

**IRONIC MISNOMER: HOW THE TERM, "PARTIAL-BIRTH ABORTION,"  
REVEALS WHY ATTEMPTS TO BAN THE PRACTICE HAVE (SO FAR) BEEN  
LARGELY UNSUCCESSFUL**

SAMUEL W. CALHOUN\*

Ms. ALVARE: This is not truly abortion as the Supreme Court addressed that issue in Roe vs. Wade. A partial-birth abortion is nothing other than killing a child in the process of delivery.

BRADLEY: But it's an abortion.

Ms. ALVARE: A doctor may call it that . . .

BRADLEY: Well, you call it that. You - - you call it . . .

Ms. ALVARE: . . . but others may call it infanticide.

Dr. HERN: The fact is that in doing an abortion, having a living fetus after the pregnancy is over is not the objective.<sup>1</sup>

INTRODUCTION

Professor Cynthia Gorney makes a provocative claim in an insightful 2004 *Harper's* piece on partial-birth abortion: legislative partial-birth abortion bans, "considered solely as a directive on what physicians may and may not do in a procedure room . . . make[] clear ethical sense only to people who don't spend much time thinking about abortion."<sup>2</sup> On first impression, this assertion shows breathtaking intellectual and moral condescension toward the general American public, which favors bans by a large

---

\* Professor of Law, Washington and Lee University School of Law. The author thanks the Frances Lewis Law Center for sponsoring a faculty workshop on this paper. The author also appreciates the help of Darryl Brown, Jackie Calhoun, Cynthia Gorney, Peter Hoadley, Rick Kirgis, Richard Stith, Mark Trapp, and the workshop participants.

<sup>1</sup> *60 Minutes: Partial-Birth Abortion* (CBS television broadcast June 2, 1996.) Ed Bradley was the co-host of the program. Helen Alvare, now a law professor at Catholic University, at the time of the broadcast was Director of Planning and Information for the National Conference of Catholic Bishops, Pro-life Office. Dr. Warren Hern was then and still is a prominent abortionist.

<sup>2</sup> Cynthia Gorney, *Gambling With Abortion*, HARPER'S MAGAZINE, Nov. 2004, at 33, 33. Professor Gorney teaches journalism at the University of California at Berkeley. She is the author of *Articles of Faith: A Frontline History of the Abortion Wars*.

margin;<sup>3</sup> to the majority of pro-choice Americans who favor a ban;<sup>4</sup> to the United States Congress, which has three times overwhelmingly passed a federal partial-birth abortion ban;<sup>5</sup> and to the majority of state legislatures that have passed bans,<sup>6</sup> some more than once.<sup>7</sup> Gorney, however, immediately explains her statement. Bans are ethically problematic as "practical legislation" because proponents, in defending them, concede the legality of the more common D&E method of killing a late second trimester fetus—pulling it "from a woman's body in dismembered pieces."<sup>8</sup> Later in her piece, Gorney implies that "for the dedicated right-to-life person," it should be "ethically repugnant to press the case that one method of ending fetal life is worse than another[.] Isn't this like arguing about whether murder by gunshot is societally preferable to murder by strangulation?"<sup>9</sup>

---

<sup>3</sup> Gallup polls show that support for bans rose from 57% to 70% between 1996 and 2003. Kenneth L. Woodward, *What's In A Name? The New York Times On "Partial-Birth Abortion*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427, 433 n.13 (2005). "A 2005 poll by the Quinnipiac University Polling Institute showed that three-quarters of the public supports a ban, except when a woman's life is at stake." Charles Lane, *Abortion Case to Test New Justices*, WASH. POST, Feb. 22, 2006, at A1.

<sup>4</sup> "Gallup and other polls also showed a majority of self-identified pro-choice respondents also favored a government ban on 'partial-birth' abortions." Woodward, *supra* note 3, at 433 n.13.

<sup>5</sup> The first two Congressional bans, passed "by wide margins" in 1996 and 1997 respectively, were vetoed by President Clinton. *Stenberg v. Carhart*, 530 U.S. 914, 994 n.11 (2000) (Thomas, J., dissenting). The third Congressional ban, signed by President Bush as the Partial Birth Abortion Ban Act of 2003, passed the House by 281-142, Sheryl Gay Stolberg, *Bill Banning Abortion Procedure Advances*, N.Y. TIMES., Oct. 3, 2003, at A24, and the Senate by 64-34. Sheryl Gay Stolberg, *Senate Approves Bill To Prohibit Type of Abortion*, N.Y. TIMES., Oct. 22, 2003, at A1.

<sup>6</sup> At the time of *Stenberg v. Carhart*, 530 U.S. 914 (2000), the decision invalidating Nebraska's partial-birth abortion ban, "some 30 other States" also banned the procedure. *Id.* at 979 (Kennedy, J., dissenting).

<sup>7</sup> One example is Virginia. Its 1998 ban of "partial-birth abortion" was invalidated in *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000). In 2003, Virginia again tried to ban the procedure by criminalizing "partial birth infanticide." This statute was also invalidated. *Richmond Med. Ctr. v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004), *aff'd*, 409 F.3d 619 (4th Cir. 2005).

<sup>8</sup> Gorney, *supra* note 2, at 33. According to Gorney, the partial-birth procedure numbers in the thousands per year, but D&E, "dilation and evacuation . . . is used for tens of thousands of abortions each year." *Id.* at 40-41.

<sup>9</sup> *Id.* at 44.

Professor Gorney's question deserves a straightforward answer.<sup>10</sup> It is indeed "ethically repugnant" to kill late second trimester fetuses,<sup>11</sup> no matter how the killing is done. Her question, however, reveals a key misconception. Criminalizing murder by both gunshot and strangulation presents no constitutional challenge. D&E abortion, however, no matter its moral repugnance, is plainly constitutionally protected under *Roe v. Wade*,<sup>12</sup> the fount of the constitutional right to abort. Any effort to criminalize D&E would therefore be doomed to failure. This Article will argue that partial-birth abortion is a different matter. The procedure, despite numerous court decisions to the contrary, is not constitutionally protected under a correct understanding of *Roe*. Consequently, ban proponents, in focusing on partial-birth abortion, are acting prudently by attacking the only evil currently open to attack.

But is that attack worth making? Professor Gorney strongly suggests "no." Because the fetus in question could be legally killed by a D&E abortion,<sup>13</sup> what purpose is served by banning the partial-birth method?<sup>14</sup> While this criticism of bans seems

---

<sup>10</sup> The National Right to Life Committee's Douglas Johnson gave this answer: "I don't think the killing, the taking of an innocent human life, becomes ethically less problematic if it's done one way or another. But on the other hand, it's preferable that there should be less suffering, rather than more." *Id.* at 44. He then suggests that partial-birth abortion is particularly objectionable because it inflicts more suffering on a fetus. *See id.* at 44-45. This is a curious explanation. One would think that a dismemberment D&E would be a worse death than dying via the partial-birth procedure. Congressman Chris Smith, for example, has stated that "it is easy to understand why . . . [D&E] causes probably even more pain than a Partial-Birth Abortion." Chris Smith, *Abortion is Excruciatingly Painful to Unborn Children*, NAT'L RIGHT TO LIFE NEWS, Jan. 2005, at 6.

<sup>11</sup> The issue of the morality of killing younger fetuses is beyond the scope of this Article.

<sup>12</sup> 410 U.S. 113 (1973).

<sup>13</sup> *See supra* note 8 and accompanying text.

