

# THE TWISTED SISTERS OF PROBATE: HOW THE UNIFORM PROBATE CODE AND SUPREME COURT PRECEDENT CREATE INCENTIVES FOR ABORTION

## INTRODUCTION

The ramifications of *Roe v. Wade* extend far beyond women's privacy issues.<sup>1</sup> In *Roe*, the Supreme Court held that a woman had the constitutional right to an abortion.<sup>2</sup> Anything less would have infringed on her privacy.<sup>3</sup>

But today the holding does more than merely allow a right of privacy. When the holding is combined with the Uniform Probate Code ("UPC"), the two can actually provide financial *incentives* for women to abort. These financial incentives can be substantial.

Consider the following hypothetical example. Mark and Carol were married for seven happy years. Carol had two children from a previous marriage; however, Mark had none of his own. They were expecting their first child when Mark was tragically killed in a car accident. His death radically altered Carol's life. In one tragic moment, Carol went from planning the color of their baby's room to planning for Mark's burial arrangements. Meanwhile, her financial adviser delivered devastating news of his own. She had a \$1.3 million choice she needed to make: whether to abort her baby—the couple's first child together. Carol already had children of her own and was pregnant with Mark's first child; because Mark died intestate, if she chose to bear the baby, she would inherit \$1.3 million fewer dollars. Unfortunately for her, the state in which she lived based its intestate succession code upon the 1990 Article II revision to the UPC. While the UPC does not promote abortion on its face, there are exceptional circumstances where it does in application. Most notably, where a husband dies intestate with an estate worth more than \$150,000, the UPC provides a financial incentive for his wife to abort where she is pregnant with their first mutual child and she has other living children who are not also the decedent's.<sup>4</sup>

Previously, these matters have not been publicly discussed, but now that the cat is out of the bag, perhaps states will finally stop forcing women to choose between their babies and their pocket books.

---

<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 153.

<sup>3</sup> *Id.* ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

<sup>4</sup> For a detailed explanation of the incentive, see *infra* Part I.A.4.

This Note provides answers for states that question how they can stop forcing women like Carol to make such difficult decisions. Part I explains how the combination of Supreme Court jurisprudence and the UPC can force women to choose between their babies and their pocketbooks. Part II provides a suggestion for a constitutionally viable solution to what no longer needs to be a dilemma. This suggested solution is a simple modification of the UPC to see to it that women are not forced to make this choice.

This Note is different from other abortion articles for several reasons. First, it is not about babies' equal protection.<sup>5</sup> Not one of the premises in this Note is dependent upon equal protection. This Note is also not about a state's interest in promoting life.<sup>6</sup> This Note is about the way states that have adopted the UPC create an incentive for abortion in specific circumstances.<sup>7</sup> Therefore, this Note is about an interest much

---

<sup>5</sup> Scholars have suggested that babies should be afforded equal protection. *See, e.g.*, Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEO. J.L. & PUB.POL'Y 361, 364 (2006) ("In the following discussion, I will show that common law, history and tradition establish that the unborn from the time of conception, are both persons and human beings, thus strongly supporting an interpretation that the unborn meet the definition of 'person' under the Fourteenth Amendment."). But even Justice Scalia has stated he does not believe a person has a right to equal protection until he is outside the womb. Interview by Lesley Stahl with Supreme Court Justice Antonin Scalia, *60 Minutes* (CBS television broadcast Apr. 27, 2008), available at <http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290.shtml>. That is not to say, however, that the Court could never recognize those rights. History provides at least one example where jurisprudence on personhood was clearly wrong and was subsequently remediated. *Compare* *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (refusing to recognize slaves as persons, holding they were mere chattels) with U.S. CONST. amend. XIII (abolishing slavery).

<sup>6</sup> A state may have a legitimate interest in promoting life. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (holding that, even though all of the Justices in the opinion did not agree with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the *Casey* opinion held that the state had a "legitimate and substantial interest in preserving and promoting fetal life"). This Note, however, is about a greater state interest in not promoting death.

<sup>7</sup> There are also instances where valid wills create incentives for abortion. Consider the following hypothetical. Bonnie is pregnant with a baby whom she plans to name Clyde. Clyde is not yet viable. Bonnie's grandmother, Flo, dies, leaving \$2 million to Bonnie unless she has any great-grandchildren. If she does have great-grandchildren, she leaves \$1 million to Bonnie and \$1 million to be divided equally among the great-grandchildren. Flo has no great-grandchildren, but Clyde is on the way. This would provide a \$1 million incentive for Bonnie to abort, since the common law rule is that infants in the womb at the time of a father's death can take an estate. *See, e.g.*, *Harper v. Archer*, 12 Miss. (4 S. & M.) 99, 109 (1845) ("[I]t is now settled . . . that from the time of conception the infant is in esse, for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the statute of distributions, provided, however, that the infant be born alive, and [is expected to keep living]."). But because this is provided for through a will rather than a state intestacy clause, the state is less involved; thus, these situations will not be the focus of this Note.

greater than promoting life—a state’s interest in refraining from promoting death.

### I. *ROE* AND THE PROBATE CODE: THE TWISTED SISTERS

Buried deep within *Roe* is a reference to a baby having inheritance rights if it is born alive.<sup>8</sup> That right is also present within the UPC.<sup>9</sup> In fact, it is a common law right dating all the way back to England.<sup>10</sup> The UPC also provides specific instances where a surviving spouse can inherit more or less of the decedent’s estate depending partially upon whether she has children.<sup>11</sup> When this right of a subsequently born baby to inherit is combined with the “Share of Spouse” section of the UPC<sup>12</sup> and the Supreme Court’s abortion jurisprudence, there can be instances where a woman must choose between an abortion and a substantial amount of money.<sup>13</sup> The laws are outlined below.

#### A. *Instances Where the UPC Encourages Abortion*

These incentives were created by revisions to Article II of the UPC in 1990.<sup>14</sup> The portion of the UPC that can create a windfall for women who abort after the death of an intestate spouse is Section 2-102,<sup>15</sup> which explains the percentages of a decedent’s estate that a surviving spouse

---

<sup>8</sup> *Roe*, 410 U.S. at 162 (“Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. . . . Perfection of the interests involved, again, has generally been contingent upon live birth.”) (citations omitted).

