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Carefully Orchestrated Campaign, The

Nadine Strossen
New York Law School

Caitlin Borgmann

The Carefully Orchestrated Campaign[1]

by Nadine Strossen[2] & Caitlin Borgmann[3]

The answer to the question, "Can partial-birth abortions be banned?" is an emphatic "No." The nonmedical term, "partial-birth abortion," is a political chimera, with amorphous, shifting definitions concocted by opponents of women's reproductive rights. Because of their vague and broad wording, so-called "partial-birth abortion" bans operate as virtual abortion bans, prohibiting even the safest and most common abortion procedures used throughout pregnancy. Accordingly, almost every single judge who has ruled on these bans — in 17 out of 18 cases to date — has enjoined their enforcement.[4]

In addition to holding that these bans impose an undue burden on a woman's right to choose abortion, due to their sweeping prohibition of virtually all abortion procedures, the courts also have held "partial-birth abortion" bans unconstitutional for several other independently sufficient reasons: they violate physicians' due process rights, since their vague terminology subjects physicians to criminal prosecution and punishment without fair notice; they lack constitutionally required exceptions to preserve women's life and health; and they vest spouses and parents with impermissible veto power over a woman's right to choose.

Anti-choice activists have performed a remarkable sleight of hand, convincing many lawmakers, as well as much of the media and the public, that "partial-birth abortion" bans

target a specific, "late-term" abortion procedure, which they depict in grisly terms. In thus distorting every element of what is actually at stake in the "partial-birth abortion" debate, opponents of women's reproductive freedom have served their goal of diverting public attention from the pregnant woman to the fetus.

A striking contrast is afforded by the courts that have focused on the "partial-birth abortion" bans that have been passed in various states by scrutinizing their language and legislative history, and hearing medical testimony about their impact. Almost unanimously, these courts have concluded that the bans are not confined to either a particular procedure or a particular stage of pregnancy, and that the bans undermine women's health and rights without advancing any countervailing legitimate interest in protecting potential fetal life.[5]

These judicial rulings highlight the flaws of the vague and sweeping prohibitions as they have been written to date. But, even assuming that the bans could be reformulated to target "only" a single abortion procedure and/or stage of pregnancy, they would still be unconstitutional. The practice of medicine is both complex and fluid. One can never rule out the possibility that a situation will arise in which a given abortion procedure will be the safest for a specific patient in a particular circumstance. It would be both unconscionable and unconstitutional for the government to eliminate from a physician's options a procedure that would be the most medically appropriate for certain patients.

I. An Examination of "Partial-Birth Abortion" Bans

The term "partial-birth abortion" is not recognized in the medical community. Moreover, much of the rhetoric surrounding the bans is wholly unmoored from their actual wording. For example, the bans' proponents invoke inflammatory imagery of fetuses late in pregnancy, or suctioning of fetal skull contents. But the bans themselves contain no such references. Accordingly, any meaningful discussion of whether "partial-birth abortion" can be banned must begin with a careful look at the actual wording and scope of the bans and a review of the political context in which they arose.

The bans to date have taken two principal forms. The first, which was incorporated in Congress's initial "partial-birth abortion" ban, passed in 1995 and subsequently vetoed, defines a "partial-birth abortion" as "an abortion in which the

person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[6] The second formulation, which was incorporated in Congress's amended ban passed in 1997 and then vetoed, retains the original definition of "partial-birth abortion" as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." But, the amended bill then defines that phrase to mean "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion there of, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."[7] Neither version is limited to any particular stage of pregnancy. Thus, when proponents claim that the bans reach only abortions performed late in pregnancy, they mislead the public and distort the debate.

Neither the term "partial-birth abortion" nor the two principal legislative definitions are medical in origin. Rather, these concepts were devised by anti-choice activists in the mid-1990s, and no medical consensus as to their meaning has yet emerged. In the words of Dr. Ralph W. Hale, Executive Vice President of the American College of Obstetricians and Gynecologists (ACOG): "Continually repeating a politically coined term does not confer legitimacy — medical or otherwise — on that term or on dangerous legislation."[8]

The chimerical nature of the term "partial-birth abortion" is not surprising when one considers its politically charged origins. The so-called partial-birth abortion ban is the product of a carefully orchestrated campaign launched by the National Right to Life Committee (NRLC). The ban was contrived following a 1992 National Abortion Federation Risk Management Seminar, where a well-respected physician and abortion provider, Dr. Martin Haskell, gave a presentation on a particular abortion technique he had developed: "dilation and extraction" or "D&X." His monograph fell into the hands of anti-choice activists. The NRLC first tried to use the monograph to galvanize opposition to the then-pending federal Freedom of Choice Act (FOCA). NRLC ads urging opposition to FOCA depicted and described "a gruesome new abortion technique" called "D&X."[9] Soon after FOCA's defeat, its opponents invented the more incendiary term, "partial-birth abortion," along with a non medical definition that deviated dramatically from the description in Dr. Haskell's monograph.

