NOTES

THE UNCONSTITUTIONALITY OF STATE LEGISLATION BANNING "PARTIAL-BIRTH" ABORTION[1]

- The Right Wing's Attempt to Advance Its True Purpose Of Outlawing All Abortions, One Procedure At a Time

"We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[2]

"We support constitutional and statutory protection for the unborn child."[3]

"The Christian Coalition's 'Contract With the American Family' is a significant first step in a broader campaign by the radical right to enact a political agenda that will infringe on the liberties of millions of Americans. The Contract is a dangerous document cleverly designed to hide the radical right's goal of criminalizing abortion in the United States."[4]

---

[1] *See Partial-Birth Abortion: Joint Hearing on S.6/ H.R. 929 Before the Senate Judiciary Comm. and the House Judiciary Subcomm. on the Const.*, 104th Cong. 33 (1997)[hereinafter *Joint Hearing*](written testimony of the Nat'l Abortion Fed'n). "[P]artial-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 and conceal the harm that will result if this proposed legislation is enacted." *Id. See also Bans on "Partial-Birth Abortion" and Other Abortion Methods*, REPROD. FREEDOM IN FOCUS (The Center for Reprod. Law & Policy, New York, N.Y.), Oct. 23, 1997. "One of the newest strategies of abortion opponents is to introduce bans on 'partial-birth abortion' or dilation and extraction, 'D & X' abortions. 'Partial-birth abortion' is a political construct with no equivalent in real-world medical practice." *Id.*

[2] Roe v. Wade, 410 U.S. 113, 154 (1973).

[3] *Contract With the American Family*, (The Christian Coalition). (http://www.cc.org/publications/ca/speech/contract.html).

[4] *The Christian Coalition's Contract: An Assault on Women's Reproductive Health*, NARAL FACTSHEETS (The Nat'l Abortion and Reprod. Rights Action League Found., New York, N.Y.), Feb. 23, 1996, at 1. *See also Contract With the American Family, supra* note 3. Under the section entitled "Restoring Respect for Human Life," the Contract states its goal to outlaw abortion and calls for three preliminary measures with serious consequences for women's health: (1) permit states to deny rape and incest victims Medicaid funding for abortions; (2) severely restrict all third trimester abortions and outlaw the D & X procedure; and (3) eliminate funding for family planning programs. *See id.* at 7-9.

Twenty-five years ago, the United States Supreme Court recognized that the Fourteenth Amendment's guarantee of liberty includes a right to privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[5] At the same time, however, the Court also declared that states have important interests in regulating abortion.[6]

The result has been a pitched battle, played out on the bodies of women, between pro-choice and anti-choice forces, which shows no signs of abating. Women facing the intensely personal and traumatic decision of whether or not to have an abortion have become public fodder for a political agenda propagated by the right wing. The weapons used by the Radical Right include: half-truths, emotionally-charged inaccuracies, rhetoric, deliberate vagueness, and distortion.[7]

The goal is to eliminate women's right to abortion procedure by procedure.[8]

---

[5] *Roe*, 410 U.S. at 153.

[6] *See id.* at 154.

[7] *See Legislation Banning Certain Abortion Procedures: The So-Called "Partial-Birth" Abortion Ban Jeopardizes Women's Health*, NARAL FACTSHEETS (Nat'l Abortion and Reprod. Rights Action League Found., New York, N.Y.), October, 1997, at 1. "Opponents of choice, by focusing the political debate on abortion late in pregnancy, are using sensational graphics and rhetoric to further their goal of making all abortion illegal." *Id.*

See also DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST 96-97 (1994). "A number of rhetorical terms has been stressed by the anti-abortion movement. Members commonly refer to abortion as another *Holocaust*, abortion providers as *pro-abortionists*, *baby killers*, *covens of witches*, and *murderers*. . . . Women seeking abortions are urged, 'do not *murder your baby*.' Anti-abortionists often refer to clinics as *abortuaries* and *death camps*. While physicians speak of *zygotes* and *fetuses*, anti-abortionists refer to *babies* and *pre-borns*. Ronald Reagan and others in the movement refer to the *unborn*. Robert Packman, the [former] Republican senator from Oregon, [was] termed *Senator Death* for his support of choice." *Id.* (emphasis in the original);

See also Laura R. Woliver, *Rhetoric and Symbols in American Abortion Politics, in* ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE 5 (Marianne Githens & Dorothy McBride Stetson, eds., 1996). Woliver examines the rhetoric and metaphors in the seventy-eight amicus briefs filed in *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989). *See id.* "Fetuses are never called fetuses, they are always 'unborn children,' 'unborn life,' 'prenatal life,' 'children in the womb,' or 'human life before birth.'. . . Right to Life advocates refer to fetuses as 'those who will be citizens if their lives are not ended in the womb.' " *Id.* at 7. "The motive for painting this picture is to evoke sympathy for what pro-life groups perceive to be independent human beings. These terms are value laden; they define as true the concept that the fetus is a living being from the moment of conception, a question about which scientists have yet to reach a consensus." *Id.* at 8. "Abortions are described by pro-life groups as the 'mindless dumping of aborted fetuses on to garbage piles' . . . . Abortion providers are painted by pro-life forces as greedy, money-hungry exploiters of vulnerable or selfish women." *Id.* at 15.