<sup>9</sup> UNIF. PROBATE CODE § 2-104(a)(2) (amended 2008), 8 U.L.A. 43 (Supp. 2010) (providing that “[a]n individual in gestation at a decedent’s death is deemed to be living at the decedent’s death if the individual lives 120 hours after birth”). [Editor’s note: The Uniform Probate Code was amended in 2008, but no substantive changes were made. The amendments relating to the sections that are the focus of this Article mostly concerned dollar amount adjustments to account for inflation. This Note will cite the 2008 amendment and 2010 Supplement, but the author’s text will refer to the 1990 revised version of Article II.].

<sup>10</sup> ROBERT LUDLOW FOWLER, *THE REAL PROPERTY LAW OF THE STATE OF NEW YORK* § 56, at 360 (3d ed. 1909) (citing *Reeve v. Long*, (1694) 87 Eng. Rep. 395 (K.B.) 395; 4 Mod. 282, 282) (other citations omitted).

<sup>11</sup> PROBATE §§ 2-102, 2-102A.

<sup>12</sup> *Id.* § 2-102.

<sup>13</sup> *See infra* Part I.A.4.

<sup>14</sup> *See infra* notes 18, 30–34 and accompanying text (explaining the incentive created by the 1990 revision of Article II).

<sup>15</sup> Section 2-102A provides the same incentives for community property states. *See* PROBATE § 2-102A. There is only one difference between the two codes: subsection (b), which provides that “[t]he one-half of community property belonging to the decedent passes to the [surviving spouse] as the intestate share.” (brackets in original). *Id.* For the purpose of this Note, there is little difference in the incentive provided; thus, § 2-102A will not be analyzed separately from § 2-102.

will inherit.<sup>16</sup> It provides for four different amounts a spouse stands to inherit after the death of his or her spouse.<sup>17</sup> Those scenarios, along with a hypothetical for each, are explained below, along with comparisons between the different formulas that explain how the formulas can induce abortion. Of the four different scenarios provided for in the “Share of Spouse” section of the UPC, only one encourages abortion. That scenario occurs where a woman has children of her own and is pregnant with her and her husband’s first mutual child at the time of his death.<sup>18</sup>

To avoid confusion in the following hypotheticals, no names are used, just nouns. To serve the purposes of this Note, the husband will be the one dying, but there could also be situations where a husband could try and persuade a woman to abort after his wife dies.<sup>19</sup> The couple in the hypothetical will not have more than one generation underneath them (that is, they will not yet be grandparents). Finally, so that the hypotheticals are easy to compare with one another, the husband will be leaving behind a \$3 million estate in each of them; and none of the \$3 million will be community property (so that the hypotheticals apply equally to Section 2-102A on intestate succession in community property states).

The four different types of spousal succession and their implications are outlined below. While the first three spousal succession scenarios do not provide state created incentives to abort, the fourth does.<sup>20</sup>

#### 1. The \$3 Million Scenario: Survivor Gets the Whole Caboodle

Section 2-102(1) provides that the “entire estate” goes to the decedent’s surviving spouse where (1) “no descendant or parent of the decedent survives the decedent[.]”<sup>21</sup> or (2) “all of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent[.]”<sup>22</sup>

Two scenarios illustrate this provision. First, Husband dies after both of his parents or, if he had any children, after his parents and all of his children. And second, Husband dies and all remaining children of Husband and Wife are their mutual children. In these situations, Wife would inherit all \$3 million.

---

<sup>16</sup> *Id.* § 2-102.

<sup>17</sup> *See infra* Parts I.A.1–4.

<sup>18</sup> *See infra* Part I.A.4.

<sup>19</sup> *See infra* note 29.

<sup>20</sup> The order of the third and fourth spousal succession clauses have been switched for the purposes of this Note. Part I.A.4 actually precedes Part I.A.3 in the UPC.

<sup>21</sup> PROBATE § 2-102(1)(i).

<sup>22</sup> *Id.* § 2-102(1)(ii).

A wife who inherits the entire \$3 million is in the best intestate inheritance position. There is no economic incentive for a spouse to try to leave this position.

One might argue that, in a situation where the decedent's parents have already passed and neither spouse yet has children, a pregnant wife could have an incentive to abort since the surviving spouse gets everything where "no descendant or parent of the decedent survives the decedent."<sup>23</sup> But if Wife was having the couple's only baby, she would still inherit all \$3 million because the only child of both spouses would be a mutual child.<sup>24</sup>

Therefore, this scenario provides no economic incentive for a woman to have an abortion to leave this category.

#### 2. The \$2.3 Million Scenario:

##### The Survivor Gets \$200,000 Plus 3/4 of the Remainder

Section 2-102(2) provides that "the first [\$200,000], plus three-fourths of any balance of the intestate estate," will go to the surviving spouse "if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent."<sup>25</sup>

That situation looks like this: Husband dies with no children, but Husband's mother or father is still alive.

In this case, Wife inherits \$2,300,000. ( $\$3,000,000 - 200,000 = \$2,800,000$ .  $\$2,800,000 \times .75 = \$2,100,000$ .  $\$2,100,000 + 200,000 = \$2,300,000$ .)

This is the second-best intestate inheritance position in which a surviving spouse could be left. There is no incentive to abort to avoid this position. In fact, if neither Husband nor Wife yet has any children, the UPC encourages Wife to have her deceased husband's child because she would then move from this \$2.3 million category to the \$3 million category, avoiding losing money to his parents. She would move to that category by having a child because "all of the decedent's surviving descendants" would also be "descendants of the surviving spouse" and she would have no other descendants.<sup>26</sup>

#### 3. The \$1,550,000 Scenario:

##### The Survivor Gets \$100,000 Plus 1/2 of the Remainder

The UPC section 2-102(4) provides that "the first [\$100,000], plus one-half of any balance of the intestate estate[]" goes to the surviving

---

<sup>23</sup> *Id.* § 2-102(1)(i).

