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Slouching toward Barbarism--The Quest to Limit Partial Birth Abortion after Stenberg v. Carhart

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SLOUCHING TOWARD BARBARISM? THE QUEST TO LIMIT PARTIAL BIRTH ABORTION AFTER *STENBERG V. CARHART*

I. INTRODUCTION

For the last year that reliable statistics exist, approximately 1,221,585 abortions were performed in the United States.[1] Of those abortions, the National Coalition of Abortion Providers estimates that 3000-5000 were partial birth abortions.[2] The debate over the legal and moral status of abortion has always been contentious, so much so that it has been called the second American Civil War.[3] Partial birth abortion has only served to make an already contentious debate incendiary. Due in large part to public outcry and revulsion over partial birth abortion, thirty state legislatures had banned the procedure by June of 2000.[4] However, by that time, eighteen of those state statutes were either partially or permanently enjoined or not enforced by state law enforcement officials.[5]

On June 28, 2000, the United States Supreme Court again ventured into the issue of abortion rights when it decided the case of *Stenberg v. Carhart*.[6] The central issue before the Court was whether a Nebraska statute,[7] that made criminal

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1 *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE – UNITED STATES 1 (1996).

2 *See* Jill R. Radloff, *Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1588 n.22 (1999).

3 *See The Battle over Abortion: A Question of "Life" or "Choice,"* TIME, Mar. 9, 1998 at 165. Former Surgeon General C. Everett Koop likened the current state of the abortion debate to "the precursors of a civil war, if not a civil war itself." He also stated that "nothing like it has separated our society since the days of slavery."

4 Those states are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin; *See* NARAL, WHO DECIDES? A STATE BY STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 238 (2000). Many of the preceding state legislatures passed these statutes by overwhelming majorities, containing pro-life and pro-choice legislators alike. For example, the Nebraska statute passed its unicameral legislature with only one dissenting vote. Nebraska Legislative Journal, 95th Leg., 1st Sess. 2609 (1997).

5 Those states were Alaska, Arizona, Arkansas, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, Rhode Island, West Virginia, and Wisconsin. *See* NARAL, *supra* note 4, at 238.

6 120 S.Ct. 2597 (2000).

7 The Nebraska statute at issue stated, "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." NEB. REV. STAT. § 28-328(1) (1999). The statute defined partial birth abortion as, "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* § 28-326(9) (1999). The statute further defined "partially delivers vaginally a living unborn child before killing the unborn child" as, "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child. *Id.* § 28-328(4) (1999).

the performance of partial birth abortions,[8] violated the U.S. Constitution.[9] Relying heavily on the rationale of *Planned Parenthood. v. Casey*,[10] and *Roe v. Wade*,[11] the Court held the statute unconstitutional on two bases. First, the Court invalidated the Nebraska statute because it lacked any exception for the preservation of the health of the mother.[12] Secondly, the Court held that the statute imposed an undue burden on the woman's ability to choose a dilation and extraction abortion,[13] "thereby unduly burdening the right to choose abortion itself."[14]

Consequently, the debate between pro-choice and pro-life factions continues. The pro-choice movement adamantly defends partial birth abortion and insists that *any* statutory ban against the procedure is unconstitutional.[15] Further, many in the pro-choice camp speak of a Republican/Christian Coalition conspiracy to impose their traditional ideals on women by banning all forms of abortion.[16] While, on the other end of the spectrum, the pro-life side of the debate views partial birth abortion as nothing more than infanticide.[17] No matter what the individual

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8 Abortion rights advocates are quick to point out that partial birth abortion is not a recognized medical term. *See* Planned Parenthood v. Woods, 982 F. Supp. 1369, 1376 (D. Ariz. 1997) (partial birth abortion is not a medical term recognized in obstetrics or gynecology); Evans v. Kelley, 977 F. Supp. 1283, 1297 (E.D. Mich. 1997) (stating all physicians that testified agreed that partial birth abortion is not a medical term); Ann MacLean Massie, *So-Called "Partial-Birth Abortion Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 313 (1998) (the term partial birth abortion does not exist in medical terminology or literature); Radloff, *supra* note 2, at 1558 (stating that partial birth abortion is a term used in conjunction with legislative efforts to ban the procedure); *But see* Richmond Med. Ctr. For Women v. Gilmore, 144 F.3d 326, 327 (4th Cir. 1998) (finding that both the American Medical Association and the American College of Obstetricians and Gynecologists recognize the term partial birth abortion); *Partial Birth Abortion Ban: Hearing on HR 1833 Before the Senate Judiciary Committee*, 104th Cong. 52-53 (1995) [hereafter HR 1833 Hearing] (letter from Dr. Watson A. Bowes, Jr. to Sen. Orrin Hatch). In this letter, a professor from the University of North Carolina Medical School wrote that, "[t]he term 'partial birth abortion' is accurate as applied to the procedure . . . [f]rom th[e] description, there is nothing misleading about describing this procedure as a 'partial birth abortion' because in most cases the fetus is partially born while alive and then dies as a direct result of the procedure. . . ." *Id.*

9 *See Stenberg*, 120 S.Ct. at 2608.

10 505 U.S. 833 (1992).

11 410 U.S. 113 (1973).

12 *See Stenberg*, 120 S.Ct. at 2609.

13 A more thorough description of this procedure may be found in Part II *infra*.

14 *Stenberg*, 120 S.Ct. at 2609.

15 A more detailed discussion of the argument over the constitutionality of partial birth abortion appears in Part VI *infra*.

16 *See* DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST 119 (1994) (claiming that the anti-abortion movement is a movement of cultural fundamentalism, seeking to re-establish 'traditional' male-female relationships, particularly the dependence of females on males); Rebecca L. Andrews, *The Unconstitutionality of State Legislation Banning "Partial-Birth" Abortion*, 8 B.U. PUB. INT. L.J. 521, 523 (1999) (the author claims that the Religious Right and the Republican party "intend to rebuild the American family and 'family values' by reestablishing traditional gender roles and relegating women to the home, barefoot and pregnant).

17 In his dissenting opinion, Justice Thomas stated, "Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from

reader's feelings are, there can be no doubt that the debate over partial birth abortion is far from over.

This case comment proceeds in several parts. Among the topics discussed are a brief discussion of relevant abortion procedures, the history of abortion, and the facts and decision of *Stenberg*. This commentary will end with proposed legislation to limit the use of partial birth abortion using *Stenberg*, other partial birth abortion statutes, and other authors' commentaries as a guide.

II. THE ABORTION PROCEDURES

In order to place the *Stenberg* decision into proper perspective, the reader must be familiar with the two forms of abortion at issue in the case. Currently, the medical community recognizes six types of abortion procedures. Those procedures are suction curettage,[18] induction,[19] hysterotomy,[20] hysterectomy,[21] dilation and evacuation (D & E), and dilation and extraction (D & X).

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infanticide . . . ." *Stenberg*, 120 S.Ct. at 2636 (Thomas, J. dissenting); in a New York Times article, Representative Christopher H. Smith (R-NJ) called the number of abortions in the U.S. "a holocaust of staggering proportions." Alison Mitchell, *Both Sides Rally to Mark Abortion Ruling*, N.Y. TIMES, Jan. 23, 1998, at A19; *Evans*, 977 F. Supp. at 1319 n.38 (even some abortion practitioners believe partial birth abortion is a "particularly hideous" procedure); *HR 1833 Hearing* at 116 (Prepared Statement of Helen M. Alvare on Behalf of the National Conference of Catholic Bishops Secretariat for Pro-Life Activities) Alvare stated, "No reasonable person can disagree, once he or she has read a description . . . of the partial birth abortion method: it is one-fifth abortion and four-fifths infanticide. It kills a child when 80 percent of his or her body is already outside the womb . . . That is a particularly heinous kind of killing because the victims are small, weak and defenseless as the very youngest infants are." *Id.*

18 This procedure is the most common first trimester abortion. *See* Radloff, *supra* note 2, at 1588, n.14. It is also synonymously known as suction aspiration. *See id.* It is commonly used from the sixth to the twelfth week of gestation, but may be used up to the fifteenth week. *See* Carhart v. Stenberg, 11 F. Supp. 1099, 1102 (D. Neb. 1998). The procedure involves the dilation of the cervix by passing a series of plastic or metal dilators, each slightly larger than the next, into the cervix. *See* Eva R. Rubin, THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY 64 (1994). When the cervix is dilated, a sterile tube attached to a vacuum aspirator is inserted into the cervix. *See id.* The aspirator, which works on the same principles as a vacuum cleaner, sucks the fetal tissue from the uterine wall. *See id.* The fragments are then drawn out and down the tube by means of the vacuum pump. *See id.* A curette may also be used to scrape the endometrium, thereby ensuring the removal of any remaining fetal tissue. *See Carhart*, 11 F. Supp. at 1102. The whole process usually takes about five to seven minutes. *See* Rubin at 64. Except for cramping of the uterus, the procedure is painless. *See id.*

19 This procedure is usually performed successfully in the second or third trimesters. *See* Radloff, *supra* note 2, at 1588, n. 17. Using this method, the woman is given a local anesthetic to her abdominal area. *See* Rubin, *supra* note 18, at 65. A long needle is then passed through the abdomen, and the physician draws out some of the amniotic fluid. *See id.* A solution of saline, urea, or prostaglandin is then injected into the amniotic cavity. *See* Carhart v. Stenberg, 972 F. Supp. 507, 516-517 (D. Neb. 1997). Over a period of several hours, contractions will begin causing the dilation of the cervix. *See id.* at 517-518. Generally, the contraction will be as strong as though the woman was experiencing natural childbirth. *See* Rubin, *supra* note 18, at 65. After eight to fifteen hours of labor, the fetus is expelled into a bedpan in the patient's bed. *See id.*

20 A hysterotomy is essentially a pre-term Cesarean section. *See* Radloff, *supra* note 2, at 1588 n.18.

21 A hysterectomy entails the surgical removal of the woman's uterus. *See id.* at 1588 n. 19.

A. The Dilation and Evacuation

The primary abortion procedure used in the second trimester, or through the thirteenth through fifteenth week of fetal gestation, is the dilation and evacuation, or D & E.[22] At this stage of gestation, the fetus is approximately six inches long.[23] The first step of this procedure requires the physician to dilate the woman's cervix with the use of laminaria, which are osmotic dilators that absorb natural moisture and expand to dilate the cervix.[24] The following day, the physician removes the laminaria.[25] After dilation, and because of the fetus' size, the physician removes the fetus by dismembering it piece by piece.[26] The physician grabs a fetal extremity, usually an arm or a leg, with forceps and pulls it through the cervix, tearing fetal parts from the body by means of traction.[27] The fetus usually dies from blood loss, either from the removal of its limbs or because the physician separated the fetus from the umbilical cord at the beginning of the procedure.[28]

When all of the fetus' limbs have been ripped from its body and only the head is left in utero, the physician must then collapse the skull to effect its removal.[29] Removing the fetal head from the uterus is typically the most difficult part of the D & E.[30] This is due, in part, to the fact that the fetal head is too large to pass through the cervical dilation.[31] As a result, physicians have developed different methods of decompressing the fetal head in order to effect its removal.[32] First, some physicians prefer to grasp the fetal head with a clamp, crush it, and remove it in pieces along with the skull contents. Second, the physician may choose to grasp the fetal head, introduce a suction cannula into the skull, and suction out the intracranial contents.[33] At the end of the procedure, only a tray full of pieces remains.[34]

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22 *See Carhart*, 11 F. Supp. 2d at 1103.

23 *See Stenberg*, 120 S.Ct. at 2638 n.3.

24 *See* Radloff, *supra* note 2, at 1588 n.15 (citing Planned Parenthood v. Miller, 30 F. Supp.2d 1157, 1161 (S.D. Iowa 1998).

25 *See id.*

26 *See id.* at 2637.

27 *See id.*

28 *See id.* at 2638.

29 *See id.* at 2638.

30 *See Voinovich*, 911 F. Supp. at 1064.

31 *See id.*

32 *See id.*

33 *See id.* at 1065.

34 *See Stenberg*, 120 S.Ct. at 2638.

