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Lifeline

A Legal Network in Support of Life

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PP vs. ACLA

Katie Short

Will the Real Reasonable Man Please Stand Up?

On May 16, the Ninth Circuit reversed its earlier ruling that two posters and a website which identified abortionists were constitutionally protected speech. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* 290 F.3d 1058 (9th Cir. 2002).

In the earlier ruling from March 2001, a three-judge panel of the Ninth Circuit ruled unanimously that posters proclaiming a number of doctors "Guilty of Crimes Against Humanity" and urging efforts at their conversion, as well as the "Nuremberg Files" website where data about abortion doctors, politicians, judges and celebrities is posted, did not constitute "true threats" but were instead protected political speech. *Planned Parenthood of the Columbia /Willamette, Inc. v. ACLA*, 244 F.3d 1007 (9th Cir. 2001). Consequently, the Court reversed the $107 million jury verdict against the defendants, as well as the injunction imposed by the trial court against publishing, reproducing, or even possessing the posters. (See *Lifeline* Volume X, No. 5 [Summer 2001]).

The plaintiff abortionists and clinics moved for reconsideration en banc, i.e., before an 11-member panel of Ninth Circuit judges, and the motion was granted and the case reargued in December 2001. At that time, court-watchers predicted a closely divided court, and they were right. The en banc panel split 6-5 in favor of reversing the earlier panel, and reinstated both the injunction and the verdict, remanding to the trial court only for reconsideration of whether the tens of millions of dollars in punitive damages under RICO and FACE were "appropriate" under more recently decided case law.

… the "poster pattern" turns out to be a "poster isolated incident."

The majority opinion opens with a lengthy discussion of the proper standard of review it should employ, and concludes that the judges must first "satisfy ourselves that the posters and the Files constitute a 'true threat' such that they lack First Amendment protection," but that in doing so it will construe all the underlying facts and credibility determinations in favor of the prevailing party, i.e., the plaintiff doctors. The opinion then launches into another lengthy discussion of the definition of a threat, and arrives at the unsurprising conclusion that "'threat of force' in FACE means what our settled threats law

(**REASONABLE** CONT. ON PAGE 10)

GENERAL RECAP & UPDATE

ONGOING CASES

Planned Parenthood v. ACLA et al. (Portland, Ore.)—On rehearing in the 9th Circuit, an 11-member en banc panel voted 6-5 to reverse the prior panel's unanimous decision and reinstate a $107 million verdict against pro-lifers who exposed the identities of abortionists. LLDF filed an amicus brief in support of rehearing before the full Ninth Circuit (denied) and will file an amicus brief in support of the defendants' petition for certiorari in the U.S. Supreme Court. Story this page.

Schiavo v. Schindler (Fla.)—Michael Schiavo seeks court permission to kill 37-year-old wife, Terri, by withdrawing food. Terri's parents oppose the motion; several doctors have expressed the opinion that her condition could improve with appropriate treatment, which Michael has refused to allow. Trial court ordered withdrawal of food and fluids

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without any independent examination of Terri's condition. Court of appeal reversed the decision and remanded with instructions that Terri be examined by other physicians. Trial set for fall 2002. For updates, see www.terrisfight.org

SOHL Network et al. v. Lockyer et al.—Constitutional challenge to California FACE law. Plaintiffs' hearing on their motion for preliminary injunction and Defendants' motion to dismiss the case is under submission. The first judge assigned to the case is on inactive status. Pursuant to the local rules of court the judge now assigned to the case sent notice to the parties that the case is under submission without oral argument. A status conference is set for fall 2002.

Foti v. Planned Parenthood/Planned Parenthood v. Foti (San Mateo)—This action and cross-action between sidewalk counselors and PP and its escorts is now stayed, pending the outcome of a new lawsuit (also captioned *Planned Parenthood v. Foti*) filed by PP seeking a declaration from the court that a speech-free zone injunction it obtained ten years ago against Operation Rescue of California actually applies against these sidewalk counselors *and* anyone else PP serves it on. On March 4, the court granted PP's motion for summary judgment and declared Foti bound by the injunction because he is allegedly acting in concert with ORC, even though it was undisputed that Foti had not had any contact with ORC for years, and absolutely no contact with them regarding his picketing at the clinic. The court further ordered two other defendants bound by the injunction as acting in concert with ORC "through" Foti, even though it was undisputed they never had any contact with ORC at all. The court later indicated that, had it been paying more attention, it would also have ruled that the injunction applied to anyone with notice, in contradiction to clearly established U.S. Supreme Court and California case law. Planned Parenthood is also seeking more than $360,000 in attorney fees from the three defendants. The judgment has been appealed.

NOW v. Scheidler—On April 22, the U.S. Supreme Court agreed to hear the pro-life activists' appeal from a decision granting substantial damages and a purported nationwide injunction. LLDF filed amicus briefs in both

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Dana Cody (with Anne Starr)

FROM THE EXECUTIVE DIRECTOR

The most highly valued event in my legal career was at the very beginning of it. I was interested in criminal law, and a criminal defense attorney, an alumnus from my law school, hired me to work with him as his intern. A former prosecutor turned defense attorney, a courteous and professional individual, was willing to train and mentor me in the practice of criminal law. After I graduated I knew my way around the law library and had a grasp of courtroom procedure. This proved to be an invaluable asset in my first job as an attorney.

LLDF's supporters have provided this same rewarding experience for several law students in the past. Thanks to your ongoing support, our internship program this summer has expanded to four law students who are learning about life issues hands on and in a way not typically taught in law school. The result of our internship program will be attorneys who are set apart from the rest for the practice of law that promotes a sanctity of human life ethic.

They may differ in personality, age and experience, but these students who served Life Legal Defense—Anna Maria Bereczky-Anderson, Erin Campbell, Laura Rore, and Grant Wahlquist—have a common respect for life from conception through natural death.

Anna Maria Bereczky Anderson is a 1998 graduate of UC Davis and will soon have her J.D. from the University of the Pacific's McGeorge School of Law. She and her husband, Craig Anderson, are the parents of 17-month-old Viktoria.

