

7-20-2000

## Will Charlie Brown Finally Kick the Football?: Missouri Enacts the Next Generation of Partial Birth Abortion Restrictions

Jennifer Landrum Elliott

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Jennifer L. Elliott, *Will Charlie Brown Finally Kick the Football?: Missouri Enacts the Next Generation of Partial Birth Abortion Restrictions*, 44 St. Louis U. L.J. (2000).

Available at: <https://scholarship.law.slu.edu/lj/vol44/iss3/24>

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

## COMMENTS

### **WILL CHARLIE BROWN FINALLY KICK THE FOOTBALL?: MISSOURI ENACTS THE NEXT GENERATION OF PARTIAL BIRTH ABORTION RESTRICTIONS**

The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the Peanuts comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only this time he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment.<sup>1</sup>

Missouri, like Charlie Brown, has shown remarkable persistence, determination and singleness of purpose, while trying to kick the legislative “football.” The lower federal courts, like Lucy, smile reassuringly and invite another attempt. The Peanuts characters live forever unchanged. Charlie Brown begins wary but eventually trusting and even confident. Lucy is beguiling and convincing, yet in the end always unreliable.

Missouri is no Charlie Brown. Among all the states, Missouri has demonstrated a willingness to aggressively legislate life issues at either end of the spectrum.<sup>2</sup> The lower courts are not Lucy, forever fated to deceive and frustrate the states’ attorney generals. The split among the courts reflects the split that exists among the justices of the Supreme Court.

This Article examines Missouri’s novel effort to ban what is commonly known as “partial birth abortion.” It is an obvious attempt to navigate the murky judicial waters surrounding any legislation having the effect of proscribing or limiting a woman’s reproductive rights. The Article examines

---

1. *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 218 (6th Cir. 1997) (Boggs, J., dissenting) (referring to the seeming impossibility for states to ever satisfy the courts’ vague standards for regulating abortions).

2. *See infra* text accompanying notes 231-34; *see also Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261 (1990).

the medico-legal issues arising from the procedure sought to be banned. Finally, the author examines how the courts are likely to view the Missouri statute.

### I. MISSOURI PASSES AN INFANTICIDE BAN TO PROHIBIT SOME ABORTIONS

After several attempts in previous years to pass a partial birth abortion bill, the Missouri general assembly successfully passed the Infant's Protection Act on September 16, 1999, overriding the Democratic governor's veto.<sup>3</sup> It was only the seventh time in Missouri history that a governor's veto was overturned and the first since 1980.<sup>4</sup> While the proposed legislation ignited the usual controversy among pro-life and pro-choice supporters, the final legislative vote was nonpartisan.<sup>5</sup> In fact, a legislature controlled by democrats overrode the democratic governor's veto.<sup>6</sup>

For the past several years, legislatures at both the state and federal level have attempted to pass partial birth abortion bans.<sup>7</sup> While thirty states have currently enacted some form of partial birth abortion legislation, Missouri's

---

3. Judy Peres, *Judge Puts Missouri Abortion Ban on Pause: "Partial Birth" Laws Raise New Challenges*, CHI. TRIB., Sept. 18, 1999, at 3. The governor issued a statement detailing his objections to the bill. His primary justifications for vetoing the bill included the following: 1) the bill could be read so as to ban "some of the safest and most commonplace first and second trimester abortion procedures," 2) the ban "fails to include an exception for medical emergencies or for preserving the health of the mother," and 3) the bill "criminalizes innocent women who are forced to make difficult health decisions. More specifically, the bill provides for severe criminal penalties – including sentences of up to life in prison," and finally the ban "fails to include an exception for rape or incest." *Statement from Gov. Carnahan Re: Veto of H.B. 427* (visited on Feb. 27, 2000) <<http://www.missourilife.org/veto/excuses.htm>>.

4. Stephanie Simon, *Abortion Law Sets Life Terms for Women, MDs*, L.A. TIMES, Sept. 17, 1999, at A1; Bill Bell, Jr., *The Moment of Truth is Here for the Abortion Measure*, ST. LOUIS POST-DISPATCH, Sept. 12, 1999, at A8. Interestingly, the bill was sponsored in the House and championed in the Senate by two democrats: Representative Bill Luetkenhaus and Senator Ted House. Simon, *supra* at A1. In a CNN interview following the override vote, Senator House commented that he was "especially proud of all of [his] fellow Democrats, many of them pro-choice, who decided to put principle over politics and to draw the line between abortion and infanticide." Interview by Judy Woodruff with Senator House, of the Missouri Senate (Sept. 17, 1999).

5. Simon, *supra* note 4, at A1.

6. Will Sentell, *Court Blocks State's New Law: Missouri Abortion Limits Put On Hold*, KANSAS CITY STAR, Sept. 18, 1999, at A1. The House voted 127-34, with 50 of the 86 House Democrats joining every House Republican in support of the bill. Simon, *supra* note 4, at A1. The Senate voted 27-7, with 11 of 18 Senate Democrats joining every Senate Republican in voting to override the governor's veto. *Id.*

7. See Partial Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. (1995) (vetoed on April 9, 1996); Partial Birth Abortion Ban Act of 1997, H.R. 1122, 106th Cong. (1997) (vetoed on October 10, 1997).

law has received national attention.<sup>8</sup> Unlike previous legislation, Missouri's Infant's Protection Act<sup>9</sup> creates the felony crime of infanticide, without reference to "abortion."<sup>10</sup> The law is the first in the nation to provide criminal penalties, from ten years to life imprisonment, for both pregnant women and physicians.<sup>11</sup> Additionally, while it contains an exception to save the life of the mother or the life of any child of the same pregnancy, many of the bill's opponents criticize the lack of an exception for the health of the mother.<sup>12</sup> Pro-choice advocates contend that the law is so vaguely worded that it could outlaw most of the abortions in the state, and not simply the late term procedure known as "partial birth abortion" or "dilation and extraction."<sup>13</sup> It is important to note, however, that the bill specifically states that the ban "shall not apply to any person who performs or attempts to perform a legal abortion if the *act* that causes the death is performed *prior to* the child being *partially born*,<sup>14</sup> even though the death of the child occurs as a result of the abortion after the child is partially born."<sup>15</sup>

---

8. National Abortion and Reproductive Rights Action League Foundation, *Bans on So-Called "Partial-Birth" Abortion and Other Abortion Procedures* (visited Feb. 28, 2000) <[http://www.naral.org/publications/2000/charts\\_bans.html](http://www.naral.org/publications/2000/charts_bans.html)> [hereinafter *Bans on So-Called "Partial Birth" Abortion*] (listing the following states as having passed partial birth abortion legislation: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin); Bell, *supra* note 4, at A8; Sentell, *supra* note 6, at A1.

9. MO. REV. STAT. § 565.300 (1999).

10. "A person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born." *Id.* § 565.300.3. "The crime of infanticide shall be a class A felony." *Id.* § 565.300.4.

11. Bell, *supra* note 4, at A8; Peres, *supra* note 3, at 3.

12. Peres, *supra* note 3, at 3. "A physician using procedures consistent with the usual and customary standards of medical practice to save the life of the mother during pregnancy or birth or to save the life of any unborn or partially born child of the same pregnancy *shall not be criminally responsible* under this section." MO. REV. STAT. § 565.300.5 (emphasis added). In an interview with CNN, Senator House claimed that "the reason that the vast majority of the members of the House and the Senate in Missouri rejected the health exception is that [the Infant's Protection Act] is an infanticide bill and there's no health exception to infanticide." Interview with Greta van Susteren with Senator House, of the Missouri Senate (Sept. 20, 1999).

13. Bell, *supra* note 4, at A8.

14. MO. REV. STAT. § 565.300.6 (emphasis added). "Partially born" is defined in the statute as "partial separation of a child from the mother with the child's head intact with the torso." *Id.* § 565.300.2(3). A child is partially separated when the "head . . . or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os." *Id.* Also see *infra* text accompanying notes 249-62.

15. *Id.* § 565.300.6. Supporters of the bill insist that this provision was added so as to make clear that the law does not affect legalized abortions on previable fetuses. Bell, *supra* note 4, at A8.

On September 17, 1999, the day after the Missouri General Assembly voted to override the governor's veto, Reproductive Health Services of Planned Parenthood of the St. Louis Region Inc., and Dr. Robert Crist obtained a restraining order from U.S. District Judge Scott Wright<sup>16</sup> in Kansas City, Missouri.<sup>17</sup> Trial had originally been scheduled to begin in federal district court on March 27, 2000; however, the state succeeded in remanding the case to a St. Louis circuit court.<sup>18</sup> Ruling for the first time on the constitutionality of partial birth abortion statutes, the Eighth Circuit struck down statutes in Nebraska, Iowa, and Arkansas on September 24, 1999, for placing an undue burden on women seeking other types of abortions.<sup>19</sup>

The majority of federal circuit courts to review partial birth abortion legislation have found such statutes unconstitutional,<sup>20</sup> although a minority of federal circuit courts have upheld similar statutes.<sup>21</sup> Interestingly, not all state partial birth abortion statutes have been challenged in court, and many are currently enforceable.<sup>22</sup> Planned Parenthood notes that those enforceable laws

---

16. Judge Wright, an appointee of Jimmy Carter, has presided over several controversial abortion cases. His decision in *Webster v. Reproductive Health Services*, declaring several portions of Missouri's 1986 abortion regulations unconstitutional, was overturned by the Supreme Court in 1989. 492 U.S. 490 (1989). Pro-life supporters of the Infant's Protection Act were pessimistic about their chances at the trial court level given Judge Wright's history of striking down abortion regulations. Will Sentell, *Reversal of Abortion Measure Expected*, KANSAS CITY STAR, Oct. 1, 1999. In a telephone interview, Representative Luetkenhaus cheerfully quipped that many at the capital believe that, "Seventy-five percent of the time Judge Wright is wrong." Telephone Interview with Representative Luetkenhaus, of the Missouri House of Representatives (Mar. 1, 2000).

17. Sentell, *supra* note 6, at A1.

18. Bill Bell, Jr., *Federal Court Challenge Delays Enforcement of New Missouri Abortion Law Until March*, ST. LOUIS POST-DISPATCH, Sept. 23, 1999, at B3; *Hearing on Missouri Infanticide Law is Postponed by Federal Appeals Court*, ST. LOUIS POST-DISPATCH, Mar. 25, 2000.

19. Tim Bryant, 3 "Partial-birth Abortion" Laws Fall: Court Rejects 3 "Partial-birth Abortion" Bans, ST. LOUIS POST-DISPATCH, Sept. 25, 1999, at 6. See also *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999); *Planned Parenthood of Greater Iowa v. Miller*, 195 F.3d 386 (8th Cir. 1999); *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999) (noting that the differences between the statutes are not significant to the court's analysis).

20. See *Voinovich*, 130 F.3d at 187; *Carhart*, 192 F.3d at 1142; *Miller*, 195 F.3d at 386; *Jegley*, 192 F.3d at 796.

21. *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (upholding both the Wisconsin and Illinois partial birth abortion bans). See also *Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp.2d 975 (W.D. Wisc. 1999); *Summit Medical v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998) (interpreting the statute to only apply to viable fetuses); *Midtown Hosp. v. Miller*, 36 F. Supp.2d 1360 (N.D. Ga. 1998) (pursuant to a court-ordered settlement, the application of the law's ban is limited to the D&X abortion procedure on viable fetuses and includes an exception for abortions necessary to preserve the mother's life or health).

22. Planned Parenthood Federation of America, Inc., *State Laws Restricting Access to Abortion 26 years after Roe v. Wade* (visited Oct. 12, 1999) <<http://www.plannedparenthood.org/>

have broad health exceptions and are clearly limited to only cover viable fetuses.<sup>23</sup>

Missouri's Infant's Protection Act raises important constitutional questions with respect to the legality of partial birth abortion statutes under current abortion case law and whether this statute may avoid invoking abortion law by classifying the banned procedure as "infanticide" as opposed to abortion. Part II explores the confusion surrounding the definition and advisability of partial birth abortion techniques. Part III explains the current framework posed by the Supreme Court for scrutinizing abortion regulations. Part IV describes federal and state decisions on partial birth abortion legislation and the specific problems with those statutes determined to be unconstitutional. Part V analyzes Missouri's Infant's Protection Act in light of current case law on partial birth abortion, whether Missouri's law significantly differs from previous state statutes, and whether Missouri's law will survive constitutional scrutiny. Part VI proposes changes in Missouri's current ban.

