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To: Editors, reporters, and other interested persons

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Re: Revival of some old myths about *Roe v. Wade* and partial-birth abortion

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Many media outlets published abortion-related stories in January, on the occasion of the 30th anniversary of the Supreme Court decision in *Roe v. Wade*. Many of those stories contained demonstrable errors, some of these apparently adopted uncritically from polemical materials issued by pro-abortion advocacy groups. This memo offers critiques of several of the most common errors. Some of these points are pertinent to anticipated upcoming coverage of debate in Congress (and in some state legislatures) on bills relating to abortion and other issues involving members of the species *Homo sapiens* prior to full live birth.

Additional documentation on current pro-life issues in Congress, including partial-birth abortion and human cloning, may be found on the National Right to Life website at www.nrlc.org under "Legislation: Current Issues," or obtained by contacting us at Legfederal@aol.com.

Counting to Nine

"What keeps Roe standing is the razor-thin five-vote majority that has stood by the decision." – *Time* magazine, Jan. 27, 2003. (Many similar examples from other major media, including the Associated Press.)

National Right to Life believes that *Roe v. Wade* should be overturned, the result of which would be to allow elected legislators to enact protective legislation to the degree desired by those who elect them. Therefore, it would be welcome news if in fact "only" five Supreme Court justices supported *Roe*. Regrettably, however, *six* current justices have voted to affirm *Roe v. Wade*: Justices Breyer, Ginsburg, Kennedy, O'Connor, Souter, and Stevens. Only three of the current justices have ever voted to overturn or substantially scale back *Roe*: Justices Rehnquist, Scalia, and Thomas.

Why the discrepancy? It seems that some pro-abortion groups think that "five to four" sounds better than "six to three," so they are counting Justice Anthony Kennedy as a *Roe* opponent. But in fact, Kennedy in the 1992 *Casey* ruling voted to reaffirm *Roe*, with the result that *Roe* was reaffirmed, 5-4, rather than being overturned. (Since then, one of the four anti-*Roe* justices, Byron White, was replaced by a pro-*Roe* justice, Ruth Bader Ginsburg.) In the 2000 *Stenberg* decision, Justice Kennedy voted to uphold Nebraska's ban on partial-birth abortion method as consistent with *Roe/Casey*.

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Will some journalists continue to count Justice Kennedy as an opponent of *Roe*, although he has voted to allow abortion for any reason until “viability,” merely because he voted to permit a ban on the *method* of partial-birth abortion? If so, for the sake of consistency, it would seem that they should also report that 70% of the public must also “oppose *Roe v. Wade*,” since that is the percentage that favors a ban on partial-birth abortion in both the second and third trimesters, according to the Gallup poll (Jan. 10-12, 2003).¹

The Amazing Elastic *Roe v. Wade*

“Do you favor the Supreme Court ruling that women have the right to an abortion during the first three months of their pregnancy?” – *Time/CNN* poll question, published in *Time*, January 27, 2003. **“The U.S. Supreme Court ruled in 1973 that a woman can have an abortion if she wants one at any time during the first three months of pregnancy. Do you favor or oppose that ruling?”** – ABC News/*Washington Post* poll, Jan. 16-20, 2003.

“The Supreme Court voted 7-2 on Jan. 22, 1973, to legalize abortions in the first three months after conception.” – *Washington Times*, Jan. 23, 2003. **“. . . the 1973 *Roe v. Wade* decision, which determined that a woman's constitutional privacy rights entitled her to get an abortion in the first trimester of her pregnancy.”** – from “Abortion, Cloning Are on Bush Agenda,” *Washington Post*, Jan. 23, 2003 (but retracted in Jan. 24 “Corrections” column).

The notion that the “right to abortion” articulated in *Roe v. Wade* and *Doe v. Bolton* was limited in any significant way to “the first trimester” is a misconception that was repudiated by major news outlets decades ago, because it is gravely misleading and has been repeatedly rebutted by the Supreme Court itself. Yet, as the quotes above demonstrate, this hoary distortion seems to be having a resurgence lately.

