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COMMENTS

THE EXCEPTION THAT SWALLOWED THE RULE? *WOMEN'S MEDICAL PROFESSIONAL CORPORATION V. VOINOVICH*¹ AND THE MENTAL HEALTH EXCEPTION TO POST- VIABILITY ABORTION BANS

I. INTRODUCTION

No legal question is ever truly “settled” in the abortion context. *Roe v. Wade*² itself continues to be lauded, lambasted and reinterpreted twenty-six years after it was decided.³ But until recently, one aspect of the *Roe* holding has received comparatively little attention: that a state’s decision to regulate or ban abortions after a fetus becomes viable (in *Roe*’s terms, in the third trimester)⁴ is subject to exception when the “life or health of the mother”⁵ is at stake. While this is perhaps the least controversial aspect of *Roe*, increased debate has recently ensued over exactly what the word “health” entails.

Health has generally been construed broadly in the abortion context. *Doe v. Bolton*,⁶ *Roe*’s companion case, seemed to suggest that

¹ 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998).

² 410 U.S. 113 (1973).

³ *See, e.g.*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 874-76 (1992) (plurality opinion co-authored by O’Connor, Kennedy, and Souter, JJ.) (replacing *Roe*’s trimester framework with an “undue burden” standard); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 517-19 (1989) (plurality opinion of Rehnquist, C.J.) (arguing that *Roe*’s trimester system should be abandoned and upholding Missouri’s statutory declaration that life begins at conception).

⁴ *See Harris v. McRae*, 448 U.S. 297, 313 (1980) (noting that under *Roe*, viability usually occurs around the beginning of the third trimester).

⁵ *Roe*, 410 U.S. at 164.

⁶ 410 U.S. 179 (1973).

the word "health" encompassed the entire spectrum of well-being, including "physical, emotional, psychological, familial [health], and the woman's age,"⁷ as viewed by the woman's physician. Taken literally, however, this interpretation appears to negate *Roe's* recognition of a state's compelling interest in preserving viable fetal life. Instead, it would seem to empower a doctor, whether a physician or psychiatrist, to make an unreviewable decision to permit an abortion whenever the doctor sees fit on grounds that are only arguably medical.

This expansive exception, however, is not the only plausible reading of the rule in *Doe* and its predecessor, *United States v. Vuitch*.⁸ The Court's reaffirmation of the state interest in fetal life in *Planned Parenthood of South Eastern Pennsylvania v. Casey*⁹ and the lingering national unease generated by the "partial birth abortion" debate, may result in a rethinking of what "health" means in the post-viability context.

Specifically, lawmakers and jurists have begun to ask, "must a viable fetus be aborted purely for the sake of the mother's mental health?" In 1997, a divided panel of the Sixth Circuit answered in the affirmative in *Women's Medical Professional Corporation v. Voinovich*.¹⁰ In their 1998 dissent to a denial of certiorari in that case, however, three Supreme Court Justices indicated their willingness to answer this question in the negative.¹¹ In doing so, they join a rising trend of national sentiment in favor of narrowing the health exception to post-viability abortion bans.¹²

Although only a distinct minority of abortions are performed late in pregnancy, the role of doctors in applying the health exception is likely to increase. The Supreme Court has become increasingly tolerant of regulations that narrow the availability of abortion in some situations.¹³ Federal courts, however, have been wary to uphold such laws unless they contain an unambiguous health exception—one that, in the view of many courts, must allow doctors almost limitless discretion to determine what "health" means in any given context. Thus,

⁷ *Id.* at 192.

⁸ 402 U.S. 62 (1971).

⁹ 505 U.S. 833 (1992).

¹⁰ See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 210 (6th Cir. 1997).

¹¹ See *Voinovich v. Women's Med. Prof'l Corp.*, 118 S. Ct. 1347, 1348 (1998) (Thomas, J., dissenting).

¹² See *Groups Try to Devalue Mind Ills as Reason for Allowing Procedure*, FULTON COUNTY DAILY REP., Jan. 7, 1999, available in NEXIS, News Library, CURNWS File (describing limitation of the mental health exception as playing "a central role in the abortion debate").

¹³ See John D. Lantos, M.D., et al., *Abortion: Ethical Issues for Clinicians*, in PSYCHIATRIC ASPECTS OF ABORTION 202 (Nada L. Stotland, M.D. ed., 1991).

the decision on how health is to be defined and weighed against competing constitutional interests will be one increasingly made by physicians and mental health professionals.¹⁴

This Comment explores the arguments on both sides of the post-viability mental health exception debate. *Voinovich* is used as a starting point in a discussion of the legal and policy concerns raised by the "health" definition. Because this subject has received little scholarly attention, this Comment does not seek a definitive answer so much as it will attempt to properly frame the questions that must be addressed. Nevertheless, after examining the legal and medical bases for a mental health exception, this Comment argues that the exception is unnecessary, and can only serve to undermine the compelling state interests in health and fetal life.

Part II traces the history of *Voinovich*, as it relates to the post-viability mental health exception. The *Voinovich* dissenters in both the Sixth Circuit and the Supreme Court rejected the idea that a mental health exception for post-viability abortions is constitutionally required. Part III analyzes whether the dissenters were correct as a legal matter. While *Doe* and *Vuitch* did not squarely rule on the matter, their treatment by subsequent courts indicates that a broad definition of health is at least the de facto law of the land. A reinterpretation of these decisions has strong constitutional support, but such a shift will require a decision by the Supreme Court to effectuate. Finally, Part IV illustrates the policy arguments for and against a formal mental health exception, and how any such exception might be implemented in practice. Especially in the context of post-viability abortions, this Comment argues that abortion is at best an ineffectual treatment for mental health disorders, and that the possible side-effects to late abortion have been completely ignored by most courts and policy-makers. Additionally, Part IV compares the mental health justifications to the countervailing state interests, and highlights new facets of the states' interest that have been suggested by *Voinovich* and other recent cases. Ultimately, this Comment concludes that *Voinovich* was an ill-informed and misguided decision. Policy makers and especially the Supreme Court should explicitly limit the post-viability health exception to physical health, so as to safeguard both the woman and the states' compelling interest in the life of a viable fetus.

¹⁴ See *id.*

II. PROCEDURAL HISTORY OF *VOINOVICH V. WOMEN'S MEDICAL PROFESSIONAL CORPORATION*¹⁵

The *Voinovich* story began in 1995 with Ohio's adoption of House Bill 135 (the "Bill").¹⁶ This would be the first¹⁷ in a series of nationwide measures aimed at abolishing "brain suction abortion,"¹⁸ a procedure that would soon come to be known alternatively as "partial birth abortion," "Dilation and Extraction" ("D & X"), or "Intact Dilation and Evacuation" ("Intact D & E").¹⁹

A. *The Bill*

The Bill was passed on August 16, 1995,²⁰ and signed into law the next day by then-Governor George V. Voinovich.²¹ Initially introduced as a simple ban on "brain suction abortion,"²² the final, compromise act contained three separate provisions:²³ (1) a ban on the use of the D & X procedure;²⁴ (2) a ban on post-viability abortions, ex-

¹⁵ 118 S. Ct. 1347 (1998).

¹⁶ H.B. 135, 121st Gen. Assembly, Reg. Sess. (Ohio 1995) (codified at OHIO REV. CODE ANN. §§ 2307.51 *et seq.*, 2919.15 *et seq.* (Anderson 1998)).

¹⁷ See Sandy Theis, *Voinovich Signs Welfare, Abortion Measures; Ban on Specific Procedure a First*, CINCINNATI ENQUIRER, Aug. 17, 1995, at C08.

¹⁸ *Id.*

¹⁹ *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 198-99 (6th Cir. 1997).

²⁰ See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1056-57 (S.D. Ohio 1995).

²¹ See Lee Leonard, *Voinovich Signs Bill Limiting Abortions*, COLUMBUS DISPATCH, Aug. 17, 1995, at 1C.

²² See *id.* (summarizing the legislative history of House Bill 135).

²³ See *Voinovich*, 911 F. Supp. at 1057.

²⁴ See OHIO REV. CODE ANN. § 2919.15(B) (Anderson 1998). House Bill 135 defined D & X as "the termination of a human pregnancy by purposely inserting a suction device into the skull of the fetus to remove the brain. 'Dilation and extraction procedure' does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion." *Id.* § 2919.15(A). It should be noted that this definition differs significantly from the one contained in the twice-passed, twice-vetoed, federal legislation on partial birth abortion. See Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong., 1st Sess. (1997). That Act defined the procedure as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." *Id.* The Sixth Circuit explicitly disavowed any application of its decision to that definition. See *Voinovich*, 130 F.3d at 199 n.9. Indeed, had Ohio's bill been more specifically tailored to the procedure it sought to ban, it may not have been stricken—at least not on vagueness grounds.

In keeping with what has become the accepted medical terminology, this Comment usually refers to the procedure as "D & X." See Janet E. Gans Epner, PhD, et al., *Late-Term Abortion*, 280 J. AM. MED. ASS'N 729 (1998). It should be noted, however, that although the term "partial birth abortion" is "unscientific," *id.*, and obviously coined to be inflammatory, it is nonetheless an accurate description of the procedure. See National Right to Life Committee ("NRLC"), *Is There a More Objective Term for the Procedure?* (visited Oct. 8, 1998) <<http://www.nrlc.org/abortion/pbafact14.html>> (quoting Dr. Martin Haskell as calling the procedure "somewhat equivalent to a breech type delivery").

cept when a physician determines in "good faith and in the exercise of reasonable medical judgement [that the abortion is] necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman,"²⁵ and the doctor follows a list of procedures;²⁶ and (3) a requirement that any fetus over twenty-two weeks of gestational age²⁷ be tested for viability before being aborted.²⁸ The judicial treatment of the second provision is the focus of this Comment.

The Bill was unique in that one of its justifications was to prevent cruelty to the fetus.²⁹ The Bill also contained a rebuttable presumption of viability at twenty-four weeks.³⁰ Violation of the provisions of the Bill constituted a fourth degree felony,³¹ punishable by up to eighteen months imprisonment and a \$2,500 fine.³² Doctors also faced potential civil liability for punitive and compensatory damages.³³

The Bill passed both the Ohio House and Senate by overwhelming majorities.³⁴ A facial challenge to the law's constitutionality under Fourteenth Amendment privacy rights was filed on October 27, 1995, seeking declaratory and injunctive relief.³⁵ The Plaintiffs were Women's Medical Professional Corp., a chain of abortion clinics operating in three Ohio counties, and Dr. Martin Haskell,³⁶ an affiliated abortion provider who claims to have coined the term "D & X."³⁷

²⁵ OHIO REV. CODE ANN. § 2919.17(A)(1) (Anderson 1998).

²⁶ Under the Bill, the physician must certify in writing that the health exception applied, obtain the written concurrence of at least one other physician, perform the abortion in a facility with neonatal services for premature infants, use the method least harmful to the fetus, and arrange for the attendance of another physician during the procedure to take all reasonable steps to preserve the expelled fetus's life. *See id.* § 2919.17(B)(1)(a)-(e).

²⁷ Gestational age is defined as the length of time from the first day of the last menstrual period of the pregnant woman. *See id.* § 2919.16(B).

²⁸ *See id.* § 2919.18.

²⁹ *See Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1071-72 (S.D. Ohio 1995). According to the district court, this was the first act to cite prevention of cruelty to the fetus as a state interest. *See id.* at 1072.

³⁰ *See* OHIO REV. CODE ANN. § 2919.17(C) (Anderson 1998).

³¹ *See id.* § 2919.17(D).

³² *See* Theis, *supra* note 17, at C08.

³³ *See* OHIO REV. CODE ANN. § 2307.52(B) (Anderson 1998).

³⁴ *See* Catherine Candisky, *Ohio To Have First Ban on Abortion Procedure*, COLUMBUS DISPATCH, June 29, 1995, at 5D.

³⁵ *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 191 (6th Cir. 1997).

³⁶ *See id.* at 191-92.

³⁷ *See* 142 CONG. REC. E1743, E1748 (daily ed. Sept. 27, 1996) (statement of Douglas Johnson, NRLC Federal Legislative Director).

*B. The District Court Decision: Women's Medical Professional Corporation v. Voinovich*³⁸

After two days of hearings, Judge Walter Rice of the U.S. District Court for the Southern District of Ohio issued a temporary restraining order on the Bill's enforcement on November 13, 1995, one day before it would have taken effect.³⁹ After four more days of testimony, the court issued a preliminary injunction.⁴⁰

1. The Post-Viability Abortion Ban

The Plaintiffs challenged seven aspects of the post-viability abortion ban.⁴¹ (1) the viability testing requirement, (2) the scope of the health exception, (3) the scope of the "medical emergency" exception, (4) the second physician concurrence requirement, (5) the requirement that the method chosen be least dangerous to the fetus, (6) the second physician attendance requirement, and (7) the viability presumption. The court would side with the Plaintiffs on all but the last of these components.

Beginning the controversy that is the focus of this Comment,⁴² the health exception was found invalid because it failed to cover impairment of mental health.⁴³ To illustrate the term "substantial and irre-

³⁸ 911 F. Supp. 1051 (S.D. Ohio 1995).

³⁹ See *id.* at 1056-57.

⁴⁰ See *id.* at 1057.

⁴¹ See *id.* at 1076.

⁴² It should be noted that *Voinovich* could serve as a starting point for a number of other *apropos* legal discussions as well. For example, both the district court and the Sixth Circuit applied a different standard of review for facial constitutional standards than has traditionally been applied. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court sustained part of a facial challenge because "in a large fraction of the cases in which [the provision at issue] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895. This standard significantly departs from the traditional requirement that a facial challenge must establish that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In applying *Casey* instead of *Salerno*, the Sixth Circuit joined a number of other courts in holding that the *Casey* standard displaces *Salerno*, at least in the abortion context. See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194-95 (6th Cir. 1997) (collecting cases). The Sixth Circuit, however, was the first court to extend the *Casey* standard to the post-viability context. See *id.* at 196. The wisdom of applying *Casey* rather than *Salerno* in either context is worthy of consideration.

Moreover, *Voinovich* presents a number of unique grounds on which to test the *Casey* Court's recognition that the state's compelling interest in potential life needs to be accorded greater weight than previous decisions have given it. See *Casey*, 505 U.S. at 875 ("Not all governmental intrusion is necessarily unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe's* terms, in practice it undervalues the State's interest in the potential life within the woman."). The mental health issue, see *Voinovich*, 130 F.3d at 209, the "cruelty to the fetus" justification, see *Voinovich*, 911 F. Supp. at 1072, and the D & X procedure, see *Voinovich*, 130 F.3d at 193, were all issues of first impression in *Voinovich*.

⁴³ See *Voinovich*, 911 F. Supp. at 1081.

versible impairment of a major bodily function,"⁴⁴ House Bill 135 gave the following nonexhaustive examples: "(1) pre-eclampsia; (2) inevitable abortion; (3) prematurely ruptured membrane; (4) diabetes; (5) multiple sclerosis."⁴⁵ The court interpreted this language to limit the exception only to physical health risks.⁴⁶ Judge Rice relied on *Doe v. Bolton*⁴⁷ to hold "that a state may not constitutionally limit the provision of abortions only to those situations in which a pregnant woman's physical health is threatened, because this impermissibly limits the physician's discretion to determine what measures are necessary to preserve her health."⁴⁸ The court cited delivery of a severely deformed baby⁴⁹ and of one conceived by rape or incest⁵⁰ as examples of when an abortion might be justified on grounds of the mother's mental health.

The court had an equally dim view of the rest of the post-viability provisions. While the court upheld the statute's definition of "viable,"⁵¹ because it relied on the physician's subjective determination of viability,⁵² the statutorily prescribed method for applying this definition was struck down.⁵³ The court determined that the method impermissibly included an objective component of reasonability,⁵⁴ and would therefore "chill the physician's determination of non-viability, and create an undue burden."⁵⁵ The court advanced a similar argument with respect to the objective medical emergency exception, especially in conjunction with the exception's lack of a scienter requirement and the court's refusal to imply one.⁵⁶ The second physician concurrence and attendance re-

⁴⁴ OHIO REV. CODE ANN. § 2919.16(J) (Anderson 1998).

⁴⁵ *Id.*

⁴⁶ See *Voinovich*, 911 F. Supp. at 1078.

⁴⁷ 410 U.S. 179 (1973).

⁴⁸ *Voinovich*, 911 F. Supp. at 1080-81. Judge Rice's statement begs the question, however, of how a doctor's ability to preserve a woman's health is impinged if the state has defined the word "health" in that context to mean only physical well-being.

⁴⁹ See *id.* at 1078-80.

⁵⁰ See *id.* at 1080.

⁵¹ House Bill 135 defined "viable" as:

The stage of development of a human fetus at which in the determination of a physician, based on particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of maintaining and nourishing life outside of the womb with or without temporary artificial life-sustaining support.

OHIO REV. CODE ANN. § 2919.16(L) (Anderson 1998).

⁵² See *Voinovich*, 911 F. Supp. at 1077 n.32.

⁵³ See *id.*

⁵⁴ See *id.* at 1077.

⁵⁵ *Id.* at 1077 n.32.

⁵⁶ See *id.* at 1081 ("[F]irst, it lacked a mens rea, or scienter requirement, and therefore was vague; second, it did not allow physicians to rely solely on their own best clinical judgment in

quirements, as well as the choice-of-method requirement, were likewise found to make post-viability abortions more difficult to obtain, impermissibly trade off between the mother and fetus's health and "chill" doctors from performing the abortions.⁵⁷ Finally, the court criticized,⁵⁸ but refused to reach the merits of the viability presumption.⁵⁹ The court thus found a substantial likelihood of the Plaintiffs' success, justifying the injunction.⁶⁰

2. *The D & X Ban and the Viability Testing Requirement*

The D & X ban was invalidated on vagueness and "undue burden" grounds.⁶¹ Although acknowledging that particular abortion procedures could be prohibited if safe alternatives are available,⁶² the Court found Ohio's broad definition of D & X to include another, more established procedure, Dilation & Evacuation ("D & E").⁶³ Physicians would not, then, have fair warning of what the Bill prohibited.⁶⁴ The court also reasoned that this result would leave some women without access to the safest possible procedure in certain situations, such that the D & X ban constituted an "undue burden on the right to seek a pre-viability abortion."⁶⁵

The court discussed but did not resolve the question of cruelty to the fetus.⁶⁶ This debate centered on expert testimony regarding whether a fetus is capable of experiencing pain.⁶⁷ The medical evidence strongly suggested that fetuses at viable ages, and perhaps even earlier,⁶⁸ may in fact suffer physical pain when aborted.⁶⁹ The court assumed for argument's sake that Ohio had a legitimate interest in

determining that a medical emergency existed, and so would chill physicians from exercising their best medical judgment in deciding whether such an emergency exists.".)

⁵⁷ See *id.* at 1087-89.

⁵⁸ See *id.* at 1090 n.41.

⁵⁹ See *id.* at 1090.

⁶⁰ See *id.* at 1094.

⁶¹ See *id.* at 1072.

⁶² See *id.* at 1067.

⁶³ See *id.* at 1063-64. D & E entails dismemberment of the fetus in the womb with suction curettes and forceps, and removing the pieces individually. See *id.* at 1064. The procedure is typically used after the thirteenth week of pregnancy, when the fetus becomes too large to remove by suction curettage. See *id.*

⁶⁴ See *id.* at 1067.

⁶⁵ *Id.* at 1072.

⁶⁶ See *id.* at 1073-74. The court broached the subject for the sake of posterity, but given its determination that the D & X ban constituted an undue burden on the pre-viability abortion right, the issue was technically moot. See *id.* at 1072.

⁶⁷ See *Voinovich*, 911 F. Supp. at 1072-75.

⁶⁸ See Brief Amici Curiae of the Am. Ass'n of Pro Life Obstetricians & Gynecologists, the Christian Legal Society and the Christian Med. and Dental Society, In Support of Defendants-Appellants at 13-14, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (Nos. 96-3157, 96-3159) [hereinafter "AAPLOG Brief"].

⁶⁹ See generally *id.*

mitigating this risk,⁷⁰ but refused to speculate as to when a fetus possesses the degree of consciousness necessary to experience pain as we know it.⁷¹ As with many facets of the abortion controversy, the court considered this a matter of individual conscience.⁷² As to the procedure itself, it was significant that alternative procedures may be equally painful to the fetus.⁷³

The third major aspect of House Bill 135 required a physician to perform a series of medical tests to determine a fetus's viability before aborting it.⁷⁴ Finding this to be unconstitutionally vague, the court held for the Plaintiffs on this challenge as well.⁷⁵

After issuing the preliminary injunction, the district court consolidated the preliminary hearings with the trial on the merits.⁷⁶ The court issued a permanent injunction on January 12, 1996, without further opinion, and the Defendants appealed to the Sixth Circuit.⁷⁷

C. The Sixth Circuit Decision

Circuit Judges Kennedy and Brown upheld Judge Rice's decision although "through somewhat different reasoning."⁷⁸ The court agreed that House Bill 135 defined the D & X procedure vaguely enough that D & E might also be covered.⁷⁹ The appellate court, however, was more explicit in its recognition that *Casey's* undue burden standard applies only before viability.⁸⁰ Thus, a D & X ban may have a greater chance of surviving after viability. The Ohio ban, however, was not found to be severable into pre- and post-viability components.⁸¹

⁷⁰ See *Voinovich*, 911 F. Supp. at 1074.

⁷¹ See *id.* at 1073.

⁷² See *id.* at 1074.

⁷³ See *id.* at 1073-74.

⁷⁴ The Bill provided:

Except as provided in [the medical emergency exception], no physician shall perform . . . an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy unless, prior to the performance [of] . . . the abortion, the physician determines, in good faith and in exercise of reasonable medical judgement, that the unborn human is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing the performing of gestational age, weight, lung maturity, or other tests of the unborn human that a reasonable physician making a determination as to whether an unborn human is or is not viable would perform or cause to be performed.

Id. at 1090 (quoting OHIO REV. CODE ANN. § 2919.18(A)(1) (Anderson 1998)).

