

INFANT PROTECTION ACT

Senate Bill 546 (Substitute H-1)

Sponsor: Sen. Joel Gougeon

House Bill 4656 with

committee amendments

Sponsor: Rep. Larry Julian

First Analysis (6-3-99)

**House Committee: Criminal Law and
Corrections**

**Senate Committee: Families, Mental
Health and Human Services**

THE APPARENT PROBLEM:

During the 1995-96 session, a particular abortion procedure, known as "partial-birth abortion" became the focus of heated debate between "pro-life" and "pro-choice" forces. During that session of Congress, the United States Congress approved, and the President then vetoed, legislation that would have banned partial-birth abortions. When the attempt to establish a national ban was unsuccessful, opponents of abortion introduced legislation in several states attempting to ban the procedure in those states. In Michigan, a ban was enacted (Public Act 273 of 1996) but was later overturned by the United States District Court (*Evans v Kelley* (977 F.Supp. 1283 [E.D. Mich 1997])) and enforcement of the ban was enjoined. Legislation has again been introduced to prohibit such abortions.

THE CONTENT OF THE BILLS:

Senate Bill 546 would create the "Infant Protection Act" within the Michigan Penal Code (MCL 750.90g). Under the bill, it would be a felony, punishable by imprisonment for life or any term of years, a maximum fine of \$50,000, or both, if a person intentionally performed a procedure or took any action upon a "live infant" with the intent to cause the infant's death. "Live infant" would mean a human fetus at any point after any "part of the fetus" was known to exist "outside of the mother's body" and had a detectable heartbeat, evidence of spontaneous movement, or evidence of breathing. "Part of the fetus" would mean any portion of the body of a human fetus that had not been severed from the fetus, but not including the umbilical cord or placenta. "Outside of the mother's body" would mean beyond the outer

abdominal wall or beyond the plane of the vaginal introitus.

It would not be a violation of the bill if a physician took measures, at any point after a live infant was partially outside of the mother's body, that, in the physician's reasonable medical judgment, were necessary to save the life of the mother, provided every reasonable precaution were also taken to save the life of the live infant. In addition, the bill would specifically exclude a mother from prosecution under the bill, provided she had consented to a legally recognized procedure that was not specifically prohibited under the bill to be performed by a physician and a live infant died in violation of the bill's provisions as a result of the physician's actions. The bill includes a statement that "The legislature finds all of the following:"

-- "That the constitution and laws of this nation and this state hold that a live infant completely expelled from his or her mother's body is recognized as a person with constitutional and legal rights and protection."

-- "That a live infant partially outside his or her mother is neither a fetus nor potential life, but is a person."

-- "That the United States Supreme Court decisions defining a right to terminate pregnancy do not extend to the killing of a live infant that has begun to emerge from his or her mother's body."

-- "That the state has a compelling interest in protecting the life of a live infant by determining that a live infant is a person deserving of legal protection at any point after any part of the live infant exists outside of the mother's body."

The bill would take effect on October 1, 1999.

House Bill 4656 would amend that statutory sentencing guidelines provisions of the Code of Criminal Procedure (MCL 777.16d) to include the felony offense of performance of a procedure on a live infant with the intent to cause death, which would be created by the Infant Protection Act (Senate Bill 546). A violation would be categorized as a Class A felony against a person, with a statutory maximum penalty of life in prison. The bill would take effect October 1, 1999 and would not take effect unless Senate Bill 546 was also enacted.

BACKGROUND INFORMATION:

Evans v Kelley (977 F. Supp. 1283 [E.D. Mich. 1997]) found Michigan's law outlawing partial birth abortions unconstitutional because it was, according to the court, "vague and overbroad and unconstitutionally impose[d] an undue burden on a woman's right to seek a pre-viability second trimester abortion". The court, in a footnote, also indicated that it believed that the Michigan legislature could constitutionally regulate abortion practice within the state provided that such regulations were consistent with U.S. Supreme Court precedent. It noted that since the Supreme Court has specifically "delineated the parameters as to when and to what extent a State may regulate abortion practices -- and lower courts are obligated to follow its mandate without attempting to creatively circumvent precedent -- such a regulation must be carefully and precisely drawn."

Vagueness. The finding of vagueness was based on the due process clauses of the Fifth and Fourteenth Amendments, which require "that a statutory prohibition be sufficiently defined 'to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'". The court also noted that a law should also provide sufficient information to "provide explicit standards for those who apply the law."

