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Comment

Partial-Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?

I. INTRODUCTION

Never, since the final shot of the Civil War, over a century and a quarter ago, has American society been faced with an issue so polarizing and, at the same time, so totally incapable of either rational discussion or compromise, as is the ongoing controversy . . . over the legality of attempts by the State to regulate abortion—the act of voluntarily terminating a pregnancy, prior to full term.¹

Abortion is a difficult topic to discuss without quickly entering into a debate over morality. The Supreme Court of the United States has held that abortion is a constitutionally protected privacy right under the Due Process Clause of the Fourteenth Amendment.² While abortion is a fundamental right, it is not an unqualified right.³ In 1992, in *Planned Parenthood v. Casey*,⁴ the Court affirmed the central holdings of *Roe v. Wade*,⁵ but established the “undue burden” standard for determining

1. *Women’s Med. Prof’l Corp. v. Voinovich*, 911 F. Supp. 1051, 1056 (S.D. Ohio 1995), *aff’d*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). This was the first court in the United States to decide the constitutionality of a state partial-birth abortion ban. The court granted an abortion clinic and a doctor’s motion for a preliminary injunction, thereby preventing Ohio from enforcing a state law attempting to regulate abortions. *See id.* at 1094.

2. *See Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (concluding that the right of personal privacy includes the decision to have an abortion, but the right must be considered against important state interests in its regulation). The Court found the right of privacy applied to the states through the Fourteenth Amendment. *See Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (upholding the essential holding of *Roe*); *Roe*, 410 U.S. at 154; *see also* U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

3. *See Casey*, 505 U.S. at 869 (holding that there are competing interests that must be evaluated when restricting abortion); *Roe*, 410 U.S. at 154; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (upholding a state requirement that abortions be performed by licensed physicians); *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (holding that states may require all second-trimester abortions to be performed in a licensed clinic), *overruled in part by Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992); *Belotti v. Baird*, 443 U.S. 622, 642 (1979) (upholding parental consent requirement for minors seeking abortion if a judicial override exists).

4. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (determining the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982).

5. *Roe v. Wade*, 410 U.S. 113 (1973).

whether a state restriction on abortion unconstitutionally infringed upon the right to abortion.⁶ Although the Court in *Casey* secured a woman's right to an abortion, the holding opened the door to a host of new issues concerning the balance between the woman's right and the state's recognized interests.

The current focus of abortion debates is on a method of abortion called "partial-birth" abortion. Although not a medical term, this phrase is generally understood to refer to the dilation and extraction ("D&X") method of late-term abortion.⁷ The procedure involves aborting a fetus after it has been partially delivered.⁸ On January 14, 2000, the Supreme Court granted certiorari to settle the contradictory federal circuit court holdings on the constitutionality of partial-birth abortion bans.⁹ In October 1999, the Seventh Circuit decided that the Illinois and Wisconsin statutes banning the D&X procedure do not create an undue burden on a woman's right to choose abortion.¹⁰

6. See *Casey*, 505 U.S. at 874. According to *Casey*, a statute constitutes an undue burden when the "regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

7. See *Hope Clinic v. Ryan*, 195 F.3d 857, 863 (7th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3480 (U.S. Jan. 10, 2000) (No. 99-1156); *Carhart v. Stenberg*, 192 F.3d 1142, 1145 (8th Cir. 1999) (noting "this term, though widely used by lawmakers and in the popular press, has no fixed medical or legal content"), cert. granted, 120 S. Ct. 865 (2000); Lee Ann Lezzer, *Richmond Medical Center for Women v. Gilmore: Virginia Partial-Birth Abortion Act's Clarity Extinguishes Physician Standing*, 2 J. HEALTH CARE L. & POL'Y 351, 356 (1999); Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 302 (1998); Rebecca L. Andrews, Note, *The Unconstitutionality of State Legislation Banning "Partial-Birth" Abortion*, 8 B.U. PUB. INT. L.J. 521, 521 n.1 (1999); Margo L. Ely, *Ruling Deals Blow to Anti-Abortion Forces*, CHI. DAILY L. BULL., May 11, 1998, at 6; ACLU, *Stop Congress from Criminalizing Safe Abortion Procedures!* (visited March 17, 2000) <<http://www.aclu.org/issues/reproduct/feature.html>> [hereinafter *Stop Congress from Criminalizing Safe Abortion Procedures*]; see also *infra* Parts II.A.3 (describing the dilation and extraction procedure); II.A (discussing other abortion methods).

8. See Testimony of Dr. Curtis R. Cook, M.D., 14 ISSUES L. & MED. 65, 66 (1998) [hereinafter *Cook*] (defining partial-birth abortion as "the feet first delivery of a living infant up to the level of its after coming head . . .").

9. See *Stenberg v. Carhart*, 120 S. Ct. 865 (2000) (granting certiorari to determine the constitutionality of prohibitions on partial-birth abortions). The Eighth and Sixth Circuits have found the partial-birth abortion statutes at issue unconstitutional. See *Planned Parenthood v. Miller*, 195 F.3d 386, 388 (8th Cir. 1999) (holding in all three cases that the partial-birth abortion bans were unconstitutional); *Carhart*, 192 F.3d at 1146; *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 798 (8th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 200 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998). Conversely, the Seventh Circuit held that the partial-birth abortion statutes of Illinois and Wisconsin could be applied constitutionally. See *Hope Clinic*, 195 F.3d at 861.

10. See *Hope Clinic*, 195 F.3d at 874-75 (applying the standard set forth in *Casey*, which held that states can regulate abortion as long as regulation is not a "substantial obstacle" that prevents a woman from choosing abortion).

Although three other federal circuits had addressed various state partial-birth abortion bans,¹¹ the Seventh Circuit was the first to uphold the constitutionality of such bans.¹² The Sixth and Eighth Circuits did not reach the issue of whether a prohibition of the D&X procedure was constitutional because they first concluded that the state bans were so broad as to prohibit other abortion methods.¹³ By deciding that issue first, the courts concluded that the statutes were unconstitutional under *Casey* because they created an undue burden on a women's right to an abortion.¹⁴ Thus, the courts did not have the opportunity to reach the issue of whether a ban of D&X, in particular, was an undue burden.¹⁵

This Comment first discusses the several methods of abortion currently used in the United States¹⁶ and the historical development of abortion law in this country.¹⁷ Next, this Comment outlines the split in the federal circuit court holdings,¹⁸ specifically exploring the differing rationale between the circuits that found the state laws prohibiting partial-birth abortion laws unconstitutional¹⁹ and those that upheld similar statutes.²⁰ This Comment then explains why specifically prohibiting the D&X procedure is an undue burden to women seeking abortions²¹ and why state legislatures should not enact such statutes.²² Finally, this Comment proposes that the Supreme Court should hold that

11. See *Miller*, 195 F.3d at 388; *Carhart*, 192 F.3d at 1146; *Jegley*, 192 F.3d at 798; *Richmond Med. Ctr. for Women v. Gilmore*, 183 F.3d 303 (4th Cir. 1998), *aff'd by panel on reh'g*, 144 F.3d 326 (4th Cir. 1998); *Voinovich*, 130 F.3d at 198.

12. See *Hope Clinic*, 195 F.3d at 861.

13. See *Carhart*, 192 F.3d at 1146 n.4. The court stated: "it [is not] necessary for us to discuss . . . whether the law creates an undue burden by prohibiting the D&X procedure. The basis for our holding is the undue burden created by the ban of the D&E procedure." *Id.*; see also *Miller*, 195 F.3d at 388 ("Other abortion procedures would be prohibited as well [under the Iowa Act], however, and this is the problem."); *Jegley*, 192 F.3d at 798 ("Because both the D&E procedure and the suction-curettage procedure used in second-trimester abortions often include what the Act prohibits, physicians performing those procedures will violate the Act"); *Voinovich*, 130 F.3d at 198 (stating that "the Act's definition of the banned procedure encompasses the D&E procedure").

14. See *Miller*, 195 F.3d at 388; *Carhart*, 192 F.3d at 1150-51; *Jegley*, 192 F.3d at 798; *Voinovich*, 130 F.3d at 198.

15. See *Miller*, 195 F.3d at 388; *Carhart*, 192 F.3d at 1150-51; *Jegley*, 192 F.3d at 798; *Voinovich*, 130 F.3d at 198.

16. See *infra* Part II.A.

17. See *infra* Parts II.B-E.

18. See *infra* Parts III.A-B.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. See *infra* Part IV.A.

22. See *infra* Part IV.B.

the bans on the D&X procedure are unconstitutional because of the undue burdens they create on a woman's choice to have an abortion.²³

II. BACKGROUND

The current abortion debate focus on the conflict between the roles of the medical and legal communities in regulating abortion techniques. Although "[t]he constitutional right to an abortion carries with it the right to perform medical procedures that many people find distasteful or worse," the medical procedure may be regulated by either the medical or the legal communities, or both.²⁴ After explaining the common medical procedures for performing an abortion,²⁵ this section will explain the development of the legal background regarding abortion and the current debate.²⁶

A. Medical Background

The particular abortion method employed by a physician depends upon the stage of the pregnancy as well as doctor and patient preferences.²⁷ A pregnancy typically lasts nine months, and its duration is determined by the number of weeks since the first day of the woman's last menstrual period ("LMP").²⁸ The nine months of pregnancy are divided up into trimesters of roughly equal duration.²⁹ The third trimester is usually defined at the point of viability,³⁰ which

23. See *infra* Part V.

24. *Planned Parenthood v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998), *vacated sub nom. Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156).

25. See *infra* Part II.A (discussing the several methods of abortion currently being used).

26. See *infra* Part II.B (discussing the development of abortion law).

27. See WARREN M. HERN, *ABORTION PRACTICE* 146-54 (1984).

28. See *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 800 n.5 (E.D. Va. 1998), *rev'd*, 144 F.3d 326 (4th Cir. 1998), *aff'd by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998); *ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY* P68 (1997) (stating that "a full-term pregnancy usually lasts 40 weeks").

29. "First Trimester" is "the first 14 weeks of gestation." "Second Trimester" is "from the 15th to the 28th week of gestation." "Third Trimester" is "from the 29th through the 42nd week of gestation." *ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY* T71 (1997); see also *STEDMAN'S MEDICAL DICTIONARY* 1855 (26th ed. 1995) (defining "trimester" as "[a] period of 3 months; one third of the length of a pregnancy.").

30. "Viability" means "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb." *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992); see also *STEDMAN'S MEDICAL DICTIONARY* 1936 (26th ed. 1995) (Viability "usually connotes a fetus that has reached 500 g[rams] in weight and 20 gestational weeks."). A fetus is considered "living" around ten weeks LMP when it has "sustained cardiac activity over a period of time at a set rate." *Gilmore*, 11 F. Supp. 2d at 801. "[L]ife' in the fetus and viability are different concepts." *Id.* Because of advances in medical technology, the point of viability occurs earlier than

typically occurs between twenty-three and twenty-five weeks LMP.³¹ While over eighty-nine percent of abortions occur during the first trimester, six percent occur between thirteen to fifteen weeks LMP, and four percent occur from sixteen to twenty weeks.³² Approximately 1.5 percent of all abortions occur after twenty weeks LMP.³³ Descriptions of abortion methods used in the United States follow.

1. Suction Curettage

The most common first trimester method of abortion is suction curettage or vacuum aspiration.³⁴ Doctors may use this method through thirteen weeks LMP.³⁵ Suction curettage can be done on an outpatient basis in a clinic or physician's office.³⁶ The doctor may choose either general or local anesthesia for this procedure.³⁷ After dilating the cervix,³⁸ the doctor uses a tube attached to a vacuum generator to

it did at the time of *Roe v. Wade*. The survival rates of prematurely born infants increase as the births reach the national medical standard for viability of twenty-five weeks LMP. See Roy Rivenburg, *In the PR War Over a Form of Late-Term Abortions, Both Sides Are Guilty of Manipulating the Facts. Here's What They Are (and Aren't) Saying*, L.A. TIMES, April 2, 1997, at E-1.

31. See *Gilmore*, 11 F. Supp. 2d at 801. At 23 weeks LMP, 25% survive at least 30 days. At 25 weeks, 40% live, "but many suffer severe disabilities, usually cerebral palsy, chronic lung problems or blindness." Rivenburg, *supra* note 29, at E-1.

32. See Massie, *supra* note 7, at 318-19 (citing statistics from 1992 survey by the Alan Guttmacher Institute).

33. See *Planned Parenthood Fact Sheet: Abortion After the First Trimester* (updated January 2000) <http://www.plannedparenthood.org/library/facts/abortaft1st_010600.html> [hereinafter *Abortion After the First Trimester*].

34. See *Gilmore*, 11 F. Supp. 2d at 801. Another alternative during the first few weeks of pregnancy is to administer certain drugs that induce a "medical abortion," but doctors choose this option for only about 1% of women. See *id.*; see also *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999) (noting the use of methotrexate and RU 486 in early pregnancy in clinical trials), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); Ely, *supra* note 6, at 6 (noting that abortion by agents such as RU 486 and methotrexate are not yet available in America).

35. See *Gilmore*, 11 F. Supp. 2d at 801; see also *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 796 (8th Cir. 1999) (holding that Arkansas' Partial-Birth Abortion Act is unconstitutional because it is too broad and unduly burdensome on women's rights). The advanced development of the fetus after 13 weeks LMP prevents the doctor from completely removing the fetus by this procedure alone. See HERN, *supra* note 27, at 146-47; Comment, *Constitutional Law-Abortion-Sixth Circuit Strikes Down Ohio Ban of Post-Viability and Dilatation and Extracorporeal Abortion-Women's Medical Professional Corp. v. Voinovich*, 112 HARV. L. REV. 731, 732 (1999) (citing *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998)).

36. See HERN, *supra* note 27, at 102.

37. See *id.* at 119-20 (suggesting the benefits of local anesthesia outweigh the increased risks associated with general anesthesia).

38. There are several methods for dilating the cervix. See *id.* at 108-11, 117-19 (preferring the use of laminaria, a seaweed based substance, over manual dilation); Martin Haskell, M.D., *Dila-*

remove the “products of conception” from the uterus.³⁹ Major complications from suction curettage are rare.⁴⁰

2. Dilation and Evacuation

During the second trimester, the most common abortion procedure is dilation and evacuation (“D&E”).⁴¹ This can also be done on an outpatient basis and under local anesthesia.⁴² After dilating the cervix,⁴³ the doctor uses forceps to dismember the fetus while it is in the uterus.⁴⁴ A vacuum then removes the pieces of fetal tissue from the uterus.⁴⁵ Often, the doctor must reduce the size of the fetus’ skull because it is too large to pass through the cervix without injuring the woman.⁴⁶ This is done by either crushing the skull or by using suction to remove the intracranial contents.⁴⁷ Complications associated with D&E are more likely to occur during the procedure, as opposed to the delayed complications that are associated with suction curettage.⁴⁸

tion and Extraction for Late Second Trimester Abortion, reprinted in 139 CONG. REC. E1092 (daily ed. April 29, 1993) (describing use of Dilapan to dilate the cervix). Dilation by Dilapan and laminaria may take two to three days. *See* HERN, *supra* note 26, at 108-11 (noting overnight use of laminaria may be seen as a disadvantage); Haskell, *supra*, at E1092.

39. *See Gilmore*, 11 F. Supp. 2d at 801; *Andrews, supra* note 6, at 526-27 (citing JOHNATHAN B. IMBER, *ABORTION AND THE PRIVATE PRACTICE OF MEDICINE* 58 (1986)). Sometimes the procedure requires use of a curette to scrape the uterus and separate the embryo or fetus from the placenta. *See Hope Clinic*, 195 F.3d at 861.

40. *See HERN, supra* note 27, at 176-87 (discussing complications which include postabortal syndrome, infection, and perforation).

