TESTIMONY REGARDING H.B. 2324, THE HEARTBEAT BILL

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What Does the Bill Do?

The Heartbeat Bill, H.B. 2324, enacts four main requirements.

First, the bill requires an abortionist to check to see if the unborn baby the pregnant woman is carrying has a heartbeat. Sec. (c).

Second, if the child has been found to have a heartbeat, it requires the abortionist to let the mother know this. Sec. (d).

Third, abortions of babies with heartbeats are prohibited. Sec. (e).

Fourth, the abortionist must keep certain important records relating to the abortion.

Is It Constitutional?

The distinct sections of the Heartbeat Bill must be analyzed separately for constitutionality under federal constitutional law.

The constitutionality of the testing, informed consent, and recordkeeping requirements is straightforward under existing precedent. The Supreme Court has affirmed that States can require that a woman contemplating abortion receive informed consent. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). That a child already has a heartbeat plainly will be a material consideration to many women considering abortion. This developmental detail brings home the humanity of the child and boldly illustrates the fact that the baby is already alive. The presence of a heartbeat also has a strong correlation with the ultimate prospects of a successful, live birth. Thus, informing the pregnant woman that her child has a heartbeat, in those cases where a heartbeat has been detected, is a constitutionally permissible facet of informed consent.

The requirement that the abortionist test for the heartbeat simply ensures that the predicate for the informed consent is laid and that the woman is given accurate information tailored to her particular situation. And the requirement that certain records be kept is consistent with Supreme Court precedent,

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Casey, 505 U.S. at 900-01, and useful both for law enforcement and for an intelligent epidemiological study of abortion practice.

The provisions of the Heartbeat Bill are severable. Thus, even if some other part of the bill were enjoined as unconstitutional, the provisions discussed above would remain as valuable, common-sense regulations of human abortion.

The most contested section of the Heartbeat Bill is its prohibition (with limited exceptions) on abortions done on unborn babies with beating hearts. Critics argue that this prohibition is incompatible with repeated Supreme Court precedents disallowing either bans or "undue burdens" on abortions done prior to fetal "viability." Nevertheless, the Supreme Court's precedents contain as well the strands of a more life-protective jurisprudence. As far back as *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court upheld a law that prohibited any abortion that was not "necessary". Much later, in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court ruled that precedent it assumed to be controlling "confirms the State's interest in promoting respect for human life ***at all stages of the pregnancy***," *id.* at 163 (emphasis added). As Justice Kennedy wrote in dissent in *Stenberg v. Carhart*, 530 U.S. 914 (2000), a dissent subsequently vindicated in *Gonzales*, "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus." *Stenberg*, 530 U.S. at 961.

A procedure that deliberately takes the life of a live human being, heart pounding away in his or her mother's womb, is plainly a procedure that fosters insensitivity to, and disdain of, the life in the womb. Indeed, such a killing is the embodiment of disdain for human life. Will a confrontation with that shocking violation of basic human dignity be enough to outweigh the past or present commitment of any given Supreme Court Justice to an abortion autonomy? Is a freedom that depends upon the stopping of innocent human hearts, indeed the hearts of one's own flesh-and-blood offspring, one that a majority of the Court can honestly embrace? Must preborn children die to preserve liberty, or is any liberty so understood an imposter? The Supreme Court, building upon *Doe*, *Casey*, and *Gonzales*, certainly has the wherewithal to reject a sanguinary understanding of liberty and instead uphold a heartbeat bill and similar laws designed to secure the most minimal protection of respect and dignity for human life before birth.

Does this mean a majority of the Supreme Court, either as currently composed or as composed when some future challenge to this or another state's heartbeat bill finally reaches the Supreme Court, will vote to uphold the constitutionality of a ban on taking the lives of developing babies with beating hearts? One would hope so, if only as a matter of basic human decency and fidelity to a written Constitution. Nevertheless, no one can properly claim the omniscience to answer that question with certainty. The Supreme Court has, at various times and in various cases, pushed its precedents in one direction or the other. The Court has also overruled seemingly well-entrenched aspects of its abortion jurisprudence, such as the trimester framework of *Roe v. Wade*. In this area, there are no guarantees.

Is the Heartbeat Bill a Good Idea?

