

**Author**

**Dawson Bell**

* [Latest Article](http://www.weeklystandard.com/author/dawson-bell#latest-article)
* [Recent Articles](http://www.weeklystandard.com/author/dawson-bell#recent-articles)
* [Biography](http://www.weeklystandard.com/author/dawson-bell#biography)

[**Roe v. Wade v. Michigan**](http://www.weeklystandard.com/Content/Protected/Articles/000/000/011/553vsodi.asp)

**Can a doctor still be sent to jail for performing abortions?**

Mar 5, 2001, Vol. 6, No. 24 • By [DAWSON BELL](http://www.weeklystandard.com/author/dawson-bell)

Lansing, Mich.

REBECCA BLACK doesn't fit the mold of the pro-life activist. And for good reason: She isn't one. In fact, Black spent eight years working as a medical assistant in one of Michigan's busiest abortion clinics. Asked her personal views on the subject, she says, "I think it's a woman's right. I'm not going to judge. I'm not God."

But Black thinks Jose Gilberto Higuera should go to jail. Higuera is the OB/GYN abortion provider for whom she worked from 1986 to 1994. And thanks to evidence she gave state investigators in 1995 that Higuera had aborted a 28-week-old fetus, then falsified medical records to cover it up, he just might land behind bars.

This would make Higuera the first doctor in Michigan -- and one of only a handful in the country -- criminally sanctioned for performing an abortion since the landmark 1973 U.S. Supreme Court abortion decision in Roe v. Wade.

The possibility of jail time for Higuera suddenly became real on January 30 when a divided panel of the Michigan Court of Appeals defied expectations by overturning two lower courts and finding that the state's pre-Roe statute prohibiting abortion -- the 1931 law under which Higuera was charged -- is not entirely a dead letter. In certain circumstances, the 2-1 majority ruled, the act of aborting a viable fetus in Michigan is a felony, and Dr. Higuera can be tried for it.

Not surprisingly, the decision received a chilly reception from supporters of abortion rights in Michigan. The court's finding, after all, would appear to concede that not all reproductive decisions are "best left to a woman and her physician." Some such decisions apparently are criminal.

But, while chilly, the reception has not been shrill. By comparison with, say, the uproar whenever anyone suggests it should be against the law for an adult man to procure an abortion for his pregnant teenage girlfriend without her parents' knowledge, the reaction to People v. Higuera has been virtually inaudible.

There is a fairly simple reason for this. Abortions late in pregnancy make abortion advocates excruciatingly uneasy. Abortions at 28 weeks -- which involve the unpleasant business of dismembering a fetus measuring upwards of 14 inches and weighing more than two pounds -- don't poll nearly as well as the sacred right to terminate a first-term pregnancy.

Dr. Higuera's case has proven especially troubling. According to testimony in the criminal case against him, and a concurrent action by state authorities to revoke his medical license, Higuera's patient, identified as "D. D.," initially believed she was no more than 23 weeks pregnant -- close to viability, but still under the cutoff after which the Supreme Court said in Roe's successor, Planned Parenthood v. Casey (1992), that the "state's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions."

An ultrasound performed at Higuera's clinic, however, indicated that D. D. was in fact closer to 28 weeks. After discussions about why she wanted an abortion -- she said, "It's not the right time" -- Higuera raised his price from $ 1,900 to $ 3,000 and went ahead.

When the two-day procedure was underway, Higuera told his patient she might have some cramping and go into labor overnight. If that happened, D. D. was instructed to call his assistant (Rebecca Black) rather than go to the hospital, because she might deliver a live baby. A day later he completed the abortion.

And that would have been the end of it, but for Black's decision to contact state health officials with her claim that Higuera was routinely performing abortions past 24 weeks and engaging in other unsavory practices like the re-use of IV bags and syringes. She made a copy of several patient files, including D. D.'s 28-week ultrasound, and turned them over to investigators.

Oddly, when investigators subpoenaed the original files from Higuera, the ultrasound report said 24 weeks. Another clinic aide said she had prepared a 24-week report at Higuera's request months after D. D.'s visit to the clinic, and Michigan authorities believe Higuera substituted the inaccurate report for the original.

All that, according to the Court of Appeals, added up to at least a theoretical crime under Michigan law, even as constrained by Roe and its progeny. The majority opinion was written by Judge Helene White, the Bill Clinton nominee to the Sixth U.S. Circuit Court of Appeals who is best known for waiting longer for confirmation than any federal court nominee in history (and waiting in vain). White's nomination was supported by abortion rights activists, and she is generally regarded as pro-choice. The prosecutor (who inherited the case and didn't drop it) is Michigan attorney general Jennifer Granholm, a Democrat and self-proclaimed advocate of "a woman's right to self-determination in her reproductive health care decisions."

So does this mean that some advocates of choice see performing some abortions as a crime? Probably not -- at least not in any practical sense that would actually prevent any abortions from taking place.

A close reading of Higuera indicates that the case is no slam dunk for the prosecution. White's opinion asserts that to convict at trial, the prosecution must prove that the defendant "subjectively believed that the fetus was . . . viable and that the defendant, in his own mind, did not hold the subjective belief or medical judgment that the procedure was necessary to preserve the life or health of the mother."

Kary Moss, executive director of the American Civil Liberties Union in Michigan, called Higuera "a really difficult decision," but one with which the ACLU wouldn't take issue because "the law in Michigan does make abortion illegal after viability when, in the doctor's subjective medical judgment, it is not necessary to preserve the life or health of the woman."

**Chat, browse and stream from anywhere.**

Promoted by U.S. Cellular®

#### More by Dawson Bell

In other words, a crime has been committed when the doctor agrees that he has committed a crime. Small wonder that since Roe the successful prosecution of abortionists (with the exception of borderline butchers, like New York's Dr. Abu Hayat, convicted in 1993 after performing a late-term abortion in which he severed the arm of a baby that survived) has been exceedingly rare.

The overall unseemliness of Higuera (the doctor had a history of abortion malpractice claims) makes it difficult for abortion rights advocates to mount a defense, but one judge gave it a try. Judge Kathleen Jansen dissented in Higuera. She found Michigan's law unconstitutionally vague and said the testimony about the term of D. D.'s pregnancy was "entirely unclear." She also cast aspersions on Black's motives, asking why her conduct in collecting patients' files had not been investigated by the attorney general.

But, while Dr. Higuera has until late February to seek review by Michigan's Supreme Court, the ACLU's Moss isn't keen on an appeal. Moss said she "never wants to see any case on reproductive rights go to that court," which is dominated by conservatives.

Better, she said, for the case to "go away," lest it become an opportunity for "Right to Life to . . . hold up 30-week fetuses to horrify people."

Better, finally, to maintain the status quo: Abortion rights advocates can insist that abortion on demand is a myth and Dr. Higuera is an aberration, while at the same time justifying any abortion, performed at any stage of pregnancy, for any reason, as long as the patient and doctor do a better job than D. D. and Dr. Higuera of holding up the fig leaf of medical necessity.

Because without the fig leaf, there looms the disquieting prospect of more unhelpful statements from putative pro-choicers like Rebecca Black, who said that what Dr. Higuera did was "way past abortion; it was bad delivery."

Dawson Bell is a reporter in the Lansing bureau of the Detroit Free Press.

Original article found online at: <http://www.weeklystandard.com/author/dawson-bell>