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Partial Birth Abortion

Gonzales v. Carhart

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On April 18, 2007, the United States Supreme Court, in a 5-4 decision in *Gonzales v. Carhart*, 550 U.S.___, 127 S. Ct. 1610 (2007) (hereinafter *Carhart*) upheld the federal Partial Birth Abortion Ban Act of 2003 (18 U.S.C. 1531).[1] In a previous decision, the Court had held a similar ban—Nebraska's law—unconstitutional. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (hereinafter *Stenberg*).

Background

In 2003, the Virginia legislature passed its own Partial Birth Infanticide Act, the text of which is similar to the federal Act. It was also immediately challenged and found unconstitutional by the 4th Circuit Court of Appeals. That case, *Richmond Medical Center v. Hicks*, 409 F. 3d 619 (4th Cir. 2005) was also appealed to the Supreme Court and was considered at the same time as *Carhart*. The Court remanded the Virginia case to the 4th Circuit for reconsideration in light of the decision in *Carhart*. On remand, the 4th Circuit once again found Virginia's statute unconstitutional, its current status. This Issue Brief will examine the impact of the federal Partial Birth Abortion Ban Act and the *Carhart* decision on Virginia's law.

The decision in *Carhart* sets the stage for the reanalysis of Virginia's partial-birth abortion ban. But *Carhart* cannot be fully understood without an understanding of the Court's earlier ruling on partial-birth abortion in *Stenberg*. Furthermore, any examination of abortion jurisprudence requires consideration of the constitutional precepts established in *Roe v. Wade*, 410 U.S 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), all of which will be discussed herein.

Abortion Rights Defined by *Roe v. Wade*

In order to fully understand the meaning of *Carhart*, it is necessary to provide background on the evolution of the law that led to it. The most significant change in American abortion law began with *Roe v. Wade*, the decision that legalized abortion in all 50 states.

In *Roe*, a single pregnant woman challenged the Texas law criminalizing abortions in all cases except to save the life of the mother, arguing that the Due Process Clause of the Fourteenth Amendment protected her against state action that would violate her right to privacy affirmed in *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Supreme Court ruled that while the right to privacy exists to protect the woman's decision to have an abortion, it is not an absolute right that would give her the option of having an abortion for any reason at any time. However, privacy was determined to be a "fundamental right" and, as such, a state may act to deprive a person of such a right only when there is shown to be a compelling interest in doing so. One argument advanced for the existence of a compelling state interest in restricting abortion was that the fetus is a person within the meaning of the Fourteenth Amendment and that the fetus' right to

life would certainly trump the mother's right to privacy. Even though the Court concluded that a fetus is not a person within the meaning of the law, when the pregnancy proceeds to the point at which the fetus approaches viability,[2] the interests of the mother and the unborn person compete. At that point, the state's interest in the continuation of the pregnancy is elevated, and it must consider both the health of the mother and the life of the unborn child. The Court observed:

> [T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman. [I]t has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."
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> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact ... that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.
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> *Roe*, at 162 (internal citations omitted).

The effective holding of *Roe* was that through the end of the first trimester, the abortion decision and effectuation is up to the pregnant woman's doctor. Until the end of the second trimester the state may regulate abortion in ways reasonably related to the woman's health. Subsequent to fetal viability the state may regulate or even proscribe abortion except where it is necessary to preserve the life or health of the mother.

Abortion Rights Refined in *Planned Parenthood v. Casey*

Nineteen years after *Roe*, following changes in maternal health care and neonatal care, the Court revisited the law of abortion. Finding the constitutional analysis in *Roe* to be sound and without rejecting the fundamental holding, the Court, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), rejected the trimester framework. The court created the rule that until fetal viability, as opposed to the beginning of the third trimester, a woman has a right to choose to terminate her pregnancy *but* that the state has a profound interest, during the course of the pregnancy, in the potential life of the fetus and may enact laws to further the health or safety of the pregnant woman even though the laws may restrict access to abortion. However, the court held that such laws may not *unduly* restrict abortion.