[8] *See* Stephen C. Meyer & David K. DeWolf, *A Pro-Life Case for the Daschle Bill*, WALL ST. J., June 6, 1997, at A14. "Republican leaders should therefore cooperate with Sen. Daschle to revive his ban on postviability abortions. They should then prepare to press their advantage with further incremental legislation . . . . [P]ro-life Republicans in

Motherhood will be enforced on every pregnant woman.[9] This will result in a state of vulnerability and dependence upon which the Religious Right and Republican party, working together,[10] intend to rebuild the American family and "family values" by reestablishing traditional gender roles and relegating women to the home, barefoot and pregnant.[11]

Congress must raise their own sights and recognize how far 'incrementalism' could take them on the abortion issue . . . . Where abortion is concerned, conservatives have little to lose from such an incrementalist strategy, and far more to gain then they probably imagined." *Id.*

See also Richard L. Berke, *G.O.P. Hopes Narrow Focus on Abortion Will Pay*, N.Y. TIMES, Oct. 21, 1997, at A1. "By steering clear of broader pronouncements against abortion [and focusing on a form of abortion], Republicans are trying to make their message more palatable." *Id.*

David V. Rivkin Jr. & Lee A. Casey, *Let the States Regulate Partial-Birth Abortion*, WALL ST. J., Apr. 9, 1997, at A15. "A gradual approach to limiting abortion may be preferable to another quixotic legislative battle . . . As pro-choice proponents understand very well, every limitation on the availability of abortion undermines the principle of abortion-on-demand. Each such restriction . . . weakens the current regime." *Id.*

The Christian Coalition's Contract: An Assault on Women's Reproductive Health, NARAL FACTSHEETS (The Nat'l Abortion and Reprod. Rights Action League Found. New York, N.Y.), Feb. 23, 1996. "In a veiled attempt to begin the process of eliminating a woman's right to choose, the 'Contract With the American Family' calls for punitive policies that would endanger women's lives and health. If they are successful there is no doubt that the radical right will seek to move Congress further down this road until they reach their desired end — to make abortion illegal." *Id.* at 3.

[9] *See Partial Birth Abortion - All Sides of the Issue* (visited Oct. 30, 1997) <http://www.religioustolerance.org/abo_pba.htm>.

[10] *See Exposé on The Christian Coalition's 1997 Road to Victory Conference*, (Matthew Freeman, People for the American Way, Washington, D.C.) Sept. 15, 1997. The Christian Coalition's Victory Conference included Religious Right and Republican notables such as: Jack Kemp, the Republican vice-presidential nominee in 1996; Pat Robertson, who called the Christian Coalition "the most powerful force in American politics;" Elizabeth Dole, whose letter of praise to Ralph Reed was read aloud; Ralph Reed, who listed the group's objectives, including banning abortions; Rep. John Linder (R-Ga.); Don Hodel, part of the Religious Right's new leadership team, who said his America was a place where "abortion is abolished;" Bill Bright of Campus Crusade for Christ; Rep. John Kaisch (R-Oh.); Sen. Paul Coverdall (R-Ga.); Arkansas Governor Mike Huckabee (R); Malcolm Steve Forbes; Rep. Ernest Istook (R-Ok.); former House Speaker Newt Gingrich; Sen. John Ashcroft (R-Mo.); Keith Fournier of the Catholic Alliance; and Oliver North. *See id.*

[11] *See* BLANCHARD, *supra* note 7, at 97. "The anti-abortionists [are appealing] to the notion of traditional 'family,' large families, and an implicit control of women." *Id.*

> [I]t has become increasingly clear that men dominate the leadership of the [anti-abortion] movement . . . Women are used more as foot soldiers, filling traditionally feminine roles . . . Thus, the male superiority ideology of the movement is reflected in who assigns and performs its tasks . . . . The anti-abortion movement in general is a movement of cultural fundamentalism, seeking to reestablish 'traditional' male-female relationships, particularly the dependence of females on males . . . It

The current abortion battle is being waged primarily in state legislatures.[12] Seventeen states have passed laws banning "partial-birth" abortions since 1995.[13] Part I of this Note will analyze the Supreme Court's rulings on abortion. This analysis will reveal the parameters that states must operate within when regulating abortion. Part II will briefly describe the medical procedure referred to as "partial-birth" abortion, as well as other procedures that are potentially implicated by the vague language of these statutes. Part III will examine state statutes that bar "partial-birth" abortion and will show that they are unconstitutional because they violate the parameters set out by the Supreme Court. This section will also examine recent state court rulings on the constitutionality of these statutes to determine how the Supreme Court's standard is being followed in different states. Finally, Part IV of this Note will analyze the larger agenda of the Religious Right to outlaw all abortions in direct contravention to Supreme Court holdings.

---

transcends religions and forges a common bond between cultural and religious fundamentalists across religious groups and perspectives that are at odds on a large number of other issues. The common bond is their definition of husband-wife, male-female, parent-child positions of dominance and authority versus obedience and submission.

Id. at 119.

See ELIZABETH ADELL COOK, ET AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 77 (1992).