41. *See Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 198 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

42. *See HERN, supra* note 27, at 132-33.

43. *See id.* at 126 (“One of the principal controversies among advocates of the D&E method is the manner of cervical dilation”); *see also supra* note 38 (describing various methods of dilation).

44. *See HERN, supra* note 27, at 139; Haskell, *supra* note 38, at E1092.

45. *See HERN, supra* note 27, at 129; *see also Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 329 (4th Cir. 1998), *aff’d by panel on reh’g*, 183 F.3d 303 (4th Cir. 1998). “Because the fetus is larger . . . and because bones are more rigid . . . some physicians use intrafetal potassium chloride or digoxim to induce fetal demise prior to a late D&E (after 20 weeks), to facilitate evacuation.” *Carhart v. Stenberg*, 192 F.3d 1142, 1147 (8th Cir. 1999) (quoting AMA report), *cert. granted*, 120 S. Ct. 865 (2000); *see also HERN, supra* note 27, at 144-46. *But see Voinovich*, 130 F.3d at 201 n.12 (noting that typically physicians will use induction during the later second trimester instead of the D&E procedure because of the difficulty caused by the toughness of fetal tissue).

46. *See HERN, supra* note 27, at 194-95, 199-200; *see also Voinovich*, 911 F. Supp. at 1066; Ely, *supra* note 7, at 6; Rivenburg, *supra* note 30, at E-1.

47. *See HERN, supra* note 27, at 194-95, 199-200; *see also Voinovich*, 911 F. Supp. at 1066; Ely, *supra* note 7, at 6.

48. *See HERN, supra* note 27, at 194-204.

3. Dilation and Extraction

The controversial alternative to the D&E procedure has several names: dilation and extraction (“D&X”),⁴⁹ intact dilation and evacuation (“intact D&E”),⁵⁰ and intact dilation and extraction (“intact D&X”).⁵¹ This procedure can be performed on patients twenty to twenty-four weeks LMP and on selected patients from twenty-five to twenty-six weeks LMP.⁵² It has also been performed up to thirty-two weeks or more.⁵³ D&X presents some physical benefits, such as less potential blood loss and less risk of lacerations or infection.⁵⁴ The procedure also has psychological benefits, such as seeing and holding an intact fetus.⁵⁵

Dr. Martin Haskell of Ohio, the first physician to call this procedure “dilation and extraction,” provided a description of the D&X procedure to the National Abortion Federation in 1992.⁵⁶ Like suction curettage and D&E, D&X can be performed on an outpatient basis with local anesthesia.⁵⁷ After dilating the woman’s cervix,⁵⁸ the doctor uses forceps to locate the lower extremities of the fetus, such as a foot or leg.⁵⁹ The doctor then uses his fingers to deliver the body of the fetus,

49. This was the term used by Dr. Martin Haskell of Ohio in 1992 to distinguish the procedure from “dismemberment-type D&E’s.” See Haskell, *supra* note 38, at E1092.

50. This was the term used by the late Dr. McMahon of California in 1989. See Cook, *supra* note 8, at 66. “The procedure called ‘partial birth abortion’ . . . is medically known as intact dilation and extraction.” Helen Dewar, *AMA Backs Late-Term Abortion Curb*, WASH. POST, May 20, 1997, at A1.

51. The American College of Obstetricians and Gynecologists (“ACOG”) committee uses this hybrid term. See Cook, *supra* note 8, at 66. The ACOG recognizes four distinct elements of the D&X procedure:

1. deliberate dilation of the cervix, usually over a sequence of days;
2. instrumental conversion of the fetus to a footling breech;
3. breech extraction of the body excepting the head;
4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

ACOG Statement of Policy, *reprinted in* 145 CONG. REC. S12954 (1999).

52. See Haskell, *supra* note 38, at E1092.

53. See *id.* (referring to another doctor’s practices). Some doctors believe this procedure is particularly useful during the later part of the second trimester because as the fetal tissue becomes more developed, D&E is more difficult. See *id.*

54. See *infra* notes 252-59 and accompanying text (discussing benefits of D&X). But see *infra* notes 260-63 and accompanying text (discussing the risks of D&X).

55. See Massie, *supra* note 7, at 316-17.

56. See *id.* at 313 n.43. The doctor’s description is found in a paper he submitted to the National Abortion Federation in 1992. See *id.*

57. See HERN, *supra* note 27, at 312-13; Haskell, *supra* note 38 at E1092; see also *supra* notes 36, 42 and accompanying text (stating that suction curettage and D&E procedures can be performed on an outpatient basis with local anesthesia).

58. See *supra* note 38 (discussing various methods for dilating the cervix).

59. See Haskell, *supra* note 38, at E1093.

except the head, into the vagina.⁶⁰ The cervix is not usually dilated enough for the head to pass through without injuring the woman.⁶¹ The doctor must then reduce the size of the head in order to complete the abortion, as may occur in D&E abortions.⁶² In his paper, Dr. Haskell described the fetal head reduction procedure, which requires the use of scissors to make an incision in the base of the skull so that a suction catheter can be used to evacuate the skull's contents.⁶³

4. Induction

Abortions by the induction method account for five percent of all procedures performed after the first trimester.⁶⁴ The induction procedure is typically used late second-term but is feasible any time after fifteen weeks LMP.⁶⁵ In the most common induction, the physician injects the uterus with a substance that both kills the fetus and induces labor.⁶⁶ In the less common procedure, the substance used will only induce labor; the resulting contractions actually kill the fetus.⁶⁷ Because this procedure is similar to labor during a full-term delivery, it involves the same complications, such as "mild to severe abdominal pain," fear, and "lack of control."⁶⁸

60. See *id.* The term "delivered," in its medical sense, applies to "anything that is removed from the uterus, which includes a baby, an intact fetus, a fetal part, or the placenta or umbilical cord." *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 814 (E.D. Va. 1998), *rev'd*, 144 F.3d 326 (4th Cir. 1998), *aff'd by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998); *STEDMAN'S MEDICAL DICTIONARY* 453 (26th ed. 1995) (stating that "deliver" means "[t]o extract from an enclosed place, as the fetus from the womb"); see also *Hope Clinic v. Ryan*, 195 F.3d 857, 863 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); *Evans v. Kelley*, 977 F. Supp. 1283, 1306 (E.D. Mich. 1997).

61. See Haskell, *supra* note 38, at E1093; see also Massie, *supra* note 7, at 315 (stating that the dangers include "hemorrhage or tearing of the woman's membranes").

62. See Haskell, *supra* note 38, at E1093; *supra* notes 46-47 and accompanying text (discussing the need to reduce the size of the fetus' skull in D&E abortions).

63. See Haskell, *supra* note 38, at E1093.

64. See Ely, *supra* note 7, at 6.

65. See *Gilmore*, 11 F. Supp. 2d at 803 (stating that induction is an alternative to D&E).

66. See HERN, *supra* note 27, at 124-26; see also *Planned Parenthood v. Doyle*, 162 F.3d 463, 467 (7th Cir. 1998) (reversing district court's denial of temporary injunction against enforcement of Wisconsin's partial-birth abortion laws), *vacated sub nom.* *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.W.L. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); *Gilmore*, 11 F. Supp. 2d at 803 (discussing the induction method).

67. See *Doyle*, 162 F.3d at 467 (citing WARREN M. HERN, *ABORTION PRACTICE* 122-60 (1984)); Mokhtar Topozada, *Terminations of Pregnancy After 14 Weeks*, in *MODERN METHODS OF INDUCING ABORTION* 70 (David T. Baird et al. eds., 1995); see also HERN, *supra* note 27, at 123-24 (describing "mechanical stimulation" as a method for induction). These procedures may unintentionally result in a live birth in a few cases. See *Doyle*, 162 F.3d at 467; HERN, *supra* note 27, at 124.

68. *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1068 (S.D. Ohio 1995),

5. Hysterotomy and Hysterectomy

The final two abortion procedures are the hysterotomy and hysterectomy. These procedures, however, are rarely used.⁶⁹ The hysterotomy is essentially a pre-term caesarian section.⁷⁰ The hysterectomy is the removal of the woman's entire uterus, which leaves her sterile.⁷¹

B. First Abortion Cases: Roe v. Wade and Doe v. Bolton

Nationwide bans on abortion came under attack during the 1960s.⁷² Because of the unsafe and unsanitary conditions of illegal abortion providers, women seeking illegal abortions suffered grave health risks, including death.⁷³ Doctors, legal reformers, clergy and women united to urge state legislators and courts to legalize abortion in order to reduce the risks associated with abortion.⁷⁴

In the landmark abortion law decision *Roe v. Wade*, the Supreme Court determined that a woman's choice to have an abortion is a fundamental right, protected by the Fourteenth Amendment's implicit right to privacy.⁷⁵ The plaintiffs, a pregnant single woman, a childless couple, and a physician, challenged a Texas law that prohibited all abortions except when necessary to save the life of the mother.⁷⁶ The

aff'd, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); *see also Gilmore*, 11 F. Supp. 2d at 803; HERN, *supra* note 27, at 187-94 (discussing drawbacks of induction procedure); Massie, *supra* note 7, at 316-17 (discussing benefits of D&X over induction); Ely, *supra* note 7, at 6; *infra* notes 271-76 and accompanying text (outlining risks of induction).

69. *See* HERN, *supra* note 27, at 123 ("Hysterotomy has been almost completely abandoned because of its associated high morbidity"); Massie, *supra* note 7, at 316 (stating that doctors avoid hysterotomy because of its "attendant surgical risks").

70. "Caesarian section" is defined as an "incision through the abdominal wall and the uterus (abdominal hysterotomy) for extraction of the fetus." STEDMAN'S MEDICAL DICTIONARY 1589 (26th ed. 1995).

71. *See Gilmore*, 11 F. Supp. 2d at 803. "Sterility" is defined as "the incapability of fertilization or reproduction." STEDMAN'S MEDICAL DICTIONARY 1675 (26th ed. 1995)

72. *See* ACLU, *The Right to Choose at 25: Looking Back and Ahead* (visited Nov. 27, 1999) <<http://www.aclu.org/issues/reproduct/rujan98.html>> (stating "finally in the 1960's, an outcry arose to make abortion legal again").

73. *See id.* (stating that "[t]he unsafe and unsanitary practice of illegal abortion maimed and killed thousands of women").

74. *See id.*

75. *See Roe v. Wade*, 410 U.S. 113, 153-155 (1973). The Court previously found that several of the guarantees within the Bill of Rights create related "zone[s] of privacy." *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that a married couple's right to use contraceptives fell in this "zone of privacy").

76. *See Roe*, 410 U.S. at 117-18, 120-21. In *Roe*, a single pregnant woman instituted a class action challenging the Texas criminal abortion statutes. *See id.* at 120-22. "The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a

Court held that the right to privacy limits how state legislatures could regulate the availability of abortions and abortion procedures.⁷⁷ In so doing, the Court divided the typical duration of a pregnancy into trimesters of roughly three months each.⁷⁸ The Court then compared the competing interests of the state to a woman's right of privacy during each trimester.⁷⁹

Under this framework, the Court concluded that during the first trimester the state may not ban abortions altogether nor closely regulate abortions because the decision of abortion is between the woman and her doctor.⁸⁰ In the second trimester, regulations are permitted only if they are "reasonably related" to the woman's health.⁸¹ Total bans on abortion, however, are not permitted at this stage.⁸² The third trimester typically marks the stage of pregnancy when the fetus becomes viable.⁸³ The Court decided that complete bans on abortions after viability are allowed.⁸⁴ The Court, however, required that abortions must be permissible, even during the third trimester, when necessary to preserve the life or health of the mother.⁸⁵

Thus, *Roe* acknowledged that state regulations face steep hurdles to outweigh a woman's fundamental right to abortion.⁸⁶ The Court recognized a two-prong test that state regulations must meet to pass

century." *Id.* at 116.

77. *See id.* at 162-64.

78. *See id.*

79. *See id.*

80. *See id.* at 163. The state does not have an interest in protecting the health of the mother during the first trimester because the mortality rate for full-term pregnancies is actually higher than abortions at this stage in history. *See id.*

81. *See id.* The Court stated that:

Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

Id. The Court found that during the second trimester, abortions pose a greater risk to the mother's health. *See id.* Thus, the state has an interest in protecting the mother's health. *See id.*

82. *See id.* The state has no interest in the protection of the fetus' life in the first two trimesters. *See id.*

83. *See id.* at 163-64. Viability means the "fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* The determination of viability is left up to the doctor's evaluation. *See Webster v. Reproductive Health Serv.*, 492 U.S. 490, 515-516 (1989) (upholding a statute requiring a doctor to perform certain tests for viability).

84. *See Roe*, 410 U.S. at 163-64. At viability, the state has a compelling interest in protecting the fetus because the fetus can potentially survive independent of the mother. *See id.* at 163.

85. *See id.* at 164.

86. *See id.* at 155-56.

muster under *Roe*.⁸⁷ The Court required that the regulations: (1) promote a compelling state interest protecting either the mother or the viability of the fetus, and (2) be narrowly drawn to protect only that interest.⁸⁸

The Supreme Court decided *Doe v. Bolton*⁸⁹ concurrently with *Roe*. In *Bolton*, the Court described the factors a doctor should consider in determining when an abortion is appropriate.⁹⁰ The Court stated that when a doctor considers the life and health of the mother, the doctor may also evaluate various “emotional, psychological, [and] familial” factors.⁹¹

C. Narrowing the Holding of Roe v. Wade: Planned Parenthood v. Casey

The complete holding of *Roe* remained intact until the Court decided *Planned Parenthood v. Casey*.⁹² Although the Court in *Casey* retained the “essential holding of *Roe*,” it rejected the trimester framework.⁹³ The Court reasoned that the trimester approach is not necessary to protect the woman’s right and that the trimester approach undervalues the state’s interest in fetal life.⁹⁴ The case addressed a Pennsylvania statute that contained several requirements for a woman to meet before she could have an abortion, including a twenty-four hour waiting period between the time she received information about the abortion and the abortion procedure. In addition, the statute required spousal notification of intent to abort for married women.⁹⁵

87. *See id.* (recognizing this two-prong test applies when fundamental rights are involved).

88. *See id.* (citations omitted).

89. *Doe v. Bolton*, 410 U.S. 179 (1973) (overturning a Georgia statute making abortion a crime unless it fell under three delineated exceptions).

90. *See id.* at 192 (stating that “medical judgement may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age”).

91. *Id.*

92. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Justices O’Connor, Souter, and Kennedy jointly wrote the plurality opinion. *See id.* at 843-911. Justices Stevens and Blackmun wrote separate concurring decisions saying they would have upheld *Roe* entirely. *See id.* at 911-22 (Stevens, J., concurring), 922-934 (Blackmun, J., concurring). Chief Justice Rehnquist and Justice Scalia wrote separate dissenting opinions that Justices White and Thomas joined. *See id.* at 944-79 (Rehnquist, J., dissenting), 979-1002 (Scalia, J., dissenting).

93. *Id.* at 873. *Roe* held that women have a right to chose abortion before viability without substantial interference by the state. *See Roe v. Wade*, 410 U.S. 113, 163 (1973). It also held that states can restrict abortions after viability as long as there is an exception for maternal life and health. *See id.* at 163-64.

94. *See Casey*, 505 U.S. at 872.

95. *See id.* at 844.

