

Winter 2001

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### Recommended Citation

Janeen F. Berkowitz, Stenberg v. Carhart: Women Retain Their Right to Choose, 91 J. Crim. L. & Criminology 337 (2000-2001)

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## STENBERG V. CARHART: WOMEN RETAIN THEIR RIGHT TO CHOOSE

Stenberg v. Carhart, 120 S. Ct. 2597 (2000)

### I. INTRODUCTION

In *Stenberg v. Carhart*,<sup>1</sup> the Supreme Court held that a Nebraska statute banning partial birth abortions was unconstitutional. In a 5-4 decision, the Court concluded that: (1) the statute lacked any exception for the preservation of the health of the mother;<sup>2</sup> and (2) the statute was impermissibly vague and could be interpreted to include a ban on the most commonly used second trimester abortions, thereby unduly burdening a woman's right to choose abortion.<sup>3</sup> For these two distinct reasons, the Nebraska statute banning partial birth abortions was rendered unconstitutional.

This Note argues that the judgment of the Court was correct.<sup>4</sup> The Note explains why the absence of a health exception in the statute rendered the entire statute unconstitutional and discusses why the statute could be interpreted to include a ban on multiple methods of abortion.<sup>5</sup> This Note further argues that the Supreme Court should have declared a broader holding on this issue.<sup>6</sup> By first addressing the issues of the health exception and the plain language interpretation, the Court did not have the opportunity to reach the issue of whether a narrowly tailored statute prohibiting only one method of abortion, specifically the Dilation and Extraction procedure (D&X), would in itself constitute an undue burden.<sup>7</sup> Ultimately, this Note concludes that a ban of the D&X alone would, in fact, im-

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<sup>1</sup> 120 S. Ct. 2597 (2000).

<sup>2</sup> *Id.* at 2620.

<sup>3</sup> *Id.*

<sup>4</sup> See *infra* Part V.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

pose an undue burden on a woman's right to choose abortion and, therefore, should be deemed unconstitutional.<sup>8</sup>

## A. BACKGROUND

### 1. *The Right to Privacy*

The Constitution does not explicitly mention any right to privacy.<sup>9</sup> However, the Supreme Court has recognized that a right of personal privacy does exist under the Constitution.<sup>10</sup> The Court has opined that this right of personal privacy has its roots in the First Amendment;<sup>11</sup> the Fourth Amendment;<sup>12</sup> within the penumbra of the Bill of Rights;<sup>13</sup> in the Ninth Amendment;<sup>14</sup> or in the Fourteenth Amendment's concept of personal liberty.<sup>15</sup> And, this right of privacy has been found to

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<sup>8</sup> *Id.*

<sup>9</sup> *Roe v. Wade*, 410 U.S. 113, 162 (1973).

<sup>10</sup> *Id.* See also *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>11</sup> *Stanley*, 394 U.S. at 565:

If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read, or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

<sup>12</sup> *Terry*, 392 U.S. at 9 (*citing* *Katz v. United States*, 389 U.S. 347, 351, 361 (1967)) (stating that the Fourth Amendment protects people, not places, and thus, wherever an individual may harbor a reasonable "expectation of privacy," he is entitled to be free from unreasonable governmental intrusion).

<sup>13</sup> *Griswold*, 381 U.S. at 484 ("[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees [within the Bill of Rights] create zones of privacy.").

<sup>14</sup> *Id.* at 491 (Goldberg, J., concurring):

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

<sup>15</sup> *Meyer*, 262 U.S. at 399 (arguing that the liberty guaranteed in the Due Process Clause of the Fourteenth Amendment encompasses more than the freedom from bodily restraint, including *inter alia* the right to marry, to establish a home, to bring up children, and generally to enjoy those privileges recognized as essential to the orderly pursuit of happiness by free men).

extend to marriage;<sup>16</sup> procreation;<sup>17</sup> contraception;<sup>18</sup> familial relationships;<sup>19</sup> and child rearing.<sup>20</sup>

2. *The Supreme Court Recognizes a Woman's Constitutional Right to Choose Whether or Not to Terminate Her Pregnancy*

In *Roe v. Wade*, the Supreme Court recognized that the right of privacy, founded in the Fourteenth Amendment's concept of personal liberty and upheld by years of Supreme Court precedent, is in fact broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>21</sup> For the first time in the United States, laws that called for an absolute proscription on abortion were deemed unconstitutional.<sup>22</sup>

Although the Court concluded that our right to personal privacy includes the abortion decision, it was made clear that the right is qualified and must be considered against important state interests in regulation.<sup>23</sup> Simply stated, the right to terminate a pregnancy is not absolute.<sup>24</sup> However, where certain fundamental rights are involved, including the right to terminate a pregnancy, the Court has held that any regulations affecting

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<sup>16</sup> See *Loving v. Virginia*, 388 U.S. 1, 18 (1967) (holding that antismiscegenation statutes are unconstitutional because they deprive appellants of a liberty, the right to marry, without due process of law).

<sup>17</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that state statute mandating the sterilization of repeat criminal offenders violates the Due Process Clause because procreation is a basic civil right of man).

<sup>18</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

<sup>19</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (arguing that there is a private realm of family life that the state cannot enter).

<sup>20</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (stating that the theory of liberty excludes any general power of the state to standardize its children, as parents have the right to raise their own children).

<sup>21</sup> *Roe*, 410 U.S. at 153. In so holding, the court reasoned that by denying this choice, the state would impose too much of a burden on women. First and foremost, medical issues may be involved. Moreover, maternity or additional children could force upon a woman a distressful life and future. And, psychological harm may be imminent, as mental and physical health can be taxed by child care. The court also took into consideration the distress associated with an unwanted child or bringing a child into a family already unable to care for it.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 154.

<sup>24</sup> *Id.*

those rights may be justified only by a compelling and legitimate state interest.<sup>25</sup> Also, any legislative enactments must be narrowly drawn to express only those compelling and legitimate state interests at stake.<sup>26</sup>

As the Justices have noted, a state may properly assert legitimate interests in safeguarding health, in maintaining medical standards, and in protecting potential life.<sup>27</sup> And, at some point during pregnancy, all these interests become sufficiently "compelling" to warrant regulation of the abortion process.<sup>28</sup> To that end, the Court established the trimester framework approach to abortion regulation.<sup>29</sup>

With respect to the state's legitimate interest in protecting the health of the mother, the point at which the interest became "compelling" was at the end of the first trimester.<sup>30</sup> This was so because until that point in a pregnancy, mortality in abortion could actually be less than mortality in childbirth.<sup>31</sup> Hence, during the first trimester, the abortion decision and any related matters, would be left to the medical judgment of the pregnant women and her doctor, and could not be regulated by the state.<sup>32</sup>

During the second trimester of pregnancy, a state could regulate the abortion procedures, but only to the extent that the regulation reasonably related to the preservation and protection of the woman's health.<sup>33</sup> Examples of permissible state regulations in this area included requirements concerning the qualifications of the person performing the abortion, the licensure of that person, or the facility in which the procedure is to be performed.<sup>34</sup>

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<sup>25</sup> *Id.* at 155-56.

<sup>26</sup> *Id.*

<sup>27</sup> *Roe*, 410 U.S. at 154.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 164-65.

<sup>30</sup> *Id.* at 163.

<sup>31</sup> *Id.* at 163.

<sup>32</sup> *Id.* at 164.

<sup>33</sup> *Roe*, 410 U.S. at 163.

<sup>34</sup> *Id.*

With respect to the state's legitimate interest in protecting potential life, the "compelling" point was at viability.<sup>35</sup> This was so because until viability, the fetus is incapable of a meaningful life outside of the womb.<sup>36</sup> Hence, for the stage subsequent to viability (approximately the beginning of the third trimester to the end of the pregnancy), the Court held that the State, in promoting its interest in the potentiality of human life, may regulate and even proscribe abortion, except where it is necessary for the preservation of the health of the mother.<sup>37</sup>

3. *A Statute Prohibiting a Particular Method of Abortion Violates a Woman's Fundamental Right to Choose Abortion, as established in Roe v. Wade*

Throughout the seventies and eighties, the essential holding of *Roe* was consistently reaffirmed.<sup>38</sup> A notable case in the mid-seventies to uphold *Roe* was *Planned Parenthood of Central Missouri v. Danforth*.<sup>39</sup> The issue in *Danforth* concerned a particular section of a Missouri statute regulating abortions that proscribed the use of saline amniocentesis, a method of abortion commonly used after the first twelve weeks of pregnancy.<sup>40</sup> The statute imposed this proscription on the grounds that the technique was deleterious to maternal health.<sup>41</sup>

The Supreme Court concluded that this proscription was unconstitutional, based on its holding in *Roe*.<sup>42</sup> The general prohibition of saline amniocentesis failed as a reasonable regu-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 163. In order to be deemed viable, the fetus must have a potentiality for meaningful life, *as opposed to merely survival*. See also *Colautti v. Franklin*, 439 U.S. 379, 387 (1979) (emphasis added). A physician determines whether or not a fetus is capable of meaningful life after considering a number of variables, including the gestational age of the fetus (derived from the reported menstrual history of the woman), fetal weight (based on an inexact estimate of the size and condition of the uterus), the woman's general health and nutrition, and the quality of the available medical facilities. *Id.* at 395-96.

<sup>37</sup> *Id.* at 164-65.

<sup>38</sup> See, e.g., *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Colautti*, 439 U.S. at 387; *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

<sup>39</sup> 428 U.S. 52 (1976).

<sup>40</sup> *Id.* at 75-76. In a saline amniocentesis abortion, the amniotic fluid is withdrawn and saline or other fluid is inserted into the amniotic sac.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 79.

lation for the protection of maternal health.<sup>43</sup> The Court reasoned that other *permitted* methods were more dangerous to the health of the mother and were less widely used and accepted.<sup>44</sup> In fact, the statute did not even prohibit techniques that were many times more likely to result in maternal death, forcing women and their physicians to terminate pregnancies by methods more dangerous to the pregnant woman's health than the method outlawed.<sup>45</sup>

Instead, the Court noted, the statute was an unreasonable and arbitrary regulation intended to inhibit the majority of second trimester abortions, as 68 percent to 80 percent of all second trimester abortions were effected through the saline amniocentesis procedure.<sup>46</sup>

Following the *Roe* trimester framework, as the Court in *Danforth* did, states could regulate abortions during the second trimester.<sup>47</sup> However, the regulations must be related to protecting a woman's health and may not be detrimental to a woman choosing to undergo an abortion.<sup>48</sup> Thus, the Missouri statute did not withstand constitutional challenge.<sup>49</sup>

*4. The Central Theme of Roe is Upheld, But the Supreme Court Rejects the Trimester Framework, Giving Power Back to the States in the Battle Over Abortion Rights*

In 1992, the issue of abortion again reached the Supreme Court with the watershed case of *Planned Parenthood of SE Pennsylvania v. Casey*.<sup>50</sup> And, once again, the essential holding of *Roe*—woman have the fundamental, yet qualified, right to choose abortion<sup>51</sup>—was upheld.<sup>52</sup> However, in this case, the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 77.

<sup>45</sup> *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 78 (1976).

<sup>46</sup> *Id.* at 79. Today, however, the medical profession has switched from medical induction of labor to surgical procedures for most second trimester abortions. See Stenberg, 120 S. Ct. at 2606.

<sup>47</sup> *Roe*, 410 U.S. at 163.

<sup>48</sup> See Jennifer Landrum Elliott, *Will Charlie Brown Finally Kick the Football?: Missouri Enacts the Next Generation of Partial Birth Abortion Restrictions*, 44 ST. LOUIS U. L.J. 1083, 1092 (Summer 2000).

<sup>49</sup> *Danforth*, 428 U.S. at 79.

<sup>50</sup> 505 U.S. 833 (1992).

<sup>51</sup> *Roe*, 410 U.S. at 153.

Court asserted that the trimester approach established in *Roe*<sup>53</sup> undervalued the state's interest in potential life.<sup>54</sup> In another 5-4 decision, the Court found that to deem unwarranted all governmental attempts to regulate previability abortions solely on behalf of potential life is irreconcilable with the Court's recognition in *Roe* that there is, in fact, a substantial state interest in protecting potential life throughout the pregnancy.<sup>55</sup> "The woman's liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn."<sup>56</sup> And with this conclusion, the Court rejected the long-standing trimester framework.<sup>57</sup>

Again, the Court concluded that the essential holding of *Roe* should be reaffirmed: women do have the fundamental right to terminate a pregnancy before the fetus attains viability.<sup>58</sup> However, to replace the rejected trimester approach, the majority decided that simple "viability," and not trimesters, would mark the point at which the state's interest in protecting potential life would outweigh the pregnant woman's liberty interest in having an abortion.<sup>59</sup> A woman may choose to terminate her pregnancy previability.<sup>60</sup> Once the fetus becomes viable, however, the state may proscribe abortion altogether.<sup>61</sup> It is important to note that while states may proscribe abortions of viable fetuses, the Court held that those regulations must contain exceptions for pregnancies that endanger the woman's life or health.<sup>62</sup>

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<sup>52</sup> *Casey*, 505 U.S. at 869.