Anna Maria's pro-life roots come from her family. "I am a cradle Catholic and was raised with the philosophy that life is the most precious thing." She had trouble finding a way to put her beliefs into practice, though. "Throughout law school I had been racking my brain trying to figure out what I could do with a law degree that would make me feel that I was doing something worthwhile in society. Nothing they taught me at law school satisfied this desire—everything there is anti-God and is about political correctness. So I started searching around on my own for organizations that combined both Catholicism/ Christianity with the law. I came across LLDF and realized that my law school at least provided the opportunity to do a work study with LLDF, so I immediately contacted Dana Cody at the Citrus Heights office."

… that I should know that under the law I have the right to have an abortion. Wow—what a mystery he was revealing to me!

Anna Maria Bereczky-Anderson with daughter, Vicktoria

In a dramatic turn, "my philosophy turned into real life during law school when I found out that I was pregnant. How was I going to balance motherhood and a career? I was afraid. Today's society pressures us women to have careers and put family second. My doctor didn't make me feel any better when he blatantly informed me (so coldhearted) that I should know that under the law I have the right to have an abortion.

(INTERNS CONT. ON PAGE 6)

CLONING AND CONGRESS

Wesley J. Smith

No ban is better than a phony ban.

What's less bad: enacting a ban on so-called "reproductive" human cloning that explicitly authorizes cloning for research purposes, or passing no law at all prohibiting cloning in 2002? That is the seeming conundrum facing cloning opponents, since neither side in the great cloning debate apparently can muster the 60 votes needed to pass either a complete or partial cloning ban in the U.S. Senate.

Actually, there is no conundrum. Banning only reproductive cloning would accomplish absolutely nothing (in fact, as I will detail below, a ban on reproductive cloning only would lead to reproductive cloning). Indeed, such a phony law would be worse in the long run than no anti-cloning law at all. The "compromise" of banning reproductive cloning while authorizing research cloning is really no compromise, since pro-cloners would give up almost nothing and would greatly gain.

The first reason is political. Poll after poll shows that the American people want to ban human cloning. Knowing this, pro-cloners have resorted to a game of "hide the ball," believing that their pseudo-ban on reproductive cloning would suffice to assuage public unease. Passing such a law would also allow politicos to brag to constituents in an election year that they had done "something" about cloning (an argument that would be abetted by the generally pro-cloning media). It would also take much of the steam out of the anti-cloning drive, which is a primary purpose behind the pseudo-ban.

The second reason pro-cloners would gain from a ban on reproductive cloning alone is that such a law would not actually prohibit anything that can be currently accomplished. Researchers are unable at this time to develop a human clone embryo that can be implanted in a woman's womb. Indeed, learning how to do that would be one of the goals of research cloning.

For a human embryo to be successfully implanted—whether the embryo is created

Knowing this, pro-cloners have resorted to a game of "hide the ball," believing that their pseudo-ban on reproductive cloning would suffice to assuage public unease.

via fertilization or cloning—it must develop for at least five days until it reaches the blastocyst stage, when the embryo has an outer lining that develops into the placenta. Not coincidentally, this is also the stage when embryonic stem cells are harvested. These cells are the targets of "therapeutic cloning" researchers, who promise to someday make embryonic clones of millions of patients, harvest the clone's stem cells, and use the resulting cell lines in "regenerative medicine" to treat various maladies without the body rejecting the cells, since they would be almost identical genetically to the patient's own cells.

(In reality, adult stem cells offer better and quicker hope for developing regenerative medicine. For example, last week the science journal *Nature* reported that adult stem cells

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the Seventh Circuit and the U.S. Supreme Court, as well as assisting the defendants with post-trial motions in the trial court. Oral argument in the Supreme Court is scheduled for December 4. 2002.

Spingola v. Village of Granville (Ohio)—City passed vague ordinance to apply as needed against pro-lifers at public events. Trial court denied preliminary injunction, holding the ordinance was facially constitutional, and the Sixth Circuit affirmed. Petition for rehearing denied, and the case was remanded to the trial court for further proceedings on the as-applied challenge.

People v. Stillson (Sacramento)—Picketers charged with resting sign on sidewalk. Trial set for fall 2002.

Reeves v. Rocklin United School District—Pro-lifers leafleting and holding signs were detained after high school administrators involved the local police; during a second visit to the same school, pro-lifers were forced to move off the campus after being refused visitor registration. They were also told that the public street adjacent to the school was off-limits. Despite clear California case and statutory authority allowing free speech on and near public school campuses, the trial court ruled that the administrators could permissibly exclude the pro-lifers in order to prevent "disruption" of school activities. Case on appeal.

Meyers v. Mathews (Athens, Ohio). Pro-lifers arrested for pro-life speech on college green. First Amendment claims were dismissed and injunctive relief denied. Court found that popular student gathering place was not a public forum. Case now on appeal.

Estavilla v. Romo and West (Yolo County)—Fetal homicide suit for injury and constitutional violations includes two issues 1) wrongful death statutes are unconstitutional because it denies equal protection to stillborn babies and 2) intentional interference with the right to privacy and reproductive rights.

Dym v. White (San Diego)—First Amendment/Due Process case, involving a judgment against ORC (Operation Rescue of Calif.) after a kangaroo court judge/trial, without the right to cross-examine witnesses. Appellate court reversed judgment and case remanded for a third trial.

People v. Mason (Denver)—Picketer at University of Denver arrested, charges

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not filed. Reviewing possible civil action.

People v. Gabriel (Wisconsin)—Pro-life activist confronts abortionist at golf course. Abortionist strikes pro-lifer with golf club. Pro-lifer is arrested next day at abortion mill for disorderly conduct. Trial set for fall of 2002.

Locatel v. City of Monrovia—Civil rights suit for violation of pro-lifer's rights while leafletting at a high school.

RESOLVED CASES

Padilla et al. v. Tamboura (San Jose)—Civil action against driver of van who tried to run over sidewalk counselors and their signs. ***Victory:*** case successfully resolved with monetary payment.

