

STORAGE NAME: h1775b.cp

DATE: April 12, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS**

BILL #: HB 1775

RELATING TO: Termination of Pregnancy (Fetal Homicide)

SPONSOR(S): Rep. Ball

COMPANION BILL(S): SB 1874(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 7 NAYS 1
- (2) CRIME AND PUNISHMENT
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

This bill creates the intentional crime of stopping parturition by partial or complete removal or destruction of the intracranial contents of a fetus with the intent to cause death of the fetus. This intentional removal or destruction is a second degree felony.

The bill has an effective date of October 1, 1999

No direct fiscal impact is anticipated.

- The Judiciary Committee adopted a strike-everything amendment that makes it a second degree felony to intentionally kill a living fetus while the fetus is partially born.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Medical Description

The medical procedure identified in the bill refers to a procedure medically identified by the American College of Obstetricians and Gynecologists (ACOG) as "Intact Dilatation and Extraction (Intact D&X)." According to ACOG, the procedure is defined by the following elements performed in sequence:

1. Deliberate dilatation of the cervix, usually over a sequence of days;
2. Instrumental conversion of the fetus to a footling breech;
3. Breech extraction of the body excepting the head; and
4. Partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

When abortion is performed after 16 weeks, D&X is one method of terminating a pregnancy. Other later-term procedures include dilatation and evacuation (D&E), intrauterine saline instillation, prostaglandin instillation, and hysterotomies and hysterectomies. Proponents claim that the D&X procedure may often be the safest and most medically appropriate procedure in a particular case and caution against permitting political and moral beliefs to interfere in medical decision-making. Opponents argue that, given the availability of alternative procedures, partial birth abortion is never medically necessary to protect a woman's health or future fertility.

Federal Law

The United States Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791(1992) sets forth the limits that the Due Process Clause of the United States Constitution imposes on the states' ability to interfere with abortion procedures. 505 U.S. at 874. There is no reason to believe that the Justices appointed by President Clinton after the decision in Casey would be more tolerant of state action relating to abortion. In Casey the Court held that the State has legitimate interests in protecting the life of the fetus, however, the Court held that the following two principles are paramount:

1. A woman has a right to an abortion before viability and to obtain it without undue interference from the State.

505 U.S. at 486.

2. Subsequent to viability, the State in promoting its interest in the potentiality of human life may ... proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

505 U.S. at 879, quoting Roe v. Wade, 410 at 164-165.

Any legislation that does not comply with these two principles will be held to be unconstitutional unless the United States Supreme Court recedes from Casey.

UNDUE BURDEN

The difficulty in complying with the first principle is that the term "undue interference" is very vague. In an attempt at clarifying the term, the Court equated "undue interference" or "undue burden" with a "substantial obstacle":

An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

505 U.S. at 878.

An undue burden may exist even if a restriction applies only to a minute fraction of women who seek abortions. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. 505 U.S. at 894.

HEALTH EXCEPTION

In Casey, the Court's analysis of a health exception to various Pennsylvania statutes does shed some light on the degree of risk to a woman's health that the Court will allow before it determines that a law is invalid for violating the second principle mentioned above. The exception to the Pennsylvania laws relating to abortion was for a medical emergency which was defined as

[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

505 U.S. at 879.

The Court, in Casey, held that this exception for a medical emergency assured that the Pennsylvania regulations relating to parental consent, informed consent, and notice to the spouse would not pose a significant threat to the life or health of the mother. 505 U.S. at 880. If there is a health risk to some women by prohibiting partial birth abortions, an exception could allow the courts to uphold the ban. A possible exception, modeled after the Pennsylvania exception, would be to authorize this procedure if in the physician's good faith clinical judgement, the procedure is necessary to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function.

VIABILITY

The Court, in Casey, provided the following reasons for choosing viability as the moment when the rights of the fetus may take priority over the rights of the woman:

1. Viability 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.
2. There is no line other than viability which is more workable.
3. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.
4. The precedent of earlier case law should be followed.

U.S. at 870.

State Actions

Since 1995, at least 18 states have enacted laws prohibiting specific abortion procedures, particularly the "D&X" procedure. It appears that the statutes enacted are all currently in litigation or enjoined. In 1995 the State of Ohio was one of the first to adopt a partial birth abortion ban.

The Ohio statute provided: "No person shall knowingly perform or attempt to perform a dilation and extraction ("D&X") procedure upon a pregnant woman." The Ohio statute provided that it is an affirmative defense for a doctor to show that all other available abortion procedures would have posed a greater risk to the health of the pregnant woman. The Ohio statute also banned all post-viability abortions, except where necessary to prevent the pregnant woman's death, or to avoid a serious risk of substantial and irreversible impairment to a major bodily function. The statute defined D&X as:

The termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation and extraction procedure" does not include either the

suction curettage procedure of abortion or the suction aspiration procedure of abortion.
OHIO REV.CODE ANN. Sec. 2919.15(B) and (A).

In Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997) the federal circuit court upheld the decision of the federal district court that the ban was unconstitutional. The circuit court in Voinovich held that the banned procedure encompasses the more common "dilation and evacuation" ("D&E") procedure which typically entails dismembering the fetus, beginning with the extremities, by means of suction curettage and forceps. The Circuit court concluded:

Because the definition of the banned procedure includes the D & E procedure, the most common method of abortion in the second trimester, the Act's prohibition on the D & X procedure has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 201.