In 1997, the NRLC distributed model language for a partial-birth abortion ban to its

state affiliates across the country. The accompanying memorandum prescribed certain crucial elements, including an approved definition of partial-birth abortion and the omission of an exception to preserve women's health. The NRLC denounced any ban that would apply "only after 'viability' or 'in the third trimester', or would contain a health exception, as a "phony ban." Finally, the NRLC "strongly advise[d] against any changes in the *name* of the banned procedure or in the *definition* of that procedure," pointing out that discussion about the definition's scope would serve the useful goal of "focus[ing] the discussion on the grisly mechanics of late-term abortions."[10]

The NRLC's memorandum evidences a central purpose underlying the drive for "partial-birth abortion" bans: to draw public concern to the fetus and away from the health, welfare, and constitutional rights of the pregnant woman. Concerns about fetal well-being are elevated by referring to fetuses as "babies." In contrast, concerns about the pregnant woman's well-being are denigrated and attacked as inherently suspect by enclosing the term "health" in quotation marks whenever it refers to her.

II. "Partial-Birth Abortion" in Congress and State Legislatures

A bill embodying the concocted concept of "partial-birth abortion" was introduced in Congress in 1995. The bill, H.R. 1833, banned all partial-birth abortions at any stage of pregnancy. It contained the first version of the definition described above, and no exception to preserve the woman's health, with only a dangerously narrow exception to preserve her life. It also created a cause of action for civil damages for violations of its provisions. With certain limited exceptions, the bill authorized suits by the "father" of the fetus, if married to the woman at the time of the abortion, as well as by "the maternal grandparents" of the fetus, if the woman was less than eighteen years old at the time of the abortion. The 104th Congress passed this unprecedented restriction on abortion — the first time Congress had outlawed any abortion procedure — but it failed to become law when President Clinton vetoed it in 1996. The President said that he could not sign legislation that reflected "congressional indifference to women's health." Congress tried to override his veto but fell a few votes short in the Senate.

The ban was reintroduced in Congress in 1997 as H.R. 1122. Although it was substantially

the same as H.R. 1833, several amendments proposed by Senator Rick Santorum were subsequently adopted to garner the endorsement of the American Medical Association.[11] With these changes, H. R. 1122 embodied the second version of the definition described above. H.R. 1122 passed both Houses of Congress but again was vetoed by President Clinton. The House voted to override the veto but the Senate fell three votes shy of an override on September 18, 1998. By mid-1998, 27 states had passed "partial-birth abortion" bans, nearly all of them modeled on one of the federal bills.[12]

III. "Partial-Birth Abortion" Bans Are Unconstitutional

As noted above, almost all courts that have considered constitutional challenges to these bans have concluded that they suffer from a range of constitutional infirmities, which will be discussed in turn.

A. Two Versions of the Same Far-Reaching Ban, Imposing an Unconstitutional "Undue Burden" on Abortion Rights

In the course of lawsuits challenging the first version of "partial-birth abortion" bans, it became clear that the definition — any procedure in which the physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery" — does not pinpoint a single, specific abortion technique. Rather, physicians testified and judges found that the definition potentially encompasses the safest and most common abortion methods used throughout pregnancy.[13] The central problem with the definition is that it is based on delivery into the vagina. But that is the way the vast majority of abortions are performed. The only non vaginal methods of performing an abortion — hysterotomy and hysterectomy — necessitate cutting through the abdomen.[14] These methods pose such high risks to a woman's health and fertility that they are used only in extremely rare circumstances. And because abortions necessarily involve the death of the fetus, virtually every method of vaginal abortion — i.e., virtually every method by which almost all abortions are performed — potentially falls within the ban's vast sweep.

The amended version of the proposed congressional ban, H.R. 1122, was touted as narrowing the all-encompassing scope of its initial incarnation. However, courts addressing challenges to comparable state bans have concluded that the revisions do not cure the constitutional problems.[15] Recall that

the amended bill retains its predecessor's core definition of the banned abortions: any in which the physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery," but it then defines that phrase to mean "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."

This revised definition continues to use non medical terms. And, it continues to threaten the safest and most common methods of abortion. Once again, the definition focuses on delivery into the vagina. The purported limitation to only those procedures that have a particular purpose — namely, to "kill the fetus" — at most immunizes obstetrical procedures, performed out of necessity when an intended childbirth goes awry. It offers no comfort to physicians performing abortions or to women seeking them. Finally, the addition of the vague term "substantial portion" does nothing to clarify what is meant by "partially vaginally delivers."