<sup>53</sup> *Roe*, 410 U.S. at 164-65

<sup>54</sup> *Casey*, 505 U.S. at 873.

<sup>55</sup> *Id.* at 876.

<sup>56</sup> *Id.* at 869.

<sup>57</sup> *Id.* at 873.

<sup>58</sup> *Id.* at 871-72.

<sup>59</sup> *Id.* at 870.

<sup>60</sup> *Casey*, 505 U.S. at 870.

<sup>61</sup> *Id.* The Court reasoned that subsequent to viability, there is a realistic possibility of maintaining and nourishing a life outside the womb. Thus, the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. *Id.*

<sup>62</sup> *Id.* at 879 ("Subsequent to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.")



Additionally, the Court gave the states greater latitude in governing previability abortions by holding that states are constitutionally permitted to regulate, but not proscribe, previability abortions based solely on their interest in respecting potential life, so long as the specific regulations *do not impose an undue burden* on the woman seeking the abortion.<sup>63</sup>

This brings us to the obvious and often debated question: what constitutes an undue burden?<sup>64</sup> The Court described an undue burden as any state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.<sup>65</sup> The Court further explained that the only issue at stake under the new "undue burden" regime is the woman's right to make the ultimate decision whether to terminate her pregnancy.<sup>66</sup> Regulations which do no more than create a mechanism for the state to express respect for the life of the unborn are, therefore, allowed, provided they do not constitute a substantial obstacle to the woman's right to choose.<sup>67</sup>

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<sup>63</sup> *Id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause.")

<sup>64</sup> *Id.* at 881-901. Is an informed consent requirement an undue burden? Is a parental notification requirement an undue burden? Is a spousal notification requirement an undue burden? Do recordkeeping and reporting requirements constitute an undue burden?

<sup>65</sup> *Id.* at 877.

<sup>66</sup> *Casey*, 505 U.S. at 877.

<sup>67</sup> *Id.* An informed consent requirement, mandating that at least 24 hours before performing an abortion, a physician must inform the woman of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term, is a reasonable measure to ensure an informed choice and is, therefore, not an "undue burden." *Id.* at 883. A provision requiring spousal notice prior to terminating a pregnancy constitutes an "undue burden" because a husband has no enforceable right to require his wife to advise him before she exercises her personal choices and fundamental rights. *Id.* at 897-98. A requirement that a minor seeking an abortion obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure, does not impose an "undue burden" on the woman seeking the abortion and is, therefore, constitutional. *Id.* at 899. Recordkeeping and reporting requirements do not constitute "undue burdens" because they relate to maternal health, while imposing no substantial obstacle to the woman's choice. *Id.* at 900-01.

5. *The Circuits are Split: Do Bans on Partial Birth Abortions Impose an "Undue Burden" on a Woman's Right to Terminate Her Pregnancy?*

Since the *Danforth* majority held that banning the saline amniocentesis method of abortion was unconstitutional, there has been no other abortion method to receive such national scrutiny—until the D&X procedure was developed.<sup>68</sup> The D&X, often performed on nonviable fetuses, is ordinarily associated with the term "partial birth abortion."<sup>69</sup> However "partial birth abortion" is a layman's term with no medical basis and does not reflect the medical definition of the D&X procedure.<sup>70</sup>

In 1993, Dr. Martin Haskell presented his paper, *Dilation and Extraction (D&X) for Late Second Trimester Abortion*,<sup>71</sup> to Congress, prompting nationwide concern over the D&X procedure.<sup>72</sup> In response, Congress twice passed a federal ban on so-called "partial birth abortions," which President Clinton twice vetoed.<sup>73</sup> Subsequently, more than one-half of the states in the country passed similar bans, modeled after the 1997 federal bill.<sup>74</sup> Not surprisingly, the majority of these statutes have been challenged;<sup>75</sup> the decisions have been split.

In late 1997, the Sixth Circuit became the first Federal Court of Appeals to hold, in a 2-1 decision, that a state statute banning previability "partial birth" abortions was unconstitutional.<sup>76</sup> An Ohio statute attempting to ban the D&X procedure<sup>77</sup> was deemed an undue burden on women seeking

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<sup>68</sup> See Karen E. Walther, Comment, *Partial-Birth Abortions: Should Moral Judgment Prevail Over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693, 706 (2000). Very recently, Mifepristone, better known as the "abortion pill" or RU-486, a new method of non-surgical abortion, has also received a great deal of national scrutiny. See Gina Kolata, *It's Ready, But Is It Wanted?*, N.Y. TIMES, November 19, 2000, at D2.

<sup>69</sup> *Stenberg*, 120 S. Ct. at 2601. For a more thorough discussion of the D&X procedure, see *infra* Part III.

<sup>70</sup> Walther, *supra* note 68, at 706. See also *Hope Clinic v. Ryan*, 195 F.3d 857, 863 (7th Cir. 1999) ("The legal definition is an imperfect match for the medical definition of D&X.").

<sup>71</sup> Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion*, reprinted in 139 CONG. REC. E1092 (daily ed. April 29, 1993).

<sup>72</sup> See Walther, *supra* note 68, at 706.

<sup>73</sup> *Id.*, at 706-07.

<sup>74</sup> *Id.*, at 707.

<sup>75</sup> *Id.*, at 708.

<sup>76</sup> *Woman's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997).

<sup>77</sup> See Ohio Rev. Code Ann. § 2919.15(B). The actual statute provided, "[n]o person shall knowingly perform or attempt to perform a dilation and extraction [D&X]

previability abortions because the statute was unconstitutionally vague and could be interpreted to include a ban on the more commonly employed dilation and evacuation (D&E) method of abortion.<sup>78</sup> Such a broad ban of procedures, the Court opined, placed a substantial obstacle in the path of women seeking pre-viability abortions.<sup>79</sup>

The Fourth Circuit followed suit in 1998 when it affirmed a District Court's stay on the ban of pre-viability partial birth abortions in Virginia.<sup>80</sup> According to the Fourth Circuit, the Virginia Act at issue used a definition of partial birth abortion that was intentionally broader than the medical descriptions of the D&X procedure.<sup>81</sup> As the opinion states, the D&X procedure is the target of the Act, but "the definition of 'partial birth abortion' used by the General Assembly is cast in terms that will encompass not only the identified medical formulations of the procedure, but as-yet unidentified and/or uninvented variations of the D&X procedure."<sup>82</sup>

Further, in 1999, the Eighth Circuit struck down statutes in Iowa, Arkansas, and Nebraska banning partial birth abortions because the statutes imposed an undue burden on women seeking pre-viability abortions.<sup>83</sup> In each of these cases, the Court of Appeals for the Eighth Circuit, like the Sixth and Fourth Circuits before it, held that the statutes prohibiting partial birth abortions, or the so-called D&X procedure, encompassed other methods of abortion that were constitutionally protected, such as the D&E procedure, the most commonly used second-

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procedure upon a pregnant woman." D&X was defined as, "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. 'Dilation and extraction procedure' does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion." For further explanation of the D&X procedure, *see infra* Part III(B) (3).

<sup>78</sup> *See Voinovich*, 130 F.3d at 202-03. For a thorough description of the dilation and evacuation procedure (D&E), *see infra* Part III(B) (2).

<sup>79</sup> *See Voinovich*, 130 F.3d at 202-03.

<sup>80</sup> *See Richmond Med. Ctr. for Women v. Gilmore*, 183 F.3d 303, 303 (4th Cir. 1998).

<sup>81</sup> *See id.* at 304.

<sup>82</sup> *Id.*

<sup>83</sup> *See Planned Parenthood v. Miller*, 195 F.3d 386, 388-89 (8th Cir. 1999) (striking down Iowa statute); *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794, 797-98 (8th Cir. 1999) (striking down Arkansas statute); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (striking down Nebraska statute).

trimester procedure.<sup>84</sup> To that end, the statutes imposed an undue burden on a woman's choice to exercise her fundamental right to an abortion.<sup>85</sup>

The Seventh Circuit, however, disagreed.<sup>86</sup> In contrast to the above-mentioned holdings, the Seventh Circuit concluded that even though the legal definition of a partial birth abortion is an "imperfect match" for the medical definition of the D&X procedure, the statutes in question clearly communicate that the ban on partial birth abortions is intended to extend only to the D&X method.<sup>87</sup> The Court held that a prohibition of the D&X procedure does not constitute an undue burden on a woman's right to choose an abortion because a D&X procedure is never the only safe method of second-trimester abortions.<sup>88</sup>

In order to resolve the split among the Circuits, the Supreme Court, in 2000, granted certiorari to a case addressing the constitutionality of state statutes banning partial birth abortions.<sup>89</sup>

## II. FACTS AND PROCEDURAL HISTORY

### A. STATEMENT OF FACTS

In June 1997, Nebraska's Governor signed into law Legislative Bill 23,<sup>90</sup> prohibiting partial birth abortions in the state of Nebraska.<sup>91</sup> Because "partial birth abortion" is not a recognized medical term, the statute defined a "partial birth abortion" as:

[A]n abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before

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<sup>84</sup> See *Miller*, 195 F.3d at 388-89; *Jegley*, 192 F.3d at 797-98; *Carhart*, 192 F.3d at 1151.

<sup>85</sup> See *Miller*, 195 F.3d at 388-89; *Jegley*, 192 F.3d at 797-98; *Carhart*, 192 F.3d at 1151.

<sup>86</sup> See *Hope*, 195 F.3d at 863.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* at 864-65.

<sup>89</sup> See *Stenberg*, 120 S. Ct. at 2597.

<sup>90</sup> See Neb. Rev. Stat. § 28-328(1). The text of the statute reads "[n]o partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

<sup>91</sup> See *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1101 (D. Neb. 1998).

killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.<sup>92</sup>

The statute made the intentional and knowing performance of an unlawful partial-birth abortion a Class III felony, with a maximum prison term of twenty years and up to \$25,000 in fines.<sup>93</sup> Also, a violation of the statute served as grounds for automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska.<sup>94</sup>

Dr. Leroy Carhart, a medical doctor, challenged the constitutionality of the statute and, in 1997, brought a lawsuit in Federal District Court seeking a preliminary injunction regarding the enforcement of the statute.<sup>95</sup> Upon asserting his claim, Dr. Carhart operated a family medical practice with a specialized abortion facility in Nebraska.<sup>96</sup> He was licensed to practice medicine in eight states and performed abortions in a clinic setting from a gestational age of three weeks until fetal viability.<sup>97</sup> The abortion procedures that Dr. Carhart utilized varied, depending on the gestational age of the fetus, as well as on various other medical factors.<sup>98</sup>

Dr. Carhart based his constitutional challenge on the claim that the ban on partial-birth abortions imposed an undue burden on a woman seeking an abortion by preventing her from choosing a safe and desired method of terminating the pregnancy before viability.<sup>99</sup> This, as established in *Casey*, was in violation of the Due Process Clause of the Fourteenth Amendment.<sup>100</sup> In the alternative, Dr. Carhart based his claim on his belief that the statute was unconstitutionally vague, as it

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<sup>92</sup> Neb. Rev. Stat. § 28-326(9).

<sup>93</sup> See *id.* at § 28-328(2).

<sup>94</sup> See *Carhart*, 11 F. Supp. 2d at 1101.

<sup>95</sup> See *id.* at 1109.

<sup>96</sup> See *Carhart*, 192 F.3d at 1146.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *Carhart*, 11 F. Supp. 2d at 1120-21.

<sup>100</sup> See *Casey*, 505 U.S. at 874.

could be interpreted to prohibit more than solely the D&X procedure.<sup>101</sup>

## B. METHODS OF ABORTION

In order to fully understand the issues surrounding the ban of partial birth abortions, it is important to gain a preliminary understanding of all available abortion procedures<sup>102</sup>

### *1. Suction Curettage or Vacuum Aspiration*

About ninety percent of all abortions performed in the United States take place during the first trimester of pregnancy, prior to the twelfth week of gestational age.<sup>103</sup> The most common means of inducing first trimester abortions is the suction curettage or vacuum aspiration method.<sup>104</sup> In this procedure, a local anesthetic is administered, and the cervix is dilated using rigid dilators.<sup>105</sup> Once the cervix is sufficiently dilated, a suction tube is inserted and rotated inside the uterus to loosen and remove the contents.<sup>106</sup> A curette may then be used to scrape the endometrium, ensuring the removal of any remaining tissue that could cause infection.<sup>107</sup> The fetus is not dead before the attending physician begins this procedure, and the entire fetus comes through the suction tube alive in many instances.<sup>108</sup>

Such an abortion is typically performed on an outpatient basis and is considered particularly safe.<sup>109</sup> In fact, the mortality rates for first trimester abortions are five-to-ten times lower than

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<sup>101</sup> See *Carhart*, 11 F. Supp. 2d at 1121.

