VIRGINIA'S PARTIAL BIRTH ABORTION STATUTE: AN UNCONSTITUTIONAL RESTRICTION ON A WOMAN'S RIGHT TO HAVE AN ABORTION

INTRODUCTION

Two months before a Virginia statute ("the statute")[1] limiting abortion took effect on July 1, 1998, a group comprised of Virginia physicians, medical clinics, and non-profit organizations offering abortions sought an injunction in federal court to prevent the statute from taking effect in *Richmond Medical Center for Women v. Gilmore* ("*Richmond Medical Center*").[2] This statute prohibits a physician from knowingly performing "a partial birth abortion that is not necessary to save the life of the mother."[3] According to the statute, any person who violates the statute commits a Class 1 misdemeanor.[4]

The plaintiffs in *Richmond Medical Center* challenged the statute on several grounds.[5] First, the plaintiffs asserted that the statute

1. VA. CODE ANN. § 18.2-74.2 (Michie 1998).

2. 11 F. Supp. 2d 795 (E.D. Va. 1998).

3. Section 18.2-74.2(A). The statute defines "partial birth abortion" as "an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or a substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery." *Id.*

4. *Id.* However, the statute excludes mothers upon whom partial birth abortions are performed from prosecution under § 18.2-74.2 "for a conspiracy to violate [§ 18.2-74.2] or for any other offense arising out of the performance of a partial birth abortion." *Id.* § 18.2-74.2(C).

5. 795 F. Supp. 2d at 799.

contained unconstitutionally vague language.[6] Second, the plaintiffs alleged that the statute violated women's Fourteenth Amendment Due Process privacy rights.[7] More specifically, the statute placed an undue burden on a woman's right to seek an abortion pre-viability, according to the plaintiffs, because the safest abortion procedures potentially fell within the proscriptions of the statute and the statute lacked a maternal health exception.[8] The United States District Court for the Eastern District of Virginia granted an injunction preventing the operation of the statute.[9] This injunction allowed a resolution of the issues of vagueness and privacy on their merits.[10]

In its reasoning, the *Richmond Medical Center* court found that allowing the statute to become effective would cause an immediate, irreparable injury to the plaintiffs and to women seeking abortions.[11]

The plaintiffs' vagueness challenge also "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them grounds for more deliberate investigation[,]" according to the court.[12] Finally, the court found that the plaintiffs would likely succeed in their assertion that, because the statute lacked maternal *health* exception (as opposed to a maternal *life* exception), it placed an undue burden on a woman's right to seek an abortion pre-viability.[13]

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6. *Id.* at 800.

7. *Id.* at 800-01.

8. *Id.* at 801. The plaintiffs contended that without a maternal health exception to the statute, the statute was unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973) and under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). 11 F. Supp. 2d at 822.

9. *Id.* at 829.

10. *Id.*

11. *Id.* at 810-11. The court balanced the harms to the State of Virginia if the injunction was granted against the harm to the plaintiffs if the injunction was not granted. Because of the potentials for criminal prosecution and unsafe abortions for the plaintiffs, the harms tipped "decidedly" in favor of granting the injunction. *Id.* at 811. The court held further that public interest favored the grant of the preliminary injunction. *Id.* at 829.

12. *Id.* at 819 (quoting *Rum Creek Coals Sales v. Caperton*, 926 F.2d 353, 359 (4th Cir 1991)). In particular, the statute's definition of "partial birth abortion" contained the terms, "delivers," "living fetus," and "substantial portion thereof." *Id.* at 811-16. The plaintiffs argued that these terms were unconstitutionally vague. *Id.*

13. *Id.* at 825.

After the court granted the injunction in *Richmond Medical Center*,[14] Virginia Governor James S. Gilmore III, requested an emergency stay of the injunction until the decision is appealed.[15] On June 30, 1998, Judge J. Michael Luttig of the Fourth Circuit Court of Appeals granted the stay.[16] The plaintiffs appealed, but the Fourth Circuit upheld the stay, making Virginia the "only state in the nation where a judge has overturned a decision to block [a partial birth abortion statute] from going into effect."[17] Accordingly, the Virginia partial birth abortion statute took effect July 1, 1998.[18]

This paper argues that the new Virginia statute prohibiting partial birth abortions is unconstitutionally vague and places an undue burden on a woman's right to have an abortion. Because of these defects, the Virginia legislature should repeal the statute or at least alter the wording of the statute to define the proscribed procedures with precision. In addition, this paper urges the Virginia legislature to recognize that any statute limiting a woman's right to an abortion should contain exceptions for the life *and health* of the mother in conformance with *Planned Parenthood of Southeastern Pa. v. Casey ("Casey")*.[19] Finally, this paper recommends that the Fourth Circuit follow the rationale in *Gilmore* when deciding the case on the merits.[20]

Part I of this paper examines the legal standards regarding regulation of abortions. In addition, part I examines abortion statutes in Virginia; the 1996 vetoed federal partial birth abortion statute, the basis for the Virginia statute; and the legislative history of the Virginia statute. Part II analyzes the District Court's decision in

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14. 11 F. Supp. 2d at 829.

15. David E. Rovella, *Court Rules Attacked In Abortion Case*, NAT'L L.J., Aug. 31, 1998, at A8.

16. *Id.*

17. Rovella, *supra* note 15, at A8; Richmond Medical Center for Women v. Gilmore, 144 F 3d 326, 332 (4th Cir. 1998). Pamela Stallsmith, *Block Law On Abortions, Center Asks Three-Judge Panel Requested To Act*, Rich. Times. Disp., July 8, 1998, at B5. Stallsmith points out that over half of the states in the U.S. enacted laws to ban partial birth abortions, and courts in seventeen states prevented the laws from taking effect, according to the Center for Reproductive Law and Policy. *Id.*

18. *Id.*

19. 505 U.S. 833.

20. 11 F. Supp. 2d 795.

