

A Lack of Jurisprudence

by Brian Rohrbough
President, American Right To Life

[Minor updates after the 2008 election; original [available](#).]

Clarke Forsythe, president of Americans United for Life, wrote a Fall 2007 Human Life Review article, [A Lack of Prudence](#), criticizing leaders he never named for an argument he never described. As the president of American Right To Life, I urge Christians who believe we are in error to address our arguments head on.

We condemn the fifteen-year partial birth abortion fiasco because while it excelled as a fundraiser generating a quarter of a billion dollars, it never had the authority to prevent even one abortion.

American Right To Life opposes every law that regulates the killing of unborn children because, regardless of the intention, such laws:

- make abortion seem more palatable to the public and politicians, and so
- merely prune the abortion weed and strengthen its root, while they
- violate God's enduring command, *Do not murder* by re-authorizing abortion, and
- on the surface undermine the very concept of the right to life of the unborn, and
- call upon judges to uphold laws that regulate killing the innocent, and thus
- turn conservative judges increasingly against the Right to Life of the unborn, and
- could easily authorize a hundred million abortions post Roe, for they
- will keep abortion legal if Roe v. Wade is merely overturned, and because they
- end with the legal meaning, "and then you can kill the baby."

Law is authority. Regulation is authority. Supreme Court rulings exercise authority. Only being able to save one of three children in a burning building is tragic but refraining is inexcusable. Opportunistic rescue is a moral imperative and does not authorize the killing of the innocent. But worse than saving none would be passing a law that acknowledges a right to burn alive one child to save every other in the world. As Ambassador Alan Keyes says, "That's the devil's game; he'd be happy to ban every abortion if we'd all agree to just one."

While Forsythe only identified us as "certain anti-abortion activists," HLR readers should know that the signers of the full-page open letters critical of the PBA ban included the heads of Human Life International, Operation Rescue National, American Life League, and the oldest "Right To Life" group in the country, Colorado RTL. Leaving the organizations unnamed made it easy to make the claim throughout the article that the critics "misunderstand" the legislative process and the courts.

Our ads, published in newspapers around the country from the Washington Times to the Colorado Springs Gazette, named legal and political leaders who joined us in condemning the PBA ban including:

- Attorney John Archibold, founding board member, AUL & National RTL
- Dr. Charles Rice, Notre Dame Law School Professor Emeritus
- Steve Curtis, former Chairman, Colorado Republican Party
- Ambassador Alan Keyes

Those recognizing the evil of the so-called PBA ban continue to pick up strong allies including Washington D.C. March for Life organizer Nellie Grey; James Odom, Focus on the Family staff attorney who left Dr. James Dobson's organization largely due to this controversy; and Judge Roy [Moore](#), former Chief Justice of the Alabama Supreme Court, whom we added to our later full-page ads as one of the many credentialed leaders condemning the *Gonzales v. Carhart* PBA ruling.

Mr. Forsythe sidesteps our principled arguments and corroborating evidence by claiming that we all simply misunderstand the PBA ban, the process, the ruling, etc. He should be able to admit that, after decades of regulating child killing, strong disagreement is growing within the pro-life movement. We don't misunderstand; we disagree, vehemently.

After seeing our ad in his newspaper, even the nation's leading ban supporter, Dr. Dobson, admitted in his May 2007 newsletter available online that, "Ending partial-birth abortion... does not save a single human life." Of course it doesn't and in the two years since the ruling, the abortion industry brought no "as applied" challenges to the ban, but compromised organizations including Michigan Right To Life, refusing to let their fund-raising bonanza die, continue to tilt at PBA windmills.

The AUL president opened his article writing that, "The crux of the criticism seems to be that the *Gonzales* decision was 'brutally wicked,' because the Court didn't prohibit all abortions (or at least D&E abortions)." Our open letters never gave the reason Forsythe suggested. Rather we wrote, documenting that this ruling:

is not [even] a ban, but a *partial-birth abortion manual*. These 'pro-life Justices' give instructions on what can be called *Navel Birth Abortion*, only a four-inch variation from a textbook PBA. Steps from the ruling:

- 1) The abortionist may partially deliver the unborn child all the way to the bellybutton, but not "past the navel"
- 2) Then "a leg might be ripped off," etc. to "kill the fetus"
- 3) Or alternatively, "find... less shocking methods to abort"

