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POST-VIABILITY ABORTION BANS AND THE LIMITS OF THE HEALTH EXCEPTION

*Michael J. Tierney**

INTRODUCTION

From *Roe v. Wade*¹ in 1973 to *Planned Parenthood v. Casey*² in 1992 to *Stenberg v. Carhart*³ in 2000, the Supreme Court has consistently held that the states have more power to regulate abortions subsequent to viability than prior to viability. Once the child is potentially able to live outside the womb, a state may even ban abortions so long as it provides an exception for situations in which an abortion protects a mother's life or health. But what does it mean to have a health exception? Some circuits interpret this health exception so broadly as to include mental health. Recent Supreme Court cases imply, however, that mental health is not a constitutionally mandated component of the health exception.

I. BACKGROUND OF MAJOR CASES

Constitutional abortion jurisprudence began with the 1973 decision of *Roe v. Wade*. Contrary to some misperceptions, however, *Roe* did not constitutionalize abortion on demand. Rather, *Roe* set up a trimester system whereby in the third trimester, states could regulate and even proscribe abortions.⁴ Nevertheless, *Roe* required that these abortion bans include an exception for "the preservation of the life or health of the mother."⁵

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1 410 U.S. 113 (1973).

2 505 U.S. 833 (1992).

3 530 U.S. 914 (2000).

4 *Roe*, 410 U.S. at 164–65 (“[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”).

5 *Id.* at 165.

As of 1973, the line between the second and the third trimester was roughly analogous to viability. Due to improving medical technology, however, the age of viability occurs earlier and earlier. In the 1992 case of *Planned Parenthood v. Casey*, the Supreme Court replaced the trimester system with a distinction made at viability.⁶ Today, prior to viability, states may not place an “undue burden” on a mother’s choice to procure an abortion.⁷ After viability, however, states may proscribe abortions as long as they provide an exception for the health and life of the mother.⁸ Finally, in the 2000 case of *Stenberg v. Carhart*, although limited in its application to partial birth abortion bans, the Supreme Court strongly implies that a mental health exception is not required in the post-viability context.⁹

II. STATES’ STATUTORY ATTEMPTS TO BAN POST-VIABILITY ABORTIONS

Three quarters of the states have legislation banning post-viability abortions.¹⁰ The majority of these states provide an exception to preserve the life or health of the mother, without defining what “health”

6 505 U.S. at 872.

7 *Id.* at 846.

8 *Id.* at 879.

9 See *infra* notes 38–44 and accompanying text.

10 ALA. CODE § 13A-13-20-7 (1994); ARIZ. REV. STAT. ANN. § 36-2301.01(A) (West 2003); ARK. CODE ANN. § 20-16-705(a) (Lexis 2000); CAL. HEALTH & SAFETY CODE § 123468 (West Supp. 2004); CONN. GEN. STAT. ANN. § 19a-602 (West 2003); DEL. CODE ANN. tit. 24, § 1790(b)(1) (1997); FLA. STAT. ANN. § 390.0111(1) (West 2002); GA. CODE ANN. § 16-12-141(c) (2003); IDAHO CODE ANN. § 18-608(3) (Michie 2004); 720 ILL. COMP. STAT. ANN. 510/5 (West 2003); IND. CODE ANN. §§ 16-34-2-1(a)(3), 16-34-2-3 (West 1997 & Supp. 2004); IOWA CODE ANN. § 707.7 (West 2003); KAN. STAT. ANN. § 65-6703 (2002); KY. REV. STAT. ANN. § 311.780 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 40:1299.35.4(B) (West 2001); ME. REV. STAT. ANN. tit. 22, § 1598 (West 2004); MASS. GEN. LAWS ANN. ch. 1122, § 12M (West 2004); MICH. COMP. LAWS ANN. § 750.14 (West 1991), as construed in *People v. Bricker*, 208 N.W.2d 172, 175–76 (Mich. 1973); MINN. STAT. ANN. § 145.412(3) (West 1998); MO. ANN. STAT. § 188.030(1) (West 2004); MONT. CODE ANN. § 50-20-109 (2003); NEB. REV. STAT. § 28-329 (1995); NEV. REV. STAT. ANN. 442.250 (Michie 2004); N.Y. PENAL LAW §§ 125.00, 125.05, 125.45 (McKinney 2004); N.C. GEN. STAT. § 14.45.1(b) (2003); N.D. CENT. CODE § 14-02.1-04(3) (2004); OHIO REV. CODE ANN. § 2919.17 (Anderson 2003); OKLA. STAT. ANN. tit. 63, § 1-732 (West 2004); 18 PA. CONS. STAT. ANN. § 3211 (West 2000); R.I. GEN. LAWS § 11-23-5 (2002); S.C. CODE ANN. § 44-41-20(c) (Lexis 2002); S.D. CODIFIED LAWS § 34-23A-5 (Michie 1994); TENN. CODE ANN. § 39-1-201(c)(3) (2003); TEX. HEALTH & SAFETY CODE ANN. § 170.002 (Vernon 2001); UTAH CODE ANN. §§ 76-7-302(2), 76-7-302(3) (Supp. 2004), construed in *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1544 (D. Utah 1992); VA. CODE ANN. § 18.2-74(b) (Michie 1996); WIS. STAT. ANN. § 940.15 (West 1996 & Supp. 2003); WYO. STAT. ANN. § 35-6-102 (Lexis 2003).