## II. WHY THE CONTROVERSY OVER PARTIAL BIRTH ABORTION?

According to the American Medical Association (AMA), "partial birth abortion" is not a medical term and is not used by the AMA.<sup>24</sup> The general public, however, generally uses the term to refer to a specific abortion procedure known as "intact dilation and extraction" (D&X). This procedure consists of the following steps: "[1)] deliberate dilation of the cervix, usually over a sequence of days, [2)] instrumental or manual conversion of the fetus to a footling breech, [3)] breech extraction of the body excepting the head, and [4)] partial evacuation of the intra-cranial contents of the fetus to effect vaginal delivery of a dead but otherwise intact fetus."<sup>25</sup> Much of the controversy surrounding this procedure is related to its graphic and disturbing description, as well as conflicting accounts of the frequency of the procedure. Most disturbing is the fact that by the third trimester the fetal skull is so large that the physician must crush it, remove the brain tissue, and collapse the skull to remove the fetus completely from the woman.<sup>26</sup>

---

library/ABORTION.StateLaws.html> [hereinafter *State Laws Restricting Access to Abortion*]. Currently some form of partial-birth abortion legislation is enforceable in Alabama, Georgia, Indiana, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Virginia. *Bans on So-Called "Partial-Birth" Abortion*, *supra* note 8.

23. See *State Laws Restricting Access to Abortion*, *supra* note 22.

24. American Medical Association Policy Finder H-5.982, *Late-Term Pregnancy Termination Techniques* (visited Jan. 23, 2000) <<http://www.ama-assn.org>> [hereinafter *Late-Term Pregnancy Termination Techniques*].

25. *Id.*

26. *Voinovich*, 130 F.3d at 198-99. In *Hope Clinic v. Ryan*, the Seventh Circuit commented on the source of the controversy:

It is this combination of coming so close to delivering a live child with the death of the

The AMA insists that while the D&X procedure is a variation of the dilation and evacuation (D&E) procedure more commonly used to induce abortion after the first trimester, it is a distinct and distinguishable procedure.<sup>27</sup> Dilation and evacuation is the most common abortion technique used between twelve and twenty-three weeks.<sup>28</sup> The D&X is generally performed after the twenty-fourth week.<sup>29</sup> In a D&E, the physician generally “dilates the cervix . . . reaches into the uterus with an instrument and . . . using a combination of suction [and traction] . . . removes the fetus . . . in parts.”<sup>30</sup> During this stage of development, the force of the traction easily tears the fetal tissue and the fetal tissue is typically removed in parts. Later in the pregnancy, it becomes nearly impossible to remove the fetus in parts using the D&E procedure. In contrast with the D&E, abortion providers using the D&X procedure generally remove an intact fetus that has progressed in fetal development.

The AMA recognizes that “there does not appear to be any identified situation in which [the] intact D&X is the only appropriate procedure to induce abortion”<sup>31</sup> and recommends that the D&X procedure not be used unless alternative procedures pose a materially greater risk to the woman.<sup>32</sup> The AMA further suggests that abortions not be performed in the third trimester, except in cases of serious “fetal anomalies incompatible with life.”<sup>33</sup>

---

fetus by reducing the size of the skull that not only distinguishes D&X from D&E medically but also causes the adverse public (and legislative) reaction. Opponents deem the D&X procedure needlessly cruel and bordering on infanticide.

Ryan, 195 F.3d at 862.

27. *Late-Term Pregnancy Termination Techniques*, *supra* note 24. While the AMA agrees that the D&X and D&E procedures are, in fact, distinct from one another, widespread confusion continues in interpreting “partial birth abortion” statutes that do not clearly name or specifically define the procedure they intend to outlaw. Rather than use medical descriptions of specific steps involved in the banned procedure, most statutes use general descriptions that some doctors interpret as encompassing both procedures. Critics of these “general statutes” claim that the legislatures intended the language to be confusingly broad so as to proscribe the vast majority of abortions. *See State Laws Restricting Access to Abortion*, *supra* note 22.

28. *R. I. Med. Soc’y v. Whitehouse*, 66 F. Supp.2d 288, 296 (D.R.I. 1999).

29. *Id.* at 297.

30. *Id.* at 296.

31. *See Late-Term Pregnancy Termination Techniques*, *supra* note 24.

32. *Id.* The AMA did support H.R. 1122, the most recent federal attempt to ban partial-birth abortion. In a letter to Senator Rick Santorum, the Executive Vice President of the American Medical Association emphasized, “[a]lthough our general policy is to oppose legislation criminalizing medical practice or procedure, the AMA has supported such legislation where the procedure was narrowly defined and not medically indicated. HR 1122 now meets both these tests.” Letter from P. John Seward, M.D. to Senator Rick Santorum (May 19, 1997) (on file with author).

33. *See Late-Term Pregnancy Termination Techniques*, *supra* note 24; *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp.2d 478, 483 n.1 (D.N.J. 1998) (noting expert testimony explaining that the “risk of death from abortion increases about thirty percent with each week of gestation from eight weeks . . . to twenty weeks . . . [and] that the risk of major medical

The actual number of late-term abortions using the D&X procedure is difficult to quantify because of incomplete data and a flawed collection process.<sup>34</sup> The most scientifically reliable national data on the incidence of abortion come from the Centers for Disease Control and Prevention (CDC) and the Alan Guttmacher Institute (AGI).<sup>35</sup> The CDC derives its data primarily from reports by state departments, whereas the AGI collects data directly from abortion providers.<sup>36</sup> For many years, the AGI's estimates of the number of abortions performed each year have been higher and considered to be more accurate than CDC estimates.<sup>37</sup> Unfortunately the AGI does not collect data on gestational age.<sup>38</sup> While the CDC does collect data on gestational age, it neither differentiates between the D&X and D&E procedures nor reports abortion frequency by gestational age beyond twenty-one weeks.<sup>39</sup> Despite these limitations, data show that ninety-five percent of induced abortions are performed at or before fifteen weeks.<sup>40</sup> The estimated number of abortions performed beyond twenty-one weeks is 16,450 per year.<sup>41</sup>

The legal definition of viability, first articulated in *Roe v. Wade*,<sup>42</sup> refers to "the capacity for meaningful life outside the mother's womb, albeit with artificial aid."<sup>43</sup> The Supreme Court has often emphasized that the attending physician is in the best position to determine viability in light of current

---

complications increases about twenty percent with each week of gestation from seven weeks . . . to full term").

34. M. LeRoy Sprang, M.D. & Mark G. Neerhof, D.O., *Rationale for Banning Abortions Late in Pregnancy*, 280 JAMA 744 (1998).

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

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The CDC reports a combined number for all abortions performed beyond 21 weeks, however more specific information is relevant given the continued dispute as to the gestational age of viability. Epner, *supra* note 35, at 726. Like the CDC, the Missouri Department of Health only reports a combined number for all abortions performed beyond 21 weeks of gestation. In addition, while it has been documented that 733 D&E abortions were performed in 1998, the Missouri Department of Health does not have a category for reporting D&X abortions. Without such a category, it cannot be conclusively determined whether D&X abortions have been performed in Missouri. Interestingly, 118 "other" abortions and 11 "unknown" abortions have been reported. It may be the case that doctors are performing D&X procedures and simply reporting them under the "other" or "unknown" category. *Table 12: Resident Abortions By Race, Age of Woman and Type of Procedure by Weeks of Gestation* (visited Feb. 28, 2000) <<http://www.health.state.mo.us/Publications/Table12.html>> [hereinafter *Table 12*].

40. Epner, *supra* note 35, at 726. Missouri statistics are consistent with national data. Ninety-four percent of Missouri abortions (11,987) are performed prior to 15 weeks of fetal development. *Table 12, supra* note 39.

41. Epner, *supra* note 35, at tbl. 2. In Missouri, 113 fetuses over 21 weeks gestation were aborted in 1998. *Table 12, supra* note 39.

42. 410 U.S. 113 (1973).

43. *Id.* at 160; *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 63 (1976).



medical technology.<sup>44</sup> “Viability is presumed to exist after twenty-seven weeks gestation . . . and is presumed not to exist prior to twenty weeks. The time between twenty and twenty-seven weeks is a ‘gray zone’ in which some fetuses may be viable and others are not.”<sup>45</sup> The D&X procedure is most often performed between twenty and twenty-four weeks and raises, therefore, the question of potential viability of the fetus.<sup>46</sup> Data reveal that fetal survival rates at twenty-four weeks ranges from 56% to 83% and survival rates at twenty-five weeks ranges from 79% to 89%.<sup>47</sup>

### III. DEVELOPMENTS IN SUPREME COURT ABORTION DECISIONS

The origins of privacy and procreative rights began with the Supreme Court’s decision in *Griswold v. Connecticut*.<sup>48</sup> The Court asserted that the substantive due process protections in the Bill of Rights includes a “zone of privacy” that cannot be invaded by governmental regulation.<sup>49</sup> The zone of privacy recognized in *Griswold* prevented a Connecticut law prohibiting contraceptive use from invading a married couple’s decisions regarding reproductive prevention.<sup>50</sup> The Court later expanded that zone of reproductive privacy to include unmarried couples.<sup>51</sup>

In *Roe v. Wade*,<sup>52</sup> the Supreme Court first recognized that the constitutionally protected right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>53</sup> When state regulations affect protected fundamental rights, such as the right of privacy, the Court strictly scrutinizes such regulations and upholds such restrictions only if justified by a “compelling state interest.”<sup>54</sup> In *Roe v. Wade*, the Court struck down a Texas law that prohibited all abortions, except when necessary to save the life of the mother.<sup>55</sup> Although the state statute was declared unconstitutional, the Court nevertheless qualified their decision by observing that a woman’s right to choose an abortion is not absolute and the state has an

---

44. See *Danforth*, 428 U.S. at 64 (“[V]iability [is] a matter of medical judgment, skill, and technical ability.”); *Colautti v. Franklin*, 439 U.S. 379, 387-88 (1979).

45. Epler, *supra* note 35, at 727. According to estimates, “the number of abortions performed after 26 weeks nationwide is estimated between 320 and 600.” *Id.*

46. Sprang, *supra* note 34, at 746. See also *Roe*, 410 U.S. at 160 (1973) (“[V]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.”).

47. Sprang, *supra* note 34, at 745.

48. 381 U.S. 479 (1965).

49. *Id.* at 484.

50. *Id.*

51. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

52. 410 U.S. 113 (1973).

53. *Id.* at 153.

54. *Id.* at 155.

55. *Id.* at 164.

interest in protecting the potential life of a fetus.<sup>56</sup> According to the Court, the fetus does not become a full “person” for purposes of Fourteenth Amendment protection until birth.<sup>57</sup>

Recognizing the competing interests of the woman and the state, the Court established the trimester framework to guide in the balance of those interests. During the first trimester, the woman’s right to privacy and to choose an abortion outweighs all state interests and she may elect to terminate her pregnancy without any interference or regulation by the state.<sup>58</sup> During the second trimester, the government may regulate, but not ban, abortions in ways that are reasonably related to maternal health.<sup>59</sup> By the third trimester or at the point of viability, the State’s interest in potential life becomes “compelling.”<sup>60</sup> Once a fetus has the “capability of meaningful life outside the mother’s womb,” the State may proscribe abortions, except when “necessary to preserve the life or health<sup>61</sup> of the mother.”<sup>62</sup>

Although the Supreme Court has not yet reviewed the constitutionality of a partial birth abortion statute or late term abortion ban, it once considered a Missouri statute prohibiting the use of a particular abortion procedure.<sup>63</sup> In *Planned Parenthood v. Danforth*,<sup>64</sup> the Court struck down a ban on saline

---

56. *Roe*, 410 U.S. at 153-54. “[A]ppellant . . . argue[s] that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.” *Id.* at 153.

