GUARDING THE THRESHOLD OF BIRTH

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I. INTRODUCTION

In Ocean City, Maryland, detectives discover four fetuses in Christy Freeman's residence.[1] Because one is over twenty-six weeks old, Freeman is charged with first-degree murder under Maryland law.[2] Legislators drafted the law to protect pregnant women and their fetuses, but now a court considers how broadly to read the statute.[3]

In Freehold, New Jersey, authorities discover the remains of a newborn baby in a garbage bin. Melissa Drexler admits to delivering her son in a toilet, strangling him with her bare hands, and then dropping him in the trash before returning to the dance floor at her senior prom. Drexler agrees to a manslaughter plea, receives a fifteen-year sentence,[4] and is released after three years.[5]

In Bloomington, Indiana, a six-day-old baby dies of dehydration and pneumonia. After discovering that their child suffered from Down Syndrome and esophageal atresia, the parents had refused any medical treatment or nourishment for their son.[6] Public officials had taken legal action to compel medical care, but the courts refused to intervene.[7]

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[1] Dan Morse & William Wan, *Mother Charged in Stillborn Death; Fetal and Placental Remains of 4 Are Discovered in Ocean City*, WASH. POST, July 31, 2007, at B01.

[2] *Id*. Specifically, Maryland's law applies to a person who "[(1)] intended to cause the death of the viable fetus; [(2)] intended to cause serious physical injury to the viable fetus; or [(3)] wantonly or recklessly disregarded the likelihood that the person's actions would cause the death of or serious physical injury to the viable fetus." MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis Supp. 2007). For a survey of similar laws across the country, see National Right to Life Committee, *State Homicide Laws that Recognize Unborn Victims*, May 9, 2007, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html.

[3] *Police Finish Searching Home Where Fetuses Found*, CNN.COM, Aug. 1, 2007, http://www.cnn.com/2007/US/08/01/mother.charged.ap/index.html.

[4] *'Prom Mom' Admits Killing Newborn*, CNN.COM, Aug. 20, 1998, http://www.cnn.com/US/9808/20/prom.birth.02/.

[5] Deroy Murdock, *Wrist-Slapping Baby Killers*, NAT'L REV. ONLINE, Dec. 10, 2001, http://article.nationalreview.com/?q=MTJkMTk3ZDk2MjJhODgyYzM3NmQ5YWVmMDBiY2ZlNjc.

[6] The C. Everett Koop Papers: Congenital Birth Defects and the Medical Rights of Children: The "Baby Doe Controversy," http://profiles.nlm.nih.gov/QQ/Views/Exhibit/narrative/babydoe.html (last visited Jan. 28, 2008).

[7] *See* PETER SINGER, RETHINKING LIFE & DEATH 106–15 (1994). Responding in part to this case, President Ronald Reagan published an article discussing the difficult issues facing the American people. Ronald Reagan, *Abortion and the Conscience of the Nation*, *in* ABORTION AND THE CONSCIENCE OF THE NATION 37, 57 (New Regency 2000) (1983). He wrote:

These are three children at different stages of life—a viable fetus, a newborn, and a six-day-old—each of whom was terminated by his or her mother. Across the United States, these stories shock the conscience of many, but the reality is that murdering newborns or infants is not a rare phenomenon.[8] In a society that recognizes a woman's right to choose an abortion in the early stages of pregnancy, and to obtain an abortion in later stages where it is necessary to preserve her life or health, each person must consider the significance of these deaths. Few would defend the right of a mother, or any person, to kill a newborn child.[9] Still, some argue that a fetus has *no* independent rights apart from the mother, and the logical conclusion of such a view is that a mother should be able to terminate her pregnancy *at any time* prior to full delivery.[10] Thus, on one day, a mother merely terminates her pregnancy by obtaining an

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> I know that when the true issue of infanticide is placed before the American people, with all the facts openly aired, we will have no trouble deciding that a mentally or physically handicapped baby has the same intrinsic worth and right to life as the rest of us. As the New Jersey Supreme Court said two decades ago, in a decision upholding the sanctity of human life, "[a] child need not be perfect to have a worthwhile life."

Id. (quoting Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967)); *see also* John A. Robertson, *Legal Aspects of Withholding Medical Treatment from Handicapped Children, in* LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS 213, 213 (A. Edward Doudera & J. Douglas Peters eds., 1982) ("Withholding necessary medical care from defective newborns in order to cause their death is a common practice in many medical centers across the United States.").

[8] *Variation in Homicide Risk During Infancy—United States, 1989–1998*, 51 MORBIDITY & MORTALITY WKLY. REP. 187, 187 (Mar. 8, 2002), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5109.pdf (documenting 3312 infant homicides); *see also* Edward L. Cardenas & George Hunter, *Boy Faces Felony in Baseball Bat Abortion*, DETROIT NEWS, Jan. 5, 2005, http://www.detnews.com/2005/metro/0501/05/A01-50709.htm (charging a teenage male, but not the consenting female, under the Michigan Prenatal Protection Act for the intentional killing of a six-month-old fetus); *Prosecutors Seek Death Penalty in Arnold Case*, WHIOTV.COM, Dec. 7, 2006, http://www.whiotv.com/news/10484126/detail.html?rss=day&psp=news (recounting criminal indictment against mother accused of killing her three-week-old daughter in the microwave).

[9] *But see infra* notes 233–235 and accompanying text (discussing Professor Peter Singer's defense of infanticide).

[10] *See, e.g.*, Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986). Johnsen notes that, historically, fetal rights did not exist independently of the woman; instead, birth was the legally significant moment where a fetus "acquired legal rights as a separate entity." *Id.* at 601. While initially the law did recognize fetal personhood in limited situations, it "did not afford rights to the fetus *qua* fetus." *Id.* at 602. Thus, the initial limited recognition of fetal rights created no conflicts with the interests of pregnant women. This absolutist view—that a fetus has no rights apart from those of the woman—would hold that a mother exercises complete dominion over the fetus until there is a full birth and separation of the fetus from her body. *Id.* at 601–02. A partial-birth, by contrast, falls short of this standard. Therefore, a partially-born fetus would have no "legal rights as a separate entity." *Id*. at 601.

abortion; on the next, she takes a life by killing her child. Immersed in the grey areas between abortion and infanticide, manslaughter and murder, the examples above compel each person to draw legal, ethical, and moral lines.

These lines are tied inextricably to the nature of abortion itself. Following the Supreme Court's controversial, landmark decision in *Roe v. Wade*, women have enjoyed a qualified right to terminate unwanted pregnancies.[11] While most Americans support broad reproductive freedoms at early stages of gestation,[12] the vast majority generally oppose abortion in later stages.[13] "Partial-birth abortion," a procedure developed and often used for terminating late-term pregnancies, forces Americans to examine this uncomfortable tension. Put another way, it forces each person to ask whether one can draw a clear line between abortion and infanticide. Traditionally, a full vaginal delivery separates these two practices from each other, but partial-birth abortion, as the name suggests, occurs at the "threshold of birth."[14] Thus, it can be described as part abortion, part infanticide.

Various attempts to ban the procedure only underscore the volatile nature of these issues. After most of the states passed partial-birth abortion bans in the late-1990s, the Supreme Court struck down Nebraska's ban in *Stenberg v. Carhart* (*Carhart I*).[15] This Article examines the Court's recent, polarizing decision in *Carhart v. Gonzales* (*Carhart II*),[16] to uphold a similar statute Congress passed, the Federal Partial Birth Abortion Ban Act of 2003 (PBABA), and suggests that,

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[11] 410 U.S. 113, 166 (1973).

[12] Jeffrey Rosen, *Partial Solution*, NEW REPUBLIC, Dec. 11, 2006, at 8, *available at* http://www.tnr.com/columnists/story.html?id=1f9e5e79-3d12-42e7-8504-242e01189b30.

[13] *Id.*

[14] Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 296 (2d Cir. 2006) (Straub, J., dissenting), *vacated by* Nat'l Abortion Fed'n v. Gonzales, 224 Fed. App'x 88 (2d Cir. 2007). This phrase, borrowed from Judge Chester Straub's dissenting opinion in *National Abortion Federation*, is used throughout this Article. *See* 437 F.3d at 296 ("In passing the Partial-Birth Abortion Ban Act of 2003 . . ., Congress sought to prohibit the 'gruesome and inhuman procedure' of delivering a fetus into this world only to destroy it as it reaches the threshold of birth.") (quoting Partial-Birth Abortion Ban Act of 2003 (PBABA), Pub. L. No. 108–105, § 2(1), 117 Stat. 1201, 1201 (2003) (codified as 18 U.S.C. § 1531 (Supp. V 2007)).

[15] 530 U.S. 914, 945–46 (2000).

[16] 127 S. Ct. 1610 (2007). Among many other criticisms, constitutional law professor Geoffrey Stone argued that the *Carhart II* decision was rooted in the majority's Catholicism. Geoffrey Stone, *Our Faith-Based Justices*, U. CHI. L. SCH. FACULTY BLOG, Apr. 20, 2007, http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html. *But see* Robert Barnes, *Did Justices' Catholicism Play Part in Abortion Ruling?*, WASH. POST, Apr. 30, 2007, at A13 (noting that four of the five Catholic justices voted to uphold three death penalty convictions in a subsequent case, a view which is at odds with the Catholic Church's teaching).

despite some flawed analysis, the majority reached the proper conclusion.

A few items merit special mention at the outset. This Article assumes that the Supreme Court's abortion jurisprudence protects two rights, each distinct from the other in both its purpose and scope.[17] First, the government may not impose an undue burden on a woman's right to terminate a pre-viability pregnancy. Second, a woman has a right of "medical self-defense,"[18] allowing her to terminate a post-viability pregnancy if that pregnancy threatens her life or health.[19] Additionally, beyond the scope of this Article, and *Carhart II,* is the question of whether the PBABA falls within the scope of Congress's Commerce Clause power,[20] as well as the question of the Court's deference to congressional fact-finding.[21]

Part II emphasizes that two dimensions of the abortion debate, the spatial and temporal, should be viewed in conjunction. While the Court historically has focused exclusively on the temporal dimension (the age of the fetus), *Carhart II* signals a dramatic shift by not only its recognition of, but its singular focus on the spatial dimension (where fetal demise occurs). Part III continues by examining the Court's

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[17] Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824 (2007) (distinguishing between two distinct abortion rights).

[18] *Id.* at 1824–25 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992); *Roe*, 410 U.S. at 163–64).

[19] Limiting the analysis to these two rights, the question of fetal abnormalities is not discussed. Pre-viability abortions are allowed for any reason, regardless of whether there is an abnormality. Post-viability abortions are allowed only when a pregnancy threatens a woman's health or life. Any fetus, normal or abnormal, could present such a risk.

This does not suggest that fetal abnormalities do not present women and families with very difficult questions. Perhaps the most famous example was that of Sherri Finkbine, whose fetus had been severely deformed from thalidomine treatments in 1962. Because the Court had not recognized a woman's right to choose, Finkbine was forced to travel to Sweden to undergo the abortion procedure. LAWRENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 37 (1990). Similarly, several children born during the 1960s suffered from rubella, causing blindness, deafness, and mental retardation. *Id.* This led twelve states to amend their abortion laws to include an exception where a fetus suffered from a severe abnormality. JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS 36 (1998). The American Law Institute advanced in its model legislation a similar exception in the Model Penal Code. *Id.* at 11.

[20] *See Carhart II*, 127 S. Ct. at 1640 (Thomas, J., concurring) (noting that the parties to the proceeding did not raise, and the Court therefore did not address, the constitutionality of the PBABA under the Commerce Clause).

[21] The *Carhart II* majority opinion spends little time on the question of deference to congressional fact-finding, and Justice Kennedy acknowledges errors in the records. *Id.* at 1638 ("Uncritical deference to Congress' factual findings in these cases is inappropriate."); *see also id.* at 1643–44 (Ginsburg, J., dissenting) (discussing potential erroneous statements of facts in the congressional findings accompanying the PBABA).

reasoning in *Carhart I*, and how the majority failed to consider both the spatial and temporal dimensions adequately. This Part also highlights Justice Kennedy's *Carhart I* dissent and the three important government interests that he emphasized.

Part IV analyzes *Carhart II* and the Court's decision to uphold the PBABA, arguing that the opinion is consistent with the controlling standards for abortion regulations as outlined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[22] Although the majority attempts to circumvent any direct reversal of *Carhart I*, this Part contends that Justice Kennedy's *Carhart II* majority opinion is constitutionally correct for the same reasons that his *Carhart I* dissent was constitutionally correct. Specifically, the PBABA does not create an undue burden on a woman's right to obtain a pre-viability abortion. Further, the unique interests at stake, both spatial and temporal, in post-viability applications of the PBABA justify the Court's decision to not require a health exception.