Ayala v. Gymboree (Modesto)—Suit filed on behalf of employee fired for wearing Precious Feet pin

McCullough v. Fogarty (Los Angeles)—Civil suit against city for false arrest and constitutional rights violations against pro-lifers who were engaging in picketing and leafletting on Venice Beach Boardwalk. ***Victory:*** case successfully resolved with monetary payment, expungement of arrest records, and First Amendment training for police officers.

Pasillas et al. v. City of Monrovia and Pasadena PP—Residents sue to prevent the opening of a Planned Parenthood abortion facility in their area. City and PP unsuccessful in their attempt to get the complaint dismissed. Planned Parenthood then abandoned its efforts to open a clinic in Monrovia. The City later acquired the Planned Parenthood facility and agreed that it would not lease the facility back to Planned Parenthood. Thereafter, the plaintiffs dismissed their legal challenge, all sides bearing their respective attorneys fees.

White v. UCLA—Pro-lifers arrested for displaying signs in free speech area of public university. ***Victory:*** Case successfully resolved with monetary payment and expungement of arrest records.

People v. Palmquist (Bakersfield)—Abortionist falsely accuses sidewalk counselor of unlawful and threatening conduct and seeks injunction. ***Victory:*** injunction denied.

(RECAP CONT. ON PAGE 5)

by Laura Rore

PARTIAL BIRTH ABORTION BAN AT THE FEDERAL LEVEL

First in a Series

During the Nineteenth Century, Americans were in a moral crisis over the issue of slavery.[1] Many supporters justified slavery on the basis that African Americans were allegedly inferior.[2] The United States Supreme Court upheld the idea of property rights in another human being in *Dred Scott v. Sandford*.[3] The United States Constitution condoned slavery in the *Three-fifths Compromise*, which considered African Americans only three-fifths of a person for purposes of representation in Congress. *The Fugitive Slave Act* assisted owners of slaves in retrieving their escaped "property." Today, over one hundred years since the Thirteenth Amendment abolished slavery, citizens consider the justifications and support of slavery an abomination, yet not so long ago this heinous institution was an acceptable way of life in our society.

Presently, abortion is an accepted practice in our society, though many consider it to be as abhorrent as slavery. Abortion rose to the heights of national controversy in 1973 when the majority of the United States Supreme Court in *Roe v. Wade* determined that an implicit right of privacy found in the Fourteenth Amendment to the United States Constitution encompasses a woman's right to abort her unborn child.[4] In 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed the central holding of *Roe v. Wade*, with modifications to the approach in analyzing abortion laws that had been put forth in the earlier decision. Additionally, the Court confirmed a State's power to restrict abortions after fetal viability, as long as there is an exception for the life or health of the woman.[5] In the year 2000, in *Stenberg v. Carhart* the United States Supreme Court struck down a Nebraska statute restricting the right to obtain a particular type of abortion procedure, commonly known as partial-birth abortion.[6] The Court found the statute unconstitutional due to a lack of an exception for the health of the woman and because the statute was considered overly broad, therefore constituting an undue burden on women seeking to abort pre-viable fetuses.[7]

There are strong differences of opinion over the issue of abortion in general, just as there were over slavery. There is a strong argument that the holding of *Roe v. Wade* itself is unconstitutional. However, certain abortion procedures of post-viable fetuses, commonly known as partial-birth abortions,[8] are even more controversial. In fact, abortion of post-viable fetuses using any method is controversial, especially in light of the fact that a health exception, required by *Casey* for post-viable abortions, can be overbroad to the extent that the exception swallows the rule. If a health exception is permitted that includes the mental and emotional health of the mother, then it would be quite simple for physicians and their patients to circumvent any restriction on partial-birth abortions, or other types of post-viable abortion procedures.

> *However, since the Court struck down Nebraska's partial-birth abortion ban in 2000, other bans against partial-birth abortion have also been struck down, thus resulting in even less protection for post-viable fetuses than existed prior to* Stenberg.

In *Stenberg*, Justice Thomas explained in his

dissent that, "The partial birth gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body."[9] Moreover, Justice Thomas stressed that thirty states have agreed with this view since they have attempted to ban partial birth abortions in their respective states.[10] However, since the Court struck down Nebraska's partial-birth abortion ban in 2000, other bans against partial-birth abortion have also been struck down, thus resulting in even less protection for post-viable fetuses than existed prior to *Stenberg*.[11]

Congress has also attempted to address this issue by trying to pass various partial-birth abortion bans, but its efforts, so far, have been thwarted by presidential veto during the Clinton administration.[12] According to his veto message, former President Clinton would have signed the previous bills had there been an exception for the health of the woman.[13] In spite of former President Clinton's message, Congress has not relented, and is presently considering proposed legislation prohibiting partial birth abortions without a health exception.[14] The bill is being presented under Congress' Commerce Clause power.[15] Additionally, a bill prohibiting all late term abortions has been introduced in the House, also under the Commerce Clause power.[16] If one of the current bills, or a modified version thereof, passes and is signed into law by President Bush, it is imperative that such a statute be drafted to withstand constitutional challenges under case law and challenges to Congress' power to pass such a bill in order to ensure protection of at least some innocent victims of abortion.

This series of articles will begin with a brief analysis of the main cases surrounding the abortion issue, beginning with *Roe v. Wade* and concluding with the effects of the decision in *Stenberg v. Carhart*. These articles will demonstrate the need for a ban on partial-birth abortion at the federal level. The series will continue with an evaluation under case law of the proposed partial-birth abortion ban, other proposed legislation prohibiting late term abortions in general, and conclude with an examination of Congress's power to enact a partial birth abortion ban. L

1 *See Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 at 1002 (1992) (Scalia, J., dissenting) (comparing the conflict over slavery prior to the Civil War and Chief Justice Taney's opinion in *Dred Scott* to the issue of abortion and *Roe v. Wade*).