"[D]isagreement about abortion is centrally concerned with gender-based divisions of labor. Pro-life activists believe strongly that men and women have fundamentally different natures and that there are clearly defined male and female spheres of activity. Women are viewed as emotionally and biologically equipped to become mothers, and women who do not aspire to motherhood are, in an important sense, denying their own nature. One activist went so far as to argue that women who seek to compete in a 'man's world' were . . . 'turn(ing) into men . . . or being de-sexed.' Pro-life activists argued that reducing or eliminating differences in the social roles played by men and women is degrading to the essentially feminine task of nurturing and caring and threatens an important social function played by traditional women."

Id. (referring to Kristin Luker's study of abortion activists).

[12] *See* ELIZABETH ADELL COOK ET AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 3-4 (Westview Press 1992). "The abortion issue has thus been returned to the legislative agenda. State legislatures have become battlegrounds for the abortion issue, and this has influenced a number of state legislative elections. Because governors can propose or veto abortion restrictions, abortion has become a factor in gubernatorial elections as well." *Id.*

[13] *See Bans on "Partial-Birth Abortion" and Other Abortion Methods*, REPROD. FREEDOM IN FOCUS (The Center of Reprod. Law & Policy, New York, N.Y.), Oct. 23, 1997. (http://www.naral.org/publications.whod98chart4.html).

I. THE UNITED STATES SUPREME COURT RULINGS ON ABORTION: SETTING OUT THE PARAMETERS FOR CONSTITUTIONAL STATE REGULATION OF ABORTION

A. *Decisions Regulating Abortions in the Supreme Court*

The Supreme Court's rulings on abortion, starting with *Roe v. Wade*[14], establish the parameters within which states must operate when regulating abortion. In *Roe*, the Court created a trimester framework which balanced the woman's right to privacy against the state's interest in regulating abortion.[15] In the first trimester, the decision whether or not to have an abortion was entirely between the woman and her doctor.[16] After the first trimester, states could regulate abortion in ways "reasonably related" to the woman's health.[17] Once the fetus became viable, the state could regulate and even proscribe abortion, unless a doctor deemed the abortion necessary to preserve the life or health of the mother.[18] The Court observed that since abortion is primarily a medical decision, the physician's ability to exercise his judgment is critical.[19]

In *Doe v. Bolton*, the companion case to *Roe*, the Court elaborated on the definition of "health of the mother."[20] The Court held that the decision of whether a woman requires an abortion for the health of the mother is a medical judgment to "be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient."[21] In so holding, the Court further recognized the physician's importance in determining whether an abortion is necessary.

In *Planned Parenthood v. Casey*, the Court abandoned the trimester framework it had established in *Roe*.[22] At the same time, however, it reaffirmed *Roe's* central holding that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" and that a woman may terminate her pregnancy before viability.[23]

The Court, however, adopted a new standard for determining whether a state may regulate abortion, stating that "an undue burden is an unconstitutional burden."[24] A statute imposes an undue burden if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion in a

---

[14] 410 U.S. 113 (1973).
[15] *See id.* at 165.
[16] *See id.*
[17] *See id.*
[18] *See id.*
[19] *See id.*
[20] *See* Doe v. Bolton, 410 U.S. 179 (1973).
[21] *Id.* at 190.
[22] Planned Parenthood v. Casey, 505 U.S. 833, 859, 869 (1992).
[23] *Id.*
[24] *Id.* at 877.

nonviable fetus."[25] The Court, while recognizing the states' interest in furthering potential life, stated that statutes must be aimed at informing women's choices, not hindering them.[26]

"Viability is the critical point" for determining when states have a "compelling interest in the life or health of the fetus."[27] The issue of viability was revisited by the Court in *Planned Parenthood v. Danforth*.[28] In that case, the Court rejected the notion that legislative bodies or courts could properly determine the specific point in the gestational period when viability occurred, holding instead that such a determination varies with each pregnancy and should be left to the individual judgment of the attending physician.[29]

B. *The Supreme Court's Current Stance on State Regulation of Abortion*

Roe and its progeny outline the essential holdings of the Supreme Court on the right to abortion. Viability is the point at which states can assert their legitimate interest in protecting fetal life. Viability, however, is a medical term which is to be determined on a case by case basis by the attending physician and not by the legislature or judiciary. Prior to fetal viability, the woman ultimately decides whether or not she will have an abortion. Throughout the pregnancy, the state may regulate abortion as long as it does not create an "undue burden."[30] Any regulation that presents an undue burden on a woman's right to choose abortion is unconstitutional. After fetal viability, states can regulate and even proscribe abortion, except where abortion is deemed medically necessary to preserve the life or health of the mother. These are the guidelines established by the Supreme Court that states must observe in formulating statutes designed to regulate abortion.

II. THE RELEVANT MEDICAL PROCEDURES

In order to fully understand the constitutional and statutory issues involved in state legislation banning "partial-birth" abortion, it is necessary to examine the various medical methods of terminating pregnancy.

A. *Dilation and Curettage (D & C)*

The D & C procedure removes "the products of conception" from the uterus.[31] In the past, a sharp curette[32] was used to carefully scrape the interior

---

[25] *Id.*

[26] *See id.*

[27] Colautti v. Franklin, 439 U.S. 379, 388 (1979).

[28] *See* 428 U.S. 52 (1976).

[29] *See id.* at 63.

[30] Planned Parenthood, 505 U.S. at 877.

[31] *See* JONATHAN B. IMBER, ABORTION AND THE PRIVATE PRACTICE OF MEDICINE 58 (1986).