⁷⁵ See *Voinovich*, 911 F. Supp. at 1090-91.

⁷⁶ See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997). This was done by stipulation of the parties. See *id.*

⁷⁷ See *id.* at 192.

⁷⁸ *Id.* at 198.

⁷⁹ See *id.* at 198.

⁸⁰ See *id.* at 201.

⁸¹ See *id.* at 202.

In analyzing the various post-viability provisions of House Bill 135, the court narrowed its focus to the health and medical emergency exceptions.⁸² The court agreed with Judge Rice that “the combination of the objective and subjective standards without a scienter requirement renders these exceptions unconstitutionally vague, because physicians can not know the standard under which their conduct will ultimately be judged.”⁸³ Since any post-viability regulation must contain sufficient medical exceptions, this vagueness was held to be fatal to all of the post-viability provisions.⁸⁴

Given this holding, the question of whether the health exception included purely mental health was moot.⁸⁵ The court discussed it, however, “since it was extensively briefed and argued. Further, if the statute is amended to meet the deficiencies found here, this issue will still remain.”⁸⁶

The court interpreted the exception to cover only physical health. Indeed, the Appellants themselves advanced this position at oral argument⁸⁷ and in their briefs.⁸⁸ The Bill’s legislative history, moreover, specifically indicated that the exception was meant to have the same meaning as the substantially identical, physical-health-only provision upheld by *Casey* in the context of a pre-viability waiting period.⁸⁹ The court’s reading of Supreme Court precedent compelled it to agree with Judge Rice that a post-viability restriction on abortion must contain a mental health exception.⁹⁰ The court, however, decided that the Constitution only requires an exception for “severe[,] irreversible risks of emotional harm,”⁹¹ as opposed to “severe-but-temporary” effects.⁹²

Judge Boggs dissented from each of the court’s holdings.⁹³ He began by identifying two principles in the Supreme Court’s abortion jurisprudence: (1) that states can regulate abortion procedures as long as they do not create an undue burden on the abortion right, and (2) that some post-viability abortions can be banned if they are not neces-

⁸² See *id.* at 203.

⁸³ *Id.* at 205. The Appellants did not challenge the district court’s holding that Ohio law would not support the importation of a scienter requirement. See *id.* at 206.

⁸⁴ See *id.* at 203.

⁸⁵ See *id.* at 206.

⁸⁶ *Id.* at 206.

⁸⁷ See *id.* at 206-07.

⁸⁸ See Reply Brief of Defendants-Appellants at 16-18, *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187 (Nos. 96-3157, 96-3159) [hereinafter “Reply Brief”].

⁸⁹ See *Voinovich*, 130 F.3d. at 209 n.20. The significance of *Casey*’s approval of this provision is discussed *infra* in Part III(C).

⁹⁰ See *id.* at 209.

⁹¹ *Id.* at 209.

⁹² *Id.* at 209 n.20.

⁹³ See *id.* at 211 (Boggs, J., dissenting).

sary to preserve the life or health of the mother.⁹⁴ He then took issue with the Appellees' position, "asserted[] with commendable candor" at oral argument,⁹⁵ that these two principles, properly construed, "pose no barrier to any woman seeking an abortion at any time for any purpose."⁹⁶ If this were the Court's intent, he reasoned, surely they would have made that position plain, "rather than setting up a maze that legislatures can in fact never successfully negotiate (despite the Court's apparent invitation to them to try)."⁹⁷ "To adopt [this] position," Judge Boggs argued, "would be to assume that the Supreme Court is deeply dishonest rather than simply deeply divided."⁹⁸

As to the D & X ban, Judge Boggs protested the majority's "off-hand dismissal" of the Bill's affirmative defense allowing doctors to prove that there was no safer alternative available.⁹⁹ Given the weight of evidence indicating that the D & X procedure was rarely, if ever medically indicated,¹⁰⁰ Judge Boggs characterized the majority's concerns as focusing on "an extreme example."¹⁰¹ He also dismissed the "chill" argument relied on by both courts, noting that "all criminal laws chill conduct that is at the margins of legality."¹⁰² Hence, Judge Boggs would not have reached the severability issue, since he found the D & X ban constitutional in both the pre- and post-viability contexts.¹⁰³

The main area of disagreement between the majority and the dissent on the post-viability regulations was the need for a scienter requirement.¹⁰⁴ Judge Boggs did not reach the question of whether *Cassey* required a mental health exception. Rather, to the extent that a mental health exception was necessary, he read the Bill's language to be "sufficiently broad to encompass such a requirement."¹⁰⁵ Applying a principle of judicial restraint cautioning that "courts must refrain from passing on the constitutionality [of a statute] unless obliged to do so,"¹⁰⁶ Judge Boggs would have simply acknowledged that Ohio's examples of a "serious risk of a substantial and irreversible impairment of a major bodily function"¹⁰⁷ were non-exhaustive, and not ex-

⁹⁴ See *id.* at 212.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See *id.* at 213.

¹⁰⁰ See *id.* at 214 (citing the American Medical Association).

¹⁰¹ *Id.* at 214.

¹⁰² *Id.*

¹⁰³ See *id.* at 215.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 216.

¹⁰⁶ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (Brandeis, J., concurring).

¹⁰⁷ OHIO REV. CODE ANN. § 2919.16(J) (Anderson 1998).

clusive of the “severe risks of mental and emotional harm[]’ language . . . [that] the majority would apparently approve.”¹⁰⁸ In other words, if mental health is included in the definition of “health,” there is nothing in the Bill to contradict that definition.¹⁰⁹

To Judge Boggs, the biggest losers in *Voinovich* and several other decisions were the state legislatures nationwide who can not find clear constitutional guidance in the convoluted reasoning of many courts. Drawing an analogy to “the classic recurring football drama of Charlie Brown and Lucy,”¹¹⁰ Judge Boggs lamented that “clear guidance to state legislatures as to where they permissibly can impose abortion regulations appears not to be the real motivation of plaintiffs nor the likely result of cases such as ours.”¹¹¹

D. The Supreme Court Denies Certiorari

The Supreme Court denied Ohio’s appeal for a writ of certiorari.¹¹² Justice Thomas filed a dissenting opinion joined by Justice Scalia and Chief Justice Rehnquist.¹¹³ This opinion narrowed the issues further by addressing only the post-viability restriction,¹¹⁴ and then only two aspects of the decision below: the scienter requirement and the mental health exception.¹¹⁵ The Justices saw both “conclusions . . . [as] unwarranted extension of our precedents.”¹¹⁶

The dissenting Justices went farther than Judge Boggs, arguing that the Supreme Court had never required a mental health exception. The Justices referred back to *Doe*, in which a health exception was held not to be vague because it had already been construed in state court to have the broad meaning that the *Voinovich* majority saw as

¹⁰⁸ *Voinovich*, 130 F.3d at 217 (Boggs, J., dissenting) (citations omitted).

¹⁰⁹ Judge Boggs did not address how he weighed the Appellant’s concession that the exception should be read to only include mental health. Judicial restraint would seem to counsel a decision based strictly on the record before the court. Judge Boggs did indicate, however, that it would be “prudent to wait for an authoritative statutory construction from an Ohio court.” *Id.* at 217.

¹¹⁰ *Id.* at 218-19. Judge Boggs explains:

Lucy repeatedly assures Charlie Brown that he can kick the football, if only this time he gets it right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment. Here, our court’s judgment is that Ohio’s legislators, like poor Charlie Brown, have fallen flat on their backs. I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so.

Id. at 219. The Supreme Court would not do so, however, in this case.

¹¹¹ *Id.* at 218.

¹¹² See *Voinovich v. Women’s Med. Prof’l Corp.* 118 S. Ct. 1347 (1998).

¹¹³ See *id.* at 1348 (Thomas, J., dissenting).

¹¹⁴ See *id.*

¹¹⁵ Because the mental health argument was apparently dicta in Judge Rice and the Sixth Circuit’s opinions, it seems appropriate to question whether this issue was properly before the Court.

¹¹⁶ *Voinovich*, 118 S. Ct. at 1348 (Thomas, J., dissenting).

required.¹¹⁷ The “conclusion that the statutory phrase at issue in *Doe* was not vague because it included emotional and psychological considerations,” however, “in no way supports the proposition that, after viability, a mental health exception is required as a matter of federal constitutional law. *Doe* simply did not address that question.”¹¹⁸ Nor did the Justices find their precedents to warrant “a constitutional scienter requirement to be imposed under the guise of the void-for-vagueness doctrine.”¹¹⁹

Like Judge Boggs, Justice Thomas lamented for the “vast majority of the 38 States that have enacted postviability abortion restrictions [and] have not specified whether such abortions must be permitted on mental health grounds.”¹²⁰ The Court’s failure to grant certiorari, the Justices feared, “may cast unnecessary doubt on the validity” of those statutes.¹²¹

III. LEGAL ANALYSIS: DOES SUPREME COURT PRECEDENT REQUIRE A MENTAL HEALTH EXCEPTION TO POST-VIABILITY ABORTION BANS?

The Supreme Court has never directly held that a post-viability health exception must include mental health to be constitutional.¹²² There have been dicta on both sides of the question, but the Court has only ruled on the vagueness of health exceptions, not their minimum constitutional threshold. Justice Thomas was correct, then, to question the assumption that the constitutional necessity of a mental health exception is a settled question. Prior to *Casey*, however, such an assumption seemed safe. But given the Court’s renewed respect for the compelling state interest in potential life,¹²³ especially once that life becomes viable, this now is truly a matter for the full Court to resolve.

¹¹⁷ See *id.* at 1349 (citing *Doe v. Bolton*, 410 U.S. 179, 183 (1973)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Bradley S. Clanton, *The Nullification Machine* (visited Oct. 8, 1998) <<http://www.leaderu.edu/ftissues/ft9808/clanton.html>>.

¹²³ See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 875 (1992) (“Not all governmental intrusion is necessarily unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*’s terms, in practice it undervalues the State’s interest in the potential life within the woman.”).

A. *The Source of the Debate: Vuitch and Doe*

The Court first addressed the meaning of the word "health" in the abortion context before it decided *Roe v. Wade*.

I. *United States v. Vuitch*¹²⁴

In *Vuitch*, the Court heard a vagueness challenge to a District of Columbia statute that criminalized abortions "unless the same were done as necessary for the preservation of the mother's life or health"¹²⁵ A doctor had been indicted under the statute, but the D.C. District Court dismissed the indictments without trial on the grounds that "[t]he word 'health' is not defined and in fact remains so vague in its interpretation and the [sic] practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health."¹²⁶ The court reasoned that, without firm guidelines, doctors would be subject to each individual jury's interpretation of the statute, and could never know the legal bounds of permissible conduct.¹²⁷ Moreover, the wording of the health exception led to accused abortionists being unconstitutionally presumed guilty until they could prove themselves innocent.¹²⁸

The Supreme Court reversed and upheld the statute. The Court focused most of its attention on the burden of proof issue, articulating a general approach to deciding the constitutionality of criminal statutes.¹²⁹ As to the health exception, the Court limited its discussion to "the contention that the word 'health' is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. We hold that it does not."¹³⁰ The Court examined the legislative history of the provision and found no attempt to define the term.¹³¹ The Court then looked to a recent District of Columbia case, in which both the district and appellate court interpreted

¹²⁴ 402 U.S. 62 (1971).

¹²⁵ *Id.* at 68.

¹²⁶ *Id.* at 68 n.3.

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.* at 68-71. The *Vuitch* case is perhaps best known for the sentence, "[b]ut of course statutes should be construed whenever possible so as to uphold their constitutionality." *Vuitch*, 402 U.S. at 70. Indeed, a recent search of the Shepard's database reveals that to this day, most citations of *Vuitch* are for this proposition, and not the definition of the word "health." Search of LEXIS, Shepard's Service (Feb. 9, 1999).

¹³⁰ *Vuitch*, 402 U.S. at 71 (citation omitted).

¹³¹ *See id.* at 71.

"health" to include a broad range of factors,¹³² and followed this construction of a local statute by local courts.¹³³

Strictly speaking, the Court's holding did not address whether the definition of "health" chosen by the District of Columbia was constitutionally required. Writing for the five-Justice majority, Justice Black did, however, observe that "[c]ertainly this construction accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being."¹³⁴ The Court also indicated its approval by quoting *Webster's Dictionary's* "properly" broad definition of health.¹³⁵ Foreshadowing its reliance on professional medical judgment in future abortion cases, the Court concluded by noting that "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."¹³⁶ These statements are clearly dicta, given the Court's preceding ruling on vagueness, but they nonetheless indicate a predisposition of several Justices towards the broader concept of health.

Other opinions in the decision added different insights to the meaning of "health." Justice White's brief concurrence stressed that a provision allowing abortions for health reasons, "whatever that phrase means,"¹³⁷ in no way legalized abortion in other contexts.¹³⁸ Justice Douglas's partial dissent argued that the statute, as written, violated procedural due process because it did not give physicians appropriate discretion to determine whether a mother's health was threatened.¹³⁹ He clearly accepted the possibility that mental health could properly be included in a health exception,¹⁴⁰ but unlike the majority, did not accept that District of Columbia precedent was sufficient to outline the parameters of the word "health." Justice Douglas found the exception to be worded broadly enough so as to allow jurors to vote according to their individual convictions on abortion, to the physician's peril.¹⁴¹ The hypotheticals he posed in his opinion echo the same questions being asked today, and demonstrate that, at least for Justice

¹³² See *id.* at 71-72 (citing *Doe v. General Hosp. of the D.C.*, 313 F. Supp. 1170 (D.C. 1970), *aff'd*, 434 F.2d 423 (D.C. Cir. 1970)).

¹³³ See *id.* at 72.

¹³⁴ *Id.* at 72.

¹³⁵ *Id.* (citation omitted).

¹³⁶ *Id.*

¹³⁷ *Id.* at 73 (White, J., concurring).

¹³⁸ See *id.* at 73-74.

¹³⁹ See *id.* at 74 (Douglas, J., concurring in part and dissenting in part).

¹⁴⁰ See *id.* ("Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another.")

¹⁴¹ See *id.* at 77-78.

Douglas, the requirement of a mental health exception remained an open question.¹⁴²

Given the "tortured divisions" within the Court on this case, it is difficult to argue that *Vuitch* has much precedential value for any proposition.¹⁴³ Chief Justice Burger and Justices Harlan, White and Blackmun joined the Court's opinion.¹⁴⁴ Justice Harlan, oddly enough, also filed a dissenting opinion as to jurisdiction, which Justices Brennan, Marshall and Blackmun (who also joined the majority) joined.¹⁴⁵

2. *Doe v. Bolton*¹⁴⁶

The Court next addressed the meaning of health in its companion case to *Roe v. Wade*. *Doe* involved a Georgia abortion statute that criminalized abortions in all but three situations: rape, severe fetal defect, or when "continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health."¹⁴⁷ The district court severed all three conditions from the statute on the grounds that "the reasons for an abortion may not be proscribed."¹⁴⁸ This left an exception without the word "health," which permitted abortions whenever "based upon . . . [the physician's] best clinical judgment that an abortion is necessary."¹⁴⁹ Other than removing these and other related restrictions, the court allowed the statute to stand.¹⁵⁰

¹⁴² Justice Douglas's hypotheticals included:

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he act in a similar way under this abortion statute?

May he perform abortions on unmarried women who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health"?

Id. at 76.

¹⁴³ Memorandum from Johnathan Entin, Professor of Constitutional Law and Political Science, Case Western Reserve University, to author (Feb. 19, 1999) (on file with author).

¹⁴⁴ *See Vuitch*, 402 U.S. at 63.

¹⁴⁵ *See id.* at 81 (Harlan, J., dissenting as to jurisdiction).

¹⁴⁶ 410 U.S. 179 (1973).

¹⁴⁷ *Id.* at 202 (app. A).

¹⁴⁸ *Doe v. Bolton*, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970) (three-judge panel).

¹⁴⁹ *Doe*, 410 U.S. at 202 (app. A).

¹⁵⁰ *Doe*, 319 F. Supp. at 1056.

The district court did mention health factors, but it did so in discussing the *state's* interest. It held that states "may legitimately require that the decision to terminate [a] pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician."¹⁵¹ In this vein, the court holistically approved of Georgia's decision to see "to it that the decisions [sic]—personal and medical—is not one undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical."¹⁵² The court framed its discussion of health in terms of state interest in fetal life, not a woman's ability to defeat that interest by asserting that her pregnancy would be injurious to her mental health. The court did not distinguish between abortions before and after viability.

The Supreme Court summarized the net effect of the district court's ruling as freeing the physician from artificial constraints on his medical judgement.¹⁵³ The Court recalled its holding in *Vuitch* that health was not vague because it had been authoritatively construed and the actual health determination was left to the physician.¹⁵⁴ That conclusion, the *Doe* Court asserted, "is equally applicable here."¹⁵⁵ The Court then characterized the decision below as holding that the doctor's "judgment may be exercised in the light of all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient. All of these factors may relate to health. This allows the attending physician the discretion he needs to make his best medical judgment."¹⁵⁶ Under this construction, the Georgia statute was not void for vagueness.

Again, the Court's ultimate holding on this issue was simply that the health exception was not vague. *Doe*, then, can logically be read as not imposing a constitutional mandate that all post-viability health exceptions include mental health. Unlike *Vuitch*, however, this stat-

¹⁵¹ *Id.* at 1055.

¹⁵² *Id.* at 1055-56.

¹⁵³ See *Doe*, 410 U.S. at 191 (observing that after the district court's decision, the abortion provider "is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him").

¹⁵⁴ See *id.* at 191-92.

¹⁵⁵ *Id.* at 192.

¹⁵⁶ *Id.* Justice Stewart also demonstrated in his *Vuitch* partial dissent that his primary focus was the right of the doctor to perform abortions as she sees fit. His brief opinion stated that "simply by extending the reasoning of the [*Vuitch*] Court's opinion to its logical conclusion . . . the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health." *United States v. Vuitch*, 402 U.S. at 96-97 (Stewart, J., dissenting in part).

ute had not been construed by Georgia courts,¹⁵⁷ and neither the district court nor the Supreme Court made any reference to state law or doctrine. Moreover, the Georgia statute no longer contained the word "health" and the district court approved of the state's *interest* in considering all facets of health, not its *requirement* to do so. As such, the *Vuitch* interpretation of health hardly appears applicable. *Doe*'s citation to *Vuitch*, then, seems at first glance to either be an attempt, conscious or otherwise, to gloss over the issue, a mistake, or a *sub silentio* elevation of the District of Columbia's definition of the word "health" to a higher level.

It is also possible, however, that the Court read into the Georgia statute the "health" language of the Model Penal Code ("MPC"). The Georgia statute at issue was relatively new and untested, and was based on the American Law Institute's treatment of abortion in its MPC.¹⁵⁸ The *Doe* Court noted this fact at the outset of its opinion, along with the observation that the MPC had inspired nearly a quarter of the abortion laws then in force.¹⁵⁹ The opinion referred the reader to Appendices A and B,¹⁶⁰ where both the Georgia and Model Codes were reproduced, and the Court referred to both statutes throughout its opinion. The MPC permits abortions if "[a physician] believes there is substantial risk that continuance of the pregnancy would gravely impair the physical *or mental health* of the mother"¹⁶¹ This language was substantially synonymous with that in *Vuitch*.

Reading the two statutes together would have made good judicial sense. First, the MPC was the Court's only outside source of insight into the Georgia statute's meaning, and was the next best thing to an authoritative construction. In that sense, the *Vuitch* vagueness analysis was, in fact, applicable. Second, given the proliferation of the MPC nationwide, interpreting its language would provide substantial and helpful guidance to a number of states. Third, it allowed the Court to construe the law so as to preserve its constitutionality as mandated by *Vuitch*.

There is further reason to doubt that *Doe* imported the *Vuitch* definition of "health" into the Constitution. In his concurring opinion, Chief Justice Burger agreed that the statutes in *Roe* and *Doe* impermissibly restricted some abortions that were necessary for the

¹⁵⁷ The statutes at issue had recently been adopted to replace a 90-year-old Georgia abortion law, and had not been tested on constitutional grounds in Georgia courts. *See Doe*, 410 U.S. at 182-83.

¹⁵⁸ *See id.* at 182 (citing MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962)).

¹⁵⁹ *See id.* at 182-83.

¹⁶⁰ *See id.* at 182.

¹⁶¹ *Id.* at 205 (quoting MODEL PENAL CODE, § 230.3(2) (Proposed Official Draft, 1962)) (emphasis added).

mother's health in the *Vuitch* sense of the term, which he called "its broadest medical context."¹⁶² Moreover, he rejected the dissent's "sweeping" reading of the opinion, explaining that "the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand."¹⁶³ The Chief Justice did not see *Roe* and *Doe* as revolutionizing abortion law as much as merely approving practices that the states had already put into place.

In his concurrence, Justice Douglas again explored a number of ways in which unwanted pregnancy may impede a woman's general well-being. While agreeing with the district court that a state may not limit the reasons for which an abortion is sought, he also noted that another "difficulty is that this statute . . . apparently does not give full sweep to the 'psychological as well as physical well-being' of women patients which saved the concept 'health' from being void for vagueness in [*Vuitch*]."¹⁶⁴ Justice Douglas appears, however, to have believed that pregnancies "which may impair 'health' in the broad *Vuitch* sense of the term"¹⁶⁵ counsel having "an *early* abortion,"¹⁶⁶ as opposed to one after viability. Indeed, Justice Douglas again emphasized the state's interest in "the life of the fetus after quickening."¹⁶⁷ For him, *Vuitch* would have no applicability to the *Voinovich* controversy.

3. *Vuitch and Doe Alone Do Not Require a Mental Health Exception After Viability*

These two cases alone do not create an obvious outcome for the *Voinovich* mental health question. As precedent, they stand only for the proposition that the two exceptions involved were not void for vagueness. Clearly, both decisions approved of taking a broad range of considerations into account when assessing the impact of an unwanted pregnancy on a woman's health. Both cases were also primarily motivated by the desire to protect abortion-providing doctors from unnecessary legal hassles, by giving them as free and well-defined a range of choices as possible. But the goal of protecting physician discretion also seems to have been at least as important, if

¹⁶² *Id.* at 207-08 (Burger, C.J., concurring).