> In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.…A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.
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> *Casey*, 505 U.S. at 877.

The Court also reaffirmed the holding in *Roe* that "subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S., at 164, 165).

Though the fundamental rules as set forth in *Roe* and *Casey* remain in place (or are *assumed* to remain in place. See *Carhart*, 127 S. Ct., at 1627), the laws of the states have evolved over the years to reduce the number of abortions by imposing elaborate informed consent rules, parental consent rules, and restrictions on abortion clinics, abortion practice, and doctors. See, e.g., Va Code Ann § 16.1-241 (V) (parental consent) and § 18.2-76 (informed consent rules). Provided the restrictions do not impose an undue burden on the pregnant woman's right to an abortion, or violate this constitutional right, these restrictions survive.

Constitutional Challenge to Partial Birth Abortion Ban — *Stenberg v. Carhart*

In recent years, many states sought to outlaw partial-birth abortion because of its shocking nature, its brutality, and the question of whether there was ever a justification for its use. The State of Nebraska was one of those states and passed a law (representative of many of such state laws) to ban it.[3] The constitutionality of the law was the subject of *Stenberg v. Carhart*, 530 U.S. 914 (2003).

In *Stenberg*, the Court analyzed Nebraska's partial birth abortion ban statute and found it unconstitutional (i) for its failure to include an exception to the ban that would protect the health of the pregnant woman and (ii) because it did not clearly distinguish between intact dilation and extraction (intact D&E, or partial-birth abortion) and another similar form of abortion, dilation and extraction (D&E). (Note that intact D&E is also labeled D&X (dilation and extraction) and that D&E also means dilation and evacuation but describes the same procedure. Where possible, only the term "intact D&E" will be used here to describe partial birth abortion.[4]

Whereas *Casey* reaffirmed the holding in *Roe* that in order to be valid constitutionally, a restriction on abortion must contain an exception that preserves the health or life of the mother, the Nebraska statute contained only an exception for the preservation of the life of the mother. The State's rationale for the omission of a health exception was that there was no need for it given the averred existence of other safe methods of accomplishing the abortion and that the ban on only one available type of abortion would create no health risk. However, at trial, the parties strongly contested the factual question of whether safe alternatives actually exist. The trial court and the 8th Circuit Court of Appeals agreed that the statute required a health exception. The U.S. Supreme Court addressed the difference of medical opinion on the relative safety of alternative procedures as follows:

> [T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.
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> *Stenberg*, at 936.

Ultimately, the Supreme Court concurred with the trial court that while there exist alternatives to intact D&E, they are not safer and that, in fact, the suggested alternatives involve similar or greater risks.[5] As such, the Court found the statute unconstitutional for its failure to include a health exception.

The *Stenberg* Court also addressed the issue of whether the statute imposed an undue burden on a woman's ability to choose a D&E abortion. Nebraska asked the Court to give weight to the State Attorney General's advisory opinion that the statute only applied to intact D&E. However, the Court found the language of the Nebraska statute broad enough to prohibit not only the intact D&E but also the D&E.

> The statute forbids "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." Neb. Rev. Stat. Ann. §28—326(9) (Supp. 1999). We do not understand how one could distinguish, using this language, between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix). Evidence before the trial court makes clear that D&E will often involve a physician pulling a "substantial portion" of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus. 11 F. Supp. 2d, at 1128; *id.*, at 1128—1130. Indeed D&E involves dismemberment that commonly

> occurs only when the fetus meets resistance that restricts the motion of the fetus: "The dismemberment occurs between the traction of…[the] instrument and the counter-traction of the internal os of the cervix." *Id.*, at 1128. And these events often do not occur until after a portion of a living fetus has been pulled into the vagina. *Id.*, at 1104.
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> Even if the statute's basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D&E and D&X–though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures.
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> *Stenberg*, at 938, 939.