Gilmore.[21] Part III discusses proposals to repeal the statute and to change the wording of the statute by adding a maternal health exception, thereby bringing the statute within the constructs of the United States Constitution.[22] Finally, part III urges the Fourth Circuit to follow the rationale in *Gilmore* to decide the case on the merits.[23]

I. HISTORY

A. Supreme Court Rulings

The United States Supreme Court's recognition of privacy rights, including a woman's right to have an abortion, stem from the Court's decisions in *Griswold v. Connecticut*[24] and *Eisenstadt v. Baird*[25]; these cases explicitly recognized a constitutional right to privacy.[26] In *Griswold*, the Supreme Court held that the Constitution includes the right to marital privacy.[27] In 1972, the Court extended the right of privacy to individuals in *Eisenstadt*.[28] One year later, in *Roe v. Wade* ("*Roe*"), the Supreme Court extended the right of privacy to the right to have an abortion.[29] The Court in *Roe* held that the right to privacy

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21. *Id.*
22. *Casey*, 505 U.S. 833.
23. 11 F. Supp. 2d 795.
24. 381 U.S. 479 (1965).
25. 405 U.S. 438 (1972).
26. D.K. WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1-16 (1998).
27. 381 U.S. 479, 485-86. The *Griswold* court held that, although the Constitution makes no explicit mention of the right to privacy, the "penumbras" of the First, Third, Fourth, and Fifth Amendments, in conjunction with the Fourteenth Amendment Due Process Clause and the Ninth Amendment, guarantee a right to marital privacy. *Id.* at 483-86. "[T]he Bill of Rights have preumberas, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.
28. 405 U.S. at 453. The Supreme Court in *Eisenstadt* stated, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person *as the decision whether to bear or beget a child*." *Id.* (second emphasis added).
29. 410 U.S. 113, 153. In *Roe*, the plaintiff, a pregnant woman, brought suit to enjoin the enforcement of Texas criminal statutes criminalizing abortions except to save the *life* of the mother. *Id.* at 120. The Court held that "a state criminal abortion statute . . . that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 164.

constitutes a fundamental liberty under the Fourteenth Amendment.[30] In *Roe*, the Court stated that the State retained two legitimate interests in the abortion context: "preserving and protecting the health of the pregnant woman," and "protecting the potentiality of human life."[31] The *Roe* Court balanced the two competing interests and determined the extent of constitutional abortion regulations.[32]

In 1992, the Court in *Casey* reaffirmed *Roe* in part and overturned it in part.[33] The Court in *Casey* recognized a woman's right to have an abortion pre-viability and to obtain it without undue interference from the State.[34] In addition, the Supreme Court affirmed the State's power to restrict abortions subsequent to fetal viability, if the law contains exceptions for pregnancies endangering the mother's life or health.[35] *Casey* also validated the State's interests in protecting the health of the mother and of the potential life.[36]

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30. *Id.* at 153. The Supreme Court declared, "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*

31 *Id.* at 162.

32. *Id.* at 163-65. The Court held that during the first trimester, abortions cannot be regulated because abortions are safer for a mother's health than carrying to term; therefore, the State lacks "legitimate interests" in the health of the mother. *Id.* at 163. Further, the Court held that, after the end of the first trimester, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Finally, the court also held that upon viability the State can regulate and ban abortion "except where it is necessary . . . for the preservation of the life or health of the mother." *Id.* at 164-65.

33 505 U.S. at 878-79. In *Casey*, the Supreme Court rejected *Roe*'s trimester framework and held that a statute that imposes an "undue burden" *pre-viability* is unconstitutional. *Id.* at 870, 878. After viability, the state may prohibit all abortions not necessary to protect the *health* or life of the mother. *Id.* at 879. Significantly, the Court never mentioned "privacy" and relied, instead, on "liberty" under the Fourteenth Amendment. *Id.* at 846-47.

34. 505 U.S. at 876-77. The Supreme Court found that a state regulation placed an "undue burden" on a woman's right to have an abortion when "[it] has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a non-viable fetus." *Id.* at 877 (emphasis added).

35 *Id.* at 879.

36. *Id.* at 846.

B. Methods of Abortion

Throughout history American doctors used various methods to perform abortions.[37] Although some methods of abortion were socially acceptable, other types of abortion lead to the enactment of laws banning abortion procedures.[38] These statutes often vaguely describe the procedure intended to be proscribed and unintentionally brought other abortion procedures into their scope.[39] Therefore, an explanation of abortion procedures currently used, and the distinguishing characteristics of each procedure are necessary to understand the statutes.

Doctors refer to the most common abortion procedure in the first trimester of pregnancy as "suction curettage" or vacuum aspiration.[40] In suction curettage, a doctor removes the fetus by a tube attached to a vacuum generator.[41] The most frequent second trimester abortion

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37. *See generally Richmond Medical Center*, 11 F. Supp. 2d at 801-04 (describing various abortion methods).

38. State lawyers called the procedure prohibited by the Virginia partial birth abortion statute a "rogue procedure." R.H. Melton, *Trial Begins On Ban of Late-Term Abortions; Opponents Say Va. Law Too Vague*, Wash. Post, Aug. 19, 1998 at B5. A Virginian Reverend declared partial birth abortions, "an abominable taking of an innocent human life." Rev. Donald Spitz, Director, Pro-Life Virginia, *Metropolitan Times; Metropolitan Voices: Truth Is Not Being Reported On Partial-Birth Abortions*, Wash. Times, July 30, 1998 at C2.

ALA. CODE §§ 26-23-1 *et seq.* (1998) (banning "partial birth abortions"); ARIZ. REV. STAT. ANN. § 13-3603.01(A) (West 1998) (same); 1997 ILL. LEGIS. SERV. 90-560 (West) (same); MICH. COMP. LAWS ANN. §§ 333.162221(l)&(m), 333.16226, 333.17016, 333.17516 (banning "partial birth abortions" and establishing punishment for health care providers); 1997 NEB. LAWS 23; 1995 OHIO LAWS 135; UTAH CODE ANN. § 76-7-302; VA. CODE ANN. § 18.2-74.2(A); WIS. STAT. ANN. § § 895.038, 940.16 (West 1998) (banning "partial birth abortions" and creating civil liability for providers thereof).