Pro-life organizations applauded these "pro-life" Justices stating for example, "the Supreme Court has affirmed the value of human life." But the superficial media accounts notwithstanding, the court actually maintained the legality of even partial-birth abortion. Our open letters quote extensively from the *Gonzales* ruling itself. Here is one example from our *Human Events* ad from June 11, 2007, that these Justices:

concur optimistically on page 30 that, "The medical profession [**abortionists**] **may find different and less shocking methods to abort the fetus...**" The Justices... upheld a mere "regulatory" law "under the Commerce Clause" (p. 36). These Justices misrepresented as "pro-life" *actually suggest* other ways for abortionists to kill the fully intact, late-term child to comply with their regulation, such as "*an injection that kills the fetus*" (p. 34). Imagine the horror yet to come now that our greatest Christian leaders are willing to call good evil, and evil good. Throughout the ruling, Justices Kennedy, Roberts, Scalia, Thomas, and Alito concur that both the partial-birth abortion (PBA) ban, and their ruling, allow the abortionist to deliver a late-term baby *all the way up to the navel* and then kill him (especially pp. 17-26). To actually violate this regulation "requires the fetus to be delivered 'until... any part of the fetal trunk past the navel is outside the body of the mother'" (p. 17)."

The growing list of those condemning the PBA fiasco contains many qualified observers but even if it did not, no Christian needs a law degree to know that a ruling is wicked if it allows, for whatever fallacious justification, the execution of a Jew for being Jewish, or a black man to be owned, or a baby to be pulled out to the bellybutton and killed. *Gonzales v. Carhart* is not a pro-life ruling but is brutally wicked on its face.

Forsythe claims the PBA Ban Act and ruling were beneficial because they "served several purposes," and he lists five, three of which were publicity for the pro-life cause, one was circular (*Gonzales* overturned *Stenberg* which had struck down PBA bans) and one was a brand new legal justification: the PBA ban "served as a legal fence between abortion and infanticide." This is an after-the-fact stretch to find a legal justification for a misguided effort. Further, there is no fence, just a swinging gate, since the PBA ban does not even attempt to prohibit killing a child. The next fundraising cycle, opposition to FOCA, the Freedom of Choice Act, demonstrates the pro-life industry's swinging gate

model. The industry's strategy of regulating child killing only builds gates; personhood alone builds a fence.

Forsythe's remaining three claims were that the PBA BAN was justified for the publicity it garnered: that it "brought national public attention," "showed the cruelty," and "helped the public better understand..." These do not justify the immorality of regulating child killing. And these claims were further undermined by the proclaimed "victory" that didn't save even one child but misled a nation into believing that this wicked court was pro-life. In 1999 my son Daniel Rohrbough was murdered at Columbine High School along with twelve other people. The Columbine murderers thought publicity justified their actions and in the aftermath many others, driven by their agendas, actually tried to rationalize the wrongdoing claiming it could bring about "gun control" or some other great good, like raising money for their cause. We must start acknowledging that every unborn child is a person with the God-given right to life, a right that we have no authority to bargain with.

When the *Gonzales* ruling came down I was president of Colorado RTL. Our widely-read ruling [analysis](#) is still available online at ColoradoRTL.org. Some activists then claimed this was a good ruling, "because the abortionists complained." But Planned Parenthood did not appreciate the mavericks who caused them such difficulty by performing partial-birth abortions. And while the abortion industry makes an obligatory stand against any "pro-life" effort, they probably laugh that the PBA ban did their heavy lifting and cleaned up their greatest, and perhaps fatal, public relations nightmare. We did not need the Supreme Court to uphold a modified partial-birth abortion, which is what they did, in order to expose the wickedness of child killing. And worse, now we have Christian leaders using technicalities to defend and dismiss the brutality of the PBA ruling, further muddying the public's conscience.

Forsythe objected that we characterized *Gonzales* as brutal suggesting we made that assessment because we were against incrementalism in that, he presumed, "the Court didn't prohibit all abortions." However, simply reading [our letter](#) shows otherwise. We wrote:

Incrementalism is fine; compromised incrementalism violates God's enduring command, *Do not murder*. When you compromise on this fundamental law, you undermine the pro-life goal of re-establishing the personhood of the child, and you cannot possibly foresee all the negative consequences. And now these kids will suffer more horrifically with this ruling than before, as we congratulate ourselves.

