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I. INTRODUCTION

Two babies were born this morning. They are both premature—each of their mothers was only twenty-three weeks pregnant at the time of birth. Because they were born at such an early stage, it is clear that both of these babies will need neonatal care.[1] However, only one will receive it. The first baby, named Sarah, will be taken to the Neonatal Intensive Care Unit ("NICU") where she will be given care and treatment to both comfort her and prolong her life. She will be held, fed, and examined to monitor her progress. The second baby will not be given a name. She will instead be taken to an empty room, a utility or laundry room, where she will be left alone to die. No care will be administered to her, not even the comfort of a warm blanket to surround her as she breathes her last breath. It will take her anywhere from forty-five minutes to eight hours to die, the whole time

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1. Babies born at this stage are at a severe disadvantage when it comes to long-term survival. Most of their lungs are underdeveloped and only adept at amniotic fluid intake. Air is, in a sense, poison to a child born at this stage of development and Respiratory Distress Syndrome (RDS) is a common condition.

gasping for the air her lungs cannot process. This unnamed infant will not have the chance to prove she can survive.

Why will these two babies receive such different treatment in the same hospital, by the same health care professionals? The answer sparks more questions than it resolves. Sarah is wanted, the second baby is not. Sarah was born premature to parents who were hoping for a healthy child. The second baby was born as a result of an abortion gone wrong. Despite the intent of each mother when she arrived at the hospital, both of these babies, regardless of their circumstances of birth, feel the same pain, struggle to breathe the same air, and fight for the same chance to live. That both of these babies are alive, moving their arms and legs and trying to breathe, does not result in equal treatment.

The question of when life begins is not exclusively linked to conception and gestational age. For some, the denial of personhood has been extended through birth to living, breathing infants. Instead of using medical or even common definitions to determine when a baby is alive, the standard has been reduced to a legal argument. Because it has become legally and politically popular to define a living baby in terms of whether that child is wanted, healthcare professionals have been forced to make medical judgments concerning aborted newborns based upon the simple fact that the baby is not welcomed into this world.

This article explores how courts and lawmakers in this country have extended a woman's right to choose an abortion to a point beyond that of birth, and how there is an immediate need for legislation to protect the rights of an infant born alive during a botched abortion. Part two introduces the Born-Alive Infants Protection Act of 2000 ("the Act") and describes its intended purpose. Part three discusses the types of abortion procedures afforded to women and identifies those most commonly associated with the result of a live birth. Part four discusses the progression of case law and political thought that has fostered the deterioration of the right to life. Part five analyzes the arguments for and against the Act and why it is essential that this legislation is passed. Part six concludes this article.

II. A CRY FOR HELP OUTSIDE THE WOMB

A. *The Born-Alive Infants Protection Act of 2000*

The text of the Born-Alive Infant Protection Act of 2000[2] basically has two parts. Section 8(a) states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person," "human being," "child," and "individual," shall include every infant member of the species homo sapiens who is born alive at any stage of development.[3]

Section 8(b) provides:

> As used in this section, the term "born alive," with respect to a member of the species homo sapiens, means the complete expulsion or extraction from its mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.[4]

The Act serves two main functions. Section 8(a) adds a baby who is born alive to the traditional definition of person, human being, child, and individual. Section 8(b) includes a baby who has survived an abortion as being born alive. The Act was proposed in the House of Representatives by then Representative Charles Canady.[5] According to Representative Canady, the legislation "would provide legal protection to living, fully born babies who survive abortions."[6] In Representative Canady's words, these babies are "tiny, helpless infants brought into the world through no choice of their own and struggling to survive."[7]

2. H.R. 4292, 106th Cong. (2000) (enacted). An identical bill was introduced in the Senate. *See* S. 3127, 106th Cong. (2000).
3. H.R. 4292 § 8(a).
4. H.R. 4292 § 8(b).
5. *See* H.R. 4292.
6. 146 CONG. REC. H7967 (daily ed. Sept. 21, 2000) (statement of Rep. Canady).
7. *Id.*

B. *Care and Nourishment*

In explaining why the Act is needed, Representative Canady focused on the notion that fully born babies entitled to full protection of the law is in serious jeopardy.[8] Evidence that this fear is a reality was offered by Jill L. Stanek[9] and Allison Baker,[10] both registered nurses who work in the Labor and Delivery Department at Christ Hospital and Medical Center in Oak Lawn, Illinois. Stanek testified that the hospital performs abortions on women in their second and third trimesters, aborting both healthy babies and babies with severe disabilities.[11] According to Stanek:

> In the event that a baby is aborted alive, he or she receives no medical assessments or care but is given only what the Christ Hospital calls "comfort care." Comfort care is defined as keeping the baby warm in a blanket until he or she dies, although even this so-called compassion is not always provided. It is not required that these babies be held during their short lives.[12]

Stanek told of an aborted Down's Syndrome baby who was born alive and subsequently taken to a "Soiled Utility Room" in the hospital because neither his parents nor the attending nurse wanted to or had time to hold him.[13] Stanek cradled and rocked him for the forty-five minutes that he survived.[14] One baby actually lived for eight hours after being aborted.[15] No care was offered to that child either. Many of the babies who survive abortions that late in the pregnancy are healthy babies who are aborted because they are misdiagnosed with birth defects and disabilities.[16] Even though these babies are healthy, they are left to die simply because their birth is the result of an abortion.[17] The most disturbing story that Stanek told concerned a healthy baby with a fetal age past twenty-three weeks:

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8. *Id.*

9. *Born-Alive Infants Protection Act of 2000: Hearings on H.R. 4292 Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives,* 106th Cong. (2000) [hereinafter Hearings] (statement of Nurse Jill L. Stanek).

10. Hearings, *supra* note 9 (testimony of Nurse Allison Baker).

11. Hearings, *supra* note 9 (testimony of Nurse Jill L. Stanek).

12. *Id.* at 15.

13. *Id.*

14. *Id.*

15. *Id.* at 14.

16. *See Hearings, supra* note 9 (testimony of Nurse Jill L. Stanek).