39. The plaintiffs in *Gilmore* argued that the Virginia law vaguely described the procedure and unintentionally brought other procedures into its scope. 11 F. Supp. 2d at 818-19. The court found that the plaintiffs would likely succeed on the merits of their argument. *Id.*

40. *See, e.g.*, 11 F. Supp. 2d at 801-02.

41. *Id.* at 801. The court in *Gilmore* explained:

> In this procedure, the doctor mechanically dilates the cervix with metal rods and removes the embryo or the fetus by means of negative suction. To do this, the physician inserts a tube or cannula, which is attached to a vacuum generator, through the vagina into the uterus. . . .
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> [D]ifferent physicians use different techniques and methods. . . . [One of the testifying doctors] often finds it necessary to use forceps to grasp part of the fetus and remove it from the uterus. Of course, when this occurs, the removed parts pass into and through the vagina via the cannula. It is undisputed that most often the fetus has

procedure is called "Dilatation and Evacuation" ("D & E").[42] The D & E procedure involves removing the fetus from the mother via a large suction curette and forceps, and "typically entails dismembering the fetus."[43]

A variation of D & E called the Intact Dilatation and Extraction ("D & X") method or the "Intact D & E," removes the fetus without dismembering it.[44] In a D & X procedure, the doctor delivers all of the fetus except the skull, but the doctor must extract the contents of the skull before delivering the entire fetus.[45] One infrequently used

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> cardiac activity and hence is living at the outset of the suction curettage procedure but that generally no effort is made to determine whether the fetus is or is not living. However, the fetus unquestionably is killed when removed from the uterus or during the suction curettage procedure. . . .
>
> [S]uction curettage often results in the removal of fetal parts . . . without removal of the entire fetus. If this occurs, the part of the fetus remaining in the uterus can be living because fetal tissue would not necessarily die upon removal of a limb.

Id. at 801-02.

42. *Id.* at 802. Ninety-six percent of abortions performed in the United States after the first trimester are D & E abortions. *Id.*

43. *Id.* (citing *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 198 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036, 118 S. Ct 1347 (1998). The Sixth Circuit in *Voinovich* explained,

> In the D & E procedure, the physician inserts laminaria into the pregnant woman's cervix . . . . Once the woman's cervix is dilated, a suction curette of larger diameter than that used in the suction curettage procedure is placed through the cervix and into the uterus. With the suction curette, the physician can remove some or all of the fetal tissue. However, the torso and the head of the fetus often cannot be removed using the suction curette. Therefore, the D & E procedure typically entails dismembering the fetus, beginning with the extremities, by means of suction curettage and forceps. The most difficult part of the D & E procedure is the removal of the fetal head from the woman's uterus, because it is often too large to fit through the partially dilated cervix.

130 F.3d at 198. The court in *Gilmore* further explained, "Often, the skull (calvarium) is too large to pass through the cervix whole and the physician must compress it to complete the abortion. As a general proposition, the fetus is removed in parts, but often it can be removed intact." 11 F. Supp. 2d at 802. The court in *Gilmore* noted that some doctors deliberately pull the umbilical cord out first and sever it, thereby killing the fetus, and sometimes doctors pulls a limb from the cervix and remove the limb from the torso, again killing the fetus. *Id.*

44. 11 F. Supp. 2d at 803.

45. *Id.* The court in *Gilmore* explained as follows:

> [T]he physician pulls a lower extremity into the vagina and then uses his fingers to deliver the lower extremity and then the torso followed by the shoulders and the upper extremities. At that point, the skull is lodged at the internal cervical os. Usually the dilation is insufficient for the skull to pass through. At that point, the surgeon slides his or her fingers along the back of the fetus; uses a pair of blunt curved scissors to rupture

alternative to D & E, the "induction method," which involves chemically-induced labor.[46] Finally, two surgical alternatives to abortion exist: a hysterotomy[47] and a hysterectomy.[48]

C. Recent Statutory Enactments

Partial birth abortions and, in particular, the D & X procedure came under moral and legislative scrutiny in recent years. In 1996, Congress drafted a bill proscribing partial birth abortions (aimed at prohibiting the D & X procedure); President Clinton vetoed the bill because it lacked a maternal health exception.[49]

The Virginia legislature drafted a statute banning partial birth abortions based on the vetoed federal legislation.[50] In March of 1998, the Virginia bill prohibiting partial birth abortions passed the Virginia House of Representatives by a vote of 79-20 and passed the Virginia Senate by a vote of 32-8.[51] Virginia governor James Gilmore signed the partial birth abortion bill into law on April 13, 1998.[52]

D. The Richmond Medical Center *Case*

In *Richmond Medical Center*,[53] the District Court performed a detailed, well-reasoned analysis of Virginia's partial birth abortion

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the base of the skull; and uses a suction catheter to evacuate the contents of the skull and then applies traction to the fetus to remove it from the patient.

Id.

46. *Id.* at 803. The court in *Gilmore* stated that "[t]he only safe and routinely performed alternative to D & E after approximately 15 weeks is the induction abortion which accounts for approximately 4% of post-first trimester abortions nationwide." *Id.*

47. *Id.* "A hysterotomy is a cesarean section accomplished before term[.]" *Id.*

48. *Id.* "A hysterectomy is the removal of the uterus," which sterilizes a woman. *Id.*

49. Sandra Sobieraj, *Clinton Vetoes Ban On Partial-Birth Abortions Again; Legislation Would Have Barred Delivery Of Fetus, Legs First, Then Drainage Of Skull*, THE HARRISBURG PATRIOT, Oct. 11, 1997, at A5.

50. VA. CODE ANN. § 18.2-74.2. *See* Dominic Perella, *Appeals Court Keeps State's "Partial-Birth" Abortion Ban In Effect*, THE ASSOCIATED PRESS POLITICAL SERVICE, July 30, 1998.

51. Laura LaFay & Warren Fiske, *Assembly Embraces Conservative Issue*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR (Norfolk, Va.), Mar. 12, 1998 at A1.

52. 11 F. Supp. 2d at 799.