<sup>14</sup> Gorney argues that the ban campaign's "primary mission" has been to use "literal visuals, to shock people from complacency; and verbal descriptions that force people to keep picturing what actually takes place in an abortion-procedure room." Gorney, *supra* note 2, at 36. This strategy is presumably designed to make all late second trimester abortions more morally problematic for the American public. Gorney describes one reporter for whom this strategy worked. *See id.* at 35. There is other supportive evidence. *See* Susan Dominus, *The Mysterious Disappearance of Young Pro-Choice Women*, GLAMOUR, August 2005, at 200, 203 (the "visually striking . . . campaign to publicize the details of what pro-lifers called 'partial birth abortion' . . . 'really helped move women more toward the pro-life view'"). From a pro-life perspective, this

initially devastating, one of Gorney's own illustrations shows that it is ultimately unpersuasive. She points out that a woman twenty-eight weeks pregnant who wants an abortion to better fit her prom dress can legally get one under *Roe*.<sup>15</sup> Does this mean, then, that it makes no "ethical sense" to ban the killing of babies of that age who have been born prematurely? I am confident that Professor Gorney would say, "Of course not! Prohibiting killings of born infants is essential in any civilized society."

The same ethical defense undergirds partial-birth abortion bans. As its description reveals, the partial-birth procedure, unlike D&E, kills a baby during delivery:<sup>16</sup>

- (1) grasping a living fetus in the womb with an instrument; (2) pulling it into a breech position; (3) delivering all of the baby feet-first except for the head; (4) puncturing the skull of the living fetus with a surgical instrument; (5) inserting a suction tube into the skull hole; (6) extracting the child's brains, collapsing the skull; and (7) completing the delivery of the dead infant.<sup>17</sup>

---

goal in itself would seem to provide clear ethical justification for the effort to ban partial-birth abortion. Gorney suggests as much herself. *See id.* at 33.

<sup>15</sup> *Id.* at 40. Professor Gorney is to be commended for accurately describing *Roe*. Incorrect descriptions are legion, in particular those stating that *Roe* only prohibited state restrictions on early abortions. For example, a 2003 ABC News-*Washington Post* poll characterized *Roe* "as giving women the ability to get abortions if they want one at any time during the first trimester." Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 24 n.4 (Jack M. Balkin ed., 2005). *See* Gregg Easterbrook, *Abortion and Brain Waves*, *THE NEW REPUBLIC*, Jan. 31, 2000, at 21, 24 (*Roe* "all but ban[ned]" abortion in the third trimester); Manny Fernandez, *Abortion Protest Draws Thousands*, *WASH. POST*, Jan. 23, 2004, at B1 (*Roe* "prevented states from restricting abortion in the first trimester of pregnancy").

<sup>16</sup> Whereas the fetus in Professor Gorney's example is viable, most fetuses killed via partial-birth abortion are not. *See infra* note 50. Viability is irrelevant to the ethical argument made here. Douglas Johnson asks us to envision "two neonatologists standing over the incubator, arguing" whether a certain premature baby is viable. Gorney, *supra* note 2, at 44. "Suddenly somebody rushes in . . . and strikes the baby on the head with a hammer. Does anybody dispute that a homicide just occurred? No." *Id.* The answer is unchanged by the fact that the baby could have legally been killed via abortion at the same age. The act would be equally morally abhorrent if the assailant had struck the baby's head as it emerged from the woman. For a discussion of the pertinence of viability to a legal analysis of partial-birth abortion, see *infra* notes 61-69 and accompanying text.

<sup>17</sup> James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 *ISSUES IN LAW & MEDICINE* 3, 4 (1998). This is only one way to perform the procedure. Another involves delivering the fetus's head first. *See infra* text accompanying note 91.

These brute facts led the late pro-choice Senator Daniel Patrick Moynihan to label partial-birth abortion, "infanticide."<sup>18</sup>

Just as prohibiting infanticide via the partial-birth procedure makes clear "ethical sense,"<sup>19</sup> it also is plainly constitutionally permissible under *Roe*. Decisions disallowing partial-birth abortion bans make a fatal classification error by viewing killing via the partial-birth procedure as an abortion rather than as what it actually is—infanticide. The irony is that ban advocates have contributed significantly to this misclassification. By attaching the label "abortion" to the technique, ban proponents have helped perpetuate the misimpression that all the constitutional safeguards accorded abortion are equally applicable to a practice that kills a human being in the process of being born.<sup>20</sup>

### I. *ROE V. WADE* DOES NOT PROTECT INFANTICIDE

While it is self-evident that *Roe v. Wade* does not constitutionally protect infanticide, it is important to make this point irrefutably clear. *Roe* held that the

---

<sup>18</sup> Woodward, *supra* note 3, at 433. Senator Moynihan believed that even one performance of the procedure "would be too many." *Id.* at 434 n.15.

<sup>19</sup> This does not mean that banning D&E abortions would make less "ethical sense," but the moral argument for doing so would differ somewhat from the argument made here against partial-birth abortion: "Nearly everyone morally condemns infanticide. This is a "line in the sand" that should not be crossed. Partial-birth abortion constitutes infanticide and thus is morally reprehensible." For a discussion of the limitations of grounding moral norms in consensus, see Samuel W. Calhoun, *Grounding Normative Assertions: Arthur Leff's Still Irrefutable, But Incomplete, "Sez Who?" Critique*, XX J.L. & REL. 31 (2004-05).

<sup>20</sup> The "abortion" label has also aided abortionists in arguing that, no matter what the procedure actually entails, they are entitled to a dead fetus as an end product because, after all, that is precisely the purpose of an "abortion." See *supra* text accompanying note 1 (Dr. Hern's statement). No claim of causation is being made. The "abortion" label might well have been attached to the partial-birth procedure even if ban advocates had uniformly urged different terminology. Moreover, both of the results mentioned might have occurred even if another name had been given to the procedure. This is suggested by the invalidation of bans with names not mentioning abortion. See *infra* note 96 and accompanying text. Nonetheless, ban advocates' use of the label "abortion" did facilitate these two outcomes.

constitutional right of privacy encompasses "the abortion decision,"<sup>21</sup> i.e., "a woman's decision whether or not to terminate her pregnancy."<sup>22</sup> The Court plainly held that the constitutional right to abort is irrelevant once birth occurs. First, once the fetus is born, it enjoys the protection accorded by the Fourteenth Amendment to the life of every "person."<sup>23</sup> Second, while the Court stated that it would "not resolve the difficult question of when life begins," the context was a response to the assertion that life "begins at conception and is present throughout pregnancy."<sup>24</sup> The Court therefore was only expressing its unwillingness to "speculate" as to when life begins *during a pregnancy*.<sup>25</sup> The Court elsewhere stated its belief that at "live birth" both human life<sup>26</sup> and personhood "in the whole sense"<sup>27</sup> unquestionably are present.<sup>28</sup>

But what exactly does "live birth" mean? In particular, what is the status of a fetus in the process of being born? *Roe* is not entirely clear on this point, but there are important indicators. First, in speaking of both constitutional and ontological personhood, the Court stated that these categories do not include "the unborn."<sup>29</sup> As James Bopp and Dr. Curtis Cook have argued, "[a] baby who is partially delivered cannot

---

<sup>21</sup> 410 U.S. at 154.

<sup>22</sup> *Id.* at 153.

<sup>23</sup> *See id.* at 157-58.

<sup>24</sup> *Id.* at 159.

<sup>25</sup> *Id.* As argued by Judge Michael McConnell, the result in *Roe*, withdrawing legal protection for fetal life, shows that the Court in fact decided the question. Samuel W. Calhoun & Andrea E. Sexton, *Is It Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers*, 49 WASH. & LEE L. REV. 437, 453 n.79 (1992).

<sup>26</sup> 410 U.S. at 150, 161.

<sup>27</sup> *Id.* at 161-62.

<sup>28</sup> Professor Richard Stith believes that while *Roe* did recognize what he calls a "birth wall" dividing fetuses from "actual human life," its recognition was only implicit. Richard Stith, *Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade*, 9 WM. & MARY J. WOMEN & L. 255, 257-61 & 259 n.18 (2003). Stith argues that Justice Stevens, concurring in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), was more explicit about "the necessity of . . . the 'birth wall.'" Stith, *supra* at 259.

