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COMMENT

THE VAGUENESS OF PARTIAL-BIRTH ABORTION BANS: DECONSTRUCTION OR DESTRUCTION?

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I. INTRODUCTION

In 1997, President Clinton vetoed the most recent incarnation of the Partial-Birth Abortion Ban[1]—a controversial piece of legislation that prescribes criminal penalties such as fines and imprisonment for any physician performing such an abortion.[2] Thirty states have enacted their own versions of the Partial-Birth Abortion Ban, only some of which are currently in effect.[3] Sev-

[1] H.R. 1122, 105th Cong. § 2 (1997). Congress has invoked the Commerce Clause power to justify its authority to regulate partial-birth abortions. *See id.* § 2(a). For an interesting discussion of whether Congress has the power to regulate partial-birth abortions under the Commerce Clause in light of the Supreme Court's decision to curtail the scope of the Commerce Clause in *United States v. Lopez*, see David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997) (discussing United States v. Lopez, 514 U.S. 549 (1995)).

[2] *See* H.R. 1122, § 2(a). All of the partial-birth abortion bans, except the Missouri ban, contain a provision that the pregnant woman upon whom the procedure is performed may not be prosecuted for conspiracy to violate the statute. *See infra* note 3. *See also* H.R. 1122, § 2(a).

[3] The following states have enacted bans: Alabama (ALA. CODE § 26-23-2 to -4 (Supp. 1998)); Alaska (ALASKA STAT. § 18.16.050 (Michie 1998)); Arizona (ARIZ. REV. STAT. ANN. § 13-3603.01 (West Supp. 1998)); Arkansas (ARK. CODE ANN. § 5-61-202 to -203 (Michie 1997)); Florida (FLA. STAT. ANN. § 390.011, -.0111 (West Supp. 1999)); Georgia (GA. CODE ANN. § 16-12-144 (1999)); Idaho (IDAHO CODE § 18-613 (Supp. 1999)); Illinois (720 ILL. COMP. STAT. 513/5-5, -10, -20 (West 1998)); Indiana (IND. CODE ANN. §§ 16-18-2-267.5, 16-34-2-1(b) (West Supp. 1998)); Iowa (IOWA CODE ANN. § 707.8A (West Supp. 1999)); Kansas (1998 Kan. Sess. Laws 142); Kentucky (KY. REV. STAT. ANN. § 311.720, -.765, -.990 (Michie Supp. 1998)); Louisiana (LA. REV. STAT. ANN § 14:32.9 (West Supp. 1999)); Michigan (MICH. COMP. LAWS § 333.17016 (West Supp. 1999)); Mississippi (MISS. CODE ANN. § 41-41-71, -73 (1999)); Missouri (1999 Mo. Legis. Serv. 427 (West)); Montana (MONT. CODE ANN. § 50-20-401 (1997)); Nebraska (NEB. REV. STAT. § 28-326, -328 (Supp. 1998)); New Jersey (N.J. STAT. ANN. § 2A:65A-6 (West Supp. 1999)); North Dakota (N.D. CENT. CODE § 14-02.6-01 to -03 (1999)); Ohio (OHIO REV. CODE ANN. § 2919.15

eral of these bans have been enjoined pending trial or have been permanently enjoined.[4] In January 2000, the Supreme Court agreed to review the Nebraska statute, which is one of the statutes permanently enjoined by a federal court of appeals.[5] As this issue goes to press, the Court has not yet heard oral arguments in the Nebraska case.

Opponents of the bans have challenged the constitutionality of the bans on a variety of grounds.[6] Two challenges—closely related to one another—are that the bans are unconstitutionally vague and unconstitutionally overbroad.[7] This comment will fo-

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(West 1996)); Oklahoma (OKLA. STAT. ANN., tit. 21, § 684 (West Supp. 1999)); Rhode Island (R.I. GEN. LAWS § 23-4.12-1 to -3, -5 (Supp. 1998)); South Carolina (S.C. CODE ANN. § 44-41-85 (West Supp. 1998)); South Dakota (S.D. CODIFIED LAWS § 34-23A-27, -32 (Michie Supp. 1999)); Tennessee (TENN. CODE ANN. § 39-15-209 (1997)); Utah (UTAH CODE ANN. § 76-7-310.5 (Supp. 1998)); Virginia (VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1999)); West Virginia (W. VA. CODE § 33-42-3, -8 (Supp. 1998)); and Wisconsin (WIS. STAT. ANN. § 940.16 (West Supp. 1999)). The bans of Virginia, Alabama, and Georgia are currently in effect after litigation. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998); Summit Med. Assoc. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998); Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360 (N.D. Ga 1997). The Illinois and Wisconsin bans were upheld by the Seventh Circuit, sitting en banc. *See* The Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999). However, Justice Stevens has granted a stay to the petitioners pending appeal to the Supreme Court. *See* Jan Crawford Greenburg, *Illinois Abortion Law Suspended*, CHI. TRIB., Dec. 1, 1999, at A1. There has been no judicial determination of the constitutionality of the partial-birth abortion bans of Indiana, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah.

[4] The Arkansas, Iowa, Nebraska, Ohio, Louisiana, New Jersey, Florida, Kentucky, West Virginia, Idaho, Arizona, Michigan, Rhode Island, Alaska, Montana, and Missouri bans are not in effect. *See* Planned Parenthood v. Miller, 195 F.3d 386 (8th Cir. 1999); Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999); Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1347 (1998); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999); Planned Parenthood v. Verniero, 41 F. Supp. 2d 478 (D.N.J. 1999); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla., 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998); Daniel v. Underwood, No. 2:98-0495, 1998 U.S. Dist. LEXIS 22290 (S.D. W. Va. Nov. 5, 1998); Weyhrich v. Lance, No. CIV 98-CV-117-S-BLW (D. Id. Mar. 27, 1998); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997); Rhode Island Med. Soc. v. Pine, C.A. No. 9704166 (D.R.I. July 11, 1997); Planned Parenthood v. Alaska, No. 3 AN 97-06019 CIV (Alaska Super. Ct. Mar. 13, 1998); Intermountain Planned Parenthood v. Montana, No. BDV 97-477 (Mont. Dist. Ct. June 29, 1998); Bill Bell, Jr., *Federal Court Challenge Delays Enforcement of New Missouri Law Until March*, ST. LOUIS POST-DISPATCH, Sept. 23, 1999, at B3.

[5] *See* Jan Crawford Greenburg, *Justices to Review Abortion Ban*, CHI. TRIB., Jan. 15, 2000, at A1. *See also Carhart*, 192 F.3d at 1142.

[6] *See, e.g.*, Planned Parenthood v. Miller, 1 F. Supp. 2d 958, (S.D. Iowa 1998), *aff'd* 195 F.3d 386 (8th Cir. 1999) (abortion providers challenged the Iowa ban on grounds, inter alia, that the bans unconstitutionally regulated pre-viability abortion procedures). *See also Evans*, 977 F. Supp. at 1285 (abortion providers challenged the Michigan ban on the grounds that the statute was unconstitutionally vague, overbroad, and did not contain an exception to preserve the health of the woman).

[7] *See Evans*, 977 F. Supp. at 1285. Both the vagueness and the overbreadth challenges center around the specificity of the statutory language and the problems resulting from vague statutory

cus primarily on these two challenges and demonstrate that none of these bans is unconstitutionally vague or overbroad. Part II will provide a backdrop to the discussion, including a description of the abortion procedure at issue, the nature of the vagueness and overbreadth challenges to the partial-birth abortion bans, and the procedural history of the litigation of the bans.

Part III will provide a detailed analysis of the void-for-vagueness doctrine as applied to other criminal statutes which arguably infringe upon constitutionally protected behavior, as the partial-birth abortion bans allegedly do. The discussion will begin with an analysis of the appropriate standard to be applied when mounting a facial challenge to a state statute. The comment will then discuss the *actus reus*[8] and *mens rea*[9] elements of criminal law in relation to vagueness challenges in order to provide a sensible paradigm for the void-for-vagueness doctrine.

Part IV will discuss the nature of the vagueness challenges to the partial-birth abortion bans. This discussion will include the prevailing opinions in the medical community regarding the specificity of these statutes, and the limited case law on the doctrine as applied to these bans.

Finally, Part V will present an argument for how the void-for-vagueness doctrine should be applied to the partial-birth abortion bans. The discussion will demonstrate that the doc-

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language. *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960). The vagueness challenge is primarily concerned with adequate notice to persons engaged in the conduct prohibited by the statute, and sufficient standards to judge when the statute has been violated. *Id. See also* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). The overbreadth challenge is concerned with statutory language so vague or ambiguous that—although intended only to prohibit conduct that is not constitutionally protected—arguably prohibits constitutionally protected conduct as well. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[8] The term *actus reus* literally means "bad act." *See* JOHN KAPLAN ET AL., CRIMINAL LAW 119 (3d ed. 1996). Criminal law requires that an individual who is to be punished for a crime has committed a criminal or bad act (an *actus reus*). *Id.* at 121. This act requirement is based on a theory of just punishment; that is, punishment is only justified when an individual has engaged in past, voluntary, bad conduct specifically proscribed in advance by statute. *Id.* at 123. *See infra* Part III.B.

[9] The term *mens rea* means "guilty mind," and refers to the mental state of the criminal actor. *See* KAPLAN, *supra* note 8, at 119. In addition to requiring a bad act, criminal law also imposes a requirement that an individual being punished have a culpable state of mind (a *mens rea*). *Id.* at 196. *Mens rea* can be manifested in either a desire to cause some harm to another or violate some social duty or a disregard for the welfare of another or for some social duty. *Id. See infra* Part III.C.

trine as traditionally applied in similar criminal statutes, when applied in the partial-birth abortion context, leads to the conclusion that none of the bans are unconstitutionally vague or overbroad.