[32] *See* WEBSTER'S COLLEGE DICTIONARY 332 (1995). Curette is defined as "a scoop-shaped surgical instrument for removing tissue from body cavities, as the uterus." *Id.*

lining of the uterus while simultaneously dilating the cervix.[33] Today, however, the curettage is normally accomplished by the less dangerous suction method.[34]

The suction method is safer because it is quicker, less likely to cause substantial blood loss, and reduces the chance of infection.[35] D & C may be done with local or general anesthesia.[36] Traditionally a method of pregnancy termination in the first trimester, D & C is now also used in the second trimester up to eighteen to twenty weeks.[37]

B. *Dilation and Evacuation (D & E)*

Generally, physicians prefer the D & E procedure for second trimester abortions, which accounts for eighty-five percent of all second trimester abortions performed after twelve weeks.[38] D & E involves cervical dilation and instrumental removal of fetal components with the aid of specially developed instruments.[39] D & E is most commonly performed between thirteen and sixteen weeks of gestation and has a mortality rate of 4.9 per 100,000 abortions.[40] Most D & E procedures are performed under local anesthetic.[41]

Cervical dilation can be accomplished by various methods.[42] However, because of the potential for permanent cervical injury associated with forceful dilation of the cervical canal, gradual dilation by laminaria[43] is now standard.[44] After dilation, the physician ruptures the membranes and proceeds to dismember the fetus in the uterus using forceps, curets, and suction.[45]

The D & E procedure has significant advantages for the patient.[46] The complication rates are lower, the procedure time is predictable, and it does not require overnight hospitalization.[47] Furthermore, the patient does not experience labor,

---

[33] *See* Thomas D. Kerenyi, *Medical and Surgical Aspects of Elective Termination of Pregnancy*, in COMPLICATIONS OF PREGNANCY· MEDICAL, SURGICAL, GYNECOLOGIC, PSYCHOSOCIAL, AND PERINATAL 765-66 (Sheldon H. Cherry, M.D. & Irwin R. Merkatz, M.D. eds., 4th ed. 1991).

[34] *See id.* at 766.

[35] *See id.*

[36] *See id.* at 766-67.

[37] *See* IMBER, *supra* note 31, at 58.

[38] *See* Evans v. Kelley, 977 F. Supp. 1283,1293 (E.D. Mich. July 31, 1997).

[39] *See* Kerenyi, *supra* note 33, at 767.

[40] *See Abortion after the First Trimester*, FACTSHEET (Planned Parenthood, New York, N.Y.), May, 1997, at 3.

[41] *See* KENNETH J. RYAN, M.D., ET AL., KISTNER'S GYNECOLOGY PRINCIPLES AND PRACTICE 558 (Susie Baxter, ed., 6th ed. 1995).

[42] *See* WARREN M. HERN, ABORTION PRACTICE 126 (1984).

[43] *See* STEDMAN'S MEDICAL DICTIONARY 934 (26th ed. 1995). A laminaria is defined as a "sterile rod made of kelp which is hydrophilic, and, when placed in the cervical canal, absorbs moisture, swells and gradually dilates the cervix." *Id.*

[44] *See* Kerenyi, *supra* note 33, at 768.

[45] *See* HERN, *supra* note 42, at 137-42.

[46] *See id.* at 132.

[47] *See id.*

which could be prolonged, painful, and ultimately unnecessary.[48]

C. *Intact D & E (also referred to as D & X, dilation and extraction)*

> The "Intact D & E," or "D & X," procedure is a variation of the conventional D & E procedure in which the physician, rather than removing the fetus in parts, removes it from a breech position intact up to the head, and then, if necessary, reduces the size of the head (by collapsing the calvarium using forceps or by evacuating its contents using suction) to remove the intact fetus the rest of the way.[49]

The American College of Obstetricians and Gynecologists defines this procedure as including only those instances where there is (1) a deliberate dilation of the cervix; (2) instrumental conversion of the fetus to a footling[50] position; (3) breech extraction of the body of the fetus excepting the head; (4) and partial evacuation of the intracranial contents with suction.[51] Advantages of this procedure include less trauma to the maternal tissues (by eliminating the break up of bones, the raw edges of which could cause lacerations), less blood loss, and less time involved as opposed to induction or instillation procedures.[52]

D. *Instillation and Induction Methods*

Instillation and induction are pregnancy termination procedures used in the midtrimester.[53] "These methods of termination of midtrimester pregnancies involve the removal of amniotic fluid in varying amounts and the instillation of hypertonic saline . . . or urea."[54] The goal is to abort the fetus and stimulate labor.[55] These procedures are generally done in hospitals.[56] The mortality rate for instillation procedures is 9.6 deaths per 100,000 procedures.[57]

Potential complications resulting from induced labor include: "fear, lack of control, mild to severe abdominal pain, nausea, and diarrhea, and extreme dis-

---

[48] *See id.* at 132-33.

[49] Evans, 977 F. Supp. at 1293.

[50] *See* ATTORNEY'S DICTIONARY OF MEDICINE ILLUSTRATED F-130 (Matthew Bender & Co., Inc.). Footling is defined as "a form of breach presentation in which the thighs and legs of the fetus are extended and the fetus comes feet first through the birth canal." *Id.*

[51] *See Statement of Policy on Intact Dilation and Extraction*, (American College of Obstetricians and Gynecologists), Jan. 12, 1997.

