Partial-Birth Abortion on Trial

Cathy Cleaver Ruse

In the spring of 2004, tens of thousands of people came to Washington, D.C., for a so-called "March for Women's Lives." Organizers explained that their purpose was to protest the new threats to "choice," chief among them, the ban on partial-birth abortion.

Hollywood celebrities like Whoopi Goldberg were on the roster, as were a long list of "Honorary Congressional Co-Sponsors" such as Barney Frank and Barbara Boxer. Senator John Kerry aired a special campaign commercial that week promising to defend "the right to choose" and even hosted a "pro-choice" rally before the march.

As the preparations to defend "choice" reached a crescendo in Washington, court reporters in federal courtrooms across the country were quietly recording testimony about what that bloodless word really entails.

The Partial-Birth-Abortion Ban

In November 2003, President George W. Bush signed the Partial-Birth Abortion Ban Act, which outlaws partial-birth abortion except where "necessary to save the life of a mother."[1] This law defines partial-birth abortion as "an abortion in which the person performing the abortion—(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus." Violation of the law subjects an abortion doctor to fines and possible imprisonment up to two years, or both.

This is a most modest limitation on the otherwise unlimited right to abortion. But no prosecutions have been launched under it, because—immediately upon its enactment into law—the giants of the abortion lobby filed suit. The focus of this article is the trials that ensued.

Never in the years since *Roe* v. *Wade* has such extensive evidence about the practice of abortion been placed in a public record—and it has been

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placed there by abortion doctors themselves.

When partial-birth abortion was first discussed in public, many people refused to believe it existed. Some in the "pro-choice" movement even accused the pro-life movement of fabricating it. Yet it was no fabrication: Dr. Martin Haskell discussed the procedure in detail at a 1992 conference of abortion providers in Dallas, Texas, titled, "Second Trimester Abortion: From Every Angle."[2] His paper stated that he "routinely performs this procedure on all patients 20 through 24 weeks LMP"[3] and uses the procedure through 26 weeks "on selected patients."[4]

As Dr. Haskell's description of the procedure became more widely known, and the existence of partial-birth abortion could no longer be denied credibly, proponents of the method made new claims. They claimed it was extremely rare, or used only in emergencies, or that the baby is already dead when it is performed. But these claims, too, collapsed in the face of investigative reports by the *American Medical News*,[5] the *Record* (Bergen, N.J.),[6] and others.[7] In fact, in 1997 the Executive Director of the National Coalition of Abortion Providers admitted publicly that the method was actually common, not rare, and that the vast majority of these abortions are done on a healthy mother with a healthy fetus that is 20 weeks or more along.[8]

Despite these admissions and revelations, abortion activists continued their public-relations campaign to cast partial-birth abortion as a rare, emergency procedure, and a necessary part of the virtue of "choice"—a virtue to be protected against politicians who would intrude between a woman and her doctor (and, where politically expedient, "her god").

When the Partial-Birth Abortion Ban Act was signed into law, Planned Parenthood, the National Abortion Federation, and a number of abortion doctors aided by the American Civil Liberties Union challenged its constitutionality in federal lawsuits filed in New York, Nebraska, and California. Each suit, naming U.S. Attorney General John Ashcroft as the defendant, claimed the ban violated the fundamental constitutional right to abortion and sought a permanent injunction against its enforcement. Temporary injunctions were granted and, pursuant to a negotiated expedited trial schedule, all trials commenced in March 2004. At the conclusion of the trials, each district court ruled against the Partial-Birth Abortion Ban Act. At the time of publication, each ruling is under appeal by the Department of Justice.

While much can be said about the legal claims at issue in the trials, the purpose of this article is to provide the abortion doctors' testimony—in effect, to let the testimony speak for itself. Each trial presented similar claims and similar testimony amounting to many thousands of pages of transcripts.[9] This article will focus on the trial in the Southern District of New York brought

by the National Abortion Federation and several abortion doctors.[10]

The New York trial was presided over by Judge Richard Conway Casey. Judge Casey, appointed to the federal bench by President Clinton, was not a judge from the pro-abortion-activist mold. He pressed the abortion doctors on the stand to use plain language when discussing their acts, he probed them about fetal pain, and he refused to let the plaintiffs' lawyers dictate the terms of trial. Because of Judge Casey, the New York trial testimony is the richest and most extensive of the three.

The plaintiffs' witnesses have long careers in abortion, and their association with seemingly reputable medical schools and hospitals came as a surprise to the authors. Their testimony was brutal.[11] Much of the testimony includes technical medical terms or, in some cases, what seem to be hyper-technical descriptions of otherwise common acts, such as "disarticulate the calvarium" rather than "cut off the head."

Some terms bear explaining. When referring to partial-birth abortion, plaintiffs' witnesses use the terms Dilation and Extraction (D&X), Intact Dilation and Extraction (Intact D&X), or Intact Dilation and Evacuation (Intact D&E). Each of these terms refers generally to the delivery of a substantial portion of the unborn child before the child is killed. This is in contrast to the dismemberment method known as Dilation and Evacuation (D&E) where the child is dismembered inside the womb and taken out piece by piece.