II. THE HISTORICAL BACKDROP

A. THE PARTIAL-BIRTH ABORTION PROCEDURE AND CONSTITUTIONAL CHALLENGES TO THE BANS

In order to better understand the nature of this controversy, one must first understand the actual procedure at issue. The term "partial-birth abortion" is commonly understood to mean a certain method of abortion, referred to in the medical community as an "intact dilation and extraction" or "D&X" procedure.[10]

In the D&X procedure, the physician typically delivers the entire body of the fetus, except the head, before the fetus is aborted.[11] The physician aborts the fetus by evacuating the contents of the cranium, which is typically done by inserting scissors into the base of the fetus' skull, then suctioning out the cranial contents.[12] This procedure collapses the head, thereby facilitating removal of the dead fetus.[13]

One of the main issues raised by opponents of the partial-birth abortion bans is that the applicable statutes are vague and ambiguous.[14] The opponents contend that the bans do not provide sufficient notice to abortion providers as to which acts will

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[10] *See* M. LeRoy Sprang & Mark G. Neerhof, *Rationale for Banning Abortions Late in Pregnancy*, 280 JAMA 744 (1998). The dilation and extraction procedure is referred to as either a "D&X" or an "intact D&E." To avoid confusion, this comment will only use the term D&X when referring to the procedure.

[11] *See* Janet E. Gans Epner et al., *Late-term Abortion*, 280 JAMA 724, 726 (1998). The American College of Obstetricians and Gynecologists (ACOG) has described the D&X procedure as consisting of the following elements: "(1) deliberate dilation of the cervix, usually over a sequence of days; (2) instrumental conversion of the fetus to a footling breech; (3) breech extraction of the body except the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." American College of Obstetricians and Gynecologists Statement of Policy as Issued by the ACOG Executive Board: Statement on Intact Dilatation and Extraction (Jan. 12, 1997) (unpublished policy statement, on file with author).

[12] *See* Sprang & Neerhof, *supra* note 10, at 745.

[13] *See* Gans Epner, *supra* note 11, at 726.

[14] *See, e.g.*, Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997).

subject the abortion providers to criminal liability.[15] Moreover, a vague statute might not provide sufficient standards for a court to determine whether the accused has, in fact, violated the criminal statute.[16] This uncertainty creates the possibility of arbitrary or discriminatory enforcement of the statute.[17] Thus, the argument goes, these statutes violate the void-for-vagueness doctrine embodied in the due process clauses of the Fifth and Fourteenth Amendments.[18]

Another underlying concern regarding the alleged vagueness of the bans sheds some light on why opponents who challenge these bans commonly raise the vagueness argument. Vague statutory language can—and often does—create a problem of overbreadth.[19] The overbreadth problem arises when a legislature, having the constitutional authority to regulate a certain activity, drafts a statute which contains language so vague that it not only proscribes the intended conduct, but also proscribes conduct which is constitutionally protected.[20] In the case of the partial-birth abortion bans, opponents contend that the statutory language of the bans is so vague that it proscribes not only the D&X procedure, but also the most commonly performed abortion procedure in the second and third trimester: the dilation and evacuation procedure, or the "D&E."[21] As a result, abortion providers may refuse to perform D&Es out of fear that they will be prosecuted under the partial-birth abortion bans,[22] despite the legislative intent to ban only the D&X procedure. Under the current analysis for abortion statutes set forth

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[15] *See id.* at 1379.

[16] *See* Evans v. Kelley, 977 F. Supp. 1283, 1304 (E.D. Mich. 1997).

[17] *Id.*

[18] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). U.S. CONST. amend XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[19] *See Woods*, 982 F. Supp. at 1378-79.

[20] *See The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 76.

[21] *See Evans*, 977 F. Supp. at 1293. *See also* David A. Grimes, *The Continuing Need for Late Abortions*, 280 JAMA 747, 748 (1998). The D&E procedure consists of the following elements: (1) dilation of the cervix over a period of several hours; (2) rupturing of the fetal membrane; (3) dismemberment of the fetus within the uterus with surgical instruments and suction; and (4) removal of the fetal parts, piece by piece, through the cervical os (i.e., the opening to the uterus). *Evans*, 977 F. Supp. at 1293.

[22] *See id.* at 1302-03.

by the Supreme Court in *Planned Parenthood v. Casey*,[23] if the refusal of physicians to perform the traditional D&E is due to the unconstitutional vagueness and overbreadth of these bans, this would surely place an undue burden on a woman's right to obtain an abortion.[24]

B. THE PROCEDURAL HISTORY OF THE BANS

Three Federal courts have held that the bans of Illinois, Wisconsin, Virginia, and Georgia are not void for vagueness.[25] Other federal courts have held that the Arkansas, Iowa, Nebraska, Ohio, Louisiana, New Jersey, Florida, Kentucky, West Virginia, Arizona, Michigan, and Missouri have held that partial-birth abortion bans are—or could be—void-for-vagueness.[26] The language of these statutes varies from state to state; however, this does not appear to account for the different results in each of the courts.

In general, the courts have focused on two elements of the bans in assessing the vagueness claims: (1) the definition of a "partial-birth abortion" as an abortion in which the physician "partially vaginally delivers a living fetus before killing the fetus

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[23] 505 U.S. 833 (1992). The Supreme Court in *Casey* held that the correct standard for determining the constitutionality of abortion laws is whether the statute at issue poses an undue burden on a woman's right to obtain an abortion. *Id.* at 874.

[24] The statutes could arguably place an undue burden on a woman's right to obtain an abortion even if they are not unconstitutionally vague or overbroad. However, this comment assumes that the vagueness challenge is the most serious charge leveled against the bans because of the impact that the vagueness and overbreadth challenges have on the undue burden analysis. For example, if the language of the partial birth abortion statute is not applicable to the D&E procedure, then the ban arguably will not place an undue burden on a woman's right to choose. Although the D&X procedure would not be available to the woman, she would still have the option of having a D&E performed on her. Thus, due to the importance of this issue, this comment is limited to the alleged vagueness and potentially resulting overbreadth of the bans.

[25] *See* The Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (upholding Illinois and Wisconsin statutes); Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998); Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360, 1363 (N.D. Ga. 1997).

[26] *See* Planned Parenthood v. Miller, 195 F.3d 386 (8th Cir. 1999); Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999); Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 200 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 619 (E.D. La. 1999); Planned Parenthood v. Verniero, 41 F. Supp. 2d 478, 493-94 (D.N.J. 1998); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1158 (S.D. Fla. 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1036 (W.D. Ky. 1998); Daniel v. Underwood, No. 2:98-0495, 1998 U.S. Dist. LEXIS 22290, at *12 (S.D. W. Va. Nov. 5, 1998); Planned Parenthood v. Woods, 982 F. Supp. 1369, 1379 (D. Ariz. 1997); *Evans*, 977 F. Supp. at 1311; Bell, *supra* note 4, at B3.

and completing the delivery,"[27] some variant of which is common to all of the statutes except the Ohio, Kansas, North Dakota, and Missouri statutes,[28] and (2) the existence, or lack thereof, of a scienter requirement in the statutes.[29]

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[27] *See, e.g.*, H.R. 1122, 105th Cong. § 2(a) (1997). The Virginia ban employs the phrase "partial-birth abortion," but defines it as "deliberately and intentionally delivers a living fetus or a substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus . . . ." VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1999). The Louisiana ban also employs the phrase "partial-birth abortion" but defines it as "the performance of a procedure . . . whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal." LA. REV. STAT. ANN § 14:32.9 (West 1998). The Utah ban employs the phrase "partial birth abortion" and the phrase "dilation and extraction," defining these phrases as: "partially vaginally delivering a living, intact fetus." UTAH CODE ANN. § 76.7-310.5 (Supp. 1998).

[28] *See* OHIO REV. CODE ANN. § 2919.15 (West 1996); 1998 Kan. Sess. Laws 142; N.D. CENT. CODE § 14-02.6-01 to -02 (1999); 1999 Mo. Legis. Serv. 427 (West). The Ohio ban does not employ the phrase "partial-birth abortion," but rather prohibits any person from knowingly performing a "dilation and extraction procedure" upon a pregnant woman, which is defined as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain . . . [and] does not include either the suction curettage . . . or the suction aspiration procedure of abortion." OHIO REV. CODE ANN. § 2919.15. The Kansas ban, similar to the Ohio ban, defines the phrase "partial-birth abortion" as "the deliberate and intentional evacuation of all or part of the intracranial contents of a viable fetus prior to removal of such otherwise intact fetus . . . ," but also explicitly states that the statute does not apply to, inter alia, the dilation and evacuation procedure. *See* 1998 Kan. Sess. Laws 142. The North Dakota ban makes it criminal to "intentionally cause[] the death of a living intact fetus while that living intact fetus is partially born . . . ." N.D. CENT. CODE § 14-02.6-01. The phrase "partially born" means:

> the living intact fetus's body, with the entire head attached is delivered so that . . . the living intact fetus's entire head, in the case of a cephalic [i.e. head first] presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech [i.e. feet first] presentation, is delivered past the mother's vaginal opening or . . . [in either situation listed above] is delivered outside the mother's abdominal wall.

Id. § 14-02.6-01.

The Missouri Legislature approached this legislation from an entirely different perspective—at least in one respect—than did the other states, by treating the statute as an infanticide statute rather than an abortion statute. *See* 1999 Mo. Legis. Serv. 427. The language of the statute, however, is similar to that of the North Dakota statute. *See id.* The statute states, in pertinent part: "A person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is *partially born* or born." *Id.* § A3 (emphasis added). The phrase "living infant" is defined as including "a human child . . . partially born." *Id.* § A2. The phrase "partially born" is defined as: "[P]artial separation of a child from the mother with the child's head intact with the torso . . . . [A] child is partially separated . . . when the head is in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external os . . . ." *Id.* § A2(3). It bears noting that Missouri's treatment of the ban as an infanticide statute rather than an abortion statute may bolster Missouri's asserted state interest in banning the procedure—an important aspect of the overall discussion concerning these bans. *See infra* note 159. Such a discussion, however, is likely broad enough to occupy an entire article by itself and is well beyond the scope of this comment.