means,¹¹ while other states expressly allow “health” to include mental health.¹² Other states proscribe post-viability abortions, excepting only those necessary to protect the life or physical health of the mother.¹³ Nevertheless, these post-viability abortion bans are only rarely enforced. Four possible reasons explain this lack of enforcement. First, for those cases involving the physical health or life of the mother exception, states rarely enforce these bans because of an expectation that the bans may be struck down under the Sixth Circuit’s precedent.¹⁴ Second, post-viability abortion bans may not be widely enforced because states have changed priorities, and those groups

11 ARIZ. REV. STAT. ANN. § 36-2301.01(A) (West 2003); ARK. CODE ANN. § 20-16-705(a) (Lexis 2000); CAL. HEALTH & SAFETY CODE § 123468 (West Supp. 2004); CONN. GEN. STAT. ANN. § 19a-602 (West 2003); FLA. STAT. ANN. § 390.0111(1) (West 2002); GA. CODE ANN. § 16-12-141(c) (2003); 720 ILL. COMP. STAT. ANN. 510/5 (West 2003); IOWA CODE ANN. § 707.7 (West 2003); KY. REV. STAT. ANN. § 311.780 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 40:1299.35.4(B) (West 2001); ME. REV. STAT. ANN. tit. 22, § 1598 (West 2004); MICH. COMP. LAWS ANN. § 750.14 (West 1991), *construed in* *People v. Bricker*, 208 N.W.2d 172, 175–76 (Mich. 1973); MINN. STAT. ANN. § 145.412(3) (West 1998); MO. ANN. STAT. § 188.030(1) (West 2004); NEB. REV. STAT. § 28-329 (1995); N.C. GEN. STAT. § 14.45.1(b) (2003); OKLA. STAT. ANN. tit. 63, § 1-732 (West 2004); S.D. CODIFIED LAWS § 34-23A-5 (Michie 1994) (after the twenty-fourth week); TENN. CODE ANN. § 39-15-201(c)(3) (2003); WIS. STAT. ANN. § 940.15 (West 1996 & Supp. 2003); WYO. STAT. ANN. § 35-6-102 (Lexis 2003).

12 MASS. GEN. LAWS ANN. ch. 112, § 12M (West 2004) (during or after the twenty-fourth week when there is danger to life or grave impairment of physical or mental health); NEV. REV. STAT. ANN. 442.250 (Michie 2004) (after the twenty-fourth week when there is danger to life or grave impairment of physical or mental health); N.D. CENT. CODE § 14-02.1-04(3) (2004) (same); S.C. CODE ANN. § 44-41-20(c) (Lexis 2002) (life or physical or mental health); TEX. HEALTH & SAFETY CODE ANN. § 170.002 (Vernon 2001) (prevent death or serious impairment to physical or mental health); UTAH CODE ANN. §§ 76-7-302(2), 76-7-302(3) (Supp. 2004) (after twentieth week to prevent death or grave impairment to health), *construed in* *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1544 (D. Utah 1992) (noting legislative intent not to exclude mental health from definition); VA. CODE ANN. § 18.2-74(b) (Michie 1996) (prevent death or substantial and irremediable impairment of mental or physical health).