¹⁶³ *Id.* at 208.

¹⁶⁴ *Id.* at 215 (Douglas, J., concurring).

¹⁶⁵ *Id.* at 215-16. Following Justice Douglas's lead, this Comment usually refers to the expansive definition of health at issue in *Doe* and *Vuitch* as the "broad *Vuitch* sense" of the term.

¹⁶⁶ *Id.* at 216 (emphasis added).

¹⁶⁷ *Id.* at 215.

not more so, than the breadth of the health definition. If the statutes had been authoritatively construed to provide for a physical-health-only exception, they would have been no more vague than the broad *Vuitch* interpretation of health.

Moreover, neither of these cases address the more specific question of *Voinovich*, which is whether the presence of a viable fetus changes the appropriate scope of the health concept. It is instructive to recall that both of these decisions were made in the pre-*Roe* legal environment, before the average person had ever thought of abortion in terms of "trimesters" or "pre- and post-viability." Before *Roe*, abortion was generally illegal at all stages of pregnancy; abortions for health reasons were as much an "exception" to the norm before viability as after.¹⁶⁸ *Roe* and *Doe* made the woman's motive a non-issue until the point of viability, at which time the Court determined that the state interest in potential life trumps the woman's liberty interest in terminating her pregnancy.¹⁶⁹ Indeed, given Justice Douglas's unanswered observation in *Doe* that the health question was relevant only before viability, and the Court's instruction to read *Roe* and *Doe* together,¹⁷⁰ there is nothing in these cases to support extending the broad *Vuitch* sense of health to post-viability cases. *Vuitch* and *Doe*, then, can provide insight regarding the Court's view of health, but they can not answer how that concept compares to the compelling state interest in fetal life.

B. Application of the *Vuitch/Doe* Definition of Health

Subsequent courts have interpreted *Vuitch* and *Doe*'s treatment of health in one of the following four ways: (1) they were simply vagueness decisions with no bearing on the meaning of health; (2) they do not require one specific definition of health, but rather that the health determination be made by the individual physician; (3) they require health to be defined in the broad *Vuitch* sense; or (4) they require such a definition only when health is left undefined. This body of law has always been ambiguous. If there was a plurality rule, however, it would have been option (3)—at least before the *Casey* decision.

¹⁶⁸ See *id.* at 221-23 (Rehnquist, J. dissenting) (arguing that the *Doe* Plaintiff should be denied a pre-viability abortion under the *Vuitch* standard because she had not asserted any threat to her life or health).

¹⁶⁹ See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

¹⁷⁰ See *id.* at 165.

I. *Vuitch and Doe as Simple Vagueness Decisions*

This approach, advocated by the Appellants¹⁷¹ and dissenting Justices¹⁷² in *Voinovich*, views *Vuitch* and *Doe* as irrelevant to the constitutional definition of health. The approving language in those decisions may have indicated the Court's preference, but is nonetheless nonbinding.

This view draws support from the *Colautti v. Franklin*¹⁷³ decision. There, the Court struck as void for vagueness a statute restricting abortion when a fetus is "viable" or "may be viable."¹⁷⁴ The statute prescribed that a viability determination was "to be based on the attending physician's 'experience, judgment or professional competence,' a subjective point of reference."¹⁷⁵ The undefined distinction between "viable" and "may be viable" created a "double ambiguity,"¹⁷⁶ and failed to provide reasonably certain guidelines for doctors.¹⁷⁷ The Court found this dilemma "readily distinguishable from the requirement that an abortion must be 'necessary for the preservation of the mother's life or health,' upheld against a vagueness challenge in [*Vuitch*], and the requirement that a physician determine, on the basis of his 'best clinical judgment,' that an abortion is 'necessary,' upheld against a vagueness attack in [*Doe*]."¹⁷⁸ In contrast, the *Colautti* statute "condition[ed] potential criminal liability on confusing and ambiguous criteria."¹⁷⁹ It did not, however, violate any minimum threshold established by *Vuitch* and *Doe*.

2. *Vuitch/Doe as Establishing a Physician's Autonomy to Define Health*

The importance that the Court places on the physician's role in the abortion decision is readily apparent. Some decisions could be read to support the argument that *Vuitch*, and especially *Doe*, import this consideration into the health exception, requiring states to allow doc-

¹⁷¹ See Brief for Defendants-Appellant at 42, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (Nos. 96-3157, 96-3159) [hereinafter "Appellants' Brief"]; Brief for States of Nebraska, Alabama, California, Illinois, Mississippi, and South Carolina and the Commonwealth of Virginia as *Amici Curiae* in Support of Appellants at 24-25, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (Nos. 96-3157, 96-3159) [hereinafter "Nebraska Brief"].

¹⁷² See *Voinovich v. Women's Med. Prof'l Corp.*, 118 S. Ct. 1347, 1349 (Thomas, J., dissenting).

¹⁷³ 439 U.S. 379 (1979).

¹⁷⁴ *Id.* at 393.

¹⁷⁵ *Id.* at 391.

¹⁷⁶ *Id.* at 393.

¹⁷⁷ See *id.* at 394.

¹⁷⁸ *Id.* at 393-94 (citations omitted).

¹⁷⁹ *Id.* at 394.

tors full autonomy to determine when an abortion is needed for health reasons, even after viability. As will be seen, however, no decision has explicitly found this subjectivity requirement to be a constitutional mandate. Instead these cases appear to support the pure-vagueness interpretation discussed above.

The first of these decisions is *Colautti*. In a recitation of its precedents, the Court described *Doe* as "underscor[ing] the importance of affording the physician adequate discretion in the exercise of his medical judgment."¹⁸⁰ In the *Colautti* Court's words, the *Doe* "Court found it critical that that judgment 'may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.'"¹⁸¹ At first glance, this language suggests that physicians are entitled to unbridled discretion in their diagnoses, but this interpretation is not sound. First, the Court acknowledged in the same paragraph that the *Doe* decision was rendered "in a vagueness-attack context."¹⁸² Second, the entire discussion took place in the context of invalidating the viability-determination provision discussed above and a section requiring use of the procedure most likely to preserve the fetus's life. Both the ascertainment of viability and the method used in a particular procedure are decisions based on "the judgment of the attending physician on the particular facts of the case before him."¹⁸³ Neither of these grounds directly involves the scope of the doctor's ability to define a woman's health, whether pre- or post-viability.

Justices Marshall and Blackmun were also advocates of this approach. In their dissent to *Beal v. Franklin*'s¹⁸⁴ holding that non-therapeutic¹⁸⁵ abortions were not medically necessary procedures entitled to state funding under Title XIX,¹⁸⁶ the Justices took issue with the Court's interference with the physician's decision: "The Court's original abortion decisions dovetail precisely with the congressional purpose under Medicaid to avoid interference with the decision of the woman and her physician."¹⁸⁷ Citing what they saw as the govern-

¹⁸⁰ *Id.* at 387.

¹⁸¹ *Id.* at 387-88 (emphasis added)(citations omitted).

¹⁸² *Id.* at 387.

¹⁸³ *Id.* at 388.

¹⁸⁴ 432 U.S. 438 (1978).

¹⁸⁵ In abortion terminology, a "therapeutic" abortion is one performed for medical reasons. "Nontherapeutic" abortions, by contrast, are elective, and "eugenic" abortions are those performed because of fetal defect. See Curt S. Rush, Note, *Genetic Screening, Eugenic Abortion, and Roe v. Wade: How Viable is Roe's Viability Standard?*, 50 BROOK. L. REV. 113, 115 (1983).

¹⁸⁶ See *Beal*, 432 U.S. at 447.

¹⁸⁷ *Id.* at 450 (Marshall, J., dissenting).

ment's restrictive application of *Vuitch* and *Doe* at oral argument,¹⁸⁸ the Justices appeared to argue that even these broad considerations can be too restrictive of the woman's rights. They noted that those cases "were more broadly directed to the 'well-being' of the woman,"¹⁸⁹ as opposed to the narrower term "health." The Justices also argued that the focus on health was getting away from the actual nature of the privacy right involved: "[w]hile the right to privacy does implicate health considerations, the constitutional right recognized and protected by the Court's abortion decisions is the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child."¹⁹⁰ Whether a doctor wished to rely on the *Vuitch* factors or other considerations entirely, these two Justices would have prohibited the government from questioning that decision.

At least three lower federal courts have emphasized physician discretion in the context of *Vuitch* and *Doe*. In *Fargo Women's Health Organization v. Schaefer*,¹⁹¹ the Eighth Circuit rejected a vagueness attack against the exception to a mandatory waiting period in North Dakota.¹⁹² The statute "allow[ed] the physician to rely on his or her 'best clinical judgment' in determining whether a condition constitutes a medical emergency . . . [and] eliminate[d] the waiting period requirement if there [was] 'grave peril of immediate and irreversible loss of major bodily function.'"¹⁹³ Citing *Doe*, *Vuitch* and relying heavily on the Third Circuit's similar reasoning in *Casey*,¹⁹⁴ the court explained that "it is the exercise of clinical judgment that saves the statute from vagueness."¹⁹⁵ The court found the differences in wording between the North Dakota and *Casey* statutes irrelevant, deciding that "the difference in the adjectives is not material to our analysis."¹⁹⁶ It did not delve further into *Doe* and *Vuitch* to explain its holding.

Casey may not, however, support the Eight Circuit's interpretation. In reviewing language nearly identical to that in *Schaefer*, the Third Circuit distinguished the holdings of *Doe* and *Vuitch* from the provision struck down in *Colautti*. Regarding the latter case, the court "stated that it was unclear whether the Act incorporated a sub-

¹⁸⁸ See *id.* at 451.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (internal quotations and citations omitted).

¹⁹¹ 18 F.3d 526 (8th Cir. 1994).

¹⁹² See *id.* at 534.

¹⁹³ *Id.* (citations omitted).

¹⁹⁴ 947 F.2d 682, 702 (3d Cir. 1991).

¹⁹⁵ *Schaefer*, 18 F.3d at 534.

¹⁹⁶ *Id.*

jective or objective standard. In addition, the definition of 'may be viable' was elusive and did not provide sufficient notice."¹⁹⁷ In contrast, the *Casey* statute imposed a purely subjective standard, "thus making the case more similar to *Vuitch* and *Doe* than to *Colautti*. We fail to see how any physician practicing in good faith could fear conviction under the Act."¹⁹⁸ The court relied further on *Doe* to hold that the medical emergency exception also required a subjective determination, saving it from vagueness.¹⁹⁹

Contrary to the mandatory-subjectivity interpretation of this language, *Casey's* reasoning may actually provide more support to the pure-vagueness interpretation of *Doe* and *Vuitch* discussed above than to the requirement of physician discretion. The only two distinctions that *Casey* drew between *Vuitch/Doe* and *Colautti* were (1) the uncertainty over whether the provision was objective or subjective, and (2) the ambiguous definition of "may be viable." In *Casey*, the viability question did not apply and the standard was clearly subjective. The court therefore found sufficient "notice," the prime objective of any vagueness question. The court gave no indication that an objective standard with adequately defined parameters would not pass vagueness scrutiny. Indeed, the vagueness question in abortion jurisprudence seems to arise most often when legislatures use complicated (and hence vague) terminology to circumscribe a doctor's decision-making,²⁰⁰ rather than telling the physician "you decide"—a command that anyone can understand. To the extent that the Eighth Circuit saw subjectivity as always being required, then, its decision seems incorrect.

The District of Utah has also found physician discretion to defeat a vagueness claim in reviewing a statute in *Jane L. v. Bangerter*,²⁰¹ which provided that doctors were to use their "best medical judgment" when determining the necessity for an abortion. The court, citing *Vuitch*, *Doe* and *Casey*, noted that "the Supreme Court has upheld the constitutionality of statutes which permit the physician's best medical judgment to determine the necessity of abortion."²⁰² Hence,

¹⁹⁷ *Casey*, 947 F.2d at 702.

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* at 702.

²⁰⁰ *See American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 298 (3d Cir. 1984) ("It is noteworthy that no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus. Each such statute considered either did not contain such a criminal provision effective at viability or was invalidated because there were fatal omissions in the statutory language or scheme.")

²⁰¹ 809 F. Supp. 865 (D. Utah 1992).

²⁰² *Id.* at 879.

neither that provision nor the medical emergency exception was vague.²⁰³

Again, this language could be read to require subjectivity. But this court's reasoning appears to be indistinct from the Third Circuit's. In summarizing its holding, the Utah court explained that the statute "provides the fair warning to physicians required by the Due Process Clause, sets clear guidelines for enforcement officials, and is therefore not void for vagueness."²⁰⁴ By upholding the subjective statute, the court did not by implication suggest that objective standards would necessarily fail. That question was simply not presented.

3. *The Broad Vuitch Sense of Health as a Constitutional Requirement*

This position was forcefully asserted by the *Voinovich* Appellees,²⁰⁵ and ultimately adopted by the Sixth Circuit.²⁰⁶ Other courts have set precedents for this interpretation.²⁰⁷

In *American College of Obstetricians & Gynecologists v. Thornburgh*,²⁰⁸ the Third Circuit summarily determined that *Doe* required health to be defined in the broad *Vuitch* sense even after viability, and then observed in dicta²⁰⁹ that "the Pennsylvania legislature was hostile to this definition."²¹⁰ A separate provision of the statute at issue there contained the statement, "[t]he potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother.' Had the legislature imposed this qualification on the language 'maternal . . . health' . . . we would have no hesitation in declaring that provision unconstitutional."²¹¹

Other Supreme Court decisions, however, do arguably give support to the Third Circuit's *Thornburgh* dicta. Indeed, the *Roe* Court itself observed the psychological implications of an unwanted preg-

²⁰³ See *id.* at 879-80.

²⁰⁴ *Id.* at 880.

²⁰⁵ See Brief Amici Curiae of the National Abortion and Reproductive Rights Action League Foundation, et al., at 25 n.10, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (Nos. 96-3157, 96-3159) [hereinafter "NARAL Brief"]; Brief of Plaintiffs-Appellees at 40, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (Nos. 96-3157, 96-3159) [hereinafter "Appellees' Brief"].

²⁰⁶ See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 208 (6th Cir. 1997).

²⁰⁷ In addition to American decisions, courts in the United Kingdom have interpreted the analogous exception to their abortion law to also include mental health. See CIBA FOUNDATION SYMPOSIUM, ABORTION: MEDICAL PROGRESS & SOCIAL IMPLICATIONS 112 (1985).

²⁰⁸ 737 F.2d 283 (3d Cir. 1984).

²⁰⁹ See Paul B. Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 24 (1993) (noting that this language was dicta).

²¹⁰ *Thornburgh*, 737 F.2d at 299.

²¹¹ *Id.* (citations omitted).

nancy.²¹² Again in *Harris v. McRae*,²¹³ the Court noted that *Roe* “emphasized the fact that the woman’s decision carries with it significant personal health implications—both physical and psychological. In fact, [*Roe*] held that even after fetal viability a State may not prohibit abortions ‘necessary to preserve the life or health of the mother.’”²¹⁴ The juxtaposition of the statements on psychological health and on health exceptions to post-viability bans strongly suggests the Court’s willingness at that time to adopt the broad *Vuitch* sense of health in the post-viability context. As discussion was a prelude to *Harris*’s ultimate holding that states were not constitutionally required to fund abortion services,²¹⁵ however, it is nonbinding dicta.

Perhaps the Court’s strongest language in support of the broad *Vuitch* definition came in *Beal v. Franklin*.²¹⁶ Although the ultimate issue in *Beal* was virtually identical to that in *Harris*,²¹⁷ Justice Powell’s majority opinion noted in a preliminary footnote:

In *Doe* . . . this Court indicated that [whether] an abortion is necessary is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.²¹⁸

The issue was not presented in *Beal* because the state assured the Court at oral argument that the “definition of medical necessity is broad enough to encompass the factors specified in [*Doe v.*] *Bolton*.”²¹⁹ Nonetheless, Justice Powell provided no caveat that the *Doe* statement was made in the context of a vagueness attack. Whether this footnote was an oversight or a subtle indication of the Court’s

²¹² See *Roe v. Wade*, 410 U.S. 113, 163 (1973). The Court stated:

Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Id.

²¹³ 448 U.S. 297 (1980).

²¹⁴ *Id.* at 316 (citations omitted).

²¹⁵ See *id.* at 326-27.

²¹⁶ 432 U.S. 438 (1978).

²¹⁷ See *id.* at 440.

²¹⁸ *Id.* at 442 n.3 (internal quotations omitted).

²¹⁹ *Id.*

willingness to extend *Vuitch*, it provided more than adequate ground for the Third Circuit's blanket statement in *Thornburgh*.

Several federal district courts have explicitly followed this interpretation. The Southern District of Indiana interpreted *Doe* in this manner in *A Woman's Choice—East Side Health Clinic v. Newman*.²²⁰ The court traced the legislative history of Indiana's health exception to its post-viability abortion ban, and determined that the legislature had intended it to apply only to physical health. The court found this construction unacceptable, as it would not be "as broad[] as the Constitution requires. . . . [I]t would not permit the broader 'construction' proposed by defendants here and would have a meaning different from the meaning of 'health' in *Doe v. Bolton*."²²¹

A three-judge panel of the District of Utah in *Doe v. Rampton*²²² categorically struck down a provision "because it prohibit[ed] abortions performed to preserve the mental health of the mother."²²³ In addition, at least three federal courts have relied on the broad *Vuitch/Doe* meaning of health to strike post-viability exceptions limited to threats to the woman's life.²²⁴ These unambiguous holdings leave no room for a narrower definition of health.

At least two non-majority opinions are in accord. In a partial dissent to the *Rampton* decision, Judge Alton Anderson argued that some of the provisions struck could be severed and upheld.²²⁵ Specifically, he would have upheld a "physical health" exception to a post-viability abortion ban by striking the word "physical." He based his decision on *Vuitch*, where he read "the Court [as] interpret[ing] 'health' to mean both a patient's mental and physical state; that is, psychological as well as physical well-being."²²⁶ Then in *Doe*, he asserted, "this interpretation was broadened to include other factors," namely "emotional, psychological, familial, and the woman's age."²²⁷ Moreover, Judge Anderson argued that health after viability "should be defined in the same manner as it is for the period before viability."²²⁸ Addi-

²²⁰ 904 F. Supp. 1434, 1466 (S.D. Ind. 1995).

²²¹ *Id.* at 1471.

²²² 366 F. Supp. 189 (D. Utah 1973).

²²³ *Id.* at 192-93.

²²⁴ See *United States v. Collier*, 478 F.2d 268, 272 (5th Cir. 1973); *Rodos v. Michaelson*, 396 F. Supp. 768, 775 (D.R.I. 1975); *Montalvo v. Colon*, 377 F. Supp. 1332, 1343 (D.P.R. 1974).

²²⁵ See *Rampton*, 366 F. Supp. at 199 (Anderson, J., dissenting).

²²⁶ *Id.* at 200-01.

²²⁷ *Id.* at 201.

²²⁸ *Id.* Judge Anderson apparently based this conclusion on the fact that the definition in *Vuitch* "apparently applied to the entire gestation period." *Id.* at 201 n.2. Because *Vuitch* was decided before *Roe* made viability the point where the state's interest in fetal life becomes compelling, however, there would have been no reason for the *Vuitch* statute to make any distinction

tionally, a dissenting opinion in a non-abortion Seventh Circuit case recognized *Vuitch* as “permitting abortions for mental health reasons.”²²⁹

The Indiana Supreme Court also applied the broad *Vuitch* sense of health beyond viability. In answering certified questions from the federal district court in *Newman*, the court found “that a doctor's regard for all relevant factors pertaining to a woman's health is implicit in the term ‘clinical judgment.’”²³⁰ The court based its decision on *Doe*, which it characterized as “holding that ‘health’ included both physical and mental health.”²³¹ Although acknowledging that *Doe* was a vagueness case, the court made no mention of the fact that the *Vuitch/Doe* definition originated from the District of Columbia and Georgia statutes. Instead, it followed the lead of the federal courts listed above, and incorporated the definition as established constitutional law.

4. *Vuitch/Doe as a Gap-Filler When Health is Left Undefined*

This approach is a decidedly minority one, having only been advanced by the Connecticut Supreme Court, and even that decision was outside the abortion context. In *State v. Payne*,²³² that court examined a child endangerment statute that left the word “health” undefined. Citing *Vuitch*, the court held that “health, when undefined by statute, includes mental health.”²³³ The *Payne* court did continue, however, to opine that this was an appropriate, modern interpretation and it cited decisions from five other states, arising in various contexts, also interpreting health to include mental health.²³⁴ Like the courts applying the first, vagueness-only approach, the Connecticut Supreme Court may prefer that health be defined broadly as a general proposition, but it will look first to how the legislature defines its own terms.

between various gestational ages. Thus, *Vuitch* has no bearing on what “health” should mean before and after viability in the post-*Roe* world.

²²⁹ See *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716, 724 (7th Cir. 1975) (Sprecher, J., dissenting).

²³⁰ *A Woman's Choice East-Side Women's Clinic, Inc. v. Newman*, 671 N.E.2d 104, 109 (Ind. 1996).

²³¹ *Id.* at 110 n.10.

²³² 695 A.2d 525 (Conn. 1997).

²³³ *Id.* at 531.

²³⁴ See *id.* at 530 (collecting cases). As the dissent pointed out, however, *Payne* itself was inconsistent with a prior Connecticut decision that found that the word “health” in a nearly identical statute did not include mental health. See *id.* at 534 (Berdon, J., dissenting) (citing *State v. Schriver*, 542 A.2d 686 (Conn. 1988)).

C. Health and the Compelling State Interest Revisited: How Casey May Alter the Interpretation of Vuitch and Doe

The Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²³⁵ strongly suggests that it would not constitutionally require a mental health exception to post-viability abortion bans. This is true for two basic reasons: (1) the principles it most heavily relies on reinforce, rather than restrain, a state's justification for rejecting a broad exception after viability; and (2) *Casey*'s specific treatment of a physical-health-only exception demonstrates that the Court will not require "health" to be defined broadly in every context.