Overbreadth. The court also found the law as enacted was overbroad, noting that the test for overbreadth in the context of abortion laws was set forth in *Planned Parenthood of Southeastern Pennsylvania v Casey* (505 U.S. 833, 112 S.Ct. 2791 [1992]). That test for determining the challenge to Michigan's partial-birth abortion statute, according to the court, was whether "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." The court noted that the *Casey* decision had indicated that a State "may enact measures influencing a woman's abortion decision, provided that such measures do not impose an 'undue burden' on the woman's right to choose an abortion." "[A] law is invalid as an undue burden '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.'" The *Casey* decision went further to point out that a statute with such a purpose "is invalid because 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."

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Proponents of the bill say that the activities that the bill would proscribe are very close to infanticide and deserving of comparable punishment. At the point when the child is more born than unborn, proponents argue, it should be protected from being murdered. Proponents describe a gruesome procedure whereby a nearly full-term fetus is partially delivered and then killed by means of having its skull crushed or incised before the delivery is completed. According to proponents of the bill, several thousand partial birth abortions are performed nationwide each year, most on non-medical grounds. They cite physicians who say there is no medical need for the procedure, that there are other, safer methods for terminating a pregnancy. The bill would provide a serious sanction by subjecting those physicians who violate the bill's provisions to criminal sanctions -- including imprisonment for life or any term of years and/or a fine of up to \$50,000. Most reasonable people would agree that this extreme practice should not be tolerated in a civilized society.

Against:

Opponents of the bill argue that the prohibitions would not be limited to late-term pregnancies; the bill's definition of "live infant" fails to distinguish between an eight week old fetus and a live birth. Thus, it would serve to criminalize many earlier term, constitutionally protected abortions, even those performed in the first trimester. As a result, opponents contend that the bill will be found unconstitutional because it will have the effect of placing a substantial obstacle in the path of a woman seeking a legal, constitutionally protected abortion before the fetus attains viability.

The bill's opponents assert that not only will early term abortions fall under the bill's provisions, a number of other situations would be criminalized. For example, the definition could be applied to criminalize situations where physician treats a spontaneous miscarriage. According to opponents, often a woman who is having miscarriage will arrive at the emergency room at a point where the miscarried fetus could still exhibit signs of "life" as defined by the bill. However, at that point, since the fetus has spontaneously aborted, the medically appropriate treatment is to remove the fetus.

As a result, a doctor who treated a woman under such circumstances would be in violation of the law as it is written. Opponents also note that in situations where a woman is pregnant with twins and the life of one of the twins can only be assured by the removal of the other, the physician involved may, for the sake of the mother and the other twin, be required to remove one of the twins.

Opponents point out that the bill could be made constitutional if the bill were restricted to cases involving viable, healthy fetuses and included an exception for cases where the procedure was necessary to protect the life or health of the mother. Opponents of the bill note that, under the Michigan Supreme Court's decision in *People v Bricker* (389 Mich. 524 [1973]), abortions are already illegal in Michigan after 24 weeks of pregnancy except where necessary to preserve the life or health of the mother, and that, in general, late-term abortions are very rare and are only performed when there are grave fetal defects or maternal illness.

Response:

Proponents of the bill argue that the bill's provisions require that the physician have the "intent" to kill the infant and that a doctor dealing with a miscarriage or

the other would not be acting with the intent to kill the infant, but would instead be acting with the intent to either save the mother or to ensure or enhance the survival of the other twin.

POSITIONS:

Right to Life of Michigan supports the bills. (6-2-99)

The Michigan Catholic Conference supports the bills. (6-2-99)

The Michigan Chapter of the National Organization for Women opposes the bills. (6-2-99)

Planned Parenthood Advocates of Michigan opposes the bills. (6-2-99)

The Religious Coalition for Reproductive Choice opposes the bills. (6-2-99)

A representative of the Michigan State Medical Society testified in opposition to the bill. (6-2-99)

The Michigan Abortion and Reproductive Rights Action League submitted testimony in opposition to the bill. (6-2-99)

A representative of the American Civil Liberties Union testified in opposition to the bill. (6-2-99)

The Michigan Section of the American College of Obstetricians and Gynecologists opposes the bill. (6-2-99)

The Greater Detroit Section of the National Council of Jewish Women submitted testimony in opposition to the bill. (6-2-99)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

removal of one twin to expand the survival chances of