2 *See Dred Scott v. Sandford,* 60 U.S. 393 at 405 (1857) (referencing the status of African Americans at the time of the framing of the U.S. Constitution). "They were at that time considered as a subordinate and inferior class of beings." *Id.*

3 *Id.*

4 *Roe v. Wade,* 410 U.S. 113 at 152 (1973).

5 *Casey,* 505 U.S. at 834.

6 *Stenberg v. Carhart,* 120 S.Ct. 2597 (2000).

7 *Id.*

8 *Id.* at 2608 (defining the steps involved in the dilation and extraction (D & X) method of partial birth abortion). "1) deliberate dilation of the cervix, usually over a sequence of days; 2) instrumental conversion of the fetus to a footling breech; 3) breech extraction of the body excepting the head; and 4) partial evacuation of the intra cranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." *Id.*

9 *Id.* at 2649.

10 *Id.* at 2640: "Nebraska, along with 29 other States, has attempted to ban the partial birth abortion procedure."

11 *Rhode Island Medical Society v. Whitehouse,* 239 F.3d 104 (1st Cir. 2001); *Hope Clinic v. Ryan,* 249 F.3d 603 (7th Cir. 2001); *Eubanks v. Stengel,* 224 F.3d 576 (6th Cir. 2000); *Richmond Medical Center for Women v. Gilmore,* 219 F.3d 376 (4th Cir. 2000); *Planned Parenthood of Central New Jersey v. Farmer,* 220 F.3d 127 (3rd Cir. 2000).

12 *Stenberg,* 120 S.Ct. at 2643, n. 11.

13 143 Cong. Rec. S9087 (1997) "I am asking Congress to send me legislation that includes a l imited exception for the small number of compelling cases where use of this procedure is necessary to avoid serious health consequences."

14 H.R. 4965 Partial Birth Abortion Ban Act of 2002, 107th Cong. (2002). "H.R. 4965 would ban partial-birth abortion, except if 'necessary to save the life of a 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." http://capwiz.com/nrlc/issues/bills.

15 *Id.* Sec. 1531(a) "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years or both." http://thomas.loc.gov.

16 H.R. 2702 Late Term Abortion Restriction Act, 107th Cong. (2001). Sec. 2(a) "It shall be unlawful, in or affecting interstate or foreign commerce, knowingly to perform an abortion after the fetus has become viable."

(**RECAP** CONT. FROM PAGE 4)

People v. Conrad (Rancho Cucamonga)—Christmas caroler charged with trespass. Charges lowered and settled.

People v. Paschen et al. (Vallejo)—Sidewalk counselors cited for injunction violation. ***Victory:*** charges dropped.

In re Sanchez (California)—Provided legal counsel for family of accident victim to avoid death by starvation. ***Victory:*** Treatment has been continued.

SAMPLING OF PRE-LITIGATION AND OUT OF COURT RESOLUTIONS:

Sampling of pre-litigation, investigation, and out of court resolutions:

Advise and provide legal assistance at school board for citizen implementing Priests for Life's Child Protection Project re expulsion of Planned Parenthood from public schools (Torrance).

Reviewing civil case challenging California's specialty license plate statutory scheme for content discrimination re refusal to authorize "Choose Life" plates.

Adoption attorney referrals.

Guardianship attorney referrals.

Help with inadequate medical care provided for disabled/institutionalized son.

Advised sidewalk counselor threatened by police for using unimproved city right-of-way.

Advised parent on rights to refuse medical treatment for minor child in Oregon.

Reviewed interference of Golden Gate Bridge Authorities with pro-life youth group stopped for wearing pro-life T-shirts on bridge.

Reviewed and advised several families on efforts of authorities to withhold food and water to patients/family member.

Reviewing civil case of vehicular assault directed at pro-life demonstration.

[With our heavy case load, we are experiencing a significant cash pinch! If you can send a donation, it would be of tremendous help. Thank you.—Ed.]

(INTERNS CONT. FROM PAGE 2)

Erin Campbell (right)

Wow—what a mystery he was revealing to me! I think that *everyone* is aware of the "right" to have an abortion. How much can these people cram this down our throats?" She suggested that doctors instead inform patients about the less-advertised notion that women also have the right to be mothers and raise their children. "Anyway, my perspective about law school and career quickly changed when Viktoria was born. She is my greatest joy and nothing else matters!"

With help from her own mother and an evening-class schedule, Anna Maria will complete her studies in December. From there, she plans to pass the bar and work in the pro-life arena. "LLDF was my first hands-on experience with pro-life work, but this is only the beginning for me," she vowed.

Anna Maria worked with LLDF as a part-time intern. She was able to work mostly from home, which meshed with her wish to keep her daughter's care in the family setting. Thanks to Anna Maria, LLDF now has points and authorities available for our attorneys when a life-threatening situation presents itself because a healthcare provider refuses to administer wanted medical treatment. Attorneys will be saved hours of research and writing when they need to appear ex parte seeking an injunction to save the life of a chronically ill, elderly, or disabled person. Ms. Anderson also used her research and writing skills to author the next issue of LLDF's *Lifeline Memorandum*. California residents will find it especially interesting reading on the right to dictate their wishes with respect to medical care should one become chronically ill or incapacitated.

Our second intern, Erin Campbell, of Ave Maria Law School in Ann Arbor, Michigan, worked with LLDF as part of Alliance Defense Fund's Blackstone Fellowship for the summer of 2002. As part of the Fellowship, she provided day-to-day assistance to our legal director, Katie Short. Among other projects, Erin has written an excellent memo on "Government in the Sunshine Laws" that will aid LLDF attorneys in their various interactions exposing the practices of governmental agencies.

Erin and her husband Owen, now a third-year student at Ave Maria, are expecting their first child in February. She intends to work on pro-life causes from home after receiving her law degree.

