



## ***Position Paper #23***

### **The Invention of “Partial-Birth” Abortion**

The following arguments explain how anti-abortion activists in the United States invented the term “partial-birth” abortion, using it in legal battles meant to curtail abortion rights. It also considers the relevance of this controversial term to the practice of abortion in Canada.

#### **What is “Partial-Birth” Abortion?**

“Partial-birth” abortion does not exist; there is no such procedure. The term is not used by the medical profession, and has never appeared in a medical journal. The phrase was invented in 1995 by anti-choice strategists in the United States hoping to ban late-term abortions. State and federal laws were introduced to ban “partial-birth” abortions, although President Clinton vetoed the federal law twice.

In the states, many courts ruled that their definition of “partial-birth” abortion was so vague it could apply to a range of abortion procedures, including the one commonly used for second trimester procedures—dilation and evacuation (D&E). It is often assumed, however, that “partial-birth” abortion refers to the intact dilation and extraction (D&X) procedure, which is a much rarer procedure reserved for late-second term and third-trimester abortions. D&X is designed primarily to be used in the case of fetuses that are dying, malformed, or threatening the woman's health or life. The procedure involves pulling the fetus from the womb, except for the head which is too large to pass without injuring the woman. The head is then collapsed to allow removal. Doctors who use with this procedure do so because it entails less medical risk for the patient.

#### **Producing a New Category, the “Not Unborn”**

Anti-abortion advocates use the term “partial-birth” abortion to create a new category for the fetus as “not unborn.” In 1973, the Supreme Court of the United States ruled that a fetus is not a person<sup>1</sup>. It did not, however, declare that a fetus in the process of being born is not a person. The main goal of the 1995 *Partial-Birth Abortion Ban Act* was to bypass *Roe v. Wade* by granting citizenship to the “not unborn.” The 1995 Act declared that “the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery”<sup>2</sup>. This definition potentially impacts a wide range of procedures, for if anything enters the vagina from the

---

<sup>1</sup> *Roe v. Wade*. Jan 22, 1973. <https://supreme.justia.com/cases/federal/us/410/113/case.html>

<sup>2</sup> Charles Canady, *Report from the Committee on the Judiciary to the 104<sup>th</sup> Congress*, 1<sup>st</sup> sess., House Report 104-267: Partial-Birth Abortion Act of 1995, 2

uterus before fetal demise—even a small piece of umbilical cord—the fetus is transformed from the category of unborn to that of “not unborn” or “partially born.”

## Misleading Imagery

The most misleading aspect of anti-abortion accounts of “partial-birth” is the insistence that anything passing through the vagina is outside of a woman’s body and thus “not unborn.”<sup>3</sup> This definition effectively proclaims that women’s vaginas are exterior to their bodies – public rather than private spaces.

Such misrepresentation of the female body is standard in anti-abortion imagery. Ubiquitous photographs of miscarried fetuses, for example, erase all signs of the maternal body to create the fantasy that fetuses are autonomous individuals. Yet to convince the public that “partial-birth” abortion is wrong, anti-abortion advocates have primarily created and disseminated drawings. A popular anti-choice drawing featured on many websites purports to depict “A Doctor’s Illustrated Guide to Partial-Birth Abortion.” Scholar Carol Mason explains that this drawing portrays a healthy, viable, and whole toddler (not a fetus) being removed from a uterus. The pregnant woman lacks all other internal organs, as well as a head, legs, and arms. Her vagina has been entirely erased. This strategic removal of the maternal body allows the viewer to avoid seeing the woman as a person who has made a difficult decision about an unhealthy fetus. It represents the fetus as a child in need of protection, encouraging viewers to identify with it rather than with the pregnant woman<sup>4</sup>.

## Has this Anti-Abortion Campaign Been Effective?

Unfortunately, yes. In June 2000, the Supreme Court struck down a Nebraska statute banning “partial-birth” abortion, saying the procedure should remain legal for the health of the mother and other reasons<sup>5</sup>. In 2005, the 4th Circuit Court of Appeals ruled that a Virginia “partial-birth” abortion ban was unconstitutional because it did not contain an exception to protect a woman’s health.

However, previously in 2003, President George W. Bush signed into law the *Partial-Birth Abortion Ban Act* of 2003, which more narrowly defined “partial-birth” abortion as intact D&X. Over the next year, judges in three separate federal courts struck down the law as unconstitutional because it had no health exception. The federal government appealed the district court rulings, which were affirmed by three courts of appeals. But the Supreme Court agreed to hear the *Carhart* case and upheld the statute in 2007 in a 5-4 decision<sup>6</sup>.

Justice Anthony Kennedy wrote for the majority and Justice Ruth Bader Ginsburg dissented, joined by Justices Breyer, Souter, and Stevens. Ginsburg argued that the decision departed from established abortion jurisprudence, and the lack of a health exception “jeopardizes women’s health and places doctors in an untenable position.” Ginsburg also said that the majority used “flimsy and transparent justifications for upholding a nationwide ban,” and that the majority reasoning was sexist and paternalistic, relying on anti-abortion beliefs about women’s “fragile emotional state” and the need to preserve the “bond of love the mother has for her child.”

---

<sup>3</sup> Not all people with vaginas are women; some transgender and non-binary people can also get pregnant.

<sup>4</sup> *Killing for Life: The Apocalyptic Narrative of Pro-Life Politics*, Ithaca: Cornell University Press, 2002, 84-85

<sup>5</sup> *Stenberg v. Carhart*. 120 S.Ct. 2597.

<sup>6</sup> *Gonzales v. Carhart* 127 S.Ct. 1610.

## Impact on Canada

At a policy convention in March 2005, some members of the Conservative Party of Canada attempted to debate a clause calling for a "ban on the performing or funding of third trimester 'partial-birth' abortion." Other Conservatives supported a resolution indicating a future Tory government would "not initiate any legislation to regulate abortion," rendering the "partial-birth" discussion moot.<sup>7</sup> Clearly, the anti-choice faction of the Party was attempting to mimic anti-abortion strategies developed in the United States. This American approach cannot, however, simply be transferred to Canada.

No third trimester abortions are done in Canada done for "elective" reasons. The Canadian Medical Association's policy is to endorse abortions on request only up to 20 weeks<sup>8</sup> (or 22 weeks LMP, after last menstrual period). Hospitals and doctors in Canada comply with this policy. People who need abortions past 20 weeks for compelling maternal health reasons or serious fetal abnormalities can get them in a few facilities in Canada, but patients may also be referred to a handful of clinics in the United States. These out-of-country procedures are generally funded by provincial governments, on the grounds that they are medically required and not easily available in Canada. The lack of availability occurs because later-term abortions require a high level of skill, experience, and dedication, and there are few providers willing or able to do them in Canada. Condemning "partial-birth" abortion or the D&X technique in Canada is simply part of a political effort to promote disinformation about abortion, and to undermine all abortion rights.

---

<sup>7</sup> Yet, conservative MPs often try to raise the issue, though they are always unsuccessful, such as when members of parliament voted 203 to 91 against Motion 312 to set up a committee to study how the *Criminal Code* defines when life begins. <http://www.cbc.ca/news/politics/motion-to-study-when-life-begins-defeated-in-parliament-1.1214834>

<sup>8</sup> <http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD88-06.pdf>