Anti-choice proponents of "partial-birth abortion" bans respond to these persistent definitional problems in two inconsistent ways. On the one hand, such advocates insist that they know what the bans prohibit. On the other hand, when pressed, these same advocates have been unwilling to identify precisely which medical procedures are banned. For example, Representative Charles Canady, a sponsor of the federal ban, signed a letter to House colleagues declaring that "H.R. 1833 does not ban [only] 'D&X' [dilation and extraction] or 'Brain Suction' abortions. . . . The ban would have the effect of prohibiting any abortion in which a child was partially delivered and then killed — no matter what the abortionist decides to call his particular technique."[16] The bans' proponents frequently have refused to adopt a narrower medical definition on the ground that to do so would enable physicians to evade the bans by modifying their practices.[17]

In short, the broad sweep of the bans' language effectuates the proponents' goal: to outlaw not a single, specific procedure, but rather any of a number of procedures a physician might use. In other words, the amorphous language is not the accidental product of poor draftsmanship, but instead precisely reflects and promotes its proponents' goal of criminalizing and deterring as many abortions as possible. That was the conclusion of the Alaska Superior Court in invalidating that state's "partial-birth abortion" ban. The court explained that

since the legislature had enacted the ban "with knowledge of the legal defects, it seems more likely than not that the unstated purpose of the Act was to cloud the scope of abortion procedures, i.e., to restrict abortion in general."[18]

Because of their vast sweep, so-called "partial-birth abortion" bans threaten the core right to choose abortion. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court reaffirmed the general principle dating back to *Roe v. Wade* that the government may not prohibit a woman from making the ultimate decision, in accordance with her own conscience, to have an abortion of a nonviable fetus.[19] Under *Casey*, a pre-viability abortion restriction is unconstitutional if it places an "undue burden" on a woman's right to choose abortion — that is, if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[20]

"The partial-birth abortion bans impose not only a substantial obstacle, but far worse, an absolute barrier to many abortions that are now safe and legal."

The "partial-birth abortion" bans impose not only a substantial obstacle, but far worse, an absolute barrier to many abortions that are now safe and legal. This is so both because of the broad range of procedures the bans encompass and because they are not limited to any particular stage of pregnancy. Courts that have reviewed laws modeled on both versions of the federal legislation have found that they encompass the safest and most common abortion procedures[21] and that they could prohibit abortions as early as the first trimester.[22]

This conclusion was reached, for example, by a federal district court in Illinois, which struck down that state's ban. After hearing extensive medical testimony, the court held that the state statute imposed "an undue burden on a woman's

constitutional right to choose to terminate her pregnancy before viability" because "virtually every abortion procedure" could violate the ban,[23] including "the most common and safest abortion procedures . . . without regard for the viability of the fetus."[24]

B. An Unconstitutionally Vague Definition

The Due Process Clause prohibits any law so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[25] Vague laws violate the due process guarantee in two ways. First, they fail to provide the persons regulated with a "reasonable opportunity to know what conduct is prohibited so that [they] may act accordingly."[26] The "partial-birth abortion" bans, with their vague and non medical terms, require doctors to guess whether performing a procedure that is medically appropriate nevertheless falls within the ban's proscriptions. Dr. Timothy R.B. Johnson, a court-appointed expert for a federal district court in Michigan, testified that it was "not entirely clear to [him] as a physician" what the definition of "partial-birth abortion" in that state's ban meant, nor was it clear to him which procedures the statute encompassed.[27] Based on this and other testimony, the court concluded that physicians "simply cannot know with any degree of confidence" which abortion methods the ban prohibits, and it therefore enjoined the ban.[28]

"Partial-birth abortion" bans also embody the second due process vice of unconstitutionally vague laws: by failing to provide explicit standards for those who apply them, the bans "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[29] In striking down Alaska's ban, the Alaska Superior Court stressed this defect, noting that "[t]he broad sweep of the language involved could allow broad enforcement against most, if not all, abortion procedures depending on the choice of the prosecuting attorney."[30]

C. An Impermissible Endangerment of Women's Health and Lives

By prohibiting the safest and most common abortion methods, "partial-birth abortion" bans compromise women's health and drastically limit physicians' discretion to choose the most medically appropriate abortion method for their patients. If doctors stopped providing all

abortion services that are potentially covered by a ban, abortions could become virtually impossible to obtain. In Wisconsin, where the ban threatened physicians with sentences as severe as life imprisonment, doctors ceased performing any abortions for a week after the law went into effect. Doctors did not resume abortion services until they received assurances from prosecutors that, pending resolution of the lawsuit challenging the ban's constitutionality, they would not be prosecuted for performing first-trimester abortions.[31]

Courts have recognized the extent to which "partial-birth abortion" bans endanger women's lives and health. A federal court in Arkansas enjoined that state's ban after finding that it would have the effect of denying women "appropriate medical care."[32] Similarly, the court that enjoined Montana's ban found it would "increase the amount of risk and pain that must be suffered by the woman."[33]

Moreover, most of the proposed bans fail to provide adequate exceptions to protect a woman's life or health. Those omissions alone render the bans unconstitutional. The government may never, even in the latest stages of pregnancy, prohibit abortions that are necessary to preserve women's lives or health.[34] Indeed, in *Planned Parenthood v. Casey*, the Supreme Court began its review of a multi-pronged abortion statute by examining the adequacy of the medical emergency exception, "[b]ecause it is central to the operation of various other requirements."[35] The Court stressed that if it determined this exception to be insufficiently protective of a woman's health, it "would be required to invalidate" all of Pennsylvania's abortion restrictions because "the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[36]