In *Casey*, the Court redefined the state's interests to include protecting not only the health of the mother but also the life of the fetus from the beginning of the pregnancy.⁹⁶ The Court held that the state's regulations must not impose an undue burden⁹⁷ on a woman's right to choose an abortion.⁹⁸ Once the point of viability has been reached, however, the Court held that the state can proscribe all abortions as long as the laws provide exceptions for where the life or health of the mother is at risk.⁹⁹

*D. Challenge of a State Ban on an Abortion Method:
Planned Parenthood v. Danforth*

*Planned Parenthood v. Danforth*¹⁰⁰ is the only case in which the Supreme Court considered the constitutionality of a state law prohibiting a specific abortion method.¹⁰¹ In *Danforth*, the Court held unconstitutional a Missouri law that forbade, inter alia, the use of the saline amniocentesis¹⁰² for the induction method of abortion after the

96. *See id.* at 876. These are competing interests that must be balanced. *See id.*

97. "Undue burden" is defined as a regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. This standard differs from the longstanding test for facial constitutional challenges before *Casey* as found in *United States v. Salerno*. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that under a facial challenge, the challenger "must establish that no set of circumstances exists under which the Act would be valid"). The Supreme Court has not decided the issue of whether *Casey* overturned *Salerno* for abortion challenges, though courts and individual judges have commented in majority or dissenting opinions. *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) (holding that *Salerno* does not apply to facial challenges to abortion regulations). *But see id.* at 217-219 (Boggs, J., dissenting) (leaving open the question of *Salerno's* applicability).

98. *See Casey*, 505 U.S. at 877. For example, the Court found the following Pennsylvania laws are not an undue burden: informed consent with a 24 hour waiting period before the procedure, parental consent for a minor under 18 as long as there is a judicial bypass provision, and mandatory record keeping at abortion facilities. *See id.* at 881, 899-900. The Court found the provision requiring spousal notification is an undue burden. *See id.* at 895.

99. *See id.* at 846.

100. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, several physicians challenged the constitutionality of the Missouri legislation, which, among other things, instituted an informed consent policy, a definition of "viability," and prohibited the use of "saline amniocentesis" as a method of abortion. *See id.* at 56-59.

101. *See* Jill R. Radloff, Note, *Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1562 (1999) ("In its twenty-six year history of abortion jurisprudence, the Supreme Court only once has considered the constitutionality of banning a specific abortion procedure."). The Supreme Court recently granted certiorari to consider the constitutionality of partial-birth abortion laws. *See Stenberg v. Carhart*, 68 U.S.W.L. 3338 (U.S. Jan. 14, 2000) (No. 99-830), *granting cert. in part* to 192 F.3d 1142 (8th Cir. 1999) (holding that ban on partial-birth abortion creates an undue burden on a woman's right to have an abortion).

102. Saline amniocentesis is an abortion procedure "whereby the amniotic fluid is withdrawn

first twelve weeks of pregnancy.¹⁰³ The Court concluded that the law was not a “reasonable regulation” that adequately supported the State’s interest in protecting the mother’s health.¹⁰⁴

In reaching this decision, the Court considered the frequency of the saline amniocentesis procedure during post-first-trimester abortions,¹⁰⁵ the limited availability of only one alternative technique,¹⁰⁶ and the increased risk to the health of the mother involved in the two remaining alternatives.¹⁰⁷ The Court found that the law effectively banned a procedure that doctors used in a “vast majority” of all second trimester abortions in the United States.¹⁰⁸ Put simply, the ban prohibited the most common second trimester abortion procedure at that time.¹⁰⁹ Although *Danforth* was decided under the trimester framework of *Roe*, the Court’s holding was narrow enough to meet the undue burden standard required under *Casey*.¹¹⁰

and ‘a saline or other fluid’ is inserted into the amniotic sac.” *Danforth*, 428 U.S. at 76. This is one way to induce labor under the induction method of abortion. See *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); see also *supra* Part II.A.4 (describing induction).

103. See *Danforth*, 428 U.S. at 75-76.

104. See *id.* at 79.

105. See *id.* at 77 (noting the testimony stated that nationwide use of saline amniocentesis ranges from 68% to 80%).

106. One alternative accepted by the district court was the prostaglandin technique, which is an alternative substance used to induce labor in an induction method abortion. See *id.* at 77. The appellees did not offer any evidence that it was even available in Missouri, however, and the evidence showed that no physicians in the neighboring state of Kentucky were “competent in the technique of prostaglandin amnio infusion.” *Id.* at 77 (quoting *Wolfe v. Schroering*, 388 F. Supp. 631, 637 (W.D. Ky. 1974) (internal quotation marks omitted)).

107. Hysterotomy and hysterectomy “are significantly more dangerous and critical for the woman than the saline technique.” *Id.* at 76. The court pointed out the “anomaly inherent in [the statute] when it proscribes the use of saline but does not prohibit techniques that are many times more likely to result in maternal death.” *Id.* at 78. Thus, the court concluded the law was not a reasonable regulation aimed at protecting maternal health, but rather an arbitrary one. See *id.* at 79.

108. See *id.* at 79.

109. See *id.*

110. See *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). The court reasoned:

Although *Roe*’s second trimester standard allowed for fewer constitutional abortion regulations than does *Casey*’s undue burden standard, it follows that a statute which bans a common abortion procedure would constitute an undue burden. An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion. Therefore, the Court’s analysis in *Danforth* is consistent with *Casey*’s undue burden standard and thus provides us with some guidance in this matter.

Id.

E. Catalyst for Concern Over Partial-Birth Abortions

The D&X procedure has become the most recent abortion method to receive national scrutiny. After the 1993 presentation to Congress of Dr. Martin Haskell's paper, *Dilation and Extraction for Late Second Trimester Abortion*,¹¹¹ nationwide concern over the D&X procedure began to spread.¹¹² Dr. Haskell's paper outlined the medical procedures involved in D&X abortions.¹¹³ The D&X procedure is commonly referred to as "partial-birth abortion" although that term does not reflect the medical definition of the procedure.¹¹⁴ In addition, public reaction to the D&X procedure may have been intensified because the only benefit of D&X provided in Dr. Haskell's paper was that it can be performed under local anesthesia on an outpatient basis.¹¹⁵

III. DISCUSSION

As a result of the widespread knowledge of the details involved in the D&X procedure, both the House and Senate twice passed a federal ban

111. See Haskell, *supra* note 38, at E1092-93. The paper is a detailed description of the technical medical terms of the procedure, and includes details such as the amount of local anesthesia that should be administered and other medications administered. See *id.* The paper was presented at the National Abortion Federation Risk Management Seminar in 1992. See Voinovich, 130 F.3d at 198-99 n.8.

112. See Lezzer, *supra* note 7, at 356 (discussing the Virginia Partial-Birth Abortion Act); Linda Greenhouse, *Justices to Rule on Law that Bans Abortion Method*, N.Y. TIMES, Jan. 15, 2000, at A1; Rivenburg, *supra* note 30, at E-1 (describing how the debate began once the National Right to Life Committee discovered Dr. Haskell's paper); see also Massie, *supra* note 7, at 322-23 (discussing the introduction of the first federal partial-birth abortion legislation). Representative Robert K. Dornan of California introduced the paper to Congress to bolster opposition to the Freedom of Choice Act, H.R. 25. See 139 CONG. REC. E1092 (1993). Mr. Dornan stated that if the Freedom of Choice Act passed "second and third trimester abortions on demand will be perfectly legal." *Id.* The Freedom of Choice Act was proposed in response to *Planned Parenthood v. Casey*. See 138 CONG. REC. S9035 (1992). Codifying *Roe v. Wade*, it prohibits states from placing undue restrictions on an individual's right to reproductive choice. See *id.*

113. See Haskell, *supra* note 38, at E1092-93.

114. See *Hope Clinic v. Ryan*, 195 F.3d 857, 863 (7th Cir. 1999) (stating that the "legal definition is an imperfect match for the medical definition of D&X"), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); *Carhart v. Stenberg*, 192 F.3d 1142, 1145 (8th Cir. 1999) (indicating that "this term, though widely used by lawmakers and in the popular press, has no fixed medical or legal content"), *cert. granted*, 120 S. Ct. 865 (2000); Massie, *supra* note 7, at 302 (asserting that the federal legislation uses "terminology that is virtually meaningless to the profession qualified to perform abortions"); Andrews, *supra* note 7, at 521 n.1 (quoting joint hearing before Senate Judiciary Committee).

115. See *Planned Parenthood v. Doyle*, 162 F.3d 463, 466 (7th Cir. 1998) (reversing district court's denial of temporary injunction against enforcement of Wisconsin's partial-birth abortion laws), *vacated sub nom.* *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.W.L. 3840 (U.S. Jan. 10, 2000); see also Haskell, *supra* note 38, at E1093 ("Among its advantages are that it is a quick, surgical outpatient method that can be performed on a scheduled basis under local anesthesia.").

on partial-birth abortions for President Clinton to veto the law both times.¹¹⁶ Most recently, the Senate passed the 1999 version of the ban¹¹⁷ on October 21, 1999,¹¹⁸ and it is currently pending approval by the House.¹¹⁹

State legislatures quickly responded to the outrage over D&X by proposing bans on the procedure.¹²⁰ At least thirty states passed bans that use the non-medical term "partial-birth abortion" to describe the D&X procedure.¹²¹ Several states modeled their statutes after the substantially identical 1997 federal bill.¹²² Since 1997, twenty of these state statutes have been challenged in both state and federal courts.¹²³

116. The President did not think the statute, as written, provided an adequate exception to protect the life and health of women who may need the D&X procedure. See *Massie*, *supra* note 7, at 319-20; Radloff, *supra* note 101, at 1555 n.3.

117. The proposed "Partial-Birth Abortion Ban Act of 1999" states "'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." S. 1692, 106th Cong. § 2(b)(1)(1999).

118. See 145 CONG. REC. S12997 (1999).

119. See *Lezzer*, *supra* note 7, at 356 (detailing federal legislative history).

120. See Radloff, *supra* note 101, at 1556 n.3 (stating that "only four state legislatures (Nevada, North Dakota, Texas and Pennsylvania) have not introduced any partial-birth abortion ban statute in the last three years"); *Partial-Birth Abortion Laws* (last modified Jan. 30, 2000) <<http://hometown.aol.com/abtrbng/pbal.htm>> [hereinafter *Partial-Birth Abortion Laws*] (citing the following state statutes: 1997 ALA. Act 97-485 (S.B. 314); ALASKA STAT. § 18.16.050 (LEXIS 1998); ARIZ. REV. STAT. ANN. § 13-3603.01 (West Supp. 1999); ARK. CODE ANN. § 5-61-203 (Michie 1998); FLA. STAT. ch. 390.011 (1998); GA. CODE ANN. § 16-12-144 (1999); 720 ILL. COMP. STAT. 513/10 (West 1999); IND. CODE ANN. § 16-34-2-1 (West Supp. 1999); KAN. STAT. ANN. § 65-6721 (Supp. 1999); LA. REV. STAT. ANN. § 14:32.9 (West Supp. 1999); MICH. COMP. LAWS ANN. §§ 333.17016, 33.17516 (West Supp. 1999); MISS. CODE ANN. § 41-41-73 (West 1999); MO. REV. STAT. § 565.300 (1998); MONT. CODE ANN. § 50-20-109 (1999); NEB. REV. STAT. §§ 28-326, 28-328 (1998); N.J. STAT. ANN. § 2A-65A (West 1998); OHIO REV. CODE ANN. § 2919.15 (Anderson 1996); R.I. GEN. LAWS § 24-4.12 (1998); S.C. CODE ANN. § 44-41-85 (West Supp. 1998); S.D. CODIFIED LAWS § 34-23A-27 (LEXIS Supp. 1999); TENN. CODE ANN. § 39-15-209 (1997); UTAH CODE ANN. § 76-7-310.5 (LEXIS 1999); VT. STAT. ANN. § 18.2-74.2 (1998)).

121. See *Partial-Birth Abortion Laws*, *supra* note 120. These states include Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wisconsin. See *Planned Parenthood Fact Sheet: State Laws Restricting Access to Abortion* (last modified Jan. 20, 1999) <<http://www.plannedparenthood.org/library/ABORTION/StateLaws.html>> (detailing status of various state laws prohibiting partial-birth abortion) [hereinafter *State Laws Restricting Access to Abortion*]. In Ohio, the statute prohibits "dilation and extraction," not "partial-birth abortion." OHIO REV. CODE ANN. § 2919.15(B) (Anderson 1996).

122. See Radloff, *supra* note 101, at 1563 n.38 (listing twenty-five state laws that are similar to the proposed federal statute).

123. See *State Laws Restricting Access to Abortion*, *supra* note 121; American Civil Liberties Union, *The State "Partial-Birth Abortion" Bans: Enjoined in the Courts* (last modified Jan. 28, 1999) <<http://www.aclu.org/issues/reproduct/statepbbans.html>> [hereinafter *Enjoined in the*

As a result of this litigation, courts in eighteen states either permanently or temporarily enjoined the statutory D&X bans.¹²⁴ The Federal Courts of Appeals in three circuits ruled on the laws of six states: Ohio, Nebraska, Iowa, Arkansas, Illinois, and Wisconsin.¹²⁵ The Eighth and Sixth Circuits found that the partial-birth abortion bans they reviewed were unconstitutional.¹²⁶ On October 26, 1999, the Seventh Circuit departed from those circuits when it held that Illinois' and Wisconsin's partial-birth abortion bans were constitutional.¹²⁷ Although the Fourth Circuit has yet to rule on the merits of Virginia's partial-birth abortion statute, it granted a stay of the district court's injunction on enforcing the statute.¹²⁸

Courts].

124. See Radloff, *supra* note 101, at 1565 n.49; *State Laws Restricting Access to Abortion*, *supra* note 121; *Enjoined in the Courts*, *supra* note 123 (listing the following cases: Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (reversing permanent injunction of Illinois law and preliminary injunction of Wisconsin law); Planned Parenthood v. Miller, 195 F.3d 386 (8th Cir. 1999) (permanently enjoined); Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000) (permanently enjoined); Little Rock Family Planning Servs., P.A. v. Jegley, 192 F.3d 794 (8th Cir. 1999) (permanently enjoined); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *aff'g* 911 F. Supp. 1051 (S.D. Ohio 1995), *cert. denied*, 523 U.S. 1036 (1998) (permanently enjoined); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998) (permanently enjoined); Causeway Med. Suite v. Foster, 42 F. Supp. 2d 604 (E.D. La. 1999) (preliminary injunction granted); Planned Parenthood v. Verniero, 41 F. Supp. 2d 478 (D. N.J. 1998) (permanent injunction granted); Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360 (N.D. Ga. 1998) (preliminary injunction granted); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998) (permanent injunction granted); Brancazio v. Underwood, 1998 U.S. Dist. LEXIS 22420 (D.W. Va. 1998) (temporary restraining order granted); Weyhrich v. Lance, No. Civ. 98-CV-117-S-BLW (D. Idaho 1998) (temporary restraining order granted); Intermountain Planned Parenthood v. State, No. BDV 97-477 (D.C. Mont. 1998); Rhode Island Med. Soc'y v. Pine, No. 97-416L (D.R.I. 1998) (temporary restraining order granted); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997) (permanently enjoined); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997) (permanently enjoined); Planned Parenthood v. State, No. 3AN-97-6019 (Super. Ct. Alaska 1998) (permanently enjoined)).

125. See Hope Clinic v. Ryan, 195 F.3d 857, 861 (7th Cir. 1999) (upholding the constitutionality of the Illinois and Wisconsin partial-birth abortion statutes), *petition for cert. filed*, 68 U.S.L.W. 3840 (U.S. Jan. 10, 2000); Planned Parenthood v. Miller, 195 F.3d 386, 387 (8th Cir. 1999) (holding Iowa's partial-birth abortion statute unconstitutional); Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999) (holding Nebraska partial-birth abortion statute unconstitutional and permanently enjoining its enforcement), *cert. granted*, 120 S. Ct. 865 (2000); Little Rock Family Planning Servs., P.A. v. Jegley, 192 F.3d 794, 795 (8th Cir. 1999) (holding unconstitutional the Arkansas partial-birth abortion statute as over broad and unduly burdensome); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 190 (6th Cir. 1997) (affirming the district court's grant of a permanent injunction enjoining enforcement of the Ohio partial-birth abortion statute), *cert. denied*, 523 U.S. 1036 (1998).

