Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	To: The Most Reverend J. Francis Stafford re: address (partial) (1 page)	08/07/1996	P6/b(6)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:
Partial Birth [2]

2012-0254-S
rc669

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 10, 1997

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 1122, which would prohibit doctors from performing a certain kind of abortion. I am returning H.R. 1122 for exactly the same reasons I returned an earlier substantially identical version of this bill, H.R. 1833, last year. My veto message of April 10, 1996, fully explains my reasons for returning that bill and applies to H.R. 1122 as well. H.R. 1122 is a bill that is consistent neither with the Constitution nor sound public policy.

As I have stated on many occasions, I support the decision in Roe v. Wade protecting a woman's right to choose. Consistent with that decision, I have long opposed late-term abortions, and I continue to do so except in those instances necessary to save the life of a woman or prevent serious harm to her health. Unfortunately, H.R. 1122 does not contain an exception to the measure's ban that will adequately protect the lives and health of the small group of women in tragic circumstances who need an abortion performed at a late stage of pregnancy to avert death or serious injury.

I have asked the Congress repeatedly, for almost 2 years, to send me legislation that includes a limited exception for the small number of compelling cases where use of this procedure is necessary to avoid serious health consequences. When Governor of Arkansas, I signed a bill into law that barred third-trimester abortions, with an appropriate exception for life or health. I would do so again, but only if the bill contains an exception for the rare cases where a woman faces death or serious injury. I believe the Congress should work in a bipartisan manner to fashion such legislation.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 10, 1997.

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 10, 1996

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 1833, which would prohibit doctors from performing a certain kind of abortion. I do so because the bill does not allow women to protect themselves from serious threats to their health. By refusing to permit women, in reliance on their doctors' best medical judgment, to use this procedure when their lives are threatened or when their health is put in serious jeopardy, the Congress has fashioned a bill that is consistent neither with the Constitution nor with sound public policy.

I have always believed that the decision to have an abortion generally should be between a woman, her doctor, her conscience, and her God. I support the decision in Roe v. Wade protecting a woman's right to choose, and I believe that the abortions protected by that decision should be safe and rare. Consistent with that decision, I have long opposed late-term abortions except where necessary to protect the life or health of the mother. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health.

The procedure described in H.R. 1833 has troubled me deeply, as it has many people. I cannot support use of that procedure on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available.

There are, however, rare and tragic situations that can occur in a woman's pregnancy in which, in a doctor's medical judgment, the use of this procedure may be necessary to save a woman's life or to protect her against serious injury to her health. In these situations, in which a woman and her family must make an awful choice, the Constitution requires, as it should, that the ability to choose this procedure be protected.

In the past several months, I have heard from women who desperately wanted to have their babies, who were devastated to learn that their babies had fatal conditions and would not live, who wanted anything other than an abortion, but who were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to ever bear children again. For these women, this was not about choice -- not about deciding against having a child. These babies were certain to perish before, during or shortly after birth, and the only question was how much grave damage was going to be done to the woman.

I cannot sign H.R. 1833, as passed, because it fails to protect women in such dire circumstances -- because by treating doctors who perform the procedure in these tragic cases as criminals, the bill poses a danger of serious harm to women. This bill, in curtailing the ability of women and their doctors to choose the procedure for sound medical reasons, violates the constitutional command that any law regulating abortion protect both the life and the health of the woman. The bill's overbroad criminal prohibition risks that women will suffer serious injury.

That is why I implored Congress to add an exemption for the small

number of compelling cases where selection of the procedure, in the medical judgment of the attending physician, was necessary to preserve the life of the woman or avert serious adverse consequences to her health. The life exception in the current bill only covers cases where the doctor believes that the woman will die. It fails to cover cases where, absent the procedure, serious physical harm, often including losing the ability to have more children, is very likely to occur. I told Congress that I would sign H.R. 1833 if it were amended to add an exception for serious health consequences. A bill amended in this way would strike a proper balance, remedying the constitutional and human defect of H.R. 1833. If such a bill were presented to me, I would sign it now.

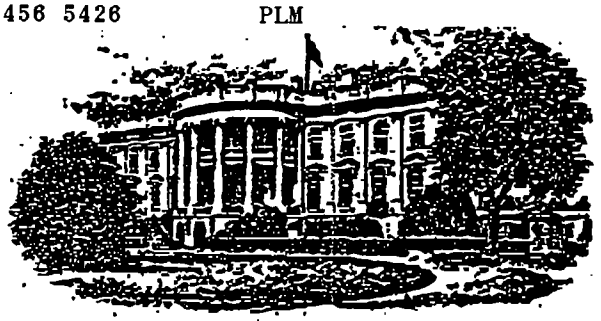
I understand the desire to eliminate the use of a procedure that appears inhumane. But to eliminate it without taking into consideration the rare and tragic circumstances in which its use may be necessary would be even more inhumane.

The Congress chose not to adopt the sensible and constitutionally appropriate proposal I made, instead leaving women unprotected against serious health risks. As a result of this Congressional indifference to women's health, I cannot, in good conscience and consistent with my responsibility to uphold the law, sign this legislation.

WILLIAM J. CLINTON

THE WHITE HOUSE,
April 10, 1996.

# # #



THE WHITE HOUSE

WASHINGTON

FACSIMILE / MEMO FROM: John Corcoran
OFFICE OF PRESIDENTIAL LETTERS AND MESSAGES
OLD EXECUTIVE OFFICE BUILDING, ROOM 93

VOICE: (202) 456- 5515 FAX: (202) 456-5426

NUMBER OF PAGES (INCLUDING COVER): 5

DATE: 3/14/2000

TO: Heather Howard, DPC

VOICE:

FAX: 6-2876

- ☐ FOR YOUR ACTION
- ☐ INCOMING LETTER(S) FROM:
  RE:
- ☐ FOR YOUR REVIEW / APPROVAL
- ☐ PER MY E-MAIL OR VOICE-MAIL MESSAGE TO YOU
- ☒ PER YOUR REQUEST

ADDITIONAL COMMENTS:

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 10, 1996

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The procedure described in H.R. 1833 has troubled me deeply, as it has many people. I cannot support use of that procedure on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available.

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In the past several months, I have heard from women who desperately wanted to have their babies, who were devastated to learn that their babies had fatal conditions and would not live, who wanted anything other than an abortion, but who were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to ever bear children again. For these women, this was not about choice -- not about deciding against having a child. These babies were certain to perish before, during or shortly after birth, and the only question was how much grave damage was going to be done to the woman.

I cannot sign H.R. 1833, as passed, because it fails to protect women in such dire circumstances -- because by treating doctors who perform the procedure in these tragic cases as criminals, the bill poses a danger of serious harm to women. This bill, in curtailing the ability of women and their doctors to choose the procedure for sound medical reasons, violates the constitutional command that any law regulating abortion protect both the life and the health of the woman. The bill's overbroad criminal prohibition risks that women will suffer serious injury.

That is why I implored Congress to add an exemption for the small

number of compelling cases where selection of the procedure, in the medical judgment of the attending physician, was necessary to preserve the life of the woman or avert serious adverse consequences to her health. The life exception in the current bill only covers cases where the doctor believes that the woman will die. It fails to cover cases where, absent the procedure, serious physical harm, often including losing the ability to have more children, is very likely to occur. I told Congress that I would sign H.R. 1833 if it were amended to add an exception for serious health consequences. A bill amended in this way would strike a proper balance, remedying the constitutional and human defect of H.R. 1833. If such a bill were presented to me, I would sign it now.

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The Congress chose not to adopt the sensible and constitutionally appropriate proposal I made, instead leaving women unprotected against serious health risks. As a result of this Congressional indifference to women's health, I cannot, in good conscience and consistent with my responsibility to uphold the law, sign this legislation.

WILLIAM J. CLINTON

THE WHITE HOUSE,
April 10, 1996.

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August 7, 1996

The Most Reverend J. Francis Stafford
Archbishop of Denver

P6/(b)(6)

[001]

Dear Archbishop Stafford:

Thank you for your thoughtful letter and the beautiful photograph from my visit with His Holiness, Pope John Paul II. I'm grateful for your generosity, and I'm glad you took the time to write about the difficult issue of late-term abortions. Because my position on this issue and the so-called "Partial Birth Abortion Ban" bill has been widely misunderstood, I'd like to explain it as clearly as I can.

I am against late-term abortions and have long opposed them, except, as the Supreme Court requires, where necessary to protect the life or health of the mother. As Governor of Arkansas, I signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health, and I would sign a bill to do the same thing at the federal level if it were presented to me.

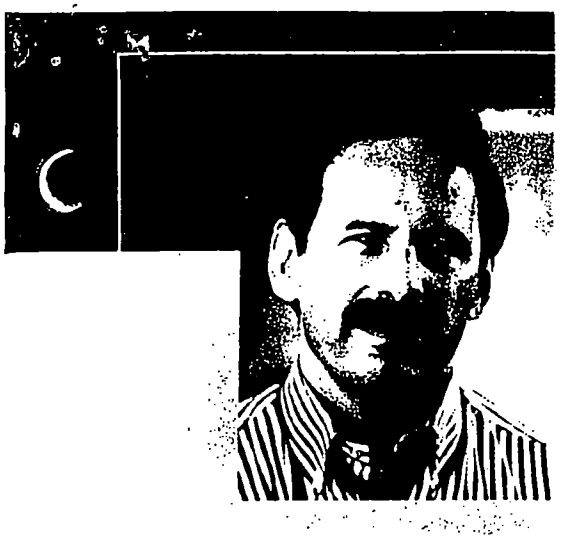
The particular procedure described in H.R. 1833 poses a difficult and disturbing issue, one which I studied and prayed about for many months. When I first heard a description of this procedure, I anticipated that I would support the bill. But after I studied the matter and learned more about it, I came to believe that this rarely used procedure is justifiable as a last resort when doctors judge it necessary to save a woman's life or to avert serious consequences to her health.

In April, I met several women who desperately wanted to have their babies and were devastated to learn that their babies had fatal conditions and would not live. These women wanted anything other than an abortion, but were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm. For these women, this was not about choosing against having a child. Their babies were certain to perish

before, during, or shortly after birth. The only question was how much grave damage the mother was going to suffer. In these rare cases, I believe the woman's doctors should have the ability to determine, in the best exercise of their medical judgment, that the procedure is indeed necessary.

The problem with H.R. 1833 is that it provides an exception to the ban on this procedure only when a doctor believes that a woman's life is in danger. That is why I implored Congress to add a limited exception for the small number of compelling cases where use of the procedure is necessary to avert serious adverse health consequences. Congress ignored my proposal, but I have continued to make it clear that I will sign a bill that meets my concerns. We cannot abandon women that need the procedure to avoid serious injury. I continue to hope that a solution can be reached on this painful issue. I appreciate the opportunity to explain my views and, again, thank you for your thoughtful gift and the assurance of your prayers.

Sincerely,



Stuart Taylor Jr.

WHEN ABORTION LAWS DEFY COMMON SENSE

Any parent who has rejoiced at seeing a sonogram showing the image of a second-trimester fetus knows how much it looks like a baby. And any parent who has seen a baby blossom into a vibrant teenage girl can imagine the agony of hearing her plead for help in aborting a pregnancy that she had hidden for three months. But any parent who would know with certainty what to say to that teenage girl must be smarter than I am.

Under "partial-birth" abortion laws adopted by many states, twice passed by Congress, and twice vetoed by President Clinton, one option would apparently be illegal: the most common (by far), and probably the safest, form of second-trimester abortion. That's the basis of three decisions issued on Sept. 24 by the U.S. Court of Appeals for the 8th Circuit, striking down "partial-birth" abortion laws in Nebraska, Iowa, and Arkansas.

The unanimous 8th Circuit rulings—written by a Carter appointee and joined by two Reagan appointees—are the latest in a line of opinions joined by some 26 judges, including 11 Reagan and Bush appointees, suggesting that "partial-birth" abortion laws are unconstitutional. Four judges thus far have suggested the contrary.

Right-to-life advocates have sold much of the public, and many legislators, on the myth that "partial-birth" abortion laws would outlaw only an especially grisly (and rare) way of killing third-trimester fetuses on the verge of birth.

False. Some 28 of the 30 state "partial-birth" abortion laws would ban certain procedures to abort fetuses at any stage of pregnancy—including fetuses that are not yet viable, and arguably including some in the first trimester. The laws except only abortions necessary to protect the life of the woman. And many of them threaten doctors with criminal penalties as harsh as life imprisonment for using abortion procedures that are morally indistinguishable from other procedures that would not be restricted.

Below I describe two abortion procedures used in the second and third trimesters. Both—indeed, *all* abortion procedures—are gruesome to contemplate. This may help account for the reluctance of some of us (including me, until now) to ponder in detail whether particular procedures should be banned.

Advocates of "partial-birth" abortion laws claim that they would restrict only an extremely rare procedure called dilation and extraction (D&X). It involves pulling the fetus, feet first, from the uterus, through the cervix, and into the vagina, except for the head; using scissors or another surgical instrument to rupture the skull; and then suctioning out the brain. The more the abortion debate has centered on this image of the dismemberment of nearly born babies—rather than on the plight of women with unwanted pregnancies—the better the right-to-life side has done in the court of public opinion.

Thus was Senator Daniel Patrick Moynihan, D-N.Y., for example, persuaded that "partial-birth" abortion is so "close to infanticide" that it should be outlawed. But if Moynihan thought he was voting to restrict only late-term abortions, he was misinformed. As the 8th Circuit held, "partial-birth" abortion has "no fixed legal or medical content." It means whatever a legislature defines it to mean. And under most definitions, these laws are very broad.

The laws in many states, and the measure that passed Congress in 1997, outlaw abortions in which the doctor kills the fetus after pulling any "substantial portion" from the uterus into the vagina.

And that, the 8th Circuit said, is precisely what doctors do, not only in D&X abortions but also in "dilation and evacuation" (D&E) abortions—the most com-

mon method in the second trimester. D&E abortions typically involve using forceps to pull an arm or a leg from the uterus into the vagina and then dismembering the fetus.

In striking down the three statutes, the 8th Circuit cited Supreme Court precedents, including the 1992 ruling in *Planned Parenthood vs. Casey* that a state may not place "a substantial obstacle in the path of a woman seeking an abortion" of any fetus that is not yet viable.

In an effort to dodge these precedents, those who defend "partial-birth" abortion laws in court have interpreted them as narrowly as possible, resorting to some bizarre distinctions. Thus, in disputing the view that "partial-birth" abortion laws (or some of them) would restrict D&E abortions, the laws' defenders argue that they would restrict only procedures in which fetuses are intentionally dismembered and killed *after* being pulled into the vagina (D&X)—and *not* procedures in which fetuses are dismembered and killed *while* being pulled into the vagina (D&E).

Think about that distinction.

A three-judge panel of the 8th Circuit showed that the Nebraska, Iowa, and Arkansas statutes in fact make no such distinction. Written by Judge Richard S. Arnold—a Carter appointee (and Little Rock friend of President Clinton's)—the three 8th Circuit opinions were joined by Chief Judge Roger L. Wollman of the 8th Circuit and Chief Judge Paul A. Magnuson of the U.S. District Court in Minnesota. Both are Reagan appointees.

The 8th Circuit left it to others to ponder why, as a matter of morality or common sense, the legality of an abortion should turn on where in the birth canal various parts of the fetus are located when it is killed.

Chief Judge Richard A. Posner of the U.S. Court of Appeals for the 7th Circuit tackled that question last November in a decision (now being reviewed by the full 7th Circuit) that preliminarily enjoined Wisconsin's "partial-birth" abortion statute.

IT'S A MYTH THAT "PARTIAL-BIRTH" ABORTION LAWS ARE CONFINED TO A RARE THIRD-TRIMESTER PROCEDURE.

"The constitutional right to an abortion carries with it the right to perform medical procedures that many people find distasteful or worse," wrote Posner, a Reagan appointee. "The singling out of the D&X procedure for anathematization seems arbitrary to the point of irrationality. Annexing the penalty of life imprisonment to a medical procedure that may be the safest alternative for women who have chosen abortion because of the risk that childbirth would pose to their health adds a note of the macabre to the Wisconsin statute."

I'm with Posner. I can well understand why some critics of *Roe* want to outlaw *any* procedure that destroys a fetus, especially in the later stages of pregnancy. I can't understand why the legality of an abortion should not turn on the safety of the procedure, or the health of the woman, or the stage of fetal development—but rather on exactly how far into the birth canal the fetus is pulled before being destroyed.

"No argument is made," as Posner wrote, "that if a fetus feels pain, the pain feels worse when the fetus is killed in the birth canal than when death occurs a moment earlier in the womb."

Posner also punctured the implausible claims that "partial-birth" abortion laws don't burden women seeking abortions, because an equally safe, legal alternative procedure is always available. If this were so, Posner wrote, the statute "cannot discourage abortions—cannot save any fetuses—but can merely shift their locus from the birth canal to the uterus."

Conversely, such a law "can save fetuses only by endangering pregnant women, since the only time a woman denied a partial birth abortion will decide to carry the fetus to term is when the alternative methods of abortion would pose a greater risk to her."

And if (as some evidence suggests) "partial-birth" abortion laws, in fact, would block some women from access to the safest abortion procedure, the laws also conflict with *Roe*'s holding that even post-viability abortions may not be restricted in ways that would endanger the woman's life *or health* (including emotional health).

None of this is in the Constitution, of course. That's why *Roe* is so hard to defend as an exercise in constitutional interpretation. But even if the Supreme Court was wrong to constitutionalize abortion in 1973, the question on the table is whether "partial-birth" abortion laws make any sense now.

To return to where I started: If I had a daughter who (after due consideration of all options) wanted a second-trimester abortion, I'd probably swallow my misgivings and help her get one. If the safest abortion procedure were illegal where we lived, I'd take her to another state, or another country. If the fetus were viable, I might feel differently. But even then, my main concern would be my daughter's health, including her mental health.

That's why I would not support a "partial-birth" abortion law, even if it was limited to viable fetuses—and why I see no sense in these laws as written, most of which would deny the safest abortion procedure to women at earlier stages of pregnancy. ■

CONFIDENTIAL MEMORANDUM

TO: INTERESTED PARTIES
FROM: PETER D. HART RESEARCH ASSOCIATES
DATE: MARCH 23, 1999
RE: RECENT SURVEY FINDINGS

Findings from the recent polling that we conducted for The Tides Foundation provide encouraging news for the pro-choice movement in terms of continued public support for pro-choice policies, pro-choice candidates, and the basic legal right to an abortion. More important, however, these results also identify several significant and largely unrealized opportunities for the pro-choice movement both to combat efforts by anti-choice legislators and groups and to advance a proactive, pro-choice agenda—and to do both using the values, principles, and beliefs that a solid majority of Americans consistently and enthusiastically embrace. In addition to these strategic insights, the survey results provide important information on developing messages and priorities with which to frame the abortion debate in today's political climate.

While there has been a fair amount of attention paid to the public's seemingly declining support for abortion rights in recent years, America firmly remains a pro-choice country. Indeed, six in ten (61%) voters rate "protecting a woman's right to choose" as a seven or higher on a ten-point scale of priorities for the federal government; and a solid majority (57%) of voters say that they favor pro-choice candidates for both Congress and governor, while just one-third (33%) would prefer pro-life candidates. Two challenges remain for the pro-choice community in the current political climate: 1) although a majority of Americans continue to express pro-choice beliefs on key measures, the intensity of pro-choice sentiment has shifted away from the most strongly pro-choice positions to more qualified demonstrations of support; 2) when it comes to taking action (such as voting), anti-choice voters are considerably more energized and mobilized than are pro-choice voters.

As the findings reveal, pro-choice organizations already enjoy a considerable advantage over anti-choice groups in the minds of American voters in terms of the values that each side represents and the qualities that each demonstrates with its actions. By decisive margins, voters attribute

positive characteristics, such as "respects the rights of individuals," to the pro-choice community and negative attributes, such as "takes extreme positions on issues too much of the time," to the anti-choice community.

Perhaps the most encouraging news emerging from this survey is that the pro-choice movement has an opportunity to use public opinion to combat anti-choice efforts. For example, on two high-profile issues—so-called "partial-birth" abortion and minors crossing state lines—pro-choice forces gain considerable ground and actually bring these issues back to a fairly even playing field when the argument is matched against the argument of anti-choice forces. Public opinion already favors a pro-choice position, in some cases by a decisive margin, on a variety of other anti-choice measures, such as prohibiting health insurance plans for federal government employees from covering many forms of prescription contraception and restricting even privately funded abortions at overseas U.S. military hospitals.

These survey findings also provide a strong rationale for the development of a proactive, pro-choice agenda; in fact, these results demonstrate that pro-choice groups and legislators are not confined to a narrow set of opportunities. A majority of Americans express support for six specific pro-choice initiatives, including federal funding for poor women to have access to abortion in cases in which a doctor determines that it is medically necessary, and restricting Internet information about doctors who perform abortions.