Yet nearly all of the "partial-birth abortion" bans enacted in the states, as well as both versions of the federal bill, apply to procedures performed throughout pregnancy and contain no health exception whatsoever. Thus, they will bar some women from obtaining an abortion, even when continuing the pregnancy seriously threatens their health. As courts have held, this feature alone is constitutionally damning.[37]

Even if the bans succeeded in targeting a single procedure, the lack of a health exception would constitute a fatal constitutional flaw. Since the medical appropriateness of any safe abortion procedure will depend on factors unique to the circumstances of

each patient — such as her medical condition, the stage of gestation, and the expertise of the physician performing the procedure — there will always be some women for whom the banned procedure is the safest. By removing a safe medical procedure from the physician's array of options without providing a health exception, the bans irreparably harm some women by forcing them to undergo other procedures that put them at greater risk.

While it's bad — and unconstitutional — enough that "partial-birth abortion" bans do not protect women's health, worse yet, they fail to afford adequate protection even when a woman's very life is at stake. For example, the federal bill that just narrowly escaped enactment permits a physician to perform a banned procedure only when it is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."[38]

This statutory language is insufficiently protective of women's lives in a couple of respects.[39] First, by enumerating certain life-endangering circumstances under which the procedure could be carried out, the lawmakers apparently intended to exclude others. But at no stage in pregnancy may the government pick and choose among various life-threatening conditions from which it is willing to protect women.[40]

Moreover, because the ban is lifted only when "a partial birth abortion . . . is necessary" to save the woman's life, the physician must first resort to any other procedure — such as hysterotomy or hysterectomy — that would save her life, even if that method poses grave risks to her health and fertility.[41] Yet the Supreme Court consistently has barred the government from subordinating a woman's health to its interest in fetal welfare. In *Colautti v. Franklin*, for example, the Supreme Court struck down a requirement that physicians "employ the abortion technique best suited to fetal survival 'so long as a different technique would not be *necessary* in order to preserve the life or health of the mother.' "[42] In so ruling, the Court noted that "the word 'necessary' suggests that a particular technique must be indispensable to the woman's life or health — not merely desirable — before it may be adopted."[43] Consequently, the Court found, "it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus."[44] The Court held that this ambiguity was constitutionally unacceptable. Likewise, "partial-birth abortion" bans suffer from the same constitutional infirmity, in failing to give physicians unambiguous authority to follow the course of action that best promotes the woman's health.

D. Unconstitutional Spousal and Parental Consent Requirements

As previously noted, "partial-birth abortion" bans authorize the "father" and "maternal grandparents" of a fetus to sue physicians for violating the bans. Therefore, the bans effectively require physicians to obtain the consent of those third parties before performing any abortions that might violate the ban. And since the bans sweep so broadly, doctors would need to obtain this consent before utilizing even the most common abortion procedures. The civil liability provision thus grants husbands and parents veto power over the woman's abortion decision, which is blatantly unconstitutional.

Striking down a provision that required spousal *notification* — in contrast with consent — the *Casey* Court held that no husband has the "right to require a [woman] to advise him before she exercises her personal choices."[45] The Court declared that such a requirement "embodies a view of marriage . . . repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry."[46] Accordingly, a provision that effectively forces a woman to obtain her husband's consent before she can have an abortion is an even worse violation of these same principles. For this reason, a federal district court in Arizona invalidated the provision of that state's "partial-birth abortion" ban authorizing "fathers" to bring civil actions.[47]

The bans' parental consent requirement is equally unconstitutional. No court has ever before considered, let alone upheld, a parental consent requirement attached to a ban on certain abortion *procedures*, and it is difficult to discern what state interest would support such a requirement. As to abortion in general, the Supreme Court has held that the government may require a minor to obtain parental consent only if it also provides a confidential and expeditious "judicial bypass" procedure — i.e., a procedure whereby a judge may determine either (1) that the particular minor is sufficiently mature to make her own decision to have an abortion, or (2) that an abortion is in her best interest.[48] But no such bypass is afforded by the "partial-birth abortion" bans, therefore constituting yet another ground on which they have been held unconstitutional.[49]

E. No Legitimate State Interest

In enacting abortion restrictions, the government must of course seek to further legitimate ends. While the *Casey* Court recognized that "the State has legitimate interests in the health of the woman and in protecting the potential life within her,"[50] so-called "partial-birth abortion" bans serve neither of these interests. To the contrary, far from promoting women's health, these bans have the opposite effect.

Nor do the bans promote a legitimate state interest in potential life. The *Casey* Court held that "measures designed to advance this interest [in potential life] will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion" and the measures do not impose "an undue burden on the right."[51] In contrast, a restriction that is "designed to strike at the right itself"[52] does not permissibly further the state's interest in potential life. By sweeping so broadly as to erect a virtual barrier to the safest and most common methods of abortion, "partial-birth abortion" bans cross the divide between permissible persuasion and prohibited coercion.[53] This thwarting of women's attempts to obtain safe abortions is wholly at odds with the *Casey* Court's insistence that the state may not "deprive women of the ultimate decision" to end their pregnancies.[54] Even if the bans could be rewritten to target a single procedure, they still would not further the interest in potential life. They would merely bar women who had already decided to end their pregnancies from utilizing one method for doing so. Without advancing the state's interest in potential life one whit, such a bar would serve only to reduce safe medical options for women.