13 ALA. CODE § 13A-13-20-7 (1994); DEL. CODE ANN. tit. 24, § 1790(b)(1) (1997); IDAHO CODE § 18-608(3) (Michie 2004); IND. CODE ANN. §§ 16-34-2-1(a)(3), 16-34-2-3 (West 1997 & Supp. 2004); KAN. STAT. ANN. § 65-6703 (2002); MONT. CODE ANN. § 50-20-109(1) (2003); N.Y. PENAL LAW §§ 125.00, 125.05, 125.45 (McKinney 2004); OHIO REV. CODE ANN. § 2919.17 (Anderson 2003); 18 PA. CONS. STAT. ANN. § 3211 (West 2000); R.I. GEN. LAWS § 11-23-5 (2002).

14 Part III.A of this Note explains why the Sixth Circuit’s decision in *Voinovich v. Women’s Medical Professional Corp.*, 130 F.3d 187 (6th Cir. 1997), is erroneous and should not be followed. Stated simply, the Sixth Circuit relies upon precedent interpreting statutory texts that include health and makes the leap from statutory interpretation to constitutional mandate. Where the Supreme Court has had to rule on the constitutionality of physical health only exceptions, it has upheld these statutes.

most likely to push for enforcement of the laws are now focusing their already scarce resources on fighting partial birth abortions.¹⁵ Third, for the states that include a mental health exception, the ban has no impact and therefore there is nothing to enforce.¹⁶ Finally, there are the problems of enforcement stemming from both the difficulty in distinguishing between physical and mental health and the difficulty in determining the age of viability.¹⁷

Although the Court has clearly stated there must be an exception to post-viability abortion bans when the mother's health or life is in danger, it is unclear how broad that health exception must be. Many states wish to limit the health exception to physical health because an exception for mental, emotional and social health takes all force out of any ban. Nevertheless, the states may have a legitimate fear that a court would disapprove of their post-viability abortion ban statutes without such a mental health exception. Only two circuits have looked at the necessity of a mental health exception, and the only circuit to directly address the question held that a mental health exception was necessary. Very shortly after *Roe* in 1973, the First Circuit refused to find unconstitutional a Rhode Island ban on post-viability abortions because of a lack of standing.¹⁸ More recently, in 1997, the Sixth Circuit in *Women's Medical Professional Corp. v. Voinovich*¹⁹ struck down an Ohio law precisely because it lacked a mental health exception. Ignoring the pleas of a sizable number of states to resolve this issue as well as the arguments of three of the Justices, the Supreme Court denied the petition to review.²⁰ With so much attention focused on partial birth abortion, the states have missed the Supreme Court's reinforcement of the foundation upon which post-viability abortion bans without a mental health requirement lie. In its 2000 *Carhart* decision, the Supreme Court clarified its understanding of

15 With the enactment of the Partial Birth Abortion Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1206, the fight against partial birth abortions has been transferred to the federal arena. Already, some states are starting to look at their post-viability abortion statutes. See, e.g., NEW YORK STATE CATHOLIC CONFERENCE, PROHIBIT POST-VIABILITY ABORTIONS, OCT. 16, 2003, at http://www.nyscatholicconference.org/pages/our_agenda/show_issueDetails.asp?id=63 (lobbying to change the health exception in New York's post-viability abortion ban to be exclusively physical health).

16 Part III.C of this Note discusses this problem.

17 These will be discussed in Part IV, *infra*.

18 *Rodos v. Michaelson*, 527 F.2d 582 (1st Cir. 1975).

19 130 F.3d 187 (6th Cir. 1997).

20 *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036 (1998). Chief Justice Rehnquist together with Justices Scalia and Thomas would reverse the Sixth Circuit and uphold the Ohio law. For many of the same reasons given in Part III.A, *infra*, the three Justices argue that *Voinovich* is contrary to the Court's holdings in *Casey* and *Roe*.

Casey and called into question the Sixth Circuit's holding. Contrary to the result reached in *Voinovich*, a ban on post-viability abortions is likely constitutional without a mental health exception.