Finally, the results of this survey provide invaluable information for strategically framing the choice debate in the next millennium. With tremendous unanimity, voters express serious concerns about the anti-choice agenda and rally strongly around the values and principles that serve as cornerstones of the pro-choice movement. Paramount among these values is the idea of government interference in private decisions—in fact, concern about undue government intrusion mobilizes pro-choice constituencies and also reaches far inside the base of the anti-choice community. Increasingly in the debate over reproductive choice, voters respond less to the implications of "*who decides*" and more to the ramifications of "*who doesn't decide.*"

CONFIDENTIAL MEMORANDUM

TO: Members of Congress and Legislative Staff

FROM: Geoffrey Garin

DATE: September 8, 1998

RE: The Partial-Birth Abortion Override

Recent polling that we conducted for The Center on Reproductive Law and Policy clearly shows that the "partial-birth abortion" debate provides an important opportunity for the pro-choice movement to regain public support by exposing the anti-choice position as being extreme, deceptive, and unconstitutional.

Our polling demonstrates that the following statement supporting the President's veto of the "partial-birth abortion" ban is a powerful and winning argument.

> The "partial-birth abortion" ban as passed by the anti-choice forces in Congress should be opposed because it is extreme, deceptive, and unconstitutional.
>
> **The measure is extreme because it doesn't provide exceptions for serious harm to the woman's health.** If enacted, this law would lead to undue government interference in medical decisions that should be left up to women and their doctors, and would put women at risk by forcing them to use a more dangerous abortion procedure to avoid serious harm to their health than the one their doctor would otherwise have recommended.
>
> **This measure is deceptive.** The bill focuses attention on a single abortion procedure while banning the safest procedures to protect a woman's health throughout the pregnancy. Legal and medical experts agree that this is not a restriction on one, but potentially all, abortion procedures. In fact, the American College of Obstetricians and Gynecologists opposes this bill, saying that it is "inappropriate, ill-advised, and dangerous."
>
> **The measure is unconstitutional.** In 17 out of 18 cases, federal and state courts have ruled that this type of law violates the Constitution because it is worded so broadly and vaguely that it actually would ban the most commonly used abortion procedures.
>
> This measure is being sponsored by politicians who are interested in gaining political support from powerful, conservative groups that oppose a woman's right to choose in all forms, and in catering to these interests they are sponsoring an extreme, deceptive, and unconstitutional measure that deserves to be vetoed.

The findings demonstrate that elected officials have an opportunity to win public approval by opposing the "partial-birth abortion" bill. Once Americans learn more about the "partial-birth abortion" bill in Congress, their views shift dramatically. Key findings from our research include the following:

① When told that Congress had passed a bill banning "partial-birth abortions," except in cases when it is necessary to save the life of the woman, but that President Clinton vetoed the ban because it does not allow for any exceptions in cases when the procedure is necessary for preventing serious harm to the woman's health, Americans agree with the President rather than Congress on this matter by 44% to 34%. Democrats support the President by 58% to 24%, and independents support his position by 47% to 30%. Republicans support the Congressional position by 51% to 25%; pro-choice Republicans are divided evenly (38% Clinton, 35% Congress).

② Americans say by 65% to 23% that there should be an exception to the ban in cases when "the woman's doctor determines that the procedure is necessary to prevent serious harm to the woman's health." This represents a dramatic shift from the 64% to 24% margin of Americans who originally say they favor the proposal in Congress that would ban "partial-birth abortions" except when necessary to save the life of the woman. Even among those who strongly favor a ban on "partial-birth abortion," 63% say that there should be an exception for preventing serious harm to the woman's health.

③ When asked what their reaction would be if their member of Congress opposed making any exceptions to the "partial-birth abortion" ban for cases in which the procedure is needed to prevent serious harm to the woman's health, 45% say they would be *less* likely to support that member of Congress, while just 18% say they would be more likely to support someone who takes this position. Pro-choice Republicans are split 48% to 20% against a member of Congress who opposes the health exception.

④ When Americans are read criticisms of the Congressional ban, at least two-thirds rate the following as giving them very or fairly serious concerns: (1) this law represents government interference in personal and difficult medical decisions that should be left up to women, their families, and their doctors (55% very serious, 20% fairly serious); (2) by passing this law, politicians and government would be putting women at risk by forcing them to use a more dangerous abortion procedure than the one their doctor would have otherwise recommended (53% very serious, 20% fairly serious); (3) this law is so extreme that it does not provide exceptions for serious harm to the woman's health (52% very serious, 25% fairly serious); and, (4) this law is a deceptive measure by politicians to focus public attention on the difficult subject of late-term abortion, while actually banning safe and legal procedures throughout pregnancy (46% very serious, 22% fairly serious).

⑤ The political motivations of the authors of this extreme version of the "partial-birth abortion" ban can be attacked with great credibility. By 59% to 19%, Americans say that politicians who are trying to impose more restrictions on abortion are concerned mainly with gaining support from powerful conservative religious groups, rather than with protecting unborn life.

LAKE SOSIN SNELL PERRY
& ASSOCIATES, INC.

POLL CONDUCTED ON BEHALF OF EMILY'S LIST

Do you favor or oppose allowing medically-necessary late-term abortions to save the life and health of the mother or aren't you sure?

Favor 73%
Oppose 13%
Don't know.....14%

Lake Sosin Snell Perry & Associates designed and administered this survey which was conducted by phone using professional interviewers. The survey reached 1000 registered voters, ages 18 and older, who reported that they voted in the November 1996 elections for President. The survey was conducted between June 18 and June 23, 1997. Telephone numbers for the survey were drawn from a random digit dial sample (RDD). Respondents for interviewing were drawn randomly within households using the most recent birthday method. The sample was stratified geographically by state based on each state's rate of turnout in the 1992 general election adjusted for current registration. The data were weighted on education level, race, and religion to ensure the sample is an accurate reflection of the electorate. The total margin of error for this survey is +/- 3.1%.

HICKMAN·BROWN
PUBLIC OPINION RESEARCH

Now I want you to think about the upcoming election for Congress. For the following description of candidates' positions on abortion, tell me which one you would be more likely to vote for. Which one of those two candidates would you personally be more inclined to vote for?

		Democrat		Independent		Republican	
	All Voters	Men	Women	Men	Women	Men	Women
A candidate who would **ban** late-term abortions even if the woman's health is in danger	30%	29%	26%	23%	33%	29%	35%
OR							
A candidate who would **not ban** late-term abortions if the woman's health is in danger	58	58	66	52	46	60	56
(Neither/Depends/Other/No Difference)	10	11	7	22	22	9	6
(Don't Know)	2	2	1	3	0	2	3

These results are based on a survey conducted by Hickman-Brown Research with 800 registered voters in the United States. The sample was stratified to reflect geographic patterns of registered voters within the country, and were drawn according to standard Random Digit Dialing procedures. Telephone interviewing was conducted October 23-26, 1995, by professional interviewers. A minimum of three attempts on different days were used to reach the randomly selected households; random sampling within the selected households was employed to identify eligible respondents. With a confidence level of 95%, the margin of potential sampling error associated with a sample of 800 is 3.5%. This means that the results are within the specified range (plus or minus) that would have been obtained if all registered voters in the United States had been interviewed.

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Fact Sheet

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Why Abortion Bans are Unconstitutional

The federal bill and state laws banning so-called "partial birth" abortion do far more than ban the one type of late second-trimester abortion procedure that many people associate with the term "partial birth."

Most of the state laws make it a criminal offense for a physician to perform a so-called "partial birth" abortion *at any time* in pregnancy — including throughout the first trimester and in the second trimester before a fetus is viable. Moreover, the laws define "partial birth" abortion so broadly and vaguely that the laws could be understood to ban *every* type of abortion procedure except early medical abortion and hysterotomy, which requires an incision in the woman's abdomen*:

- Fifteen courts — Alaska, Arizona, Arkansas, Florida, Georgia, Illinois (reversed), Iowa, Kentucky, Louisiana, Michigan, Montana, Nebraska, New Jersey, Rhode Island, Virginia (stayed) — have ruled that these laws would ban dilation and evacuation abortions, used in 93 percent of second-trimester abortions (Koonin *et al.*, 1999).

- Seven of those courts — Alaska, Arizona, Arkansas, Florida, Illinois (reversed), Louisiana, and New Jersey — have also ruled that the laws would ban induction procedures, used in 2 percent of second-trimester abortions (Koonin *et al.*, 1999).

- Seven of the courts — Alaska, Arkansas, Illinois (reversed), Iowa, Louisiana, New Jersey, and Virginia (stayed) — have ruled that the laws would ban suction curettage procedures, used in over 95 percent of first-trimester abortions (Koonin *et al.*, 1999).

In several respects, these laws fundamentally undermine the critical balance between the rights of the pregnant woman and the state's interest in the potential life of the fetus established by the U.S. Supreme Court in *Roe v. Wade* (1973) and reaffirmed in *Planned Parenthood v. Casey* (1992).

- Because of their broad and vague language, these laws significantly reduce women's access to the safest and most common medical procedures for terminating a pregnancy prior to fetal viability. For example, an Alaska court ruled: "The broad sweep of the language involved could allow broad enforcement against most, or all, abortion procedures depending upon the choice of the prosecuting authority." (*Planned Parenthood v. Alaska*, 1998). Similarly, a federal court ruled that New Jersey's law "threatens women with irreparable injury because they may be denied access to the most conventional and safest abortion procedures." (*Planned Parenthood v. Verniero*, 1998). This violates the principle established in *Casey*, that a state may not place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (*Planned Parenthood of Southeastern Pa. v. Casey*).

- These laws ban safe medical procedures

without allowing an exception to protect a woman's health, thereby devaluing the life and health of a pregnant woman in favor of the potential life of a pre-embryo, embryo, or fetus. This directly contravenes one of the core principles of *Roe* — that the life and health of the pregnant woman are paramount *throughout* pregnancy.

- These laws violate the "right of the physician to administer medical treatment according to his [or her] professional judgment" (*Roe*, at 165), including the right to determine what medical procedure is best for his or her patient, which is at the core of the right to choose abortion that was also established in *Roe*.

Even if the laws banned only the intact dilation and extraction (D&X) abortion procedure that much of the public equates with so-called "partial birth" abortion, such laws would be unconstitutional.

- One federal court ruled that D&X is the safest abortion method in the later part of the second trimester, even before the fetus is viable, and banning it would subject women "to an appreciably greater risk of injury or death than would be the case if these women could" obtain the banned procedure‡ (*Carhart v. Stenberg*, 1998).

- Similarly, another federal court ruled that the "D&X procedure appears to have the potential of being a safer procedure than all other abortion procedures" in the later part of the second trimester (*Women's Med. Prof'l Corp. v. Voinovich*, 1998; *Evans v. Kelley*, 1997).

In its October 26, 1999 decision, the U.S. Court of Appeals for the Seventh Circuit found Illinois and Wisconsin "partial birth" abortion laws constitutional (*Hope Clinic v. Ryan*, 1999a). On November 30, 1999, however, U.S. Supreme Court Justice John Paul Stevens issued an order blocking the enforcement of these laws (*Hope Clinic v. Ryan*, 1999b). The issue seems headed for a final resolution by the U.S. Supreme Court (Biskupic, 1999) because the Seventh Circuit's ruling is in conflict with the September 24, 1999 rulings of the U.S. Court of Appeals for the Eighth Circuit in three related cases (*Carhart v. Stenberg*; *Little Rock Family Planning Services v. Jegley*; *Planned Parenthood of Greater Iowa v. Miller*).

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*Most of the state laws and the federal bill define the term "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." The laws further define the term "vaginally delivers a living fetus before killing the fetus" as meaning "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."

‡*Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1123 (D. Neb. 1998), *affirmed on other grounds*, No. 98-3245NE, 1999 WL 753919 (8th Cir. Sept. 24, 1999). The court ruled that this procedure is safer than other variants of the D&E because: "(a) it reduces instrumentation in the uterus that can cause damage to the uterus and cervix; (b) it reduces uterine or cervical perforation from bony fragments; (c) it prevents disseminated intravascular coagulopathy (DIC) and amniotic fluid embolus (among the most common causes of maternal mortality and complications) . . . ." *Carhart*, 11 F. Supp. 2d at 1123.

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Prepared 12/99

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Partial Birth
April 5, 2000

Will the President veto the bill passed by the House today?

The President has said he will veto the bill for the same reasons he vetoed similar bills in the 104th and 105th Congresses -- because it lacks a health exception.

Did the President support the Hoyer-Greenwood substitute?

The President has repeatedly said he would sign a bill that bans late-term abortions with an appropriate exception for life or health. For that reason, he supported the Hoyer-Greenwood substitute.

Isn't this position inconsistent with the position the Administration took in the Supreme Court case (Carhart v. Stenberg)?

~~The Administration filed an amicus brief in that case because~~ No. The Nebraska statute that is the subject of the case does not meet the standards that the President has indicated are necessary for any acceptable legislation. ~~His position has been consistent.~~

Do you believe that there is any significance to the Court's denying the DOJ's request for oral argument in Carhart?

~~DOJ's arguments~~ No. ~~The Administration's position~~ fully ~~set forth in the brief~~ in its brief

No. The arguments of the Dept of Justice are fully set out in its brief

Stenberg v. Carhart (Partial-Birth Abortion Case)

Background: A Nebraska law enacted in 1997 prohibits any "partial-birth abortion" except when "necessary to save the life of the mother." Violation of the law by a physician is punishable as a felony. The U.S. Court of Appeals for the Eighth Circuit held that because the law, as drafted, prohibits the most common procedure for second-trimester abortions, it imposes an "undue burden" on a woman's right to choose to have an abortion in violation of the Constitution. The State of Nebraska petitioned for Supreme Court review of the decision, and the Supreme Court will hear argument on April 25.

Q: Is the federal government filing an amicus brief in the partial-birth abortion case?

A: Yes. The President has vetoed similar bills passed by the 104th and 105th Congresses, in part because of constitutional concerns about how far the prohibitions went.

Q: Doesn't the brief indicate that the President has changed his position and now opposes any ban on partial-birth abortion?

A: No. The Nebraska statute that is the subject of the case does not meet the standards that the President has indicated are necessary for any acceptable legislation.

Q: Has the President's position changed?

A: The President's position is, and always has been, that statutes like the one at issue in this case are not constitutional.

NARAL
Reproductive Freedom & Choice

To: Reproductive Health Staff
From: Allison Herwitt, Director of Government Relations
Donna Crane, Legislative Representative
Date: March 23, 2000
Subject: ***Upcoming House Consideration of H.R.3660, the "Partial-Birth" Abortion Ban***

As early as the week of April 2, the House may consider H.R.3660, the so-called "Partial-Birth" Abortion Ban. **NARAL strongly opposes this legislation and will score this vote in our 2000 *Congressional Record on Choice.***

This marks the third Congress in which this legislation has been considered. Each of the two previous times, the president's veto has been sustained in the Senate but overridden in the House.

Additionally, over the past five years, 31 states have enacted similar legislation. Court challenges against these laws have been initiated in 21 states, and in 20 states, courts or attorneys general have prohibited full enforcement of the laws. Even though the Supreme Court is set to hear arguments on Nebraska's so-called "partial-birth" ban April 25, the anti-choice House leadership is bringing up this bill yet again to force pro-choice members to vote in an election year on an issue that has been demagogued in graphic and sensational rhetoric.

Additionally, American voters across the country have concluded the bans are deceptive and extreme; ballot initiatives to outlaw so-called "partial-birth" abortions recently have been defeated in Colorado, Washington, and Maine.

H.R.3660, though modified very slightly from earlier versions of this legislation, remains unconstitutional and deceptive:

- "Partial-birth" is a political term, not a medical term. The definition of what methods of abortion would be banned is vague and overbroad. Courts have found it would ban a variety of safe abortion procedures used throughout pregnancy, not just one technique.

- By banning a variety of safe abortion procedures, the legislation would significantly narrow the options available to women seeking abortion, forcing doctors to use procedures that may be less appropriate and safe for the woman's particular circumstances. This imposes an unconstitutional undue burden on women's freedom to choose.

- The bill endangers women's health by failing to include a constitutionally mandated exception to protect the health of the woman.

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- The bill attempts to micro-manage surgical procedures, which undermines the health of women and intrudes on the doctor-patient relationship.

In addition to its inherent legislative flaws, this new bill is being introduced just as the Supreme Court is poised to decide whether Nebraska's so-called "partial-birth" ban is an unconstitutional violation of the right to choose. The Congress should not legislate on this matter; rather, members should let the Supreme Court rule.

Please join the reproductive health community and respected health organizations such as the American College of Obstetricians and Gynecologists (ACOG), the American Medical Women's Association (AMWA), the American Nurses Association and the American Public Health Association in opposition to this legislation. Additional information H.R.3660 is enclosed for your information. If you have any questions, please contact Allison Herwitt at 973-3003 or Donna Crane at 973-3047.

NARAL
Reproductive Freedom & Choice

PROTECT WOMEN: OPPOSE BANS ON SO-CALLED "PARTIAL-BIRTH" ABORTION

Opponents of choice have been using inflammatory rhetoric about "infanticide" and "partial-birth" abortion in a nationwide strategy to further their goal of eroding women's reproductive options. These legislators say they are trying to ban only one abortion procedure, but the vague and broadly worded legislation indicates another motive: they want a political tool to use against women and politicians to undermine support for reproductive choice.

- **Private medical decisions should be made by women and their families, not politicians.** Medical decisions are often difficult and complex and depend on a variety of individual factors. Politicians are not trained to make medical decisions and should not regulate medicine in a way that undermines the safety of patients. Bans on so-called "partial-birth" abortion would take medical decisions out of the hands of women and their families and give it to politicians.
    - The American College of Obstetricians and Gynecologists (ACOG), an organization dedicated to women's health, opposes this criminal ban because "[t]he intervention of legislative bodies into medical decision making is inappropriate, ill advised and dangerous."
- **Women's health would be endangered by bans on abortion procedures.** Despite repeated attempts, anti-choice lawmakers have refused to allow an exception to protect women's health. The Supreme Court has concluded in several cases that a woman's health must remain the physician's primary concern and that a physician must be given the discretion to determine the best course of treatment to protect women's lives and health.
- **The ban violates the core principles of *Roe v. Wade*.** Bans on abortion procedures are unconstitutional in at least three ways:
    - The definition of what methods of abortion would be banned is vague and overbroad. "Partial-birth" abortion is a political term, not a medical term. It could ban safe and common abortion procedures pre-viability.
    - By banning a variety of safe abortion procedures, the bans impose an undue burden on women seeking access to abortions by forcing them to rely upon less safe medical options.
    - The bans are unconstitutional because they do not allow women to obtain a banned procedure when it would preserve her health.
- **Instead of making abortion more difficult and dangerous for women, lawmakers should promote policies that reduce the need for abortion.** Almost 50 percent of all pregnancies in this country are unintended, including over 30 percent within marriage. And over half of all unintended pregnancies end in abortion. Improved access to contraception -- including increases in Title X funding, insurance coverage of contraception and improved contraceptive research -- would address the root causes of unintended pregnancy and would reduce the need for abortion.

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Feb. 2000

NARAL
Reproductive Freedom & Choice

NUMEROUS FEDERAL COURTS SPEAK: BANS ON ABORTION PROCEDURES ARE UNCONSTITUTIONAL

Recently, the U.S. Supreme Court agreed to review a case regarding the constitutionality of Nebraska's law banning so-called "partial-birth" abortion.[1] Arguments in this case will be heard in April, with a decision expected in the summer of 2000. The highly anticipated decision will determine the constitutionality of such laws, resolving the split that developed among the U.S. Circuit Courts of Appeal in 1999. Despite this split, it is important to note that courts have ruled repeatedly that bans on so-called "partial-birth" abortion are unconstitutional. In fact, a majority of courts considering challenges to such bans has enjoined the laws. Thus, we trust that the U.S. Supreme Court will rule in accordance with courts across the country that have found that these laws are overly broad, deceptive, and threaten women's health and lives. In the interim (while we await U.S. Supreme Court action on this issue), it is inappropriate for Congress to act. To do so exposes Congressional hostility to the judicial rulings in this area and the true political motives behind this legislation.

Bans on so-called "partial-birth" abortion are unconstitutional for three main reasons: they constitute an "undue burden" on a woman's right to choose in violation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); they are vague and overbroad because it is unclear to what procedures they apply, and thus they chill medical practice; and, the laws lack an exception to protect women's health.

HERE IS WHAT THE NATION'S FEDERAL JUDGES HAVE TO SAY ABOUT SO-CALLED "PARTIAL-BIRTH" ABORTION BANS:

- The Hon. John G. Heyburn, II, U.S. District Court for the Western District of Kentucky:

  "By adopting a considerably less precise definition of a partial birth abortion, the legislature not only defined the terms of its prohibition, but also said a lot about its own collective intent. Though the Act calls itself a partial birth abortion ban, it is not. The title is misleading, both

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medically and historically. . . . A few [legislators] seem to disregard the constitutional arguments and push for language which they believed would make abortions more controllable." *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1036 (W.D. Ky. 1998).