Enactment of the Heartbeat Bill would serve several goals. Among these would be the enhancement of informed consent for abortions and public education about the humanity of the child in the womb. Presumably a number of women contemplating abortion will decide not to do so upon learning that their baby has a heartbeat.

For many people, fundamental principles of justice and morality require strong efforts to reduce, and ultimately eliminate, the intentional taking of the lives of human children prior to birth, just as those same principles would preclude the deliberate killing of children after birth. But even if one were to leave aside questions of morality and justice, reducing the number of abortions definitely would reflect sound public policy.

The immediate adverse effects of abortion upon the child in the womb are obvious. In the years since abortion has become a widespread practice in the United States and elsewhere, other, less-obvious effects upon other persons have become clear. For example, abortion, especially when repeated, increases the odds that a future pregnancy will miscarry or result in a premature birth, the former resulting in the undesired loss of a child's life in the womb, the latter posing the threat of developmental difficulties to children successfully born alive after the abortion of one or more prior pregnancies.[1] Moreover, the negative effects of abortion upon a woman's physical and mental health after abortion have now been documented extensively.[2] In addition, the social problems abortion was theorized to ameliorate have not in fact been eliminated, and in many cases have increased, in the wake of liberalized recourse to abortion.[3]

Furthermore, scientific developments over the past decades have heightened society's awareness of the uniqueness, humanity, and sensitivity of prenatal human beings at earlier and earlier stages of gestation.[4] Likewise, the public has begun to appreciate the horrific nature of particular abortion methods, such as partial birth abortion and dismemberment abortion.

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[1] Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?*, 13 J. AM. PHYSICIANS & SURGEONS, no. 4, 2008 at 102, 102–03.

[2] *E.g.*, Priscilla Coleman, *A Tidal Wave of Published Data: More Than 30 Studies in Last Five Years Show Negative Impact of Abortion on Women*, THE UNCHOICE CAMPAIGN, http://www.theunchoice.com/News/colemanresearcharticle.htm (providing a list of more than thirty studies detailing the after-effects of abortion on the mental and physical health of the women) (all websites last visited Dec. 13, 2011); *see also* Priscilla Coleman et al., *The Choice to Abort Among Mothers Living Under Ecologically Deprived Conditions: Predictors and Consequences*, INT'L J. MENTAL HEALTH & ADDICTION 7, 405–22 (2009). *See generally* SHADIA HRICHI, NAMELESS NO MORE: A JOURNEY OF HEALING AFTER ABORTION (Judith Robl, ed., 2010) (recounting the author's own post-abortion experience); THOMAS W. STRAHAN, DETRIMENTAL EFFECTS OF ABORTION: AN ANNOTATED BIBLIOGRAPHY WITH COMMENTARY (3d ed. 2001).

[3] The number of births, the birth rate, and the percentage of births to unmarried women have all steadily increased since the 1970s. Stephanie J. Ventura, U.S. DEP'T OF HEALTH & HUM. SERVS, *Changing Patterns of Nonmarital Childbearing in the United States* (May 2009), *available at* http://www.cdc.gov/nchs/data/databriefs/db18.pdf. Further, more than half (60%) of all births to women between the ages of 20 and 24 were out of wedlock in 2007. *Id.* Significantly, instances of child abuse to children of unwed mothers have increased as well. In a study published by Child Welfare Information Gateway, "child maltreatment fatalities remain a serious problem" throughout the United States, and boyfriends of unwed mothers are among those most likely to be responsible for child abuse deaths. Child Welfare Info. Gateway, *Child Abuse and Neglect Fatalities 2009: Statistics and Interventions* (2011), *available at* http://www.childwelfare.gov/pubs/factsheets/fatality.cfm.