<sup>102</sup> See *Stenberg*, 120 S. Ct. at 2605.

<sup>103</sup> See *id.*

<sup>104</sup> See *Carhart*, 11 F. Supp. 2d at 1102 (citing the American Medical Association's (AMA) "Report of the Board of Trustees on Late-Term Abortion"). (The Board of Trustees prepared and submitted the report to the AMA's board of delegates in May, 1997, in response to the passage of a 1996 resolution by the delegates calling for the AMA to conduct a study of late-term pregnancy termination techniques.); see also *Hope*, 195 F.3d at 861.

<sup>105</sup> See *Carhart*, 11 F. Supp. 2d at 1102 (citing the AMA Report).

<sup>106</sup> See *id.*; see also *Hope*, 195 F.3d at 861 (the fetus is separated from the placenta either by scraping or vacuum pressure, then is removed by suction.)

<sup>107</sup> See *Carhart*, 11 F. Supp. 2d at 1102 (citing the AMA Report).

<sup>108</sup> See *id.* at 1103 (citing the AMA Report).

<sup>109</sup> See *Stenberg*, 120 S. Ct. at 2605 (citing S. GABBE, J. NIEBYL, & J. SIMPSON, OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 1253-54 (1996)).

those associated with carrying the fetus to term.<sup>110</sup> Complication rates are also low.<sup>111</sup> As the fetus grows in size, however, this method of abortion becomes increasingly more difficult.<sup>112</sup> Dr. Carhart claimed that he could no longer use this procedure when the fetus reaches a gestational age of 15 weeks.<sup>113</sup>

## 2. *Dilation and Evacuation (D&E)*

According to the AMA, the most common procedure for inducing abortion in the early second trimester of pregnancy, the thirteenth through fifteenth week of gestation, is dilation and evacuation (D&E).<sup>114</sup> However, the D&E can be performed through the twenty-fourth week of pregnancy with variations in D&E operative strategy.<sup>115</sup> Common points for all D&E procedures include (1) the dilation of the cervix; (2) the removal of at least some fetal tissue using nonvacuum instruments; and (3) after the fifteenth week, the potential need for instrument disarticulation or dismemberment of the fetus or the collapse of the fetal parts to facilitate evacuation from the uterus.<sup>116</sup>

Between thirteen and fifteen weeks of gestation, the D&E is similar to the vacuum aspiration method, except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue.<sup>117</sup> A local anesthetic is often administered, and instruments are inserted through the cervix into the uterus to remove fetal and placental tissue.<sup>118</sup> Because fetal tissue is easily broken at this stage of pregnancy, the fetus is rarely removed intact.<sup>119</sup> The walls of the uterus are then

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<sup>110</sup> See *id.*

<sup>111</sup> See *id.* See also Walther, *supra* note 68, at 698.

<sup>112</sup> See Walther, *supra* note 68, at 698.

<sup>113</sup> See Carhart, 11 F. Supp 2d at 1103.

<sup>114</sup> See *id.* (citing the AMA Report).

<sup>115</sup> See WARREN HERN, ABORTION PRACTICE 146-56 (1984).

<sup>116</sup> See Stenberg, 120 S. Ct. at 2606; see also Hope, 195 F.3d at 861.

<sup>117</sup> See Stenberg, 120 S. Ct. at 2606. Osmotic dilators are usually used. Dr. Carhart typically waits 12-72 hours before completing the abortion in order to allow for adequate dilation. Often, in pregnancies beyond 14 weeks, oxytocin is given intravenously to stimulate the uterus to contract and shrink. See Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1101 (D. Neb. 1998) (citing the AMA Report).

<sup>118</sup> See Stenberg, 120 S. Ct. at 2606.

<sup>119</sup> See *id.*

scraped with a curette to ensure that no infection-causing tissue remains.<sup>120</sup>

After fifteen weeks, the D&E can still be performed.<sup>121</sup> However, because the fetus is larger at this stage of gestation, particularly the head, and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages in order to remove fetal and placental tissue.<sup>122</sup>

Unlike the vacuum aspiration method, the D&E procedure does carry certain risks.<sup>123</sup> The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs.<sup>124</sup> Sharp fetal bone fragments create similar dangers.<sup>125</sup> And, because the fetus is rarely removed intact, fetal tissue accidentally left behind can cause infection and various other complications.<sup>126</sup> Nonetheless, performing the D&E procedure between the twelfth and twentieth weeks of gestation is significantly safer than performing the rarely used induced labor procedures.<sup>127</sup>

### 3. *Dilation and Extraction (D&X)*

There is a variation of the D&E procedure, commonly referred to as an "intact D&E."<sup>128</sup> Like other versions of the D&E procedure, the intact D&E begins with the induced dilation of

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<sup>120</sup> See *id.*

<sup>121</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2606 (2000).

<sup>122</sup> See *id.* After the sixteenth week of gestation, Dr. Carhart uses the D&E procedure combined with prostaglandin to aid in cervical dilation, along with other medications to cause the uterus to contract. Dr. Carhart inserts an instrument inside the uterus, grabs a portion of the fetus, pulls it through the cervical os, and dismembers various fetal parts by the traction created between the instrument and the cervical os. The tearing of the fetal parts from the fetal body is accomplished by means of traction at the cervical os. As stated by Dr. Carhart, "[T]he dismemberment occurs between the traction of . . . my instrument and the counter-traction of the internal os of the cervix." See *Carhart*, 11 F. Supp. 2d at 1104.

<sup>123</sup> See *Stenberg*, 120 S. Ct. at 2607.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2607 (2000) (*along* D. NICHOLS & CLARKE-PEARSON, GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY (2000)).

<sup>128</sup> See *id.* at 2607.



the cervix.<sup>129</sup> The fetus is then removed from the uterus through the cervix, while remaining intact (in one pass, rather than in several passes).<sup>130</sup> The technique is used after sixteen weeks at the earliest, when vacuum aspiration becomes ineffective because the fetal skull becomes too large to pass through the cervix.<sup>131</sup> The intact D&E can proceed in one of two ways, depending on the presentation of the fetus.<sup>132</sup> First, if the fetus presents head first, the physician collapses the skull and then extracts the entire fetus through the cervix.<sup>133</sup> If the fetus presents feet first, however, the physician pulls the fetal body through the cervix, *then* collapses the skull and extracts the fetus.<sup>134</sup> This second version of the intact D&E is commonly known as the dilation and extraction method (D&X).<sup>135</sup>

The D&X procedure, according to the AMA, may minimize trauma to the woman's uterus, cervix, and other vital organs.<sup>136</sup> Intact removal of the fetus minimizes the risk of damage to maternal structures from repeated use of instrumentation in the uterine cavity.<sup>137</sup> Also, the intact removal of the fetus lowers maternal complications by preventing sharp fragments, such as pieces of long bones or skull fragments, from passing through the cervical os without some kind of covering or protection.<sup>138</sup>

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<sup>129</sup> See *id.*; see also *Hope*, 195 F.3d at 861-62.

<sup>130</sup> See *Stenberg*, 120 S. Ct. at 2607.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2607 (2000).

<sup>134</sup> See *id.* To collapse the fetal skull and evacuate its contents in order to pull it through the cervical canal, the physician uses an instrument to either tear or perforate the skull to allow insertion of a suction tube and removal of the cranial contents. Sometimes he will crush the skull, rather than pierce it. See *Carhart*, 11 F. Supp. 2d at 1106.

<sup>135</sup> See *Carhart*, 11 F. Supp. 2d at 1105. The AMA describes the D&X as "deliberate dilation of the cervix, usually over a sequence of days; instrumental conversion of the fetus to a footlong breech; breech extraction of the body excepting the head; and partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus; see also *Hope*, 195 F.3d at 861-62.

<sup>136</sup> See *Carhart*, 11 F. Supp. 2d at 1107 (citing the AMA Report).

<sup>137</sup> See *id.* The more times the physician must enter the uterus with an instrument, the more likely it becomes that an injury to the uterus will occur. The D&X procedure involves fewer insertions of forceps or other foreign objects into the uterus than a D&E because in a D&X the fetus is removed intact.

<sup>138</sup> See *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1107 (D. Neb. 1998).

When the fetus is intact, its bones are covered by fetal tissue, causing less trauma to the cervix.<sup>139</sup> Additionally, the D&X offers a more accurate assessment of whether the uterine cavity has been completely emptied.<sup>140</sup> Fetal and placental tissue or debris left in the uterus, as is possible with a D&E involving dismemberment, can cause infection, greater bleeding, and risk of absorption of the fetal tissue into the maternal bloodstream.<sup>141</sup> Finally, compression of the fetal skull, as performed in the D&X, enables the physician to obtain as little cervical dilation as possible in order to reduce other maternal complications at a later date.<sup>142</sup>

#### 4. Labor Induction

An alternative to both D&E and D&X, labor induction may also be used to induce abortion during the sixteenth to twenty-fourth week of gestation.<sup>143</sup> Labor is induced by introducing a hypertonic solution into the amniotic sac with the insertion of a needle through the abdomen.<sup>144</sup> The injection causes fetal demise and induces uterine contractions.<sup>145</sup> Over a period of several hours, the contractions cause dilation of the cervix and expulsion of the contents of the uterus.<sup>146</sup>

Labor induction is a rarely used procedure and presents a variety of problems.<sup>147</sup> The procedure can take over a week to complete; women may have reactions to the drugs used during

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<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.* at 1104-05. Dr. Jane Hodgson, founder of the American College of Obstetrics and Gynecology and author of 50 to 100 published articles on abortion, has performed or supervised at least 30,000 abortions since 1973. Dr. Hodgson is quoted as saying that, "leaving fetal parts in the uterus [is] a potentially 'horrible complication' that can cause infection and often results in perforation of the uterine wall by bony splinters."

<sup>142</sup> *See Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1099 (D. Neb. 1998). In Dr. Carhart's opinion, performing a D&X is much safer than performing a D&E that results in a dismembered fetus.

<sup>143</sup> *See id.* at 1108-09 (*citing* the AMA Report).

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See id.* For this reason, labor induction abortions are primarily done only in hospital settings.

the procedure; and, a segment of the population cannot undergo induction because of medical conditions like hypertension, heart disease, or diabetes.<sup>148</sup> Also, because this procedure is similar to labor during a full-term delivery, it involves the same complications, such as mild to severe abdominal pain, fear, and lack of control.<sup>149</sup>

### 5. *Hysterotomy and Hysterectomy*

Other abortion procedures available during the sixteenth through twenty-fourth week of pregnancy are the rarely used hysterotomy and hysterectomy.<sup>150</sup> Hysterotomy warrants major surgery in which an incision is made into the abdomen and uterine wall, from which the fetus and placenta are removed.<sup>151</sup> And, hysterectomy is appropriate only in cases in which there is a preexisting pathology.<sup>152</sup> According to the AMA, maternal mortality associated with these procedures is significantly greater than those associated with the other techniques.<sup>153</sup>

## C. PROCEDURAL HISTORY

### 1. *Carhart v. Stenberg* (1997)<sup>154</sup>

Dr. Leroy Carhart brought this lawsuit against the state of Nebraska seeking a preliminary injunction concerning the enforcement of Nebraska's partial birth abortion law.<sup>155</sup> Dr. Carhart claimed that the ban on partial birth abortions subjected women seeking abortions to an appreciably greater risk of injury or death than would be the case if Dr. Carhart was permitted to perform partial birth abortions of nonviable fetuses when he believed it medically necessary.<sup>156</sup> Such a ban, he argued, was an undue burden to women seeking abortions, and, therefore, violated the Due Process Clause of the Fourteenth

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<sup>148</sup> See *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1108-09 (D. Neb. 1998).

<sup>149</sup> See Walther, *supra* note 68, at 700.

<sup>150</sup> See *Carhart*, 11 F. Supp. 2d at 1110 (*citing* the AMA Report).

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1101 (D. Neb. 1998).

<sup>155</sup> See *id.* at 1099.