57. *Id.* at 158. The Court specifically rejected the argument that the fetus is a “person” from the moment of conception. In doing so, the Court relied heavily on the observation that “[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.” *Id.* at 159-61. It should be noted, however, that the premise upon which the Court relies has drastically changed as state courts have recognized a fetus as a person under criminal and tort law. See discussion *infra* Part V.D.1.

58. *Id.* at 163.

59. *Id.*

60. *Id.*

61. The Court does not fully explain what is meant by the term “health” in *Roe*. See generally *Roe*, 410 U.S. at 113. The Court did, however, agree with a district court’s interpretation of a Georgia abortion law’s “health exception” in *Doe v. Bolton*, *Roe*’s companion case. In *Doe*, the Court acknowledged that a physician’s medical decision to abort a pregnancy to protect the health of a woman “may be exercised in light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well being of the patient. All these factors may relate to health.” *Id.* at 192 (emphasis added).

62. *Roe*, 410 U.S. at 163-64. The Court goes on to note that the *Roe* decision “leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests.” *Id.* at 165.

63. The Supreme Court granted certiorari to review a Nebraska “partial birth abortion” ban during the 2000 spring term. *Stenberg v. Carhart*, 192 F.3d 1142 (8th Cir. 1999), cert. granted, 68 U.S.L.W. 3338 (U.S. Jan. 14, 2000) (No. 99-830). See discussion *infra* Part VII.

64. 428 U.S. 52 (1976).

amniocentesis abortions, finding that the law would have banned one of the more common and safer second trimester abortion procedures.<sup>65</sup> The Court determined that the ban was not reasonably related to the protection of the mother's health, given that the effect of the ban on saline amniocentesis would require a woman seeking an abortion to "terminate her pregnancy by methods more dangerous to her health than the method outlawed."<sup>66</sup> *Danforth* was decided using the more rigid trimester standard set forth in *Roe*<sup>67</sup> and placed particular emphasis on the state's motive in passing a ban on a relatively safe procedure.<sup>68</sup> Following the *Roe* trimester framework, a state may regulate abortions during the second trimester; 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>69</sup>

While continuing to uphold the importance of protecting a woman's life and health in the abortion decision, the Court has also upheld state and federal laws limiting financial access to abortions.<sup>70</sup> A state may refuse to fund some elective and "medically necessary" abortions.<sup>71</sup> In *Harris v. McRae*, the Court upheld the Hyde Amendment, a federal statute that withholds federal Medicaid funding for some *medically necessary* abortions.<sup>72</sup> The Court has also held that a Medicaid participating state need not fund all medically necessary abortions for its citizens given that the Hyde Amendment precludes federal reimbursement.<sup>73</sup> While the freedom of a woman to choose to terminate her pregnancy for health reasons has been acknowledged by the Court, "it simply does not follow that a woman's freedom of choice carries with it a

---

65. *Danforth*, 428 U.S. at 76-79. The Court found that the saline amniocentesis procedure was "employed in a substantial majority (. . . from 68% to 80%) of all post-first-trimester abortions." *Id.*

66. *Id.* at 79.

67. *Cf.* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 871 (1992). *Casey* criticized the cases following *Roe* that found:

[A]ny regulation touching upon the abortion decision must survive strict scrutiny . . . . Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

*Id.*

68. *See Danforth*, 428 U.S. at 76-79.

69. *See Roe*, 410 U.S. at 162-65.

70. *See Maher v. Roe*, 432 U.S. 464 (1979) (upholding a Connecticut regulation that denied payments to Medicaid recipients receiving non-therapeutic abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (finding prohibition of federal Medicaid funds for abortions other than to save the life of the mother to be constitutional).

71. *See Maher v. Roe*, 432 U.S. 464 (1979); *Harris v. McRae*, 448 U.S. 297 (1980).

72. *Harris*, 448 U.S. at 312-18.

73. *Id.* at 326.

constitutional entitlement to the financial resources to avail herself to the full range of protected choices.”<sup>74</sup>

Reflecting its new conservative makeup, a majority of the Court upheld Missouri’s comprehensive abortion law at issue in *Webster v. Reproductive Health Services*.<sup>75</sup> The Court held that the “preamble” to the statute, declaring that the life of each human being begins at conception, was a permissible value judgment of the state.<sup>76</sup> In viewing the “preamble” as a value judgment rather than an abortion regulation, the Court declined to consider its constitutionality.<sup>77</sup> The Court did review and uphold a provision prohibiting the use of public employees and public facilities in performing non-therapeutic abortions.<sup>78</sup> Finally, the Court upheld a requirement that a physician test a fetus of at least twenty weeks in order to determine whether it is viable.<sup>79</sup>

*Planned Parenthood v. Casey*<sup>80</sup> was the most recent abortion case reviewed by the Supreme Court. In *Casey*, the Court reexamined state regulation of abortions and reaffirmed the essential holding of *Roe v. Wade* in a plurality opinion.<sup>81</sup> Reasserting that a woman has a “right to terminate her pregnancy before viability,” the Court ultimately discarded the rigid trimester framework for evaluating governmental regulations established earlier in *Roe*.<sup>82</sup> Emphasizing the state’s legitimate interest in potential life throughout a pregnancy, the Court concluded that “viability” should be the new standard for evaluating abortion regulations such that a woman may choose to terminate her pregnancy prior to viability.<sup>83</sup> Once the fetus has attained viability, the

---

74. *Id.* at 316.

75. 492 U.S. 490 (1989).

76. *Id.* at 504-06.

77. *Id.* at 506-07. The Court noted that:

The extent to which the preamble’s language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitely decide . . . . It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way.

*Id.*

78. *Id.* at 507-10.

79. *Webster*, 492 U.S. at 517.

80. 505 U.S. 833 (1992).

81. *Casey*, 505 U.S. at 846.

82. *Id.* at 871. The Court noted that the trimester framework had proven unworkable given advances in neonatal care that push viability to an earlier point in fetal development. *Id.* at 860.

83. *Id.* at 870.

The concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that 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.*

“State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”<sup>84</sup>

While the *Casey* plurality reaffirmed the “essential holding of *Roe*,” it significantly altered the constitutional analysis for a state abortion regulation. Rather than being subject to *Roe*’s strict scrutiny standard, abortion restrictions prior to viability are now permissible so long as they have a “rational basis” and do not place an “undue burden” on a woman’s right to an abortion.<sup>85</sup> A state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman’s choice to abort a nonviable fetus is an “undue burden.”<sup>86</sup> Not all burdens will be deemed “substantial obstacles.”<sup>87</sup> “[T]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”<sup>88</sup>

As to viable fetuses, a state may protect its interest in potential human life by “regulat[ing], and even proscrib[ing], abortion except where it is necessary . . . for the preservation of the life or health of the mother.”<sup>89</sup> After *Casey*, a key inquiry in analyzing the constitutionality of an abortion statute is whether the law proscribes or regulates a previable or viable fetus. Many questions remain as to how to correctly apply the new *Casey* standard. The *Casey* analysis makes it difficult to know whether a regulation might be permissible on its face, but an undue burden on an individual woman as applied.<sup>90</sup> At some points the *Casey* plurality refers to individuals, yet the plurality found a restrictive spousal notification requirement to be an undue burden because it affected “a significant number of women” and “for many women it will impose a substantial obstacle.”<sup>91</sup> This suggests that requirements that do not adversely affect “many women” would be permissible even if they do adversely affect a few.

---

84. *Casey*, 505 U.S. at 869. The Court further commented that “[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.” *Id.* at 870.

85. *Id.* at 877-78. In evaluating *Casey*, it is important to recognize that the “undue burden” standard has “no present legal doctrinal significance simply because a majority of the Court has not adopted [it].” B. J. George Jr., J.D., *Planned Parenthood of Southeastern Pennsylvania [sic] v. Casey: An Analysis, in ABORTION, MEDICINE, AND THE LAW* xv, xvi (J. Douglas Butler & David F. Walbert eds., 1992).

86. *Casey*, 505 U.S. at 877. “The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue.” *Id.* at 876.

87. *Id.* at 887.

88. *Id.* at 894.

89. *Id.* at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

90. *See infra* text accompanying notes 92-103.

91. *Casey*, 505 U.S. at 894-95.

#### IV. CIRCUIT COURT DECISIONS ARE SPLIT AS TO WHETHER “PARTIAL BIRTH ABORTION” BANS ARE CONSTITUTIONAL.

##### A. *Standard of Review for Facial Challenge of Abortion Laws*

The standard of review for “facial” and “applied” challenges to statutes is particularly important in abortion litigation. If a statute is found to be unconstitutional as applied, then the state may continue to enforce the statute in such ways as are constitutional, whereas, if a statute is unconstitutional on its face, then the state may not enforce the statute under any circumstances.<sup>92</sup> Federal courts are divided on whether abortion statutes are subject to a separate, stricter standard of review.<sup>93</sup> Under the general rule,<sup>94</sup> established in *United States v. Salerno*,<sup>95</sup> a court may only invalidate a law on a facial challenge where “no set of circumstances exists under which [the law] would be valid.”<sup>96</sup> Many plaintiffs opposed to partial birth abortion legislation have argued that the Supreme Court implicitly established a separate standard of review for abortion laws in *Casey*.<sup>97</sup> The *Casey* Court determined that an abortion law that operates as a “substantial obstacle to a woman’s choice of abortion in a large fraction of the cases in which it applies” will be declared unconstitutional, even if the law has constitutional applications.<sup>98</sup>

Interestingly, both the circuit courts<sup>99</sup> and the Supreme Court justices dispute whether the *Salerno* standard has been replaced with *Casey*’s “undue burden” standard in the abortion context.<sup>100</sup> The majority of circuit courts have held that the “undue burden” standard was central to the outcome in *Casey* and, therefore, the “undue burden” standard controls in the abortion arena.<sup>101</sup>

---

92. *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997).

93. *See infra* notes 99-102 and accompanying text.

94. *See R. I. Med. Soc’y v. Whitehouse*, 66 F. Supp.2d 288, 312 (D.R.I. 1999) (discussing *Salerno*’s general rule for facial challenges).

95. 481 U.S. 739 (1987).

96. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

97. 505 U.S. 833 (1992).

98. *Id.* (citing *Casey*, 505 U.S. at 894-95).

99. *Id.* at 312-13 (noting that the Eighth Circuit has found *Salerno* to be “effectively overruled” while the Fifth Circuit continues to apply the *Salerno* standard).

100. *See id.* Justice O’Connor considers the *Casey* standard to be controlling, while Justice Scalia considers the *Salerno* standard controlling. *Id. Compare* *Ada v. Guam Soc’y of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting) (disputing denial of certiorari), *with* *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring).

101. *Compare* *Causeway Med. Suite v. Foster*, 43 F. Supp.2d 604, 611-12 (E.D. La. 1999) (acknowledging that the *Salerno* standard is inconsistent with the rule set forth in *Casey*, yet continuing to apply the *Salerno* standard), *and* *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1998), *with* *Richmond Med. Ctr. v. Gilmore*, 55 F. Supp.2d 441, 476-79 (E.D. Va. 1999), *and*

The Sixth and Eighth Circuits “choose to follow what the Supreme Court actually did – rather than what it failed to say – and apply the undue-burden test.”<sup>102</sup>

While the majority of circuits have found the *Casey* “undue burden” standard to provide the correct analytical framework for abortion legislation, the circuits are also split as to whether the *Casey* standard applies only to laws affecting pre-viable abortions or to laws affecting both pre-viable and viable abortions.<sup>103</sup> Therefore, partial birth abortion legislation limited solely to viable fetuses may not be subject to the more difficult undue burden standard established in *Casey*.

*B. The Sixth and Eighth Circuits, as Well as Several District Courts, Have Found Partial Birth Abortion Legislation to be Unconstitutional on Various Grounds*

Many of the state partial birth abortion bans found to be unconstitutional by federal judges were based on similar bills proposed by Congress.<sup>104</sup> A substantial number of the state statutes challenged in federal court contain either nearly or precisely identical language as in the federal models.<sup>105</sup> The

---

Women’s Med. Prof’l Corp. v. Voinovich, 130 F.3d at 187, 194-96 (6th Cir. 1997), and Carhart v. Stenberg, 192 F.3d 1142, 1149 (8th Cir. 1999).

