

LEGISLATIVE EFFORTS TO LIMIT STATE REPRODUCTIVE PRIVACY RIGHTS

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I. INTRODUCTION

The right to decide without government interference whether and when to have children does not seem at all controversial when pregnancy prevention is the issue.¹ However, when there is a “potential life” at stake, the relationship between the right to decide and the right of the government to intrude becomes far more emotional and complex. “Potential life” or “personhood” is somewhat arbitrarily defined. Depending on one’s religious or philosophic views, life may begin anywhere from conception to implantation to “quickening” to viability to survivability to birth.² In a recent poll of Florida voters, the pollsters came to this conclusion:

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1. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that a state statute proscribing the use of contraceptives violated married couples’ right to privacy implied in the Bill of Rights); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (holding that a state statute proscribing the use of contraceptives violated unmarried individuals’ privacy rights).

2. See generally *Keeler v. Superior Ct.*, 470 P.2d 617, 628 (Cal. 1970) (holding that the defendant could not be charged for the murder of an unborn fetus pursuant to the

Pro-life voters see all life as a priori and the need to protect it self-evident. Pro-choice voters, on the other hand, see it not in black and white terms, but in many shades of gray. For these voters, not all life is necessarily meaningful and sacred. In the end, the debate over abortion is not about the rights of a woman versus the rights of the unborn, but the definition of life itself.³

The Florida Supreme Court has consistently ruled in tort cases that there is no "person" with any rights, standing, or entitlement to any damages until there is a live birth.⁴ Although inapplicable to laws criminalizing involuntary abortion or abortion after viability,⁵ this principle has been upheld as applied to criminal laws⁶ with only one exception.⁷

state statute because the Legislature did not intend to include unborn fetuses in the definition of "human being," but intended "human being" to have the common law meaning of a person born alive); *Jones v. Commonwealth*, 830 S.W.2d 877, 880 (Ky. 1992) (holding that the defendant can be charged for the murder of a baby if the injuries causing death were inflicted to the fetus prior to the birth and the baby was born alive); *Davis v. Davis*, 842 S.W.2d 588, 596 (Tenn. 1992) (finding that frozen embryos, in a custody dispute, are not human beings but should be afforded more respect than human tissue because of the embryos' potential to become human beings).

3. The Abortion Attitude Paradox, FLORIDA VOTER (Austin Forman Center for Political Studies, Ft. Lauderdale, Fla.), June-July 1997, at 1, 2.

4. See, e.g., *Tanner v. Hartog*, 696 So. 2d 705, 706 (Fla. 1997) (finding expectant parents cannot prevail on a wrongful death claim because a fetus is not a person, but holding expectant parents can prevail on a claim for the emotional suffering inflicted by the birth of the stillborn fetus due to the doctor's negligence).

5. See *State v. Ashley*, 670 So. 2d 1087, 1089 (Fla. 2d DCA), reh'g granted, 678 So. 2d 339 (Fla. 1996), quashed in part, 22 Fla. L. Weekly S682 (Fla. Oct. 30, 1997). Ashley involved a woman who could not afford to pay for an abortion. At the beginning of her third trimester of pregnancy and after weeks of unsuccessfully attempting to raise the necessary money, she shot herself in the abdomen "to hurt the baby." A Caesarean section was performed. There was a live birth. The bullet had passed through the wrist of the fetus. The infant lived for 15 days and died as a result of multi-organ problems caused by premature birth and not by the bullet wound. See *id.* at 1088.

The state charged Ashley with manslaughter, under section 782.07, Florida Statutes, and with felony murder under section 782.04(4), Florida Statutes. The latter charge was based on committing the felony of performing an illegal abortion on herself, contrary to section 390.001(10)(a), Florida Statutes. Section 390.001(10)(a) makes it a third degree felony for anyone other than a physician to perform an abortion. In an interlocutory appeal, the court threw out the illegal abortion charge and upheld the simple manslaughter charge because the infant was born alive and then died indirectly due to Ashley's actions. See *id.* at 1093.