53. *Id.*

statute.[54] First, the court discussed the statute's prohibitions and its definition of "partial birth abortion."[55] The court noted that the statute proscribes partial birth abortions unless necessary to save the mother's life.[56] Then, the court examined the statute's definition of partial birth abortion and stated that the statute failed to define several terms used in the statute's definition of partial birth abortion, including the word "delivers," and the phrases "living fetus" and "a substantial portion thereof."[57] The court stated that the term "partial birth abortion" had "no accepted medical meaning" and that the term is "coined by legislators, anti-abortion activists, and the media."[58]

After addressing the statute's language, the *Richmond Medical Center* court turned to the history of abortion laws in Virginia.[59] The court also attempted to determine whether the statute contained unconstitutionally vague language, or language so vague and broad that the wording "encompass[ed] two key methods of abortion now performed by the plaintiffs," thereby imposing an undue burden on a woman's right to have an abortion.[60] Finally, the court noted the plaintiff's argument that the statute violated *Casey* because it failed to provide a maternal health exception.[61]

To address the validity of the statute the court examined the nature, timing, and relative safety of various abortion procedures.[62] The court recognized that suction curettage, the most common abortion procedure during the first trimester, "carries a lesser risk of

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54. VA. CODE ANN. § 18.2-74.2(A).

55. 11 F. Supp. 2d at 799-800.

56. *Id.* at 799.

57. 11 F. Supp. 2d at 799. VA. CODE ANN. § 18.2-74.2(B). The statute defines partial birth abortion as:

> an abortion in which the person performing the abortion deliberately and intentionally *delivers* a *living fetus* or a *substantial portion thereof* into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery.

Id

58. 11 F. Supp. 2d at 799. In addition, the court noted that the American College of Obstetricians and Gynecologists issued a policy statement equating the term "partial birth abortion" with "[I]ntact D & X." *Id.*

59. *Id.* at 800-01.

60. *Id.*

61. 11 F. Supp. 2d at 801.

62. *Id.* at 801-04. *See also supra* notes 40-48 and accompanying text.

mortality and morbidity than does carrying a pregnancy to term."[63] Furthermore, the *Richmond Medical Center* court noted that approximately ninety-six percent of all abortions performed in the United States after the first trimester of pregnancy are D & E abortions, the safest abortions available after the first trimester.[64] Both the induction method and surgical procedures carry a greater risk than D & E abortions, and doctors rarely use these methods.[65] Finally, doctors perform D & X abortion method as an alternative for D & E because D & X procedures follow a similar method to D & E (except D & X does not include dismemberment).[66] Because dismemberment after the first twenty weeks of pregnancy often becomes difficult due to tougher fetal tissue, doctors rely on D & X rather than D & E.[67]

After addressing the issue of standing, the *Richmond Medical Center* court determined whether to grant the plaintiff's request for injunctive relief.[68] The court found that the plaintiffs risked

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63. 11 F. Supp. 2d at 801, 804.

64. *Id.* at 802, 804. D & E abortions become more common after the first trimester because they constitute the safest procedure after the fetus grows too large to be removed by suction alone. *Id.* at 802. Suction curettage constitutes a greater risk than D & E, after the first trimester, because fetal tissue becomes stronger, slowing down the suction curettage procedure, "thereby resulting in greater maternal blood loss." *Id.*

65. *Id.* at 803. The induction method involves greater risk than a D & E because induction "involves the same physiological stress, emotional stress, medical complications, and risks as does labor and delivery at term." *Id.* The two surgical procedures discussed by the court were hysterotomy and hysterectomy.

66. *Id.*

67. *Id.*

68. 11 F. Supp. 2d at 804-06. The discussion of standing is beyond the scope of this paper. In the Fourth Circuit, courts rely on a four-factor, sliding scale, "hardship balancing test" to determine the need for preliminary injunctive relief. Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991). The factors include "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest." *Richmond Med. Center*, 11 F. Supp. 2d at 806. The Fourth Circuit balancing test proceeds as follows: the first two factors are balanced against each other, and if the balance of these factors:

> *'tips decidedly' in favor of the plaintiff[s]*, a preliminary injunction will be *granted 'if the plaintiff[s] [have] raised questions going to the merits so serious, substantial, difficult* and doubtful, as to make them *fair ground for litigation* and thus for *more deliberate investigation.*' As the balance tips away from the plaintiff[s], a stronger showing on the merits is required. . . .

[I]f the balance of harm strongly favors the plaintiffs, it is not required that the

irreparable harm if the court refused to grant an injunction because of the threat of criminal prosecution.[69] The defendants in *Richmond Medical Center* argued that the abortion procedures performed by the plaintiffs fell outside the scope of the statute.[70] In their argument, the defendants pointed to the fact that the plaintiffs do not perform D & X procedures and statements by the Virginia Commonwealth Attorneys and the Virginia Attorney General, pledging not to prosecute physicians for performing "suction curettage abortions, drug-induced abortions, induction abortions, and so-called 'conventional D & E' abortions[.]"[71] As a result of the court's analysis of the various abortion procedures, the court disagreed with the defendants and found that the plaintiffs risked irreparable injury.[72]

Continuing the analysis, the *Richmond Medical Center* court noted that the plaintiff physicians, in performing D & E abortions, sometimes remove the intact fetus through the cervix (a safer method for the mother), thereby placing the procedure outside the scope of the Commonwealth Attorneys' definition of D & E abortions.[73] Therefore, the court held that "[b]ecause the D & E procedure, as performed by the plaintiffs, does not fall within the definition of a procedure that the defendants assert would not be prosecuted, it is quite possible, if not likely, that the plaintiffs could be prosecuted under the act."[74] Moreover, the court found that the Commonwealth Attorneys' statements expressing an intent not to prosecute

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plaintiffs make a strong showing of likelihood of success on the merits.

Id. at 807 (quoting *Direx Israel, Ltd.*, 952 F.2d at 812-13) (emphasis in original).