III. THE CONSTITUTIONALITY OF THE EXCEPTION FOR PHYSICAL HEALTH ONLY

A post-viability abortion ban is constitutional with only an exception for preserving the life or physical health of the mother.²¹ Some courts have summarily dismissed the claim that a mental health exception is required. The Fourth Circuit has stated: “[W]e doubt that the Court would require an emotional health exception even to an abortion regulation that banned certain abortions entirely.”²² Nevertheless, other courts have found a mental health exception is constitutionally necessary by looking to *Doe v. Bolton*²³ and *United States v. Vuitch*.²⁴

A. *Voinovich Is Not Valid Precedent*

In *Voinovich*, the Sixth Circuit found an Ohio statute banning post-viability abortions with an exception for the life or physical health of the mother to be unconstitutional. The Sixth Circuit ignored the Supreme Court's 1992 *Casey* decision that upheld a physical health only exception. The Sixth Circuit thought they could distinguish *Voinovich* from *Casey* because *Casey* dealt with a forty-eight hour delay and not a complete ban.²⁵ Although a forty-eight hour delay is less of an impediment than a complete ban, the law in *Casey* is not necessarily milder than the law in *Voinovich*. While the Ohio law in *Voinovich* only banned abortions *post*-viability, the Supreme Court in *Casey* upheld a physical health only exception throughout the entire pregnancy, including *prior* to viability. The Supreme Court clearly holds that a state has more power to regulate abortions *post*-viability than *pre*-viability.²⁶

21 See *Stenberg v. Carhart*, 530 U.S. 914, 921, 930 (2000) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973))).

22 *Planned Parenthood v. Camblos*, 155 F.3d 352, 375 n.7 (4th Cir. 1998).

23 410 U.S. 179 (1973).

24 402 U.S. 62 (1971).

25 *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 207 (6th Cir. 1997).

26 See *Carhart*, 530 U.S. at 930 (finding that states have considerably more power to restrict abortion *post*-viability than they do *pre*-viability); *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (finding that state regulations of abortion *prior* to viability are subject to a far more stringent standard); *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (“[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion

The Supreme Court has been less clear about exactly what the health exception in *Roe* entails. While there are many places to look for guidance, the Sixth Circuit was wrong to look to *Vuitch* and *Doe* to establish that a mental health exception was constitutionally mandated. Both of these decisions were statutory interpretations and not constitutional mandates.

Vuitch was the Supreme Court's interpretation of a District of Columbia statute that prohibited abortions with an exception "for the preservation of the mother's life or health."²⁷ The Court analyzed the statutory definition of health in *Vuitch* to determine if the exception for health was unconstitutionally vague.²⁸ In interpreting the District of Columbia's statute, the Court found that "health" includes mental health.²⁹ The Court reached this conclusion only after investigating the legislative history of the act. Because the 1901 Congress failed to express intent to interpret health one way or another, the Court saw no reason to disagree with the lower court's interpretation of health as including mental health.³⁰

Courts would be wrong to rely on the health definition in *Vuitch* for the health exception required for post-viability abortion bans. In *Vuitch*, the Supreme Court interpreted "health" in a pre-existing statute rather than what health must mean in future state statutes. Also, while Congress may have left a vague exception for just "health" in the 1901 District of Columbia statute, the Ohio statutes and those of other states are not vague. The Ohio statute provided an exception for the life of the mother or "serious risk of the substantial and irreversible impairment of a major bodily function."³¹ The Sixth Circuit decided, by the language and the legislative history, that the Ohio legislature clearly sought to provide an exception only for physical health.³²

Doe v. Bolton was decided on the same day as *Roe* and dealt with a Georgia statute that proscribed abortion with an exception for when an "abortion is necessary because continuation of the pregnancy . . . would seriously and permanently injure [the mother's] health."³³ The health exception in *Doe* was challenged as being unconstitution-

except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

27 402 U.S. at 68.

28 *Id.* at 72.

29 *Id.*

30 *Id.* at 70.

31 *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 206 (6th Cir. 1997) (quoting OHIO REV. CODE ANN. §§ 2919.16(F), 2919.17(A)(1) (Anderson 2003)).

32 *See id.*

33 410 U.S. 179, 183 (1973).

ally vague. The Court held that, like the District of Columbia statute in *Vuitch*, *Doe's* exception was not unconstitutionally vague.³⁴ The Court found that whether "'abortion is necessary' is a professional judgment that . . . may be exercised in light of all factors—physical, emotional, psychological."³⁵ The *Doe* Court interpreted the Georgia statute as having a mental health exception and therefore concluded it was not unconstitutionally vague. However, *Doe* did not address the issue of whether such an exception was necessary.