Federal Partial Birth Abortion Ban

Responding to the *Stenberg* decision, the United States Congress passed the Partial Birth Abortion Ban Act.[6] The Act included a preamble with numerous recitals targeted at the courts that would likely be required to interpret it, with Congress substituting its factual findings regarding the procedure for those of the trial courts in previous cases interpreting various state court bans, including Nebraska's.

The law was challenged on its face in the United States District Court in Nebraska. Another facial challenge was mounted in the United States District Court in the Northern District of California. The cases wound through the appellate courts and were consolidated in the U.S. Supreme Court ruling in *Carhart*.[7] The trial courts and appellate courts found the Act unconstitutional.

The issues presented to the Supreme Court were whether the Act (i) was void for vagueness for its failure to offer physicians a clear definition of the type of procedure prohibited, (ii) placed an undue burden on a woman's right to choose a second trimester abortion for its failure to distinguish between a D&E and an intact D&E, and (iii) placed an undue burden on a woman's right to choose a second trimester abortion for its failure to contain an exception to protect a woman's health. In the 5-4 opinion written by Justice Kennedy, the Court found that the Act was not void for vagueness and that the law created no undue burden on a pregnant woman. It is noteworthy that the composition of the Court had changed since *Stenberg* was decided.[8]

Vagueness challenge to the partial-birth abortion ban

The *Carhart* Court found that the Act was not void for vagueness and articulated four bases for its decision.

First, the Act requires that "the person performing the abortion must 'vaginally delive[r] a living fetus.' § 1531(b)(1)(A). The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy)." *Carhart*, at 1627.

Second, "the Act's definition of partial-birth abortion requires the fetus to be delivered 'until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.' § 1531(b)(1)(A) (2000 ed., Supp. IV) .... [I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks' ... the prohibitions of the Act do not apply." Id., at 1627.

Third, "to fall within the Act, a doctor must perform an 'overt act, other than completion of delivery, that kills the partially delivered living fetus.' § 1531(b)(1)(B) (2000 ed., Supp. IV). For purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark. This is because the Act proscribes killing 'the partially delivered' fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark." Id., at 1627, 1628.

Fourth, "the Act contains scienter requirements concerning all the actions involved in the prohibited abortion. To begin with, the physician must have 'deliberately and intentionally' delivered the fetus to

one of the Act's anatomical landmarks. § 1531(b)(1)(A). If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered 'for the purpose of performing an overt act that the [doctor] knows will kill [it].' *Ibid.* If either intent is absent, no crime has occurred. This follows from the general principle that where scienter is required no crime is committed absent the requisite state of mind." Id., at 1628.

Undue burden/overbreadth challenge to the partial-birth abortion ban

The Court then addressed the issue of undue burden resulting from the asserted facial overbreadth of the statute; i.e., because the statute includes proscriptions on both D&E and intact D&E, it is too inclusive and overbroad and, because the statute is overbroad, it prohibits a legal procedure and represents an undue burden to a pregnant woman.

The Court held that the Act only prohibits a doctor from intentionally performing an intact D&E and that it does not prohibit the performance of a D&E.

> The Act excludes most D&Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D&E procedure can often "tak[e] about 10-15 'passes' through the uterus to remove the entire fetus." *Planned Parenthood*, 320 F. Supp. 2d, at 962. Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery.
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> *Carhart*, at 1629.

The Court reasoned that because a D&E requires the removal of fetal parts by being ripped from the fetus by friction as they are pulled through the cervix (a.k.a., dismemberment or disarticulation) and because the banned procedure requires live delivery to an anatomical "landmark" outside the body of the mother, followed by an act that kills the fetus, the two procedures are sufficiently differentiated, and that there is no doubt as to which procedure is and which is not included in the ban.

