

TESTIMONY REGARDING H.B. 2324

May 26, 2013

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Chairman Siegfried and Members of the Committee,

On this date, 60 years ago, March 26, 1953, Dr. Jonas Salk announced to the world the first vaccine to prevent polio. Because of that vaccine, millions of children were saved from death or life long disabling paralysis.

Today, on this date, March 26, 2013 this committee and this Senate, this legislature and this State, consider enacting a legislative vaccine, one that will save millions more children.

Today, medical science has shown incontestably that once a human individual possesses a heartbeat, he or she is virtually certain to be born, unless there be the lethal act of abortion.

In a law review article, soon to be published in the Ohio State Law Journal, I have laid out the medical evidence demonstrating that fact.

Consider: in recent studies, pre-natal research now reveals that, although as many as thirty per cent of natural pregnancies end in spontaneous miscarriage, less than five per cent of all natural pregnancies end in spontaneous miscarriage once a heartbeat is detected. As one gynecologist related to me, "there are as innumerable things that need to happen biologically for a sperm to reach an ovum, and once there is fertilization, there are innumerable things that need to happen before formation and implantation of the fetal body. But once cardiac activity is seen, it's pretty clear sailing to full term birth."

Taking its point of departure from the legal principle established by the Supreme Court that the State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," this bill affirms: First, that "fetal heartbeat is the key medical predictor that an unborn human individual will reach live birth." Second, absent a medical emergency, the bill requires that the physician test for a fetal heartbeat, and if the physician find one, inform the pregnant woman that the fetus she is carrying possesses a heartbeat and that the chances of the child reaching term are very high.

Third, it moves the time line of protection of the unborn forward by prohibiting abortions after a heartbeat is detected. Fourth, it provides for ample reporting requirements, so that greater knowledge and accountability can be obtained.

The scientific and moral bona fides of this bill are clear. This is a human individual. It has a beating heart. There is a high degree of certainty that this human will reach live birth, and that, practically speaking, only abortion can prevent it from seeing the light of day.

Yet, as we know, some of our friends object to the bill, not on substantive grounds, but merely as a tactical matter. They say they would support a law that mandates testing for a heartbeat and notice to the pregnant woman. Well, this bill does that, but it does more. It protects such unborn human individuals from being aborted, absent a medical emergency, before their natural time of birth. If one agrees that a heartbeat is such important indicator of human life and eventual birth and that a law should require testing for it, then why shrink before the undeniable moral conclusion: those humans with a beating heart ought to be protected? They ought to be allowed to complete their allotted time before birth.

At bottom, our friends do not deny the science; they do not deny the moral command. They are reduced to saying: yes we ought to protect unborn humans in the womb who possess a heartbeat, but not now. Well, if not now, when? Instead of taking legislative and legal action now, they ask us to wait for a political miracle to solve the problems of the unborn, to wait until there's a new Supreme Court, however many years it may take and without any confidence that there will actually be a new Supreme Court to their liking.

The fact of the matter is that this is the best Supreme Court we're going to get for many years. And it is this Supreme Court before which we have the best chance of moving the line for the protection of the unborn from viability to the detection of heartbeat. For, as I explain in my forthcoming article, the reason the Supreme Court chose viability as the line when the state can protect an unborn child is that viability is a marker that demonstrates that the unborn child has a very good chance of surviving until birth. That is why the Supreme Court said it would approve of legislation that compels a woman to carry a viable unborn child to birth even if it could have been born alive prematurely. It is survivability that is the principle.

But what we now have from medical science are two salient facts: First that determining viability is at best a guess for a physician, with broad range of disagreement among physicians as to when viability actually begins. Second, heartbeat is a far better predictor of live birth and is easily determined by standard medical practice. The Supreme Court has stated that a precedent should be overturned “when facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.” The medical facts have “come to be seen.” So we bring forward the argument, backed by medical science, that the principle behind the viability line is better served by pegging the line of protection at the detection of heartbeat.

Many years ago there was a famous play by Samuel Becket, entitled, “Waiting for Godot.” The point of the play, of course, was that Godot never arrives. Waiting for the sake of waiting never saved anybody, and it won’t save any unborn children.

So instead of waiting for Godot, let us look at history and recall how the stamina and resilience of the pro-life movement won many victories even when there was never a pro-life majority on the Supreme Court. These victories came because the pro-life movement never gave up, never decided to wait for a political miracle.

In 1995, the Ohio General Assembly passed a bill banning partial birth abortions. It was the first in the nation. The law was struck down by a federal court. But Nebraska did not wait. It passed its own bill prohibiting partial birth abortions. In the year 2000, the Supreme Court voided the Nebraska statute outlawing partial birth abortion. But Congress did not wait. In 2003, Congress passed a federal ban on partial birth abortions and invited the Court to change its mind. The Court did, and now *Gonzales v. Carhart* is the law of the land and partial birth abortions are against the law.

Some years back, the city of Akron, Ohio, passed a law requiring informed consent, a waiting period, and parental consent for minors seeking an abortion. The Supreme Court said that Akron’s law was unconstitutional. But other states did not wait for a better day. They kept inviting the Court to change its mind. And the Court did. Now Ohio and most states have laws requiring informed consent, a waiting period, and parental consent or notification.

It used to be restrictions on abortion had to pass a strict scrutiny test. Now, no longer. It used to be that courts would routinely strike down an entire statute limiting abortion if they could find one part of it that was objectionable. But in *Ayotte v. Planned Parenthood of New England*, the Court unanimously got rid of that rule. It used to be that pro-life protesters could be sued under the Racketeer Influenced and Corrupt Organizations Act (RICO). But invited to look at what the courts were doing, the Supreme Court in 2006 denied the application of RICO to pro-life supporters.

This bill before you is forward looking in its defense of unborn human individuals possessing a heartbeat, but it remains prudent in its approach. It leaves untouched other interests that the courts have been sensitive to. Contraceptives are exempted from the bill. The question of the status of embryos is also outside the compass of the bill, for the bill only covers fetuses in a pregnancy that already possess a detectible heartbeat. The bill is also sensitive to a necessary range of discretion in the doctor/patient relationship.

This bill invites the courts to look at an earlier point in time as more medically definable than viability and more statistically relevant to the survivability of the infant. The science is there, research that was not present when *Roe* was decided or when *Casey* was decided.

In sum, waiting gains us nothing. But passing the bill gains incalculable benefits for unborn life. This bill, like the bans on partial birth abortion, will trigger a momentum in other states. It already has. It will focus on the importance of heartbeat for live birth, It will educate women (and men) contemplating what to do in a pregnancy. And it will open the door to the protection of thousands of lives.