17. *See id.* One baby who was aborted weighed much more than expected and the attending nurse was "haunted because she [did not] know if she made a mistake by not getting

> I was recently told about a situation by a nurse who said, "I can't stop thinking about it." She had a patient who was 23+ weeks pregnant, and it did not look as if her baby would be able to continue to live inside of her. The baby was healthy and had up to a 39% chance of survival, according to national statistics. But the patient chose to abort. The baby was born alive. If the mother had wanted everything done for her baby, there would have been a neonatologist, pediatric resident, neonatal nurse, and respiratory therapist present for the delivery, and the baby would have been taken to our Neonatal Intensive Care Unit for specialized care. Instead, the only personnel present for this delivery were an obstetrical resident and my co-worker. After delivery of the baby, who showed early signs of thriving, was merely wrapped in a blanket and kept in the Labor & Delivery Department until she died 2 ½ hours later.[18]

In addition to Stanek's testimony, Baker told of three separate instances where she witnessed babies left to die without even so much as a blanket to keep them warm.[19] Recalling one occasion, Baker said:

> I happened to walk into a "soiled utility room" and saw, lying on the metal counter, a fetus, naked, exposed and breathing, moving its arms and legs. The fetus was visibly alive, and was gasping for breath. I left to find the nurse who was caring for the patient and this fetus. When I asked her about the fetus, she said that she was so busy with the mother that she didn't have time to wrap and place the fetus in the warmer.[20]

Due in no small part to the testimony of Stanek and Baker, on September 26, 2000, the Act passed in the House by a margin of 380 to 15.[21] The Act was then introduced as a bill in the Senate the very next day by Senator Rick Santorum.[22] Despite bipartisan support, the bill died when Senator Kent Conrad objected to a request made by Senator Trent Lott to pass the bill by

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that baby any medical help." *Id.* at 15. Stanek testified that she heard of a live aborted baby who was left to die on the counter of the utility room, wrapped in a disposable towel. *Id.* The baby was accidentally thrown into the garbage. *Id.*

18. Hearings, *supra* note 9, at 16 (testimony of Nurse Jill L. Stanek).
19. Hearings, *supra* note 9, at 18 (testimony of Nurse Allison Baker).
20. *Id.*
21. *See* H.R. 4292, 106th Cong. (2000) (enacted).
22. *See* S. 3127, 106th Cong. (2000).

unanimous consent.[23] The Act was reintroduced into both houses of Congress on June 14, 2001.[24]

Senator Conrad is not the Act's only opponent. The main argument against its passage is that it violates a woman's right to choose to have an abortion. Political activists groups like the National Organization for Women ("NOW") and the National Abortion Rights Action League ("NARAL") argue that the Act is a direct attack on the Constitution.[25] This belief stems from the perception that the sole determining factor in abortion decision making is the intent of the mother.[26] However, the very purpose of the Act is to separate the rights of the baby from that of the mother at the moment of birth.

III. THE STAGES OF TERMINATION

As the purpose of the Act is to define a newborn who survives an abortion as a person, it is necessary to understand the stages of pregnancy and which abortion procedures have the potential of resulting in a live birth. The abortion procedure a doctor chooses to perform is determined by the age of the fetus, namely, whether the fetus has reached the point of viability. Viability is defined as "'the capacity for meaningful life outside the womb, albeit with artificial aid,' and not just momentary survival."[27] It is presumed to exist after twenty-seven weeks of gestation but not before twenty weeks.[28]

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23. *Id. See also 'Born Alive' Bill Fails in Senate*, CHRISTIANITY TODAY, Jan. 8, 2001, at 20.

24. *See* Born-Alive Infants Protection Act of 2001, H.R. 2175, 107th Cong. (2001); S. 1050, 107th Cong. (2001). There have been no further hearings or votes concerning the Act since its reintroduction.

25. John Leo, *Baby Saving Made Easy: Any Bill that Protects Against Infanticide Should Be Backed*, U.S. NEWS & WORLD REPORT, Sept. 25, 2000. The NARAL announced that "this bill attempts to inject Congress into what should be a personal and private decision about medical treatment." *Id.*

26. *Id.* Leo writes:

> The intent of the mother is something of a frontier for abortion supporters. It shifts attention away from the reality of the baby, already born with rights, and back toward the purpose of the operation—to abort. Pro-choice literature is filled with suggestions that the developing life within a mother is an unborn baby if she wants it, simply discardable tissue if she doesn't.

Id.

27. Janet E. Gans Epner et al., *Late-term Abortion*, 280 JAMA 724, 724 (1998).

28. *Id.* Weeks of gestation are calculated "in terms of the first day of the last menstrual period. However, gestational age may vary depending on whether the stage of

The period between the twentieth and twenty-seventh week is considered to be the "gray zone" in which some fetuses may be viable and some may not.[29]

Pregnancy and fetal age are calculated by trimesters. The first trimester is measured from the start of the pregnancy to the thirteenth week, the second trimester is measured from the thirteenth week to the twenty-seventh week, and the third trimester is measured from the twenty-seventh week until the date of delivery.[30] Ninety-five percent of abortions are performed in the first or very early second trimester, usually at or before fifteen weeks gestation.[31] It is estimated that "two thirds of abortions beyond [twenty] weeks are performed between [twenty-one and twenty-two] weeks."[32] Furthermore, the number of abortions that are performed after twenty-six weeks gestation is estimated to be between 320 and 600.[33]

In the first trimester, abortions are usually performed on an outpatient basis.[34] Procedures which are used at this stage include vacuum aspiration, menstrual regulation, and prescribing Mifepristone ("RU-486").[35] Vacuum aspiration, the predominate method, involves inserting a vacuum tube into the uterus to evacuate the fetus from the woman's body.[36] It is usually not required to use anesthesia or dilation at this time.[37] Because the fetus is at the earliest stage of development and has not reached the point of viability, abortions performed in the first trimester do not result in a live birth. The Born-Alive Infants Protection Act would therefore most likely not apply in these situations.

Once a pregnant woman enters the second trimester her options change. The most common procedure used in the early second trimester is dilation and extraction ("D&E").[38] This "is similar to vacuum aspiration except that the cervix must be dilated more widely (usually with osmotic dilators) because surgical instruments are used to remove larger pieces of tissue."[39] Intravenous fluids, sedatives and a local anaesthetic may be administered to

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pregnancy is calculated from the first day of the last menstrual period, from the estimated time of fertilization, or from the estimated time of implantation." *Id.*