<sup>24</sup> *See id.* § 2-102(1)(ii).

<sup>25</sup> *Id.* § 2-102(2) (brackets in original).

<sup>26</sup> *Id.*

spouse “if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.”<sup>27</sup>

That situation looks like this: Husband dies and is survived by at least one child not belonging to Wife.

In this case, Wife inherits \$1,550,000. ( $\$3,000,000 - 100,000 = \$2,900,000$ .  $\$2,900,000 \times .5 = \$1,450,000$ .  $\$1,450,000 + 100,000 = \$1,550,000$ .)

While Wife actually winds up with \$25,000 less in this situation than in one other situation addressed by the UPC,<sup>28</sup> there will be no incentive for her to have an abortion because this provision only concerns situations where the surviving spouse must share the inheritance with the decedent’s children by another.<sup>29</sup>

#### 4. The \$1,575,000 Scenario/An Incentive to Abort: The Survivor Gets \$150,000 Plus 1/2 of the Remainder

The UPC section 2-102(3) provides that “the first [\$150,000], plus one-half of any balance of the intestate estate” goes to the surviving spouse “if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent.”<sup>30</sup>

That situation looks like this: Husband dies and all of his children are also Wife’s; however, Wife has other children not from Husband.

In this case, Wife inherits \$1,575,000. ( $\$3,000,000 - 150,000 = \$2,850,000$ .  $\$2,850,000 \times .5 = \$1,425,000$ .  $\$1,425,000 + \$150,000 = \$1,575,000$ .)

Financially, this scenario is one of the two worst, and seems to be the most likely to create an incentive to abort, particularly where the surviving spouse is the wife. Consider the following hypotheticals.

Wife has three children from a previous marriage when she marries Husband, who has no children. Husband dies two months after Wife

---

<sup>27</sup> *Id.* § 2-102(4) (brackets in original).

<sup>28</sup> *See infra* Part I.A.4.

<sup>29</sup> PROBATE § 2-102. There is a scenario where someone could be encouraged to abort, but it would not be directly due to the state’s laws. This is a crucial point to distinguish. For example, assume Husband and Wife have mutual children. Husband cheats on Wife and sends her a letter confessing and asking for her forgiveness. Wife reads the note and, tragically, commits suicide. Wife’s estate is worth \$3 million. The next day, Girlfriend, who is unwed, notifies Husband that she is pregnant. Although Husband might try to induce Girlfriend to abort, the law does not encourage her to do so. The UPC, combined with the Supreme Court’s jurisprudence, would actually encourage Girlfriend to have the baby. Baby would inherit his portion of the \$1,450,000 not going to Husband ( $\$3,000,000 - \$1,550,000 = \$1,450,000$ ); thus, even though the money would not belong directly to Girlfriend, she could have the baby and know that he or she would be well provided for in the future.

<sup>30</sup> *Id.* § 2-102(3) (brackets in original).

becomes pregnant with their first mutual child and husband's first descendant, Girl. Wife has a dubious decision to make: abort Girl, her only child with husband, or lose a lot of money.

Consider these two possible scenarios: (1) if either of Husband's parents are still alive, Wife gains \$725,000 by aborting Girl (\$2,300,000 – 1,575,000 = \$725,000) since she would bump up into the \$2,300,000 category—where Husband has a living parent, but no descendant;<sup>31</sup> or, even more tempting, (2) if Husband has no living parent and Wife aborts Girl, Wife gains \$1,425,000 (\$3,000,000 – 1,575,000 = \$1,425,000) since she would bump up into the \$3 million category—where Husband has no living parent or descendant.<sup>32</sup>

Indeed, Girl's inheritance rights effectively put Wife on notice that if she chooses to deliver Girl from her pre-viability purgatory, she bears to lose a lot of money.

Finally, there is another way this part of the UPC encourages abortion: where Husband and Wife have children together and neither has any other children, the law encourages Wife to abort where she becomes pregnant with another man's child. If the mutual children are able to somehow overcome the presumption that their father was the father of the new baby,<sup>33</sup> they would be able to inherit the \$1,425,000; thus, their mother would lose that amount.<sup>34</sup> Wife might rather not take such a large risk and rely upon the presumption of fatherhood. Therefore, the law would encourage her to abort here.

### B. Supreme Court Abortion Jurisprudence

In light of the fact that the UPC clearly offers incentives for mothers to abort in certain circumstances,<sup>35</sup> UPC authors and state lawmakers should take steps to remove the incentives in those instances. Those steps should be consistent with Supreme Court abortion jurisprudence. This Part explores holdings of three of the most important Supreme Court abortion cases: *Roe v. Wade*,<sup>36</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>37</sup> and *Gonzales v. Carhart*.<sup>38</sup>

---

<sup>31</sup> *Id.* § 2-102(2).

<sup>32</sup> *Id.* § 2-102(1)(i).

<sup>33</sup> *See* Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989) (upholding California's presumption that a husband is the father of a child when the husband was living with the mother at the time of the child's birth).

<sup>34</sup> *See* PROBATE § 2-102.

<sup>35</sup> *See supra* Part I.A.4.

<sup>36</sup> 410 U.S. 113 (1973).

<sup>37</sup> 505 U.S. 833 (1992).

<sup>38</sup> 550 U.S. 124 (2007).

### 1. *Roe v. Wade*

The Supreme Court first held there is a constitutional right to an abortion in *Roe* in 1973.<sup>39</sup> It made that decision in response to a challenge to Texas's ban on most abortions.<sup>40</sup> The Court noted that there had historically been three reasons for statutes proscribing abortions,<sup>41</sup> none of which the Court fully upheld.

The first was to "discourage illicit sexual conduct."<sup>42</sup> But according to the Court, that was not taken seriously and was overbroad because it failed to distinguish between wed and unwed mothers.<sup>43</sup>

The second reason was because the procedure was hazardous to the woman's health.<sup>44</sup> The Court found that reason to be outdated, though, due to modern medicine.<sup>45</sup> "Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."<sup>46</sup>

The third reason was because the state had an interest in protecting "prenatal life."<sup>47</sup> Although the Court noted that protecting prenatal life could be a valid interest,<sup>48</sup> it held that this interest was not strong enough to infringe upon a woman's privacy in the first two trimesters.<sup>49</sup> Under *Roe*, protecting life did not become a compelling interest until the third trimester.<sup>50</sup>

An issue that the Court did not decide, however, was whether a woman's right to privacy outweighs a state's interest in not incentivizing death. The Court explicitly rejected the notion that the privacy right was absolute:

[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential

---

<sup>39</sup> *Roe*, 410 U.S. at 153.