[4] The advent of 4-D ultrasounds has produced poignant images unveiling the humanity of the developing unborn child. *See* Brian Handwerk, *4-D Ultrasound Gives Video View of Fetuses in the Womb*, NAT'L GEOGRAPHIC NEWS (Feb. 25, 2005), *available at* http://news.nationalgeographic.com/news/2005/02/0225_050225_tv_ultrasound.html (describing movement by the unborn visible at as early as 8 weeks into gestation and the gleeful responses of parents who are "immediately" able to recognize the ultrasound images because the fetus actually looks like a baby). Evidence of fetal pain also points to the humanity of the unborn and has posed a challenge for abortion activists who argue that unborn babies are incapable of feeling pain. *E.g.*, Annie Murphy Paul, *The First Ache*, N.Y. TIMES MAGAZINE (Feb. 10, 2008), *available at* http://www.nytimes.com/2008/02/10/magazine/10Fetal-t.html (describing the research of Drs. Kanwaljeet Anand and Nicholas Fisk, both of whom have discovered that unborn and premature babies are capable of experiencing tremendous pain and have subsequently begun to administer anesthesia to infant patients). Finally, the advances in preterm birth survival rates also have provided strong confirmation of the unborn child's independent

Finally, there is a growing body of evidence that, in many cases, abortion represents, not an empowering of women, but rather an instrument for facilitating male irresponsibility or sexual predations.[5]

In short, the tragic and inhuman downsides of abortion have become more obvious, while the previously assumed advantages have failed to materialize. Abortion has proven to be, to say the least, a harmful social experiment.

The U.S. Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a constitutional right protected, at least to a certain broad extent, by the federal Constitution. This decision has been subject to serious and sustained academic criticism and has, at least in part, already been overruled by the Supreme Court itself, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Supreme Court has not yet overruled *Roe* completely, however, and thus has not yet restored to the States the authority to deal with abortion that States enjoy with regard to other destructive practices such as child abuse, drug abuse, and animal abuse. Consequently, until there are new developments in the pertinent case law from the Supreme Court, States are constrained in their ability to confront the harms abortion poses.

Nevertheless, States are not completely powerless in the face of abortion. The Supreme Court has expressed a willingness to uphold common-sense, defensible measures to limit or regulate abortion, *id.*, and in fact has upheld a variety of measures ranging from waiting periods, *id.* at 885-87, to informed consent requirements, *id.* at 887, to recordkeeping and reporting requirements, *id.* at 900-01, to bans on the use of State resources to facilitate abortion, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977), to bans on abortions by non-physicians, *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *see also City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 447 (1983) (stating that "[the Supreme

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humanity. *See* Dara Brodsky & Mary Ann Ouellette, *Introduction: Transition of the Premature Infant from Hospital to Home*, *in* PRIMARY CARE OF THE PREMATURE INFANT 1, 1 (Brodsky & Ouellette eds., 2008) (explaining that "medical advancements in obstetric and neonatal care have led to dramatically greater chances for survival of extremely premature infants [of whom those] born at 24 weeks' gestation currently have a survival rate of approximately 40% to 60%" and "almost 100% of infants born at 34 weeks' gestation survive"). *See also* Kim Carollo, *Preemies Among World's Smallest Surviving Newborns Beating Odds*, ABC Good Morning America (Dec. 12, 2011), available at http://abcnews.go.com/Health/follow-study-finds-worlds-smallest-surviving-newborns-fine/story?id=15121655 (recounting extraordinary success of two babies who were born extremely prematurely and weighing about as much as an 18-week-old fetus).

[5] *See* ELLIOT INSTITUTE, REVERSING THE GENDER GAP at 13 (2010) [hereinafter Elliot Institute], *available at* http://www.afterabortion.info/pdf/gendergapbooklet.pdf (compiling data related to, *inter alia*, coerced abortions) ("[Sixty-four] percent [of women] reported that they were pressured to abort by others. Indeed, most abortions are primarily the result of lack of support, pressure, emotional blackmail, coercion, manipulation, deceptive counseling, threats or even violence from partners, parents, employers, doctors, counselors or others with influence over women's lives") (footnotes omitted); *see also* Vincent M. Rue et al., *Induced abortion and traumatic stress: a preliminary comparison of American and Russian women*, MEDICAL SCIENCE MONITOR, Oct. 2004, *abstract available at* http://www.ncbi.nlm.nih.gov/pubmed/15448616. Studies show that most women feel coerced into, or at least inadequately informed about, having an abortion: "More than 50 percent [of post-abortive women] described themselves as feeling rushed or uncertain before the abortion; 79 percent said they were not counseled on alternatives to abortion; 84 percent said they did not receive adequate counseling before abortion; and 67 percent said they received no counseling before abortion." ELLIOT INSTITUTE, REVERSING THE GENDER GAP at 14 (2010) (footnote omitted). Furthermore, coercive action can become violent and deadly. *See, e.g.,* John Futty, *Man guilty of trying to force woman to abort baby,* THE COLUMBUS DISPATCH (Apr. 29, 2011), http://www.dispatch.com/content/stories/local/2011/04/29/man-guilty-of-trying-to-force-woman-to-abort-baby.html (last visited Dec. 6, 2011) ("man who tried to force his girlfriend at gunpoint to get an abortion"); Kim Curtis, *Murder: The Leading Cause of Death for Pregnant Women*, NOW.ORG, http://www.now.org/issues/violence/043003pregnant.html (last visited Jan. 17, 2011).