<sup>29</sup> 410 U.S. at 158, 162.

properly be termed *unborn*."<sup>30</sup> Second, the Court quotes, but does not comment upon, a Texas statute, not challenged in the *Roe* litigation, that criminalized killing "a child in a state of being born and before actual birth."<sup>31</sup> Professor Richard Stith argues that this bare reference shows that the Court "explicitly left undecided" the issue of whether the "momentous shift from sub-human to human life [occurs] at the beginning, in the middle, or at the end of the birth process."<sup>32</sup> Since, however, the Court denies personhood only to "the unborn," one can reasonably read its silence about this Texas statute as suggesting "that abortion jurisprudence does not govern state regulation of procedures during extraction of the child."<sup>33</sup> This conclusion is further supported by an exchange that occurred during the oral arguments in *Roe*:

Mr. Justice Marshall: What does it [the statute] mean?

Mr. Flowers:<sup>34</sup> I would think that --

Mr. Justice Stewart: That it is an offense to kill a child in the process of childbirth.

Mr. Flowers: Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.

Mr. Justice Marshall: **Which is not an abortion.**

Mr. Flowers: Which is not--would not be an abortion. Yes sir, you're correct, sir. It would be homicide.<sup>35</sup>

---

<sup>30</sup> Bopp & Cook, *supra* note 17, at 26. Justice Scalia argues that the partial-birth procedure involves "killing a human child—one cannot even accurately say an entirely unborn human child." Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

<sup>31</sup> 410 U.S. at 118 n.1.

<sup>32</sup> See Stith, *supra* note 28, at 266-67.

<sup>33</sup> See Bopp & Cook, *supra* note 17, at 26-27. One court considered any arguments based upon the Texas statute as inapplicable to partial-birth abortion because the statute, "[b]y its own terms . . . applies explicitly to killing the fetus . . . during the process of giving birth, not during an abortion procedure." Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 144 (3d Cir. 2000). It will be shown that the partial-birth procedure is an instance of "giving birth." See *infra* notes 46-51 and accompanying text.

<sup>34</sup> Robert C. Flowers was an Assistant Attorney General of Texas. *Roe*, 410 U.S. at 115.

<sup>35</sup> Transcript of the Second Oral Argument in *Roe v. Wade*, October 11, 1972 (<http://members.aol.com/abtrbng2/roea2.htm>) (emphasis added). My thanks to my former student, Mark Trapp, for bringing this enlightening colloquy to my attention. See Mark M. Trapp, *Blackmun's Bane*, (January 27, 2003) (<http://www.enterstageright.com/archive/articles/0103/0103abortion.htm>).

Based on this dialogue, it is irrefutable that Justice Marshall, who voted with the majority in *Roe*, did not intend to recognize a constitutional right that would bar a State's prohibiting killing a child once delivery has begun.<sup>36</sup>

## II. THE TERM, "PARTIAL-BIRTH ABORTION," IS ONLY PARTIALLY ACCURATE

An important aspect of the partial-birth abortion controversy has been the battle over terminology. What name should be given to the procedure? Abortionists have used a variety of names, "dilation and extraction" (D&X),<sup>37</sup> "intrauterine cranial decompression,"<sup>38</sup> "intact dilation and evacuation,"<sup>39</sup> and "intact dilation and extraction."<sup>40</sup> Ban proponents have from the beginning preferred the name, partial-birth abortion. Keri Folmar, "who wrote the original [federal] Partial-Birth Abortion Ban,"<sup>41</sup> gives this account of the naming process: "We called it the most descriptive thing we could call it . . . We were throwing around terms . . . We wanted a name that rang true."<sup>42</sup>

Does the name, partial-birth abortion, ring true? Ban opponents have strenuously said "no," branding the term as disingenuous,<sup>43</sup> propagandistic,<sup>44</sup> and "inflammatory."<sup>45</sup>

---

<sup>36</sup> One could reasonably further assert that Justice Stewart and the other members of the *Roe* majority, none of whom questioned Justice Marshall's characterization, must have agreed with his understanding that the right to abortion ends when the birth process begins.

<sup>37</sup> This is the name that abortionist Martin Haskell said that he "coined" for the procedure. Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortion* (a paper presented at the National Abortion Federation Risk Management Seminar, September 13, 1992).

<sup>38</sup> Woodward, *supra* note 3, at 434.

<sup>39</sup> *Id.*

<sup>40</sup> Deborah Sontag, *'Partial Birth' Just One Way, Physicians Say*, N.Y. Times, Mar. 21, 1997, at A1.

<sup>41</sup> Gorney, *supra* note 2, at 38.

<sup>42</sup> *Id.* Douglas Johnson, Legislative Director of the National Right to Life Committee, states that the name was chosen "because there was need to create a legal term of art and this term accurately conveyed the essence of the method." Woodward, *supra* note 3, at 433 n.12.

<sup>43</sup> Alisa Solomon, *Fetal Distraction*, THE VILLAGE VOICE, Jan. 27, 1998, at 49.

<sup>44</sup> *60 Minutes*, *supra* note 1 (Dr. Warren Hern).

<sup>45</sup> *In Depth: Late-Term Abortions* (America's Talking television broadcast June 22, 1995; comment of Vicki Saporta, Executive Director, National Abortion Federation).

But part of the name, "partial-birth," seems clearly to be accurate. As pointed out by Justice Clarence Thomas, the phrase reflects "the fact that the fetus is all but born when the physician causes its death."<sup>46</sup> The fetus is in the process of being born, i.e., removed from the woman's body,<sup>47</sup> when it is killed. Hence, it has been partially born.<sup>48</sup>

Critics might respond that while the procedure partially removes an intact, living fetus from the woman, "birth" is still an inapt description. No partial "birth" occurs because the procedure: (1) takes place far earlier than at full-term;<sup>49</sup> (2) depends upon artificial means; (3) involves a fetus who likely is pre-viable;<sup>50</sup> and (4) aims for a dead, not a live, baby. None of these characteristics prevents a partial "birth." Deliveries prior to full-term are commonly known as premature births. Concerning artificiality, deliveries that are induced, assisted by forceps, and occur via Caesarian section are still "births." A pre-viable, premature baby will die, but he/she has still been born. The woman's

---

<sup>46</sup> *Stenberg v. Carhart*, 530 U.S. 914, 986 n.5 (2000) (Thomas, J., dissenting). "[T]he fact that a fetus is 'partially born' during the procedure is indisputable." *Id.* at 1000.

<sup>47</sup> "'Birth' is the 'passage of the offspring from the uterus to the outside world.'" *Nat'l Abortion Fed. v. Gonzales*, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting) (quoting *Dorlands Illustrated Medical Dictionary* 207 (27th ed. 2000)).

<sup>48</sup> "'Partial-birth' as a label emphasizes the fact the delivery of a fetus/baby takes place, but only up to a point . . . ." Woodward, *supra* note 3, at 433.

<sup>49</sup> Abortionist Martin Haskell, who in 1992 wrote a detailed description of the procedure, stated that he "routinely" used it "on all patients 20 through 24 weeks LMP [referring to the beginning of the woman's last menstrual period, a point approximately two weeks earlier than the fetus's actual gestational age] with certain exceptions" and used it "on selected patients 25 through 26 weeks LMP." Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortion* (a paper presented at the National Abortion Federation Risk Management Seminar, September 13, 1992). Dr. Haskell mentions a surgeon who "performs these procedures up to 32 weeks or more," i.e., well into the third trimester. *Id.*

<sup>50</sup> "A fetus is generally understood to have achieved viability -- meaning that there exists a realistic potential for long-term survival outside the uterus -- at twenty-four weeks lmp or later." *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163, 1166 n.1 (9th Cir. 2006). In view of when the procedure generally is performed, *see supra* note 49, most, but not all, fetuses would be pre-viable. *See* Woodward, *supra* note 3, at 439 (discussing an investigative report by David Brown of the *Washington Post*).

intention that the fetus be killed during the procedure cannot negate the fact that an intact, living fetus has been partially delivered from her body.<sup>51</sup>

While "partial-birth" is an accurate description of the procedure, it is improperly labeled an "abortion" even though the woman intends that the fetus be killed.<sup>52</sup> The term "abortion" ignores the fact that the fetus is being born when it is killed. This makes the killing infanticide rather than abortion.