For the abortion industry and their activist allies, an ultimate win in these legal challenges might prove to be a Pyrrhic victory. While the cases involve legal claims about statutory defects and the like, the admissions made in pursuit of these claims, and their astonishingly graphic nature, put partial-birth abortion—and even the abortion industry itself—on trial.

One claim against the law was that its definition of partial-birth abortion was too broad and therefore encompassed more than one particular procedure. In order to show that many procedures fall within each element of the definition of partial-birth abortion—including "performing an overt act that the person knows will kill [the baby]"—plaintiffs presented abortion doctors who described the various purposeful steps they take that they know will kill a baby.

Another claim by the plaintiffs was that the issue of fetal pain is irrelevant. In order to diminish the powerful expert testimony that partial-birth abortion causes "prolonged and excruciating pain" to the unborn child, plaintiffs used their cross-examination to make the point that other methods of abortion at this stage would be quite painful too, and perhaps even more so.

Plaintiffs' central claim at trial was that banning partial-birth abortion except in life-threatening circumstances would limit doctors' ability to use

the safest and most beneficial method of second-trimester abortion. While plaintiffs' experts acknowledged that the dismemberment method is used in 95 percent of second-trimester abortions,[12] they nevertheless claimed that partial-birth abortion is actually safer than dismemberment abortion. There was, therefore, substantial testimony about the comparative health risks and benefits of partial-birth abortion and dismemberment abortion. For example, plaintiffs' experts testified that uterine perforation is one of the most dangerous abortion complications, and that the dismemberment method requires more forceps passes into the uterus and therefore presents a greater chance of uterine perforation than partial-birth abortion.[13] They also testified that the dismemberment method exposes the cervix to fetal bone and skull fragments, and that this, too, presents a greater risk of uterine perforation and infection than partial-birth abortion.[14] Plaintiffs' experts testified that the retention of fetal parts in the uterus is a complication more likely in dismemberment abortions, and that such retention threatens infection, hemorrhage, and infertility.[15] They testified that dismemberment abortions require a longer time to perform than partial-birth abortions and thus increase the risks associated with exposure to anesthesia, infection, and bleeding.[16] Plaintiffs' experts also claimed that partial-birth abortion may be safer for women with certain medical conditions such as bleeding disorders and compromised immune-system conditions.[17]

The Government, however, was not able to test any of these claims made by plaintiffs' experts against the hard evidence of their medical records, as is customary in federal cases involving medical claims, because each time medical records were subpoenaed they were refused. Plaintiffs' witnesses testified that their records were under the control of the hospitals where they worked, and the hospitals refused to produce the records based upon a wholly fabricated federal "abortion records" privilege. The hospitals even filed suit in federal court to avoid having to comply with the subpoenas. Ultimately a federal appellate court ruled that the right to "privacy" protected the hospitals from having to produce the abortion records, despite the fact that patient names and other identifying information would have been redacted.

Government experts nevertheless disputed each of the plaintiffs' claims about the medical benefits of partial-birth abortion. Some of the claims were disputed on the grounds that the claimed benefit was purely hypothetical or theoretical; others, on the basis that partial-birth abortion would actually present a greater risk of harm.[18] Regarding maternal medical conditions, Dr. Steven Clark, a professor of obstetrics and gynecology at the University of Utah School of Medicine and director of obstetric education and research at the LDS Hospital in Salt Lake City,[19] testified that "there simply . . . remains

no . . . maternal medical condition for which D&X would be necessary to preserve the life or health of the mother. There are always equally if not more safe alternatives that do not involve D&X."[20]

The importance of the testimony as a whole cannot be overstated, for it is nothing less than a collection of admissions by the abortion industry, under oath, about the reality of abortion.

Performing a Partial-Birth Abortion

Each of the plaintiffs' witnesses was well-versed in the grisly art of abortion. Dr. Timothy Johnson, a plaintiff in the case, is chair of the department of obstetrics and gynecology at the University of Michigan Medical School. He has performed second-trimester dismemberment abortions and observed partial-birth abortions, and was offered as an expert witness for the plaintiffs.[21]

Dr. Johnson testified from his own experience about performing dismemberment abortions, and gave his opinion about the partial-birth abortions he had observed. Dr. Johnson described observing how doctors who did partial-birth abortions "used a crushing instrument to deliver the head."[22] This provoked further questions from Judge Casey:

THE COURT: Can you explain to me what that means.

THE WITNESS: What they did was they delivered the fetus intact until the head was still trapped behind the cervix, and then they reached up and crushed the head in order to deliver it through the cervix.

THE COURT: What did they utilize to crush the head?

THE WITNESS: An instrument, a large pair of forceps that have a round, serrated edge at the end of it, so that they were able to bring them together and crush the head between the ends of the instrument.

THE COURT: Like the cracker they use to crack a lobster shell, serrated edge?