1. Casey's Impact on the Basic Principles of Abortion Jurisprudence

The logic of the *Casey* decision,²³⁶ if applied faithfully, should change abortion jurisprudence in several profound ways. First, and most importantly in terms of this Comment's subject matter, the Court reaffirmed the legitimacy and compelling nature of the states' interests in protecting fetal life and the mother's health. From the beginning, the Court has recognized that abortion is constitutionally different from other surgical procedures because only abortion involves the destruction of a potential human being.²³⁷ *Roe* recognized that states have an important interest in potential life from conception,²³⁸ and this interest grows stronger as time passes and the fetus develops.²³⁹ But as *Casey* recognized, the judicial zeal since *Roe* to protect the abortion right has sometimes led courts to devalue this compelling interest: "[t]hose decisions went too far because the right recognized by *Roe* is a

²³⁵ 505 U.S. 833 (1992).

²³⁶ Although the joint opinion of Justices Souter, O'Connor and Kennedy only commanded a plurality of the Court, it has nonetheless been recognized as the controlling opinion. See *Planned Parenthood of S.E. Pa. v. Casey*, 510 U.S. 1309, 1310 n.2 (1994) (Souter, J., in chambers) (instructing that the joint opinion in *Casey* is controlling); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456 n.7 (8th Cir. 1995) (same); *A Woman's Choice—East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1444 (S.D. Ind. 1995) (same). The joint opinion represents the least common denominator of all concurring Justices, and most of its assertions were not questioned in the concurring opinions of Justices Blackmun and Stevens.

²³⁷ See *Casey*, 505 U.S. at 852 ("Abortion is a unique act."); *Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 477 (7th Cir. 1998) (Manion, J., dissenting) ("In a gall bladder operation . . . the doctor removes and destroys a diseased organ. . . . In a partial birth abortion, the doctor destroys a 'potential' life.").

²³⁸ See *Roe v. Wade*, 410 U.S. 113, 150, 154 (1973).

²³⁹ See *id.* at 162-63.

right to be free from *unwarranted* governmental intrusion Not all governmental intrusion is of necessity unwarranted."²⁴⁰ For the *Casey* Court, the reason for this devaluation was *Roe's* own "trimester" framework, because "even in *Roe's* terms, in practice it undervalues the State's interest in the potential life within the woman."²⁴¹ In rejecting the trimester framework, *Casey* attempted a jurisprudential house cleaning. It specifically overruled parts of its previous decisions that had gone too far,²⁴² and cast doubt on other holdings that may also devalue the interest of the state.²⁴³

Second, *Casey* reaffirmed that fetal viability is the threshold at which judicial scrutiny favors the state.²⁴⁴ *Roe* chose viability as the point at which the state interest becomes compelling, overriding the woman's liberty interest,²⁴⁵ because at viability the fetus has a reasonable chance to experience meaningful life outside the womb.²⁴⁶ Indeed, in rejecting *Roe's* trimester framework, it has been said that *Casey* replaced it with "bimesters"—the periods before and after viability.²⁴⁷ After viability, abortion regulations are presumed to be valid.²⁴⁸ Abortions may be banned outright at this point, except only when "continuing her pregnancy would constitute a threat to [the woman's] health."²⁴⁹

Third, *Casey* harmonized its precedents with these two meta-rules by reclassifying the abortion right and the scrutiny it invokes. Abortion after *Casey* is a "liberty interest," no longer a "fundamental right" entitled to "strict scrutiny" for every impinging law.²⁵⁰ Be-

²⁴⁰ *Casey*, 505 U.S. at 875 (emphasis added) (internal quotations and citation omitted).

²⁴¹ *Id.* at 875.

²⁴² *See id.* at 881-82 (overruling parts of *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

²⁴³ *See Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 473 (7th Cir. 1998) (Manion, J., dissenting); Nebraska Brief, *supra* note 171, at 19, 28.

²⁴⁴ *See Casey*, 505 U.S. at 870.

²⁴⁵ *See Roe v. Wade*, 410 U.S. 113, 163 (1973).

²⁴⁶ *See id.* Put another way, viability is the point at which the right to end one's pregnancy is no longer co-extensive with the right to kill one's fetus. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 224-25 (1992); Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451 (1984) [hereinafter Rhoden, *Neonatal Dilemma*]. This dividing line has been reaffirmed repeatedly. *See, e.g.*, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 428 (1983); *Colautti v. Franklin*, 439 U.S. 379, 389 (1979).

²⁴⁷ *See Linton, supra* note 209, at 35.

²⁴⁸ *See Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1060 (S.D. Ohio 1995).

²⁴⁹ *Casey*, 505 U.S. at 880.

²⁵⁰ *See Jane L. v. Bangerter*, 809 F. Supp. 865, 875 n.25 (D. Utah 1992) ("In *Casey* the Court revised the woman's right to abortion from a virtually unassailable fundamental right subject to strict scrutiny review to a liberty interest subject to undue burden analysis.").

cause “[n]ot all governmental intrusion is of necessity unwarranted,”²⁵¹ regulations of the abortion right are invalid only if they impose an “undue burden” on the liberty interest.²⁵² Importantly, however, this “undue burden” analysis applies only before viability.²⁵³ *Casey* does nothing to alter the presumption of constitutionality of prohibiting abortion after viability, and indeed bolsters the validity of post-viability regulations.

Fourth, *Casey* reined in somewhat the Court’s previously sweeping language regarding the right of doctors to prescribe abortions as they see fit. In rejecting the argument that an informed consent provision impinged on the doctor’s medical autonomy, the Court noted that the doctor’s rights in this context are “derivative of the woman’s position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy.”²⁵⁴ The doctor is an agent of the woman, and is legally empowered to perform abortion-related services only to the extent that the woman is able to delegate that authority. The physician brings no additional liberty interests into consideration. This principle directly conflicts with the interpretation of *Vuitch* and *Doe* that doctors are free to define the scope of the health exception.

2. *Casey’s Treatment of Physical and Mental Health*

In addition to announcing these principles, *Casey* explicitly upheld a physical-health-only exception. In the broader context of the *Casey* opinion, this action casts serious doubt on the Sixth Circuit’s reasoning in *Voinovich*.

Casey upheld the medical emergency exception to two Pennsylvania pre-viability regulations: a twenty-four hour waiting period and an informed consent requirement.²⁵⁵ Because both of these provisions would fail without a valid health emergency exception, its validity was “central” to the decision.²⁵⁶ Pennsylvania’s exception permitted abortions for women who were at risk of “death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.”²⁵⁷ The district court in *Casey* had found this

²⁵¹ *Casey*, 505 U.S. at 875.

²⁵² *See id.* at 874. The Court attempted to harmonize past decisions even further by reconciling two previous, inconsistent articulations of the “undue burden” standard into “a standard of general application to which we intend to adhere.” *Id.* at 876.

²⁵³ *See id.* at 877.

²⁵⁴ *Id.* at 884.

²⁵⁵ *See id.* at 879-80.

²⁵⁶ *Id.* at 879.

²⁵⁷ *Id.*

language too limiting, noting several physical conditions that would not be covered by this language.²⁵⁸ In reversing, the Third Circuit found the language broad enough to cover those risk factors.²⁵⁹ Because this interpretation was not plainly erroneous, the Supreme Court accepted it.²⁶⁰ While the Court did not make this clear, the Third Circuit was explicit in recognizing that its expanded reading of the exception still only covered physical health.²⁶¹ The Court was quick to conclude that this language posed no undue burden on the pre-viability abortion right.²⁶²

The Court also held that the regulations to which this exception applied were not an undue burden. The record in the case indicated that the twenty-four hour waiting period would subject women to a number of inconveniences:²⁶³ at least two visits would be required; women who lived a great distance from a clinic would spend a good deal more time travelling; they would be subjected to more “hostility and harassment”²⁶⁴ from anti-abortion demonstrators; and the net effect of all of these factors would be “particularly burdensome” on women with the fewest financial means and greatest desire to keep their abortions secret. Undoubtedly, all of these considerations would increase “the cost and risk of delay of abortions,”²⁶⁵ and subject the woman to significant amounts of additional stress and anguish. The Court found this “troubling in some respects,”²⁶⁶ but the waiting period was nevertheless justified to serve the state’s interest in fetal life, and did not pose an undue burden.

The Court’s approval of the informed consent provision also helped shed light on its view of “health.” Although the decision overruled the holdings of two previous cases, the state interest in fetal life justified a provision requiring a woman’s signed statement that she had been made aware of literature on alternatives to abortion—materials that advocated birth over abortion and described the impact on the fetus.²⁶⁷ The Court began by observing that “[i]t can not be questioned that psychological well-being is a facet of health.”²⁶⁸ Previ-

²⁵⁸ See *id.* at 880 (including pre-eclampsia, inevitable abortion and ruptured membrane).

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ See *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d at 701 (3d Cir. 1991).

²⁶² See *Casey*, 505 U.S. at 880.

²⁶³ See *id.* at 885-86.

²⁶⁴ *Id.* at 886. It is interesting to note here that the efforts of the most fervent anti-abortion demonstrators, aimed at dissuading the performance of abortions, actually become a factor for persuading the Court to strengthen the abortion right.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See *id.* at 881.

²⁶⁸ *Id.* at 882. This sentence could be read to confirm what has been labeled here as Approach (3)—that *Vuitch* and *Doe* incorporate into the Constitution a broad definition of the word

ously, courts had found that additional information would increase distress to the woman, but *Casey* took an opposing view because “[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”²⁶⁹ The Pennsylvania statute also exempted doctors from the informed consent requirement, “if . . . furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.”²⁷⁰ With the state interests in both fetal life and maternal health behind it, the inconvenience posed by the informed consent requirement did not pose an undue burden.

3. *Applying Casey to Voinovich and the Post-Viability Mental Health Exception*

The Sixth Circuit’s *Voinovich* majority attempted to distinguish *Casey*. In a single-paragraph discussion, the panel made two points: first, *Casey* dealt only with a pre-viability delay, not an outright ban in the post-viability context.²⁷¹ Second, it noted that although the undue burden standard is inapplicable after viability, restrictions are still subject to the life or health exception. As if it had satisfactorily distinguished *Casey*, the court announced that “[t]herefore, we reject defendant’s reliance on *Casey*” to uphold Ohio’s physical-health exception.²⁷² The court then cited *Vuitch* and *Doe* as enshrining a broad interpretation of health,²⁷³ and *Coluatti* as requiring that physicians be given discretion to use any of the *Vuitch/Doe* factors in defining health.²⁷⁴ With this, the panel majority decided that “the Court will hold, *despite its decision* in *Casey*, that a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause a severe non-temporary mental and emotional harm.”²⁷⁵

The *Casey* decision, however, shapes the abortion jurisprudence in far more profound ways than the panel majority’s superficial treatment of the case acknowledges. Most important is *Casey*’s reaf-

“health” in all contexts. Compared to this assertion, however, the Court’s action in upholding a physical-health-only medical emergency exception belies this categorical interpretation. It is also significant that all of the *Casey* regulations applied only before viability.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 883-84 (quoting 18 PA. CONS. STAT. § 3205 (1990)).

²⁷¹ See *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 208 (6th Cir. 1997) (“Importantly, a woman would still be free to choose to have an abortion.”).

²⁷² *Id.*

²⁷³ See *id.*

²⁷⁴ See *id.* at 208-09.

²⁷⁵ *Id.* at 209 (emphasis added).

firmation that after viability, “the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”²⁷⁶ *Voinovich*’s interpretation that the *Casey* restrictions were permissible because they still ultimately allowed abortions to occur, is ill-conceived. The only reason that the ultimate availability of the abortion decision mattered at all to *Casey*’s rationale was that the decision was made solely in the pre-viability context. That fact has precisely nothing to do with the validity of a post-viability regulation like that in *Voinovich*. Every post-viability regulation should enjoy a presumption of constitutionality²⁷⁷ and be upheld unless the statute is proven to endanger a woman’s life or health enough to outweigh the state’s superior interest.

Voinovich’s abandonment of *Casey* before reaching its definition of health in the post-viability context ignores the breadth of the *Casey* decision’s treatment of this subject. The Court’s approval of Pennsylvania’s physical-health-only exception, without even mentioning *Vuitch* or *Doe*, strongly suggests that an exception need not be worded in the broad *Vuitch* sense to be constitutional. The Court did not posit any hypothetical emotional impact that must necessarily be included in the exception.²⁷⁸ Indeed, the Court listed several very realistic and quite emotionally draining drawbacks of the waiting period, including severe harassment by protestors, prolonging the experience by far more than twenty-four hours, and substantial travel burdens. It also acknowledged that being required to learn about alternatives to abortion and the procedure’s effect on the woman’s fetus would undoubtedly be distressing. To be sure, these facts command sympathy. Nevertheless, the Court decided that they were not severe enough to overcome the state’s interest in protecting fetal life through this limited means, by encouraging the woman to fully consider—and perhaps reconsider—her choice to undergo abortion. This was true even though in the pre-viability context, the woman’s liberty interest ultimately outweighs those of the state. How much less can these emotional factors outweigh the state interest in fetal life after viability, when it is constitutionally the overriding concern?

Casey’s observation on the importance of psychological health does not change this result for several reasons. First, this was merely

²⁷⁶ *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 870 (1992).

²⁷⁷ *See Women’s Med. Prof’l Corp. v. Voinovich*, 911 F. Supp. 1051, 1060 (S.D. Ohio 1995).

²⁷⁸ *See Reply Brief, supra* note 88, at 17-18 (“*Casey* was not troubled by the hypothetical prospect that some unidentified ‘psychological’ condition might not fall within the medical emergency exception there and just upheld the statute.”).

a statement, and probably dicta,²⁷⁹ whereas the Court's approval of the physical-health-only exception was an actual holding. Second, it was made in the context of the informed consent provision, which by its own language specifically instructed doctors to consider psychological health factors. *Casey's* statement simply approved of this decision. Third, nowhere in the discussion did the Court cite *Vuitch* or *Doe's* broad health definitions. This detracts from the idea that *Casey's* statement molded the broad language in those decisions into requirements. And most importantly, *Casey's* discussion of mental health took place entirely in the pre-viability context. It is reasonable to assume that the Court would be more willing to accept a broad conception of health when the woman's liberty interest outweighs the state interest, as opposed to vice versa.

Finally, *Casey* also belies the propriety of *Voinovich's* reliance on *Colautti* to require a broad range of medical discretion in defining health. The rights of the woman, not the doctor, govern the abortion decision. To allow a doctor unfettered discretion to choose what factors on which to base a diagnosis, as opposed to the discretion to make the diagnosis based on a pre-defined set of factors, seems anomalous. After *Casey*, a Pennsylvania doctor can not waive the waiting period requirement before a pre-viability abortion for any mental health reason, no matter how severe. It makes very little sense, then, to argue that the same doctor should be able to justify an abortion on the same grounds after viability, when the liberty interest of his patient, and of the doctor as well, has been subsumed by the state interest.

The only difference between Ohio's health exception and Pennsylvania's was the pre- and post-viability distinction. Indeed, the phrasing of Ohio's exception was identical to that of Pennsylvania's, and the Ohio legislature itself instructed that it be given the same construction as in *Casey*.²⁸⁰ The *Voinovich* court, then, should have followed *Casey's* example and upheld the statute.

D. Institutional Deference to Congress: How the Partial Birth Abortion Debate Affects the Voinovich Question

Congress's adoption of a ban on the D & X procedure without a mental health exception may provide the Court with further reason to reject the *Voinovich* result. The Court noted its willingness to take

²⁷⁹ See *id.* at 16 (calling the sentence a "fleeting statement [that] will not bear the weight Appellees give it"). The definitiveness of the statement, however, counsels that it be taken seriously.

²⁸⁰ See *id.* (citing House Bill 135 § 4, 121st Gen. Assembly, Reg. Sess. (Ohio 1995)).

into account Congress's approach to tough, constitutional line-drawing in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.²⁸¹ There, the Court examined the Federal Communication Commission's (FCC) decision regarding its licensees' policies on viewpoint advertisements.²⁸² The Court acknowledged its lack of expertise in the broadcast media industry, and the existence of a regulatory system that had been carefully constructed by Congress by Congress and the FCC over several decades.²⁸³ It noted that

[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because [the plaintiff invokes] the First Amendment. That is not to say we "defer" to the judgment of Congress . . . on a constitutional question The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.²⁸⁴

To be sure, if any area of law presents "a complex problem with many hard questions and few easy answers," it is abortion—especially after viability. Should the Court face the question of post-viability mental health exceptions, it would do well to "pay careful attention" to Congress's actions on partial-birth abortions.

Congress has been overwhelming and unrelenting in its opposition to a mental health exception. Twice the Congress has passed a bill prohibiting the partial birth abortion procedure. Twice President Clinton has vetoed the bill on the grounds that it did not have a sufficiently broad mental health exception.²⁸⁵ The Hoyer Amendment to the Partial Abortion Ban Act, advocated by the President, would have defined its health exception broadly enough to include mental health and psychological trauma.²⁸⁶ Twice the Congress was nearly successful in overturning the veto.

Moreover, a pair of proposals by Democratic Senators Daschle and Feinstein in 1997 to ban post-viability abortions nationwide failed to gain enough support, largely because most Senators believed that neither bill would accomplish anything; both contained mental health

²⁸¹ 412 U.S. 94 (1973).

²⁸² *See id.* at 97.

²⁸³ *See id.* at 102.

²⁸⁴ *Id.* at 103.

²⁸⁵ *See* Nancy E. Roman, et al., *Senators Battle over Bill on Partial-Birth Abortion; Clinton Backs Daschle amid Emotional Pleas*, WASH. TIMES, May 15, 1997, at A12.

²⁸⁶ *See* Rep. Steny Hoyer, *quoted in* NRLC, *Watch What He's Doing, Not What He Says* (visited Oct. 8, 1998) <<http://135.145.12.245/abortion/pba/clintonlie.html>> [hereinafter NRLC, *Watch What He's Doing*] ("Does it include . . . mental health? Yes, it does. . . . It is because it poses a psychological trauma to the woman to carry to term . . .").

exceptions that many saw as "loopholes."²⁸⁷ Curiously, President Clinton had thrown his support behind the narrower of the two exceptions—Senator Daschle's—which was limited to a "risk [of] grievous injury to [a woman's] physical health."²⁸⁸ Both Daschle and Clinton explained that this wording was sufficient to cover "severe mental stress, [which] can sometimes manifest itself physically."²⁸⁹ Congress, has never collectively interpreted the Constitution to require a broad mental health exception, despite numerous opportunities and the political pressure of the White House. This record would be pertinent to the Court's decision, should it ever be asked to resolve the issue, for the same reasons that the Court gave in *Columbia Broadcasting System*. Indeed, that case involved the heightened-scrutiny-invoking First Amendment, whereas this issue deals only with a liberty interest that is subject to several governmental compelling interests. Some Justices have sought a means to return the contentious abortion issue back to the political realm and out of the courts.²⁹⁰ While a complete abandonment of this now-constitutionalized issue is impracticable, taking explicit heed of the public's representatives on the matter of mental health exceptions would be a welcome step towards bolstering the popular legitimacy of the Court's abortion jurisprudence.

In sum, there is little reason to believe that the Supreme Court's precedents require a post-viability abortion ban to include an excep-

²⁸⁷ Katherine Q. Seelye, *Senators Reject Democrats' Bills to Limit Abortion*, N.Y. TIMES, May 16, 1997, at A1.

²⁸⁸ David J. Garrow, *A LOOK AT . . . The New Politics of Abortion; When "Compromise" Means Caving In*, WASH. POST, June 1, 1997, at C03.

²⁸⁹ Michael McCurry, *The White House Washington, D.C. Regular Briefing*, FED. NEWS SERVICE, May 14, 1997, available in NEXIS, News Library, CURNWS File. Indeed, in a letter to the president and ten past presidents of the Southern Baptist Convention in 1996, before he took a public stance against the partial birth abortion ban, President Clinton gave a much different opinion on the mental health exception:

I also understand that many who support this bill believe that any health exception is, as you suggest, a 'loophole . . . to include any reason the mother so desires,' such as youth, emotional stress, financial hardship or inconvenience. That is *not* the kind of exception I support. I support an exception . . . making crystal clear that the procedure may be used only in cases where a woman risks death or serious damage to her health, and in no other case.

NRLC, *Watch What He's Doing*, *supra* note 286.

²⁹⁰ Justice Scalia, for instance, in his dissenting opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), noted:

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.

Id. at 532 (Scalia, J., dissenting).

tion to protect only a woman's mental health, as opposed to physical well-being. The Court has suggested on numerous occasions that it may require such an interpretation, and certainly several courts have anticipated such a ruling, including *Voinovich*. *Casey*, however, seems to be a clear sign that the power of States to protect viable fetal life is not so circumscribed that a woman or doctor can evade it simply by asserting an unreviewable diagnosis of mental or emotional distress. Of course, there is no indication that states are disallowed from providing such an exception; post-viability abortions are not illegal unless a state chooses to prohibit them. There are obviously a significant number of citizens and legislators that favor such exceptions, and an equally great number that oppose them. In Part IV, this Comment will explore the policy justifications behind each position.

IV. POLICY ANALYSIS: *SHOULD* THERE BE A MENTAL HEALTH EXCEPTION TO POST-VIABILITY ABORTION BANS, AND IF SO, WHAT SHOULD IT LOOK LIKE?

In considering post-viability mental health exceptions to abortions, legislators may not be solely concerned with the constitutional permissibility of such laws, but also with their practical, societal and moral advisability. Those aspects of the debate are summarized below.