Erin remembers that "while I was growing up my mother was a volunteer counselor at Birthright in Portland, Oregon. I have always been pro-life, but I did not really become involved in pro-life efforts until high school, when I helped lead "Lifesavers" retreats for eighth graders. At these retreats we discussed abortion and euthanasia, and I noticed that many of the eighth-graders who labeled themselves "pro-choice" were horrified when they learned the truth about these practices. It made me realize how much the "pro-choice" position is against human reason and how much it relies on tired rhetoric in order to succeed. The experience made me optimistic that, through hard work and prayer on the part of pro-lifers, society will gain a greater greater understanding and appreciation of the value of every human life."

Working with LLDF, Erin saw first-hand how a grassroots organization can have an effect, even when success seems a distant goal. "I was extremely impressed by the work LLDF does, and in particular by the work of my boss, Katie Short. One of the main reasons I decided to attend law school was because I saw that groups like LLDF are making a huge difference in our legal system and in our country, and I hope that I will be able to join them in some way once I receive my law degree."

Laura Lee Rore, a San Joaquin Valley resident, is married and the mother of two teens and a young adult. A high school teacher for nine years, she is adding a law degree to her professional repertoire with the intention of continuing to teach while doing pro-life legal work on the side. She has been first in her class at McGeorge School of Law her entire three years as a law student.

Laura's support for life goes back to childhood. She remembers her mother being "very happy when *Roe v. Wade* happened. I, at the age of 11, argued with her." Somehow, even as a child, she knew that abortion was wrong. Today she likens legal support for abortion to the past lawful practice of slavery in the United States. "Let's try to justify slavery—people used to do that," she

Laura Lee Rore

said. Her experience working in the LLDF main office with Executive Director Dana Cody has increased her admiration for those who defend life. She also sees a need to broadcast pro-life perspectives across the cultural spectrum. Getting the word out about the facts of abortion also will help change minds and "add to our cause," she said.

This edition of *Lifeline* features the first in a series of articles about partial birth abortion legislation originally written by Laura as a law review article. She has agreed to edit and revise her article for our next few issues of *Lifeline*. Laura is also overseeing a project that seeks to ensure that students in California public schools have equal access to information on abortion that recognizes the sanctity of human life.

Grant Wahlquist

Last, but not least, Grant Wahlquist. I find Grant to be a man of few words but his research skills speak for themselves. He has done research on several issues during his tenure as a work-study intern, all of which have been vital to the mission and purpose of LLDF. Some difficult issues have been resolved thanks to his findings on the law. Grant has also helped prepare pleadings to protect the privacy of LLDF's client in *Sanctity of Human Life Network v. Lockyer.*

We at LLDF are grateful for your ongoing support not only because it has provided an invaluable opportunity for our interns, but it has provided countless hours of legal research and writing that will be put to use to advance the sanctity of human life ethic in our culture. The time our interns have spent with LLDF will translate into lives saved and for that we can all be truly thankful! L

[My special thanks to long-time Lifeline contributor Anne Starr who interviewed the interns and compiled their comments for this article.—Ed.]

SINGER/CAMERON DEBATE

Terry Thompson

What does it mean to be human?

What does it mean to be human? This was the topic of the highly touted debate between Dr. Peter Singer and Dr. Nigel M. de S. Cameron June 7 at the Henry J. Kaiser Auditorium in Oakland. Among the audience were dozens of handicapped people including one individual who was wheeled down the aisle on a portable bed with his oxygen supply. Outside, more than 40 people from "Not Dead Yet," a national disability rights organization, were chanting and parading in a circle in wheelchairs and on foot. Pro-lifers were holding large graphic signs showing aborted babies. What caused this interest in an apparently intellectual and scholarly debate? The lightning rod was Dr. Peter Singer, Professor of Bioethics at Princeton University.

Singer has sparked controversy (and outrage) throughout the country and the world for his views on the value of life. He became widely known for his radical view of when an infant becomes a "person" and has the right to live. Originally he said that an infant was not a person until it was 28 days old. Since then he has said that 28 days was too arbitrary and now says the time of transition is sometime during the first year.

Singer's first remark of the evening was that the subject of the debate "What does it mean to be human?" posed the wrong question. He said that just answering the question "are they human beings?" doesn't end the discussion. He said, for example, that he has "no doubt that embryos are human", but for him that doesn't answer the ethical question of their right to life. Singer believes the pertinent questions are, "Is this a being of moral significance toward which we have moral obligation?" and "Does it have the capacity to enjoy life, i.e., is it self-aware?" He contended that "it's OK to end life if it does not have a sense of living over time."

Moderator Michael Krasny of KQED-FM asked Singer "Who makes the decision of whether an individual lives or dies?" Singer responded that for infants, the decision should be made by the parents in consultation with their doctor. For older people, unable to communicate whether they wish to live or die, he said "you just make the best judgment you can." Krasny then asked how Singer would deal with the eugenics problem. Singer said that these are not "Nazi type" decisions since he does not propose that the state should make decisions for parents or others.

Originally he said that an infant was not a person until it was 28 days old. Since then he has said that 28 days was too arbitrary and now says the time of transition is sometime during the first year.

Dr. Cameron, Director of the Center for Bioethics and Culture, says Singer's views not only start us down a slippery slope but that it is down-hill skiing! He noted that in Holland, where assisted suicide is legal, "non-volunteers" are being killed and elderly people are being forced to die. Cameron believes that the heart of every culture is its view of what it means to be human or, as he put it, "what it means to be one of us." He said that this "lies behind every great question that confronts the culture" and that what it means to be human "is being tried in our generation as never before." He credited the Judeo-Christian belief system with giving dignity to human beings, by recognizing all humans as having equal dignity under the law because all individual humans have equal dignity before God. Cameron said this was the primary force behind abolishing the father's right to kill his child which was legal during the Roman Empire.

Cameron believes we are now at a watershed breakpoint in our culture. Abortion on demand and the rapid advancement of the acceptance of euthanasia are prime examples. Society now views some lives as more worthy to live than others. Cameron credited Singer with inventing "speciesism", which is a concept similar to racism but between species, e.g., between humans and fish or between humans and pigs. Singer says that you "shouldn't make the assumption that if you are a member of a species that you have all the rights as other members of the species." He then takes another quantum leap and says that all members of one species are not inherently more worthy of life than all members of another species.