B. The Dilation and Extraction

The dilation and extraction, or D & X, is the partial birth abortion procedure.[35] It is also known synonymously as the "intact D & X," [36] the "intact D & E," [37] and the "brain suction procedure." [38] The partial birth abortion procedure is usually performed in mid-second to late-second trimester pregnancies, and sometimes even into the third trimester.[39] The procedure is generally performed on fetuses ranging in development from fifteen to twenty-six weeks gestation.[40] However, the procedure has been performed on fetuses up to the ninth month of pregnancy.[41]

One of the first, and most often ignored, aspects of the procedure is that it requires three days to accomplish.[42] First, the physician dilates the woman's cervix, usually over a two-day period.[43] Over this two-day period, up to twenty-five dilators are forced into the woman's cervix at one time.[44] After the cervix is sufficiently dilated, the physician uses an ultrasound to determine the location of

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35 As stated earlier in note 8 *supra*, there is no consensus in the legal or medical community as to the proper term to be applied to the D & X procedure. One of the physicians who developed the procedure, Dr. Martin Haskell, referred to this procedure as "dilation and extraction." *See HR 1833 Hearing* at 27-34 (letter of Dr. Haskell introducing his procedure to the National Abortion Federation Risk Management Seminar, September 13, 1992). The American College of Obstetricians and Gynecologists refers to the partial birth abortion procedure as "intact dilation and extraction." Statement of Policy on Dilation and Extraction (American College of Obstetricians and Gynecologists), Jan 12, 1997; According to the American College of Gynecologists, the partial birth abortion procedure contains four elements: 1) deliberate dilation of the cervix over a sequence of days, 2) instrumental conversion of the fetus to footling breech, 3) breech extraction of the body excepting the head, and 4) partial evacuation of the intracranial contents of a living fetus to affect vaginal delivery of a dead but otherwise intact fetus. *See* Nancy G. Romer, *The Medical Facts of Partial Birth Abortion*, 3-FALL NEXUS: J. OPINION 57, 58 (1998).

36 *See Carhart*, 11 F. Supp. 2d at 1105; *Gilmore*, 144 F.3d at 327 (stating that partial birth abortion is also known as intact D & X in the medical community).

37 *See, e.g.*, Planned Parenthood v. Doyle, 9 F. Supp. 2d 1033, 1036 (W.D. Wis. 1998) (noting that the intact D & E is synonymous with the D & X or intact D & X); Women's Medical Prof'l Corp. v. Voinovich, 130 F.3d 187, 198 (6th Cir. 1997) (noting that the D & X procedure is also known as the intact D & E).

38 *See Voinovich*, 130 F.3d at 198.

39 *See Stenberg*, 120 S.Ct. at 2638-39.

40 *See Carhart*, 11 F. Supp. at 1105 (stating that the D & X procedure may be performed on fetuses over 15 weeks gestation); *HR 1833 Hearing* at 6 (in his letter introducing the procedure, Dr. Haskell said he "routinely performs this procedure on all patients 20 through 24 weeks [of gestation] with certain exceptions." He also performs the procedure "on selected patients 25 through 26 weeks [of gestation].").

41 *See* Curtis R. Cook, *Testimony of Dr. Curtis R. Cook at a Joint Hearing Before the U.S. Senate Judiciary Committee*, 14 ISSUES L. & MED. 65, 66 (1998) (hereafter Cook Testimony).

42 *See id.* at 67.

43 *See id.*

44 *See id.*

the fetus' extremities.[45]

Next, the physician grabs the fetus by the feet and pulls the legs, torso, shoulders, and arms out of the uterus and into the vaginal cavity.[46] The fetal skull lodges in the cervix and the fetus is oriented spine up.[47] At this point, the physician slides his fingers along the back of the fetus.[48] The physician then hooks the shoulders of the fetus with his index and ring fingers.[49] While maintaining tension, the physician takes a pair of blunt curved scissors and advances the tip along the fetal spine until he feels it make contact with the base of the fetal skull.[50] While the fetus is in this position, partially hanging outside the woman's body inches from completed birth, the physician uses a pair of scissors to tear the back of the fetal skull.[51] The physician then forces the scissors into the base of the fetal skull.[52] At this point, the fetal head is too large to complete the delivery.[53] Therefore, to complete the procedure, a vacuum tube is placed in the perforation and the fetus' brains are removed.[54] With the suction catheter still in place, the physician applies traction and removes the fetus completely from the patient.[55]

Interestingly, despite their support of the partial birth abortion procedure, pro-choice advocates bristle at the description of partial birth abortion in such frank, straightforward terms.[56] Supporters of partial birth abortion prefer the clinical description of the procedure, perhaps to make it sound sterile and medically

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45 *See Voinovich*, 130 F.3d at 199 (describing how the ultrasound is used to locate the fetal extremities).

46 *See id.*

47 *See HR 1833 Hearing* at 110 (Prepared Statement of Nancy G. Romer, M.D.).

48 *See id.*

49 *See id.*

50 *See id.*

51 *See Stenberg*, 120 S.Ct. at 2639; *see also Voinovich*, 130 F.3d at 199 (describing the use of scissors to perforate the fetal skull).

52 *See HR 1833 Hearing* at 110 (Prepared Statement of Nancy G. Romer, M.D.).

53 *See Stenberg*, 120 S.Ct. at 2639.

54 *See id.* (describing the use of a vacuum to remove the brain and intracranial contents of the fetus); *see also Voinovich*, 130 F.3d at 199 (describing the use of a suction cannula to decompress the fetal head).

55 *See HR 1833 Hearing* at 110 (Prepared Statement of Nancy G. Romer, M.D.).

56 *See, e.g.* Andrews, *supra* note 16, at 536 n.1 (claiming that partial birth abortion is an "inflammatory term" created by anti-choice activists to obscure the medical reality of the procedure). *But see Stenberg*, 120 S.Ct. at 2646 (Thomas, J., dissenting) (stating that the term D & X is ambiguous on its face and could encompass the D & E procedure, but partial birth abortion accurately describes the procedure); Planned Parenthood v. Doyle, 44 F. Supp .2d 975, 979 (W. D. Wis. 1999) (physicians have equated partial birth abortion with D & X); Little Rock Family Planning Services v. Jegley, 192 F.3d 794, 795 (8th Cir. 1999) (the court acknowledged that partial birth abortion is commonly known as intact dilation and extraction); *Gilmore*, 144 F.3d at 327 (stating that partial birth abortion is otherwise known as intact D & X in the medical community); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1028 (W. D. Ky. 1998) (stating that partial birth abortion is known as the D & X procedure in the medical community).

sanctioned.[57] But no matter how the partial birth abortion procedure is described, the emotional effects evoked after the performance of the procedure can be very profound. Powerful emotional responses may be had by women on whom the procedure was performed and on anyone witnessing the D & X procedure. An obstetric nurse who witnessed a D & X abortion on a 26 ½ week old fetus with Down Syndrome described her experience in this way:

> Dr. Haskell brought the ultrasound in and hooked it up so that he could see the baby. On the ultrasound screen, I could see the heart beat . . . [T]he baby's heartbeat was clearly visible on the ultrasound screen. Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then, he delivered the baby's body and the arms – everything but the head. The doctor kept the head right inside the uterus . . . The baby's little fingers were clasping and unclasping, and his little feet were kicking. The doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. I was completely unprepared for what I was seeing. I almost threw up as I watched Dr. Haskell doing these things. Next, Dr. Haskell delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw the baby in a

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57 *See HR 1833 Hearing* at 7-9 (letter of Dr. Haskell introducing his procedure to the National Abortion Federation Risk Management Seminar, September 13, 1992). Dr. Martin Haskell, credited as the inventor of the D & X procedure, described it in this way:

> The cervix is scrubbed, anesthetized and grasped with a tenaculum . . . The surgical assistant places an ultrasound probe on the patient's abdomen and scans the fetus . . . The surgeon introduces a large grasping forcep . . . through the vaginal and cervical canals into the corpus of the uterus . . . [H]e moves the tip of the instrument carefully toward the fetal lower extremities . . . [T]he surgeon . . . firmly and reliably grasps[s] a lower extremity. The surgeon applies firm traction to the instrument . . . and pulls the extremity into the vagina . . . With a lower extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. The skull lodges in the cervical os. Usually, there is not enough dilation for it to pass through. The fetus is oriented . . . spine up. At this point, the . . . surgeon slides the fingers . . . along the back of the fetus and hooks the shoulders of the fetus with the index and ring fingers. Next, he slides the tip of the middle finger along the spine towards the skull while applying traction to the shoulders and lower extremities . . . While maintaining this tension . . . the surgeon takes a pair of blunt curved Metzenbaum scissors . . . He carefully advances the tip . . . along the spine . . . until he feels it contact the base of the skull . . . The surgeon then forces the scissors into the base of the skull . . . [H]e spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient. The surgeon finally removes the placenta with forceps and scrapes the uterine walls . . . The procedure ends.

> pan, along with the placenta and the instruments he had just used. I saw the baby move in the pan. I asked another nurse, and she said it was just reflexes . . . The woman asked to see her baby, so they cleaned up the baby and put it in a blanket and handed it to her. She cried the whole time. She kept saying, "I am so sorry, please forgive me." I was crying too. I couldn't take it. That baby boy had the most perfect angelic face I think I have ever seen in my life.[58]

C. *Partial Birth Abortion: Safe and Necessary?*

Among the many areas of disagreement over partial birth abortion is whether or not the procedure is both safe and necessary. Predictably, both sides of the debate disagree over these two points. Many courts have concluded that the partial birth abortion procedure is the safest second term abortion procedure in many circumstances.[59] One reason courts have found the D & X procedure to be safer than other abortion procedures is because it is less invasive than the D & E procedure,[60] poses less risk to maternal health than induction procedures,[61] and poses less risk to maternal health than a hysterotomy or a hysterectomy.[62]

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58 *HR 1833 Hearing* at 18 (Statement of Brenda Pratt Shafer).

59 *See e.g. Stenberg*, 120 S.Ct. at 2613 (in commenting on the state of disagreement over the relative safety of the D & X procedure, the fact that those who believe the D & X is safer may turn out to be right); *see also Carhart*, 972 F.Supp. at 525. "The data suggests that the D & X procedure . . . is appreciably safer than all other forms of abortion during the relevant gestational time. Moreover . . . the D & X is 'an advance in technology' because removing the fetus intact there is 'less instrument manipulation' and of course . . . higher . . . safety." *Id.* at 525-526; *Evans*, 977 F.Supp. at 1296 (stating that six physicians agree that the D & X "reduce[s] the risks associated with conventional D & Es"); *Voinovich*, 911 F. Supp. at 1069 (reciting testimony of Dr. George Goler, who testified that he "views [the D & X procedure] as an improvement over the traditional D & E procedure"); *HR 1833 Hearing* at 248 (testimony of Dr. Warren Hern) (stating that an advantage of the intact D & E is that it eliminates the risk of embolism of cerebral tissue into the woman's bloodstream, which would be almost immediately fatal).

60 *See Voinovich*, 911 F. Supp. at 1070 (court states that the D & X does not require sharp instruments to be inserted into the uterus, and therefore doesn't pose the same risk of cervical or uterine lacerations as other procedures); Womens' Med. Prof'l Corp. v. Taft, 114 F. Supp. 2d 664, 688 (S.D. Ohio 2000) (court states that the D & X does not require sharp instruments to be inserted into the uterus, and therefore doesn't pose the same risk of cervical or uterine lacerations as other procedures, due to the removal of any need to crush the fetal skull and remove the pieces); Richmond Medical Center for Women v. Gilmore, 11 F.Supp. 2d 795, 809 (E.D. Va. 1998) (stating that it is safer for the physician to withdraw an intact fetus because to do so reduces the number of instruments in the uterus which lowers the possibility of uterine perforation, hemorrhaging and infection); *HR 1833 Hearing* at 248 (testimony of Dr. Warren Hern) (stating that one of the possible advantages of the intact D & E is the reduction of the risk of perforation of the uterus).

61 *See Voinovich*, 911 F. Supp. at 1070. (stating that injection of fluid to induce labor can cause additional health risks to the woman, and noted that inductions cannot be used for every woman); *Evans*, 977 F.Supp. at 1316 (quoting *Voinovich*, 911 F.Supp. at 1070) (induction requires the woman to go through labor and poses risks from the injection of fluid into the woman); *Taft*, 114 F.Supp.2d at 688 (injection of fluid into the mother poses additional health risks).