Court has] left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions"), to parental involvement statutes, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326-27 (2006), to a ban on a particularly heinous method of abortion, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003). These examples certainly do not exhaust the possible responses a State could undertake. For example, States presumably can ban forced abortions, can protect the consciences of medical students, nurses, and pharmacists who do not wish to participate in abortions, can require basic sanitary conditions in abortion facilities, etc.

The Heartbeat Bill attempts to follow the path laid out by these cases. The testing, informed consent, and recordkeeping requirements are consistent with Supreme Court precedent upholding common-sense abortion regulations. The Heartbeat Bill also attempts to secure additional protection for unborn children, namely, those whose hearts have begun to beat. By calling a halt to the deliberate slaying of innocent human beings with beating hearts, the prohibition section of the bill calls upon the Court to allow states to provide a level of protection for unborn children against abortion that is more consonant with basic human dignity.

What about pro-life objections that heartbeat bills are not good strategy?

There are pro-life voices raised in support of the pending Kansas Heartbeat Bill. There are also voices within the pro-life community taking a contrary stand, not because they support abortion, but rather because they consider one aspect of this particular bill, at this particular time, to be unwise and counterproductive.

Notably, there seems to be a pro-life consensus that the testing and informed consent requirements of the Kansas Heartbeat Bill are both constitutional and desirable. That is, all pro-life voices agree that it is a very good idea – and permissible under current court precedents -- to require abortionists first to test for the presence of a fetal heartbeat and then, if one is found, to inform the pregnant woman of this fact. Likewise, recordkeeping and reporting requirements for abortion can provide essential information on the practice of abortion in Kansas, entirely apart from the prohibition of any particular abortions. The Kansas Heartbeat Bill would thus take the state several steps forward in a pro-life direction.

The intra-movement disagreement focuses on a separate section of the Kansas Heartbeat Bill, namely, the section that bans the abortion of a baby once the heartbeat begins. Regarding this section, good-faith concerns have been raised both for and against the prohibition.

While the voices raised against the strategic value of a ban on abortions after fetal heartbeat include long-term colleagues and allies whose views I greatly respect, I cannot agree that the balance of good versus bad consequences definitively weighs against adopting the ban section of the bill. I would like, therefore, to identify some reasons, why a negative assessment may be mistaken. What follows are the main pro-life objections raised against the post-heartbeat ban approach, and some responses thereto.

Objection One: The ban section is unconstitutional under current Supreme Court precedent.

The argument here is that the ban section represents a legally hopeless attempt to restrict abortions prior to the stage at which the child attains viability, i.e., the capacity to survive outside the

womb. This objection charges both futility and the likelihood that a successful legal challenge will simply enrich some group like Planned Parenthood or the ACLU with attorney fees.

To be sure, no one wants to waste time and effort or give tax money to pro-abortion groups. But is there more to the picture? Yes.

First, the objection of unconstitutionality under current Supreme Court precedent would also have condemned federal efforts to pass a partial birth abortion ban right after the Supreme Court had struck down a similar ban in a Nebraska case. But Congress passed the law, and the Supreme Court ultimately upheld the law, setting an important precedent in the pro-life direction.

Second, the current presidential administration is extremely unlikely to make judicial appointments that would move the federal courts, and in particular the U.S. Supreme Court, to a greater openness to life-protective legislation. That is, any changes to the Supreme Court over the next four years are likely, if anything, to make the Court more hostile to state efforts to protect unborn babies and their mothers. Now may be the best time, for the foreseeable future, to bring cases that invite the Court to reconsider or reshape its abortion jurisprudence.