<sup>156</sup> See *id.* at 1120-21.

Amendment.<sup>157</sup> Dr. Carhart further argued that the statute was unconstitutionally vague.<sup>158</sup>

Because the ban on partial birth abortions prohibited Dr. Carhart's patients from choosing, with his advice, a safe and desired method of terminating pregnancy before viability (the D&X method),<sup>159</sup> the court found the ban to be unconstitutional. Specifically, the court found that the ban violated Dr. Carhart's patients' Fourteenth Amendment Due Process right to choose whether to terminate a pregnancy prior to viability.<sup>160</sup>

The District Court further concluded that the statute prohibited Dr. Carhart from using the standard D&E procedure, impacting every woman who sought an abortion from Carhart between the 16th and 20th week of pregnancy.<sup>161</sup> According to the District Court, the wording of the statute, fairly read, prohibited the D&E procedure.<sup>162</sup> Essentially, the ban prohibited Carhart from employing the most widely-used abortion technique for approximately 190 women each year, making it an undue burden.<sup>163</sup>

The District Court further held the statute unconstitutional on the basis of its vagueness.<sup>164</sup> According to the opinion, any criminal law, especially one banning protected constitutional freedoms like abortion, that fails to give fair warning or that allows arbitrary prosecution is void for vagueness.<sup>165</sup> And, although it is clear that the vaginal delivery of an arm or leg is a substantial portion of a fetal body, it is unclear what more the

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<sup>157</sup> See *id.*

<sup>158</sup> See *id.* at 1121.

<sup>159</sup> See *id.* at 1123. The court concluded that the D&X procedure is appreciably safer than all other forms of abortion during the relevant gestational time.

<sup>160</sup> See *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1127 (D. Neb. 1998).

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 1128. In sum, when using the D&E, the physician routinely dismembers a leg or arm from a nonviable, yet living, fetus. In any sensible and ordinary reading of the word, a leg or arm is "substantial." The physical act of dismemberment of this substantial portion of this intact fetus occurs partly in the vaginal cavity. The physician deliberately intends that all of these events occur in order to perform the D&E, a procedure the physician knows and deliberately intends will kill the nonviable living fetus.

<sup>163</sup> See *id.* at 1127.

<sup>164</sup> See *id.* at 1131.

<sup>165</sup> See *id.* at 1132.

term "substantial portion" may mean.<sup>166</sup> The term "substantial portion" is meaningless to doctors, lay people, and prosecutors alike, rendering the entire statute void for vagueness and, therefore, unconstitutional.<sup>167</sup>

2. *Carhart v. Stenberg* (1999)<sup>168</sup>

On appellate review, the Eighth Circuit affirmed the judgment of the District Court.<sup>169</sup> Under the Nebraska partial birth abortion statute, the court noted, a person is prohibited from "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the child."<sup>170</sup> The court explained that although it had a duty to give the statute a construction that would avoid any constitutional doubts, it could not twist the words of the statute to give them a meaning they could not reasonably bear.<sup>171</sup> To that end, while the State argued that the statute intended only to ban the D&X procedure, the court concluded that the language of the statute described a procedure which encompassed more than just D&X.<sup>172</sup> Specifically, the Nebraska statute described a method of abortion that included the D&E procedure.<sup>173</sup>

<sup>166</sup> See *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1131 (D. Neb. 1998).

<sup>167</sup> See *id.* at 1132.

<sup>168</sup> *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999).

<sup>169</sup> See *id.* at 1152.

<sup>170</sup> *Id.* at 1150 (citing Neb. Rev. Stat. § 28-326(9)).

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* The crucial problem is the term "substantial portion," which is nowhere defined in the statute. If "substantial portion" means an arm or a leg, which the Court believed it does, then the ban on partial birth abortions encompasses both the D&E and D&X procedures. The State defined the proscribed procedure as involving the intentional (1) partial delivery of a living fetus vaginally; (2) killing the fetus; and (3) completing the delivery. But, as the Court noted, the D&E procedure involves all three of those steps. In a D&E, the physician intentionally brings a substantial part of the fetus into the vagina, dismembers the fetus—leading to fetal demise—and completes the delivery. Additionally, in order to qualify as a partial birth abortion in Nebraska, the abortion must be performed by someone who knows that the procedure "will kill the unborn child and does kill the unborn child." In the D&E, as in any abortion procedure, the physician performing the procedure intends to kill the unborn child and knows that the procedure will do so.

Once the court determined that the Nebraska statute banned the D&E procedure, as well as the D&X procedure, it turned to the issue of whether such a ban imposed an undue burden on women seeking second trimester abortions.<sup>174</sup> The court cited *Voinovich*<sup>175</sup> for the proposition that any abortion regulation that inhibits the vast majority of second trimester abortions clearly has the effect of "placing a substantial obstacle in the path of a woman seeking a pre-viability abortion."<sup>176</sup> Accordingly, because the Nebraska ban on partial birth abortions encompassed the D&E procedure, the most commonly-used second trimester abortion, it was again deemed an undue burden on a woman's right to choose to terminate her pregnancy.<sup>177</sup>

### 3. *Stenberg v. Carhart* (2000)

The United States Supreme Court granted certiorari<sup>178</sup> on January 14, 2000, to resolve the split among the circuits as to whether state statutes banning partial birth abortions are constitutional.

## III. SUMMARY OF THE OPINIONS

### A. THE MAJORITY OPINION

In an opinion written by Justice Breyer,<sup>179</sup> the Supreme Court affirmed the Eighth Circuit's holding that Nebraska's statute banning partial birth abortion was unconstitutional.<sup>180</sup>

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<sup>174</sup> See *id.* at 1150-51.

<sup>175</sup> See *Woman's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997). The *Voinovich* Court based its reasoning on the *Danforth* holding. In *Danforth*, the Court struck down the ban of the saline amniocentesis method of abortion because it would inhibit the vast majority of abortions after the first 12 weeks of pregnancy, forcing a woman to undergo a method of abortion more dangerous to her health. See *Danforth*, 428 U.S. at 79. The *Danforth* Court's analysis, although based on the *Roe* trimester framework, was consistent with *Casey*'s undue burden standard, and therefore provided guidance on the issue of whether banning a particular and commonly used method of abortion could constitute an undue burden.

<sup>176</sup> *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999).

<sup>177</sup> See *id.*

<sup>178</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2598 (2000).

<sup>179</sup> See *id.* at 2604. Justices Stevens, O'Connor, Souter, and Ginsburg joined Justice Breyer in the majority opinion. Justice Stevens filed a concurring opinion, in which Justice Ginsburg joined. Justice O'Connor filed a concurring opinion. Justice Ginsburg filed a concurring opinion, in which Justice Stevens joined.

<sup>180</sup> See *id.* at 2617.

Following a thorough discussion of the different methods of abortion currently available,<sup>181</sup> the majority first concluded that the Nebraska statute was unconstitutional because it lacked any exception for the preservation of the health of the mother.<sup>182</sup> Breyer noted that the decision in *Casey* reiterated the decision in *Roe* that "subsequent to viability, the State in promoting its interest in . . . human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*"<sup>183</sup> Therefore, the Court argued, since the law requires a health exception in order to validate a post-viability abortion, it, at a minimum, requires the same with respect to pre-viability regulation.<sup>184</sup> After all, while states can regulate and even proscribe *post-viability* abortions with no federal interference whatsoever, in order to regulate *pre-viability* abortions, states are limited in that they must first show that the regulation does not impose an undue burden on the woman seeking the abortion.<sup>185</sup> Further, according to the Court, a risk to a woman's health is the same whether it happens from regulating a particular method of abortion, or from prohibiting abortion entirely.<sup>186</sup> Thus, the lack of a health exception in the Nebraska statute rendered it unconstitutional.<sup>187</sup>

While Nebraska responded that there is no need for a health exception to the statute because safe alternatives remain available and because a ban on partial birth abortions would create no risks to the health of women, the Court disagreed.<sup>188</sup> In fact, the Court found that significant medical authority supports the proposition that in some circumstances, the D&X is the safest method of abortion.<sup>189</sup>

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<sup>181</sup> See *id.* at 2605-2608. For a detailed description of the different abortion methods, see *supra* Part II(B).

<sup>182</sup> See *id.* at 2609.

<sup>183</sup> *Id.* See also *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. at 879; *Roe v. Wade*, 410 U.S. 113, 164-65 (emphasis added).

<sup>184</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2609 (2000). The state's interest in regulating abortions pre-viability is considerably weaker than post-viability.

<sup>185</sup> See *Casey*, 505 U.S. at 874.

<sup>186</sup> See *Stenberg*, 120 S. Ct. at 2609.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* at 2610.

<sup>189</sup> See *id.* The Court relied heavily on the medical evidence put forth in the District Court opinion. On the basis of medical testimony, the District Court concluded that

In response to the Court's findings, Nebraska put forth several arguments.<sup>190</sup> First, the State asserted that the D&X procedure is "little-used" and only by "a handful of doctors."<sup>191</sup> The Court, however, deemed this argument irrelevant.<sup>192</sup> Even if the D&X is infrequently used, the health exception question "is whether protecting women's health requires an exception for those infrequent occasions."<sup>193</sup> And, as the Court analogized, a rarely-used treatment might be necessary to treat a rarely occurring disease that could strike anyone; thus, the state could not prohibit a person from obtaining the treatment "simply by pointing out that most people do not need it."<sup>194</sup>

Next, the State asserted that the D&E method of abortion and labor induction are "safe alternative procedures."<sup>195</sup> However, the District Court, relying on different expert testimony, believed that although the D&E and labor induction methods are safe, the D&X is significantly safer in certain circumstances.<sup>196</sup> The Supreme Court adopted the District Court's opinion regarding this argument.<sup>197</sup>

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Carhart's D&X procedure was safer than the D&E and other abortion procedures during the relevant gestational period in the ten-to-twenty cases per year that present to Carhart. *See Carhart v. Stenberg*, 11 F. Supp. 2d at 1126. Because the fetus is passed through the cervix with a minimum of instrumentation, operating time, blood loss, and risk of infection are reduced; there is less chance of complications from bony fragments and instrument-inflicted damage to the uterus and cervix; and it eliminates the possibility of complications arising from retained fetal parts. *See id.* Moreover, the District Court also noted that a select panel of American College of Obstetricians and Gynecologists concluded that the D&X "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of the mother." *Id.* at 1105, n. 10 (quoting American College of Obstetricians and Gynecologists' statement of police on intact dilation and extraction).

<sup>190</sup> *See Stenberg*, 120 S. Ct. at 2610-12.

<sup>191</sup> *Id.*

<sup>192</sup> *See id.* at 2611.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 2610.

<sup>196</sup> *See id.* at 2611. According to the AMA, statistical data suggests that the D&X procedure is appreciably safer than all other forms of abortion during the relevant gestational time. Maternal mortality rates for induced abortion procedures at 13 weeks' gestation or later in the United States between 1974-1987 were (per 100,000 abortions): D&E—3.7 deaths; induction—7.1 deaths; hysterectomy/hysterotomy—51.6 deaths. For the gestational period between the 16th and 20th week: D&E—6.5 deaths; induction—7.9 deaths; hysterectomy/hysterotomy—103.4 deaths. Moreover, the risk of complications is as important as the mortality risk. The complication rate for the D&E is only 7 per 1000, compared to between 21 and 25 per 1000 for induction procedures. A much greater risk is associated with other procedures such as hys-



The State then put forth the argument that the ban would not increase a woman's risk of several rare abortion complications.<sup>198</sup> In response, the Court adopted the District Court's findings once again and opined that the D&X actually reduces the risk of complications during abortions.<sup>199</sup>

The Association of American Physicians and Surgeons, as *amici* supporting Nebraska, argued that elements of the D&X may actually create special risks, including cervical incompetence caused by overdilation.<sup>200</sup> In response to this argument, the Court turned to the American College of Obstetricians and Gynecologists ("ACOG"), which denied that the D&X generally poses greater risks than the alternatives.<sup>201</sup> The State also noted that there are no medical studies establishing the safety of the D&X procedure; the Court agreed with this assertion, but found ACOG's assertion that D&X can be the most applicable procedure to be persuasive.<sup>202</sup>

Finally, the State argued that the ACOG had qualified its position that the D&X may be the "best or most appropriate procedure" by adding that they could identify no particular circumstances under which the D&X would be the only option to save the life or preserve the health of the mother.<sup>203</sup> The Court responded that although the ACOG was unable to identify a specific circumstance in which the D&X would be the only option to save the life or preserve the health of the mother, it does report that there is medical evidence that the D&X may at times be a safer procedure than other available alternatives.<sup>204</sup>

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terectomies. See *Stenberg v. Carhart*, 11 F. Supp. 2d at 1116-17. Because the D&X is essentially a variant of the D&E, there are no separate statistics comparing the D&E and the D&X. However, Dr. Haskell has testified that his use of the D&X procedure has resulted in no serious complications in approximately 1000 procedures, while out of approximately 1000 D&E procedures, two patients had serious complications. See Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 360 (Winter, 1998).