BANS ON ABORTION PROCEDURES ARE VAGUE AND OVERBROAD, UNDULY BURDENING THE RIGHT TO CHOOSE

Most courts have held that so-called "partial-birth" abortion bans are unconstitutional because they are so ill-defined that they effectively eliminate some of the safest and most common forms of abortion.

- The Hon. Richard S. Arnold, former Chief Judge, U.S. Court of Appeals for the Eighth Circuit, writing for the unanimous Eighth Circuit panel:

  "In interpreting the statute, it is our duty to give it a construction, if reasonably possible, that would avoid constitutional doubts. We cannot, however, twist the words of the law and give them a meaning they cannot reasonably bear. . . . [The Act] prohibit[s] the most common procedure for second-trimester abortions and, in doing so, imposes an undue burden on a woman's right to choose to have an abortion." *Carhart v. Stenberg*, 192 F.3d 1142, 1150-51 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000).

- The Hon. Donald L. Graham, U.S. District Court for the Southern District of Florida:

  "The broad language contained in the Act serves only to heighten the confusion. The legislature's choice of broad terminology fails to give physicians adequate notice of which medical procedures are prohibited. Moreover, the Act must meet a higher standard of certainty because it directly [affects] a woman's constitutional right to an abortion and imposes criminal penalties. The Act fails to meet this higher standard." *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1158 (S.D. Fla. 1998).

- The Hon. Ronald R. Lagueux, Chief Judge, U.S. District Court for the District of Rhode Island:

  "[T]his Court finds that 'substantial portion' is vague and does not provide doctors with sufficient guidance to know what the Legislature has made illegal. [Thus, the law] places an undue burden on a woman's ability to receive an abortion." *Rhode Island Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 309-10 (D.R.I. 1999).

- The Hon. G. Thomas Porteous, Jr., U.S. District Court for the Eastern District of Louisiana:

  "[T]he Act now in question advances neither maternal health or potential life and clearly would create undue burdens on a woman's right to choose abortion. At most, the Act may force women seeking abortions to accept riskier or costlier abortion procedures which nevertheless result in fetal death." *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 612 (E.D. La. 1999).

- The Hon. Gerald E. Rosen, U.S. District Court for the Eastern District of Michigan:

  "[T]he language of the definition of 'partial birth abortion' in the Michigan statute is hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning. Physicians looking to its language for direction as to what procedures are proscribed by the law simply cannot know with any degree of confidence what conduct may give rise to criminal prosecution and license revocation." *Evans v. Kelley*, 977 F. Supp. 1283, 1311 (E.D. Mich. 1997).

- Proponents of these bans argue that the Seventh Circuit Court of Appeals decision upholding the bans in Illinois and Wisconsin indicates that the laws are not unconstitutionally vague. In actuality, the closely divided Seventh Circuit opinion (5-4) upheld so-called "partial-birth" abortion bans in Illinois and Wisconsin only after it directed the lower courts to issue "precautionary injunctions" prohibiting enforcement of these bans as applied to all but a single type of procedure. *Hope Clinic v. Ryan* and *Christensen v. Doyle*, 195 F.3d 857 (7th Cir. 1999). Thus, the Seventh Circuit tacitly acknowledged that, on their face, without a limiting instruction, the Wisconsin and Illinois bans needed to be clarified and narrowed.[2]

  - The Hon. Richard A. Posner, writing on behalf of four dissenters who would have struck down the Illinois and Wisconsin laws as unconstitutionally vague, stated that "it is extremely difficult, indeed probably impossible, to distinguish a 'partial-birth' abortion from the methods of abortion that are conceded to be privileged. . . . [T]here is no meaningful difference between the forbidden and the privileged practice. No reason of policy or morality that would allow the one would forbid the other." *Hope Clinic v. Ryan* and *Christensen v. Doyle*, 195 F.3d 857, 879 (7th Cir. 1999) (Posner, C.J., dissenting).

ABORTION BANS ARE UNCONSTITUTIONAL WITHOUT AN EXCEPTION PROTECTING WOMEN'S HEALTH

Numerous courts have ruled that, in the absence of an exception to protect the woman's health, so-called "partial-birth" abortion bans are unconstitutional.

- On October 26, 1999, a five-judge majority of the U.S. Court of Appeals for the Seventh Circuit sitting *en banc* became the only federal court ruling on the merits of a so-called "partial-birth" abortion ban to disagree that the Constitution requires an exception to protect the woman's health. *Hope Clinic v. Ryan* and *Christensen v. Doyle*, 195 F.3d 857 (7th Cir. 1999).[3] The Hon. Richard A. Posner, writing for the four dissenters, and echoing the view of the other courts around the country that have addressed this issue, explained that "[t]he right of abortion is unduly burdened by any law that endangers the woman's health." *Hope Clinic v. Ryan* and *Christensen v. Doyle*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting). In an earlier opinion regarding Wisconsin's ban, Chief Judge Posner stated, "Wisconsin is taking chances of unknown magnitude with the health of pregnant women. This the Supreme Court's decisions do not permit. Those decisions require that maternal health be the physician's paramount concern." *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 468 (7th Cir. 1998). As demonstrated below, Chief Judge Posner's position is consistent with the majority of courts that have ruled on this issue.

- The Hon. John G. Heyburn, II, U.S. District Court for the Western District of Kentucky:

  "The absence of the health exception would seem to raise fundamental concerns under binding Supreme Court precedents. In *Casey*, the Supreme Court explained that even after viability, when a state's interest in protecting potential life is greatest, a state could not proscribe abortion without providing an exception for an appropriate medical judgment that an abortion is necessary ' "for the preservation of the life or health of the mother." '" *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1041 (W.D. Ky. 1998) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992), quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

- The Hon. Ronald R. Lagueux, Chief Judge, U.S. District Court for the District of Rhode Island:

  "The Supreme Court requires an exception to any abortion ban that would allow a woman to undergo an abortion if her pregnancy would constitute a threat to her health. . . . This exception must apply even after viability." *Rhode Island Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 314 (D.R.I. 1999).

- The Hon. Anne E. Thompson, Chief Judge, U.S. District Court for the District of

New Jersey:

"Reviewing the Act in light of *Roe* and *Casey*, the Court finds . . . that it imposes an undue burden on a woman's constitutional right to terminate her pregnancy. . . . [T]he Act proscribes 'partial-birth abortions' without providing a health or adequate life exception." "[S]tates may not proscribe an abortion procedure, before or after viability, without providing an exception for when such procedure is necessary, in a physician's medical judgment, to preserve the physical or mental health of the woman." *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478, 499, 502 (D.N.J. 1998).

- The Hon. Donald L. Graham, U.S. District Court for the Southern District of Florida:

"Even subsequent to viability, a State may not interfere with a [woman's] choice to decide which procedure is most appropriate to save her life or health." *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1156 (S.D. Fla. 1998).

- The Hon. Richard M. Bilby, Senior District Judge, U.S. District Court for the District of Arizona:

"[T]he fact that the Act does not provide an exception where the proscribed conduct is in the best interest of the health of a woman is an additional reason to find that the Act is unconstitutional." *Planned Parenthood of Southern Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1378 (D. Ariz. 1997).

- The Hon. G. Thomas Porteous, Jr., U.S. District Court for the Eastern District of Louisiana:

"The Act contains no health exception whatsoever . . . and is constitutionally infirm on this basis alone." *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 613 (E.D. La. 1999).

March 2, 2000

Notes:

1. *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000).

2. Even with these clarifying "precautionary injunctions," the Wisconsin and Illinois bans still interfere with medical practice, removing an option that may, in any particular case, be the recommended course medically.

3. While not a ruling on the merits, the U.S. Court of Appeals for the Fourth Circuit stayed the lower court's permanent injunction of Virginia's ban on so-called "partial-birth" abortion pending appeal–thereby allowing the law to remain in effect without a health exception. *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999) (permanent injunction), *appeal filed*, 99-2000 (4th Cir. July 28, 1999), Nos. 98-1930 and 99-2000 (4th Cir. Sept. 14, 1999) (stay issued), *motion for rehearing* (4th Cir. filed Sept. 24, 1999).

NARAL
Reproductive Freedom & Choice

FEDERAL COURTS HAVE RULED REPEATEDLY ON THE MERITS THAT A BAN ON ABORTION PROCEDURES IS UNCONSTITUTIONAL

In April 2000, the U.S. Supreme Court will hear arguments in a case regarding the constitutionality of Nebraska's law banning so-called "partial-birth" abortion. While we await this U.S. Supreme Court decision, it is inappropriate for Congress to act with respect to so-called "partial-birth" abortion. This case will determine the constitutionality of such laws and will resolve the split that developed among the U.S. Circuit Courts of Appeal in 1999. We trust that the U.S. Supreme Court will rule in accordance with the majority of federal courts across the nation that have addressed the constitutionality of bans on abortion procedures. As the rulings below demonstrate, ***most federal courts ruling on the merits have held that a ban on abortion procedures is unconstitutional.***

U.S. CIRCUIT COURTS OF APPEAL, RULINGS ON THE MERITS

Eighth Circuit:

Arkansas, Iowa, and Nebraska:

Little Rock Family Planning Services v. Jegley, 192 F.3d 794 (8th Cir. 1999); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386 (8th Cir. 1999), *petition for cert. filed*, No. 99-1112 (U.S. Dec. 23, 1999); and *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000): the Eighth Circuit affirmed permanent injunctions against enforcement of bans on so-called "partial-birth" abortion in Arkansas, Iowa, and Nebraska on the grounds that they each unduly burden a woman's right to choose. The U.S. Supreme Court granted *certiorari* in the Nebraska case, thereby agreeing to consider the constitutionality of Nebraska's ban. Additionally, a petition seeking Supreme Court review has been filed in the Iowa case.

Seventh Circuit:

Illinois and Wisconsin:

Hope Clinic v. Ryan and *Christensen v. Doyle*, 195 F.3d 857 (7th Cir. 1999), *petitions for cert. filed*, Nos. 99-1152 and 99-1177 (U.S. Jan. 10 and 14, 2000): the Seventh Circuit upheld "partial-birth" abortion bans in Illinois and Wisconsin, but directed the lower courts to issue "precautionary injunctions" prohibiting enforcement of these bans as applied to all but a single type of procedure. Subsequently, U.S. Supreme Court Justice Stevens stayed the Seventh Circuit's decision pending the timely filing and disposition of a petition for a writ of *certiorari*, *Hope Clinic v. Ryan*, No. 99A427 (U.S. Nov. 30, 1999) and *Planned Parenthood of Wisconsin v. Doyle*, No. 99A428 (U.S. Nov. 30, 1999), and in

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January 2000, petitions for a writ of *certiorari* were filed in both cases.

Sixth Circuit:

Ohio:

Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998): the Sixth Circuit affirmed a permanent injunction against enforcement of Ohio's ban on "dilation and extraction" abortion on the grounds that it unduly burdens a woman's right to choose. The U.S. Supreme Court refused to review the decision.

U.S. DISTRICT COURTS, RULINGS ON THE MERITS

Arizona:

Planned Parenthood of Southern Arizona, Inc. v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997), *appeal filed*, No. 97-17377 (9th Cir. Nov. 26, 1997), *appeal dismissed* (9th Cir. Feb. 26, 1999): permanently enjoined Arizona's ban on so-called "partial-birth" abortion on the grounds that it imposes an undue burden on a woman's right to terminate a pregnancy, is unconstitutionally vague, unconstitutionally fails to provide a health exception, and creates impermissible spousal and parental consent mandates. An appeal was filed and then withdrawn by the state attorney general.

Florida:

A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998), *appeal dismissed*, No. 99-4002 (11th Cir. Mar. 2, 1999): permanently enjoined Florida's ban on "partial-birth" abortion on the grounds that it places an undue burden on a woman's right to obtain an abortion, unconstitutionally fails to provide a health exception and an adequate life exception, and it is unconstitutionally vague.

Idaho:

Weyhrich v. Lance, No. CV98-0117-S-BLW (D. Idaho Oct. 12, 1999): permanently enjoined Idaho's "partial-birth" abortion ban on the grounds that it constitutes an undue burden on a woman's right to terminate her pregnancy, is unconstitutionally vague, unconstitutionally lacks a health exception and an adequate life exception, and creates impermissible spousal and parental consent requirements.

Kentucky:

Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), *appeal filed*, No. 98-6671 (6th Cir. Dec. 4, 1998): permanently enjoined Kentucky's "partial-birth" abortion ban on the grounds that it is unconstitutionally overbroad, constitutes an undue burden, and unconstitutionally lacks a health exception.

Louisiana:

Causeway Medical Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999), *appeal filed*, No. 99-30324 (5th Cir. Apr. 5, 1999): permanently enjoined Louisiana's so-called "partial-birth" abortion ban on the grounds that it constitutes an undue burden on a woman's right to choose, impermissibly lacks a health exception and an adequate life exception, impermissibly imposes third-party consent requirements, and is unconstitutionally vague.

Michigan:
Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997): permanently enjoined Michigan's "partial-birth" abortion ban on the grounds that it is unconstitutionally vague and overbroad and unduly burdens the right to choose. (In 1999, Michigan enacted a new ban on so-called "partial-birth" abortion, and a court has issued a preliminary injunction prohibiting the enforcement of this new law. *WomanCare of Southfield v. Granholm* and *Evans v. Granholm*, Nos. 00-CV-70585 and 00-CV-70586 (E.D. Mich. Mar. 9, 2000).)

New Jersey:
Planned Parenthood of Central New Jersey v. Verniero, 41 F. Supp. 2d 478 (D.N.J. 1998), *appeal filed*, No. 99-5042 (3d Cir. Jan. 6, 1999): permanently enjoined New Jersey's so-called "partial-birth" abortion ban on the grounds that it is unconstitutionally vague, unconstitutionally fails to provide a health or an adequate life exception, and imposes an undue burden on a woman's right to terminate a pregnancy.

Rhode Island:
Rhode Island Medical Society v. Whitehouse, 66 F. Supp.2d 288 (D.R.I. 1999), *appeal filed*, Nos. 99-2095 and 99-2141 (1st Cir. Sept. 20 and Oct. 5, 1999): permanently enjoined Rhode Island's "partial-birth" abortion ban on the grounds that it is unconstitutionally vague, constitutes an undue burden on a woman's right to terminate a pregnancy, impermissibly lacks a health exception and an adequate life exception, and includes an unconstitutional private right of action.

Virginia:
Richmond Medical Center for Women v. Gilmore, 55 F. Supp. 2d 441 (E.D. Va. 1999), *appeal filed*, 99-2000 (4th Cir. July 23, 1999), Nos. 98-1930 and 99-2000 (4th Cir. Sept. 14, 1999) (stay issued), *motion for rehearing* (4th Cir. filed Sept. 24, 1999): although the district court permanently enjoined Virginia's ban on so-called "partial-birth" abortion on the grounds that it is unconstitutionally vague, constitutes an undue burden, and unconstitutionally fails to provide a health or an adequate life exception, the U.S. Court of Appeals for the Fourth Circuit stayed the permanent injunction pending an appeal – thereby allowing the law to remain in effect.

♦♦♦

Of Interest: In Georgia, a court has approved a consent order (agreed to by the parties, including the state attorney general) that limits enforcement of Georgia's ban on so-called "partial-birth" abortion to "intact dilation and extraction" procedures performed to abort a viable fetus except when necessary to preserve the woman's life or health. *Midtown Hospital v. Miller*, No. 1:97-CV-1786-JOF (N.D. Ga. Sept. 3, 1998).

Limitations of this memorandum: This memo contains information regarding federal courts that have issued final rulings on the merits. It therefore does not include information about cases awaiting final decisions regarding the constitutionality of the laws, including those in which state bans have been temporarily enjoined or limited by the state attorney general.

March 14, 2000

NARAL
Reproductive Freedom & Choice

CONSTITUTIONAL ANALYSIS OF LEGISLATION BANNING ABORTION PROCEDURES

Opponents of choice have been using inflammatory rhetoric about "infanticide" and "partial-birth" abortion in a nationwide strategy to further their goal of eroding women's reproductive options. However, bans on abortion procedures are unconstitutional in at least three ways. First, the definition of what methods of abortion would be banned is vague and overbroad -- it would ban a variety of safe and common abortion procedures, not just one procedure. Second, by banning a variety of safe abortion procedures, the bans impose an undue burden on women seeking access to abortions by forcing them to rely upon less safe medical options. Finally, these bans are unconstitutional because they do not allow a woman to obtain a banned procedure when it would preserve her health.

Instead of making abortion more difficult and dangerous for women, lawmakers should promote policies that reduce the need for abortion. Almost 50 percent of all pregnancies in this country are unintended, including over 30 percent within marriage. And over half of all unintended pregnancies end in abortion. Improved access to contraception -- including increases in Title X funding, insurance coverage of contraception and improved contraceptive research -- would address the root causes of unintended pregnancy and would reduce the need for abortion.

Bans on Abortion Procedures, Such As So-Called "Partial-Birth" Abortion, Violate Roe v. Wade.

- The U.S. Supreme Court recognized a woman's constitutional right to choose whether or not to have an abortion in *Roe v. Wade*.[1] *Roe* also established that this right is limited after fetal viability, at which point the state may ban abortion as long as exceptions are provided for cases in which the woman's life or health are at risk. By violating these holdings, explicitly reaffirmed by the Court in the 1992 *Planned Parenthood v. Casey* decision,[2] so-called "partial-birth" abortion bans present a direct constitutional challenge to *Roe*.
    - The legislation, as typically introduced, applies throughout pregnancy in disregard of the crucial constitutional distinction between pre- and post-viability abortion. In addition, the bills' failure to provide an exception for cases in which the banned procedure is necessary to

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preserve a woman's health is a grave constitutional flaw.

- Nearly 90 percent of all abortions occur in the first trimester of pregnancy.[3] Only approximately one percent of abortions take place at 21 weeks or later.[4] Although states may ban virtually all abortion after viability — a point that varies with each pregnancy but is generally considered to be at 23-24 weeks[5] — the state may not ban second-trimester abortion. As recently as 1992, the U.S. Supreme Court held that "[r]egardless of whether exceptions are made for particular circumstances, [the government] may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[6] By prohibiting the use of certain procedures, both before and after viability, the ban violates the constitutionally protected status of second-trimester abortion and curtails a physician's ability to use the abortion method most appropriate in light of each woman's individual circumstances.

Bans On Abortion Procedures Unconstitutionally Jeopardize Women's Health.

- As stated above, the Supreme Court held in *Roe,* and reaffirmed in *Casey,* that after viability, a state may not ban an abortion necessary to preserve a woman's life or health. In *Casey*, the Court also held that, prior to viability, restrictions on abortion must not constitute an undue burden on a woman's right to choose. An undue burden is one that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[7] As numerous courts have found, blocking a woman's access to the abortion procedure that may be safest for her unduly burdens her right to choose.[8]

  - For example, in *Carhart v. Stenberg*,[9] the U.S. Court of Appeals for the Eighth Circuit concluded that Nebraska's ban on so-called "partial-birth" abortion was problematic because it "prohibit[s] the most common procedure for second-trimester abortions and, in doing so, imposes an undue burden on a woman's right to choose to have an abortion."

  - Similarly, in *Planned Parenthood of Central New Jersey v. Verniero,*[10] the U.S. district court said: "First, the Act's language is so vague that its effect is to ban most conventional abortion procedures without regard to the viability of the fetus. Second, the Act proscribes 'partial-birth abortions' without providing a health or adequate life exception. For these reasons, the Act imposes an undue burden and is unconstitutional."

- In *Thornburgh v. American College of Obstetricians and Gynecologists*[11] and *Colautti v. Franklin,*[12] the Supreme Court established that it is unconstitutional to force a physician to make a "trade-off" between the woman's health and the state's interest in fetal life. The woman's health must remain the physician's primary concern, and the physician must be

given the discretion he or she needs to choose the most appropriate abortion method.

- A statutory ban on so-called "partial-birth" abortion violates the basic tenets set forth in *Casey* and *Thornburgh* by substituting the woman's judgment as informed fully and accurately by her physician with that of a state legislature, thereby unduly burdening her right to choose.

Bans on Abortion Procedures Create an Unconstitutional Chilling Effect.

- A bedrock principle of constitutional law prohibits the government from punishing individuals for violating a statute when the statute does not give "fair warning as to what conduct is prohibited."[13] Many state legislative bans utilize the term "partial-birth" abortion, but this term does not have a medically recognized meaning. The definition of "partial-birth" abortion in most bills fails to identify clearly which procedures are prohibited by the ban. Although proponents of the bans claim that they are targeting a specific abortion method, courts across the country have found that the legislation could prohibit many methods of abortion.[14]

- Generally, under another important constitutional law principle, an individual may be punished as a criminal only for actions undertaken with at least some degree of criminal intent. Under some versions of this legislation, however, physicians could be criminally liable if — in the exercise of their best medical judgment — they determined that a woman's circumstances were so dire that she was covered by the life endangerment exception but this determination was later considered by a court, a jury or state medical review board to have been mistaken.