<sup>40</sup> *Id.* at 117–18.

<sup>41</sup> *Id.* at 147–49.

<sup>42</sup> *Id.* at 148.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 149.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 150.

<sup>48</sup> *Id.* ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.")

<sup>49</sup> *See id.* at 153 ("This 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, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.")

<sup>50</sup> *See id.* at 163.



life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past . . . .

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.<sup>51</sup>

Although this passage clearly shows the right to privacy is not absolute, the obstacles in overcoming it are great. Under *Roe*, in order for a state to overcome a woman's right to privacy, it must show "a compelling state interest" that is "narrowly drawn to express only the legitimate state interests at stake."<sup>52</sup>

The Court laid out a rigid trimester-based framework to govern the parameters of the state's interest in limiting a woman's abortion right.<sup>53</sup> It summarized the framework as follows:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>54</sup>

The Court's jurisprudence after *Roe*, then, established that (1) abortion could only be proscribed when the government had a narrowly drawn compelling interest in the third trimester; and (2) in order to regulate

---

<sup>51</sup> *Id.* at 154 (citing *Buck v. Bell*, 274 U.S. 200, 207 (1927); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–26, 39 (1905)).

<sup>52</sup> *Id.* at 155 (citations omitted).

<sup>53</sup> *Id.* at 162–65.

<sup>54</sup> *Id.* at 164–65. The Court explained that the state did not have an interest in regulating abortions in order to promote the mother's health in the first trimester because, "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* at 163. It then listed specific examples that would be permissible ways to protect the mother's health in the second trimester, including regulating "qualifications of the [abortionist]; . . . the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; . . . the licensing of the facility; and the like." *Id.*

abortion procedures in the second trimester, the regulations had to be based on promoting the woman's health.

## 2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Casey*, the Court simultaneously reaffirmed its "essential holding" in *Roe* and promulgated a new standard for state restrictions on abortions.<sup>55</sup> It held that (1) the state could not unduly burden a woman's right to choose a pre-viability abortion; (2) a state could proscribe abortions as soon as the baby attained viability as long as the health of the mother was not jeopardized; and (3) the state's interest "in protecting the health of the woman and the life of the . . . child" was "legitimate . . . from the outset."<sup>56</sup>

Justices O'Connor, Kennedy, and Souter, in a joint opinion, defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a *nonviable* fetus."<sup>57</sup> Accordingly, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>58</sup> Other than those guidelines, however, the Court promulgated no clear rules defining either a substantial obstacle or an undue burden.

The new standard promulgated in *Casey* was partially due to the Justices' belief that *Roe* "undervalue[d] the State's interest in the potential life within the woman."<sup>59</sup> *Casey* was also an explicit rejection of *Roe*'s trimester framework.<sup>60</sup> Rather than holding there could be no regulations before the third trimester, the court held that a state could "create a structural mechanism by which" it "express[es] profound respect for the life of the unborn," even pre-viability, as long as it did not place an undue burden on a woman's right to choose.<sup>61</sup>

The trimester framework was not the only aspect of *Roe* that was rejected in *Casey*. The joint opinion also rejected the need for a state to

---

<sup>55</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 877 (O'Connor, Kennedy, & Souter, JJ., joint opinion) (emphasis added).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 875.

<sup>60</sup> *Id.* at 878.

<sup>61</sup> *Id.* at 877; *see also id.* at 871 ("Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. . . . Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases." (citation omitted)).

overcome strict scrutiny.<sup>62</sup> The need for any new laws to overcome strict scrutiny was swallowed by the “amorphous” abyss that is the undue burden standard.<sup>63</sup>

While the Court did not perfectly explain the undue burden standard, it did give examples of what were and were not undue burdens. The state of Pennsylvania attempted to regulate abortion in the several ways: (1) it required a woman to “give her informed consent” twenty-four hours before the abortion; (2) for a minor, it required her parent’s informed consent—unless she was granted a “judicial bypass”; (3) it required a married woman to notify her husband of her intent; (4) it provided an exception to (1)–(3) in “medical emergenc[ies]”; and (5) it imposed “certain reporting requirements on facilities that provide[d] abortion services.”<sup>64</sup>

The Court concluded that the only requirement that was an undue burden was the requirement that a married woman notify her husband.<sup>65</sup> The Court believed the husband’s interest in the life of the child was not great enough to justify an infringement upon the woman’s privacy right.<sup>66</sup> This gives an example of the sort of restriction that creates an undue burden.

In finding an undue burden, the Court relied mostly upon the following district court findings: (1) most women already tell their husbands anyhow, so this provision would not accomplish much;<sup>67</sup> (2) this requirement could harm women because their husbands might keep them from aborting;<sup>68</sup> and (3) spousal abuse is high in the United States, and telling husbands about pregnancies is likely to create more abuse.<sup>69</sup> Accordingly, these are the types of substantial obstacles that create an undue burden. By contrast, the other restrictions were all compelling state interests because they promoted life while protecting the health of the mother.<sup>70</sup> Protecting the health of the mother was an integral aspect

---

<sup>62</sup> *Id.* at 871.

<sup>63</sup> Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 139 (2005).

<sup>64</sup> *Casey*, 505 U.S. at 844 (majority opinion) (internal quotation marks and citations omitted).

<sup>65</sup> *Id.* at 879, 895.

<sup>66</sup> *See id.* at 898 (“The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”).

<sup>67</sup> *Id.* at 888.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at 888–89.