62 *See Voinovich*, 911 F. Supp. at 1070. (stating that hysterotomy and hysterectomy are major,

Many pro-choice commentators claim that partial birth abortion bans are unconstitutional because they do not serve to further the life and health of the mother, but serve only to ban a safer abortion method.[63] These commentators claim that partial birth abortion bans "compromise women's health and drastically limit physician's discretion to choose the most medically appropriate abortion method for their patients."[64]

However, despite the claims of partial birth abortion defenders, no scientific data exists to establish its relative safety.[65] In fact, just the opposite may be true. The American College of Gynecologists panel could identify no circumstance in which this procedure would be the only option to save the life or preserve the health of a woman.[66] The AMA recommended that third trimester abortions be performed only in cases of serious fetal anomalies incompatible with life.[67] In those cases, termination of the pregnancy could be accommodated without sacrifice of the fetus.[68]

When a mother experiences medical complications during the second trimester of her pregnancy, what is required to save her life and protect her health is not the death of her baby, but separation of the baby from the mother.[69] At stages of early viability, there is no danger in delivering the live baby and providing neonatal care for the infant.[70] Fetal survival at less than twenty-four weeks gestation is approximately 30%.[71] However, between twenty-four to twenty-six weeks, fetal

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traumatic surgeries); *Taft*, 114 F. Supp. 2d at 688 (stating hysterectomy and hysterotomy are major, traumatic surgeries).

63 *See* Andrews, *supra* note 16, at 533.

64 Nadine Strossen & Caitlin Borgmann, *The Carefully Orchestrated Campaign*, 3-FALL NEXUS: J. OPINION 3, 10 (1998).

65 *See* Romer, *supra* note 35, at 61; In recent D & X litigation, a West Virginia federal district judge recognized that the D & X procedure has not been the subject of comparative clinical trials comparing it with other abortion procedures. *See* Daniel v. Underwood, 102 F. Supp. 2d 680, 684-85 (S.D. W. Va. 2000). However, the court went on to state that "[t]he lack of controlled medical studies and the conflicting medical evidence do not . . . demonstrate that the 'partial-birth abortion' ban does not need a health exception." *Id.* at 685. Another district court admitted that no peer review journal has published any studies measuring the benefits of the D & X procedure. *See Voinovich*, 911 F. Supp. at 1068-1069. The court further stated that such studies would make the asserted benefits of the D & X procedure more credible. *See id.* at 1069. In the end, the court was convinced that the D & X procedure *"appear[ed]* to pose less of a risk to maternal health than . . . the D & E procedure . . . induction procedures . . . [and] hysterotomy or hysterectomy [procedures]." *Id.* at 1070 (emphasis added).

66 *See* Romer, *supra* note 35, at 58.

67 *See id.*

68 *See id.*

69 *See* Romer, *supra* note 35, at 60.

70 *See id.*; *see also Cook Testimony*, *supra* note 41, at 68 (stating that in the rare case of a severe maternal condition requiring delivery, partial birth abortion is not necessary and is not preferred; only separation from the mother is necessary).

71 *See* Romer, *supra* note 35, at 60.

survival jumps significantly to between 50% to 75%.[72]

In addition, other medical facts must be considered when deciding what abortion procedure to use. Defenders of partial birth abortion claim the procedure is used only in rare and unusual cases of severe fetal malformations and critically ill women.[73] However, Dr. Haskell admitted that "probably 20% are for genetic reasons, and the other 80% are purely elective in the 20-24 week range of fetal gestation."[74]

Further, the late Dr. James McMahon, a Los Angeles physician who performed thousands of partial birth abortions, admitted that he would perform the partial birth abortion procedure at all stages of fetal gestation for any reason.[75] McMahon detailed performing more than 2,000 partial birth abortions, only 9% of which he detailed as involving "maternal health indications," the most common of which was maternal depression.[76] The 56% he did for fetal indications were for non-lethal fetal flaws such as Down Syndrome and cleft palate.[77] Probably most striking, at least one federal court quoted Dr. Haskell as admitting that "the D & X is never medically necessary to save the life or preserve the health of a woman."[78]

Similarly, many physicians and authors maintain that the partial birth abortion procedure actually poses health risks to the mother. Perhaps the most significant risk in the partial birth abortion procedure is the breaching of the fetus, called the internal podalic position.[79] The technique of fetal rotation associated with the procedure are largely abandoned in modern obstetrics because of the unacceptable risks associated with it.[80] The breaching places the woman at greater risk for both immediate bleeding and delayed infection complications.[81] Also, women who have had a partial birth abortion often develop problems maintaining future pregnancies.[82] In fact, the only advantage of partial birth abortion, if one could consider it an advantage, is that it guarantees a dead baby by the time of

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72 *See id.*

73 *See id.*

74 *See id.*

75 *See id.*

76 *See* Romer, *supra* note 35, at 60.

77 *See* James Bopp, Jr. & Curtis R. Cook, *Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 11 (1998).

78 *Doyle*, 44 F. Supp. 2d at 980; *see also* Hope Clinic v. Ryan, 195 F.3d 857, 873 (7th Cir. 1999) (stating that the D & X is not essential to protect the health of any woman).

79 *See id.* at 61.

80 *See Cook Testimony*, *supra* note 41, at 67.

81 *See id.*

82 *See id.*; *see also* Romer, *supra* note 35, at 61 (stating that the dilation of the cervix has been identified as a risk factor in cervical incompetence, a factor for complications in future pregnancies).

delivery.[83]

Lastly, another issue that demands attention from partial birth abortion supporters and opponents alike is the issue of fetal pain. Fetal pain is always given as a reason by opponents of partial birth abortion for banning the procedure. Predictably, both sides of the partial birth abortion debate disagree over this issue.

There is general consensus, in the medical community, that from at least the twentieth week of fetal gestation and onward, fetal sensory organs throughout the entire body react to touch and relay nervous impulses to the brain.[84] However, this is where the general consensus ends. Debate exists whether the mere fact that a fetus reacts to stimuli is evidence that a fetus can feel pain.[85] Opponents of partial birth abortion maintain that fetuses are clearly and obviously able to feel pain.[86] However, other medical practitioners maintain that fetuses undergoing a partial birth abortion, or any other abortion, are unable to feel pain.[87] The result is that this debate remains unresolved until this day.

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83 *See Cook Testimony*, *supra* note 41, at 67.

84 *See* Radloff, *supra* note 2, at 1586.

85 *See id*; *see also HR 1833 Hearing* at 225 (letter of Norig Ellison, M. D.). Dr. Ellison states that "very little is known about fetal response and consciousness to pain prior to 24 to 25 weeks gestation," but that delivered infants are "exquisitely sensitive to pain stimulus." *Id.* at 249.

86 *See e.g. Cook Testimony*, *supra* note 41, at 68. In addressing the issue that a fetus does not feel pain at gestational ages, Cook stated that this was "ridiculous." *Id.* He further stated that "in the course of my practice . . . I have often observed babies five to six months gestation withdraw from needles and instruments, much like a pain response." *Id.* Cook also reported that an English physician recently reported "an increase in fetal pain response hormones during the course of these procedures at the same gestational ages." *Id.* Cook also reported "observ[ing] the standard grimaces and withdrawals of neonates born at six months gestation like any other pain response in a more mature infant." *Id.*; *see also* Bopp & Cook, *supra* note 77, at 34 (stating that the partial birth abortion procedure inflicts pain on the fetus, which remains alive during the cranial suction portion of the procedure); L. G. Almeda, *Michigan's Ban on Partial Birth Abortions: Balancing Competing Interests*, 74 U. DET. MERCY L. REV. 685, 706 (1997) (quoting Dr. Robert J. White, Partial Birth Abortion: Hearing Before the Subcomm. On the Constitution of the House Comm. On the Judiciary, 104th Cong., 1st Sess. 70 (June 15, 1995)) (stating that the partial birth abortion procedure is a "painful experience for the human fetus . . . at or beyond twenty weeks gestation . . . [because the fetal] nervous system is sufficiently advanced . . . [and] is able to perceive and appreciate noxious stimuli which is an intricate part of [the partial birth abortion] procedure." *Id.*

87 *See HR 1833 Hearing* at 248-49 (written statement of Dr. Warren Hern) Dr. Hern states that fetal neurological development well into the early part of the third trimester is insufficient for the fetus to experience pain. *Id.* Further, he stated that "an adequate neural substrate for experienced pain does not exist until about the seventh month of pregnancy (thirty weeks) . . . ." *Id.* at 249; *see also* Karen E. Walther, *Partial Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693, 723 (2000). The author states that courts have acknowledged that preventing unnecessary cruelty to the fetus is part of the state's interest in protecting fetal life, but medical evidence presented on the issue of fetal pain is inconclusive. *See id.* The author also points out that courts have found the D & X procedure is no more cruel than the D & E method because both often require the same procedures. *See id.* (citing *Voinovich*, 911 F. Supp. at 1074 n.29 (court stated that it "fails to see how the [D & X] is more cruel than the D & E procedure – which involves the dismemberment of the fetus and, sometimes, the crushing of its skull.")).

III. A BRIEF HISTORY OF ABORTION: ACCEPTED OR NOT?

A. *An Historical Perspective*

1. Abortion in Antiquity

The argument over the legitimacy of abortion existed long before the modern day. This is, because, it seems that for almost as long as there has been pregnancy, there has been abortion. In ancient Greece, for example, followers of the Stoic philosophy believed that abortion should be allowed up to the moment of birth.[88] The Pythagoreans, however, vehemently opposed this belief.[89] They believed that the soul entered the body at the moment of conception and therefore, to abort a fetus was to commit murder.[90] Early Roman law was silent on the subject of abortion.[91] In fact, abortion and infanticide was common in the Roman Empire, especially among the upper class.[92]

2. Abortion and English Common Law

In examining the roots of historical American views toward abortion, one must examine its roots in English common law.[93] In England, William Hawkins wrote one of the first compilations of criminal law in 1738.[94] In his discussion of murder, Hawkins considered whether or not abortion should be so classified. He wrote:

> And it was anciently holden, That the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: But at this Day, it is said to be a great [misdemeanor] only, and not Murder, unless the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some opinions to the contrary. And in this Respect also, the Common Law seems to be agreeable to the Mosaical, which as to the Purpose is thus expressed, If Men strive and hurt a Woman with Child, so that her Fruit depart from her, and yet no Mischief follows, he shall be surely punished, according to the Woman's Husband will lay upon him, and he

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88 *See* Rubin, *supra* note 18, at 3.

89 *See id.*

90 *See id.*

91 *See id.*

92 *See id.*

93 *See* Rubin, *supra* note 18, at 6.

94 *See id.*

> shall pay as the Judges determine; And if any Mischief follow, then thou shalt give Life for Life.[95]

One possible reading of the text of that passage would seem to show that, at least in England in 1762, abortion was illegal. Presumably, the statute would have applied to "abortions" that occurred before the event of the quickening. Also, it was only the result of the abortion *procedure* that decided the severity of the punishment. If the one performing the abortion procedure succeeded in aborting the fetus in the womb, then it was a misdemeanor punishable at law for which damages could be awarded. But if the baby was born alive because of the abortion procedure and subsequently died, it was considered murder to be punished by death.

Yet, many commentators insist that abortion was legal under common law.[96] They point out that English common law adopted the doctrine of "quickening," or the first noticeable movement of the fetus in the woman's womb.[97] Only an abortion performed after quickening could bring about punishment, but not one performed before.[98] After the bellwether event of the quickening, the woman incurred a moral duty to continue the pregnancy through until birth.[99] In line with this philosophy, England passed a statutory ban on abortions in 1803.[100] In that year, Parliament passed Lord Ellenborough's Act,[101] which was a comprehensive crime control statute. It made any attempt to induce an abortion after quickening a felony.[102]

3. Overview of Abortion in America

Abortion rights supporters frequently point out that abortion was not uncommon in early America.[103] Herbal abortifacients[104] were widely known, and cookbooks and women's diaries of the era contained recipes for medicines.[105] Studies indicate that midwives supplied abortifacient compounds to pregnant

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95 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 80 (1762) (reprinted in Rubin, *supra* note 18, at 6).

