Ourselves Unborn

A History of the Fetus in Modern America

Sara Dubow

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INTRODUCTION
FETAL STORIES

The fetus is a familiar, contested, and provocative presence in American culture and politics. Ultrasound images used by activists at antiabortion protests, or produced in fetal photo studios where expectant parents can buy greeting cards and other keepsakes, illustrate the proliferation and power of the fetal image in contemporary society. Although ultrasound technology has made a particular image of the fetus extremely recognizable, that image represents only one moment on the historical continuum of encounters with the unborn. The meanings ascribed to the fetus in those encounters are neither inevitable nor self-evident. Rather, the fetus has long been a screen onto which society projects its deepest held assumptions and anxieties. *Ourselves Unborn: The Fetus in Modern America* examines how, from the late nineteenth to the early twenty-first century, Americans have articulated those assumptions and anxieties through arguments about the social value, legal identity, and political status of the human fetus.

Some recent examples illustrate how the fetus is currently imagined as part of the body politic, a citizen recognized and protected by the state. In October 2002, the United States Department of Health and Human Services added human embryos to the list of "human subjects" whose welfare must be taken into account by the Advisory Committee on Human Research Protections.[1] The next month, in revising the State Child Health Insurance Program (S-CHIP), HHS redefined the term *child* to begin at the moment of conception, making fetuses eligible for state-sponsored health insurance.[2] In April 2004, Congress signed into law the Unborn Victims of Violence Act, making the death of a pregnant woman and her zygote, embryo, or fetus in the execution of a federal crime punishable as two separate criminal violations. And in May 2004, a U.S. district judge in Missouri temporarily prohibited the deportation of a pregnant Mexican woman because "[i]f this child is an American citizen, we can't send his mother back until he is born."[3]

The policies regarding stem cell research and health insurance, the making of the killing of an unborn child a federal crime, and the immigration decision illustrate how the state constructs fetal citizens through bureaucratic technologies

such as statutory policies, state and federal laws, and judicial rulings.[4] Although none of these four examples are about abortion per se, they, and the idea of fetal citizenship itself, are products of and participants in the politics of abortion that began in 1973. For nearly forty years, the *Roe v. Wade* decision has intersected with political exigencies, social tensions, religious beliefs, and technological developments to generate a series of conflicts about the meaning and status of the fetus.[5]

Some examples of these conflicts involved the so-called epidemic of "crack babies," the increasingly violent culture wars over abortion, and the eruption of a series of so-called maternal-fetal conflicts in the 1980s and 1990s. Pictures of pregnant women addicted to crack or of crack babies, and antiabortion billboards featuring aborted fetuses were part of the cultural landscape. Also part of that landscape was the escalating violence of the antiabortion movement, most horrifyingly illustrated by the bombings of abortion clinics and the assassinations of abortion providers, including, between 1993 and 1998, four physicians, two clinic employees, a security guard, and a clinic escort. In 2009, Dr. George Tiller, an abortion provider and one of the few physicians willing to perform late-term abortions, was assassinated.[6] Between 1977 and the end of September 1998, more than 3,385 bombings, arsons, blockades, episodes of vandalism, stalkings, assaults, and other acts of violence took place at clinics throughout the country.[7] The hysteria about crack babies dissipated, and the violence of the antiabortion movement was curtailed by the 1994 passage of the Freedom of Access to Clinics Entrances Act (FACE), which made it a federal crime to use force, the threat of force, or physical obstruction to prevent individuals from obtaining or providing reproductive health-care services. Nonetheless, the fetus remains a public presence.

The political culture of the 1980s and 1990s increasingly saw the interests and rights of pregnant women as separate from the interests and rights of the fetus. Courts were asked to resolve a series of perceived conflicts between women and fetuses: Could women be required to undergo sterilization procedures in order to work in certain environments? Could pregnant women be required to undergo caesarean sections without their consent? Could pregnant women be charged with child abuse or neglect if they were taking drugs? One of many examples of this phenomenon was the case of Cornelia Whitner, who had been arrested and charged with child neglect after delivering a baby with traces of cocaine in his system. In 1997, the South Carolina Supreme Court upheld her conviction. Among the countless political battles surrounding the meaning and status of the fetus since *Roe v. Wade*—battles that have included the construction of fetal citizenship, the "crack baby epidemic," and the violence of the antiabortion movement—these so-called maternal-fetal conflicts constituted just

another episode in the history of public efforts to ascribe meanings to and monitor women's behavior on behalf of the fetus.

In the year following Whitner's arrest, Eric Rudolph bombed an abortion clinic in Birmingham, Alabama, and James Kopp murdered Dr. Bernard Slepian, an obstetrician and abortion provider in Buffalo, New York. At the same time, public health billboards featuring sonogram images of fetuses with messages like "Smoking will seriously damage the health of your unborn child. For their sake stop today!" proliferated in the public landscape. Stores like "A Peek in the Pod" opened, where for $295 expectant parents can buy a "keepsake package of prenatal memories" that includes a thirty-minute ultrasound session recorded on DVD, a computer screensaver, and photo frames.[8]

Ourselves Unborn: Fetal Meanings in Modern America historicizes the public fetus of the 1980s and 1990s in a larger context, contending that the meanings ascribed to the fetus from the late nineteenth century through the early twenty-first century have had more to do with social values and political circumstances than with biology or theology. Therefore, in order to understand the particular resonance of fetal discourses at particular historical moments, we need to read them against those social values and political circumstances. A fetus in 1870 is not the same thing as a fetus in 1930, which is not the same thing as a fetus in 1970, which is not the same thing as a fetus in 2010. Although multiple and competing fetuses have always coexisted, particular historical circumstances have generated and valorized different stories about the fetus. This book is about the relationship between those stories and those circumstances. By telling and interpreting stories about the origins, development, and significance of the fetus, people—individually and collectively—have expressed their assumptions and anxieties about personhood, family, motherhood, and national identity. By asking questions such as: How do people come to understand what embryos and fetuses are and what they mean? Why and how did people begin to make an emotional and political investment in the fetus? How do particular stories become politically and culturally significant? *Ourselves Unborn* examines the causes and consequences of the American obsession with the unborn.

The answers to those questions reveal deep patterns of change and continuity. In the late nineteenth century, fetal life was recognized and acknowledged only at the moment of "quickening" in the fourth or fifth month of pregnancy; by the late twentieth century, ultrasound exams could detect fetal life from the earliest days of conception.[9] In the late nineteenth century, embryologists and obstetricians were only beginning to understand the mechanisms of fertilization and development, and could neither observe nor intervene in that process; by the late twentieth century, reproductive endocrinologists could manage and manipulate fertility, and fetologists could diagnose and treat the fetus *in utero*.[10]

In the late nineteenth century, the fetus was not regulated, or even recognized, by law; a century later, the fetus was governed by a wide array of tort, criminal, property, and abortion laws.[11] In the late nineteenth century, almost no one knew what a fetus actually looked like; today, most people can easily identify sonogram images as a fetus.[12] Despite these quite remarkable developments, the meanings ascribed to the fetus are also marked by more subtle continuities and recurrent questions. Some of those questions—the ones about how fetal life develops—are embryological; some of them—the ones about what fetal life means—are philosophical; and some of them—the ones about whether fetal life should be protected—are political and ethical.

Fetal stories are constructed through a combination of theological, governmental, and medical technologies, as well as through everyday cultural practices. Since the late nineteenth century, these technologies and practices have intersected with larger conversations about the authority of science and religion, the relationship between individuals and society, and the meaning of individuality and personhood. By examining those intersections, the history of fetal meanings offers a new perspective on debates and assumptions at the center of the twentieth-century American history. The fetal stories of *Ourselves Unborn* are specifically American stories. Certainly, other cultures have rich histories in which individuals and the state ascribe particular meanings to the fetus and other historians have written those histories.[13] This book looks at the ways in which fetal stories are refracted through the prisms of the peculiarly American history of race, gender, ethnicity, and class; the relationships among religion, science, and politics; and the debates about individualism and democracy.

Ourselves Unborn builds on and engages with a rich literature on the various meanings and constructions of the fetus in Western culture and American history. Legal scholars and political scientists have traced a history of the fetus that identifies precedent-setting cases as significant turning points.[14] These works typically begin with the 1884 decision *Dietrich v. Northampton,* which established the legal precedent that a fetus has "no separate existence" from the mother and therefore cannot sue to obtain damages for injuries sustained *in utero.* The *Dietrich* precedent held for over sixty years, until 1946, when the *Bonbrest v. Katz* decision legitimized limited fetal rights by upholding a plaintiff's claims for damages for injuries incurred prenatally. The next significant turning point is the 1973 *Roe* decision that ruled that a fetus is not a person under the terms of the Fourteenth Amendment, but that the state has an interest in protecting the life of the fetus after viability. The legal history of the fetus generally ends with three landmark cases between 1990 and 2001: the 1990 case *In re A.C.,* in which the District of Columbia Court of Appeals ruled that physicians must honor the

wishes of a competent woman regarding a cesarean section; the 1991 decision in *UAW v. Johnson Controls,* in which the Supreme Court declared that policies that bar women from specific jobs out of fear that these jobs might harm embryos or fetuses were a form of sexual discrimination that violates Title VII of the Civil Rights Act of 1964; and the 2001 decision in *Ferguson v. The City of Charleston,* in which the U.S. Supreme Court found unconstitutional a public South Carolina hospital's policy of surreptitiously testing pregnant women for drugs.[15] Within those parameters, legal scholars trace the patchwork of state laws having to do with fetal homicide, fetal abuse, and fetal neglect.

Medical historians begin their story much earlier, frequently with Aristotle's theories of human reproduction.[16] But the fetus's modern medical history in the United States generally begins in the 1880s, at Johns Hopkins University, with embryologist Franklin Mall's project to collect human embryos. The next turning point might be the 1930s and 1940s, with Arthur Hertig and John Rock's efforts to photograph specimens of early fertilized human ova between one and seventeen days of development, and Rock's 1944 success in fertilizing a human egg in a test tube.[17] Other important steps in this medical narrative include Dr. Ian Donald's development in the late 1950s of ultrasound technology for obstetrical purposes; the growing use of amniocentesis in the late 1960s; and Dr. William Liley's research and practice of intrauterine transfusions in the late 1960s and 1970s, which inaugurated the practice of fetal medicine, or fetology.[18]

Providing a different perspective on these medical and legal developments, feminist scholars have worked to expose the political and ideological motives behind the transformation of the maternal-fetal relationship from one experienced and defined by the pregnant woman to one interpreted and regulated by laws and physicians. Others have worked to reclaim that relationship from its overmedicalized and highly politicized position. Historians of abortion and reproductive rights begin with the premise that abortion has always been practiced, and trace its largely unregulated history until the mid-nineteenth century, when Dr. Horatio Storer started the antiabortion movement that succeeded in criminalizing abortion in almost every state by the early twentieth century.[19] This physician-led antiabortion movement has been seen as part of a larger effort to professionalize medicine, led by medical-school trained physicians who wanted to end midwives' control over reproduction, and endorsed by a society that wanted to control the behavior of women. Storer and his followers focused primarily on the ways in which abortion posed serious dangers to women, but also introduced the concept of fetal life into abortion politics. This body of scholarship focuses on the ways that abortion politics are a window into ideas about women and their appropriate role in society.