Part V considers in greater detail the important governmental interests emphasized in Justice Kennedy's *Carhart I* dissent and *Carhart II* majority, which are also highlighted in the PBABA's congressional record. First, government has an important interest in protecting fetal life from the outset of pregnancy. This interest was emphasized in *Roe*, reaffirmed in *Casey*, and its status has been solidified by *Carhart II*. Second, government has an important interest in safeguarding the integrity of the medical profession. This interest has been discussed in various contexts. Two such contexts, assisted suicide and involuntary medical treatment of death row inmates, are discussed as comparisons. Third, and most importantly, government has an interest in drawing a clear line between abortion and infanticide. While abortion is secured as a constitutional right through the Court's jurisprudence, neither the Constitution nor the laws of the United States should ever condone infanticide. By examining the historical consensus favoring infanticide and contemporary support for it, this Part argues that the government has the constitutional authority, as well as the moral and ethical duty, to draw a clear line between the two procedures.

II. PARTIAL-BIRTH ABORTION AND THE ROAD TO *CARHART II*

A. Two Dimensions of the Abortion Debate

The abortion debate is dominated by questions of *when* the act occurs,[23] but too often neglected are questions of *where* it occurs.

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[22] 505 U.S. 833, 846 (1992).

[23] *See Roe*, 410 U.S. at 163 (noting that the "compelling" point where the State interest is heightened is at viability); *Casey*, 505 U.S. at 846 (affirming *Roe*'s essential

Proponents of a partial-birth abortion ban argue that the "spatial" question (location where fetal demise occurs) is equally important to the "temporal" question (fetal age at the time of the procedure).[24] Thus, any discussion of abortion policy must focus on the circumstances attendant to the killing, including the location at the time of the procedure, and the type of being that is killed, as indicated by fetal age and development.

One might analogize these two dimensions to the death penalty context. The Supreme Court has held that the death penalty is inappropriate for certain classes of people.[25] But even when a person is sentenced to death, the Constitution also limits the type of punishment that can be inflicted.[26] For example, the American criminal justice system has rejected public executions, recognizing that the power to punish offenders must be balanced against inmates' rights to be free from cruel and unusual punishment.[27]

Thus, courts have always considered whether the greater power of administering the death penalty includes the lesser power to use any method of inflicting that penalty. Just as the *type* of person being killed and the *method* by which he is killed has significance in the death penalty context, both the age of the fetus and the location where fetal death occurs have legal, ethical, and moral significance in the abortion debate. Thus, even when a woman has a right to an abortion, countervailing considerations, including the state's interest in preserving and protecting life, must be considered as well. The temporal and spatial elements should be analyzed in conjunction with the woman's interests and the state's interests.

Although the Supreme Court has emphasized the temporal element in its abortion jurisprudence, the spatial dimension is important in discussing partial-birth abortion because it highlights important

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holding, including "a *confirmation of the State's power to restrict abortions after fetal viability*, if the law contains exceptions for pregnancies which endanger the woman's life or health" (emphasis added)).

[24] United States Solicitor General Paul Clement stated in the *Carhart II* oral arguments, "I don't think anybody thinks that the law is or should be indifferent to whether in that case fetal demise takes place in utero or outside the mother's womb." Transcript of Oral Argument at 16–17, *Carhart II*, 127 S. Ct. 1610 (No. 05–380), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-380.pdf.

[25] Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (minors); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (mentally retarded); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (insane).

[26] Trop v. Dulles, 356 U.S. 86, 99 (1958) (plurality opinion) ("[T]he existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.").

[27] Furman v. Georgia, 408 U.S. 238, 297 (1972) (Brennan, J., concurring) ("No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all."); *see also Trop*, 356 U.S. at 99.

distinctions between abortion and infanticide. An abortion is defined as the "termination of a pregnancy before the embryo or fetus can live independently."[28] Infanticide, by contrast, is defined as the murder of a living child outside of the womb.[29] Because partial-birth abortion occurs at the threshold of birth, one must consider the spatial dimension in analyzing the appropriateness of the procedure.

The temporal and spatial elements, viewed in conjunction, distinguish four types of abortions. These are: pre-viability, internal; pre-viability, external; post-viability, internal; and post-viability, external. Although the viability line is difficult to establish with certainty,[30] and some procedures are neither completely internal nor

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[28] KAREN J. CARLSON ET AL., THE HARVARD GUIDE TO WOMEN'S HEALTH 6 (1996).

[29] *See* STEDMAN'S MEDICAL DICTIONARY 703 (4th Unabridged Lawyer's ed. 1976) (defining infanticide as "[t]he killing of an infant," and defining an infant as "[a] child under the age of 2 years" or "[a] newborn baby"); WEBSTER'S NEW WORLD DICTIONARY 731 (Michael Agnes & David B. Guralnik eds., 4th ed. 1999) (defining infanticide as "the murder of a baby").

[30] *E.g.*, *Roe*, 410 U.S. at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [on when life begins], the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). Greater survival rates among pre-term infants born at earlier stages push back the viability line. In October, 2006, Amillia Taylor was born at twenty-one weeks and six days, and has thus far been resilient in the face of minimal odds of survival. This is the youngest fetus to have ever survived delivery, raising new questions about where the viability line should be drawn. Pat Wingert, *The Baby Who's Not Supposed to be Alive*, NEWSWEEK, Mar. 5, 2007, at 59, *available at* http://www.msnbc.msn.com/id/17304274/site/newsweek. Amillia's parents have since taken her home. *Tiny Baby Goes Home From Hospital*, CBSNEWS.COM, Feb. 21, 2007, http://www.cbsnews.com/stories/2007/02/21/health/main2501131.shtml.

Although this Article focuses on the traditional viability line, consistent with the Supreme Court's approach, reasonable arguments have been put forth for dismissing the traditional approach. For example, some have proposed the "vector theory of life" as a substitute. According to this theory, viability is not defined simply as an ability to live outside of the womb, but by forces directed towards *the specific end of human life*. BERNARD NATHANSON, THE HAND OF GOD 135–39 (1996). Dr. Nathanson, co-founder of the National Abortion and Reproductive Rights Action League, but now a prominent pro-life advocate, BERNARD N. NATHANSON AND RICHARD N. OSTLING, *Preface to* ABORTING AMERICA (1st ed. 1979), notes that within the first nineteen days of gestation, fetal growth is most pronounced because of rapid cell division, but by the nineteenth day, cells no longer split and are simply growing. Interestingly, this process of cell growth continues through birth to adolescence to adulthood, whereas cell division has already ended at the earliest stages of gestation. *Id.* at 135–36. *See also* KEITH L. MOORE, THE DEVELOPING HUMAN 81 (2d ed. 1977) ("The transition from embyro to fetus is not abrupt, but *the name change is meaningful because it signifies that the embryo has developed from a single cell, the zygote, into a recognizable human being*. Development during the fetal period is primarily concerned with growth and differentiation of tissues and organs that started to develop during the embryonic period." (emphasis added)).

external,[31] these abortion types are useful for discussing the convergence of the spatial and temporal elements. The PBABA restricts only "partial-birth abortion," also referred to in medical circles as dilation and extraction (D&X),[32] which causes death when the fetus is almost entirely outside of the vagina. Because the PBABA contains no reference to fetal age, it applies with equal force to both pre- and post-viability fetuses.

The PBABA therefore poses two constitutional questions. As applied pre-viability, one must ask whether the statute creates an undue burden on a woman's right to choose.[33] As applied post-viability, one must ask whether the absence of a health exception is fatal to the statute's constitutionality.[34] Section V answers each of these questions in the negative, and the following pages provide factual and legal background information upon which those conclusions are based.

B. D&X: The Procedure and the Politics

Although it is one of the most rarely used abortion procedures, D&X is one of the most controversial. It is a procedure that can be seen in two different ways. To some, it is a grievous assault on human life,[35] and to others, it is merely a practical—and in some cases medically necessary—

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[31] Admittedly, the spatial element is more accurately described as a continuum and defies classification with mechanical precision. Fetal demise can occur when the fetus is in the uterus, when it is lodged in the cervix, or when it is substantially outside of the vagina.

The vast majority of abortions are performed surgically while the fetus is in the uterus. *See Carhart I*, 530 U.S. at 923 (noting that ninety percent of all abortions are performed in the first trimester, and the predominant method is vacuum aspiration). Vacuum aspiration involves the insertion of a tube into the uterus; suction is then used to remove the fetal contents. *See id*. A second type of abortion that takes place in the uterus is dilation and curettage (D&C), although this method is being employed by physicians less frequently. CARLSON ET AL., *supra* note 28, at 211–12. After administering an anesthetic, the abortionist gradually dilates the cervix and uses a metal tool called a curette to scrape the fetal contents from the uterus. *Id.* The key consideration for both procedures is that fetal demise occurs in the uterus. In a vacuum aspiration, the suction destroys the fetus as it is removed from the woman's body. In a D&C, the curette scrapes the fetus from the uterine wall, which results in fetal death. *Id.* at 212.

Abortions can also occur outside of the uterus. Some are transcervical, meaning that they occur when the fetus is lodged in the cervix. The most common transcervical procedure is dilation and evacuation (D&E), which is discussed further in Section IV.B. *See infra* notes 96–97 and accompanying text. By contrast, dilation and extraction (D&X) ends fetal life when the fetal body is almost entirely outside of the woman's body. D&X is discussed further in Section II.B. *See infra* notes 35–46 and accompanying text.

[32] *Carhart II*, 127 S. Ct. at 1621 (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 440 n.2 (2004)).

[33] *See infra* notes 155–166 and accompanying text.

[34] *See infra* notes 167–242 and accompanying text.

[35] *See* RAMESH PONNURU, THE PARTY OF DEATH 43–53 (2006) (equating D&X with infanticide).

option for terminating unwanted pregnancies.[36] Opponents emphasize that the procedure was developed as a means of terminating viable or late-term fetuses,[37] but proponents emphasize pre-viability uses,[38] as well as instances where it may be medically necessary post-viability.[39]

Developed by Dr. Martin Haskell, a physician in Dayton, Ohio, the D&X procedure first gained notoriety when Dr. Haskell described it at a National Abortion Federation conference in 1992.[40] After dilating the woman's cervix over two full days, the physician removes the fetal legs and torso until the head lodges in the cervical opening. He then uses a pair of Metzenbaum scissors to pierce the skull and create an opening. Next, the scissors are removed and replaced with a suction catheter to evacuate the "skull contents."[41] Having emptied the head, the skull is then collapsed, and the fetus is removed intact.[42]

Those who oppose the partial-birth abortion procedure use different language to describe it. Brenda Pratt Schafer, a nurse who was formerly employed by Dr. Haskell, described the procedure as follows:

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

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[36] *See Carhart II*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting) (listing testimony suggesting health and safety benefits to women in certain cases when D&X is used in favor of D&E).

[37] Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion*, *in* SECOND TRIMESTER ABORTION: FROM EVERY ANGLE 27, 33 (1992) (noting that D&X is designed for late-second, and even third, trimester abortions), *available at* http://www.priestsforlife.org/prochoice/haskell1.htm.

[38] *Carhart I*, 530 U.S. at 929 (discussing possible health benefits during second trimester justifying use of D&X procedure).

[39] *Carhart II*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting). Opponents of the PBABA also possess a general distrust of congressional medical regulations and edicts, which are too often an outgrowth of political whims. *E.g.,* Jeffrey M. Drazen, M.D., *Government in Medicine*, 356 NEW. ENG. J. MED. 2195, 2195 (2007) ("In 2005, we all saw the disastrous consequences of congressional interference in the case of Terri Schiavo. In that case, the courts wisely decided that Congress should not be practicing medicine. They correctly ruled that wrenching medical decisions should be made by those closest to the details and subtleties of the case at hand. Such decisions must be made on an individual basis, with the best interests of the patient foremost in the practitioner's mind.").

[40] *See* Haskell, *supra* note 37.

[41] *Id.* at 31.

[42] *Id.*

> The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.[43]

Gruesome depictions of D&X like this cause many people, who otherwise support a woman's right to choose, to oppose the procedure. This is in part because D&X is often a late-term or post-viability procedure,[44] but irrespective of fetal age, many find the gruesome nature of the procedure to be objectionable.[45] As the late Democratic Senator Daniel Patrick Moynihan once stated, D&X "is infanticide, and one would be too many."[46] Consequently, this procedure, more than any other abortion procedure, raises unique spatial concerns, in addition to temporal questions raised by any procedure in the abortion debate.

Not surprisingly, legislatures at both the federal and state levels have made several attempts to ban D&X. In 1996, the United States Congress first passed a partial-birth abortion ban, which was vetoed by President Clinton.[47] With the Senate unable to override the veto, the bill never became law. Similarly, a 1997 ban suffered the same fate.[48] Despite Congress's inability to override the presidential vetoes, by the late 1990s, thirty-one states had passed similar measures banning D&X.[49]

III. *CARHART I*: JUDICIAL PROTECTION FOR D&X

The Supreme Court's decision in *Carhart I* to strike down Nebraska's partial-birth abortion ban severely hampered the states' efforts to regulate the procedure.[50] Under Nebraska's ban, a "partial-birth abortion" occurred when, prior to completing a full delivery, the physician "deliberately and intentionally deliver[ed] into the vagina a living unborn child, or a substantial portion thereof," to perform a procedure that the physician "knows will kill the unborn child and does

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[43] *Carhart I*, 530 U.S. at 1007 (Thomas, J., dissenting) (quoting *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Comm. on the Judiciary*, 104th Cong. 17 (1995) (statement of Brenda Pratt Shafer)).

[44] Rosen, *supra* note 12 (noting that approximately two-thirds of Americans oppose partial-birth abortion).