The Florida Supreme Court held the state cannot prosecute Ashley for either murder or manslaughter because the statute failed to explicitly trump the long-standing common law that holds a woman who self-inflicts injuries while pregnant cannot be criminally liable for the death of her fetus if it dies after birth. See *State v. Ashley*, 22 Fla. L. Weekly S682, S683 (Fla. Oct. 30, 1997). Moreover, the court concluded that the Legislature had not evidenced an intent to "pit woman against fetus in criminal court." *Id.* at S683.

6. See *Johnson v. State*, 602 So. 2d 1288, 1292 (Fla. 1992).

7. The willful killing of an unborn "quick" child by an injury to the mother is manslaughter if the injury was inflicted in such a way as would have made it murder if the injury caused the mother's death. See FLA. STAT. § 782.09 (1997); see also *Williams v. State*, 15 So. 760, 760 (1894) (affirming the defendant's manslaughter conviction for beating his pregnant wife with a club, causing the premature birth of her baby, who subse-

Although the Florida Legislature entered the debate, its focus has not been on the definition of life itself. Rather, the Legislature has sought to impose procedural requirements on doctors performing abortions,⁸ to restrict insurance coverage for abortions,⁹ and to ban certain types of abortions.¹⁰ However, prior to 1997, none of the Legislature's attempts to modify a woman's right to an abortion had been successful. Up until the 1997 Regular Session, the Florida Legislature had not passed a bill placing restrictions on abortion for nearly a decade.¹¹ In 1997, the Woman's Right-To-Know Act became law.¹² The Act requires that women seeking to terminate a pregnancy in Florida be provided with oral and printed information about specific aspects of pregnancy, abortion, and childbirth prior to the abortion procedure.¹³ Physicians who violate the Act are subject to professional discipline, including license revocation.¹⁴ The Act has been temporarily enjoined, and the injunction is being appealed by the state.¹⁵

Part II of this Article discusses the protections afforded women seeking an abortion under the U.S. Constitution, while Part III examines protections under the Florida Constitution. Part IV provides a constitutional analysis of the three bills restricting abortion that were considered by the 1997 Florida Legislature, most significantly The Woman's-Right-To-Know Act. Finally, Part V concludes that the restrictions in place prior to the passage of The Woman's-Right-To-Know Act maintained an appropriate balance between the pregnant woman's life and health and the life and health of the fetus.

quently died due to the battery). Although criminal charges have been filed under circumstances where a fetus has died as a result of a criminal act toward the pregnant woman, appellate review of the statute's constitutionality has been prevented because the state has charged the perpetrator under a different, inapplicable statutory section, the injury was followed by a live birth prior to the infant's death, or some other condition was not met that prevented challenging the validity of the statute on appeal. See, e.g., *Knighton v. State*, 603 So. 2d 71, 72 (Fla. 4th DCA 1992) (affirming a third-degree murder charge because the defendant shot a bullet into the head of a viable fetus who, although born alive, died as a direct result of the gunshot wound).

8. See, e.g., Fla. HB 1205 (1997) (Woman's Right-To-Know Act).

9. See Fla. SB 2304 (1997) (Employee Health Care Access Act).

10. See Fla. CS for HB 1227 (1997) (Abortion Method Ban Bill).

11. In 1988, the Parental Consent Abortion Law was enacted. See Act effective Oct. 1, 1988, ch. 88-97, § 6, 1988 Fla. Laws 460, 462-63 (amending FLA. STAT. § 390.001(4)(a) (1987)) (requiring physicians performing abortions on minors to obtain the written consent of the minor's parent, custodian, or legal guardian or permitting the physician to rely on a judicial order).

12. See Act effective July 1, 1997, ch. 97-151, 1997 Fla. Laws 2501 (amending FLA. STAT. ch. 390 (1995 & Supp. 1996)).

13. See FLA. STAT. § 390.0111(3) (1997).

14. See *id.* § 390.0111(3)(c).

15. See *Presidential Women's Ctr. v. State*, No. 97-5796 (Fla. 15th Cir. Ct. July 2, 1997) (order granting preliminary injunction), appeal docketed, No. 97-2557 (4th DCA filed July 24, 1997).