- A provision in a bill permitting a physician to seek a hearing before the state medical board regarding whether a banned procedure was necessary to save a woman's life endangered by certain physical threats does not mitigate the threat of criminal prosecution. The government can proceed with its prosecution of the physician regardless of the outcome of the state medical board hearing. Moreover, the medical board cannot decide in favor of a physician exercising his or her considered medical discretion to protect the patient's health unless it concludes that the procedure falls within the narrow life exception.

- Most bans would subject physicians to broad civil as well as criminal liability. Under many bills, a physician who performs a banned procedure may be sued for monetary damages by his or her patient, and in some cases, the woman's parents or the "father" of the fetus. The threat of unwarranted lawsuits is significant; abortion providers have already been targeted widely for civil litigation.[15]

- Under vague legislation in which the banned procedures are not sufficiently well-defined, physicians are forced to guess whether employing the method they believe to be in the best medical interest of the patient would violate the law. They face criminal liability

without criminal intent and significant civil litigation. Such legal peril further chills physicians' willingness to provide necessary abortion services and unconstitutionally jeopardizes women's lives and health.

10/27/99

Notes

1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

3. The Alan Guttmacher Institute (AGI), "The Limitations of U.S. Statistics on Abortion," Jan. 1997 (Issues in Brief); AGI, "When Do Abortions Take Place?," September 25, 1996 (factsheet).

4. AGI, "The Limitations of U.S. Statistics on Abortion," 2.

5. AGI, "The Limitations of U.S. Statistics on Abortion," 1.

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

7. *Casey*, 505 U.S. at 877.

8. *See Carhart v. Stenberg*, 1999 WL 753919 at *7 (8th Cir. Sept. 24, 1999); *Little Rock Family Planning Services v. Jegley*, 1999 WL 753928 at *4 (8th Cir. Sept. 24, 1999); *Planned Parenthood of Greater Iowa, Inc. V. Miller*, 1999 WL 753770 at *2 (8th Cir. Sept. 24, 1999); *Causeway Medical Suite v.* Foster, 43 F. Supp. 2d 604, 613 (E.D. La. 1999); *Planned Parenthood of Central New Jersey v. Verniero,* 41 F. Supp. 2d 478, 499-500 (D.N. J. 1998); *A Choice For Women v. Butterworth*, 54 F. Supp. 2d 1148, 1156 (S.D. Fla. 1998); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1037 (W.D. Ky. 1998); *Evans v. Kelley*, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997). *See also Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976). *But see Hope Clinic v. Ryan*, No. 98-1726 (7th Cir. Oct. 26, 1999); *Christensen v. Doyle*, Nos. 99-2528 & 99-2533 (7th Cir. Oct. 26, 1999) (upholding so-called "partial-birth" abortion bans in Wisconsin and Illinois while directing the lower courts to issue "precautionary injunctions" prohibiting the enforcement of these bans as applied to all but a single type of procedure, despite the fact that neither statute contained such limiting language).

9. *Carhart v. Stenberg*, 1999 WL 753919 at *7 (8th Cir. Sept. 24, 1999).

10. *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478 (D. N.J. 1998), *appeal docketed*, No. 99-5042 (3d Cir. Jan. 28, 1999).

11. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 769 (1986).

12. *Colautti v. Franklin,* 439 U.S. 379, 400 (1979).

13. *Women's Medical Professional Corp. v Voinovich,* 911 F. Supp. 1051, 1063 (S.D. Ohio 1995)(*citing Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)), *affirmed*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1347 (1998).

14. Several courts have ruled that bans on so-called "partial-birth" abortion and other abortion procedures encompass more than one method of abortion. *See, e.g., Carhart v. Stenberg*, 1999 WL 753919 at *7 (8th Cir. Sept. 24, 1999); *Little Rock Family Planning Services v. Jegley*, 1999 WL 753928 at *4 (8th Cir. Sept. 24, 1999); *Planned Parenthood of Greater Iowa, Inc. V. Miller*, 1999 WL 753770 at *2 (8th Cir. Sept. 24, 1999); *Voinovich*, 130 F.3d at 198-200; *Verniero*, 41 F. Supp. 2d at 494; *Butterworth*, 54 F. Supp. 2d at 1155; *Eubanks*, 28 F. Supp. 2d at 1036; *Planned Parenthood of Southern Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1378-79 (D. Ariz. 1997); *Evans,* 977 F. Supp. at 1306-12. *But see Hope Clinic v. Ryan*, No.

98-1726 (7th Cir. Oct. 26, 1999); *Christensen v. Doyle*, Nos. 99-2528 & 99-2533 (7th Cir. Oct. 26, 1999) (upholding so-called "partial-birth" abortion bans in Wisconsin and Illinois only after directing the lower courts to issue "precautionary injunctions" prohibiting the enforcement of these bans as applied to all but a single type of procedure, despite the fact that neither statute contained such limiting language).

15. Julie Cohen, "Protecting Women or Harassing Doctors?" *Legal Times*, Feb. 14, 1994, 1; *see* David C. Reardon, *Abortion Malpractice* (Lewisville, Texas: Life Dynamics Inc. 1993).

NARAL
Reproductive Freedom & Choice

MEMORANDUM

To: Interested Parties
From: NARAL Legal Department
Re: State Legislation to Ban So-Called "Partial-Birth" Abortion or Other Abortion Procedures
Date: March 14, 2000

- Thirty-one states have enacted legislation banning so-called "partial-birth" abortion or other abortion procedures (AL, AK, AZ, AR, FL, GA, ID, IL, IN, IA, KS,[1] KY, LA, MI,[2] MS, MO, MT,[3] NE, NJ, NM,[4] ND, OH,[5] OK, RI, SC, SD, TN, UT,[6] VA, WV, WI).

- Court challenges regarding these laws have been initiated in 21 states (AL, AK, AZ, AR, FL, GA, ID, IL, IA, KY, LA, MI, MO, MT, NE, NJ, OH, RI, VA, WV, WI).

  - In 20 states, courts or attorneys general have prohibited full enforcement of the laws (AL,[7] AK, AZ, AR, FL, GA,[8] ID, IL, IA, KY, LA, MI,[2] MO, MT,[3] NE, NJ, OH, RI, WV, WI).

    - The U.S. Court of Appeals for the Eighth Circuit held that so-called "partial-birth" abortion bans in Arkansas, Iowa, and Nebraska are unconstitutional. On January 14, 2000, the U.S. Supreme Court granted *certiorari* in the Nebraska case, thereby agreeing to consider the constitutionality of Nebraska's "partial-birth" abortion ban. Additionally, a petition seeking Supreme Court review has been filed in the Iowa case.

    - The U.S. Court of Appeals for the Seventh Circuit upheld so-called "partial-birth" abortion bans in Illinois and Wisconsin, but directed the lower courts to issue "precautionary injunctions" prohibiting the enforcement of these bans as applied to all but a single type of procedure. Subsequently, U.S. Supreme Court Justice

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Stevens stayed the Seventh Circuit's decision pending the timely filing of and disposition of a petition for a writ of *certiorari*, and in January 2000, petitions for a writ of *certiorari* were filed in both cases.

- The U.S. Court of Appeals for the Sixth Circuit held Ohio's ban on dilation and extraction abortion unconstitutional, and the U.S. Supreme Court denied *certiorari* in 1998.

- Although a federal district court ruled that Virginia's ban on so-called "partial-birth" abortion is unconstitutional and issued a permanent injunction prohibiting its enforcement, the U.S. Court of Appeals for the Fourth Circuit stayed the injunction pending an appeal -- thereby allowing the law to remain in effect.

- In nine states, the laws have not been challenged and are in effect (IN, KS, MS, ND, OK, SC, SD, TN, UT).

- In one state, the law has not been challenged and has not yet gone into effect (NM[4]).

Notes:

1. The Kansas statute prohibits "partial-birth" abortion after viability except when necessary to preserve the woman's life or if the pregnancy will result in "substantial and irreversible impairment of a major physical or mental function" of the woman.

2. Michigan's former ban on so-called "partial-birth" abortion has been permanently enjoined. In the 1999 legislative session, Michigan enacted a new ban on so-called "partial-birth" abortion (MI SB 546 (1999)). A court has issued a preliminary injunction prohibiting the enforcement of this new law.

3. Montana's former ban on so-called "partial-birth" abortion has been permanently enjoined. In the 1999 legislative session, Montana amended its previously enjoined ban on so-called "partial-birth" abortion (MT HB 530 (1999)). Upon agreement of the parties, a court has issued a temporary restraining order prohibiting the enforcement of Montana's "partial-birth" abortion ban as amended.

4. In March 2000, New Mexico enacted a bill prohibiting "partial-birth" abortion after viability except when necessary to preserve the woman's life or "prevent great bodily harm" to the woman. (NM SB 140 (2000)). This bill is scheduled to become effective 90 days after the legislature's adjournment date, which was February 17, 2000.

5. The Ohio statute prohibits dilation and extraction abortion unless the defendant proves that all other available abortion procedures pose a greater risk to the woman's health.

6. The Utah statute prohibits "partial-birth" abortion, dilation and extraction abortion, and saline abortion after viability unless all other available abortion procedures would pose a risk to the woman's life or health.

7. In Alabama, the court has not ruled on the merits, but the Alabama Attorney General has directed the state's district attorneys to enforce the statute only after viability.

8. In Georgia, the district court approved the parties' consent order, which limits enforcement of the law to post-viability intact dilation and extraction procedures except when necessary to preserve the woman's life or health.

NARAL
Reproductive Freedom & Choice

MEMORANDUM

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BANS ON SO-CALLED "PARTIAL-BIRTH" ABORTION AND OTHER ABORTION PROCEDURES

More than half the states have banned so-called "partial-birth" abortion, but in 20 of these states, courts or attorneys general have blocked full enforcement.

State	Enforced	Limited Enforcement	Enjoined/Not Enforced
Alabama		X[1]	
Alaska			X
Arizona			X
Arkansas			X
Florida			X
Georgia		X[2]	
Idaho			X
Illinois			X[3]
Indiana	X		
Iowa			X[4]
Kansas[5]	X		
Kentucky			X
Louisiana			X
Michigan			X[6]
Mississippi	X		
Missouri			X

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State	Enforced	Limited Enforcement	Enjoined/Not Enforced
Montana			X[7]
Nebraska			X[8]
New Jersey			X
New Mexico[9]			
North Dakota	X		
Ohio[10]			X
Oklahoma	X		
Rhode Island			X
South Carolina	X		
South Dakota	X		
Tennessee	X		
Utah[11]	X		
Virginia	X[12]		
West Virginia			X
Wisconsin			X[3]
Total = 31	**10**	**2**	**18**

Notes:

1. The Alabama Attorney General has directed the state's district attorneys to enforce the statute only after viability.

2. A court has approved a consent order that limits the enforcement of this law to post-viability intact dilation and extraction procedures except when necessary to preserve the woman's life or health.

3. The U.S. Court of Appeals for the Seventh Circuit upheld so-called "partial-birth" abortion bans in Illinois and Wisconsin, but directed the lower courts to issue "precautionary injunctions" prohibiting the enforcement of these bans as applied to all but a single type of procedure. Subsequently, U.S. Supreme Court Justice Stevens stayed the Seventh Circuit's decision pending the timely filing of and disposition of a petition for a writ of *certiorari*, and in January 2000, petitions for a writ of *certiorari* were filed in both cases.

4. A petition seeking U.S. Supreme Court review has been filed in this case.

5. The Kansas statute prohibits so-called "partial-birth" abortion after viability except when necessary to preserve the woman's life or if the pregnancy will result in "substantial and irreversible impairment of a major physical or mental function" of the woman.

6. Michigan's former ban on so-called "partial-birth" abortion has been permanently enjoined. In the 1999 legislative session, Michigan enacted a new ban on so-called "partial-birth" abortion. A court has issued a preliminary injunction prohibiting the enforcement of this new law.

7. Montana's former ban on so-called "partial-birth" abortion has been permanently enjoined. In the 1999 legislative session, Montana amended its previously enjoined ban on so-called "partial-birth" abortion. Upon agreement of the parties, a court has issued a temporary restraining order prohibiting the enforcement of Montana's "partial-birth" abortion ban as amended.

8. On January 14, 2000, the U.S. Supreme Court granted *certiorari* in the Nebraska case, thereby agreeing to consider the constitutionality of Nebraska's "partial-birth" abortion ban.

9. The New Mexico law prohibits "partial-birth" abortion after viability except when necessary to preserve the woman's life or "prevent great bodily harm" to the woman. Enacted in March 2000, the New Mexico law is scheduled to become effective 90 days after the legislature's adjournment date, which was February 17, 2000.

10. The Ohio statute prohibits dilation and extraction abortion unless the defendant proves that all other available abortion procedures pose a greater risk to the woman's health.

11. The Utah statute prohibits so-called "partial-birth" abortion, dilation and extraction, and saline abortion after viability unless all other available abortion procedures would pose a risk to the woman's life or health.

12. Although a federal district court ruled that Virginia's ban on so-called "partial-birth" abortion is unconstitutional and issued a permanent injunction prohibiting its enforcement, the U.S. Court of Appeals for the Fourth Circuit stayed the injunction pending an appeal, thereby allowing the law to remain in effect.

3/14/2000

FOUR REASONS WHY THE FEDERAL ABORTION BAN IS BAD PUBLIC POLICY

(S. 1692/HR 3660 — The "Partial-Birth" Abortion Ban Act)

- **The bill does not contain an exception to protect women's health.** Currently, the bill includes only a narrow exception to protect the life of the woman, jeopardizing those women who may need an abortion to protect their health. Proponents of the bill have blocked several attempts to include a health exception even though the President has asked Congress to send him a bill that includes one.

- **Medical decisions should be made by patients in consultation with their doctors, not by the government.** The decision about abortion is a private, medical decision. This bill would prevent doctors and their patients from choosing what might well be the best and most appropriate medical treatment. The ban represents an unprecedented intrusion into the personal lives of Americans— from the halls of Congress right into the examination room.

- **The legislation is unconstitutional.** Most courts that have reviewed legislation banning so-called "partial-birth" abortion have found these bans unconstituional for several reasons: First, the legislation is unconstitutionally vague because it does not rely on any medical definition of what is prohibited; second, it does not provide an exception to protect women's health; and third, it violates *Roe v. Wade* by banning procedures regardless of the gestational stage of the pregnancy. On September 24, 1999, the 8th Circuit Court of Appeals upheld the rulings of lower courts in Arkansas, Iowa, and Nebraska rejecting bans similar to the federal ban. Although the 7th Circuit, in a 5 to 4 decision issued on October 26, 1999, upheld the Illinois and Wisconsin bans, it did so only after ordering the lower courts to issue "precautionary injunctions" limiting enforcement of the bans to a single type of procedure, despite the absence of limiting language in the statutes. The U.S. Supreme Court has agreed to rule on the constitutional issues this summer, and Congress should await the Court's ruling before taking further action.

- **The bill is deceptive and represents a first step toward the banning of all abortion, at any stage of pregnancy.** Anti-choice groups have unabashedly proclaimed their intent to use the so-called "partial-birth" abortion issue as a strategy to ultimately ban all abortions:

  "[Gary Bauer] likes the approach of seeking a ban on all abortions in the ninth month of pregnancy, then the eight, and so on. 'You'd probably get down to the fourth month before you had a close vote ... ,' [said Bauer]. In the end though, Bauer favors a campaign to ban second and third-trimester abortions."

  — from "Beyond Partial-Birth," by Fred Barnes, *The Weekly Standard*, July 6-13, 1998

  "By going after partial-birth abortions, we're trying to show the extreme, radical view of the pro-abortion lobby. But no, that procedure isn't what we care most about. Our goal is to stop the killing of unborn children at any stage of development."

  — John Jakubczyk, General Counsel, Arizona Right To Life, as quoted in *The Arizona Republic*, "Effort to Ban 'Partial-Birth' Wins By Losing," by Steve Wilson, 9/27/96

The Supreme Court decision in the case of *Roe v. Wade* struck a careful balance between the right of women to choose abortion in the early stages of pregnancy and the states' interest in protecting potential life after viability. *Roe* stated that prior to fetal viability, the abortion decision must reside with the woman, to be made in consultation with her doctor and within the context of her own religious and moral beliefs. After fetal viability, *Roe* allows states to ban abortion as long as the woman's life and health are protected. NARAL supports this careful balance and rejects attempts to restrict abortion in any manner that undermines the basic tenets of *Roe*.

October 21, 1999

The Honorable Henry Hyde, Chair
Committee on the Judiciary
US House of Representatives
Washington, DC 20515

Dear Mr Chairman:

Upon review of the re-drafted "Partial-Birth Abortion Ban Act of 2000," in my opinion the language does not correct the constitutional defects of H.R. 1122. In particular, this language does not correct the issues addressed by many states and federal courts, including the U.S. Court of Appeals for the Eighth Circuit, which have held similar legislation to be unconstitutional.

Sincerely,

Ann E. Allen

Ann Allen, JD
General Counsel

THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS • WOMEN'S HEALTH CARE PHYSICIANS
409 12TH STREET SW WASHINGTON DC 20024-2188
MAILING ADDRESS: PO BOX 96920 WASHINGTON DC 20090-6920
202/638-5577

March 3, 2000

The Honorable Henry Hyde
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The American College of Obstetricians and Gynecologists (ACOG), an organization representing 40,000 physicians dedicated to improving women's health, continues to oppose H.R. 3660, the "Partial Birth Abortion Ban Act of 2000." ACOG urges the Committee on the Judiciary to reject this legislation.

ACOG believes that H.R. 3660 represents an inappropriate, ill advised and dangerous intervention into medical decision-making. The amended bill still fails to include an exception for the protection for the health of the woman.

Further, the bill violates a fundamental principle at the very heart of the doctor-patient relationship: that the doctor, in consultation with the patient, based on that patient's individual circumstances, must choose the most appropriate method of care for the patient. This bill removes decision-making about medical appropriateness from the physician and the patient.

H.R. 3660 is vague and broad, with the potential to restrict other techniques in obstetrics and gynecology. It fails to use recognized medical terminology and fails to define explicitly the prohibited medical techniques it criminalizes

Moreover, the ban applies to all stages of pregnancy. It would have a chilling effect on medical behavior and decision-making, with the potential to outlaw techniques that are critical to the lives and health of American women. Chief Judge Richard Arnold wrote in the Eighth Circuit decision that, "Such a prohibition places an undue burden on the right of women to choose whether to have an abortion."

Sincerely,

Ralph W. Hale MD

Ralph W. Hale, MD
Executive Vice President

CC: Members of the Committee on the Judiciary

DO NOT BE FOOLED: THE SO-CALLED "PARTIAL-BIRTH" ABORTION BAN REMAINS UNCONSTITUTIONAL

The language of S. 1692, as approved by the Senate, and H.R. 3660, as introduced in the House, fails to cure the constitutional defects in the bill. Proponents of the bill claim that the revised language remedies the legal infirmities. Nevertheless, the bill continues to endanger women's health and to deprive them of their constitutional rights by banning safe, pre-viability abortions. Moreover, since the United States Supreme Court will be reviewing a case from Nebraska dealing with this issue, it is inappropriate for Congress to take up this legislation now. To do so exposes the true political motives behind this legislation.

The revised language of S.1692/H. 3660 remains unconstitutional for the following reasons:

- The bill continues to impose an unconstitutional undue burden on women's right to choose by reaching safe abortion procedures performed before fetal viability. The bill continues to contain no reference to gestational age.

- The bill further endangers women's health by failing to include a constitutionally mandated exception to protect the health of the pregnant woman, and by including only a constitutionally inadequate life exception.

- The bill impermissibly attempts to micro-manage surgical procedures, thereby undermining the health of women, intruding into the doctor-patient relationship, and interfering with pregnant women's right to medical self-determination.

March 2000

The New Canady Language Banning So-Called "Partial-Birth" Abortion Does Not Cure the Constitutional Defects of Prior Versions

- Proponents of the bill claim that the revised language remedies the legal infirmities. Don't be fooled HR 3660 continues to endanger women's health and to deprive them of their constitutional rights by banning safe, previability abortions.

- HR 3660 continues to impose an unconstitutional undue burden on women's right to choose by reaching safe abortion procedures performed before fetal viability. The bill still lacks a reference to gestational age.

- HR 3660 further endangers women's health by failing to include a constitutionally mandated exception to protect the health of the pregnant woman, and by including only a constitutionally inadequate life exception. The bill impermissibly attempts to micro-manage surgical procedures, thereby undermining the health of women, intruding into the doctor-patient relationship, and interfering with pregnant women's right to medical self-determination.