Religious scholars approach the history of the fetus from a variety of angles, based on the particular doctrines of Catholicism, Judaism, Buddhism, and Hinduism. This perspective illustrates a great variation. In Judaism, the fetus is a person only once the head has emerged from the birth canal and the first breath has been taken.[20] In Islam, the fetus becomes a person at 120 days of gestation.[21] Hindus believe that life is without a clear beginning or a clear end—conception and death are not the boundaries of life.[22] The Roman Catholic Church's position has changed over the past two thousand years from teaching that personhood occurs at 40 days after conception for a boy and 80 days for a girl, to teaching that personhood begins at conception.[23] Religious scholars also study how these doctrinal teachings are practiced in people's lives and in different cultural contexts, showing a tremendous gap between theory and practice.[24] A third perspective focuses on the intersections of religion and politics, either using religion to justify a particular position on abortion or stem cell research, for example, or showing how different groups have mobilized religious authority to make political claims.[25]

Cultural critics have analyzed the ways in which modes of visualization have enabled the identification of a fetus as a "person" separate from the mother, and constructed the fetus as a "citizen" with rights subject to the protection of the state.[26] Anthropologists have written about how women's experiences of pregnancy and childbirth have been altered by new technologies.[27] Working from a variety of disciplines and perspectives, these scholars have provocatively analyzed the social and political causes and consequences of contemporary fetal politics. But in overemphasizing the causal role of technology, much of this literature foreshortens the history of those politics and understates the significance of the fetus in American history. Although it is true that ultrasound technology has familiarized a particular visual image of the fetus, that image is only one moment along the historical continuum of Americans' encounters with the fetal body.

Cumulatively, this scholarship offers important insights into the varied meanings that have been ascribed to the fetus, and the ways in which those meanings have been constructed and deployed in modern America. However, it can also obscure the ways in which these different narratives—legal, political, medical, religious, anthropological, sociological, cultural—intersect and interact with one another. Understanding the history of fetal meanings in modern America involves tracing the relationships among these different narratives, and relating them to the larger context of social, political, and economic changes. This historical project required creating a kind of archive of the fetus, one that includes medical textbooks and journals, educational literature and "popular" science books, museum exhibitions and mass media, case law and legal journals,

and legislation and legislative debates. Historicizing the fetus requires amassing and making sense of stories told by embryologists and physicians, museum curators and self-help literature, politicians and lawyers, religious leaders and social activists, and by women themselves. In revealing how people have come to understand what embryos and fetuses are, these stories highlight the causes and consequences of the cultural, emotional, and political investments that have been made in the fetus in modern America. That archive and those stories are the basis for *Ourselves Unborn*.

Organized loosely chronologically, the book does not move comprehensively through time, but, instead, examines particular themes and episodes as representative and illuminative of a particular era. Chapter 1, "Discovering Fetal Life, 1870s–1920s," focuses on the period during which embryology became a modern science, obstetrics became a profession, abortion became a crime, birth control became a movement, eugenics became a cause, and prenatal care became a policy. This chapter examines the ways in which the fetus was imagined in each of these shifts. Tracing the formulation of the idea that the fetus had a "right to be well-born," this chapter argues that fetal meanings in these years were shaped by anxieties about and responses to the ways in which the emerging industrial order was challenging traditional values and assumptions. This Progressive Era fetus was used to respond to the tremendous changes of these years, to express anxieties or excitement about industrialization, immigration, urbanization, feminism, modernity, and America's place in the world. The wide range of responses to those changes produced a protean fetus that meant different things to different people and that is used to endorse and comment upon a wide range of ideas and policies.

Chapter 2, "Interpreting Fetal Bodies, 1930s–1970s," analyzes the public encounters with the fetus through the dissection, display, and depiction of fetal bodies. Since the late nineteenth century, embryologists had been making wax models of human embryos and fetuses, and pathologists had been collecting real human embryos and fetuses to study.[28] As these collections expanded in the early twentieth century, ordinary Americans were increasingly exposed to fetal bodies through exhibits at fairs and museums, specimens in laboratories and classrooms, and photographs in textbooks and popular literature. This chapter analyzes how, during World War II and the early years of the Cold War, the corporeal fetal body that people encountered in public spaces became deployed as a symbol that paradoxically embodied both the strength and the vulnerability of the American individual and of American democracy in those perilous times. It then looks at how medical, political, and social changes wrought by 1960s liberalism generated a radically new abortion policies and politics that remade the fetus.

Chapter 3, "Defining Fetal Personhood, 1973–1976," focuses on two related episodes in Boston. The first episode is a series of local hearings on fetal research performed in Boston hospitals. The chapter examines the ways in which abortion politics transformed the longstanding and uncontroversial practice of fetal research into a politically and socially divisive issue. It then looks closely at the trial of Dr. Kenneth Edelin, an African-American obstetrician at Boston City Hospital. The fetal research hearings led investigators to BCH, where they heard reports of a purportedly questionable abortion performed by Edelin. The district attorney decided to pursue the issue. For performing a legal abortion on a seventeen-year-old girl, Edelin was charged with manslaughter. After a trial that consumed the city's attention for months, Edelin was convicted in February 1975. Both these events—the fetal research hearings and the Edelin trial—took place in a city riven by tensions over gender, race, class, and religion, tensions exacerbated by the contemporaneous busing crisis. The Edelin case and the fetal research controversy illustrate how fetal meanings in the 1970s emerged from those divisions transforming Boston and the nation.

The proliferation of rights-based movements for equality in the 1960s and 1970s provided the seductive language and compelling logic of "fetal rights" as a strategy of resistance. Chapter 4, "Defending Fetal Rights, 1970s–1990s," analyzes the context, intentions, and consequences of that strategy. Beginning in the 1970s, court-mandated medical interventions began invoking fetal rights while overriding women's civil rights as patients. At the same time, corporate-sponsored fetal protection policies began invoking fetal rights while overriding women's equal protection rights as workers. Beginning in the 1980s, states began prosecuting women for crimes of fetal abuse. This chapter analyzes the proliferation of claims on behalf of fetal rights that came at the cost of women's constitutional and legal rights. It situates this fetal rights discourse in the context of the growth of the New Right, and the backlash to the legalization of abortion, feminism, changing gender roles, and the welfare policies of the Great Society.

Chapter 5, "Debating Fetal Pain, 1984–2007," analyzes how fetal pain has been defined and debated in medical literature, in litigation, in legislative debates, and in public discourse. It begins in 1984, when Bernard Nathanson released *The Silent Scream,* a film in which he videotaped and narrated an abortion procedure performed on a twelve-week-old fetus, and ends in 2007, when the Supreme Court upheld the 2003 Partial Birth Abortion Ban Act in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America, Inc., et. al.*[29] Debates about fetal pain and partial birth abortion emerged during the Reagan era, at the height of the religious right's influence and the "family values" movement; they are best understood in that context. This chapter argues these debates—shaped by conflicting visions of motherhood and gender roles, by politicized

struggles over the relative authority of scientific evidence and religious values, and by arguments about the role of government in people's lives—ultimately became a referendum on liberalism.

Ourselves Unborn makes clear that competing fetal stories and contested fetal meanings have occupied an important place in the public sphere and collective imagination of the United States throughout the modern era. Illustrating how fetuses came to symbolize "ourselves unborn," this book also argues that stories about fetuses express individual and collective beliefs about individuality, motherhood, and American society. The fetus is sometimes a window into anxieties about race, gender, and motherhood; sometimes a projection of our beliefs about the relative authority of religion, science, or personal experience; and sometimes a proxy for seemingly unrelated issues like immigration, the Cold War, feminism, or liberalism. Analyzing the changing and contested meanings ascribed to the fetus from the late nineteenth century through the early twenty-first century offers a new perspective on those anxieties, beliefs, and issues, and explains why the fetus is such a powerful symbol in American culture and politics.

fetal abuse were not the wives of doctors. On May 12, 2008, the South Carolina Supreme Court ruled that McKnight did not receive a fair trial, concluding that her counsel was "ineffective in her preparation of McKnight's defense through expert testimony and cross examination." Accepting a causal link between McKnight's cocaine use and the stillbirth was determined to be factual error, and failing to call medical experts as witnesses who could refute that link or using the most updated scientific studies were determined to a legal error. Regina McKnight was be released after nine years in prison, but the *Whitner* decision upholding the South Carolina statute that defines a fetus as a child or person in the child abuse and endangerment statute stands in the South Carolina Children's Code.[210]

Efforts to regulate and punish the behavior of pregnant women on behalf of the fetus have been, for the most part, technically unsuccessful in that higher courts have thus far overturned them. These efforts have succeeded, however, in contributing to a larger phenomenon of blaming social problems on individuals—particularly on relatively powerless individuals without resources—and thereby exempting from responsibility the more structural forces underpinning poverty, substance abuse, and inequality. It is in this sense, then, that the phenomenon of "fetal rights" can be understood as a referendum on the weakened liberalism of the late twentieth century.[211]

Using the fetus to demonize particular kinds of mothers impinges upon the rights of all women, but it also jeopardizes the inviolability of the rights of all citizens, and ignores the obligations of the state to protect those rights. The premise of an inevitable conflict between women's rights and fetal rights, a conflict resolvable only through privileging one set of rights over the other ignores the ways in which everyone's rights are called into question when one group's rights are made contingent, and obscures the social costs of fetal rights. Fetal rights may provide an inexpensive tool for corporations trying to skirt their responsibilities for creating workplaces safe for all workers, or for states trying to avoid treating substance abuse as a public health crisis, but they impose high costs on the rest of society. Fetal rights are paid for in the erosion of privacy, medical research, environmental protection, industrial safety, public health, and racial and economic justice. Accepting those costs as inevitable or making them invisible are the consequences of a liberalism premised upon the recognition of individual rights without a concomitant obligation of the state to ensure political, social, and economic justice for all its citizens.

CHAPTER 5

DEBATING FETAL PAIN, 1984–2007

On November 6, 2006, South Dakotans voted on the Women's Health and Human Life Protection Act, a bill that prohibited all abortions except those intended "to prevent the death of a pregnant mother," and claiming to "fully protect the rights, interests, and health of the pregnant mother; the rights, interest, and life of her unborn child, and the mother's fundamental natural intrinsic right to a relationship with her child."[1] One month later, on December 5, 2006, the Republican-controlled House of Representatives of the 109th Congress voted on the Unborn Child Pain Awareness Act, which, invoking notions of "informed consent" and a women's "right to know," required physicians to tell women seeking abortions after the twentieth week of pregnancy that "Congress finds that there is substantial evidence that the process of being killed in an abortion will cause the unborn child pain, even though you receive a pain-reducing drug or drugs."[2] Two days later, in the joined cases of *Gonzales v. Planned Parenthood of America* and *Gonzales v. Carhart*, the U.S. Supreme Court heard arguments about the constitutionality of the 2003 Partial Birth Abortion Ban Act, an act that described the procedure as one that "is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances their lives."[3] Although the details and outcomes of these efforts differ—South Dakotans voted down the ban; Congress sent the bill back to committee; and the Supreme Court upheld the act—collectively, their shared assumption that abortions were dangerous and damaging to women, and their shared argument that these restrictions and regulations were intended to protect women, reconceptualized the maternal-fetal relationship in ways radically different from the one dominant in the post-*Roe* era while eerily similar to the one dominant in the late nineteenth-century movement to criminalize abortion.