102. See *Voinovich*, 130 F.3d at 195 (quoting *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995)).

103. See, e.g., *Casey v. Planned Parenthood of Southeastern Pa.*, 14 F.3d 848, 863 n.21 (3rd Cir. 1994); *Causeway Med. Suite v. Foster*, 43 F. Supp.2d 604, 611 (E.D. La. 1999) (“[U]ndue burden’ standard applies only to pre-viability abortions”); *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp.2d 478, 499 n.12 (D.N.J. 1998); *Voinovich*, 130 F.3d 187, 196 (6th Cir. 1997) (“We can see no reason to apply a different standard for pre- and post-viability abortion. We conclude that *Casey*’s analysis should be extended to post-viability abortion regulations.”); *Richmond Med. Ctr. v. Gilmore*, 55 F. Supp.2d 441, 478 (E.D. Va. 1999). In concluding that a different test does not apply, the *Gilmore* court noted:

[W]hen the facial challenge is to a post-viability abortion measure. It is true that the *Casey* ‘undue burden’ standard applies only to pre-viability abortion regulations, but the analysis in *Casey* respecting the appropriate standard for facial challenges transcended the line drawn . . . at viability for purposes of the substantive constitutional right.

*Id.*

104. See *Partial Birth Abortion Ban Act of 1995*, H.R. 1833, 104th Cong. (1995) (vetoed on April 9, 1996) noting:

Any physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined . . . or imprisoned . . . . This . . . shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury . . . . [T]he term ‘partial-birth abortion’ means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

*Id.*; see also *Partial Birth Abortion Ban Act of 1997*, H.R. 1122, 106th Cong. (1997) (vetoed on October 10, 1997).

105. See *Verniero*, 41 F. Supp.2d at 495-96.

majority of courts reviewing partial birth abortion legislation have found them to be unconstitutional on several, interrelated grounds, where the legislation contains vague and overbroad language, unduly burdens women's access to abortion, forces women to have less safe abortions, and fails to include a health exception or includes an inadequate life exception.<sup>106</sup>

#### 1. Statutes Vague and/or Lack Scierter Provision

Ohio's partial birth statute was the first to be challenged in federal court<sup>107</sup> and was found to be unconstitutional for each of the above reasons. The Ohio act created civil and criminal liability for doctors who performed a D&X procedure (partial birth abortion) upon a pregnant woman (with a previable or viable fetus)<sup>108</sup> and for any abortion procedure performed on a viable fetus, unless necessary to save the life or to prevent serious bodily impairment of the woman.<sup>109</sup> In *Women's Medical Professional Corporation v. Voinovich*,<sup>110</sup> the Sixth Circuit enjoined enforcement of the act, finding the law unconstitutionally vague in its description of the banned procedure such that the law could be read to include procedures often performed on previable fetuses.<sup>111</sup> While the act specifically banned only the D&X procedure, the court focused on the vague statutory description of the procedure.<sup>112</sup> The Ohio act described the procedure as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain" and specifically excluded from the definition the suction curettage and suction aspiration procedures of abortion.<sup>113</sup> Key to the court's analysis was the legislature's failure to also exclude the D&E from the statutory definition of the banned procedure.<sup>114</sup> The court found that the D&E procedure, on occasion, utilizes suction devices that would include D&E under the general ban, absent an explicit exception.<sup>115</sup> Because abortion doctors could not accurately determine which procedures were banned, the act did not provide fair warning and was, therefore, unconstitutionally vague.<sup>116</sup>

---

106. See generally *Voinovich*, 130 F.3d at 190.

107. *Carhart v. Stenberg*, 192 F.3d 1142, 1148 (8th Cir. 1999); see also *Voinovich*, 130 F.3d 187 (6th Cir. 1997).

108. See OHIO REV. CODE ANN. § 2919.15(B) (Anderson 1998) ("No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman."). The Act does not provide for criminal liability against the woman seeking the abortion. *Voinovich*, 130 F.3d at 191.

109. See OHIO REV. CODE ANN. § 2919.17 (Anderson 1998).

110. 130 F.3d 187 (6th Cir. 1997).

111. *Id.* at 200.

112. *Id.* at 198.

113. *Id.*

114. *Id.* at 200.

115. *Voinovich*, 130 F.3d at 199.

116. *Id.* at 197-99.



Unlike the Ohio act, the Rhode Island act<sup>117</sup> at issue in *Rhode Island Medical Society v. Whitehouse*,<sup>118</sup> did not specifically identify the medical procedure to be banned.<sup>119</sup> The district court noted that, if possible, the law should be read by the court so as to find it constitutional and “must consider limiting constructions offered by the state . . . [and] Attorney General.”<sup>120</sup> Unable to find a reasonable, constitutional reading of the act, the court deemed the act unconstitutionally vague.<sup>121</sup> While the court noted that most abortion procedures would not fall under the ban, the D&E procedure could be construed so as to fall under the ban.<sup>122</sup> The most problematic language was the term “substantial portion,” that was not defined in the act.<sup>123</sup> The court determined that an arm or leg of a fetus could be deemed to be a “substantial portion” of a “living fetus” such that the D&E procedure, that often results in removal of the fetus in parts, would be considered a “partial birth abortion.”<sup>124</sup> Because the “phrase is so vague as to be meaningless,”<sup>125</sup> the act failed since physicians could not determine what conduct would be considered illegal.<sup>126</sup> Finding a similarly worded New Jersey statute<sup>127</sup> to be vague, the district court in *Planned Parenthood of Central New Jersey v. Verniero*<sup>128</sup> suggested that the legislature could have avoided vagueness challenges by defining the banned procedures with medical terminology.<sup>129</sup>

Relying on *Colautti v. Franklin*,<sup>130</sup> many courts reviewing potentially vague statutes have noted that a scienter requirement may alleviate a vagueness problem.<sup>131</sup>

117. R.I. GEN. LAWS § 23-4.12 (1998). The act prohibits a person from “deliberately and intentionally deliver[ing] into the vagina a living fetus, or a *substantial person* thereof, for the purpose of performing a procedure the person performing the abortion knows will kill the infant, and kills the infant.” R.I. GEN. LAWS § 23-4.12-1(c) (1998) (emphasis added).

118. 66 F. Supp.2d 288 (D.R.I. 1999).

119. *Whitehouse*, 66 F. Supp.2d at 294.

120. *Id.* at 305.

121. *Id.* at 311.

122. *Id.* at 308-09.

123. *Id.* at 309-12.

124. *Whitehouse*, 66 F. Supp.2d at 310-12.

125. *Id.* at 311.

126. *Id.* at 312. Several other district courts have found similarly worded statutes void for vagueness. See, e.g., *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp.2d 478, 493-94 (D.N.J. 1998); *Eubanks v. Stengel*, 28 F. Supp.2d 1024, 1037-38 (W.D. Ky. 1998); *Carhart v. Stenberg*, 11 F. Supp.2d 1099, 1131-32 (D. Neb. 1998).

127. N.J. STAT. ANN. § 2A:65A-6 (West 1997).

128. 41 F. Supp.2d 478 (D.N.J. 1998).

129. *Verniero*, 41 F. Supp.2d at 496 n.9 (“The Legislature need not use medical terminology in order to ban certain medical procedures. However . . . definitions ascribed by the medical community to terms used in the Act are certainly relevant to . . . [the] vagueness analysis.”).

130. 439 U.S. 379, 390-97 (1979).

131. See *Verniero*, 41 F. Supp.2d at 494.

In *Colautti*, the Supreme Court found that a lack of a scienter requirement compounded a statute's vagueness and noted that such a requirement "may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid."<sup>132</sup> The *Verniero* court, however, noted that "[a] scienter requirement cannot eliminate vagueness . . . if it is satisfied by an 'intent' to do something that is in itself ambiguous."<sup>133</sup> Finding a scienter requirement inadequate to cure an ambiguous statute, the court in *Richmond Medical Center For Women v. Gilmore*<sup>134</sup> recognized the limitations of a statutory scienter requirement "as some sort of a cure-all or antidote".<sup>135</sup> Additionally, at least one court would require scienter in the abortion context.<sup>136</sup>

## 2. Undue Burden Imposed on Women Seeking Abortions

As the following cases will illustrate, courts have found partial birth abortion acts to place an undue burden on women seeking abortions on pre-viable fetuses, particularly when the legislation fails to limit its scope to viable fetuses.<sup>137</sup> Additionally, some partial birth abortion bans limited to viable fetuses have been found unconstitutional for failure to include adequate exceptions for the life or health of the woman.<sup>138</sup> An attempt to set forth a standard by which to analyze the constitutionality of partial birth abortion bans on pre-viable fetuses is particularly difficult given that the lower federal courts are not in agreement as to whether the *Casey* "undue burden" standard<sup>139</sup> is limited to pre-viability abortion regulations.<sup>140</sup> Some courts have limited *Casey*'s "undue burden" standard solely to pre-viability abortion procedures,<sup>141</sup>

---

132. *Colautti*, 439 U.S. at 395 n.13.

133. *Verniero*, 41 F. Supp.2d at 494-95 (quoting *Nova Records, Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983)).

134. 55 F. Supp.2d 441 (E.D. Va. 1999).

135. *Id.* at 498-99.

136. *Voinovich*, 130 F.3d at 205-06 ("In an area as controversial as abortion, the need for a scienter requirement is, as the Supreme Court pointed out, particularly important . . . [The] lack of scienter will have a profound chilling effect on the willingness of physicians to perform abortions.").

137. *See Verniero*, 41 F. Supp.2d at 503 (citing cases that have found partial birth abortion bans to be unconstitutional for imposing an undue burden).

138. *See id.*

139. *See supra* note 86 and accompanying text.

140. *See supra* text accompanying note 103. *See also Gilmore*, 55 F. Supp.2d at 478 ("It is true that the *Casey* 'undue burden' standard applies only to pre-viability abortion regulations, but the analysis in *Casey* respecting the appropriate standard for facial challenges transcended the line drawn . . . at viability . . . . The Supreme Court purported to set forth a standard for general applicability.").

141. *See Gilmore*, 55 F. Supp.2d at 478 (the "'undue burden standard' applies only to pre-viability abortion regulations.").

while others have extended the “undue burden” standard to also include post-viability abortion regulations.<sup>142</sup>

The Eighth Circuit initially addressed the constitutionality of partial birth abortion laws on September 14, 1999, when it filed joint opinions on such laws in Nebraska, Iowa, and Arkansas.<sup>143</sup> In *Carhart v. Stenberg*,<sup>144</sup> the Eighth Circuit found a Nebraska partial birth abortion act unconstitutional on undue burden grounds using the *Casey* standard.<sup>145</sup> It specifically noted that the decision was based solely on the undue burden created by the ban of the D&E procedure on pre-viable fetuses and did not analyze the strength or weakness of other challenges.<sup>146</sup> The Nebraska law referred to and attempted to outlaw “partial birth abortion” defined in the act as a procedure in which an unborn child or “substantial portion thereof” is “partially delivered.”<sup>147</sup> While the legislature only intended to ban the D&X procedure, the district court found that the definition of the “partial birth abortion” was broad enough to reasonably include the most common method of second trimester abortions, the D&E procedure.<sup>148</sup> The Eighth Circuit found that by banning both the D&X and the D&E procedures, the act “would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion” because it would prohibit the most common procedure for second trimester abortions.<sup>149</sup>

In *Voinovich*, the Sixth Circuit also struck down a partial birth abortion ban based on undue burden grounds.<sup>150</sup> Like the Eighth Circuit, the *Voinovich* court determined that the act incorporated both the D&X and the D&E procedures.<sup>151</sup> The court relied heavily on *Planned Parenthood of Central Missouri v. Danforth*<sup>152</sup> in reviewing the Ohio partial birth abortion act. While

---

142. See *Voinovich*, 130 F.3d at 196 (“We conclude that Casey’s analysis should be extended to post-viability abortion regulations.”).

143. See *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386 (8th Cir. 1999); *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999).

144. 192 F.3d 1142 (8th Cir. 1999).

145. *Id.* at 1148 n.10 (noting that the case did not raise any questions with respect to procedures performed on viable fetuses).

146. *Id.* at 1146 n.4.