[29] *See, e.g., Evans*, 977 F. Supp. at 1308. A scienter requirement in the context of the partial-birth abortion bans is a *mens rea* requirement that the abortion provider performing the D&X

The bans can be logically divided into four categories. The first category consists of those statutes that contain a scienter requirement and that further define the phrase, "partially vaginally delivers a living fetus before killing the fetus" as: "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."[30] Eight statutes contain these elements, as did the federal bill vetoed by President Clinton.[31]

The second category consists of those statutes which contain a scienter requirement, but do not further define the phrase, "partially vaginally delivers a living fetus." Thirteen statutes fall into this category.[32]

The third category consists of those statutes that do not contain a scienter requirement, and do not further define the phrase, "partially vaginally delivers a living fetus." Two statutes fall into this category.[33]

The fourth category consists of the statutes of Louisiana, Virginia, Utah, Ohio, Kansas, North Dakota, and Missouri, which differ to varying degrees from the statutes in the three categories listed above.[34] The bans of Louisiana and Virginia closely resemble bans in the other three categories and will be treated as if they belonged in one of those categories. The ban of Louisiana, lacking a scienter requirement, logically falls into

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procedure intends to perform or knows that he is performing that procedure. *Id.*; *see also supra* note 9, and accompanying text.

[30] *See, e.g.*, H.R. 1122, 105th Cong. § (2)(a) (1997).

[31] *See* IDAHO CODE § 18-613 (Supp. 1999); IOWA CODE ANN. § 707.8A (West Supp. 1999); KY. REV. STAT. ANN. § 311.720, -.765, -.990 (Michie Supp. 1998); NEB. REV. STAT. § 28-326, -328 (Supp. 1998); N.J. STAT ANN. § 2A:65A-6 (West Supp. 1999); OKLA. STAT. ANN., tit. 21, § 684 (West Supp. 1999); R.I. GEN LAWS § 23-4.12-1 to -3, -5 (West Supp. 1998); TENN. CODE ANN. § 39-15-209 (1997). *See also* H.R. 1122, § 2(a).

[32] *See* ALA. CODE § 26-23-2 to -4 (Supp. 1998); ALASKA STAT. § 18.16.050 (Michie 1998); ARIZ. REV. STAT. § 13-3603.01 (West Supp. 1997); ARK. CODE ANN § 5-61-202 to -203 (Michie 1997); FLA. STAT. ANN. § 390.011, -.0111 (West Supp. 1998); GA. CODE ANN. § 16-12-144 (1999); 720 ILL. COMP. STAT. 513/5-5, -10, -20 (West 1998); IND. CODE ANN. §§ 16-18-2-267.5, 16-34-2-1(b) (West Supp 1998); MISS. CODE ANN. § 41-41-71, -73 (1999); MONT. CODE ANN. § 50-20-401 (1997); S.C. CODE ANN. § 44-41-85 (West 1998); W. VA. CODE § 33-42-3, -8 (Supp. 1999); WIS. STAT ANN. § 940.16 (Supp. 1999).

[33] *See* MICH. COMP. LAWS § 333.17016 (West Supp. 1999); S.D. CODIFIED LAWS § 34-23A-27, -32 (Michie Supp. 1999).

[34] *See supra* notes 27-28.

the third category,[35] while the ban of Virginia, which has a scienter requirement and employs the "substantial portion" language logically falls into the first category.[36] Unless otherwise specified, these bans will be treated as falling within those respective categories. The bans of Ohio, Utah, Kansas, Missouri, and North Dakota, however, are quite different from the others and will be treated separately.

III. THE VOID-FOR-VAGUENESS DOCTRINE

A. THE BACKGROUND OF THE DOCTRINE

The constitutional origins of the void-for-vagueness doctrine are somewhat obscure.[37] In a few cases, the Supreme Court has held that the doctrine is embodied in the Sixth Amendment requirement that an accused be "informed of the nature and cause of the accusation."[38] More recently, the Supreme Court has discovered the foundation for the doctrine in the due process clauses of the Fifth and Fourteenth Amendments.[39] It is generally agreed, however, that the purpose of the doctrine is twofold. First, the statute must give a criminal offender fair warning of the proscribed behavior before he can be convicted of the crime.[40] Second, the statute must provide sufficient standards to those applying the statute, in order to avoid arbitrary or discriminatory enforcement.[41]

Several commentators have noted that Supreme Court jurisprudence on this doctrine seems, at least at first glance, to be

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[35] *See* LA. REV. STAT. ANN. § 14:32.9 (West Supp. 1999).

[36] *See* VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1999).

[37] *See The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 67-68 n.3 (discussing the different theories upon which the void-for-vagueness doctrine may be founded).

[38] U.S. CONST. amend. VI. *See, e.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1920) (implying that the need for certainty in statutory language is driven by the Sixth Amendment requirement that a person accused of a violation of the statute is informed of the nature and cause of the accusation against them).

[39] *See, e.g.*, Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) (discussing the due process implications of a vaguely worded vagrancy statute); Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (same); Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (same).

[40] *See Grayned*, 408 U.S. at 108-09 (discussing principles behind requirement that statutory language be precise).

[41] *See id.*

highly inconsistent.[42] For example, in *United States v. Ragen*,[43] the Court upheld a tax evasion statute making it criminal to deduct from taxable income more than a "reasonable allowance for salaries."[44] However, in *United States v. L. Cohen Grocery Co.*,[45] the Court invalidated a statute that made it criminal for any person to make an "unjust or unreasonable rate in handling any necessaries."[46] Some commentators have suggested a theory that may account for this inconsistency.[47] One commentator, expressing skepticism about this theory, characterized it as follows:

> [T]here are two wholly separate and differently grounded kinds of vagueness decision: the "true" uncertainty case . . . in which a legislature which might constitutionally have proscribed either or both of two classes of behavior, A and B, has chosen to proscribe only A, but in language so uncertain that whether most fact situations are A or B is a matter for guesswork; and the "spurious" uncertainty cases . . . in which a legislature, constitutionally free to regulate sphere A, but forbidden to encroach upon sphere B, has included indiscriminately within the broad wording of a criminal statute both A cases and B cases, thereby leaving the individual to guess at his peril whether he can or cannot be constitutionally punished for violation of the statute. The evil in the first kind of case is said to be lack of fair warning and of a standard for the adjudication of guilt; in the second, the threat that the statutes' "broad language may throttle protected conduct. They have a coercive effect since rather than chance prosecution people will tend to leave utterances unsaid even though they are protected by the Constitution."[48]

The problem in the so-called "spurious" cases is a problem of the potential overbreadth of a vaguely worded statute, in which the legislature is encroaching upon constitutionally protected conduct.[49] A so-called "true" case, in contrast, concerns the constitutionality of the vague statutory language in and of itself.[50]

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[42] *See, e.g.*, Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 195-96 (1955); *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 70-71.

[43] 314 U.S. 513 (1942).

[44] *Id.* at 524.

[45] 255 U.S. 81 (1921).

[46] *Id.* at 92.

[47] *See, e.g.*, Collings, *supra* note 42, at 195; *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 67.

[48] *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 76 (footnotes omitted) (quoting Collings, *supra* note 42, at 219).

[49] *See* Collings, *supra* note 42, at 197.

[50] *See id.*

The distinction between the true and spurious cases, however, is far from clear; the true cases typically contain elements of infringement upon constitutional rights, and the spurious cases are often concerned with fair warning and arbitrary discrimination.[51] Nonetheless, the Supreme Court will more closely scrutinize a statute that it believe falls under the "spurious" line of cases (i.e., a statute that is overbroad) than under the "true" line of cases.[52] In other words, a statute that could potentially be overbroad will be held to a much higher standard of specificity, and will therefore be easier to challenge as unconstitutional than a statute that is only accused of being vaguely worded.[53]

This higher standard of specificity is especially evident in the context of First Amendment claims.[54] For example, in *Coates v. City of Cincinnati*,[55] the Supreme Court invalidated a city ordinance that made it a criminal offense for three or more persons to assemble on a city sidewalk and conduct themselves in a manner annoying to passers-by.[56] The Court reasoned that the ordinance "is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard of conduct is specified at all.*"[57] Although the city was free to prevent people from engaging in countless forms of antisocial conduct on the streets, "it cannot constitutionally do so through the enactment . . . of an ordinance whose violation may entirely de-

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[51] *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 76-77. The author further notes that "the so-called 'true' cases, when seen in their historical perspective, contain many of the elements of the spurious line. Most of them date from an era when economic laissez faire was for the Court the sanctum sanctorum that free speech has become today . . . ." *Id.* (footnote omitted).

[52] *See The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 75.

[53] *See id.*

[54] *See, e.g.*, Smith v. California, 361 U.S. 147 (1959). The Court in *Smith* clearly indicated its stance concerning statutes which regulate speech, writing: "[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech . . . ." *Id.* at 151. In subsequent cases, the Court has stated that First Amendment cases are the only cases in which overbreadth challenges to statutes are recognized. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e [the Supreme Court] have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

[55] 402 U.S. 611 (1971).

[56] *Id.* at 616.

[57] *Id.* at 614 (emphasis added).

pend upon whether or not a policeman is annoyed."[58] Such a broadly worded statute violated the constitutional right of free assembly.[59]

Three Justices dissented in the *Coates* opinion on the grounds that upholding a facial challenge to a statute that is constitutionally permissible in some applications is inappropriate.[60] Justice White, writing for the dissenters, reasoned:

> It is possible that a whole range of other acts, defined with unconstitutional imprecision, is forbidden by the ordinance. But as a general rule, when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior. Such a statute is not vague on its face. It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged.[61]

The underlying debate between the majority and the dissent in this case concerned which standard to apply in ruling on a facial overbreadth challenge to a statute, when the standing of the defendants to raise the challenge is in doubt.

The Court explicitly addressed this debate in *Young v. American Mini Theatres, Inc.*[62] *Young* involved a city zoning ordinance that classified "adult" movie theaters as those which present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,'" and restricted the location of such theaters to avoid a concentration in any one area.[63] The respondents, operators of two "adult" theaters, claimed that the phrase "characterized by an emphasis" was overly vague, and thus violated the Due Process Clause of the Fourteenth Amendment.[64]

The Court rejected this argument, reasoning that the respondents did not have standing to raise the objection because

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[58] *Id.*

[59] *Id.* at 615. *See* U.S. CONST. amend I.