[45] *See Carhart II*, 127 S. Ct. at 1623 (quoting Carhart v. Ashcroft, 331 F. Supp. 2d 805, 858 (D. Neb. 2004) (abortion doctor's concession that it is a "difficult situation" for his staff to deal with the D&X procedure)).

[46] PONNURU, *supra* note 35, at 43 n.1.

[47] *Carhart II*, 127 S. Ct. at 1623.

[48] *Id.*

[49] R. Alta Charo, *The Partial Death of Abortion Rights*, 356 NEW ENG. J. MED. 2125, 2126 (2007) (noting that only five bans contained exceptions to preserve the health of the mother).

[50] *Carhart I*, 530 U.S. 914 (1999).

kill the unborn child."[51] The statute made no mention of fetal age, so its focus was primarily on the spatial dimension, where the physician destroyed the fetus in relation to the woman's body. The statute contained no health exception; instead, it only allowed partial-birth abortion when necessary "to save the life of the mother."[52] Performing a partial-birth abortion would result in automatic suspension and revocation of the physician's medical license and was punishable as a Class III felony.[53]

A. Nebraska Ban Found Unconstitutional

In 2000, the Supreme Court, with Justice Stephen Breyer writing for the majority, found that the Nebraska ban was unconstitutional on two grounds. First, the statute was unconstitutional because it contained no health exception, which was required by *Casey*.[54] Although Nebraska claimed that banning partial-birth abortion created no health risk for women, the Court found that in some cases the procedure provided a health benefit to women.[55] "[W]here substantial medical authority supports the proposition that banning a particular abortion procedure *could* endanger women's health," the Court found that such a ban required a health exception.[56]

The majority's second reason for striking down the Nebraska ban was that it placed an "undue burden" on a woman's right to choose an abortion.[57] Justice Breyer could not understand how the term partial-birth abortion could be limited only to D&X, rather than the more commonly used second trimester procedure, dilation and evacuation (D&E).[58] The Nebraska State Attorney General argued that "substantial portion" of the fetus should have been read as a "child up to the head,"[59]

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[51] NEB. REV. STAT. § 28-326(9) (Supp. 2006).

[52] *Id.* § 28-328(1).

[53] *Id.* § 28-328(2), (4). Under Nebraska Law, a Class III felony is punishable by up to twenty years in prison, and/or a $25,000 fine. *Id.* § 28-105(1) (1995 & Supp. 2006).

[54] *See Carhart I*, 530 U.S. at 938 (quoting *Casey*, 505 U.S. at 879); *see also* Roe v. Wade, 410 U.S. 113, 163–64 (1993) ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

[55] *Carhart I*, 530 U.S. at 931–33, 936.

[56] *Id.* at 938 (emphasis added).

[57] *Id.* at 930 (quoting *Casey*, 505 U.S. at 874).

[58] *Id.* at 939. *But see id.* at 993 (Thomas, J., dissenting) (noting use of the term, "partial-birth abortion," by a majority of state legislatures, the United States Congress, medical journals, physicians, reporters, and judges in reference to D&X, rather than D&E). For more discussion of the D&E procedure, see *infra* notes 96–97 and accompanying text.

[59] *Carhart I*, 530 U.S. at 940 (quoting Brief of Petitioners at *20, *Carhart I*, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 228615). Noticeably absent from Justice Breyer's opinion is a discussion of how one "delivers" a child, piece-by-piece. *See id.* at 990–91 (Thomas, J., dissenting) ("Without question, one does not 'deliver' a child when one

but Justice Breyer thought that phrase could just as easily encompass a leg or an arm.[60] Accordingly, the Court found that the prospect of future prosecution, conviction, and imprisonment could deter physicians from providing this procedure to women, and this would result in an undue burden on a woman's right to choose.[61]

In a concurring opinion, Justices Stevens and Ginsburg went a step further, arguing that there is no moral difference between various methods of killing the unborn.[62] In contrast, Nebraska, like many other states,[63] saw a moral difference between killing a child at the threshold of birth, with almost the entire body outside of the womb, and killing a fetus inside of the mother's body. Still, comparing the D&E procedure and the D&X procedure, Justice Stevens argued that "the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, *is simply irrational*."[64]

B. Three Forgotten Interests

In stark contrast to the majority's indifference, Justice Kennedy's dissenting opinion emphasized the role of states in "defining their interests in the abortion debate."[65] In particular, he noted three important interests put forth by Nebraska: (1) concern for the life of the unborn and partially born; (2) preserving the integrity of the medical profession; and (3) erecting a barrier to infanticide.[66]

The key issue, in Justice Kennedy's view, was not whether the Court sees a moral difference between partial-birth abortion and other abortion methods, but whether legislatures, as agents of the people, see a difference. Noting that "[t]he differentiation between the procedures is

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removes the child from the uterus piece by piece, as in a D&E. . . . The majority has pointed to no source in which 'delivery' is used to refer to removal of first a fetal arm, then a leg, then the torso, etc.").

[60] *Id.* at 938–39 ("We do not understand how one could distinguish, using this language, between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix).").

[61] *Id.* at 945–46.

[62] *Id.* at 946–47 (Stevens, J., concurring); *Id.* at 951–52 (Ginsburg, J., concurring).

[63] *Id.* at 995 & n.13 (Thomas, J., dissenting) (discussing partial-birth abortion bans that were virtually identical to Nebraska's in twenty-eight different tates).

[64] *Id.* at 946–47 (Stevens, J., concurring) (emphasis added); *see also id.* 951–52 (Ginsburg, J., concurring) ("[T]his law does not save any fetus from destruction, for it targets only 'a *method* of performing abortion.'" (quoting *id*. at 930) (majority opinion)).

[65] *Id.* at 961 (Kennedy, J., dissenting) (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

[66] *Id.* (citing Brief of Petitioners, *supra* note 59, at *48–49).

itself a moral statement, serving to promote respect for human life,"[67] and that the difference for a mother's health was, at best, marginal, Justice Kennedy believed legislatures should be allowed to consider "the grave moral issues" presented by D&X.[68] Accordingly, the abortion debate should not be limited to the temporal question of fetal age and development; rather, the people, speaking through their representatives, have a legitimate and important role in distinguishing between various abortion methods in light of spatial considerations. Justice Kennedy recognized that questions of *when* the fetus is killed are not the only important questions in the debate. Equally important are questions of *where* the fetus is destroyed.

C. Congressional Response: The PBABA

Although Justice Kennedy was unable to convince a majority of the *Carhart I* Court to uphold Nebraska's partial-birth abortion ban, Congress was successful in passing a similar ban five years later. President Bush signed the PBABA into law on November 5, 2003.[69] The PBABA defines a partial-birth abortion as a procedure in which the physician:

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .[70]

Any physician who knowingly performs a partial-birth abortion is subject to fines and/or a maximum jail term of two years.[71] Like the Nebraska statute from *Carhart I*, the PBABA contains no health exception, but it expressly carves out an exception for a D&X that is necessary to save the life of the mother.[72]

The PBABA also contains a section detailing congressional findings pertaining to partial-birth abortion.[73] Congress discussed the serious

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67 *Id.* at 964.

68 *Id.* at 967.

69 *Carhart II*, 127 S. Ct. at 1623–24.

70 18 U.S.C. § 1531(b)(1)(A)–(B) (Supp. V 2007).

71 *Id.* § 1531(a).

72 *See id.*

73 In light of testimony heard during legislative hearings held during the 104th, 105th, 107th, and 108th Congresses, Congress made the following findings in the PBABA:

> (A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. . . .

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. . . .

(C) A prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice," that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use". . . .

(D) Neither the plaintiff in [*Carhart I*], nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) . . . In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) . . . A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) . . . [A] prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside the womb. . . ."

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. . . .

(K) . . . [P]artial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of a partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) . . . [D]uring a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain. . . .

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. . . .

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated [i.e. necessary] to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical

health risks associated with the partial-birth abortion procedure, including risks of future cervical incompetence; "uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus" caused by the breech conversion; and risks of "lacerations and secondary hemorrhaging" attendant to puncturing the fetal skull while it is lodged in the birth canal.[74] Additionally, the findings emphasize the absence of any circumstance where D&X would be medically necessary to preserve a woman's health or life.[75]

Noting the moral, medical, and ethical consensus that D&X is "a gruesome and inhumane procedure that is never medically necessary,"[76] Congress affirmed three interests that justified banning the procedure. Just as in *Carhart I*, in which Justice Kennedy focused on protecting potential life, safeguarding the integrity of the medical profession, and drawing a clear line between abortion and infanticide, Congress argued that D&X directly undermines each of these. First, D&X promotes a "complete disregard for infant human life."[77] Second, it perverts the delivery process and manipulates the obstetrician's techniques to destroy life, rather than to bring life into the world.[78] Furthermore, this morally confusing process undermines public perception of the medical profession.[79] Third, D&X blurs the line between abortion, the killing of an unborn child, and infanticide, the killing of a child after birth.[80]

Although there are differences between the PBABA and the Nebraska statute struck down in *Carhart I*,[81] opponents of the PBABA quickly filed suit to bar its enforcement. After obtaining injunctive relief barring enforcement at the trial level, three federal circuits held that the PBABA was unconstitutional.[82] Two circuits wrote unanimous opinions. The Eighth Circuit held that the PBABA was unconstitutional because it

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> community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches away from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14), 117 Stat. 1201, 1204–06 (2003) (codified as 18 U.S.C. § 1531 (Supp. V 2007)).

74 *Id.* § 2(14)(A).

75 *Id.* § 2(14)(D).

76 *Id.* § 2(1).

77 *Id.* § 2(14)(L).

78 *Id.* § 2(14)(J).

79 *Id.* § 2(14)(K).

80 *Id.* § 2(14)(O).

81 *Compare supra* note 70 and accompanying text, *with supra* notes 51–53 and accompanying text.

82 Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006), *vacated by* 224 Fed. App'x. 88 (2d Cir. 2007); Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007); Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1180–81 (9th Cir. 2006), *rev'd*, 127 S. Ct. 1610 (2007).

contained no health exception.[83] Likewise, the Ninth Circuit held that the PBABA was unconstitutional because it contained no health exception, it was void for vagueness, and it placed an undue burden on a woman's right to choose an abortion.[84]

The Second Circuit's opinion in *National Abortion Federation* was fractured in a 2-1 decision to strike down the PBABA. Though Chief Judge Walker believed the PBABA to be a clear violation of *Carhart I*, he voiced his strong opposition to that opinion.[85] Conversely, Judge Straub argued in his dissent that the PBABA and the Nebraska statute could be distinguished.[86] In early 2006, the Supreme Court granted certiorari on the Eighth and Ninth Circuit cases.[87]

IV. *CARHART II*: REVISITING AND REJECTING THE D&X PROCEDURE

Almost ten years after writing an impassioned dissent in *Carhart I*, Justice Kennedy penned the Supreme Court's majority opinion in *Carhart II*. From the outset, he distinguished the PBABA from other restrictions on abortion because it focuses on "a particular manner of ending fetal life . . . ."[88] Thus, the *Carhart II* opinion focuses on spatial questions of where and how the abortion occurs, rather than temporal questions of fetal age and viability.

A. Surveying Various Abortion Methods

In order to put the D&X procedure in a larger context, Justice Kennedy began by surveying various methods used to terminate a pregnancy. Eighty-five to ninety percent of abortions are performed during the first trimester, and the primary method used is vacuum

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[83] *Carhart*, 413 F.3d at 803.

[84] *Planned Parenthood Fed'n of Am., Inc.*, 435 F.3d at 1180–81.

[85] *Nat'l Abortion Fed'n*, 437 F.3d at 290 (Walker, C.J., concurring) ("[I]t is my duty to follow [*Carhart I*] no matter how personally distasteful the fulfillment of that duty may be."); *id.* at 296 ("In today's case, we are compelled by [*Carhart I*] to invalidate a statute that bans a morally repugnant practice, not because it poses a significant health risk, but because its application might deny some unproven number of women a marginal health benefit.").

[86] *Id.* at 298 (Straub, J., dissenting) ("Because I do not believe that a woman's right to terminate her pregnancy under [*Roe*] or [*Casey*] extends to the destruction of a child that is substantially outside of her body, and that the State has a compelling interest in drawing a bright line between abortion and infanticide, I am of the opinion that [*Carhart I*] is not dispositive of this case.") (citations omitted); *id.* at 312 ("I find the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable.").

[87] Gonzales v. Carhart, 546 U.S. 1169 (2006); Gonzales v. Planned Parenthood Fed'n of Am., Inc., 126 S. Ct. 2901 (2006).