<sup>197</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2610-12 (2000).

<sup>198</sup> See *id.* at 2610.

<sup>199</sup> See *id.* at 2611.

<sup>200</sup> See *id.* at 2610.

<sup>201</sup> See *id.* at 2611 (citing *amici curiae* Brief of American College of Obstetricians and Gynecologists, *et al.* at 23-24).

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See *id.* at 2612 (citing Brief of American College of Obstetricians and Gynecologists at 21-22).

In short, the Court responded to each argument, concluding that they were all insufficient to demonstrate that Nebraska's law needed no health exception.<sup>205</sup> Further, the Court argued that the division of medical opinion about the matter means, at most, uncertainty—a factor that signals the presence of risk, not its absence.<sup>206</sup> There are highly knowledgeable and qualified experts on both sides of this issue, and where a significant amount of medical opinion believes that a procedure may expose unnecessary risk to some patients and has valid medical reasons to support its view, the presence of a different view in itself does not prove the contrary.<sup>207</sup> Because it is possible that the absence of a health exception could place women at an unnecessary risk of tragic health consequences, the statute in question must contain such an exception.<sup>208</sup>

The next issue the majority addressed was whether the statute applied to the more commonly used D&E procedure, as well as to the D&X procedure, thereby unduly burdening a woman seeking a pre-viability abortion.<sup>209</sup> Concerning this issue, the Court agreed with the Eighth Circuit that it did so apply.<sup>210</sup>

As the Court noted, even if the statute's basic aim was to ban the D&X procedure only, its language made clear that it also covered other procedures, and specifically, the D&E procedure.<sup>211</sup> Both procedures can involve the introduction of a substantial portion<sup>212</sup> of a still living fetus, through the cervix, into the vagina.<sup>213</sup> Although the Nebraska Attorney General argued that the statutory term "substantial portion" mean "the child up to the head," the Court refused to accept his interpretation, citing to Supreme Court precedent that the Court need not give

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<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 2612-13.

<sup>207</sup> *See id.* at 2613.

<sup>208</sup> *See id.* ("Nebraska has not convinced us that a health exception is 'never necessary to preserve the health of a woman.'") (*citing* Reply Brief for Petitioners at 4).

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* at 2614.

<sup>212</sup> *See id.* at 2613. The Court agreed with the District Court that an arm, a foot, or a leg does, in fact, constitute a "substantial portion" of the fetus.

<sup>213</sup> *See id.* at 2614.

controlling weight to State Attorneys' General interpretive views.<sup>214</sup>

The next argument the Court struck down concerned the statutory words' "partial delivery."<sup>215</sup> Proponents of the statute claimed that the introduction of merely a limb into the vagina does not involve "delivery of the fetus," so the statutory words could be read to exclude the D&E.<sup>216</sup> However, in response, the Court argued that obstetric textbooks and even dictionaries routinely use the term "delivery" to describe any facilitated removal of tissue from the uterus, not only the removal of an intact fetus.<sup>217</sup>

According to the Court, using this statute, some prosecutors or future Attorneys' General may choose to bring action against physicians who perform the D&E, the most commonly used method for performing pre-viability abortions.<sup>218</sup> Thus, all physicians who perform second trimester abortions using the D&E must fear prosecution.<sup>219</sup> To that end, the statute imposed an undue burden upon a woman's right to make an abortion decision and is, therefore, unconstitutional.<sup>220</sup>

#### B. JUSTICE STEVENS' CONCURRENCE

In a brief concurrence,<sup>221</sup> Justice Stevens explained that because the liberty guaranteed in the Fourteenth amendment encompasses a woman's right to choose abortion, the state has no legitimate interest in requiring the physician performing the abortion to follow any procedure other than the one the physician believes will be in the best interests of the mother.<sup>222</sup> Additionally, Justice Stevens pointed out that both the D&E and D&X procedures are equally gruesome and are performed at a

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<sup>214</sup> *See id.*

<sup>215</sup> *See id.* at 2616.

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See id.* at 2617.

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

<sup>221</sup> *See id.* (Stevens, J., concurring). Justice Ginsburg joined in Justice Stevens' concurrence.

<sup>222</sup> *See id.* (Stevens, J., concurring).

late stage of gestation; banning one but not the other, therefore, is irrational.<sup>223</sup>

### C. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor, in her concurrence, echoed the reasoning of the Majority opinion. First, she argued that the Nebraska statute was irreconcilable with *Casey* because it lacked an exception for the preservation of the health of the mother.<sup>224</sup> Further, O'Connor argued that medical evidence had established that the statute banned the D&E, as well as the D&X procedure, thereby unduly burdening a woman's right to choose abortion.<sup>225</sup>

Unlike the majority opinion, however, Justice O'Connor touched on the issue of similar statutes from other states that are more narrowly drawn to proscribe the D&X procedure alone.<sup>226</sup> If the Nebraska statute limited its application to the D&X procedure alone and included an exception for the life and the health of the mother, Justice O'Connor opined, the question presented to the Supreme Court in this case would be very different.<sup>227</sup> However, she offered no indication of what the resolution would be.

### D. JUSTICE GINSBURG'S CONCURRENCE

In the final concurrence, Justice Ginsburg<sup>228</sup> emphasized the fact that any ban on partial birth abortions does not save any fetus from destruction, as it targets only a method of performing

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<sup>223</sup> See *id.* (Stevens, J., concurring).

<sup>224</sup> See *id.* at 2618. (O'Connor, J., concurring).

<sup>225</sup> See *id.* at 2619. (O'Connor, J., concurring).

<sup>226</sup> See *id.* (O'Connor, J., concurring). Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion. For example, the Kansas statute states that its ban does not apply to the "(A) suction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman." The Utah statute similarly provides its prohibition "does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion."

<sup>227</sup> See *id.* (O'Connor, J., concurring).

<sup>228</sup> See *id.* at 2620. (Ginsburg, J., concurring). Justice Stevens joined in Justice Ginsburg's concurrence

abortion.<sup>229</sup> Nor does the statute seek to protect the health of lives of women.<sup>230</sup> Rather, bans on partial birth abortions "seek to chip away at the private choice shielded by *Roe v. Wade*, even as modified by *Casey*."<sup>231</sup>

#### E. CHIEF JUSTICE REHNQUIST'S DISSENT

In a very brief dissent, Chief Justice Rehnquist reminded the Court that he dissented from the *Casey* opinion and still does not agree with its holding.<sup>232</sup> He then stated his belief that Justices Kennedy and Thomas correctly applied the *Casey* principles in their dissents, and he simply joined in their opinions.<sup>233</sup>

#### F. JUSTICE SCALIA'S DISSENT

Justice Scalia, in his dissent, first touched on the issue of whether the ban on partial birth abortions encompassed more than the D&X procedure.<sup>234</sup> Without much discussion, Justice Scalia simply concluded that the Majority had abandoned the long-standing principle that ambiguously worded statutes should always be read to avoid constitutional challenge.<sup>235</sup>

He then discussed the subjective nature of the "undue burden" test, claiming that it is in reality a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of the fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to terminate it.<sup>236</sup>

Justice Scalia concluded his dissent by suggesting that the Court had involved itself in politics, as opposed to interpreting the Constitution.<sup>237</sup> He argued that the Court should not be in the abortion umpiring business, but rather should leave the issue for the people to decide.<sup>238</sup>

<sup>229</sup> See *id.* (Ginsburg, J., concurring).

<sup>230</sup> See *id.* (Ginsburg, J., concurring).

<sup>231</sup> *Id.* (Ginsburg, J., concurring).

<sup>232</sup> See *id.* at 2620. (Rehnquist, J., dissenting).

<sup>233</sup> See *id.* at 2621. (Rehnquist, J., dissenting).

<sup>234</sup> See *id.* (Scalia, J., dissenting).

<sup>235</sup> See *id.* (Scalia, J., dissenting).

<sup>236</sup> See *id.* at 2622. (Scalia, J., dissenting).

<sup>237</sup> See *id.* at 2622-23 (Scalia, J., dissenting).

<sup>238</sup> See *id.* (Scalia, J., dissenting).

## G. JUSTICE KENNEDY'S DISSENT

Justice Kennedy began his dissent by graphically describing the way in which a fetus is terminated during both a D&E abortion<sup>239</sup> and a D&X abortion.<sup>240</sup> He then argued that in reaching its decision in this case, the Majority misunderstood *Casey*.<sup>241</sup> He claimed that the main premise of *Casey* was that states were granted an important constitutional role in defining their interests in the abortion debate,<sup>242</sup> and that although Nebraska put forth a number of legitimate interests in banning partial birth abortions,<sup>243</sup> the Court simply ignored them.<sup>244</sup> Although the Court was unable to distinguish the D&E from the D&X in terms of *scientific* means, Justice Kennedy noted that the state of Nebraska had a right to recognize a *moral* difference between the two procedures.<sup>245</sup> In a D&X, the fetus is killed outside the womb and, therefore, bears a closer resemblance to infanticide, which could present a greater disrespect for human life and a consequent greater risk to the medical profession and society.<sup>246</sup> For this reason, Justice Kennedy argued, the holding in this case is irreconcilable with *Casey*'s assurance that the states interest in promoting respect for life is "more than marginal."<sup>247</sup>

Concerning the Majority's argument that the Nebraska statute was unconstitutional because it lacked a health exception, Justice Kennedy's response was simply that there have been no studies that support the contention that the D&X abortion

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<sup>239</sup> See *Stenberg*, 120 S. Ct. at 2624 (Kennedy, J., dissenting). ("The fetus, in many cases, dies just as a human adult or child would; it bleeds to death as it is torn from limb to limb (referring to the D&E procedure).")

<sup>240</sup> See *id.* (Kennedy, J., dissenting). ("Witnesses report observing the portion of the fetus outside the woman react to the skull penetration.")

<sup>241</sup> See *id.* at 2625 (Kennedy, J., dissenting).

<sup>242</sup> See *id.* (Kennedy, J., dissenting). *Casey* held that cases decided under the trimester framework established in *Roe* had given state interests too little acknowledgment. See *Casey*, 505 U.S. at 873.

<sup>243</sup> See *Stenberg*, 120 S. Ct. at 2625 (Kennedy, J., dissenting). States have an interest in forbidding medical procedures that might cause medical professionals or even society as a whole to become insensitive, even disdainful, to life. Or, a state might have an interest in ensuring that their medical professionals are viewed as healers, and not killers.

<sup>244</sup> See *id.* (Kennedy, J., dissenting).

<sup>245</sup> See *id.* at 2626 (Kennedy, J., dissenting).

<sup>246</sup> See *id.* (Kennedy, J., dissenting).

<sup>247</sup> See *id.* at 2627-28 (Kennedy, J., dissenting).

method is any safer than other available abortion methods.<sup>248</sup> With that noted, Justice Kennedy referred back to the *Casey* decision requiring that a regulation impose a *significant* threat to the life or health of a woman before its application imposed an undue burden.<sup>249</sup> He argued that unsubstantiated marginal health differences, does not amount to a significant threat to the life or health of the mother and, therefore, cannot constitute a substantial obstacle to the abortion right.<sup>250</sup>

Further, Justice Kennedy opined that if the health of the mother is put to the discretion of the doctor, the health of the mother standard is basically eviscerated.<sup>251</sup> Any doctor could say that any procedure is necessary for the health of the mother.<sup>252</sup> This, according to Justice Kennedy, is the vice of a health exception resting in the physician's discretion.<sup>253</sup> He suggested that this standard must be reigned in.<sup>254</sup>

Next, Justice Kennedy tackled the issue of whether the statute proscribed both the D&X and the D&E procedure. First, he explained that the term "partial birth abortion" is consistently associated with the D&X procedure.<sup>255</sup> He next addressed the true meaning of the word "delivery,"<sup>256</sup> claiming that there is no delivery in the D&E procedure, excluding it from the ban on partial birth abortions.<sup>257</sup> Justice Kennedy argued that the Ma-

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<sup>248</sup> See *id.* at 2628 (Kennedy, J., dissenting).

<sup>249</sup> See *id.* (Kennedy, J., dissenting); see also *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 880 (1992).

<sup>250</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2628-29 (2000) (Kennedy, J., dissenting).

<sup>251</sup> See *id.* at 2631 (Kennedy, J., dissenting).