Therefore, while reliance on *Doe* and *Vuitch* may lead one to the conclusion that health alone, absent any statutory context or legislative history to the contrary, may include mental health, it does not require that health always be interpreted to include mental health nor that a mental health requirement is constitutionally mandated. Finally, *Doe* should not be read as defining the health exception for post-viability abortion bans because the *Doe* Court interpreted a statute that banned abortions both prior to and subsequent to viability. Throughout *Roe*, *Casey*, and *Carhart*, the Court has been explicit that there are different standards for bans on abortion before and after viability.³⁶

The Court could not have had an all encompassing definition of health in mind when it provided an exception for the "preservation of the life or health of the mother" in *Roe* and *Casey*. *Casey* upheld a physical health only exception to pre-viability delays to abortion.³⁷ Even if the Court meant health to include mental health in 1973, its reaffirmation in 1992 cannot be seen as including mental health because it had upheld a physical health only statute.

Given that the Court has upheld physical health only exceptions to delay in the pre-viability context, it would also be logical to uphold physical health only exceptions to post-viability bans. A state has considerably more power to restrict abortion post-viability than it does

34 *Id.* at 191.

35 *Id.* at 192 (emphasis added).

36 See *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (finding a state has considerably more power to restrict abortion post-viability than it does pre-viability); *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (finding that state regulations of abortion prior to viability are subject to a far more stringent standard); *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) ("[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

37 See *Casey*, 505 U.S. at 880. The pre-viability delay in the Pennsylvania statute included an exception for "substantial and irreversible impairment of a major bodily function." 18 PA. CONS. STAT. ANN. § 3203 (West 2000).

pre-viability.³⁸ The Supreme Court has considered abortion only once in the last ten years.³⁹ In that case, the Court struck down a ban on partial birth abortions because it did not include a health exception at all. The Nebraska legislature intentionally left out a health exception because of its findings that partial birth abortions are never necessary to protect the health of the mother.⁴⁰ However, the Court cited conflicting evidence regarding whether a partial birth abortion reduces “blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix.”⁴¹ The Court also cited other possible physical health risks including “disseminated intravascular coagulopathy and amniotic fluid embolus.”⁴² Nowhere does the Court cite any mental health risks that could be avoided by having a partial birth abortion. The *Carhart* Court did not consider a mental health exception necessary. It is highly unlikely that the Court inadvertently did not mention mental health or felt the issue was already resolved on other grounds. The *Carhart* decision is extremely thorough and explains many of the possible physical health problems even though they are admittedly extremely rare.⁴³ Furthermore, even though the act could be held unconstitutional simply for lacking a health exception, the Court fully explains that even if it had a health exception, the act affected some pre-viability abortions and therefore could be an undue burden.⁴⁴

B. *Balancing Liberty and Life*

The Supreme Court has consistently held that in the abortion context, there must be a balancing between the woman’s liberty interest and the state’s interest in the protection of the child’s life. The Court clearly stated in *Casey*:

[V]iability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.⁴⁵

38 See *Carhart*, 530 U.S. at 930.

39 See *id.*

40 *Id.* at 931–32.

41 *Id.* at 932 (quoting the District Court in *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998), *aff’d*, 530 U.S. 914 (2000)).

42 *Id.* at 933.

43 *Id.*

44 *Id.* at 930.

45 *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973)).

Because the state's interest in protecting life is recognized in *Roe*, *Casey*, and *Carhart* as supreme to a woman's liberty interest subsequent to viability, the restrictions on the state's power to ban abortions is considerably lessened after viability. Nevertheless, a state still cannot ban post-viability abortions if an abortion was necessary to save the mother's life.⁴⁶ The Court sees life on both sides of the equation and has decided that because the child has life at risk and the woman has life and liberty at risk, the balance tips toward the mother's side. Following this logic, the Court has also tipped the balance toward the mother's choice to have an abortion when not having one could presumably endanger the mother's health drastically enough to be life threatening. The phrase used by the Court throughout its cases, "for the preservation of the life or health of the mother,"⁴⁷ should be given a narrow interpretation.