96 *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 8 (1997).

97 *See* Rubin, *supra* note 18, at 4; *see also* REAGAN, *supra* note 96, at 8.

98 *See* Rubin, *supra* note 18, at 4.

99 *See* REAGAN, *supra* note 96, at 9.

100 *See id.* at 295.

101 *See id.*

102 *See id.*

103 By "early America," the author means the period from 1607 to 1857.

104 An abortifacient is anything that can induce an abortion.

105 *See* Brief of 281 American Historians as Amici Curiae Supporting Appellees, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605) (reprinted in Rubin, *supra* note 18, at 11).

women.[106] Moreover, such events were described as routine and met with no particular disapproval.[107] Indeed, commentators claim that abortions induced by drugs, herbal potions and surgical techniques was common, but unregulated.[108]

Further, during this time in American history, commentators insist that abortion was a "woman's business" and "family business."[109] Not until 1821 was the first abortion law passed in America.[110] In that year, Connecticut brought abortion under the rubric of its criminal law.[111] This law, generally addressing murder by poisoning, made it a crime to give a woman a "poisonous substance" in order to induce a miscarriage.[112]

Additionally, abortion rights commentators claim that the trend toward criminalization of abortion began in the mid-1800s.[113] In 1857, the newly formed American Medical Association (AMA) began a crusade to eliminate the concept of quickening and make all abortions illegal at all stages of pregnancy.[114] Further, abortion rights authors claim that the AMA's motivation to criminalize abortions was its desire to gain professional power, control the practice of medicine, and squeeze out competition, especially from homeopaths and midwives.[115]

But abortion rights authors do not stop there. These authors also attribute sexism, racism, xenophobia and anti-Catholicism as motivations for criminalizing abortions in mid-nineteenth century America.[116] The motivation of these anti-abortion activists during this time was the fear that immigrant families, many of them Catholic and many non-white, would outproduce the native-born white "Yankees" and thus, usurp their political power.[117] Also, by criminalizing abortion, white, native-born legislators gained a weapon to use against women who had been agitating for political and personal reforms.[118] In the period from 1880 to 1930, abortions were criminalized in some form in all fifty states.[119] Starting in the 1950s,

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106 *See id.*

107 *See id.*

108 *See* Rubin, *supra* note 18, at 1.

109 *See id.*

110 *See id.*

111 *See id.*

112 *See id.*

113 *See generally* REAGAN, *supra* note 96, at 10.

114 *See id.* at 10, 13.

115 *See id.*

116 *See generally id.* at 11, 13.

117 *See id.*

118 *See* REAGAN, *supra* note 96, at 13.

119 *See id.* at 14.

however, physician-led movements to decriminalize abortion began.[120] Consequently, by the time of the *Roe v. Wade* decision, states differed in their treatment of abortion, but the majority still maintained some kind of restriction.[121]

4. Selected Modern Abortion Jurisprudence and Philosophy

However, many commentators disagree with the contention that the right to abortion is universally accepted, among them Chief Justice Rehnquist and Justice Scalia. In his dissent in *Roe v. Wade,* then-Justice Rehnquist stated that the decision to artificially divide the pregnancy into trimesters and outline the restrictions that a state may impose was nothing more than "judicial legislation" and did not reflect the intent of the drafters of the Fourteenth Amendment.[122] In fact, to reach its result, the majority had to find within the Fourteenth Amendment a right that was "apparently completely unknown to the drafters of the Amendment."[123]

Further, Justice Rehnquist stated that the mere fact that a majority of the states had some kind of restriction on abortion was a good indication that the right "[was] not so deeply rooted in the traditions of the conscience of our people as to be ranked fundamental."[124] Rehnquist further asserted that even though views on abortion were changing by that time, the fact that debate existed was evidence "that the right to an abortion is not so universally accepted as [Roe] would have us believe."[125]

Rehnquist also pointed out that there were thirty-six abortion restricting statutes in existence at the time of the adoption of the Fourteenth Amendment.[126] He concluded that there was obviously no question of the validity of any of these statutes at the time of the adopting of the Amendment.[127] Therefore, the only conclusion one could make was that the Framers of the Amendment did not mean

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120 *See id* at 15.

121 The states and jurisdictions could be broken down into five distinct groups based on their treatment of abortion. The states that allowed abortion for any reason were Alaska, D.C., Hawaii, New York, and Washington. The states that permitted abortion only to protect the woman's physical and mental health were Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. Mississippi permitted abortion to preserve the woman's life and in cases of rape. The states that permitted abortion only to preserve the life of the mother were Alabama, Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. States that prohibited all abortions were Louisiana, New Hampshire, and Pennsylvania. *See* MATTHEW E. WEINSTEIN, ABORTION RATES IN THE UNITED STATES 16 (1996).

122 *See Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

123 *Id.*

124 *Id.*

125 *Id.*

126 *See id.* at 174-75.

127 *See Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting).

to withdraw from the states the power to regulate abortion.[128]

Justice Scalia is no less adamant about the non-existence of the constitutional right to an abortion. In his dissenting opinion in *Casey,* he stated that "the States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so."[129] Further, Scalia does not agree that abortion is a right protected by the Constitution. He believes this for two main reasons. First, the Constitution says "absolutely nothing about it."[130] Second, Scalia, like Rehnquist, sees that the "longstanding traditions of American society have permitted [abortion] to be legally proscribed."[131] Similarly, Scalia asserts that the "right" of privacy found in the Constitution that made abortion a fundamental right does not exist.[132]

However, Scalia did not stop there. In poking his finger in the eye of the *Casey* majority by using its own words, he said the following:

> The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," it involves a "most intimate and personal choice," it is "central to personal dignity and autonomy," it "originates within the zone of conscience and belief," it is "too intimate and personal" for state interference, it reflects "intimate views" of a "deep, personal character," it involves "intimate relationships," and notions of "personal autonomy and bodily integrity," and it concerns a particularly "important decision." But it is obvious that anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court . . . has held are not entitled to Constitutional protection – because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestioned Constitutional tradition that they are proscribable.[133]

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128 *See id.*

129 *Casey,* 505 U.S. at 979 (Scalia, J., dissenting).

130 *Id.* at 980.

131 *Id.*

132 *See id.* at 981 (citing Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (stating that in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right . . . .")).

133 *Id.* at 983-984 (citations omitted).

5. The History of Partial Birth Abortion

The historical examination of this commentary now turns to partial birth abortion. To put it succinctly, it possesses a less than impressive historical pedigree. The procedure was largely unknown until September 1992. It was then that Dr. Martin Haskell[134] introduced his procedure in a letter to the National Abortion Risk Management Seminar.[135]

What is the result? The result depends on one's opinion of abortion. If one subscribes to the pro-choice ideology, then partial birth abortion is nothing more than a modern variation of a procedure that was accepted at common law, and was historically known and accepted by the Framers of the Constitution and the Fourteenth Amendment. However, if one subscribes to the Rehnquist/Scalia school of thought, partial birth abortion is a modern variation of a procedure unknown to the framers of the Constitution and Fourteenth Amendment, has a history of accepted proscription, and by the very fact that debate exists over it, the right to partial birth abortion is not so widely accepted as pro-choice advocates would want the public to believe.

B. Roe. v. Wade

With its 1974 decision in *Roe v. Wade*,[136] the U.S. Supreme Court forever changed the face of the abortion debate in America. The *Roe* Court determined that the right of privacy found throughout the U.S. Constitution was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[137] The Court found the Texas statute at issue in the case unconstitutional because it violated the Due Process clause of the Fourteenth Amendment protecting the right to privacy against state action.[138] Although not specifically mentioned in the Constitution, the Court reasoned that certain "zones of privacy" existed sufficiently in the Constitution to support the woman's right to choose.[139] Justice Blackmun found these roots of privacy in the First Amendment,[140] the Fourth and Fifth Amendments,[141] in the penumbras of the Bill of Rights,[142] the Ninth Amendment,[143]

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134 *See* Bopp & Cook, *supra* note 77, at 7 (as of 1998, Dr. Haskell was reported to have performed over 1,000 partial birth abortions).

135 *See supra* note 57.

136 410 U.S. 113 (1973).

137 *Id.* at 153.

138 *See id.* at 164.

139 *See id.* at 152.

140 *See id.* (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

141 *See Roe*, 410 U.S. at 152 (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Olmstead v. United States, 277 U.S. 438, 478 (1928)).

142 *See id.* (citing Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965)).

and in the first section of the Fourteenth Amendment.[144]

The *Roe* Court then went on to divide the pregnancy into trimesters.[145] In the first trimester, the woman, in consultation with her physician, had the right to terminate her pregnancy without interference from the state.[146] In the second trimester, the state could begin to regulate abortion, but only so far as it related to and preserved maternal health.[147] In the third trimester, however, the state could regulate or even proscribe abortion, except where necessary to preserve the life or health of the woman.[148]

However, the *Roe* Court did recognize that the state would eventually gain a compelling interest in protecting fetal life. As Justice Blackmun stated, the "compelling point" in the pregnancy that allowed the state to proscribe abortion was viability.[149] However, the Court deemed abortion a fundamental right with any further attempt to regulate it subject to strict scrutiny.[150]

C. *The Abortion on Demand Era*

For approximately fifteen years after *Roe*, abortion decisions handed down by the Supreme Court greatly enhanced the power and reach of *Roe*.[151] For example, in *Planned Parenthood v. Danforth*,[152] the Court struck down a state statute requiring spousal and parental consent before a woman could obtain an abortion.[153] The Court also struck down a statute imposing criminal penalties on physicians failing to protect the life and health of the fetus.[154] Lastly, the Court invalidated a state ban on the use of saline amniocentesis as an abortion technique.[155]

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143 *See id.* (citing *Griswold*, 381 U.S. at 486).

144 *See id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

145 *See id.* at 164-165.

146 *See Roe*, 410 U.S. at 163.

147 *See id.*

148 *See id.* at 163-64.

149 *See id.* at 163.

150 *See id.* at 154-56.

151 *See Stenberg*, 120 S.Ct. at 2635 (Thomas, J., dissenting) (Justice Thomas described the period between 1976 and 1989 as an "era of Court-mandated abortion on demand " and an "unrestrained imposition of the Court's own, extraconstitutional value preferences on the American people.").

152 428 U.S. 52 (1976).

153 *See id.* at 69, 74 (stating that the state could not delegate to a spouse or parent a veto power which the state itself is constitutionally prohibited from exercising during the woman's first trimester of pregnancy).

154 *See id.* at 83-84 (this section of the Missouri statute deemed that a physician could be charged with manslaughter for failure to exercise professional care to preserve fetal life and health).

155 *See id.* at 79.

Similarly, other post-*Roe* abortion decisions furthered the initial reach of *Roe v. Wade*. In *Bellotti v. Baird*,[156] the Supreme Court declared parental veto power over a minor's abortion unconstitutional without a judicial bypass option.[157] In *Colautti v. Franklin*,[158] the Court struck down a statute requiring a physician to be responsible for the health and potential life of a viable fetus as unconstitutionally vague.[159]

One of the most substantial abortion on demand cases was *City of Akron v. Akron Center for Reproductive Health*.[160] In *Akron*, the Court struck down a statute requiring all second trimester abortion to be performed in hospitals.[161] But the Court in *Akron* did not stop there. It also invalidated parental notification provisions for minors,[162] invalidated informed consent guidelines for physicians,[163] invalidated state requirement of 24-hour waiting periods before abortions,[164] and invalidated guidelines requiring humane and sanitary disposal of fetal remains as unconstitutionally vague.[165] Decided along with *Akron* was *Planned Parenthood Ass'n v. Ashcroft*.[166] In *Ashcroft*, the Court invalidated a Missouri statutory requirement that all abortions after twelve weeks of gestation be performed in hospitals.[167]

The Supreme Court dealt another victory to those favoring abortion on demand in *Thornburgh v. American College of Obstetricians and Gynecologists*.[168] In *Thornburgh*, the Court overturned Pennsylvania statutes requiring extensive lectures on fetal viability and risks of abortion procedures,[169] "intrusive" record keeping provisions,[170] a mandated state waiting period before abortions,[171] the presence of a second physician when abortions were performed without a medical-

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156 443 U.S. 622 (1979).