Responding to the argument that an otherwise legal D&E could result in a prohibited procedure by virtue of an unintended live delivery to an anatomical landmark, the Court concluded that the Act clearly established the requirement of intent to perform the prohibited procedure at the outset and that without the requisite intent, there can be no violation of the act, notwithstanding the ultimate performance of an intact D&E.

Another challenge to the Act was that many doctors do not perform an intact D&E by accident. Rather, they begin every D&E abortion assuming they will complete it by disarticulation but with the objective, if possible, of removing the fetus intact under the belief that the intact D&E is safer than the dismemberment. Thus, even though the intent is to perform a D&E, if the procedure becomes an intact D&E because the doctor takes particular care and the fetus is not dismembered while being removed from the cervix, the doctor will perform an unlawful but, nevertheless, preferred procedure. The Court demurred:

> This does not prove, as respondents suggest, that every D&E might violate the Act and that the Act therefore imposes an undue burden. It demonstrates only that those doctors who intend to perform a D&E that would involve delivery of a living fetus to one of the Act's anatomical landmarks *must adjust their conduct to the law by not attempting to deliver the fetus to either of those points*. Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions. The Act, then, cannot be held invalid on its face on these grounds.
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> *Carhart*, at 1632 (emphasis added).

Undue burden/health exception challenge to the partial-birth abortion ban

Per *Roe* and *Casey*, any abortion prohibition or restriction statute that does not include a health exception for the pregnant woman represents an undue burden to the pregnant woman and is unconstitutional. However, the federal statute only allows the use of partial birth abortion to

preserve the life of the pregnant woman; there is no health exception.

In *Stenberg*, the Court found that there was significant medical disagreement about whether there exist safe alternatives to intact D&E. The Court concluded that because there was disagreement, it was necessary to safeguard the option to perform the intact D&E procedure to preserve the health of the pregnant women who would otherwise be subject to another, potentially less safe, alternative.[9] The *Carhart* court used almost precisely the same reasoning to arrive at the opposite conclusion.

> There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. There continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D&E.
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> The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.
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> Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden. The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D&E.
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> The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.
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> *Carhart*, at 1636, 1637 (internal quotations and citations omitted).

Thus, without affirming *Roe* or *Casey*, and while acknowledging that the D&E procedure may be as brutal as intact D&E,[10] the Court upheld the Partial Birth Abortion Ban Act in its entirety.

Virginia Partial Birth Abortion Infanticide Act

Also on appeal to the Supreme Court while *Carhart* was being considered was the appeal from the 4th Circuit Court of Appeals of a case that held the Virginia Partial Birth Infanticide Act[11] unconstitutional. Because the Virginia law is similar in most respects to the federal law and given its holding in *Carhart*, the Court remanded *Richmond Medical Center for Women v. Hicks*, 409 F. 3d 619 (4th Cir. 2005), to the 4th Circuit for further consideration. It appears the Supreme Court thought the 4th Circuit would, upon reconsideration, find the Virginia statute constitutional in light of the decision in *Carhart*. However, the Court of Appeals once again found the Virginia Act unconstitutional.

When the 4th Circuit first considered the Virginia law, it held the law unconstitutional for its failure to "contain an exception for circumstances when the banned abortion procedures are necessary to preserve a woman's health." *Richmond Medical Center v. Hicks*, 409 F.3d 619, 629 (4th Cir. Va., 2005);[12] and upheld the district court's permanent injunction against its enforcement. The 4th Circuit did not address the district court's alternative grounds for striking it down. (The district court had held the law an impermissible infringement on the fundamental right to choose an abortion "because it imposes an undue burden on that right and because it contains no health exception and an inadequate life exception, and it is impermissibly void for vagueness." *Richmond Medical Center for Women v. Hicks*, 301 F. Supp. 2d, 499 at 517 (E.D. Virginia, 2004).)

A three-judge panel of the 4th Circuit, reconsidering the Virginia law upon remand did not address the health exception, that having been resolved by the Supreme Court.