IV. Bans on Safe Abortion Procedures Threaten the Quality and Progress of Medical Practice

The practice of medicine is not stagnant. We know and expect that physicians continually question existing methods and experiment with new techniques or with variants of recognized techniques. This process of evaluation and experimentation ensures the development of ever safer and more effective medical procedures. Abortion practice is no exception. Methods of abortion that were once considered the standard of care have been virtually abandoned, while other methods once thought experimental are now the most common.

For example, until the middle of this century, the most widely used abortion method was a procedure called hystero-

tomy. This is essentially a preterm caesarean section, but it is significantly more dangerous. These dangers were known even at the time that hysterotomy was the most common abortion technique. However, "so long as the whole subject of abortion was regarded as quasi-legal and disreputable, . . . innovatory practitioners were deterred from publishing their results and technical progress was inhibited."[55] In the late 1960s and early 1970s, the legalization of abortion led to more widespread experimentation with alternative techniques, experimentation that continues to this day. Consequently, hysterotomy has been all but abandoned as an appropriate method for terminating pregnancy.[56]

Two strands of Supreme Court abortion jurisprudence acknowledge the importance and value of medical innovation and progress. First, the Court repeatedly has stressed the essential role of the doctor's discretion in abortion practice, invalidating restrictions that circumscribed such discretion as violating a woman's reproductive freedom.[57] In *Colautti v. Franklin*, the Court reaffirmed this principle, noting that its decision in *Roe v. Wade* accorded great weight to "the central role of the physician . . . in determining how any abortion was to be carried out."[58]

Second, the Supreme Court consistently has struck down abortion restrictions that fail to account for ongoing developments in the standard of medical care. In *Planned Parenthood v. Danforth*, for example, the Court struck down a ban on the use of saline amniocentesis as an abortion method. The ban flew in the face of accepted medical practice, since at that time saline amniocentesis was employed in "a substantial majority . . . of all post-first-trimester abortions."[59] The Court further noted that the ban "appear[ed] to include within its proscription the intra-amniotic injection of prostaglandin . . . and other methods that may be developed in the future and that may prove highly effective and completely safe."[60] Indeed, not only did prostaglandin come to replace saline as the favored substance for "abortions by induction," but furthermore, inductions themselves were later largely replaced by the newer, often safer dilation and evacuation (D&E) method of abortion.[61]

Similarly, in *City of Akron v. Akron Reproductive Health Center*, the Supreme Court struck down a requirement that all second-trimester abortions be performed in a hospital. The Court recognized that the D&E method had become accepted as the safest method of performing most post-first-trimester abortions, and that D&Es could be performed safely on an out-

patient basis.[62] The Court noted that both the American Public Health Association and the American College of Obstetricians and Gynecologists had "abandoned [their] prior recommendation[s] of hospitalization for all second-trimester abortions."[63] The Court concluded that " 'present medical knowledge' convincingly undercuts Akron's justification" for the requirement.[64]

"Partial-birth abortion" bans are frequently — and erroneously — thought to prohibit only the abortion procedure known as either "intact dilation and evacuation" (intact D&E) or "dilation and extraction" (D&X). While definitions of intact D&E/D&X vary, there is general consensus that it is not really a distinct procedure, but rather, a variant of the D&E method of abortion, which is used in more than 96 percent of all post-first-trimester abortions.[65] Many physicians believe, and several federal courts have found, that intact D&E/D&X has specific safety advantages and may be the safest procedure in certain circumstances.[66] For example, a federal district court in Nebraska noted that "the D&X procedure has been shown by medical evidence to be the safest procedure used by mainstream medical professionals . . . in certain circumstances."[67] A federal district court in Michigan observed that six board-certified doctors all agree that the intact D&E/D&X procedure "reduce[s] risks associated with conventional D&Es."[68]

Even if a law prohibited only the performance of intact D&Es/D&Xs, it would still cripple the ability of doctors to treat their patients according to their own best medical judgment. A physician would be unable to use the procedure that might be the safest for a particular patient in the given circumstances. Yet, the Supreme Court repeatedly has held that a woman's health may never be compromised in order to promote a state interest in fetal welfare.[69] A woman is constitutionally entitled to the specific abortion procedure that her physician deems the safest for her. If that procedure is outlawed, it is legally irrelevant that other, generally safe, procedures might still be available options. For this reason, it would be unconstitutional even to ban procedures such as the rarely used hysterotomy; although the procedure is seldom warranted, there are rare circumstances in which it would be the safest option.[70] For any woman facing such circumstances, a ban would unconstitutionally "force [her] and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed."[71]

Courts should not sanction a ban on a single abortion proce-

dure for the additional reason that this would set a dangerous precedent of approving legislative micro-management of medical practice. Such interference would inevitably chill the experimentation and free flow of ideas necessary for medical innovation and progress. It is telling to recall how the "partial-birth abortion" campaign arose: it was a political response to a physician's scholarly presentation of a technique he believed represented an advance in safe abortion practice. In the already chilly climate for reproductive freedom, in which ever-declining numbers of doctors are willing to perform abortions, one can only imagine the deep-freeze impact this development is likely to have on other doctors' willingness to present their own ideas or to learn new abortion techniques from their colleagues.