157 *See id.* at 643-44.

158 439 U.S. 379 (1979).

159 *See id.* at 390-92, 397.

160 462 U.S. 416 (1983).

161 *See id.* at 431-33.

162 *See id.* at 439-40.

163 *See id.* at 445.

164 *See id.* at 449-50.

165 *See Akron*, 462 U.S. at 451.

166 462 U.S. 476 (1983).

167 *See id.* at 481-82.

168 476 U.S. 747 (1986).

169 *See id.* at 764.

170 *See id.* at 765-68.

171 *See id.* at 760-62.

emergency exception,[172] and a statute outlining the physician's duty to protect the fetus.[173]

D. *Putting the Brakes on Abortion on Demand*

Perhaps due to a conservative turn in the Supreme Court's ideology, more and more state restrictions on abortions began to be upheld by the end of the 1980s. The first case to put the brakes on abortion on demand was *Webster v. Reproductive Health Services*.[174] This case dealt with an amended Missouri statute regarding unborn children and abortions.[175] Here, the Court stated that private physicians and their patients do not have a constitutional right to access public hospitals for abortions.[176] The Court also upheld guidelines that required physicians to perform viability tests on fetuses after the twentieth week of gestation.[177] Further, the Court upheld a ban that prohibited the use of state funds to counsel women regarding medically unnecessary abortions.[178] But probably most interestingly, the majority did not offer an opinion of the preamble of the Missouri law that found "life . . . begins at conception."[179] The Court found that these words did not regulate abortion or favor childbirth over abortion.[180]

However, arguably the most important post-*Roe* abortion decision was *Casey*.[181] For the first time, the Court was faced with the opportunity to overturn *Roe*. However, the court stressed the importance of honoring stare decisis in reaffirming the essential holding of *Roe*.[182] The Court did, however, announce a new standard for reviewing state regulation of abortion. The Court abandoned the strict scrutiny analysis, replacing it with an "undue burden" analysis.[183] In articulating the new analysis, the Court admitted that not every abortion regulation was necessarily unfounded.[184] Under the undue burden analysis, an abortion

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172 *See id.* at 769-71.

173 *See Thornburgh*, 476 U.S. at 768-69.

174 492 U.S. 490 (1989).

175 *See id.* at 500.

176 *See id.* at 510.

177 *See id.* at 515-20.

178 *See id.* at 511-13.

179 *Webster*, 492 U.S. at 504-07.

180 *See id.* at 506.

181 505 U.S. 833 (1992).

182 *See id.* at 854-55. Justice O'Connor stated, "[W]hen this Court reexamines a prior holding . . . [w]e may ask whether the rule has proven to be intolerable simply in defying practical workability . . . . Although *Roe* has engendered opposition, it has in no sense proven unworkable."

183 *See id.* at 874.

184 *See* id. at 876; Allison D. Gough, *Banning Partial Birth Abortion: Drafting a Constitutionally*

regulating statute is invalid only if its purpose or effect is to place a substantial obstacle in the path of the woman seeking the abortion before fetal viability.[185]

Further, the court jettisoned the rigid trimester framework announced in *Roe* and made viability the bellwether event for abortion regulation.[186] Therefore, in applying the undue burden analysis, the issue becomes whether the particular abortion regulation will operate as a substantial obstacle to a woman's decision to have an abortion in the majority of the cases in which the regulation is relevant.[187] On the other hand, abortion regulations that do no more than create a "structural mechanism" for which the State may express its respect for life are permissible if they do not impose a substantial obstacle.[188]

The Court upheld a number of abortion restrictions in the Pennsylvania statute at issue in *Casey*. First, it upheld a lengthy informed consent provision.[189] Next, the Court upheld a 24-hour waiting period before obtaining an abortion, overruling that portion of *Akron* that forbade waiting periods.[190] The Court also upheld the state mandated record keeping and reporting requirements.[191]

However, the Court invalidated a number of provisions of the statute. First, it invalidated a portion of the otherwise acceptable reporting statute that required reporting of the excuse of a married woman for not informing her husband of the abortion.[192] Lastly, the Court invalidated the spousal notification section of the statute as a substantial burden that would be tantamount to a veto by the husband over the woman's choice to have an abortion.[193]

IV. *STENBERG V. CARHART*: A PROCEDURAL HISTORY

On June 3, 1997, the Nebraska state legislature passed Legislative Bill 23 (LB 23) which prohibited partial birth abortions in Nebraska.[194] The bill, however, included an exception that the procedure could be performed if the life of the mother was "endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the

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Acceptable Statute, 24 U. DAYTON L. REV. 187, 193 (1998).

185 *See Casey*, 505 U.S. at 878.

186 *See id.* at 873. Justice O'Connor stated that the trimester framework "misconceive[d] the nature of the woman's interest; and in practice it undervalue[d] the [s]tate's interest in potential life.

187 *See id.*

188 *See id.* at 877.

189 *See id.* at 881-85.

190 *See id.* at 885.

191 *See Casey*, 505 U.S. at 900-01.

192 *See id.* at 901.

193 *See id.* at 897-98.

194 *See* Carhart v. Stenberg, 972 F. Supp. 507, 510 (D. Neb. 1997).

pregnancy itself."[195] On June 9, 1997, Nebraska's governor signed LB 23 into law.[196]

A. *The District Court's Decision*

Shortly after the passage of LB 23 into law, Dr. LeRoy Carhart filed a complaint in the federal district court of Nebraska challenging the constitutionality of the statute.[197] In response, the district court granted a temporary restraining order, followed by a preliminary injunction.[198] Dr. Carhart challenged the constitutionality of the Nebraska statute on two grounds. First, he argued that the statute placed an undue burden on himself and his patients in two ways.[199]

Carhart's first claim was that the D & X procedure is, in certain circumstances, the safest abortion procedure for some women.[200] Therefore, according to Carhart, banning the D & X procedure placed an undue burden on women seeking an abortion.[201] Further, Carhart claimed that since the Nebraska statute prohibited vaginally delivering a "substantial portion" of the fetus, it also applied to the D & E procedure.[202] Because the D & E procedure is the most widely used abortion procedure used in second trimester abortions, the ban also placed an undue burden on women seeking abortions.[203]

The second constitutional argument Carhart offered in attacking the Nebraska statute was that it was unconstitutionally vague.[204] The statute was vague, he argued, because it was unclear what "substantial portion" meant.[205] Subsequently, the District Court for the District of Nebraska initially enjoined the Nebraska statute from enforcement.[206] Then, at trial on the merits, the district court found the Nebraska statute unconstitutional as applied to Dr. Carhart.[207] The court

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195 *Id.*; *see also* NEB. REV. STAT. § 28-328(1) (1999).

196 *See* Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999).

197 *See id.*

198 *See id.*

199 *See id.* at 1146.

200 *See id.* at 1146.

201 *See Carhart*, 192 F.3d at 1146.

202 *See id.*

203 *See id.*

204 *See id.*

205 *See id.*

206 *See Carhart*, 972 F. Supp. at 531.

207 A law may be challenged as unconstitutional in two ways, it may either be challenged "as applied" or "facially." *See id.* at 1119 (quoting Ada v. Guam Soc. of Obstetricians and Gynecologists, 506 U.S. 1011, 1012-13 (1992) (Scalia, J., dissenting). "If the law is judged unconstitutional on facts peculiar to the plaintiff, then the law is unconstitutional as applied." *Id.* (quoting *Ada* at 1013). But if the law is found unconstitutional

made extensive findings of fact, in which it determined that the D & X procedure is the safest procedure for women in some circumstances.[208]

First, the court found that the Nebraska law prohibited the performing of the D &X procedure on ten to twenty women per year, based on the number of procedures Carhart performed in 1996.[209] The court found that the ban had a "direct and immediate impact" upon Carhart and about 190 patients.[210] As a result, the court determined an undue burden existed on these women because the law had the effect of subjecting Carhart's patients to an appreciably greater risk of injury or death than would be the case if Carhart could perform the D & X procedure.[211]

However, the court found that the effects of the Nebraska partial birth abortion ban went far beyond the 10-20 patients per year that could be affected.[212] The court found that the Nebraska statute also prohibited the use of the D & E procedure.[213] As a result, the court reasoned that the Nebraska statute impacted every woman seeking an abortion from the 16th to the 20th week of gestation.[214] In other words, the court found that the Nebraska partial birth abortion ban prohibited Dr. Carhart from using the D & E procedure on up to 190 women per year.[215] As a result, the statute placed an undue burden in the path of a woman seeking an abortion.[216]

Lastly, the district court found the Nebraska statute void because of vagueness.[217] The court found that no one, including the state's expert witnesses, understood what the term "substantial portion" in the Nebraska partial birth abortion ban meant.[218]

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regardless of how it might be applied to a particular plaintiff, then the law is facially unconstitutional. *Id.* If a law is unconstitutional as applied, it cannot be enforced against the plaintiff or others similarly situated, but the law is otherwise generally enforceable. *See id.*

208 In the opinion, the district court stated that "Nebraska's ban . . . has the effect of subjecting his patients to an appreciably greater risk of injury or death than would be the case if these women could rely upon Carhart to do his variant of the banned procedure when medically advisable." *Carhart*, 972 F. Supp. at 524-25. Further, the court went on to say that "[t]he data suggests that the D & X procedure . . . is appreciably safer than all other forms of abortion during the relevant gestational time. *Id.* at 525.

209 *See Carhart*, 972 F. Supp. at 520.

210 *See id.*

211 *See Carhart*, 11 F. Supp. 2d at 1122-23.

212 *See id.* at 1127.

213 *See id.*

214 *See id.*

215 *See id.*

216 *See Carhart*, 11 F. Supp. 2d at 1127.

217 *See id.* at 1131-32.

218 *See id.* at 1131.

B. *The Circuit Court of Appeals' Decision*

Upon appeal, the Eighth Circuit Court of Appeals affirmed the Nebraska district court.[219] The Eighth Circuit reasoned that the term "substantial portion" used in the Nebraska statute encompassed the D & E procedure as well as the D & X procedure.[220] Although the court found that the Nebraska statute did not limit all second trimester abortions, it found the statute broad enough to prohibit the most common second trimester abortion procedure, which is the D & E. [221] In doing so, the Nebraska statute imposed an undue burden on a woman's right to choose an abortion.[222]

C. *The Supreme Court's Decision*

Upon review, the Supreme Court found that the language of the Nebraska statute did not distinguish between the D & X procedure and the D & E procedure.[223] In this portion of the decision, Justice Breyer, writing for the majority, focused on the "substantial portion" language of the statute. The majority reasoned that the D & E would often require the physician to pull a substantial portion of the fetus, such as an arm or a leg, into the vagina prior to the death of the fetus.[224] Further, the majority pointed out that the events leading up to the dismemberment of the fetus do not occur until after a portion of the fetus is pulled into the vagina.[225]

Moreover, the majority reasoned that both the D & X and D & E procedures can involve the introduction of a "substantial portion" of the fetus into the vagina.[226] Therefore, since the statute applied to both the D & E and D & X procedures, the Nebraska statute placed a substantial obstacle in the path of a woman seeking an abortion and therefore, placed an undue burden on the woman's right to terminate her pregnancy before viability.[227] However, two of the dissenters, Justices Thomas and Kennedy, strongly disagreed with the majority's construction of the Nebraska partial birth abortion ban.[228] Both Thomas and Kennedy undertook

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219 *See Carhart*, 192 F.3d at 1152.

220 *See id.* at 1150.

221 *See id.* at 1151.

222 *See id.*

223 *See Stenberg*, 120 S.Ct. at 2614.

224 *See id.* at 2613.

225 *See id.*

226 *See id.*

227 *See generally id.* (quoting *Casey*, 505 U. S. at 877).