S. 1692 (before 10/21/99) (old PBA)	**H.R. 3660 (new PBA)**	**H.R. 2149 (Hoyer – Greenwood)**
No health exception	No health exception	Exception for serious adverse health consequences
No medical terminology – thus unconstitutionally vague: *"Partially vaginally delivers a living fetus before killing the fetus and completing delivery," which is defined as, "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."*	No medical terminology – thus unconstitutionally vague: *"Deliberately and intentionally vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother."*	Not vague
Ban is not limited by gestational age	Ban is not limited by gestational age	Ban applies only after fetus is viable

NARAL 3/6/00

COMPARISON OF PROPOSED HOUSE ABORTION BANS

	Old Canady Language	HR 3660 - New Canady Bill	HR 2149 - Hoyer-Greenwood Bill
Nature of ban	Prohibits so-called "partial-birth" abortion ("PBA") throughout pregnancy, without regard to fetal viability.	Prohibits so-called "partial-birth" abortion ("PBA") throughout pregnancy, without regard to fetal viability.	Post-viability abortion ban.
Definitions	PBA defined as abortion in which physician "partially vaginally delivers a living fetus before killing the fetus and completing delivery," which is defined as, "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."	PBA defined as abortion in which physician "deliberately and intentionally vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother."	Not applicable.
Scienter	Requires knowledge and intent.	Requires knowledge and intent.	Requires knowledge.
Penalty	Civil and criminal penalties. Provides a private cause of action for the fetus' "father," and/or "maternal grandparents."	Civil and criminal penalties. Provides a private cause of action for the fetus' "father," and/or "maternal grandparents."	Civil penalties.
Exceptions	No health exception. Exception for an abortion "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."	No health exception. Exception for an abortion "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."	Exceptions for life of and "serious adverse health consequence to" the woman.
Medical Board involvement	Can seek state Medical Board hearing to determine if necessary to save woman's life.	Can seek state Medical Board hearing to determine if necessary to save a woman's life.	Not applicable.
Immunity	Cannot prosecute woman.	Cannot prosecute woman.	Cannot prosecute woman.

NARAL March 2, 2000

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

October 20, 1999
(Senate)

S. 1692 - Partial-Birth Abortion Ban Act of 1999
(Sen. Santorum (R) PA and 43 cosponsors)

S. 1692 contains the same serious flaws as H.R. 1833 and H.R. 1122, virtually identical bills that were passed during the 104th and 105th Congresses and vetoed by the President on April 10, 1996, and October 10, 1997, respectively.

The President will veto S. 1692 for the reasons he expressed in his veto message of April 10, 1996, which is attached.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 10, 1996

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 1833, which would prohibit doctors from performing a certain kind of abortion. I do so because the bill does not allow women to protect themselves from serious threats to their health. By refusing to permit women, in reliance on their doctors' best medical judgment, to use this procedure when their lives are threatened or when their health is put in serious jeopardy, the Congress has fashioned a bill that is consistent neither with the Constitution nor with sound public policy.

I have always believed that the decision to have an abortion generally should be between a woman, her doctor, her conscience, and her God. I support the decision in Roe v. Wade protecting a woman's right to choose, and I believe that the abortions protected by that decision should be safe and rare. Consistent with that decision, I have long opposed late-term abortions except where necessary to protect the life or health of the mother. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health.

The procedure described in H.R. 1833 has troubled me deeply, as it has many people. I cannot support use of that procedure on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available.

There are, however, rare and tragic situations that can occur in a woman's pregnancy in which, in a doctor's medical judgment, the use of this procedure may be necessary to save a woman's life or to protect her against serious injury to her health. In these situations, in which a woman and her family must make an awful choice, the Constitution requires, as it should, that the ability to choose this procedure be protected.

In the past several months, I have heard from women who desperately wanted to have their babies, who were devastated to learn that their babies had fatal conditions and would not live, who wanted anything other than an abortion, but who were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to ever bear children again. For these women, this was not about choice -- not about deciding against having a child. These babies were certain to perish before, during or shortly after birth, and the only question was how much grave damage was going to be done to the woman.

I cannot sign H.R. 1833, as passed, because it fails to protect women in such dire circumstances -- because by treating doctors who perform the procedure in these tragic cases as criminals, the bill poses a danger of serious harm to women. This bill, in curtailing the ability of women and their doctors to choose the procedure for sound medical reasons, violates the constitutional command that any law regulating abortion protect both the life and the health of the woman. The bill's overbroad criminal prohibition risks that women will suffer serious injury.

That is why I implored Congress to add an exemption for the small number of compelling cases where selection of the procedure, in the medical judgment of the attending physician, was necessary to preserve

the life of the woman or avert serious adverse consequences to her health. The life exception in the current bill only covers cases where the doctor believes that the woman will die. It fails to cover cases where, absent the procedure, serious physical harm, often including losing the ability to have more children, is very likely to occur. I told Congress that I would sign H.R. 1833 if it were amended to add an exception for serious health consequences. A bill amended in this way would strike a proper balance, remedying the constitutional and human defect of H.R. 1833. If such a bill were presented to me, I would sign it now.

I understand the desire to eliminate the use of a procedure that appears inhumane. But to eliminate it without taking into consideration the rare and tragic circumstances in which its use may be necessary would be even more inhumane.

The Congress chose not to adopt the sensible and constitutionally appropriate proposal I made, instead leaving women unprotected against serious health risks. As a result of this Congressional indifference to women's health, I cannot, in good conscience and consistent with my responsibility to uphold the law, sign this legislation.

WILLIAM J. CLINTON

THE WHITE HOUSE,
April 10, 1996.

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 10, 1997

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 1122, which would prohibit doctors from performing a certain kind of abortion. I am returning H.R. 1122 for exactly the same reasons I returned an earlier substantially identical version of this bill, H.R. 1833, last year. My veto message of April 10, 1996, fully explains my reasons for returning that bill and applies to H.R. 1122 as well. H.R. 1122 is a bill that is consistent neither with the Constitution nor sound public policy.

As I have stated on many occasions, I support the decision in Roe v. Wade protecting a woman's right to choose. Consistent with that decision, I have long opposed late-term abortions, and I continue to do so except in those instances necessary to save the life of a woman or prevent serious harm to her health. Unfortunately, H.R. 1122 does not contain an exception to the measure's ban that will adequately protect the lives and health of the small group of women in tragic circumstances who need an abortion performed at a late stage of pregnancy to avert death or serious injury.

I have asked the Congress repeatedly, for almost 2 years, to send me legislation that includes a limited exception for the small number of compelling cases where use of this procedure is necessary to avoid serious health consequences. When Governor of Arkansas, I signed a bill into law that barred third-trimester abortions, with an appropriate exception for life or health. I would do so again, but only if the bill contains an exception for the rare cases where a woman faces death or serious injury. I believe the Congress should work in a bipartisan manner to fashion such legislation.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 10, 1997.

# # #

AMERICAN NURSES ASSOCIATION

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202 651-7000 • FAX 202 651-7001
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MARY E. FOLEY, MS, RN
PRESIDENT

DAVID W. HENNAGE, PhD, MBA
EXECUTIVE DIRECTOR

March 3, 2000

The Honorable John Conyers, Jr.
U. S. House of Representatives
Washington, DC 20515

Dear Representative Conyers:

I am writing to express the opposition of the American Nurses Association to H.R. 3660, the "Partial-Birth Abortion Ban Act of 2000," which may be considered by the Committee on the Judiciary in the near future. This legislation would impose Federal criminal penalties and provide for civil actions against health care providers who perform certain abortion procedures.

It is the view of the American Nurses Association that this proposal would involve an inappropriate intrusion of the federal government into a therapeutic decision that should be left in the hands of a pregnant woman and her health care provider. ANA has long supported freedom of choice and equitable access of all women to basic health services, including services related to reproductive health. This legislation would impose a significant barrier to those principles. It is inappropriate for Congress to mandate a course of action for a woman who is already faced with an intensely personal and difficult decision.

The American Nurses Association is the only full-service professional organization representing the nation's registered nurses through its 53 constituent associations. ANA appreciates your consideration of our views on this issue and respectfully urges members of the Committee to oppose H.R. 3660.

Sincerely,

Chris deVries
Deputy Executive Director, Programs

American Medical Women's Association

March 3, 2000

Dear Judiciary Committee Member:

Regarding: Oppose H.R. 3660

As President of the American Medical Women's Association (AMWA), I am writing to urge you to oppose H.R. 3660, the "Partial-Birth Abortion Ban Act of 2000." AMWA is an organization of 10,000 women physicians and medical students dedicated to promoting women's health and increasing the influence of women in all aspects of the medical profession.

AMWA has long been an advocate for women's health care services, including abortion. We feel that abortion is a private decision between a patient and her physician. Abortion is a legal, constitutionally protected procedure, and any regulation of abortion practices should be left to the states' medical licensing boards, as with any other medical procedure. We are concerned with the language in this bill which defines what methods of abortion would be banned, as it is both vague and overly broad, affecting safe and common abortion procedures and placing an undue burden on a woman's right to choose.

Please let me know if AMWA can answer any of your questions. You can reach the Governmental Affairs staff at our National Office at 703-838-0500.

Sincerely,

Catherine A. Henry, MD, FACP
President
American Medical Women's Association

801 N. Fairfax Street, Suite 400, Alexandria, VA 22314 • (703) 838-0500 • fax: (703) 549-3864 • www.amwa-doc.org

American Medical Association

Physicians dedicated to the health of America

Statement

For Response Only

October 21, 1999

"U.S. Senator Rick Santorum (R-PA) has reintroduced a bill that would ban intact dilatation and extraction. The American Medical Association (AMA) has previously stated our opposition to this procedure. We have not changed our position regarding the use of this procedure.

"The AMA has asked Sen. Santorum to remove the criminal sanctions from his bill, but such a change has not been made. For this reason we do not support the bill."

1101 Vermont Avenue, NW
Washington, DC 20005
202 789-7400

New York Times - December 7, 1998

The A.M.A.'s Partial Birth Fiasco

The American Medical Association blundered badly when it endorsed a Republican bill last year banning so-called partial birth abortion. That blunt conclusion, reached long ago by many doctors, has now been echoed by consultants the A.M.A. hired to investigate the debacle. Confronted with this finding, the organization has but one honorable path. It ought to use the gathering of its house of delegates this week in Honolulu to rescind its support for an abortion measure that intrudes on decisions best made by women and their doctors.

The report by the consulting firm of Booz Allen & Hamilton paints a devastating picture of a politically naïve organization so consumed by the desire to cut a deal and to protect the financial interests of doctors on Medicare issues that it "lost sight of its responsibility for making decisions which, first and foremost, benefit the patient and protect the physician-patient relationship." Trustees of the organization, rookies in the high-pressure game of Congressional negotiations, ended up supporting the legislation, the report notes, even after failing to win concessions to address valid concerns about placing doctors in legal jeopardy by criminalizing a medical procedure the legislation defines only vaguely.

Although the partial birth bill was vetoed by President Clinton, Congress, buttressed by the A.M.A position, came within three votes of overriding the veto. The bill's sponsors plan to introduce it again next spring. Moreover, the A.M.A.'s endorsement has helped encourage many state legislatures to impose partial birth bans of their own. In 18 states where such bans have been enacted, courts have blocked or severely limited their implementation, finding that the legislative definitions could cover the most commonly used abortion procedures, in violation of Roe v. Wade. Inevitably, the issue will reach the Supreme Court, where the position taken by the A.M.A. is bound to be influential. The group should correct its mistake on partial birth abortion before it causes more confusion and damage.

Inquiry Criticizes A.M.A. Backing of Abortion Procedure Ban

By ROBERT PEAR

WASHINGTON, Dec. 3-Investigators hired by the American Medical Association say that the organization ignored its own decision-making procedures, got swept up in politics and failed to protect the welfare of patients when it endorsed a Republican bill banning a specific abortion procedure last year.

In a scathing report, the investigators said that AMA trustees had abandoned the group's longstanding positions on abortion and rushed to embrace the bill even though it did not meet the criteria previously set by the association for such an endorsement.

The report, part of a larger investigation of the board of trustees, concludes that "the AMA blundered" in its handling of the bill to outlaw the procedure that opponents call "partial birth abortion." The trustees had been seeking concessions from Congress to make the bill more acceptable to doctors.

But the report said the association "set itself up for accusations of playing politics" because it announced its support for the abortion bill on the same day it asked Congress to shield doctors from deep cuts in Medicare spending.

"Rather than focusing on its role as steward for the profession and the public health," the report said, "the board got enmeshed in operational issues of lobbying and lost sight of its responsibility for making decisions which, first and foremost, benefit the patient and protect the physician-patient relationship."

The report, a "management audit" by Booz Allen & Hamilton, the consulting company, is based on scores of confidential documents and interviews with people at all levels of the association. The report will be discussed next week in Honolulu at a meeting of the AMA House of delegates, the 486-member policy-making body for the association. At that time, some doctors will press the association to rescind its endorsement of the abortion bill, which passed Congress but was vetoed by President Clinton.

The investigators expressed no views for or against abortion. But they cited the association's handling of the abortion bill as an example of serious flaws in its decision-making process. The report suggests that leaders of the association were manipulated by Republican members of Congress, and that the trustees were inexperienced and unable to deal with the intense political pressures surrounding their negotiations with Congress over the abortion bill in the spring of 1997.

"As the AMA became determined to cut a deal with the Congressmen," the report said, "the decision-making process began to reel out of the control of the AMA and into the control of the Congressmen on the other side of the negotiating table."

While the trustees negotiated directly with congressional sponsors of the legislation, they failed to consult adequately with the American College of Obstetricians and Gynecologists and other groups of medical specialists, the report said.

Some members of the association said they agreed with the auditors' findings. In the culture of the AMA, "political considerations often take precedence over the profession's needs," said a panel of doctors who studied the structure and governance of the organization, at the behest of the House of Delegates. The investigators from Booz Allen & Hamilton worked under the direct supervision of the doctors' panel.

The extraordinary self-examination was prompted by a fiasco in which the AMA last year agreed to endorse health care products of the Sunbeam Corp. in return for millions of dollars in royalty payments. Stung by charges of commercialism and conflict of interest, the doctors' group canceled the deal, and its chief executive resigned.

Supporters of the abortion bill repeatedly cite the AMA's endorsement as a reason for Congress and state legislatures to impose such restrictions, and many states have done so. The federal version was twice vetoed by President Clinton, in April 1996 and October 1997, but it is sure to come up again next year in Congress.

The bill would make it a crime for a doctor to perform a partial birth abortion, defined as a procedure in which a doctor "partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

Supporters of the legislation say it is aimed at a specific late-term abortion procedure. But

judges have struck down similar language in state laws, saying it is so broad that it has the effect of banning abortion techniques widely used in earlier stages of pregnancy.

In July, for example, Judge Richard Kopf of the Federal District Court for Nebraska ruled that the state's ban on partial birth abortion was unconstitutionally vague because it did not give "fair warning" to doctors and patients about what conduct was prohibited.

"One simply cannot ascertain from the legislative history precisely what the Legislature wanted to ban," Kopf said. "We know the legislators wanted to ban 'partial birth' abortions, but that term is unknown in medical circles."

Janet Benshoof, president of the Center for Reproductive Law and Policy, an abortion rights group, said courts had blocked or limited partial birth abortion laws in 18 states. At least six of the laws were modeled on the federal bill endorsed by the American Medical Association.

The audit report also makes these points:

¶Through the timing of its action on the abortion bill, "the AMA painted a picture of itself as primarily concerned about protecting the financial interests of physicians."

¶The trustees had "a general sense, based on national polls, that the American public was opposed to the partial birth abortion procedure," but the AMA did not survey its members to ascertain what would be in the best interest of patients and doctors.

¶The decision to support a ban on partial birth abortion "contradicted longstanding AMA policy" and deviated from positions reaffirmed by the house of delegates just five months earlier, in December 1996.

¶The association "appeared to get swept up by the high-profile nature of the issue" last year.

¶The AMA had well-established procedures to set policy in a "thoughtful, deliberative and democratic way," but disregarded them. Instead, it used a "crisis mode of policy-setting."

The trustees decided that they had to take a position on the abortion bill in May 1997, rather than wait for the house of delegates to consider the issue at its regularly scheduled meeting one month later.

As a result, the report says, "many doctors were outraged."

17, 1999) (purporting to enjoin a private-civil-damages provision in a suit to which only state officers were defendants, without mentioning the eleventh circuit's conclusion in Summit Medical).

The judgments in both cases are vacated. The cases are remanded with instructions to enter the precautionary injunctions discussed in Part II.3 of this opinion, to dismiss the challenges to the civil-liability provisions for want of a case or controversy, and otherwise to enter judgment for the defendants.

Vacated and Remanded

/* Circuit Judge Ripple did not participate in the consideration or decision of these cases.

Posner, Chief Judge, with whom Rovner, Diane P. Wood, and Evans, Circuit Judges, join, dissenting. Compromise holds seductive allure for a court faced with a hot issue, and there is none hotter than the issue of abortion rights. The Illinois and Wisconsin statutes criminalizing "partial birth" abortion are challenged here both as being unconstitutionally vague and as unconstitutionally burdening the right of abortion. (These are independent grounds; if either is valid, the statutes are invalid.) The court rejects both challenges yet orders the district courts to enjoin enforcement of the statutes against any method of abortion other than the one the medical community refers to as "intact D & E" (that is, intact dilation and evacuation) or, more commonly, "D & X" (dilation and extraction). This is the form of "partial birth" abortion that gave rise to these statutes, although they are not limited to it.

The court's decision is not a real compromise. It leaves intact the core of the statutory prohibitions, which unlawfully burden the right of abortion by outlawing the D & X procedure. The court does toss a bone to the plaintiffs, but at the cost of expanding federal judicial power over the states by a method that the Supreme Court has never countenanced and that violates Article III of the Constitution. It is a bone, incidentally, that the plaintiffs didn't ask for; neither side, in either case, requested this novel form of relief or commented on it in their briefs. We are taking a leap into the unknown without any input from the parties.

The "precautionary" injunctions that the court is directing the district courts to enter will

forbid the enforcement of the statutes outside their core prohibition, thus placing the federal contempt power behind this court's interpretation of state statutes. The court does this while accepting the enforcers' assurances that they will not enforce the statutes outside the core, and concludes, therefore, "that the probability of improper prosecution is low." The states are nevertheless to be enjoined because the probability, though low, is greater than zero. The probability of improper prosecution under every criminal statute ever written is greater than zero; and so the court's decision, should it be followed outside the abortion context--and nothing in the decision suggests a principled limitation to that context--implies a radical expansion of the power of the federal courts to superintend the enforcement of state statutes. State officials will be subject to federal contempt sanctions for failing to abide by a federal court's interpretation of the statutes that these officials, not federal judges, are charged with administering.

The court adds that while the probability of improper enforcement now is low, given the assurances that the state law enforcement authorities have made in their briefs in this court and at oral argument, the probability was high enough when these cases were brought to confront the plaintiffs with "a real risk" of being prosecuted for performing constitutionally privileged abortions. But if that is so, it means the statutes are unconstitutionally vague. If the law enforcers' present assurances are not enough to moot the case, how can they be enough to moot the central issue to which those assurances are addressed, the issue the court ducks of whether the statutes are in fact unconstitutionally vague? And if the present probability of improper enforcement is slight, as the court believes, what equity do the plaintiffs have to obtain an injunction?

The court is directing that state statutes be enjoined that it has not found either violate federal law or create a significant danger of such violation. This is unprecedented, and (on the court's view of the facts) violates Article III. If the court is right--I do not think it is, but it is the premise of the decision--that there is only a "non-zero" probability that either state statute will be enforced against any abortion procedure other than the D & X, the threatened injury is too slight to activate the curative powers of federal courts. A nonzero probability could be a probability of one in a thousand, or one in a million. A probabilistic injury can support standing, e.g., Clinton v. City of New York, 118 S. Ct. 2091, 2100-01 (1998); Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998); North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991), but the probability must be nontrivial, not merely nonzero. E.g., Murphy v. Hunt, 455 U.S. 478, 482-83 (1982) (per curiam); City of Los Angeles v. Lyons, 461 U.S. 95, 105-07 and n. 8 (1983); Walters v. Edgar, supra, 163 F.3d at 434-35. Otherwise the federal

courts will be flooded with cases, since few statutes are altogether free of vagueness; statutes that are too precise allow loopholes.

Lyons, the choke-hold case, makes the basic point. The probability that the plaintiff would again be arrested and subjected to a choke hold was held to be too slight to support standing. But it was no less than the implicit probability that this court today assigns to the threat of prosecution for performing abortions that the state law enforcement authorities concede are constitutionally privileged.

Although the injunctions that the court is ordering ostensibly are temporary, to remain in force only until the state courts have a chance to clarify the statutes, those courts are unlikely ever to get that chance, since the enforcement of the statutes beyond their core prohibition, which in the court's view needs no clarification, will be enjoined. Private civil suits are unaffected, but the provisions for civil enforcement of these statutes are limited and cases are unlikely. The Illinois statute authorizes civil suits only by the parents of a minor who has a "partial birth" abortion, and the Wisconsin statute by either the minor's parent or the fetus's father. Should a prosecutor indict a physician for performing a D & X, and the physician contend that it was really a D & E, the dispute will be resolved by the district court's interpreting its injunction in contempt proceedings. As a practical matter, the courts of Illinois and Wisconsin will never have an opportunity to explore the outer bounds of these statutes.