The first question to ask when considering a mental health exception is, what are the mental health reasons given for abortions? If a broad conception of health is so passionately defended as necessary by so many, then there must be data supporting their claims. Opponents of post-viability mental health exceptions, on the other hand, offer two general refutations: that there are no detriments to mental health severe enough to justify a post-viability abortion, and that the abortion experience itself not only fails to cure the perceived threats, but can actually exacerbate them. The former argument begs the question of how to decide what is "severe enough." To answer this question, one must examine the counterweight to the woman's interest in seeking an abortion: the nature of the state's interest in the fetus. While the legal basis for this interest has been explored above, this Part briefly addresses elements of the state interest that have only recently received much attention: the psychological impact to the woman of an abortion (mentioned in *Casey*), the impact of the abortion decision on the woman's partner and family (implicated by the broad *Vuitch* definition of health) and the "cruelty to the fetus" argument (introduced in *Voinovich*). Finally, this Part asks how a mental health exception might affect those interests in practice, and how the

exception might be worded, based on the language in current proposals and statutes.

A. *Mental Health Reasons for an Abortion*

Two principles should guide exploration of the interrelationship of a woman's mental health and abortion: first, the experience of pregnancy itself and the unique effects it has on a woman's emotional state is something that can never be fully understood by those who will never share the experience.²⁹¹ Regardless of the importance one gives to the life of the fetus the woman carries, one should be careful not to devalue the woman's suffering.²⁹² While this awareness should inform an evaluation of abortion laws, it must not dissuade the legal community from honestly evaluating the justifications behind those laws, or prevent lawmakers and citizens from rethinking their conclusions when necessary. Nor is it necessarily true that any attempt to question or disagree with broad, mental-health-based justifications for abortion is an attack on women or a slandering of their motives, as the ad hominem rhetoric of some of the more staunch abortion-rights supporters has suggested.²⁹³

Second, the data on why women undergo abortions is incomplete.²⁹⁴ This is especially true with late-term abortions,²⁹⁵ perhaps because statistics indicate that the overwhelming majority of abortions are performed in the first trimester.²⁹⁶ Consequently, much of the data used in this section will include women seeking pre-viability abortions. Moreover, a significant amount of misinformation abounds in the literature. Still, the data is the best available, and when taken together it offer a number of insights.

1. *The Reasons Women Give for Aborting*

Most women in the U.S. give an average of four reasons for aborting. The most common reasons given by women in the United States for choosing to abort are "not being ready for how a baby would change their lives (76%), not being able to afford a baby (68%) and wanting to avoid single parenthood or having problems with

²⁹¹ This includes the author.

²⁹² A similar warning was given by TRIBE, *supra* note 246, at 136.

²⁹³ See NARAL Brief, *supra* note 205, at 3 n.1; Garrow, *supra* note 288, at C03; *Groups Try to Devalue Mind Ills as Reason for Allowing Procedure*, *supra* note 12, (characterizing opposition to a mental health exception as an attack on the sanity of women who choose abortion, and calling Justice Thomas's dissent in *Voinovich* "chilling").

²⁹⁴ See MARY BOYLE, RE-THINKING ABORTION: PSYCHOLOGY, GENDER, POWER AND THE LAW 1 (1997).

²⁹⁵ See Gans Epner, *supra* note 24, at 725.

²⁹⁶ See *id.*; Seelye, *supra* note 287, at A1.

partner relationships (51%).”²⁹⁷ These decisions “emerge within the complex web of a woman’s relationships and life choices,”²⁹⁸ including age (one of four is a teenager), unstable relationships (six of ten are unmarried), commitments to others (almost half are already mothers), and financial situation (a third earn less than \$11,000 per year).²⁹⁹ Many of these explanations span the spectrum of what might conventionally be considered “mental health”: emotional unavailability to raise a child,³⁰⁰ recent death of a husband,³⁰¹ short period of time since the birth of a previous child.³⁰² All of these factors are causes of psychological stress, and indeed, several abortions have been justified purely on stress grounds.³⁰³ Perhaps the most questionable example was the decision of Dr. Haskell, the D & X provider in *Voinovich*, to justify an abortion on the basis of the woman’s agoraphobia,³⁰⁴ or fear of open places.

An Alan Guttmacher Institute (“AGI”) study on the reasons for late-term abortions is in accord. Those results found that “youth, poverty, isolation, fear, ignorance, rape and incest were frequently factors.”³⁰⁵ Alan Guttmacher was the president of Planned Parenthood Federation of America for over a decade,³⁰⁶ and the AGI is widely considered to be the most reliable source for abortion statistics.³⁰⁷ An abortion may be also be desired after viability when the woman mistakes the age of the fetus, or endures relational problems

²⁹⁷ See Nancy F. Russo, Ph.D., *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in *ABORTION, MEDICINE AND THE LAW* 607 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) [hereinafter Russo, *Psychological Aspects*].

²⁹⁸ Jeanne P. Lemkau, *Emotional Sequelae of Abortion: Implications for Clinical Practice*, 12 *PSYCHOL. OF WOMEN Q.* 461, 464 (1988).

²⁹⁹ See Russo, *Psychological Aspects*, *supra* note 297, at 607. These factors are often inter-related as well; for example, unmarried mothers are more likely to face financial setbacks from the birth of a child. See *id.* at 608; see also NRLC, *For What Reasons Are Late-Term Abortions Usually Performed?* (visited Oct. 8, 1998) <<http://www.nrlc.organization/abortion/pbafact9.html>> [hereinafter NRLC, *For What Reasons?*] (citing poverty and youth as predominant motivations for late-term abortions).

³⁰⁰ See Russo, *Psychological Aspects*, *supra* note 297, at 609.

³⁰¹ See *id.*

³⁰² See *id.* at 610.

³⁰³ See 142 CONG. REC. E1743, E1747 (daily ed. Sept. 27, 1996) (statement of Douglas Johnson, NRLC Federal Legislative Director).

³⁰⁴ See NRLC, *For What Reasons?*, *supra* note 299 (citing testimony of Dr. Haskell in *Voinovich*).

³⁰⁵ Marie McCullough, *The Facts Behind “Partial Birth” Debate* (visited Oct. 8, 1998) <http://www.phillynews.com/inquirer/98/Sep/16/front_page/PBA16.htm>.

³⁰⁶ See The Alan Guttmacher Inst., *History* (visited Mar. 14, 1999) <http://www.agi-usa.org/agi_about/history.html>.

³⁰⁷ See Nancy F. Russo, *Adolescent Abortion: The Epidemiological Context*, in *ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES* 41 (Gary B. Melton ed., 1986) [hereinafter Russo, *Adolescent Abortion*]; Nancy F. Russo, et al., *U.S. Abortion in Context: Selected Characteristics and Motivations of Women Seeking Abortions*, 48 *J. SOC. ISSUES* 185 (1992) [hereinafter Russo, *U.S. Abortion in Context*].

in the midst of pregnancy.³⁰⁸ Under the broad *Vuitch/Doe* sense of the "health" exception, which considers "physical, emotional, psychological, familial [health], as well as the woman's age,"³⁰⁹ each of these reasons could be construed as affecting a woman's health.

The psychological impact of unwanted pregnancy and birth is especially pronounced in teenage mothers.³¹⁰ Adolescent mothers generally attain less education and economic success, experience more marital problems and have more children overall than their peers.³¹¹ Teenagers are also more prone to deny their pregnancy and delay seeking neo-natal care. As a result, pregnant teens represent a disproportionate amount of those women seeking late-term abortions.³¹²

Perhaps the most commonly understood psychological motivations for a late-term abortion include pregnancies resulting from rape or incest,³¹³ or in the case of severe fetal defects.³¹⁴ Bearing a child under any of these circumstances would undeniably cause a mother great stress and anguish.³¹⁵

Whatever the motivation for an abortion, bearing an unwanted child can be a significant source of psychological distress for the mother in a number of ways,³¹⁶ even if the child is subsequently adopted.³¹⁷ One study found that as many as a third of such mothers

³⁰⁸ See Gans Epner, *supra* note 24, at 725.

³⁰⁹ *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973).

³¹⁰ See Russo, *Psychological Aspects*, *supra* note 297, at 599.

³¹¹ See Jeanne Marecek, *Consequences of Adolescent Childbearing and Abortion*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 98-102 (Gary B. Melton ed., 1986); Gary B. Melton et al., *Adolescent Abortion: A Psycholegal Analysis*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 17 (Gary B. Melton ed., 1986).

³¹² See Nancy Adler, *Psychological Issues in Abortion for Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 75 (Gary B. Melton ed., 1986) [hereinafter Adler, *Adolescent Abortion*].

³¹³ See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1080 (S.D. Ohio 1995) ("In this Court's view, it is inconceivable that the act of being forced to bear her father's child, could have failed to have a severe, negative, and lasting impact on this girl's emotional and psychological health."); *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1473-74 (S.D. Ind. 1995) ("The affidavit . . . concerning women who are victims of rape and incest shows that a significant proportion of victims suffer significant psychological difficulties, including post-traumatic stress syndrome or a major depressive episode. Such difficulties can be made worse by pregnancy resulting from the rape or incest."); NARAL Brief, *supra* note 205, at 31-32 (emphasizing the district court's concerns).

³¹⁴ See *Voinovich*, 911 F. Supp. at 1080; CIBA FOUNDATION SYMPOSIUM, *supra* note 207, at 113.

³¹⁵ See Appellees' Brief, *supra* note 205, at 40; NARAL Brief, *supra* note 205, at 26. All states confronting this issue have recognized a tort of wrongful birth and have allowed parents to recover damages for the psychological distress that bearing a deformed child causes them. See Rush, *supra* note 185, at 139.

³¹⁶ See Russo, *Psychological Aspects*, *supra* note 297, at 594 ("The few available studies of women denied abortion suggest unwanted childbearing can have a profound and long-lasting psychological impact.").

³¹⁷ See *id.* at 593, 621. There are, however, very few studies on the mental health effects of adoption on the birth mother, especially in contrast to abortion. See *id.* at 621. What studies

resented their child at one- and two-year follow-up interviews, and suggested a possible correlation with suicide attempts.³¹⁸ From the beginning, Courts have acknowledged these concerns,³¹⁹ and several studies have explored their frequency and severity.³²⁰

2. *Physical Health Is Rarely a Factor*

One striking fact that emerges from the literature is that a woman's physical health is not a factor in the vast majority of abortions. Many, especially the most vocal supporters of abortion rights, have asserted or at least assumed that late-term abortions are performed only where a woman's health is severely threatened.³²¹ Many media outlets have accepted and conveyed this misinformation,³²² but a number of more recent studies have dispelled this myth.³²³ Indeed, one *Washington Post* columnist, who had previously made this assertion, retracted it after doing more research.³²⁴ One Planned Parent-

there are, however, have led some to suggest that it may have a more pronounced effect on the mother, because it is felt for a longer amount of time, *see id.* at 620, especially if the mother feels coerced into giving up her child. *See id.* at 622. This extrapolation seems arguable, however; whether the fetus dies in the womb or is born and lives with adoptive parents, the birth mother still has the same amount of time to reconcile herself with her decision. Moreover, the adoption procedure used is also relevant as studies suggest that an open adoption procedure may help to alleviate the birth mother's possible depression. *See id.* at 623.

³¹⁸ *See id.* at 594.

³¹⁹ *See Doe v. Bolton*, 410 U.S. 179, 214-15 (1973) (Douglas, J., concurring); *Voinovich*, 911 F. Supp. at 1091-92.

³²⁰ *See Lemkau*, *supra* note 298, at 463.

³²¹ *See, e.g.*, Ann M. Massie, *So-Called "Partial Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 322 (1998) ("To the extent that the D & X procedure is employed for post-viability abortions, the cases described [detailing narratives of women receiving abortions for dire health emergencies] would undoubtedly be typical, as the *Roe/Casey* framework permits a state to prohibit all post-viability abortions except those necessary to preserve the woman's life or health."); Michelle Roman, *Topical Summary: The Partial-Birth Abortion Act and the Undue Burden It Places on Women's Right to an Abortion: The Controversy over D & E, Dilation and Evacuation*, 18 WOMEN'S RIGHTS L. REP. 381, 381 (1997) ("All abortions performed during the third trimester are the result of severe fetal abnormality or risk to the life of the pregnant woman. Women seeking later abortions do so for these serious reasons.").

³²² *See* NRLC, *AMA's American Medical News and Public Broadcasting's Media Matters Independently Report that Pro-Abortion Groups Have Badly Misled the Press and the Public About Partial-Birth Abortions*, (visited Oct. 8, 1998) <<http://www.nrlc.org/release970225.html>>; NRLC, *Testimony of Douglas Johnson on Partial-Birth Abortions* (last modified March 11, 1997) <<http://www.nrlc.org/abortion/pba/test.html>> [hereinafter *NRLC, Testimony of Douglas Johnson*].

³²³ *See* NRLC, *Testimony of Douglas Johnson*, *supra* note 322 (describing a PBS documentary on the amount of misinformation generated by the abortion rights lobby in the partial-birth abortion debate).

³²⁴ *See* Richard Cohen, *A New Look at Late-Term Abortion*, WASH. POST, Sept. 24, 1996, at A17 ("[B]ehind the purported figures and the purported rationale for these abortions [I] found something other than medical crises After interviewing doctors who performed late-term abortions and surveying the literature, Brown—a physician himself—wrote: 'These doctors say that while a significant number of their patients have late abortions for medical reasons, many others—perhaps the majority—do not.' . . . If, in fact, most women seeking late-term abortions

hood study reported that none of the women it surveyed had abortions for health reasons.³²⁵ Another source estimates that perhaps seven percent of all abortions are justified on health grounds,³²⁶ and *Voinovich's* Dr. Haskell admitted that over eighty percent of his D & X procedures were purely elective.³²⁷

These results should hardly be surprising. Alan Guttmacher himself has admitted that there is hardly any medical condition that necessitates an abortion, at least as opposed to giving birth.³²⁸ This includes most maternal health conditions cited by politicians, including heart disease and fetal deformity.³²⁹ Indeed, although the Court has described the health exception as a core principle of *Roe v. Wade*,³³⁰ "the evidence . . . is undisputed that except for the extremely rare (one in a million) case of partial hydatidiform mole, there are no fetal abnormalities which cause more risk to the mother by continuing the pregnancy to term than aborting the fetus."³³¹

3. Psychological Impact of Denying an Abortion

In addition to the stress and dependency caused by unwanted births, commentators have recognized that denial of a desired abortion can have a negative psychological impact on the woman.³³² The *Voinovich* district court hypothesized a case of a woman suffering mentally because she felt forced into aborting a defective fetus before viability, rather than taking the chance that fetal surgery would fail

have just come to grips a bit late with their pregnancy, then the word 'choice' has been stretched past a reasonable point.").

³²⁵ See NRLC, *For What Reasons?*, *supra* note 299.

³²⁶ See Linton, *supra* note 209, at 33 n.60.

³²⁷ See NRLC, *Testimony of Douglas Johnson*, *supra* note 322 (citing transcript of interview with Dr. Martin Haskell, submitted with letter from Barbara Bolsen, editor of AM. MED. NEWS, to House Judiciary Subcomm. on the Constitution, July 11, 1995).

³²⁸ See AAPLOG Brief, *supra* note 68, at 23-24 (quoting Alan Guttmacher, M.D., in THE CASE FOR ABORTION NOW 9 (Alan Guttmacher ed., 1967) ("Two or three decades ago the common indications for legal abortion were serious disease of the heart, lung or kidney Today it is possible for almost any patient to be brought through pregnancy alive unless she suffers from a fatal illness such as cancer or leukemia and if so, abortion would be unlikely to prolong, much less save life.")).

³²⁹ See *id.* at 24.

³³⁰ See *Harris v. McRae*, 448 U.S. 297, 316 (1980).

³³¹ Appellants' Brief, *supra* note 171, at 13. A hydatidiform mole is a condition in pregnant women that causes severe eclampsia prior to twenty-four weeks of gestation, first-trimester bleeding, enlarged uterus, blood clots, cysts and passing of grape-like vesicles. It "resembles [an] incomplete abortion." Yong H. Hahn, M.D., *Hydatiform Mole* (visited Mar. 14, 1999) <<http://chorus.rad.mcw.edu/doc/00948.html>>. A "partial" hydatiform mole causes early onset of preeclampsia, is consistent with fetal structures, and has no malignant potential. See Yong H. Hahn, M.D., *Hydatiform Mole: Types* (visited Mar. 14, 1999) <<http://chorus.rad.mcw.edu/doc/00947.html>>.

³³² See Russo, *Psychological Aspects*, *supra* note 297, at 594.

and then being required to give birth because of a post-viability abortion ban.³³³ But a determination as to whether any of these facts justify termination of a viable fetus requires one to first ask whether an abortion will help remove the source of the distress.

B. Abortion as Treatment: Is It a Cure for Mental Health Problems?

Medical literature suggests that the psychological drawbacks of unwanted pregnancy stem from a variety of sources, many of which can not be helped by an abortion.

1. Unwanted Pregnancies Cause Distress Regardless of Their Resolution

Initially, it is well-understood that the condition of pregnancy itself is stressful, and can be the source of psychological problems regardless of how it is resolved.³³⁴ Moreover, there is no painless way to deal with an unwanted pregnancy; societal and emotional factors guarantee distress no matter how the pregnancy proceeds.³³⁵ This is especially true for pregnant teens, for whom the fact of an unwanted pregnancy itself presents a host of stigmatic and emotional reactions.³³⁶

The onset of pregnancy is an inevitably disconcerting situation for any woman. Rapid and profound changes in body chemistry occur throughout pregnancy.³³⁷ For many, it can be the first time in their lives that their psychological balance is disrupted.³³⁸ Elevated endocrine levels can be a source of depression.³³⁹ Stress during pregnancy

³³³ See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1080 (S.D. Ohio 1995). This example is significantly undermined, however, by the fact that almost no fetal defects are ever detectable until well beyond the first trimester. See Gans Epner, *supra* note 24, at 726.

³³⁴ See Warren B. Miller, *An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion*, 48 J. SOC. ISSUES 88 (1992); Russo, *Psychological Aspects*, *supra* note 297, at 604 ("Unwanted pregnancy is a stressful event no matter how it is resolved."); Berit Sjögren, *Fear of Childbirth and Psychosomatic Support*, 77 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 819 (1998).

³³⁵ See DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* 118 (1987); Adler, *Adolescent Abortion*, *supra* note 312, at 74; Lemkau, *supra* note 298, at 461-63. *But see* BOYLE, *supra* note 294, at 106 ("Claims that women are ambivalent may also be a necessary part of a legislative system in which decision-making power about abortion lies with doctors and not with women themselves.").

³³⁶ See Adler, *Adolescent Abortion*, *supra* note 312, at 90.

³³⁷ See ANN L. DUNNEWOLD, *EVALUATION & TREATMENT OF POSTPARTUM EMOTIONAL DISORDERS* 9 (1997).

³³⁸ See Sjögren, *supra* note 334, at 823.

³³⁹ See J.L. Cox et al., *Prospective Study of the Psychiatric Disorders of Childbirth*, 140 BRIT. J. PSYCHIATRY 115 (1982).

is often compounded by external factors,³⁴⁰ including spousal violence.³⁴¹ On the whole, researchers have found a relatively high incidence of psychiatric symptoms during pregnancy, as compared to other stages of life.³⁴²

2. *Diagnosis of Fetal Defect Causes Distress Regardless of How the Pregnancy Is Resolved*

In addition to being seen as a reason for abortion, the parents' distress over a fetal defect diagnosis is largely inevitable whether the child is born or aborted.³⁴³ To be sure, "[t]here are few if any more ego-involving phenomena than being part of producing a child."³⁴⁴ When that child is wanted, it becomes a focal point for a couple's hopes and dreams, catalyzing their inherent desire for immortality, personal pride and appreciation for each other.³⁴⁵ When the fetus turns out to be severely malformed or on the brink of inevitable death, the plunge from this "special emotional high . . . to an emotional low is immediate and devastating."³⁴⁶ Aborting the fetus can not alleviate the psychological pain.³⁴⁷ Indeed, some doctors have said that they

³⁴⁰ See Russo, *Psychological Aspects*, *supra* note 297, at 604.

³⁴¹ See *id.* at 605.

³⁴² See R. Kumar et al., *A Prospective Study of Emotional Disorders in Childbearing Women*, 144 BRIT. J. PSYCHIATRY 40 (1984).

³⁴³ See NARAL Brief, *supra* note 205, at 27 ("The psychological devastation a woman experiences upon discovering that the fetus is unlikely to survive is immense.")

³⁴⁴ M. Neil MacIntyre, Ph.D. et al., *The Impact of an Abnormal Fetus or Child on the Choice for Prenatal Diagnosis and Selective Abortion*, in ABORTION, MEDICINE & THE LAW 536 (J. Douglas Buster & David F. Walbert eds., 1992).

³⁴⁵ See *id.*

³⁴⁶ *Id.* MacIntyre elaborates:

The initial reaction is a state of shock so overwhelming and confusing that the individual appears to be living in a nightmare, a dream world, out of touch with reality. Reality is often too painful to bear, and the reaction is one of denial as a protection from the pain, a feeling that when the nightmare is over everything will somehow be all right. Some individuals avoid recognizing the full truth of reality by viewing the tragic event as a complete blessing, thereby prolonging the avoidance of reality. The majority of individuals soon find that they cannot avoid facing the reality of the shattering event that has so upset their lives, and at that point the predominant reactions tend to be a vacillating mixture of depression, anger and mistrust. "Why me?" "Why us?" "What have I done to deserve this?" are the big questions. The utter unfairness of the situation gives rise to overwhelming anger, anger at everything and everyone connected with the unfortunate event; in effect, anger at the world. Religious faith tends to crumble under the impact of the question: "What kind of God would do this to me?"

Id.