[60] *Coates*, 402 U.S. at 618-20 (White, J., dissenting).

[61] *Id.* at 618 (White, J., dissenting).

[62] 427 U.S. 50 (1976).

[63] *Id.* at 52-53.

[64] *Id.* at 58. *See* U.S. CONST. amend XIV.

the ordinance unquestionably applied to them.[65] The Court acknowledged that on some occasions it had recognized the standing of litigants, whose own speech was unprotected, to challenge the constitutionality of a statute that arguably prohibited some protected speech.[66] However, "if the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and . . . is 'readily subject to a narrowing construction by the state courts,' the litigant is not permitted to assert the rights of third parties."[67]

Eleven years later, the Court further articulated the proper standard for facial challenges to statutes outside the First Amendment context in *United States v. Salerno*,[68] which involved a facial overbreadth challenge to the Bail Reform Act of 1984.[69] The Court laid out the proper standard as follows:

> A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish *that no set of circumstances exists under which the Act would be valid.* The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.[70]

In a facial challenge to an abortion statute, such as a partial-birth abortion ban, the threshold issue is whether to apply the *Salerno* standard in which the challenger must show that "no set

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[65] *Young*, 427 U.S. at 59. The doctrine of "standing" is a justiciability doctrine which, arguably, arises from the "case or controversy" requirement of Article III of the Constitution. *See* U.S. CONST. art. III, § 2. *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-14, at 108 (2d ed. 1988). The standing doctrine requires that a party who brings a lawsuit have a sufficient stake in the outcome of the dispute. *Id.* At a minimum, the party must show:

> (1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, (injury in fact); (2) that the injury fairly can be traced to the challenged action, (causation); and (3) that the injury is likely to be redressed by a favorable decision (redressability).

Id. (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (citations and footnotes omitted)).

[66] *Young*, 427 U.S. at 59.

[67] *Id.* at 60 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975)).

[68] 481 U.S. 739 (1987).

[69] *See* 18 U.S.C.A. §§ 3141-3150 (1998). The Bail Reform Act allows federal courts to detain arrestees without bail, pending trial, if the government demonstrates by clear and convincing evidence that no release conditions can reasonably assure the safety of any other person. *Id.* § 3142(e). The defendants mounted a facial challenge to the Act on the grounds that it violated their Fifth Amendment right to substantive due process. *See Salerno*, 481 U.S. at 746.

[70] *Salerno*, 481 U.S. at 745 (emphasis added).

of circumstances exists under which the [a]ct would be valid,"[71] or whether to apply a less stringent standard to the challenger—as the Court does in First Amendment cases—in which the challenger must show that the statute's chilling effect on constitutionally protected conduct is "real and substantial"[72] and is not "readily subject to a narrowing construction by the state courts."[73] In either event, the standard for a facial challenge is difficult to surmount, as it should be.[74]

Traditionally, the Court has applied the *Salerno* standard in striking down facial challenges to abortion statutes.[75] However, at least one lower court has held that the Court's decision in *Planned Parenthood v. Casey*[76] replaced the *Salerno* standard in abortion cases with a test of whether "in a large fraction of the cases in which [the law] is relevant, it will operate as a substan-

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[71] *Id.*

[72] *Erznoznik*, 422 U.S. at 216.

[73] *Id.*

[74] The reason why such challenges are (and should be) difficult to surmount lies in the Supreme Court standing doctrine. *See* TRIBE, *supra* note 65, § 12-31 to -32, at 1033-37. Professor Tribe notes:

> The conclusion that a statute is too vague and therefore void as a matter of due process is . . . unlikely to be triggered without two findings: that the individual challenging the statute is indeed one of the entrapped innocent, and that it would have been practical for the legislature to draft more precisely.

Id. at 1034 (citations omitted). Professor Tribe goes on to point out that the First Amendment overbreadth doctrine "is often perceived as an exception to the rule that an individual is not ordinarily permitted to litigate the rights of third parties." *Id.* at 1035. The rationale behind the exception in these cases is:

> that there is not likely to be a better party. Those whose expression is "chilled" by the existence of an overbroad or unduly vague statute cannot be expected to adjudicate their own rights, lacking by definition the willingness to disobey the law. In addition, such deterred persons may not have standing . . . since the hypothetical "chilling effect" of the mere existence of an overbroad or vague law does not by itself constitute the sort of "injury-in-fact" which confers standing.

Id. However, "some nexus is nevertheless required." *Id.* at 1036. Furthermore, "one to whose conduct a statute clearly applies may not challenge it on the basis that it is 'vague as applied' to others." *Id.*

[75] *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 406-07 (1981) (applying *Salerno* standard in striking down facial challenge to statute requiring parental notification for minor seeking abortion). *See also* Webster v. Reproductive Health Serv., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (citing *Salerno* in striking down a facial challenge to a Missouri statute which banned the use of public employees and facilities for the performance of abortions).

[76] 505 U.S. 833 (1992).

tial obstacle to a woman's choice to undergo an abortion."[77] The Supreme Court has yet to resolve the debate.[78]

B. *ACTUS REUS*

Determining the appropriate standard for a facial challenge to a statute does little to illuminate how specific the statutory language must be. Indeed, the Court has never explicitly adopted a test for vagueness; however, the Court has generally recognized that language is inherently ambiguous and imprecise, and has allowed for leeway in statutory language consistent with this recognition.[79] For example, in *Smith v. Goguen*,[80] the Court struck down a Massachusetts statute that made it a crime to "treat contemptuously" the flag of the United States.[81] The Court reasoned that the phrase "treats contemptuously" was "of such a standardless sweep" that it allowed "policemen, prosecutors, and juries to pursue their personal predilections."[82] Justice White wrote a concurring opinion in which he implicitly adopted a "core and penumbra" analysis[83] in determining that the statute itself was not unconstitutionally vague.[84] He wrote:

> It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is contemptuous conduct and that would be covered by the statute if directed at the flag. In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed contemptuous by the State, but unpredictability in those situations does not change the certainty in others.[85]

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[77] Planned Parenthood v. Miller, 63 F.3d 1452, 1457 (8th Cir. 1995) (quoting *Casey*, 505 U.S. at 895).

[78] *See id.*

[79] *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

[80] 415 U.S. 566 (1974).

[81] *Id.* at 582. The defendant was arrested for sewing a likeness of the flag on the seat of his pants. *Id.* at 568.

[82] *Id.* at 575.

[83] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 90 (1958). Professor Hart asserts that words have both a clearly recognizable core meaning and "a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out." *Id.*

[84] *Goguen*, 415 U.S. at 584 (White, J., concurring) (arguing that the statute was not unconstitutionally vague, but violated the First Amendment on its face).

[85] *Id.* (White, J., concurring).

This "core and penumbra" theory, exemplified by Justice White's concurrence in *Goguen*, seems to underlie many of the Court's vagueness decisions.[86] The result, in part, has been a general standard of reasonableness: a statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited."[87]

The primary concern of the courts is the precision of the *actus reus* element of the criminal statute.[88] For example, in *Papachristou v. City of Jacksonville*,[89] the Court invalidated a vagrancy ordinance that made it a crime to be, among other things: a "rogue," a "vagabond," a "dissolute person who goes about begging," a "common gambler," a "habitual loafer," or a "person wandering or strolling around from place to place without any lawful purpose or object."[90] The Court held that the statute was vague on its face, because it only criminalized possible future conduct, not past conduct.[91]

Similarly, in *Lanzetta v. New Jersey*,[92] the Court invalidated a New Jersey statute that made it a crime to be a "gangster."[93] The statute defined "gangster" as: "[a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person . . . ."[94] The Court reasoned that there was no limitation whatsoever on the term "gang," and that it could be both over-inclusive and under-inclusive in its application.[95]

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[86] *See, e.g.*, United States v. Wurtzbach, 280 U.S. 396, 399 (1930) ("Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so . . . and if he does so it is familiar to the criminal law to make him take the risk."). *See also*, Collings, *supra* note 42, at 206 ("[T]he presence of difficult borderline or peripheral cases will not invalidate a statute at least where there is a hard core of circumstances to which the statute unquestionably applies . . . .").

[87] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[88] *See supra* note 8 and accompanying text.

[89] 405 U.S. 156 (1972).

[90] *Id.* at 156-57 n.1.

[91] *Id.* at 171.

[92] 306 U.S. 451 (1939).

[93] *Id.* at 458.

[94] *Id.* at 452.

[95] *Id.* at 457.

Finally, in *City of Chicago v. Morales*,[96] a Supreme Court decision handed down just last year, the Court invalidated a Chicago ordinance that prohibited loitering in any public place by two or more people, at least one of whom was known by the police officer to be a "criminal street gang member."[97] The city argued that the ordinance was not void for vagueness because the police were required to order the alleged loiterers to disperse and the alleged loiterers had to ignore the order before the ordinance was violated. Thus, said the city, the alleged loiterers would have adequate notice that their conduct was illegal.[98] The Court rejected this argument, for two reasons. First, the Court concluded that, since the ordinance was aimed at loitering, and the loitering was harmless, the dispersal order itself could be unconstitutional. The ordinance would not protect the alleged loiterer from the order of dispersal.[99] Second, the Court reasoned that the terms of the dispersal order could compound the vagueness problem of the ordinance by failing to specify what the alleged loiterers would be required to do in order to avoid violating the dispersal order.[100] In other words, the lack of clarity in the ordinance's definition of the forbidden conduct exacerbated the problem of what the scope of the alleged loiterer's duty should be upon receiving a dispersal order.[101]

The problem with these and other similarly worded vagrancy statutes is that they do not criminalize any act at all. Rather, they tend to criminalize a person's "status," or worse, what a law enforcement officer believes a person's status to be.[102]

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[96] 119 S. Ct. 1849 (1999).

[97] *Id.* at 1854.