<sup>252</sup> See *id.* (Kennedy, J., dissenting). ("A ban which depends on the 'appropriate medical judgment' of Dr. Carhart is no ban at all.")

<sup>253</sup> See *id.* (Kennedy, J., dissenting).

<sup>254</sup> See *id.* (Kennedy, J., dissenting).

<sup>255</sup> See *id.* at 2632 (Kennedy, J., dissenting). Dr. Carhart's own leading expert prefaced his description of the D&X by describing it as the procedure which, in the lay press, has been called a partial birth abortion. And, the AMA has declared that partial birth abortion legislation is by its name aimed exclusively at the D&X procedure.

<sup>256</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2632. (2000) (Kennedy, J., dissenting). ("Only removal of an intact fetus can be described as a "delivery" of a fetus and only the D&X involves an intact fetus.")

<sup>257</sup> See *id.* (Kennedy, J., dissenting). In a D&E, portions of the fetus are pulled into the vagina with the intention of dismembering the fetus by using the traction at the opening between the uterus and vagina; this cannot be considered a delivery of a por-

jority, in reaching its holding, ignored the settled rule against deciding unnecessary constitutional questions by concluding that the Nebraska statute encompassed more than the D&X method of abortion.<sup>258</sup>

#### H. JUSTICE THOMAS'S DISSENT

Justice Thomas began his lengthy dissent<sup>259</sup> with the recognition of the Court's acknowledgment in *Casey* that states have a legitimate role in regulating abortion and that states have an interest in respecting fetal life at all stages of development.<sup>260</sup> He continued to argue that if the Nebraska statute was unconstitutional under *Casey*, then *Casey* meant nothing at all.<sup>261</sup>

Similar to the Majority opinion, Justice Thomas, in his dissent, offered detailed descriptions of all available abortion procedures.<sup>262</sup> He then addressed the issue of statutory interpretation and whether the Nebraska statute included a prohibition of the D&E method of abortion. Like Justice Kennedy, Justice Thomas found his answer in the term "delivery."<sup>263</sup> When read in context, the term "partial delivery," according to Justice Thomas, cannot be fairly interpreted to include removing pieces of an unborn child from the uterus one at a time.<sup>264</sup>

Additionally, according to Justice Thomas, the wording of the statute made it clear that the procedure that kills the fetus must be separate and apart from the "partial delivery into the vagina" of "a living unborn child or substantial portion thereof."<sup>265</sup> However, in a D&E, the physician does not "deliver"

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tion of a fetus. In Dr. Carhart's own words, the D&E "leaves the abortionist with a tray full of pieces."

<sup>258</sup> See *id.* at 2634.

<sup>259</sup> Justice Thomas was joined in his dissent by Chief Justice Rehnquist and Justice Scalia.

<sup>260</sup> See *id.* (Thomas, J., dissenting); see also *Casey*, 505 U.S. at 877. Justice Thomas further points out that although in his decision he adheres to the undue burden standard previously set forth by the Court, he makes it known that he disagreed strongly with the *Casey* holding. See *Stenberg*, 120 S. Ct. at 2634.

<sup>261</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2637 (2000) (Thomas, J., dissenting).

<sup>262</sup> See *id.* at 2637-40 (Thomas, J., dissenting). For a thorough discussion of these procedures, see *supra* Part III(B).

<sup>263</sup> See *Stenberg*, 120 S. Ct. at 2640 (Thomas, J., dissenting).

<sup>264</sup> See *id.* (Thomas, J., dissenting). ("Without question, one does not deliver a child when one removes the child from the uterus piece by piece, as in a D&E.")

<sup>265</sup> See *id.* at 2641 (Thomas, J., dissenting).



the child before performing the death-causing procedure because the dismemberment “delivery” is in itself the act that causes the fetus’s death.<sup>266</sup> And, Justice Thomas did not agree that removing a limb from the uterus would constitute a “substantial portion” of the fetus.<sup>267</sup>

Like the other dissenters, Justice Thomas also noted that the AMA and other medical authorities have equated the term “partial birth abortion” with the D&X procedure, and that several lower courts have acknowledged that “partial birth abortion” is commonly understood to mean D&X.<sup>268</sup> However, Justice Thomas, unlike the other dissenters, included the fact that “partial birth abortion” has been twice used by Congress, which described the procedure as separate and distinct from the D&E.<sup>269</sup> Finally, as Justice Thomas argued, were there any doubts as to the whether the plain language of the statute could apply to the D&E procedure, the Court was bound to consider whether a construction of the statute that would avoid constitutional challenge was available;<sup>270</sup> in this case, there was.<sup>271</sup>

Justice Thomas then attacked the Majority’s speculation that a Nebraska prosecutor or future Attorney General may attempt to stretch the statute to apply it to the D&E procedure.<sup>272</sup> A statute cannot be deemed unconstitutional on its face merely because one can imagine an aggressive prosecutor who would attempt an overly aggressive application of the statute.<sup>273</sup> The Court is not in the business of giving statutes the broadest definition imaginable.<sup>274</sup> Rather, as Justice Thomas, noted, the Court should ask whether the “ordinary person exercising ordi-

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<sup>266</sup> See *id.* (Thomas, J., dissenting).

<sup>267</sup> See *id.* (Thomas, J., dissenting).

<sup>268</sup> See *id.* at 2642 (Thomas, J., dissenting).

<sup>269</sup> See *id.* at 2643. (Thomas, J., dissenting).

<sup>270</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2644 (2000) (Thomas, J., dissenting). The term substantial portion was susceptible to a narrowing construction that would exclude the D&E procedure. Or, a Court could construe “for the purpose of performing a procedure” to mean “for the purpose of performing a separate procedure.”

<sup>271</sup> See *id.*

<sup>272</sup> See *id.* at 2647 (Thomas, J., dissenting).

<sup>273</sup> See *id.* (Thomas, J., dissenting).

<sup>274</sup> See *id.* (Thomas, J., dissenting).

nary common sense can sufficiently understand and comply with the statute.<sup>275</sup>

Turning to the question of whether the Nebraska statute is unconstitutional based on its lack of any exception for the preservation of the health of the mother, Justice Thomas again referred to *Casey*.<sup>276</sup> As he concluded, the ruling in *Casey*, requiring an exception for the health of the mother, addressed only those situations in which a woman must obtain an abortion because of some threat to her health from continued pregnancy.<sup>277</sup> However, *Casey* mentioned nothing at all about cases in which a physician considered one prohibited method of abortion to be preferable to permissible methods.<sup>278</sup> Justice Thomas opined that the Majority opinion twisted the *Casey* health exception to apply to a situation in which a woman desires, for whatever reason, an abortion and wishes to obtain the abortion by some particular method.<sup>279</sup> Simply stated, the Majority failed to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion to prefer one method over another.<sup>280</sup>

Justice Thomas then supported Justice Kennedy's argument that if the health of the mother is put into the discretion of the doctor, the health of the mother standard is eviscerated.<sup>281</sup> Any doctor could say that any procedure is necessary for the health of the mother.<sup>282</sup> Just because a procedure has some comparative health benefits does not make it a "necessary" procedure.<sup>283</sup> The broad health exception would impose unfettered abortion-on-demand because there will always be some physicians who conclude that some procedure is preferable.<sup>284</sup>

<sup>275</sup> *Id.* (Thomas, J., dissenting) (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n, of Letter Carriers*, 413 U.S. 548, 579 (1973)).

<sup>276</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2651 (2000) (Thomas, J., dissenting).

<sup>277</sup> See *id.* (Thomas, J., dissenting).

<sup>278</sup> See *id.* (Thomas, J., dissenting).

<sup>279</sup> See *id.* (Thomas, J., dissenting).

<sup>280</sup> See *id.* at 2652. (Thomas, J., dissenting).

<sup>281</sup> See *id.* (Thomas, J., dissenting).

<sup>282</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000). (Thomas, J., dissenting).

<sup>283</sup> See *id.* (Thomas, J., dissenting).

<sup>284</sup> See *id.* (Thomas, J., dissenting).

## IV. LEGAL ANALYSIS

In *Carhart*, the Court correctly held that the Nebraska statute banning partial birth abortions was unconstitutional.<sup>285</sup> The holdings in *Roe* and *Casey* make it clear that any abortion regulation must have an exception for the preservation of the life or the health of the mother;<sup>286</sup> the statute at issue did not.<sup>287</sup> Further, the statutory language and legislative history of the statute in question support the Court's conclusion that the D&E, as well as the D&X, method of abortion was banned, imposing an undue burden on any woman seeking a pre-viability abortion.<sup>288</sup>

Although correct, the *Carhart* holding was incomplete and unsatisfactory. Justice O'Connor, in her concurrence, touched on the concept of analyzing a statute narrowly tailored to proscribe only the D&X method of abortion and including an exception for the preservation of the health of the mother.<sup>289</sup> The Court, however, neglected to address this issue.<sup>290</sup> By first addressing (1) whether the lack of a health exception in this particular statute rendered it unconstitutional, and (2) whether the D&E was included in the ban, the Court did not have the opportunity to reach the issue of whether a ban of the D&X procedure, in itself, would constitute an undue burden. The Court should have declared a broader holding on the constitutionality of banning partial birth abortions, concluding that even a ban on the D&X procedure alone would constitute an undue burden.<sup>291</sup>

A. THE COURT CORRECTLY CONCLUDED THAT THE LACK OF A HEALTH EXCEPTION IN THE NEBRASKA STATUTE RENDERED IT UNCONSTITUTIONAL

In order to be deemed constitutional, abortion restrictions must contain adequate provisions to preserve a woman's life and

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<sup>285</sup> See *id.* at 2617.

<sup>286</sup> See *Roe*, 410 U.S. at 164-65; see also *Casey*, 505 U.S. at 879.

<sup>287</sup> See *Stenberg*, 120 S. Ct. at 2620. (O'Connor, J., concurring).

<sup>288</sup> See *id.* at 2617.

<sup>289</sup> See *id.* at 2619.

<sup>290</sup> See *id.*

<sup>291</sup> See Walther, *supra* note 68, at 695.

health, even post-viability.<sup>292</sup> And, an adequate life and health provision must cover not only situations where the woman is facing physical harm, but also situations where a woman is faced with the risk of severe psychological or emotional injury that may be irreversible.<sup>293</sup> In a medical emergency requiring quick responses to rapidly changing circumstances, allowing the attending physician the discretion to use the full range of treatment options is particularly crucial.<sup>294</sup> The Nebraska statute, however, contained no such health exception, rendering it unconstitutional.<sup>295</sup>

The wording of the relevant phrase in *Casey* is that the state can regulate, and even proscribe, abortion, "except when necessary, in appropriate medical judgment, for the preservation of the life of health of the mother."<sup>296</sup> As the Supreme Court concluded, the term "necessary" cannot refer only to absolute necessity or to absolute truth, as medical treatments and procedures are often considered appropriate (or not) in light of estimated comparative health risks (or benefits) in particular cases.<sup>297</sup> Further, the phrase cannot require absolute unanimity of medical opinion—doctors often differ in their estimation of comparative health risks and appropriate treatment.<sup>298</sup> In this instance, both the petitioner and respondent have adequate and reliable medical opinions about the necessity (or lack thereof) of the D&X procedure.<sup>299</sup> However, as the Court noted, this uncertainty signals the possible presence of risk.<sup>300</sup> If the D&X truly is the safest abortion method in some circumstances, the absence of a health exception will place women at an unnecessary risk of health consequences.<sup>301</sup> If, however,

<sup>292</sup> See *Roe*, 404 U.S. at 164-65; see also *Casey*, 505 U.S. at 879-80; see also Thornburgh, *supra* note 38, at 768-69.

<sup>293</sup> See *Casey*, 505 U.S. at 882 ("It cannot be questioned that psychological well-being is a facet of health.").

<sup>294</sup> See Brief of *Amici Curiae* in Support of Respondent, *supra* note 201, at 28-29.

<sup>295</sup> See *Stenberg*, 120 S. Ct. at 2620.

<sup>296</sup> See *Casey*, 505 U.S. at 879.

<sup>297</sup> See *Stenberg*, 120 S. Ct. at 2612.

<sup>298</sup> See *id.*

<sup>299</sup> See Brief of Respondent, at 32-34, *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000) (No. 99-830); but see Brief of Petitioners, at 35-47, *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000) (No. 99-830).

<sup>300</sup> See *Carhart*, 120 S. Ct. at 2612-13.