[52] *See* Women's Med. Prof. Corp. v. Voinovich, 911 F. Supp. 1051, 1069 (S.D. Ohio 1995) (citing testimony of Dr. George Goler, the Ohio Section Chief of the American College of Obstetricians and Gynecologists).

[53] *See* Kerenyi, *supra* note 33, at 768.

[54] *See id.*

[55] *See id.*

[56] *See* Evans, 977 F. Supp. at 1294.

[57] *See Abortion After the First Trimester*, FACTSHEET (Planned Parenthood, New York, N.Y.), May, 1997, at 3.

comfort, over a lengthy period of time."[58] The substances used to induce labor can result in mild side effects or in severe maternal complications.[59]

E. *Hysterotomy and Hysterectomy*

Hysterotomy and hysterectomy are rarely used abortion procedures that, combined, account for less than one percent of post-first-trimester abortions throughout the country.[60] "Hysterotomy is the transabdominal, surgical removal of the fetus from the uterus prior to term. Hysterectomy entails the removal of the uterus."[61] Both procedures are major surgical procedures that involve high risks of mortality.[62]

F. *Comparative Safety of Second Trimester Abortion Procedures*

The American College of Obstetricians and Gynecologists considers the D & E procedure to be the safest method of abortion available early in the second trimester.[63] Potential complications include uterine perforation, infection, retained products of conception, and tearing of the cervix, but such complications are quite rare.[64]

Inductions require less skill on the doctor's part because instruments are not used in the uterus.[65] As such, inductions present a smaller risk of uterine perforation than D & E's.[66] Inductions, however, do have higher rates of "infection, bleeding, and cervical lacerations."[67]

In comparing the conventional D & E procedure to the intact D & E or D & X procedure, doctors agree that the intact procedure reduces risks associated with conventional D & E.[68] "The intact procedure reduces the risk of uterine perforation and cervical lacerations because, removing the fetus intact, rather than in pieces, entails less instrumentation of the uterus and minimizes the pas-

---

[58] Women's Med. Prof. Corp., 911 F. Supp. at 1068.

[59] *See id.* There are several possible severe maternal complications:

> The fluids which are introduced may be forced into the maternal circulation, leading either to amniotic fluid embolus, which is generally fatal, or to disseminated intravascular coagulation (DIC), in which the clotting factors in the blood are used up, and bleeding cannot be stopped. Induction methods can also thin out the lower uterus to the point that the fetus comes through the uterine wall instead of through the vagina.

Id.

[60] *See Evans*, 977 F. Supp. at 1294.

[61] *Id.*

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See Evans*, 977 F. Supp. at 1294.

[67] *Id.*

[68] *See id.* at 1296.

sage of bony fetal fragments through the cervix and vagina."[69] Additionally, it is quicker to remove the fetus intact and the woman has less operating time, resulting in less risk of hemorrhage, and less risk of infection.[70] Consequently, the D & X procedure "appears to have the potential of being a safer procedure than all other available abortion procedures."[71]

III. AN EXAMINATION OF STATE STATUTES BANNING "PARTIAL-BIRTH" ABORTION AND THEIR UNCONSTITUTIONALITY IN LIGHT OF PARAMETERS SET FORTH BY THE UNITED STATES SUPREME COURT

As of the beginning of 1997, eighteen states have enacted laws prohibiting "partial-birth" abortion.[72] Courts in nine states have issued orders prohibiting the enforcement of these laws.[73] In nine states, these laws are being partially or fully enforced.[74]

---

[69] *Id.*

[70] *See id.*

[71] *See* Women's Med. Prof. Corp., 911 F. Supp. at 1070. After viewing the evidence, the court found that the D & X procedure in the late second trimester poses less of a risk to maternal health than does the D & E procedure because it is less invasive. *See id.* This is because the D & X procedure does not require sharp instruments be inserted into the uterus with the same frequency. *See id.* The Court also found that the D & X procedure is less of a risk to maternal health than induction procedures, which require women to go through labor, pose additional risks for the mother, and cannot be used for every woman seeking an abortion. *See id.* It also determined that the D & X procedure was less of a risk to maternal health than either a hysterotomy or a hysterectomy, both of which are major, traumatic surgeries. *See id.*