69. 11 F. Supp. 2d at 807. The court reasoned that the plaintiffs could be prosecuted for abortions legal under *Roe* and *Casey*. *Id.*

70. *Id.*

71. *Id.*

The Commonwealth Attorneys all define "conventional D & E" as:

> an abortion procedure technique in which "the physician [after dilating the cervix and removing the dilators] then ruptures the membranes, and dismembers the fetus in the uterine cavity using sharp instruments such as forceps, and suction [and] then removes the fetal parts by pulling them out piece by piece through the cervical os.

Id at 808.

72. *Id.* at 810.

73. *Id.* at 808.

74. *Id.*

physicians for performing certain types of abortion procedures failed to bind the state to its position.[75]

The court's opinion in *Richmond Medical Center* regarding irreparable injury to the plaintiffs contains sound and accurate reasoning because physicians will be left with two choices: continuing to perform constitutionally protected abortions, thereby risking prosecution and irreversible punishment, or refusing to perform D & E (and other types of constitutionally protected abortions) due to the legitimate fear of prosecution for an unintentional violation of the statute.[76]

After determining that the plaintiffs risked irreparable injury, the court in *Richmond medical Center* held that the plaintiffs' patients also risked irreparable injury absent an injunction.[77] Specifically, the court found that patients may not receive the safest and most appropriate medical care if physicians stop performing abortions altogether due to the fear of prosecution, or if "physicians [are] forced to resort to less safe medical procedures which expose the patients to a greater degree of risk to their health."[78] Furthermore, the court reasonably and prudently held that the patient suffers an irreparable injury if a doctor performs an unsafe procedure which detrimentally affects her health, and because the patient suffers irreparable injuries if the statute causes physicians to delay her abortion, thereby increasing the risks associated with the delayed abortion procedures.[79]

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75. *Richmond Med. Center*, 11 F. Supp. 2d at 809-09. The court relied on the United States Supreme Court's holding in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395 (1988).

76. In cases in which the intact, living fetus passes through the cervix, a substantial possibility exists that this type of procedure falls within the proscriptions of the partial birth abortion statute because this procedure involves the delivery of a living fetus into the vagina for the purpose of performing a procedure the physician knows will kill the fetus. *See* VA. CODE ANN. § 18.2-74.2(A). The court in *Richmond Medical Center* stated that if it denied an injunction, the statute would "chill the plaintiffs' ability to provide safe medical care for their patients who choose, or are required for medical reasons to obtain, constitutionally protected abortions." 11 F. Supp. 2d at 809.

77. 11 F. Supp. 2d at 809.

78. *Id.*

79. *Id.* "Because any delay in abortion increases the risk of the procedure and of harm to the life and health of the woman, a patient faced with these choices will suffer irreparable harm." *Id.* at 809-10.

Next, the *Richmond Medical Center* court considered the likelihood of harm to the defendants if the injunction were granted.[80] The court found no evidence that the State possessed a legitimate interest in the mother's health because the procedures intended to be prohibited by the statute fail to endanger the mother's health.[81] Furthermore, they also found that, because the State's interest in fetal viability fail to outweigh the interests of the mother until viability, the potential harm to the state also fails to significantly tip the balance of the harms in favor of the State.[82] The court's decision is also fair because it follows the dictates of the Supreme Court and because the decision recognizes that patients and physicians retain strong interests throughout the term of the pregnancy, as opposed to the interests of the State, which only receives protection after viability.

The court then considered the likelihood of success on the merits for the plaintiffs' argument that the contained unconstitutionally vague language.[83] The plaintiffs argued that vagueness of the following words: "partial birth abortion," "living fetus," "or a substantial portion thereof," and "deliver" rendered the statute void.[84] Although the plain language of the statute fails to mention the term "D & X," the defendants argued that the statute referred only to D & X abortions because the term "partial birth abortion" means only "D

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80. *Id.* at 810-11. The defendants argued that the state retained five interests: "(1) protecting the individual lives of children who have been partially born; (2) protecting the dignity of human life and society's respect for human life; (3) preserving the integrity of the health care profession; (4) preventing cruelty to living beings; and (5) protecting the lives and health of women." *Id.* at 810. The court found the only potential State interests relevant in the abortion context included protecting the health of the mother and the potential life. *Id.* The Supreme Court in *Casey,* enumerated these interests as the only relevant state interests in the abortion context. 505 U.S. 877-78.

81. 11 F. Supp. 2d at 811.

82. *Id.* The court found support for its holding in *Casey,* 505 U.S. at 874.

83. 11 F. Supp. 2d at 811.

> When considering a challenge to a criminal statute under the void for vagueness doctrine, it must be determined: (1) whether the penal statute defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) whether the criminal offense is described in a manner that does not encourage arbitrary and discriminatory enforcement.

Id (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

84. *Id.* at 812. The plaintiffs argued that the statute was so vague as to comprehend several conventional types of abortions. *Id.*

& X" procedures.[85] The court rejected the defendants' argument, reasoning that "the term 'partial birth abortion' lacks any medical meaning."[86] Moreover, the court in *Richmond Medical Center* noted that the considerable confusion concerning the term partial birth abortion: "the defendants themselves . . . demonstrate confusion over the procedure, or procedures which they think is or are 'clearly' banned . . . . [T]hroughout the defendants' opposition papers, they argue alternatively that the Act will ban 'certain procedures,' but at other times they say it bans only the 'partial birth abortion procedure.'"[87]

Next, the *Richmond Medical Center* court considered the arguments regarding the vagueness of the various terms defining partial birth abortion in the statute.[88] Beginning with the term "delivers," the court noted that the term retained a broad definition in obstetrics, including "anything that is removed from the uterus, which includes a baby, an intact fetus, a fetal part, or the placenta or umbilical cord."[89] The court found further that a delivery occurs in "every safe and common method of abortion."[90] Therefore, the term delivery not only defines D & X abortions, but, as the court observed, also applies to suction curettage abortions.[91]

Continuing its analysis, the court in *Richmond Medical Center* attempted to find the meaning of "living fetus," another term used to

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85. *Id.*

86. *Id.* at 813. The court noted that the term partial birth abortion has never "been used in any medical text or journal." *Id.*

87. *Id.* The court rejected the defendants' argument that the term partial birth abortion clearly meant D & X procedure. As the court stated, the terms D & X and partial birth abortion received differently definitions by the Commonwealth Attorneys, the AMA, the Virginia statute, and the affidavits filed by the defendants. *Id.* at 813-14.