147. NEB. REV. STAT. § 28-326(9) (1998).

148. *Carhart v. Stenberg*, 11 F. Supp.2d 1099, 1127-31 (D. Neb. 1998) (emphasizing the ambiguity of the term “substantial portion”); *Carhart v. Stenberg*, 192 F.3d 1142, 1145 (8th Cir. 1999).

149. *Carhart*, 192 F.3d at 1151.

150. *Voinovich*, 130 F.3d at 203.

151. *Id.* at 201.

152. 428 U.S. 52, 75-79 (1976) (finding ban on saline amniocentesis method of abortion after the first twelve weeks of pregnancy unconstitutional because it would inhibit the vast majority of abortions and would restrict a woman’s choice to a more dangerous abortion method).

*Danforth* was decided using the *Roe* trimester framework rather than the *Casey* undue burden standard, the court reasoned that although “*Roe*’s second trimester standard allowed for fewer constitutional abortion regulations than does *Casey*’s undue burden standard, it follows that a statute that bans a common abortion procedure would constitute an undue burden.”<sup>153</sup> Because the act was not restricted to abortions performed on viable fetuses, it was found to be an unconstitutional burden on woman’s right to choose an abortion.<sup>154</sup>

Other federal district courts finding partial birth abortion bans unconstitutional on undue burden grounds have, likewise, emphasized the problems created by bans that incorporate the D&E procedure.<sup>155</sup> In *Richmond Medical Center v. Gilmore*,<sup>156</sup> the district court held that because the Virginia statute<sup>157</sup> excluded the most common and preferred second trimester abortion procedure (D&E) and left a statistically more risky procedure in its place (induction), it resulted in an undue burden.<sup>158</sup> In addition to restricting safe abortion procedures, the court in *Rhode Island Medical Society v. Whitehouse* further found that the state ban imposed an undue burden on women by forcing them to cross state lines in order to get an abortion.<sup>159</sup> The *Verniero* court also found that the New Jersey act<sup>160</sup> “chills physicians from performing most conventional abortion procedures and thereby imposes an undue burden on a woman’s constitutional right to terminate a pregnancy.”<sup>161</sup>

Maternal health exceptions are an additional source of controversy with respect to partial birth abortion bans. The two main disputes involve the following issues: 1) whether such an exception must be included in partial birth abortion bans limited to viable fetuses and 2) whether “health” must include both physical and mental health.<sup>162</sup> The vast majority of federal courts have found partial birth abortion bans that lack a “health” exception to be unconstitutional, even if a “life” exception is included.<sup>163</sup> These courts rely on *Casey*’s holding that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except* where it is necessary . . . for the preservation of the

---

153. *Voinovich*, 130 F.3d at 201.

154. *See id.*

155. *See Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp.2d 441, 467-71 (E.D. Va. 1999); *Rhode Island Med. Soc’y v. Whitehouse*, 66 F. Supp.2d 288, 309 (D.R.I. 1999).

156. 55 F. Supp.2d 441 (E.D. Va. 1999).

157. VA. CODE ANN. § 18.2-74.2 (Michie 1998).

158. *Gilmore*, 55 F. Supp.2d at 483-85. The court noted that the D&E procedure accounts for 86%, while induction accounts for only 8.8% of second trimester abortion. Additionally, maternal mortality rates are higher for labor induction than for D&E procedures. *Id.* at 483-84.

159. *Whitehouse*, 66 F. Supp.2d at 313.

160. N.J. STAT. ANN. § 2A:65A-6 (West 1997).

161. *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp.2d 478, 499 (D.N.J. 1998).

162. *See, e.g., Verniero*, 41 F. Supp.2d at 502; *Voinovich*, 130 F.3d at 203-10.

163. *See Gilmore*, 55 F. Supp.2d at 492; *Voinovich*, 130 F.3d at 209.

life or health of the mother.”<sup>164</sup> An abortion regulation, therefore, must protect the life and health of the mother at all stages of pregnancy.<sup>165</sup> Some states have argued that a D&X procedure on viable fetuses is never medically necessary to protect the health of the mother and, therefore, a “health” exception is not required.<sup>166</sup> Most courts, however, have declined to accept such arguments due to conflicting evidence on the D&X procedure.<sup>167</sup>

The *Voinovich* court addressed the “medical necessity exception” in the Ohio partial birth abortion ban, which excepted abortions necessary to save the woman’s life or to avoid “a serious risk of the substantial and irreversible impairment of a major bodily function.”<sup>168</sup> The Sixth Circuit found such a health exception, limited to physical health risks, to be unconstitutional for failing to provide a mental health exception.<sup>169</sup> The court looked to prior Supreme Court cases to construe the meaning of “health.”<sup>170</sup> In *Doe v. Bolton*,<sup>171</sup> decided the same day as *Roe v. Wade*,<sup>172</sup> the Court approved a district court’s construction of “medically necessary” abortion.<sup>173</sup> The Court agreed that a physician’s medical judgment “may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient. All of these factors may relate to health.”<sup>174</sup> Relying on this language, the Sixth Circuit concluded, “a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause severe non-temporary mental and emotional harm.”<sup>175</sup> An adequate health exception, therefore, should include abortions necessary to protect the physical health and to prevent “severe irreversible risks of mental and emotional harm.”<sup>176</sup>

---

164. *Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)) (emphasis added).

165. *Gilmore*, 55 F. Supp.2d at 487.

166. *Id.* at 490-91 (insisting that the D&X procedure is not taught in medical schools or tested in peer review journals).

167. *Id.* at 490-92.

168. *Voinovich*, 130 F.3d at 206 (citing OHIO REV. CODE ANN. §. 2919.17(A)(1) (Anderson 1997)).

169. *Id.* at 206-10.

170. *Id.* at 208-09.

171. 410 U.S. 179 (1973).

172. 410 U.S. 113 (1973).

173. *Doe*, 410 U.S. at 192.

174. *Id.*

175. *Voinovich*, 130 F.3d at 209.

176. *Id.*

C. *The Seventh Circuit has Upheld Partial Birth Abortion Legislation in Both Wisconsin and Illinois*

In 1998, a federal district court in Wisconsin denied Planned Parenthood a preliminary injunction against enforcement of the Wisconsin partial birth abortion ban.<sup>177</sup> The Seventh Circuit ordered a preliminary injunction after determining that the plaintiffs may have succeeded in proving the law unconstitutional on either of three separate grounds: 1) failure to include an exception for fetuses not viable at the time of the procedure, 2) failure to include an exception for the health of the mother, and 3) vagueness.<sup>178</sup> The circuit court stated that its opinion was based on a limited record and that a “full trial may cast the facts in a different light.”<sup>179</sup>

Indeed, the court’s prediction was accurate. After a full trial, the district court held that the statute was constitutional.<sup>180</sup> Finding the circuit court’s concerns ultimately unfounded, the district court determined that the statute was not vague and did not require exceptions for previability abortions or the health of the mother.<sup>181</sup> The plaintiffs in *Planned Parenthood v. Doyle* challenged the act’s validity on grounds identical to those made against other state partial birth abortion laws; however, the court rejected every constitutional challenge to the Wisconsin statute.<sup>182</sup>

The district court determined that the term “partial birth abortion” was commonly known to include only the D&X procedure and did not include any common second trimester abortion procedures.<sup>183</sup> Additionally the court found that only in the D&X procedure does the doctor “intend” to kill an “intact child.” Opponents of the bill, according to the court, strained the meaning of “child” to include “dismembered body parts” in order to argue that the ban encompassed the D&E procedure that frequently results in the destruction of an intact fetus.<sup>184</sup>

Secondly, the district court found that a previability exception was not required because the act serves to further “several compelling state interests,

---

177. *Planned Parenthood of Wis. v. Doyle*, 9 F. Supp.2d 1033 (W.D. Wis. 1998). Wisconsin’s statute bans any person from performing a partial birth abortion. WIS. STAT. § 940.16(2) (1997). It defines “partial birth abortion” as “an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.” *Id.* § 940.16(1)(b). The Act allows for an exception for abortions “necessary to save the life of woman whose life is endangered by a physical illness.” *Id.* § 940.16(3).

178. *Planned Parenthood of Wis. v. Doyle*, 162 F.3d. 463, 466-69 (7th Cir. 1998).

179. *Id.* at 466.

180. *Planned Parenthood of Wis. v. Doyle*, 44 F. Supp.2d 975, 983 (W.D. Wis. 1999).

181. *See id.* at 983-94.

182. *Id.*

183. *Id.* at 984-85.

184. *Id.*

including interests in maternal health, potential life and morality.”<sup>185</sup> Lastly, the act need not include an exception for cases in which the D&X procedure is necessary to protect the mother’s health, because based on testimony at trial, the court determined that partial birth abortion “is never medically necessary to preserve the health or save the life of the woman and abolition of the procedure does not subject women to materially greater health risks.”<sup>186</sup> Furthermore, the act does not impose an undue burden on a woman’s right to an abortion because women are left with safe, alternative methods of abortion.<sup>187</sup>

Another district court reviewed a similar partial birth abortion law in Illinois and found it to be unconstitutional. Acting without an evidentiary hearing, the court held the Illinois ban<sup>188</sup> unconstitutional in *Hope Clinic v. Ryan*<sup>189</sup> and granted a permanent injunction.<sup>190</sup> The court first found the act’s language subject to multiple interpretations, primarily because key terms were not defined in the statute, and determined the act was void for vagueness.<sup>191</sup> The court stated that when confronted with potential infringements of constitutionally protected rights and with criminal penalties, it requires a statute to pass a higher standard of certainty.<sup>192</sup> The court next found that the act imposed an undue burden on a woman’s right to terminate her pregnancy prior to viability because the vague language of the act could potentially ban safe, early abortion procedures.<sup>193</sup> Lastly, the ban on partial birth abortions on viable fetuses was also improper in that it failed to include an exception for procedures necessary to protect the woman’s physical or mental health.<sup>194</sup>

Following the contradictory district court decisions on similar partial birth abortion laws, the Seventh Circuit consolidated the appeals and heard the cases en banc.<sup>195</sup> Relying heavily on the recent Supreme Court case *Chicago v. Morales*,<sup>196</sup> the court determined that the state courts were the proper courts to interpret the statute, rather than the federal courts and that both laws could be

---

185. *Doyle*, 44 F. Supp.2d at 983.

186. *Id.* at 984.

187. *Id.*

188. 720 ILL. COMP. STAT. 513/10 (West 1998). The act bans a “partial birth abortion,” defined as “an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing delivery.” *Id.* § 513/5.

189. 995 F. Supp. 847 (N.D. Ill. 1998).

190. *Id.* at 849.

191. *Id.* at 855. The court focused on the statutory definition of “partial birth abortion” as “an abortion in which the person performing the abortion partially vaginally delivers a living human fetus . . . before killing [it].” *Id.* at 850.

192. *Id.* at 856.

193. *Id.* at 857.

194. *Hope Clinic*, 995 F. Supp. at 857.

195. *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999).

196. 527 U.S. 41 (1999).

applied in a constitutional manner.<sup>197</sup> Until the state courts had an opportunity to review the statutes, however, the Seventh Circuit issued “precautionary injunctions” to temporarily limit the statutes’ application.<sup>198</sup> The court addressed each of the plaintiffs’ challenges to the constitutionality of the statutes and found them each unfounded.<sup>199</sup>

### 1. Not Vague

The court began by recognizing that while the statutory definition of “partial birth abortion” does not track the medical definition of the D&X procedure and while the general public may be confused, physicians recognize that the statute only applies to the D&X procedure.<sup>200</sup> Further, having been assured by the Attorneys General of Illinois and Wisconsin that their states’ respective statutes dealt only with the D&X procedure, the court determined that the vagueness concerns could be resolved.<sup>201</sup> While the plaintiffs’ charged the district court with “revisionism,” the court reasoned that “[u]sing a medical definition to supplement a vague lay definition does not strike us as revisionism or an exercise in deconstruction.”<sup>202</sup> The court criticized other circuits that had declared abortion statutes unconstitutionally vague, irrespective of “how precise an interpretation state courts eventually develop.”<sup>203</sup> It stated, “[o]nly if vagueness remains after judicial interpretation is there a constitutional problem.”<sup>204</sup>

The court supported its conclusion that doctors clearly understand that only the D&X procedure is to be banned by looking to states where partial birth

---

197. *Ryan*, 195 F.3d at 864 (“[S]tate courts are entitled to construe state laws to reduce their ambiguity, and that federal courts should evaluate state laws as they have been construed, not just as they appear in the statute books.”) (relying on *Chicago v. Morales*, 527 U.S. 41 (1999)). Compare *Hope Clinic*, 195 F.3d at 861 (insisting that state courts are the appropriate bodies to smooth “interpretive wrinkles” and that courts should avoid “advisory opinions”), with *Hope Clinic*, 195 F.3d at 877 (Posner, C.J., dissenting) (“No case holds . . . that until the statute is construed by the state courts, a claim that it is unconstitutionally vague is premature. No case denies the authority of the federal courts to interpret state statutes, which is something we do all the time.”).