[72] *See Who Decides?: A State-by-State Review of Abortion and Reproductive Rights: 1998 Summary of Findings on Reproductive Rights in the States*, STUDY (Nat'l Abortion Rights Action League Found., New York, N.Y.), 1998, at 2. These states are Alabama, *see* ALA. CODE § 26-23-1 (1997); Alaska, *see* ALASKA STA. § 18.16.050 (Michie Supp. 1997); Arizona, *see* ARIZ. REV. STAT. ANN. § 13-3603.01 (West 1997); Arkansas, *see* ARK CODE ANN. §§ 5-61-201-204 (Michie, 1997); Georgia, *see* GA. CODE ANN. §§ 16-12-144 (Supp. 1997); Illinois, *see* 720 ILL. COMP. STAT. ANN. 513/5 (West 1998); Indiana, *see* IND. CODE ANN. §§ 16-18-2-267.5, (West Supp. 1997); Louisiana, *see* LA. REV. STAT. ANN. § 14:32.9 (West Supp. 1997); Michigan, *see* MICH COMP. LAWS ANN. § 333..17516 (West Supp. 1997); Mississippi, *see* MISS CODE ANN. § 97-3-3 (Supp. 1997); Montana, *see* MONT. CODE ANN. § 50-20-401 (1997); Nebraska, *see* NEB. REV. STAT. ANN. §§ 28-326(9),-328 (Supp. 1997); New Jersey, *see* N.J. STAT. ANN. §§ 2A:65A-5-65-A-6 (West Supp. 1997); Rhode Island, *see* R.I. GEN. LAWS § 23-4.12-2; South Carolina, *see* S.C. CODE ANN. § 44-41-85(Law Co-op, Supp. 1997); South Dakota, *see* S.D. CODIFIED LAWS §§ 34-23A-27-33 (Michie Supp. 1997); Tennessee, *see* TENN. CODE ANN. § 39-15-209 (1997); and Utah, *see* UTAH CODE ANN. § 76-7-310.5 (Supp. 1996). The Utah statute not only prohibits "partial-birth" abortion after viability, it also prohibits "dilation and extraction" and saline abortion after viability. *See* § 76-7-310.5 (Supp. 1996).

[73] *See id.* The states are Alaska, Arizona, Arkansas, Louisiana, Michigan, Montana, New Jersey, Ohio, and Rhode Island. *Id.*

[74] *See id.* The states are Alabama, Indiana, Georgia, Mississippi, Nebraska, South Car-

According to the language used in the majority of state statutes, "partial-birth" abortion is defined as "partially vaginally delivering a living fetus before killing the fetus and completing the delivery."[75] Some state statutes add the requirement of intent on the part of the doctor to the definition of "partial-birth."[76] Regardless of the individual wording of the statutes, they violate the parameters set out by the Supreme Court within which states may constitutionally legislate abortion.[77]

The first problem with the "partial-birth" abortion statutes is that they do not differentiate between abortions that take place prior to fetal viability, and those that take place after viability.[78] Regardless of whether exceptions are made in certain circumstances, "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[79]

For some women, what anti-choice legislators call "partial-birth" abortion, (but is properly referred to as D & X), might be the safest and only method of aborting a pregnancy. In such cases, "partial-birth" abortion statutes that do not draw a distinction at the line of viability are unconstitutional because the State is essentially prohibiting a woman from terminating her pregnancy prior to viabil-

---

olina, South Dakota, Tennessee, and Utah. *Id.* In Alabama, the Attorney General has directed the state's district attorneys to enforce the statute after viability. *See id.* In Georgia, a court has issued an interim order permitting enforcement of this law as it applies to abortion after viability. *See id.* In Nebraska, a court has issued a preliminary injunction prohibiting enforcement of this law as applied to the plaintiff "regarding his performance of D & X abortions on nonviable fetuses." *Id.*

[75] *See Who Decides?: A State-by-State Review of Abortion and Reproductive Rights: Anti-Choice Gains in the 105th United States Congress,* STUDY (Nat'l Abortion Rights Action League Found., New York, N.Y.), 1998, at 2. This language, or substantially similar language, is used in the following states' statutes: Alaska, *see* ALASKA STA. § 18.16.050 (Michie Supp. 1997); Arizona, *see* ARIZONA REV. STAT. ANN. § 13-3603.01; Georgia, *see* GA. CODE ANN. §§ 16-12-144(Supp. 1997); Illinois, *see* 720 ILL. COMP. STAT. ANN. 513/5 (West 1998); Indiana, *see* IND. CODE ANN. §§ 16-18-2-267.5(West Supp. 1997); Michigan, *see* MICH. COMP. LAWS ANN. §§ 333..17516 (West Supp. 1997); Mississippi, *see* Miss. CODE ANN. § 50-20-401 (1997); Montana, *see* MONT. CODE ANN. § 50-20-401 (1997); Rhode Island, *see* R.I. GENERAL LAWS § 23-4.12-2 (Supp 1997); South Carolina, *see* S.C. CODE ANN. § 44-41-85(Law Co-op.Supp. 1997); and South Dakota, *see* S.D. CODIFIED LAWS §§ 34-23A-27-33 (Michie Supp. 1997).

[76] *See id.* These states include: Louisiana (requires "specific intent to kill or do great bodily harm"), Nebraska (requires "deliberately and intentionally delivering"), New Jersey, Tennessee, and Utah. *Id.*

[77] *See supra* notes 14-28 and accompanying text.

[78] *But see* Letter from Bill Pryor, Attorney General, *(Office of the Atty. Gen., Ala.,* Aug. 1, 1997). The Attorney General of Alabama wrote a letter to prosecutors instructing them to utilize the following definition of "partial-birth" abortion: "partially delivers a living fetus before killing the fetus where the physician deliberately and intentionally delivers into the vagina a *viable* fetus, or a substantial portion of a *viable* fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." (emphasis added) *Id.*

[79] *See* Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992).

ity. If the D & X procedure—which poses less risk to maternal health than other abortion options—were banned and therefore forced women to use riskier 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 unconstitutional under *Casey*."[80]

At the very least, "partial-birth" abortion statutes force women to take unnecessary medical risks, subordinating the life of the woman to the life of a nonviable fetus.[81] They subject women seeking an abortion to greater risk of injury or death than would be the case if her doctor could choose to perform the D & X procedure where medically advisable.[82] States cannot claim that these statutes are aimed at furthering the health or safety of women seeking an abortion, when they eliminate one of the safest abortion procedures used during the second trimester of pregnancy.