The Circuit Court in Voinovich held that the ban on postviability abortions was unconstitutional in part because there was not an exception where there was serious risk of the substantial and irreversible impairment of the pregnant woman's *mental health*. Id. at 207. The United States Supreme Court refused to review the Circuit Court's decision in Voinovich with three justices dissenting from the decision not to hear the case.

Florida Law

Under the rule commonly referred to as the "adequate and independent state ground doctrine," a federal court will not disturb a state court judgment which is based on an adequate and independent state ground, even if federal issues are present, provided the result is not violative of the federal constitution. When this occurs, federal courts are without jurisdiction to review these decisions, provided the state ground is both adequate and independent.

Unlike the U.S. Constitution, Florida's Constitution contains an express provision guaranteeing a right of privacy, Art. I, § 23. Adopted in 1980, the Florida Supreme Court, in Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985), concluded that section 23 provided a strong right of privacy not found in the United States Constitution which is much broader in scope than that of the Federal Constitution. In Winfield the Court also provided a standard of review, holding that: "The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."

In In re T.W., 551 So.2d 1186 (1989), the Florida Supreme Court struck down a state statute requiring parental consent for a minor's abortion as violative of Florida's constitutional right of privacy ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy"). Given the broader protection provided by the Florida Constitution's express "right of privacy," and the higher burden that the state must assume to overcome that right, a state law criminalizing the cessation of parturition by partial or complete removal of the intracranial contents with the premeditated intent to cause the death of a fetus will face a challenge as limiting the right of privacy of the mother.

Born Alive Doctrine

At common law, the killing of a fetus was not homicide unless the child was born alive and then expired as a result of the injuries previously sustained. State v. Gonzalez, 467 So.2d 723 (3rd DCA 1985). Under common law it would be possible to have the homicide of a nonviable fetus/child if the child were killed outside of the mother before the child expires from the premature birth. The common law brings into question the point during the birth process at which the fetus becomes a constitutionally protected person. A court could not reasonably assert that viability after birth is necessary in order to have a constitutionally protected person. A fetus that is not viable could live outside the mother for a substantial period of time. Viability occurs when there is "a realistic possibility of maintaining and nourishing a life outside the womb." Casey 505 U.S. at 870. It could be difficult for a court to differentiate between a fetus that is partially born, perhaps with only the head extruding, and a fetus that is newly or 4/5ths born.

Florida Legislation

The State of Florida has previously enacted legislation criminalizing Intact D&X, which is the procedure clinically described in HB 1775. CS/HB 1227 was passed during the 1997 Legislative Session and subsequently vetoed by the governor. In 1998, the veto was overridden. In A Choice For Women, et al v. Robert A. Butterworth, Case No. 98-0774-CIV-GRAHAM the plaintiffs sought declaratory and injunctive relief from the applications of the provisions of the law with the United States District Court for the Southern District of Florida. That court examined the pertinent similar issues discussed in Women's Medical Health, supra, reached similar conclusions¹, entered its permanent injunction, and noted:

This Court is bound by precedent and must strike down the Partial-Birth Abortion Act because it has the unconstitutional purpose and effect of placing a substantial obstacle in the path of a woman seeking an abortion prior to the fetus attaining viability.

A Notice of Appeal was filed and subsequently withdrawn; the Eleventh Circuit has now dismissed the State's appeal with prejudice.

B. EFFECT OF PROPOSED CHANGES:

Individuals who stop parturition by removal of some or all of the intracranial contents of a fetus with the premeditated intent to cause the death of the fetus will be guilty of a second degree felony and punished as provided by law.

The Judiciary Committee adopted a strike-everything amendment creating the "Partial-Birth Abortion/Infanticide Act" which makes it a second degree felony to intentionally kill a living fetus while the fetus is partially born. The intent of the amendment is to clarify the prohibited act. The amendment also provides an exception for a physician who commits a partial birth abortion to save the life of the mother.

The amendment changes the effective date to make the act effective upon becoming law.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

¹ Including especially that the act was not narrowly drawn to prohibit only intact D&X procedures, and unconstitutional as imposing an undue burden on a woman's right to an intact D&X on a nonviable fetus.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, the bill criminalizes performance of a currently legal medical procedure.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates 782.091, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates section 782.091, F.S., relating to the homicide and provides that it is unlawful to:

- (a) stop parturition
- (b) by means of complete or partial removal of intracranial contents
- (c) with the premeditated intent to cause the death of a fetus.

Statutory violations are second degree felonies punishable as provided by general law.

Section 2. Provides that the act takes effect October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

To the extent that criminalization of a particular medical procedure currently available at a doctor's office will effectively eliminate access to the procedure, medical costs for late term abortions may increase as the result of necessary hospitalization.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

Negligible.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judiciary adopted a "strike-all" amendment on April 5, 1999. This amendment defines "partially born", "living fetus", and "suction or sharp curettage abortion." It creates the crime of partial birth abortion, a second degree felony, and creates exceptions which include such measures as are necessary to save the life of the mother.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Jo Ann Levin

Staff Director:

Don Rubottom

AS REVISED BY THE COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

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Staff Director:

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