[88] *Carhart II*, 127 S. Ct. at 1620.

aspiration, also referred to as suction curettage.[89] This procedure involves the insertion of a flexible tube through the cervix and into the uterus. Suction is then used to remove the fetal contents.[90] Additionally, some physicians prescribe the drug mifepristone, or RU-486, to terminate a first trimester pregnancy.[91]

Approximately ten to fifteen percent of abortions take place during the second trimester,[92] and the predominate method employed by physicians is dilation and evacuation (D&E). The D&E procedure, which is discussed in greater detail in the next Section, can be performed with a digoxin or potassium chloride injection to end fetal life prior to removing the fetus.[93] Rarely used techniques include induction abortions,[94] hysterotomy, or hysterectomy.[95]

B. Contrasting D&E and D&X

After describing some of the various procedures employed throughout the term of a woman's pregnancy, Justice Kennedy's opinion highlights important distinctions between the most common procedure employed during the second trimester, D&E, and the D&X procedure, which is barred by the PBABA. The D&E procedure involves dilation of the cervix over an extended period of time, placing the woman under general anesthesia or conscious sedation, and then grabbing the fetus with forceps and pulling it through the cervix. When the fetus becomes lodged in the cervical walls, the physician rips out the fetal tissue, piece-by-piece, with as many as ten to fifteen passes.[96] After removing the bulk

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[89] Some physicians also use a method called dilation and curettage (D&C), although this method is being employed by abortionists less frequently. CARLSON ET AL., *supra* note 28, at 211–211. After administering an anesthetic, the physician gradually dilates the cervix and uses a metal tool called a curette to scrape the fetal contents from the uterus. *Id*. at 212.

[90] *Carhart I*, 530 U.S. at 923 (citations omitted).

[91] *Carhart II*, 127 S. Ct. at 1620 (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 464 n.20 (S.D.N.Y. 2004)).

[92] *Id.* A small number (less than one percent) of abortions are performed during the third trimester. Because such abortions are rare, there is very little data available; however, the D&X procedure has been performed into the third trimester. Haskell, *supra* note 37, at 33.

[93] *Carhart II*, 127 S. Ct. at 1620–21 (citing Carhart v. Ashcroft, 331 F. Supp. 2d 805, 907–12 (D. Neb. 2004); *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 474–75).

[94] *Id.* at 1623 (citing *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 467; Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 962–63 (N.D. Cal. 2004)) (noting that approximately five percent of pre-twenty week abortions are inductions).

[95] *Id*.

[96] *Id.* at 1621. The dismemberment causes severe bleeding in the fetus and subsequently, death. As Justice Kennedy noted in *Carhart I*, "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."

of the tissue, suction is used to remove any placenta or remaining material in the uterus.[97]

By contrast, D&X, which is also referred to as "intact D&E,"[98] begins with a more substantial dilation process than ordinary D&E.[99] Upon reaching the appropriate level of dilation, the physician uses forceps to remove the entire fetal body until the head lodges in the cervix. The physician then inserts scissors into the base of the skull, uses suction to remove the fetal brain, collapses the head, and removes the intact fetus from the cervix.[100]

In addition to describing the original D&X method developed by Dr. Haskell,[101] Justice Kennedy explains the procedure's evolution in the years following *Carhart I*. For example, one physician testified that he squeezes the skull after piercing it to empty the cranial contents, rather than using suction, and then removes it. Another preferred crushing the skull with forceps instead of the scissors and suction method. Still another would simply pull on the body until the head was "disarticulat[ed]," or decapitated, from the body. The head was then crushed with forceps in the uterus and removed.[102]

Most importantly, Justice Kennedy describes various self-imposed boundaries that physicians use when performing the D&X procedure. One physician would remove the entire fetus without collapsing the head, but limited this practice to fetuses less than twenty-four weeks gestation.[103] Another physician testified that if he had over-dilated the woman's cervix, he would purposefully hold the fetal head inside body, so that he could terminate the life before it was outside the woman's body.[104] And another physician acknowledged that it is a "'difficult situation'" for "staff to have to deal with a fetus that has 'some viability

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530 U.S. at 958–59 (Kennedy, J., dissenting). When the procedure is over, the abortionist is left with "'a tray full of pieces.'" *Id.* at 959 (quoting testimony of Dr. Leroy Carhart).

97 *Carhart II*, 127 S. Ct. at 1621.

98 *Carhart I*, 530 U.S. at 927. Technically, there are two types of D&E: non-intact and intact. Intact D&E is rarely used, and it is virtually identical to D&X. *See id.* at 927–28. Although Justice Kennedy used intact D&E in his *Carhart II* opinion, D&X is used herein for purposes of clarity. Many courts have taken this approach when discussing the issue. *See Id*. at 928 ("Despite the technical differences . . . intact D&E and D&X are sufficiently similar for us to use the terms interchangeably.").

99 *Carhart II*, 127 S. Ct. at 1621 (describing "'serial' dilation," which lasts up to two full days and can involve up to twenty-five osmotic dilators) (quoting Carhart v. Ashcroft, 331 F. Supp. 2d. 805, 870 (D. Neb. 2004); *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 965).

100 *Carhart II*, 127 S. Ct. at 1622 (quoting H.R. REP. NO. 108-58, at 3 (2003)).

101 *See* Haskell, *supra* note 37, at 27–33.

102 *Carhart II*, 127 S. Ct. at 1623 (citing *Carhart*, 331 F. Supp. 2d at 858, 864, 878).

103 *Id.* (citing *Carhart II*, 127 S. Ct. 1610, J.A. at 408–09 (2007) (No. 05-1382), 2006 WL 2285650).

104 *Id.* (citing *Carhart II*, 127 S. Ct. 1610 J.A. at 409).

to it, some movement of limbs . . . .'"[105] Thus, it would seem that even proponents of the procedure recognize a difference between D&X and other procedures, even if they have no qualms about terminating the pregnancy by other means. Justice Kennedy's evidence suggests that the spatial dimension has independent moral significance, regardless of fetal age.

C. Why the PBABA Does Not Place an Undue Burden on a Woman's Right to Choose

After highlighting the various abortion methods above, Justice Kennedy's legal analysis begins with *Roe*'s "essential holding," as it was interpreted in *Casey*.[106] First, a woman has a right to choose abortion before viability without undue interference from the state. Second, the state has power to regulate post-viability abortions, provided that there are exceptions to preserve the life and health of the mother. Third, the state has a legitimate interest from the outset of the pregnancy in protecting a woman's health and the life of the fetus that may become a child. Justice Kennedy contends that, despite *Casey*'s attempt to reconcile the potentially competing interests of the woman and the state, one of the plurality opinion's "central premises" is that the state has an important interest in preserving and promoting fetal life.[107] This interest would be repudiated were the Court to strike down the PBABA.

1. The PBABA Is Not Overbroad

Justice Kennedy spends significant time examining the language of the PBABA in order to distinguish between the procedure that the statute covers, D&X, and the procedure that it does not cover, D&E.[108] D&X involves the delivery of a fetus, while D&E involves the extraction of fetal parts.[109] Further, the PBABA expressly requires that the physician commit an "overt act" to kill the fetus after removing it beyond a specified anatomical landmark.[110] Unlike D&E, which involves destruction of fetal life inside the woman's body, the PBABA covers only the D&X procedure which involves the partial delivery of a fetus, and a subsequent deliberate, intentional, and overt act.

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[105] *Id.* (quoting *Carhart II*, 127 S. Ct. 1610, J.A. at 94 (2007) (No. 05-380), 2006 WL 1440830).

[106] *Id.* at 1626 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 846).

[107] *Id.* at 1633 (quoting *Casey*, 505 U.S. at 873).

[108] *See supra* notes 96–97 and accompanying text.

[109] *Carhart II*, 127 S. Ct. at 1630 ("D & E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.").

[110] 18 U.S.C. § 1531(b)(1)(A)–(B) (Supp. V 2007).

Justice Kennedy notes the Court's longstanding, "'elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[111] Conversely, where a statute is not susceptible to more than one construction, the Court may not rewrite the language to avoid an undesirable result.[112] The Nebraska statute was facially broad enough to cover D&E, so the Court had to strike it down; however, the "most reasonable reading" of the PBABA, according to Justice Kennedy, does not encompass D&E.[113]

2. The Lack of a Health Exception does not Render PBABA Unconstitutional

After concluding that the PBABA is not overbroad, Justice Kennedy addressed the absence of a health exception, which had previously been considered a constitutional mandate under *Roe* and *Casey*.[114] In fact, those cases seemed to establish a per se constitutional rule that, absent life or health exceptions, no abortion regulation would be valid. Even in

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[111] *Carhart II*, 127 S. Ct. at 1631 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). The Court explained that where statutory text is susceptible to two separate meanings, courts traditionally read such legislation so as to avoid any constitutional conflicts, or where there is a conflict, to uphold statutes that can be saved through a narrowing construction. *Id.* The Court also held that the PBABA is not void for vagueness. *Id.* at 1628–29. The void for vagueness doctrine generally requires that a criminal statute define an offense with sufficient particularity both to inform an ordinary person what is prohibited and to prevent arbitrary enforcement by law enforcement officials. *Id.* at 1628 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). Because the PBABA contains a scienter requirement and specific anatomical landmarks past which the fetus must be delivered, Justice Kennedy found that it was not void for vagueness. In contrast, the Nebraska Statute struck down in *Carhart I* did not contain a specific anatomical landmark but used the language of delivering a "substantial portion" of the fetus, which is susceptible to various definitions. *Id.* (quoting *Carhart I*, 530 U.S. at 922). Furthermore, although the Nebraska Statute contained the same scienter requirement, the PBABA requires that the physician "'deliberately and intentionally'" deliver the fetus past the specified anatomical landmark, *id.* (quoting 18 U.S.C. § 1531(b)(1)(A) (Supp. V 2007)), which ultimately alleviates the vagueness concerns. *Id.* (citing Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 526 (1994)). Thus, the PBABA's specific requirements not only give clear notice of what is prohibited, but also prevent arbitrary enforcement by law enforcement officials. *Id.* at 1629.

[112] *See id.* at 1631 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998)).

[113] *Id.* Justice Thomas argued in *Carhart I* to the contrary, suggesting that the Nebraska statute *could* be read to only include D&X, rather than D&E. To the extent that "partial birth abortion" could be read to apply to both D&X and D&E, the Court easily could have read the statute to apply only to D&X. This would have been consistent with a common sense interpretation of "partial-birth abortion" as a term-of-art. *See Carhart I*, 530 U.S. at 999 (Thomas, J., dissenting) ("There is, of course, no requirement that a legislature use terminology accepted by the medical community. A legislature could, no doubt, draft a statute using the term 'heart attack' even if the medical community preferred 'myocardial infarction.'").

[114] *Casey*, 505 U.S. at 846; Roe v. Wade, 410 U.S. 113, 163–64 (1973).

Ayotte v. Planned Parenthood of Northern New England, where a unanimous Court supported the appropriateness of reading an implicit health exception in a statute that lacked one, the Court did not suggest that a health exception might not be required in some cases.[115]

Nonetheless, Justice Kennedy begins with the threshold question whether the lack of a health exception exposes a woman to significant health risks. Because this was a contested factual question in the lower courts,[116] Justice Kennedy concludes that medical uncertainty exists; and, where medical uncertainty exists, the PBABA is safe from a facial challenge.[117] Medical uncertainty does not foreclose legislative regulation in the abortion context any more than in any other context.[118] Even

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[115] 546 U.S. 320, 331 (2006). *Ayotte* dealt with a facial challenge to New Hampshire's parental notification law. Like the PBABA, it contained a life exception, but no health exception. The Court held that an injunction "prohibiting unconstitutional applications" of the law could save the statute as a whole. *Id.* at 332. Such an injunction would, in essence, read the statute as implicitly including a health exception. *Id.* at 331. In this way, *Ayotte* dealt with the proper measure of remedies in the abortion context, rather than any suggestion that a health exception might not be required.

[116] *Carhart II*, 127 S. Ct. at 1635 ("[W]hether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.").

[117] *Id.* at 1636 (citing Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997)). Justice Kennedy explicitly notes that an as-applied challenge could render the PBABA unconstitutional for lacking a health exception. This would require specific examples of how the procedure poses a significant health risk; short of that, no health exception is required. *Id.* at 1638–39.

[118] *Id.* at 1636 ("The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."). Abortion has never been considered, as Justice Kennedy seems to suggest, just another medical procedure. Indeed, the substantive due process cases that preceded and laid the groundwork for *Roe* and its progeny further underscore the high level of scrutiny that the Court has applied in abortion cases. In *Griswold v. Connecticut*, the Supreme Court struck down a statute prohibiting the use of contraceptives, as applied to a married couple. 381 U.S. 479, 485 (1965). The Court discussed important First Amendment principles that opposed the Connecticut statute. Specifically, the Court noted that freedom of association, though not explicitly mentioned in the First Amendment, "is necessary in making the express guarantees fully meaningful." *Id.* at 483. Without certain "peripheral rights," the specific and most fundamental constitutional rights would be less secure. *Id.* at 482–83.

Famously, the Court went on to state that these examples suggest that the specific guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Certain "zones of privacy" can be deduced from specific guarantees in the First, Third, Fourth and Fifth Amendments, not the least of which is privacy surrounding the marital bed. Because Connecticut's law swept too broadly into this constitutionally-protected area, the Court ultimately struck it down. *Id.* at 484–85.