Mental and emotional health issues, when added to the woman's liberty, are not enough to trump a child's right to life. First, mental health does not implicate the same risk of death that serious bodily harm entails.⁴⁸ Furthermore, it has been doubted whether mental health can ever be improved by abortions, and there is widespread agreement that having an abortion can have negative psychological effects.⁴⁹ Dr. Fred Mecklenburg, a member of the American Associa-

46 See *Carhart*, 530 U.S. at 929 (quoting *Casey*, 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973))).

47 *Id.*

48 Suicidal tendencies will be explored in Part IV, *infra*.

49 See Brian D. Wassom, Comment, *The Exception that Swallowed the Rule? Women's Medical Professional Corporation v. Voinovich and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 845 (1999) (noting "several have argued that no responsible psychiatrist would ever recommend that a patient have an abortion"); see also Joyce L. Dunlop, *Counseling of Patients Requesting an Abortion*, 220 PRACTITIONER 847, 850 (1978) (stating that immature teenagers are especially susceptible to the disorder); Nadja Burns Gould, *Postabortion Depressive Reactions in College Women*, 28 J. AM. C. HEALTH ASS'N 316, 316-20 (1980); Monte Harris Liebman & Jolie Siebold Zimmer, *The Psychological Sequelae of Abortion: Fact and Fallacy*, in THE PSYCHOLOGICAL ASPECTS OF ABORTION 127, 127-38 (David Mall & Walter F. Watts eds., 1979) (reporting twenty-four immediate and long-term reactions to abortion); Janet Mattinson, *The Effects of Abortion on a Marriage*, in ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS 165, 165-77 (Ruth Porter & Maeve O'Connor eds., 1985) (noting that couples show a delayed grief reaction to the abortion, with many still troubled years after the abortion); Roberto Mester, *Induced Abortion and Psychotherapy*, 30 PSYCHOTHERAPY AND PSYCHOSOMATICS 98, 99 (1978) (concluding that induced abortion is a stressful experience, and women may unconsciously ignore or minimize emotional pain); Anne C. Speckhard & Vincent M. Rue, *Post Abortion Syndrome: An Emerging Public Health Concern*, 48 J. SOC. ISSUES 95 (1992) (finding posttraumatic stress disorder may result post abortion).

tion of Planned Parenthood physicians stated: "There are no known psychiatric diseases which can be cured by abortion. In addition there are none that can be predictably improved by abortion (Instead), it may leave unresolved conflicts coupled with guilt and added depression which may be more harmful than the continuation of the pregnancy."⁵⁰ Therefore, even for the women whose mental or emotional health may suffer by giving birth, their mental health will also suffer by knowingly aborting their viable child.⁵¹ In fact, in most cases a woman's mental health will suffer more by abortion than by delivering the baby. A Danish study showed that while giving birth increased psychiatric admissions by approximately 150%, having an abortion increased admissions by almost 250%.⁵² While we cannot turn back the clock and prevent the pregnancy from occurring in the first place, we are obligated to do the same balancing that is done throughout the abortion context. As the Court has stated, "a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."⁵³

C. *Dichotomy of Mental Health Exception*

When interpreting statutes, the Court has found that Congress should always be assumed to have intended each section to have separate meaning. It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."⁵⁴ This canon of statutory construction can also be applied to understanding the Court's interpretation of Constitutional rights. The Court has repeatedly held that, after viability, a state may ban abortions as long it provides an exception "for the preservation of the life or health of the mother."⁵⁵ *Roe's* recognition that a state "may, if it chooses, regulate, and even proscribe abortion"⁵⁶ means nothing if the health of the mother exception encompasses any possible mental, psychological, emotional or social reason.

50 DAVID C. REARDON, *ABORTED WOMEN, SILENT NO MORE* 169 (1987).

51 See Henry P. David et al., *Postpartum & Postabortion Psychotic Reactions*, 13 *FAM. PLAN. PERSP.* 88 (1981) (providing a comparison of admissions to psychiatric hospitals of women delivering babies and women obtaining abortions).

52 See *id.* at 89 (noting psychiatric admission rate of 7.5 per thousand for all women, 12.0 per thousand for women who gave birth and 18.4 per thousand for women who aborted).

53 *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992).

54 *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion).

55 *Stenberg v. Carhart*, 530 U.S. 914, 929 (2000) (quoting *Casey*, 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973))).