In *Roe*, and in many subsequent decisions, the Court made it clear that abortion had to be allowed *for any reason whatever* through the *second* trimester. The original ruling left the door open for minor medical-practice regulations to protect women's health in the second trimester, but it was clear from the language of the decision that these regulations could not amount to much, and they never did. After months of research on the partial-birth abortion debate, *Washington Post* medical writer David Brown, M.D., accurately summarized the *Roe v. Wade* ruling in an article published Sept. 17, 1996, edition of that newspaper. Dr. Brown wrote:

¹ The January, 2003 Gallup poll found that 70% favored and 25% opposed “a law that would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as ‘partial birth abortion,’ except in cases necessary to save the life of the mother.” (margin of error +/- 3%)

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The landmark Supreme Court decisions *Roe v. Wade* and *Doe v. Bolton*, decided together in 1973, permit abortion on demand up until the time of fetal “viability.”²

[Note: References to *Roe* are generally understood to apply to *Doe* as well, since both decisions were issued on the same day, and the Court said in *Roe*, “That opinion and this one, of course, are to be read together.”]

The *Post* story went on to explain that even after “viability,” the Court said that states must permit abortions sought for reasons of “health,” explicitly defined to include (quoting the Court in *Doe*), “all factors -- physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient.” Dr. Brown concluded, “Because of this definition, life-threatening conditions need not exist in order for a woman to get a third-trimester abortion.”

The “first three months” formula was formally declared erroneous in the early 1980s by senior news executives of *The New York Times*, the Associated Press, and others. For example, in 1982 the national editor of *The New York Times* decreed that “brief references to the Supreme Court's 1973 decision on abortion should say simply that the court legalized abortion,” because “the phrase ‘in the first three months of pregnancy’ might be incorrectly interpreted to mean that abortions in the last six months of pregnancy remain illegal.” Associated Press Vice President and Executive Editor Louis D. Boccardi wrote in a September, 1981 directive, “The decision is often misreported, even now. . . . For summary purposes, you can say the court legalized abortion in 1973. . . . Thus, it's wrong to say only that the court approved abortion in the first three months. It did that, but more.” These documents are available on request.

Anyone still laboring under the misconception that there was something different about “the first three months” was corrected again by the Supreme Court itself in the 1992 *Casey* ruling. In that ruling, the Court reaffirmed *Roe v. Wade* on a vote of 5 to 4, and held that the “abortion right” applied with equal force throughout the first and second trimesters until “viability.” **The Court explicitly repudiated any distinction whatever between the first and second trimesters, writing, “We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.” Why, then, should pollsters represent that it was indeed the “essential holding of *Roe*”?**

It is also noteworthy that in the 2000 *Stenberg* ruling, the Supreme Court struck down Nebraska's ban on partial-birth abortions, a method used in the fifth month of pregnancy and later (never in the first trimester). The five-justice majority said that such a ban was inconsistent with, yes, *Roe v. Wade*.

Why, then, does the bogus “first three months” formulation keep cropping up? In some cases, it appears to reflect a desire, unconscious or otherwise, to “prettify” *Roe* – that is, to describe it in the manner least offensive to the greatest number of people.³ Despite such cosmetic work, the

² “Viability,” the capacity of the baby to survive independently of the mother with technological assistance, currently is reached in the late weeks of the second trimester.

³ It appears that in the minds of some, *Roe* is a very elastic concept that can easily be expanded or contracted depending on which version serves a particular story line. The inconsistent treatment of *Roe* is

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Washington Post/ABC poll – which itself propagates the same error – shows public support for the ruling has dropped 11 points in ten years.⁴

Discredited Myths About Partial-Birth Abortion

A so-called partial-birth abortion is defined generally as a late-term procedure in which the fetus is aborted after it is partially outside the mother's body. It is usually performed in cases when the mother's life is threatened or the fetus is deformed. – from “Anti-abortion lobby counting on victories in 108th Congress,” by Pamela Brogan, Gannett News Service, December 17, 2002. (Similar examples sighted in other media.)

When the federal Partial-Birth Abortion Ban Act was first introduced in mid-1995, there already was abundant evidence that some abortionists employed the partial-birth method routinely for purely elective abortions. In articles, interviews, and legislative testimony, prominent abortionists had readily admitted to using the method to perform thousands of abortions, mostly purely elective. Their printed admissions were widely circulated to the media by NRLC and other groups, and by lawmakers supporting the bill. However, many major news outlets chose to ignore this evidence and to uncritically adopt the unsupported claims of the pro-abortion lobby that the partial-birth abortion method was used only rarely and nearly always in cases involving acute medical problems with the mother or baby. [Innumerable examples of such reporting are available on request.]