88. 11 F. Supp. 2d at 814.

89. *Id.* citing Hope Clinic v. Ryan, 995 F.Supp. 847, 854 (N.D. Ill. 1998), and Evans v. Kelley, 977 F. Supp. 1283, 1306 (E.D. Mich 1997).

90. 11 F. Supp. 2d at 814. "Because vaginal delivery is a necessary part of every safe and common method of abortion, a physician performing an abortion always deliberately and intentionally 'delivers' a fetus, or a portion thereof, into the vagina." *Id.* This observation by the court related to the statute's use of the term "delivers" in defining partial birth abortion as "an abortion in which the person performing the abortion deliberately and intentionally *delivers* a living fetus or a substantial portion thereof into the vagina." VA. CODE ANN. § 18.2-74.2(D) (emphasis added).

91. 11 F. Supp. 2d at 814.

define partial birth abortion in the Virginia statute.[92] The court found the term living fetus vague because "people of common intelligence could differ as to the meaning and interpretation of the term 'living fetus.'"[93] Furthermore, the court reasoned that the words living fetus fail the vagueness standard because several other courts expressed trouble defining this term.[94] Finally, the *Richmond Medical Center* court found that a living fetus could be delivered in suction curettage and D & E abortions.[95]

The court concluded its analysis by investigating the meaning of "substantial portion thereof," another term used in the statute.[96] The plaintiffs argued that the statute failed to specify the exact amount of a fetus necessary to constitute a substantial portion, and one of the plaintiff's testified that the term possibly meant "a hand or a leg."[97]

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92. *Id.* at 815. The statute uses the term living fetus in defining a partial birth abortion as, "an abortion in which the person performing the abortion deliberately and intentionally delivers a *living fetus* or a substantial portion thereof into the vagina." VA. CODE ANN. § 18.2-74.2(1) (emphasis added).

93. 11 F. Supp. 2d at 815.

94. *Id.* The court cited *Planned Parenthood of Southern Arizona, Inc. v. Woods,* 982 F. Supp. 1369, 1379 (D. Ariz. 1997), in which the District Court for Arizona expressed its difficulty with the term as follows:

> Does "living fetus" . . . refer to the presence of a fetal heartbeat? Alternatively, does living fetus refer to living cells? As demonstrated by the testimony in this case, reasonable physicians differ as to the meaning of what is "living." In addition, the Act does not define when fetal death occurs.

Id. at 1379. The court in *Richmond Medical Center* cited other courts that sustained vagueness challenges to statutes using the words living fetus. *See Ryan,* 995 F. Supp. at 854. In *Hope Clinic,* the court reasoned that, "[w]ithout a clear definition in the statute as to the meaning of the term 'living,' a physician cannot know whether her conduct falls within the statute's reach." *Id.* Like the court in *Hope Clinic,* the court in *Richmond Medical Center* expressed concern with the idea that a doctor might not know whether his conduct falls within the scope of the statute. 11 F. Supp. 2d at 815. The *Richmond Medical Center* court noted that:

> [W]hile performing a suction curettage or D & E procedure, [a doctor] does not know the exact point at which the fetus dies, and that depending on the definition of the term, the fetus might still be "living" while a substantial portion of a disarticulated fetus is brought into the vagina.

Id

95. *Id.*

96. *Id* at 816. The Virginia statute defines partial birth abortion as, "an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or a *substantial portion thereof* into the vagina . . . ." VA. CODE ANN. § 18.2-74.2(D) (emphasis added).

97. 11 F. Supp. 2d at 816.

The defendants' experts similarly failed to offer a specific definition of a substantial portion of a fetus.[98] The court, relying on the differing expert opinions and lack of a common medical definition, held that "there is certainly grave doubt that the term . . . supplies the kind of notice requirement to avoid a finding of vagueness or whether the term is sufficient to prevent arbitrary prosecution."[99]

After discussing the arguably vague terms the *Richmond Medical Center* court analyzed how different constructions of the terms brought the procedures performed by the plaintiffs within the scope of the statute.[100] First, the court determined that suction curettage, the most common abortion procedure during the first trimester of pregnancy, potentially fell within the proscriptions of the statute.[101] The court reasoned further that the D & E procedure, the most frequent form of second trimester abortion, also potentially fell within the proscriptions of the statute.[102] The court held that suction

98. *Id.*
99. *Id.*
100. *Id.* at 816-19.
101. *Id.* at 816. The court reasoned that

> [I]n a suction curettage procedure, as performed by the plaintiffs, the physician "delivers" portions of the fetus from the uterus into and through the vagina through a cannula. The physician does not know when the fetus "dies" and it is entirely possible that the fetus may still be "living" when portions of the fetus are in the vagina, with other portions remaining in the uterus. Further, according to the testimony of Dr. Jones, it is possible at the early stages of gestation for a suction procedure to result in the entire fetus being brought into the cannula, and hence into and through the vagina, intact. . . . [T]he physician would not know how long the heartbeat of the fetus would continue after removal.
>
> On this record, it appears that, during a suction curettage procedure, the physician could "deliver" a "living fetus" or a "substantial portion thereof" into the vagina, for the purpose of performing a procedure with the intent of killing the fetus, which kills the fetus, and then complete the delivery. So construed, the physician would appear to violate the Act when performing the suction curettage procedure.

Id. at 816-17.