II. A BRIEF SUMMARY OF PRIVACY RIGHTS AS APPLIED TO ABORTION UNDER THE UNITED STATES CONSTITUTION

In *Roe v. Wade*,¹⁶ the United States Supreme Court struggled with the issue of determining at what point a state can constitutionally prevent a pregnant woman from terminating a "potential life."¹⁷ The *Roe* Court defined fundamental reproductive privacy rights and the scope of the state's authority to regulate those rights.¹⁸ The Court decided the word "person" did not include the unborn¹⁹ and established a trimester framework as a paradigm to balance the pregnant woman's privacy interests with the state's interests in the health of the mother and the potential life of the fetus.²⁰

Pursuant to *Roe*, the state's important and legitimate interest in the health of the mother becomes compelling at approximately the end of the first trimester.²¹ During this stage, the doctor and patient are permitted to decide, without state interference, whether or not to terminate a pregnancy.²² They may act on that decision free of government restrictions.²³ After this stage, the state can regulate abor-

16. 410 U.S. 113 (1973).

17. See *id.* Prior to *Roe*, the Court upheld a provision of the District of Columbia Code criminalizing abortion because it "[did] not outlaw all abortions, but only those that are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health." *United States v. Vuitch*, 402 U.S. 62, 70 (1971). The decision expressly defined "health" as including all aspects of a woman's physical and mental health. See *id.* at 72.

18. See *Roe*, 410 U.S. at 153-54.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153.

19. See *id.* at 158.

20. See *id.* at 164. But see *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (retreating from the strict trimester framework as an overly rigid paradigm for protecting a woman's right to choose to have an abortion).

21. See *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."). Based on medical knowledge, the Court explained that mortality rates in abortion can be less than mortality rates in normal childbirth. See *id.*

22. See *id.*

23. See *id.*

tion as long as the restrictions are reasonably related to the "preservation and protection of maternal health."²⁴

At some point, generally at the beginning of the third trimester, viability of the fetus becomes an issue. This is because the fetus can presumably have a "meaningful life outside of the mother's womb."²⁵ Thus, after viability, the state can implement restrictions on abortion that extend as far as prohibition of the procedure.²⁶ However, the state may not impose restrictions on therapeutic abortions when the mother's life or health is at stake, even after viability.²⁷

In *Planned Parenthood v. Casey*,²⁸ the U.S. Supreme Court retreated from the strict trimester framework.²⁹ The plurality held that restrictions that do not impose an "undue burden" on abortion are permissible and that states can express a preference for childbirth over abortion in their laws.³⁰ In response, state legislatures have attempted to impose, sometimes successfully, numerous restrictions on abortions to make them more difficult to obtain than other medical procedures.³¹ Courts strike down these laws when they clearly restrict abortions throughout the pregnancy that are necessary to preserve the life or health of the pregnant woman.³² Courts have also struck down laws that restrict abortions prior to viability, when the restriction does not promote maternal health or conflicts with women's privacy rights to make their own decisions about whether and when to have children.³³ However, the U.S. Supreme Court has

24. *Id.*

25. *Id.*

26. See *id.* at 163-64.

27. See *id.*

28. 505 U.S. 833 (1992).

29. See *id.* at 876 (holding that the state can regulate abortion as long as it does not place a substantial burden on a woman's ability to have an abortion prior to viability).

30. See *id.* at 878.

31. See *Planned Parenthood v. Miller*, 63 F.3d. 1452, 1460, 1463 (8th Cir. 1995) (holding unconstitutional parental notification provisions, a criminal penalty provision, and a civil penalty provision of a South Dakota abortion statute), cert. denied sub nom, *Janklow v. Planned Parenthood*, 116 S. Ct. 1582 (1996); *Fargo Women's Med. Org. v. Schafer*, 18 F.3d 526, 533-35 (8th Cir. 1994) (upholding the constitutionality of informed consent provisions, a 24-hour waiting period, and the definition of "medical emergency" in a North Dakota abortion statute).

32. See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1060 (S.D. Ohio 1995), *aff'd*, Nos. 96-3157, 96-3159, 1997 WL 713520, at *1 (6th Cir. Nov. 18, 1997) (holding unconstitutional an Ohio statute that only permitted post-viability abortions to be performed to prevent the pregnant woman's death or injury to a major bodily function, but not for abortions performed to preserve the pregnant woman's general health); *Evans v. Kelly*, 1997 WL 471906 at *37 (E.D. Mich. July 31, 1997) (enjoining a Michigan statute that banned partial birth abortion); *Planned Parenthood v. Woods*, No. 97-385, (D. Ariz. Oct. 24, 1997) (enjoining an Arizona statute criminalizing partial birth abortion).