However, belatedly, towards the end of 1996, some major newspapers, including the *Washington Post* and the *Record* in northern New Jersey, actually went out and investigated. They found numerous abortionists who admitted to routinely employing the method for abortions on healthy mothers with healthy babies in the fifth and sixth months of pregnancy. To cite just one example, on September 15, 1996, the *Record* (Bergen, New Jersey) published a report by staff writer Ruth

especially evident in the January 27 edition of *Time* magazine. As quoted above, the *Time*/CNN poll asked respondents if they favored the Supreme Court decision that allowed women to obtain abortions “during the first three months of their pregnancy.” If the *Time*/CNN pollster had happened to telephone Supreme Court Justice Anthony Kennedy, presumably the justice would have responded as he did in the *Casey* and *Stenberg* rulings: that the woman has a “constitutional right” to obtain an abortion for any reason she chooses not only in the first three months, but all the way up to “viability” (about 5½ months). Thus, the *Time* pollster would have counted Justice Kennedy as among the 55% deemed to support *Roe* in that poll. Yet in the article that accompanied the published poll, Justice Kennedy was counted as an anti-*Roe* justice (to produce the “razor-thin five-vote majority”), apparently on the basis of his vote to uphold a ban on the partial-birth abortion method – a method *which is never used in the first trimester* and is used mostly in the fifth and sixth months.

⁴ The *Post* reported, “A new *Washington Post*-ABC News Poll found majority support for the ruling in *Roe v. Wade* [mischaracterized as legalizing abortion “during the first three months of pregnancy”], but also showed that opposition to the decision has risen since the 20th anniversary in 1993. In the poll, 54 percent of those surveyed said they favored the Supreme Court ruling that legalized abortion, with 44 percent opposed. Ten years ago, 65 percent favored the ruling, with 33 percent opposed.” “Democratic Candidates Vow To Protect Abortion Rights,” by Dan Balz, *Washington Post*, Jan. 22, 2003, www.washingtonpost.com/wp-dyn/articles/A25818-2003Jan22.html

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Padawer, based on separate interviews with two abortionists, who independently told her that they performed **over 1,500** partial-birth abortions annually in their single facility -- which was roughly triple the *nationwide* figures then being given out by pro-abortion advocacy and industry groups and reported as fact by many journalists. As to *why* they performed these procedures:

“We have an occasional amnio abnormality, but it's a minuscule amount,” said one of the doctors at Metropolitan Medical, an assessment confirmed by another doctor there. “Most are Medicaid patients, black and white, and most are for elective, not medical, reasons: people who didn't realize, or didn't care, how far along they were. Most are teenagers.” (*The Record*, September 15, 1996)

The September 17, 1996 edition of the *Washington Post* contained the results of a lengthy investigation conducted by reporters Barbara Vobejda and David M. Brown, M.D., who interviewed several abortionists (*not* those in New Jersey), and concluded:

Furthermore, in most cases where the procedure is used, the physical health of the woman whose pregnancy is being terminated is not in jeopardy.... Instead, the “typical” patients tend to be young, low-income women, often poorly educated or naive, whose reasons for waiting so long to end their pregnancies are rarely medical.

Shortly thereafter, in February 1997, the abortion industry's disinformation campaign completely exploded when Ron Fitzsimmons -- then and now the executive director of the National Coalition of Abortion Providers (an association of 150 or so abortion providers) -- gave a series of well-publicized interviews in which he acknowledged that the claim that the partial-birth abortion procedure was used rarely and mostly in acute medical situations was merely a “party line,” and was false. Mr. Fitzsimmons expressed regret about his own previous (albeit minor) role in propagating that “party line,” explaining, “I lied through my teeth.”