228 *See generally Stenberg*, 120 S.Ct. at 2640-44 (Thomas, J., dissenting) (providing a narrowing construction of the Nebraska partial birth abortion ban to avoid constitutional infirmities); *see also id.* at 2631-34 (Kennedy, J., dissenting) (providing narrowing construction of Nebraska statute).

a construction of the Nebraska statute to show how it could be narrowly construed to avoid constitutional infirmities.[229]

The Court also invalidated the Nebraska statute on a second basis. The Court agreed with the findings of the district court that the D & X procedure obviates the health risks to the woman that undergoes the procedure.[230] The majority reasoned that the state could not subject a woman's health to significant risks by forcing her to use "[a] riskier method of abortion."[231] Therefore, since the D & X procedure is the safer method of late term abortion, the Nebraska statute required a health exception to pass Constitutional muster.[232]

V. THE WEST VIRGINIA STATUTE INVALIDATED

On July 7, 2000, the U.S. District Court for the Southern District of West Virginia invalidated the West Virginia partial birth abortion ban in the case of *Daniel v. Underwood*.[233] This ban was part of the Women's Access to Health Care Act, located in Chapter 33, Article 42 of the West Virginia Code.[234] Specifically, the court invalidated §§ 33-42-3(3)-(5) and 33-42-8.[235] The district court originally

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229 *See id.*

230 See *id.* at 2612

231 *See id.* at 2609.

232 *See id.* at 2612.

233 102 F. Supp. 2d 680 (S. D. W. Va. 2000).

234 *See* W. VA. CODE §§ 33-42-1 to 8 (1998).

235 The relevant portions of the West Virginia statute are as follows:

> (3) "Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery
> (4) "Physician performing a partial birth abortion" means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery in West Virginia, or any other individual who is legally authorized by the state to perform abortions: Provided, [t]hat any individual who is not a physician or not otherwise legally authorized by the state to perform abortions, but who nevertheless directly performs a partial-birth abortion, is subject to the provisions of this article.
> (5) "Vaginally delivers a living fetus before killing the fetus" means deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure that the physician or person delivering the living fetus knows will kill the fetus, and kills the fetus.

Id. § 33-42-3(3) to (5) (1998);

> (a) Any person, who knowingly performs a partial-birth abortion and thereby kills a human fetus is guilty of a felony and shall be fined not less than ten thousand dollars, nor more than fifty thousand dollars, or imprisoned not more than two years, or both fined and imprisoned. This section does not apply to a partial-birth abortion that is necessary to save the life of a mother when her life is endangered by a physical disorder, illness or injury.
> (b) A physician charged pursuant to this section may seek a hearing before the West Virginia board of medicine on the issue of whether the physician's act was necessary to

certified the question of the construction of the partial birth ban to the West Virginia Supreme Court of Appeals.[236] The West Virginia high court, however, returned the certified question to the district court without comment. As a result, the district court held off its decision whether or not to grant summary judgment until the U.S. Supreme Court had decided *Stenberg*.

A. Daniel v. Underwood: The facts of the case

In *Daniel*, the plaintiffs, represented by Dr. William D. Daniel, filed suit in the district court for the Southern District of West Virginia to enjoin enforcement of the state ban on partial birth abortion.[237] The plaintiffs alleged that the West Virginia ban violated "a woman's right to privacy" as set forth in *Roe v. Wade*.[238] The plaintiffs set forth four allegations. First, the plaintiffs alleged that the West Virginia statute "infringe[d] upon a woman's bodily integrity without any compelling or even legitimate state interest."[239] Second, the plaintiffs alleged that the statute imposed an "undue burden on a woman's right to choose an abortion."[240] Third, they alleged the statute forbade abortion methods that "could be the safest in certain circumstances."[241] Lastly, the plaintiffs alleged that the statute lacked a health or medical emergency exception.[242]

The plaintiffs included a motion for a temporary restraining order (TRO) and preliminary injunction with their complaint.[243] After a hearing, the court issued the TRO, temporarily restraining the enforcement of West Virginia Code sections 33-42-3(3) through (5) and 33-42-8.[244]

> save the life of a mother pursuant to the provisions of subsection (a) of this section. The findings of the board of medicine are admissible on this issue at the trial of the physician. Upon a motion by the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit the board of medicine hearing to take place.
> (c) No woman may be prosecuted under the provisions of this section for having a partial-birth abortion, nor may she be prosecuted for conspiring to violate the provisions of this section.

Id. § 33-42-8 (1998).

236 *See* W. VA. CODE § 55-1A-3 (1998). This is the section of the West Virginia Code that allows for the certification of questions by another court to the West Virginia Supreme Court of Appeals. However, the authority of the court to answer is discretionary. The statute states in relevant part that "[t]he supreme court of appeals of West Virginia *may* answer a question of law certified to it by a court of the United States . . . ." *Id.* (emphasis added).

237 *See Daniel*, 102 F. Supp. 2d at 681.

238 *See id.*

239 *See id.*

240 *See id.*

241 *See id.*

242 *See Daniel*, 102 F. Supp. 2d at 681.

243 *See id.*

244 *See id.*

B. The District Court's Decision

The district court found the West Virginia statue to be virtually identical to the Nebraska statute at issue in *Stenberg*.[245] In finding the two statutes virtually identical, the court found that the *Stenberg* decision guided and controlled the evaluation of the constitutionality of the West Virginia partial birth abortion ban.[246]

First, the court found that the D &X procedure "may have certain advantages over the D & E for some patients."[247] In fact, a reading of the court's decision could lead one to presume that it believed that the D & X is a superior procedure to the D & E.[248] Yet, almost immediately after touting the advantages of the D & X, the court admitted that the D & X "has not been the subject of comparative clinical trials and that there is no data comparing it to other procedures."[249] The court admitted this in response to sworn statements presented by the State describing risks of the D & X procedure.[250] However, the court seemed to brush this part of the state's argument aside.[251] The court determined that the possible benefits of the D & X procedure militate in favor of allowing the physician discretion to use the D & X if he or she feels it is proper.[252]

Moreover, the district court found the West Virginia ban on partial birth abortion unconstitutional in two areas. First of all, the court felt that since the West Virginia ban failed to contain a health exception, the statute violated the U. S. Constitution.[253] The court stated that "a statute that bans the D & X procedure creates a significant health risk [to women] and must therefore provide an

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245 *See id.* at 682.

246 *See id.* at 684.

247 *Daniel*, 102 F. Supp. 2d at 684.

248 In his opinion, Judge Goodwin stated the following:

> The D & X procedure may reduce the risk of uterine perforation because it can eliminate the insertion of sharp instruments into the uterus, and because the fetus passes through the birth canal intact. In a D & E, in which the physician disarticulates the fetus, sharp instruments and sharp fetal fragments may damage the woman's uterus. A D & E requires repeated passes with the suction curette and the forceps, which can perforate the uterine wall. Further, a D & X may result in less blood loss and less trauma for some patients and may take less operating time, thus reducing anesthesia needs.

Id. at 684.

249 *Id.* at 684-85.

250 Those risks include future cervical incompetence, risks of uterine perforation and cervical damage, and concluding that other abortion procedures were at least as safe. *See Daniel*, 102 F. Supp. at 685.

251 Judge Goodwin stated the following: "The lack of controlled medical studies and the conflicting medical evidence do not, however, demonstrate that the partial birth abortion ban does not need a health exception. Rather, they demonstrate uncertainty, a factor that signals the presence of risk, not its absence." *See id.*

252 The district court emphasized that physicians often differ in their assessment of health risks and appropriate treatment, and that there is judicial need to tolerate the differences in those opinions. *See id.*

253 *See Daniel*, 102 F. Supp. at 684.

exception for the preservation of the health of the woman."[254]

Second, the court found that the West Virginia statute was unconstitutionally vague.[255] It concluded that the statute prohibited the D & E procedure as well as the D &X procedure.[256] As such, the court stated that the physician risked prosecution, conviction, and imprisonment for performing not only partial birth abortions, but D & E abortions as well.[257] Since the court concluded that the West Virginia statute encompassed both the D & X and D & E procedures, a substantial burden on the woman's right to choose an abortion existed.[258] The court then permanently enjoined and restrained the State of West Virginia from enforcing its ban on partial birth abortion.[259]

VI. AFTER *STENBERG*: REDRAFTING A CONSTITUTIONAL PARTIAL BIRTH ABORTION LIMITATION

Probably the most obvious and important question left after the dust has settled is "can partial birth abortion truly and effectively be banned?" The most obvious answer is "nobody knows for sure." Several scenarios must occur before we know. The first, and most obvious, step is that a state legislature must redraft and reenact a statute banning partial birth abortion. Second, and most importantly, that statute must be subjected to judicial review to determine if it passes constitutional muster.

However, those who support partial birth abortion have long insisted any ban on the procedure is unconstitutional. Pro-choice advocates maintain that partial birth abortion bans are unconstitutional because they impose an undue burden on the woman's right to choose an abortion.[260] These bans, they maintain, are too overbroad because they ban not only the partial birth abortion procedure, but impermissibly encompass other forms of abortion as well.[261]

Further, these commentators maintain that partial birth abortion bans are unconstitutionally vague, and therefore, violate physicians' due process rights.[262]

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254 *Id.* at 685.

255 *See generally Daniel*, 102 F. Supp. at 685-86.

256 *See id.* at 685.

257 *See id.* at 686.

258 *See Daniel*, 102 F. Supp. at 686.

259 *See id.*

260 *See generally* Strossen and Borgmann, *supra* note 64, at 7-9.

261 *See id.* at 6 (authors maintaining that partial birth abortion bans do not pinpoint a single, specific abortion procedure, but potentially encompassed the safest and most common forms of abortion). *See also* Andrews, *supra* note 16, at 533 (stating that partial birth abortion bans are vague and overly broad, implicate other abortion procedures, and could encompass conventional D & E procedures and some inductions).

262 *See* Strossen & Borgmann, *supra* note 64, at 10.

Physicians' due process rights are violated, they contend, because the particular state bans don't provide physicians with enough notice as to what type of procedure is prohibited, and impermissibly delegates basic policy matters to police, judges and juries for resolution, with the attendant dangers of arbitrary and discriminatory application.[263] Also, they maintain that partial birth abortion bans are constitutionally invalid because they do not differentiate between abortions that take place pre- and post-viability.[264]

Further, pro-choice advocates also feel that partial birth abortion is one of the safest and most common abortion methods.[265] As such, they feel that partial birth abortion bans compromise women's health by limiting physicians' discretion to choose the most medically appropriate abortion procedure for their patients.[266] Lastly, they maintain that partial birth abortion bans do not further the state's legitimate interest in safeguarding potential life and women's health, and in fact have the opposite effect.[267]

Yet, other commentators feel that a ban on partial birth abortion is constitutionally possible. For those seeking legitimacy in their efforts to ban partial birth abortion, they need only to look to the words of Justice O'Connor in her concurring opinion in *Stenberg*.[268] However, other commentators feel that partial birth abortion can constitutionally be banned for reasons apart from the ones enunciated by Justice O'Connor. [269]

Regardless of one's view of the correct constitutional approach to banning partial birth abortion, if the holding of *Stenberg* means anything, states are free to draft statutes banning the procedure. According to Justice O'Connor in her concurring opinion, "a ban on partial birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of

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263 *See id.*

264 *See* Andrews, *supra* note 16, at 533.

265 *See* Strossen & Borgmann, *supra* note 64, at 10.

266 *See id*; *see also* Andrews, *supra* note 16, at 532 (author maintaining "[a]t the very least, 'partial-birth' abortion statutes force women to take unnecessary medical risks, subordinating the life of the woman to the life of a non-viable fetus.").

267 *See* Strossen & Borgmann, *supra* note 64, at 14.

268 *See generally Stenberg*, 120 S.Ct. at 2620 (O'Connor, J., concurring).