33. See *Casey*, 505 U.S. at 893-94 (striking down a Pennsylvania spousal consent requirement in abortion procedures); *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1113 (5th Cir. 1997) (holding unconstitutional a Louisiana parental consent law because it did not impose specific time limits for judicial bypass proceedings and failed to require that

approved carefully crafted state laws that require a brief waiting period prior to obtaining an abortion, detailed informed consent procedures, and parental consent for minors' abortions.³⁴ The Supreme Court has also approved a federal prohibition on the use of Medicaid funds to reimburse indigents for the costs of abortions³⁵ and a statutory ban on the use of public employees and facilities for abortions not performed to save the life of the pregnant woman.³⁶ However, the Court has not retreated from the holding in *Roe* that states cannot restrict abortion after viability when continuing a pregnancy would endanger the mother's health or life,³⁷ or prior to viability when the restriction is not reasonably related to maternal health.³⁸

III. A BRIEF SUMMARY OF PRIVACY RIGHTS AS APPLIED TO ABORTION UNDER THE FLORIDA CONSTITUTION

The Tenth Amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³⁹ The Ninth Amendment to the U.S. Constitution provides, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴⁰ Thus, under the Tenth Amendment, state constitutions may contain a wide variety of provisions that will be deemed valid as long as they do not exceed the few restrictions the U.S. Constitution imposes on the exercise of governmental powers.⁴¹ The Ninth Amendment makes it clear that citizens' rights are not limited to the ones defined and specifically included in the U.S. Constitution.⁴²

judges must authorize abortions for minors who were found to be mature or when an abortion would be in the minors' best interest).

34. See *Casey*, 505 U.S. at 887, 899.

35. See *Harris v. McRae*, 448 U.S. 297, 324 (1980).

36. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989).

37. See *Casey*, 505 U.S. at 872, 880 (citing *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

38. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 77-79 (1976) (striking down a Missouri statute that banned saline induction abortions after the first 12 weeks of pregnancy), partially overruled by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (overruling the holding that provisions of an abortion law requiring informed consent and a 24-hour waiting period were unconstitutional).

39. U.S. CONST. amend. X.

40. *Id.* amend. IX.

41. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (holding that a state may adopt reasonable restrictions on private property in a state constitution if the restrictions do not violate the U.S. Constitution); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800 (1995) (holding that states cannot impose additional qualifications required for candidates to serve in the U.S. Congress than are already established in the U.S. Constitution); *United States v. Darby*, 312 U.S. 100, 124 (1941) (holding that Congress can exclude from interstate commerce goods that have been manufactured in a way that damages citizens' welfare).

42. See *Casey*, 505 U.S. at 998.

The U.S. Supreme Court clarified that, through the Fourteenth Amendment, states are not permitted to infringe or violate the individual rights of citizens established under the U.S. Constitution.⁴³ In combination with the Ninth and Tenth Amendments, this requirement provides the foundation for the principle that states may not provide lesser or fewer protections of the individual rights already identified in the federal Constitution, but state constitutions are clearly authorized to provide additional rights or greater protections of federal rights.⁴⁴

In *In re T.W.*,⁴⁵ the Florida Supreme Court explained this principle:

The Court, however, has made it clear that the states, not the federal government, are the final guarantors of personal privacy: "But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."⁴⁶

Thus, article I, section 23 of the Florida Constitution, the "privacy amendment," extends more protection to individual privacy interests than does the federal Constitution.⁴⁷

The difference in force and function between state and federal protection of rights addresses the impropriety of relying on U.S. Supreme Court cases, such as *Casey*, as the ultimate and binding authority to follow when determining whether state abortion restrictions meet state constitutional requirements. The U.S. Supreme Court's interpretation of the extent to which a state is prohibited from interfering with, infringing upon, or violating similar federal

43. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

44. See *Pruneyard*, 447 U.S. at 81; *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992) (explaining that courts must first evaluate whether the admission of the defendant's confession as evidence violated the state constitution before evaluating whether it violated the federal Constitution); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Rachel E. Fugate, *Comment, The Florida Constitution: Still Champion of Citizens' Rights?*, 25 FLA. ST. U. L. REV. 87 (1997).