29. *Id.*
30. *Id.*
31. Gans Epner, *supra* note 27, at 725.
32. *Id.*
33. *Id.*
34. *Id.* at 726.
35. *Id.*
36. Gans Epner, *supra* note 27, at 726.
37. *Id.*
38. *Id.*
39. *Id.*

the patient.[40] After the fetus is removed, a curette is used to remove the tissue that remains on the uterine walls.[41] Labor induction is sometimes used at this stage, but this procedure is usually more common in the mid second to third trimester.[42] The most common abortion procedures performed in the mid second and third trimesters of pregnancy include D&E, intact dilation and extraction ("D&X"), labor induction, hysterotomy, and hysterectomy.[43] During a third trimester D&E procedure, "[b]ecause the fetus is larger . . . and because its bones are more rigid," a physician is more likely to use a destructive procedure to perform the abortion.[44] Uterine and cervical perforation caused by medical instruments and fetal parts are more likely.[45] The risks involved in an abortion at this stage of pregnancy cause some doctors to perform D&X on patients who are in the third trimester.[46] D&X, commonly known as partial birth abortion, consists of:

> deliberate dilation of the cervix, usually over a sequence of days; instrumental or manual conversion of the fetus to a footling breech; breech extraction of the body except the head; and partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.[47]

Labor induction as a means to perform an abortion increases in conjunction with fetal age. The procedure has three steps:

> First, the physician opens the cervix . . . using either prostaglandin E_2 gel, Cytotec[3] or laminaria (little match-like sticks composed of seaweed) . . . . He inserts one . . . or two . . . pills in or near the cervix, irritating it and causing it to open. Second, after the cervix opens, the small baby . . . literally drops out of the womb. Sometimes, the baby dies in the process. However, many are born

40. *Id.*

41. Gans Epner, *supra* note 27, at 726.

42. *Id.*

43. *Id.* Hysteromony and hysterectomy are rarely used because of increase in maternal mortality and morbidity rate associated with these procedures. *Id.* These procedures involve the "surgical delivery of the fetus through an incision in the uterine wall and abdomen." *Id.*

44. Gans Epner, *supra* note 27, at 726.

45. *Id.*

46. *Id.*

47. *Id.*

> alive—thus the name, "live-birth" abortion. In this case, the third step is letting the baby die.[48]

Late term abortions are most often associated with the possibility of the baby actually surviving and, in essence, being born alive. This has created a confusing situation for health care professionals. If a woman comes into the hospital with the intent to have an abortion, is she entitled to that and nothing less? Because our legal and political systems have created a standard that choice is absolute, health care professionals are now in a quandary as to what to do when a child who was marked for abortion is born alive. At this point, the only two choices that they are left with is to let the baby die or finish the job.[49]

IV. THE EROSION OF THE RIGHT TO LIFE

The right to have an abortion extends further than reproductive decision making as the concepts of abortion rights and of life's parameters are scientifically amorphous at best. Attempts to resolve this enigma have taken the debate from the delicate subject of determining when life inside the womb begins to an all out conclusion that a woman's intent controls. This progression, and the effect thereof, are the reasons why the Born-Alive Infants Protection Act has been proposed.

A. *The Cases*

In *Roe v. Wade*,[50] the Supreme Court found that a woman has a fundamental right to privacy established by the Fourteenth Amendment which is "broad enough to encompass [her] decision whether or not to terminate her pregnancy."[51] Because of this, the state must show a compelling interest in order to restrict this fundamental right.[52] According to the *Roe* Court, the state's interest in the life of the fetus becomes compelling

48. Catherina Hurlburt, *Live-Birth Abortions: The Next Step After Partial-Birth Abortion*, Concerned Women for America, (July 2000), *at* http://www.cwfa.org/library/life/2000-07_pp_lba.shtml; *see also* David A. Grimes, *The Continuing Need for Late Term Abortions*, 280 JAMA 747, 748 (1998).

49. Hurlburt, *supra* note 48.

50. 410 U.S. 113 (1973).

51. *Id.* at 153.

52. *Id.* at 155.

only at the point of viability.[53] Therefore, before viability, the right of a woman to have an abortion overrides any interest of the unborn child.[54] Despite this fundamental right, the Court was careful to note that the right to have an abortion is not unconditional.[55] Both the life and health of the mother are parts of the equation that the physician should analyze when determining whether to perform an abortion post viability.[56]

In order to balance both the interest of the mother in choosing an abortion and the interest of the state in protecting what it called "potentiality of life,"[57] the Court established a trimester test.[58] During the first trimester, the Court held, the state may not regulate abortion.[59] During that stage the decision to terminate a pregnancy should be left to a woman and her doctor.[60] In the second trimester, the Court concluded, the state may only regulate abortions "in ways that are reasonably related to maternal health."[61] Finally, the Court ruled that in the third trimester, the state may regulate and even proscribe certain abortion procedures unless such procedure is necessary to preserve the life or health of the mother.[62]

Despite occasional challenges in court and a plethora of scholarly dissatisfaction, the standard set forth in *Roe* remained in place for almost twenty years.[63] Then, in 1992, the Court decided *Planned Parenthood of*

53. *Id.* at 163. In *Roe*, the court defined viability as the point that the fetus can survive independent of its mother. *Id.* at 160.

54. *Roe*, 410 U.S. at 164.

55. *Id.*

56. *Id.* at 153. In *Doe v. Bolton*, the companion case to *Roe*, the Court stated that a physician's medical judgment may be exercised according to physical, emotional, psychological, familial, and age factors relating to the health of the mother. 410 U.S. 179, 192 (1973).

57. *Roe*, 410 U.S. at 162.

58. *Id.* at 163.

59. *Id.*

60. *Id.*

61. *Id.* at 164.

62. *Roe*, 410 U.S. at 165.

63. *Cf.* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976) (stating that "[t]he time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician"); Webster v. Reprod. Health Servs., 492 U.S. 490, 515 (1989) (upholding a state statute creating a presumption of viability at twenty weeks which the attending physician "must rebut with tests indicating that the fetus is not viable prior to performing an abortion"); Colautti v. Franklin, 439 U.S. 379, 400 (1979) (clarifying a statute subjecting physicians who performe an abortion to potential criminal liability if they failed to attempt to preserve the life of a viable or potentially viable fetus); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down a provision in a statute

Southeastern Pennsylvania v. Casey.[64] In *Casey*, the Court affirmed the fundamental tenets of *Roe*, but changed the legal standard.[65] Instead of affirming the compelling state interest and trimester test of *Roe*, the Court held that "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional.[66] The Court described an "undue burden" as a state 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."[67]

Although the *Casey* Court disregarded the trimester test established in *Roe*, it quoted the language of *Roe* with regard to the health of the mother and noted that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother."[68]

This new standard, coupled with the Court's decision to uphold certain restrictions imposed by the state,[69] brought dissatisfaction to both sides of the abortion debate. Although *Casey* did not overturn *Roe* like many had assumed it would, the new language used by the Court was an indication that the interest of the state would be more respected in the balancing analysis. At the very least, the Court moved away from the impression that abortion was an absolute right—a theory which brought outrage to some abortion advocates.[70] However, because the Court upheld the legality of abortion, the

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that mandated every person performing an abortion to "exercise of that degree of care . . . 'required . . . to preserve the life and health of any unborn child intended to be born and not aborted'").