[98] *Id.* at 1860.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See* Robinson v. California, 370 U.S. 660 (1962). In *Robinson*, the Supreme Court struck down as unconstitutional a statute that made addiction to narcotics a criminal offense. *Id.* at 666-67. The Court reasoned that punishing someone for his status as an addict rather than for conduct, such as using narcotics, constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.*

In this way, they allow for too much discretion on the part of police officers and other law enforcement agencies.[103]

On the other end of the spectrum are statutes that are "mechanical" in their application. For example, in *Spence v. Washington*,[104] the Court, in dicta, rejected the defendant's void-for-vagueness argument applied to a flag-desecration statute which made it criminal to "place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement . . . upon any flag . . . of the United States . . . ."[105] The Court reasoned:

> The statute's application is quite mechanical . . . . The law in Washington, simply put, is that nothing may be affixed to or superimposed on a United States flag or a representation thereof. Thus, if selective enforcement has occurred, it has been a result of prosecutorial discretion, not the language of the statute. Accordingly, this case is unlike *Smith v. Goguen* . . . where the words of the statute at issue ("publicly . . . treats contemptuously") were themselves sufficiently indefinite to prompt subjective treatment by prosecutorial authorities.[106]

Many vagueness challenges, however, are mounted against statutes that fall somewhere in between the extremes of the mechanical statute at issue in *Spence* and the broadly worded vagrancy statutes that punish status rather than conduct. Generally, the statutes have some mechanical elements combined with terms that allow for varying degrees of discretion on the part of law enforcement officials.

For example, the Court in *Grayned v. City of Rockford*[107] upheld an anti-noise ordinance that made it a crime for any person adjacent to a school building to make any noise that disturbed or tended to disturb a class in session.[108] Although the words of the ordinance were "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" the Court that

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[103] *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (noting that the more important aspect of vagueness doctrine is the problem of arbitrary enforcement, not the problem of fair warning to the potential offender).

[104] 418 U.S. 405 (1974).

[105] *Id.* at 407, 415 n.9.

[106] *Id.* at 415 n.9 (discussing Smith v. Goguen, 415 U.S. 566 (1974)). *See also supra* notes 80-85 and accompanying text. The Court in *Spence* held that the statute was unconstitutional because it violated the First Amendment. *Spence*, 418 U.S. at 414.

[107] 408 U.S. 104 (1972).

[108] *Id.* at 107-08, 121.

the ordinance was clear in what conduct it prohibited.[109] The Court reasoned that the ordinance fixed the time and the place and provided a measurable factor for when the ordinance was violated; that is, whether normal school activity had been or was about to be disrupted.[110]

Grayned demonstrates that ambiguous or vague language in a statute can be clarified by an objectively measurable factor. This factor can be contained within the statute, as it was in *Grayned*, or can be external to the statute. In *Connally v. General Construction Co.*,[111] the Court listed the ways in which a statute may be clarified, as follows:

> [The statutes] employ[] words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply to them . . . or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, . . . or . . . for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.[112]

In *Omaechevarria v. Idaho*,[113] the Court upheld a statute that made it a crime to graze sheep on ranges previously occupied by cattle, rejecting the argument that the term "range" was overly vague because it failed to specify the boundaries of the range.[114] The Court reasoned: "men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it."[115]

Similarly, in *Hygrade Provision Co. v. Sherman*,[116] the Court upheld a statute that prescribed criminal penalties for anyone who, with intent to defraud, sold any meat or other product falsely represented as kosher or as having been sanctioned by the orthodox Hebrew religious requirements.[117] The challengers of the statute argued that the terms "kosher" and "orthodox

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[109] *Id.* at 110 (quoting Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969)).

[110] *Id.* at 112.

[111] 269 U.S. 385 (1926).

[112] *Id.* at 391-92 (citations omitted).

[113] 246 U.S. 343 (1918).

[114] *Id.* at 348.

[115] *Id.*

[116] 266 U.S. 497 (1925).

[117] *Id.* at 498.

Hebrew religious requirements" were very difficult to determine with any certainty, and that the statute was, therefore, unconstitutional.[118] The Court rejected this argument, reasoning, inter alia, that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it . . . ."[119]

Based on the foregoing, it appears that courts will generally require the *actus reus* elements of the partial-birth abortion bans to contain fairly mechanical language, but will allow a great deal of flexibility in the language provided the external context—for example, the generally accepted meaning in the medical field of the phrase "partial-birth abortion"—adequately narrows the scope of the bans to only "partial-birth abortions."

C. *MENS REA*

Sometimes, if the challenged statute fails to provide a sufficiently precise *actus reus* element, the statute's defect can be cured by a *mens rea* or "scienter" requirement.[120] For example, in *Adderley v. Florida*,[121] the Court upheld the arrest of a group of protestors demonstrating at a county jail who were convicted of violating a trespass statute.[122] The statute prescribed criminal penalties for trespass committed with malicious or mischievous intent.[123] The Court rejected the defendants' argument that the phrase "malicious and mischievous intent" was vague and overbroad, asserting that this phrase actually narrowed the scope of the offense, rather than broadening it, and made its meaning more understandable and clear.[124] The Court offered very little reasoning for this analysis, merely pointing to the jury instructions given by the trial court for the terms "malicious" and "mischievous."[125] The trial court had defined the term "malicious" as "done knowingly and willfully and without any legal justifica-

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[118] *Id.* at 499-500.

[119] *Id.* at 502.

[120] *See The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 87 n.98. *See also supra* note 9 and accompanying text.

[121] 385 U.S. 39 (1966).

[122] *Id.* at 40, 48.

[123] *Id.* at 40 n.1.

[124] *Id.* at 42-43.

[125] *Id.* at 43.

tion,"[126] and "mischievous" as "inclined to cause petty and trivial trouble, annoyance and vexation to others."[127]

It is difficult to see, however, how these definitions clarify the trespass statute. First, the definition of the term "mischievous," standing alone, could easily be read as broadening the statute. Like the ordinance at issue in *Coates*,[128] the "violation may entirely depend upon whether or not a policeman is annoyed."[129] The word itself does nothing to clarify what constitutes a trespass under the Florida statute.

Second, and more important, the definition of the term "malicious" merely makes the alleged clarity of the statute circular. In other words, one of the main problems with a vague statute is that it fails to give notice to a potential violator of that statute which acts are proscribed and will thus subject her to criminal liability. Such a person, who is complaining that she had no notice that her conduct was unlawful, will not be persuaded that the statute provided the notice simply because the statute requires that the act be done "knowingly and willfully and without any legal justification."[130] She would be required to know that the act had no legal justification (i.e., that the act was against the law), which is exactly what she is claiming she did *not* know because of the vague statutory language.[131]

Despite these difficulties, the Court continues to accept the line of reasoning in vagueness cases that a scienter requirement in a statute can sometimes clarify an ambiguity in the *actus reus* element of the statutory language.[132] This tendency can perhaps be adequately explained in the context of arbitrary enforce-

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[126] *Id.* at 43 n.2.

[127] *Id.*

[128] 402 U.S. 611 (1971). *See also supra* notes 54-61 and accompanying text.

[129] 402 U.S. at 614.

[130] *Adderley*, 385 U.S. at 43 n.2.

[131] *See The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 87 n.98. *See also* Screws v. United States, 325 U.S. 91, 153-54 (1945) (Roberts, J., dissenting) (reasoning that the existence of a *mens rea* requirement does nothing to cure a vague statute).

[132] *See The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 87 n.98 (listing cases in which the Supreme Court accepted the reasoning that vagueness in a statute was cured by a scienter requirement).

ment, rather than in adequate notice.[133] It is more difficult to convict someone of violating a law if the prosecutor must establish intent to do the act that the law proscribes.[134] This additional obstacle could effectively weed out those cases in which a person inadvertently violates the law without the requisite intent.[135]

Based on the foregoing, one would expect that a partial-birth abortion ban that contains a scienter requirement would be even less susceptible to a vagueness or overbreadth challenge than a ban without a scienter requirement. However, the case law on the partial-birth abortion bans does not bear this expectation out.[136]

D. SUMMARY OF THE VOID-FOR-VAGUENESS DOCTRINE

The Supreme Court's silence on the issue of facial challenges to abortion statutes raises interesting possibilities in the area of the partial-birth abortion bans. If the *Salerno* standard applies—as it ostensibly does for every area of case law outside the context of the First Amendment—then the Supreme Court would certainly uphold the partial-birth abortion bans against these facial challenges; the only issue to address would be whether "no set of circumstances exist under which the [a]ct would be valid."[137] Under *Planned Parenthood v. Casey*,[138] the bans are valid if they do not place an undue burden on a woman's right to choose.[139] Thus, under the *Salerno* standard, a potential challenger probably would not have standing to challenge the bans.

If the First Amendment standard applies, the challenger will be required to show that the chilling effect of the statute on the performance of abortions is "real and substantial" and not

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[133] *See, e.g.*, United States v. Jackson, 983 F.2d 757, 765 (7th Cir. 1993) (implying that a scienter requirement in a criminal statute requires the government to prove knowledge or intent, making the prosecutor's job more difficult and the statute more fair).

[134] *Id.*

[135] *Id.*

[136] *See infra* Part V.B.

[137] United States v. Salerno, 481 U.S. 739, 745 (1987).

[138] 505 U.S. 833 (1992).

[139] *Id.* at 895.

"readily subject to a narrowing construction by state courts."[140] Whether the bans are readily subject to a narrowing construction depends, for the most part, on the vagueness of the statutory language.

A general principle which can be derived from these void-for-vagueness cases is that courts will allow a certain amount of vagueness or ambiguity in the *actus reus* portion of the statutory language, as long as the language or the external context of the statute provides an adequate objective standard for determining when the statute has been violated. In other words, a court generally will not hold as void-for-vagueness a statute with mechanical terms which are easy to apply to concrete situations, combined with terms which are more vague or susceptible to varying interpretations, especially when the vague terms can be narrowed in scope by external context. Moreover, if the statute contains a *mens rea* requirement, it should be further insulated from being thrown out on void-for-vagueness grounds, although, as stated earlier, the reason for this remains unclear.

One reason (among many) underlying the principle that some vagueness is allowed, is the well-established doctrine of lenity, which requires a court to construe a state criminal statute as narrowly as possible to avoid declaring the statute unconstitutional.[141] In fact, state statutes enjoy a presumption of constitutionality, in deference to concerns about the proper role the federal government should play in determining state criminal laws.[142] Thus, courts should be, and in most cases are, reluctant to hold state statutes void for vagueness, unless the statute contains virtually no measurable standard to determine when the statute has been violated.