If a living fetus is killed after complete separation from the woman during an abortion procedure, under federal law it is clear that a human being has been killed.<sup>53</sup> The 2002 Born-Alive Infants Protection Act defines "'person,' 'human being,' 'child,' and 'individual'" as including "every infant member of the species homo sapiens who is born alive at any stage of development."<sup>54</sup> But "born alive" includes only fetuses that have been completely expelled or extracted.<sup>55</sup> Thus, partially-born fetuses are not viewed as infants "born alive" under the Act. This does not mean that they cannot be the subject of infanticide, for the Act states that it should not "be construed to affirm, deny, expand, or

---

<sup>51</sup> Judge Barry of the Third Circuit has argued to the contrary: "[T]he fetus [during a partial-birth abortion] is [not] in the process of being 'born' at the time of its demise . . . A woman seeking an abortion is plainly not seeking to give birth." *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000). But how does the intention of the woman change what has actually occurred in the real world—the partial emergence of the fetus from her body? Moreover, "[i]f the intent of the mother controls the scope of her right to destroy her offspring, there is no reason why she should not be able to destroy the child after it has completely been separated from her body." *Nat'l Abortion Fed. v. Gonzales*, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting).

<sup>52</sup> Kenneth Woodward says that "'partial-birth abortion' is a common sense term," Woodward, *supra* note 3, at 436, and suggests that calling it an "abortion" stresses the fact that the fetus is partially delivered "solely for the purpose of destroying it." *See id.* at 433. This destructive intent, however, does not keep the procedure for actually constituting infanticide. *See supra* note 51 and accompanying text.

<sup>53</sup> The same result has been reached under State law. *See, e.g., Showery v. State*, 690 S.W.2d 689 (Tex. Ct. App. 1985) (murder conviction upheld for a doctor who suffocated a fetus after it was removed alive from its mother's body following an abortion attempt). Under both the federal law and *Showery*, there is no requirement that the fetus be viable. *See infra* notes 55 & 69.

<sup>54</sup> 1 U.S.C. § 8(a) (2002).

<sup>55</sup> *Id.* at § 8(b). Cutting the umbilical cord is not a prerequisite to complete separation. *Id.* Stage of development is irrelevant, as is "whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." *Id.*

contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive' as defined in this section."<sup>56</sup>

Do the partially born have "any legal status or legal right" to be treated as persons with the right not to be killed? The English common law's answer was "no." Professor Glanville Williams writes that "complete extrusion from the body of the mother" was required.<sup>57</sup> "Thus if the child is deliberately throttled when only its head is protruding, this is not murder according to the English authorities."<sup>58</sup> Williams, though, branded this result "absurd."<sup>59</sup> Pro-choice advocate Professor Laurence Tribe agrees: "Nearly everyone, surely, would think it profoundly wrong if 'people with power' chose to treat an admittedly 'unborn' infant, struggling to push itself through the birth canal during the final minutes of its mother's labor, as not yet a person entitled to our protection and our love."<sup>60</sup> But both Williams and Tribe presumably were referring to a partial birth during a full-term delivery. What about partial births at earlier stages of the pregnancy?

*Roe* itself offers some guidance. Again, its key holding is that at "live birth" human life and personhood begin.<sup>61</sup> Assuming that this phrase does not categorically exclude fetuses in the process of being born,<sup>62</sup> does the Court indicate whether a partial birth must occur at some particular stage of fetal development to qualify as a "live birth"?

---

<sup>56</sup> *Id.* at § 8(c). The court in *National Abortion Federation v. Gonzales*, 437 F.3d 278 (2d Cir. 2006), ignored subsection (c) and thereby completely misconstrued the statute to mean that a fetus aborted by the partial-birth procedure cannot be the subject of infanticide. *Id.* at 288. But as Judge Straub points out, "[w]hile the statute *includes* infants that have been 'complete[ly] expel[led] or extract[ed] from his or her mother,' it does not *exclude* humans at a prior stage of development from the term." *Id.* at 312 (Straub, J., dissenting). To be more precise, subsection (c) shows that the statute cannot properly be read to mean that a fetus at any point prior to complete separation, including a fetus that has been partially born, is not a human being.

<sup>57</sup> GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 5 (1957).

<sup>58</sup> *Id.* at 5-6.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 120 (1990).

<sup>61</sup> See *supra* notes 26-28 and accompanying text.

<sup>62</sup> See *supra* notes 29-36 and accompanying text.

The Court at one point refers to viability, the stage when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," as an "interim point" preceding "live birth."<sup>63</sup> While this could be taken to mean that "live birth" can only occur after viability, that interpretation is not mandated. The relevance of viability to the Court's holding was to identify the point at which the State's interest in "potential life" becomes compelling.<sup>64</sup> Viability thus is irrelevant once the fetus's status changes from "potential life" to "alive."<sup>65</sup> The question then becomes whether a partially born fetus, regardless of its stage of development, that is alive under the applicable medical criteria, is no longer mere "potential life." The answer is unmistakably given in *The Dreaded Complication*, the landmark 1981 *Philadelphia Inquirer* investigation of the phenomenon of live-birth abortions, i.e., abortion procedures that result "in a *live baby*."<sup>66</sup> One nurse gave this account of "the second abortion live birth in her experience":

"I was called by the patient's roommate," she recalled. "When I got there the baby's head was sticking out and its little tongue was wiggling. Everybody felt they couldn't do anything until they called the doctor. It was a little thing — it only lasted about 15 minutes. But it was alive, and we did nothing. And that was wrong."<sup>67</sup>

---

<sup>63</sup> 410 U.S. at 160.

<sup>64</sup> *Id.* at 163.

<sup>65</sup> The *Roe* Court's initial discussion of "potential life" plainly refers to a "point prior to live birth." *Id.* at 150.

<sup>66</sup> Liz Jeffries and Rick Edmonds, *The Dreaded Complication*, PHIL. INQUIRER (Aug. 2, 1981) (Special Reprint Edition). At the time, the Center for Disease Control estimated "400 to 500 abortion live births" each year in the United States. *Id.* The incidence of live births, of course, depends chiefly on the abortion technique used. D&E is "foolproof," i.e., it "never, ever results in live births." *Id.* Prostaglandin instillation, on the other hand, can produce a live birth rate as high as eight percent. Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births From Late Abortions*, 72 GEO. L.J. 1451, 1458 (1984). Live births following abortions are a continuing phenomenon. See Shantala Vadeyar, Tracey A. Johnston, Mary Sidebotham, and Jean Sands, *Neonatal death following termination of pregnancy*, 112 BJOG 1159 (Aug. 2005) (a study of neonatal death following abortion in thirty-one cases over six years in a certain medical region in England).

<sup>67</sup> Jeffries and Edmonds, *supra* note 66.

This fetus was pre-viable, but it defies reality to say that it was not alive in its partially born state. The fetus died, but this does not mean that it was never alive.<sup>68</sup>

Since living fetuses attain "live birth" status in the process of being born, under *Roe* at that moment they attain both constitutional and ontological personhood. It therefore is inaccurate to call the partial-birth procedure, even when applied to pre-viable fetuses, an "abortion." It is instead an act of infanticide.<sup>69</sup> Interestingly, though, ban advocates have chiefly called the procedure a "partial-birth abortion."<sup>70</sup> They have

---

<sup>68</sup> The 2005 British study suggests a contrary position. The authors did not study partial births, but rather the incidence of completely expelled or extracted living fetuses following abortion attempts. They documented eighteen examples of pre-viable fetuses that met the criteria of "live birth" according to the World Health Organization definition. Vadeyar et. al, *supra* note 66, at 1159-60 (the authors said "it is clear that there is significant underreporting," *id.* at 1161). The law required that "all live births and neonatal deaths be registered." *Id.* at 1159-69. Nonetheless, the authors questioned "what purpose it serves to register as a live birth a fetus that is clearly not capable of being born alive and surviving . . . because the gestational age is below the clinical limit of viability. This . . . misleadingly increases the perinatal mortality rate." *Id.* at 1161. It is difficult to imagine a more striking example of an effort to mask the reality of live birth.