Less than seven years later, the Court extended *Griswold*'s protection to non-married persons in *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972). *Griswold* focused on the sanctity of the marriage relationship. *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school

where "'substantial medical authority'" supports the proposition that banning D&X "could" endanger a woman's health, legislatures may ban the procedure when it pursues rational and legitimate ends, such as protecting the fetus that may become a child.[119]

The mere fact that D&X could be *safer* than D&E in isolated cases does not show that D&E is no longer *safe*.[120] In fact, the *safest* method in some cases might be to simply remove the entire fetus and kill it outside of the woman's body, but that does not mean that each person has a constitutional right to such a procedure.[121] By accepting the congressional determination that D&X is "never medically necessary,"[122] Justice Kennedy avoided expressly overruling *Carhart I*.

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system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); *id.* at 499 (Goldberg, J., concurring) ("I believe that the right of privacy in the marital relation is fundamental and basic . . . ."). Despite *Griswold*'s focus on marriage, the Court in *Eisenstadt* applied the substantive Due Process right of marital privacy to unmarried persons via the Equal Protection Clause. *Eisenstadt*, 405 U.S. at 453–55. "If the right of privacy means anything," it is the right of any person, married or unmarried, "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Id.* at 453 (emphasis added) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)). Justice O'Connor's opinion in *Casey* would further solidify these rights. 505 U.S. at 896 (recognizing the interests of two distinct individuals in the marriage relationship). Abortion has always been considered an extension of these fundamental rights; Justice Kennedy's language seems to marginalize the conncetion of abortion to fundamental rights by comparing abortion to medical procedures in a general sense.

[119] *Carhart II*, 127 S. Ct. at 1638 (quoting *Carhart I*, 530 U.S. at 938).

[120] Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 291 (2d Cir. 2006) (Walker, C.J., concurring). The *Carhart I* Court

> never identified why a statute that altogether forbids D & X creates a significant health risk; it simply noted that, while other methods of abortion are "'*safe*,'" some doctors believe that "the D & X method [is] significantly *safer* in certain circumstances." Of course, this only establishes that a statute that altogether forbids D & X would deny some women a potential health *benefit* over an objectively "safe" baseline; it does not establish that such a statute would pose a constitutionally significant health *risk*.

Id. (citation omitted) (quoting *Carhart I*, 530 U.S. at 934).

[121] There are reported cases when the cervix is overly dilated such that the fetus could be removed without piercing the fetal skull and sucking out the brain. *See Carhart I*, 530 U.S. at 988 (Thomas, J., dissenting); Roger Byron, Comment, *Children of a Lesser Law: The Failure of the Born-Alive Infants Protection Act and a Plan for Its Redemption*, 19 REGENT U. L. REV. 275, 275–76 (2006) (citing multiple examples of delivered fetuses who survived delivery only to be killed by medical professionals). Going through with the D&X procedure in those cases inevitably poses a greater risk to the woman, but that does not mean infanticide is a better alternative.

[122] Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105 § 2(14)(E), 117 Stat. 1201, 1205 (2003) (codified as 18 U.S.C. § 1531 (Supp. V 2007)).

D. Legitimate Aims of the PBABA

While much of Justice Kennedy's opinion focuses on why the PBABA does not violate constitutional mandates under *Roe* and its progeny, he also emphasizes three important governmental objectives. These objectives were, in his view, ignored in *Carhart I*,[123] but duly noted by Congress and embodied in the PBABA's fact-finding.

First, "[t]he Act expresses respect for the dignity of human life,"[124] which is consistent with the state's important interest in protecting fetal life from the outset of the pregnancy.[125] Allowing "a brutal and inhumane procedure" like D&X would coarsen society to the value and humanity of life, beginning at its earliest stages and beyond.[126] Consistent with *Casey*, the state "may use its voice and its regulatory authority to show its profound respect for the life within the woman."[127] This interest is served not only by protecting a small number of fetuses from the brutality of the D&X procedure, but also by the dialogue that better informs all of the citizenry of the procedure and the value of fetal life.[128]

Second, government has an important interest in safeguarding the integrity of the medical profession.[129] D&X "confuses the medical, legal, and ethical duties of physicians to preserve and promote life . . . ."[130] The physician begins the D&X procedure wearing the hat, so to speak, of an obstetrician, but manipulates the procedure to accomplish the ends of an abortionist.[131] Interestingly, the same could be said of many other methods, including the induction procedure upheld in *Planned*

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[123] *See Carhart I*, 530 U.S. at 961–64 (Kennedy, J., dissenting).

[124] *Carhart II*, 127 S. Ct. at 1633.

[125] *But cf. Carhart I*, 530 U.S. at 951 (Ginsburg, J., concurring) ("[T]his law does not save any fetus from destruction, for it targets only 'a *method* of performing abortion.'" (quoting *id.* at 930)).

[126] *Carhart II*, 127 S. Ct. at 1633 (quoting Partial-Birth Abortion Ban Act § 2(14)(N)).

[127] *Id.* (citing *Casey*, 505 U.S. at 877 (plurality opinion)).

[128] *See id.* at 1634.

> It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. *The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion*.

Id. (emphasis added).

[129] *Id.* at 1633 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

[130] *Id.* (quoting Partial-Birth Abortion Ban Act § 2(14)(J)).

[131] *Id.*

Parenthood of Central Missouri v. Danforth.[132] Nonetheless, the gruesome nature of the D&X procedure is qualitatively different from other methods of abortion, thus justifying the distinction.[133]

Third, government has an important interest in drawing a clear line between abortion and infanticide. The PBABA, Justice Kennedy contends, draws such a line.[134] The Court has drawn similar lines in the past, and these lines can be a valid attempt by the government to prevent a moral descent from that which is legal, but controversial to that which is clearly condemned.[135] Considering these three factors, Justice Kennedy concludes that when the government has a "rational basis" to take action and it imposes no undue burden, "the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[136]

E. Dissenting Voices in Carhart II

Joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg criticizes the "flimsy and transparent"[137] justifications for upholding the validity of the PBABA. First, she argues that the PBABA does not further a state interest in protecting fetal life. Because the statute targets a method of abortion, rather than a particular fetal age, women are free to obtain and physicians are free to perform other procedures in lieu of D&X. Thus, the PBABA "saves not a single fetus from destruction . . . ."[138]

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[132] 428 U.S. 52, 79 (1976).

[133] Justice Kennedy is not the only pro-choice person to see something inherently different in the D&X procedure. Dr. George Tiller, a well-known abortion doctor in Kansas, refused to perform partial-birth abortions on ethical grounds. RISEN & THOMAS, *supra* note 19, at 323. Dr. Tiller gained national recognition for his efforts to protect a woman's right to choose when he refused to be intimidated by the radical anti-abortion group, Operation Rescue, whose members eventually firebombed Dr. Tiller's offices. *Id.* at 321.

[134] *Carhart II*, 127 S. Ct. at 1633–34 (quoting Partial-Birth Abortion Ban Act § 2(14)(G)).

[135] *Id.* at 1634 (quoting *Glucksberg*, 521 U.S. at 732 (upholding state bans on assisted suicide based on the "fear that permitting assisted suicide will start [a state] down the path to voluntary and perhaps even involuntary euthanasia")).

[136] *Id.* at 1633.

[137] *Id.* at 1646 (Ginsburg, J., dissenting).

[138] *Id.* at 1647. Similar arguments have been put forth by pro-life advocates, albeit for different reasons. For example, when conservative, evangelical leader Dr. James Dobson suggested that *Carhart II* signaled a victory in the abortion debate for the pro-life movement, he faced stiff criticism from other prominent leaders in the pro-life movement who argued the PBABA does virtually nothing to save the millions of fetuses who are killed annually by abortion procedures. *See* Open Letter to Dr. James Dobson, Colorado Right to Life, http://www.coloradorighttolife.org/openletter (last visited Mar. 1, 2008). In response to

Second, Justice Ginsburg criticizes the PBABA as being motivated chiefly by "'moral concerns.'"[139] But these same concerns, she notes, could also be marshaled in opposition to *all* abortion procedures, the remainder of which are not affected by the statute. The majority, Justice Ginsburg argues, provides no justification for overriding fundamental rights in appeasing "moral concerns" in this case, but refraining from doing so in other cases.[140]

Justice Ginsburg is also critical of Justice Kennedy's failure to adequately address the viability line with regards to the PBABA. She notes that the Supreme Court has long considered viability to be an important line because when a woman carries a fetus beyond the age of viability, she implicitly consents to greater state intrusion into her reproductive choices.[141] Thus, the Court has "identified viability as a critical consideration."[142] While Justice Kennedy, like Congress, is concerned with blurring the line between abortion and infanticide,[143] the dissenting Justices are equally concerned with blurring the line between pre- and post-viability abortions.[144] Essentially, Justice Ginsburg questions the constitutionality of a statute that focuses solely on spatial considerations, or "where a fetus is anatomically located,"[145] rather than the more important temporal question of viability.

V. *CARHART II* IN THE SHADOW OF *ROE* AND *CASEY*: WHY PRECEDENT SUPPORTS THE PBABA'S CONSTITUTIONALITY

Though the *Carhart II* opinion probably says more about the Supreme Court Justices' differences than it says about their commonalities, the majority's opinion is consistent with the principles underlying precedent. Justices Thomas and Scalia reluctantly joined the majority opinion, while noting the constitutional right to abortion

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these arguments, Justice Kennedy does claim that, even when physicians are able to use different procedures to conform to the PBABA, the interest in protecting life is furthered by the debate and dialogue surrounding the procedure. *Carhart II*, 127 S. Ct. at 1617.

[139] *Id.,* 127 S. Ct. at 1647 (Ginsburg, J., dissenting) (quoting *id.* at 1633 (majority opinion)).

[140] *Id.*

[141] *Id.* at 1650 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869–70 (1992) ("In 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.")).

[142] *Id.* at 1649 (citing *Casey*, 505 U.S. at 869–70).

[143] *Id.* at 1633–34 (majority opinion) (citing Partial-Birth Abortion Ban Act of 2003 § 2(14)(G)).

[144] *Id.* at 1650 (Ginsburg, J., dissenting) (quoting *id.* at 1627 (majority opinion)).

[145] *Id.*

established in *Roe* and *Casey* "has no basis in the Constitution."[146] They joined because it "accurately applies current [abortion] jurisprudence."[147] Since the four dissenting Justices clearly would have struck down the PBABA, that leaves only three Justices—Chief Justice Roberts, Justice Kennedy, and Justice Alito—whose views are consistent with the central holding of *Carhart II*: that abortion is a constitutionally protected right, and the PBABA is consistent with the contours of that right.[148]

Assuming, consistent with *Roe* and *Casey*, that abortion is a fundamental right under the Constitution, as seven of the Justices at least implicitly concede, this Section suggests that the PBABA is consistent with that fundamental right. Although Justice Kennedy's opinion does not adequately distinguish between pre- and post-viability applications of the PBABA, his conclusion is nonetheless correct. The PBABA does not place an undue burden on a woman's right to choose a pre-viability abortion;[149] and, while it contains no health exception, the nature of the procedure—including its convergence of spatial and temporal components—justifies this omission.[150]

The Supreme Court has long held that a woman "has a right to choose to terminate her pregnancy" pre-viability.[151] On the other hand, post-viability, states can place substantial restrictions, even prohibitions, on abortion so long as there are exceptions to preserve the life and health of the mother.[152] Put another way, the pre-viability right is one of "reproductive choice," while the post-viability right is one of "medical self-defense."[153]

This distinction provides the basic lens through which abortion rights must be viewed. The greatest flaw in Justice Kennedy's *Carhart II* opinion is that it never adequately recognizes the important temporal distinctions posed by the PBABA. While it is important that the Court

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[146] *Id.* at 1639 (Thomas, J., concurring) (citing *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part)); *Carhart I*, 530 U.S. at 980–83 (Thomas, J., dissenting).

[147] *Carhart II*, 127 S. Ct. at 1639 (Thomas, J., concurring).

[148] Perhaps Chief Justice Roberts and Justice Alito would join Justices Thomas and Scalia in a future opinion to strike down *Roe*, but that is pure speculation.

[149] *See infra* notes 155–166 and accompanying text.

[150] *See infra* notes 167–242 and accompanying text.

[151] *Carhart I*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 870 (plurality opinion)).

[152] *Casey*, 505 U.S. at 846 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973).

[153] Volokh, *supra* note 17, at 1824–28. This distinction has not always been clear. The 1959 revision to the Model Penal Code by the American Law Institute included three exceptions to the general ban on abortions when restricting abortion "would gravely impair the physical or mental health of the mother"; when a child would likely be born with "grave physical or mental defects"; or where the pregnancy resulted from rape or incest. TRIBE, *supra* note 191~~19~~19, at 36 (quoting MODEL PENAL CODE § 207.11(2)(a) (Tentative Draft No. 9, 1959)).

consider the spatial dimension of where fetal death occurs, it must do so in conjunction with the temporal dimensions. Failure to adequately address both the spatial and temporal dimension and an inability to reconcile them only enhances the cynical view, held by many, that abortion jurisprudence is simply an extension of Justices' political whims or religious beliefs.[154] Below, both pre-viability and post-viability applications of the PBABA are discussed in turn.