64. 505 U.S. 833 (1992).

65. *Id.* at 870. The Court reaffirmed that, pre-viability, a "woman has a right to choose to terminate her pregnancy." *Id.*

66. *Id.* at 877.

67. *Id.*

68. *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164–65).

69. *See id.* The Court upheld four of five provisions imposed by the State including informed consent, twenty-four hour waiting periods, extensive reporting requirements, and the medical emergency exception. *Id.*

70. *See* Janet Benshoof, Planned Parenthood v. Casey: *The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249 (1993). Benshoof wrote that "[w]hile the majority opinion reaffirmed a woman's right to choose an abortion, the opinion opens the door to a multitude of new restrictive abortion laws, which diminish, and in some cases completely block, a woman's ability to exercise that right." *Id.* at 2249. She continued that "for the first time in a case that did not involve government funding, the Court abandoned the principle that the government must act with neutrality with regard to the woman's decision whether to terminate her pregnancy." *Id.*

burden remained on the pro-life side to lobby for change. Since a complete ban on abortion appeared to be a fruitless fight, the focus turned to time and manner—namely, partial birth abortion.

When *Stenberg v. Carhart*[71] came before the Court in 2000, the focus was on the ability of a state to ban the late term D&X abortion procedure.[72] The Court framed the issue as "whether Nebraska's statute,[73] making criminal the performance of a "partial birth abortion," violates the Federal Constitution" as interpreted in *Roe* and *Casey*.[74] The Court ruled that the statute was unconstitutional for "two independent reasons."[75] The first reason was that the "law lack[ed] any exception 'for the preservation of the . . . health of the mother.'"[76] The second reason was that the statute "'impose[d] an undue burden on a woman's ability' to choose a D&E abortion,[77] thereby unduly burdening the right to choose abortion itself."[78]

The Court discussed the health exception prong first, intentionally emphasizing that the earlier undue burden test would no longer be the sole arbiter of statutory validity.[79] As the Court discussed, this health exception prong applies to more than the ability to choose abortion:

> [A] State cannot subject a woman's health to significant risks both in [the context where the pregnancy itself creates a threat to health], *and also* where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks. They make clear that a risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.[80]

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71. 530 U.S. 914 (2000).
72. *Id.* at 921–22.
73. *See* NEB. REV. STAT. ANN. § 28-328(1) (Supp. 2000).
74. *Carhart*, 530 U.S. at 929–30.
75. *Id.* at 930.
76. *Id.* (quoting *Casey*, 505 U.S. at 880).
77. *See supra* text accompanying notes 37–40.
78. *Carhart*, 530 U.S. at 930.
79. *Id.* at 930–39. The Court extended the health exception prong to a previable fetus as well. Justice Breyer noted that because the "law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." *Id.* at 930.
80. *Id.* at 931.

This decision made clear what was unresolved in *Casey*—that the health of the mother stands on its own and is not to be balanced against the interest of the state.[81]

B. *The Language*

Although this case could have been decided by applying only the undue burden test, the Court split the previous test, which incorporated the concerns for the health of the mother in determining whether the state had imposed an undue burden on her choice, into a separate and distinct two-part test.[82] In deciding that the statute posed an undue burden, the Court relied on a vagueness challenge. It held that the statute had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[83] The language of the statute, the Court reasoned, could have been interpreted to apply to the more commonly used D&E procedure as well as D&X because the procedures are similar in form.[84] If this were the case, Nebraska and any other state would have had the opportunity to revise the statutory language and clarify that the ban only covered D&X abortions. The Court did not afford the State the opportunity to do this but instead promoted the health exception prong, a test that would virtually block any state from creating legislation to stop this procedure.

This *Carhart* decision came as a surprise to some who had presumed that the Court would uphold the Nebraska statute. In fact, prior to that decision, similar statutes had been interpreted by courts to apply only to the D&X procedure.[85] After the *Carhart* decision, those courts were called to reconsider such decisions.[86]

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81. *See The Supreme Court, 1999 Term Leading Cases—Constitutional Law,* 114 HARV. L. REV. 219, 220 (2000).

82. *Id.* at 226–27.

83. *Carhart,* 530 U.S. at 921 (quoting *Casey,* 505 U.S. at 877).

84. *Id.* at 939.

85. *See, e.g.*, Richmond Med. Ctr. For Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998). The court in *Gilmore* noted that the "term 'partial birth abortion' in the statute applie[d] only to the intact dilation and extraction procedure" and that the conventional dilation and evacuation procedures were not subject to prosecution. *Id.* at 331. That interpretation was also provided by the Attorney General of Virginia. *Id.* The court also relied on the interpretation of the AMA with respect to the federal partial birth abortion statute, an act similar in language to the Virginia statute as well. *Id.* at 332. The AMA said that the federal statute "'clearly defines the prohibited procedure so that it is clear on the face of the legislation what act is to be banned . . . physicians will be on notice as to the exact nature of the prohibited conduct.'" *Id.* In *Planned Parenthood of Wis. v. Doyle,* the court

Although the language of these decisions seem at first blush to be relatively harmless, the implications are of significance to the validity of the Born-Alive Infants Protection Act. With each passing abortion case, the language becomes more offensive to the rights and needs of the baby. For example, in *Carhart*, the Court completely disregarded the fetus' experience in a partial birth abortion and instead focused exclusively on the will of the mother. It relied upon information supplied by the American College of Obstetricans and Gynecologists ("ACOG") which provided that dilation and extraction "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman."[87] However, the same panel which released that opinion "'could identify no circumstances under which [this] procedure . . . would be the only option to save the life or preserve the health of the [mother].'"[88]

In fact, more evidence supports the belief that intact D&X should be banned.[89] The American Medical Association ("AMA") has recommended "that the intact [dilatation and extraction] procedure not be used unless alternative procedures pose materially greater risk to the woman" and that the abortions "not be performed in the third trimester except in cases of serious fetal anomalies incompatible with life."[90] Furthermore, according to the AMA, there are no credible studies on intact D&X to attest to the

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held that the "intentional removal of the fetus intact is what distinguishes an intact D&E procedure from a [conventional] D&E procedure." 9 F. Supp. 2d 1033, 1036 (W.D. Wis. 1998).