Beginning in the 1980s, two new claims—that women were psychologically traumatized by abortion and that the fetus experienced pain during an abortion—were woven together by some antiabortion activists into a new rhetorical strategy that emphasized the ways that abortion hurt women and fetuses. In 1984, Dr. Bernard Nathanson used that strategy in his film *The Silent Scream*, in

which he videotaped and narrated an abortion procedure performed on a twelve-week-old fetus.[4] In the 1990s, it emerged in a series of congressional debates about banning partial-birth abortions. By 2006, the South Dakota ban, the Unborn Child Pain Awareness Act, and the arguments for the constitutionality of the Partial Birth Abortion Ban, explicitly linked the interests of the woman with the interests of the fetus. And in 2007, in the *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America, Inc., et al.* decision, the Supreme Court gave their imprimatur to that link.[5] This rhetorical strategy was developed and deployed within a new political context—the growing influence of the religious right on the Republican Party, as reflected first in the 1980 election of Ronald Reagan, and subsequently in the 1994 election of a Republican majority in Congress, the increasing number of Republican-controlled state legislatures, and the 2000 and 2004 election of George W. Bush. It was also shaped by a new cultural context, represented by the increasing public presence of and pressure from the "family values" movement, as championed by organizations like the Moral Majority, the Christian Coalition, the Family Research Council, the Eagle Forum, and Focus on the Family. This strategy also operated within a new legal context, illustrated by the fact that Republican appointees constituted the majority of judges on ten out of thirteen federal appeals courts, and the replacement of the liberal Supreme Court Justice Thurgood Marshall with a conservative one, Clarence Thomas in 1991; and the replacement of the moderate defender of *Roe,* Sandra Day O'Connor with a conservative and vocal opponent of *Roe,* Samuel Alito in 2006.[6] Debates about fetal pain and partial birth abortion between 1984 and 2007 are best understood as a commentary on those changing circumstances, conflicting visions of motherhood and gender roles, and politicized struggles over the relative authority of scientific evidence and religious values, as well as a referendum on the sixties liberalism that had produced them.

Fetal politics subsequent to the *Roe* decision typically posited the interests of pregnant women and fetuses as distinct from one another, with opponents of legalized abortion emphasizing the fetus's right to life and advocates emphasizing the woman's right to choose.[7] This perceived conflict extended beyond abortion, impacting the rights of women in workplaces and medical care facilities.[8] Antiabortion activists in groups like Operation Rescue, Prisoners of Christ, and the Army of God adopted violent tactics that included bombing abortion clinics and assassinating abortion providers. Between 1977 and 1998, antiabortion activists were responsible for 269 bombings, arson attacks, or attempted bombings and attempted arson attacks on clinics; 790 bomb threats and death threats; 16 attempted murders, and 7 murders of doctors, clinic escorts, and clinic staff.[9] At the same time, groups like the National Right to Life Committee,

Americans United for Life, Concerned Women for America, and Focus on the Family were developing a less incendiary and more incrementalist antiabortion strategy that invoked a concern for women along with a concern for the unborn.[10] The mission statement of Americans United for Life (AUL) put it this way:

> The social experiment in abortion on demand, imposed by the judiciary in 1973, has disastrously failed by ending the lives of more than 30 million children while damaging the physical and emotional health of millions of women.... [A]bortion is a violent deception that results in two victims: the child whose life is destroyed, and the woman who suffers devastating physical and psychological harm.[11]

AUL's list of legislative objectives included one to "mandate standards for abortion clinics to protect the health and safety of women and correct often substandard conditions" and one to "inform women of the health risks of abortion including the link between abortion and breast cancer."[12] Similarly emphasizing abortion's impact on women, Focus on the Family's website quoted an anonymous woman's description of her experience after having undergone an abortion: "The following weeks and months brought a myriad of emotions. My relief quickly turned to grief.... Before long, I wanted to die.... My relationship ended.... I became promiscuous, drank, and experimented with lesbianism."[13] The National Right to Life Committee (NRLC) issued a pamphlet on "Abortion's Psycho-Social Consequences," warning that abortions may lead to psychological trauma, guilt, regret, divorce, promiscuity, child abuse, lesbianism, eating disorders, reckless behavior, substance abuse, and suicide.[14] Another NRLC pamphlet titled "Is Abortion Safe?" listed dangers including permanent infertility, hemorrhage, death, and breast cancer.[15] Concerned Women for America (CWA) similarly framed their opposition to abortion by emphasizing "the physical, emotional and spiritual harm to women, men and their families."[16] In a new iteration of arguments made during late nineteenth-century efforts to criminalize abortion, this approach intended to attract supporters in a "kinder gentler nation" who were turned off by the bombing of abortion clinics but might be drawn to a movement dedicated to protecting women while also protecting the fetus.[17] But then and now, these women-centered arguments against abortion obscure a much broader agenda than that single issue.

Just as antiabortion efforts at the turn of the twentieth century reflected a commitment to an ideology then called "separate spheres" so too do efforts at the turn of the twenty-first century reflect a commitment to an ideology of what its supporters call "family values." And just as the ideology of separate spheres encoded racial assumptions and class anxieties through

prescribed traditional gender roles, so too does the ideology of family values.[18] For example, whereas nineteenth-century antiabortion activists like Horatio Storer worried about race suicide, today's antiabortion activists link the issue to immigration. In November 2006, the Missouri House of Representatives issued a report concluding that abortion was a factor in the rise of illegal immigration because it created a shortage of American-born workers. As its author Representative Edgar Emery (R) said, "If you kill 44 million of your potential workers, it's not too surprising we would be desperate for workers."[19] Dr. J. C. Willke—past president of the National Right to Life Committee, founder of the International Right to Life Federation, current president of Life Issues, and the originator of the "Why can't we love them both?" campaign, gave the following testimony in front of the South Dakota Taskforce to Study Abortion that was considering the Women's Health and Human Life Protection Act:

> Muslim countries forbid abortion. Furthermore they have large families. . . . Germany's birth rate is 1.2. . . . That is the Aryan Germans. What is happening? They're importing Turkish workers who do all of the more menial labor and right now there are over 1,500 mosques in Germany. The Muslim people in Germany have an average of four children. The Germans are having about one. So it's only a question of so many years and what do you think Germany is going to be? It's going to be a Muslim country.[20]

In conflating post-9/11 fears about Muslims with assertions about the relationship between legal abortion, economic imperatives, and immigration patterns in Germany, Wilke implicitly invites listeners to make those same connections in an American context. Phyllis Schlafly, president of the Eagle Forum and founder and chair of the Republican National Coalition for Life, has gone so far as to challenge the Fourteenth Amendment's guarantee of citizenship to anyone born in the United States, saying that "it's not the physical location of birth that defines citizenship, but whether your parents are citizens."[21] At the same time, though, the Republican National Coalition for Life endorses "legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."[22] So, paradoxically, Schlafly and her organization argue against the Fourteenth Amendment's guarantee that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States," while simultaneously arguing that the Fourteenth Amendment should apply to unborn children. It would appear that her suggestion is that the fetus should be considered a "person" with the attendant protections of due process and equal protection, but not a citizen, with the "privileges and immunities" associated with that status.

This contradiction troubles neither her nor Gary Bauer, past president of the Family Research Council and Republican presidential candidate in 2000, who worries that "hyphenated Americans put other countries and affiliations first, and they drive a wedge into the heart of 'one nation'" but also supports a human life bill that "defines unborn children as persons under the Fourteenth Amendment."[23] In *The Death of the West,* Patrick J. Buchanan clearly articulates the link between nativism and antiabortion arguments: "The West is dying. Its nations have ceased to reproduce, and their populations have stopped growing and begun to shrink. Not since the Black Death carried off a third of Europe in the fourteenth century has there been a graver threat to the survival of Western civilization."[24] At the same time that antiabortion and family values activists and organizations were focusing less on overturning *Roe* and more on trying to restrict abortion through partial-birth abortion bans, informed consent requirements, and waiting periods, and trying to protect the fetus through laws like the Unborn Victim of Violence Act, those same individuals and organizations began invoking arguments about fetal pain to link their "pro-life" politics to a larger worldview about the cultural fragility of a white Christian America.

The issue of fetal pain came to national attention on January 30, 1984 when, in a much-publicized address to the National Religious Broadcasters convention, President Ronald Reagan announced that "[m]edical science doctors confirm that when the lives of the unborn are snuffed out, they often feel pain, pain that is long and agonizing."[25] The contested nature of this claim was immediately exposed in the conflicting responses from physicians. The American College of Obstetricians and Gynecologists, representing the mainstream medical community's position, immediately issued the following statement:

> We know of no legitimate scientific information that supports the statement that a fetus experiences pain early in pregnancy. We do know that the cerebellum attains its final configuration in the seventh month and that mylenization of the spinal cord and the brain begins between the 20th and 40th weeks of pregnancy. These, as well as other neurological developments, would have to be in place for the fetus to receive pain. To feel pain, a fetus needs neurotransmitted hormones. In animals, these complex chemicals develop in the last third of gestation. We know of no evidence that humans are different.

At the same time, a group of twenty-six physicians rejected that statement in a public letter they wrote to Reagan, expressing their admiration for his success in "drawing the attention of people across the nation to the humanity and sensitivity of the human unborn."[26] For the antiabortion movement, resolving neurologists' debates about how to define, identify, and assess pain was ultimately

less important than shifting the location of the fetal pain debate from peer-reviewed medical journals to emotionally charged public forums, changing the standard of proof from empirical evidence to visceral response, and transforming what had previously been a scientific and philosophical question about how to define and identify pain into an emotional and political one.[27]

Sympathetic physicians, lawyers, and philosophers bolstered this transformation. In his influential article "The Experience of Pain by the Unborn," Catholic philosopher and legal scholar John T. Noonan explained the strategic utility of the concept of fetal pain:

> We live in a society of highly developed humanitarian feeling, a society likely to respond to an appeal to empathy. There are those who either will not respond to an argument about killing because they regard the unborn as a kind of abstraction, or who will not look at actual death photographs of the aborted because they find the fact of death too strong to contemplate, but who nonetheless might respond to evidence of pain suffered in the process of abortion.[28]

Noonan's essay anticipated, albeit with a different political purpose, literary scholar Elaine Scarry's argument that pain is "something that cannot be denied and something that cannot be confirmed" and that the belief or disbelief in someone's pain serves as an "example of conviction, or alternatively, as an example of skepticism."[29] Historian Martin Pernick and journalist Annie Murphy Paul make the similar point that "pain has long played a special role in how society determines who is like us or not like us."[30] The differentiating power of pain is expressed in Shylock's question "If you prick us, do we not bleed?"; in the Grimm's fairy tale about a princess so sensitive that she could detect a pea buried beneath countless mattresses; and in nineteenth-century beliefs that blacks did not experience pain the same way that whites did.[31] Scarry's claim that "when some central idea or ideology or cultural construct has ceased to elicit a population's belief . . . the sheer material factualness of the human body will be borrowed to lend that cultural construct an aura of 'realness' and 'certainty,'" suggests why so much was at stake in arguments about fetal pain.[32] Explicitly adopting Noonan's antiabortion strategy and perhaps implicitly understanding Scarry's insights, Americans United for Life led the effort to invoke pain in its campaign to substantiate the fetal body.