THE WITNESS: No.

THE COURT: Describe it for me.

THE WITNESS: It would be like the end of tongs that are combined that you use to pick up salad. So they would be articulated in the center and you could move one end, and there would be a branch at the center. The instruments are thick enough and heavy enough that you can actually grasp and crush with those instruments as if you were picking up salad or picking up anything with—

THE COURT: Except here you are crushing the head of a baby.

THE WITNESS: Correct.[23]

Another of plaintiffs' expert witnesses was Dr. Marilynn Fredriksen, an associate professor in clinical obstetrics and gynecology at Northwestern

University Medical School. In establishing her expertise on the issue of abortion, plaintiffs' attorney asked her how many dismemberment abortions she has done in her career. She answered, "I really don't know, but probably thousands." "Thousands, plural?" Judge Casey queried. "Thousands, plural," she answered.[24]

Dr. Fredriksen has also done partial-birth abortions, and in her testimony about performing a partial-birth abortion she described how she does not always need to pierce the baby's skull before completing delivery; sometimes "grasping forceps" will do the trick. Judge Casey inquired further:

THE COURT: Excuse me. Grasping forceps, does that mean you crush the skull?

THE WITNESS: You compress the skull, yes.

THE COURT: You crush it, right?

THE WITNESS: Yes.

THE COURT: Yesterday you mentioned sometimes you use your finger, right, rather than using scissors?

THE WITNESS: No, that is not my testimony.

THE COURT: Isn't that what you said?

THE WITNESS: No, that is not. I said the scissors would be important to make an incision at the base of the skull, but I don't use suction. I use my finger to disrupt the contents of the cranial cavity, to thereby collapse the skull and allow delivery of the fetus.

THE COURT: So you use your finger to get the contents of the skull out rather than sucking the contents of the skull out, is that correct?

THE WITNESS. Yes.[25]

Dr. Cassing Hammond, another plaintiff in the case who has performed "thousands" of abortions,[26] is an assistant professor in obstetrics and gynecology at the Northwestern University School of Medicine. According to his own testimony, Dr. Hammond *does* use his finger—or scissors, or anything else on his table that will get the job done—to puncture the baby's head:

Q. Dr. Hammond, do you always use scissors or other instruments to breech the fetal head or the fetal neck in the course of doing an intact D&E of this kind?

A. Not always. It depends on the fetus. If you've got a fetus that is earlier in gestation, the skull, or calvarium, it is soft. It isn't as firmly formed. So in those cases you can often do this just with your finger, you can do this digitally. In some cases the scissors probably after 20 weeks I am more likely to use them. We actually have a number of instruments on the table that I can use, whatever seems like it is going to be most effective.[27]

Dr. Stephen Chasen, another plaintiff, is associate professor of obstetrics and gynecology at the Weill Medical College of Cornell University. He has

done 500 abortions in his career, including 200 dismemberment and 75 partial-birth abortions.[28] In his expert testimony he described the way he finds the place on the baby's head to puncture: "I place a clamp on the front part of the cervix and, applying mild traction to this, it exposes the skin at the back of the fetal neck at the site through which I place the scissors. So I can in almost all cases actually visualize the spot through which I place the scissors.[29]

On cross-examination, counsel for the Government walked him through the steps he takes in a partial-birth abortion:

Q. You wrap a small sterile towel around the fetus, because it is slippery, and after the legs are out you pull on the sacrum, or the lower portion of the spine, to continue to remove the fetus, right?

A. Right.

Q. When the fetus is out to the level of the breech, you place another, larger towel around the first small towel, right?

A. Right.

Q. You gently pull downward on the sacrum until the shoulder blades appear, right?

A. Right.

Q. Then, with your hand on the fetus's back, holding it with the towel, you twist in a clockwise or counterclockwise motion to rotate the shoulder, right?

A. Right.

Q. The shoulder in front or the arm in front is swept out with your fingers, and then you rotate the other side of the fetus to sweep out the other arm, right?

A. Right.

Q. Then the fetus is at a point where only the head remains in the cervix, correct?

A. That's correct.

Q. That is when you make the decision based on the gestational age and the amount of cervical dilation, whether the head will fit out intact, whether you can tuck the head of the fetus to its chest, or whether you have to decompress the skull to remove the fetus's head, right?

A. It is based on the size of the fetal head and the cervical dilation. I don't directly consider the gestational age.

Q. If you are able to deliver the head by flexing the chin against the fetal chest—and you have been able to do this several times . . . Doctor?

A. There have been a few occasions, yes.

Q. Then you remove the fetus with the towel, you put it on the table, and you turn back to the woman to deal with the placenta, right?

A. That's right.

Q. If you can't do that, you know you are going to have to crush the head, and so you take a clamp and you grasp the cervix to elevate it, and then your assistant there in the operating room will pull down on the fetus's legs or back, gently lowering the fetus's head toward the opening of the vagina, right?