126. See Miller, 195 F.3d at 387; Carhart, 192 F.3d at 1145; Jegley, 192 F.3d at 795; Voinovich, 130 F.3d at 190.

127. See Hope Clinic, 195 F.3d at 861.

128. See Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 327 (4th Cir. 1998) (denying the motion to vacate the stay of the district court order), *aff'd by panel on reh'g*, 183 F.3d

A. Circuits Holding Partial-Birth Abortion Bans Are Unconstitutional

1. Sixth Circuit Decision

In *Women's Medical Professional Corp. v. Voinovich*,¹²⁹ the Sixth Circuit became the first Federal Court of Appeals to review the constitutionality of a partial-birth abortion ban.¹³⁰ It affirmed the district court's holding that the Ohio statute is unconstitutional.¹³¹ The statute created two separate bans: one of the D&X¹³² procedure entirely and the second of any type of abortion procedure when the "unborn human is viable."¹³³ The plaintiffs claimed the statute is unconstitutional because it "impose[s] undue burdens on a woman's right to choose an abortion or . . . jeopardize[s] the pregnant woman's health," and was unconstitutionally vague.¹³⁴

Because this was a facial challenge of the constitutionality of a statute, the court applied the undue burden standard of review set forth in *Casey*.¹³⁵ The court determined that the definition of the prohibited procedure is broad and could also apply to other methods of abortion,

303 (4th Cir. 1998). This is the only jurisdiction in which the district court found the state ban unconstitutional, yet the court of appeals allowed the ban to remain in effect until further review. *See Enjoined in the Courts, supra* note 123.

129. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 190 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). In *Voinovich*, an abortion clinic and doctor filed suit against the Governor of Ohio, Attorney General of Ohio, and a State's Attorney, seeking to enjoin enforcement of an Ohio law prohibiting dilation and extraction method abortions. *See id.* at 191-92. The district court entered a permanent injunction against the enforcement of the statute. *See Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1092-94 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). The Sixth Circuit affirmed this grant of injunction on appeal. *See Voinovich*, 130 F.3d at 190.

130. Ohio's early involvement in banning partial-birth abortions and challenging the bans is not surprising because "Dr. Haskell, the originator of the D&X procedure, is from Ohio." Radloff, *supra* note 101, at 1563 n.40. The Ohio statute involved specifically bans the "dilation and extraction" procedure. *See* OHIO REV. CODE ANN § 2919.15(B) (Anderson 1996).

131. *See Voinovich*, 130 F.3d at 190.

132. D&X is defined in the statute as "[t]he termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. 'Dilation and extraction procedure' does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion." OHIO REV. CODE ANN. § 2919.15(A).

133. *Voinovich*, 130 F.3d at 190 (quoting OHIO REV. CODE ANN. § 2919.17(A)). The analysis of the post-viability ban focuses on the adequacy of the medical necessity or medical emergency exceptions and the lack of scienter requirement. *See* OHIO REV. CODE ANN. § 2919.17(A).

134. *Voinovich*, 130 F.3d at 192.

135. *See id.* at 195-96. The standard in *Casey* is if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," the statute is unconstitutional. *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992). The court acknowledged the split in the Supreme Court over the actual effect of the *Casey* decision on the previous standard of review for facial challenges to constitutionality as established in *United States v. Salerno*, 481 U.S. 739 (1987). *See Voinovich*, 130 F.3d at 195.

such as the D&E procedure.¹³⁶ Thus, the court found that the Ohio law creates an undue burden because it prohibits D&E, the most common abortion procedure used during the second trimester.¹³⁷ The court found the second part of the Ohio law, which banned all post-viability abortions, permissible under *Casey* because a state can proscribe all post-viability abortions, as long as there are exceptions to protect maternal life and health.¹³⁸ The court, however, concluded that according to Ohio law, this part of the statute is not severable from the unconstitutional portion.¹³⁹

The dissenting opinion in *Voinovich* argued that the state legislature acted within the scope of its power in regulating the D&X procedure.¹⁴⁰ First, the dissent considered the holding of *Danforth* in light of the undue burden standard set forth in *Casey*.¹⁴¹ The dissent argued that without a finding that other procedures are unsafe or unavailable, it is not enough that the procedure may be less risky to constitute an undue burden on the right to an abortion.¹⁴² Second, the dissent stated that the statute's definition of the D&X procedure was not so broad as to prohibit the D&E procedure,¹⁴³ arguing that the Ohio legislature's intent to ban only one procedure was clearly communicated through sufficiently exact words.¹⁴⁴

2. Eighth Circuit Decision

In September, 1999, the Eighth Circuit, by unanimous vote, found three similarly written partial-birth abortion bans unconstitutional

136. See *Voinovich*, 130 F.3d at 200. Doctors testified before the district court that often when performing the D&E procedure, the doctor must reduce the size of the fetus' head in order to complete the abortion. See *id.* at 198. Although doctors develop different methods to do this, "some physicians compress the head by using suction to remove the intercranial contents." *Id.* The court concluded that this makes the statutory definition for D&X applicable to some D&E procedures because the use of suction occurs "purposely." See *id.* at 200.

137. See *id.* at 201.

138. See *id.* at 202.

139. See *id.*

140. See *id.* at 213 (Boggs, J., dissenting).

141. See *id.* (Boggs, J., dissenting).

142. See *id.* (Boggs, J., dissenting). The district court compared the risks of D&X to D&E, induction, hysterectomy, and hysterotomy. See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1067-70 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). It concluded that D&X "appears to have the potential of being a safer procedure than all other available abortion procedures." *Id.* at 1070.

143. See *Voinovich*, 130 F.3d at 214-15 (Boggs, J., dissenting).

144. See *id.* at 215 (Boggs, J., dissenting) ("[T]he D&E procedure does not satisfy the definition of the ban because it does not terminate the pregnancy by purposely inserting a suction device into the fetal skull to excavate the contents of the skull.").

because each places an undue burden on the woman's right to choose whether or not to have an abortion.¹⁴⁵ The court found each statute's definition of "partial-birth abortion" sufficiently ambiguous so as to prohibit not only the D&X method but the D&E procedure as well.¹⁴⁶ Because the D&E procedure is the most commonly used second trimester procedure, the statutes creates an undue burden.¹⁴⁷ The court compared the similarities and overlap of the D&X and D&E procedures to show how the statutes fail to provide a term that differentiated the two procedures.¹⁴⁸ For example, the statutes' focus on prohibiting an abortion when dismemberment occurs outside the uterus fails to meaningfully distinguish between D&X and D&E. Both procedures may involve dismemberment outside the uterus.¹⁴⁹ Further, the court

145. The statutes were from Iowa, Nebraska, and Arkansas. See *Planned Parenthood v. Miller*, 195 F.3d 386, 388 (8th Cir. 1999) (Iowa); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (Nebraska), *cert. granted*, 120 S. Ct. 865 (2000); *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 796 (8th Cir. 1999) (Arkansas). Because the court held that the statute creates an undue burden, the court did not address the vagueness issue asserted by the plaintiffs. See *Miller*, 195 F.3d at 388; *Carhart*, 192 F.3d at 1146 n.4; *Jegley*, 192 F.3d at 796.

146. See *Miller*, 195 F.3d at 389; *Carhart*, 192 F.3d at 1150; *Jegley*, 192 F.3d at 798. The Nebraska definition of partial-birth abortion is "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 . . . the term partially delivers vaginally . . . means deliberately and intentionally delivering . . . a living unborn child, or a substantial portion thereof." NEB. REV. STAT. § 28-326(9) (1998). Arkansas defines partial-birth abortion as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before taking the life of the fetus and completing the delivery." ARK. CODE ANN. §5-61-202 (Michie 1998). The definition found in the Iowa statute is "an abortion in which a person partially vaginally delivers a living fetus before killing the fetus and completing the delivery." IOWA CODE ANN. § 707.8(A)(1)(d) (West 1999). "Vaginally delivers' . . . means deliberately and intentionally delivering . . . a living fetus or a substantial portion of a living fetus." IOWA CODE ANN. § 707.8(A)(2). The court noted that the slight differences between the states' statutes were insignificant and therefore applied the same analysis to all. See *Miller*, 195 F.3d at 387; *Jegley*, 192 F.3d at 795.

147. See *Miller*, 195 F.3d at 388; *Carhart*, 192 F.3d at 1151; *Jegley*, 192 F.3d at 797-98.

148. For example, the court considered the term "substantial portion" used in the Nebraska and Iowa statutes. This term, however, is not defined within the statutes. See *Miller*, 195 F.3d at 388-89; *Carhart*, 192 F.3d at 1150. The Arkansas statute does not use the term "substantial portion" like the Nebraska and Iowa statutes; it only requires that the fetus be "partially" delivered. See *Jegley*, 192 F.3d at 798. For the purposes of its analysis, the court stated, "'partially' is not appreciably different from 'substantial portion.' The effect is the same." *Id.* The court proposed that a "substantial portion" of the fetus must include an arm or a leg, which means that a doctor who "brings an arm or [a] leg into the vagina as part of the D&E procedure therefore violates the statute." *Carhart*, 192 F.3d at 1150. The scienter requirement that the procedure be done "deliberately and intentionally" does not limit the application of the statute to only D&X because doctors who bring an arm or leg into the vagina while performing the D&E do so deliberately and intentionally. See *id.* at 1150; *Miller*, 195 F.3d at 389.

149. Several doctors testified in *Carhart* that the dismemberment of the fetus that occurs in the D&E procedure does not necessarily occur in the uterus and that it is actually more often done in the vagina. See *Carhart*, 192 F.3d at 1147. Furthermore, the court noted the point of fetal

found no way to interpret the statutes to avoid creating an undue burden on a woman's right to choose to have an abortion and, at the same time, retain the basic structure of the statutes as intended by the legislatures.¹⁵⁰

B. Circuits Upholding the Constitutionality of Partial-Birth Abortion Bans

1. Fourth Circuit Decision

The Fourth Circuit, in *Richmond Medical Center for Women v. Gilmore*,¹⁵¹ became the second circuit court to evaluate the partial-birth abortion procedure. While this case was pending before the district court, the district judge granted a preliminary injunction against enforcing the partial-birth abortion laws.¹⁵² The defendants appealed the district court's refusal to stay the injunction pending appeal. The appellate judge granted the defendants' motion, thereby reversing the district court's preliminary injunction of the ban.¹⁵³ Although the appellate judge did not rule on the merits of the case,¹⁵⁴ the judge criticized the district court's preliminary finding that the statute is unconstitutional.¹⁵⁵ The plaintiffs appealed the sole appellate judge's reversal of the injunction to a panel of three appellate judges. The panel

death is not an accurate gauge under the statute because it occurs at different stages during each D&E or D&X procedure. *See id.* at 1148; *see also Jegley*, 192 F.3d at 797. There is no universal definition of fetal demise. *See Carhart*, 192 F.3d at 1148 n.8. The parties in *Carhart*, however, agreed that a heart beat indicated a living fetus. *See id.*

150. *See Miller*, 195 F.3d at 389; *Carhart*, 192 F.3d at 1150.

151. *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998), *aff'd by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998). In *Gilmore*, three medical organizations and two doctors brought suit to enjoin enforcement of a Virginia state law prohibiting partial-birth abortions. *See id.* at 327.

152. *See Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 799 (E.D. Va. 1998), *rev'd*, 144 F.3d 326 (4th Cir. 1998), *aff'd by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998). The court applied the "hardship balancing test" before determining the injunction should be granted. *See id.* at 806-29. The court stated that risk of prosecution for the plaintiffs would "chill the plaintiffs' ability to provide safe medical care for their patients." *Id.* at 809. The court concluded that the plaintiffs were likely to succeed on the claim that the statute was unconstitutional. *See id.* at 819 (regarding vagueness), 827 (regarding undue burden).

153. *See Gilmore*, 144 F.3d at 327.

154. *See id.* at 328.

155. *See id.* First, the judge stated that because none of the plaintiffs performed the D&X procedure, they did not have a "reasonable fear of prosecution" and, thus, lacked standing to challenge the ban. *Id.* The judge narrowly interpreted the statute so as to reach only the D&X procedure. *See id.* at 328-30. He concluded that the district court "all but presumed the statute unconstitutional and, where the slightest ambiguity in the statute's language arguably existed, assumed . . . that the State would adopt and enforce a construction of the statute that would render it unconstitutional." *Id.* at 332.

denied the plaintiff's motion to reinstate the preliminary injunction, thereby enforcing the sole appellate judge's opinion that the Virginia law was likely to be found constitutional upon further review.¹⁵⁶

2. Seventh Circuit Decision

The Seventh Circuit twice considered partial-birth abortion laws but reached opposite conclusions.¹⁵⁷ In *Planned Parenthood of Wisconsin v. Doyle*,¹⁵⁸ the Seventh Circuit considered the Wisconsin partial-birth abortion law.¹⁵⁹ In a 2-1 decision, the Seventh Circuit granted a preliminary injunction against the partial-birth abortion law.¹⁶⁰ The court reasoned that the Wisconsin statute was likely to be found unconstitutional after a full trial because it obstructed a woman's constitutional right to an abortion.¹⁶¹

The Court of Appeals, en banc, reviewed the same case in October, 1999.¹⁶² In *Hope Clinic v. Ryan*,¹⁶³ the court jointly considered the constitutionality of the Illinois and Wisconsin partial-birth abortion

156. See *Richmond Med. Ctr. for Women v. Gilmore*, 183 F.3d 303 (4th Cir. 1998). The dissenting judge compared one physician's description of D&E abortions to the statutory definition of "partial-birth abortion." See *id.* at 304-05 (Murnaghan, J., dissenting). The judge concluded the statute could apply to the procedure used by this physician. See *id.* (Murnaghan, J., dissenting). The judge also agreed with the district court that the statute was vague and, thus, that abortion providers were "without fair notice of the line between lawful and unlawful conduct." *Id.* at 306 (Murnaghan, J., dissenting). Furthermore, the judge concluded that the lack of a maternal health exception created an undue burden on a woman's right to an abortion when continuing with the pregnancy would put her health at risk. See *id.* (Murnaghan, J., dissenting).

After a trial on the merits, the district court concluded that the partial-birth abortion ban is unconstitutional and issued a permanent injunction against the statute. See *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 445 (E.D. Va 1999).

157. Compare *Planned Parenthood v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998) (granting preliminary injunction against enforcement of the Wisconsin partial-birth abortion statute), *vacated sub nom.* *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.W.L. 3461 (U.S. Jan. 10, 2000), with *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999) (en banc), (denying preliminary injunction against enforcement of the Illinois and Wisconsin partial-birth abortion statutes), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156).

158. *Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1998), *vacated sub nom.* *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156).