Dr. Dobson, in celebrating this evil ruling, you used the word "*brutally*" regarding PBA. The ruling itself speaks of *brutality*, but in the opposite sense that you used it. The Justices raise the likelihood that *with this ruling, the fetus faces greater brutality*. On page 30, **the Justices note the objection "that the standard D&E is in some respects as brutal, if not more, than the intact D&E [PBA]."** That is, standard late-term D&E abortion appears to be more cruel than PBA. And the Justices *do not rebut that claim*. Their interest is not to *protect children*, but to promote the "integrity and ethics" (p. 27) of late-term abortion. **The concern of these "pro-life Justices" has nothing to do with the brutality against the child, but with improving "the public's perception" (p. 30) of late-term abortion.**

Americans United for Life, Focus on the Family, and the National RTL Committee spent fifteen years leading an effort to regulate child killing that ensured that late-term abortions are more painful to children and less visible to the public, hiding the victim, and improving the image of her murderer.

The U.S. Supreme Court never reversed their wicked Dred Scott decision, and it is unknown how "legalized" child killing will eventually be ended in America. While the personhood wing advances, teaching the public and governing officials about the God-given right to life of the unborn, the child-killing regulators try to undermine every personhood effort as though victory will come only as more judges agree to violate the most fundamental principle of government. Perhaps the road to abolition will go through the "borking" of a dozen judges who know right from wrong. Apart from the Second

Coming of Jesus Christ, American RTL claims it irrefutable that, if pro-life leaders cling more tightly to power and influence than to morality and justice, their own actions will postpone the eventual protection of the innocent.

Mr. Forsythe then claims that we misunderstand and quote *Gonzales* out of context. However, virtually none of the pro-life groups that praised the ruling actually linked to it. Our websites link directly to the ruling and our ads ask the readers to go online to SupremeCourtUS.gov and read it for themselves. We do not misrepresent or misuse the context of these horrendous quotes, including that the Justices recorded their hope that the:

- "The medical profession... may find different and less shocking methods to abort the fetus (p. 30)"
- The ruling affirms causing "**the fetus to tear apart**" (p. 4)"
- "If a living fetus is delivered past the critical point [the bellybutton] by *accident or inadvertence* [and then killed] **no crime has occurred** (p. 18)"
- And **for the purpose of this current opinion**, Kennedy, Roberts, Scalia, Thomas, and Alito, regarding a still living unborn child, ruled that "**the removal of a small portion ['say, an arm or leg' as stated in the ruling] of the fetus is not prohibited**" and that's after the baby is pulled out to his bellybutton (p. 22)
- The court ruling results in the legal preference for "**reasonable alternative procedures**" (p. 33) for killing "late-term" children, including that "**a leg might be ripped off the fetus,**" "**friction causes the fetus to tear apart,**" "**evacuating the fetus piece by piece continues,**" "**10 to 15 passes with the forceps,**" "**ripping it apart,**" "**dismemberment**" (pp. 4-6)

And Americans United for Life applauds the court. We rebuke them. This is a brutally wicked ruling. Then in an extraordinary attempt to wash the hands of judges on the very court that "legalized" murdering the innocent nationwide, Forsythe writes "the justices... do not 'rule' that abortions unprohibited by the statute 'are legal.'" Startling.

Forsythe then proves that legal positivism (which is moral relativism in law) prevails at AUL, when he wrote that, "*the critics impugn Justices Thomas and Scalia* for their established position that abortion is a matter to be decided by the people at the state level because the Constitution contains no right to abortion." No constitution or other side-deal among men has the authority to set aside God's enduring command, *Do not murder*. No state nor any subdivision of government has the authority to de-criminalize gassing Jews, lynching blacks, or killing children. We note however that the Constitution does require that the states provide equal protection of the law to all persons.

Googling these quotes will corroborate that in 2002 Scalia said, "I will... strike down a law that is the *opposite* of *Roe v. Wade*. ... One wants no state to be able to prohibit abortion and the other one wants every state to have to prohibit abortion, and they're *both wrong*..." In 2006 Scalia claimed, "Take the abortion issue... there's something to be said for both sides." And on April 7, 2008 Scalia said, "You want the right to abortion? Create it the way most rights are created in a democracy. Persuade your fellow citizens it's a good idea – and pass a law." In September 2008 Scalia told CBS News' *60 Minutes* that, "anti-abortion people... say that the Equal Protection Clause requires that you treat a helpless human being that's still in the womb the way you treat other human beings. I think that's wrong." Clarence Thomas is just as bad.