A. Right.

Q. That is when you put two fingers at the back of the fetus's neck at the base of the skull where you can feel the base of the skull, and then you puncture the skull with the scissors, right?

A. I usually can see it as well as feel it. But yes.

Q. At that point you see some brain tissue come out, and you are 100 percent certain that you are in the brain, so you open the scissors to expand the hole, remove the scissors, and put the suction device in the skull, right?

A. Correct.

Q. You turn on the suction, and typically the fetus comes right out with the suction device still in its skull, right?

A. Right.[30]

Dr. Gerson Weiss, a plaintiff and expert witness at trial, is chair of the department of obstetrics and gynecology and women's health at the UMDNJ-New Jersey Medical School. He claims to have done approximately 1,500 to 2,000 abortions, including 300 to 500 dismemberment and partial-birth abortions.[31] Dr. Weiss testified that, not only is the baby's neck visible in a partial-birth abortion, but also a portion of the baby's head: "Visualize in your mind this. The cervix has to be dilated enough to allow the entire trunk of the fetus to pass through it. The neck of the fetus is much smaller than the shoulders and the trunk but a larger thing, the shoulders and the trunk have passed through. So, not only is the neck through but a portion of the skull which is vividly, you know, exactly where it is and you see it, it's above the neck."[32]

Judge Casey questioned Dr. Weiss about finding the place on the baby's head to puncture:

THE COURT: You do it by feel, don't you?

THE WITNESS: You always feel it. It's right there where your finger is.

THE COURT: If you feel it you can't see it.

THE WITNESS: Usually you see it. So, when it's right there you can usually, under direct vision, insert a sharp instrument into the skull or, at worst, by feel, not blindly, because you know exactly where it is and you feel it with your finger.[33]

The fact that the baby is alive during the partial-birth procedure—a fact formerly contested by abortion activists—was confirmed by a number of plaintiffs' witnesses.

Dr. Carolyn Westoff, a plaintiff and expert in the case, is a professor of epidemiology and population and family health in the School of Public Health at Columbia University. She has performed hundreds of abortions including dismemberment and partial-birth abortions, fifty of which she performed or supervised in 2003.[34] Dr. Westoff testified that there is "usually a heartbeat" when she commences delivery in a partial-birth abortion, and that when she collapses the skull, the fetus is living.[35]

The fact that the baby is still living at this point in the abortion was also confirmed vividly here by Dr. Johnson in a series of questions from Judge Casey:

THE COURT: An affidavit I saw earlier said sometimes, I take it, the fetus is alive until they crush the skull?

THE WITNESS: That's correct, yes, sir.

THE COURT: In one affidavit I saw attached earlier in this proceeding, were the fingers of the baby opening and closing?

THE WITNESS: It would depend where the hands were and whether or not you could see them.

THE COURT: Were they in some instances?

THE WITNESS: Not that I remember. I don't think I have ever looked at the hands.

THE COURT: Were the feet moving?

THE WITNESS: Feet could be moving, yes.[36]

What Do Abortion Doctors Tell Their Patients?

Judge Casey displayed a keen interest in learning whether, and to what extent, abortion doctors inform their patients about the details of the abortion procedures they will perform. The following is an exchange between Judge Casey and Dr. Johnson:

THE COURT: When you describe the possibilities available to a woman do you describe in detail what the intact D&E or the partial birth abortion involves?

THE WITNESS: Since I don't do that procedure I wouldn't have described it.

THE COURT: Did you ever participate with another doctor describing it to a woman considering such an abortion?

THE WITNESS: Yes. And the description would be, I would think, descriptive of what was going to be, what was going to happen; the description.

THE COURT: Including sucking the brain out of the skull?

THE WITNESS: I don't think we would use those terms. I think we would probably use a term like decompression of the skull or reducing the contents of the skull.

THE COURT: Make it nice and palatable so that they wouldn't understand

what it's all about?

THE WITNESS: No. I think we want them to understand what it's all about but it's—I think it's—I guess I would say that whenever we describe medical procedures we try to do it in a way that's not offensive or gruesome or overly graphic for patients.

THE COURT: Can they fully comprehend unless you do? Not all of these mothers are Rhodes scholars or highly educated, are they?

THE WITNESS: No, that's true. But I'm also not exactly sure what using terminology like sucking the brains out would—

THE COURT: That's what happens, doesn't it?

THE WITNESS: Well, in some situations that might happen. There are different ways that an after-coming head could be dealt with but that is one way of describing it.

THE COURT: Isn't that what actually happens? You do use a suction device, right?

THE WITNESS: Well, there are physicians who do that procedure who use a suction device to evacuate the intracranial contents; yes.[37]

Judge Casey pursued this line of questioning with Dr. Westhoff as well:

THE COURT: I want to know whether that woman knows that you are going to take a pair of scissors and insert them into the base of the skull of her baby, of her fetus. Do you tell her?

THE WITNESS: I do not usually tell patients specific details of the operative approach. I'm completely—

THE COURT: Do you tell her that you are going to then, ultimately, suck the brain out of the skull?