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[140] Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

[141] *See* Planned Parenthood of Wisconsin v. Doyle, 9 F. Supp. 2d 1033, 1042 (W.D. Wis. 1998), *aff'd sub nom.* The Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999).

[142] *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 332 (4th Cir. 1998).

IV. THE PARTIAL-BIRTH ABORTION BANS

A. THE PLAIN MEANING OF THE STATUTORY LANGUAGE

All of the partial-birth abortion statutes, except the Ohio, Missouri, and North Dakota statutes, employ the phrase "partial-birth abortion" to describe the proscribed procedure.[143] Nearly all of the bans also define the term "partial-birth abortion" as a procedure in which the physician partially vaginally delivers a living fetus—or "unborn child" as it is phrased in the Wisconsin statute[144]—before killing the fetus and completing the delivery.[145] According to the opponents of the bans, such statutory language contains several potential problems.

First, the term "partial-birth abortion" is not a technical medical term.[146] Opponents of the ban claim that this leaves the phrase susceptible to varying interpretations as to what medical procedure the statute proscribes.[147] This argument will be addressed in Part IV.B.

Second, opponents contend that the statutory definition of the term "partial-birth abortion" as "partially vaginally delivers a living fetus" does little to clear up the vagueness.[148] For example, some Courts have accepted the argument that the phrase "partially vaginally delivers a living fetus" is ambiguous because it could mean either of two things: (1) a partial delivery of an intact fetus, or (2) a delivery of part of a dismembered fetus.[149] The first interpretation is the exact procedure at which these bans are aimed. However, under the second interpretation, the statute could arguably apply to an abortion provider performing a conventional dilation and evacuation (D&E) procedure.[150]

In a conventional D&E, the fetus is dismembered inside the uterine cavity, then removed piece by piece. According to some

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[143] *See supra* notes 27-32 and accompanying text.

[144] *See* WIS. STAT. ANN. § 940.16 (West Supp. 1999).

[145] *See supra* notes 27-32 and accompanying text.

[146] *See* Evans v. Kelley, 977 F. Supp 1283, 1305 (E.D. Mich. 1997).

[147] *See id.*

[148] *See Evans*, 977 F. Supp. at 1305.

[149] *See, e.g.*, The Hope Clinic v. Ryan, 995 F. Supp. 847, 854 (N.D. Ill. 1998), *rev'd*, 195 F.3d 857 (7th Cir. 1999).

[150] *See Evans*, 977 F. Supp. at 1306.

opponents of the bans, an abortion provider who is performing a conventional D&E "delivers" dismembered parts of the fetus through the cervical opening.[151] If the fetus is still "living" inside the uterine cavity (i.e., the heart is still beating) when the abortion provider "delivers" a dismembered leg for example, he could be convicted of violating the statute.[152]

The flaw in this argument is that the term "partially" is an adverb, modifying the verb "delivers," not an adjective modifying the noun "fetus." Thus, the statute could not reasonably be read as including among its prohibitions the delivery of a dismembered part of a fetus. Rather, the most reasonable interpretation is that the statute only refers to the partial delivery of an *intact* fetus.[153]

If one accepts the argument that the fetus must be intact, the issue then concerns how much of an intact fetus must be delivered before the statute is triggered. Several doctors in the partial-birth abortion ban cases testified that, in the process of performing a conventional D&E, various parts of an intact living fetus might inadvertently protrude from the cervical opening.[154] Moreover, one doctor testified that, in performing a conventional D&E, he often pulls the leg of the fetus through the cervical opening in order to provide "counter-traction" of the cervical opening to facilitate dismemberment of the fetus.[155]

Several states have attempted to solve this problem by further defining "partially vaginally delivers" as "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof."[156] Opponents claim, however, that this language does little to ameliorate the vagueness, asserting that the bans contain no clear statutory definition of what constitutes

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[151] *See id.*

[152] *See id.*

[153] Underlying this argument is a general presumption that the word "fetus" refers to an intact fetus unless the language explicitly states otherwise. The use of the word "partially" does not rebut this presumption because "partially" modifies not "fetus" but rather "delivers."

[154] *See id.* at 1298.

[155] *See* Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1104 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999). As stated earlier, the Supreme Court agreed, in January 2000, to review the Nebraska statute. *See* Greenburg, *supra* note 5, at A1.

[156] *See supra* note 30 and accompanying text.

a "substantial portion."[157] At least one court—the District Court of Nebraska in *Carhart v. Stenberg*—has accepted the argument that a leg or an arm could qualify as a substantial portion.[158] However, Webster's Dictionary defines the term "substantial" as "relatively great in size,"[159] indicating that a "substantial portion" should mean at least more than half of the fetus' body. A leg of a fetus, for example, is not "great in size" relative to the remainder of the fetus.[160]

Another way to alleviate the difficulty of determining how much of the intact fetus must be "delivered" in order to trigger the statute is to add a scienter requirement to the statute, which the majority of the states have done.[161] As stated in Part III.C, it is somewhat difficult to see how a scienter requirement clears up ambiguous statutory language,[162] but it may provide an additional method for weeding out those borderline cases that could otherwise allow for arbitrary or discriminatory enforcement.[163] In other words, if an abortion provider does not intend to partially vaginally deliver a living fetus before killing the fetus, but a small portion of the intact fetus inadvertently protrudes from the cervical opening, he cannot be convicted of violating the statute.

The district court in *Carhart*, however, rejected the argument that the scienter requirement alleviated the vagueness or

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[157] *See Carhart*, 11 F. Supp. at 1129.

[158] *Id.*

[159] NEW WEBSTER'S DICTIONARY 427 (Grolier, Inc. 1992).

[160] One may quibble over whether the fetus' body is the correct relative measure to compare to the fetus' leg but, as this comment will demonstrate in Part IV.B, it is not necessary to go into such detail. *See infra* Part IV.B. Moreover, it is difficult to see how anything other than the fetus' entire body could be the correct relative measure.

This interpretation of the phrase "substantial portion" also squares with what is arguably the underlying purpose of the statute: that is, the prevention of infanticide. *See, e.g.*, 1999 Mo. Legis. Serv. 427 (West). *See also supra* note 28. The notion here is that the state's interest in the ongoing life of the fetus is fully realized when the fetus is completely delivered from the mother's womb. Conversely, at that point the mother's interest in her body as it relates to the fetus's life is extinguished. The partial-birth abortion bans, therefore, can arguably be viewed as the state's attempt to draw the line between abortion and infanticide.

[161] *See supra* notes 30-31 and accompanying text. Only Louisiana, Michigan, and South Dakota have not included a scienter requirement in the statutes. *See* LA. REV. STAT. ANN. § 14:32.9 (West Supp. 1998); MICH. COMP. LAWS § 333.17016 (West Supp. 1999); S.D. CODIFIED LAWS § 34-23A-27, -32 (Michie Supp. 1998).

[162] *See supra* Part III.C.

[163] *See supra* notes 126-28 and accompanying text.

overbreadth of the statute, because the abortion provider in that case testified that he intended to extract the intact fetus' leg from the uterine cavity in order to facilitate dismemberment.[164] The Nebraska statute at issue in *Carhart* also contained the "substantial portion" language.[165] Thus, the court could have, and should have, held that this language by itself was sufficient to remove any vagueness or overbreadth problem in the statute. But even those statutes in the second and third category, which do not employ the "substantial portion" language, are not void for vagueness; the context of the statutes ameliorates any issue of vagueness and overbreadth.

B. THE CONTEXT OF THE STATUTES

Despite the dubious claims of some physicians that they do not know what constitutes a "partial-birth abortion,"[166] the medical literature indicates a common understanding of the term to mean a dilation and extraction (D&X) procedure.[167] For example, in hearings conducted pursuant to the federal bill, the president of the National Coalition of Abortion Providers, the president of Planned Parenthood Federation of America, and the president of the National Abortion Rights Action League all identified the ban on partial-birth abortions as a ban on the D&X procedure.[168] Moreover, the American College of Obstetricians and Gynecologists (ACOG) issued a statement of policy on January 12, 1997, which stated:

> The debate regarding legislation to prohibit a method of abortion, such as the legislation banning "partial-birth abortion" and "brain sucking abortions," has prompted questions regarding these procedures. . . .

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[164] *Carhart*, 11 F. Supp. 2d at 1128-29.

[165] *See* NEB. REV. STAT. ANN. § 28-326(9) (Michie 1997).

[166] *See, e.g.*, Evans v. Kelley, 977 F. Supp. 1283, 1297-1301 (E.D. Mich 1997) (summarizing testimony of abortion-providing doctors that indicated their confusion as to the definition of "partial-birth abortion").

[167] *See, e.g.*, Sprang & Neerhof, *supra* note 10, at 744. *See also* Grimes, *supra* note 21, at 749 (discussing federal and state legislators' attempts to ban the D&X procedure). These articles and others were published in the Journal of the American Medical Association (JAMA), which has a weekly circulation to over 365,000 physicians in over 50 specialties. *See American Medical Association* (visited October 8, 1999) <http//pubs.ama-assn.org/how_classad.html>; *see also* Gans Epner, *supra* note 12.

[168] *See Partial-Birth Abortion: The Truth: Joint Hearing Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 17-21, 23-25 (1997).