159. See *id.* at 464.

160. See *id.* at 464, 471.

161. See *id.*

162. See *Hope Clinic*, 195 F.3d at 861.

163. *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (en banc), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156). *Hope Clinic* involved a consolidated review of two cases: *Hope Clinic* and *Doyle*. See *id.* at 861. In *Hope Clinic*, abortion providers brought suit against the Illinois Attorney General and the State's Attorney, arguing the unconstitutionality of the Illinois partial-birth abortion statute. See *id.* In *Doyle*, abortion providers similarly challenged a Wisconsin partial-birth abortion statute. See *id.*

laws.¹⁶⁴ Contrary to its prior decision, the court concluded that with the help of state courts, both states partial-birth abortion statutes are capable of constitutional application.¹⁶⁵

a. Majority Opinion

The court recognized that the partial-birth abortion laws at issue focused on the D&X procedure.¹⁶⁶ D&X is often singled-out because it is particularly gruesome in comparison to other methods of abortion.¹⁶⁷ The court evaluated the constitutionality of the partial-birth abortion bans, considering the challenge of vagueness and whether the bans imposed an undue burden on women's rights.¹⁶⁸ These two issues were linked when considering partial-birth abortion laws because if the statutes were vague, they prohibited other methods of abortion, such as the induction, suction curettage, or D&E procedures. Thus, the court stated that prohibiting any of these "principal methods of performing abortions in the United States" would create an undue burden to a woman's right to an abortion.¹⁶⁹ First, the court concluded that even though the "legal definition is an imperfect match for the medical definition of D&X," the statutes in question clearly communicate that the ban is intended only for the D&X method.¹⁷⁰ Second, the court found that prohibiting the D&X procedure is not an undue burden on a woman's right to abortion.¹⁷¹

The court held that the statutes should not be enjoined because the state courts could "save their statutes" from vagueness.¹⁷² The Supreme

164. *See id.* at 861.

165. *See id.* (deferring to state courts to form a constitutionally permissible construction of the statutes).

166. *See id.*

167. "It is this combination of coming so close to delivering a live child with the death of the fetus by reducing the size of the skull that not only distinguishes D&X from D&E medically but also causes the adverse public (and legislative) reaction." *Id.* at 862.

168. *See id.* at 861.

169. *Id.* In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court established the undue burden standard to test the constitutionality of a restriction on abortion. *See id.* at 877 (defining undue burden as having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"); *see also supra* Part II.C (discussing *Casey*).

170. *Hope Clinic*, 195 F.3d at 863. Based on the recent Supreme Court case, *City of Chicago v. Morales*, 527 U.S. 41 (1999), the court found that state courts should clarify ambiguities of state laws. *See Hope Clinic*, 195 F.3d at 864. The issue before the Court in *Morales* was whether Chicago's Gang Congregation Ordinance was unconstitutionally vague. *See Morales*, 527 U.S. at 43. The Court held that federal courts are bound by the state courts' interpretations of vague laws. *See id.*

171. *See Hope Clinic*, 195 F.3d at 871.

172. *See id.* at 864-65.

Courts of Illinois and Wisconsin could do this in two ways: first, they could help define the statutes; second, they could grant injunctions to eliminate the risk of improper prosecution.¹⁷³

The court laid out several options for defining the statutes.¹⁷⁴ The court suggested that the state courts “assimilate” the statutory definition of partial-birth abortion with the medical definition of D&X.¹⁷⁵ The court also suggested that because there is a “central core of meaning” in the statute, the state courts can define the “outer boundaries” through their common law decisions.¹⁷⁶ Finally, the court suggested that state courts apply the partial-birth abortion statutes’ mental state requirements to a physician’s mental state or knowledge regarding “the medical procedure being performed.”¹⁷⁷

Although the court’s requirement that the state courts sharpen the definition of “partial-birth abortion” meant that the statutes are not absolutely clear, the statutes are not so vague as to violate the Due Process Clause.¹⁷⁸ Because the court believed there is a central understanding of what is prohibited by the laws, physicians will have sufficient notice about what is prohibited while the courts are busy defining the outlying boundaries.¹⁷⁹ Furthermore, the precautionary injunction granted by the court limited the prosecution under the statute to only the D&X procedure.¹⁸⁰ Therefore, the plaintiffs’ contention that

173. *See id.* at 864-71.

174. *See id.* at 865-69.

175. *See id.* at 865.

176. *Id.* at 867-68. The Supreme Court also used this method in interpreting the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and Article 133 of the Uniform Code of Military Justice, making “conduct unbecoming an officer and a gentleman” a crime for commissioned officers. *Id.* at 868.

177. *Id.* at 866-67. For example, the Illinois statute provides: “Any person who knowingly performs a partial-birth abortion and thereby kills a human fetus or infant is guilty of a Class 4 felony.” 720 ILL. COMP. STAT. 513/10 (West 1999). According to the court’s suggestion, the statute would require that the “physician know that the medical procedure being performed is a ‘partial-birth abortion’ and not simply that the physician know that he is performing particular physical acts.” *Hope Clinic*, 195 F.3d at 867. The court also relied on the Supreme Court’s reading of 18 U.S.C. §§ 241 and 242 to show how the Court was “exceptionally creative with statutory allusions to mental states.” *Id.* at 866-67. The statute makes conspiracy to deprive someone’s constitutional rights a crime, and § 242 makes it a crime to deprive someone’s constitutional rights under color of law. *See* 18 U.S.C.A. § 241 (West 2000). The court encouraged the Supreme Court of Wisconsin to follow the U.S. Supreme Court’s admirable way to “save” a statute. *See Hope Clinic*, 195 F.3d at 866-67.

178. Due process is violated when a law is so vague that a reasonable person would not have notice that a certain behavior is prohibited. *See Hope Clinic*, 195 F.3d at 869 (citing *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Marks v. United States*, 430 U.S. 188, 196 (1977); *Bouie v. Columbia*, 378 U.S. 347, 351 (1964)).

179. *See id.* at 868.

180. *See id.* at 869-70.

the vagueness of the statute will cause fearful doctors not to perform other, presumptively legal, abortion procedures, had no weight.¹⁸¹ The court also looked at statistics from Indiana to compare the effect of that state's ban of partial-birth abortion on the number of abortions generally performed in that state. This was illustrative for the court because Indiana's statute is similar to Wisconsin and Illinois' statutes.¹⁸² The court found that the data indicates no apparent effect of the state's ban of D&X on the legal D&E procedure. The court thus concluded that the bans do not have the negative effect of discouraging other abortion methods.¹⁸³

The second part of the court's analysis focused on whether banning D&X is an undue burden on a woman's right to choose abortion.¹⁸⁴ The court divided the plaintiffs' claim that prohibiting D&X was an undue burden into two arguments. First, the plaintiffs argued that, according to *Casey*, all abortion laws must permit abortions when they are necessary to protect the life and health of the woman.¹⁸⁵ Both the Illinois and Wisconsin statutes provide one exception only when the mother's life is endangered.¹⁸⁶ The *Hope* court rejected the plurality holding in *Casey* concerning the health of the mother as a universal rule, especially to a procedure that is never necessary to protect a patient's health.¹⁸⁷ Second, the court rejected the argument that any prohibition

181. *See id.* at 871.

182. *See id.* at 870-71 (relying on data from Indiana's State Epidemiologist). The Indiana statute defines "partial birth abortion" as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." IND. CODE ANN. § 16-18-2-267.5 (West Supp. 1999).

183. *See Hope Clinic*, 195 F.3d at 870-71.

184. *See id.* at 871-75. Because the court did not find that the statutes effectively prohibit the D&E procedures, it did not follow the Eighth Circuit's reasoning for finding that the bans cause an undue burden. *See id.* The Eighth Circuit found that because the bans reached the D&E procedure, the statute creates an undue burden. *See Planned Parenthood v. Miller*, 195 F.3d 386, 388 (8th Cir. 1999); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000); *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 798 (8th Cir. 1999). The court went on to state that because none of the plaintiff doctors in Illinois used the D&X procedure, they do not have standing to challenge the ban on D&X on the basis that it is an undue burden. *See Hope Clinic*, 195 F.3d at 871-72.

185. *See Hope Clinic*, 195 F.3d at 871-72.

186. *See* 720 ILL. COMP. STAT. 513/10 (1999) ("necessary to save the life of a mother . . ."); WIS. STAT. ANN. § 940.16(3) (West Supp. 1999) ("necessary to save the life of a woman . . .").

187. *See Hope Clinic*, 195 F.3d at 871-72. The court stated:

The point that the plurality made was that a statute that lacks a "health exception" may unduly burden the woman's right to obtain an abortion before the fetus has reached viability; when state law offers many safe options to that end, the regulation of an additional option does not produce an undue burden.

Id. at 871. In the Wisconsin case, because the district court found that "the D&X procedure is never necessary from the perspective of the patient's health," the statute does not burden women

of a medical procedure is an undue burden on a woman's right to abortion. The plaintiffs' reading of each statute to require a physician's case-by-case evaluation of the health reasons for a woman's choice of abortion would effectively prohibit the State from regulating any abortion technique.¹⁸⁸ The court stated that this conclusion leaves the term "undue burden" meaningless, thereby rendering the *Casey* standard ineffective.¹⁸⁹

b. Dissenting Opinion

The dissent, written by Chief Judge Posner, first criticized the majority decision for overstepping the court's scope of authority in interpreting the state statutes.¹⁹⁰ Specifically, the dissent disagreed with the court's conclusion that the statutes are not vague because they only prohibit the D&X procedure.¹⁹¹ According to the dissent, the majority's conclusion is inconsistent with the court's issuance of a precautionary injunction and its suggestion that state courts define the laws.¹⁹² The dissent argued that the court overstepped its power by enjoining laws that, by the court's arguments, neither violate federal law nor create a significant danger of violating federal law.¹⁹³ The majority opinion relied on the assurances of state law enforcement authorities to find that there is a low probability of improper enforcement of the statutes.¹⁹⁴ The dissent argued that by requiring additional assurances from law

seeking abortions because other procedures are always available. *Id.* at 872.

188. *See id.* at 873. Because of the medical technicalities involved, the Seventh Circuit stressed that jury review of independent medical judgement is not ideal. *See id.* ("A health exception, where jurors rather than physicians assessed health, would be an order of magnitude worse than the ambiguity plaintiffs perceive in the partial-birth-abortion laws."). This would undermine faith in the judgment of medical professionals. *See id.* The other alternative is to conclude that a physician's assessment is incontestable. *See id.* at 874. The problem this presents, the court stated, is that some doctors would believe the option they chose was the best, "even if the medical profession as a whole disagrees." *Id.*

189. *See id.*

190. *See id.* at 876 (Posner, C.J., dissenting). Chief Judge Posner wrote that the majority "expand[ed] federal judicial power over the states by a method that the Supreme Court has never countenanced and that violates Article III of the Constitution." *Id.* (Posner, C.J., dissenting). Chief Judge Posner was joined by Circuit Judges Rovner, Wood, and Evans.

191. *See id.* (Posner, C.J., dissenting).

192. *See id.* at 877-78 (Posner, C.J., dissenting).

193. *See id.* at 877 (Posner, C.J., dissenting). One violation of federal law is infringing on someone's constitutional rights. In order to enjoin a statute, there must be a nontrivial probability of injury by enforcing the statute. *See id.* (Posner, C.J., dissenting) (citing *Clinton v. City of New York*, 524 U.S. 417 (1998); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983); *Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam); *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998)).

194. *See id.* at 865 ("The Attorneys General of Illinois and Wisconsin . . . tell us that their statutes are concerned only with the D&X procedure and will be enforced only against its use.")

enforcement authorities, the laws themselves are unconstitutionally vague.¹⁹⁵

The dissent also criticized the majority for suggesting state courts rewrite unconstitutionally vague statutes to cure the ambiguities.¹⁹⁶ The dissent argued that the inadequacy of the terms used in the statutes cannot be saved by interpreting the statutes' mental state requirements.¹⁹⁷ Furthermore, Judge Posner asserted that vague statutes will unnecessarily deter constitutionally protected conduct and that, as a result, a rational person may avoid such protected conduct because it might fall within the statute's prohibitions.¹⁹⁸ Additionally, because the injunction limits enforcement only to D&X procedures, the courts will not get the chance to clarify the statutes.¹⁹⁹

The dissent next discussed the undue burden on the woman if the D&X procedure was banned.²⁰⁰ The dissent argued that the statutes are based only on moral considerations, not on protecting the health or life of the mother.²⁰¹ The dissent noted that late-term abortions are more likely than first-trimester abortions to be motivated by health considerations rather than mere convenience.²⁰² Thus, the dissent found it perplexing that there are no exceptions to the statutes that provide for the protection of maternal health.²⁰³

Moreover, the dissent proposed that challengers targeted D&X simply because the gruesome details of the procedure have been

195. *See id.* at 878 (Posner, C.J., dissenting). Also, "the court both rejects the charge that the statutes are unconstitutionally vague and, by enjoining their application outside their small clear core until they are clarified by the state courts, holds that they are too vague to provide fair warning—which means they *are* unconstitutionally vague." *Id.* (Posner, C.J., dissenting).

196. *See id.* at 876-78 (Posner, C.J., dissenting). The dissent criticized the court's reliance on its interpretation of *City of Chicago v. Morales*, 527 U.S. 41 (1999), holding that federal court review of state statutes for vagueness must be postponed until state courts have considered the statute. *See Hope Clinic*, 195 F.3d at 877 (Posner, C.J., dissenting). The cases cited by the majority "involve federal courts either narrowing federal statutes that are fairly susceptible of being narrowed or accepting as authoritative a narrowing interpretation of a state statute by a state court." *Id.* (Posner, C.J., dissenting).

197. *See id.* at 876-78 (Posner, C.J., dissenting).

198. *See id.* (Posner, C.J., dissenting).

199. *See id.* at 886 (Posner, C.J., dissenting). Also, because the penalty for violation is high and the doctors have much to lose (in Wisconsin, the maximum penalty is life imprisonment), the doctors are unlikely to give the courts the chance to define the borders by testing the outside limits of the statute. *See id.* at 889 (Posner, C.J., dissenting).

200. *See id.* at 878-85 (Posner, C.J., dissenting).

201. *See id.* (Posner, C.J., dissenting).

202. *See id.* at 878-79 (Posner, C.J., dissenting). Without a health exception, D&X is prohibited even if the available alternatives would cause permanent sterilization or paralysis. *See id.* at 881 (Posner, C.J., dissenting).

203. *See id.* at 878 (Posner, C.J., dissenting).

publicized.²⁰⁴ The dissent stated that in reality, the “position of the feet” is the only substantial difference between an acceptable D&E procedure and a felonious D&X procedure.²⁰⁵ The dissent further proposed that the statutes are victims of publicized inaccuracies surrounding differences among abortion methods.²⁰⁶ The dissent stated that the statutes’ use of medically inaccurate terminology and emotionally charged words did not clarify the distinctions between procedures.²⁰⁷ The dissent then accused the district court of being driven by emotions because of the questionably biased findings of fact.²⁰⁸ It also criticized the majority for considering only the Wisconsin district court’s findings of fact, when the Illinois district court’s affidavits indicated contradictory information.²⁰⁹ The dissent found that banning the D&X procedure is an undue burden on a woman’s right to choose abortion and is unconstitutional.²¹⁰

204. *See id.* at 880 (Posner, C.J., dissenting). “[P]ublic support for the laws was also based . . . on sheer ignorance of the medical realities of late-term abortion.” *Id.* (Posner, C.J., dissenting).

205. *See id.* at 879 (Posner, C.J., dissenting). Because the fetus’s skull is usually too large to pass through the dilated cervix, both procedures require reducing the size of the skull by similar methods. *See id.* (Posner, C.J., dissenting).

206. *See id.* (Posner, C.J., dissenting) (suggesting “there is no meaningful difference between the forbidden and the privileged practice”).

207. *See id.* at 882 (Posner, C.J., dissenting). The Illinois and Wisconsin statutes use the terms “child” and “infant,” respectively, to refer to the fetus from the moment of conception. *See* 720 ILL. COMP. STAT. 513/5 (West 1999); WIS. STAT. § 940.16(1)(a) (West 1998). Applying these definitions to all abortions in general would make any abortion infanticide. *See Hope Clinic*, 195 F.3d at 882 (Posner, C.J., dissenting).

208. *See Hope Clinic*, 195 F.3d at 882-84 (Posner, C.J., dissenting).