THE WITNESS: In all of our D&Es the head is collapsed or crushed and the brains are definitely out of the skull but those are—

THE COURT: Do you tell them that?

THE WITNESS: Those are details that would be distressing to my patients and would not—information about that is not directly relevant to their safety.

THE COURT: Don't—whether it's relative to their safety or not don't you think it's since they're giving authorization to you to do this act that they should know precisely what you're going to do?

THE WITNESS: That's actually not the practice I have of discussing surgical cases with patients.

THE COURT: I didn't ask you that. I said don't you think they ought to know?

THE WITNESS: No, sir, I don't.[38]

Judge Casey questioned Dr. Chasen about the information he gives his patients before a dismemberment abortion:

THE COURT: Do you tell them straight out what you are doing? No sugar

coating, just you tear it off and remove it in pieces?

THE WITNESS: There is nothing I can do to make this procedure palatable for the patients. There is no sugar coating.

THE COURT: I didn't ask you that, Doctor. I know it is not pleasant. I want to know whether or not these people know, have a fully-educated discussion with you what you are going to do.

THE WITNESS: We have a full and complete discussion about the fact that in most cases the fetus will not pass intact through the cervix and in many cases—

THE COURT: No, let's go back. I asked you a simple question. Do you tell them you are going to tear limbs off?

THE WITNESS: I don't have simple discussions with my patients. I have involved discussions. I can share with you what I tell my patients.

THE COURT: Go ahead. I am asking you, do you tell them you tear it off?

THE WITNESS: I initiate the discussion in general terms, and they always include the possibility that destructive procedures will be done to facilitate removal of the fetus.

THE COURT: Do you do it in nice sugar-coated words like that?

THE WITNESS: My patients are under no illusions and they don't regard that as sugar-coating and they are usually devastated—

THE COURT: How do you know, Doctor, do you see into their minds?

THE WITNESS: These are patients most of whom I have cultivated a relationship, and I can tell.[39]

The Issue of Fetal Pain

The only pain expert at trial was Government witness Dr. Kanwaljeet Anand.[40] Dr. Anand testified that "[f]etuses that are beyond 20 weeks of gestation can feel pain." He explained that, by this age: a baby can respond to sound, light, and taste, indicating that the central nervous system is functioning and that the baby is conscious; all of the skin surfaces and mucus membranes have sensory receptors; and all of the anatomical structures needed to perceive and process pain are present and functional.[41] He testified that evidence demonstrates that "between 20 and 30 weeks of gestation there is the greatest sensitivity to pain."[42]

Dr. Anand explained why the partial-birth abortion procedure will cause "prolonged and excruciating pain to the fetus" beyond 20 weeks of gestation: "Given the increased sensitivity to pain at that period of gestation, the parts of the procedure associated with grasping the lower extremity of the fetus, of manipulation and rotating the fetus within the confines of the uterus, of delivering the fetus through an incompletely dilated cervix as well as the surgical incision made at the back of the head, the puncturing of the

intracranial cavity through . . . the membranes that covered the brain, all of those parts of the procedure would be associated with prolonged and excruciating pain to the fetus."[43]

Moreover, anesthesia administered intravenously to a pregnant woman would not have an impact on the baby "because the concentrations that are generated in the fetal blood would not be effective."[44] In fact, to ensure that there was a state of fetal anesthesia, Dr. Anand testified, "we would need to give anywhere from five to 50 times the dose of regular anesthetic that is used for the mother,"[45] which would produce "a very high likelihood of toxic side effects in the mother."[46]

Plaintiffs offered no expert witness to counter this testimony. Rather, in order to diminish the powerful evidence that partial-birth abortion causes "prolonged and excruciating pain," plaintiffs used their cross-examination of Dr. Anand to make the point that *other* methods of abortion at this stage would be quite painful, too. For example, plaintiffs' counsel asked Dr. Anand to compare the pain inflicted by a partial-birth abortion to the pain inflicted by a dismemberment abortion:

Q. Are you familiar with the dismemberment D&E?

A. I am familiar with it to the extent that I have read about the procedure. I have not performed any of those procedures.

Q. In a dismemberment D&E, it is your opinion, isn't it, that at 20 weeks of gestation a fetus undergoing that procedure would experience severe pain?

A. That is correct.

Q. Isn't it true, Doctor, that assuming the same gestational age, a D&E procedure involving dismemberment would be more painful to a fetus than a D&X procedure?

A. That is possible, yes.[47]

When plaintiffs' counsel inquired about pain caused by an induction abortion procedure, Dr. Anand testified that "as a result of the induction procedure there would be pain associated to the fetus."[48] Finally, when plaintiffs' counsel pursued the possibility of pain caused by injecting a needle into the baby's heart, Dr. Anand testified that the baby would feel pain "from the point of entry of the needle into the fetal body to the point when fetal demise occurs as a result of cardiac arrest."[49]

Questions to plaintiffs' abortion experts about fetal pain produced some of the most fascinating testimony in the trial. In questions to Dr. Hammond about what he informs his patients, Judge Casey pursued the issue of fetal pain:

THE COURT: Do you tell them whether or not it hurts the baby?