<sup>70</sup> *See id.* at 879–80 (holding that the medical emergency exception was not too narrow because it adequately provided that the regulations would “*not . . . pose a significant threat to the life or health of a woman*” (emphasis added) (internal quotation marks omitted)); *id.* at 881–83 (O’Connor, Kennedy, & Souter, JJ., joint opinion) (holding

of those restrictions because, as the Court noted, “a State’s interest in the protection of life [alone] falls short of justifying any plenary override of individual liberty claims.”<sup>71</sup>

Finally, one of the reasons the Court refused to overturn *Roe* was because people relied on it in making life decisions.<sup>72</sup>

### 3. *Gonzales v. Carhart*

The Court gave another example of what was not an undue burden when it upheld the congressional Partial-Birth Abortion Ban Act of 2003 (“the Act”)<sup>73</sup> in *Carhart*.<sup>74</sup> In *Carhart*, abortionists sought an injunction

---

that the informed consent requirement was a legitimate state interest since—in helping to dispel ignorance about the procedure—(1) it could prevent negative psychological consequences in the future, and (2) it could help in “its legitimate goal of protecting the life of the unborn”); *id.* at 885–87 (holding (1) that the 24-hour waiting period was reasonable for the state to implement and (2) that it was not a “substantial obstacle” to a woman’s right to choose because a state could “enact persuasive measures which favor child-birth over abortion,” even if the measures burden the woman more than she otherwise would have been); *id.* at 900–01 (O’Connor, Kennedy, Souter, & Stevens, JJ., joint opinion) (holding that the reporting and recordkeeping requirements were constitutional—except for the one requiring that notice be given to husbands—since “recordkeeping and reporting provisions that [were] reasonably directed to the preservation of maternal health and that properly respect[ed] a patient’s confidentiality and privacy [were] permissible” (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80 (1976))).

<sup>71</sup> *Id.* at 857 (majority opinion) (citation omitted). This point is also important to remember because states are not only trying to protect life in this instance. Far from it—in this instance, states are trying to stop incentivizing death, while maintaining the integrity of their property laws. This difference may seem minute, but it is not. *See infra* Part II.B.

<sup>72</sup> *See id.* at 856 (“The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”); *id.* at 860 (“An entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . .”). This is an important point to remember when addressing possible ways that states can neutralize the abortion incentive to inheritance law because it is highly unlikely that a woman ordered her life around state intestacy clauses. In fact, logically speaking, the opposite would be true most of the time. Intestacy clauses are needed precisely because people do not make plans for their futures.

<sup>73</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006). The relevant part of the act was as follows:

(a) Any physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered . . .

(b) As used in this section—

(1) the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing

against a ban which imposed criminal penalties on doctors who deliberately, intentionally, and knowingly performed partial-birth abortions.<sup>75</sup> Congress originally implemented the ban because “among other things, . . . a moral, medical, and ethical consensus exist[ed] that the practice” was “gruesome,” “inhumane,” and “never medically necessary[.]”<sup>76</sup> In upholding the ban, the Court noted that it followed *Casey* based on principles of *stare decisis* rather than reaffirmation of *Casey*’s rationale.<sup>77</sup>

Applying *Casey*, the Court found the act was legal because, on its face, it did not impose an undue burden.<sup>78</sup> The Court’s holding was directly contrary to the findings of the district court, which found that the Act could ban other abortions along with the partial-birth abortion,<sup>79</sup>

---

an overt act that the person knows will kill the partially delivered living fetus; and

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

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

.....

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

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

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

*See also* Gonzales v. Carhart, 550 U.S. 124, 141–43 (2007) (quoting 18 U.S.C. § 1531 (2000 ed., Supp. IV)) (internal quotation marks omitted).

<sup>74</sup> *Carhart*, 550 U.S. at 168.

<sup>75</sup> *See* 18 U.S.C. § 1531. For a description of the procedure that the Act banned, see *Carhart*, 550 U.S. at 134–38.

<sup>76</sup> *Carhart*, 550 U.S. at 141 (internal quotations and citation omitted).

<sup>77</sup> *See id.* at 146 (“We assume the following principles *for the purposes of this opinion.*”) (emphasis added); *see also id.* at 168–69 (Thomas & Scalia, JJ., concurring) (“I join the Court’s opinion because it accurately applies current jurisprudence, including [*Casey*]. I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and [*Roe*], has no basis in the Constitution.”).

<sup>78</sup> *Id.* at 168 (majority opinion).

<sup>79</sup> *Id.* at 143.

and the appellate court, which found that the Act needed a health exception for the mother.<sup>80</sup>

*Carhart* dealt primarily with whether the Act promoted the legitimate state interest of protecting the life of the child and the health of the mother.<sup>81</sup> Notably, the Act did not hinder women from choosing any abortion. It only effectively proscribed women from choosing a partial-birth abortion.

Partial-birth abortions were performed much less often than the two most popular abortions, which the Act did *not* regulate. The most common method of abortion occurs in the first trimester and is called “vacuum aspiration.”<sup>82</sup> An abortionist using the vacuum aspiration method uses a tool to suck the embryonic tissue out of the womb.<sup>83</sup> The second most common method of abortion occurs in the second trimester and is known as the standard “dilation and evacuation, or D&E.”<sup>84</sup> When an abortionist performs a standard D&E, he inserts forceps through the cervix and removes the fetus “piece by piece.”<sup>85</sup> Meanwhile, in a partial-birth abortion—also known as an “intact D&E”<sup>86</sup>—the abortionist partially delivers the baby from his mother, leaving only the head inside the cervix.<sup>87</sup> He then inserts scissors into “the base of the skull,” spreads the scissors, removes the brain, and then removes the rest of the baby from the cervix.<sup>88</sup>

After the second-trimester abortionists argued unsuccessfully that the restriction banning partial-birth abortions was unconstitutionally vague,<sup>89</sup> they claimed that the restrictions were too broad, creating an undue burden.<sup>90</sup>

That argument, too, was unsuccessful.<sup>91</sup> The Court held that the Act did not create an undue burden because the abortionists did not show “that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the *vast majority* of D&E abortions.”<sup>92</sup>

---

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 145–46.

<sup>82</sup> *Id.* at 134.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 135 (internal quotations and citations omitted).

<sup>85</sup> *Id.* at 135–36.