269 *See e.g.*, Steven Grasz, *If Standing Bear Could Talk . . . Why There is No Constitutional Right to Kill a Partially Born Human Being*, 33 CREIGHTON L. REV. 23 (1999). The author first points out that the woman's right to abort a fetus, as defined by *Roe v.* Wade, applies to the unborn. *See id.* at 26-27. Thus, he argues, the right to an abortion is limited only to fetuses that are in utero. *See id.* at 28. To bolster his point, the author pointed out that a federal court noted that there is no precedent regarding the treatment of partially born human beings. *See id.* at 28 (quoting *Carhart*, 972 F. Supp. at 529). Since abortion typically occurs in utero, the recognition of a heightened legal status for partially born children is not inconsistent with either *Roe* or *Casey*. *See id.* at 30. *Roe*, the author pointed out, held that unborn fetuses are not persons under the Fourteenth Amendment. *See id.* at 32. Once the fetus is partially outside the womb, logically, it can no longer be termed as unborn. *See id.* Consequently, he maintained that the Supreme Court should not add partially born children to "the infamous list of those considered 'non-persons.' " *Id.* at 29. Since the partial birth of a fetus is a significant event in the eyes of the author, the fetus then becomes a person under the definitions of the Fourteenth Amendment and entitled to all the protections afforded by it. *See id.* at 33.

the mother would be constitutional . . . ."[270] In O'Connor's view, such a statute would not place an "undue burden" on the woman seeking an abortion.[271]

In redrafting a statutory ban on partial birth abortion, the drafter must take into account the *Casey* analysis. In other words, the ban must not place an undue burden on the woman's right to choose an abortion by placing a substantial obstacle in the path of a woman seeking an abortion.[272] Clearly, banning partial birth abortion can fairly be said to place some kind of burden on the woman's abortion choice.[273] However, the *Casey* Court stated that "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[274]

Therefore, banning partial birth abortion is not meant to strike at the woman's right to access an abortion. Nor can such a ban be said to be a slippery slope toward the eventual outlawing of abortion. Only the overturning of *Roe* and its progeny can accomplish that. A ban on partial birth abortion serves only to proscribe one little-used,[275] particular type of abortion that many state legislatures find unnecessarily cruel.[276]

However, the *Casey* undue burden test is not the only consideration the drafter must consider. Other considerations are vagueness of the statute and the inclusion of a health exception. This commentary will consider each factor in turn.

A. A Proposed Partial Birth Abortion Limitation

As stated earlier in this commentary, the West Virginia partial birth abortion ban was located in the Woman's Access to Health Care Act of the West Virginia Code.[277] The author strongly urges the West Virginia Legislature to repeal the partial birth abortion ban found in Chapter 33, Section 42 of the West Virginia Code. Once done, the Legislature should enact another statute limiting the use of partial birth abortion. The proposed statute that follows is based on the *Stenberg*

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270 *Stenberg*, 120 S.Ct. at 2620 (O'Connor, J., concurring).

271 *See id.*

272 *See Casey*, 505 U.S. at 877.

273 *See* Gough, *supra* note 184, at 206.

274 *Casey*, 505 U.S. at 874.

275 *See* Gough, *supra* note 184, at 206 (stating that "the D & X abortion procedure . . . is the least employed method of aborting a pre-viability fetus.").

276 *See Voinovich*, 130 F.3d at 198 n.6 (citing Am. Sub. H.B. 135, 121st General Assembly (Ohio 1995)). Interestingly, the district court in *Voinovich* commented that Ohio's interest in preventing cruelty was intertwined with its interest in the potential life of the fetus, and it would be illogical for a state's interest in preventing cruelty to animals to be considered legitimate while its interest in preventing cruelty to human fetuses would not. *See Voinovich*, 911 F. Supp. at 1071.

277 *See* W. VA. CODE §§ 33-42-1 to 8.

decision, the proposed 1995 federal ban on partial birth abortion,[278] the original West Virginia partial birth abortion ban, and other scholarly works. The sections that follow contain a proposed limitation on partial birth abortion, to be placed in Chapter 61 of the West Virginia Code.[279]

§ 61-13-1. Legislative findings and purpose.

The Legislature finds and declares that it is necessary to repeal the previous prohibition against partial-birth abortion due to constitutional infirmities. Nevertheless, the Legislature finds and declares that the State of West Virginia has a profound interest in protecting potential human life from unnecessary cruelty.[280] Therefore, the Legislature finds and declares that partial-birth abortion is a particularly cruel procedure, the performance of which inflicts unnecessary cruelty on the fetus. To that end, the Legislature finds and declares that a constitutional prohibition against partial-birth abortion is necessary to further the State's interest.

§ 61-13-2. Definitions.

(1) "Partial birth abortion" means an abortion procedure, known as Dilation & Extraction (D & X), intact Dilation & Extraction (intact D & X), or intact Dilation & Evacuation (intact D & E), where the physician performs a totally intact vaginal delivery of a fetus up to the level of the fetal head followed by an incision made into the fetal skull to permit the removal of the intracranial contents by suction in order to collapse the fetal skull before completing the procedure.[281]

(2) "Physician performing a partial-birth abortion" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery in West Virginia, or any other individual who is legally authorized by the state to perform abortions: Provided, That any individual who is not a physician or not otherwise legally authorized by the state to perform abortions, but who nevertheless directly performs a partial-birth abortion, is subject to the provisions of this article.[282]

(3) "Dilation & Evacuation" means an abortion procedure, also known as the D & E, whereby the physician dilates the mother's cervix by any means, grabs a

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278 *See HR 1833 Hearing* at 209-11.

279 Chapter 61 of the West Virginia Code is titled "Crime and their Punishments." The author proposes amending that chapter by adding a new section, to be designated section 13. This new section would be dedicated solely to the new limitation on partial birth abortion in West Virginia. The reason for placing the proposed limitation in this chapter of the W. Va. Code is to further provide notice to physicians that performing an unnecessary partial birth abortion is a criminal offense.

280 *See generally* H. 135, § 135, 121st Gen. Ass. (Ohio 1995) (the Ohio General Assembly declared that its interest in enacting the D & X ban was to prevent unnecessary cruelty to the fetus); *see also* Bopp & Cook, *supra* note 77, at 33. The authors state that partial birth abortion bans are "rationally related to a legitimate state interest in preventing cruelty to living beings. In a society where great care is taken to prevent cruelty to animals, there is as legitimate a state interest in preventing cruelty to human beings who are nearly born." *See id.* at 33-34.

281 *See generally* Gough, *supra* note 184, at 204.

282 *See* W. VA. CODE § 33-42-3(4) (1998).

fetal extremity, dismembers the fetus in utero, and removes the fetal parts, and uses suction at any stage of the procedure to remove any fetal tissue or collapse the fetal skull by removing the intracranial contents in order to complete the procedure.

(4) "Any other abortion procedure" means any abortion procedure currently recognized by the medical community, to include suction curettage, induction, hysterotomy, or hysterectomy.

§ 61-13-3. Partial-birth abortions prohibited; criminal penalties; civil penalties; exceptions; hearings by state board of medicine.

(a) Any physician who knowingly performs a partial-birth abortion and thereby kills a human fetus is guilty of a felony and shall be fined not less than ten thousand dollars, nor more than fifty thousand dollars, or imprisoned not more than two years, or both fined and imprisoned.[283] This section shall apply only to a physician who knowingly or intentionally performs a partial birth abortion as the initial procedure. [284] This section does not apply to a partial-birth abortion that is necessary to save the life or preserve the health of a mother when her life or health is endangered by a physical disorder, illness, injury, or complication arising during the pregnancy or from the performance of the initial abortion procedure.

(b) The father, the mother, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may obtain appropriate relief in a civil action, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. Such relief shall include:

(1) money damages for all injuries, psychological and physical, resulting by the violation of this section; and

(2) statutory damages equal to three times the cost of the partial birth abortion.[285]

(c) A physician charged pursuant to this section may seek a hearing before the West Virginia Board of Medicine on the issue of whether the physician's act was necessary to save the life or preserve the health of a mother. The findings of the board of medicine are admissible on this issue at the trial of the physician. Upon a motion by the defendant, the court shall delay the beginning of trial for not more than thirty days to permit the Board of Medicine hearing to take place.[286]

(d) No woman may be prosecuted under the provisions of this section for having a partial-birth abortion, nor may she be prosecuted for conspiring to violate the provisions of this section. [287]

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283 *See* W. VA. CODE § 33-42-8(a) (1998).

284 *See* Gough, *supra* note 184, at 206.

285 *See generally HR 1833 Hearing* at 210.

286 *See* W. VA. CODE § 33-42-8(b) (1998).

287 *See id.* § 33-42-8(c) (1998).

§ 61-13-4. Defenses.

(a) It is an affirmative defense to a prosecution under this section, which must be proven by clear and convincing evidence, that the partial birth abortion was performed by a physician who reasonably believed:

(1) the partial birth abortion was necessary to save the life or preserve the health of the mother; and

(2) no other procedure would suffice for that purpose.

(b) It is an affirmative defense to a civil action under this section, which must be proven to a preponderance of the evidence, that the partial birth abortion was performed by a physician who reasonably believed:

(1) the partial birth abortion was necessary to save the life or preserve the health of the mother; and

(2) no other procedure would suffice for that purpose.[288]

§ 61-13-5. Procedures not prohibited.

This Act shall not prohibit the performance of the Dilation & Evacuation abortion procedure or any other abortion procedure.[289]

B. Statutory Vagueness

In properly drafting a partial birth abortion ban, the drafter must ensure that the statute will survive an attack that it is unconstitutionally vague. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.[290] Vague statutes offend several important values.[291] First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.[292] Vague statutes may trap the innocent by not providing fair warning.[293] Second, if arbitrary and discriminatory enforcement is to be prevented, statutes must provide explicit standards for those who apply them.[294]

Even though the *Stenberg* majority did not mention the term vagueness, it did, nonetheless, invalidate the Nebraska statute partially on that basis. The majority stated "even if the [Nebraska] statute's basic aim [was] to ban D & X, its

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288 *See generally HR 1833 Hearing* at 211.

289 *See* Gough, *supra* note 184, at 205.

290 *See* Planned Parenthood v. Farmer, 220 F.3d 127, 135 (3rd Cir. 2000) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

291 *See id.*

292 *See id.*

293 *See id.*

294 *See id.*

language makes it clear that it also covers a much broader category of procedures. The language does not track the medical differences between D & E and D & X . . . The plain language covers both procedures."[295] The statute was unconstitutional because the "substantial portion" language did not permit one to distinguish between the D & E procedure, where a foot or arm is drawn through the cervix, and D & X, where the body up to the head is drawn through the cervix.[296] Because the statute did not distinguish between the two procedures, it placed an undue burden in the path of a woman seeking an abortion of a nonviable fetus.[297]

1. The Procedure to be Specifically Banned

This proposed Bill should satisfy the "vagueness" question. First of all, the statute specifically defines the procedure to be banned. Section 61-13-2(1) specifically describes partial birth abortion as the "D & X," "intact D & X," or "intact D & E" procedure. Next, along with naming the procedure, it specifically describes the procedure that is prohibited. To ensure that no misunderstanding occurs, the statute adds a new section, § 61-13-5. In this section, the new statute specifically states that the ban "shall not prohibit" the D & E procedure.

Much of the vagueness problems of previous partial birth abortion bans was that the D & X and D & E procedures are similar enough so that many courts found that the bans effectively encompassed both procedures. As such, courts invalidated such statutes as unconstitutional under the *Casey* undue burden standard.[298] The proposed language is meant to eliminate any question about what procedure the ban is to cover.

2. The Intent Element

Next, the proposed statute retains an intent element. Many state partial birth abortion bans lacked any kind of intent element.[299] For example, in previous D & X litigation, a Michigan district court stated that "a lack of an explicit intent requirement . . . makes [a] statute particularly susceptible to ambiguous interpretation and unpredictable enforcement."[300] The original West Virginia statute contained a specific intent element, in that the physician had to knowingly perform a partial birth abortion.[301] Section 61-13-3(a) of the proposed West Virginia ban retains that specific intent element, requiring the physician to knowingly perform a

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295 *Stenberg*, 120 S.Ct. at 2614.

296 *See id.* at 2613.

297 *See id.* (quoting *Casey*, 505 U.S. at 877).

298 *See* Gough, *supra* note 184, at 202.

299 *See, e.g. Evans*, 977 F. Supp. at 1307-1308 (Michigan's partial birth abortion ban lacked an intent standard).

300 *Id.* at 1308.

301 W. VA. CODE § 33-42-8(a) (1998).

partial birth abortion that is subject to the Act.