AUL used their journal *Studies in Law and Medicine* as a platform from which antiabortion physicians could give their arguments the legitimacy of scientific authority, and could translate that realness and certainty, that material factualness, into political sway.[33] In "Fetal Pain and Abortion: The Medical Evidence," Dr. Vincent J. Collins, one of the physicians who had signed the letter supporting

Reagan, invoked the authority of data and evidence, but ultimately relied on making emotional claims to the heart:

> The prospect of fetal pain—pain that results from abortion—cuts through philosophical abstractions and scientific nomenclature, proceeding directly to the heart. A being that feels pain makes an urgent demand for recognition, a demand we know through the experience of our own bodies rather than because of any cool, deductive need in our minds for logical consistency. . . . The demand is based on empathetic or sympathetic impulses that have little to do with reason or notions of justice. Abortion is approved or tolerated largely because of feelings of sympathy with the pregnant woman . . . but an understanding of fetal pain . . . counterbalances the claim the woman makes on the emotions.[34]

Dr. Bernard Nathanson took this idea of inciting "empathetic or sympathetic impulses" on behalf of the fetus rather than on behalf of the woman outside of theory and put it into practice. One of the original founders of the National Association for the Repeal of Abortion Laws (NARAL), Nathanson had become a dedicated antiabortion activist in 1975.[35] After hearing Reagan's speech, Nathanson decided to make the argument for fetal pain visually, and he produced a twenty-eight-minute film of an abortion performed on a twelve-week-old fetus.[36] He introduced the purpose of the film: "Now, for the first time we have the technology to see abortion from the victim's vantage point. We are going to watch a child being torn apart, dismembered, disarticulated, crushed and destroyed by the unfeeling steel instruments of the abortionist." Throughout the film, Nathanson narrated ultrasound images, ascribing emotion, sensation, and intent to the twelve-week-old fetus, identified throughout as "the child": "The child will rear away from it [the suction cannula] and undergo much more violent, much more agitated movements. The child is now moving in a much more purposeful manner. The child is agitated and moves in a violent manner." Nathanson described the end of the procedure with the statement that would provide the title of the film: "We see the child's mouth open in a silent scream. This is the silent scream of a child threatened immediately with extinction."[37] Reverend Jerry Falwell, president of the Moral Majority, indicated his immediate understanding of the potential political power of this film, suggesting that it "may win the battle for us," and indeed, the NRLC distributed ten thousand prints of *The Silent Scream*, including copies to members of Congress and the justices of the Supreme Court.[38]

Leading neurologists and neuroembryologists challenged the basic assumptions of Nathanson's film, arguing that because a twelve-week fetus had not developed the nerve cell pathways in the cortex that would allow an electrical

nerve impulse to travel from the brain to the muscle, it would be virtually impossible for a fetus at that developmental stage to experience pain. Dr. Robert Eiben, president of the National Child Neurology Society, said that it was a "desperately bad thing to imply" that fetuses felt pain.[39] Dr. Hart Peterson, acting chairman of pediatric neurology at New York Hospital at Cornell Medical Center in New York, said, "[T]he notion that a 12-week fetus screams in discomfort is erroneous."[40] Dr. Edwin C. Myer, chairman of the department of pediatric neurology at the Medical College of Virginia in Richmond, put it this way: "To make a statement that the fetus feels pain is a totally ridiculous statement. Pain implies cognition. There is no brain to receive the information."[41] Dr. Pasko Rakic, chairman of neuroanatomy at Yale University School of Medicine and one of the nation's leading experts in neuroembryology agreed, explaining that the absence of synapses in the cortex made it impossible to feel pain.

Planned Parenthood attacked the film for what it called "scientific, medical, and legal inaccuracies, misleading statements, and exaggerations," and convened a group of "internationally known and respected physicians" to identify the medical inaccuracies in the film.[42] Rejecting the claim that the twelve-week fetus experiences pain, these experts explained that "at this stage of pregnancy, the brain and nervous system are still in a very early stage of development.... Most brain cells are not developed. Without a cerebral cortex, pain impulses cannot be received or perceived."[43] The physicians also challenged Nathanson's description of the fetus moving in an "agitated" manner "in an attempt to avoid suction cannula."[44] Fetal movement, the physicians said, "is reflexive in nature, rather than purposeful, since the latter requires cognition, which is the ability to perceive and know."[45] The convened experts also concluded that the "videotape of the abortion was deliberately slowed down and subsequently speeded up to create an impression of hyperactivity."[46] Other criticisms included the fact that the "fetal model displayed during the abortion procedure is much larger than a fetus of a 12 weeks' gestation model visualized by ultrasonography."[47] Although including these criticisms in their reviews of and articles about the film, the press did not try to assess the science, but instead presented both arguments uncritically, implying that there were two equally legitimate interpretations of the status of fetal pain and leaving the reader or viewer to choose which explanation to believe.

Although the fetus was clearly the central victim in this film, central to its argument was also the claim that women frequently suffered severe and lasting psychological damage after having an abortion. The film ended with a montage of women Nathanson describes as "victims" who, because of the "conspiracy of silence with respect to the true nature of abortion," had had abortions with "no true knowledge" and were subsequently "full of extreme regret and sorrow."[48]

Nathanson's conclusion picked up on a phenomenon first identified by psychotherapist Vincent Rue at a 1981 congressional hearing on "Abortion and Family Relations" as "post-abortion syndrome."[49] *The Silent Scream* reintroduced this idea, which became increasingly central to the antiabortion movement. The same year as the release of *The Silent Scream*, psychologist David Reardon surveyed members of a group called Women Exploited by Abortion (WEBA) and concluded that that there was a relationship between having an abortion and high rates of nervous breakdowns, substance abuse, violence, and suicide attempts.[50] Reardon founded the Eliot Institute, an organization dedicated to what he calls a "woman-centered" approach to opposing abortion, generates papers on post-abortion syndrome, and advocates for women he calls "abortion survivors."[51] Organizations like Rachel's Vineyard Ministries, which offers "a safe place to renew, rebuild, and redeem hearts broken by abortion," Safe Haven, which offers "a place for healing for the trauma of abortion," Victims of Choice, and Healing Hearts, among others, provide online counseling and online communities and message boards for women suffering from postabortion trauma.[52] Comparing postabortion stress to the posttraumatic stress disorder afflicting many Vietnam veterans, psychologist Anne Speckhard described women experiencing flashbacks and hallucinations, and reporting intense nightmares, such as images of discarded fetuses in garbage heaps or babies trying to locate their mother.[53]

The public may have first learned of postabortion trauma during the trial of Lorena Bobbitt, who, in 1994, cut off almost half of her husband John's penis. David Reardon provided the defense with the argument that Bobbitt's attack, which took place almost exactly three years after her husband coerced her into having an abortion, was a manifestation of postabortion trauma:

> Lorena Bobbitt's abortion was unwanted. It violated her moral beliefs and signified the destruction of her dream to have a family just like the one in which she had grown up. It was an attack on her self-identity and her maternal self. By understanding how her abortion traumatized Lorena, we can understand why she mutilated John in the way she did.... It takes no leap of imagination to see how a woman, such as Lorena who, on an unconscious level felt that she had been sexually mutilated by her abortion, would, in a moment of bitter passion, attempt to "castrate" her husband.[54]

Rue, founder and codirector of the Institute for Pregnancy Loss, concurred, saying that, "from the evidence accumulated in the course of her trial, it is very likely that Lorena Bobbitt's actions were a direct result of both her traumatic coerced abortion experience and her longstanding abusive relationship with her husband."[55] In linking abortion and domestic violence as related forms of abuse with similarly damaging consequences for women, Rue and Reardon provide a

way for antiabortion activists to frame their argument in terms difficult for feminists to dispute.

Another strategy deployed by antiabortion activists wanting to position themselves as "women-centered" was their active promotion of the idea that there was a link between breast cancer and abortion. Joel Brind, a professor of endocrinology and biology at Baruch College, as well as an evangelical Christian and member of the NRLC, reviewed and analyzed a collection of epidemiological studies of that relationship, publishing his conclusions in the *Journal of American Physicians and Surgeons:*

> [I]nduced abortion is indeed a risk factor for breast cancer, despite the strong and pervasive bias in the recent literature in the direction of viewing abortion as safe for women.... It is deplorable that in an era in which women's rights appear so prominently on the political and public health landscape, women should be denied the right to know about the breast-cancer risk-increasing effect of such a common matter of choice as induced abortion.[56]

In journal articles, testimony in trials and in legislative debates, and in publications for antiabortion journals, Brind pushed this link through his advocacy for laws requiring clinics to warn women that one of the risks of an abortion was breast cancer. In 1999, he founded the Breast Cancer Prevention Institute, dedicated to publicizing what he called the abortion-breast cancer (ABC) link. In addition to a brochure titled "The Single Most Avoidable Risk for Breast Cancer Is Elective Abortion," the institute provides seven online fact sheets explaining the link.[57] Other organizations like the Coalition on Abortion/Breast Cancer spread similar ideas, selling magnets, bumper stickers, and T-shirts featuring their logo, a red ribbon outlined in pink, with pink text reading "Abortion Hurts Women" on one side and a pink breast cancer symbol on the reverse. Suggesting that the mainstream medical community is repressing information about this link, the coalition draws an analogy to the Tuskegee syphilis study, saying, "Just as the men in the Tuskegee study weren't told that their health was at risk, women who've had abortions haven't been told they're at greater risk for breast cancer. For this reason, they're less likely to seek early detection or to reduce their risk for the disease."[58] In addition to being scientifically suspect, these women-centered arguments mask a certain double message. Reardon's analysis of the Bobbitt case emphasized the impact on women of postabortion trauma, but it could easily be interpreted as a quite graphic object lesson about the dangers abortion poses to men. And Brind's explanation that "if a woman ignores the life of her unborn baby, maybe we can reach her through education concerning proven risks to herself," could be interpreted as an argument on behalf of women, but could also be read as a not-so-subtle suggestion that the

purported link between breast cancer and abortion might be effective because a woman's self-interest is more powerful than her maternal instinct.[59]

Just as the mainstream medical profession had challenged the idea that the fetus could feel pain, it also challenged the concept of postabortion trauma and the myth of a link between breast cancer and abortion. A 1997 Danish study published in the *New England Journal of Medicine* was considered the authoritative study debunking Brind's argument. Despite that, in 2002, the National Cancer Institute responded to pressures from Brind, Representative Tom Coburn (R-OK), and the Bush administration to provide information about the ABC link on their website. Pro-choice organizations and NCI scientists succeeded in having that information removed, and in 2003, the NCI released a study that concluded, "[H]aving an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer."[60] The American Psychological Association issued a report concluding that "the weight of the evidence" indicates that first-trimester abortion of an unwanted pregnancy "does not pose a psychological hazard for most women."[61] And in a comprehensive literature review published in the *Journal of the American Medical Association,* psychiatry professor Nada Stotland concluded that "there is no evidence of an abortion-trauma syndrome."[62]

But although postabortion trauma, fetal pain, and an ABC link did not have scientific backing, they did have strong emotional resonance and popular currency. And activists promoting all three phenomena were at least as interested in getting media attention as they were in gaining scientific legitimacy. Rather than publishing in refereed journals, activists were happy to have their research debated in the mass media, where the public could interpret the science through the familiar lens of politics instead of by the highly nuanced standards of epidemiology. Because scientific studies can rarely, if ever, prove a negative—they cannot, for example, prove that abortion does not cause breast cancer, that there is no such thing as postabortion syndrome, and that fetal pain does not exist—scientists who opposed the arguments of Reardon, Brind, and others were forced into making less conclusive arguments. This left the media to present the issue as a debate between two different but equally legitimate positions, leaving the public to decide which position they preferred.