IV. CONCLUSION

"Partial-birth abortions" cannot constitutionally be banned. The non medical terminology and vague definitions contained in the so-called "partial-birth abortion" bans in fact render them virtual abortion bans, prohibiting the safest and most common abortion procedures used throughout pregnancy. As such, these laws cannot survive constitutional scrutiny. But even if the laws could be revised to prohibit a single specific procedure, they would still be unconstitutional, not advancing the government's interest in potential life, and undermining its interest in the actual lives and health of pregnant women.

Notes

[1] Shortly before this article went to press, on October 23, 1998, a Buffalo-area doctor who performed abortions, Dr. Barnett A. Slepian, was shot to death, apparently by a sniper who lay in wait outside his home. This tragic murder illustrates the extreme lengths to which some "pro-life" activists will go in pursuit of their ultimate goal -- criminalizing and deterring as many abortions as possible. "Partial-birth abortion" bans serve the same goal, contributing to the increasingly chilly, hostile environment faced by all abortion providers. Therefore, we dedicate this article to the memory of Dr. Slepian and the other courageous, compassionate women and men who have sacrificed their lives -- all too literally -- to the cause of preserving womens' health and freedom.

[2] President, American Civil Liberties Union; Professor of Law, New York Law School.

[3] State Strategies Coordinator, Reproductive Freedom Project,

American Civil Liberties Union ("RFP"). Ms. Borgmann has advised activists throughout the country opposing "partial-birth abortion" bans in the states and is currently litigating a challenge to Rhode Island's ban. The authors gratefully acknowledge the assistance of Catherine Weiss and Louise Melling, the Director and Associate Director, respectively, of the RFP. The authors also thank Professor Strossen's Academic Assistant, Amy L. Tenney, as well as Jennifer Shmulewitz and Kimberly Parker, Legal Intern, and Staff Attorney Fellow, respectively, of the RFP.

[4] Although 19 bans have been challenged, the merits of one such challenge, Alabama, have not yet been addressed by the court. Of the 18 bans as to which the courts have reached the merits, 17 are under court order blocking or limiting their enforcement. Carhart v. Stenberg, No. 4:97CV3205, 1998 U.S. Dist. LEXIS 9816 (D. Neb. July 2, 1998) (permanent injunction); Intermountain Planned Parenthood v. State, No. BDV 97-477 (Dist. Ct. Mont. June 29, 1998) (permanent injunction); Planned Parenthood v. State, No. 3AN-97-6019 (Mar. 13, 1998) (permanent injunction), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998); Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill. 1998) (permanent injunction), *appeal docketed*, No. 98-1726 (7th Cir. Mar. 23, 1998); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997) (permanent injunction), *appeal docketed*, No. 97-17377 (9th Cir. Dec. 22, 1997); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997) (permanent injunction); Planned Parenthood v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa 1998) (preliminary injunction); Causeway Med. Suite v. Foster, No. 97-2211 (E.D. La. July 21, 1997) (preliminary injunction); Planned Parenthood v. Doyle, No. 98-C-305 (7th Cir. June 25, 1998) (granting injunction pending appeal of Planned Parenthood v. Doyle, No. 98-C-305-S (W.D. Wis. June 12, 1998)); A Choice for Women v. Butterworth, No. 98-0774-CIV-Graham (S.D. Fla. June 30, 1998) (temporary restraining order); Eubanks v. Stengel, No. 3:98-CV-383-H (W.D. Ky. July 2, 1998) (temporary restraining order); Brancazio v. Underwood, No. 2:98-0495 (D. W. Va. June 11, 1998) (temporary restraining order); Weyhrich v. Lance, Civ. No. 98-0117-S-BLW (D. Idaho Mar. 27, 1998) (temporary restraining order); Planned Parenthood v. Verniero, No. 97-6170 (D.N.J. Dec. 24, 1997) (temporary restraining order); Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581 (E.D. Ark. July 31, 1997) (temporary restraining order);

Rhode Island Medical Society v. Pine, No. 97-416L (D.R.I. Sept. 4, 1998) (extending temporary restraining order of July 11, 1998).

In Georgia, a preliminary injunction had been in effect, Midtown Hosp. v. Miller, No. 1:97-CV-1786-JOF (N.D. Ga. Mar. 24, 1998) (extending order of July 24, 1997), but on September 2, 1998, the court approved a settlement. Under the terms of the settlement, the ban (1) will be enforced only as to abortions performed on viable fetuses; (2) prohibits only abortions using "an 'intact dilation and extraction' abortion procedure" narrowly defined in the order approving the settlement; and (3) will not be enforced as to abortions "that are necessary to preserve a woman's life or health." Midtown Hosp. v. Miller, No. 1:97-CV-1786-JOF (N.D. Ga. Sept. 2, 1998).