209. *See id.* at 882-83 (Posner J., dissenting). The Wisconsin district court judge recognized advantages of D&X for women’s health but then “concluded that the procedure is never necessary to protect the woman’s health.” *Id.* at 882 (Posner J., dissenting). Furthermore, the district court relied on the testimony of only one physician and ignored suggestions by other courts that questioned this physician’s credibility because of his political convictions. *See id.* (Posner J., dissenting). The court of appeals found support for the Wisconsin district court findings in two medical papers that focused on the ethical dilemmas of late-term abortions while overlooking an article that supports ACOG’s policy that the decision should remain with the physicians, not the legislatures. *See id.* (Posner J., dissenting) (discussing David A. Grimes, *The Continuing Need for Late Abortions*, 280 JAMA 747 (1998) (concurring with the ACOG’s opinion that the D&X procedure should be an option for the physician, and not cited by the district court); Nancy G. Romer, *The Medical Facts of Partial-Birth Abortion*, in 3 NEXUS: A JOURNAL OF OPINION 57 (1998) (written by a pro-life doctor concerning ethical as opposed to medical concerns); M. LeRoy Sprang & Mark G. Neerhoff, *Rationale for Banning Abortions Late in Pregnancy*, 280 JAMA 744 (1998)).

210. *See Hope Clinic*, 195 F.3d at 885 (Posner, C.J., dissenting).

IV. ANALYSIS

Partial-birth abortion laws have been challenged both as unconstitutionally vague and as an undue burden on a woman's right to choose an abortion. Two courts of appeals have found that the undue burden is created because, in addition to prohibiting D&X, the laws also prohibit D&E, the most common second term abortion technique.²¹¹ Only one court of appeals has held that a narrowly read statute that prohibits only D&X is constitutional.²¹²

The essential issue remains unresolved: can states proscribe a method of abortion if the legislatures consider it offensive? The answer is no for two reasons. First, prohibiting the D&X procedure alone is an undue burden on women's right to abortion.²¹³ Second, it is not possible for the legislature to succinctly and fairly proscribe this method.²¹⁴ The best option is to allow the medical community to evaluate this procedure and respond independently according to its conclusion.²¹⁵

A. Banning D&X Is an Undue Burden on a Woman's Right to Choose an Abortion

Pre-viability bans on the D&X procedure are unconstitutional because they place an undue burden on a woman's right to choose an abortion.²¹⁶ These bans create an undue burden for three reasons. First, there is no valid state interest that overrides concerns for women's health.²¹⁷ Second, the unavailability of D&X forces women to undergo what may be a riskier method of abortion or forego the abortion altogether even when it is in the mother's best health interest to abort

211. See *supra* Part III.A (discussing the holdings of *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998), and *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000)).

212. See *Hope Clinic*, 195 F.3d at 874; *supra* Part III.B.2.a (discussing majority opinion of *Hope Clinic v. Ryan*).

213. See *infra* Part IV.A (asserting that banning D&X is an undue burden on a woman's right to choose an abortion).

214. See *infra* Part IV.B (asserting that drafting a constitutionally permissible statute is a legislative impossibility).

215. See *infra* notes 240-43 and accompanying text (discussing the importance the medical community has in evaluating the safety of the D&X procedure).

216. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (stating that laws creating undue burdens on a woman's right to choose abortion are unconstitutional).

217. See *infra* Part IV.A.1 (asserting that no valid state interest overrides concerns for women's health).

the pregnancy.²¹⁸ Third, the bans create a substantial obstacle for the class of women seeking late-term abortions.²¹⁹

1. No Valid State Interest Overrides Concerns for Women's Health

In *Planned Parenthood v. Casey*, the Supreme Court held that valid state interests permit state laws to regulate abortion before fetus viability so long as the laws do not pose an undue burden on a woman's choice of abortion.²²⁰ As such, any burden is "undue" when the state does not have a valid interest in the law, especially when maternal health may be at risk.²²¹

States began to pass bans on the D&X procedure, usually labeled "partial-birth abortion," shortly after Representative Robert K. Dornan of California submitted Dr. Haskell's paper to the House of Representatives.²²² Congress also attempted to pass legislation prohibiting this procedure.²²³ The legislative bodies contend that these laws support two valid state interests: (1) protecting fetal life and (2) protecting maternal health.²²⁴ In reality, however, the bans protect neither of these interests.²²⁵

Both pro-choice and pro-life groups have been active in responding to these laws. Pro-choice groups oppose partial-birth abortion bans because they believe that the laws are solely political statements intended to "dramatize the ugliness of abortions."²²⁶ The D&X procedure has been singled out, according to opponents of the bans,

218. See *infra* Part IV.A.2 (asserting that the partial-birth abortion bans may force women to choose riskier procedures).

219. See *infra* Part IV.A.3 (discussing the *Casey* undue burden standard as applied to partial-birth abortion procedures).

220. See *Casey*, 505 U.S. at 833.

221. See *Hope Clinic v. Ryan*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting) ("The right of abortion is unduly burdened by any law that endangers the woman's health"), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); see also *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1071-72 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

222. See 139 CONG. REC. E1092 (1993); see also *supra* notes 111-15 and accompanying text (describing reaction to Dr. Haskell's paper).

223. See *supra* notes 116-19 and accompanying text (discussing proposed federal legislation).

224. See *Casey*, 505 U.S. at 869 (holding that the states have an interest in protecting maternal health and fetal life throughout pregnancy).

225. See *Massie*, *supra* note 7, at 364 (discussing the opinion of Professor Louis Michael Seidman, Georgetown University Law Center, that federal legislation supports "no legitimate purpose").

226. *Hope Clinic*, 195 F.3d at 880 (Posner, C.J., dissenting); see also *Andrews*, *supra* note 7, at 521 n.1. "Partial-birth abortion is not a medical procedure that is defined anywhere in the scientific medical literature. Rather, it is an inflammatory term intended by anti-choice groups to obscure medical reality." *Andrews*, *supra* note 7, at 521 n.1.

solely because the details of the procedure have been publicized.²²⁷ However, other lesser-known abortion methods may involve the same or substantially similar procedures²²⁸ or may be equally offensive in some other way.²²⁹ Some pro-choice supporters believe the ban of D&X is just the tip of the iceberg and that it will lead to not only the ban of other abortion methods but ultimately the prohibition of abortion.²³⁰ Alternatively, pro-life groups support the bans because the D&X procedure comes uncomfortably close to delivering a live child,²³¹ causing people to equate the procedure to infanticide.²³² Moreover, supporters of these bans have stated that the procedure used to reduce the size of the skull is unnecessarily cruel.²³³ The concerns raised by

227. See *Planned Parenthood v. Doyle* 162 F.3d 463, 477 (7th Cir. 1998) (Manion, J., dissenting) (“[A]ll methods [of abortion] are gruesome. But this is the one method that has been at least partially exposed to the light of day”), *vacated sub nom.* *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); Massie, *supra* note 7, at 379 (“[I]t is the shock value of the physical description of the procedure upon which its opponents often seem to rely in garnering support for their position.”).

228. See *Hope Clinic*, 195 F.3d at 859 (Posner, C.J., dissenting) (remarking that if a woman chose to abort a hydrocephalic fetus (water on the brain), both the D&E and D&X procedures would require reduction of the skull). There is “no meaningful difference between the forbidden and privileged practice.” *Id.*; see also *infra* Part IV.B.1 (discussing the problem with terminology in statutes).

229. See *Doyle*, 162 F.3d at 470 (Manion, J., dissenting) (detailing how other third trimester abortion procedures are equally horrible).

230. See Lezzer, *supra* note 7, at 369 (arguing that upholding partial-birth abortion bans “open[s] the back door for legislators to attack abortion one procedure at a time”); Massie, *supra* note 6, at 307 n.24 (quoting statements from various Senators from *The Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 248, at 13-14, 61, 66 (1995)). Senator Feingold stated “although the focus of this legislation is, in fact, one particular type of abortion used in late-term abortions, I fear that this is really an assault upon the basic right to have an abortion.” Massie, *supra* note 7, at 307 n.24. Some pro-choice opponents have expressed their goal to prohibit all abortion procedures. See Andrews, *supra* note 7, at 534-35 (quoting Christopher H. Smith, a Republican Representative from New Jersey, and Gary Bauer, the head of the Family Research Council).

231. “A number of the ban’s adherents have been heavily influenced by the visual image of a fetus whose body is visible before completion of the abortion process.” Massie, *supra* note 7, at 363 n.339.

232. See *Hope Clinic*, 195 F.3d at 862 (stating that some critics believe D&X “borders on infanticide”). Indeed, at a hearing on partial-birth abortion, it was stated:

This hearing focuses on partial birth [sic] abortion because while every abortion sadly takes a human life, this method takes that life as the baby emerges from the mother’s womb while the baby is in the birth canal. The difference between the partial-birth abortion procedure and homicide is a mere 3 inches.

Massie, *supra* note 7, at 323 n.103 (quoting a statement by Chairman Canady, *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 64 (1995)); see also Radloff, *supra* note 101, at 1557 (suggesting that bans of “partial-birth infanticide” would be constitutional); Rivenburg, *supra* note 30, at E-1 (remarking that the Catholic bishops consider the D&X procedure similar to infanticide).

233. See *Hope Clinic*, 195 F.3d at 862 (stating that opponents believe D&X is “needlessly

proponents of the bans, however, do not translate into valid state interests.

First, the proposed laws do not truly protect fetal life. Although partial-birth abortion laws prohibit one method of abortion, the laws do not prevent women from ultimately having abortions; the laws merely require that women choose alternate methods.²³⁴ As these laws still allow women to have abortions, they do little to protect the life of a fetus.²³⁵ Some legislatures consider preventing unnecessary cruelty to the human fetus as part of the state's interest in protecting fetal life.²³⁶ Although courts have acknowledged this as a valid state concern, medical evidence presented on the issue of fetal pain was found to be inconclusive.²³⁷ Also, courts have found the D&X method of abortion no more cruel than the D&E method because both often require the same procedures.²³⁸

Second, the bans do not support a valid state interest in protecting maternal health. In fact, contrary to this state interest, prohibiting the D&X procedure may actually put a woman's health at risk.²³⁹ The medical community has not reached a consensus on the benefits of the

cruel"). *But see supra* notes 46-47 and accompanying text (discussing methods of reducing size of fetal skull in D&E procedure).

234. *See Hope Clinic*, 195 F.3d at 875 (stating "partial-birth-abortion laws do not diminish the number of abortions"); *Massie, supra* note 7, at 346 n.227 (quoting several U.S. Senators who supported the bill even though they acknowledged that it would not ban abortion). Women can still have, for example, D&E or induction method abortions.

235. "[The statute] does not appear to accomplish much in the way of saving babies." *Hope Clinic*, 195 F.3d at 879 (Posner, C.J., dissenting) (quoting *Planned Parenthood v. Doyle* 162 F.3d 463, 477 (Manion, J., dissenting) (7th Cir. 1998), *vacated sub nom. Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156)).

236. *See Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1072 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

237. One medical opinion concluded that "a fetus who is aborted by the D&E procedure, which involves dismemberment, might experience as much discomfort as a fetus who is aborted by the D&X procedure." *Id.* at 1073; *see generally* Deborah Sontag, *A Vote on Abortion: Doctors Say It's Just One Way*, N.Y. TIMES, Mar. 21, 1997, at A1 (discussing the debate over D&X in the House of Representatives).

238. *See Voinovich*, 911 F. Supp. at 1074 n.29 ("[T]his Court fails to see how [D&X] is more cruel than the D&E procedure—which involves the dismemberment of the fetus and, sometimes, the crushing of its skull"); *see also supra* notes 46-47 and accompanying text (discussing methods of reducing size of fetal skull in D&E procedure).

239. District courts have ruled both ways of the issue of a woman's health. *See, e.g., Hope Clinic*, 195 F.3d at 883 (Posner, C.J., dissenting) (indicating the difficulty an appellate court faces when simultaneously reviewing cases from different district courts with opposite findings of fact). A Wisconsin district court held that D&X is "never necessary to protect the woman's health." *Id.* at 882 (Posner, C.J., dissenting). Alternatively, an Illinois district court relied on uncontested affidavits that included facts regarding the medical advantages of the D&X procedure. *See id.* at 883 (Posner, C.J., dissenting).

D&X procedure.²⁴⁰ Supporters of D&X bans conclude that D&X is not accepted by the medical community because of the absence of scientific reports affirming that D&X is safer than other abortion procedures.²⁴¹ However, this conclusion fails to consider the specific difficulties that complicate an accurate, nationwide study of the D&X procedure.²⁴² Regardless, representatives of the medical community have expressed opinions that they, not the legislatures, should reach the ultimate conclusion regarding the use of D&X.²⁴³

240. See *infra* notes 250-51 and accompanying text (discussing the opinions of the American Medical Association (AMA) and the American College of Obstetricians (ACOG) that D&X may be the safest procedure for some women, despite the lack of medical studies to prove it).

241. See Cook, *supra* note 8, at 67 (“There is no record of these procedures in any medical text, journals, or on-line medical service. There is no known quality assurance, credentialing, or other standard assessment usually associated with newly-described surgical techniques”); Nancy W. Dickey, *AMA Supports H.R. 1122 as Amended*, Press Release, May 20, 1997 (available at <<http://www.ama-assn.org/ad-com/releases/1997/hr521.htm>>) (stating “[D&X] is a procedure which . . . has no history in peer reviewed medical literature or in accepted medical practice development”). But see Massie, *supra* note 7, at 309 (stating that the available medical literature on the D&X procedure reflects a lack of consensus).

242. See *Planned Parenthood v. Doyle*, 162 F.3d 463, 468 (7th Cir. 1998) (noting that “the procedure has not been studied systematically, maybe because of its infrequency, novelty, and controversy”), *vacated sub nom. Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.W.L. 3840 (U.S. Jan. 10, 2000). The district court in *Voinovich* noted:

First, the D&X procedure is relatively new . . . and it will take time for other practitioners to begin using and evaluating the procedure. Second, given the security concerns which must be considered by doctors who perform abortions, physicians who use the D&X procedure may be understandably reluctant to publicly acknowledge that they use this procedure, and may be even more reluctant to participate in a study and publish the results. Finally, . . . funding for studies of abortion methods was cut drastically in the early 1980s, and there have been no large-scale abortion studies since that time.

Voinovich, 911 F. Supp. at 1069.

Many doctors perform variations of the D&E procedure that conform to the description of D&X by Dr. Haskell but do not believe they perform the D&X procedure. See *Voinovich*, 130 F.3d at 200 (stating that the D&E procedure can involve the purposeful use of suction to remove contents of the fetal skull).

243. ACOG’s 1997 statement and technical bulletin states: “[a]lthough D&X is never the only medically appropriate option, choice still should be reserved to the physician.” See *Hope Clinic*, 195 F.3d at 872 (referencing the ACOG, Statement on Intact Dilatation and Extraction (1997)); AMA, Report 26 of the Board of Trustees (1997); Sontag, *supra* note 237, at A1, A24. A doctor interviewed stated, “[D&X] is not something I rely on, but I find it absolutely bizarre that Congress wants to ban it . . . it’s as if they were to forbid me to use a certain kind of suture.” Sontag, *supra* note 237, at A24. But see Dickey, *supra* note 241.

Although the AMA officially supported the 1997 version of the federal proposed ban, the chairwoman of the association, Dr. Dickey, stated, “We would prefer to have no legislation.” Robert Pear, *A.M.A. Abortion Stand Splits Its Members*, N.Y. TIMES, May 22, 1997, at A16. Some members of the AMA disagreed with the support of the federal proposed legislation. See Della De Lafuente, *AMA Members on Both Sides in Late-Term Abortion Debate*, CHI. SUN-TIMES, June 24, 1994, at 20; Pear, *supra*, at A16. Furthermore, the AMA’s stand has been questioned as more politically motivated, rather than solely based on medical opinion. See Dewar, *supra* note 50, at A1.