86. In *Gilmore*, the court vacated its stay order pending appeal after the *Carhart* decision. *See* Richmond Med. Ctr. For Women v. Gilmore, 219 F.3d 376 (4th Cir. 2000). In reluctantly vacating the stay, Judge Luttig stated:

> As a court of law, ours is neither to devise ways in which to circumvent the opinions of the Supreme Court nor to indulge delay in the full implementation of the Court's opinions. Rather, our responsibility is to follow faithfully its opinions, because that court is, by constitutional design, vested with the ultimate authority to interpret the Constitution.

Id. at 378. Judge Luttig believed that the Supreme Court would hold the partial birth abortion ban to be constitutional, based on the "overlay of deference customarily afforded state statutes in facial challenges . . . ." *Id.* at 377.

87. *Carhart*, 530 U.S. at 932; *see also* George J. Annas, *Partial Birth Abortion & the Supreme Court*, 344 NEW ENG. J. MED. 152 (2001).

88. *Carhart*, 530 U.S. at 934.

89. Gans Epner, *supra* note 27, at 729.

90. *Id.* The AMA recommendations provide that "except in extraordinary circumstances, maternal health factors that demand termination of the pregnancy can be accommodated without sacrifice of the fetus, and the near certainty of the independent viability of the fetus argues for ending the pregnancy by appropriate delivery." *Id.*

procedure's safety.[91] Finally, the AMA has argued that none of the risks associated with a D&X procedure are medically necessary because other procedures are necessary to doctors who decide that terminating the pregnancy that late in the term is necessary.[92] The *Carhart* Court could have at least balanced the recommendations of these two agencies. However, instead of fairly weighing the two, the Court chose the statement that fit its intended result and concluded that the D&X procedure should remain an option. Furthermore, in speaking about the health exception prong, the Court reasoned:

> the division of medical opinion signals uncertainty. If those who believe that D&X is a safer abortion method in certain circumstances turn out to be right, the absence of a health exception will place women at an unnecessary risk. If they are wrong, the exception will simply turn out to have been unnecessary.[93]

The problem with this line of thought is that it does not eliminate the fact that hundreds or thousands of babies will have been subject to excruciating torture all for the protection of a procedure which may or may not be necessary. If this reality were a legitimate concern, then the result may have been different.

Carhart set a new standard of denial which was quickly adhered to as a legitimate rationalization for the intended result to follow the will of the mother first, last, and only. In *Planned Parenthood of Central New Jersey v. Farmer*,[94] the Third Circuit drew a distinction between a partial birth abortion and infanticide by reasoning that:

> Positing an "unborn" versus "partially born" distinction, the [New Jersey] Legislature would have us accept, and the public believe, that during a "partial-birth abortion" the fetus is in the process of being "born" at the time of its demise. It is not. A woman seeking an abortion is plainly not seeking to give birth.[95]

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91. *Id.* The partial birth abortion procedure is also not recognized in medical textbooks or taught in medical schools or residencies. *Id.*

92. M. Leroy Sprang & Mark G. Neerhof, *Rationale for Banning Abortion Late in Pregnancy*, 280 JAMA 744 (1998).

93. *Carhart*, 530 U.S. at 916.

94. 220 F.3d 127 (3d Cir. 2000).

95. *Id.* at 143.

The language of this case is further evidence that the rights of the fetus have become obsolete.

C. *The People*

In addition to a twenty-eight year downward spiral in which the courts have continued to chip away at the minuscule interest in potential life granted to the state by *Roe*, political and philosophical thought has in many ways pushed our society into believing that an unborn or even newly born baby should not enjoy the rights of full personhood. Peter Singer, Professor at Princeton University, has argued that "birth is an arbitrary point for society to bestow personhood . . . ."[96] He and other influential scholars "want parents to have some time to decide whether to dispatch the baby or keep it."[97] Jeffrey Reiman, professor at American University, has expressed that "infants do not 'possess in their own right a property that makes it wrong to kill them.'"[98] He has denied "that infants are members of the community who share equal worth, dignity, and rights, and explicitly [has concluded] that 'there will be permissible exceptions to the rule against killing infants that will not apply to the rule against killing adults and children.'"[99] Furthermore, Michael Tooley, a philosopher writing at the time of the *Roe* decision declared that fetuses and newborns do not have a right to life because they are not people.[100] In other words, Tooley advocated the belief that infants do not qualify as human beings because "a human being . . . 'possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity.'"[101]

This belief that infants are not entitled to full protection of the law has even permeated the Oval Office. In November, 2000, then President Bill Clinton's Office for Civil Rights wrote that "protections against discrimination on the basis of age and disability [do not] require doctors to treat seriously ill newborns as long as the parents consider them aborted."[102] This statement is less than shocking considering the fact that Clinton twice vetoed a ban on partial birth abortion which was passed by both houses of Congress.

96. Leo, *supra* note 25.
97. *Id.*
98. *Id.*
99. Hearings, *supra* note 9 (testimony of Prof. Robert P. George).
100. *Id.*
101. *Id.*
102. *Insider Report: Are Newborns "Persons?,"* NEW AMERICAN, Nov. 20, 2000.

Before the first veto the procedure was believed to be implemented in rare medical emergencies.[103] This misconception was due not only to a lack of available information, but also intentional skewing of statistics. After Clinton vetoed the ban in April, 1996, conflicting information began to surface.[104] The fact that the original statistics had been skewed for political purposes, and that the evidence concerning the effects of this procedure were by that time widely publicized did not stop the former president from vetoing the ban a second time. It is actions like these that signal the need for a clear and distinct determination that a baby born alive is entitled to personhood.

D. *The Need*

The cases, legal theories, and political arguments surrounding the abortion debate have enabled the intent of the mother to be paramount to any and all rights of the child. The thought that a baby aborted during the mid-second to third trimester can survive the abortion, be born alive, and feel the effects of the abortion have been consistently dismissed. Pain perception centers develop early in the second trimester of pregnancy.[105] Infants of similar gestational age, that are born prematurely, are cared for with pain management as one of the tenets used in the NICU.[106] The pain management practiced for a partial birth abortion "would not meet the federal standards for the humane care of animals used in medical research."[107] These views support the need for the Born-Alive Infants Protection Act.