<sup>86</sup> *Id.* at 136.

<sup>87</sup> *Id.* at 137–38.

<sup>88</sup> *Id.* at 138 (internal quotations and citations omitted).

<sup>89</sup> *Id.* at 148–49.

<sup>90</sup> *Id.* at 150.

<sup>91</sup> *Id.* at 156.

<sup>92</sup> *Id.* at 156 (emphasis added). According to the opinion, partial-birth abortions occur much less frequently than “standard D&E” abortions, which are the “usual method” in the second trimester. *Id.* at 135 (citing *Planned Parenthood Fed’n of America v. Ashcroft*, 320 F. Supp. 2d 957, 960–61 (N.D. Cal. 2004)). Furthermore, an abortionist could

The Court noted that, according to the Act, doctors would have to *intentionally* perform the procedure to be liable—thus, it would be unlikely that an abortionist would accidentally violate the law.<sup>93</sup> The Court also applied the canon of constitutional avoidance under which “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”<sup>94</sup> Applying the canon kept the Court from extending the ban beyond its “reasonable reading,” which was that the Act prohibited more than intact D&Es.<sup>95</sup> That the canon of constitutional avoidance was applied is important because there were abortion cases in the past where the Court declined to apply the canon.<sup>96</sup>

The Court next held that the ban did not “place a substantial obstacle in the path of a woman seeking an abortion[,]” regardless of whether the ban proscribed a pre-viability abortion.<sup>97</sup> Congress’s reasons for passing the act were not “substantial obstacles” to abortion, but valid reasons for limiting it for at least three reasons. First, “[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”<sup>98</sup> Second, a decision to abort can be a difficult moral decision, sometimes leading to depression.<sup>99</sup> And third, the procedure might very well tarnish doctors’ reputations.<sup>100</sup>

#### 4. Summary of Abortion Jurisprudence

*Roe*, *Casey*, and *Carhart* show that it is difficult for a state to put limitations on abortions. Furthermore, the standards the Court adopted in those cases can be ambiguous. For example, while it is clear that a state cannot impose a substantial obstacle to a woman’s right to choose a

---

still choose to do a standard D&E, ripping the baby apart piece by piece. *Id.* at 150. For more detail pertaining to how abortionists perform these killings, see *id.* at 135–36.

<sup>93</sup> *Id.* at 150–51.

<sup>94</sup> *Id.* at 153 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The Court later made the canon even clearer, holding the following: “[T]he canon of constitutional avoidance does not apply if a statute is not ‘genuinely susceptible to two constructions.’” *Id.* at 154 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998)).

<sup>95</sup> *Id.* at 154.

<sup>96</sup> *Id.* at 153–54 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting)).

<sup>97</sup> *Id.* at 160 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992) (O’Connor, Kennedy, & Souter, JJ., joint opinion)).

<sup>98</sup> *Id.* at 157–58 (brackets in original) (quoting *Casey*, 505 U.S. at 874).

<sup>99</sup> *Id.* at 159 (citing *Casey*, 505 U.S. at 852–53).

<sup>100</sup> *Id.* at 160.

pre-viability abortion, thus creating an undue burden, it is not clear what constitutes a substantial obstacle.<sup>101</sup>

Restrictions fall into two categories: those prior to viability and those subsequent to the child reaching viability. The Court has identified several appropriate reasons for abortion restrictions prior to viability, including promoting the health of the mother and promoting respect for the life of the child.<sup>102</sup> States can pass such pre-viability regulations as long as they do not constitute undue burdens.<sup>103</sup> As for restrictions subsequent to viability, states can freely restrict those as long as the mother's health is not jeopardized.<sup>104</sup>

The Court has been clear that while the spirit of *Roe* is still alive,<sup>105</sup> the standard by which pre-viability abortion restrictions will be judged is the undue burden.<sup>106</sup> There are several key aspects to the undue burden framework. First, a state cannot impose a substantial obstacle blocking a woman seeking a pre-viability abortion from obtaining one.<sup>107</sup> That apparently means that “the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.”<sup>108</sup> Second, as long as the state has not imposed an undue burden, restrictions will no longer need to overcome strict scrutiny.<sup>109</sup> Third, restrictions with valid purposes such as informing the woman or promoting the state's interest in life can be valid—even if they make the abortion process more difficult—so long as they are “not designed to strike at the right itself.”<sup>110</sup> Finally, the Court now applies the canon of constitutional avoidance to these cases, reading the restrictions as reasonably understood so long as their meanings are not

---

<sup>101</sup> See *supra* notes 57–58 and accompanying text.

<sup>102</sup> See *supra* note 56 and accompanying text.

<sup>103</sup> See *supra* notes 56–57 and accompanying text.

<sup>104</sup> See *supra* note 56 and accompanying text.

<sup>105</sup> See *supra* note 55 and accompanying text.

<sup>106</sup> See *supra* notes 55–58, 78 and accompanying text.

<sup>107</sup> See *supra* note 57 and accompanying text.

<sup>108</sup> See *supra* note 58 and accompanying text. This explanation of an undue burden is best understood by studying examples of what have and have not constituted undue burdens. For example, the regulations upheld in *Casey* were all focused around educating or protecting women. See *supra* note 64 and accompanying text. The regulation that was found to be an undue burden, however, was not focused on educating or protecting women; rather, its purpose was to notify women's husbands. See *supra* notes 65–66 and accompanying text. Furthermore, the restriction in *Carhart* was not an undue burden because, in seeking the legitimate interest of respecting life, it did not prohibit women from choosing abortions; it only prohibited a less-used, particularly egregious form of abortion. See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

<sup>109</sup> See *supra* notes 62–63 and accompanying text.

<sup>110</sup> See *supra* note 98 and accompanying text.



ambiguous.<sup>111</sup> Thus, the Court will avoid construing restrictions as overbroad so long as they are clearly intended for limited circumstances.