The elimination of a safer method of abortion was rejected by the Court in *Danforth*. In *Danforth*, the Court ruled that a prohibition of the abortion procedure saline amniocentesis after the first twelve weeks of pregnancy was unconstitutional.[83] The Court noted that the statute forced a woman and her doctor "to terminate her pregnancy by methods more dangerous to her health than the method outlawed."[84] As such, the Court ruled that the "outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. [It is] . . . an unreasonable or arbitrary regulation designed to inhibit . . . the vast majority of abortion after the first twelve weeks."[85]

Similarly, the "partial-birth" abortion statutes force women to terminate their pregnancies during the second trimester by methods which are more dangerous than the procedure prohibited.[86] Just as many physicians considered amniocentesis to be the safest method of abortion for some women, many physicians

---

[80] *See* Women's Med. Prof. Corp. v. Voinovich, 911 F.Supp 1051, 1070 (1995).

[81] *See* Carhart v. Stenberg, 972 F.Supp. 507, 523 (D. Neb. 1997). The Court held that the Nebraska ban on "partial-birth" abortion imposes a constitutionally unacceptable "undue burden" on Carhart's patients. *See id.* "[W]e cannot constitutionally allow the life or health of a woman to be made subservient to the state's otherwise profound interest in a nonviable fetus." *Id.*

[82] *See id.* at 524-25.

[83] *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[84] *Id.* at 79.

[85] *Id.*

[86] See *Carhart*, 972 F.Supp. at 525. "The data suggest that the D & X procedure, a variant of the D & E procedure, is appreciably safer than all other forms of abortion during the relevant gestational time." *Id.* Additionally, "[t]he credible medical evidence establishe[d] that the D & X procedure used by Carhart is appreciably safer than the D & E procedure." *Id.* "Moreover, Dr. Hodgson, a very credible board-certified physician who has performed more than 30,000 abortions, delivered at least 5,000 babies, and is a founding fellow of the American College of Obstetricians and Gynecologists, believes the D & X procedure is 'an advance in technology' because by removing the fetus intact there is 'less instrument manipulation' and 'of course, the higher your safety.' " *Id.* at 525-26.

today feel that D & X is the safest abortion method for their patients.[87] As a result, "partial-birth" abortion statutes, as applied prior to fetus viability, are unconstitutional because they do not serve to further the health and life of the mother, but instead operate to ban a safer method of abortion. This is prohibited state action under *Casey*.[88]

An added problem is that while the statutes' proponents claim that they are only targeting a specific abortion method, the vague and overly broad language implicates other abortion procedures. In *Evans v. Kelley*,[89] doctors testified that they thought the Michigan "partial-birth" abortion statute could also reach conventional D & E procedures and some inductions.[90] Dr. Evans testified that the term "partial-birth" abortion as defined in the statute does not refer to a single, discrete medical procedure but rather essentially covers all abortion procedures used.[91] Therefore, "partial-birth" abortion statutes are also unconstitutional because of their (purposeful) vagueness.[92]

Additionally, "partial-birth" abortion statutes that are vague and thus encompass more than the D & X procedure, are even more likely to constitute an undue burden under *Casey* because of their overbreadth.[93] If the vague language of a "partial-birth" abortion statute can encompass conventional D & E procedures, "the only remaining methods for post-first trimester abortions would be induction, hysterotomy and hysterectomy."[94] However, between the thirteenth and sixteenth week of pregnancy, induction is not feasible.[95] The only alternatives left would be hysterotomy and hysterectomy, invasive procedures which pose serious health risks to the mother.[96]

Finally, as noted by constitutional law scholar Laurence Tribe of Harvard University Law School, there is a curious aspect to the statutes' definition of "partial-birth" abortion.[97] "[T]he legality of the physician's conduct in facilitating the woman's exercise of her reproductive freedom turn[s] no[t] on the viability of the fetus or on its capacity to perceive *or* on the health of the woman but,

---

[87] *See id.* at 525-26.

[88] *See Planned Parenthood*, 505 U.S. at 833.

[89] *See Evans*, 977 F. Supp. at 1283.

[90] *See id.* at 1298-99.

[91] *See id.*

[92] *See id.* at 1304-5 (declaring that the statutory definition of the banned procedure is ambiguous and as such the entire statute must be declared void for vagueness).

[93] *See id.* at 1311-12.

[94] *See id.*

[95] *See Evans*, 977 F. Supp. at 1311-12.

[96] *See id.*

[97] *See* Memorandum from Laurence H. Tribe, Professor of Const. Law, *Harvard U. Law School, Constitutional Analysis of "Partial Birth Abortion" Ban* (March 6, 1997). Professor Tribe's memorandum addresses the constitutionality of S.6, a proposed federal statute that would criminalize "partial-birth" abortion. *See id.* While this Note deals with state statutes, Professor Tribe's analysis of the definition of "partial-birth" abortion is applicable because of the parallel wording.

strangely, on the *physical location* of the fetus."[98] This definition plainly fails to comport with *Casey's* constitutional requirements because the critical points are whether or not the fetus is viable, and the health of the woman, not the location of the fetus.