<sup>69</sup> There is contrary authority with respect to pre-viable fetuses. *Showery v. Texas*, 690 S.W.2d 689 (Tex. Ct. App. 1985), suggests that viability might be necessary before a fetus is accorded legal protection while being born. The court's discussion, while dictum, is especially significant because it concerns the scope of the Texas statute, not challenged in *Roe*, see *supra* notes 31-36 and accompanying text, that criminalizes destroying a child "*in a state of being born and before actual birth.*" 690 S.W.2d at 692. The court distinguished a partial-birth situation from one in which the fetus was completely separated from the woman. The latter case requires no showing of viability, *id.* at 693-94, whereas the former "might necessitate an analysis in terms of viability." *Id.* at 692. The word "might," of course, is not definitive. More important, the court's evaluation of the complete separation scenario demonstrates that viability should not be a requirement for protecting a fetus partially born. Viability is unnecessary for the separated fetus because "[o]nce the fetus has been removed from the mother's body, there is no further conflict between its interests and those of the mother." *Id.* at 693. The same analysis applies to a fetus partially born. Such a fetus literally is only inches and seconds away from complete separation. Under these circumstances, there is no longer any meaningful conflict between mother and fetus.

*People v. Chavez*, 176 P.2d 92 (Cal. Dist. Ct. App. 1947), is definitive in stating (also in dictum) that viability is a prerequisite to legal protection: "It should . . . be held that a *viable* child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed." *Id.* at 94 (emphasis added). See *Singleton v. State*, 35 So. 2d 375, 379 (Ala. Ct. App. 1948) (quoting *Chavez* in dictum). As just shown, however, a viability requirement serves no purpose once the birth process has begun.

<sup>70</sup> This is the name of the federal ban, see *supra* note 5, and almost all of the state bans. Stenberg v. Carhart, 530 U.S. 914, 986 n.5 (2000) (Thomas, J., dissenting). Not all ban proponents have been happy with the "partial-birth abortion" label. Americans United for Life's (AUL) Clarke Forsythe, for example, in an April 9, 2003 letter, mentioned the federal ban of partial-birth abortion, but then said that he would refer to the procedure "as 'infanticide' because that's what it is." He went on to say that AUL would "work to focus on the argument that partial-birth abortion is legally and medically infanticide so as to help the Justice Department and U.S. Attorneys defend the law." *Id.*

criticized ban opponents for using different terminology<sup>71</sup> and criticized the media for regularly naming the procedure a "so-called partial birth abortion."<sup>72</sup> It is ironic that the "abortion" label allows abortionists to invoke the normal goal of an abortion—producing a dead fetus—to justify that outcome even if the actual procedure involves killing a fetus that has begun the birth process.<sup>73</sup> The "abortion" misnomer has also contributed to evaluating attempted bans, contrary to *Roe*, by the standards applicable to State abortion restrictions.<sup>74</sup>

### III. *STENBERG V. CARHART DISREGARDS ROE V. WADE*

---

<sup>71</sup> In a 2004 brochure, prominent pro-life advocate Dr. John C. Willke states that "[p]ro-abortion forces have renamed [the procedure] 'intact dilitation and extraction' or 'D&X'. These sterile terms hide what is being done." Interestingly, Willke also states that "[w]e probably should not even call it 'partial birth abortion,' rather, always speak of 'killing a baby during delivery,' for that is precisely what occurs." *Id.* Willke's brochure, however, is entitled "partial birth abortion." As shown by the examples of Willke and Clarke Forsythe, *see supra* note 70, some ban proponents eventually recognized that the "partial-birth abortion" terminology was inaccurate and unhelpful. By then, though, the label had become irrevocably attached to the procedure.

<sup>72</sup> Kenneth Woodward singles out the *New York Times* for special criticism. Woodward, *supra* note 3. (Woodward states that his article "is about journalistic ethics, not the ethics of abortion. *Id.* at 442. Nonetheless, one can reasonably assume that Woodward himself would support banning the partial-birth procedure. He describes the technique as obviously constituting "'infanticide,'" *id.* at 433, and states that the controversy is "no longer just a partisan issue created by anti-abortion advocates but a moral issue that transcends political categories." *Id.* at 433-34.)

<sup>73</sup> *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 638 (4th Cir. 2005) (Niemeyer, J., dissenting) (quoting an abortionist's testimony that "[m]y ultimate job on any given patient is to terminate that pregnancy, which means that I don't want a live birth."); *supra* text accompanying note 1 (statement of Dr. Hern). Since abortions are generally permitted, the label "abortion" allows one to clothe any act so-named with a mantle of legal legitimacy. But a label should not exempt from scrutiny actions not properly included within the protected class. When a fetus is completely separated from the woman, the Born Alive Infants Protection Act does not allow "abortion" terminology to control. Such fetuses are human beings under federal law even if they were brought into the open air via an abortion. *See supra* notes 53-55 and accompanying text. The inapt "abortion" label also should not be allowed to mask the humanity of the partially born fetus.

<sup>74</sup> As previously stated, no claim of direct causation is being made. *See supra* note 20. Still, the irony of ban advocates' insistence on an unhelpful term is fascinating. Other ironies exist as well. Although Kenneth Woodward criticizes the *New York Times* for generally avoiding the label, partial-birth abortion, *supra* note 72 and accompanying text, the *Times*, by not using the phrase "partial-birth" in tandem with the word "abortion," unintentionally performed a service for ban proponents. There is another irony concerning the *Times*. Woodward criticizes the organization for allowing its editorial position against partial-birth abortion bans unduly to influence its reporting of the news concerning such bans. *See Woodward, supra* note 3, at 441-42. The *Times* chose its headlines to frame "every story . . . as a narrative of assault upon *Roe v. Wade*." *Id.* at 437. It has been shown, however, that *Roe*, properly understood, does not protect partial-birth abortion.

*Stenberg v. Carhart*,<sup>75</sup> the United States Supreme Court decision that struck down Nebraska's partial-birth abortion ban, is representative of many other decisions that, while purporting to follow *Roe*, in fact disregarded it in finding various state bans to be unconstitutional. At the time of *Stenberg*, some ban advocates had already argued that partial-birth abortion, despite its name, is in fact an act of infanticide not protected by *Roe*.<sup>76</sup> Despite this,<sup>77</sup> the Court still made a critical paradigm error, which it revealed early in the opinion: "Because Nebraska law seeks to ban one method of aborting a pregnancy . . . ."<sup>78</sup> Since it viewed the procedure as an abortion, the Court evaluated the statute under a *Roe* standard that allows a State to prohibit abortions only if the prohibition contains an exception allowing abortion where necessary to preserve the

---

<sup>75</sup> 530 U.S. 914 (2000).

<sup>76</sup> See, e.g., Bopp and Cook, *supra* note 17; Jill R. Radloff, Note, *Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555 (1999); *supra* note 1 and accompanying text (Helen Alvare statement).

<sup>77</sup> A different version of the argument that the partial-birth procedure is not protected by *Roe* was presented several times in the *Stenberg* litigation. In the initial phase of the lawsuit, the State argued that *Roe* did not recognize "a constitutional right to kill a *partially born human being*." *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997) (abortionist's request for preliminary injunction). The court interpreted this argument as an "invitation to ignore *Roe*" and declined to accept it because there was "no precedent . . . [that] uses the 'partially born human being' category as a construct for constitutional analysis." *Id.* The court declined that invitation for a "second time" in ruling favorably on the abortionist's request for a permanent injunction. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1132 n.48 (D. Neb. 1998). The Eighth Circuit expressed no final opinion on whether "there is a separate legal category for the 'partially born.'" *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999). Even if there were, the category would not be relevant to the present litigation because the court believed "that the word 'born' refers most naturally to a viable fetus." *Id.* This Article argues to the contrary. See *supra* notes 61-69 and accompanying text.