Therefore, contrary to the claims of state legislatures, partial-birth abortion laws do not support any valid state interests.²⁴⁴ Bans of the D&X procedure do not protect fetal life or the health of the mother.²⁴⁵ These laws, in fact, are merely statements of legislators' moral convictions.²⁴⁶ Legislatures are free to enact statutes that reflect their values.²⁴⁷ When constitutional rights are infringed, however, legislators should not let their moral views govern their decisions.²⁴⁸ This kind of prohibition does not advance a state interest but rather creates an undue burden on the constitutional right of a woman to choose abortion.²⁴⁹

2. The Bans May Force Women to Choose Riskier Procedures

Partial-birth abortion laws also create an undue burden on women by forcing them to choose an alternative procedure or no procedure. This result may pose more risks to maternal health or life than the D&X procedure itself. Although medical journals have not shown the D&X procedure to be safer than all alternatives in every instance,²⁵⁰ the American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists ("ACOG") have stated that D&X may be the safest procedure.²⁵¹

244. See *supra* notes 236-38 and accompanying text (discussing how stated purpose of protecting against cruelty to fetus is erroneous).

245. See *supra* notes 234-39 and accompanying text (discussing how legislation will not impact number of abortions performed).

246. Furthermore, "when that right [of the state to regulate the practice of medicine] comes into collision with a constitutional right, the state has to give a reason for regulating medicine in a way that impairs the interest that the constitutional right seeks to protect." *Doyle*, 162 F.3d at 471 (Manion, J., dissenting).

247. See *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998) (explaining that legislators may enact laws prohibiting conduct without showing demonstrated harm), *cert. denied*, 525 U.S. 1024 (1998).

248. See *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (Posner, C.J., dissenting) (7th Cir. 1999) ("But if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue"), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156).

249. See *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (balancing state interest and a woman's constitutional right to choose abortion).

250. Peer review articles would help the credibility of D&X, but "the lack of a study in a peer review journal does not, *ipso facto*, mean that there are no benefits, or no risks." *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1069 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

251. See *Doyle*, 162 F.3d at 468 (citing AMA, Report 26 of the Board of Trustees (1997); ACOG, Statement on Intact Dilatation and Extraction (1997)). D&X "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision." *Hope Clinic*, 195 F.3d at 883-84 (Posner, C.J., dissenting) (quoting ACOG, Statement on Intact Dilatation and Extraction (1997)). *But see Dickey, supra*

Many of the articles discussing the recognized benefits of D&X focus on reduced risks to the woman's health as well as the economic realities of abortion.²⁵² General benefits of removing a fetus intact (the procedure in D&X) include reduction of the following risks: (1) uterine infection;²⁵³ (2) infection of remaining fetal tissue;²⁵⁴ (3) lacerations to maternal tissue and consequent blood loss;²⁵⁵ and (4) increased time spent under anesthesia.²⁵⁶

Patients who suffer from certain medical conditions would also benefit from a D&X procedure instead of D&E or induction. These patients include those who are more susceptible to uterine injury because of previous Caesarian sections or uterine scarring,²⁵⁷ those requesting an intact fetus for genetic testing,²⁵⁸ and those whose fetus is in the "double footling breech" position.²⁵⁹

Although the medical advantages of D&X are many, certain disadvantages exist as well. These disadvantages include the following: (1) D&X requires a high degree of surgical skill;²⁶⁰ (2) the method may

note 241 (noting AMA's support for federal bill).

252. Because the procedure can be done under local anesthesia on an outpatient basis, it costs less than a procedure which has to be performed in a hospital. See *Voinovich*, 911 F. Supp. at 1071 (noting that some hospitals do not permit elective abortions); Haskell, *supra* note 38, at E1092; Cook, *supra* note 8, at 66 (stating most of Dr. Haskell's patients receiving abortions by D&X were of "lower age, education, or socioeconomic status").

253. See *Hope Clinic*, 195 F.3d at 884 (Posner, C.J., dissenting); *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 817 (E.D. Va. 1998), *rev'd*, 144 F.3d 326 (4th Cir. 1998), *aff'd by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998); *Voinovich*, 911 F. Supp. at 1070.

254. See *Hope Clinic*, 195 F.3d at 884 (Posner, C.J., dissenting).

255. See *Voinovich*, 911 F. Supp. at 1065, 1067-69. The reasons for removing a fetal head intact during a D&E are:

"[T]he edges of the fetal skull are sharp enough to lacerate the maternal uterine blood vessels . . ." The goal is therefore to place the suction cannula into the skull in order to remove its contents and make it smaller, thereby allowing it to be removed intact, in order to minimize lacerations.

Id. at 1065 (quoting trial testimony). These reasons are applicable to D&X because the same procedure is used to remove the fetal head intact.

256. See *Hope Clinic*, 195 F.3d at 884 (Posner, C.J., dissenting). Less time under anesthesia is a generally accepted benefit within the medical community. See *Carhart v. Stenberg*, 972 F. Supp. 507, 527 (D. Neb. 1997) (noting that "less operative time . . . means less risk of hemorrhage, less total bleeding and less risk of infection"); Massie, *supra* note 7, at 316 n.61 (noting less surgical time as a benefit of D&X).

257. See *Voinovich*, 911 F. Supp. at 1067.

258. See *Hope Clinic*, 195 F.3d at 884 (Posner, C.J., dissenting); Massie, *supra* note 7, at 316-17 (discussing importance of genetic testing).

259. See *Voinovich*, 911 F. Supp. at 1067 n.20. "Double footling breach" is the presentation of the fetus in the uterus "when . . . both . . . legs are extended below the level of the buttocks." ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY P70 (1997).

260. See Haskell, *supra* note 38, at E1093.

be inappropriate for some patients;²⁶¹ (3) D&X requires daily office visits over a three day period with the procedure accomplished on the third day;²⁶² and (4) D&X involves a health risk caused by the internal rotation of the fetus while in the uterus.²⁶³ Concerns over these risks are valid, but, they do not constitute the typical argument against D&X. Instead, proponents of the ban typically focus on moral issues and conclude that there are always alternative procedures to D&X.²⁶⁴

The existence of alternative abortion procedures, however, does not resolve the issue. Other available abortion methods must still provide safe alternatives to D&X; failure to do so creates an undue burden on women's right to choose abortion.²⁶⁵ Because D&X is typically used from weeks twenty to twenty-four LMP, the available alternatives are D&E, induction, hysterectomy, and hysterotomy.²⁶⁶

These options, however, are not always optimal. For example, D&E is more difficult to perform at this stage because of the advanced growth of the fetus.²⁶⁷ The orientation of the fetus, with the spine to cervix, and the toughness of fetal tissues make it more difficult for doctors to dismember the fetus, resulting in increased operating time and increased risk.²⁶⁸ Some doctors choose to administer a chemical into the amniotic cavity that will ease this problem, but the mother still faces risks.²⁶⁹ The possibility of these risks causes some physicians to choose induction over D&E.²⁷⁰

261. *See id.* Dr. Haskell included in this category women with previous Caesarian section over 22 weeks, obese patients, twin pregnancy over 21 weeks, and patients over 26 weeks as ineligible for D&X. *See id.* at E1092.

262. *See Cook, supra* note 8, at 67. *But see Voinovich*, 911 F. Supp. at 1070 (stating that evidence shows the visits on days one and two take less than an hour, and on day three, total time is less than two hours); *supra* note 38 (discussing dilation methods used by Dr. Hern for both suction curettage and D&E that may take more than one day).

263. *See Cook, supra* note 8, at 67 ("This form of internal rotation, or version, is a technique largely abandoned in modern obstetrics because of the unacceptable risk associated with it. These techniques place the woman at greater risk for both immediate (bleeding) and delayed (infection) complications."). Dr. Cook stated that induction of labor, which lasts an average of twelve hours, is a preferred alternative. *See id.*

264. *See supra* notes 226-33 and accompanying text (setting forth common arguments in support of bans on partial-birth abortion).

265. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 77 (1976); *Voinovich*, 911 F. Supp. at 1067.

266. *See Voinovich*, 911 F. Supp. at 1067-69.

267. *See supra* Part II.A.2 (discussing the D&E procedure).

268. *See Voinovich*, 911 F. Supp. at 1068 n.22. "[I]n the mid to late second trimester . . . the D&E is no longer the procedure of choice to perform an abortion." *Id.* at 1067-68.

269. *See id.* at 1068. The risks vary from "mild side effects—vomiting, diarrhea, and high fever" to "severe maternal complications." *Id.*

270. *See Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 803 (E.D. Va.

Induction also involves substantial risks, such as maternal reaction to the chemicals used.²⁷¹ A woman may also experience labor for twelve to thirty-six hours,²⁷² and because induction causes labor, the possible complications mirror those of full term labor.²⁷³ Although the procedure must be done in a hospital, less skilled physicians typically perform inductions because they do not involve intricate surgical procedures.²⁷⁴ Furthermore, induction sometimes results in unintended live birth.²⁷⁵ Finally, several additional circumstances exist in which induction should not be used.²⁷⁶

The last two options, hysterectomy and hysterotomy, also involve elevated risks, as they are high-risk surgical procedures.²⁷⁷ Hysterotomy involves performing a Caesarian section before it is medically necessary.²⁷⁸ Hysterectomy is an "extreme alternative" that removes the woman's uterus.²⁷⁹

The choice of abortion method should be made by the woman and her physician after considering which risks are more probable to affect the woman.²⁸⁰ Eliminating the D&X procedure as an option creates an

1998) ("The only safe and routinely performed alternative to D&E after approximately 15 weeks is the induction abortion"), *rev'd*, 144 F.3d 326 (4th Cir. 1998), *aff'g by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998); Massie, *supra* note 7, at 316 ("The current alternative for abortion during the twentieth week of a pregnancy and beyond is induction.").

271. See *Voinovich*, 911 F. Supp. at 1068. If fluids introduced into the uterus enter maternal circulation, there are two possible results: "amniotic fluid embolus, which is generally fatal, or disseminated intravascular coagulation (DIC), in which the clotting factors in the blood are used up and bleeding cannot be stopped." *Id.* "The mortality rate from induction is twice that of D&E." Ely, *supra* note 7, at 6. *But see Abortion After the First Trimester*, *supra* note 33 (citing recent data showing comparable mortality rates).

272. See *Voinovich*, 911 F. Supp. at 1068.

273. See *id.* Complications are "fear, lack of control, mild to severe abdominal pain, nausea, and diarrhea, and extreme discomfort, over a lengthy period of time." *Id.*

274. See *id.*

275. See *supra* note 67 (discussing unintentional live births resulting from inductions).

276. Induction "cannot be performed on women who have an active pelvic infection, or who are carrying dead fetuses, and probably should not be performed on women who had previously had Caesarian sections, given the possibility of rupturing the uterine scar." *Voinovich*, 911 F. Supp. at 1068.

277. See *id.*

278. The hysterotomy "is potentially more dangerous because the uterus is thicker than it is at the end of term, and the incision causes more bleeding and may make future pregnancies more difficult." *Id.*

279. See *id.*

280. See Massie, *supra* note 7, at 365. "[A] woman choosing abortion must be entitled in every instance to the technique that she and her physician think is optimal for the preservation of her health interests, reading 'health' broadly to include her psychological and emotional well-being, as well as her physical condition." *Id.*

undue burden to the woman's right to an abortion.²⁸¹ When faced with alternatives that pose greater risks to the mother's health, she may be forced to choose a riskier procedure or even opt out of an abortion altogether.²⁸² If a woman opts out of an abortion because the available alternatives are too risky, the prohibition of D&X effectively acted as a "substantial obstacle" to her right to choose abortion.²⁸³ Only the woman and her doctor should evaluate these risks.

3. A Ban Serves as a Substantial Obstacle

Supporters of partial-birth abortion bans believe that because D&X is not a widespread procedure, prohibiting it will not be a substantial obstacle to a woman's choice of abortion.²⁸⁴ This conclusion is flawed because it misapplies *Planned Parenthood v. Casey*.²⁸⁵

The Supreme Court in *Casey* defined undue burden as occurring when "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."²⁸⁶ With this definition, the Court reviewed the

281. See *Voinovich*, 911 F. Supp. at 1070. If the ban of D&X forces women to "use riskier and more deleterious abortion procedures, the ban could have the effect of placing a substantial obstacle in the path of women seeking pre-viability abortions, which would be an undue burden and thus unconstitutional under *Casey*." *Id.*

282. See *supra* Part IV.A.2 (discussing how the imposed bans may force women to choose riskier abortion procedures); see also *Lezzer*, *supra* note 7, at 360.

283. See *Hope Clinic v. Ryan*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156). According to the dissent, "[t]he right of abortion is unduly burdened by any law that endangers the woman's health." *Id.*

284. See *id.* at 861. *But see Rivenburg*, *supra* note 30, at E-1 (citing statistics that estimate several thousand partial-birth abortions performed annually); *Sontag*, *supra* note 237, at A1 (stating that statistics reflecting use of D&X procedure are underestimated). One doctor who supports the ban questioned, "why ever do a partial birth abortion?" *Cook*, *supra* note 8, at 67. Answer: there must be some valid benefits to using the procedure if the statistics that show its use are valid. See *supra* notes 252-259 and accompanying text (listing noted benefits of D&X).

Other arguments supporting the bans have compared the burden caused by laws that require abortions be performed only by licensed physicians to the burden caused by laws that prohibit D&X. See *Hope Clinic*, 195 F.3d at 873. The Supreme Court has found that the requirement of a licensed physician is not an undue burden on abortion (even though it would make abortion impractical for low income people). See *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997). Supporters of D&X bans rely on this finding to say there is no undue burden caused by laws banning D&X. See *Hope Clinic*, 195 F.3d at 873. This argument ignores the fact that the requirement of a licensed physician was a benefit to the woman's health where partial-birth abortion bans do not protect the health of women. See *supra* Part IV.A.3 (discussing potential risks to women if D&X procedure is unavailable).

285. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

286. *Id.* at 895; see also *Hope Clinic*, 195 F.3d at 881 (Posner, C.J., dissenting). "The *Casey* opinion speaks of placing a substantial obstacle in the path of 'a woman,' not 'many women.'" *Id.*

constitutionality of Pennsylvania's mandatory spousal notification statute²⁸⁷ and estimated that the law affected "one percent of women seeking abortions."²⁸⁸ The narrow class of women affected was women seeking abortions who were married and chose not to tell their husbands of the abortion.²⁸⁹ The court concluded that for that narrow class of women, the spousal notification law created an undue burden.²⁹⁰

This reasoning can be applied to partial-birth abortions as well. Partial-birth abortion laws generally affect only second term abortions, which are uncommon.²⁹¹ Of the post-first-trimester abortions, only 1.5 percent occur after twenty weeks LMP.²⁹² Because D&X is suggested for abortions during twenty to twenty-six weeks LMP, the size of the class of women affected by partial-birth abortion laws could be closely compared to the one percent of women affected by the spousal notification laws.²⁹³ The class of women affected are those a doctor believes would benefit from the procedure.²⁹⁴ For these women, the unavailability of D&X creates an undue burden to their right to choose abortion.²⁹⁵

287. See *Casey*, 505 U.S. at 887.

288. *Id.* at 894.

289. See *id.* (presuming also that they do not qualify for one of the exceptions listed by the statute).

290. See *id.* at 895. Other information on domestic violence showed how the impact on the choice of abortion was significant even though only a small number of women seeking abortion actually met the qualifications of the narrowed class. See *id.* at 887-92.