Nevertheless, because the Virginia Act and the federal Act are not identical, a new challenge to the Virginia Act was before the Court of Appeals.

Intent of the doctor

The federal Act identifies specifically the point at which a doctor's intent to perform an intact D&E must occur in order for criminal liability to attach to be when:

> "…the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus."
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> 18 U.S.C. § 1531(b)(1)(A).

Virginia's Act does not define the intent of the doctor as precisely as the federal Act.

> *"[P]artial birth infanticide"* means any deliberate act that (i) is intended to kill a human infant who has been born alive," [when] "in the case of a headfirst presentation, the infant's entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant's trunk past the navel is outside the body of the mother."
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> Va. Code Ann. § 18.2-71.1.

The 4th Circuit interpreted the differences as follows:

> "[T]he Federal Act 'contains scienter requirements concerning all the actions involved in the prohibited abortion,' including both a requirement that the doctor intentionally deliver the fetus to an anatomical landmark *and* a requirement that this delivery be for the purpose of performing the overt act that the doctor knows will cause fetal demise. As the Supreme Court observed, under the Federal Act '[i]f either intent is absent, no crime has occurred.' The Court rejected the respondents' argument that the Federal Act imposes criminal liability on doctors who complete an abortion after accidental intact delivery to an anatomical landmark. According to the Court, this argument failed to "take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D&E."
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> In contrast to the Federal Act, the Virginia Act omits any mention of the doctor's intent *at the commencement* of the procedure, using the phrase "*has been* born alive" to describe delivery. *Va. Code Ann. § 18.2-71.1.B* (emphasis added). *Compare 18 U.S.C. § 1531(b)(1)(A)* (requiring that the doctor "deliberately and intentionally vaginally deliver living fetus," thus focusing on intent at the outset). The Virginia Act's use of the passive voice in "has been born alive" makes it clear that the statute does not require that the doctor intend at the outset to perform an intact D&E for a violation to occur.
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> The Virginia Act's requirement that a doctor "*knowingly* perform partial birth infanticide" does not remedy the problem. The term "partial birth infanticide" has a specific definition: to perform "any deliberate act that… is intended to kill a human infant who has been born alive." *Va. Code Ann. § 18.2-71.1.B.* The use of "has been born alive," which describes an event that has already occurred, means that partial birth infanticide, as defined by the Act, does not occur until *after* delivery to an anatomical landmark, at the point the doctor commits the deliberate act. The knowledge requirement thus only attaches to commission of the deliberate act (that is, the commission of the partial birth infanticide); the knowledge requirement does not attach to the commencement of the abortion. In sum, the Virginia Act reaches doctors who intend to perform a standard D&E, but who nonetheless accidentally deliver the fetus to an anatomical landmark, and who must perform a deliberate act that causes fetal demise in order to complete removal.
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> *Richmond Medical Center v. Herring*, 2008 U.S. App. Lexis 10701 (2008),[13] at 22, 23, 24 (internal citations omitted).

By specific named exception of D&E in the Act, the Virginia law is quite clear: a doctor may legally perform the procedure. However, per the 4th Circuit's reading of the statute, a doctor who sets out to perform a D&E and who unintentionally or accidentally delivers the fetus to one of the anatomical landmarks and completes the abortion is guilty of a Class 4 felony,[14] notwithstanding his intent at the outset to perform a legal procedure. There is no mistaking the intent requirements in the federal Act, however. The federal Act makes clear that a doctor who performs an intact D&E must intend at the outset

to perform an intact D&E in order to be criminally liable.[15]

The 4th Circuit found that,

> "[t]he Virginia Act, on its face, lacks both the intent and distinct overt act requirements found crucial to the constitutionality of the Federal Act. The Virginia Act's exceptions are limited. As a result, the Virginia Act unconstitutionally criminalizes the standard D&E because a doctor performing such a procedure cannot know at the outset whether he will accidentally violate the Act."
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> *Richmond Medical Center v. Herring*, at 44.