Is there a middle ground? Singer said yes but Cameron emphatically said no. Cameron said that he finds Singer a very amiable man but he finds his ideas appalling. Cameron believes that humans are very special, made in the image of the Creator.

The debate was sponsored by The Center for Bioethics and Culture and co-organized with Life Legal Defense Foundation. For more information on this issue or to order a video of the debate see www.thecbc.org. L

LIFE LEGAL DEFENSE FOUNDATION
invites you to enjoy an evening with

Raymond Dennehy, Ph.D.

Saturday, November 9, 2002

The Bellevue Club, 525 Bellevue Avenue, Oakland, California

Hors d'oeuvres and No Host Bar—
5 p.m., Dinner—6:30 p.m.

Tickets may still be available.
For information or to make reservations, please call 707-224-6675.

Dr. Dennehy will speak on "The Language of Abortion." He is Professor of Philosophy at the University of San Francisco, where he teaches bioethics and political philosophy. After serving in the U.S. Navy for four years as a radarman aboard the heavy cruiser, *USS Rochester*, in the South China Sea, he began his academic career, obtaining his bachelor's degree in philosophy from the University of San Francisco and his Ph.D. in philosophy from the University of Toronto.

Dr. Dennehy has edited *Christian Married Love*, has contributed many articles and reviews for scholarly journals and is the author of *Reason and Dignity* and the just-published *Anti-Abortionist at Large: How to Argue Intelligently About Abortion and Live to Tell About It*. He is frequently invited to address contemporary ethical issues on television, radio, and university campuses. This coming October 7th will mark his 31st semester debating abortion at the University of California, Berkeley, before a class of 700 students. He is listed in the forthcoming edition of Who's Who in America. He is married to Maryann Dennehy and has four children and eleven grandchildren.

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Dear Pro-Life Attorneys,

We need your help.

Population Research Institute (PRI), a non-profit organization which is committed to ending human rights abuses committed in the name of "family planning," and to ending counter-productive social and economic paradigms premised on the myth of "overpopulation," seeks your help in creating an informative brochure, a "Know Your Rights" pamphlet, showing how the F.A.C.E. Act (Freedom of Access To Clinic Entrances Act, 1994) (http://members.aol.com/abtrbng/s636-248.htm) can help American women and set a precedent to help women world-wide.

In order to help women whose rights have been violated at facilities that offer reproductive health services and/or abortions, or to help women who in their personal interaction with family or friends might have been persuaded to seek, beyond her true wishes, one of the aforementioned "services," we would like your opinion on the implications of the F.A.C.E. act, and the recent court decision, as it applies to protecting women from coercion.

We are specifically interested in: 1) Alerting crisis pregnancy clinics to client situations that may fall under a broad understanding of a "forced" situation that a woman would find herself in as she seeks medical care. Crisis pregnancy centers could then refer the woman to legal services that would expose the illegal activities of abortion facilities, "family planning" or reproductive "health" centers.

2) Presenting pro-life attorneys with the necessary first steps on how to use the federal act called F.A.C.E. to expose the federal violations in (a) cases where a woman has been coerced or forced to receive undesired reproductive services such as an abortion, sterilization or abortifacient contraceptives (b) counseling environments where information has been withheld from a woman seeking reproductive health services, thorough information that could aid her in exercising her rational decision-making power and possibly spare her from future physical, emotional or psychological suffering.

How you can help:

Read over the briefing [http://www.pop.org/briefings/wb080701.htm and also read the F.A.C.E. act of 1994, http://members.aol.com/abtrbng/s636-248.htm

Then give us your feedback:

1) Speculate on how wide of an interpretation this decision is likely to get.

2) Include what other types of violations might fit under the F.A.C.E. Act.

3) Give us advice on how someone should go about pressing charges under the F.A.C.E. Act.

4) Allow us to post your contact information on a database or published list in order that clients can call you directly.

Thank you in advance for your time, interest, and input for this project. I am certain that it will bear much good fruit due to your help. We intend, inter alia, to publish, both in print and on the internet, the information that we gather.

I look forward to hearing from you.

Sincerely yours in Christ,

Steven W. Mosher
President

(**CLONING** CONT. FROM PAGE 3)

extracted from the bone marrow of mice appear to be as versatile as embryonic stem cells but without the problems of tumor formation and tissue rejection. Meanwhile, adult stem cells are already being used to treat human ailments such as Parkinson's disease and multiple sclerosis—the very diseases for which cloning is held out as a panacea 10 years from now.)

Learning how to reliably create human clone blastocysts will require much time and money, assuming it can be done at all. Indeed, the whole reason to explicitly legalize research cloning is to free up research grants and private investment for this very purpose. Here's the catch: Should the research cloning enterprise succeed in creating human clone blastocysts, the legal ban on reproductive cloning now being touted by pro-cloners would immediately be attacked. It doesn't take a psychic to predict the scenarios:

—Infertile couples will file lawsuits claiming that the reproductive cloning ban violates their "fundamental right" to procreate. Considering the importance recent court decisions have placed on the right to reproduce, it is quite conceivable that once reproductive cloning could be done safely, the ban would be declared unconstitutional.

—A major political campaign will be mounted, perhaps concurrently with such lawsuits. Teary-eyed couples will appear on "Oprah" urging an end to the ban on reproductive cloning so that they can have children. Since human cloning is now safe, they and their supporters in the biotech industry will argue, cloning should be viewed as merely another reproductive technology akin to in vitro fertilization.

—A mad scientist, perhaps from offshore, will implant an embryo into a woman desiring to go down in history as the first birth mother of a human clone. No one would urge that she be forced to have an abortion, so the birth of the child will be unstoppable. The event will produce spectacular headlines and no legal consequences. (Would society actually allow the parents of a cute baby to be jailed, much less the scientist who had helped the infant come into being?) The birth of the next such child will produce page three stories. The birth of the twentieth or thirtieth such child will be unremarkable and the ban will soon become functionally irrelevant, regardless of the actual state of the law.