102. 11 F. Supp. 2d at 817. The court reasoned that

> [I]n performing a D & E . . . [o]ften, the physician will bring into the vagina a fetal leg or arm which remains attached to the thorax of the fetus still in the uterus. . . . [A] physician "can neither predict nor control whether, in the course of the D & E, such an event will occur while the fetus is still alive." If "substantial portion thereof" is defined to encompass a fetal arm or leg, this procedure would come within the ambit of the Act because a "substantial portion" of the fetus would have been "delivered" into the vagina, and the fetus may still be "living" while the physician uses forceps to complete

curettage and D & E were both potentially proscribed by the statute because the terms defining partial birth abortion (i.e., delivers, living fetus, and substantial portion thereof) potentially included suction curettage and D & E procedures.[103]

As a result of the findings regarding the definition of partial birth abortion, the court in *Richmond Medical Center* held that the plaintiffs proved the statute failed to provide fair notice of the conduct prohibited.[104] In addition, the court found that the plaintiffs proved a "substantial likelihood of success" on the merits of their vagueness challenge.[105]

The next task faced by the *Richmond Medical Center* court involved a determination of whether the plaintiffs proved a "substantial likelihood of success" on the merits of their undue burden challenge.[106] The court reviewed the precedent set in *Roe* and *Casey*.[107] In *Richmond Medical Center*, the court noted that the case law stood for five principles that are relevant to the case at bar.[108] First, the State may not place an undue burden on (or substantial obstacle in the path of) a woman's choice to have an abortion pre-viability.[109] The second principle recognizes the State's interest in potential life but warns that the State may not take measures to promote its interest if they place an undue burden on women seeking abortions.[110] The court's third principle as allows the State to take

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the procedure which kills the fetus . . . and finishes the delivery.

. . . [I]n some cases, during a D & E procedure, the physician may remove the entire fetus from the uterus into the vagina in an intact condition.

Id (citations omitted).

103. *Id.* at 818. *See also supra* notes 63-71 and accompanying text.

104. 11 F. Supp. 2d at 819.

105. *Id.* After attempting to understand the proscriptions of Virginia's partial birth abortion statute, the court reasoned that the plaintiffs "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them grounds for more deliberate investigation." *Id*

106. *Id.*

107. *Id.* at 819-21 (citing *Roe*, 410 U.S. at 152-66, and *Casey*, 505 U.S. at 846).

108. *Id.* at 821-22 (citing *Casey*, 505 U.S. at 878-79).

109. 11 F. Supp. 2d at 821.

110. *Id.* The court found that:

To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to

measures to benefit the mother's health, but not unnecessary measures that "have the purpose or effect" of placing an undue burden on the mother's right to have an abortion.[111] Fourth, the "*State may not prohibit* any woman" from obtaining an abortion pre-viability.[112] Finally, the fifth principle states that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe abortion *except where it is necessary . . . for the preservation for the life or health of the mother.*"[113]

The court in *Richmond medical Center* first applied the fifth principle to the facts of the case to determine whether the absence of a maternal health provision in the statute violated *Roe* and *Casey*.[114] The court stated that *Casey* requires a maternal health exception and reached the holding that because the Virginia statute lacked a maternal health exception, the plaintiffs were likely to succeed on the merits of their undue burden argument.[115] The court's decision correctly follows *Roe*, because in *Roe*, the Court held that "a state criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to

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persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

Id.

111. *Id.*

112. *Id.* (emphasis in original).

113. *Id.* (quoting *Casey*, 505 U.S. at 878-79 (1992) (emphasis in original)).

114. 11 F. Supp. 2d at 822. The plaintiffs asserted that without a maternal health exception the statute clearly fell within the proscriptions of *Roe* and *Casey*. *Id.* The defendants argued that "*Roe* and *Casey* are inapplicable because, in those decisions, the Supreme Court did not announce constitutional protections to abortions where 'the child is partially born.'" *Id.* The court rejected the defendants' argument stating that "*Roe* and *Casey* established the line of demarcation for a state's ability to regulate and proscribe abortion in terms of whether the fetus was viable or nonviable, not in terms of whether a fetus was in the process of being born." *Id.* (citing *Casey*, 505 U.S. 879).

115. *Id.* at 825. The court considered the plaintiffs' arguments regarding the maternal health exception because the statute potentially applied to the D & E and suction curettage procedures performed by the plaintiffs. *Id.*; *see also supra* notes 74-76 and accompanying text. Furthermore, the court noted that, even if the statute did not apply to suction curettage or D & E abortions, "*Roe* and *Casey* are clear that, although a State may proscribe abortion at viability, it must include exceptions for the life and health of the mother so as to avoid violating the Due Process Clause of the Fourteenth Amendment." 11 F. Supp. 2d at 823. The court also noted that, even though the Virginia statute contained a maternal life exception, under precedent, the statute must also contain a maternal health exception. *Id.*

pregnancy stage and without recognition of other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."[116] The Virginia statute certainly constitutes a state criminal abortion statute that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of other interests involved.

In its analysis, the court in *Richmond Medical Center* further considered whether procedures performed by the plaintiffs, "which appear to fall within the reach of the Act, are 'necessary' to save the health of the mother."[117] The court noted that the D & E procedure is the safest method of abortion for the mother in the second trimester of pregnancy.[118] The court stated that, "'[I]t follows that a statute which bans a common abortion procedure would constitute an undue burden under *Casey* because 'an abortion regulation which inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a previability abortion.'"[119] Accordingly, the *Richmond Medical Center* court held that the plaintiffs presented a strong argument that the statute poses an unconstitutional burden on a woman's right to seek pre-viability abortions and, further, that they

116 *Id.* at 164.

117. *Id.*

118. *Id.* at 825. The court listed the main reasons for preferring D & E procedures to the available, non-surgical alternative of labor induction procedures. *Id.* at 824. First, "the main risk of induction stems from the fact that it involves the same medical complications as labor and delivery at full term." *Id.* This fact indicates that if an abortion becomes necessary for the health or the life of the mother, any alternative to a D & E procedure involves the same risks as carrying the fetus to term. Therefore, the D & E procedure may be necessary to save the life or health of the mother. Second, the court found that a D & E procedure takes less time and causes less pain for the mother than the alternatives. *Id.* Third, the court observed that "the physiological stress of the labor itself makes induction relatively more dangerous and is often contraindicated for women with various medical conditions." *Id.* Finally, the court noted that "labor inducing-medication can . . . lead to potentially fatal heart, lung, and kidney problems." *Id.* The court also noted the plaintiff's evidence that "where induction is contraindicated for a woman, *D & E procedures are the only safe abortion procedures available* that do not involve major surgery." *Id.* (emphasis added). Finally, the court compared the D & E procedure to the hysterectomy and hysterotomy (the major surgical alternatives) and found that D & E is "'far preferable 'to [both] because these two procedures entail the risks of major surgery . . . [a]nd, the mortality rate associated with these two procedures is more than 10 times that associated with the D & E." *Id.*