On the historic date of May 29, 2008, Colorado certified 103,000 signatures to put the Personhood Amendment on the November ballot. Contrary to the conventional wisdom that only around 10 percent of the public supports an outright ban, 27 percent, which is more than a half million voters in liberal Colorado, 585,000 people, voted to end all abortion! After being vastly outspent, and opposed by the pro-life industry and all Republican presidential and senatorial candidates, American Right To Life helped this grassroots effort double the supposed maximum percent of those willing to stop child killing! Pro-lifers taught citizens and governing officials of their obligation to advocate enforcement of the God-given right to life and of His command, *Do not murder*. We then put our money where our

mouth is to underscore the case against the Supreme Court Justices and sent out the following press release:

\$10,000 Offer to National RTL from American RTL to name one pro-life justice

"American Right To Life is offering attorney James Bopp \$10,000 for National RTL," said the group's president Brian Rohrbough, "if he can name a single justice on the current U.S. Supreme Court who has ever acknowledged that the unborn child has a right to life, whether in a majority opinion or a dissent." ...

"National Right to Life has misled the pro-life community to think that this is the wrong time to advocate personhood because we need one more Justice on the Supreme Court to have a pro-life majority," said Rohrbough. "But if we added a Justice who would uphold the right to life of the unborn, then we would have *only one* such Justice. The failed long-term strategy of *regulating* the killing of a fetus has left America without a single Justice who knows that it's wrong to kill an unborn baby; National RTL's compromise will never produce a pro-life Supreme Court."

In an article about NRTL's failed PBA ban, Notre Dame Law School's professor emeritus Charles Rice said, "Every justice now on the court accepts the *Roe* holding that the unborn child is a non-person... The situation remains as described by Justice John Paul Stevens in *Planned Parenthood v. Casey*." For Stevens had written that, "the Court... rejected, the argument 'that the fetus is a "person"'. ... there was no dissent..." And Clarence Thomas wrote in his *Stenberg* dissent that "a State may permit abortion," and Antonin Scalia wrote in *Casey*, "The states may, if they wish, permit abortion-on-demand..."

According to the group's website, AmericanRTL.org, "To make their strategy appear successful, National RTL has misled the pro-life movement into believing that abortion accomplices like Samuel Alito, John Roberts, Thomas and Scalia are pro-life."

"National RTL claims success in Antonin Scalia but he is not pro-life; like all the Republicans on the Court, he is a legal positivist," Rohrbough said. "Like their Dred Scott counterpart that ruled a black man could be owned as property, the current Republican Supreme Court is wicked and will only learn about the right to life of the unborn from the advancing personhood wing of the pro-life movement."

Yes, we criticize our Supreme Court justices. We urge them to repent. However, other than the personhood wing of the pro-life movement, no one is teaching our judges of the unalienable right to life of the unborn, which Americans United for Life have relegated to a second-tier negotiable issue. So we pray that Clarke Forsythe and the readers of Human Life Review will focus on the strategy of the pro-life movement and realize that regulating child killing, because it is immoral, merely prunes the abortion weed while strengthening its root.

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ARTL website intro:

Human Life Review invited American Right To Life to respond to a critical article in their publication, yet they have never published that reply, so we publish it below. Maria of HLR wrote to an ARTL staffer: "I want to thank you and Mr. Rohrbough for working to get his response to Forsythe in under the deadline I'd given. And now I have an apology... the piece itself [is] based specifically on [Clarke] Forsythe's piece, which we published a while ago now—I have to think about how I would set it up, how would we refresh readers' memories about the original piece, etc... Yours sincerely, Maria McFadden"

ARTL replied, "Maria, we're praying that you will publish Brian Rohrbough's submission. Regarding refreshing readers' memories, here are a couple ideas:

- Publish a link in the preface which the readers can use to review Clarke's article.
- It seems that a large percent of HLR readers save their issues, so most could refer back

Of course, the Forsythe piece could have told readers where to find our original letter online, but they were not, so right now the readers' opportunity to be informed of both sides of the current personhood debate is slanted. Please consider publishing both sides. Pro-life activity in Colorado has exploded onto the scene, with far more energy and effort expended in the last year as compared to any of the previous 17 years (since rescue ended)."

Since Human Life Review has so far refused to publish the reply they requested, ARTL presents:

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