For Nathanson and his supporters, the real success of his film would not be measured by its medical facts and scientific accuracy but by its emotional power and political efficacy. On those terms, the film was an unqualified hit. Following a screening of the film, Ronald Reagan said, "[I]f every member of Congress could see that film, they would move quickly to end the tragedy of abortion." David O'Steen, the executive director of the National Right to Life Committee, said he believed the film would do for the antiabortion movement what Harriet Beecher

Stowe's 1852 novel *Uncle Tom's Cabin* had done for the antislavery movement.[63] On May 21, 1985, the Senate Subcommittee on the Constitution of the Committee of the Judiciary, chaired by Senator Orrin G. Hatch (R-UT), held hearings on fetal pain.[64] Hatch's opening statement declared that fetal pain called upon "the humanitarian character of our Nation," indicating that in these hearings, emotion and anecdote would trump scientific evidence. The main witness in the hearings was Dr. Bernard Nathanson, who opened his testimony by showing clips from *The Silent Scream* and restating many of the film's interpretive claims.[65]

Although using fetal pain to make an argument against abortion was the ostensible purpose of these hearings, a less obvious, perhaps less conscious, phenomenon was that many of those who believed in the existence of fetal pain appropriated the language and undermined the politics of 1960s liberalism. Arguments putting fetal pain at the center of antiabortion rhetoric countered liberalism's monopoly on compassion with compassion for the fetus; appropriated liberalism's commitment to the tolerance of different views by insisting that anecdotal claims by politicians and laypeople be treated as seriously as scientific evidence from experts; and challenged liberalism's commitment to a woman's "right to choose" with an emphasis on a woman's "right to know."

The argument about fetal pain was, in part, an argument over the ownership of compassion. Joseph Sobran, senior editor at the *National Review,* argued in 1984 that "the fifteen million children killed in the womb since 1973 deserve to be called the victims of liberalism," and that liberals' refusal to accept the existence of fetal pain threatened to "explode their humanitarian pretensions."[66] Liberalism, Sobran suggested, "has organized itself historically around a series of 'suffering situations': slavery, child labor, racial discrimination, poverty. Liberalism's claim to power and authority was that it relieved pain.... Its entire claim to legitimacy was that it could make things stop hurting."[67] The consequences of this, for Sobran, are immense. "Private property, the work ethic, and of course the sanctity of life itself," he argued, "have all been forced to yield to the liberal imperative of relieving pain and misery of various kinds." But at the same time, he argues that liberalism is

> interested in those kinds of suffering that can be defined as "social problems" susceptible to collectible organized "solutions."... The liberal is interested in suffering only insofar as it can be exploited to force 'social change' and produce a secular order liberalism aspires to.... Permitting abortion is part of the scheme. Limiting abortion would disrupt the scheme. Therefore the pain of the aborted fetus is ineligible for the liberal's selective but purposeful "compassion."[68]

Sobran suggested that compassion was always just a tool used by liberals in their larger "purpose of subverting the morals and institutions of traditional America." Conversely, exposing liberals' "humanitarian pretensions" through the debate about fetal pain would, he contended, provide "a great service for the unborn" as well as for "the moral tradition to which America by right belongs."[69] Sobran's argument outlines the premise of "compassionate conservatism"—as articulated by Marvin Olasky in his 2000 book of that title and championed by George W. Bush in his 2000 presidential campaign—that would become central to the rhetoric of the Republican Party in the early twenty-first century.[70]

Recognizing that the issue of fetal pain could be leveraged into a wholesale attack on liberalism, some critics tried to expose the motives and politics behind the film. Psychologist James W. Prescott argued that the "motivation for 'The Silent Scream' was not fetal well-being.... The anti-abortion motivation behind the producers and supporters of 'The Silent Scream' resides in an authoritarian control and denial of the fundamental human right of self determination."[71] After analyzing the voting patterns of senators on a series of bills involving abortion, capital punishment, "no-knock" laws (laws that allowed police officers with warrants to enter homes without knocking), and gun control, Prescott identified a strong relationship between opposing abortion and supporting capital punishment; between opposing abortion and supporting no-knock laws; and between opposing abortion and opposing handgun control.[72]

Similarly, Catholics for a Free Choice developed what they called a "Pro-Child Life Score," by analyzing congressional support for child nutrition programs, Medicaid, Aid for Families with Dependent Children, Head Start, and food stamps—programs established as part of Lyndon B. Johnson's Great Society and War on Poverty in order to improve the health and well-being of children. Hoping to expand the discourse about what it meant to be pro-child beyond abortion, Catholics for a Free Choice compared the voting records of 100 congressional representatives who supported legalized abortion to the voting records of 100 representatives who opposed legalized abortion. The comparison revealed that the average Pro-Child Life Score of the representatives who support abortion rights was 92, and the average Pro-Child Life Score of the representatives who oppose legal abortion was 49.[73] It appeared that there was a clear relationship between one's position toward abortion and one's position toward the programs of 1960s liberalism, a relationship that suggests that abortion was about more, or less, than fetal life. And even on the specific issue of alleviating pain, an analysis of those same 200 representatives' votes on the Compassionate Pain Relief Act, which would permit the use of parenteral diacetylmorphine (heroin) for the relief of intractable pain when "pain could not be effectively treated with currently available analgesic medications"

indicated that 72 percent of those who supported abortion rights supported the Human Pain Relief Act and 95 percent of those who opposed abortion rights opposed the Human Pain Relief Act.[74] What all of this suggests, according to Prescott, is that "the production of 'The Silent Scream' is another attempt by the anti-abortion movement to mislead the public and legislators into believing that the anti-abortion movement has a fundamental concern and compassion about human pain, suffering, and violence."[75] Whether the antiabortion movement intended to lead or mislead, it did succeed in shifting the terms of debate from competing political or legal perspectives to competing assumptions about knowledge and expertise.

Whereas the debate between Sobran and Prescott revolved around one of the tenets of liberalism, compassion, the debate between expert witnesses in the *Fetal Pain* hearings allowed antiabortion representatives to appropriate liberalism's commitment to multiple perspectives by challenging the authority of scientific expertise. Expert witnesses presenting scientifically complicated explanations for why the fetus does not feel pain were dismissive of the emotionally resonant arguments of Nathanson. Dr. Richard L. Berkowitz, acting chairman of the Department of Obstetrics and Gynecology at Mount Sinai Medical Center in New York, characterized those claims as "pseudoscientific" and "fanciful."[76] Dr. Jeremiah Mahoney, professor of human genetics, pediatrics, obstetrics, and gynecology at Yale University School of Medicine, addressed the issue this way: "Does the human fetus, early in its development within the womb, experience pain? Can the human fetus be aware of pain? Can the human fetus be in fear of pain? I believe that all scientifically derived evidence and observations available today which bring light to these questions say no."[77] Others repeatedly invoked the quantity and quality of scientific evidence mitigating against the existence of fetal pain.

Notwithstanding the impressive academic credentials of the witnesses testifying against fetal pain, the committee members focused their question-and-answer session not on the substance of the evidence, but on the politics of those witnesses. In a lengthy exchange, Representative Hyde kept pushing Berkowitz to "reveal" his political beliefs and Berkowitz refused, insisting that his politics were irrelevant as his testimony was based on his scientific knowledge, not his political positions. The emphasis on ascertaining whether those witnesses were pro-life or pro-choice suggests that the goal of the hearing was not to explicate the different interpretations of scientific evidence on pain, but to deploy the claim of fetal pain in service of one political argument, while at the same time undermining the conclusions of the medical experts as being politically motivated. The exchange between Hyde and Berkowitz demonstrates how arguments that knowledge was socially and politically constructed and that multiple truths

could coexist—arguments generally associated with the academic and activist left—were now being appropriated and used to attack the credibility and legitimacy of experts who argued against the existence of fetal pain.

The third premise of liberalism challenged by arguments about fetal pain was the primacy of rights, which involved shifting the debate from a woman's "right to choose" to a woman's "right to know." Illustrating that shift was an exchange between Senator Gordon Humphrey (R-NH) and Dr. Kathryn Moseley, a pediatrician and neonatologist. Moseley testified that she found it "paradoxical" that when she was treating a sick child, she had to "go with a long paper of an informed consent for the parents," but that in the case of performing an abortion, "a woman, not really intent, in not knowing the full extent of what she is doing, gets no information whatsoever with regard to any pain it might experience upon the abortion of an unborn child."[78] Humphrey asked Moseley the following question:

> In your capacity as not only a physician, but also a physician who also happens to be a woman, you have a special perspective that our other witnesses do not have. Then as a woman who is a physician, or as a physician who is a woman . . . do you feel that knowledge of pain has been withheld from women, and do you feel that women should be more apprised of that possibility?[79]

Moseley responded, "I think knowledge not only of the possibility of pain perception of the fetus, but the uterine development of the fetus has been withheld."[80] Notwithstanding the weight of the evidence suggesting that the fetus does not feel pain, the issue had taken on a meaning of its own and had become entangled with the question of informed consent. Reverend James A. DeCamp put it this way: "Surely, at the least, those mothers who are aborting their unborn children should know the suffering they are putting their babies through. Shouldn't the woman's 'right to choose' carry with it a 'right to know' about this pain her child will feel?"[81] The woman's "right to know" would become crucial in efforts to restrict abortion through informed consent laws, efforts that had failed in the 1980 case of *Charles v. Carey,* the Seventh Circuit Court of Appeals had struck down several informed consent provisions in Illinois, including a restriction requiring physicians to provide all abortion patients with information regarding any "organic pain to the fetus."[82] Finding that that particular provision placed a direct and unwarranted burden on a woman's decision and created an unwarranted intrusion into the privacy of the physician-patient relationship, the court characterized the informed consent provisions as "medically meaningless, confusing, medically unjustified, and contradicted, causing cruel and harmful stress to . . . patients."[83] But in 1992, more than ten years after that decision, and almost twenty years after *Roe,* the

Supreme Court rendered a ruling in the *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision that would enlarge the scope of informed consent and radically transform the landscape of abortion politics.