The court concluded:

> As a result, the Act on its face effectively prohibits all standard D&Es, imposing an undue burden on a woman's right to choose an abortion before fetal viability. Because this defect infects the entire Act, partial invalidation is not an option. Any remedy short of declaring the Act invalid would require us to rewrite its very core, and that is a task that must be left to the legislature.
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> We therefore affirm the district court's ruling that declares the Virginia Act unconstitutional on the ground that it imposes an undue burden on a woman's constitutional right to choose a (previability) second trimester abortion. We likewise affirm the permanent injunction against enforcement of the Act. We recognize, of course, that Virginia may enact a statute that prohibits certain abortion procedures, such as the intact D&E, so long as the statute complies with the limits imposed by the Constitution. [*Gonzales v. Carhart*] provides the Commonwealth with further (and important) guidance.
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> *Richmond Medical Center v. Herring*, at 56, 57.

Current Status of Partial Birth Abortion Law

Virginia law

The 4th Circuit Court of Appeals decision in *Richmond Medical Center v. Herring* was rendered by a three-judge panel. If the 4th Circuit agrees to hear the case *en banc* prior to the upcoming regular General Assembly session and the full court disagrees with the panel's holding and itself holds that the intent of the doctor is clearly established in the statute to attach prior to the procedure, arguably Virginia need not amend the law. Otherwise, the Virginia Act will remain ineffectual until amended by the General Assembly to comport with the intent requirement in the federal Act. Meanwhile, however, the federal ban is in effect and the partial-birth abortion procedure is unlawful, provided interstate commerce is implicated.[16]

Implications of the Carhart decision on further abortion challenges

The federal Act was challenged in *Carhart* as unconstitutional on its face rather than "as-applied," meaning that there was no underlying factual issue involving an abortion and, more importantly, asserting that a simple reading of the statute exposes its unconstitutionality without the necessity of applying the law to a set of factual circumstances. The Court left open the possibility of an "as-applied" challenge to the "health-of-the-mother" exception, acknowledging that there could be an instance when the lack of such an exception in the law could raise a constitutional question.

Questions are also raised whether the decision may also have opened the door for (i) a further criticism of *Roe* and *Casey*,[17] (ii) a review and possible curtailment of the D&E procedure,[18] and (iii) a review of the applicability of a health exception (having now been found legally unnecessary in at least one instance) to other abortion procedures.

Notes

[1] § 1531. Partial-birth abortions prohibited-

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect one day after the date of enactment of this chapter.

(b) As used in this section-

(1) the term 'partial-birth abortion' means an abortion in which-

(A) the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

***

(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

[2] Fetal viability at the time *Roe* was decided was at approximately 28 weeks; at the time of *Casey*, fetal viability was at approximately 23 or 24 weeks. See, *Casey*, at 860.

[3] "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. §28—328(1) (Supp. 1999).

The statute defines "partial birth abortion" as: "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." §28—326(9).

It further defines "partially delivers vaginally a living unborn child before killing the unborn child" to mean "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Ibid.

The law classifies violation of the statute as a "Class III felony" carrying a prison term of up to 20 years, and a fine of up to $25,000. §§28—328(2), 28—105. It also provides for the automatic revocation of a doctor's license to practice medicine in Nebraska. §28—328(4).

[4] See, Note 5, infra.

[5] About 90% of all abortions performed in the United States take place during the first trimester of pregnancy, before 12 weeks of gestational age. During the first trimester, the predominant abortion method is "vacuum aspiration," which involves insertion of a vacuum tube into the uterus to evacuate the contents. Such an abortion is typically performed on an outpatient basis under local anesthesia. Vacuum aspiration is considered particularly safe. As the fetus grows in size, however, the vacuum aspiration method becomes increasingly difficult to use.