³⁴⁷ See Rhoden, *Neonatal Dilemma*, *supra* note 246, at 1504 n.381.

will refuse to abort a defective but viable fetus solely on the grounds that its defects cause distress to the parents.³⁴⁸

Moreover, the mother's mental health is not the only—or even the most common—ground on which courts and commentators justify abortions for fetal defects. Some have argued that severe fetal defects are a justification in themselves for abortion, independent of viability or parental health questions.³⁴⁹ This argument posits that the deformed child will never be capable of contributing to society,³⁵⁰ and the pain and suffering that it will endure during its shortened life span outweighs the state interest in preserving its life.³⁵¹ The moral criteria for this argument are akin to those for euthanasia.³⁵² The question arises most often when fetuses are diagnosed with conditions like Trisomy 13 or Tay-Sachs Syndrome, in which a baby is technically viable, but will live for a few years at most, in extreme agony.³⁵³ More difficult applications of this approach include non-lethal but inconvenient defects like Down's Syndrome (Trisomy 21).³⁵⁴ Many doctors will not abort on these grounds alone.³⁵⁵

This separate logic is also applied by many to pregnancies by rape or incest. The *Casey* joint opinion posited that even a total ban on abortion would include an exception for health, rape and incest.³⁵⁶ Moreover, the Indiana law in *Newman* exempted rape and incest victims from its waiting period.³⁵⁷ While these types of provisions may be more informed by the woman's inevitable and justified distress³⁵⁸ than fetal defect exceptions, they nonetheless appear underlied by an implicit assumption that the life of the fetus conceived by rape or incest is less deserving of life than others. This Comment does not express any opinion on these alternate moral conceptions of abortion; it simply seeks to distinguish them from its discussion of the mother's mental health.

³⁴⁸ See Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 685-86 (1986) [hereinafter Rhoden, *Trimesters and Technology*]; see also Rhoden, *Neonatal Dilemma*, *supra* note 246, at 1504 n.380.

³⁴⁹ See Rhoden, *Neonatal Dilemma*, *supra* note 246, at 1504-05.

³⁵⁰ See Rush, *supra* note 185, at 134.

³⁵¹ See *id.* at 134-35.

³⁵² See CIBA FOUNDATION SYMPOSIUM, *supra* note 207, at 112.

³⁵³ See Rhoden, *Trimesters and Technology*, *supra* note 348, at 687-88.

³⁵⁴ See *id.* at 689-90.

³⁵⁵ See *id.* at 686 n.222.

³⁵⁶ See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 850-51 (1992).

³⁵⁷ See *A Woman's Choice—East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1473 (S.D. Ind. 1995).

³⁵⁸ Indeed, the very experience of the rape itself is perhaps the most devastating psychological experience that a woman may have. See Joan L. Hassol, *Rape and Pregnancy*, in *PREGNANCY, CHILDBIRTH AND PARENTHOOD* 103 (Paul Ahmed ed., 1981).

3. Abortion as Counterproductive Psychiatric Treatment

Some have argued that abortion in and of itself is inherently less conducive to a woman's mental health because it is a negative, capitulatory step instead of a positive, proactive approach.³⁵⁹ A 1978 symposium of psychiatrists pronounced that "[i]n the final analysis, . . . life is better than death, and that psychotherapy which affirms life is by far the best. Abortion is a defeatist answer, a psychic retreat for those who have given up looking for answers."³⁶⁰ Encouraging this option has been seen as foisting blame and distrust on the woman. Rather than affirming a woman's confidence that she can be a mother and be successful, "many women are encouraged to abort by a society which insists 'You can't afford a child. You're not mature or stable enough to raise children. It is better to abort the child than force it to live under your inadequate care.'"³⁶¹ Such self-blame is a significant indicator of post-abortion psychological distress.³⁶²

Moreover, some have noted that even when a woman chooses an abortion, it involves some psychologically daunting decision-making. Those who appear to have no qualms whatsoever about the decision may well be evincing an inability or unwillingness to honestly assess her own emotions.³⁶³ For these reasons, several have argued that no responsible psychiatrist would ever recommend that a patient have an abortion.³⁶⁴

³⁵⁹ See REARDON, *supra* note 335, at 135.

³⁶⁰ *Id.* at 137.

³⁶¹ *Id.* at 127; see also Anne Speckhard, *Postabortion Syndrome: An Emerging Public Health Concern*, 48 J. SOC. ISSUES 95, 96 (1992) (arguing that the politicization of abortion psychology research generates self-stigma in the woman who experiences psychological symptoms that psychologists tell her she should not have).

³⁶² See Brenda Major, *Psychosocial Predictors of Adjustment to Abortion*, 48 J. SOC. ISSUES 121, 137 (1992).

³⁶³ See REARDON, *supra* note 335, at 139-41.

³⁶⁴ See *id.* at 142. Reardon also quotes Dr. Fred E. Mecklenburg, Professor of Obstetrics and Gynecology at the University of Minnesota Medical School and member of the American Association of Planned Parenthood Physicians, as saying:

There are no known psychiatric diseases which can be cured by abortion. In addition there are none which can be predictably improved by abortion . . . [Instead], it may leave unresolved conflicts coupled with guilt and added depression which may be more harmful than the continuation of the pregnancy.

Furthermore, there is good evidence to suggest that serious mental disorders arise following abortions more often in women with real psychiatric problems. Paradoxically, the very women for whom legal abortion may seem most justifiable are also the ones for whom the risk is highest for post-abortion psychic insufficiency

....

When abortion is substituted for adequate psychiatric care—and there is ample evidence to suggest that this is already happening—there is a distinct danger of minimizing established psychotherapeutic principles. Unfortunately, it is the distressed woman who ultimately faces the dulling impact of this minimization. She is the one who cries for help, and she is also the one who is turned away.

4. *Mental Health Justifications for Abortion Are Less Compelling in the Post-Viability Context*

All of these considerations are heightened in the post-viability context. The first trimester, when the overwhelming majority of decisions to abort are made, is the most vulnerable time for pregnancy-induced depression.³⁶⁵ If a legally cognizable mental health reason for abortion is likely to exist, it is medically unlikely to exist after the fetus becomes viable.

This point is best illustrated by the litany of examples put forth by abortion rights activists during the partial-birth abortion debates. The *Voinovich* district court, for example, relied on the experiences of two “Jane Does” to justify the need for the D & X procedure after viability. The fetuses aborted by each woman, however, were deformed severely enough that they were incapable of life outside the womb (and ipso facto not viable) despite their gestational age.³⁶⁶ The National Abortion and Reproductive Rights Action League (NARAL) amicus brief in *Voinovich* told the emotionally wrenching stories of twelve separate women whose deformed fetuses were aborted by the D & X method, but because all of these babies were either already dead or incapable of independent life, *not a single one* was viable.³⁶⁷

Id. at 169.

Similarly, Reardon quotes the World Health Organization as warning that “the very women for whom legal abortion is considered justified on psychiatric grounds are the ones who have the highest risk of post-abortion psychiatric disorders.” *Id.* Finally, the *World Medical Journal* is quoted as saying “[abortion] is a bad way of treating true psychiatric disease Investigation shows that there is less psychological trauma associated with normal birth than there is with legal abortion.” *Id.*

³⁶⁵ See Kumar et al., *supra* note 342, at 40.

³⁶⁶ See Appellants’ Brief, *supra* note 171, at 17-18 nn.10-11 (explaining that neither of these fetuses were viable); NARAL Brief, *supra* note 205, at 10-12 (recounting the stories of Jane Does 1 & 2).

³⁶⁷ See NARAL Brief, *supra* note 205, at 29 (Tammy Watts) (“my baby was going to die”), *id.* at 29-30 (Diane Reiner) (“it had no proper brain, no proper lungs . . . its organs were not properly inside its body cavity . . . its spine was bent at a 45 degree angle, and . . . its extremities were also deformed.”), *id.* at 30 (Phyllis Baker) ([The child] “wouldn’t be able to live long enough to do anything but suffer”), *id.* (Jane Doe 2) (“this baby would not live”), *id.* at 33 n.13 (Jane Doe 1) (“the fetus stood an 80% chance of dying when born and, even if he survived birth, would probably not live to be two years old”); *id.* app. p. 2 (“[i]n addition to a fluid-filled non-functional brain, he had a malformed heart with a large hole between the chambers He had also developed an extremely large cyst filled with intestinal matter, and . . . severe brain damage. . . . [T]hese symptoms added up to Trisomy 13, a fatal chromosomal disorder”), *id.* app. p. 11 (Coreen Costello) (“it doesn’t look like this baby has any hope”), *id.* app. p. 24 (Erica Fox) (“[t]he fetus had stopped growing Phrases like ‘severe mental retardation’ and ‘short, painful life followed by death’ were just a couple of the things I heard.”), *id.* app. p. 44 (Sophie Horak) (“Joey was going to die and . . . there was nothing more that could be done.”), *id.* app. p. 48 (Nancy Jenkins) (“if the fetus was [sic] alive it would be severally [sic] deformed” (emphasis added)), *id.* app. p. 54 (Mary-Dorothy Line) (“A hydrocephalic baby that advanced has no

Nor were any of the women who stood with President Clinton at his "veto ceremony" for the Partial Birth Abortion Act carrying viable fetuses when they aborted.³⁶⁸ Evacuating a dead fetus or a fetus with anencephalia (a liquid-filled cranium with no brain), which many of these fetuses had, is not even an "abortion" in legal or medical terms.³⁶⁹

Moreover, in all but the most extreme examples of denial and delay, a woman will realize that she is pregnant well before the point of viability, which is generally recognized to occur between the twenty-second and twenty-sixth week of gestation,³⁷⁰ and under the Ohio statute was presumed after twenty-four weeks.³⁷¹ Viability occurs shortly after "quickening," when the woman first feels her baby kick.³⁷² As Justice Blackmun noted, this gives the woman more than adequate time to exercise her pre-viability liberty interest in obtaining an abortion before her rights are eclipsed by the interests of the state.³⁷³ After viability, a mental health justification for an abortion is less compelling because it is less likely to be either genuine or unavoidable.

C. *The Psychological Impact from Abortion*

To make a balanced assessment of a post-viability mental health exception, one must also consider the possible ways in which an abortion intended to ameliorate mental distress may or may not succeed. Two caveats must be kept in mind when evaluating the data in this section. First, both the imprecise nature of psychiatry and the volatility of abortion opinions make research on the psychological

hope"), *id.* app. p. 60 (Vicki Stella) ("[h]e never would have survived outside my womb"), *id.* app. p. 70 (Viki Wilson) ("she would not survive outside my womb").

In addition, these stories may have constituted inadmissible hearsay, offered for the first time at the appellate level, that should not have been considered by the court. See Appellants' Brief, *supra* note 171, at 18 n.11.

³⁶⁸ See NRLC, *Testimony of Douglas Johnson*, *supra* note 322.

³⁶⁹ See Gans Epner, *supra* note 24, at 725; Rhoden, *Trimesters and Technology*, *supra* note 348, at 686-87.

³⁷⁰ See *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 515 (upholding a Missouri law effectively creating a presumption of viability at 20 weeks); *Roe v. Wade*, 410 U.S. 113, 160 (asserting viability at 24-28 weeks); Appellants' Brief, *supra* note 171, at 12 (22-24 weeks); CIBA FOUNDATION SYMPOSIUM, *supra* note 207, at 111 (generally accepted point of viability in United Kingdom is 24 weeks, and a legal presumption of viability at 28 weeks); Gans Epner, *supra* note 24, at 724 (20-27 weeks is a "gray zone" of viability); Planned Parenthood Federation of America, *Abortion and Fetal Viability* (last visited Oct. 8, 1998) <<http://www.plannedparenthood.org/library/ABORTION/fetalviability.html>> (stating that generally accepted point of viability is 24 weeks).

³⁷¹ See OHIO REV. CODE ANN. § 2919.17(C) (Anderson 1998).

³⁷² See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 932 (Blackmun, J., concurring in part and dissenting in part).

³⁷³ See *id.* at 932-33, (citing *Webster*, 492 U.S. at 553-54 (Blackmun, J., dissenting)).

effects of abortion among the most biased in the field.³⁷⁴ An early survey of such studies over a thirty-year period found generalizations, misquotes and evident bias from researchers on both sides of the issue.³⁷⁵ This bias is often evident in the ways in which authors define their terms³⁷⁶ and characterize their findings.³⁷⁷ For example, some researchers have dismissed outright any ambivalent opinion on abortion from any woman in their samples, treating them as cultural myths that must be refuted.³⁷⁸ Others, especially before *Roe* was decided, have demonstrated an untested assumption that abortion is always a negative experience.³⁷⁹ Some have observed that although research abounds on the psychology of abortion, relatively few studies use sound methodology.³⁸⁰ Researchers have not been able to find common ground, because they rely on tainted data and inflexible policy positions.³⁸¹ Psychological debate has reached an impasse, because many are attempting to uncover conclusive evidence one way or the other, and refusing under the guise of objectivity to acknowledge the vital role of policy and personal values in resolving the question.³⁸²

Second, reliable data on the psychological impact of abortion are incomplete although there appears to have been many studies conducted on the subject.³⁸³ Former Surgeon General C. Everett Koop, who had headed a presidential commission on the psychological sequelae of abortion, recognized these flaws when he refused to issue an official report on the grounds that the evidence did not warrant any conclusion.³⁸⁴ One major flaw in the studies is their short-term focus.³⁸⁵ As of 1990, there were no such studies that examined the

³⁷⁴ See BETTY SARVIS ET AL., *THE ABORTION CONTROVERSY* 105 (1974); Russo, *U.S. Abortion in Context*, *supra* note 307, at 185.

³⁷⁵ See SARVIS, *supra* note 374, at 112.

³⁷⁶ See REARDON, *supra* note 335, at 115.

³⁷⁷ See BOYLE, *supra* note 294, at 3; Richard A. Schwartz, M.D., *Abortion on Request: The Psychiatric Implications*, in *ABORTION, MEDICINE & THE LAW* 330 (J. Douglas Butler & David F. Walbert eds., 3d ed. 1986).

³⁷⁸ See BOYLE, *supra* note 294, at 103.

³⁷⁹ See HYMAN RODMAN ET AL., *THE ABORTION QUESTION* 72 (1987); Susan J. Blumenthal, *Psychiatric Consequences of Abortion: Overview of Research Findings*, in *PSYCHIATRIC ASPECTS OF ABORTION* 21 (Nada L. Stotland ed., 1991).

³⁸⁰ See Nancy E. Adler, *Unwanted Pregnancy and Abortion: Definitional and Research Issues*, 48 *J. SOC. ISSUES* 19, 33 (1992) [hereinafter Adler, *Unwanted Pregnancy*]; Gregory H. Wilmoth et al., *Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence*, 49 *J. SOC. ISSUES* 37, 61 (1992) [hereinafter Wilmoth et al., *Limits of the Evidence*].

³⁸¹ See BOYLE, *supra* note 294, at 130.

³⁸² See *id.* at 133; SARVIS, *supra* note 374, at 106.

³⁸³ See RODMAN ET AL., *supra* note 379, at 75.

³⁸⁴ See BOYLE, *supra* note 294, at 129-30; Gregory H. Wilmoth, *Abortion, Public Health Policy, and Informed Consent Legislation*, 48 *J. SOC. ISSUES* 1, 2 (1992) [hereinafter Wilmoth, *Informed Consent*].

³⁸⁵ See REARDON, *supra* note 335, at 116; Melton et al., *supra* note 311, at 16.

emotional aftereffects of abortion for more than two years; the majority of studies survey women only a few short hours after the procedure.³⁸⁶ These data are skewed by the emotional numbness, relief and retreat that many women demonstrate immediately after an abortion.³⁸⁷ Additionally, many studies do not distinguish the effects of abortion from those of the unwanted pregnancy.³⁸⁸ Psychological studies on minors who have abortions are especially lacking.³⁸⁹

With these principles in mind, this Comment does not seek to use the following data to settle the issue conclusively. Studies will be cited "as is," with no representation being made as to their reliability. Indeed, advocates on both sides of the issue have undermined their own arguments in the past by asserting flawed studies as "proof" of their policy positions.³⁹⁰ While it can be noted that the research gives ammunition to both sides of the debate,³⁹¹ in the final analysis, psychological survey data, no matter how accurate, can only inform, not decide, our policy decisions in the abortion field.³⁹² In the post-viability focus of this Comment, however, the data as a whole suggest that late-term abortions may do more harm to mental health, and for policymakers it is more useful to have knowledge of relative risk than of absolute risk.³⁹³ The risk factors discussed below should give pause to those who would reflexively advocate an abortion as a solution for the stress of an unwanted pregnancy.

1. *The Evidence Against a Negative Psychological Impact from Abortion*

As nearly all researchers will admit, any surgical procedure has psychological risks.³⁹⁴ But several researchers have reported that the psychological detriment to women who undergo abortions is minimal

³⁸⁶ See Nancy E. Adler et al., *Psychological Responses After Abortion*, 248 SCI. 41, 43 (1990) [hereinafter Adler et al., *Psychological Responses*].

³⁸⁷ See REARDON, *supra* note 335, at 117.

³⁸⁸ See Russo, *Psychological Aspects*, *supra* note 297, at 614.

³⁸⁹ See Adler, *Adolescent Abortion*, *supra* note 312, at 83; Melton et al., *supra* note 311, at 16.

³⁹⁰ See Wilmoth, *Informed Consent*, *supra* note 384, at 4. Wilmoth further opines that in general, studies cited by "pro-choice" advocates tend to be more methodologically sound than those cited by those on the "pro-life" side. See *id.*; see also Blumenthal, *supra* note 379, at 28 (arguing that only a few studies use sound methodology, and they tend to be the ones showing no negative emotional sequelae).

³⁹¹ See SARVIS, *supra* note 374, at 108.

³⁹² See BOYLE, *supra* note 294, at 136.

³⁹³ See Wilmoth et al., *Limits of the Evidence*, *supra* note 380, at 55.

³⁹⁴ See SARVIS, *supra* note 374, at 105.

at best.³⁹⁵ This includes studies that are purported to be the largest and most comprehensive on the topic.³⁹⁶ Although some of these authors use conclusory language that exposes a possible pro-abortion bias on occasion,³⁹⁷ their data reveal no causal link between abortion and psychosis as a general matter.³⁹⁸ Especially highlighted by these studies, is the importance of free choice, as their data indicates that any perceived compromise of a woman's freedom to choose an abortion significantly increases the likelihood of psychological symptoms.³⁹⁹

These studies heavily refute the suggestion that there is a diagnosable post-traumatic stress disorder in women who have abortions.⁴⁰⁰ While Dr. Koop's commission did not release official findings, he did testify before Congress that abortion opponents use as one of "their weapons the fact that there is such a thing as a postabortion syndrome As we have talked to various groups, there is no doubt that there are people who experience a post-abortion syndrome, but there are people who have a post-death-of-my-child syndrome, post-death-of-my-mother syndrome, post-lost-my-job syndrome" ⁴⁰¹

Indeed, some authors have argued that abortion can have a positive effect on a woman's psyche. Benefits include a sense of personal empowerment and smaller family size.⁴⁰² These effects have been noted for women as well as minors.⁴⁰³ It has also been argued that even portraying abortion as a negative emotional experience is a detriment to mental health.⁴⁰⁴ Nevertheless, a substantial number of psychology researchers have argued that abortion can be mentally damaging to a woman in many contexts, at least more so than childbirth.⁴⁰⁵

³⁹⁵ See Adler et al., *Psychological Responses*, *supra* note 386, at 41; Blumenthal, *supra* note 379, at 22, 24-27 (collecting studies); Lemkau, *supra* note 298, at 462.

³⁹⁶ See RODMAN ET AL., *supra* note 379, at 79; Russo, *Psychological Aspects*, *supra* note 297, at 612.

³⁹⁷ See Marecek, *supra* note 311, at 110; Russo, *Psychological Aspects*, *supra* note 297, at 613, 616.

³⁹⁸ See Russo, *Psychological Aspects*, *supra* note 297, at 615.

³⁹⁹ See REARDON, *supra* note 335, at 132; Russo, *Psychological Aspects*, *supra* note 297, at 614.

⁴⁰⁰ See Russo, *Psychological Aspects*, *supra* note 297, at 617.

⁴⁰¹ *Id.* at 619; see also Wilmoth et al., *Limits of the Evidence*, *supra* note 380, at 38 (discrediting findings of a post-abortion syndrome). *But see* Speckhard, *supra* note 361, at 98 (disagreeing with Dr. Koop's dismissal of a post-abortion syndrome).

⁴⁰² See Russo, *Psychological Aspects*, *supra* note 297, at 617.

⁴⁰³ See Marecek, *supra* note 311, at 110.

⁴⁰⁴ See Russo, *Psychological Aspects*, *supra* note 297, at 618.

⁴⁰⁵ See *infra* Part IV(C)(2).

2. *The Evidence for Psychologically Damaging Effects of Abortion*

"Researchers tend to agree that, at some level, abortion is a stressful experience for all women."⁴⁰⁶ A number of studies have purported to demonstrate a higher incidence of psychological difficulties after abortions than after childbirth.⁴⁰⁷ These include a Danish study demonstrating a higher rate of psychiatric illnesses after abortions than births,⁴⁰⁸ and a Finnish study that found the suicide rate among women who had aborted was three times the national average and six times above the rate of women who had given birth.⁴⁰⁹ Negative effects in American studies include undermined romantic and maternal relationships, increased suicide risk, a lingering sense of loss, rage, etc.⁴¹⁰

As some have argued, even the one percent risk demonstrated by some studies is a non-negligible result.⁴¹¹ Of the 1.5 million women who undergo abortion annually, "that means that each year 15,000 women are so severely scarred by post-abortion trauma that they become unable to function normally. Since this one percent figure is by far the lowest claimed anywhere in the literature, the actual rate of disabling sequelae is probably much higher."⁴¹² Statistics, moreover, are only an imprecise measurement of actual human suffering.⁴¹³ The fact that these studies are conducted in diverse populations from Finland to Japan indicate that post-abortion guilt and depression are not a peculiar hang-up of Western or Judeo-Christian culture.⁴¹⁴

The data available on the long-term effects indicate that the relief and sense of empowerment common immediately after an abortion tend to fade over time. One group of researchers studying the emotional sequelae of childbirth was surprised to discover a "highly significant correlation" between antenatal depression and mothers who had ended previous pregnancies in abortion.⁴¹⁵ This "dormant grief reaction" manifested itself in conflicting expressions of worry and retribution towards their later child, and was consistent in women

⁴⁰⁶ Speckhard, *supra* note 361, at 104 (citing the American Psychiatric Association).