291. Over eighty-nine percent of abortions occur during the first trimester; six percent occur between thirteen to fifteen weeks LMP. See *Massie*, *supra* note 7, at 317-18 (citing statistics from 1992 survey by the Alan Guttmacher Institute). One court has found that a partial-birth abortion law may reach the suction curettage method of abortion used primarily in the first trimester. See *Planned Parenthood v. Miller*, 195 F.3d 386 (8th Cir. 1999); *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 796 (8th Cir. 1999).

292. See *Abortion After the First Trimester*, *supra* note 33.

293. Because of the lack of statistical information on the use of the D&X procedure, this is a rough comparison.

294. See *Hope Clinic v. Ryan*, 195 F.3d 857, 874 (7th Cir. 1999) ("The affected set here is women for whom a physician will think that D&X is the procedure most likely to succeed, or to entail the least cost"), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156).

295. Some opponents of partial-birth abortion bans propose that any law that puts a woman's health at risk is an undue burden. See *id.* at 880 (Posner, C.J., dissenting). Furthermore, when a partial-birth abortion ban forces women "to use riskier and more deleterious abortion procedures, the ban could have the effect of placing a substantial obstacle in the path of women seeking pre-viability abortions, which would be an undue burden and thus unconstitutional under *Casey*." *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1070 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

B. A Legislative Impossibility: Drafting a Constitutionally Permissible Statute

Legislatures have difficulty regulating highly technical medical procedures, such as the D&X procedure, for two reasons. First, the terms used in the statutes are broad.²⁹⁶ They encompass not only D&E but also other accepted methods of abortion.²⁹⁷ Second, assuming a definition of D&X could be agreed upon, doctors easily avoid application of the statute.²⁹⁸

I. Terms of the Statutes

The typical state statute bans “partial-birth abortions.”²⁹⁹ Partial-birth abortion is defined as “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.”³⁰⁰ Although partial-birth abortion is not a legal term, it is widely understood to refer to the D&X procedure.³⁰¹ Legislatures purposely chose these broad terms, understanding that the legal definition differed from the medical

296. See *Hope Clinic*, 195 F.3d at 863. The court stated, “[b]ut, as is common with legislation, the price of avoiding loopholes is generality.” *Id.*

297. See *infra* Part IV.B.1 (applying common statutory language of partial-birth abortion statutes to various abortion methods); see also Radloff, *supra* note 101, at 1571-78 (suggesting that framing the statute in terms of partial-birth infanticide is a more precise way to prohibit the D&X procedure).

298. See *infra* Part IV.B.2 (describing variations of techniques in abortion methods that are outside the scope of partial-birth abortion statutory language).

299. See, e.g., 720 ILL. COMP. STAT. 513/10 (West 1998); IND. CODE ANN. § 16-34-2-1(b) (West Supp. 1999); WIS. STAT. ANN. § 940.16(2) (West Supp. 1999).

300. IND. CODE ANN. § 16-18-2-267.5; see also 720 ILL. COMP. STAT. 513/5 (defining partial-birth abortion as “deliver[ing] a living human fetus or infant”); WIS. STAT. ANN. § 940.16(1)(b) (defining the partial-birth abortion procedure as “an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child . . . then completes the delivery”).

301. See *Hope Clinic*, 195 F.3d at 863; *Carhart v. Stenberg*, 192 F.3d 1142, 1145 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000); Lezzer, *supra* note 7, at 356; Massie, *supra* note 7, at 302; Andrews, *supra* note 7, at 521 n.1; Ely, *supra* note 7, at 6; *Stop Congress From Criminalizing Safe Abortion Procedures*, *supra* note 7.

definition.³⁰² They specifically aimed to avoid making technical terms the focus in determining the scope of the statute.³⁰³

The imprecise language has been challenged as vague. The courts that found that the statutory term “partial-birth abortion” and its definition prohibited both D&X and D&E focused on the similar medical procedures used in both.³⁰⁴ Supporters of the ban allege that one difference between D&E and D&X is that fetal death occurs in D&E completely *in utero* while in D&X it occurs after delivery from the uterus.³⁰⁵ Thus, if interpreted broadly, the statutes prohibit the vaginal delivery of a living fetus or substantial portion of a living fetus before fetal death occurs.³⁰⁶ Several doctors testified that although they did not perform D&X, they were at risk of prosecution under the bans.³⁰⁷ They testified that during a D&E procedure some of the dismemberment of the fetus occurs outside the uterus, thereby violating the statutes.³⁰⁸ According to a broad reading of the statutes, these physicians, who perform D&E abortions, would be subject to prosecution under the statutes.

302. See *Hope Clinic*, 195 F.3d at 863. “This legal definition is an imperfect match for the medical definition of D&X.” *Id.*; see also *Richmond Med. Ctr. for Women v. Gilmore*, 183 F.3d 303, 304 (4th Cir. 1998) (Murnaghan, J., dissenting), *aff’g by panel on reh’g*, 144 F.3d 326 (4th Cir. 1998); see also *infra* Part IV.B.2 (suggesting that the use of precise medical definition would not help the statute). The Ohio statute banning “dilation and extraction” was still found to be broad enough to reach the D&E procedure. See *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). The statute defined D&X as “the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. ‘Dilation and extraction procedure’ does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.” OHIO REV. CODE ANN. § 2919.15(A) (West 1997).

303. See *Hope Clinic*, 195 F.3d at 863; see also *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 814 (E.D. Va. 1998), *rev’d*, 144 F.3d 326 (4th Cir. 1998), *aff’d by panel on reh’g*, 183 F.3d 303 (4th Cir. 1998).

304. See *Planned Parenthood v. Miller*, 195 F.3d 386, 388-89 (8th Cir. 1999); *Carhart*, 192 F.3d at 1148; *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 796 (8th Cir. 1999); *Voinovich*, 130 F.3d at 200.

305. See *Carhart*, 192 F.3d at 1147-48 (evaluating whether this is a meaningful distinction between D&E and D&X).

306. See 720 ILL. COMP. STAT. 513/5 (West 1998); IND. CODE ANN. § 16-18-2-267.5 (West Supp. 1999); WIS. STAT. ANN. § 940.16(1)(b) (West Supp. 1999).

307. See *Carhart*, 192 F.3d at 1147; *Gilmore*, 183 F.3d at 304-05 (Murnaghan, J., dissenting); *Voinovich*, 130 F.3d at 198-99.

308. See *Carhart*, 192 F.3d at 1147; *Gilmore*, 183 F.3d at 304 (Murnaghan, J., dissenting) (quoting one doctor’s testimony that “it is never his intent to disjoin the fetus in the woman’s uterus”). In *Carhart*, a physician testified that “dismemberment occurs after a part of the fetus has been pulled through the cervix, into the vagina” and the traction created between what is outside and inside of the uterus is what causes the dismembering. *Carhart*, 192 F.3d at 1147.

Another similar procedure required in both D&E and D&X is the reduction of the size of the fetal skull in order to complete the abortion. Some statutory definitions include procedures in which fetal death is caused by removal of fetal skull contents by suction.³⁰⁹ Because D&E may require this procedure, these types of statutes will also prohibit D&E abortions.³¹⁰

Furthermore, partial-birth abortion statutes use non-medical terms that do not correspond accurately with medically understood criteria.³¹¹ This creates ambiguities in enforcement.³¹² It has been suggested that legislators purposefully chose emotionally charged and vague terms to strengthen their moral and political statements.³¹³ For example, the statutes do not define key terms such as “termination of a human pregnancy”³¹⁴ and “substantial portion.”³¹⁵ Additionally, terms like “living fetus” and “killing” are ambiguous because the medical criteria of life for fetuses differs from the criteria for adults and children.³¹⁶

309. The Ohio statute defines the D&X procedure as “the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain.” OHIO REV. CODE ANN. § 2919.1(A)(5) (West 1997).

310. There is more than one technique to decompress the head. See *Voinovich*, 130 F.3d at 199-200. Some doctors prefer to use a clamp to crush the fetal head and remove it in pieces while others suction the contents of the skull. See *id.*

311. See *Hope Clinic v. Ryan*, 195 F.3d 857, 863 (7th Cir. 1999) (stating that the term “partial-birth abortion” “though widely used by lawmakers and in the popular press, has no fixed medical or legal content”), *petition for cert. filed*, 68 U.S.L.W. 3461 (U.S. Jan. 10, 2000) (No. 99-1156); *Carhart*, 192 F.3d at 1145; *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 813-14 (E.D. Va. 1998) (referring to legislative intent to avoid technical medical description of D&X such as provided by the AMA or ACOG), *rev'd*, 144 F.3d 326 (4th Cir. 1998), *aff'd by panel on reh'g*, 183 F.3d 303 (4th Cir. 1998).

312. Courts that have found the statutes ambiguous have held they are unconstitutional. See *Planned Parenthood v. Miller*, 195 F.3d 386, 389 (8th Cir. 1999); *Carhart*, 192 F.3d at 1146; *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794, 796 (8th Cir. 1999); *Voinovich*, 130 F.3d at 200.

313. See *supra* notes 296-303 and accompanying text (discussing the use of statutory terms).

314. OHIO REV. CODE ANN. § 2919.15(A). The court interpreted that term to mean the end of the abortion procedure, not the end of human life. See *Voinovich*, 130 F.3d at 199.

315. See *Carhart*, 192 F.3d at 1150. The court proposed that a “substantial portion” of the fetus must include an arm or a leg, which means that a doctor who “brings an arm or leg into the vagina as part of the D&E procedure therefore violates the statute.” *Id.* But see *Hope Clinic*, 195 F.3d at 863 (finding the statutory definition of partial-birth abortion ambiguous).

316. For adults and children, “living” is determined by measuring brain function. See *Carhart*, 192 F.3d at 1148 n.8. For a fetus, however, a living fetus is one whose heart is beating because it does not have brain waves until it is nearly full-term. See *id.* Thus, during an abortion procedure, “part or all of the fetus often will still have a heartbeat, and so be ‘living,’ in the sense of the word apparently intended by the legislatures, when it emerges from the uterus.” *Hope Clinic*, 195 F.3d at 887 (Posner, C.J., dissenting); see also *Gilmore*, 11 F. Supp. 2d at 815 (stating that fetal cells are still “living” when they are in the vagina because the cells “have not yet been deprived of oxygen or blood supply . . . thus, the fetus might not be said to have ‘died’ until after it has left the body entirely”).

The legislatures' attempt to differentiate the procedures based on the point at which fetal demise occurs may have been misguided, as the time of fetal demise after either procedure varies for each D&E and D&X.³¹⁷

2. Medical Variations Outside of Bans

Even if the statutes used precise medical terminology, doctors have several options to avoid meeting the statute's criteria.³¹⁸ The most assured way to avoid the statutory criteria is to make sure the fetus is dead before extracted from the uterus.³¹⁹ The physician can either give the fetus a lethal injection or cut the umbilical cord.³²⁰ Alternatively, any slight variation in the D&X techniques would remove the procedure from the scope of the statutory prohibition.³²¹

V. PROPOSAL

A woman's constitutional right to choose abortion should always be superior to the state's interest in passing laws that merely support the moral conviction of the legislators.³²² Therefore, the Supreme Court should find unconstitutional partial-birth abortion laws that prohibit D&X before fetus viability.³²³ The D&X procedure has demonstrable

317. See *Carhart*, 192 F.3d at 1148.

318. Some courts suggest the four elements of D&X as described by ACOG would provide a clear statutory definition. See *Hope Clinic*, 195 F.3d at 863; *Carhart*, 192 F.3d at 1145; *Gilmore*, 11 F. Supp. 2d at 813-14. The elements are:

1. deliberate dilation of the cervix, usually over a sequence of days;
2. instrumental conversion of the fetus to a footling breech;
3. breech extraction of the body excepting the head;
4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

145 CONG. REC. S12,954 (daily ed. October. 21, 1999) (ACOG Statement of Policy).

319. See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1066 n.17 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

320. See *id.* (noting that fetal death occurs generally eight to ten minutes after the umbilical cord is severed). Of three physicians interviewed regarding the partial-birth abortion debates, one said he already does the lethal injection and the other two agreed that if the bans were upheld, they would start doing them as well. See *Massie*, *supra* note 7, at 367 (quoting Dr. Hern's statement at a Senate Hearing suggesting the induction of fetal death before beginning the abortion); *Sontag*, *supra* note 237, at A1 ("Clearly, if someone's going to put me in jail, I'll do the injection first . . . [b]ut it's unnecessary, if not risky, medically.").

321. See *Hope Clinic*, 195 F.3d at 863 (suggesting examples like changing the method of reducing the fetal head or removing a toe to defeat the "otherwise intact" requirement); James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 23-24 (1998) (demonstrating how variations of D&X could avoid meeting the medical definition).

322. See *supra* Part IV.A.1 (discussing the lack of a valid state interest in banning D&X).

323. The Supreme Court will hear the case in April, 2000. See *Greenhouse*, *supra* note 112, at A1. A decision is expected early in the summer. See *id.*

benefits to women's health.³²⁴ The procedure should be an available alternative for doctors to rely on if and when the patient's needs indicate that D&X would be beneficial.

At the point of viability, the state interest in fetal life permits prescription of D&X, provided there are adequate exceptions for maternal life and health.³²⁵ Because late-term abortions are more likely to be necessary for the health of the mother than earlier abortions and because D&X is a late-term abortion technique, it is important that the mother's health is adequately protected after fetal viability.³²⁶ An adequate health exception should relieve the physician from liability for performing a post-viability D&X abortion when necessary to protect the life or health of the mother. The health exception should be broad enough to allow the doctor to evaluate mental health concerns in addition to physical health.³²⁷

Should the Supreme Court uphold the constitutionality of the partial-birth abortion statutes, there will be a substantial negative impact on a woman's right to choose an abortion. At best, many doctors will be wrongfully prosecuted for performing supposedly protected abortion procedures and they will be subjected to an intrusive examination over every medical technique they use in performing abortions. At worst, women's health will suffer the consequences as rational doctors who want to avoid the scrutiny of prosecution will shy away from performing even protected abortion procedures.

324. See *supra* notes 252-59 and accompanying text (discussing various benefits of the D&X procedure in comparison to available alternatives).

325. The state's interest in protecting fetal life begins when the pregnancy begins. See *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992); see also *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 210 (6th Cir. 1997) ("The State's substantial interest in potential life must be reconciled with the woman's constitutional right to protect her own life and health."), *cert. denied*, 523 U.S. 1036 (1998). In this situation, however, the only noted pre-viability state interest was the right to make a political or moral statement. See *supra* notes 204-07 and accompanying text (discussing the impact of charged statutory language).

The exception for maternal life or health was established in *Casey*. See *Casey*, 505 U.S. at 846; see also *Roe v. Wade*, 410 U.S. 113, 153 (1973). But see *Hope Clinic*, 195 F.3d at 871 (stating that "[w]e do not think that the plurality in *Casey* meant [protection of women's life or health] as a universal rule").

326. See *Hope Clinic*, 195 F.3d at 878 (Posner, C.J., dissenting) ("The absence of any such [health] exceptions is particularly surprising because late-term abortions are much less likely than the much more common first-trimester abortions to be motivated by considerations merely of convenience rather than of urgency.").

327. See *Voinovich*, 130 F.3d at 209 (holding "that a maternal health exception must encompass severe irreversible risks of mental and emotional harm").

VI. CONCLUSION

Although it is difficult to separate moral debates from legal debates when discussing the issue of abortion, it is necessary to do so when considering a ban on a method of abortion. If a law limiting abortion does not support a valid state interest or if it bans a safe abortion procedure leaving a woman to choose between a riskier abortion or none at all, the Supreme Court must find the law unconstitutional. Constitutional rights are too precious to be compromised by laws only intended to make a moral statement.

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