In speaking in support of the Act, Representative Canady summarized the Supreme Court's decision in *Carhart* as resting "on the pernicious notion that a partially-born infant's entitlement to the protections of the law is dependent not upon whether the child is born or unborn but upon whether or not the partially-born child's mother wants the child or not."[108] He also pointed to the decision in *Farmer* as holding that "an infant who is killed

103. Sprang, *supra* note 92. The circulated numbers were 450 to 500 per year. *Id.* at 744.

104. *Id.* For example, in November 1995, the National Coalition of Abortion Providers Executive Director Ron Fitzsimmons stated that "women had these abortions only in the most extreme circumstances of life endangerment or fetal anomaly." *Id.* After President Clinton vetoed the bill, Fitzsimmons "admitted that his own contacts with many of the physicians performing intact D&X procedures found that the vast majority were done not in response to extreme medical conditions but on healthy mothers and healthy fetuses." *Id.*

105. Sprang, *supra* note 92, at 745.

106. *Id.*

107. *Id.*

108. 146 CONG. REC. H7967 (daily ed. Sept. 21, 2000) (statement of Rep. Canady).

during a partial birth abortion is not entitled to the protections of the law because . . . a woman seeking an abortion is plainly not seeking to give birth."[109] After reflecting upon these cases, Representative Canady demonstrated the potential consequences of this line of thought. He concluded that:

> [u]nder the logic of these decisions, once a child is marked for abortion it is not relevant whether that child emerges from the womb as a live baby. A child marked for abortion may be treated as a nonentity even after a live birth and would not have the slightest rights under the law; no right to receive medical care, to be sustained in life or to receive any care at all. Under this logic, just as a child who survives an abortion and is born alive would have no claim to the protections of the law, there would appear to be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing it or allowing it to die.[110]

Representative Canady was not hypothesizing when he told of the consequences of these decisions. The testimony of Nurses Stanek and Baker are proof that these practices are already in use.[111]

V. BUT YOU'RE SUPPOSED TO BE DEAD

Senator Conrad is not the only opposition that the Born-Alive Infants Protection Act faces.[112] During the hearings before the House, doctors, scholars, and lawmakers spoke out against the proposed law. The attacks stem from two systems of belief. First, there is the content neutral attack. This is the group which would base their resistance on the addition of a born alive infant to the list of those entitled to personhood, such as the Peter Singers of the world.[113] They would essentially deny personhood to a newborn baby regardless of whether the baby was wanted by its parents or not. This argument is an across the board ban on recognition of a living baby.

The second attack is content based. The argument is that babies who are born alive as the result of an abortion are not entitled to personhood.

109. *Id.*
110. *Id.*
111. *See supra* pp. 488-89 and accompanying notes.
112. *See supra* note 23 and accompanying text.
113. *See supra* p. 500.

The proponents of this are groups like NOW and the NARAL. It is also fostered by the language of noted court opinions. This theory focuses solely on the woman's determination that she will abort the baby. For the followers of this line of thought, once this decision has been made, the concept of being born alive ceases to exist.

Of the two lines of thought, the first grouping seems to make more sense. At least it does not discriminate on the basis of self-worth. However, as pointed out by its supporters, no argument for banning this Act can reconcile the distinction between a woman's right to choose to have an abortion and the rights of a born alive infant. Opponents of the bill have yet to explain how the mother's right to terminate her pregnancy extends through the birth of a live baby. There are several more concise arguments, upon which those opposing this Act rely. Each of these arguments, however, does not appear strong enough to deny personhood to a newborn baby.

The first argument against the Born-Alive Infants Protection Act is that it restates current law.[114] Opponents contend that "[e]xisting federal and state law already provide adequate protection for the fetus."[115] It is true that more than forty states have laws that either grant a new born personhood or proscribe the killing of a baby born alive, but these laws only apply to babies who are born to mothers who either planned to have them or at least did not have an abortion. If the judiciary does not interpret those laws as applying to an aborted baby who is born alive, then the laws do not solve the problem that this Act would. Enacted laws are of no support to a class that is not protected by the legislation.

The second argument against the Born-Alive Infants Protection Act is that the language of the bill "would impose on doctors and parents a universal definition of life or 'alive,' which is . . . inconsistent with the harsh reality presented by a number of circumstances."[116] In other words, this bill would "significantly interfere with the agonizing, painful and personal decisions that must be left to parents in consultation with their physicians."[117] It would cause parents to prolong the life of a dying infant out of fear that choosing to discontinue treatment would be a "termination of life" instead of a termination of the "painful process of death."[118] What all of this means is that there are physicians who would be confused as to "whether this

114. Hearings, *supra* note 9, at 35 (testimony of Rep. Stephanie Tubbs-Jones); *see also* 146 CONG. REC. E1647 (daily ed. Oct. 2, 2000) (statement of Rep. Kilpatrick).

115. Hearings, *supra* note 9, at 35 (testimony of Rep. Stephanie Tubbs-Jones).

116. Hearings, *supra* note 9, at 56 (testimony of Dr. F. Sessions Cole).

117. *Id.* at 57.

118. *Id.*

bill would mandate that doctors provide care beyond what they would normally deem to be appropriate for newborns who have no possibility of survival."[119] In addition to the testimony of doctors who analyzed the bill and concluded that the criteria of live birth as set forth in the Act is "unambiguous and easily discernible by any birth attendant,"[120] it is common knowledge that a baby who is lying on a table, moving its arms and legs, and gasping for air is, in fact, alive.

Furthermore, any parent who was planning on giving birth and raising their child will not arbitrarily decide to stop life sustaining methods based on a legal definition of live birth.[121] The Act is intended to apply to babies born alive as a result of a botched abortion. It is for the purpose of granting those children the same rights as children born to parents who want them. It is not meant to force parents and doctors to keep babies, who clearly have no vital signs, nor is it meant to force them to administer treatment that would be ineffective. When medical attention will no longer help the child survive, doctors are not required, under the Act, to keep the baby alive, regardless of the circumstances of birth.[122] The effect of this Act is to define a baby who survives an abortion as a person, so doctors do not leave a baby to die, in an effort to fully perform their end of an abortion contract.

A third argument against the Born-Alive Infants Protection Act is that it is a back-door attempt to restrict a woman's right to choose to terminate her pregnancy.[123] However, there is a distinction between having an abortion and killing a living baby. Once a woman delivers her baby, there is no way she can terminate her pregnancy because the pregnancy has already been terminated through the birthing process.[124] Because the Act defines born

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119. 146 CONG. REC. E1647 (daily ed. Oct. 2, 2000) (statement of Rep. Kilpatrick).