198. *Hope Clinic*, 195 F.3d at 876.

199. *Id.* at 871-76.

200. *Id.* at 864. The court further commented that the legislature may have been fearful that a statutory medical description could prove the statute meaningless if physicians need only to slightly alter the procedure defined so as to remove the act from the statutory ban. *Id.* at 863.

201. *Id.* at 865.

202. *Id.*; but cf. *Hope Clinic*, 195 F.3d at 878 (Posner, C.J., dissenting) (arguing that the majority’s decision is internally inconsistent because the court both rejects the charge that the statute is vague, yet by issuing “precautionary injunctions” until the state courts can clarify the statutory language, the court impliedly suggests that the statutes are unconstitutionally vague).

203. *Hope Clinic*, 195 F.3d at 866.

204. *Id.*



abortion laws are currently in effect.<sup>205</sup> The court predicted two ways in which vague statutes could affect physicians and abortion rates in such states: 1) the percentage of all second trimester abortions would decrease if physicians sent patients to states without partial birth abortion regulations, or 2) the ratio of D&X and D&E procedures compared to other abortion procedures would decrease if doctors feared prosecution.<sup>206</sup> Relying on statistics from Indiana,<sup>207</sup> the court concluded that Indiana's partial birth abortion had no effect on late term abortions.<sup>208</sup>

## 2. No Undue Burden and No Health Exception Required

Having interpreted the scope of the ban to be limited to the D&X procedure, the court determined whether the statutes created an undue burden on abortion by failing to include an exception for the woman's health.<sup>209</sup> The district court had found that the D&X procedure was never medically necessary to maintain a woman's health and may even be hazardous to her health.<sup>210</sup> Relying on the district court's findings, while recognizing that other courts had reached different conclusions,<sup>211</sup> the circuit court determined that

---

205. *Id.* at 870.

206. *Id.*

207. *Id.* Indiana was the only state in the Seventh Circuit with such a statute currently in effect and its terms are virtually identical to Illinois' statute. *Hope Clinic*, 195 F.3d at 862.

208. *Id.* at 870-71.

During 1997 a total of 13,208 abortions were performed in Indiana. During the . . . 6 months [prior to the law's enactment] 74 late-second-trimester abortions were performed: 72 by D&E . . . . During the second six months (that is, after the partial-birth-abortion law took effect), 87 late-second-trimester abortions were performed, all by D&E. . . . Abortion by D&E during the first six months represented 1.03% of all abortions performed in Indiana . . . . Abortion by D&E during the second six months represented 1.39% of all abortions in the state.

*Id.*

209. *Id.* at 871. The court acknowledged that had they found the statutes to include the D&E procedure, as did the Eighth Circuit, then the laws would impose an undue burden. *Id.*

210. *Hope Clinic*, 195 F.3d at 871-72 (citing *Planned Parenthood of Wis. v. Doyle*, 44 F. Supp.2d 975, 979-82 (W.D. Wis. 1999)).

None of the physicians would state unequivocally that the D&X procedure is safer than the D&E procedure. . . . [One doctor] admitted that he had never encountered a situation where D&X would have been the best procedure to use. [Dr.] Haskell, who *invented the procedure*, admitted that the D&X procedure is never medically necessary to save the life or to preserve the health of a woman.

*Id.* (emphasis added); *Hope Clinic*, 195 F.3d at 872 ("We proceed on the assumption, which appears to be shared by the American Medical Association, that the D&X is not the best or safest option in any articulable category of situations.").

211. *Id.* at 872.

*Casey* did not require a “health exception” from a ban on an abortion procedure that “lacks demonstrable health benefits.”<sup>212</sup>

As to the meaning of “undue burden” for purposes of analysis, the Seventh Circuit deemed that the key word is “undue” rather than “burden.”<sup>213</sup> “[U]ndue’ means not only ‘substantial’ but also that the burden must be undue in relation to the woman’s interests, rather than undue in relation to the court’s assessment of society’s interests.”<sup>214</sup> Rejecting the plaintiffs’ theory that every regulation of a medical procedure is undue (because many regulations create small burdens), the court determined that the prohibition of the D&X procedure does not create an undue burden for woman seeking an abortion because they will continue to have safe, alternative procedures from which to choose.<sup>215</sup> The court stated, “when state law offers many safe options to that end, the regulation of an additional option does not produce an undue burden.”<sup>216</sup>

“The question in the end . . . is whether the state legislatures exceeded their constitutional powers. . . . Only if every regulation related to abortion must contain a case-by-case ‘health exception’ is there a problem with these laws. Yet *Casey* did not say that health effects must be evaluated case-by-case, rather than procedure-by-procedure.”<sup>217</sup> The court suggested that the regulations would be more problematic if they required a case-by-case evaluation of the health effects of a given procedure.<sup>218</sup> According to the court, *Casey* did not require states to evaluate health effects on a case-by-case basis, rather than evaluated procedure-by-procedure prior to enacting a law.<sup>219</sup> To require such a standard would effectively render the statutes meaningless, since a physician presumably will only perform a procedure he deems to be “medically necessary, and would amount to a rule that no state may regulate any abortion procedure.”<sup>220</sup>

---

212. *Id.* at 871 (“The point that the plurality [in *Casey*] made was that a statute that lacks a ‘health exception’ may unduly burden the woman’s right to obtain an abortion before the fetus has reached viability.”).

213. *Id.* at 874.

214. *Id.* (noting that a small cost or inconvenience is not “undue”).

215. *Hope Clinic*, 195 F.3d at 874.

216. *Id.* at 871.

217. *Id.* at 872-73.

218. *Id.* at 873.

219. *Id.*

220. *Hope Clinic*, 195 F.3d at 873 (relying particularly on *Mazurek v. Armstrong* that holds that states may limit performance of abortions to physicians and may permit laws that regulate by class of procedures or regulate by class of medical providers).

## V. MISSOURI'S INFANT'S PROTECTION ACT

### A. *Key Aspects of the Law*

#### 1. Crime of Infanticide

Missouri's "Infant's Protection Act" creates the class A felony of infanticide and is codified in the criminal code under "offenses against the person."<sup>221</sup> A person commits the crime of infanticide if "such person causes the death of a living infant *with the purpose* to cause said death by an *overt act* performed when the infant is *partially born* or born."<sup>222</sup>

#### 2. "Partially Born" Defined in Statute

As defined in the statute, "partially born" refers to the "*partial separation* of a child from the mother with the child's head intact with the torso."<sup>223</sup> A child is partially separated when the head is outside the mother's external cervical, when presented in a cephalic presentation, when any part of the torso above the navel is outside the mother's external cervical, or when in a breech position.<sup>224</sup> In layman's terms, if the "child" is removed headfirst, then the child is partially separated once the head enters the vagina so long as the head is intact with the torso. If the child is removed feet first (as is most often the case in the D&X procedure), then the child is partially separated once the upper portion of the body has entered the vagina so long as the head is intact with the torso.

#### 3. Act Protects Crimes against "Living Infants"

The "living infant" protected by the statute is one who has been 1) born or partially born, 2) medically determined to be alive, 3) not deemed to be "dead" pursuant to medical standards and the statutory definition,<sup>225</sup> and 4) not yet attained the age of thirty days post birth.<sup>226</sup> Because the Act is intended to protect "living infants," no reference is made to "fetuses" or "viability." The legislative history reveals that the Committee on Public Health and Welfare's

---

221. MO. REV. STAT. § 565.300 (1999).

222. *Id.* § 565.300.3 (emphasis added).

223. *Id.* § 565.300.2 (3) (emphasis added).

224. *Id.*

225. MO. REV. STAT. § 194.005 (1996). The statute sets forth the legal definition of "death" as "determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met: (1) . . . irreversible cessation of spontaneous respiration and circulation . . ." *Id.*

226. MO. REV. STAT. § 565.300.2 (2) (1999).

original version of the bill had been intended to amend the abortion statutes so as to ban a “partial birth abortion” on a viable fetus.<sup>227</sup>

#### 4. Scierter Requirement

In order to be held criminally liable under the Act, a person must perform the “overt act” necessary to commit the crime. The language of the statute also specifies that the person must perform such an “overt act” “with the purpose” of committing the crime. A mother or any other person may also be liable if that person firmly intends to commit infanticide and takes a “substantial step” towards committing such crime.<sup>228</sup>

#### 5. No Criminal Liability for Procedures Used to Save the Life of the Mother or Child

The Act protects physicians who use usual and customary medical procedures to either save the life of the mother during pregnancy or birth or to save the life of any unborn or partially born child of the same pregnancy from being found criminally responsible. Furthermore, no mother shall be held criminally responsible if the physician is not found to be criminally responsible.<sup>229</sup>

#### 6. Statute Excludes Legal Abortion Procedures from its Scope

Legal abortion procedures do not fall under this Act so long as “[1]) the *act that causes the death* is [2]) *performed prior to the child being partially born*, [3]) even though the death of the child occurs as a result of the abortion after the child is partially born.”<sup>230</sup> While this definition could certainly be more precise with respect to which abortion techniques are considered to be “legal,” several reasonable interpretations are permissible.

#### B. Other Related Missouri Abortion Laws Currently in Force

Missouri has long been considered to be an “active battleground[] and testing ground[] for abortion regulation.”<sup>231</sup> Missouri’s legislature is considered to be one of the most hostile legislatures in the country toward the Supreme Court’s landmark abortion decision in *Roe v. Wade*.<sup>232</sup> In fact, the

---

227. H.B. 427, 90th Leg., 1st Reg. Sess. (Mo. 1999).

228. MO. REV. STAT. § 565.300.7 (1999).

229. *Id.* § 565.300.5.

230. *Id.* § 565.300.6 (emphasis added); *see also infra* text accompanying notes 249-62.

231. MATTHEW E. WETSTEIN, ABORTION RATES IN THE UNITED STATES: THE INFLUENCE OF OPINION AND POLICY 95 (1996).

232. BARBARA HINKSON CRAIG & DAVID M. O’BRIEN, ABORTION AND AMERICAN POLITICS 83 (1993). A study of state abortion policy identified twenty-four different forms of abortion policies codified into state law. WETSTEIN, *supra* note 231, at 95. Missouri, with eighteen restrictions, was found to be the most restrictive state with respect to the number of abortion

Supreme Court reviewed four challenges to Missouri abortion laws within fifteen years of *Roe*.<sup>233</sup> Missouri won a significant constitutional victory in 1989 when the Court upheld a comprehensive abortion regulation and signaled a potential future retreat from the strict standard set forth in *Roe*.<sup>234</sup>

Currently in Missouri, a physician must test all fetuses beyond twenty weeks gestational age for viability before performing an abortion.<sup>235</sup> If a fetus is viable, it may only be aborted to save the life or health of the mother.<sup>236</sup> In such cases, a second physician, who shall provide immediate medical care for the aborted child, must be in attendance.<sup>237</sup> Anyone who kills a child aborted alive may be prosecuted for murder in the second degree.<sup>238</sup>

### C. *Will Missouri's Infant's Protection Act Survive Constitutional Scrutiny Under Abortion Jurisprudence?*

#### 1. Void for Vagueness?

Both the Sixth and Seventh circuits agree that a statute will be deemed impermissibly vague if it fails to give reasonable notice of what conduct is forbidden.<sup>239</sup> The Seventh Circuit, relying on *Chicago v. Morales*,<sup>240</sup> would

---

regulations. *Id.* The study also found that those states with the fewest abortion restrictions (New York and California) also had some of the highest abortion rates in the nation. *Id.* at 94-95. The suggestion, however, that the number of abortion restrictions in a state is directly correlated with the number of abortions performed could be deceiving. For example, by comparing the number of abortion restrictions in a state with the actual number of abortions performed in a state (as reported by state health agencies) we find that a total of 70,389 abortions were performed in the most restrictive states (Missouri, North Dakota, and Pennsylvania) while only 36,839 abortions were performed in the least restrictive states (Connecticut, Oregon, and Vermont). *Compare id.*, with Lisa M. Koonin et al., *Abortion Surveillance, United States, 1988*, in *ABORTION, MEDICINE, AND THE LAW* 458, 465-66 (J. Douglas Butler & David F. Walbert eds., 1992). The most recent data available from the Missouri Department of Health shows that 12,751 abortions were performed in Missouri in 1998. *Table 12, supra* note 39.