C. The Civil Damages Element

Unlike the original West Virginia statute, the proposed statute adds two new features. First, the proposed statute contains a section for the father or the mother of the fetus, or the parents of any unemancipated female who receives a partial birth abortion, to recover civil damages. The proposed civil penalty is found in sections 61-13-3(b)(1) and (2) of the proposed statute. It is the author's feeling that if any partial birth abortion ban is to have any meaning in the future, the physician should suffer potential economic loss, as well as the loss of freedom, for the performance of an unnecessary partial birth abortion.

However, one must expect opposition to the proposed statute from pro-choice advocates. One of the first arguments such groups would make is that the civil provision will cause physicians not to perform the D & X procedure when it could be the most proper in some instances. Because physicians will not perform the procedure, it will effectively remove the D & X procedure as an abortion option. Therefore, an undue burden would exist.

However, the *Casey* decision addresses that argument. Recall that the *Casey* Court said "not every law which makes a right more difficult to exercise is . . . an infringement on that right . . . . The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[302]

A civil penalty element does not strike at the heart of the abortion right. It only provides an avenue of recovery for the father of a fetus or the parents of a mother on whom a partial birth abortion was wrongly performed. Also, the provision arguably limits the class of plaintiffs who could bring an action. Triple damages only apply to the cost of the wrongful partial birth abortion. Furthermore, the standard does not take away the option of performing a partial birth abortion. The health and "life of the mother" exceptions expressly forbid that. True, the standard may make the D & X procedure more expensive for a woman. But, that point is arguable, and under the *Casey* analysis, a civil penalty provision that could make the D & X procedure more expensive to attain is not enough to invalidate the statute.[303]

D. The Affirmative Defense Element

The second new feature of the proposed West Virginia ban is that it adds an affirmative defense provision in section 61-13-4. This section is based upon the original 1995 federal ban on partial birth abortion that passed both houses of

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302 *Casey*, 505 U.S. at 873-874.

303 *See id.*

Congress and was subsequently vetoed by President Clinton.[304] The author's rationale for adding an affirmative defense section is similar to those for adding the civil penalty. With the exceptions that the Supreme Court articulated for any future partial birth abortion bans, it is arguable that the performance of partial birth abortions would be as widespread as if there were no ban at all. Therefore, it only makes sense to force the physician to be absolutely sure that the D & X procedure is necessary and to prove his reasons for performing it. Similarly, if, as proponents of partial birth abortion claim, the D & X procedure is the safest procedure in many instances, there should be enough data and enough experts available to the physician to prove his defense.

Again, pro-choice advocates might predictably oppose the affirmative defense element of the proposed statute. One of the main arguments those advocates might make is that the affirmative defense provision will cause physicians not to perform the D & X procedure when it could be the most proper in some instances. Because of the prospect of having to prove the reasonableness of his actions in a future trial, physicians would be deterred from performing a D & X in any circumstance. Because physicians will not perform the procedure, it will effectively remove the D & X procedure from the woman as an abortion option. Therefore, an undue burden would exist. However, the answer to that argument is the same as the one the author made in support of the civil penalty provision.

An affirmative defense provision does not strike at the heart of the abortion right. The provision merely forces the physician to be sure the performance of a partial birth abortion is necessary, that the decision was made in good faith, and requires him or her to articulate that good faith reason in court. The standard does not take away the option of performing a partial birth abortion. The health and "life of the mother" exceptions expressly forbid that. True, the standard may make the D & X procedure more difficult to attain for a woman. Again, that point is arguable under the *Casey* analysis. That it may make the D & X more difficult to attain is not enough to invalidate the affirmative defense element.[305]

However, an additional consideration exists of which the drafter must be aware. When crafting an affirmative defense provision, the drafter must ensure that it does not violate the physician's Due Process rights. Therefore, we must start with the simple premise that the Due Process Clause of the U.S. Constitution requires the prosecutor to persuade the factfinder beyond a reasonable doubt of every fact necessary to constitute the crime charged.[306] It is also a long accepted rule that the Constitution permits states to require defendants to prove affirmative defenses as it sees fit.[307] The drafter must ensure, however, that the affirmative defense provision does not burden the defendant with disproving any of the elements of the crime that

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304 *See Hearing, supra* note 278.

305 *See Casey*, 505 U.S. at 873-874.

306 *See* In re Winship, 397 U.S. 358, 363-364 (1970).

307 *See* Patterson v. New York, 432 U.S. 197, 211 (1977).

the state must prove.[308]

The affirmative defense provision of the proposed West Virginia statute does not burden the physician with disproving any of the elements of the Act. Section 61-13-3(a) of the Act requires the state to prove that the physician "knowingly and intentionally" performed a partial birth abortion as the initial procedure beyond a reasonable doubt. Therefore, if the physician performs a D & X procedure as the initial procedure, he must prove beyond a reasonable doubt that he reasonably believed the procedure was necessary to preserve the life or health of the mother. Therefore, in that instance, the affirmative defense provision merely "constitutes a separate issue on which the defendant is required to carry the burden of persuasion."[309]

E. The Health Exception Provision

As this commentary already pointed out, the *Stenberg* Court stated that any future ban on partial birth abortion requires a health exception for the mother to be constitutional. Unlike the previous West Virginia partial birth abortion ban, section 61-13-3(a) of the proposed statute provides a health exception. This section allows the D & X procedure to be performed to safeguard the life and health of the mother. Under the proposed statute, the physician has discretion to use appropriate medical judgment should he feel that the use of the D & X procedure is necessary. Therefore, the partial birth abortion ban only affects a seldom-used abortion procedure.[310] Since the D & E procedure is the most widely used second trimester abortion procedure, it cannot be said that banning a procedure that is used in only 3000 to 5000 of the approximately 1,221,585 abortions each year places a substantial burden in the path of a woman.[311] Such a contention is buttressed by Justice O'Connor who said "it is unlikely that prohibiting the D & X procedure alone would amount in practical terms to a substantial obstacle to a woman seeking an abortion."[312]

However, the proposed West Virginia partial birth abortion ban goes

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308 *See* U.S. v. Petty, 132 F.3d 373, 378 (7th Cir. 1997) (stating that an affirmative defense must be sharply distinguished from a simple defense, or a simple negation of one of the elements of the offense, because the defendant never bears the burden of proof on the elements of the offense).

309 *Patterson*, 432 U.S. at 207.

310 *See* Radloff, *supra* note 2 (about 3000 to 5000 partial birth abortions are performed every year).

311 *See id.* at 1588 n.14 (D &E procedures account for 85% of all second trimester abortions). However, even the data on the number of second trimester/pre-viability abortions is conflicting. According to Dr. Carhart's brief before the Supreme Court in *Stenberg*, the D & E procedure "is the most common method of pre-viability second trimester abortion, accounting for approximately 96% of all second trimester abortions in the United States. *See* LeRoy Carhart, *Brief of Carhart et al. in* Stenberg v. Carhart, 16 ISSUES L. & MED. 35, 41 (2000). If we take Carhart's 96% figure, this means that the D & E was performed in 1,172,722 of the 1,221,585 abortions performed in 1996. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1. Given those figures, this leaves 48,863 abortions where other procedures were used. If one uses the higher number of the estimated 3,000-5,000 partial birth abortions performed 1996, that leaves 43,863 abortions that were non-D & E, non-D & X.

312 *Stenberg*, 120 S.Ct. at 2620 (quoting *Casey*, 505 U.S. at 884).

further than providing the necessary health exception. Section 61-13-3(a) specifically states that only when a physician performs the D & X procedure as the initial procedure does he or she become subject to the Act. The statute would not apply, then, to a scenario where the physician begins to perform a D & E procedure and complications arise such that the D & X becomes necessary to safeguard the life or health of the mother.[313]

F. Balancing Irreconcilable Interests

Careful drafting of a statute to avoid vagueness and the addition of a health exception is the tip of the iceberg in the attempt to ban partial birth abortion. Much of the problem is that many courts have concluded that partial birth abortion is the safest possible late-term abortion method.[314] The question becomes which is supreme: the woman's interest in the safety advantage of the partial birth abortion procedure, or the state's interest in the prevention of cruelty and dehumanization of the fetus?

The partial birth abortion ban suggested in this commentary balances the interests of all involved. First, it provides protection for the physician. The statute clearly defines the procedure to be proscribed: the D & X, the intact D & X, and the intact D & E procedure. It describes the procedure and bans it by name. Therefore, the physician is on notice as to the procedure that is proscribed. Further, the statute specifically states that the ban is not meant, and should not be construed, to ban any other abortion procedure but the partial birth abortion procedure. Also, the physician is further protected because the statute bans partial birth abortion only as the initial procedure. Therefore, the physician has the flexibility to switch to it should a complication arise in the performance of another procedure, such as the D & E.

Second, the statute provides protection for the woman. The statute specifically provides exceptions for the life and health of the mother. In this way, she is protected should unforeseen complications arise during the performance of another abortion procedure. The statute also would allow the physician to use his best medical judgment should he feel that the D & X is the *only* appropriate procedure to safeguard the woman's life or health. Further, the statute bans the first use of the D & X procedure with the woman's future health in mind. Specifically, it bans the initial use of a procedure that could expose the woman to significant health risks, and the risk of not being able to complete another pregnancy in the future.

For opponents of partial birth abortion, the statute accomplishes what they

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313 *See generally Evans*, 977 F. Supp. at 1308 (describing a case where a physician, intending to perform a D & E procedure, reaches into the uterus to dismember the fetus and the fetus, still intact, slips through the cervix up to the neck, necessitating the performance of a D & X; thus, a permitted procedure quickly becomes an illegal procedure).

314 In *Carhart*, the district court held that Nebraska's partial birth abortion ban would likely not meet *Casey*'s undue burden standard, not because it was vague, but rather because it eliminated an abortion method that the court determined was the safest second trimester abortion procedure. *See Carhart*, 972 F. Supp. at 524-525.

want. First, the statute bans the use of partial birth abortion as the initial procedure. Also, it provides for incarceration and fines as punishment for violation of the Act. Second, it requires the physician to prove at trial that his decision to use the partial birth abortion procedure was due to an accident or based on a sound, good faith medical judgment. And, perhaps most importantly, the legislative findings section reiterates the state's profound respect for potential human life, while decrying partial birth abortion as a "particularly cruel" procedure.

Further, the ban cannot be said to strike at the heart of the abortion right. The focus of the statute is entirely on the fetus.[315] This statute does not seek to preserve the life of the fetus, but rather, it seeks to limit the method by which the life of the fetus may be terminated so that it is not subjected to unnecessary cruelty.[316]

Moreover, the statute does not seek to strike at the woman's ultimate right to terminate her pregnancy by banning a majority of pre-viability abortions.[317] The statute merely takes away one abortion procedure from initial use, while providing exceptions should its use become necessary. At best, the partial birth abortion procedure accounted for 5,000[318] of the 1,221,585 abortions performed in 1996.[319] In other words, the amount of partial birth abortions performed in the U.S. is statistically zero. Given that statistic, can a ban on the first use of such a seldom-used abortion procedure be called a slippery slope to eventually overturning *Roe* and its progeny?

In deciding the constitutionality of any future partial birth abortion ban, a court should be guided by the words of Justice Stevens. In his partial concurrence and partial dissent in *Casey*, he stated, "A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character."[320]

VII. CONCLUSION

No matter on which side the reader falls, the debate between proponents and opponents of partial birth abortion is far from over. However, a statutory ban on the initial use of a rarely-used abortion procedure cannot be held to strike at the heart of the abortion right itself. With the guidance of *Stenberg* and *Casey*, states should redraft partial birth abortion bans that balance the interests of all who wish to maintain or abolish partial birth abortions.

Many good people on both sides of the abortion debate believe that individuals may differ in the arena of ideas over partial birth abortion. Reasonable

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315 *See* Gough, *supra* note 184, at 212.

316 *See id.*

317 *See id.*

318 *See* Radloff, *supra* note 2.

319 *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1.

320 *Casey*, 505 U.S. at 920.

people on all sides of the partial birth abortion debate can find common ground in a properly drafted ban. A properly drafted statute can ban the partial birth abortion procedure and only that procedure. A properly drafted statute can protect the future health and lives of women by providing exceptional use of partial birth abortion. A properly drafted statute provides notice to physicians as to what procedure is specifically banned. A properly drafted statute reaffirms the state's "compelling interest" in potential human life. The Supreme Court has spoken. Now, it is time for the states to act.

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