Third, the threat of an attorney fee award need not be decisive against the ban section. Rather, the question regarding attorney fees is whether the potential fee assessment outweighs the benefits of the bill. On this point, see the response to the next objection.

Objection Two: A ban section that is struck down accomplishes nothing.

While attorneys tend to focus on the outcome in court, laws have more than legal effect. One can win even by losing, if it is the right battle. The passage and invalidation of partial birth abortion laws generated an enormous pro-life educational effect, opening citizens' eyes both to the horror of abortion and to the pro-abortion extremism of the courts. The laws kept losing, but the pro-life side kept winning in the court of public opinion (and, ultimately, in the Supreme Court).

Regarding the Heartbeat Bill, the debate alone can have a similarly valuable effect in terms of opening eyes to the reality of prenatal development and to the brutality of abortion. Extending that debate with the coverage attending the passage of, and the ensuing legal challenge to, a heartbeat ban section will enhance the educational value by extending the discussion in the media and in daily lives. Is that "earned media" and education worth the fee the state might pay to pro-abortion lawyers? The answer is not obviously "no," and it may well be "yes."

Notably, this value to the ban section exists *even if the law never goes into effect at all.*

Objection Three: The Supreme Court could use a ban section to make an even worse precedent.

The argument here is that if a majority of the current Supreme Court were to overturn a pro-life law, several of the Justices, even if not enough to form a five-Justice majority, would try to use the occasion to promote an "equal protection" rationale for abortion. This rationale of the "plurality" (less than a majority but on the winning side of a case), the argument goes, could give lower courts all the excuse they need to start striking down a host of current pro-life laws such as funding restrictions and parental involvement laws. No pro-lifer wants this to happen, but again, this argument does not present the whole picture.

First, a plurality cannot overrule a majority. The precedents upholding a variety of pro-life regulations would still stand, and any renegade lower courts that tried to strike them down would likely

face prompt reversal from a contrary majority on the Supreme Court. (If such a majority no longer existed, then such laws were doomed anyway.)

Second, the Kansas Heartbeat Bill contains more than a ban section. If the Supreme Court upholds the informed consent sections, as all agree it should, then even a simultaneous decision striking down the ban section will at worst produce a splintered result, with competing pluralities that largely neutralize each other.

Third, a swing Justice who does not adopt a plurality's rationale can expressly negate it. In the case of *Planned Parenthood v. Casey* (1992), a sizable majority of the court voted to uphold every challenged provision but one. Of that majority, four Justices voted to overrule *Roe v. Wade* (1973), the decision creating a right to abortion. In theory, that bloc of four qualified as the plurality opinion on the provisions that were upheld. But the rest of the majority joined with the remainder of the Court to reject the effort to overturn *Roe*. The *Casey* decision thus graphically illustrated how a splintered majority's views could override a plurality's views, regardless of a result mostly favorable to the plurality. The same could happen with a split decision overturning the heartbeat ban section.

Objection Four: If the votes are there to uphold a ban, the ban should be complete and not limited to abortions after a baby's heart begins to beat.

This objection flips the debate, saying that if there is sufficient warrant for optimism about a heartbeat ban, then there likewise a basis for optimism about a total ban, and thus the heartbeat ban does not go far enough.

The fact is, though, that the Supreme Court generally moves incrementally in altering its precedents. A smaller step is always easier for the Court to take than a larger one. So, a ban tied to a baby's beating heart is more likely to find success in the Supreme Court than one that bans all abortions, period. Banning the knowing slaying of a baby with a beating heart is a huge step forward. That accomplishment, were it to happen, should not be minimized by focusing upon the fraction of abortions not yet outlawed.

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Whether a particular bill represents a prudent step forward is a judgment call that must consider both the known factors and, as well, the limits of our own predictive capacity.

There are legitimate opinions on both sides of the debate among pro-lifers over this bill. And, I submit, there is wisdom on both sides as well. A proclamation of absolute certainty about a net negative outcome from adopting this bill is, in my view, beyond mortal ken.