> The American College of Obstetricians and Gynecologists (ACOG) believes the intent of such legislative proposals is to prohibit a procedure referred to as "Intact Dilatation and Extraction" (Intact D&X).[169]

Interestingly, the first statute to utilize the phrase "dilation and extraction" rather than the phrase "partial-birth abortion" in referring to the procedure which the legislature intended to prohibit—and the only such statute examined by a federal court—was also declared unconstitutionally vague and was permanently enjoined.[170] This Ohio statute defined the dilation and extraction procedure as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain."[171] The Sixth Circuit held that this definition could also be applied to the D&E procedure in those circumstances when the dismembered skull of the fetus was too large to pass through the cervical opening and required compression accomplished through the suctioning of the intracranial contents, and thus it was void for vagueness.[172] Ironically, the court stated in dicta that the proposed federal legislation,[173] which employed the phrase "partial-birth abortion," appeared to come closer to describing the D&X procedure.[174]

The Ohio legislature could have made the statute less vague by including all of the elements listed by the ACOG as constituting a D&X procedure.[175] But, in *Planned Parenthood v. Doyle*,[176] the district court highlighted the problems inherent in listing

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[169] American College of Obstetricians and Gynecologists Statement of Policy as Issued by the ACOG Executive Board: Statement on Intact Dilatation and Extraction (Jan. 12, 1997) (unpublished policy statement, on file with author). ACOG defined the D&X procedure as consisting of four elements: (1) deliberate dilation of the cervix, usually over a sequence of days; (2) instrumental conversion of the fetus to a footling breech; (3) breech extraction of the body except the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus. *Id.* *See also supra* note 11.

[170] *See* Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 200 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998).

[171] OHIO REV. CODE ANN. § 2919.15 (West 1996).

[172] *Women's Med. Prof. Corp.*, 130 F.3d at 199.

[173] H.R. 1122, 105th Cong. § 2 (1997).

[174] *Women's Med. Prof. Corp.*, 130 F.3d at 199 n.9.

[175] The Kansas legislature attempted to alleviate the vagueness and overbreadth problems by listing which procedures are not included within the scope of the statute, in particular the D&E procedure. *See* 1998 Kan. Sess. Laws 142.

[176] 9 F. Supp. 2d 1033 (W.D. Wis. 1998), *aff'd sub nom.* The Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999).

all of the elements.[177] For example, if the fetus were already in a breech presentation, the statute would not apply.[178] Moreover, an abortion provider could utilize a means of killing the fetus other than suctioning the intracranial contents.[179] Finally, an abortion provider could partially remove a fetus from the uterus, but not "everything except the head," without technically violating the statute.[180] These examples demonstrate the problem facing *any* legislature attempting to draft *any* criminal legislation: the dilemma of drafting a statute either susceptible to the claim that it is too vague to be constitutional, or so specific that it provides loopholes for those whom the legislature intends to prosecute.

The Utah legislature attempted to strike the balance by utilizing both "partial birth abortion" and "dilation and extraction" to describe the procedure being banned.[181] In addition, the Utah legislature added the word "intact" in describing the fetus to be delivered.[182] This statute is not susceptible to the criticism that it could be applied to the removal of part of a dismembered fetus, since the statute requires that the fetus be intact. Moreover, it employs both the "partial birth" language and the more medically accepted "dilation and extraction" language, which helps to alleviate any alleged confusion in the medical community. However, the use of the word "intact" in describing the fetus does provide a substantial loophole for abortion providers who wish to perform D&Xs without technically violating the statute. Such an abortion provider could simply remove a toe of the fetus before performing the procedure, thereby removing himself from the purview of the statute. Even without this loophole, the Utah legislature's arguable success at drafting a statute that is less susceptible to a vagueness attack, does not render the remaining statutes unconstitutionally vague.[183]

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[177] *See id.* at 1042.

[178] *See id.*

[179] *See id.* Note that this observation creates problems for the Ohio and Kansas statutes as well.

[180] *See id.*

[181] *See* UTAH CODE ANN. § 76-7-310.5 (Supp. 1998).

[182] *Id.*

[183] The same can be said for the Missouri and North Dakota bans. *See supra* note 28. They are arguably less vague than most of the other bans, in that the language is very mechanical. But

As Part V will show, by utilizing the phrase "partial-birth abortion"—with the common understanding that a partial-birth abortion is a D&X procedure—and defining it as an abortion in which one "partially vaginally delivers a living fetus before killing the fetus," the remaining state legislatures were able to adequately limit the scope of the statute to only those physicians performing D&X procedures.

V. THE DOCTRINE AS APPLIED TO PARTIAL-BIRTH ABORTION

A. STANDING TO RAISE AN OVERBREADTH CHALLENGE

Clearly, the partial-birth abortion bans fall under the line of "spurious" cases—cases in which the statutory language, if vague, will cause a problem of overbreadth.[184] In other words, if these bans are overly vague, they could impermissibly prohibit constitutionally protected conduct (performing D&Es), or, at the very least, could chill abortion providers from performing D&Es out of fear of prosecution. Because these bans are being challenged facially and not as applied by a particular state, the initial issue is whether the potential chilling effect is sufficiently imminent to justify a court striking down the bans on facial challenges. This issue is sometimes addressed as a standing issue.[185]

The bans unquestionably apply to those abortion providers who perform D&Xs. Thus, these abortion providers have standing to mount a facial challenge to the constitutionality of the statutes on grounds other than the alleged vagueness and resulting overbreadth of the statutes. However, as the Supreme Court held in *Young v. American Mini Theatres, Inc.*,[186] they do not have the standing to assert the rights of abortion providers who do not perform D&Xs, unless (at the very least) the statutes' chilling effect on those third parties is "both real and substantial,"

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they still provide substantial loopholes, and, in any event, do not, simply by virtue of their existence, render the remaining statutes void for vagueness.

[184] *See supra* notes 47-52 and accompanying text.

[185] *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 618 (1971) (White, J. dissenting). *See also supra* notes 59-65 and accompanying text.

[186] 427 U.S. 50 (1976). *See also supra* notes 62-67 and accompanying text.

and is not "readily subject to a narrowing construction by the state courts."[187]

Abortion-providers who do not perform D&Xs also face the standing problem in mounting a facial overbreadth challenge to the statutes. The Supreme Court has repeatedly held that it does not recognize an overbreadth doctrine outside the limited

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[187] 427 U.S. at 59. This is typically the less stringent standard applied in the absence of the *Salerno* standard. In some states, such as Indiana, Mississippi, South Dakota, Tennessee, and Virginia, where the bans are currently in effect, empirical evidence indicates that the challengers' asserted fears that the bans will have a chilling effect on abortion providers performing any abortion procedures has not been borne out. *See* Indiana State Department of Health, Terminated Pregnancies by Procedure and Month, 1996 (Aug. 18, 1999) (unpublished tables, on file with author); Indiana State Department of Health, Terminated Pregnancies by Procedure and Month, 1997 (Aug. 18, 1999) (unpublished tables, on file with author); Mississippi State Department of Health, Induced Terminations Performed in Mississippi in 1996 by Primary Procedure and Month Termination was Done (Aug. 23, 1999) (unpublished tables, on file with author); Mississippi State Department of Health, Induced Terminations Performed in Mississippi in 1997 by Primary Procedure and Month Termination was Done (Aug. 23, 1999) (unpublished tables, on file with author); South Dakota Department of Health, Induced Abortions Occurring in South Dakota by Month of Abortion and Type of Procedure, 1996 (Aug. 26, 1999) (unpublished tables, on file with author); South Dakota Department of Health, South Dakota Vital Statistics and Health Status, 1996 (Aug. 26, 1999) (on file with author); South Dakota Department of Health, South Dakota Vital Statistics and Health Status, 1997 (Aug. 26, 1999) (on file with author); Tennessee Department of Health, Selected Induced Abortion Data According to Age and Race of Woman, Tennessee and Department of Health Regions, Resident Data, 1996 (Aug. 26, 1999) (unpublished tables, on file with author); Tennessee Department of Health, Selected Induced Abortion Data According to Age and Race of Woman, Tennessee and Department of Health Regions, Resident Data, 1997 (Aug. 26, 1999) (unpublished tables, on file with author); Tennessee Department of Health, 1997 Tennessee Resident Abortions, Table by Month by Procedure (Aug. 26, 1999) (unpublished tables, on file with author); Virginia Department of Health, Resident Induced Terminations of Pregnancy, 1996 (Aug. 23, 1999) (unpublished tables, on file with author); Virginia Department of Health, Resident Induced Terminations of Pregnancy, 1997 (Aug. 23, 1999) (unpublished tables, on file with author).

For example, in 1996, prior to the enactment of Indiana's partial birth abortion ban, the Indiana State Department of Health reported that 12,875 Indiana residents terminated a pregnancy in Indiana. *See supra* Indiana State Department of Health, Terminated Pregnancies by Procedure and Month, 1996. In 1997, that number remained essentially the same, with the Indiana State Department of Health reporting a drop of only 210 terminations to 12,665. *See supra* Indiana State Department of Health, Terminated Pregnancies by Procedure and Month, 1997. Of these 12,665 abortions, 159 were D&E abortions and 87 of the 159 D&Es (54.7%) were performed in the second half of 1997, while the ban was in effect. *See id.*

In Mississippi, the total number of reported induced terminations of pregnancy in 1996 was 4206, with the ratio of induced terminations per 1000 live births at 102.6. *See supra* Mississippi State Department of Health, Induced Terminations Performed in Mississippi in 1996 by Primary Procedure and Month Termination was Done. In 1997, the year in which the Mississippi statute was enacted, the total number of induced terminations increased to 4325, with the ratio of induced terminations per 1000 live births increasing to 104.1. *See supra* Mississippi State Department of Health, Induced Terminations Performed in Mississippi in 1997 by Primary Procedure and Month Termination was Done. Were these bans to be chilling abortion providers from performing all abortions, one would expect these numbers to drop dramatically. As the evidence shows, however, this is not the case.

context of the First Amendment.[188] As stated earlier, the Supreme Court has not resolved the issue of whether the *Salerno* standard for mounting facial challenges to statutes applies in the abortion context in light of its decision in *Planned Parenthood v. Casey*.[189] If the *Salerno* standard applies, then these abortion providers must show that "no set of circumstances exists under which the act would be valid."[190] Essentially, this would amount to requiring the challengers to show that the bans are unconstitutional on grounds other than the overbreadth of the statutory language.

If the *Salerno* standard does not apply and the Court adopts a First Amendment standard, then the abortion providers who do not perform D&Xs must show that the chilling effect of the statutes is both real and substantial and is not readily subject to a narrowing construction by state courts.[191] In either case, the facial challenge is difficult to mount, as it logically should be.[192] Abortion providers who do not perform D&Xs cannot complain that their rights have been violated unless they have actually been prosecuted for violating the statutes or the threat of prosecution is so imminent that they reasonably will not perform conventional D&Es out of fear of prosecution.[193] As the next section will show, the partial-birth abortion bans are, indeed, readily subject to a narrowing construction.[194] Thus, the abortion providers who do not perform D&Xs do not have standing to mount a facial challenge to the partial-birth abortion bans.