233. See *Danforth v. Rodgers*, 414 U.S. 1035 (1973); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

234. See *Webster*, 492 U.S. at 499.

235. See MO. REV. STAT. § 188.029 (1986). Missouri is one of four states (Alabama, Louisiana, Missouri, and Ohio) with laws requiring a physician to perform tests to determine viability. THE NARAL FOUNDATION, *A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS* xiii (1998).

236. See MO. REV. STAT § 188.030.1 (1979). Missouri is one of forty-one states that prohibit abortion after viability under specified circumstances. THE NARAL FOUNDATION, *supra* note 235, at xii.

237. See MO. REV. STAT. § 188.030.3 (1979).

238. See *id.* § 188.035.

239. See *supra* Parts IV.B.1, IV.C.1.

240. 527 U.S. 41 (1999).

not declare a statute vague prior to judicial interpretation by a state court.<sup>241</sup> In *Voinovich*, the Sixth Circuit interpreted a statute to be vague;<sup>242</sup> however, it is not clear whether the Sixth Circuit would impose a similar restriction on federal interpretation following *Morales*. A statute must be interpreted in a light most favorable to finding it as constitutional and a court must apply any reasonable construction so as to find it constitutional.<sup>243</sup> A court should narrowly construe a statute if reasonable.<sup>244</sup>

Upon close reading, the Infant's Protection Act outlaws only those 1) overt acts performed with the purpose to kill<sup>245</sup> 2) a partially born infant that is deemed to be alive and not dead according to medical standards.<sup>246</sup> The "overt act" must be 3) "performed *when* the infant is partially born or born."<sup>247</sup> A "living infant" is "partially born" only if 4) the child's head is intact with the torso, and either the child's head is outside the uterus, or the lower half of the child's body below the navel is outside the uterus.<sup>248</sup> Additionally, the Act does not include "legal abortions" within the prohibition.<sup>249</sup> A legal abortion is any overt act intended to cause the death, performed *prior to* partial birth,<sup>250</sup> even if the fetus is "alive" when aborted and does not die until after removed from the uterus.<sup>251</sup>

The relevant question becomes: Are the statutory definitions sufficiently clear so as to apprise doctors of the prohibited conduct? The Act could surely have defined prohibited conduct more simply by referring to the specific medical procedures to be outlawed. While the definitions are complicated, if comprehensible and reasonably capable of being found to be constitutional, they should be so construed.

Based upon the AMA accepted definition of the D&X procedure,<sup>252</sup> the procedure would clearly be banned under the Act. The important distinction between the D&X procedure and traditional abortion procedures is that the

---

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

242. *Voinovich*, 130 F.3d at 200.

243. *Whitehouse*, 66 F. Supp.2d at 305-06 (relying on *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

244. *Id.*

245. MO. REV. STAT. § 565.300.3 (1999).

246. *See id.* § 565.300.2 (2).

247. *See id.* § 565.300.3.

248. *See id.* § 565.300.2(3).

249. *See id.* § 565.300.6.

250. As outlined earlier in the text, "partial birth" requires that the fetus' head be intact with the torso, and either the head be outside the uterus or the lower half of the body be outside the uterus. Therefore, should the head detach from the torso or should the "overt act" be performed while the fetus is in the uterus or before the head or lower half of the body leaves the uterus, then the "overt act" is a legal abortion and is protected. MO. REV. STAT. § 565.300.2 (3) (1999).

251. *See id.* § 565.300.6.

252. *See Late-Term Pregnancy Termination Techniques*, *supra* note 24.

fatal step is not performed until the body of the intact fetus is removed from the uterus.<sup>253</sup> Only after removing the torso of the fetus from the uterus does the physician puncture the skull and evacuate the cranial contents.<sup>254</sup> Physicians who perform the D&X procedure would certainly fall under the ban because they 1) intend to partially remove an intact fetus from the uterus, 2) intend to remove the torso of the fetus from the uterus, and 3) only after removing the torso from the uterus do they then perform the fatal act of puncturing the skull.<sup>255</sup> The D&X procedure would not fall under the “legal abortion” exception, because at no time does a doctor deliver the “act” intended to kill the fetus *prior to* partially removing the fetus from the uterus.<sup>256</sup>

The common first trimester abortion procedure of suction curettage or vacuum aspiration would fall under the “legal abortion” exception, and, therefore, would not be banned. This procedure entails inserting a suction tube into the uterus and removing the fetus with suction.<sup>257</sup> During suction curettage abortions, the fetus normally dies prior to removal from the uterus, because the fetus is not developed enough to withstand the pressure of suction. The fetus, therefore, is typically dismembered and dies from the suction performed within the uterus.

Induction abortions are most commonly performed late in the second or third trimester of pregnancy. The physician inserts a solution of saline, urea, or prostaglandin into the amniotic cavity in order to “cause fetal demise” within the uterus.<sup>258</sup> Regardless of whether the fetus dies within the uterus or after expulsion, a physician will not be held liable under the Act because the injection that causes the death is performed while the fetus is in the uterus.

Lastly, the D&E procedure should not be prohibited under the Act. A physician performs the D&E by reaching into the uterus and removing the fetus in parts using a combination of suction and traction.<sup>259</sup> While a rare occurrence, at times a physician will deliver a fetus intact. This is an unintended consequence and not the standard procedure for the D&E.<sup>260</sup> The fetus is generally so fragile when the D&E is performed that it cannot withstand the suction and traction.<sup>261</sup> The D&E procedure should be excluded from the Act for either of two reasons. First, the D&E should fall within the

---

253. *Id.*

254. *Id.*

255. *Id.*

256. Compare *Late-Term Pregnancy Termination Techniques*, *supra* note 24, with MO. REV. STAT. § 565.300.6 (1999).

257. See *Doyle*, 9 F. Supp.2d at 1036; *Gilmore*, 55 F. Supp.2d at 451-52.

258. See generally *Gilmore*, 55 F. Supp.2d at 456-57.

259. See *Whitehouse*, 66 F. Supp.2d at 296.

260. *Id.*

261. *Id.*

“legal abortion” exception because the doctor uses suction and traction with the intent to remove the fetus in pieces. The traction and suction are performed while the fetus remains in the uterus, and are ultimately responsible for the fetus’ demise. Secondly, should the doctor deliver an intact fetus, he will not satisfy the “intent” requirement to cause the death of the fetus “by an overt act performed *when the infant is partially born or born.*”<sup>262</sup> Delivery of an intact fetus would be an unintended consequence.

While the statutory definitions in Missouri’s Infant’s Protection Act are complicated, they are not constitutionally vague and can reasonably be read to ban only the D&X procedure. While some may suggest that the D&E procedure also falls within the Act’s ban, proper statutory construction would require the judiciary to narrowly construe the Act in the light most favorable to finding it constitutional.<sup>263</sup>

## 2. Does the Regulation Constitute an Undue Burden on Women Seeking Abortion of Previable Fetus?

The language of Missouri’s Infant’s Protection Act does not explicitly limit the scope of the Act to protect only viable fetuses.<sup>264</sup> While the legislative history shows that an earlier version of the bill (intended to modify the abortion statutes rather than the criminal laws) was meant to protect only viable fetuses, later versions of the bill dropped the viability language and replaced it with the term “living infant.”<sup>265</sup> “Living infant” could be interpreted to be limited solely to viable fetuses or could be interpreted to cover “living” previable fetuses. The Act does give the doctor discretion in determining whether the fetus is “living,”<sup>266</sup> so in order to encourage a finding of constitutionality, a court could limit the interpretation of “living infant” to only “viable fetuses.” If the Act protects only viable fetuses, then it will not place any undue burden on women seeking to abort a previable fetus. The courts should narrowly construe the Act to its constitutional applications so as to uphold the statute and to prevent any undue burden on women.<sup>267</sup>

Even if “living infant” were not read to mean “viable fetus” the statute could also withstand a constitutional inquiry, given that it should only be read to prohibit a D&X abortion. A ban limited to the D&X procedure should not create an undue burden on women seeking abortions prior to fetal viability because those women and their doctors would continue to have access to the most common forms of abortion techniques.

---

262. MO. REV. STAT. § 565.300.3 (1999) (emphasis added).

263. *Whitehouse*, 66 F. Supp.2d at 305-06.

264. *See* MO. REV. STAT. § 565.300.2 (2) (1999).

265. H.B. 427, 90th Leg., 1st Reg. Sess. (Mo. 1999).

266. MO. REV. STAT. § 565.300.2 (2) (1999).

267. *See supra* text accompanying note 243.



With access to the most common and safe abortion procedures, women cannot claim that the state has placed a substantial obstacle in their path to aborting a pre-viable fetus.

3. Does the Regulation Constitute Undue Burden for Failure to Include Exceptions for Life and Health of the Mother?

The Infant's Protection Act contains an absolute exclusion for medical acts performed to save the life of the mother.<sup>268</sup> Any constitutional problems remaining for the Act revolve around the necessity to include an exception for the health of the mother. *Casey* clearly held that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>269</sup> While it will continue to be debated as to whether a statutory health exception must encompass both physical and mental health,<sup>270</sup> Missouri's Infant's Protection Act fails to include any exception for health. *Hope Clinic v. Ryan*<sup>271</sup> determined that a health exception is not necessary for a ban on D&X abortions because the D&X procedure is never necessary to protect the health of a woman; however, that factual determination has been disputed in the vast majority of reported cases.<sup>272</sup> A reasonable reading of *Casey* reveals that some form of a health exception is required, even for abortions of viable fetuses. Missouri's Act, therefore, will fail a constitutional undue burden analysis.

D. Does Drafting a Statute Framed as Infanticide Remove it From Constitutional Requirements Imposed by Abortion Jurisprudence?

In more recent partial birth abortion lawsuits, defendants have begun to argue that the proscribed procedure is an infanticide issue and not an abortion issue "because once the living fetus is brought into the birth canal, the birth process has begun."<sup>273</sup> They argue, "the constitutionality of the Act is not to be measured against the decisions of the Supreme Court . . . which define the constitutional parameters of state abortion laws."<sup>274</sup> These arguments have not yet been successful, in part due to the fact that legislatures had enacted the statutes as part of state codes regulating abortion, rather than criminal

---

268. MO. REV. STAT. § 565.300.5 (1999).

269. *Casey*, 505 U.S. at 879.

270. See *Voinovich*, 130 F.3d at 206-10; *Gilmore*, 55 F. Supp.2d at 488-90.

271. *Hope Clinic*, 195 F.3d at 871.

272. See, e.g., *Voinovich*, 130 F.3d at 210; *Gilmore*, 55 F. Supp.2d at 490-91.

273. *Causeway Med. Suite v. Foster*, 43 F. Supp.2d 604, 609 (E.D. La. 1999).

274. *Gilmore*, 55 F. Supp.2d at 444.

homicide.<sup>275</sup> In those cases, it was difficult for states to argue that the purpose of the laws was to combat infanticide when the acts actually regulated abortion procedures. Missouri will attempt to use similar arguments to uphold the Infant's Protection Act that was included in the criminal homicide code rather than the code regulating abortion.