56 *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

Nearly all agree that where there is a mental health exception to the ban, there is no ban at all. Michael Paulsen recently stated: "Because of the 'health' exception to abortion regulation in the last trimester, the mother may choose abortion for essentially any personal, family or emotional reason."⁵⁷ Brian Wassom pointed out that "[e]xpress or implied mental health exceptions have given physicians so much diagnostic discretion as to make such [state post-viability abortion ban] laws worthless."⁵⁸ There are no published cases of a state with a mental health exception ever attempting to enforce its ban.⁵⁹ The result of a very broad reading of health is that "the exception entirely swallows the rule."⁶⁰

Because a ban with a health exception that includes mental health would not be a ban at all, the Court's instruction for health exception must include only physical health. Allowing the health exception to encompass mental health removes all meaning from the Court's recognition that states can ban post-viability abortions.

IV. PROBLEMS WITH ENFORCEMENT

Over three quarters of the states have post-viability abortion bans⁶¹ but very few seek to enforce them. This is most probably due to a belief that the laws were not constitutional following *Voinovich*, or had no teeth in them due to an express or implied mental health exception.⁶² Having established that states can constitutionally ban post-viability abortion with an exception for physical but not mental health, we must briefly investigate some potential problems with enforcing post-viability abortion bans. These problems will generally be related to difficulty in determining the distinction between mental and physical health or the difficulty in determining viability.

A. *The Distinction Between Physical and Mental Health*

The line between physical and mental health is definitely a very fine one. In many cases, physical health issues cause mental health

57 Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 996 n.4 (2003).

58 Wassom, *supra* note 49, at 862.

59 For a list of the seven states with mental health exceptions, see *supra* note 12.

60 *Carhart*, 530 U.S. at 1012 (Thomas, J., dissenting).

61 For a list of the states with post-viability abortion bans, see *supra* note 10.

62 For a list of states with mental health exceptions to their bans, see *supra* note 12.

issues⁶³ and vice versa. Nevertheless, in determining how to make the distinction between physical and mental health, one should consider the reasons why such a distinction was made in the first place. Serious physical health issues can endanger the mother's life. When constitutionally balancing the life of the child with the liberty of the mother, the scale is tipped to the mother's choice when her physical health is in such danger as to implicate a danger to her life.⁶⁴ Because, with one exception, emotional, social or mental health does not impact the life of the mother to such a degree as to endanger her life, the child's life takes precedence over the mother's choice.⁶⁵ The exception, of course, is when continuing the pregnancy may lead to psychological stress so great as to encompass suicidal tendencies.

The health exception to post-viability bans should not encompass women with suicidal tendencies. Studies suggest the suicide rate for women who abort is considerably higher than for those who give birth. A Finnish study found the "suicide rate after an abortion was three times the general suicide rate and six times that associated with birth."⁶⁶ Another study found women who had abortions are nine times more likely to attempt suicide than the general population.⁶⁷ Allowing a mother with suicidal tendencies to abort a viable fetus would therefore seem to increase the chances of that mother injuring herself as compared to her risk in carrying the baby to term. Furthermore, while it is always difficult to quantify psychological harm, aborting a viable child is more psychologically damaging than aborting a pre-viable child.⁶⁸ The solution for women with severe mental problems is not to abort and forget but to receive proper psychiatric

63 For example, consider post-partum or post-abortion depression. See David et al., *supra* note 51, *passim*; Wassom, *supra* note 49, at 851-52.

64 See the balancing discussion in Part III.B, *supra*.

65 See *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973)) ("[T]he independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.").

66 Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987-1994: Register Linkage Study*, 313 *BRIT. MED. J.* 1431, 1433 (1996).

67 REARDON, *supra* note 50, at 129. Note that the difference in the rate in the Finnish study from this study is that Reardon's study showed that *attempted* suicides were nine times more likely while the Finnish study tracked *actual* suicides. Nevertheless, both show a much higher suicide rate for women who have abortions.