In 1988 and 1989, the Pennsylvania legislature amended its abortion law to require doctors to provide particular information about the health risks and possible complications of an abortion, establish a twenty-four-hour waiting period prior to the procedure, and require parental consent for minors and spousal notification for married women. Challenged by a group of abortion clinics and physicians, the laws were upheld first by a federal appeals court in 1991 and then by the Supreme Court in 1992. In a 5–4 ruling, *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed *Roe* while also upholding all of the provisions except the spousal notification requirement.[84]

Three justices—Sandra Day O'Connor, David Souter, and Anthony Kennedy—wrote the plurality opinion, which established a new standard to determine whether laws restricting abortion were a violation of women's constitutional right to an abortion as determined by *Roe v. Wade*. The *Casey* decision held that states could regulate abortion in accordance with their "compelling interests" so long as those regulations did not have the purpose or effect of imposing an "undue burden," defined by the court as a "substantial obstacle in the path of a woman seeking an abortion."[85] Whereas the *Roe* decision had required states to completely rewrite their abortion statutes, most often dramatically liberalizing them, the *Casey* decision offered states the opportunity to revisit those statutes, and to construct new laws that did not constitute an "undue burden" but did restrict the availability of abortions.[86] Peter Samuelson, president of Americans United for Life, describes his organization's response to the *Casey* decision:

> After *Casey* it became very clear the Supreme Court is just not going to reverse *Roe*. But with *Casey* they said, "We'll open it up for state regulation. We understand there are other interests at stake, that the state has an interest in protecting the women and in the life of the unborn child." And so since then Americans United for Life and other groups have been working very incrementally trying to identify opportunities where we can protect the woman within what are the constitutional bounds today of her right to an abortion. . . . What we do with incremental laws is we invite people to think about it. We invite people to think about the negative impact of abortion on women. Abortion creates all sorts of psychological and health problems for women. It's a very difficult thing. It's not a good solution to the problem they're facing with the unwanted pregnancy.[87]

This new strategy, constructing women as the sympathetic victims of abortion, rather than as the selfish perpetrators of it, would be used to weave together the

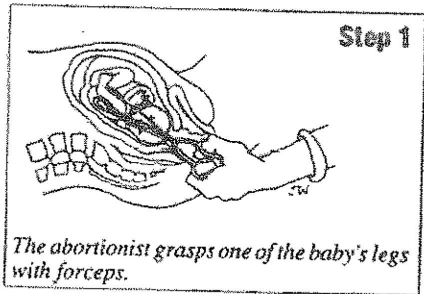
decade-old debate about fetal pain, the ABC link, and postabortion trauma with the new issue that was beginning to dominate abortion politics, the controversial late-term abortion procedure termed by the antiabortion movement "partial birth abortion."

Three months after the Supreme Court issued the *Casey* decision, at the National Abortion Federation Risk Management Seminar, a seminar for physicians, Cincinnati physician Dr. Martin Haskell presented a paper titled "Dilation and Extraction for Late Second Trimester Abortion," in which he described a new surgical procedure in which the physician would remove an intact fetus feet first until the head lodged against the cervix, and then depress its skull, and remove its intact body from the patient.[88] Haskell explained why this "intact dilation and extraction" (D&X) procedure was faster, cleaner, and safer than dismembering and then removing the fetus with the standard dilation and evacuation (D&E) method used in second-trimester abortions.[89] The NAF published Haskell's talk, along with detailed instructions on the procedure, in a volume on the proceedings of the seminar. When Jenny Westberg, an antiabortion activist on the NAF mailing list, received the proceedings, she decided to write about it, and include an illustration of the procedure, in *Life Advocate* (figure 5.1).[90]

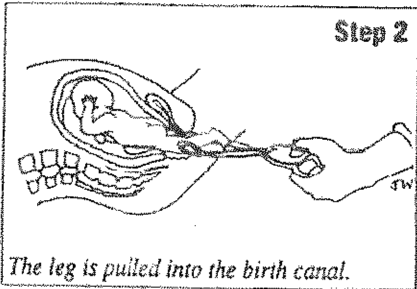
When National Right to Life Committee lobbyist Douglas Johnson read the article and saw the illustrations, he decided to move the discussion of this procedure from a medical conference to the political stage.[91] In 1995, Johnson met with Representative Charles Canady (R-FL) and his legislative aide Keri Folmer, who before working for Canady had worked as a lawyer for the NRLC. It was at that meeting, according to Folmer, that the term "partial-birth abortion" was coined.[92] "We called it the most descriptive thing we could call it," Folmer explains. "We were throwing around terms. We didn't want it to be inflammatory. We wanted a name that rang true."[93] Whether intended to inflame or inform, the term partial-birth abortion did more of the former than the latter.

As the chair of the House Judiciary Subcommittee on the Constitution, Canady introduced the Partial-Birth Abortion Ban Act on June 14, 1995.[94] The bill defined partial-birth abortion as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery" and held that physicians performing this procedure would be fined or imprisoned for up to two years.[95] Jenny Westberg's images were front and center of the debate about this bill. Objecting to the use of the illustrations as evidence, one physician wrote the following letter to Representative Canady:

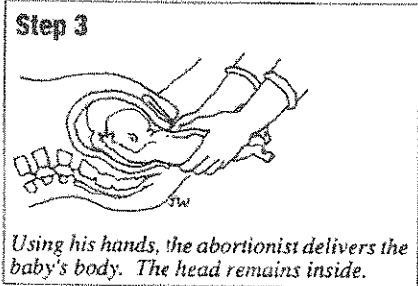
> There are many substantive inaccuracies in the drawings presented. For example, the clear implication of the drawings is that the fetus is alive until



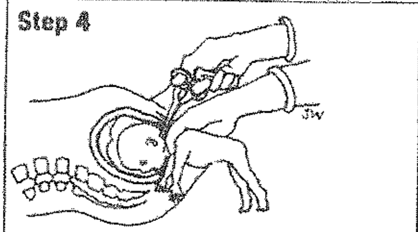
The abortionist grasps one of the baby's legs with forceps.



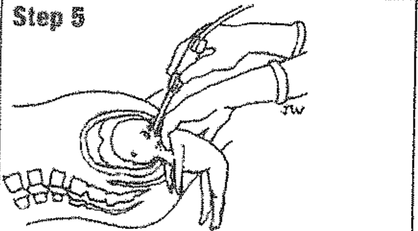
The leg is pulled into the birth canal.



Using his hands, the abortionist delivers the baby's body. The head remains inside.



The abortionist forces scissors into the base of the baby's skull. He then opens the scissors to enlarge the hole.



A suction catheter is inserted into the wound, and the baby's brains are sucked out. The child is then removed.

Figure. 5.1 From *Life Advocate*, February 1993

the end of the procedure, which is untrue. The stylized illustrations further imply that the fetus is conscious and experiencing pain or sensation of some kind—which is also obviously untrue. Finally, the fetus depicted is shown as perfectly formed (indeed proportionally larger in relationship to the woman than it ought to be), when in fact a great number of such procedures are performed on fetuses with severe genetic or neurological defects. All of these factors, as well as the rudimentary, even crude, nature of the sketches added up to a picture that is, as I previously stated, highly imaginative and misleading.[96]

Despite this letter, and others like it, 332 members voted to allow the pictures to be submitted as exhibits in the House debate.[97] The schematic images and the graphic captions—one reads, "The abortionist jams scissors into the baby's skull"; another, "The child's brains are sucked out. The dead baby is then removed"—were a compelling background for the attacks on the procedure that either manipulated or appropriated elements of liberalism to make their point.

Representative Ed Bryant (R-TN), for example, compared the procedure to the death penalty:

> If they brought Ted Bundy into the electric chair or were about to execute him after these years of appeal and all of this, and the power failed…and someone came and asked Mr. Bundy to put his head down and they hit him over the head with a screwdriver and knocked a hole in his head, and drained out his brain, sucked out his brain, does the gentleman from Florida think that would be any cause for civil libertarians in terms of cruel and inhuman punishment via this type of execution?[98]

This not-so-subtle maneuver implies that a civil libertarian would let Ted Bundy live while allowing an unborn baby to die in a gruesome manner. Others compared the procedure to historical wrongs like slavery, comparing the partial birth abortion ban to the movement to ban the slave trade, and identifying the bill's supporters with the abolitionist William Wilberforce. Others, like Representative Ernest Istook (R-OK), invoked more recent historical barbarities: "Some people may not want to recognize the practice that we seek to prohibit. Some people did not want to look when Hitler was slaughtering the Jews or Stalin was slaughtering his countrymen. If we do not look, if we do not understand what is being done…instead of barbarity they call it choice."[99] Here, the moral courage to support H.R. 1833 was compared to the same courage required to abolish slavery, defeat Hitler, and fight Communism.

Opponents of the bill countered these historically mythic comparisons with detailed stories from real women who had undergone this procedure. Vikki Stella described her decision this way:

> I've been told that mothers like me are selfish and only want perfect babies; that we're having third trimester abortions because of cleft palates and missing fingers. Well, yes, my son had a cleft palate. I wish to God that was all that was wrong! He wasn't just imperfect—his condition was incompatible with life. The only thing keeping him alive was my body. He could never have survived outside my body. I took my son off life support.[100]

Tammy Watts told Congress a similar story:

> We had wanted this baby so much. We named her Mackenzie.... I remember getting on the plane, and as soon as it took off we were crying because we were leaving our child behind. The really hard part started when I got home. I had to go through my milk coming in, everything you go through if you have a child. I don't know how to explain the heartache. There are no good words.... I never blamed God for this, I'm a good Christian woman.... I've still got my baby's room, and her memory cards from her memorial service, her foot and handprints.[101]

Testifying before Congress, Claudia Crown Ades described her experience this way:

> We loved this baby. We wanted this baby desperately. This was our son. We were preparing our family and our world for him. And now, we had to prepare for a tragedy. Away went the baby name books. Away went the shower invitations. Away went the first birthday party, the baseball games, the bar mitzvah. Away went our dream.... Ironically, the final day of the procedure was Yom Kippur, the holiest day of the Jewish year. On Yom Kippur, we are asked to mourn those who have passed and pray to God to inscribe us into the Book of Life. I prayed more than one person can pray. I was praying for all of us.[102]

These women had been carefully selected to embody the characteristics most likely to elicit sympathy—they were married, they were mothers, they had wanted these pregnancies, they were white, they were middle class, they were religious, and they were heartbroken. Nonetheless, their experiences were easily dismissed by Representative Jim Bunning (R-KY):

> As a father of 9 children and a grandfather of 28, I have had a lot of experience in the wonders of a new life being brought into this world. When a baby is born, it is the most innocent of creatures, its hands stretch and kick with energy, and its cry is filled with life. Compare this to what occurs during a partial-birth abortion. The baby exits the uterus, its hands extend to hold its mother, its legs kick wildly, in the air as the child attempts to breathe, but its first breath will never come.[103]

Bunning trumped the stories of women making devastating decisions to terminate their pregnancies and describing their genetically damaged fetuses with his personal story of fatherhood and his universalized narrative about a genetically perfect fetus. On November 1, 1995, the House of Representatives passed the Partial-Birth Abortion Ban Act by a vote of 288 to 139.[104]