Approximately 10% of all abortions are performed during the second trimester of pregnancy (12 to 24 weeks). In the early 1970's, inducing labor through the injection of saline into the uterus was the predominant method of second trimester abortion Today, however, the medical profession has switched from medical induction of labor to surgical procedures for most second trimester abortions. The most commonly used procedure is called "dilation and evacuation" (D&E). That procedure (together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks of gestational age.

Between 13 and 15 weeks of gestation: D&E is similar to vacuum aspiration except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue. Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as a paracervical block may be administered, dilating agents, if used, are removed and instruments are inserted through the cervix into the uterus to removal fetal and placental tissue. Because fetal tissue is friable and easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains.

After 15 weeks: Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages to remove fetal and placental tissue.

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The D&E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. Nonetheless studies show that the risks of mortality and complication that accompany the D&E procedure between the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures).

[I]ntact D&E, [l]ike other versions of the D&E technique … begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix "intact," *i.e.*, in one pass, rather than in several passes. It is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. The intact D&E proceeds in one of two ways, depending on the presentation of the fetus. If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix. The breech extraction version of the intact D&E is also known commonly as "dilation and extraction," or D&X. In the late second trimester, vertex, breech, and traverse/compound (sideways) presentations occur in roughly similar proportion.

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"[I]ntact D&E and D&X are sufficiently similar for us to use the terms interchangeably."

Stenberg v. Carhart, at 923-928 (internal citations and quotations omitted).

[6] See, Note 1, supra.

[7] The Supreme Court consolidated two cases in its *Carhart* opinion—*Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (Nebraska 2004); and *Planned Parenthood of America v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. California 2004).

[8] The composition of the Court when *Stenberg* was decided was: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer. When *Carhart* was decided, Roberts and Alito had replaced Rehnquist and O'Connor.

[9] See, Page 4, supra.

[10] "It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E, so that the legislation accomplishes little. What we have already said, however, shows

ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D&E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." *Gonzales v. Carhart*, 127 S. Ct., at 1634, 1635 (internal citations and quotations omitted).

[11] § 18.2-71.1. Partial birth infanticide; penalty.

A. Any person who knowingly performs partial birth infanticide and thereby kills a human infant is guilty of a Class 4 felony.

B. For the purposes of this section, *"partial birth infanticide"* means 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.

The term *"partial birth infanticide"* shall not under any circumstances be construed to include any of the following procedures: (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the mother, or (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.

C. For the purposes of this section, *"human infant who has been born alive"* means a product of human conception that has been completely or substantially expelled or extracted from its mother, regardless of the duration of pregnancy, which after such expulsion or extraction breathes or shows 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.

D. For purposes of this section, *"substantially expelled or extracted from its mother"* means, in the case of a headfirst presentation, the infant's entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant's trunk past the navel is outside the body of the mother.

E. This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother, so long as the physician takes every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant. A procedure shall not be deemed necessary to prevent the death of the mother if completing the delivery of the living infant would prevent the death of the mother.

F. The mother may not be prosecuted for any criminal offense based on the performance of any act or procedure by a physician in violation of this section.

[12] Upon remand from the U.S. Supreme Court, Richmond Commonwealth's Attorney Herring was substituted as a party for Richmond Commonwealth's Attorney Hicks. On remand the case was known as *Richmond Medical Center for Women v. Herring*.

[13] See, Note 12.

[14] Va Code Ann § 18.2-71.1(A).

[15] 18 USC § 1531 (b)(1)(A).

[16] The Federal Act only applies to abortions "affecting interstate or foreign commerce." See, Note 1, supra.

[17] "I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), has no basis in the Constitution." *Gonzales v. Carhart*, at 1639, 1640 (concurring opinion by Justice Thomas).

[18] "The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off." *Stenberg v. Carhart*, 530 U.S. at 959. (Kennedy, J., dissenting) (internal citations omitted) (describing D&E, the abortion procedure that remains legal following *Carhart).* See, also, Note 8.

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