A. Pre-Viability Applications of the PBABA

As applied to pre-viability cases, the PBABA addresses spatial concerns of where the abortion takes place, but temporal concerns related to fetal age are not in issue. Announcing the proper standard for pre-viability abortion restrictions and dismissing *Roe*'s strict scrutiny approach, the *Casey* plurality stated that government could not place an "undue burden" on a woman's right to choose. The plurality defined an undue burden as any restriction having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[155] In *Carhart I*, the Court officially recognized the "undue burden" test as controlling its analysis of pre-viability abortion restrictions.[156]

Like many judicially created tests, the "undue burden" standard defies precise explanation and demarcation. The Court has stated that twenty-four hour waiting periods do not place an undue burden on a woman's right to choose.[157] Similarly, the Court has held that requiring a higher informed consent standard for abortion procedures, relative to other medical procedures, does not create an undue burden.[158] One could argue that the key distinction between these restrictions and a complete D&X ban provided in the PBABA is that the former only affected abortion rights through ancillary requirements. While burdensome in some ways, these did not amount to a complete ban on any procedure.

In fact, some would argue that the PBABA is more like the complete ban on saline amniocentisis that was struck down by the Court in

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[154] *See, e.g.,* Stone, *supra* note 16.

[155] *Casey*, 505 U.S. at 876–77 (plurality opinion).

[156] 530 U.S. at 921 (citing *Casey*, 505 U.S. at 877).

[157] *Casey*, 505 U.S. at 885–86. *But cf.* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452 (1983) (striking down a twenty-four-hour waiting period under a strict scrutiny analysis).

[158] *Casey*, 505 U.S. at 882, 884, 887 (upholding government requirement that abortion providers give "truthful, nonmisleading information about the nature of the [abortion] procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus"). *But cf.* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 762–63 (1986) (striking down a similar law under strict scrutiny analysis).

Danforth.[159] Although the State of Missouri claimed that the procedure endangered women's health,[160] the Court held that the ban was an "unreasonable or arbitrary regulation . . . ."[161] This was because, at the time of the decision, saline amniocentisis was one of the most commonly used procedures. A restriction on it would have inhibited the "'vast majority of abortions'" after twelve weeks.[162] In contrast, pre-viability application of the PBABA leads to a very different result from that of *Danforth*. Banning an oft-used procedure like D&E today would be akin to the saline amniocentisis ban in *Danforth*, but the isolated use of D&X pre-viability severely undercuts any argument that the PBABA poses an undue burden on a woman's right to choose.

Banning pre-viability D&X, at worst, prevents access to a slightly safer procedure than the other safe procedures that are already available.[163] As Justice Kennedy notes, in the absence of clear medical evidence to the contrary,[164] Congress can legislate and the Court can affirm regulations on the abortion procedure to the same extent as regulations on any other procedure.[165] This is particularly true in pre-viability applications of the PBABA, when safe alternatives exist. Neither *Roe* nor *Casey* has ever required the advancement of marginal safety benefits without any deference to competing interests at stake.[166]

B. Post-Viability Applications of the PBABA

Perhaps the more difficult question is the post-viability application of the PBABA. Although the pre-viability application raises some questions, the undue burden test is sufficiently pliable to uphold the PBABA.[167] But the PBABA provides no exception to protect the woman's

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159 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976).

160 *Id.* at app. at 86–87 (quoting H.C.S.H.B. 1211 § 9, 77th Leg. (Mo. 1974)).

161 *Id.* at 79.

162 *Carhart II*, 127 S. Ct. at 1637 (quoting *Danforth*, 428 U.S. at 79).

163 *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 291 (2d Cir. 2006) (Walker, C.J., concurring), *vacated on other grounds by* Nat'l Abortion Fed'n v. Gonzales, 224 Fed. App'x 88 (2d Cir. 2007).

164 Justice Ginsburg emphasized plaintiffs' expert testimony and trial court findings contradicting Justice Kennedy's view. *Carhart II*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting) ("According to the expert testimony plaintiffs introduced, the safety advantages of [D&X] are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, . . . compromised immune systems [or] . . . certain pregnancy-related conditions, such as placenta previa and accreta . . . .").

165 *Id.* at 1636 (majority opinion) ("The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.").

166 *See Nat'l Abortion Fed'n*, 437 F.3d at 291 (Walker, C.J., concurring).

167 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 798–800 (2d ed. 2002) (questioning substance of the undue burden standard).

health, which appears to be a clear violation of the *Roe-Casey* mandate requiring such an exception.

The corollary of *Casey*'s undue burden test for pre-viability restrictions on a woman's right to choose is the grant of broad powers to regulate, even proscribe, post-viability abortion, so long as exceptions are made to protect the life and health of the mother.[168] Prior to *Carhart II*, the Court never upheld a statute that purposefully excluded a health exception. In *Ayotte v. Planned Parenthood of Northern New England*, the Court implied a health exception when the statute was silent,[169] but *Carhart II* takes a significant step beyond *Ayotte*. Though Congress purposefully excluded a health exception to the PBABA because D&X is "never medically necessary"[170]—thus negating the possibility of an implied health exception as in *Ayotte*—Justice Kennedy's majority opinion in *Carhart II* affirmed the constitutionality of the statute. Thus, at first blush, the PBABA appears irreconcilable with *Casey*'s requirement that every post-viability restriction contain an exception to preserve the life or health of the mother. Despite this apparently fatal flaw, if one steps back to consider the "essential holding" of *Roe*, as was reaffirmed in *Casey*, *Carhart II* proves to be consistent with the underlying constitutional principles and public policies. Though Justice Kennedy's opinion lacks sufficient explanation and is flawed in some ways, the end result is correct: the PBABA does not violate the post-viability right to an abortion, as outlined in *Casey*.

Abortion jurisprudence has developed by the Court's balancing of competing interests. Beginning in *Roe*, the Court balanced the woman's interest in reproductive autonomy, the state's interest in protecting health, and the state's interest in protecting fetal life. *Casey* reinforced this delicate balance, emphasizing the latter. Though the *Carhart I* Court failed to recognize the validity of a state D&X ban, the *Carhart II* majority finally recognized both the temporal and spatial concerns justifying the PBABA.[171] In the end, the post-viability application of the

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[168] *See Casey*, 505 U.S. at 846.

[169] 546 U.S. 320 (2006). In *Ayotte*, the Supreme Court reviewed New Hampshire's parental notification law, which prohibited a physician from performing an abortion until at least forty-eight hours after notice is delivered to a minor's parent or guardian. *See* Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. §§ 132:24–132:28 (LexisNexis 2006). The law contained no exception allowing a physician to perform the procedure in a medical emergency, unless the minor's life was in peril. Thus, it contained no explicit health exception.

[170] *Carhart II*, 127 S. Ct. at 1624 (quoting Partial-Birth Abortion Ban Act of 2003 § 2(1)).

[171] *See Nat'l Abortion Fed'n*, 437 F.3d at 311–12 (Straub, J., dissenting) ("At birth, we are . . . confronted with a unique circumstance where we must weigh the relative strength of the mother's privacy right, specifically her right to terminate her pregnancy in

PBABA comes down to a balance: three legitimate and important state interests against an exception to allow D&X when necessary to preserve a woman's health. Considering the grave governmental interests—and by extension, social interests—at stake, as well as the unsubstantiated need for a health exception,[172] the *Carhart II* Court was right in upholding the constitutionality of the PBABA. The following pages consider in greater detail the three important government interests that were dismissed in *Carhart I* and affirmed in *Carhart II*: protecting potential life; safeguarding the integrity of the medical profession; and drawing a clear line between abortion and infanticide.

1. Protecting Potential Life

Since 1973, the Court has affirmed the important government interest in protecting potential life.[173] In fact, Justice Blackmun's *Roe* opinion flatly rejected the contention that a woman may terminate her pregnancy at any time, in any manner, and for any reason.[174] The State's important interests of regulating medical procedures and protecting potential life dictate that the abortion right is a qualified right, and that this individual interest must be balanced against important government interests.[175]

While the *Roe* Court emphasized the State of Texas's interest in protecting potential life, it also refrained from answering "the difficult question of when life begins."[176] Instead, Justice Blackmun attempted to balance the competing interests through the trimester system:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the

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a manner that preserves her own health, against the emerging right of the fetus to live and the State's interest in protecting life.").

[172] *See id.* at 306–07. The American Medical Association could not identify a single circumstance where D&X would be medically necessary. *Id.* at 306 (citation omitted). Likewise, the American College of Obstetricians and Gynecologists could identify no such circumstance, although they did suggest the procedure "may be the best or most appropriate procedure' in an unspecified 'particular circumstance." *Id.* (citation omitted).

[173] *Roe*, 410 U.S. at 150 ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

[174] *Id.* at 153.

[175] *Id.* at 154.

[176] *Id.* at 159. Although this statement is not entirely true, the purpose of this Article is not to question the validity of *Roe*; countless others have accomplished this task. *See, e.g.*, Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

> mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[177]

The "'compelling' point," according to Justice Blackmun, is at viability because a viable fetus is capable of "meaningful life outside the mother's womb."[178] Accordingly, the trimester system recognized the state's interest in potential life, an interest which became more and more compelling as the day of birth approached.

Nearly twenty years later, the Supreme Court reaffirmed and retained *Roe*'s "essential holding" in *Casey*.[179] The Court discussed three key principles that remained from Justice Blackmun's opinion. First, a woman has a right to pre-viability abortion without "undue interference from the State."[180] Second, the Court confirmed the State of Pennsylvania's ability to regulate post-viability abortions, if such regulations contain exceptions "for pregnancies which endanger the woman's life or health."[181] Third, and most importantly for the purposes of this Article, legislatures have an interest in not only protecting the woman's health during pregnancy, but also in protecting "the life of the fetus that may become a child."[182]

In *Casey*, Justice O'Connor's chief criticism with the *Roe* decision was that the trimester framework was too rigid and that it failed to "fulfill [its] own promise that the State has an interest in protecting fetal life or potential life."[183] *Roe* held that any governmental attempt to influence a woman's abortion decision pre-viability was unwarranted; however, this view is incompatible with the *Roe* Court's recognition of the "substantial state interest in potential life *throughout pregnancy*."[184] Although *Casey* is often cited for the undue burden standard, the

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[177] *Roe*, 410 U.S. at 164–65.

[178] *Id.* at 163.

[179] 505 U.S. 833, 846 (1992).

[180] *Id.* at 846.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 876 (plurality opinion) (citing *Roe*, 410 U.S. at 162). *See also* Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989) (plurality opinion) ("'[T]he State's interest [in protecting fetal life], if compelling after viability, is equally compelling before viability.'" (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting))).

[184] *Casey*, 505 U.S. at 876 (plurality opinion) (emphasis added) (comparing *Webster*, 492 U.S. at 519 (plurality opinion) with City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 460–61 (1983) (O'Connor, J., dissenting)).

plurality left *Roe*'s post-viability framework where it found it. Under *Casey*, a state could still regulate, or even proscribe abortion altogether, provided that exceptions were made where abortion would be necessary to preserve the life or health of the mother.[185]

As applied post-viability, the PBABA furthers the important interest in protecting potential life in two ways. First, it ensures that D&X is only used, if at all, to protect the life of the mother. Thus, no person may rely on an overly broad reading of the health exception to justify this gruesome procedure.[186] Second, the ban also has symbolic value because it fosters dialogue on the nature of abortion itself.[187] By forcing individuals to grapple with both the spatial and temporal elements, it forces each person to consider the nature of life, when it begins, and how to reconcile abortion rights with that developing life.

2. Safeguarding the Integrity of the Medical Profession

In addition to protecting potential life, government also has an important interest in safeguarding the integrity of the medical profession. Today, commentators debate this issue in contexts ranging from prisoner abuse in the war on terror,[188] to capital punishment,[189] to euthanasia.[190] When a physician performs a gruesome procedure like D&X to destroy fetuses that are both viable and partially born, similar policy concerns can be raised.

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[185] *Casey*, 505 U.S. at 879 (plurality opinion) (citing *Roe*, 410 U.S. at 164–65).

[186] For a critical discussion of the health exception, see Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?* Women's Medical Professional Corporation v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799 (1999).

[187] *Carhart II*, 127 S. Ct. at 1634.

[188] *E.g.,* Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty*, 34 J.L. MED. & ETHICS 570, 576 (2005) ("For prisoners and detainees to see their primary care physicians also in the role of assisting those who tortured and abused them, or to see them remain silent in the face of such human rights violations, undermines the credibility of the medical profession and is irreconcilable with the physician's role as healer.").

[189] *E.g.,* Christopher J. Levy, Note, *Conflict of Duty: Capital Punishment Regulations and AMA Medical Ethics*, 26 J. LEGAL MED. 261, 274 (2005) ("The Hippocratic Oath binds the medical community to the healing of society, regardless of the historical and humane natures of capital punishment. Under current law, there is a direct conflict between requiring physicians to assist in capital punishment and the sworn oath of medicine. Furthermore, there is great conflict between laws criminalizing one form of physician-assisted death, euthanasia, and laws requiring medical professional to execute for the state.").

[190] *E.g.,* Kelly Green, Note, *Physician-Assisted Suicide and Euthanasia: Safeguarding Against the "Slippery Slope"—The Netherlands Versus the United States*, 13 IND. INT'L & COMP. L. REV. 639, 650 (2003) ("If physicians are obligated by law to provide their patients with a lethal prescription or injection upon request, physicians will no longer be viewed as healers but those who take life.").