In Virginia, a federal district court preliminarily enjoined the ban, but, on appeal, a single judge of the Fourth Circuit Court of Appeals stayed the preliminary injunction. Judge Luttig found that the ban prohibited only the "intact dilation and extraction" method of abortion. Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998). The stay was then upheld by a divided panel, with Judge Luttig and another judge upholding it, and the third judge dissenting, on the ground that the ban would likely be found unconstitutional. Richmond Med. Ctr. for Women v. Gilmore, No. 98-1930 (CA-98-309-3) (4th Cir. July 29, 1998).

In Alabama, on grounds unrelated to the merits of the plaintiffs' challenge, a federal district court issued a preliminary ruling dismissing health care providers' claim for injunctive relief. Summit Medical Associates v. James, 984 F. Supp. 1404 (M.D. Ala. 1998). Still remaining before the court is the plaintiffs' request for a declaration that the ban is unconstitutional. In the interim, the state attorney general has issued a letter limiting enforcement of the ban to post-viability procedures.

It is noteworthy that of the 13 federal judges who have enjoined "partial-birth abortion" bans, six were appointed by Republican presidents and seven were appointed by Democratic presidents. (The three other judges who have enjoined such bans were a federal magistrate judge and two state court judges.)

[5] *See, e.g.,* Planned Parenthood v. State, No. 3AN-97-6019 (Alaska Mar. 13, 1998), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998); Intermountain Planned Parenthood v. State, No. BDV 97-477 (Mont. Dist. Ct. June 29, 1998); Planned Parenthood v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa 1998) (preliminary

injunction); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997) (permanent injunction), appeal docketed, No. 97-17377 (9th Cir. Dec. 22, 1997); Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill. 1998) (permanent injunction), appeal docketed, No. 98-1726 (7th Cir. Mar. 23, 1998). *But see* Richmond Med. Ctr., 144 F.3d 326 (4th Cir.), *mot. to vacate denied*, 1998 U.S. App. LEXIS 18547 (4th Cir. July 29, 1998) (finding that the ban prohibited only the "intact dilation and evacuation" method of abortion).

Prior to the recent Fourth Circuit ruling, only one court — a federal district court in Wisconsin — had interpreted the ban as applying to only a particular procedure and hence refused to issue a preliminary injunction. Planned Parenthood v. Doyle, No. 98-C-305-S, 1998 U.S. Dist. LEXIS 11106 (W.D. Wis. June 12, 1998). That decision was appealed to the Seventh Circuit, however, which enjoined the ban pending its ruling on the appeal. Planned Parenthood v. Doyle, No. 98-C-305-S (7th Cir. June 26, 1998).

[6] H.R. 1833, 104th Cong. 2d (1995).

[7] H.R. 1122, 105th Cong. 2d (1997).

[8] Ralph W. Hale, M.D., *Abortion Procedure Saves Women's Lives*, Wall St. J., Aug. 28, 1998 (letter to the editor).

[9] Diane M. Gianelli, *Shock-Tactic Ads Target Late-Term Abortion Procedure*, Am. Med. News, July 5, 1993, at 3.

[10] Memorandum from Douglas Johnson, NRLC Federal Legislative Director, and Mary Spaulding Balch, NRLC State Legislative Director, to NRLC State Affiliates and Other Interested Parties (Nov. 22, 1996) (emphasis in original).

[11] Although the AMA endorsed the bill as amended, other organizations in the medical community that are more directly concerned with women's health continue to oppose the bill. The American College of Obstetricians & Gynecologists (the professional association of physicians specializing in women's health), the American Medical Women's Association, and the American Nurses Association all reaffirmed their opposition to the bill after it was amended.

[12] The states are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, New Jersey, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wis-

consin. Another state, Ohio, passed a law banning the "dilation and extraction" procedure.

[13] *See, e.g.,* Planned Parenthood v. State, No. 3AN-97-6019 (Alaska Mar. 13, 1998), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998); *Woods*, 982 F. Supp. at 1377-78; Hope Clinic, 995 F. Supp. at 857; *Evans*, 977 F. Supp. at 1297-1301, 1305-06; *Intermountain*, No. BDV 97-477.

[14] Medical forms of abortion, in which an oral medication is taken early in pregnancy to induce abortion, are not yet widely available in the United States.

[15] *See, e.g.,* Carhart v. Stenberg, No. 4:97CV3205, 1998 U.S. Dist. LEXIS 9816 (D. Neb. July 2, 1998); Planned Parenthood v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa 1998).

[16] Letter from Rep. Charles T. Canady et al., United States House of Representatives, to Colleagues in Congress (Mar. 18, 1996).

[17] *See, e.g., Miller*, 1 F. Supp. 2d at 962 (reviewing legislature's rejection of narrowing amendments); Planned Parenthood v. State, No. 3AN-97-6019 (Alaska Mar. 13, 1998) (same), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998); Intermountain Planned Parenthood v. State, No. BDV 97-477 (Mont. Dist. Ct. June 29, 1998) (same).