The following week, when the bill went to the Senate, Gordon Smith (R-NH) further personalized the abstract fetus by reminding the senators that they had once been in that same position:

> Think about it, my colleagues, because this is a very personal matter. Each and every one of us—each and every one of us—started out life as an unborn child. Just like the one depicted in the first illustration that I showed earlier today. When you were born as you came through the birth canal your little fingers moved, your little feet moved, you kicked your legs, you moved your arms.... We slept, we woke, we felt pain, we were happy, we were sad.... As I close, I am reminded of a great maxim. Do unto others as you have them do unto you.... You and I deserved to be protected by law from a partial-birth abortion when you and I lived in our mothers' womb.... We had value. We had worth. We had rights. We became U.S. Senators. And those little babies have the same rights that we have under the Constitution. As the Old Testament tells us, Almighty God knew us even then, and he loved us. Our fellow human beings, these youngest of Americans, deserve no less.[105]

Having asked each senator to imagine himself in place of the fetus, Smith looked to the nation's future, compromised and weakened by the practice of abortion:

> As I look at that depiction of that little baby in the womb, hanging there limp, you know what I say to myself? How many U.S. Senators are there in that 700 [partial-birth abortions]? How many doctors, lawyers, Nobel Peace Prize winners, teachers? How many? I do not know. We will never know. We will never know. The first black president, is he or she in there? We will never know. First Hispanic president? We will never know. First woman president? We will never know. Cure for cancer? It may be one of those seven hundred... we will never know.[106]

Again, there is an appropriation and undermining of liberalism as Smith implied that the reason that no black, Hispanic, or woman had been elected president was not historical patterns of racism and sexism, as liberals might have it, but abortion. Smith went on to speak directly to President Clinton:

> President Clinton, you were an unborn child once. The President's father died, you know, while his mother was pregnant. Is that not interesting? She faced a very tough decision. Do I raise a child alone without a father? Bill Clinton's mother chose life. Regardless of party, regardless of ideology, I think we could say we are thankful. He became a President of the United States. He could have been a victim. Bill Clinton could have been a partial-birth abortion.

Notwithstanding that plea, and the fact that the Senate had passed the bill by 55 to 44, President Clinton vetoed the bill.[107]

Hoping to override Clinton's veto, the Republican leadership scheduled a second set of hearings on the bill for March 21, 1996.[108] On the morning of the

hearings, the House Judiciary Committee's Subcommittee on the Constitution focused on the question of whether or not the anesthesia used to reduce the woman's pain eliminated pain to the fetus. It turned into a sort of "he said/she said" contest between expert witnesses, and in the afternoon experts offered competing claims for sympathy.[109] The afternoon's first witness, Brenda P. Shafer, a registered nurse, described what she observed while assisting in an abortion by dilation and extraction:

> The baby's little fingers were clasping and unclasping, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like the baby does when you throw him up in the air and he thinks he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.[110]

To counter that graphic testimony, the opponents of the ban stuck to their strategy that women's stories would be the best argument for the procedure's necessity and called upon Mary-Dorothy Line and Coreen Costello to testify about their experiences.

In April 1995, Line and Costello confronted the most difficult decisions of their lives. Line, who describes herself as a "registered Republican and a practicing Catholic," had been married to her husband Bill for fourteen years when she became pregnant for the first time. Following her ob/gyn's recommendation, she had an alpha-fetoprotein (AFP) test to screen for neurological anomalies, including spina bifida. When the test indicated an abnormal AFP level, Line decided to have a follow-up amniocentesis, explaining that she and her husband "needed to know what we were dealing with."[111] The ultrasound given in preparation for the amniocentesis indicated that the fetus had a very advanced case of hydrocephalus, an abnormal accumulation of cerebrospinal fluid within ventricles in the brain. "We asked about *in utero* operations and drains to remove the fluid," Line said, "but Dr. Carlson said there was absolutely nothing we could do. The hydrocephaly was too advanced. Our precious little baby was destined to be taken from us. Dr. Carlson recommended that we terminate the pregnancy." Line underwent an intact dilation and evacuation, a three-day procedure she describes as "the worst days of our life. We had lost our son before we even had him."[112]

Costello was in her seventh month of pregnancy when she began experiencing contractions and rushed to the hospital for an ultrasound. She describes how "the physician became very silent. Soon more physicians came in.... My husband reassured me that we could deal with whatever was wrong. We had talked about raising a child with disabilities and there was never a question that

we would take whatever God gave us."[113] Physicians said that "they did not expect our baby to live.... This poor precious child had a lethal neurological disorder... her vital organs were atrophying. Our darling little girl was going to die."[114]

A self-described "full-time, stay-at-home wife," Costello explains her political and religious beliefs: "I am a registered Republican, and very conservative. I don't believe in abortion. Because of my deeply held Christian beliefs, I knew I would never have an abortion."[115] Costello decided to try to maintain the pregnancy and deliver the baby, whom she and her husband had named Katherine Grace. Over the next two weeks, Katherine Grace's condition continued to deteriorate, and Costello describes realizing "that terrible truth... that if she were born, her passing would not be peaceful or painless.... We decided to baptize her *in utero,* while she was still alive." After being told by a doctor that it would be extremely risky to her life and health to deliver Katherine Grace, Costello decided to have an abortion by dilation and extraction.[116]

In contrast to the women whom Representative Bob Inglis (R-SC) described as "deceived and now realize that they wish they had not had an abortion," these women clearly understood the choices they were making. But tragic as their choices were, these women's stories could not compete with the unborn victims. At any rate, the hearings were more of a staged drama than a real effort to pass legislation, as it was clear from the outset that the bill would pass both houses of Congress but would not garner enough votes to override Clinton's veto. And indeed, when Congress passed the same bill the following year, Clinton vetoed it for a second time.

Because Congress did not have enough votes to override a presidential veto, the passage of a federal ban was extremely unlikely, and antiabortion activists refocused their efforts on passing legislation at the state level. By 2000, thirty-one states had passed partial-birth abortion bans, and the Supreme Court was considering the constitutionality of Nebraska's ban.[117] In June 2000, in the case of *Stenberg v. Carhart,* the Supreme Court ruled that because the Nebraska statute did not provide an exception for the health of the woman and did not accept that a significant body of medical authority viewed the procedure as the safest one in certain circumstances, it constituted an "undue burden."[118] The ruling invalidated similar laws in twenty-nine out of thirty-one states. Although a setback for antiabortion activists, the decision intensified their desire to pass a federal law rather than continue to work state by state, especially given that they were facing a more favorable political climate with a Republican Congress and Republican president.

Congress's third debate over the federal law pushed familiar emotional buttons. One representative asked, "[I]s there no limit, no amount of pain, is there

no procedure that is so extreme that we can apply to this unborn child or this fetus that we are willing as a country to say that just goes too far?"[119] But proponents of the ban knew that they needed to do more than highlight the specifics of a gruesome procedure in order to pass a law that would withstand Supreme Court scrutiny after *Stenberg*. The *Stenberg* decision had offered a template for how to fix the law in order to make it compliant with the *Casey* standards, and when the House of Representatives and Senate passed a Partial-Birth Abortion Ban Act in 2003, it did include an exception for the life of a mother. The PBABA did not, though, include an exception for the woman's health, even though the *Stenberg* decision had explicitly identified that exception as necessary in order to make the ban constitutional. By including an extensive "findings" section that stated that "partial birth abortion is never medically necessary and that the procedure itself poses health risks to women," Congress was exploring how far they could push the assumption of judicial deference to legislative findings.[120] The Republican Congress was arguing that a health exception was unnecessary because the Supreme Court was required to "defer to congressional 'findings of fact' regarding the safety of D&X and the need for a health exception."[121] Senator Rick Santorum (R-PA) argued that Congress had the right to make findings that challenged the Supreme Court's decision because Congress had done "a heck of a lot more exhaustive study, in our deliberations with hearings and other testimony, than the Supreme Court can."[122] Representative James Sensenbrenner (R-WI) made a similar argument, saying that he hoped the Court would "give the same type of deference that it has done in the past civil rights and employment cases."[123] Representative John Conyers, Jr. (D-MI), strongly criticized this logic, arguing that "Gainsaying, no matter how presented, is not the same as fact-findings.... Congress cannot simply refute findings of fact made by the District Court by presenting its own 'findings.'"[124] This conflict was both a test of the Supreme Court's understanding of its relationship to Congress, as well as the natural result of the antiabortion activists efforts to challenge scientific expertise by creating their own experts.

The bill's supporters had explicitly and persuasively argued that the ban was as concerned with protecting women as it was with protecting the fetus. Senate Majority Leader Bill Frist (R-TN) claimed that partial-birth abortions "carry the danger of doing unnecessary harm to a mother, to an infant, and to our conscience as a nation that values the sanctity of human life."[125] When Bill Clinton vetoed the bill, he was surrounded by women whose pregnancies had been aborted with the D&X procedure. When George Bush signed the bill, he was surrounded by an all-male, all-white group of legislators. Although these women-centered antiabortion arguments focused rhetorically on a series of unfounded claims about the risks abortions posed to women, the consequences

of those arguments are quite serious in presenting women with misinformation about the risks of abortions, and in limiting their physicians' ability to determine the best and safest procedure.

Two days after President Bush signed the PBABA into law on November 5, 2003, abortion providers in San Francisco, New York, and Nebraska obtained temporary restraining orders from federal district courts preventing the law from taking effect.[126] The decisions of these courts included harsh condemnations of Congress's fact-finding process. San Francisco Judge Phyllis Hamilton said that "the oral testimony before Congress was heavily weighted in favor of the Act.... [I]t is apparent to this court... that the oral testimony before Congress was not only unbalanced, but intentionally polemic."[127] Nebraska Judge Richard G. Kopf found that the congressional findings were "unreasonable," that the "overwhelming weight of the trial evidence proves that the procedure is safe and medically necessary in order to preserve the health of women under certain circumstances," and that the ban was unconstitutional both in failing to provide a health exception and because it imposed an undue burden on women seeking abortions by banning some D&E procedures, in addition to all D&X procedures.[128] New York Judge Richard Conway Casey reached similar conclusions, arguing that "the evidentiary standard established by the Supreme Court does not permit the government to legislate in the face of medical uncertainty" and that "Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings.... This Court heard more evidence during its trial than Congress heard over the span of eight years.... Even the Government's own experts disagreed with almost all of Congress's factual findings."[129]

But although Judge Casey agreed with Judges Hamilton and Kopf that Congress had overstepped its bounds in claiming that the Supreme Court should defer to congressional findings over trial and appellate court testimony, he disagreed on a closely related issue of fetal pain. Judge Casey called the D&X procedure "gruesome, brutal, barbaric, and uncivilized," and agreed that the evidence supported the conclusion that the procedure "subject[s] fetuses to severe pain." In contrast, Judge Hamilton wrote that "much of the debate on this issue is based on speculation and inference" and that "the issue of whether fetuses feel pain is unsettled in the scientific community."[130]