<sup>301</sup> See *id.* at 2613.

other methods of abortion are equally as safe, or even safer, the exception will merely turn out to be unnecessary.<sup>302</sup>

In response to the argument of Justices Thomas and Kennedy that, if able, a physician would perform the D&X procedure for reasons other than the health of the mother, such as financial gain,<sup>303</sup> it is highly unlikely. The D&X method requires less time than techniques which induce labor and, unlike most induction methods, the D&X can be performed on an outpatient basis.<sup>304</sup> The D&X, therefore, entails less expense to the patient and, consequently, less financial gain to the attending physician.<sup>305</sup> Furthermore, we must and do presume that a physician will do only what is in her patient's best interests.<sup>306</sup>

The statute's narrow life exception, permitting the physician to perform the banned procedure only if it is necessary to save the life of the mother,<sup>307</sup> is wholly inadequate. First, the life exception ignores the essential issue of mental and/or psychological illness, as discussed in *Casey*.<sup>308</sup> The psychological benefit of seeing and even holding an intact fetus is an advantage the patient realizes by choosing the D&X method.<sup>309</sup> At a Hearing before the House of Representatives concerning this issue, a woman spoke about her experience with the D&X method of abortion:

Thanks to the [D&X] procedure that Dr. McMahon uses in terminating these pregnancies, we got to hold her and be with her and love her and have pictures for a couple of hours, which was wonderful and heart-

<sup>302</sup> See *id.*

<sup>303</sup> See *id.* at 2652 (Thomas, J., dissenting). ("If the health of the mother is put into the discretion of the doctor, the health of the mother standard is essentially eviscerated.")

<sup>304</sup> See Massie, *supra* note 196, at 360. Abortions by induction are primarily performed in hospital settings. See *Carhart v. Stenberg*, 11 F. Supp. 2d, 1099, 1109. (D. Neb. 1998).

<sup>305</sup> See Massie, *supra* note 196, at 360.

<sup>306</sup> See 1 HIPPOCRATES, WORKS 299-301 (Francis Adams trans., New York, Loeb) available at <<http://www.humanities.cuny.cuny.edu/history/reader/hippoath.htm>> ("I swear . . . I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous . . . into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from any voluntary act of mischief and corruption.").

<sup>307</sup> See Neb. Rev. Stat. § 28-328(1).

<sup>308</sup> See *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992).

<sup>309</sup> See Massie, *supra* note 196, at 317. See also *Casey*, 505 U.S. at 882 ("It cannot be questioned that psychological well-being is a facet of health.").

breaking all at once. They had her wrapped in a blanket. We spent some time with her, said our goodbyes, and went back to the hotel.<sup>310</sup>

Further, genetic testing, useful for tracing the source of fetal abnormalities and in helping a couple's future family planning, is also possible when the fetus is intact, allowing for psychological comfort to the woman.<sup>311</sup>

Additionally, the life exception of the statute would chill physicians from life-saving care.<sup>312</sup> Even physicians who act in good faith in a medical emergency, believing that the only way to save the life of the mother is to perform a "partial birth abortion," will risk imprisonment and loss of their license if their decisions are later second-guessed.<sup>313</sup> Dr. Warren Hern,<sup>314</sup> at a Senate Hearing, emphasized the importance of according physicians the right to make professional judgments based on their expertise, particularly in on-the-spot situations:

While I may choose a different method of performing a late abortion, I support the right of my medical colleagues to use whatever methods they deem appropriate to protect the woman's safety during this difficult procedure. It is simply not possible for others to second-guess the surgeon's judgment in the operating room. That would be dangerous and unacceptable . . . [When I was forced to act quickly to perform abortions in order to save women's lives], Mr. Chairman, I did not have time to consult the United States Senate on the proper method of performing the abortions.<sup>314</sup>

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<sup>310</sup> Partial-Birth Abortion: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong. 64, 72 (1995) (statement of Tammy Watts).

<sup>311</sup> See *id.* at 75. "If I can keep one family from going through what we went through, it would make her life have some meaning. So, they're doing the testing now. And because Dr. McMahon does the procedure the way he does, it made the testing possible."

<sup>312</sup> See Brief of Amici Curiae in support of Respondent, *supra* note 201, at 29-30.

<sup>313</sup> See *id.*

<sup>314</sup> Dr. Warren Hern, M.D., M.P.H., Ph.D., is the Director of the Boulder, Colorado, Abortion Clinic and a Clinical Professor in the Obstetrics and Gynecology Department at the University of Colorado Health Sciences Center in Denver. He is also the author of *Abortion Practice*, the principle medical textbook on abortion procedures, and a well-known authority on the subject, as he specializes in difficult, late-term abortions. See Massie, *supra* note 196, 335, 373.

<sup>314</sup> Massie, *supra* note 196, at 373. (citing The Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Committee on the Judiciary, 104th Cong. 248, 248 (1995)).

The statute hinders a physician's ability to provide her patients with the best medical care.<sup>315</sup> Because the statute could force a woman whose health is threatened by her pregnancy to choose between undergoing an abortion more dangerous to her health than the D&X procedure<sup>316</sup> and continuing her pregnancy in the face of potentially serious health risks, the statute is irreconcilable with the holding in *Casey*.<sup>317</sup> It is, therefore, unconstitutional.<sup>318</sup>

Justice Thomas's argument that the health exception, as reaffirmed in *Casey*, extends only to women who seek abortions for health-related concerns, and not to women who seek abortions for non-health-related issues, but desire one method of abortion over another due to health concerns,<sup>319</sup> is a misreading of *Casey*. In *Casey*, the Court specifically asserted that the only issue at stake under the "undue burden" regime is the woman's right to make the ultimate decision whether to terminate her pregnancy.<sup>320</sup> Hence, if a woman desires an abortion but decides not to get one *because* of health concerns from a particular method, those health concerns would serve as a substantial obstacle to her decision whether to abort her pregnancy.<sup>321</sup> This, as defined in *Casey*, constitutes an undue burden.<sup>322</sup>

B. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE INDICATE THAT THE BAN INCLUDED THE D&E PROCEDURE, AS WELL AS THE D&X PROCEDURE, THEREBY UNDULY BURDENING A WOMAN'S RIGHT TO CHOOSE A PREVIABILITY ABORTION

Although the State and the dissenters argued that the ambiguous wording of the statute should have forced the Court to

<sup>315</sup> See *id.*

<sup>316</sup> See Brief of Amici Curiae in support of Respondent, *supra* note 201, at 29-30. If a hysterotomy or hysterectomy would preserve the health of a woman, the Nebraska statute would require the physician to resort to those procedures, even though they present far greater risks to the woman's health and future fertility than the banned procedures. *Id.*

<sup>317</sup> See *id.* at 29.

<sup>318</sup> See *id.*

<sup>319</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2651 (2000) (Thomas, J., dissenting).

<sup>320</sup> See *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 887 (1992).

<sup>321</sup> See *id.*

<sup>322</sup> See *id.*

interpret the statute in a way to avoid constitutional challenge,<sup>323</sup> the Eighth Circuit was correct in stating that, "it could not twist the words of the statute to give them a meaning they cannot reasonably bear."<sup>324</sup> The statute is impermissibly vague.<sup>325</sup> And, contrary to the State's assertion that "no reasonable person" could interpret the Act as applying to the D&E procedure,<sup>326</sup> all of the federal judges for the Court of Appeals<sup>327</sup> and five Supreme Court Justices<sup>328</sup> actually determined that the statute did ban the D&E procedure. Because the Courts, the plaintiffs, and the defendants failed to agree on the meaning of the terms, neither can ordinary people understand their meaning.<sup>329</sup> *At the very least*, therefore, the statute is impermissibly vague.

The main reason for the vagueness is the use of the term "substantial portion" in the statutory definition of partial birth abortion.<sup>330</sup> "[T]his term could be interpreted in vastly different ways by fair-minded people."<sup>331</sup> For instance, Dr. Carhart believes that the term "substantial portion" could mean any identifiable part of the fetus, including the umbilical cord, a foot, a finger, or a portion of the skull.<sup>332</sup> Dr. Stubblefield testified that the meaning of "substantial portion" was subject to opinion because "there is no legal or medical definition of what constitutes a substantial portion of an unborn child."<sup>333</sup> He further testified

<sup>323</sup> See *Stenberg*, 120 S. Ct. at 2634 (Kennedy, J., dissenting).

<sup>324</sup> See *Carhart v. Stenberg*, 192 F.3d 1142, 1150 (8th Cir. 1999).

<sup>325</sup> See Brief of Amici Curiae in support of Respondent, *supra* note 201, at 9-10.

<sup>326</sup> See Brief of Petitioners, *supra* note 299, at 15.

<sup>327</sup> See *Carhart*, 192 F.3d at 1150 ("The language of [the statute] describes a method of abortion that includes the D&E procedure, and the intent requirement of the statute does not work to protect physicians who perform the D&E procedure from violating the statute. [The statute] not only prohibits the D&X procedure, but the D&E procedure as well.").

<sup>328</sup> See *Stenberg*, 120 S. Ct. at 2609 ("[The statute] imposes an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself.").

<sup>329</sup> See Susan Michelle Gerling, *Recent Development: Virginia's Partial Birth Abortion Statute: An Unconstitutional Restriction on a Woman's Right to Have an Abortion*, 55 WASH. U. J. URB. & CONTEMP. L. 275, 295 (Winter, 1999).

<sup>330</sup> See Neb. Rev. Stat. § 28-326(9) (2000).

<sup>331</sup> Brief of Amici Curiae in support of Respondent, *supra* note 201, at 11 (internal quotation marks and citation omitted).

<sup>332</sup> See *Carhart*, 11 F. Supp. 2d 1099, 1118 (D. Neb. 1998).

<sup>333</sup> *Id.* Dr. Stubblefield is a professor and chairman of the Department of Obstetrics and Gynecology at the Boston University School of Medicine. See *id.* at 1109.



that if it means just more than a little bit of the fetus, the statute would be precluding most surgical abortions.<sup>334</sup> Dr. Riegel believes that a "substantial portion" means "probably over 50 percent of the size [of the fetus] . . . . It's a vague term."<sup>335</sup> Dr. Boehm reads "substantial portion" to mean more than a hand or a leg.<sup>336</sup> Specifically, Dr. Boehm believes, "I'm not sure that I can define that, but I don't think anyone has or could."<sup>337</sup> There are even numerous and conflicting explanations of the term in the statute's legislative history.<sup>338</sup> Unless physicians are given clear guidance about how much of a fetus can legally be removed from the woman's uterus before triggering the statute, they will be unable to conform their conduct appropriately.<sup>339</sup> Moreover, the variety of definitions of "substantial portion" are "fodder for arbitrary and discriminatory enforcement" of the statute.<sup>340</sup> And, as the Eighth Circuit noted, if "substantial portion" can mean an arm or a leg, then the ban clearly encompasses both the D&E and the D&X procedures.<sup>341</sup>

Additionally, the dissenters' argument that the statutory term "partially delivers" excludes the D&E procedure from the

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<sup>334</sup> See *id.* at 1118.

<sup>335</sup> *Id.* Dr. Riegel is an obstetrician, gynecologist, and infertility specialist. See *id.* at 1113.

<sup>336</sup> See *id.* at 1119. Dr. Boehm is board-certified in obstetrics and gynecology and maternal fetal medicine and has practiced in those areas since 1996. See *id.* at 1114.

<sup>337</sup> *Id.* at 1119.

<sup>338</sup> See Brief of Respondent, *supra* note 299, at 49-50. After stating that the term "substantial portion" could be easily defined, Senator Maurstad, a proponent of the statute, stated, "one-third of a fetus could be a substantial portion;" "one-fourth could be, depending on which fourth;" and "substantial portion would be subjective." He also agreed that "as small a portion of the fetus as a foot would constitute a substantial portion . . . as would a fetal hand." In fact, Senator Maurstad plainly acknowledged that dismembering the fetus after "more than a little bit" of it had been delivered into the vagina would violate the statute. Other senators, supporting the statute, were confused by the term, "substantial portion." One senator stated, "I would assume . . . substantial would mean a significant portion of that child;" another senator simply stated, "I think it would be difficult [for a physician reading the statute to understand what was meant by the words 'substantial portion']." *Id.* at 6 (citations omitted).

<sup>339</sup> See *id.* at 49-50.

<sup>340</sup> *Id.*

<sup>341</sup> See *Carhart v. Stenberg*, 192 F.3d 1142, 1150 (8th Cir. 1999). In the D&E procedure, the physician often inserts forceps into the uterus, grasps a part of the living fetus, and pulls that part of the fetus through the cervix. That part of the fetus is usually the arm or the leg.

ban<sup>342</sup> is invalid. As the Court noted, obstetric textbooks and even dictionaries use the term "delivery" to describe any facilitated removal of tissue from the uterus, not only the removal of an intact fetus.<sup>343</sup>

Once again, as the Eighth Circuit noted, although the Court has a duty to give the statute a construction that would avoid any constitutional doubts, it cannot twist the words of the statute to give them a meaning that they could not bear.<sup>344</sup> Because, as Dr. Stubblefield testified, there is no legal or medical definition as to what constitutes a "substantial portion" of an unborn child,<sup>345</sup> the Court is essentially unable to construct a meaning for the term in order to give the statute a more narrow reading. Thus, the statute is unconstitutionally vague.