For those who consider such scenarios unlikely, remember this: When the National Academy of Sciences urged the government to pass a ban on human reproductive cloning last year, it did so not because human cloning was deemed morally objectionable but because it currently wasn't deemed "safe." Such amoral reasoning hardly inspires confidence in the durability of a ban limited to reproductive cloning, or in the long-term commitment to maintaining it of those now urging that approach.

For those who believe that human cloning for any purpose is intrinsically immoral and dehumanizing, a pseudo-ban is worse than no ban at all.

For those who believe that human cloning for any purpose is intrinsically immoral and dehumanizing, a pseudo-ban is worse than no ban at all. Accordingly, if our choice today is either acceptance of a ban on human reproductive cloning only or stalemate, we should choose stalemate. Far better to keep struggling for a moral public policy with integrity than surrender to political expediency and harmful half-measures.

Even without a ban today, we accomplish a lot by continuing to struggle toward outlawing the cloning of human life at both federal and state levels. (Iowa recently outlawed all human cloning within its borders.) As long as venture capitalists know that investing in immoral cloning research presents a significant financial risk, the Brave New World enterprise will continue to face a shortage of resources.

In the meantime, adult stem cell experiments likely will continue to demonstrate awesome potential, so that one day even the New York Times will be unable to ignore the news. Once the country recognizes that we can have regenerative medicine and morality too, the dogged resistance to a legal ban on all human cloning will collapse, and a proper legal ban will be enacted.

L

[Wesley J. Smith is a senior fellow at the Discovery Institute and the author of *Culture of Death: The Assault on Medical Ethics in America*. This article originally appeared in *The Weekly Standard* (http://weeklystandard.com) July 1, 2002, and is here reprinted by kind permission of the author.]

(REASONABLE CONT. FROM PAGE 1)

says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person."

The third and final major step in the majority's analysis was to rule that "the circumstances" or context under which an allegedly threatening statement is made is not limited to the direct circumstances of the delivery of the statement, but includes matters over which the speaker has no control. Moving in for the kill, the majority rested its decision on the theory that because there was a "history" of three doctors being killed after their names or pictures appeared on what the court terms "'wanted'-style posters," "the poster format itself had acquired currency as a death threat for abortion providers." Thus, "it is the use of the 'wanted'-type format in the context of the poster pattern—poster followed by murder—that constitutes the threat."

Before looking at the constitutional problems with the court's reasoning, a preliminary factual problem should be noted. Of the three murdered doctors who make up the "poster pattern," one was killed in an apparent robbery attempt in a nightclub parking lot with no evidence that he was killed because he performed abortions. Another was killed by someone who had no involvement in publishing posters. Only one doctor, Bayard Britton, was killed by a person who participated in preparing a poster about him. All the other individuals who made posters never killed anyone, and many doctors who have been named on posters have never been subject to any threats or violence. Thus, the "poster pattern" turns out to be a "poster isolated incident."

Moreover, the inconvenient but undisputed facts are that none of the defendants committed any of those earlier murders or was connected with acts of violence against abortionists, and none of the defendants published any of the posters which are part of the so-called "poster pattern." Indeed, the defendants' posters have significant differences in their wording, which is why the majority referred to "'wanted'-style posters" even though the defendants posters didn't say "Wanted" or even "Unwanted." In sum, the majority's holding means that, because of an alleged "poster pattern" of violence, posters about abortion providers have been transformed from constitutionally protected speech into unlawful "true threats," at least when published by someone who knew or should have known about the supposed "poster pattern."

> *"to perceive a threat, one must **disregard** the actual language used and rely on context to **negate** the ordinary meaning of the communication."*

The majority's conclusion about the Nuremberg Files website is confused and confusing. The judges acknowledge the differences between the posters which identified a few specific abortionists, and the website, which lists hundreds of doctors, judges, politicians, and celebrities, and is not associated with any "pattern" of violence. But, the judges state, the website goes further, because it lists the abortionists separately, and because the names of abortionists who have been killed or wounded are so indicated by strike-throughs or shading. (As noted in an earlier article, Neal Horsley, the creator of the website, testified that he copied these names and notations from a mainstream newspaper article he saw. It was not intended to be a "scorecard" to be updated.) Because of these sinister aspects, the majority ruled the website was not protected speech and thus the jury could decide if it was a threat. Later in the opinion, however, the majority comes right out and says that the Files are a "true threat," but only "in conjunction with the 'guilty' posters." Thus, although the website is *not* a threat to almost all of the hundreds of individuals named on it, it *is* a threat to those whose names also appeared on posters. Go figure.

The majority opinion drew sharp dissents from both liberal and conservative jusdges, notably Judges Reinhardt and Berzon on the left, and Kozinski on the right. The judges pointed out the many flaws in the majority opinion, most notably:

1) The posters and website didn't contain any explicit threats; they didn't even contain any implicit threats. In fact, they explicitly disavowed the use of violence. Although it is permissible to look at context and circumstances to determine whether speech is or is not intended as a threat, in this case, "to perceive a threat, one must *disregard* the actual language used and rely on context to *negate* the ordinary meaning of the communication." In other words, context was used not to enhance or explicate the language, but to contradict it. The majority admitted "the language itself is not what is threatening" and for that reason ignored the communicative aspect of the posters altogether. Because of the supposed "poster pattern" of violence, the majority effectively treated the posters as weapons, not speech, and publishing them as the equivalent of waving a gun in someone's face.

2) The alleged threats were not communicated to the supposed victims. Rather, they were introduced at pro-life rallies and meetings, including one on the steps of the courthouse in Missouri where the *Dred Scott* case was originally decided. The plaintiff abortion providers first heard of them from the federal agents who came to their doors to warn them that they were being threatened. As the dissenters point out, "statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest." Instances of speech uttered in public protests being construed as unlawful threats are few and far between, and in such cases, courts have held that the language in question must be "so unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent threat of execution." *U.S. v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). As noted above, far from being unequivocal (or unambiguous, Judge Berzon's preferred term), unconditional, and specific, the language in the posters and website only conveys a threat after being put through the wringer of the majority's "poster pattern" analysis, at which point it becomes

threatening only for those in the know.