<sup>78</sup> 530 U.S. at 923.

health of the mother.<sup>79</sup> Nebraska's statute contained no such exception, and the Court considered this omission an "independent" reason for the ban's invalidity.<sup>80</sup>

*Stenberg* dramatically departed from the principles of *Roe*. As has been shown, "live birth" was to the *Roe* Court an event of tremendous legal and moral significance.<sup>81</sup> Moreover, it has been demonstrated that "live birth" is a concept broad enough to include the partial birth of a living infant, regardless of its stage of development.<sup>82</sup> The *Stenberg* Court, however, "claim[ed] not to see how location could matter at all."<sup>83</sup> As stated by Professor Stith,

Recall that before birth, even after fetal viability, *Roe* had acknowledged a state interest in protecting the fetus only as the "potentiality of human life." The majority in *Stenberg* notes that Nebraska . . . "describes its interests differently. It says the law . . . 'prevents cruelty to partially born children' . . . . But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the 'health' requirement." For the majority of the Court, a state interest in "partially born children" counts no more than a state interest in the

---

<sup>79</sup> *Id.* at 930-31. The Court points out that in *Roe* the health exception requirement was explicitly imposed only on laws regulating post-viability abortion. *Id.* at 930. A State's interest, however, "in regulating abortion previability is considerably weaker than postviability . . . . Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation. *Id.* As noted, most partial-birth procedures occur previability. *See supra* notes 49 & 50.

<sup>80</sup> 530 U.S. at 930. *Stenberg* stated an additional independent ground for invalidating the Nebraska statute—that it could be read as also barring D&E, the prevailing second trimester abortion technique, a procedure that does not involve killing a fetus in the process of being born. Consequently, contrary to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the ban imposed an undue burden on a woman's right to choose abortion. *Stenberg*, 530 U.S. at 930, 945-46. Whether various partial-birth abortion bans can reasonably be read to prohibit true abortion procedures is a complex matter of statutory interpretation beyond the scope of this Article. The thesis here is that infanticide is not protected by *Roe*. It is unobjectionable to require that infanticide bans cover only infanticide. There is no reason to think that adequate language cannot be found to accomplish this objective. *See, e.g., id.* at 939; *id.* at 950 (O'Connor, J., concurring); *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 451-53 (6th Cir. 2003) (upholding Ohio's "partial birth feticide" statute against an undue burden challenge). Clarity in drafting would also resolve vagueness objections, *e.g., Northland Family Planning Clinic v. Cox*, 394 F. Supp. 2d 978, 988-89 (E.D. Mich. 2005) (invalidating Michigan's Legal Birth Definition Act), to partial-birth abortion bans.

<sup>81</sup> *See supra* notes 23-28 and accompanying text.

<sup>82</sup> *See supra* notes 61-69 and accompanying text.

<sup>83</sup> Stith, *supra* note 28, at 267.

"potentiality of human life" when balanced against maternal health.<sup>84</sup>

Professor Stith's criticism of the Court is entirely persuasive. By arguing that, in balancing a State's interests against those of the woman, fetal "location could not possibly make a difference,"<sup>85</sup> *Stenberg* did deviate strikingly from *Roe*.<sup>86</sup> The Court, however, made an even more fundamental error by engaging in a balancing of interests test at all. Partial-birth abortion constitutes infanticide, not a method of abortion.<sup>87</sup> As neither *Roe* nor any other decision has recognized a constitutional right to commit infanticide, there is no legally cognizable interest on the woman's side against which to balance the State interest in protecting human life. Any assertion that a law prohibiting infanticide must have a health exception is absurd. Infanticide should be illegal no matter what the circumstances.<sup>88</sup>

---

<sup>84</sup> *Id.* at 267-68. Justice Stevens claimed that it was "irrational" for Nebraska to claim that killing a fetus in the process of being born was "more akin to infanticide" than killing a fetus just prior to the beginning of the birth process. 530 U.S. at 946-47 (Stevens, J., concurring). Perhaps this is because he, like the majority, incorrectly viewed the former as only "potential life." *Id.* at 946; see *supra* notes 63-68 and accompanying text. Judge Posner brands partial-birth abortion bans as "irrational" for the same reasons as Justice Stevens. *Hope Clinic v. Ryan*, 195 F.3d 857, 878-80 (7th Cir. 1999) (Posner, J., dissenting), *rev'd*, 249 F.3d 603 (7th Cir. 2001). For criticism of Posner's rationale, see Calhoun, *supra* note 19, at 40 n.71.

<sup>85</sup> Stith, *supra* note 28, at 268.

<sup>86</sup> Professor Stith's perspective is that *Stenberg* undercut *Roe*. See Stith, *id.* at 255-57. My perspective is that *Stenberg* is not good law under *Roe*. Thus, I disagree with the implication about *Roe* in a January 16, 2006 letter from the National Right to Life Committee (NRLC). The letter solicits funds to run ads publicizing the extremity of the *Roe* decision: "The [NRLC] has gone to great lengths to tell Americans that partial-birth abortion, which the country detests, is legal because of *Roe v. Wade*, as are other equally-brutal mid- and late-term abortions . . . [A]ds . . . are badly needed to continue educating Americans about what *Roe v. Wade* really did." The letter is accurate to say that partial-birth abortion is legal *because* of *Roe*, since the *Stenberg* Court relied upon *Roe* in invalidating Nebraska's ban of the procedure. But the letter is inaccurate to state that this outcome is something that *Roe* "really did." As has been argued, *Stenberg*'s reliance upon *Roe* was completely misplaced.

<sup>87</sup> This assertion, which is a chief point of this Article, has been roughly handled by jurists other than Justice Stevens and Judge Posner. See *supra* note 84. For example, Judge Barry of the Third Circuit has stated that the argument that "'partial-birth' abortion procedures . . . are infanticide rather than abortion is based on semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion instead of logic and medical evidence." *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000). This Article attempts to refute Judge Barry's characterization.

<sup>88</sup> It is likely that any health exception would be virtually limitless in its application. This assertion is seemingly contradicted by *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003),

#### IV. COURTS' MISAPPLICATION OF *ROE* CONTINUES UNJUSTIFIABLY TO PROHIBIT EFFORTS TO BAN INFANTICIDE

Misapplication of *Roe*, based both on later courts' independent misinterpretations and their dependence upon *Stenberg*, continues unjustifiably to frustrate efforts to ban the partial-birth procedure. This is true even though some recent ban attempts demonstrated the intent to prohibit only the practice that kills a fetus in the process of being born, not late second trimester abortion methods generally. For example, Virginia's partial-birth infanticide statute criminalized

any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.<sup>89</sup>

"Born alive" was defined as showing medical signs of life after having been "completely or substantially expelled or extracted from its mother, regardless of the duration of the pregnancy."<sup>90</sup> A human infant is "substantially expelled or extracted" when either the infant's "entire head" or "any part of the infant's trunk past the navel is outside the body

---

which upheld an Ohio "partial birth feticide" statute that contained a narrowly drawn health exception: the partial birth procedure was permitted "when 'necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.'" *Id.* at 444. It is questionable, however, whether such a restricted health exception will ultimately be deemed constitutional. In particular, the exception's failure to include considerations of mental health is problematic. *See Doe v. Bolton*, 410 U.S. 179, 192 (1972) (the concept of "health" includes "emotional [and] psychological" factors); *Women's Med. Profl Corp.*, 353 F.3d at 462-64 (Tarnow, J., dissenting).

<sup>89</sup> Va. Code Ann. § 18.2-71.1(B) (2003).