Apart from the limited rights afforded to the fetus in constitutional abortion law, in the years following *Roe v. Wade*, many state courts and legislatures have become increasingly protective of fetal rights in tort, criminal, and property law.<sup>276</sup> The trend has been for states to expand the legal rights of a fetus and to recognize that a fetus can be an independent victim under criminal and tort law.<sup>277</sup> In expanding the legal rights of the fetus in other areas of the law, a tension necessarily grows between fetal rights and a woman's right to privacy. This tension becomes particularly acute when analyzing Missouri's Infant's Protection Act.

#### 1. Fetal Rights under Missouri Law

##### a. Compensation for Prenatal Injuries under Tort Law

Beginning in 1953 some remedies were made available for injuries sustained by a fetus while in utero. *Steggall v. Morris*<sup>278</sup> held that a parent of a child born alive and who thereafter died from prenatal injuries could recover under the wrongful death statute.<sup>279</sup> Until 1983, Missouri did not allow tort recovery for the death of a viable, but unborn fetus.<sup>280</sup> Missouri first recognized a cause of action for wrongful death of an unborn fetus in *O'Grady v. Brown*.<sup>281</sup> Finding that the legislature intended to establish a remedy for the

---

275. *Id.* at 480 n.44. The court ultimately declines to "circumvent the requirements of *Roe* and *Casey* . . . [which] established the line of demarcation . . . in terms of whether the fetus was viable or nonviable, not in terms of whether a fetus was in the process of being born." *Id.* at 480.

276. See generally Alan S. Wasserstrom, J.D., Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671 (1998).

277. *Id.*

278. 258 S.W.2d 577 (Mo. 1953) (en banc).

279. See *id.* at 581.

280. See *Hardin v. Sanders*, 538 S.W.2d 336, 340 (Mo. 1976) (en banc).

281. 654 S.W.2d 904, 909 (Mo. 1983) (en banc) (noting that fetal interests are protected in other areas of the law, including criminal, abortion, child neglect, and property law). The court distinguished between seemingly inconsistent approaches to fetal rights in the abortion and tort law context. *Id.* at 910.

*Roe v. Wade*, while holding that the fetus is not a 'person' for purposes of the 14th amendment, does not mandate the conclusion that the fetus is a legal nonentity. 'The abortion issue involves the resolution of the mother's rights as against the child when the two are in conflict. Whatever may be the determination of the rights in that context, this special relation gives a third-party tortfeasor no comparable rights.'

*Id.* at 910.

death of a human fetus, the court interpreted the term “person” in the wrongful death statute to include a fetus.<sup>282</sup> The court limited its holding to the facts of the case, that involved the death of a viable, nine month fetus and postponed decision on whether a cause of action would likewise lie for the death of a nonviable fetus.<sup>283</sup>

In 1995, the en banc panel of the Missouri Supreme Court determined that an unborn, previable fetus is also a “person” within the meaning of the state wrongful death statute.<sup>284</sup> In *Connor v. Monkem*,<sup>285</sup> the husband of a woman killed in an auto accident was able to state a claim against the negligent driver’s employer for the wrongful death of his wife and previable, unborn child.<sup>286</sup> The Court found that although a majority of other jurisdictions limit recovery to viable, unborn children, the Missouri legislature intended to extend the wrongful death statute to cover previable fetuses as well.<sup>287</sup>

#### b. Criminal Liability for Prenatal Harm

Under common law, no crime exists if a child dies before birth; however, a defendant may be held liable for murder if the child is born alive and later dies.<sup>288</sup> Many jurisdictions now allow for a criminal conviction absent a live birth.<sup>289</sup> In *State v. Holcomb*,<sup>290</sup> Holcomb was convicted of murder in the first degree and sentenced to two consecutive life sentences for strangling and killing his girlfriend and her unborn, twenty-six week fetus.<sup>291</sup> The court made

---

282. *Id.* at 909.

283. *Id.* at 911.

284. *Connor v. Monkem Co.*, 898 S.W.2d 89, 93 (Mo. 1995) (en banc) (extending coverage to an unborn four month fetus). The court relied on MO. REV. STAT. §1.205 (1986) that reads:

(1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; . . . the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons . . . subject only to the Constitution of the United States . . . .

*Id.* §1.205. Interestingly, this is the same statute addressed in *Webster v. Reproductive Health Services* in which the Supreme Court deferred judgment on the statute’s constitutionality until Missouri courts had the opportunity to interpret it. *Webster*, 492 U.S. at 506-07.

285. 898 S.W.2d 89 (Mo. 1995) (en banc).

286. *Id.* at 92-93.

287. *Id.* “[T]he question before us is one of statutory construction, [therefore] we must be more sensitive to legislative direction and less sensitive to our own evaluation of policy . . . [T]he legislature’s [intent] . . . must be accorded greater weight than the many other and obvious difficulties associated with the type of claim here . . . .” *Id.* at 93.

288. See generally Wasserstrom, *supra* note 276.

289. *Id.*

290. 956 S.W.2d 286 (Mo. Ct. App. 1997).

291. *Holcomb*, 956 S.W.2d at 288-89.

clear that a murderer of any fetus could be convicted of either involuntary manslaughter or murder.<sup>292</sup>

## 2. Resolving the Conflict Between the “Rights” of a Fetus under Infanticide and Abortion Law

While Missouri’s infanticide argument is somewhat more persuasive than those states outlawing partial birth abortion through abortion statutes, any proposal to expand infanticide prohibitions to include procedures used to abort “partially born” fetuses will likely fail. While the state clearly has a legitimate interest in the potential life of a fetus, that right is not absolute until the infant has separated from the mother at birth. Even while emphasizing the state’s compelling interest in a viable fetus, the Supreme Court has nevertheless constrained the state’s ability to protect the fetus when the interests of the fetus conflict with the mother’s life or health. The exercise of constitutional line drawing is difficult and at times imprecise; however, the act of “birth” currently serves as a clear line of demarcation for the recognition of constitutional rights and personhood.

Unfortunately, neither the states nor the federal government have reached consensus on the legal status of a living fetus. As previously mentioned, both the Supreme Court and Missouri state courts have upheld legislation recognizing that “unborn children have protectable interests in life, health, and well-being . . . [and that] at every stage of development, [unborn children shall have] all the rights, privileges, and immunities available to other persons.”<sup>293</sup> The Court in *Webster* upheld such legislation in so much as Missouri courts might choose to expand tort and probate protection to unborn fetuses.<sup>294</sup> They deferred for another day the resolution of any conflict the law may have with abortion rights.<sup>295</sup> Following *Webster*, homicide convictions in Missouri for the murder of a fetus have only been brought against third parties with the intent to harm the fetus and/or the mother. Presumably in those cases the interests of the mother and the fetus were in harmony. As elaborated in *Holcomb*, the fact that a mother may have a constitutionally protected right to obtain an abortion does not preclude the prosecution of a third party for murder

---

292. *Id.* at 290. The court specifically rejected the defendant’s argument that he should only be convicted of a misdemeanor, the penalty for an illegal abortion. *Id.* at 292. The court determined, “[t]he fact that a mother of a pre-born child may have been granted certain legal rights to terminate the pregnancy does not preclude the prosecution of a third party for murder in the case of a killing of a child not consented to by the mother.” *Id.* at 291. *See also* State v. Kenney, 973 S.W.2d 536, 545 (Mo. Ct. App. 1998) (finding an unborn child to be a person for purposes of the first degree assault statute).

293. *See supra* note 284 and accompanying text.

294. *Webster*, 492 U.S. at 506.

295. *Id.*

of her fetus.<sup>296</sup> When analyzed solely in the context of Missouri feticide law, the Infant's Protection Act appears to be entirely consistent with previous decisions. In fact, in some respects it could be considered less controversial in that it bans murder of an infant already in the process of being born, as opposed to banning the murder of a pre-viable fetus still within the womb.

Only when considered in combination with abortion law does the Infant's Protection Act become troublesome. The Supreme Court determined in *Roe v. Wade* that Fourteenth Amendment protection does not extend to the unborn.<sup>297</sup> The Court partially relied on the fact that at that time many areas of state law did not afford legal protection to a fetus prior to birth.<sup>298</sup> Given that state law has evolved to protect the unborn, *Roe's* holding has been undermined to some degree; however, there is no reason to believe that the Court will abandon that determination in the near future. The Court in *Casey* explicitly established the relevant constitutional inquiry when a state abortion law designed to protect the potential life of a fetus was in conflict with a woman's liberty or privacy rights under the Constitution.<sup>299</sup> The Court considered whether a state law imposes an undue burden on a woman's decision to terminate her pregnancy prior to fetal viability.<sup>300</sup> "[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."<sup>301</sup>

While the Court appears content to allow states the ability to extend greater protection to a fetus under state law than is available to it under the Constitution, the inconsistent approaches should be resolved. This author does not advocate a particular resolution, yet it is nonsensical to continue allowing an unborn fetus to be a "person" entitled to protection in some situations yet not in others, particularly under criminal homicide statutes. Clearly a difference exists between a mother's relationship with her fetus in the abortion context and a third party's "relationship" to the fetus under homicide and wrongful death statutes; however, it is illogical to suggest that the status of a fetus as a "person" depends on who terminates its life.

## VI. PROPOSED CHANGES TO MISSOURI'S STATUTE

The question is not so much whether it would be constitutional to outlaw a particular procedure on viable fetuses, but rather how a legislature must draft the statute in order to pass constitutional muster. Missouri has included several

---

296. See *supra* note 292 and accompanying text.

297. 410 U.S. 113, 158 (1973).

298. *Id.* at 161-62. See also *supra* note 57 and accompanying text.

299. *Casey*, 505 U.S. at 876-77.

300. *Id.* at 877.

301. *Id.* at 860 ("Whenever . . . [viability] may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* . . .").

key elements in the Infant's Protection Act; however, the Act should be reworded so as to ensure constitutionality. Most importantly, the Act must include an exception for the health of the mother. It need not specifically define the meaning of "health" to include both physical and mental aspects of health. The state may dispute whether mental health should be excepted from regulation and may argue its case in the courts. The courts are the appropriate forums to determine the constitutional requirements for a health exception.

Secondly, while not necessary, it would be wise to more specifically define "living infant" such that when applicable to "partially born" "living infants" the Act only applies to viable "living infants." Viability should be defined by using the definition approved in *Roe v. Wade*.<sup>302</sup> Also, in order to simplify the terms of the Act, it would be advisable to both specifically name the procedure to be outlawed and specify which medical procedures will remain legal. Clearly many legislatures are concerned that should they name the specific abortion procedure to be outlawed, then abortion providers need only alter their "partial birth abortion" technique so as to avoid penalty under the statute. While those concerns may be well founded, it would be more prudent to avoid vagueness concerns and later consider amending the statute should those concerns become a reality.

## VII. CONCLUSION

It is abundantly clear that where there is a political "will" there may be a "way." That "way" may seem like a fierce football rivalry in the abortion arena, but given the convergence of morals, politics, religious beliefs, science, individual rights and states' rights, perhaps it cannot be otherwise. The Supreme Court may offer some guidance in the partial birth abortion debate in the near future. The Court recently granted certiorari to consider the constitutionality of the Nebraska partial birth abortion law at issue in *Carhart v. Stenberg*.<sup>303</sup> The grant of certiorari is limited to the two following issues: 1) whether the Eighth Circuit's broad reading of Nebraska's partial birth abortion ban violates fundamental rules of statutory construction and federalism, and 2) whether the lower court misapplied the *Casey* "undue burden" standard when it found Nebraska's law to be unconstitutional.<sup>304</sup> Perhaps the Court will take the opportunity to further elaborate and clarify the confusion surrounding the correct application of the *Casey* undue burden standard. With clearer guidance from the Court, perhaps the "Peanuts characters" will finally settle their

---

302. *Roe*, 410 U.S. at 160 (defining viability as the "potential[] . . . to live outside of the mother's womb, albeit with artificial aid.").

303. 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3338 (U.S. Jan. 14, 2000) (No. 99-830).

304. Petitioner's Brief, *Stenberg v. Carhart*, 2000 WL 228615 (No. 99-830).

differences. Until that time, Missouri's Infant's Protection Act seems doomed to fail.

JENNIFER LANDRUM ELLIOTT