"Partial-birth" abortion statutes are unconstitutional because they are vague, overbroad, and present an "undue-burden" to women seeking an abortion prior to fetal viability. States cannot claim that they are protecting the life and health of the mother by outlawing an abortion procedure prior to fetal viability, which often is the safest method available in the second trimester. Such an assertion directly contradicts the wealth of medical evidence available. Furthermore, the very definition of "partial-birth" abortion is completely inapposite with the standards set out by the Supreme Court. While under *Casey* states may regulate and even proscribe abortion after fetal viability—provided they make an exception where the procedure is necessary to protect a woman's life or health—they may not do so prior to viability. Because the relevant statutes fail to distinguish between pre-viability and post-viability "partial-birth" abortions, they fail constitutional scrutiny.

IV. THE COVERT GOAL OF THE RELIGIOUS RIGHT AND THE REPUBLICAN PARTY — OUTLAWING ALL ABORTIONS: A RETURN TO TRADITIONAL FAMILY VALUES *OR* THE REASSERTION OF MALE DOMINANCE

Pro-choice opponents, including the Religious Right and the Republican party, will not stop at the outlawing of the D & X or the "partial-birth" abortion procedure.[99] Rather, their goal is to outlaw all abortion procedures.

Republican Representative Christopher H. Smith of New Jersey stated that "We will begin to focus on the methods [of abortion] and declare them to be illegal."[100] He has also hyper-emotionalized the issue by irresponsibly comparing it to the experiences of Jews during the Holocaust, calling the number of abortions "a holocaust of staggering proportions."[101] Gary Bauer, head of the conservative Family Research Council, stated that the goal of his and other pro-life

---

[98] *Id.* at 2 (emphasis in the original).

[99] Significantly, "partial-birth" abortion is not a medical term; rather, it is a political construct aimed at emotionalizing a necessary medical procedure. *See* Joint Hearing, *supra* note 1. *See also 60 Minutes* (CBS television broadcast, June 2, 1996). Dr. Warren Hern, who runs an abortion clinic in Boulder, Colorado and wrote the standard medical text on abortion procedures, *see supra* note 42, was asked, "What is a partial-birth abortion?" He replied, "Well, I'm not really sure I know. There's no such thing in medical literature." When asked if "partial-birth" abortion existed, he replied, "No." When pressed as to where the term came from, he replied that it was a "[p]ropaganda term. It's a political term; has no medical meaning." *Id.*

[100] Mimi Hall, *'Partial Birth' Abortions Face House Vote*, USA TODAY, Nov. 1, 1995, at 6A.

[101] Alison Mitchell, *Both Sides Rally to Mark Abortion Ruling*, N.Y. TIMES, Jan. 23, 1998, at A19.

agencies is to promote federal legislation that will make all abortion illegal.[102] The Christian Coalition's Contract With America states that one of its goals is to outlaw *all* abortion.[103] What is the impetus, then, behind conservative groups' desire to make abortion illegal again?

The political right wing traces society's current problems to the sexual liberation of women, i.e., women's ability to have sex without the necessary result of imminent motherhood.[104] In this respect, conservative groups are acting "out of self-interest, particularly out of the defense of a cultural fundamentalist position."[105] As such, their opposition to abortion is an expression of their desire to return to what they perceive to be "traditional culture."[106]

These conservative groups believe that by re-criminalizing abortion we will return to an idealistic "Family Values" society. However, that society never existed; therefore it cannot be re-created. The anti-abortion movement wants to re-establish traditional male and female relationships.[107] Outlawing all abortion, according to their argument, would be a strong deterrent to sexual licentiousness and its abolition would help re-establish traditional morality in women.[108] Thus, the anti-choice movement implicates much larger issues than the "right to life."

V. CONCLUSION

State legislation attempting to ban "partial-birth" abortion is unconstitutional according to Supreme Court precedent. The statutes fail to address fetal viability and their vague language is overly inclusive and therefore implicates additional abortion procedures. Furthermore, the conservative groups who oppose abortion and support "partial-birth" abortion bans, such as the Religious Right and the Republican party, have a larger agenda. Their goal is to outlaw all abortion and in so doing are acting in defense of a theory of cultural fundamentalism. They

---

[102] *See* Gary Bauer, Family Research Newsletter, (Family Research Council) April 3, 1997.

[103] *See Contract with the American Family*, *supra* note 3. "Our ultimate goal is to establish the humanity of the unborn child and to see a day when every child is safe in their mother's womb." *Id.*

[104] *See* BLANCHARD, *supra* note 7, at 19-20.

> One important factor leading to the value placed on controlling family size was the development and dissemination of the birth control pill. Giving women a new power of control over their reproduction, the pill may have been a crucial element in further development among many women of the feeling, as never before, that they *should* be able to have complete control over their reproductive lives. Such an ethos leads to the idea that if one method, birth control, fails, other methods, such as abortions, should be available. This ethos was a contributing factor to the 'sexual revolution.'

Id.

[105] *Id.* at 41.

[106] *Id.*

[107] *See id.* at 119.

[108] *See id.* at 47.

want to return to "traditional family values," at the direct expense of women and women's independence. The anti-choice movement's current adeptness at emotionalizing the abortion issue should not blind one to their true ideals.

Rebecca L. Andrews