STORAGE NAME: h1775.jud
DATE: March 23, 1999

HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
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
(2) CRIME & 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 intercranial 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.

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.

Legal Background

The United States Supreme Court’s 1973 decision in *Roe v. Wade, 410 U.S. 113, 93 S.Ct. 2791, 120 L.Ed.2d 674 (1992)* was premised upon the right of privacy which the *Roe* court held to be a “fundamental right” encompassing a woman’s decision whether or not to terminate her pregnancy. Where a ”fundamental right” is involved, regulations limiting that right are subject to strict scrutiny, justified only by a “compelling state interest” which must be narrowly drawn to express only that interest. The court found that two interests might be compelling: protecting the health of the mother, and protecting the viability of the fetus. Since the health of the mother would only be compelling after the first trimester (when abortion-related dangers outweigh the live-birth-related ones), the court held that during the first trimester, a state may not ban, or even closely regulate, abortions. Second trimester abortions could be restricted only to protect the woman’s safety.

Interest in the fetus only applied during the last trimester when the fetus became viable. Consequently states could restrict or prohibit abortions entirely subsequent to fetal viability “except when necessary, in appropriate medical judgment, for the preservation of the life or health” of the woman. In *Doe v. Bolton*, the 1973 companion to *Roe*, the Court explained that the health of the mother represents a medical judgment that “may be exercised in light of all factors - physical, emotional, psychological, familial, and the woman’s age - relevant to the well-being of the patient.”

Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)*, the U.S. Supreme Court partially retreated from that position. Abandoning the trimester system, the Court upheld the basic right of a woman to choose an abortion before fetal viability. However, the standard against which the Court evaluated state regulatory provisions restricting that right shifted from one of “strict scrutiny” to the less rigorous “undue burden.” Consequently, state efforts to promote a policy preference for encouraging childbirth over abortion is now permissible even if those measures do not further a health interest. Post-viability, the state may regulate, even proscribe, abortion “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the pregnant woman.”

State Actions

Since 1995, at least 18 states have enacted laws prohibiting specific abortion procedures, particularly the "D&X". It appears that the statutes enacted are all currently in litigation or enjoined. Ohio was the first state to prohibit a specific abortion procedure, and certiorari is pending in that case.

The Ohio statute banned in 1995: (1) the use of the "dilation and extraction" ("D&X") procedure in any abortions, including those performed before viability; (2) 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; and (3)imposed a viability testing requirement before an abortion could be performed after the 22nd week of pregnancy. The constitutionality of Ohio's statute was challenged in the United States District Court for the Southern District of Ohio (Western Division) in *Women's Medical Professional Corp. v. Voinovich,* 911 F. Supp. 1051 (1995), in which a doctor sought injunction against the law. The court granted the injunction, found that the Plaintiff had demonstrated a substantial likelihood of showing:

(a) the banned D&X procedure to be unconstitutionally vague (it also included D&E procedures);

(b) the ban on use of the D&X procedure unconstitutional, because a state may not ban an abortion procedure unless there are safe and available alternatives, and because this ban may chill the exercise of a woman's right to a pre-viability abortion;

(c) the ban on the use of the D&X procedure does not serve the stated interest of preventing unnecessary cruelty to the fetus;

(d) the mandated determination of non-viability, as applied to the post-viability ban -- and the viability testing -- is unconstitutional because the objective standard is inconsistent with the subjective standard in the definition of viable;

(e) the definition of serious risk of substantial and irreversible impairment of a major bodily function is unconstitutional because of its limitation to factors relating solely to physical health impermissibly restricts the physician's determination of whether an abortion is necessary to preserve the health of the pregnant woman:

(f) the definition of medical emergency as it applies to the post-viability ban and the viability testing requirement is unconstitutional because it lacks a scienter requirement and is therefore vague, and because it does not allow the physician to rely on his or her best judgment that a medical emergency exists, and so may chill physicians from determining that a medical emergency exists even where necessary to preserve the life of the pregnant woman;

(g) the second physician concurrence is unconstitutional as limiting the primary physician's discretion and because it may chill the performance of post-viability abortions necessary to preserve the life or health of the mother;

(h) choice of method requirement is unconstitutional because it requires the woman to bear an increased medical risk and impermissibly interferes with the exercise of a doctor's discretion;

(i) second physician attendance requirement is unconstitutional, because the medical emergency exception appears to be unconstitutional;

(j) the rebuttable presumption of viability is unconstitutional because the mandated determination of non-viability appears to be unconstitutional; and

(k) viability testing is unconstitutional because the medical emergency definition appears to be unconstitutional, and because mandated determination of non-viability appears to be unconstitutional.

The decision was affirmed on appeal in *Women's Medical Professional Corp. V. Voinovich,* 130 F. 3d 187 (6th Cir. 1997; and *cert denied Voinovich v. Women's Medical Professional Corp.,* 118 S.Ct. 1347; 140 L. Ed.2d 496; 66 USLW 3427 (U.S. March 23, 1998)

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.

Status of Legislation in the State of Florida

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 conclusions[1], 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.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

[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.

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.

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:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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