The court cites no case that authorizes such injunctions. It relies on cases such as City of Chicago v. Morales, 119 S. Ct. 1849, 1861 (1999), and Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n. 5 (1982), which hold that if a state statute has been interpreted by the state's highest court, the interpretation binds any federal court asked to decide the meaning of the statute. No case holds, however, that until the statute is construed by the state courts, a claim that it is unconstitutionally vague is premature. No case denies the authority of the federal courts to interpret state statutes, which is something we do all the time. No case holds that until a state statute is construed by the state courts its operation may be enjoined without a determination that the statute is unconstitutional. All the cases on which the majority relies involve federal courts either narrowing federal statutes that are fairly susceptible of being narrowed or accepting as authoritative a narrowing interpretation of a state statute by a state court. In no case cited by the majority did a federal court impose its own narrowing interpretation on a state statute by injunction, let alone a state statute the language of which defies a saving interpretation.

Although grounded in a concern with preserving

the prerogative of state courts to interpret state statutes, today's decision curtails that prerogative by forbidding the states to enforce state statutes that the court has not found to be invalid. The decision is thus internally inconsistent (the court both rejects the charge that the statutes are unconstitutionally vague and, by enjoining their application outside their small clear core until they are clarified by the state courts, holds that they are too vague to provide fair warning--which means they are unconstitutionally vague, e.g., Bouie v. City of Columbia, 378 U.S. 347, 351 (1964)), as well as being an evasion of judicial duty, a violation of Article III, and an affront to federalism. The content of the injunctions that the court orders entered, moreover, is not specified; disputes over it will undoubtedly give rise to further litigation. And there will be a nice question of whether the plaintiffs can obtain attorneys' fees on the ground that they have won something, with the defendants arguing that it is they who have won the case because the court has both held the challenged statutes to be valid and accepted the defendants' assurances that the statutes will not be enforced beyond their valid scope.

On the merits, the most important issue raised by the appeals is that of undue burden. (I'll come back later to the substantive issue of vagueness, as distinct from the problems raised by the court's effort to evade the issue by means of the "precautionary" injunctions.) To understand this issue requires understanding the peculiar and questionable character of these statutes. They do not protect the lives of fetuses either directly or by seeking to persuade a woman to reconsider her decision to seek an abortion. For the statutes do not forbid the destruction of any class of fetuses, but merely criminalize a method of abortion--they thus have less to recommend them than the antiabortion statutes invalidated in Roe v. Wade, 410 U.S. 113 (1973). If any fetal lives are saved by these statutes, it will only be by scaring physicians away from performing any late-term abortions, an effect particularly likely in Wisconsin, whose statute imposes a punishment of life imprisonment for its violation. In tacit acknowledgment of that statute's especially questionable character, the majority opinion invites an Eighth Amendment challenge should a lengthy prison sentence ever be imposed on a violator of the statute.

The statutes do not seek to protect the lives or health of pregnant women, or of anybody else, as by confining the performance of abortions to licensed physicians, as in Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam), or to facilities equipped to deal with emergencies that may arise in the course of an abortion, particularly a late-term one. A legislature can ban quacks from practicing medicine without making an exception for those quacks (and no doubt there are some) who are abler than the worst physicians. Any general health regulation is likely to hurt a few people. But as banning "partial birth" abortions is not intended to

improve the health of women (or anyone, for that matter), it cannot be defended as a health regulation.

The statutes make no exception for cases in which pregnancy results from rape or incest, or in which the fetus is profoundly deformed, nonviable, or unlikely to live more than a few hours after birth, or indeed, as I shall show, in which the woman's life would be endangered if she carried the fetus to term. The absence of any such exceptions is particularly surprising because late-term abortions are much less likely than the much more common first-trimester abortions to be motivated by considerations merely of convenience rather than of urgency. A woman who finds herself five months pregnant is unlikely to decide to have an abortion unless advised by her physician either that the fetus is profoundly deformed or that her own health requires that the pregnancy be terminated. Indeed, if the fetus has become viable, she cannot lawfully obtain an abortion unless her life or health is in danger. Wis. Stat. sec. 940.15(3); 720 ILCS 510/5(1). These are constitutionally permissible protections of fetal life. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992). It is incomprehensible to me why these states, if acting in good faith, were unwilling to write the same health exception into statutes that criminalize the abortion of nonviable as well as viable fetuses. The "partial birth" statutes do not distinguish between fetuses that are viable, in the sense of being sufficiently developed to be able to survive outside the mother's body, and those that are not. Some fetuses don't become viable until 27 weeks or even later, but the "partial birth" abortion, even defined so narrowly as to cover only the D & X procedure, is performed from 20 weeks on. A physician might be convicted of a felony violation of these statutes even though the Supreme Court has held that a state may not prevent the abortion of a nonviable fetus. Id. at 846, 877.

The statutes do not outlaw a particularly cruel or painful or horrifying mode of abortion. This can be shown with the aid of a simple example. Suppose that the fetus is hydrocephalic, so that its head is too large to pass through the cervix. If the physician performing the abortion crushes the fetus's skull in the uterus, killing the fetus while the fetus is still entirely within the uterus, he is not guilty of violating either of the statutes before us. But if before crushing the fetus's skull the physician turns the fetus around so that its feet are protruding into the vagina, he has committed a felony. In both cases, the fetus is killed by the crushing of its head in the uterus. (The crushing is necessary to enable the fetus to be removed through the birth canal without making the woman go into labor.) From the standpoint of the fetus, and, I should think, of any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus. Yet the position of

the feet is the only difference between committing a felony and performing an act that the states concede is constitutionally privileged.

The tortured efforts of the states' lawyers to provide guidance to physicians engaged in performing abortions--physicians who already are frequent subjects of picketing and other harassment and occasionally of physical assaults, see, e.g., United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996), and who are now to be threatened with criminal prosecution and professional defrocking-- make one thing clear: it is extremely difficult, indeed probably impossible, to distinguish a "partial birth" abortion from the methods of abortion that are conceded to be privileged. (This is the key to the statutes' vagueness, and so a point to which I'll return.) The principal reason for the difficulty is that, as my example of the hydrocephalic fetus suggests, there is no meaningful difference between the forbidden and the privileged practice. No reason of policy or morality that would allow the one would forbid the other. We should consider therefore why any state would pass such a law. An important part of the answer is found in Judge Manion's opinion in Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463 (7th Cir. 1998). The states want to dramatize the ugliness of abortion. "[A]ll methods [of abortion] are gruesome. But this is the one method that has been at least partially exposed to the light of day. . . . The exposure of this procedure has cast a bright light on the alternative procedures that are equally gruesome. . . . No doubt when this statute is properly construed--[so] that it bans only the rarely-used D & X procedure--it does not appear to accomplish much in the way of saving babies. But these laws have certainly elevated the public's concern over the fate of the 'potential human lives' that are exposed to abortion." Id. at 477, 479 (dissenting opinion). From this standpoint, the more a "partial birth" abortion is like an abortion that is conceded to be constitutionally privileged, the better.

The wave of "partial birth" abortion statutes that broke over the nation after a description of the D & X procedure was publicized--see Martin Haskell, "Dilation and Extraction for Late Second Trimester Abortion" (1992), reprinted in 139 Cong. Rec. E1092, 1993 WL 135664 (Apr. 28, 1993), and in The Partial-Birth Abortion Ban Act of 1995, Hearing before the S. Comm. on the Judiciary, 104th Cong., 1st Sess. 5 (Nov. 17, 1995)--does not exhibit the legislative process at its best, whatever one thinks of abortion rights. Whipped up by activists who wanted to dramatize the ugliness of abortions and deter physicians from performing them, the public support for the laws was also based--as is implicit in Judge Manion's defense of the laws--on sheer ignorance of the medical realities of late-term abortion. The uninformed thought the D & X procedure gratuitously cruel, akin to infanticide; they didn't realize that the only

difference between it and the methods of late-term abortion that are conceded all round to be constitutionally privileged is which way the fetus's feet are pointing. Opposition to the bills that became these laws was at first muted not only by ignorance of the character of a late-term abortion but also by the fact that few women are likely to be affected by the laws. Circumstances conspired, as it were, to produce a set of laws that can fairly be described as irrational.

This is a harsh verdict, but doubt about its soundness is laid to rest by the absence of any exception for situations in which a "partial birth" abortion is necessary to protect the pregnant woman's health. The right of abortion is unduly burdened by any law that endangers the woman's health. Even a law that limits only the right to abort viable fetuses--a limitation not found in the statutes challenged in this case--must, to pass constitutional muster, make an exception "for pregnancies which endanger the woman's life or health." Planned Parenthood of Southeastern Pennsylvania v. Casey, supra, 505 U.S. at 846 (emphasis added). Immediately the question arises why the Wisconsin and Illinois legislatures didn't try to come within reach of the cases that permit states to limit the right of abortion by making an exception for pregnancies that endanger the woman's health, the same exception they have written into their other abortion statutes. When pressed at argument, the lawyers for the two states could answer only that the exception is unnecessary. The lawyers were confident that such an abortion is never required to preserve a woman's health. They may be right, though I think not (more on this below). But if so, they are right only for today. Tomorrow, studies may show that, yes, there indeed are cases where a "partial birth" abortion is necessary to protect the mother's health, as many physicians believe. Tomorrow, then, these two statutes may be unconstitutional even by the lights of the majority opinion. Why would a state risk the early obsolescence of its statute by making it wholly dependent on ever-changing medical opinion, when to avoid this risk it need only have excepted those "partial birth" abortions, if any, that are necessary to protect the woman's health? If there are few such cases, the exception will rarely be invoked; if none, never.

The answer is that opponents of abortion do not think there should be an exception for abortions that endanger a woman's health. Life, yes, but not health. These statutes, remember, are not concerned with saving fetuses, with protecting fetuses from a particularly cruel death, with protecting the health of women, with protecting viable fetuses, or with increasing the Wisconsin population (as intimated, surely not seriously, by Wisconsin's counsel). They are concerned with making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions. The statement is that fetal life is more valuable

than women's health.

I do not deny the right of legislatures to enact statutes that are mainly or for that matter entirely designed as a statement of the legislators' values. Milner v. Apfel, 148 F.3d 812, 814 (7th Cir. 1998). Nothing in the Constitution forbids legislation so designed. Many statutes are passed or, more commonly, retained merely for their symbolic or aspirational effect. But if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue. The statutes before us endanger pregnant women--and not only pregnant women who want to have an abortion. There is no exception for women whose physicians tell them you must have an abortion or die. It is true that if a "partial birth" abortion is necessary to save the woman's life, the statutes permit this. But if her life could be saved by another type of abortion, even one that threatened her health--that threatened to sterilize her or to paralyze her--then the physician would be committing a felony if he performed a "partial birth" abortion. I cannot believe that my colleagues would think the physician could be punished in such a case, and I wonder therefore why the "precautionary" injunctions do not extend to it. The statutes allow a "partial birth" abortion to be performed if "no other medical procedure would suffice for that purpose" (that is, saving the mother's life). Wis. Stat. sec. 940.16(3); 720 ILCS 513/10. Could not "would suffice" be interpreted to mean "would be as good as from the standpoint of the woman's health"? Such an interpretation, no more audacious than the interpretive leaps that underlie the order to enter "precautionary" injunctions, would seem compelled by the court's own reasoning, but goes unremarked. If the interpretation is rejected, it would imply that a D & X would be forbidden even if the only alternative were a hysterectomy. That can't be right.

The court points out that it is unclear how many women are endangered by these statutes. The forbidden procedure is performed only (or almost only) in late-term abortions, which fortunately are rare; and only in some unknown fraction of them is a "partial birth" abortion the medically preferable procedure. But government cannot without a reason forbid a person to obtain medical treatment and if challenged defend by pointing out that most people don't need that treatment. In the context of abortion this principle is implicit in the statement in Planned Parenthood of Southeastern Pennsylvania v. Casey, supra, 505 U.S. at 878, that "purpose or effect" (emphasis added)--and thus purpose alone--"to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" condemns an antiabortion statute. E.g., Okpalobi v. Foster, No. 98-30228, 1999 WL 728396, at *16-20 (5th Cir. Sept. 17, 1999); Jane L. v. Bangerter, 102 F.3d 1112, 1116-

18 (10th Cir. 1996). That is no constitutional novelty; statutes that burden other constitutional rights besides the right of abortion have been invalidated on the basis of improper purpose. E.g., Edwards v. Aguillard, 482 U.S. 578 (1987). The Casey opinion speaks of placing a substantial obstacle in the path of "a woman," not "many women." Imagine a married woman, pregnant, told by her physician that her life depends on her obtaining an abortion. He tells her it would be better from the standpoint of minimizing the risk to her of medical complications from the abortion for her to have a D & X. But, he adds, unfortunately the law prohibits the procedure. It does so not because the procedure kills the fetus, not because it risks worse complications for the woman than alternative procedures would do, not because it is a crueler or more painful or more disgusting method of terminating a pregnancy, but because the state wishes to make a statement of opposition to constitutional doctrine. A legislature may be taken to intend any consequences of its handiwork that are at once natural, highly probable, and wholly foreseeable (and foreseen). Here the intent is to block a woman from seeking an abortion when her doctor advises her that the best procedure for her is criminal.

The statutes' improper purpose is further shown by the terminology they employ. The Wisconsin statute defines a fetus from the moment of conception to the moment of birth as a "child" (thus absurdly implying that when we are born we are no longer children). The Illinois statute defines the fetus, also from the moment of conception, as an "infant." If these definitions are sound, all abortion is infanticide, which is not the Supreme Court's view. A state cannot be permitted to abrogate federal constitutional rights by definition. Line drawing is inescapable but the line between feticide and infanticide is birth. Once the baby emerges from the mother's body, no possible concern for the mother's life or health justifies killing the baby. But as long as the baby remains within the mother's body, it poses a potential threat to her life or health and this threat presents a compelling case (or so at least the Supreme Court believes) for a right of abortion. The Wisconsin statute, whose provision for life imprisonment already marks it as the crazier one, also allows either of the fetus's grandparents to sue in respect of a "partial birth" abortion. One can imagine a father who cares more for having a grandchild than he cares for the health of his daughter threatening to sue in order to block a "partial birth" abortion, while the mother (who may be divorced from the father), valuing the situation differently, sits on the sideline, helpless to protect her daughter.

In concluding that the challenged statutes do not pose any threat to women's health, the court relies heavily on tendentious factfindings by the district judge in the Wisconsin case. He fastened on the fact that a Dr. Harlan Giles believes that

the D & X procedure is rarely, maybe never, necessary for the protection of the pregnant woman's health. The judge brushed aside the contrary testimony of reputable physicians--more reputable, perhaps, as we're about to see, than Dr. Giles. Giles's testimony is essentially the only basis of the judge's finding, and the judge's finding is the principal basis on which this court, disregarding the contrary findings in the Illinois case, dismisses concerns about the absence of a health exception. Yet apart from everything else, Judge Shabaz's opinion is internally contradictory. He acknowledged that the D & X procedure, being quicker and easier to perform on fetuses that are more than 18 weeks old, has advantages for the woman's health in reducing the amount of bleeding, the risk of uterine perforations, and the amount of time that she has to be under anesthesia. Planned Parenthood v. Doyle, 44 F. Supp. 2d 975, 979 (W.D. Wis. 1999). Yet without retracting these findings, he concluded that the procedure is never necessary to protect the woman's health.

I daresay reputable physicians can be found who believe that surgery is never necessary in a case of prostate cancer, or that all vitamins are worthless, or that no efforts should be made to resuscitate a person over 80 years old who experiences cardiac arrest, since he is quite likely to be "revived" to a vegetative state. Dr. Giles may not even be wholly reputable. Another district judge rejected his testimony in opposition to the D & X procedure because, among other reasons, Giles was "more focused on the political aspects of the abortion debate than on the medical questions essential to resolution of the issues presented in this action. And, Dr. Giles was evasive when responding to questions directed at crucial issues in the case. Hence the testimony of Dr. Giles was neither credible, reliable nor helpful." Richmond Medical Center for Women v. Gilmore, No. Civ. A. 3:98 cv 309, 1999 WL 507453, at *7 (E.D. Va. July 16, 1999) (footnote omitted). Another district judge criticized Giles--who appears to be a member of that much-criticized fraternity, the professional expert witness--for pronouncing on an abortion statute with which he was unfamiliar. Evans v. Kelley, 977 F. Supp. 1283, 1309-10 (E.D. Mich. 1997). Another rejected his testimony that the D & X is "a resurrection of an obstetric method discarded in the 1960s, which was used to deliver dead fetuses, and known as craniotomy," and concluded that Giles's criticisms of the D & X procedure were "not persuasive." Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051, 1070 (S.D. Ohio 1995), aff'd, 130 F.3d 187 (6th Cir. 1997).

Judge Shabaz, his only support the dubious Dr. Giles, stands alone among district judges who have made factfindings concerning the potential benefits of the D & X procedure for women's health. See Rhode Island Medical Society v. Whitehouse, No. C.A. 97-416L, 1999 WL 683846, at *22 (D. R.I. Aug. 30, 1999) (contrary testimony is "unbelievable"); Richmond Medical Center for

Women v. Gilmore, supra, at *44-45; Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1124-26 (D. Neb. 1998), aff'd, 1999 WL 753919 (8th Cir. Sept. 24, 1999); A Choice For Women v. Butterworth, 54 F. Supp. 2d 1148, 1153, 1156-57 (S.D. Fla. 1998); Hope Clinic v. Ryan, 995 F. Supp. 847, 852 (N.D. Ill. 1998) (the decision reversed today without regard for the district judge's findings); Evans v. Kelley, supra, 977 F. Supp. at 1296; Women's Medical Professional Corp. v. Voinovich, supra, 911 F. Supp. at 1070; see also Causeway Medical Suite v. Foster, 43 F. Supp. 2d 604, 608, 613-14 (E.D. La. 1999); Planned Parenthood of Central New Jersey v. Verniero, 41 F. Supp. 2d 478, 484-85 (D.N.J. 1998). If this court is to give weight to district judges' assessment of the credibility of the physicians who have testified pro or con the D & X procedure, it ought at least to acknowledge that Judge Shabaz is in a minority of one.

In refusing to give any weight to the findings of fact made by Judge Kocoras in the Hope case, the court seems to have forgotten that we are reviewing his judgment too. It is not some unrelated case that we are free to ignore on the ground that it is based on a different record from any before us. His findings, made in a proceeding that resulted in the issuance of a permanent injunction against the Illinois statute, are entitled to as much weight as Judge Shabaz's, Knapp v. Northwestern University, 101 F.3d 473, 478 (7th Cir. 1996); Durasys, Inc. v. Leyba, 992 F.2d 1465, 1471 (7th Cir. 1993)--more, really, because they are not infected by the internal contradiction that weakens Judge Shabaz's findings. If those findings justify our upholding the Wisconsin statute, Judge Kocoras's should lead us to invalidate the Illinois statute.

The court denies that Judge Kocoras made findings. I don't understand this. It is true that he based his findings on affidavits rather than on live testimony, but the state did not challenge the facts contained in the affidavits, including the facts about the medical advantages of the D & X procedure. Findings do not lose weight by being based on uncontested facts; admissions are not weaker evidence than facts found after vigorous contest. And if it were true that there were no findings in the Illinois case, this would call for a remand; it would not entitle us to plug Judge Shabaz's findings into a separate litigation with no common parties. (What kind of transplant is that?)

Consistent deference to district court factfindings in this pair of cases would lead to an inconsistent result--the upholding of one statute and the condemnation of its sister. This demonstrates that the constitutional right of abortion cannot be made to depend on whether a particular district judge finds a particular physician who disagrees with the consensus of medical opinion to be more credible than the spokesmen for the consensus. The consensus here is found in the statement by the American College of Obstetricians and Gynecologists (ACOG) that

the D & X procedure "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision." As Judge Shabaz himself acknowledged, the procedure reduces the risk of lacerating the uterus and the cervix with the sharp instruments used in the standard D & E. Such lacerations cause trauma and loss of blood. The D & X also reduces the risk that fetal tissue will remain in the woman's body, where it can cause infection. It reduces the length of time that the woman is under anesthesia. And it facilitates testing for genetic abnormalities, which is particularly important to the woman's decision whether to become pregnant again. (So much for the suggestion of Wisconsin's lawyer that banning the D & X will lead to more births.) Not all physicians agree with these points; and ACOG hedged its opinion by noting that a select panel of physicians had been unable to identify specific circumstances in which there is no satisfactory alternative to a D & X. But the team of Dr. Giles and Judge Shabaz are, with all due respect, not competent to resolve this medical controversy.