⁴⁰⁷ See REARDON, *supra* note 335, at 119; Speckhard, *supra* note 361, at 96.

⁴⁰⁸ See CIBA FOUNDATION SYMPOSIUM, *supra* note 207, at 118-19.

⁴⁰⁹ See Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 BRIT. MED. J. 1431, 1433 (1996).

⁴¹⁰ See REARDON, *supra* note 335, at 123-30.

⁴¹¹ See *id.* at 121.

⁴¹² *Id.* But see Wilmoth et al., *Limits of the Evidence*, *supra* note 380, at 44 (indicting Reardon's methodology).

⁴¹³ See REARDON, *supra* note 335, at 121.

⁴¹⁴ See *id.* at 122.

⁴¹⁵ See Kumar et al., *supra* note 342, at 42.

whose abortions had been both legal and illegal.⁴¹⁶ Additional studies have also suggested that other subsequent events occurring long after the abortion can trigger negative emotional symptoms,⁴¹⁷ including the onset of menopause.⁴¹⁸ There is a particular dearth of research data, however, on these delayed grief reactions.⁴¹⁹

These results are particularly poignant in comparison to the emotional sequelae of birth. As is commonly known, depression can occur in the post-partum period.⁴²⁰ It is estimated that 40,000 women annually have some form of post-partum psychological symptoms,⁴²¹ and eighty percent of women giving birth experience post-partum symptoms to some degree.⁴²² Giving birth has also been found to trigger other types of depression, though not necessarily caused by the birth itself.⁴²³ Post-partum psychoses, though extremely rare, have occurred; because they are biologically induced, however, they have been successfully treated with drugs.⁴²⁴ At least one study has concluded that these effects are temporary, and that the experience usually benefits a woman's overall mental health.⁴²⁵

While no psychology researcher is likely to agree with all of the data presented in this Part, there are certain areas in which studies on both sides of the issue appear to converge. This includes one area of particular relevance to the basic inquiry of this Comment—late-term abortions.

3. *Areas of Convergence in the Research*

One fact on which almost all researchers appear to agree is that the woman's perception that her choice is uncoerced is an important factor in preventing negative emotional sequelae from abortion.⁴²⁶ As seen above, many authors phrase this finding in terms that would suggest a scientific basis for liberalized access to abortion. But these data have significant implications for those who are predisposed to recommend an abortion as well. Indeed, one study cautioned practitioners against assuming that a woman's abortion decision has been

⁴¹⁶ See *id.*

⁴¹⁷ See Lemkau, *supra* note 298, at 468; Speckhard, *supra* note 361, at 108.

⁴¹⁸ See REARDON, *supra* note 335, at 116.

⁴¹⁹ See Blumenthal, *supra* note 379, at 32; Major, *supra* note 362, at 136.

⁴²⁰ See Cox et al., *supra* note 339, at 114.

⁴²¹ See DUNNEWOLD, *supra* note 337, at v.

⁴²² See *id.* at 28.

⁴²³ See Kumar et al., *supra* note 342, at 35.

⁴²⁴ See DUNNEWOLD, *supra* note 337, at 16.

⁴²⁵ See Gissler, *supra* note 409, at 1431.

⁴²⁶ See Russo, *Psychological Aspects*, *supra* note 297, at 615.

made freely, and found that the psychological aftereffects of a coerced decision to abort were comparable to post-traumatic stress disorder.⁴²⁷ Other studies have confirmed these findings.⁴²⁸

The threat of coercion is quite tangible when a woman's partner persuades her to abort against her wishes. Eighty-five percent of women, by one accounting, discuss the decision with their husband or partner before making a choice.⁴²⁹ Another study found that twenty-three percent of women choosing to abort cited their partner's disapproval of the pregnancy as a factor in their decision.⁴³⁰ It can be assumed that a substantial number of women, then, are obtaining abortions not entirely of their own choosing, with devastating psychological results.

The potential for coercion is especially great with a pregnant minor.⁴³¹ Research indicates that minors are often under strong pressure from both parents and boyfriends to abort, often against their own desires.⁴³² Perhaps as a result, minors who abort face a greater risk of suicide.⁴³³ The Supreme Court has articulated three reasons why minors should be treated differently than adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."⁴³⁴ All three of these factors invite psychological analysis.⁴³⁵

Perhaps the one fact that seems nearly axiomatic in the psychological literature on abortion is that the later in the pregnancy one aborts, the greater the woman's risk for negative emotional sequelae.⁴³⁶ This is true for a number of reasons. The procedure itself is physically riskier in the late-term, and the fact that the fetus is so developed and has moved makes the choice more difficult morally as well.⁴³⁷ The fact that a woman has waited until the late-term to obtain

⁴²⁷ See Lemkau, *supra* note 298, at 468.

⁴²⁸ See Schwartz, *supra* note 377, at 330.

⁴²⁹ See BOYLE, *supra* note 294, at 105.

⁴³⁰ See *id.* at 125.

⁴³¹ See Adler, *Adolescent Abortion*, *supra* note 312, at 77. But see Melton et al., *supra* note 311, at 11 (disagreeing with the suggestion that abortion is always more difficult for a minor than an adult).

⁴³² See Elizabeth Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents*, in *ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES* 123 (Gary B. Melton ed., 1986).

⁴³³ See Adler, *Adolescent Abortion*, *supra* note 312, at 84.

⁴³⁴ *Belotti v. Baird*, 443 U.S. 622, 634 (1979).

⁴³⁵ See Melton et al., *supra* note 311, at 9.

⁴³⁶ See Shalia Misri, *Second-Trimester Abortion*, in *PSYCHIATRIC ASPECTS OF ABORTION* 166-68 (Nada L. Stotland ed., 1991); Russo, *Psychological Aspects*, *supra* note 297, at 612; Speckhard, *supra* note 361, at 114.

⁴³⁷ See BOYLE, *supra* note 294, at 121; Adler, *Adolescent Abortion*, *supra* note 312, at 75; Lemkau, *supra* note 298, at 467; Melton et al., *supra* note 311, at 21.

an abortion can itself indicate conflicting emotions about the procedure, which in turn magnifies the anguish felt over the decision.⁴³⁸ Broken relationships are also a reason for late-term abortions, and are themselves an independent risk factor for negative sequelae.⁴³⁹ Because almost all fetal defects are found late in the pregnancy,⁴⁴⁰ many late-term abortions are also performed for that reason. These women are particularly susceptible to feelings of animosity, because the abortion is done for the baby's sake despite the mother's desire to have the child.⁴⁴¹

Even the studies concluding that abortion per se is not a mental health risk factor often concede that late-term abortions are an exception.⁴⁴² Some of the studies listed above do not even include in their samples abortions performed after the first trimester.⁴⁴³ At least three Supreme Court Justices, relying on medical literature, have also recognized the psychological dangers of late-term abortions.⁴⁴⁴ Because post-viability abortions pose much greater risks of mortality⁴⁴⁵ and psychiatric morbidity,⁴⁴⁶ then, mental health is a factor that weighs in favor of the *state's* compelling interest in preserving the mother's health by restricting abortion availability.

D. Summary: What Does the Psychological Literature Reveal About the Relationship Between Abortion and Mental Health?

None of the above studies are conclusive. Because psychology and psychiatry are necessarily inexact sciences, this research can only indicate risk factors. It can not predicate with complete accuracy when or how severely a particular woman will suffer emotionally. But can it reveal what might lead a woman to succumb to psychological pressures? Is there a difference in the segments of the population

⁴³⁸ See Major, *supra* note 362, at 125; Adler et al., *Psychological Responses*, *supra* note 386, at 42; Lemkau, *supra* note 298, at 467.

⁴³⁹ See Lemkau, *supra* note 298, at 468.

⁴⁴⁰ See Gans Epner, *supra* note 24, at 726.

⁴⁴¹ See REARDON, *supra* note 335, at 176; Lemkau, *supra* note 298, at 467.

⁴⁴² See BOYLE, *supra* note 294, at 105; Russo, *Psychological Aspects*, *supra* note 297, at 615.

⁴⁴³ See, e.g., Lemkau, *supra* note 298, at 462-63 (citing only first-trimester studies); Misri, *supra* note 436, at 159 (observing that most literature focuses on the first trimester).

⁴⁴⁴ See *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 467 (1983) (O'Connor, J., dissenting).

⁴⁴⁵ See Gans Epner, *supra* note 24, at 727; see also *Jane L. v. Bangerter*, 809 F. Supp. 865, 873 (D. Utah 1992) (observing that on the record of that case, no physician performed an abortion after 20 weeks gestational age, because of the physical risks to the mother).

⁴⁴⁶ See Gans Epner, *supra* note 24, at 727.

most susceptible to negative sequelae from an unwanted birth and from an abortion?

The literature points to a number of considerations that can influence whether an abortion is psychologically damaging to a woman. These include her general ability to cope with stress, her age and her personal attitudes toward abortion before the procedure.⁴⁴⁷ A woman's self-confidence and the perceived social support of others are also important.⁴⁴⁸ Indeed, the most accurate indicator of post-abortion psychosis is a woman's pre-abortion symptoms.⁴⁴⁹ Thus, a woman in a high-risk group for severe distress, such as one who aborts after viability because of a fetal defect, may suffer no clinically diagnosable sequelae if she is a strong person, generally capable of dealing with stress, and has a number of close friends to support her.

By the same token, not all women with unwanted pregnancies will suffer the mental distress cited by some as justification for an abortion. Not all women will develop psychiatric illness when their fetus is diagnosed with defects.⁴⁵⁰ And those women who do suffer psychologically before and during pregnancy are also those who demonstrate the most psychological complications after an abortion.⁴⁵¹ Indeed, for women who suffer psychologically before or during pregnancy, the risk factors for negative emotional sequelae appear to be the same after birth or abortion.⁴⁵²

The implications of this information for the necessity of a mental health exception should be obvious. Proponents of the exception are faced with this paradox: Either a woman is mentally fragile and vulnerable during an unwanted pregnancy, in which case having an abortion is likely to only aggravate her condition, or the woman is strong, self-confident and supported, in which case her mental health should not be threatened by delivering her child.⁴⁵³ This result is all the more true in the post-viability context, where the complicating

⁴⁴⁷ See Adler et al., *Psychological Responses*, *supra* note 386, at 42; Lemkau, *supra* note 298, at 465.

⁴⁴⁸ See Russo, *Psychological Aspects*, *supra* note 297, at 617; Major, *supra* note 362, at 130.

⁴⁴⁹ See Adler et al., *Psychological Responses*, *supra* note 386, at 43; Lemkau, *supra* note 298, at 466; Major, *supra* note 362, at 135; Nada L. Stotland, M.D., *Psychiatric Issues in Abortion, and the Implications of Recent Legal Changes for Psychiatric Practice*, in *PSYCHIATRIC ASPECTS OF ABORTION 3* (Nada L. Stotland, M.D. ed., 1991).

⁴⁵⁰ See Rhoden, *Neonatal Dilemma*, *supra* note 246, at 1504.

⁴⁵¹ See DUNNEWOLD, *supra* note 337, at 17; REARDON, *supra* note 335, at 169-70; Schwartz, *supra* note 377, at 328.

⁴⁵² See Adler, *Adolescent Abortion*, *supra* note 312, at 84; Russo, *Psychological Aspects*, *supra* note 297, at 625; Schwartz, *supra* note 377, at 331.

⁴⁵³ See REARDON, *supra* note 335, at 170 ("This may seem like a neat little Catch-22 invented by anti-abortionists, but it is a fact confirmed not only by medical experts but by common sense as well.").

emotional factors of late-term abortions described above become particularly acute even for the psychically stable woman, and potentially devastating for an emotionally fragile one.

In addition to the dubious scientific support for a post-viability mental health exception, policymakers must always remember that in this context, the state's interests in both the woman's health and the fetal life have become compelling, overriding the woman's liberty interest.⁴⁵⁴ The potential threats to a woman's health from the abortion procedure have been covered above, and the state's deep moral and pragmatic interests in the life of the fetus have been well-covered elsewhere.⁴⁵⁵ The *Voinovich* controversy, however, clarifies additional facets of those interests.

E. Two Additional State Interests that Are Particularly Acute in Post-Viability Context: Cruelty to the Fetus and the Impact on the Third Parties

1. Cruelty to the Fetus: Can It Feel Pain?

The Ohio statute cited prevention of cruelty to the fetus as one of its motivations.⁴⁵⁶ The *Voinovich* court was the first to address this issue.⁴⁵⁷ The argument was based on medical evidence that the fetus can feel pain when it is aborted, and especially when the D & X procedure is used.

The district court's rejection of the fetal pain argument was a legally dubious decision. Judge Rice acknowledged the evidence that fetuses can feel pain, and even discredited the Plaintiffs' expert, Dr. Haskell, because he was not a neurology expert.⁴⁵⁸ Nonetheless, Judge Rice cast the issue of whether the fetus was sufficiently conscious to experience pain as a matter of conscience, on which reasonable people could disagree.⁴⁵⁹ Accepting this proposition, however, changes nothing in the post-viability context.⁴⁶⁰ Because the state can

⁴⁵⁴ See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 870 (1992).

⁴⁵⁵ A very abbreviated sample of this literature includes: *Casey*, 505 U.S. at 914-15 (Stevens, J., concurring in part); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (Burger, C.J., dissenting); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 100 (1976) (White, J., dissenting); William W. Van Alstyne, *The Cycle of Constitutional Uncertainty in American Abortion Law*, in *ABORTION, MEDICINE & THE LAW* 87 (J. Douglas Butler & David F. Walbert eds., 1992); CIBA FOUNDATION SYMPOSIUM, *supra* note 207, at 115; Rhoden, *Neonatal Dilemma*, *supra* note 246, at 1484 n.271; Rush, *supra* note 185, at 134 n. 108; Cohen, *supra* note 324, at A17.

⁴⁵⁶ See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1071 (S.D. Ohio 1995).

⁴⁵⁷ See *id.* at 1072.

⁴⁵⁸ See *id.* at 1072 n.28.

⁴⁵⁹ See *id.* at 1073.

⁴⁶⁰ Ohio, of course, also used this argument to justify the D & X ban. See *id.* at 1071.

ban post-viability abortions anyway, subject only to the life or health exception, there seems to be no reason why a state can not rationally determine that there is sufficient evidence of fetal cruelty to justify a post-viability ban.

Judge Rice's ultimate characterization of the fetal pain issue as purely a matter of conscience is an intellectual retreat, not a compromise. To be sure, many aspects of the abortion debate are necessarily matters of conscience. Because we have no demonstrable method of proving whether a fetus is a "person" imbued with an immortal soul, or whether killing it is morally wrong, these matters can only be decided by personal belief (and perhaps a transcendent Judgement). Fetal pain, however, is a question whose answer has a direct consequence in this life. If a fetus does feel pain, regardless of whether it is a person in every sense of the term or what happens to its essence after death, it is still a living creature suffering tremendous agony. Indeed, few, if any of those who advocate fetal personhood would characterize animals as "persons" that have "souls," but society as a whole considers the needless infliction of pain on an animal to be cruel and inhumane.

This question is one that can be answered with scientific evidence, and a distinct majority of such literature suggests that fetuses do indeed suffer pain in the womb.⁴⁶¹ Several commentators have, in fact, drawn an analogy between what they have witnessed in the fetus and animal cruelty.⁴⁶² Associate Professor of pediatrics and anesthesia Jean Wright at Emory University testified before Congress that fetuses are more susceptible to pain than infants, and lamented that "this [partial birth abortion] procedure, if it were done on an animal in my institution, would not make it through the institutional review process. The animal would be more protected than the child is."⁴⁶³

A number of factors suggest that fetuses can feel pain, at least by the twentieth week of gestation.⁴⁶⁴ Fetuses who experience unpleas-

⁴⁶¹ See AAPLOG Brief, *supra* note 68, at iii-v, 11-12 (collecting authorities); James Bopp, Jr., *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 35-40 (same).

⁴⁶² See *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 477 (7th Cir. 1998) (Manion, J., dissenting) ("An uncaged animal does not suffer less when shot as compared to a caged animal, but Wisconsin still criminalizes the latter and not the former. . . . [T]he court overextends when it concludes that there is no moral difference between partial birth abortion and other abortion procedures."); L.G. Almeda, Comment: *Michigan's Ban on Partial-Birth Abortions: Balancing Competing Interests*, 74 U. DET. MERCY L. REV. 685, 705 (1997) ("[O]ne who believes that a human fetus is morally equivalent to a cow, pig, or other animal could believe that there is a legitimate governmental purpose in not unnecessarily subjecting living creatures to pain or cruelty, even in the process of killing them.").

⁴⁶³ NRLC, *Some Key Facts on Partial-Birth Abortions* (last modified Jan. 8, 1996) <<http://www.nrlc.org/abortion/pba/pbakey.html>> (quoting Prof. Jean Wright).

⁴⁶⁴ See AAPLOG Brief, *supra* note 68, at 9-15; Appellants' Brief, *supra* note 171, at 11-12.

ant stimuli in the womb have exhibited all of the same reflex reactions that a born person would,⁴⁶⁵ and tend to move away from the source of the stimuli.⁴⁶⁶ Indeed, there is a good deal of evidence that fetuses actually have a higher sensitivity to pain than born persons,⁴⁶⁷ because the fetuses have developed enough nerves to transmit the pain impulses, but lack the physical and chemical coping mechanisms to handle the sensations.⁴⁶⁸ The fetus's small size provides a shorter distance for the impulses to travel and hence less opportunity to degrade.⁴⁶⁹ Fetal surgeries must use relatively more painkillers than other humans would require for similar procedures.⁴⁷⁰ Scientific concern regarding fetal pain has grown to the point that the United Kingdom now mandates by law that painkilling drugs be used in fetal surgery.⁴⁷¹

No witness in congressional hearings on this subject offered convincing evidence against the fetal pain theory,⁴⁷² and the record in *Voinovich* was more than sufficient to prove its case.⁴⁷³ Still, arguments have been made against the fetal pain theory. One holds that fetal nerves have not undergone sufficient myelination,⁴⁷⁴ or development, to transmit pain impulses.⁴⁷⁵ Evidence suggests that at least by the twentieth week of gestation, however, nerves are as developed as adults with a condition that degrades their nerves to similar levels and who can still feel pain.⁴⁷⁶ Even if the myelination of fetal nerves is incomplete, however, the impulses have a much shorter distance to travel than in adults, so that much more of the sensation will be felt.⁴⁷⁷

It has also been suggested that the anesthesia given to the mother before an abortion numbs or even kills the fetus before the procedure

⁴⁶⁵ See AAPLOG Brief, *supra* note 68, at 10-12.

⁴⁶⁶ See *id.* at 10.

⁴⁶⁷ See *id.* at 10-16.

⁴⁶⁸ See *id.* at 15-16.

⁴⁶⁹ See *id.* at 11 n.4.

⁴⁷⁰ See *id.* at 16.

⁴⁷¹ See McCullough, *supra* note 305.

⁴⁷² See Almeda, *supra* note 462, at 706-07; Massie, *supra* note 321, at 348-50.

⁴⁷³ See Appellants' Brief, *supra* note 171, at 29.

⁴⁷⁴ "Myelination" is the process of acquiring (or in the case of fetuses, developing) myelin, a white, fatty substance that acts as "a thick medullary sheath" around the nerve fibers. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1494 (1986). This sheath plays an important role in transmitting nerve impulses. A breakdown of myelin in adults leads to diseases such as multiple sclerosis, and "remyelination" techniques are being developed to treat such diseases. See Jo-Ann Chinn, *Exciting News From the Myelin Project* (visited Feb. 24, 1999) <<http://aspin.asu.edu/msnews/chinn1.htm>>.

⁴⁷⁵ See AAPLOG Brief, *supra* note 68, at 9.

⁴⁷⁶ See *id.*

⁴⁷⁷ See *id.* at 11 n.4.

takes place.⁴⁷⁸ This idea, however, has been roundly refuted by a number of knowledgeable physicians and commentators.⁴⁷⁹ Indeed, there is no evidence that either a local anaesthetic⁴⁸⁰ or one given intravenously⁴⁸¹ has any measurable effect on the fetus, much less that it kills it. Another assertion is that the fetus dies after its umbilical cord is cut, as it usually is in preparation for the D & X procedure.⁴⁸² While this will eventually kill the fetus by asphyxiation, death takes anywhere from five to twenty minutes to occur.⁴⁸³ As Dr. Haskell himself has conceded,⁴⁸⁴ an abortion provider does not always cut the cord⁴⁸⁵ or wait for the fetus to die,⁴⁸⁶ and the fetus is typically alive and unanesthetized when it begins to be dismembered.⁴⁸⁷

To be sure, there are those who disagree with the theory that fetuses feel pain.⁴⁸⁸ Even the Supreme Court has echoed Judge Rice's approach and declined to reach a conclusion, citing the issue's indeterminacy.⁴⁸⁹ Some legal writers, moreover, have disturbingly evinced both ignorance and bias on the subject.⁴⁹⁰ The *Voinovich* Appellees' brief countered that even if the fetus did feel pain, that interest is outweighed by the risk to the mother's health.⁴⁹¹ Not only is this viewpoint particularly misplaced in the post-viability context, as argued above, but such statements demonstrate an unsettling refusal to even contemplate the possibility of giving credence to fetal suffering. It is perhaps telling to wonder whether such persons take

⁴⁷⁸ See NARAL Brief, *supra* note 205, at 10; NRLC, *Testimony of Douglas Johnson*, *supra* note 322.

⁴⁷⁹ See AAPLOG Brief, *supra* note 68, at 18; Massie, *supra* note 321, at 352; McCullough, *supra* note 305.

⁴⁸⁰ See AAPLOG Brief, *supra* note 68, at 17; NRLC, *Testimony of Douglas Johnson*, *supra* note 322.

⁴⁸¹ See AAPLOG Brief, *supra* note 68, at 17.

⁴⁸² See Roman, *supra* note 321, at 382 ("The truth is that neurological fetal demise is induced well before the procedure begins or early in the procedure.").