## II. HOW STATES AND AUTHORS OF THE UPC CAN LEGALLY NEGATE THE UPC'S INCENTIVE TO ABORT

This Part addresses states and UPC authors who want to stand up, say “We’re not gonna take it/No, we ain’t gonna take it/We’re not gonna take it anymore[,]” and change their cultures of death.<sup>112</sup> Currently, nine states have adopted the 1990 Article II revision to the UPC.<sup>113</sup> While the UPC and the Supreme Court’s privacy-based abortion jurisprudence encourage women to abort, there are ways states and UPC authors can stop encouraging abortions while complying with the Court’s decisions. States that have adopted the UPC could either amend their codes to stop creating incentives to abort or adopt a revision that the UPC authors draft to solve this problem.

### *A. The Easy Way To Change the UPC Without Encroaching upon Women’s Rights*

Where a woman fits one of the factual scenarios of Part I.A.4 of this Note—where, for instance, a wife will gain \$1,425,000 for aborting her first mutual child with husband because she has other children of her own—states and UPC authors should modify the UPC to eliminate the incentive.<sup>114</sup>

The state can neutralize this incentive without encroaching upon the woman’s right to abort by designating another heir to receive the interest the child would have received had he or she not been aborted. Because the UPC already provides for successors in interest, it would only be a matter of finding the relative or relatives who are next in line to inherit after the wife.<sup>115</sup> That could be accomplished by allowing the woman to inherit what she would have otherwise inherited had she not aborted, and then giving the next heir in line—under UPC §§ 2-103 and 2-105—the right to the money she would have gained by aborting.<sup>116</sup>

---

<sup>111</sup> See *supra* notes 94–96 and accompanying text.

<sup>112</sup> TWISTED SISTER, WE’RE NOT GONNA TAKE IT (Atlantic Records 1984).

<sup>113</sup> Cornell University Law School’s Legal Information Institute, *Uniform Probate Code Locator*, LAW BY SOURCE: UNIFORM LAWS, <http://www.law.cornell.edu/uniform/probate.html> (last visited Jan. 24, 2011). Those states include Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Mexico, North Dakota, and South Dakota. *Id.*

<sup>114</sup> There should also be a health exception since that is required. See *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (confirming “the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health[]” (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992))).

<sup>115</sup> See UNIF. PROBATE CODE § 2-103 (amended 2008), 8 U.L.A. 83 (Supp. 2010).

<sup>116</sup> See *id.* §§ 2-103, 2-105.

Furthermore, the state would not have to waste its resources enforcing this measure because it would be enforced by private action (unless it were to escheat to the state under UPC § 2-105).<sup>117</sup>

There are two different groups of people who would stand to inherit. First, where a husband dies and the couple's first mutual child is aborted,<sup>118</sup> the right to the portion of the estate that would have gone to the child would be as follows: to the decedent's parents, or, if they are not alive, to the descendants of decedent's parents; if there are no such living descendants, to the decedent's grandparents; if decedent's grandparents are not alive, to the descendants of decedent's grandparents; if there are no such descendants alive, to the state.<sup>119</sup> The other way this would come about is where the husband and wife already have children of their own, the wife becomes pregnant with her first child from another man while her husband still lives, and he subsequently dies with the child in the womb.<sup>120</sup> This scenario is more complicated because of the presumption of legitimacy.<sup>121</sup> The mutual children between the husband and wife would be the people who would stand to inherit that which the mother would gain from aborting.<sup>122</sup> But it is unlikely that they could ever overcome any presumption that the new baby was their father's because DNA would be the best way to try to prove the new baby had a different father; however, because aborted babies are often completely disposed of,<sup>123</sup> there would often be no way to prove its DNA. Nevertheless, enacting this change would at least negate the incentive for the wife to abort their first mutual child.

Finally, in order to guarantee that this restriction will be a valid restriction, drafters should allow a physical-health exception.<sup>124</sup> That is,

---

<sup>117</sup> See *id.* § 2-105.

<sup>118</sup> See *supra* Part I.A.4.

<sup>119</sup> PROBATE §§ 2-103, 2-105.

<sup>120</sup> See *supra* Part I.A.4.

<sup>121</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110 (1991) (upholding California's presumption that a husband is the father of a child when the husband was living with the mother at the time of the child's birth).

<sup>122</sup> PROBATE § 2-103(1).

<sup>123</sup> See, e.g., Mary Meehan, *The Ex-Abortionists: Why They Quit*, HUM. LIFE REV., Spring/Summer 2000, at 7, 8–9 (explaining that aborted babies are often disposed of by, among other methods, cremation, contaminated waste container, or garbage disposal).

<sup>124</sup> Allowing the health exception to take mental-health into account would mean the rule could be circumvented too easily. 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, 863 (1999) (noting that "in many, if not most situations, a mental health exception translates into abortion on demand").

they should allow the woman to inherit the larger amount if the abortion was not due solely to a mental-health-based need to abort.<sup>125</sup>

*B. Avoiding Death Incentives Is a Legitimate Interest  
That Is a Greater Interest Than Promoting Life*

A key tenet to states enacting this change is their realization that a larger interest is at stake than showing a preference for life.<sup>126</sup> This interest is about keeping state law from letting people, other than abortionists,<sup>127</sup> profit from abortions. The states' interests in *Roe*, *Casey*, and *Carhart* were all justifications for banning or limiting abortion or a type of abortion. However, in this instance, states would not be attempting to limit abortions but would be trying to stop compelling women to choose abortions for purely financial gain.

In *Roe*, Texas's justification for its law against abortion was an interest in protecting babies' lives.<sup>128</sup> Texas was trying to stop abortions—which, presumably, were already going to happen.

In *Casey*, Pennsylvania's interest in requiring women to notify their husbands before aborting was based upon the husband's interest in the life of the child. Pennsylvania was trying to require women—who, presumably, were already going to have abortions—to perform an extra task that the Court considered an undue burden.<sup>129</sup>

Finally, the controversial ban in *Carhart* only stopped one form of abortion that was not performed as often as the most popular methods.<sup>130</sup> Thus, the banned method did not reach the level of morbidity the UPC

---

<sup>125</sup> See *supra* note 56 and accompanying text.

<sup>126</sup> This is not to say that a state's interest in life is not a noble and important interest.