119. *Id.* at 825 (quoting Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 201 (6th Cir. 1997)).

demonstrated a likelihood of success on the merits.[120] The statute likely created an undue burden, according to the court, because it proscribed the safest and most common pre-viability, second term abortion procedure.[121]

The court in *Richmond Medical Center* analyzed the public interest factor to determine whether to grant an injunction.[122] First, the court acknowledged the competing interests in the case: a mother's right to an abortion pre-viability without an undue burden, and her right to have an abortion post-viability in order to protect her health or life; physicians' rights to provide medical care; and the state's interest in potential life.[123] The court recognized that in determining whether to issue an injunction, "an important aspect . . . is the need to 'maintain the *status quo* . . . provided that it can be done without imposing too excessive an interim burden upon the defendant.'"[124]

The court correctly found that, preventing the application of the statute until adjudication on the merits, the status quo remained.[125] This position constitutes the only logical view because at the time of the decision, the statute had not taken effect and, therefore, the status quo consisted of life before the application of the statute. The court judiciously held that the public interest required an injunction because "the public is certainly interested in the prevention of enforcement of [laws] which may be unconstitutional."[126]

Finally, the court in *Richmond Medical Center* issued an injunction preventing the application of the Virginia statute until the issues presented by the plaintiffs could be decided on the merits.[127] The author again agrees with the *Richmond Medical Center* court in

120. *Id.* at 827.

121. 11 F. Supp. 2d at 827. The court found that the plaintiffs had to choose between providing D & E abortions and risking prosecution or discontinuing the procedure, thereby denying women the abortion procedure and consequently imposing an undue burden on a women's right to seek an abortion. *Id.*

122. *Id.* at 827-29.

123. *Id.* at 827.

124. *Id.* at 828 (quoting Feller v. Brock, 802 F.2d 722, 727 (4th Cir. 1986)).

125. 11 F. Supp. 2d at 828.

126. *Id.* (quoting Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)).

127. *Id.* at 829.

its conclusion because the statute likely remains unconstitutionally vague due to the terms that lack an obvious definition. In addition, the author believes that statute clearly violates the clear dictates of *Roe* and *Casey*, regarding any abortion statute to contain maternal health and life exceptions. Finally, the author holds the opinion that the operation of the Virginia statute imposes an undue burden on a woman's right to seek an abortion because it arguably proscribes the two most common and safe abortion procedures. This proscription forces physicians to refuse to offer their services to women, or to offer the services under the fear of criminal prosecution.

III. PROPOSAL

The Virginia legislature should repeal the statute prohibiting partial birth abortions because of its vagueness and because it imposes an unconstitutional burden on a woman's right to an abortion. First, the legislature should recognize, as the court stated in *Richmond Medical Center*, that ordinary people cannot possibly understand the conduct prohibited by the vague terms of the statute. Because the court, the plaintiffs, and the defendants failed to agree on the meaning of the terms, neither can ordinary people understand their meaning. Second, the legislature needs to recognize that the statute places an unconstitutional burden on a woman's right to have an abortion because the statute lacks a maternal health exception, as required by *Roe* and *Casey*. The statute also places physicians in a predicament of choosing between refusing to offer the two most common and safe abortion services to mothers or to offer the services under the fear of criminal prosecution.

If, however, the Virginia legislature remains intent on prohibiting D & X abortions, the legislature must change the wording of the statute to define the following terms more precisely: delivers, living fetus, and substantial portion thereof. In addition, the statute should specifically proscribe as partial birth abortions, the procedure defined as D & X by the ACOG and the AMA. The defendants in *Richmond Medical Center* claimed the statute only targeted D & X abortions.

The author recognizes the legislative reluctance to define the term partial birth abortion because of the fear that abortion providers would change their techniques slightly to remove the intended

procedures from the proscriptions of the statute. Nevertheless, the evidence in *Richmond Medical Center* suggests that physicians lack control over the method by which the fetus is delivered, dismembered, or killed. Absent a narrow definition of partial birth abortion, therefore, a statute proscribing partial birth abortions imposes an undue burden on women seeking abortions as evidenced by the Virginia statute. In addition, if the Virginia legislature intends to prohibit D & X abortions, *Roe* and *Casey* require that any statute prohibiting abortions post-viability contain a maternal health and life exception; therefore, further drafts of the statute must include both exceptions.

In conclusion, the Virginia statute must be repealed by the legislature or overruled by a court because it fails to meet constitutional requirements in its current form. If, however, the legislature decides to keep a partial birth abortion statute, the legislature must clearly and narrowly define the terms in the statute. Moreover, to prevent the statute from constituting an undue burden, the statute must contain both a maternal health and a maternal life exception.

CONCLUSION

The Virginia statute is unconstitutionally vague because it contains several terms that lack obvious definition. As noted above, neither the court, the plaintiffs, nor the defendants in *Richmond Medical Center* agree on definitions for the terms partial birth abortion, delivers, living fetus, and substantial portion thereof. The author believes that statute remains unconstitutional because it fails to contain a maternal health exception, thereby violating the clear dictates of *Roe* and *Casey*. Finally, the author holds the opinion that the operation of the Virginia statute imposes an undue burden on a woman's right to seek an abortion because it proscribes the two most common and safe abortion procedures.

The legislature should repeal the statute because of its several constitutional infirmities. Alternately, a court deciding the issues presented in *Richmond Medical Center* must invalidate the statute as unconstitutional based on the district court's analysis. If, however, the Virginia legislature retains a partial birth abortion statute, the

legislature needs to define the terms of the statute narrowly and with sufficient definiteness. In addition, if the Virginia legislature remains determined to have a partial birth abortion statute, the legislature should define the specific types of abortion that it intends to prohibit. Finally, any new version of the statute must contain a maternal health and maternal life exception as required by *Roe* and *Casey*.

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