120. Hearings, *supra* note 9, at 59 (testimony of Dr. Watson A. Bowes, Jr.).

121. Parents who want their baby will fight until they feel that it is a losing battle.

122. Hearings, *supra* note 9, at 59. Dr. Bowes testified:

> It is my opinion that this definition of being born alive does not and will not have a detrimental effect on either maternal or infant health care. I am confident of this because this is the definition of live birth that is in effect in the state of North Carolina in which I practiced for 18 years. During this time, these criteria for defining live birth did not interfere with physicians making clinical judgments about providing appropriate care for newborn infants nor with parents being involved in those decisions. Importantly, this definition of live birth does not restrict a physician's prerogative to recommend that medical care regarded as futile be withdrawn or withheld.

Id.

123. *Id.* at 35 (testimony of Rep. Stephanie Tubbs-Jones).

124. *Id.* at 56 (testimony of Prof. Gerard V. Bradley).

alive as "complete expulsion or extraction" from the womb,[125] there is no conceivable way to abort a child who has already been completely expelled or extracted from a woman's body.

The only chilling effect that this bill may have on a woman seeking an abortion is the thought that the woman who goes in for an abortion may, nonetheless, end up being a mother if the child is born alive.[126] So, the issue boils down to determining whether a baby who survives an abortion can force a woman to be a mother.[127] *Roe* spoke to this possibility:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[128]

As testimony before the House has indicated, these detriments that the court in *Roe* spoke of are "not of pregnancy, but of having and raising a child."[129] Neither the text nor the spirit of the Born-Alive Infants Protection Act mandates that a woman is required to keep and care for the child that she aborted in the event that the baby survives the abortion. She has the same ability as any other mother who gives birth to terminate her parental rights and give the baby up for adoption. She never has to see the baby, know how it is progressing, or provide any care whatsoever.

While a woman who intends for an abortion to be successful can relinquish her rights as a parent, health care professionals should not be entitled or even forced to relinquish their obligations to a living human being based solely on the will of the mother. It is the very essence of a physician's responsibility to care for a patient who is alive and in need of medical attention. That the mother did not intend to have the child should,

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125. *Id.*

126. Hearings, *supra* note 9, at 55.

127. *Id.*

128. Roe v. Wade, 410 U.S. 113, 153 (1973).

129. Hearings, *supra* note 9, at 55 (testimony of Prof. Gerard V. Bradley). Bradley noted that the Court in *Roe* "stressed in unmistakably clear terms that this liberty [interest in choosing to have an abortion] was not absolute, and that it was limited by the social interest in protecting 'potential life'—a child in utero—and, after birth, by the exceptionless protection of new persons." *Id.* at 55–56.

realistically, not be part of the equation for a doctor in deciding whether to care for a baby who has obvious signs of life. The answer is certainly not to ignore the baby until the intent of the procedure is achieved. The same standards that apply to any person who presents at a hospital for care should be applied to a baby who survives an abortion. The fact that this standard is not equally applied means that we have different levels of care for living people based upon whether they are considered valuable by others. If that is a legitimate criterion, then the most rudimentary theory of worth holds no authority.

The fourth argument against the Born-Alive Infants Protection Act is that it is vague and overbroad.[130] According to its opponents, because the Act could affect over 70,000 sections of the United States Code ("the Code"), it would be impossible to predict all of its possible ramifications.[131] Although this argument was presented as a serious problem that could emerge from enacting this bill, there have never been any examples provided of how this Act would negatively affect the Code. Surely, if this were a legitimate problem that could potentially redefine 70,000 sections of the Code, there could be at least one example provided of how these sections would be detrimentally affected.

Although no opponent stepped forward and offered evidence concerning the Act's statutory effect, the House Subcommittee on the Constitution requested that two attorneys from the American Law Division of the Congressional Research Service discuss the possible statutory impact of the Act.[132] The attorneys concluded that the "addition of [the] new language would have minimal effect on the prospective application of federal statutes."[133] They analyzed the effect on tort, trusts and estates, and criminal law—the areas of law where the interests of those born alive are most often recognized.[134]

They began with federal tort claims which are most commonly brought under the Federal Tort Claims Act (FTCA).[135] The Act would not effect this practice because "the relevant portions of the FTCA do not use the terms 'person,' 'human being,' 'child,' or 'individual' in establishing damages

130. *Id.* at 35 (testimony of Rep. Stephanie Tubbs-Jones).

131. *Id.* at 36.

132. *See id.* at 48 (testimony of Ken Thomas, Attorney, American Law Division of the Congressional Research Service).

133. Hearings, *supra* note 9, at 50 (testimony of Ken Thomas).

134. *Id.* at 50–52.

135. *Id.* at 50.

claims."[136] For trust claims, state law and the trust instrument determine whether those born alive are considered beneficiaries.[137] Therefore, these new definitions would have little effect on that area of the law.[138] The most damaging effect to existing law that the attorneys found would be in the area of criminal law. They stated that the concept of born alive proposed by the Act is broader than that of common law because it appears to be intended to apply to fetuses which were born prior to viability.[139] It also adds abortion to the common law definition which was previously limited to non-consensual fetal demise.[140] Because of this, the attorneys concluded that:

> [I]t is not clear if the statute would be limited to the situation where the cause of death was inflicted after the fetal expulsion, or whether it could be interpreted to cover injury inflicted *in utero* during an abortion. Application of the homicide statutes for damage[s] incurred during an abortion would raise constitutional issues based on a woman's liberty interests under the 14th Amendment. While the canon of constitutional doubt would lean against the application of a statutory ambiguity in a way that may violate the Constitution, it is not clear how this statute would be applied.[141]

The answer to whether this Act would affect the point of viability can be answered by responding to the fifth argument proposed by the opposition. The argument is that the Act defines viability—a task which the Supreme Court has consistently refused to do.[142] This argument fails for three reasons. First, viability, like a woman's right to choose to have an abortion, is a concept only applicable to a pregnant woman. Once a baby is born, the definition of viability is extinguished. Either the newborn baby is alive or it is dead. Whether the baby lives or dies, there is no longer any need to calculate the potential for the baby to live outside of the womb.

Second, even if the viability test were used once the baby was aborted, the test would not be altered by any significant amount of time. Because viability is measured by fetal age, it is more likely that an older fetus will survive a late term abortion. The gray area between the twentieth and

136. *Id.*

137. *Id.* at 51 (testimony of Ken Thomas, Attorney, American Law Division of the Congressional Research Service).

138. Hearings, *supra* note 9, at 51.

139. *Id.* at 51–52.

140. *Id.* at 52.