THE WITNESS: We have that conversation quite a bit with patients, your Honor.

THE COURT: And what's your answer?

THE WITNESS: We say several things to the patient, your Honor. First of all, we tell the patient that it's controversial what exactly—what the fetus experiences of pain at various gestational ages. We share with them the fact that even for normally developed fetuses people debate the beginning of sensation of the fetus. They debate at what gestational age the fetus is able to interpret pain as we think about it. We share with the patients that even though there are speculations about these things among normal fetuses, when you start dealing with the kind of circumstances that we confront where a baby may not have its forebrain or may not have its brain . . . which is in essence a completely disrupted and in some cases spinal cord, that there is no data that lead us to know what the baby feels.

THE COURT: How about when there is no anomaly instead of all these exceptions, how about when there is no anomaly?

THE WITNESS: We say that there is a possibility and one of the things that we are doing with most of these patients after 16 to 18 weeks is they're all under IV anesthesia . . . which may confer some pain control to the fetus. We also share with them their alternatives and we share with them the fact that we really don't know what the fetus feels and some of the other things that they can do for pain. For example, frankly, your Honor, I think we sugar coat some of the other options and we share this with patients. . . . But the honest truth is, how do we know that taking this huge instrument and poking it into the baby's heart and injecting a poison hurts any less than my rapidly cutting the umbilical cord or transecting the spinal cord with my scissors? Or how do we know that poisoning the environment that the baby is in with digoxin is any more painful or less painful than my doing a very rapid D&E. . . . So what we are really asking the patients that I see is, which do you think is going to hurt worse for your fetus?[50]

Judge Casey pursued the issue of fetal pain with Dr. Westhoff as well:

THE COURT: Do any of them ask you whether or not the fetus experiences pain when that limb is torn off?

THE WITNESS: I do have patients who ask about fetal pain during the procedure, yes.

The Court: And what do you tell them?

THE WITNESS: I, first of all, assess their feelings about this, but they of course even notwithstanding the abortion decision, would generally tell me they would like to avoid the fetus feeling pain. I explain to them that in conjunction with our anesthesiologists that the medication that we give to our patients during the procedure will cross the placenta so the fetus will have some of the same medications that the mother has.

THE COURT: Some.

THE WITNESS: Yes, that's right.

THE COURT: What do you tell them, does the fetus feel pain or not when they ask?

THE WITNESS: What I tell them is that the subject of the fetal pain and whether a fetus can appreciate pain is a subject of some research and controversy and that I don't know to what extent the fetus can feel pain but that its—

THE COURT: Do you tell them it feels some pain?

THE WITNESS: I do know that when we do, for instance an amniocentesis and put a needle through the abdomen into the amniotic cavity that the fetus withdraws so I certainly know based on my experience that the fetus [will] withdraw in response [to] a painful stimulus.[51]

Judge Casey also discussed the issue of fetal pain with Dr. Johnson:

THE COURT: I heard you talk a lot today about dismemberment D&E procedure, second trimester; does the fetus feel pain?

THE WITNESS: I guess I—

THE COURT: There are studies, I'm told, that say they do. Is that correct?

THE WITNESS: I don't know. I don't know of any—I can't answer your question. I don't know of any scientific evidence one way or the other.

THE COURT: Have you heard that there are studies saying so?

THE WITNESS: I'm not aware of any.

THE COURT: You never heard of any?

THE WITNESS: I'm aware of fetal behavioral studies that have looked at fetal responses to noxious stimuli.

THE COURT: Does it ever cross your mind when you are doing a dismemberment?

THE WITNESS: I guess whenever I—

THE COURT: Simple question, Doctor. Does it cross your mind?

THE WITNESS: Does the fetus having pain cross your mind?

THE COURT: Yes.

THE WITNESS: No.

THE COURT: Never crossed your mind.

THE WITNESS: No.[52]

Judge Casey also questioned Dr. Frederiksen about partial-birth abortion and fetal pain:

THE COURT: Do you tell them whether or not that hurts the fetus?

THE WITNESS: I have never talked to a fetus about whether or not they experience pain.[53]

THE COURT: I didn't say that, Doctor. Do you tell the mother whether or not it hurts the fetus?

THE WITNESS: In a discussion of pain for the fetus it usually comes up in

the context of how the fetus will die. I make an analogy between what we as human beings fear the most—a long protracted painful death.

THE COURT: Doctor, I didn't ask you—

THE WITNESS: Excuse me, that's what I tell my patients.

THE COURT: But I'm asking you the question.

THE WITNESS: I'm sorry.

THE COURT: And I'm asking you whether or not you tell them that.

