONSTITUTIONAL LAW AFTER *STENBERG*

The majority opinion in *Stenberg* demonstrates that five justices take *Roe v. Wade* and *Casey* seriously. By applying the basic principles of these decisions, the majority found the Nebraska statute unconstitution-

al for the following reasons: because it would place an undue burden on a woman’s right to choose an abortion, as such a burden is defined in *Casey*; because it is so vague, in that it might be interpreted as applying to dilation and evacuation and might thus intimidate physicians, who might therefore not perform them; and because the statute provided no exception for protecting the health of the woman, as required by *Roe*. Thus, in this opinion, five justices strongly reaffirmed *Roe* and *Casey*.

The somewhat surprising vote, and the one that has caused pro-choice commentators the most concern, was that of Justice Kennedy, one of the three justices who wrote the joint opinion in *Casey* (the others are Sandra Day O’Connor and David Souter).^{8,10} Kennedy stated that the Nebraska law did not impose an undue burden on women as defined by *Casey*, whereas O’Connor and Souter found that it did. Does this mean that Kennedy might change his mind about the *Casey* decision and vote to overrule it along with *Roe v. Wade* at some future time? No one can say for sure. But I do not believe that such a conclusion can be drawn from this case. In *Stenberg*, because five justices upheld *Roe* and *Casey*, Kennedy could express his own moral outrage at partial-birth abortion — and support Nebraska’s right to express its moral outrage — without having his personal views change the outcome of the case or the constitutional status of either *Roe* or *Casey*.

The result in *Stenberg* was determined by *Roe* and *Casey*. Justice O’Connor may be correct in noting that it would be possible to craft a statute that meets constitutional requirements. But given the medical facts, such a statute would probably not apply to any patient in the real world. In my view, there is little likelihood that redrafted statutes will be the centerpiece of antiabortion activity at the state or federal level after this opinion. On the other hand, antiabortion forces will most likely renew their efforts to change the composition of the Court by lobbying for the appointment of justices with strong antiabortion stances.

Physicians should take comfort from the Court’s strong protection of the application of medical judgment. In this regard, the opinion can be seen as reflecting *Roe v. Wade*’s strong endorsement of the privacy of the physician–patient relationship and the right of women and their physicians to make decisions about abortion.¹¹ The opinion reflects this endorsement by focusing much more attention on physicians and the medical techniques they use than it does on women and their lives and liberty. This focus was necessary because the statute under review aimed to restrict medical practice. *Casey*, on the other hand, dealt with restrictions of women’s autonomy and therefore centered more on women, whose constitutional rights were directly at stake. The opinion’s emphasis on physicians may also explain why Dr. Car-

hart entitled his presentation last October to an audience of Harvard medical students “Partial-Birth Abortion, the Supreme Court, and Physician Autonomy,” as well as why he personally remains a target of antiabortion forces.¹²

MEDICINE AND ABORTION

A deeper discussion of the availability of safe abortions to protect women’s lives and liberty may be too much to ask of the Supreme Court. Maybe, in the debate over abortion, we are all past the point at which facts and logic matter. As the decision in *Stenberg* underlines, the law can determine whether abortions are permitted, but only physicians — with their patients — can determine how they may be performed safely. Ultimately, the central question regarding abortion remains who should make the decision: the state or women and their physicians together. The answer of the Supreme Court, as articulated in *Roe v. Wade* and its companion case, *Doe v. Bolton*,¹³ and now strongly reinforced in *Stenberg*, is that the decision

belongs to the woman and her physician together. In this respect, the Court has been remarkably consistent in all the abortion cases it has heard.

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