How often the circumstances sketched in the previous paragraph that led ACOG to recommend retention of the D & X as a treatment option in late-term abortions will be present is not critical. It is slight consolation to be told that while the state has forbidden the optimal treatment of your medical problem, that problem happily is rare. Although we haven't been told of cases in states that have enacted laws forbidding "partial birth" abortion that were not promptly enjoined in which the consequence has been to endanger women, for all we know women in those states go out of state if they are candidates for a D & X. Cf. Jane L. v. Bangerter, supra, 102 F.3d at 1117. That would be the prudent course. My colleagues in the majority perform their own statistical analysis, outside the record, in an effort to refute this possibility. I have no objection to a court's relying on extra-record evidence to determine the health effects of "partial birth" abortion. Those effects should indeed be treated as a legislative fact rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges, sheltered by the deferential "clear error" standard of appellate review of factfindings, to different records--the inconsistency illustrated by the different findings of Judges Shabaz and Kocoras in the two cases before us. Even so, we should hesitate to play statistician. It is incongruous for this court to brush aside the findings of district judges in other cases while bolstering Judge Shabaz's inadequate findings with extra-record evidence of its own.

The court tries to shore up Judge Shabaz's findings with two medical papers. One of these, however, Nancy G. Romer, "The Medical Facts of

Partial-Birth Abortion," 3 Nexus: A Journal of Opinion 57 (1998), is not a medical paper at all. Although the author is an M.D., she is also a pro-life activist, and the burden of her paper is that viable fetuses should be saved rather than aborted. This is a respectable ethical stance but it has nothing to do with the medical pros and cons of a D & X. The other paper, M. LeRoy Sprang & Mark G. Neerhoff, "Rationale for Banning Abortions Late in Pregnancy," 280 JAMA (Journal of the American Medical Association) 744 (1998), appears in a section of JAMA captioned "controversies," and though it does point out possible dangers to the woman from the procedure, the authors are heavy on the ethical issues involved in abortion. Like Dr. Romer, they come out in opposition to late-term abortion by any method, and opine very unscientifically that "partial birth" abortion is "closer to infanticide than it is to abortion." Id. at 746. Another medical article in the same issue of JAMA concludes that the D & X procedure should, as ACOG concluded, be an option for the physician. See David A. Grimes, "The Continuing Need for Late Abortions," 280 JAMA (Journal of the American Medical Association) 747 (1998). The court does not cite that article.

No hypothesis has been proposed by either of the states, or by the amici curiae who have submitted briefs in support of the Wisconsin statute, as to why physicians would perform, or the American College of Obstetricians and Gynecologists support, a method of abortion that benefits no patient. There has been no suggestion of any pecuniary incentive that might cause them to engage in a controversial procedure of this kind.

Apart from performing its own statistical analysis and bringing to bear so-called medical papers, the court evinces its queasiness about resting entirely on Judge Shabaz's findings by saying that "the question in the end is not what one or another judge found on a given record" (the question the court had spent so much time discussing). "It is enough that there is real, and not just hypothetical, support for a belief that the partial-birth-abortion laws do not pose hazards for maternal health." This sounds suspiciously like the test for whether a statute has a rational basis, see, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993), and so may explain the court's one-sided treatment of the facts (the failure to cite Dr. Grimes's paper, for example). Rational basis is not the issue here. The issue is whether the Wisconsin and Illinois "partial birth" statutes impose an undue burden, and specifically whether they are a threat to maternal health. That is rightly an issue of legislative fact, meaning that its resolution is not to be cabined by facts determined in an adjudicative hearing; still it must be resolved in accordance with the weight of the evidence, including such extra-record evidence as the consensus of the relevant expert community, in this case the medical community. It is not enough to note that there is some evidence

in support of one side of the issue, when there is more evidence on the other side. In the case the court cites as illustrating the appropriate scope of review, Craig v. Boren, 429 U.S. 190, 199-204 (1976), the Supreme Court critically reviewed statistical evidence underlying the claimed constitutionality of the challenged statute--and found it wanting. When one critically reviews the testimony of Dr. Giles, and the court's own statistical analysis, and the so-called medical papers, and weighs them against the evidence that establishes the medical consensus, it becomes apparent that the court does not take the standard of Craig seriously.

Let me suggest an analogy. Suppose that a legislature in the South in the 1950s had listened to several "reputable" cognitive psychologists testify that blacks as a group are slow learners, and hence that they should be educated in separate schools. No one would argue that this legislative finding, because supported by some evidence from the relevant expert community, would have to be accepted in deciding the constitutionality of segregated education. The court, if it thought the issue relevant, would have to decide whether the finding was correct before relying on it. Similarly, the Wisconsin and Illinois legislatures are not entitled to ban an abortion procedure that the medical community believes may be preferable from a medical standpoint for some women, simply because a marginally reputable expert (Dr. Giles) thinks that the set of women for whom the procedure is preferable is actually zero. That might bear on the legislatures' good faith (though there is contrary evidence on that too, as I have pointed out), but it would not decide the issue of the statutes' effects on the right of abortion.

Enough said: banning the D & X, the core prohibition in these statutes, imposes an undue burden on women who seek to have an abortion, and is therefore unconstitutional. Let me turn now to the alternative ground of vagueness. Both statutes forbid the partial vaginal delivery of a living fetus, and this describes many instances of the D & E method of abortion--which the court acknowledges cannot constitutionally be banned, see also Carhart v. Stenberg, Nos. 98-3245NE, 1999 WL 753919 (8th Cir. Sept. 24, 1999); Little Rock Family Planning Services, P.A. v. Jegley, No. 99-1004EA, 1999 WL 753928 (8th Cir. Sept. 24, 1999); Planned Parenthood of Greater Iowa, Inc. v. Miller, No. 99-1372SI, 1999 WL 753770 (8th Cir. Sept. 24, 1999)--as well as it does the D & X. Judge Shabaz himself acknowledged that "often" in the course of a D & E there is a fetal heartbeat after portions of the fetus have been delivered into the vagina, 44 F. Supp. 2d at 977, making the D & E definitionally a "partial birth" abortion under both statutes. The court's response, as I noted at the outset of this dissent, is not to hold that the statutes are unconstitutionally vague, but instead to hold that they can't be enforced against any procedure except the D & X until the Wisconsin and Illinois

state courts have had a chance (the chance that is unlikely ever to come) to "interpret" their statutes to permit the standard D & E method even when it results, as it frequently does, in the partial vaginal delivery of a living fetus.

Putting to one side my objections to the court's procedure, which I discussed at the outset of this dissent, I note that the court seems to have bought into the legal-realist view that a statute means whatever the courts say it means, despite the Supreme Court's admonition that a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." Reno v. American Civil Liberties Union, 521 U.S. 844, 884 (1997), and cases cited there. If the realists are right, and the contrary intimations of cases such as Reno v. American Civil Liberties Union can be brushed aside, I wish the court would, as I suggested earlier, hold that these statutes can be further narrowed by "precautionary" injunction to make an exception for cases in which the D & X procedure is necessary to protect the woman's health. The interpolation of such an exception would be no greater act of judicial hubris than narrowing the statute to the D & X when the draftsmen of the statutes decided not to use that term, preferring a vaguer term intended to be broader.

The constitutional law of vagueness is obviously in turmoil and so I shall suggest a lowest-common-denominator approach with which I think few judges will disagree, however much they may disagree about its application to particular cases. If a criminal statute is so worded that it is highly likely to condemn a constitutionally privileged act, and if the constitutionally privileged actor could not as a practical matter avoid being punished for engaging in such an act by raising a defense in a criminal proceeding, then the statute is enjoinable, in advance of any prosecutions, as unconstitutionally vague. For the very existence of such a statute "deter[s] constitutionally protected activity." Coe v. County of Cook, 162 F.3d 491, 496 (7th Cir. 1998), and cases cited there. When vague statutes prescribe heavy penalties for their violation, rational people avoid any conduct that might be thought to fall within the statute's scope, even if in an error-free litigation the conduct would be sure to be found constitutionally protected. See, e.g., Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., supra, 455 U.S. at 494 n. 6; Colautti v. Franklin, 439 U.S. 379 (1979); Charles v. Daley, 749 F.2d 452, 460 (7th Cir. 1984).

When the demanding conditions that I have outlined are satisfied, the statute is invalid, and the legislature has to go back to the drawing board. The court cannot rewrite the statute, or tell the state courts how to rewrite it, and, in advance of any further interpretation, uphold the rewritten statute. That procedure, the procedure followed by the court today, in effect nullifies the doctrine of unconstitutional vagueness.

These statutes are either absurdly (and unlawfully) overbroad or remarkably vague, and the court's direction to issue "precautionary" injunctions is a tacit acknowledgement of its inability to give the statutes a plausible narrowing interpretation; the confused concessions of the states' lawyers at the oral argument were no help in the endeavor. Although the statutes are addressed to physicians--it is their conduct alone that is regulated--the language employed is not medical language. Instead of denoting the victim of illegal abortion as a live fetus, a fetus with a heartbeat, or a viable fetus (a fetus, remember, that can survive outside the mother's body), the Illinois statutes refers to "a living human fetus or infant," terms that the statute explains are "used interchangeably to refer to the biological offspring of human parents," 720 ILCS 513/5, while the Wisconsin statute refers to "a living child" or "partially delivered child," with "child" defined, as I noted earlier, as "a human being from the time of fertilization until it is completely delivered from a pregnant woman." Wis. Stat. sec.sec. 940.16(1)(a), (b). The use of such language makes the statutes incurably ambiguous. Neither "biological offspring" nor "living" is defined. At argument the Solicitor General of Illinois was emphatic that "biological offspring" is a synonym for "intact fetus," that is, a fetus (however deformed) before the physician performing the abortion begins to work on it. But he retreated from this position when faced with the hypothetical case of a physician who, intending to perform a D & X, removes a limb or other part of the fetus before beginning the procedure. His retraction was consistent with his statement that the Illinois legislature had tried to make the statute "as broad as possible." More extensive dismemberment than merely removing a limb or two, Wisconsin's lawyer assured us, would inevitably kill the fetus before any part of it emerged from the uterus. She offered no basis for this hopeful bit of medical advice, and it is wrong. Carhart v. Stenberg, supra, at *4; Richmond Medical Center for Women v. Gilmore, supra, at *10. By "killing" the fetus, she evidently meant doing something to cause its heart to stop beating, although a fetus is living before it develops a heart. Obviously a one-day old embryo, like the cells that compose a living human body, is alive, not "dead."

In a standard D & E, part or all of the fetus often will still have a heartbeat, and so be "living," in the sense of the word apparently intended by the legislatures, when it emerges from the uterus. Therefore it is "partially vaginally delivered," just as in a D & X. "During the D & E procedure, the fetus may be removed from the uterus and brought through the cervix and vagina either intact or disarticulated. . . . [I]t may happen that part of the intact fetus will be in the vagina and part in the uterus or a disarticulated part of the fetus will be in the vagina while the remainder of the fetus is in the uterus. In either of these situations, that part of the fetus which remains in the uterus may

still have a heartbeat." Planned Parenthood of Central New Jersey v. Verniero, supra, 41 F. Supp. 2d at 484. If the physician then kills the fetus, he would, one would think, be guilty of having violated these statutes, which punish the killing of a fetus that has been partially vaginally delivered.

Against this interpretation, the Illinois Solicitor General, discarding settled principles of criminal law for the sake of a short-term victory, declared that the statute would not be violated unless the physician had planned before beginning the abortion to wait until a part of the fetus had emerged from the uterus and kill the fetus then; the mere fact that the physician knew it was likely that a part of the fetus would be outside the uterus at the moment of death would not show the requisite intent. By this logic--which the state's Solicitor General actually embraced at argument--if you fire a machine gun into a lighted college dormitory at night, reckoning that you have only a 10 percent chance of actually killing anyone, and you do kill one or more of the residents, you are not guilty of murder, provided you didn't want to kill anyone but just wanted to see whether your machine gun was in working order. The law is otherwise. First-degree murder in Illinois requires only that "in performing the acts which cause the death" the defendant "knows that such acts create a strong probability of death or great bodily harm." 720 ILCS 5/9-1; People v. Daniels, 702 N.E.2d 324, 330-31 (Ill. App. 1998); People v. Mitchell, 601 N.E.2d 916, 919 (Ill. App. 1992); Hennon v. Cooper, 109 F.3d 330, 333-334 (7th Cir. 1997). A physician who performs a standard D & E knowing, as he must, before he begins, that part of the fetus is quite likely to be outside the uterus when he kills the fetus, and then kills it after a part has emerged from the uterus, is guilty of the crime of partially vaginally delivering a living fetus and then killing it.

The Illinois statute itself, moreover, requires only that the partial-birth abortion have been performed "knowingly." 720 ILCS 513/10. Under the law of Illinois, a defendant is deemed to know "the result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b).

Wisconsin authorizes life imprisonment for performing a "partial birth" abortion. That is the state's heaviest penalty, the penalty for murder. Wisconsin deems its statute--as both the penalty and the use of the term "child" to denote the fetus reflect--a law against infanticide. (So does Illinois, by using the term "infant," but it is not serious, because the maximum punishment for killing the "infant" is only three years.) No one would suppose, in the example of shooting into a dormitory, that if only a one-day-old baby were killed the killer would be innocent of murder. If Wisconsin is serious in regarding a

fetus that has begun to emerge from the uterus as "a living child" who should be protected to the full extent of the law against murder, it cannot rationally interpret the statute to permit the physician to escape punishment by the plea that when he began the abortion he thought there was only a 50 percent chance that he would be killing "a living child." It would be like arguing that if a nurse hit a newborn over the head with a baseball bat, with all her might, not to kill it but merely to make it stop crying, and the newborn died, the nurse could defend against a charge of first-degree murder by proving that while she thought it quite possible that the newborn would die, she didn't want it to die and thought it had a 50 percent chance of surviving.

Any doubts on this score are stilled by Wisconsin's statutory definition of intentional. The statute punishes "intentionally" performing a partial birth abortion, Wis. Stat. sec. 940.16(2), and the term means either acting purposely to accomplish the forbidden end or being "aware that [one's] conduct is practically certain to cause that result." Wis. Stat. sec. 939.23(3). As glossed by the case law, the alternative definition is satisfied by conduct carrying a known high risk of the forbidden result even if that result is not desired. See State v. Gould, 202 N.W.2d 903, 906 (Wis. 1973); State v. McCarter, 153 N.W.2d 527, 529 (Wis. 1967); State v. Webster, 538 N.W.2d 810 (Wis. App. 1995). In Webster, where the defendant was convicted of attempted first-degree murder, it was deemed irrelevant that the jury might have accepted his testimony "that he precisely aimed the shotgun at Hood's armpit, and that the gun was loaded only with shotshells filled with bird shot." 538 N.W.2d at 815.

So the state-of-mind requirements of the two statutes turn out to be the same. They are, moreover, the standard state of mind requirements for liability for serious crimes. A criminal defendant acts intentionally, and, even more clearly, knowingly, "when he knows that that result [here, a "partial birth" abortion] is practically certain to follow from his conduct, whatever his desire may be as to that result." 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law sec. 3.5, p. 304 (1986); see, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 444-46 (1978); Smith v. Farley, 59 F.3d 659, 663 (7th Cir. 1995); United States v. McAnally, 666 F.2d 1116, 1119 (7th Cir. 1981).

I have discussed the state of mind requirements of these statutes at such length in order to make clear how little mileage the court can get from the cases that it cites, such as Screws v. United States, 325 U.S. 91 (1945), that save vague statutes by narrow interpretations. Put aside the fact that these were federal statutes given narrowing interpretations by federal courts, rather than state statutes given narrowing interpretations by federal courts, and that the Supreme Court in Bellotti v. Baird, 428 U.S. 132,

146-47 (1976), a decision that is still good law on this point, held that the proper way to obtain a narrowing interpretation of a vague state abortion statute is to abstain in favor of the state courts. The point I wish to stress is that the device used in Screws and many similar cases to save the statute, that of interpolating a scienter requirement, is unavailable here. And this for two reasons. The first is that the Wisconsin and Illinois statutes make clear what the state of mind requirement for guilt under each statute is, leaving no room for interpolating such a requirement in the guise of interpretation; and the second is that the problem with knowing what these statutes require of a physician is not ignorance of legal obligation, but ignorance of the factual premises of liability. The statute challenged in Screws made it a crime to deprive a person of a constitutional right. The Court held that the statute could be saved by requiring that the defendant be shown to have known that he was violating a constitutional right. It was a realistic requirement because the set of constitutional rights at any moment is more or less known and it is a straightforward (though not always easily answerable) factual question whether the defendant knew that his conduct infringed something in that set. No one knows what procedures constitute "partial birth" abortion, and specifically whether many, perhaps most, D & E's do, given that the fetus often has a heartbeat after part of the fetus has emerged from the uterus. Screws, when he beat his victim to death, knew that he was committing the assault; the question was whether he knew that the assault (because he was a sheriff and his victim an arrestee) violated the Constitution. Physicians performing late-term abortions in Illinois and Wisconsin do not know whether they are performing "partial birth" abortions and thus committing crimes.

The incurable vagueness of these statutes might seem to be of little moment if a physician prosecuted for infanticide or feticide had a sure defense should the prosecution stray beyond the narrow path to which the court today attempts to confine the statute. He could not avoid prosecution but at least he would know he would be acquitted, and if he were lucky he would be let out on bail pending trial and maybe Planned Parenthood would pay his legal fees. But let us be realistic, and not only about the possibility of legal error. The physician is not the real target of the statute; the pregnant woman is. It is not the physician's pregnancy that is to be terminated. He has no incentive to undergo the agony of a criminal prosecution merely in order to perform an abortion in a particular way. Better for him either to abandon late-term abortions altogether, or to be sure to give the fetus a lethal injection in utero, and wait for it to take effect, before performing the abortion. The in terrorem effect of these statutes, especially the Wisconsin statute with its maximum penalty of life imprisonment, is likely to induce physicians in these states to

steer well clear of the forbidden zone. What physician would be fool enough, or hero enough, to risk a criminal prosecution in order to explore the precise meaning and outer bounds of the precautionary injunctions that this court has ordered the district courts in these two cases to enter, even if the risk is small?

And now we can see more clearly one of the fallacies in the "precautionary" injunction gimmick. It is the existence of these statutes, because of their extraordinary breadth and the limited incentive of a physician to test their scope, not the risk of prosecution, which may indeed be slight, that burdens those abortion rights that are conceded to be constitutionally protected. A peculiarity of abortion rights is that they require the assistance of a third party, the physician, who has a lesser interest in them than his patient. Because his interest is less, he is more easily deterred, and this should increase our concern with the deterrent effects of these vague statutes.

It remains only to make clear that in finding these statutes pernicious and unconstitutional I do not mean to criticize anyone who believes, whether because of religious conviction, nonsectarian moral conviction, or simply a prudential belief that upholding the sacredness of human life whatever the circumstances is necessary to prevent us from sliding into barbarism, that abortion is always wrong and perhaps particularly so in late pregnancy, since all methods of late-term abortion are gruesome. If a woman told by her physician that her fetus will be a Down's baby or a Tay-Sachs baby or will be born without arms or legs, or that her own health or even life will be endangered if she carries the fetus to term, decides nevertheless against abortion, I would be the last to criticize her decision. I might consider her a heroine or a saint. But what is at stake in these cases is whether the people who feel that way are entitled to coerce a woman who feels differently to behave as they would in her situation. The Constitution as interpreted by the Supreme Court in decisions that we are not free to palter with answers this question "no." We should therefore affirm the district court's decision in Hope and reverse the district court's decision in Doyle.

'Partial Birth' Deceptions

Once again a woman's right to choose abortion is under direct attack in Congress. The Senate is poised to vote today on the latest Congressional attempt to impose a national ban on so-called partial birth abortions. Billed by its proponents as a narrow targeting of a single late-term procedure, the measure is actually a backdoor attempt to severely constrict abortion rights throughout all stages of pregnancy.

This reality has not been lost on the courts. Since the Senate's last partial birth vote, there have been 11 court decisions on the legal merits of partial birth bans passed by different states. In all but one instance, the ban was blocked because of constitutional problems.

Just last month the United States Court of Appeals for the Eighth Circuit struck down partial birth statutes in Nebraska, Arkansas and Iowa. Two of the statutes included language nearly identical to the language of the Senate bill. Finding that the term "partial birth abortion" has no fixed medical or legal meaning, the court said that the vague laws placed an undue burden on abortion rights by outlawing even the safest and most common procedures used before fetal viability.

Of course, Republican leaders are well aware of what the courts have been saying. But that has not prevented them from forging ahead without holding a single hearing on the serious constitutional issues. The real goal here is to gain an edge in next year's election by forcing President Clinton to lift his veto pen for the third time. The nation's lawmakers should have more respect for the Constitution, women's rights and their own institution than to go along with such a dangerous and deceptive game.

Sustain the 'Partial Birth' Veto

A woman's right to abortion faces a critical test today in the Senate. The House has already voted to override President Clinton's principled veto last year of the latest Congressional attempt to ban so-called partial birth abortions. A Senate vote scheduled for this morning will determine whether this professedly narrow but actually far-reaching assault on abortion rights becomes the law of the land.