⁴⁸³ See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1066 (S.D. Ohio 1995); AAPLOG Brief, *supra* note 68, at 7.

⁴⁸⁴ See AAPLOG Brief, *supra* note 68, at 19.

⁴⁸⁵ See *id.* at 7.

⁴⁸⁶ See Appellants' Brief, *supra* note 171, at 11-12; Nebraska Brief, *supra* note 171, at 4 n.2.

⁴⁸⁷ See AAPLOG Brief, *supra* note 68, at 8.

⁴⁸⁸ See *id.* at 6 (quoting Dr. Haskell); Appellees' Brief, *supra* note 205, at 9, 33; Massie, *supra* note 321, at 352.

⁴⁸⁹ *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 443 n.34 (1983).

⁴⁹⁰ See Massie, *supra* note 321, at 348-49 (dismissing out of hand the testimony of the most qualified witness on the subject because he "conceded that he was opposed to all abortion," while accepting at face value the witness produced by the National Abortion Federation); Rhoden, *Trimesters and Technology*, *supra* note 348, at 663 (making an unsupported assertion that "[t]he viable fetus has no more capability for self-awareness or feeling pain than a pre-viable fetus").

⁴⁹¹ See Appellees' Brief, *supra* note 205, at 33.

the same dim view of an animal's suffering inflicted in the name of sport, testing drugs or designing better cosmetics.

Finally, as Judge Rice pointed out in the context of the D & X ban, if one method of abortion is painful, certainly all of them are.⁴⁹² While this is logical, what response should it dictate? Judge Rice suggested, again in the D & X context, that abortionists be required to wait a sufficient period of time after cutting the umbilical cord for the fetus to die of asphyxiation.⁴⁹³ NARAL, on the other hand, fears that giving any credence to fetal pain could lead to the prohibition of all abortions.⁴⁹⁴ Falling somewhere in between, another commentator has suggested that while the fetal pain issue can not be dismissed out of hand, any response to it should be an even-handed one that applies to all abortion procedures.⁴⁹⁵ While the place of the fetal pain issue in the nation's overall abortion jurisprudence is beyond the scope of this Comment, it is sufficient to say here that it deserves more attention from policymakers than it has received thus far.

2. *Psychological Impact on Third Parties*

If the broad *Vuitch* sense of health is to be imported into the post-viability context, it seems only fair to carry the definition to its logical conclusion. Specifically, *Doe* speaks of a woman's "familial" well-being as a facet of her health.⁴⁹⁶ As we have seen above, eighty-five percent of women discuss their abortion decision with their husbands or partners,⁴⁹⁷ and twenty-three percent cite coercion from these men as a factor in their decision to abort.⁴⁹⁸ Fathers are thus not only likely to be aware of the abortion, but their reaction then becomes a crucial influence on the woman's own mental well-being.⁴⁹⁹ The Court has also recognized that abortion is a unique decision fraught with consequences for others beyond the woman, especially fathers.⁵⁰⁰ If *Vuitch* and *Doe* are to be taken literally, it seems that the impact on fathers and family members should be taken into account.

Although *Roe* reserved the question of paternal rights in the abortion decision,⁵⁰¹ the Court has subsequently made clear that fathers can not be given a veto power over a woman's decision to abort, es-

⁴⁹² See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1073 (S.D. Ohio 1995).

⁴⁹³ See *id.* at 1075.

⁴⁹⁴ See Appellees' Brief, *supra* note 205, at 32.

⁴⁹⁵ See *Massie*, *supra* note 321, at 367.

⁴⁹⁶ See *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

⁴⁹⁷ See *BOYLE*, *supra* note 294, at 105.

⁴⁹⁸ See *id.* at 125.

⁴⁹⁹ See *Major*, *supra* note 362, at 133.

⁵⁰⁰ See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

⁵⁰¹ See *Roe v. Wade*, 410 U.S. 113, 165 n. 67 (1973).

pecially in the first trimester.⁵⁰² *Casey* struck a spousal notification requirement, on the grounds that it could lead to marital violence.⁵⁰³ The Court agreed that marital harmony is a worthy ideal, but since women bear the child, their rights had to be given priority.⁵⁰⁴ More recent decisions by lower courts have also recognized that paternal rights are limited by the woman's liberty interest.⁵⁰⁵

Even though paternal rights have been circumscribed in the abortion context, lawmakers can not deny the deep, overriding stake that most fathers feel in the lives and welfare of their children.⁵⁰⁶ That stake may well be the greatest interest that the father has,⁵⁰⁷ and the Court has been mindful of the profound detriment that an abortion can have on a husband's mental well-being and the harmony of a marriage.⁵⁰⁸ Men can especially suffer frustration and anguish when they are marginalized in abortion decision-making.⁵⁰⁹ The same is true even for teen fathers.⁵¹⁰ Perhaps consideration of the psychological toll of abortion on men has been ignored because abortion has so often been justified in the name of the mother's health. This exclusive focus on the woman's well-being, however, only makes sense if the term "health" is confined to the physical context, because only the woman's physical health is implicated by pregnancy. Once judges reach into a woman's psyche to justify an abortion, though, they can not logically distinguish the psychological impact on the mother from that on the father. Courts have given this suffering little weight in calculating health, however, and researchers have gathered extremely little data on the subject.⁵¹¹

⁵⁰² See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976); *Casey*, 505 U.S. at 898.

⁵⁰³ See *Casey*, 505 U.S. at 895.

⁵⁰⁴ See *Danforth*, 428 U.S. at 71; see also *id.* at 90 (Stewart, J., concurring).

⁵⁰⁵ See *Coe v. County of Cook*, 162 F.3d 491, 494 (7th Cir. 1998) ("[T]he Supreme Court necessarily as well as explicitly weighed the woman's interest in reproductive freedom against the man's interest in potential paternity, and found the former interest to be the weightier."); *Doe v. Rampton*, 365 F. Supp. 189, 203 (D. Utah 1973) (three-judge panel) (Anderson, J., dissenting).

⁵⁰⁶ See *Casey*, 505 U.S. at 895; Speckhard, *supra* note 361, at 96. *But see* RODMAN ET AL., *supra* note 379, at 81 (noting study results that abortion decision did not affect relationships with male partners).

⁵⁰⁷ See *Danforth*, 428 U.S. at 93 (White, J., dissenting).

⁵⁰⁸ See *id.* at 69-70.

⁵⁰⁹ See BOYLE, *supra* note 294, at 126.

⁵¹⁰ See Marecek, *supra* note 311, at 104.

⁵¹¹ See BOYLE, *supra* note 294, at 127; LAURIE N. SHERWEN, *PSYCHOSOCIAL DIMENSIONS OF THE PREGNANT FAMILY* 157 (1987); Adler, *Adolescent Abortion*, *supra* note 312, at 89; Arden Rothstein, *Male Experience of Elective Abortion: Psychoanalytic Perspectives*, in *PSYCHIATRIC ASPECTS OF ABORTION* 146 (Nada L. Stotland, M.D. ed., 1991). There is also virtually no data on the effect of the father's reaction on the mother's well-being. See Major, *supra* note 362, at 134.

The role that the psychological well-being of the child's father and others in the woman's family should play in assessing her "health" is unclear, but it should be given serious consideration when making policy choices about a mental health exception.⁵¹² States may well have more of an interest in requiring paternal notification after viability, although it is difficult to conceive of how such a provision could be drafted in a way that satisfies the Court's valid concern about domestic abuse. In any event, the reality of an overwhelming impact on the well-being of the child's father should further detract from the suggestion that abortions are a necessary or useful method of attaining maternal "health" in the *Vuitch/Doe* sense.

*F. Physician Discretion Under a Mental Health Exception
Erodes the State Interest in Practice*

As noted in Part III, federal courts as a whole have traditionally given physicians a virtual *carte blanche* to determine when an abortion is medically necessary. Various ways to phrase the exception will be considered, but there is little reason to believe that any language permitting abortions on mental health grounds, no matter how limited its wording, will be effective in standardizing abortion justifications in practice.

*1. Physician Discretion Under a Mental Health Exception
Results in Standardless Diagnoses of Health*

Although forty-one states have adopted post-viability abortion bans, many have argued that express or implied mental health exceptions have given physicians so much diagnostic discretion as to make such laws worthless.⁵¹³ Indeed, attorneys for the *Voinovich* Plaintiffs admitted as much to the court in oral argument.⁵¹⁴ When a doctor has sole discretion to decide if a woman's health is at risk in the broad *Vuitch* sense of the term, the state's interest in fetal life, while "compelling" enough to override the woman's liberty interest on paper, is reduced to empty rhetoric in practice.⁵¹⁵ Abortions performed on "health" grounds before the *Roe* decision bear out these concerns.⁵¹⁶ Alan Guttmacher was among those doctors who performed abortions

⁵¹² See Russo, *Psychological Aspects*, *supra* note 297, at 625.

⁵¹³ NRLC, *Testimony of Douglas Johnson*, *supra* note 322.

⁵¹⁴ See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997) (Boggs, J., dissenting).

⁵¹⁵ See Appellants' Brief, *supra* note 171, at 42.

⁵¹⁶ See Blumenthal, *supra* note 379, at 17-18.

under the "thinly veiled lie" of safeguarding the woman's health.⁵¹⁷ Even today, there are practitioners who openly admit that they see every abortion as medically necessary.⁵¹⁸

This practice continues because the Supreme Court has refused to concede that doctors may abuse their discretion and provide abortions for reasons that do not fall under the Court's or the state's definition of "health."⁵¹⁹ Unfortunately, given the predominance of independent clinicians among abortion providers, the Court's model of the "conscientious doctor" is not the norm.⁵²⁰ Most abortion providers, while conscientious persons, do not see their job as requiring a calm, detailed discussion of the woman's well-being, and most women do not seek the doctor's counsel.⁵²¹ Indeed, the uniform stand of clinicians nationwide against any form of abortion regulation demonstrate a lack of interest in seeking a holistic understanding of a woman's health, and a predisposition towards abortion over alternatives.⁵²² The same is true of most mental health professional organizations, such as the American Psychological Association. Their public, corporate stances that abortions, especially in the first trimester, are psychologically unthreatening risk professional denial and make it difficult for individual practitioners to make contrary findings.⁵²³ Instead, abortion providers see themselves as simply providing a service, effectively delegating their judicially enshrined diagnostic discretion to the woman whose psychological distress has led her to seek the abortion in the first place.⁵²⁴ Thus, in many, if not most situations, a mental health exception translates into abortion on demand.⁵²⁵

⁵¹⁷ REARDON, *supra* note 335, at 165-67.

⁵¹⁸ See Almeda, *supra* note 462, at 704.

⁵¹⁹ See *Doe v. Bolton*, 410 U.S. 179, 196-97 (1973).

⁵²⁰ See REARDON, *supra* note 335, at 162.

⁵²¹ See *id.*

⁵²² See *id.*

⁵²³ See Speckhard, *supra* note 361, at 97.

⁵²⁴ See REARDON, *supra* note 335, at 161. Some British doctors have interpreted their health exceptions analogously. See CIBA FOUNDATION SYMPOSIUM, *supra* note 207, at 118.

⁵²⁵ This situation parallels an analogous threat posed in another constitutional context—religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), lawyers for the State of Oregon argued against allowing religious organizations unreviewable, individual discretion to determine when they could use illegal substances in their ceremonies:

[D]enominational practices, and indeed individual believers, . . . can and do change . . . the nature of their religious beliefs [and] of their doctrine If we exempt a practice, even if we are presently satisfied by its safety, control passes forever into private hands. [But] then we must ask, before we let that control pass in the form of a constitutional exemption . . . , what are the contours of that exemption and how will it be conferred. Because if the denominational or church controls weaken or change, there are still enshrined in the Bill of Rights a permanent exception for the practices of that religion.

MAY IT PLEASE THE COURT: THE FIRST AMENDMENT 90 (Peter Irons ed., 1997) (quoting the oral argument of David B. Frohnmayer, Attorney General of Oregon, before the Supreme Court

Even for abortion providers who attempt to diagnose mental health objectively, there is no agreed-upon means to predict the effect that a birth or abortion will have on a given patient's psyche.⁵²⁶ Moreover, the person asked to make the diagnosis is often not a psychiatrist or psychologist at all but rather is the same practitioner who will provide the abortion.⁵²⁷ Pregnant women need professionals trained to understand their situation if any type of reasoned diagnosis is to be expected.⁵²⁸ For these reasons, most psychiatrists agree that the task is impossible, and prefer either a limitless mental health exception or none at all.⁵²⁹

Making the task even more difficult is the vested interest that women have in exaggerating or faking psychiatric illness in order to obtain an abortion.⁵³⁰ Studies have found that women in the pre-*Roe* era regularly faked suicidal tendencies and other psychiatric symptoms for this purpose,⁵³¹ even though evidence suggests that pregnancy dramatically lowers the overall suicide rate.⁵³² Women were often coached by others in how to fake these symptoms.⁵³³

Despite this dilemma, a mental health exception gives psychiatrists almost limitless discretion to determine the medical need for an abortion.⁵³⁴ Because the woman is not a "patient" seeking holistic counseling, but is visiting the psychiatrist only to achieve a very specific goal, the doctor-patient relationship is badly distorted.⁵³⁵ Under these circumstances, it is nearly impossible for a counselor to be objective.⁵³⁶ Whether a psychiatrist interprets a woman's apparent symptoms as genuine or dishonest will necessarily be shaped by that person's personal convictions on abortion.⁵³⁷ Indeed, pre-*Roe* studies found exactly this result.⁵³⁸

in *Smith*). Similarly, judicial delegation of the task of defining "health" to abortion providers leaves states and courts powerless to prevent the subversion of the compelling state interest in viable fetal life. Regardless of one's opinion of the ultimate holding in *Smith*, the Court agreed with this logic then and should apply it to abortion jurisprudence as well.

⁵²⁶ See Schwartz, *supra* note 377, at 326.

⁵²⁷ See *Doe v. Rampton*, 366 F. Supp. 189, 203 (D. Utah 1973) (three-judge panel) (Anderson, J., dissenting in part).

⁵²⁸ See Blumenthal, *supra* note 379, at 24, 34; Sjögren, *supra* note 334, at 823.

⁵²⁹ See SARVIS, *supra* note 374, at 118.

⁵³⁰ See RODMAN ET AL., *supra* note 379, at 74.

⁵³¹ See SARVIS, *supra* note 374, at 115.

⁵³² See REARDON, *supra* note 335, at 168.

⁵³³ See SARVIS, *supra* note 374, at 118.

⁵³⁴ See RODMAN ET AL., *supra* note 379, at 73; SARVIS, *supra* note 374, at 114; Scott, *supra* note 432, at 118.

⁵³⁵ See Stotland, *supra* note 449, at 2.

⁵³⁶ See SARVIS, *supra* note 374, at 114.

⁵³⁷ See *id.* at 116.

⁵³⁸ See Schwartz, *supra* note 377, at 327.

Courts and legislatures have attempted to guide practitioners' discretion somewhat by articulating various standards for determining when mental health is threatened by pregnancy. These rules, however, are as subject to interpretation and bending as the status quo.

2. A Mental Health Exception Is Impossible to Standardize

Even the earliest abortion laws attempted to narrow the range of their mental health exceptions. Both the Uniform Abortion Act⁵³⁹ and the Model Penal Code⁵⁴⁰ promulgated by the American Law Institute allowed abortions only when the woman's mental health would have been "gravely impaired." As discussed earlier, however, it was under these laws that abortion providers like Alan Guttmacher were able to provide virtual abortion on demand in the name of safeguarding health.

Courts have not fared better in articulating standards. In 1980, the Eastern District of Louisiana struck an exception for "permanent impairment of health," on the grounds that a woman whose pregnancy was severely distressing, such as a rape or incest victim, would be unable to prove that her short-term distress would be permanent.⁵⁴¹ Nonetheless, subsequent decisions in Utah⁵⁴² and Indiana⁵⁴³ have construed mental health exceptions to only cover permanent disturbances. The Sixth Circuit followed suit in *Voinovich*, deciding that the mental health exception it would require of Ohio was limited to severe and irreversible psychological damage.⁵⁴⁴ Another version, the "severe and irreversible impairment of a major bodily function" language of *Newman*, was found to be too restrictive by the district court,⁵⁴⁵ although substantially identical language was upheld in *Casey* and modeled by the Ohio statute, as seen above. Finally, perhaps the most broadly worded exception was the Clinton-backed Hoyer Amendment to the Partial Birth Abortion Act, which would have permitted abortions "to avert serious adverse health consequences."⁵⁴⁶

What any of these phrases mean, however, is still an open question. Congressman Hoyer, for what it was worth, explained his ex-

⁵³⁹ See *Roe v. Wade*, 410 U.S. 113, 146 (1973).

⁵⁴⁰ See *Doe v. Bolton*, 410 U.S. 179, 205 (1973) (app. B).

⁵⁴¹ See *Margaret S. v. Edwards*, 488 F. Supp. 181, 196 (E.D. La. 1980).

⁵⁴² See *Doe v. Rampton*, 366 F. Supp. 189, 202 (D. Utah 1973) (Anderson, J., dissenting in part).

⁵⁴³ See *A Woman's Choice—East Side Women's Clinic, Inc. v. Newman*, 671 N.E.2d 104, 111 (Ind. 1996).

⁵⁴⁴ See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209-10 (6th Cir. 1997).

⁵⁴⁵ See *A Woman's Choice—East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1467 (S.D. Ind. 1995).

⁵⁴⁶ Rep. Henry Hyde, "Psychological Trauma," CONG. PRESS RELEASES, July 22, 1998, available in NEXIS, News Library, CURNWS File.

ception as not allowing abortions for “a hangnail [or] a headache” but for “psychological trauma.”⁵⁴⁷ NARAL has complained that any “objective” standard would chill legitimate diagnoses and impede professional judgment.⁵⁴⁸ As seen above, though, the Supreme Court indicated in *Casey* that the “bodily function” language could be construed to mean only physical health, and that this construction was acceptable.⁵⁴⁹ In the end, defining health to mean only physical health in the post-viability context may be the only practicable way to standardize abortion practice and safeguard the state interest in fetal health.

V. CONCLUSION

This Comment has examined both the legal and policy arguments for and against construing the “life or health” exception to include a woman’s mental health. Although the Supreme Court has never explicitly required such an exception, it has not contradicted the assumption of many federal and state courts that such an exception is constitutionally required. With the Court’s reordering of its abortion jurisprudence in its 1993 *Casey* decision, and its reaffirmation of the state’s compelling interest in children who are physically capable of enjoying a meaningful life outside of their mothers’ wombs, however, the time has come for the Court to dispel the notion that health must, as a constitutional matter, mean whatever an individual abortion provider or patient wants it to mean in any given circumstance.

While medical researchers will never come to consensus on the possible psychological motivations for—and side-effects from—abortion, courts and policymakers should take heed of the information that is available. Despite their fundamental differences in political and personal views of abortion, virtually all researchers to date have agreed that the same symptoms that could cause a woman to suffer psychologically if denied an abortion make her vulnerable to negative emotional effects after obtaining an abortion. Put another way, women who are psychologically vulnerable are at risk no matter how they end their pregnancies. Mental health, then, can virtually never be a reason to choose abortion over birth. By definition, women obtaining post-viability abortions are always among the groups at highest risk for these complications, which include those receiving late-

⁵⁴⁷ *Id.*

⁵⁴⁸ See Appellees’ Brief, *supra* note 205, at 4.

⁵⁴⁹ Likewise, the American Medical Association (AMA) gave its support to the federal Partial Birth Abortion Ban Act because it had an exception to protect the woman’s life. The AMA never mentioned health, let alone mental health. See NRLC, *AMA Letter* (last modified May 19, 1997) <<http://www.nrlc.org/amaletter.html>> (reproducing a letter from the AMA).

term abortions, the young, and those who are coerced into aborting. The very idea of negative side-effects from abortion, moreover, is a subject that seems to have been too politically taboo for serious political discussion for too long.⁵⁵⁰ Meanwhile, women suffer the very tangible consequences.

Finally, as *Casey* suggests, courts and policymakers have a constitutional duty to take seriously our common interest in viable fetal life. Regardless of where personal feelings and convictions may lie on the right to abort in early pregnancy, society as a whole would do well to conceptualize the termination of pregnancy after viability and the destruction of a viable fetus as the two separate acts that they are. The "state's" interest in a life that is capable of existing apart from its mother is judicial shorthand for the societal decision to avoid the unnecessary destruction of life, and our own natural, moral impulses to prefer life over non-life when the choice no longer poses a substantial threat to the life-giver.

The mental well-being of any human being is an intimate element of personhood, and its protection is an important and worthy goal. But in our rush to assert individual, legal rights in the name of protecting that inner peace for one person, we as a society must not be willing to extinguish the possibility of another human ever having the chance to know what it is to be alive. We must not, especially without knowing with certainty that what we are doing will achieve its purpose and is worth the price we will pay for it. In the case of mental health exceptions in post-viability abortion bans, we can not be certain, and the price is a high one indeed. One judge on the Sixth Circuit and three Justices of the Supreme Court have had the courage to make that statement. Courts and lawmakers around the country should follow their example.

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⁵⁵⁰ See Speckhard, *supra* note 361, at 96.

[†] J.D., Case Western Reserve University School of Law, May 1999. This Comment is dedicated to my mother, Suzanne R. Wassom, who made the choice and sacrifice to bear me and raise me up in the way I should go. My sincere thanks to Mike Tucci and Johanna Fabrizio who took the time to edit and comment on this work; Prof. Johnathan Entin, who suggested the line of research that formed the basis for this Comment and who has provided helpful editorial guidance; and to the several attorneys who made available to me their briefs for the parties and amici in the *Voinovich* case. Additionally, I would like to acknowledge the moral support and encouragement of my colleagues, including but not limited to Matt Salerno, Jason Hollander, Lorne Novick, Chris LaVigne, Tina Luzader, Jim Barnett and Dick Currey. Lastly, I give praise to God; my richly blessed law school experience demonstrates that "I can do all things through Christ which strengtheneth me." *Phillipians 4:13*.