3) Finally, as most eloquently put by Judge Berzon, "The posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and propose a—peaceful, legal—course of action; and they were presented with explicit reference to great moral and political controversies of the past." Thus, they are, on their face, "clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment." Put another way, the issue is not whether certain speech was a true threat vs. a thoughtless comment spoken in the heat of the moment; or a true threat vs. a malicious prank gone too far; or a true threat vs. rhetorical overkill. The issue was whether defendants' speech, which on its face fits every definition and description of the most highly-protected type of First Amendment activity, can nonetheless be classified as unprotected speech, and the defendants severely punished for it and enjoined from repeating it in the future, based on a context over which they had no control.

This is the distinction that the majority never seemed to grasp in its lengthy review of the jurisprudence of "threats." Unlike so many of the cases it either followed or distinguished, the speech here, on its face, stands on the highest rung of the First Amendment hierarchy. This is not a case where the expression, while of negligible societal value, may be held to be protected simply to avoid a chilling effect on other speakers. Rather, here the speech itself is exactly the type of political, moral, and religious expression on a matter of societal importance that the First Amendment is intended to protect from suppression.

Further, the majority never considered the merging of all the above factors. It cited cases where speech was held to be threatening even though it was not uttered directly to the victim; or only by reference to extrinsic factors; or where the threat did not specify who would commit the violence; or it was communicated in a public setting along with protected political speech. However, while these cases each had one exculpating factor, they made up for it by the presence of other indicia of a true threat.

The majority could not cite a single case where expression was held to be threatening even though it was on its face not just non-threatening but anti-violence, where it was not communicated directly to the alleged victims, and where the speech was core First Amendment speech, and promulgated as such.

Throughout her dissent, Judge Berzon suggests that the majority's opinion was shaped by its latent sympathy for the plaintiffs and its disapproval of the tactics, and quite possibly the beliefs, of the defendants. For example, in discussing the prejudicial impact of various evidentiary rulings made in the trial court, she noted "with some confidence" that these issues "would not be decided so summarily, and probably would not be decided in the same way, were this a less wrenching case on its facts."

The most egregious of these rulings was allowing federal agents to testify about their visits to the plaintiffs warning them of the "threatening" posters that were being distributed. The trial court allowed one FBI agent and two U.S. Marshals to take the stand and make statements such as:

> *"I told him that he was on a threat list;"…*
>
> *"Because of the nature of the threats, and—I asked Dr. Hern to—he had a bulletproof vest. I thought it would be a good thing if he wore that;"*
>
> *"I told her that I thought…. the teachers of her children should know about this threat, as well, in order to maintain the security of the children;"*
>
> *"[H]eadquarters was taking this threat very seriously;"*
>
> *"I told him … that I had been given instructions to notify—to immediately notify him, so that he could take some personal precautions for his safety."*
>
> *"I was directed by my headquarters to immediately contact Dr. Warren Hern, because he was listed on the—the document."*

The majority ruled that this testimony (and several other statements of similar import) "had some tendency to show the physicians' state of mind when they found out they were named on the posters." It doesn't take a lawyer

(**REASONABLE** CONT. ON PAGE 12)

EDUCATION

LLDF, on an ongoing basis, provides referrals to attorneys for assistance in ensuring care for medically dependent relatives and for adoption and guardianship matters; obtains legal assistance for women injured by abortion; advises employees in regards to free speech rights in the workplace; instructs pro-lifers in how to defend themselves in court; advises attorneys and citizens on working with legislative bodies re proposed legislation; advises numerous sidewalk counselors, picketers, and prayer supporters of their free speech rights and rights to peaceful assembly when speaking out for the unborn in their communities; provides spokespersons for television, radio, and print media, and speakers for training workshops and debates.

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•

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LIFELINE MISSION STATEMENT

The mission of Life Legal Defense Foundation is to give innocent and helpless human beings of any age, and particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the courtrooms of our nation.

LIFELINE EDITORIAL POLICY

The purpose of LLDF is set forth in our mission statement above. To that end, *Lifeline* welcomes all ideas, opinions, research and comments, and all religious and political points of view, so long as not seen to be clearly divisive, and so long as fundamentally based upon the twin pillars of truth and charity.

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(**REASONABLE** CONT. FROM PAGE 11)

to see that this testimony shows nothing about the physicians' reaction to being named on the posters. Rather it told the jury that: 1) federal agents thought the posters were threats; 2) their superiors at "headquarters" thought the posters were threats, and 3) the doctors were told that their lives had been threatened, and consequently felt threatened. Because of the government's precipitous response to these alleged threats, there was in fact no testimony about what the abortionists' reaction to the posters was or would have been uncolored by the dire warnings of the federal agents. The testimony thus carried maximum prejudicial punch without a modicum of probative value.

The majority held that the federal agents' testimony also showed "the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated." Not only is this argument logically unpersuasive, it is, as Judge Berzon noted, dangerous to the First Amendment: "Under this rationale, if federal law enforcement officials dislike certain speech, they can take a substantial step toward rendering it unprotected by expressing publicly the view that such speech is threatening, because if the speaker then repeats the speech he does so with knowledge of the reaction it precipitated."

One of the most ironic aspects of this decision is that, as noted above, the majority ruled that the posters and website constituted "true threats" because "a reasonable person" would foresee that they would be understood as such. Yet the en banc panel split 6-5 on that holding, with five judges arguing that "defendants said nothing remotely threatening," and in fact, their speech was constitutionally protected. Thus, the defendants, none of whom are lawyers, are held liable for a crushing monetary judgment because six judges say "a reasonable person" would have known something which five judges say isn't so.

The defendants filed a motion for rehearing before the entire Ninth Circuit (a panel of 25 judges) but that motion was denied. They have filed a petition for certiorari in the United States Supreme Court in October, which LLDF is supporting with an amicus brief. L