For the most part, though, that issue had been settled. In August 2005, the *Journal of the American Medical Association* published a report concluding that "evidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester."[131] The article makes a distinction between pain, which "requires cortical recognition," and "nociception," a system of physical reflexes driven by "peripheral sensory receptors," and

concludes that the "capacity for conscious perception of pain can arise only after thalomocortical pathways begin to function, which may occur around 29 to 30 weeks' gestational age."[132] The *JAMA* article immediately intersected with a heated political debate about the existence and implications of fetal pain.[133] The authors' findings, based on a multidisciplinary review of several hundred scientific papers on fetal pain and fetal anesthesia and analgesia, led the authors—experts on anesthesia, neuroanatomy, obstetrics, and neonatal development—to conclude that "discussions of fetal pain for abortions performed before the end of the second trimester should be noncompulsory. Fetal anesthesia or analgesia should not be recommended or routinely offered for abortion because current experimental techniques provide unknown fetal benefit and may increase risks for the woman."[134] Antiabortion groups immediately attacked the article, with the NRLC issuing a statement that two of the article's authors were "pro-abortion activists" whose conclusions were "predetermined by their political agenda."[135]

Judge Casey's decision and this *JAMA* report reinvigorated the discussion of the pending Unborn Child Pain Awareness Act, sponsored in 2007 by Senator Sam Brownback (R-KS) and Representative Chris Smith (R-NJ). Pro-choice organizations struggled with how to respond to this issue. NARAL Pro-Choice America, perhaps the nation's leading abortion rights group, issued the following statement: "Pro-choice Americans have always believed that women deserve access to all the information relevant to their reproductive health decisions. For some women, that includes information related to fetal anesthesia options. NARAL Pro-Choice America does not intend to oppose this legislation."[136] But Planned Parenthood Federation of America, the National Abortion Federation, and the Center for Reproductive Rights all vigorously opposed the legislation. "It's really inflammatory antiabortion propaganda," said Janet Crepps, a lawyer with the Center for Reproductive Rights, headquartered in New York. "Right out of the box, I think it's an inappropriate exercise of congressional power. Congress is taking sides in a very controversial medical debate. It's a very fuzzy area."[137]

Opponents of so-called fetal pain legislation suggested that it manipulated scientific evidence and that "distribution of false and misleading information places an unconstitutional burden on a woman's right to choose," whereas proponents argued that it merely extended "existing state laws that mandate that patients receive information about abortion procedures before giving their consent."[138] The UCPAA was debated in the House and Senate in 2005, and remained in committee until December 6, 2006, when, in one of their last acts, the Republican-controlled House of Representatives of the 109th Congress called a vote on a revised version of that bill. Whereas Representative Lois Capps (D-CA) described the revised bill (H.R. 6099) as a "sham bill... laden with rhetoric but very little science... yet another partisan political ploy that misguidedly attempts to insert the government into private medical conversations between women and their doctors," Representative Phil Gingrey (R-GA) characterized it as "a compassionate piece of legislation to take informed consent to the level it should be at."[139] Although the vote was 250–162 in favor of the bill, it failed to get the two-thirds majority required to pass.[140] Nonetheless, as of October 2009, nine states had passed similar bills.[141]

At the same time that state legislatures and the U.S. Congress were debating fetal pain bills, the Supreme Court was hearing arguments from plaintiffs in the combined cases of *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation*, challenging the constitutionality of the Partial Birth Abortion Ban Act of 2003.[142] In oral arguments, Solicitor General Paul Clement argued that the law distinguished between the still-legal D&E (dilation and evacuation) procedure and the banned D&X (intact dilation and extraction) procedure, based on the fact that in the first case, "fetal demise takes place in utero," whereas in the second case, "the lethal act takes place when the fetus is more than halfway out of the mother."[143] Because the law did not differentiate between abortions performed pre- and postviability, Justice Ruth Bader Ginsburg pushed Clement on this question, asking why the law drew the line between a legal and illegal abortion not developmentally but geographically. Clement responded that the law recognized a "bright line" between abortion and infanticide, and that although that line was at times "temporal," it also had a "spatial dimension.... [T]hat line is basically in womb, outside of womb." He asked the justices to imagine a situation in which "there is a problem with the mother's health, there is a problem in her life so it's a lawful post-viability abortion. I don't think anybody thinks that the law is or should be indifferent as to whether in that case fetal demise takes place *in utero* or outside the mother's womb. The one is abortion, the other is murder."[144] Clement presented this scenario as one that everyone could agree upon. But Clement also agreed with Justice John Paul Stevens's statement that "[i]t [the ban] is not preventing the lethal act, it is requiring that the lethal act be performed prior to any part of the delivery, because there is no doubt that there will be a lethal act."[145]

These exchanges with the justices about why the "where" of the procedure mattered more than the "when" or "if" of the procedure echoed much of the testimony during the Edelin trial, revisiting the debate over how to distinguish between legal abortion and criminal infanticide that was as contested in 2006 as it had been in 1975. Also reminiscent of the Edelin trial, Clement and the justices used different terminology—Clement using *baby*, and Stevens, Bader Ginsburg, and Souter using *fetus*—throughout. At one point, Stevens said, "Some of these fetuses I understand in the procedure, are only four or five inches long. They are

very different from fully formed babies." Somewhat surprisingly, Clement conceded the point, saying, "Justice Stevens, again, you're right," only to be interrupted by Justice Antonin Scalia's somewhat sarcastic comment that "when it's halfway out, I guess you can call it either a child or a fetus. It's sort of half and half, isn't it?"[146]

On April 18, 2007, the Court released their 5–4 decision in *Gonzalez v. Planned Parenthood* and *Gonzalez v. Carhart,* upholding the constitutionality of the Partial Birth Abortion Ban Act. The majority opinion, written by Justice Kennedy and joined by Chief Justice John Roberts, Justice Samuel Alito, Justice Antonin Scalia, and Justice Clarence Thomas, began by emphasizing their deference to the congressional findings that there was never a medical reason to perform this procedure other than to save the life of the mother, and then focused on the details of the procedure itself. Kennedy contrasted the description provided by Dr. Haskell, the physician who had presented the procedure at the National Abortion Federation Risk Management Seminar, to the description given by a nurse. He quotes Haskell's description:

> At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down). While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under the middle finger until he feels it contact the base of the skull under the tip of his middle finger. The surgeon then forces the scissors into the base of the skull or into the forearm magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hold and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.[147]

He then quotes the description that nurse Brenda Shafer provided during the congressional debate over the act:

> Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right in the uterus.... The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he's going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby went completely limp.... He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.[148]

Kennedy turned to Shafer's description in explaining why he found persuasive the congressional findings that "implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the inhumanity of not only newborns, but all vulnerable and innocent life, making it increasingly difficult to protect such life," as well as the finding that the procedure "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to deliver that life."[149] According to Kennedy, the *Casey* undue burden standard allows the "state to use its regulatory powers to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life," and that Congress's concern with "draw[ing] a bright line that clearly distinguishes abortion and infanticide" clearly furthers the government's interests.[150] Kennedy goes on to conclude that not only does this ban not constitute an undue burden, but that it protects women from making uninformed and emotional decisions:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow. In a decision so fraught with emotional consequences some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the

> skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[151]

As an indication of her vehement opposition to what she called an "alarming" decision, Ruth Bader Ginsburg took the relatively unusual step of reading her dissent, which was joined by Justice John Paul Stevens, Justice David Souter, and Justice Stephen Breyer, out loud from the steps of the Supreme Court. She responded to Kennedy's decision point by point, beginning with a critique of his reading of the *Casey* decision. In determining whether or not a restriction constitutes an "undue burden," she argued that the court must consider the impact of the restriction not on "all women," "all pregnant women," nor even all women "seeking abortions." The restriction, Ginsburg explained, "must be judged by reference to those women for whom it is an actual rather than irrelevant restriction. Absence of health exception burdens all women for whom it is relevant—women who, in the judgement of their doctors, require an intact D&E because other procedures would place their health at risk."[152] And the standard for assessing whether a restriction is an undue burden must be measured not by the low bar of "rational basis," as Kennedy did, but by the higher bar of "heightened scrutiny."

She then condemned the majority's deference to congressional findings, suggesting that the findings did not reflect the tremendous weight of expertise on the argument that the procedure is at times the safest. Rather, she suggested, the findings reflected the antiabortion bias of Congress, and Kennedy's opinion indicated a similar hostility to *Roe* and *Casey*. She pointed out that throughout the opinion, Kennedy called the obstetrician-gynecologists who perform abortions "abortion doctors"; described the fetus as an "unborn child" and "baby"; described second-trimester previability abortions "late-term"; described medical judgments as "preferences" motivated by "mere convenience"; and referred to the "essential holding of *Roe*" not as "reaffirmed," which *Casey* did, but as "assumed for the moment."[153]

She concluded by rejecting entirely Kennedy's argument that the ban "protects" women from making bad decisions they may regret.[154] Ginsburg's strongest criticism came in her attack on the "antiabortion shibboleth" that "women who have abortions come to regret their choices, and consequently suffer from 'severe depression and loss of esteem.'"[155] Comparing this logic to the *Bradwell v. Illinois* decision, which in 1873 upheld an Illinois statute refusing to admit a woman to the bar because "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life... the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother," and to the *Muller v. Oregon*

decision, which in 1908 upheld limitations on women's hours of work because of women's "physical structure and a proper discharge of her maternal function," Ginsburg concluded that the *Gonzales* decision "reflects ancient notions about women's place in the family that have long since been discredited."[156]

Despite Ginsburg's powerful dissent, Kennedy's opinion illustrated the success of the women-centered arguments developed and deployed by the antiabortion movement over the previous two decades, while highlighting the fact that this case was at once about much more than and much less than the fetus. On the one hand, as Ginsburg made clear, not one more fetus will live as a result of the *Gonzales* decision, showing how opposition to partial-birth abortion was never about the saving of unborn life. The decision also suggested that those "ancient notions" that Ginsburg alluded to have not in fact been entirely discredited. Cheered by antiabortion activists and condemned by pro-choice activists as the biggest step taken toward banning abortion since the *Roe* decision, the *Gonzales* decision echoed nineteenth-century arguments for criminalizing abortion, arguments that emphasized a purported concern for women rather than the fetus. That similarity suggests that now, as then, the debate about abortion is less about the life and rights of the fetus than it is about women's role in society; and that now, as then, the court, and the country, remain conflicted about the relative authority of scientific authority and religious values, the connection between motherhood and citizenship, and the relationship of physical and physiological difference to the meaning of political and social equality.

offices.

From the late nineteenth century through the early twenty-first century, the fetus has been a vehicle through which people have wrestled with assumptions about science and religion, anxieties about demography and democracy, beliefs about feminism and motherhood, and ideas about conservatism and liberalism. Recent efforts to protect "fetal rights" and fetal citizenship echoed but did not replicate late nineteenth-century efforts to protect the "right to be well-born" and the fears of race suicide. Appreciating the rhetorical continuities that link these claims together, as well as the historical specificities that differentiate them from one another, underscores the significance of fetal meanings in the history of modern America as well as the significance of modern America in the history of fetal meanings.

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