[18] Planned Parenthood v. State, No. 3AN-97—6019 CIV (Alaska Mar. 13, 1998), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998).

[19] 505 U.S. 833, 846, 852-53 (1992).

[20] *Id.* at 877.

[21] *See* e.g., cases discussed in notes 4 and 5.

[22] *See* Planned Parenthood v. Alaska, No. 3AN-97-06019 Civ., slip op. at 10, 17 (Alaska Mar. 13 1998), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998); *Hope Clinic*, 995 F. Supp. at 857.

[23] *Hope Clinic*, 995 F. Supp. at 858.

[24] *Id.* at 857

[25] Smith v. Goguen, 415 U.S. 566, 572 n.8 (1974) (citations omitted).

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

[27] *Evans*, 977 F. Supp. at 1299-1300.

[28] *Id.* at 1311.

[29] *Grayned*, 408 U.S. at 108-09.

[30] Planned Parenthood v. Alaska, No. 3AN-97-06019 Civ., slip op. at 10.

[31] Marilynn Marcione, *"Partial Birth" Abortion Ban Stands*, Milwaukee J. Sentinel, May 20, 1998 (available in Online Milwaukee J. Sentinel News).

[32] Jegley, No. LR-C-97-581.

[33] *Intermountain*, No. BDV 97-477.

[34] *Casey*, 505 U.S. at 879.

[35] *Id.* at 880.

[36] *Id.*

[37] *Hope Clinic*, 995 F. Supp. at 857; *Woods*, 982 F. Supp. at 1377-78.

[38] H.R. 1122, 105th Cong. 2d Sess. (1997).

[39] Worse yet, some bans — such as those in Arkansas and Mississippi — contain no life exception at all, but rather only an affirmative defense that the procedure was necessary to save the woman's life.

[40] *See Casey*, 505 U.S. at 880.

[41] H.R. 1122, 105th Cong. 2d Sess. (1997).

[42] Colautti v. Franklin, 439 U.S. 379, 400 (1979) (emphasis added).

[43] *Id.* at 400; *see also* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 769 (1986).

[44] *Colautti*, 439 U.S. at 400.

[45] *Casey*, 505 U.S. at 898.

[46] *Id.*

[47] *See Woods*, 982 F. Supp. at 1380 ("[I]n practice, there is no distinction between a spousal consent provision and the civil liability portion of the Act. Under *Casey*, such a provision is unconstitutional.").

[48] *Id.* at 1380-81; *Casey*, 505 U.S. at 899; Bellotti v. Baird, 443 U.S. 622, 643-44 (1979).

[49] *Hope Clinic*, 995 F. Supp. at 861; *Woods*, 982 F. Supp. at 1380.

[50] *Casey*, 505 U.S. at 871.

[51] *Id.* at 878.

[52] *Id.* at 874.

[53] *Id.* at 878-79.

[54] *Id.* at 875.

[55] P. Diggory, *Hysterotomy and Hysterectomy as Abortion Techniques, in Abortion and Steril-*

ization: Medical and Social Aspects 317, 318 (Jane Hodgson ed. 1981).

[56] *Hope Clinic*, 995 F. Supp. at 853; *Woods*, 982 F. Supp. at 1375.

[57] *Colautti*, 439 U.S. 379, 387-88 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976); Doe v. Bolton, 410 U.S. 179, 192 (1973); Roe v. Wade, 410 U.S. 113, 166 (1973).

[58] *Colautti*, 439 U.S. at 387-88 (citing *Roe*, 410 U.S. at 166).

[59] *Danforth*, 428 U.S. at 77.

[60] *Id.* at 77-78.

[61] CDC, *Surveillance for Reproductive Health*, 47 Morbidity And Mortality Weekly Report (MMWR), ss-2, July 3, 1998, at 67.

[62] 462 U.S. 416, 435-37 (1983), *overruled in part on other grounds*, *Casey*, 505 U.S. at 880.

[63] *City of Akron*, at 436-37.

[64] *Id.* at 437.

[65] CDC, *supra* note 57, at 44.

[66] *See, e.g.,* Women's Med. Prof'l Corp. v. Voinovich, 911 F. Supp. 1051, 1070 (S.D. Ohio 1995), *aff'd on other grounds*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998); Carhart v. Stenberg, 972 F. Supp. 507, 525-26 (D. Neb. 1997); Evans v. Kelley, 977 F. Supp. 1283, 1316 (E.D. Mich. 1997).

[67] *Carhart*, 1998 U.S. Dist. LEXIS 9816, at *92.

[68] *Evans*, 977 F. Supp. at 1296.

[69] *Thornburgh*, 476 U.S. at 769-71 (1986); *Colautti*, 439 U.S. at 400.

[70] For example, a hysterotomy may become necessary because of failure of an induction abortion during the second trimester. F. Gary Cunningham, et al., Williams Obstetrics 599 (20th ed. 1997).

[71] *Danforth*, 428 U.S. at 79.