THE WITNESS: I feel that fetus dies quickly and it's over quickly. And I think from a standpoint of a human being our desire is that we have a quick death rather than a long protracted death—

THE COURT: That's very interesting, Doctor but it's not what I asked you. I asked you whether or not you tell them the fetus feels pain.

THE WITNESS: I don't believe the fetus does feel pain at the gestational ages that we do, but I have no evidence to say one way or the other so I can't answer that question.[54]

Judge Casey also questioned Dr. Chasen about partial-birth abortion and fetal pain:

THE COURT: Does it hurt the baby?

THE WITNESS: I don't know.

THE COURT: But you go ahead and do it anyway, is that right?

THE WITNESS: I am taking care of my patients, and in that process, yes, I go ahead and do it.

THE COURT: Does that mean you take care of your patient and the baby be damned, is that the approach you have?

THE WITNESS: These women who are having [abortions] at gestational ages they are legally entitled to it—

THE COURT: I didn't ask you that, Doctor. I asked you if you had any care or concern for the fetus whose head you were crushing.

THE WITNESS: No.[55]

Conclusion

Like the "collective amnesia" that is said to occur when a culture forgets a common experience, abortion requires a kind of collective blindness. *Roe* v. *Wade* made the Constitution blind to the personhood of children not yet born, and this blindness was exhibited in all its pitiless brutality in the trials on the partial-birth-abortion ban. The testimony was a bracing, if brief, reprieve from the layers of euphemism that cloak the truth about abortion.

For abortion doctors on the witness stand, removing those layers was not always an easy process. Perhaps the best example of this was Dr. Westoff's tortured explanation for why she does not like the new law against partial-

birth abortion: "I mean, I know what my purpose is . . . to empty the uterus in the safest way possible. Yet, this language implies that I have this other purpose, which is to kill the fetus. So, to me, it's like—kind of like there is an elephant in the room besides me and my patient . . . there is somebody judging what my purpose is in bringing the fetus out a certain way."[56]

On this point she was quite right: There is someone else in the room. Seven justices in *Roe* v. *Wade* closed the eyes of the law to the unborn child upon uttering the infamous words, "We need not resolve the difficult question of when life begins."[57] But in the case of a partially born child, even the Supreme Court cannot continue the charade forever. The law simply cannot say that there is no person there.

Congress and dozens of states, with overwhelming public support, have worked to ban partial-birth abortion precisely because of what happens to that someone else in the room. And no matter the outcome of the current trials on the federal ban, the effort will continue until this inhumane practice is eradicated from American public life.

NOTES

(Full transcripts are available from:http://www.usccb.org/prolife/issues/pba/pbaban.htm.The following transcript legend may be of help in finding testimony. Plaintiffs' experts: Dr. Johnson, day 3; Dr. Hammond, days 3-4; Dr. Westhoff, days 4-6; Dr. Fredriksen, day 7; Dr. Weiss, day 8; Dr. Chasen, day 9. DOJ's experts: Dr. Lockwood, day 10; Dr. Anand, day 11, Dr. Sprang, day 12, Dr. Clark, day 13; Dr. Cook, day 14.)

1. Partial Birth Abortion Ban Act of 2003: 108th Congress, 1st Session, Section 1531.
2. He described the procedure this way:

   > With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. The skull lodges at the internal cervical os [the opening to the uterus]. . . . 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). . . [and] takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. . . . [T]he surgeon then forces the scissors into the base of the skull or into the foramen 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 hole and evacuates the skull contents.

   National Abortion Federation, Second Trimester Abortion: From Every Angle, Fall Risk Management Seminar, September 13014, 1992, Dallas, Texas; Presentation, Bibliography & Related Materials, Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion*, pages 30-31.
3. "LMP" refers to measuring the length of pregnancy from the mother's last menstrual period, rather than from conception.
4. *Id.* at 28.
5. "Medicine adds to debate on late-term abortion," *American Medical News*, American Medical Association, Vol. 40, No. 9 (March 3, 1997).
6. "Abortion: Activists Lied," *The Bergen Record*, February 27, 1997.
7. Barbara Vobejda and David Brown, "Discomforting Details of Late-Term Abortions Intensify

Dispute," *Washington Post*, September 17, 1996; *Media Matters, PBS* television series, January 1997. Hosted by Alex Jones and reported by Terry Eastland.