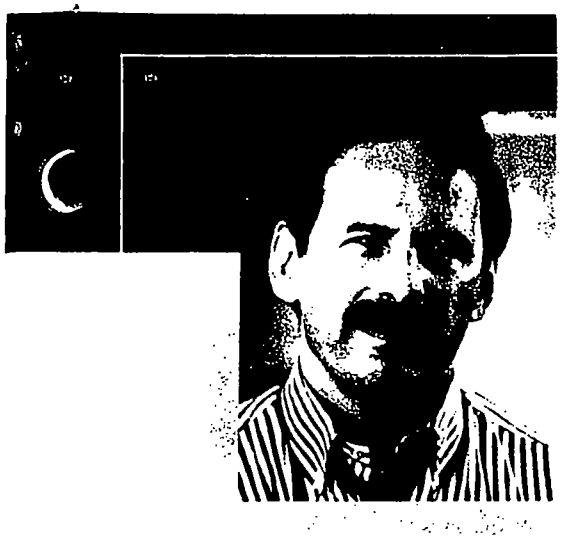
The latest head counts suggest that Mr. Clinton's veto will stand. But for Americans concerned about government intrusion into women's private medical decisions, this is a moment for nervousness. Two years ago, an effort to rally the required two-thirds of the chamber to override Mr. Clinton's veto of a similar bill fell short by just three votes — and that was before Mr. Clinton's Monica Lewinsky troubles and the Christian right's expensive lobbying campaign aimed at senators deemed susceptible to pre-election pressure. The Republican leadership, content to let the Christian Coalition's political strategy drive the Senate's schedule, has timed today's vote to coincide with the group's "Road to Victory" conference in Washington D.C.

Though promoted by its supporters as an attempt to outlaw a single controversial third-trimester procedure, known as intact dilation and extraction, the bill's reach actually is far broader. Its vague terms could be interpreted to prohibit the safest and most common abortion procedures used throughout a pregnancy, not just in the final three months, thus interfering with a woman's right to a first- or second-trimester abortion.

Indeed, six of seven court rulings on state measures that were modeled on the Congressional version have found significant constitutional defects, citing the Supreme Court's decision in Roe v. Wade. "The law is unconstitutionally vague and unduly burdensome on a woman's constitutional right to an abortion," explained Federal District Judge Robert Pratt when he enjoined an identically worded Iowa statute from going into effect two months ago.

Mr. Clinton was right to veto this crude attempt to narrow every woman's access to safe and legal abortions. Senators who care about preserving that access will vote to sustain the veto.

New York Times -- September 18, 1998



Stuart Taylor Jr.

WHEN ABORTION LAWS DEFY COMMON SENSE

Any parent who has rejoiced at seeing a sonogram showing the image of a second-trimester fetus knows how much it looks like a baby. And any parent who has seen a baby blossom into a vibrant teenage girl can imagine the agony of hearing her plead for help in aborting a pregnancy that she had hidden for three months. But any parent who would know with certainty what to say to that teenage girl must be smarter than I am.

Under "partial-birth" abortion laws adopted by many states, twice passed by Congress, and twice vetoed by President Clinton, one option would apparently be illegal: the most common (by far), and probably the safest, form of second-trimester abortion. That's the basis of three decisions issued on Sept. 24 by the U.S. Court of Appeals for the 8th Circuit, striking down "partial-birth" abortion laws in Nebraska, Iowa, and Arkansas.

The unanimous 8th Circuit rulings—written by a Carter appointee and joined by two Reagan appointees—are the latest in a line of opinions joined by some 26 judges, including 11 Reagan and Bush appointees, suggesting that "partial-birth" abortion laws are unconstitutional. Four judges thus far have suggested the contrary.

Right-to-life advocates have sold much of the public, and many legislators, on the myth that "partial-birth" abortion laws would outlaw only an especially grisly (and rare) way of killing third-trimester fetuses on the verge of birth.

False. Some 28 of the 30 state "partial-birth" abortion laws would ban certain procedures to abort fetuses at any stage of pregnancy—including fetuses that are not yet viable, and arguably including some in the first trimester. The laws except only abortions necessary to protect the life of the woman. And many of them threaten doctors with criminal penalties as harsh as life imprisonment for using abortion procedures that are morally indistinguishable from other procedures that would not be restricted.

Below I describe two abortion procedures used in the second and third trimesters. Both—indeed, *all* abortion procedures—are gruesome to contemplate. This may help account for the reluctance of some of us (including me, until now) to ponder in detail whether particular procedures should be banned.

Advocates of "partial-birth" abortion laws claim that they would restrict only an extremely rare procedure called dilation and extraction (D&X). It involves pulling the fetus, feet first, from the uterus, through the cervix, and into the vagina, except for the head; using scissors or another surgical instrument to rupture the skull; and then suctioning out the brain. The more the abortion debate has centered on this image of the dismemberment of nearly born babies—rather than on the plight of women with unwanted pregnancies—the better the right-to-life side has done in the court of public opinion.

Thus was Senator Daniel Patrick Moynihan, D-N.Y., for example, persuaded that "partial-birth" abortion is so "close to infanticide" that it should be outlawed. But if Moynihan thought he was voting to restrict only late-term abortions, he was misinformed. As the 8th Circuit held, "partial-birth" abortion has "no fixed legal or medical content." It means whatever a legislature defines it to mean. And under most definitions, these laws are very broad.

The laws in many states, and the measure that passed Congress in 1997, outlaw abortions in which the doctor kills the fetus after pulling any "substantial portion" from the uterus into the vagina.

And that, the 8th Circuit said, is precisely what doctors do, not only in D&X abortions but also in "dilation and evacuation" (D&E) abortions—the most com-

mon method in the second trimester. D&E abortions typically involve using forceps to pull an arm or a leg from the uterus into the vagina and then dismembering the fetus.

In striking down the three statutes, the 8th Circuit cited Supreme Court precedents, including the 1992 ruling in *Planned Parenthood vs. Casey* that a state may not place "a substantial obstacle in the path of a woman seeking an abortion" of any fetus that is not yet viable.

In an effort to dodge these precedents, those who defend "partial-birth" abortion laws in court have interpreted them as narrowly as possible, resorting to some bizarre distinctions. Thus, in disputing the view that "partial-birth" abortion laws (or some of them) would restrict D&E abortions, the laws' defenders argue that they would restrict only procedures in which fetuses are intentionally dismembered and killed *after* being pulled into the vagina (D&X)—and *not* procedures in which fetuses are dismembered and killed *while* being pulled into the vagina (D&E).

Think about that distinction.

A three-judge panel of the 8th Circuit showed that the Nebraska, Iowa, and Arkansas statutes in fact make no such distinction. Written by Judge Richard S. Arnold—a Carter appointee (and Little Rock friend of President Clinton's)—the three 8th Circuit opinions were joined by Chief Judge Roger L. Wollman of the 8th Circuit and Chief Judge Paul A. Magnuson of the U.S. District Court in Minnesota. Both are Reagan appointees.

The 8th Circuit left it to others to ponder why, as a matter of morality or common sense, the legality of an abortion should turn on where in the birth canal various parts of the fetus are located when it is killed.

Chief Judge Richard A. Posner of the U.S. Court of Appeals for the 7th Circuit tackled that question last November in a decision (now being reviewed by the full 7th Circuit) that preliminarily enjoined

IT'S A MYTH THAT "PARTIAL-BIRTH" ABORTION LAWS ARE CONFINED TO A RARE THIRD-TRIMESTER PROCEDURE.

Wisconsin's "partial-birth" abortion statute.

"The constitutional right to an abortion carries with it the right to perform medical procedures that many people find distasteful or worse," wrote Posner, a Reagan appointee. "The singling out of the D&X procedure for anathematization seems arbitrary to the point of irrationality. Annexing the penalty of life imprisonment to a medical procedure that may be the safest alternative for women who have chosen abortion because of the risk that childbirth would pose to their health adds a note of the macabre to the Wisconsin statute."

I'm with Posner. I can well understand why some critics of *Roe* want to outlaw *any* procedure that destroys a fetus, especially in the later stages of pregnancy. I can't understand why the legality of an abortion should not turn on the safety of the procedure, or the health of the woman, or the stage of fetal development—but rather on exactly how far into the birth canal the fetus is pulled before being destroyed.

"No argument is made," as Posner wrote, "that if a fetus feels pain, the pain feels worse when the fetus is killed in the birth canal than when death occurs a moment earlier in the womb."

Posner also punctured the implausible claims that "partial-birth" abortion laws don't burden women seeking abortions, because an equally safe, legal alternative procedure is always available. If this were so, Posner wrote, the statute "cannot discourage abortions—cannot save any fetuses—but can merely shift their locus from the birth canal to the uterus."

Conversely, such a law "can save fetuses only by endangering pregnant women, since the only time a woman denied a partial birth abortion will decide to carry the fetus to term is when the alternative methods of abortion would pose a greater risk to her."

And if (as some evidence suggests) "partial-birth" abortion laws, in fact, would block some women from access to the safest abortion procedure, the laws also conflict with *Roe*'s holding that even post-viability abortions may not be restricted in ways that would endanger the woman's life *or health* (including emotional health).

None of this is in the Constitution, of course. That's why *Roe* is so hard to defend as an exercise in constitutional interpretation. But even if the Supreme Court was wrong to constitutionalize abortion in 1973, the question on the table is whether "partial-birth" abortion laws make any sense now.

To return to where I started: If I had a daughter who (after due consideration of all options) wanted a second-trimester abortion, I'd probably swallow my misgivings and help her get one. If the safest abortion procedure were illegal where we lived, I'd take her to another state, or another country. If the fetus were viable, I might feel differently. But even then, my main concern would be my daughter's health, including her mental health.

That's why I would not support a "partial-birth" abortion law, even if it was limited to viable fetuses—and why I see no sense in these laws as written, most of which would deny the safest abortion procedure to women at earlier stages of pregnancy. ■

CONFIDENTIAL MEMORANDUM

TO:	INTERESTED PARTIES
FROM:	PETER D. HART RESEARCH ASSOCIATES
DATE:	MARCH 23, 1999
RE:	RECENT SURVEY FINDINGS

Findings from the recent polling that we conducted for The Tides Foundation provide encouraging news for the pro-choice movement in terms of continued public support for pro-choice policies, pro-choice candidates, and the basic legal right to an abortion. More important, however, these results also identify several significant and largely unrealized opportunities for the pro-choice movement both to combat efforts by anti-choice legislators and groups and to advance a proactive, pro-choice agenda—and to do both using the values, principles, and beliefs that a solid majority of Americans consistently and enthusiastically embrace. In addition to these strategic insights, the survey results provide important information on developing messages and priorities with which to frame the abortion debate in today's political climate.

While there has been a fair amount of attention paid to the public's seemingly declining support for abortion rights in recent years, America firmly remains a pro-choice country. Indeed, six in ten (61%) voters rate "protecting a woman's right to choose" as a seven or higher on a ten-point scale of priorities for the federal government; and a solid majority (57%) of voters say that they favor pro-choice candidates for both Congress and governor, while just one-third (33%) would prefer pro-life candidates. Two challenges remain for the pro-choice community in the current political climate: 1) although a majority of Americans continue to express pro-choice beliefs on key measures, the intensity of pro-choice sentiment has shifted away from the most strongly pro-choice positions to more qualified demonstrations of support; 2) when it comes to taking action (such as voting), anti-choice voters are considerably more energized and mobilized than are pro-choice voters.

As the findings reveal, pro-choice organizations already enjoy a considerable advantage over anti-choice groups in the minds of American voters in terms of the values that each side represents and the qualities that each demonstrates with its actions. By decisive margins, voters attribute

positive characteristics, such as "respects the rights of individuals," to the pro-choice community and negative attributes, such as "takes extreme positions on issues too much of the time," to the anti-choice community.

Perhaps the most encouraging news emerging from this survey is that the pro-choice movement has an opportunity to use public opinion to combat anti-choice efforts. For example, on two high-profile issues—so-called "partial-birth" abortion and minors crossing state lines—pro-choice forces gain considerable ground and actually bring these issues back to a fairly even playing field when the argument is matched against the argument of anti-choice forces. Public opinion already favors a pro-choice position, in some cases by a decisive margin, on a variety of other anti-choice measures, such as prohibiting health insurance plans for federal government employees from covering many forms of prescription contraception and restricting even privately funded abortions at overseas U.S. military hospitals.

These survey findings also provide a strong rationale for the development of a proactive, pro-choice agenda; in fact, these results demonstrate that pro-choice groups and legislators are not confined to a narrow set of opportunities. A majority of Americans express support for six specific pro-choice initiatives, including federal funding for poor women to have access to abortion in cases in which a doctor determines that it is medically necessary, and restricting Internet information about doctors who perform abortions.

Finally, the results of this survey provide invaluable information for strategically framing the choice debate in the next millennium. With tremendous unanimity, voters express serious concerns about the anti-choice agenda and rally strongly around the values and principles that serve as cornerstones of the pro-choice movement. Paramount among these values is the idea of government interference in private decisions—in fact, concern about undue government intrusion mobilizes pro-choice constituencies and also reaches far inside the base of the anti-choice community. Increasingly in the debate over reproductive choice, voters respond less to the implications of "*who decides*" and more to the ramifications of "*who doesn't decide.*"

CONFIDENTIAL MEMORANDUM

TO: **Members of Congress and Legislative Staff**

FROM: **Geoffrey Garin**

DATE: **September 8, 1998**

RE: **The Partial-Birth Abortion Override**

Recent polling that we conducted for The Center on Reproductive Law and Policy clearly shows that the "partial-birth abortion" debate provides an important opportunity for the pro-choice movement to regain public support by exposing the anti-choice position as being extreme, deceptive, and unconstitutional.

Our polling demonstrates that the following statement supporting the President's veto of the "partial-birth abortion" ban is a powerful and winning argument.

> The "partial-birth abortion" ban as passed by the anti-choice forces in Congress should be opposed because it is extreme, deceptive, and unconstitutional.
>
> **The measure is extreme because it doesn't provide exceptions for serious harm to the woman's health.** If enacted, this law would lead to undue government interference in medical decisions that should be left up to women and their doctors, and would put women at risk by forcing them to use a more dangerous abortion procedure to avoid serious harm to their health than the one their doctor would otherwise have recommended.
>
> **This measure is deceptive.** The bill focuses attention on a single abortion procedure while banning the safest procedures to protect a woman's health throughout the pregnancy. Legal and medical experts agree that this is not a restriction on one, but potentially all, abortion procedures. In fact, the American College of Obstetricians and Gynecologists opposes this bill, saying that it is "inappropriate, ill-advised, and dangerous."
>
> **The measure is unconstitutional.** In 17 out of 18 cases, federal and state courts have ruled that this type of law violates the Constitution because it is worded so broadly and vaguely that it actually would ban the most commonly used abortion procedures.
>
> This measure is being sponsored by politicians who are interested in gaining political support from powerful, conservative groups that oppose a woman's right to choose in all forms, and in catering to these interests they are sponsoring an extreme, deceptive, and unconstitutional measure that deserves to be vetoed.

The findings demonstrate that elected officials have an opportunity to win public approval by opposing the "partial-birth abortion" bill. Once Americans learn more about the "partial-birth abortion" bill in Congress, their views shift dramatically. Key findings from our research include the following:

① When told that Congress had passed a bill banning "partial-birth abortions," except in cases when it is necessary to save the life of the woman, but that President Clinton vetoed the ban because it does not allow for any exceptions in cases when the procedure is necessary for preventing serious harm to the woman's health, Americans agree with the President rather than Congress on this matter by 44% to 34%. Democrats support the President by 58% to 24%, and independents support his position by 47% to 30%. Republicans support the Congressional position by 51% to 25%; pro-choice Republicans are divided evenly (38% Clinton, 35% Congress).

② Americans say by 65% to 23% that there should be an exception to the ban in cases when "the woman's doctor determines that the procedure is necessary to prevent serious harm to the woman's health." This represents a dramatic shift from the 64% to 24% margin of Americans who originally say they favor the proposal in Congress that would ban "partial-birth abortions" except when necessary to save the life of the woman. Even among those who strongly favor a ban on "partial-birth abortion," 63% say that there should be an exception for preventing serious harm to the woman's health.

③ When asked what their reaction would be if their member of Congress opposed making any exceptions to the "partial-birth abortion" ban for cases in which the procedure is needed to prevent serious harm to the woman's health, 45% say they would be *less* likely to support that member of Congress, while just 18% say they would be more likely to support someone who takes this position. Pro-choice Republicans are split 48% to 20% against a member of Congress who opposes the health exception.

④ When Americans are read criticisms of the Congressional ban, at least two-thirds rate the following as giving them very or fairly serious concerns: (1) this law represents government interference in personal and difficult medical decisions that should be left up to women, their families, and their doctors (55% very serious, 20% fairly serious); (2) by passing this law, politicians and government would be putting women at risk by forcing them to use a more dangerous abortion procedure than the one their doctor would have otherwise recommended (53% very serious, 20% fairly serious); (3) this law is so extreme that it does not provide exceptions for serious harm to the woman's health (52% very serious, 25% fairly serious); and, (4) this law is a deceptive measure by politicians to focus public attention on the difficult subject of late-term abortion, while actually banning safe and legal procedures throughout pregnancy (46% very serious, 22% fairly serious).

⑤ The political motivations of the authors of this extreme version of the "partial-birth abortion" ban can be attacked with great credibility. By 59% to 19%, Americans say that politicians who are trying to impose more restrictions on abortion are concerned mainly with gaining support from powerful conservative religious groups, rather than with protecting unborn life.

LAKE SOSIN SNELL PERRY
& ASSOCIATES, INC.

POLL CONDUCTED ON BEHALF OF EMILY'S LIST

Do you favor or oppose allowing medically-necessary late-term abortions to save the life and health of the mother or aren't you sure?

Favor 73%
Oppose 13%
Don't know.....14%

Lake Sosin Snell Perry & Associates designed and administered this survey which was conducted by phone using professional interviewers. The survey reached 1000 registered voters, ages 18 and older, who reported that they voted in the November 1996 elections for President. The survey was conducted between June 18 and June 23, 1997. Telephone numbers for the survey were drawn from a random digit dial sample (RDD). Respondents for interviewing were drawn randomly within households using the most recent birthday method. The sample was stratified geographically by state based on each state's rate of turnout in the 1992 general election adjusted for current registration. The data were weighted on education level, race, and religion to ensure the sample is an accurate reflection of the electorate. The total margin of error for this survey is +/- 3.1%.

HICKMAN-BROWN
PUBLIC OPINION RESEARCH

Now I am going to read to you a list of bills designed to restrict access to abortion that were voted on by the U.S. Congress in the last year and a half. For each one, assume that a candidate for Congress favors that becoming law and tell me if the candidate's position makes you more or less likely to vote for that candidate. Here's the first one: [READ ITEM] Does the fact that a Congressional candidate supports that make you more or less likely to vote for that candidate? [IF MORE/LESS LIKELY] Does that make you much [MORE/LESS] likely to vote for that candidate or only somewhat [MORE/LESS] likely to vote for that candidate?

- Banning late-term abortion even in cases where the woman's health is endangered

	All Voters
Much more likely	8%
Somewhat more likely.....	12%
Somewhat less likely	27%
Much less likely	38%
(No Difference).....	7%
(Don't Know)	8%
TOTAL MORE LIKELY ...	20%
TOTAL LESS LIKELY ...	65%

These results are based on a survey conducted by Hickman-Brown Research of 500 likely voters in the United States. The sample was stratified to reflect geographic patterns of likely voters within the country, and was drawn according to standard Random Digit Dialing procedures. Telephone interviewing was conducted from July 29 to August 4, 1996, by professional interviewers. A minimum of three attempts on different days were used to reach the randomly selected households; random sampling within the selected households was employed to identify eligible respondents. With a confidence level of 95%, the margin of potential sampling error associated with a sample of 500 is 4.4%. This means that the results are within the specific range (pus or minus) that would have been obtained if all likely voters in the United States had been interviewed.

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HICKMAN·BROWN
PUBLIC OPINION RESEARCH

Now I want you to think about the upcoming election for Congress. For the following description of candidates' positions on abortion, tell me which one you would be more likely to vote for. Which one of those two candidates would you personally be more inclined to vote for?

		Democrat		Independent		Republican	
	All Voters	Men	Women	Men	Women	Men	Women
A candidate who would **ban** late-term abortions even if the woman's health is in danger	30%	29%	26%	23%	33%	29%	35%
OR							
A candidate who would **not ban** late-term abortions if the woman's health is in danger	58	58	66	52	46	60	56
(Neither/Depends/Other/No Difference)	10	11	7	22	22	9	6
(Don't Know)	2	2	1	3	0	2	3

These results are based on a survey conducted by Hickman-Brown Research with 800 registered voters in the United States. The sample was stratified to reflect geographic patterns of registered voters within the country, and were drawn according to standard Random Digit Dialing procedures. Telephone interviewing was conducted October 23-26, 1995, by professional interviewers. A minimum of three attempts on different days were used to reach the randomly selected households; random sampling within the selected households was employed to identify eligible respondents. With a confidence level of 95%, the margin of potential sampling error associated with a sample of 800 is 3.5%. This means that the results are within the specified range (plus or minus) that would have been obtained if all registered voters in the United States had been interviewed.

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