In order to provide a more robust understanding of these policy concerns, this Section looks at two other examples where similar arguments have been raised: (a) involuntary medication of death row inmates and (b) assisted suicide. If the integrity of the medical profession is implicated through assisting in the death of murderers, and if it is also implicated through alleviating the suffering of consenting adults, one must ask whether those same interests are implicated in the case of a partially born, viable fetus that is neither guilty of any wrongdoing nor capable of giving consent. When considering these types of policy questions, one must also consider the interplay between law and ethics, and the degree to which each informs the other.[191]

(a) Involuntary Medication

The Supreme Court's decision in *Washington v. Harper* established the standard for involuntary medication of a prison inmate.[192] In *Harper*, the Court balanced the inmate's liberty interest guaranteed, though diminished in some ways, under the Fourteenth Amendment against traditional state interests in prison safety and security. In light of these considerations, the Court held that involuntary medication is permissible when "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[193] Thus, the constitutionality of involuntary medication hinges on the question of "medical appropriateness."[194]

Because the Eighth Amendment prohibits the execution of the insane,[195] the *Harper* involuntary medication framework created a potential loophole whereby prisons could medicate mentally incompetent inmates for the express or implied purpose of carrying out a death sentence.[196] In *Singleton v. Norris*, a death row inmate—whose death

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[191] One of America's most controversial physicians describes this aptly: "Before [*Roe*], abortion was illegal and therefore unethical. That decision suddenly made it legal and, of course, ethical; and doctors began doing abortions on a grand scale." JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 163 (1991). This line of thinking suggests that, were the Court to overturn *Roe*, abortion would become unethical again. *See id.* at 164.

[192] 494 U.S. 210 (1990).

[193] *Id.* at 227.

[194] Riggins v. Nevada, 504 U.S. 127, 135 (1992) (citing *Harper*, 494 U.S. at 227).

[195] Ford v. Wainwright, 477 U.S. 399, 401 (1986).

[196] At least two state courts have recognized that the *Harper* involuntary medication framework is problematic in the context of the death penalty. State v. Perry, 610 So. 2d 746, 747 (La. 1992); Singleton v. State, 437 S.E.2d 53 (S.C. 1993). These courts argue that so-called "medicate-to-execute" regimes run afoul of the Hippocratic Oath, which states:

> "I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment the following Oath: . . . I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to

sentence had been stayed due to insanity—received medically appropriate antipsychotic medication for his mental condition.[197] This treatment had a secondary effect of rendering him competent for execution, thus reinstating his death sentence. The Eighth Circuit ultimately held that this treatment was consistent with Due Process requirements espoused in *Harper*.[198]

Despite the majority's reasoning, commentators have been critical of the *Norris* decision in part because of a failure to adequately consider how it would affect the integrity of the medical profession.[199] Judge

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> anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death. . . . I will preserve the purity of my life and my art. . . . In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing . . . ."

Perry, 610 So. 2d at 752 (quoting Hippocratic Oath, *reprinted in* STEDMAN'S MEDICAL DICTIONARY 647 (4th Unabridged Lawyer's ed. 1976)); *see also Singleton*, 437 S.E.2d at 61 (same).

In *Perry*, the Louisiana Supreme Court held that involuntary medication that restores an inmate's competency for execution violates the Louisiana Constitution, 610 So. 2d at 747 (citing LA. CONST. art. I, §§ 5, 20), but the court focused much of its attention on federal precedent. *Id.* at 761–71 (discussing Eighth Amendment case law). The *Perry* court noted that "blurring the distinction between healing and punishing denigrates the 'deep-seated social interest in preserving medical care, in actuality and in perception, as an unambiguously beneficent healing art.'" *Id.* at 753 (quoting David L. Katz, Note, Perry v. Louisiana*: Medical Ethics on Death Row—Is Judicial Intervention Warranted?*, 4 GEO. J. LEG. ETHICS 707, 724 (1991)).

In *Singleton*, the South Carolina Supreme Court followed *Perry*, holding that involuntary medication that restored an inmate's competency for execution violated the State's Constitution. Like the Louisiana Supreme Court in *Perry*, the South Carolina Supreme Court in *Singleton* rested on independent state grounds; nonetheless, the court discussed the same concern of safeguarding the integrity of the medical profession. Citing published opinions by the American Medical Association and the American Psychiatric Association, the court discussed the "causal relationship between administering a drug which allows the inmate to be executed, and the execution itself." *Singleton*, 437 S.E.2d at 61. Emphasizing the deference that the United States Supreme Court has shown to medical professionals in other cases, *id.* (citing Addington v. Texas, 441 U.S. 418 (1979) (discussing clear and convincing standards for involuntary commitment proceedings); Vitek v. Jones, 445 U.S. 480 (1980) (discussing transfer of inmate to medical hospital)), the court in *Singleton* found that psychotic drugs could not be prescribed solely to facilitate execution. 437 S.E.2d at 61.

[197] 319 F.3d 1018 (8th Cir. 2003).

[198] *Id.* at 1026 ("[T]he mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set.").

[199] *See* Thompson v. Bell, No. 1:04-CV-177, 2006 WL 1195892, at *32 n.18 (E.D. Tenn. May 4, 2006) (citing Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005)); Jeremy P. Burnette, Note, *The Supreme Court "Sells" Charles Singleton Short: Why the Court Should Have Granted Certiorari to* Singleton v. Norris *After Reversing* United States v. Sell, 21 GA. ST. U. L. REV. 541 (2004); Lisa N. Jones, Note, Singleton v. Norris: *The Eighth Circuit Maneuvered Around the Constitution by Forcibly Medicating Insane Prisoners to Create an Artificial Competence for Purposes of Execution*, 37 CREIGHTON L. REV. 431 (2004).

Heaney, one of the five dissenting judges, criticized the majority opinion because medicate-to-execute regimes violate important ethical standards of the medical profession.[200] He noted that this was not merely a policy concern, and that "courts have long recognized the integrity of the medical profession as an appropriate consideration in its decision-making process."[201] In the context of involuntary medication for execution, Judge Heaney wrote that "the medical community has spoken with a singular voice, opposing its members' assistance in executions."[202] Consequently, he argued that the majority's decision to uphold the death sentence, rather than to defer to the medical community's view, was erroneous.

This reasoning provides a useful analogy for the partial-birth abortion context. Death row inmates have diminished constitutional rights in many important respects, but that does not release physicians from their ethical duty to do no harm. Although a fetus is not a "person" within the constitutional definition, the partially born, viable fetus—being on the threshold of birth, having violated no laws, and having taken no lives—deserves heightened protections.[203] Where the medical community has spoken with a "singular voice"[204] in opposition to D&X,[205] the *Carhart II* Court correctly deferred to the medical community in affirming the importance of this interest.

(b) Assisted Suicide

A second and equally instructive context where courts have discussed government's important interest in safeguarding the medical profession is in assisted suicide cases. The Supreme Court has held that the "right to die" is not a fundamental right.[206] While each person has a

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[200] *Norris*, 319 F.3d at 1036 (Heaney, J., dissenting).

[201] *Id.* at 1037 (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

[202] *Id.*

[203] *See Carhart I*, 530 U.S. at 962–63 (Kennedy, J., dissenting) ("We are referred to substantial medical authority that D&X perverts the natural birth process to a greater degree than D&E, commandeering the live birth process until the skull is pierced. American Medical Association (AMA) publications describe the D&X abortion method as 'ethically wrong.'"); *id.* at 995 n.13 (Thomas, J., dissenting).

[204] *Norris*, 319 F.3d at 1037 (Heaney, J., dissenting).

[205] *Carhart I*, 530 U.S. at 963 (Kennedy, J., dissenting) (quoting publications from the American Medical Association ["AMA"] stating that D&X is "ethically wrong"). In part because of reservations against governmental interference in medicine, the AMA has softened its stance. *See H-5.982 Late-Term Pregnancy Termination Techniques*, AMERICAN MEDICAL ASSOCIATION, http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-5.982.HTM (last visited Mar. 5, 2008) (stating that "ethical concerns have been raised about intact D&X" instead of determining the procedure to be ethically wrong).

[206] *Glucksberg*, 521 U.S. at 728.

fundamental right to refuse unwanted medical care,[207] it does not follow that one has a right to actively receive treatment that will cause his or her death.[208]

In 1997, the Supreme Court decided companion cases on the question of assisted suicide, *Washington v. Glucksberg*[209] and *Vacco v. Quill*.[210] While *Glucksberg* was a substantive due process challenge and *Vacco* was an equal protection challenge, each stands for the proposition that a state may draw a line between a patient's constitutional right to refuse unwanted medical care and a patient's interest in obtaining physician assistance to end his or her life.[211] The *Glucksberg* opinion is particularly instructive because the Court analyzes the state's interest in "protecting the integrity and ethics of the medical profession."[212] Using similar language to that employed in the *Norris* dissent, the Court noted that "'[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer.'"[213]

Glucksberg and *Vacco* show the significance of drawing lines. One could certainly argue that assisted suicide, at least in some cases, constitutes the ultimate sort of pain relief with which physicians could be involved.[214] Indeed, the line between pain relief and assisted suicide is not always clear; sometimes very aggressive, "palliative care" aims at soothing pain, but ultimately can hasten death.[215] Nonetheless, legislatures have an important interest in distinguishing between medical treatment that aims at healing and medical treatment that aims at ending life, despite any imperfections in such a distinction.

In the end, the *Glucksberg* Court recognized the important policy implications that underlie these types of ethical or moral lines. The State

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[207] *Id.* at 720 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990)).

[208] While the right to die is not a fundamental right, a state may pass legislation recognizing such a right. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (upholding the Oregon Death With Dignity Act).

[209] 521 U.S. 702 (1997).

[210] 521 U.S. 793 (1997).

[211] *See id.* at 808–09; *Glucksberg*, 521 U.S. at 735.

[212] *Glucksberg*, 521 U.S. at 731; *see also Vacco*, 521 U.S. at 808–09 (referencing *Glucksberg*'s discussion on this issue).

[213] *Glucksberg*, 521 U.S. at 731 (quoting American Medical Association, CODE OF ETHICS § 2.211 (1994), *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY 291 (Rena A. Gorlin ed., 3d ed. 1994)).

[214] *See* Marya Mannes, *Euthanasia vs. the Right to Life*, 27 BAYLOR L. REV. 68, 69 (1975) (quoting FRANCIS BACON, THE ADVANCEMENT OF LEARNING (1605), *reprinted in* 2 THE WORKS OF FRANCIS BACON 165 (Basil Montagu ed., 1825) ("I esteem it the office of a physician not only to restore health, but to mitigate pain and dolours; and not only when such mitigation may conduce to recovery, but when it may serve to make a fair and easy passage . . . .")).

[215] *Vacco*, 521 U.S. at 802.

of Washington argued that, were the Court to strike down the state's ban on physician-assisted suicide, such a ruling would start the state "down the path to voluntary and perhaps even involuntary euthanasia."[216] The Court looked to the example of the Netherlands, where this prophecy has been fulfilled:

> [D]espite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering. . . . [R]egulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.[217]

The two examples discussed in this Section, medicate-to-execute regimes and physician-assisted suicide, highlight the government's important interest in safeguarding the integrity of the medical profession. Traditionally, the role of the physician has been that of a healer and preserver of life, and thus, the state has an interest in prohibiting practices that undermine this view. By condoning a procedure in which a physician manipulates an obstetrician's delivery techniques to ultimately destroy a fetus when it is only inches from a full birth,[218] the *Carhart I* Court failed to recognize the importance of this interest. In *Carhart II*, the Court corrected this error.

3. Drawing a Clear Line Between Abortion and Infanticide

The third important government interest at issue is the need to draw a clear line between abortion and infanticide.[219] This interest is

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[216] *Glucksberg*, 521 U.S. at 732.

[217] *Id.* at 734 (citing CHARLES T. CANADY, 104TH CONG., REPORT ON PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA IN THE NETHERLANDS 10-12 (U.S. Gov. Print 1996)).

[218] *See Carhart II*, 127 S. Ct. at 1633 (citing Partial-Birth Abortion Ban Act of 2003 § 2(14)(J)).

[219] In discussing the intentional killing of a child, scholars typically refer to three definitional categories. LITA LINZER SCHWARTZ & NATALIE K. ISSER, ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE 1 (2000). Neonaticide refers to "the killing of an infant at or within hours of his birth . . . ." *Id.* Infanticide is "the murder of a child up to 1 year of age," and filicide is "the murder of a [child] older than 1 year." *Id.* The key distinction between these definitional concepts is largely based on the psychological causes. Explanations for neonaticide include (1) shame; (2) denial of pregnancy; (3) mental disorders; and (4) reaction or revenge. *Id.* at 44–53. The causes of infanticide or filicide, by contrast, include immaturity or stress, and in some cases, desire for financial gain. *Id.* at 53–55.