<sup>90</sup> Va. Code Ann. § 18.2-71.1(C) (2003). Medical indications of life were defined as "breath[ing] or show[ing] any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached." *Id.* This is the same definition of "live birth" used by the World Health Organization. *See Vadeyar, et. al, supra* note 66, at 1159.

of the mother."<sup>91</sup> The federal partial-birth abortion ban also protects only living fetuses separated from the mother to the same extent as described in the Virginia statute.<sup>92</sup>

These provisions clearly were intended to punish the killing of a living human being during the birth process, something that Virginia lawmakers believed to constitute infanticide,<sup>93</sup> and Congress believed had a "disturbing similarity to the killing of a newborn infant."<sup>94</sup> After all, the prohibitions apply only when the living infant's head or its entire lower body is outside the mother.<sup>95</sup> Nonetheless, both efforts have failed. In June 2005, the Fourth Circuit invalidated Virginia's statute due to its lack of a health exception.<sup>96</sup> More recently, three federal circuit decisions have invalidated the federal

---

<sup>91</sup> Va. Code Ann. § 18.2-71.1(D) (2003).

<sup>92</sup> 18 U.S.C. § 1531(b)(1)(A) (2003).

<sup>93</sup> The Virginia statute created a new crime of "partial birth infanticide." Va. Code Ann. § 18.2-71.1(B) (2003). *See supra* note 89 and accompanying text. The Virginia statute explicitly excluded true abortion methods from the definition of "partial birth infanticide." Va. Code Ann. § 18.2-71.1(B) (2003).

<sup>94</sup> Partial-Birth Abortion Ban Act, Pub. L. No. 108-105, § (2)(14)(L), 117 Stat. 1201, 1206 (2003). Consequently, a ban was needed to "draw a bright line that clearly distinguishes abortion and infanticide." *Id.* at § (2)(14)(G), 117 Stat. 1201, 1205 (2003).

<sup>95</sup> *See supra* text accompanying notes 91-92. A question arises whether the partial-birth procedure would still constitute infanticide if a smaller part of the fetus is outside the woman before it is killed. Under the argument presented here, the infanticide label does not depend upon the percentage of the fetus outside the woman. If the purpose of the procedure is to remove an intact living fetus, the birth process has begun once any part of the fetus is outside the woman. Killing the fetus at any point thereafter would be infanticide. A ban, however, not limited to situations where a specific, substantial portion of the intact fetus is outside the mother before it is killed could well be more vulnerable to attack on undue burden and vagueness grounds. *See supra* note 80.

<sup>96</sup> *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005). The Fourth Circuit was well aware that Virginia believed that *Roe* was inapplicable to the statute in dispute. The State in 1998 had tried unsuccessfully to ban "partial-birth abortion." In that litigation, the State asserted what the district judge called "the rather unusual view that *Roe* . . . [is] inapplicable because . . . the Supreme Court did not announce constitutional protections to abortions where 'the child is partially born.'" *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 822 (E.D. Va. 1998). The court "decline[d] the State's invitation to circumvent the requirements of *Roe*," *id.*, a rejection it reiterated in a later phase of the case. *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 480 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000) (per curiam). In 2003, Virginia tried again, this time making its policy rationale even more clear by now seeking to ban "partial birth infanticide." A different federal district judge invalidated the new statute, once more rejecting Virginia's attempt "to establish a line [demarking a State's ability to prohibit abortion] in 'terms of whether a fetus was in the process of being born.'" *Richmond Med. Ctr. for Women v. Hicks*, 301 F. Supp. 2d 499, 515 (E.D. Va. 2004). The Fourth Circuit affirmed, without explicitly referring to the State's argument that *Roe* is inapplicable to the partial birth procedure. *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005).

ban due to the absence of a health exception.<sup>97</sup> As would be expected of intermediate appellate courts, all four decisions relied principally upon *Stenberg*.

The judges who dissented in two of these four federal circuit decisions expressed great distress at the outcomes.<sup>98</sup> Judge Straub in the Second Circuit found "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."<sup>99</sup> Judge Niemeyer in the Fourth Circuit characterized the majority's opinion as "constitutionaliz[ing] infanticide of a most gruesome nature."<sup>100</sup> Both judges believed that the bans under review were constitutional because they differed significantly from the Nebraska law struck down in *Stenberg*.<sup>101</sup>

As admirable as the two dissenters are for strongly expressing their condemnation of the partial-birth procedure, their approach to *Stenberg* is regrettable. Both judges

---

<sup>97</sup> *National Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006); *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir.), *cert. granted*, 126 S. Ct. 2901 (2006); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006). The Second and Eighth Circuits relied solely on the lack of a health exception in invalidating the ban. The Ninth Circuit stated two additional independent grounds for invalidation—undue burden and vagueness. For a brief discussion of these two grounds, see *supra* note 80.

<sup>98</sup> See *National Abortion Fed'n*, 437 F.3d at 296-313 (Straub, J., dissenting); *Richmond Med. Ctr.*, 409 F.3d at 629-46 (Niemeyer, J., dissenting). The two dissents, especially Judge Niemeyer's, have the same tone of indignant moral outrage that Professor Michael Paulsen expresses in his hypothetical dissent in *Roe*. Michael Stokes Paulsen, *Paulsen, J., dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 196 (Jack M. Balkin ed., 2005).

<sup>99</sup> *National Abortion Fed'n*, 437 F.3d at 312 (Straub, J., dissenting).

<sup>100</sup> *Richmond Med. Ctr.*, 409 F.3d at 630 (Niemeyer, J., dissenting).

<sup>101</sup> Judge Niemeyer argued that *Stenberg* was inapplicable because Nebraska had only "proscribed certain abortion procedures while the [Virginia law] bans only the destruction of living fetuses"—fetuses "delivered at least halfway into the world." *Richmond Med. Ctr.*, 409 F.3d at 645 n.5; 630-31. Thus, "without offending" *Stenberg*, it was possible to "accommodate Virginia's deeply held moral position" by upholding the statute. *Id.* at 645 n.5. Similarly, Judge Straub believed that *Stenberg* did not apply because the Federal Ban "proscribes the destruction of the fetus at a location later than the one considered by the Court in *Stenberg*." *National Abortion Fed'n*, 437 F.3d at 310. The Nebraska law prohibited a procedure "that could have occurred completely within the body of the mother," whereas the Federal Ban applies only "when a substantial part of the fetus 'is outside the body of the mother.'" *Id.* at 310-11. Consequently, the *Stenberg* Court was not "squarely faced" with the need to balance a woman's health interest with "both the fetus's emerging right to life and the State's interest in protecting actual and potential life." *Id.* at 311-12.

recognized that the partial-birth procedure does not actually constitute an abortion.<sup>102</sup> This is a critical insight, but one the judges failed to follow to its necessary conclusion. Judge Straub's opinion reveals this most clearly. He expressed his deep moral concerns by calling for a balancing test to evaluate the federal ban.<sup>103</sup> Earlier, however, he used language plainly demonstrating that he should have done more than attempt to distinguish *Stenberg*: "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 . . . ." <sup>104</sup> This statement reveals that Judge Straub believed that *Stenberg* misapplied *Roe*. Although a federal appellate judge of course must follow Supreme Court precedent, one might have hoped for the following bold assertion of what the outcome in *Stenberg* should have been: "If a woman's right to abort does not encompass the partial-birth procedure, it necessarily follows that the safeguards afforded to that right, such as the necessity for a health exception, are inapplicable. A State should be able completely to outlaw the killing of partially delivered fetuses, not forced to authorize the heinous practice in a loosely defined set of circumstances."<sup>105</sup>

---

<sup>102</sup> For substantiation concerning Judge Niemeyer, see *supra* note 101. Judge Straub emphasized that the category of abortion ends at birth, see *National Abortion Fed'n*, 437 F.3d at 311, and suggested that a "child" or "infant" who has begun the birth process has been "born alive." *Id.* at 312.