8. "An Abortion Rights Advocate Says He Lied About Procedure," *New York Times*, A11 (February 26, 1997).
9. The transcripts in their entirety can be found online at http://www.usccb.org/proflife/index.htm.
10. Individual plaintiffs were Mark Evans, Carolyn Westoff, Cassing Hammond, Marc Heller, Timothy Johnson, Stephen Chasen, and Gerson Weiss.
11. There was the occasional light moment. When an expert for the plaintiffs said abortion is safer than childbirth, for example, Judge Casey inquired, "safer than childbirth?" "Yes, your Honor," she replied. "Would you recommend abortions rather than childbirth then?" he asked. "If a woman wants to have a baby, she should definitely go the full nine months," she answered.
12. Tr. New York: Day 5, Page 3: 12-13 (Westhoff).
13. See Grunebaum, Hammond, Westhoff, Johnson, and Fredriksen testimony.
14. See Hammond, Johnson, Chasen, and Westhoff testimony.
15. See Grunebaum, Hammond, Fredriksen, Westhoff, and Chasen testimony.
16. See Grunebaum, Hammond, Weiss, and Chasen testimony.
17. See Hammond, Johnson, Weiss, Grunebaum, Chasen, Westhoff testimony.
18. See testimony of Dr. Charles Lockwood, Dr. M. Leroy Sprang, Dr. Curtis R. Cook, and Dr. Steven Leigh Clark.
19. Dr. Clark has authored over 170 peer-reviewed scientific articles, is an editorial consultant for peer-reviewed medical journals, and has been named by his peers to the list of "Best Doctors in America" every year for over a decade.
20. Tr. New York: Day 13, 2377: 22-2378-2 (Clark).
21. Tr. New York: Day 3: 388:4-390:19 (Johnson).
22. Tr. 466: 9-15 (Johnson).
23. Tr. 467: 6-15 (Johnson).
24. Tr. New York: Day 6, page 93: 2-10 (Fredriksen).
25. Tr. 1141: 6-9 (Fredriksen).
26. Tr. 517: 5-19 (Hammond).
27. Tr. New York: Day 4, page 32: 1-9 (Hammond).
28. Tr. New York: Day 9, page 60: 13-19 (Chasen).
29. Tr. New York: Day 9, page 102: 20-25.
30. Tr. New York: Day 9, page 182: 5-7 (Chasen).
31. Tr. New York: Day 8: 1312: 18-25; 1314: 25-1315: 3 (Weiss).
32. Tr. 1351: 5-11 (Weiss).
33. Tr. 1351: 21-25 (Weiss).
34. Tr. New York: Day 4, page 170: 16-page 171:2 (Westhoff).
35. Tr. New York: Day 5, page 72: 1 (Westhoff).
36. Tr. 468: 12-25 (Johnson).
37. Tr. 515: 24-516: 1 (Johnson).
38. Tr. New York: Day 5, page 21: 8-10 (Westhoff).
39. Tr. New York: Day 9, page 69: 3-page 70: 9 (Chasen).
40. Dr. Anand, a Rhodes scholar with an Oxford doctorate in the hormonal and metabolic responses of premature infants, is a professor of Pediatrics, Anesthesiology, Pharmacology and Neurobiology at the University of Arkansas for Medical Sciences and Director of the Pain Neurobiology Laboratory at the Arkansas Childrens' Hospital Research Institute.
41. Tr. New York: Day 11, page 35-page 36: 24 (Anand).
42. That is because "the early development of the receptors and the density of these receptors is much greater in the fetal skin as compared to an older child or adult (Tr. New York: Day 11 page 46: 22-25, page 47:1(Anand)) and because "inhibitory mechanisms or mechanisms that may modulate" are not yet developed (Tr. New York: Day 11 page 105: 1-11 (Anand).Tr. New York: Day 11 page 61: 1-3 (Anand).
43. Tr. New York: Day 11, page 54: 14-23 (Anand).
44. Tr. New York: Day 11, page 60: 13-17 (Anand). The circulation of the mother and the circulation of the baby are separated by the placental membrane, and "drugs that are circulating in the mother's blood have to get across this placental membrane and reach sufficient enough concentrations in the fetus' blood in order to then cross the blood brain barrier and have an impact on brain cells in the fetus." Nor did Dr. Anand assert that general anesthesia administered to the

mother would produce an adequate amount of pain control in the baby. Tr. New York: Day 11 page 60: 23-25, page 61: 1-3 (Anand).
45. Tr. New York: Day 11, page 66: 5-12.
46. Id. On cross-examination Dr. Anand stated that general anesthesia in various gaseous forms would equilibrate fairly quickly across the placental barrier and would produce some levels of anesthesia in the fetus.
47. Tr. New York: Day 11, page 100: 3-14 (Anand).
48. Tr. New York: Day 11, page 104: 7-12 (Anand).
49. Tr. New York: Day 11, page 107: 12-17 (Anand).
50. Tr. New York: Day 4, page 87: 5-page 88: 13 (Hammond).
51. Tr. New York: Day 5, page 8: 3-8 (Westhoff).
52. Tr. New York: Day 3, 513: 1-8 (Johnson).
53. Dr. Anand explained in his testimony that the International Association for the Study of Pain's official definition of pain states that the inability to communicate verbally does not negate possibility of experiencing pain.
54. Tr. New York: Day 6, page 121: 4-page 122: 1 (Fredriksen).
55. Tr. New York: Day 9, page 101:14-page 102: 1-2 (Chasen).
56. Tr. California: Day 1 *(Planned Parenthood* vs. *Ashcroft*, CO3-4872 PJH), page 80: 10-16 (Paul).
57. *Roe* v. *Wade*, 410 U.S. 113 (1973) at 159.