The truth, Mr. Fitzsimmons said, was that “[i]n the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus” (*The New York Times*, Feb. 26, 1997). He estimated that 3,000-5,000 abortions annually are performed by the partial-birth method. Here are two examples of clear reporting on these revelations, including confirmations from other pro-abortion sources:

www.nrlc.org/abortion/pba/PBA%20NYT%20lied.pdf

and www.nrlc.org/abortion/pba/PBA%20activists%20lied.pdf

In addition, in early 1997 the PBS media criticism program *Media Matters* reviewed the history of the news media's gullible acceptance of the abortion lobby's original disinformation about partial-birth abortion, and concluded that it was a case study in bad journalism. See: www.pbs.org/wnet/mediamatters99/transcript2.html

The *Washington Post*'s David Brown was shown on the program saying that the *Post* study found, “Cases in which the mother's life were at risk were extremely rare. . . . Most people who got this procedure were really not very different from most people who got abortions.”

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Is Partial-Birth Abortion Performed “Rarely”?

The *Washington Post* reported that a committee of the Virginia legislature passed a bill to ban the “*rarely used*” method (Jan. 28, 2003). Likewise, the Associated Press reported, “*A bill seeking to ban a rarely performed procedure commonly referred to as ‘partial-birth abortion’ moved along in the [Virginia] Senate . . .*” (Jan. 30, 2003) (Many similar sightings in other media.)

Peggy Girsham, deputy managing editor of NPR News, recently sent out a note cautioning NPR reporters, “It is not correct to call these procedures ‘RARE’ -- it is not known how often they are performed.” However, in fact enough is known to demonstrate that it is tendentious to dismiss these brutal procedures as “rare.”

Only one state (Kansas) requires reporting the partial-birth method separately from other methods used at the same stages in pregnancy.⁵ As noted, in 1997, Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, estimated approximately 3,000-5,000 abortions were performed by the method annually. However, since the Supreme Court’s 2000 ruling in *Stenberg v. Carhart* rendered unenforceable the bans on partial-birth abortion that had been enacted by more than half the states, the number of partial-birth abortions may have climbed since Mr. Fitzsimmons made that estimate. A voluntary survey of known abortion providers conducted by the Alan Guttmacher Institute (a special affiliate of Planned Parenthood), released in January 2003, claimed 2,200 partial-birth abortions in the year 2000 (despite a survey question so convoluted that daily practitioners of the method could have honestly answered “zero”). This was *more than triple* the absurdly low number of 650 obtained by AGI using the same question just four years earlier – yet both numbers were immediately accepted by some journalists as reliable. **So has the number of partial-birth abortions more than tripled in just four years? If so, isn’t that news?**

None of these numbers justify the dismissive adjective “rare.” **Rare, compared to what?** Usually, the answer is, “Rare, compared to first-trimester abortions performed by entirely different methods.” But why is that the apt comparison? It is evident that a substantial fraction of the population, and many state and federal lawmakers, believe that there are some important distinctions between abortions performed by vacuum aspiration or drugs during the first three months, and abortions performed in the fifth month and later involving partial delivery while the baby is still alive.

Rare? If a virus had killed 5,000 (or 2,200) newborn premature infants in neonatal units in one year, it would be declared an epidemic and reported on the evening news -- even though that would be a “very small fraction” of all premature infants cared for in neonatal units during a year.

⁵ In 1999, Kansas abortionists reported they performed 182 partial-birth abortions on babies who were defined by the abortionists themselves as “viable,” and they also reported that all 182 of these were performed for “mental” (as opposed to “physical”) health reasons. See page 11 of this document: <http://www.kdhe.state.ks.us/hci/99itop1.pdf>

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Resources

Additional documents on medical, legal, and legislative aspects of partial-birth abortion are posted on the NRLC website at www.nrlc.org/abortion/pba/index.html. A good primer on the issue is the testimony NRLC presented to a joint hearing of the U.S. Senate Judiciary Committee and the U.S. House Judiciary Constitution Subcommittee in March, 1997, which contains footnoted citations to some of the more thorough journalistic examinations of the issue (including interviews with partial-birth abortionists) and to various primary documents. The testimony is posted here: www.nrlc.org/abortion/pba/test.html

The eight-page instruction paper on how to perform a partial-birth abortion that began the whole partial-birth abortion debate, written by an abortionist in 1992, is posted on a congressional website here: www.house.gov/burton/RSC/haskellinstructional.pdf