<sup>103</sup> See *supra* note 101. The majority hinted at its own moral concerns. It stated that "[t]he destruction of a fetus is a distressing event," *National Abortion Fed'n*, 437 F.3d at 281, and acknowledged "the strong feelings legitimately" aroused by the partial-birth procedure. *Id.* at 287. But the court believed that *Stenberg* compelled a health exception. *Id.* The court believed that concerns about infanticide did not require a different outcome, in part because of its misinterpretation of the Federal Born Alive Infants Protection Act. See *supra* note 56 and accompanying text. The concurring judge was more forthright in expressing his moral indignation—*Stenberg* compelled the invalidation of the ban of a "deeply disturbing--and morally offensive" practice. *Id.* at 290 (Walker, J., concurring) (Judge Walker later called the partial-birth procedure "morally repugnant"; *id.* at 296). Judge Walker was not swayed by arguments relating to infanticide because that concept only encompasses viable fetuses. *Id.* at 292 n.10. Judge Straub countered that viability ceases to be a relevant factor once a fetus is born. *Id.* at 311 n.14 (Straub, J., dissenting). Judge Straub's position is more persuasive. See *supra* notes 61-69 and accompanying text.

<sup>104</sup> *National Abortion Fed'n*, 437 F.3d at 298; see *id.* at 312. Judge Straub was mistaken to place such emphasis on how much of the fetus is outside the mother before it is killed. See *supra* note 95.

<sup>105</sup> See *supra* notes 87-88 and accompanying text.

## CONCLUSION

Because courts, perhaps influenced to some extent by the "abortion" label commonly attached to the partial-birth procedure, still erroneously view it as a type of abortion, they continue to misapply *Roe* in striking down bans for the lack of a health exception. Such decisions are wrong because a health exception is not constitutionally mandated in a prohibition of infanticide.

This Article has pointed out the irony that ban proponents, by their insistence on naming the procedure an "abortion,"<sup>106</sup> are in part to blame for courts' faulty analysis. Nonetheless, ban advocates have shown prudence by picking a battle that can be won without infringing upon the constitutional right to abortion. *Roe*, properly interpreted, applies only to an abortion procedure, not to all actions resulting in fetal death.<sup>107</sup> Once the birth process has begun, killing the fetus is infanticide, not abortion.<sup>108</sup> Unqualified legal protection for the fetus at this point is therefore essential in a civilized society.

Banning only partial birth abortion still leaves most late second trimester fetuses unprotected. Bans do not apply to the D&E procedure.<sup>109</sup> Neither do they prohibit

---

<sup>106</sup> As noted, some ban advocates have recognized the inappropriateness of the "abortion" label. *See supra* notes 70-71.

<sup>107</sup> *Roe* does not invalidate laws that separately criminalize killing a fetus in an attack on a pregnant woman. *E.g.*, *People v. Davis*, 872 P.2d 591, 597-99 (Cal. 1994); *State v. Merrill*, 450 N.W.2d 318, 321-22 (Minn. 1990). *Roe* also is inapplicable to statutes that criminalize killing a fetus after it has been completely separated from the woman during an abortion procedure. *Showery v. State*, 690 S.W.2d 689, 693-94 (Tex. Ct. App. 1985).

<sup>108</sup> In evaluating partial-birth abortion bans, this argument has been uniformly rejected to date. *See supra* notes 77, 87, & 96. *See also* *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 615 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000) (*aff'g judgment*); *Planned Parenthood of S. Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997). *Showery* and *Chavez* show that the principle has support, at least for viable fetuses, as a general statement of when the protection of the homicide laws attaches. *See supra* note 69. *See also* notes 31-36 and accompanying text.

<sup>109</sup> *See supra* note 8 and accompanying text. For a discussion of the importance of drafting clarity, see *supra* note 80.

killing a fetus within the womb before an intact delivery.<sup>110</sup> Because of this limited protection, Professor Gorney believes that bans make little "ethical sense."<sup>111</sup> Justice Stevens and Judge Posner brand bans as irrational for the same reason.<sup>112</sup> This Article argues instead that bans are supported by the same moral reasoning that lies behind laws against infanticide.<sup>113</sup> Fetuses left at risk are morally entitled to the protection of the law.<sup>114</sup> This, though, is a fight for another day. Ban advocates are not responsible for the legal regime of abortion on demand "all the way through the ninth month of pregnancy."<sup>115</sup> The ban effort seeks to restrict that regime to its appropriate sphere as delineated by *Roe*.

---

<sup>110</sup> Bans only apply to killing a *living* fetus that has been partially delivered. See, e.g., *supra* text accompanying note 89. Methods of killing the intact fetus prior to delivery include "injection of a feticidal agent such as digoxin and . . . severing the umbilical cord." *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 459 (6th Cir. 2003) (Tarnow, J., dissenting). After describing some of the possible medical complications associated with these two methods, Judge Tarnow found "that requiring fetal demise before completion of the intact procedure may present additional risks of serious health consequences for some women." *Id.* at 459-60. This is a bizarre argument. Nothing *requires* an abortionist to use the intact procedure in the first place. Moreover, killing a fetus once birth has begun constitutes infanticide. Judge Tarnow's point therefore is like criticizing laws against killing one-week old infants because they require a woman wanting to kill the child to have a more risky third-trimester abortion.

<sup>111</sup> See *supra* text accompanying notes 2 & 8.

<sup>112</sup> See *supra* note 84.

<sup>113</sup> See *supra* notes 13-18 and accompanying text & note 110. Additional support for the "ethical sense" of partial-birth abortion bans comes in a recent article describing how English physicians are advised to handle the problem of fetuses born alive following abortion attempts. Under English law, such a fetus, if viable, "becomes a child and a deliberate act that causes the death of a child is murder, even if that deliberate act precedes the birth." *Vadeyar, et. al, supra* note 66, at 1159. The authors therefore state "that if an abortion is taking place at a gestation at which the fetus is capable of remaining alive it is imperative that feticide is performed prior to delivery." *Id.* Does the fact that a fetus can legally be killed before delivery discredit the law designed to protect it after its birth? The obvious answer is "no." Similarly, laws protecting fetuses in the delivery process make good "ethical sense" even though those same fetuses could be legally killed moments before. (For the argument that it is morally irrelevant that most fetuses killed via the partial-birth procedure are not viable, see *supra* note 16.)

<sup>114</sup> Professor Gorney is clearly troubled by second and third trimester abortions. See Gorney, *supra* note 2, at 46. She stresses the radical permissiveness of American law and calls for "a sober, profoundly difficult public conversation" on the subject. *Id.* Her misgivings suggest another irony. She views the chief purpose of the ban effort as turning people against abortion by revealing the harsh reality of the procedures. See *supra* note 14. Her own exposure to these harsh realities led to her disquiet, see Gorney, *supra* note 2, at 45-46, yet she is generally critical of the ban effort and also states that "[t]he Partial-Birth Abortion argument" is not part of the conversation that needs to take place concerning late abortions. *Id.* at 46.

<sup>115</sup> See Gorney, *supra* note 2, at 39. Professor Gorney's article is refreshing in that she candidly acknowledges the accuracy of this characterization. *Id.*; see *supra* note 15 and accompanying text. Some pro-choice ban advocates, see *supra* note 4 and accompanying text, no doubt in fact support the current

It is sometimes necessary to confront a perceived evil incrementally. Abraham Lincoln first fought slavery by attempting to restrict its expansion, which he believed the Constitution allowed.<sup>116</sup> He delayed assaulting the institution of slavery itself until changed circumstances made that practicable.<sup>117</sup> Until legal changes make broader protection for the lives of late second trimester fetuses constitutionally permissible, defending the lives of fetuses that have begun the birth process is a cause to be praised, not belittled.

---

radically permissive abortion regime. For Gorney's discussion of how most Western countries restrict abortion much more than the United States, see Gorney, *supra* note 2, at 46.

<sup>116</sup> See Abraham Lincoln, First Inaugural (March 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262 (Roy P. Basler ed., 1953).

<sup>117</sup> The Emancipation Proclamation, for example, was not issued until Lincoln felt it could be justified "[a]s a military measure" to deprive the enemy of property. See DAVID HERBERT DONALD, LINCOLN 456 (1995).