<sup>127</sup> Doctors have an incentive to fight to keep all abortions legal because the abortion industry is extremely lucrative. According to Planned Parenthood, "Nationwide, the cost at health centers ranges from about \$350 to \$950 for abortion in the first trimester. *The cost is usually more for a second-trimester abortion.* Costs vary depending on how long you've been pregnant and where you go. Hospitals generally cost more." *In-Clinic Abortion Procedures*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm#center> (follow "Where Can I Get an In-Clinic Abortion? How Much Does It Cost?" hyperlink) (last visited Feb. 19, 2011) (emphasis added). In fact, Planned Parenthood has been criticized for targeting more affluent suburban areas in its effort to generate larger volumes of cash. Stephanie Simon, *Extending the Brand: Planned Parenthood Hits Suburbia*, WALL ST. J., June 23, 2008, at A1. The large cash flows—along with taxpayer dollars—have, in turn, allowed Planned Parenthood to create clinics that are even more attractive to teens. *Id.*

<sup>128</sup> *Roe v. Wade*, 410 U.S. 113, 148, 150 (1973). The other reason was to protect the mother's health from the dangers of the abortion procedure, but the Court held that was no longer a valid interest since it found that modern medicine extinguished the dangers. *Id.* at 148–49.

<sup>129</sup> See *supra* note 66 and accompanying text.

<sup>130</sup> See *supra* note 92 and accompanying text.

does because, even though the type of abortion being outlawed was particularly egregious,<sup>131</sup> nothing about the method compelled a woman who would not have otherwise aborted to seek an abortion.

Therefore, in each case, the Court was deciding whether a particular state had an interest in limiting a constitutional right that a woman was already going to exercise. Modifying the UPC is more compelling than trying to stop abortions that are already going to take place. The interest here is to avoid giving women who have no other legitimate reason to abort a purely financial reason to abort. This is the precise scenario that can be regulated without creating an undue burden: where “the means chosen by the State to further the interest in potential life [would] be calculated to inform the woman’s free choice, not hinder it.”<sup>132</sup>

When one applies past case law, and the logic behind the case law, it seems that a state has a legitimate interest in changing its code to stop itself from promoting abortions.

### *C. Eliminating the Abortion Incentive Does Not Create an Undue Burden*

Because a state can already restrict abortions subsequent to viability as long as there is a health exception for the mother,<sup>133</sup> there is no need to analyze whether an undue burden is created subsequent to viability. Any restrictions that happen to affect a woman wanting to abort subsequent to viability will be upheld as long as they have the health exception.

As for pre-viability abortions, changing the UPC to take away the incentive to abort is too narrow a restriction to reach the level of an undue burden. Unlike *Roe*, where Texas sought to keep most abortions illegal,<sup>134</sup> in this instance the state would only be restricting abortions under very specific factual scenarios, as it did in *Carhart*.<sup>135</sup> And, because the Court will apply the canon of constitutional avoidance, the Court will not extend an unambiguous restriction past its logical reading, which does not unduly burden the woman.<sup>136</sup>

The interest would not be an undue burden, as the husband-notification statute was in *Casey*.<sup>137</sup> Unlike husband notification statutes, which would have applied in many circumstances and the

---

<sup>131</sup> See *supra* note 76 and accompanying text.

<sup>132</sup> See *supra* note 58 and accompanying text.

<sup>133</sup> See *supra* note 56 and accompanying text.

<sup>134</sup> See *supra* note 40 and accompanying text.

<sup>135</sup> See *supra* note 92.

<sup>136</sup> See *supra* note 94–96 and accompanying text.

<sup>137</sup> See *supra* note 65.

Court held could lead to *widespread* abuse<sup>138</sup>—restricting inheritance rights for women who abort will only limit very specific circumstances and will do more to protect women than harm them. It will keep them from making a choice wrought with potential negative psychological repercussions motivated solely by financial gain.<sup>139</sup>

Most importantly, this restriction will clearly not be an undue burden. First, a state's interest in avoiding abortion incentives is a legitimate interest.<sup>140</sup> Second, a state which negates its abortion incentive by allowing other heirs to inherit is not imposing a substantial obstacle on a woman's right to choose a pre-viability abortion; it is merely discouraging with one hand that which it encourages with the other. This is logically consistent with the Court's statement that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>141</sup> Changing the UPC to allow someone else to inherit after a woman aborts gives her the chance to look objectively at her situation and decide whether to abort based on the sweet mystery of her own life<sup>142</sup> rather than a chance for financial gain. This restriction is also not designed "to strike at the right itself"<sup>143</sup> but merely shows appropriate respect for life and the well being of the mother. Therefore, based upon the Supreme Court's definitions of "undue burden," negating the abortion incentive by allowing another heir to inherit would not constitute an undue burden.

#### CONCLUSION

The explosion of privacy rights detonated by *Roe* has left women's rights to abort largely unchecked. So deep are the ramifications of the decision that it has combined with the UPC to birth a twisted state-sponsored death incentive. It is time for states and the UPC to stop providing an incentive for women to make this choice. It is time for a change.

As this Note has explained, there is a viable solution to the identified problem. States have a legitimate interest in negating death

---

<sup>138</sup> See *supra* notes 67–69 and accompanying text.

<sup>139</sup> See *Cause for Concern (Abortion)*, Found on *Social Issues*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/socialissues/sanctity-of-life/abortion/cause-for-concern.aspx> (2008) ("Psychological risks after an abortion include depression, substance abuse and suicide."). For more information on the profound psychological effects of abortion, including scholarly works and first-hand testimonials, see Elliot Institute, AFTERABORTION.ORG, <http://afterabortion.org/> (last visited Feb. 19, 2011).

<sup>140</sup> See *supra* Part II.B.

<sup>141</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

<sup>142</sup> See *id.* at 851.

<sup>143</sup> *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007) (quoting *Casey*, 505 U.S. at 874 (O'Connor, Kennedy, & Souter, JJ., joint opinion)).

incentives, and doing so as recommended above would not constitute an undue burden. Therefore, states and the authors of the UPC should take action, allowing women to make this immensely consequential choice based upon legitimate needs rather than financial considerations thrust upon them by the state.

*Aaron Mullen*