By prohibiting multiple methods of abortion, including the most commonly used procedure for second-trimester, previability abortions (the D&E method), the statute succeeded in imposing an undue burden on women seeking abortions.<sup>346</sup> The Court in *Casey* declared that any regulation placing a substantial obstacle in the path of a woman seeking a previability abortion would constitute an "undue burden."<sup>347</sup> The statute at issue precludes a woman from consulting with her physician in an effort to choose the most appropriate and safest abortion procedure for her particular circumstances, forcing the woman and her physician to consider terminating her pregnancy by methods more dangerous to her health than the method outlawed.<sup>348</sup> Because the statute can be read to ban D&E procedures of all varieties, which account for more than ninety percent of post-first-trimester abortions performed in the United States, it

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<sup>342</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2616. The dissenters claim that the introduction of a limb or even of both limbs into the vagina does not constitute a "delivery." See *id.*

<sup>343</sup> See *id.* (citing *OBSTETRICS: NORMAL & PROBLEM PREGNANCIES* 388 (describing "delivery" of fetal membranes, placenta, and umbilical cord in the third stage of labor); B. MALOY, *MEDICAL DICTIONARY FOR LAWYERS* 221 (3d. ed. 1960) ("Also, the removal of a [fetal] part such as the placenta [constitutes delivery].")).

<sup>344</sup> See *Carhart*, 192 F.3d at 1150.

<sup>345</sup> See *Carhart*, 11 F. Supp. 2d 1099, 1118 (D. Neb. 1998).

<sup>346</sup> See *Stenberg*, 120 S. Ct. at 2617.

<sup>347</sup> See *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

<sup>348</sup> See Brief of Amici Curiae in support of Respondent, *supra* note 201, at 18.

places a substantial obstacle in the path of the woman seeking the abortion, rendering the statute unconstitutional.<sup>349</sup>

C. THE SUPREME COURT SHOULD HAVE DECLARED A BROADER HOLDING ON THIS ISSUE, CONCLUDING THAT EVEN A BAN ON THE D&X PROCEDURE ALONE WOULD CONSTITUTE AN UNDUE BURDEN

By first addressing the issues of whether the lack of a health exception and the unconstitutionally vague wording of the statute rendered it unconstitutional, the Court was unable to reach an answer to the ultimate question—if a statute is narrowly tailored to proscribe only the D&X procedure, as the State contends that this statute is, and includes a valid health exception, will such a ban impose an undue burden on a woman seeking an abortion?<sup>350</sup> Undoubtedly, this question will be presented to multiple lower courts, and presumably it will reach the Supreme Court once again.

Banning the D&X procedure, in itself, would create an undue burden on women by forcing them to choose alternative procedures to the D&X,<sup>351</sup> or no procedure at all, if she believes her health would be in danger. Depending on the physician's skill and experience, the D&X procedure can be the most appropriate abortion procedure for some women in certain circumstances.<sup>352</sup> The D&X presents a variety of potential safety advantages over other abortion procedures used during the same gestational period.<sup>353</sup> Compared to D&E procedures involving dismemberment, the D&X involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix.<sup>354</sup> There is also considerable evidence that the D&X reduces the risk of retained fetal tissue, a serious abortion complication that can cause maternal death.<sup>355</sup>

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<sup>349</sup> See *id.*; see also *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 79 (1976) (holding unconstitutional a ban on saline amniocentesis, then the most common method of post-first-trimester abortions).

<sup>350</sup> See *Stenberg*, 120 S. Ct. at 2619-20 (O'Connor, J., concurring).

<sup>351</sup> See *id.* at 2608.

<sup>352</sup> See *id.*

<sup>353</sup> See *id.*

<sup>354</sup> See *id.*

<sup>355</sup> See *id.*

Moreover, the D&X is more protective of future fertility, does not require hospitalization, and requires less time than other later term abortions.<sup>356</sup> Finally, the possible psychological benefit of seeing and holding an intact fetus is an advantage of the D&X procedure, as is genetic testing of intact fetuses, useful for tracing the source of fetal abnormalities.<sup>357</sup>

Additionally, patients who suffer from certain medical conditions benefit from the D&X procedure, instead of the D&E or induction method.<sup>358</sup> These patients include those who are more susceptible to uterine injury because of previous Caesarian sections or uterine scarring and those whose fetus is in the "double footling breech" position.<sup>359</sup> Further, a select panel, brought together by the ACOG, concluded that the D&X may actually be the "best or most appropriate procedure in a particular circumstance to save the life or preserve the health of the mother."<sup>360</sup>

The choice of abortion method should be made by the woman and her physician after considering which risks are more likely to affect the woman.<sup>361</sup> Eliminating the D&X procedure as an option creates an undue burden to the woman's right to an abortion because when she is faced with alternatives that pose greater risks to her health, she may be forced to choose a riskier procedure or even opt out of an abortion altogether.<sup>362</sup> And, as established years ago in *Danforth*, if a woman opts out of an abortion because the available alternatives are too risky, the ban of the procedure effectively acts as a substantial obstacle to her right to choose an abortion.<sup>363</sup> Although *Danforth* was decided during the trimester framework regime and before the majority in *Casey* gave added value to the states' interests in regulating abortions, the principle that regulations

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<sup>356</sup> See Massie, *supra* note 196, at 316.

<sup>357</sup> See *id.* at 316-317.

<sup>358</sup> See Walther, *supra* note 68, at 726.

<sup>359</sup> See *id.*

<sup>360</sup> See Brief of Amici Curiae in support of Respondent, *supra* note 201, at 22-23.

<sup>361</sup> See *id.* at 28.

<sup>362</sup> See *id.* at 28-29.

<sup>363</sup> See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 78-79 (1976).

acting as substantial obstacles to a woman's right to choose abortion are unconstitutional survived the *Casey* opinion.<sup>364</sup>

Strong social policies advise heavily against legislative intervention into a medical judgment call about the appropriate surgical technique to use in performing late term abortions.<sup>365</sup> If the D&X procedure turns out to be "bad medicine" in the medical world, the procedures for its regulations exist, including peer review mechanisms, state medical board licensing decisions, and the medical malpractice system.<sup>366</sup> Until these procedures prove unable to protect patient welfare while ensuring responsible and ethical medical decision-making, it is constitutionally questionable for Congress to define an acceptable medical procedure.<sup>367</sup> Only the woman and her physician should evaluate the risks—not the state legislators.<sup>368</sup> As the ACOG has proclaimed, the intervention of legislative bodies into medical decision-making is inappropriate, ill advised, and dangerous.<sup>369</sup>

Moreover, the ban on partial birth abortions does not further any constitutionally-valid state interest.<sup>370</sup> As Justice Stevens opined in his concurrence, the Constitution grants women the right to choose abortion, and the state has no legitimate interest in requiring the physician performing the abortion to follow any procedure other than the one the physician believes will be in the best interests of the mother.<sup>371</sup> In *Casey*, the Court held that regulations that do not impose an undue burden on women who choose to abort will be upheld *in order to further constitutionally valid state interests*.<sup>372</sup> However, bans of the D&X pro-

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<sup>364</sup> See *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992). An undue burden is defined as any state regulation that has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. See *id.*

<sup>365</sup> See *Massie*, *supra* note 196, at 380.

<sup>366</sup> See *id.*

<sup>367</sup> See *id.*

<sup>368</sup> See *Walther*, *supra* note 68, at 723.

<sup>369</sup> See American College of Obstetricians and Gynecologists, Statement of Intact Dilatation and Extraction, p. 2 (Jan. 12, 1997).

<sup>370</sup> See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2617 (2000) (Stevens, J., concurring).

<sup>371</sup> See *id.*

<sup>372</sup> See *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992). In response to Justice Kennedy's argument, in his *Casey* dissent, that the State has a moral interest in proscribing the D&X procedure, the *Casey* majority addressed only

cedure do not protect the potentiality of human life, as the bans do not *outlaw* late term abortions, nor do they protect the health of the mother, as D&X procedures are widely believed to be the safest late term abortion procedure.<sup>373</sup>

Although proponents of the statute might cite unnecessary cruelty to the human fetus as part of the state's interest in protecting fetal life, there has been no conclusive medical evidence on the issue of fetal pain offered to the Court.<sup>374</sup> Concerning this matter, Dr. Warren Hern testified to the Senate:

[F]etal neurological development well into the early part of the third trimester is insufficient for the fetus to experience what we regard as pain . . . an adequate neural substrate for experienced pain does not exist until about the seventh month of pregnancy (thirty weeks), well into the period when prematurely born fetuses are viable with intensive life support. Like any other mammalian organism, fetuses have enough neurological development to permit certain reflexes, but this is not the same as pain. Interpretation of these reflexes as pain is highly misleading.<sup>375</sup>

Other qualified experts, however, were quick to note that in their experience, fetuses did react to painful stimuli, such as needle sticks.<sup>376</sup> Additionally, nurses assisting in abortion procedures differ in their descriptions of fetal reactions to painful stimuli.<sup>377</sup> While one registered nurse stated that the movements made by the fetus during the D&X indicated suffering, another maintained that at no time during the D&X procedure is there any fetal movement or response indicative of pain or struggle.<sup>378</sup>

Because there is no clear evidence of whether fetal pain exists, it is essential to turn to Dr. Joseph Conomy's studies. Dr. Conomy is a professor of clinical neurology at Case Western Re-

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two valid state interests that can be furthered with abortion restrictions: (1) protecting the potentiality of human life throughout pregnancy and (2) maternal health or safety. Nowhere in the opinion is it written that states have a moral right to differentiate between abortion procedures. *See id.* at 878-79.

<sup>373</sup> *See* Walther, *supra* note 68, at 723.

<sup>374</sup> *See* Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051, 1073 (S.D. Ohio, 1995).

<sup>375</sup> *See* Senate Hearing, *supra* note 314, at 248-49 (statement of Warren M. Hern, M.D.).

<sup>376</sup> *See* Massie, *supra* note 196, at 350.

<sup>377</sup> *See id.* at 350-51.

<sup>378</sup> *See id.*

serve University and is involved in the field of medical ethics.<sup>379</sup> He has studied the nervous system "and has worked on problems of the nervous system in fetuses and newborn infants."<sup>380</sup> Although Dr. Conomy does not commit to an opinion as to whether a fetus feels pain, as "it would be 'speculative' to try to 'get inside the mind of a fetus, if there is one,'"<sup>381</sup> he claims that a fetus aborted by the D&E procedure, which involves dismemberment, would likely experience as much discomfort as a fetus aborted by the D&X procedure.<sup>382</sup> Yet, the D&E method "is the abortion technique routinely used for fetuses of thirteen to nineteen weeks' gestation and never questioned by anyone," except for those who oppose abortion in general.<sup>383</sup> To that end, it is wholly arbitrary to ban only the D&X procedure based on the state's interest in preventing cruelty to the human fetus.<sup>384</sup>

## V. CONCLUSION

In referring to the women who will be personally touched by the outcome of the on-going abortion debate, the Court once stated:

[Their] suffering is too intimate and personal for the state to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>385</sup>

Perhaps with this reasoning in mind, the Supreme Court, in a 5-4 decision, upheld the Eighth Circuit's decision that a Nebraska ban on partial birth abortion was unconstitutional.<sup>386</sup> The statutory language and the legislative history, along with strong Supreme Court precedent, provided support for the Court's decision. However, with its narrow holding, the Court did not satisfactorily resolve the issue of partial birth abortion.

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<sup>379</sup> See *Voinovich*, 911 F. Supp., at 1072.

<sup>380</sup> *Id.*

<sup>381</sup> See *id.* at 1073.

<sup>382</sup> See *id.*

<sup>383</sup> See *Massie*, *supra* note 196, at 355.

<sup>384</sup> See *id.* See also *Stenberg v. Carhart*, 120 S. Ct. 2597, 2617 (2000) (Stevens, J., concurring).

<sup>385</sup> See *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

<sup>386</sup> See *Stenberg*, 120 S. Ct. at 2617.

Americans still do not know whether a prohibition of the D&X method of abortion is constitutional. It is likely, therefore, that this issue will return to the Supreme Court.

Janeen F. Berkowitz