141. *Id.*

142. *See id.* at 44 (testimony of Rep. Stephanie Tubbs-Jones).

twenty-seventh week may be carved out to a clearer degree if a substantial number of twenty week old fetuses live, but administering aid to aborted babies that live is not going to automatically turn a pre-viable fetus into a viable fetus. This argument leaves out the most important part of the equation—the baby has to be born alive. Just because the Act applies to all stages of fetal development, does not excuse the fact that the baby has to be born alive to receive protection.

Third, the chances of a pre-viable fetus living through an abortion remain low due to both the age of the fetus and the abortion procedures that are used on fetuses that young. Early term abortion methods destroy the body of the fetus, ripping it apart. By the time the fetus exits the womb, it is reduced to tissue, and often times it is not expelled in full form. With a live birth abortion, not only is the child usually at the point of viability but the child is delivered in its entirety, similar to an actual birth in the ninth month. The chance of survival obviously increases dramatically when the child is delivered like a full birth as opposed to being removed like a tumor.

Furthermore, viability is determined inside the womb. The essence of this term is its potentiality. The *Roe* Court defined viability as the point when the fetus can survive independent of its mother, but that definition has changed over the years to now mean "'the capacity for meaningful life outside the womb, albeit with artificial aid,' and not just momentary survival."[143] Once the child is born, there is no need to measure viability because potentials have become realities, and the reality is that there is now a living, breathing human being. Even if viability were the determining factor, the fact that the baby may need artificial aid to survive is meaningless. The definition explicitly allows for medical help in determining viability. The argument that the Act would have any effect on the definition of viability is simply untrue and irrelevant.

A related argument was provided by the NARAL. This organization claims that the Born-Alive Infant Protection Act is "yet another anti-choice assault on the basic tenets of *Roe v. Wade*."[144] However, the point of birth

143. *See* Gans Epner, *supra* note 27, at 724.

144. Stuart Taylor, Jr., *When Does Abortion Become Infanticide?: Approval of RU-486 May Help Pull Us Back from That Line*, 23 LEGAL TIMES 84 (2000). Another argument that has been offered, though not by the NARAL, is based entirely on statistical data and population counts. It provides:

> "[B]irth" has always been understood as the delivery of an infant who has at least some chance of living more than a few minutes. Since no baby has ever survived birth before 22 weeks of pregnancy (20 weeks since fertilization), a miscarriage or abortion during the first half of pregnancy is not considered to result in a live birth even if the embryo or fetus exhibits some signs of life after delivery. The reason for this definition

"marks the earliest possible time . . . when the interests of the [mother] can be separated entirely from the interests of the child."[145] Additionally, prosecutors and lawmakers are already injected into the medical decision making process. They have been involved since the profession began. Passing the Act may be the first step toward leaving this decision to health care professionals by providing a definition of "alive" based on heart beats and respiration instead of a convoluted interest-serving legal definition. In other words, maybe "[i]f we understand that we are dealing with a human being, reasons of convenience and self-interest [would] become radically inadequate in supplying a 'justification' for the killing of [a] child."[146]

While most of the arguments against the Born-Alive Infants Protection Act are based on the constitutional right of a woman to choose to have an abortion, no critic has provided any analysis of the Act's validity under the current test. If the argument challenges the Act's constitutionality under *Roe*, *Casey*, and now *Carhart*, then the opponents should at the very least be prepared to apply those standards to the present situation. Despite this retreat to the security of *Roe* and its progeny, implementation of this doctrine is incompatible with any form of relief under these circumstances. In other words, abortion rights and live children do not mix.

In order to strike down the Act under a right to choose analysis, a litigant would have to prove that either the law does not contain a vital

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> is obvious: [it is] important to know how many babies are born alive each year for all kinds of vital statistics and public health purposes. For instance, we want to know how many stillbirths and infant deaths there are as a percentage of live births, in order to address medical problems. Because the birth of a living child has tax consequences, we need to define birth in a reasonable way. Including miscarriages and induced abortions as births would make nonsense of these efforts.

Margaret Sykes, *Congressional Follies of Fall 2000: The Born Alive Infant Protection Act*, Pro-Choice Views, *at* http://prochoice.about.com/newsissues/prochoice/library/weekly/aa101200b.htm (last visited Apr. 8, 2001).

145. Hearings, *supra* note 9, at 9 (testimony of Prof. Hadley Arkes). Arkes testified that:

> Even if *Roe v. Wade* articulated an unqualified right on the part of a woman to end her pregnancy, the pregnancy would now be over. No right to end the pregnancy would require at this moment the death of the child. And of course no one, at that moment, claims to be suffering any doubt that we are dealing with a human being—as though the offspring of homo sapiens could have been anything less than human at any phase in its life. This is the first moment then, under our current law, when we should be able to declare, with unchecked conviction, that the law may extend its protections over that child.

Id.

146. *Id.* at 10.

exception for the preservation of the life or health of the mother, or it imposes an undue burden on a woman's right to obtain an abortion.[147] Proving either of these as a way of showing that born alive infants are not entitled to personhood is impossible. The argument is fundamentally flawed under both prongs, as once a baby is born alive, it is no longer a part of the mother. As soon as the baby leaves the womb, the privacy right becomes as important to the mother as the placenta is to the already born child.

The basic tenet behind the abortion rights analysis is that a woman should be able to do what she wants with her own body. But basic biology is cogent evidence that once it survives birth, the baby is its own separate, independent being. No health exception is needed because allowing the living, breathing baby to be considered a person has no correlation to a mother's life or health. There is no undue burden imposed on the woman's right to terminate her pregnancy because the pregnancy has already been terminated through the birth. Although this reality may be unpopular to those who would prefer that a woman retain total control over the life and death of her child, even through birth, it cuts right to the heart of this debate. Once a child is born, its mother does not have the right to a dead baby.

VI. CONCLUSION

How can what seems like such a simple theory be so complex? It would appear that within the most basic of thought processes that the evidence that a child is born alive is for all necessary purposes proof that it is a person. Politics has once again been injected into a formula where it does not belong. A child's worth should not be placed on whether he or she is wanted by the person who gave birth to him or her. Although there is a right to prevent the birth of such a child, that right ceases to exist when the child is born. There is no clearer point of individualism than that of separation. When a child is born, it is its own being, no longer dependant upon its mother for food, shelter, and comfort. All of those essentials can be provided by another once the child leaves the womb. There are others who want to step in and take over the role that is often times so casually disregarded. But before that can happen, the child must be given the chance to survive. The Born-Alive Infants Protection Act would allow such a child to have that chance at life.

147. *Carhart*, 530 U.S. 914, 930 (2000).