For the purposes of this Article, the differences between neonaticide, infanticide, and filicide will not be considered. Infanticide, as used herein, will refer to the killing of a newborn child. Though scholars technically would refer to this as neonaticide, both laypersons and those in the legal community would consider this to be infanticide. *See, e.g.*, *supra* note 29; *Carhart I*, 530 U.S. at 982 (Thomas, J., dissenting) (recognizing even in a legal context that partial-birth abortion is "a method of abortion that millions find hard to distinguish from infanticide"). Thus, while abortion involves the taking of a fetus's life

related to the previous interests of protecting potential life and safeguarding the integrity of the medical profession. Because even potential life has some value, government may take measures to protect such life. Further, it may take steps to ensure that physicians are regarded as healers, rather than killers. Clearly distinguishing abortion from infanticide serves both of these ends because it protects the dignity of potential human life, ensuring that viable fetuses are not killed at the threshold of birth, and safeguards the medical profession by distinguishing between abortion, which is generally accepted, and infanticide, which is not accepted.

(a) Historical Consensus Favoring Infanticide

In the ancient world, infanticide was a norm in many cultures. Records from ancient Babylonian and Chaldean civilizations, dating back as far as 4000 to 2000 B.C., reference the common practice of infanticide.[220] The Spartan ritual of exposing children to the hillsides is a notable example for many,[221] but few recognize that this was the common practice for all of ancient Greece and Rome.[222] Some scholars have noted the disparate sex ratios between males and females as evidence that infanticide was used as post-birth gender selection favoring males.[223] The ancient world viewed its children as expendable, and when they became a burden, they could simply be discarded.[224]

The emergence of Christianity in the Roman Empire during the late-third and early-fourth centuries helped to eradicate the practice of infanticide,[225] a moral trend that has had long-term implications for

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prior to full vaginal delivery, infanticide would involve the taking of that fetus's life immediately after delivery.

[220] *See* Michelle Oberman, *A Brief History of Infanticide and the Law*, *in* INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL 3, 4 (Margaret G. Spinelli ed., 2003).

[221] In Sparta, children would be left alone, subjected to the elements. As Glanville Williams notes, "[t]he practice of exposing the baby meant that death was the most merciful fate that might befall it; often the child might be picked up by someone, and reared for slavery or prostitution." GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 14–15 (1974).

[222] PETER SINGER, PRACTICAL ETHICS 173 (2d ed. 1993) (discussing approval of infanticide by Greek philosophers Plato and Aristotle, as well as the Roman philosopher Seneca). Plato suggested that children "begotten by inferior parents" should be killed. SCHWARTZ & ISSER, *supra* note 219, at 4 (citation omitted). In Rome, the father was given complete discretion to kill his children, while the mother could do the same with his authorization. *Id.*

[223] *Id.*

[224] *See* WILLIAMS, *supra* note 221, at 14.

[225] Oberman, *supra* note 220, at 6 ("In 318 A.D., when the Roman Empire converted to Christianity, Constantine declared an end to *patria potens*, the absolute right of the

subsequent Western cultures. In fact, the Judaic tradition stands in sharp contrast with many other ancient cultures in that child sacrifice and child exposure were condemned in the Scriptures.[226] To the extent that the partial-birth abortion debate is framed as a merely theological (and thus, legally irrelevant) debate,[227] the Judeo-Christian influence on eradicating the practice of infanticide is worth noting.[228]

Still, a cultural aversion to infanticide historically was, and in some cases still is, the exception, rather than the norm.[229] For example,

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father over his children, and infanticide was declared to be a crime."). For a complete discussion, see generally MICHAEL J. GORMAN, ABORTION AND THE EARLY CHURCH (1982).

[226] SCHWARTZ & ISSER, *supra* note 219, at 5. For example, in *Leviticus* 18:21 (NKJV), God gives the nation of Israel the following command: "And you shall not let any of your descendants pass through the fire of Molech . . . ." Further, *Leviticus* 20:1 *(NKJV)* states that "whoever of the children of Israel, or of the strangers who dwell in Israel, who gives any of his descendants to Molech, he shall surely be put to death."

[227] *See, e.g.,* Francis J. Beckwith, *Gimme That Ol' Time Separation: A Review Essay*, 8 CHAP. L. REV. 309, 322–23 (2005) (noting that pro-life arguments are often dismissed as attempts to establish religion).

[228] The entire abortion debate can be framed as a theological question of when life begins, which would have a direct bearing on when such a being is given rights. One could attempt to reject the difficult question of when life begins, but the legal question of when society will recognize certain rights does not go away. They are thus intertwined in some respects. To label the PBABA as imposing "moral" values that are not legally relevant assumes that the partially-born fetus has no rights. Such a determination is both moral and legal, in the same way that the ancient Roman practice of infanticide was both a moral and legal determination. In other contexts, such as the civil rights movement, "moral" values unquestionably have served the common good. *See, e.g.,* Martin Luther King, Jr., Letter from a Birmingham Jail, (Apr. 16, 1963), *available at* http://www.historicaltextarchive.com/sections.php?op=viewarticle&artid=40; *see also* THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 351 (Clayborne Carson ed., 1998) ("The great tragedy is that Christianity failed to see that it had the revolutionary edge. You don't have to go to Karl Marx to learn how to be a revolutionary. I didn't get my inspiration from Karl Marx; I got it from a man named Jesus, a Galilean saint who said he was anointed to heal the broken-hearted. He was anointed to deal with the problems of the poor. And that is where we get our inspiration. And we go out in a day when we have a message for the world, and we can change this world and we can change this nation."). Even those who generally oppose pro-life causes recognize the need for religion and moral conviction in public debates. *E.g.,* MADELEINE ALBRIGHT, THE MIGHTY AND THE ALMIGHTY 87–88 (2006) ("I do not . . . fault members of the Christian right for expressing and fighting for a moral view, since many others engaged in public policy—including me—do the same. Articulating moral principles is what movements to establish international norms are in business to do. That is precisely how military aggression, slavery, piracy, torture, religious persecution, and racial discrimination have come to be outlawed. It is also how abuses against women, including domestic violence, 'dowry murders,' 'honor crimes,' trafficking, and female infanticide may one day be further reduced. This is a question not of imposing our views on others, but of convincing enough people in enough places that we are right. That is persuasion, not imposition.").

[229] Oberman, *supra* note 220, at 4–6 (recognizing a present and persistent custom of female infanticide in China); SINGER, *supra* note 222, at 172 ("Infanticide has been practised [sic] in societies ranging geographically from Tahiti to Greenland and varying in culture from the nomadic Australian aborigines to the sophisticated urban communities of

families in India and China use sex-selective infanticide to avoid financial burdens associated with having a daughter.[230] Across the Atlantic Ocean, the Netherlands has in place an administrative mechanism allowing for disposing of unwanted, handicapped children.[231] And even America is not exempt: many newborns and infants have been left to die by those charged to protect them.[232]

(b) Peter Singer and the Contemporary Defense of Infanticide

For years, philosophers and ethicists like Peter Singer have advocated for infanticide, arguing against the idea that full personhood, including concomitant legal, ethical, and moral significance associated with humanity, is acquired at birth.[233] Singer argues that the fetus lacks intrinsic value because it does not possess those things that make a person fully human: rationality, self-consciousness, awareness, and capacity to feel.[234] Like many animals, the fetus is a sub-human form,

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ancient Greece or mandarin China. In some of these societies infanticide was not merely permitted but, in certain circumstances, deemed morally obligatory."); *see also* SINGER, *supra* note 7, at 129–30 ("[I]t is worth knowing that from a cross-cultural perspective it is *our* tradition . . . that is unusual in its official morality about infanticide.").

[230] Oberman, *supra* note 220, at 5 (discussing cultural dowry obligations that burden some families in India); *id.* at 5–6 (discussing China's one child policy); *see also* Qu Jian Ding & Therese Hesketh, *Family size, fertility preferences, and sex ratio in China in the era of the one child family policy: results from national family planning and reproductive health survey*, 333 BMJ (BRIT. MED. J.) 371, 373 (2006), *available at* http://www.bmj.com/cgi/reprint/333/7564/371 ("Since the start of the one child family policy, the total birth rate and the preferred family size have decreased, but a gross imbalance in the sex ratio has also emerged.").

[231] *See generally* A. A. E. Verhagen & Pieter J.J. Sauer, *End-of-Life Decisions in Newborns: An Approach From the Netherlands*, 116 PEDIATRICS 736 (2005), *available at* http://www.pediatrics.org/cgi/content/full/116/3/736. In the Netherlands, the practice of infanticide has been embraced by the medical community and by the populace as a whole. *Id.* at 738 (highlighting two infanticide cases which established the standard of care in Dutch medicine, one involving a child with an extreme form of spina bifida, the other involving a child with trisomy 13 (Down syndrome)). The "Groningen Protocol" has become recognized as the standard of care in newborn end-of-life decisions. Eduard Verhagen & Pieter J.J. Sauer, *The Groningen Protocol—Euthanasia in Severely Ill Newborns*, 352 NEW ENGL. J. MED. 959, 959 (2005) [hereinafter Verhagen & Sauer, *Groningen Protocol*]. The Groningen Protocol requires:

> [1] The diagnosis and prognosis must be certain [2] Hopeless and unbearable suffering must be present [3] The diagnosis, prognosis, and unbearable suffering must be confirmed by at least one independent doctor [4] Both parents must give informed consent [5] The procedure must be performed in accordance with the accepted medical standard.

Id. at 961 tbl.2.

[232] *See* SINGER, *supra* note 7, at 106–15; Byron, *supra* note 121.

[233] *See generally* SINGER, *supra* note 222, at 95–109; *see also* PONNURU, *supra* note 35, at 179–82 (discussing others who advocate similar concepts as Singer).

[234] SINGER, *supra* note 222, at 169.

and it is expendable. By extension, Singer contends that "these arguments apply to the newborn baby as much as to the fetus."[235]

If one adopts the view that fetal rights cannot exist independently of the mother,[236] one should not dismiss Singer's logic too easily.[237] Full delivery significantly alters the mother-child relationship, but it does not fundamentally change the fetus. Essentially, the change is semantic: the fetus is no longer called a fetus, but a child. If a viable fetus may be aborted only inches from a full delivery, then one must ask—as Singer does ask—why a newborn infant could not be killed as well.[238]

This is the moral quandary presented by partial-birth abortion. Devised as a method of killing late-term fetuses at the threshold of birth,[239] it has the appearance of infanticide, and it is an affront to human dignity. The process of delivering a fetus within inches of a full birth only to puncture her skull and suck out her brain, too closely resembles infanticide; therefore, the government, legislating as the voice of the people, has an important interest in eradicating the procedure.

The clear danger from Singer's logic is that abortion, once conceived as a decision between a woman and her physician based on her physician's medical judgment,[240] devolves into the ancient brutality of infanticide. In a world where scholars argue the moral equivalence of abortion and infanticide, it is entirely feasible that segments of the population would follow suit. Indeed, the Netherlands has resurrected the practice of infanticide based on this type of logic.[241] Legislatures therefore have an important interest in drawing clear moral lines. Where philosophical argumentation and speculation has so blurred these lines that they become virtually undetectable, legislatures must erect fixed, firm barriers between prohibited and permitted acts. In this way, the PBABA is a valid attempt to provide a clear boundary between abortion and infanticide.[242]

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[235] *Id.*

[236] *See* Johnsen, *supra* note 10, at 601–02.

[237] SINGER, *supra* note 7, at 130 ("Birth is a significant point because the mother has a relationship to her baby that is different from the relationship she had with her fetus; and others can now relate to the baby too, in a way that they could not earlier. But it is not for that reason a point at which the fetus suddenly moves from having no right to life to having the same right to life as every other human being.").

[238] *See* PONNURU, *supra* note 35, at 127 ("Pro-choicers who find Peter Singer's advocacy of infanticide repulsive cannot come up with a persuasive argument for why he is wrong. He differs from them only in his willingness to embrace the logical consequences of the premises he joins them in affirming.").

[239] Haskell, *supra* note 37.

[240] *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

[241] *See* Verhagen & Sauer, *Groningen Protocol*, *supra* note 231, at 959.

[242] *See* Partial-Birth Abortion Ban of 2003 § 2(14)(O).

VI. CONCLUSION: RETHINKING ABORTION RIGHTS IN LIGHT OF *CARHART II*

Partial-birth abortion forces Americans to ask some of the most fundamental questions that one can ask about when life begins and when a fetus obtains intrinsic value in the eyes of the law. More than other abortion procedures, however, D&X forces each person to consider the spatial question of where a fetus gains independent moral status apart from his or her mother. At the threshold of birth, the law must draw a clear line between abortion and infanticide.

Justice Kennedy's opinion in *Carhart II* draws this line by affirming the constitutionality of the PBABA. Where other safe abortion alternatives exist pre-viability, the PBABA prohibits the unnecessary brutality of the D&X procedure. And absent any evidence that D&X is ever medically necessary, the PBABA ensures that an overly broad reading of the health exception is not used to justify pulling a child almost entirely outside of the mother's body in order to ends its life.

Ultimately, *Carhart II* succeeds where *Carhart I* failed because it recognizes the three important governmental interests at stake. The PBABA promotes and protects life by limiting the unnecessary use of D&X and fostering dialogue about the nature of and substantive limits on reproductive rights. It also safeguards the integrity of the medical profession by barring physicians from manipulating obstetricians' delivery techniques to complete an ethically and morally offensive procedure. Most importantly, the PBABA draws a clear line between abortion, a right of reproductive choice and medical self-defense, and infanticide, an abhorrent practice that no society should ever condone.