B. *ACTUS REUS* AND *MENS REA* OF THE PARTIAL-BIRTH ABORTION BANS

It bears noting that the bans in all four categories contain fairly mechanical language. On the spectrum of statutory language, the language of the bans more closely resembles the lan-

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[188] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987).

[189] 505 U.S. 833 (1992). *See supra* notes 68-78 and accompanying text.

[190] *Salerno*, 481 U.S. at 745.

[191] *Young*, 427 U.S. at 60. *See supra* note 187.

[192] *See supra* note 74.

[193] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (holding that a party lacks standing when the injury she is asserting is not imminent or substantially likely to occur).

[194] *See infra* Part V.B.

guage of the flag-desecration statute at issue in *Spence v. Washington*[195] than the vagrancy statutes in *Papachristou v. City of Jacksonville*[196] and *Lanzetta v. New Jersey*.[197] The bans do not penalize a "status" but rather an affirmative act. The prohibited act is laid out clearly and contains a chronology of events that must occur before triggering the statute. The fetus must be partially vaginally delivered before the abortion provider kills the fetus and completes the delivery.

Moreover, the bans do not prohibit an act defined such that the violation of the statute depends on the subjective preferences of a law enforcement official, like the ordinance at issue in *Coates v. City of Cincinnati*,[198] where the violation of the statute "may entirely depend upon whether or not a policeman is annoyed,"[199] or the flag desecration statute in *Smith v. Goguen*,[200] which contained "[s]tatutory language of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections."[201] The language of the bans contains no subjective terms similar to "treats contemptuously"[202] or "conduct themselves in a manner annoying to persons passing by."[203]

Finally, as demonstrated in Part IV.A, the language of the bans is not susceptible to more than one interpretation. The phrase "partially vaginally delivers a living fetus" cannot logically be read to mean anything other than partial delivery of an intact fetus. The only allegedly vague terms used are the terms "partially" (contained in the first three categories of bans)[204] and "substantial portion" (contained in the first category of bans).[205] These terms may arguably present a problem of degree, but certainly not a problem of ambiguity.

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[195] 418 U.S. 405 (1974). *See also supra* notes 104-06 and accompanying text.
[196] 405 U.S. 156 (1971). *See also supra* notes 89-91 and accompanying text.
[197] 306 U.S. 451 (1939). *See also supra* notes 92-95 and accompanying text.
[198] 402 U.S. 611 (1971).
[199] *Id.* at 614. *See also supra* notes 55-61 and accompanying text.
[200] 415 U.S. 566 (1974).
[201] *Id.* at 575. *See also supra* notes 80-85 and accompanying text.
[202] *Goguen*, 415 U.S. at 573.
[203] *Coates*, 402 U.S. at 615.
[204] *See supra* notes 30-33 and accompanying text.
[205] *See supra* notes 30-31 and accompanying text.

This problem of degree can be resolved by looking at the context of the statutory language, just as the Court did in *Omaechevarria v. Idaho*[206] where it upheld the grazing statute by reasoning that people engaged in the occupation of grazing sheep should not have difficulty in determining the boundaries of what constitutes a "range," given their expertise in the area.[207] The implication here is that one engaged in a particular occupation subject to regulation by the state is expected to have special knowledge of the subject matter being regulated.[208]

Thus, the language of the bans taken in context with the ACOG statement of policy, the common understanding that a partial-birth abortion refers to a D&X procedure, and the definition of a D&X procedure, offers state courts the ability to adopt a narrowing construction of these statutes such that the only procedure prohibited is the D&X procedure. Even if the Supreme Court were to hold that the *Salerno* standard does not apply to abortion statutes, this narrowing ability is enough to satisfy the more lenient First Amendment standard for facial overbreadth challenges. There is no evidence that the threat of prosecution for performing a D&E is "real and substantial,"[209] nor is there evidence that the bans are not "readily subject to a narrowing construction by the state courts."[210]

Even the bans that fall in the third category, and do not contain a scienter requirement, are sufficiently precise to satisfy the overbreadth standard. The lack of a scienter requirement does not, by itself, render a statute void-for-vagueness.[211] Rather,

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[206] 246 U.S. 343 (1918).

[207] *Id.* at 348. *See also supra* notes 113-15 and accompanying text.

[208] The Seventh Circuit, in *The Hope Clinic v. Ryan*, adopted this line of reasoning in upholding the Illinois and Wisconsin statutes. 195 F.3d 857, 865 (7th Cir. Oct. 26, 1999). Judge Easterbrook, for the majority, wrote: "[W]e think that the Supreme Courts of Illinois and Wisconsin could read their laws in ways that comport with the Constitution. One means of doing this would be to assimilate the statutory definitions to the medical definition of the D&X . . . ." *Id.* Responding to the criticism that this would amount to rewriting rather than reinterpreting at statute—a judicial act that is (arguably) forbidden, at least when a federal court is construing a state statute that has not yet been construed by a state court—Judge Easterbrook remarked: "Using a medical definition to supplement a vague lay definition does not strike us as revisionism or an exercise in deconstruction. But if this approach would nonetheless be an example of brute force used to save a statute—well, courts do it all the time." *Id.*

[209] Young v. American Mini Theatres, 427 U.S. 50, 59 (1976). *See also supra* note 187.

[210] *Young*, 427 U.S. at 59. *See also supra* note 187.

[211] *See* Voinovich v. Women's Medical Professional Corp., *cert. denied*, 118 S. Ct. 1347 (1998). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented in the Court's

it compounds the problem for an already vague statute,[212] while the existence of a scienter requirement may cure an otherwise vague statute.[213]

VI. CONCLUSION

A court's decision in any vagueness case probably reflects, to an extent, its views on the constitutionality of the statute irrespective of the alleged vagueness. Thus, in a First Amendment case, a court may more strictly scrutinize the vagueness challenge than it might in a economic substantive due process case, because free speech is currently the "sanctum sanctorum" of the Supreme Court.[214] There are early indications that the Supreme Court will treat statutes regulating abortions as strictly as it treats First Amendment cases, as evidenced by the Court's decision in *Planned Parenthood v. Casey*,[215] and a subsequent lower court decision interpreting *Casey* as requiring a stricter standard of scrutiny in abortion cases.[216]

Several federal courts have implicitly adopted the position that abortion cases alleging vagueness and overbreadth are to be treated as rigorously as First Amendment cases are treated.[217] However, the depth of scrutiny these courts have engaged in is

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denial of the petition for writ of certiorari to determine the constitutionality of Ohio's partial-birth abortion ban, writing:

> We have never held that, in the abortion context, a scienter requirement is mandated by the Constitution. To the contrary, in *Colautti* [*v. Franklin*] . . . we explicitly declined to address whether "under a properly drafted statute . . . some . . . type of scienter would be required before a physician could be held criminally responsible" . . . . We only stated that the vagueness of the statute at issue was "compounded" by the fact that it lacked a scienter requirement.

Id. at 1349 (quoting Colautti v. Franklin, 439 U.S. 379, 396 (1979)) (Thomas, J., dissenting).

[212] *See, e.g.*, *Young*, 427 U.S. at 59.

[213] *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 42-43 (1966).

[214] *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 7, at 77.

[215] 505 U.S. 833 (1992).

[216] *See* Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995).

[217] *See* Planned Parenthood v. Miller, 195 F.3d 386 (8th Cir. 1999); Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999); Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 200 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 619 (E.D. La. 1999); Planned Parenthood v. Verniero, 41 F. Supp. 2d 478, 493-94 (D.N.J. 1998); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1158 (S.D. Fla., 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1036 (W.D. Ky. 1998); Daniel v. Underwood, No. 2:98-0495, 1998 U.S. Dist. LEXIS 22290, *12 (S.D. W. Va. Nov. 5, 1998); Planned Parenthood v. Woods, 982 F. Supp. 1369, 1379 (D. Ariz. 1997); *Evans*, 977 F. Supp. at 1311; Bell, *supra* note 4, at B3.

largely unprecedented, even in the First Amendment cases.[218] Judge Luttig of the Fourth Circuit, in his order staying a preliminary injunction granted by the district court against the Virginia ban, criticized the district court for just such overreaching as follows:

> Instead of presuming the statute constitutional and indulging the assumption, mandated by our federalism, that the State will, where necessary, construe its statutes so as to ensure their constitutionality, the district court all but presumed the statute unconstitutional and, where the slightest ambiguity in the statute's language arguably existed, assumed . . . that the State would adopt and enforce a construction of the statute that would render it unconstitutional.[219]

Judge Luttig further criticized the District Court for utterly failing to take into account the assurances from the Attorney General and the Governor of Virginia that the state would not prosecute physicians for performing any procedure other than D&Xs.[220] Judge Easterbrook of the Seventh Circuit echoed this criticism, stating:

> The Attorneys General of Illinois and Wisconsin, the principal defendants, tell us that their statutes are concerned only with the D&X procedure and will be enforced only against its use. That assurance might be enough by itself, in the absence of any contrary indication from the state judiciary, to resolve immediate vagueness concerns.[221]

The significance of the problem cannot be overlooked. As in all legislation, the legislature must be allowed leeway in drafting criminal statutes such that they do not provide loopholes for those at whom the statute is aimed. In refusing to grant the legislatures this leeway in drafting the partial-birth abortion bans, the thirteen federal courts that have struck down or enjoined enforcement of these bans on void-for-vagueness grounds have done a disservice to the principles of federalism. The partial-birth abortion bans may or may not be unconstitutional. However, their constitutionality does not turn on the alleged vagueness of the language.

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[218] *See supra* Part III.B. *See also* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998).

[219] *Gilmore*, 144 F.3d at 332. *See also* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 811-19 (E.D. Va. 1998).

[220] 144 F.3d at 331.

[221] The Hope Clinic v. Ryan, 195 F.3d 857, 865 (7th Cir. 1999).