68 See Wassom, *supra* note 49, at 853 ("[T]he one fact that seems nearly axiomatic in psychological literature on abortion is that the later in pregnancy one aborts, the greater the woman's risk for negative emotional sequelae.").

help.⁶⁹ In excluding women with suicidal tendencies from the health exception, states are not only protecting the child's life but are also exercising their constitutionally protected right to restrict abortion to protect maternal health.⁷⁰

B. *Problems in Determining the Age of Viability*

In any post-viability abortion ban, there exists the problem of determining viability. Viability is the point at which a fetus could, with or without technological support, live outside the womb. This is not as easy to determine as it may seem. There are two problems. First, the Court has imposed limitations on how viability can be determined.⁷¹ Second, viability is a fluid concept that changes with evolving medical technology and is substantially different for each person.⁷²

Viability is generally understood to be somewhere between the twentieth and twenty-fourth week.⁷³ Although many state statutes have determined a presumptive age of viability,⁷⁴ courts have generally held that viability is a matter solely within the discretion of the attending physician.⁷⁵ The Third Circuit has held that "a statute that established the limit for performance of abortions in terms of the weeks of pregnancy would have been invalid."⁷⁶ Furthermore, statutes requiring doctors to test for viability prior to performing late term abortions have been held unconstitutional because they have the possibility of placing an undue burden on a woman's choice, as the test

69 See REARDON, *supra* note 50, at 169 ("When abortion is substituted for adequate psychiatric care—and there is ample evidence to suggest that this is already happening— . . . [the mother] is the one who cries for help, and she is also the one who is turned away.").

70 See *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (recognizing the state's interest in maternal health in a state statute prohibiting abortions by non-physicians).

71 See *Am. Coll. of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 298 (3d Cir. 1983) (finding that the presumptive age of viability cannot be legislatively determined).

72 See *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976) (finding that the age of viability varies with each person).

73 There are some cases of babies surviving who were born as early as the nineteenth week but it is not until the twenty-fourth week that a baby has a twenty percent chance of survival. Ohio Right to Life, *Viability: When?*, at <http://www.pregnantpause.org/numbers/mvhlive.htm> (last visited Aug. 31, 2004).

74 For example, both Massachusetts and Nevada set it at twenty-four weeks. MASS. GEN. LAWS ANN. ch. 112, § 12M (West 2004); NEV. REV. STAT. ANN. 442.250 (Michie 2004).

75 See *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996).

76 *Thornburgh*, 737 F.2d at 298.

would be unnecessary if the baby is not viable.⁷⁷ The Supreme Court stated:

[N]either the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the state has a compelling interest in the life or health of the fetus.⁷⁸

Therefore, the states are caught in a Catch-22. They are powerless to determine or even know when viability begins, yet they are unable to require doctors to test for viability. The attending physician who has complete discretion in determining whether the child is viable and therefore whether an abortion is legally permissible also usually has a financial incentive to determine that a debatably viable child is not viable because he is paid to perform the abortion.

Determining viability is also difficult because viability is such a fluid concept. The Court has recognized that the “time when viability is achieved may vary with each pregnancy.”⁷⁹ Furthermore, as medical progress advances, the age of viability has been constantly changing. It is impossible for a legislature, court or a doctor to know precisely when viability occurs. Nevertheless, “there is no line other than viability which is more workable.”⁸⁰

CONCLUSION

As medical technology advances there may come a time when all abortions are post-viability. In the meantime, there are over 15,000 abortions performed post-viability every year.⁸¹ As fifty different states democratically decide how best to protect life, the states should understand that they have the power to ban post-viability abortions. While the Court has held that there must be exception for the life or health of the mother, this exception need not include a mental health exception. In fact, a mental health exception eliminates the ban's impact. Although enforcement of these bans may be complicated due to

77 *Bangert*, 102 F.3d at 1117.

78 *Colautti v. Franklin*, 439 U.S. 379, 388–89 (1979).

79 *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976).

80 *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992).

81 Keith J. Grady, Note, *The Value of Life*, *Thornburg v. American College of Obstetricians and Gynecologists*, 10 *HAMLIN L. REV.* 623, 623 (1987). Similarly, the CDC estimates that 1.4% of all abortions or approximately 16,600 abortions take place after twenty weeks. *PLANNED PARENTHOOD, ABORTION AFTER THE FIRST TRIMESTER*, at www.plannedparenthood.org/library/facts/abotaft1st_010600.html (last visited Aug. 31, 2004).

difficulty associated with determining the age of viability, the bans remain constitutional and have the potential to save thousands of lives each year.