45. 551 So. 2d 1186 (Fla. 1989).

46. See *id.* at 1191 (quoting *Katz v. United States*, 389 U.S. 347 (1967)) (footnotes omitted).

47. See *id.*

Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Id. at 1191-92 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985)).

constitutional rights is merely a base line beneath which no state may fall.⁴⁸

Therefore, as long as the state's protections do not fall below those afforded by the U.S. Constitution, the standard applied when testing whether an individual's state constitutional rights have been violated is the standard established by that state's supreme court.⁴⁹ The Florida Supreme Court has long rejected restricting the protection of individuals' state constitutional rights only to the same degree of protection provided by their federal counterparts.⁵⁰ For example, twenty-five years ago, just before *Roe* was decided, in a case successfully challenging Florida's statute making it a felony for doctors to perform abortions except where necessary to protect the pregnant woman's life, the Florida Supreme Court noted that:

"State courts are not bound to follow a decision of a federal court, even the United States Supreme Court, dealing with state law. Thus a state court is not bound to follow a decision of a federal court, even the United States Supreme Court, construing the constitution or a statute of that state."⁵¹

Despite the clear message that Florida's constitutional protection of privacy rights related to abortion is even stronger than the protection provided by the federal Constitution, the Florida Legislature attempted to restrict these rights by enacting a new law in 1988 requiring parental consent or a court order for minors' abortions.⁵²

A. In re T.W. and the Parental Consent Law

Florida's Parental Consent Law went into effect on October 1, 1988.⁵³ It was temporarily enjoined by the United States District Court for the Middle District of Florida on October 6, 1988, because it failed to provide procedural protections for minors seeking to use the law's judicial consent bypass.⁵⁴ The Florida Supreme Court promulgated rules pursuant to the Parental Consent Law in order to ensure that the judicial bypass proceedings were conducted confi-

48. See Traylor, 596 So. 2d at 962 ("In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.") (citation omitted).

49. See *id.*

50. See *State v. Barquet*, 262 So. 2d 431, 435 (Fla. 1972). But see *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997) (holding that the Florida Constitution does not impose greater restrictions on law enforcement than those required by the U.S. Constitution).

51. *Barquet*, 262 So. 2d at 435 (quoting 20 AM. JUR. 2D Courts § 225 (1964)).

52. See FLA. STAT. § 390.001(4)(a) (Supp. 1988), repealed by Act effective May 30, 1991, ch. 91-223, § 6, 1991 Fla. Laws 2166.

53. See Act effective Oct. 1, 1988, ch. 88-97, § 6, 1988 Fla. Laws 460, 462-63 (amending FLA. STAT. § 390.001(4)(a) (1987)).

54. See *Jacksonville Clergy Consultation Serv., Inc. v. Martinez*, 696 F. Supp. 1445, 1448 (M.D. Fla. 1988), order dissolved, 707 F. Supp. 1301, 1304 (M.D. Fla. 1989).

dentially and expeditiously.⁵⁵ Thereafter, the district court granted the state's motion to dissolve the injunction on February 13, 1989.⁵⁶ The Plaintiffs appealed to the Eleventh Circuit, but by then the law was in effect.

In 1989, a minor in central Florida petitioned the circuit court for an order allowing her to have an abortion without her parent's consent.⁵⁷ Within forty-eight hours, the court found the law unconstitutionally vague and the young woman too immature to consent.⁵⁸ Despite holding the consent requirement unconstitutional, the judge refused to grant an order allowing her to proceed with the abortion without obtaining parental consent.⁵⁹ On May 12, 1989, the Fifth District Court of Appeal vacated the circuit court's order, allowing the minor to proceed with the abortion.⁶⁰ The Florida Supreme Court granted a stay of the Fifth District's mandate again postponing the abortion, but vacated the stay four days later. The court set *In re T.W.* for oral argument in September 1989 to determine the constitutionality of the parental consent law.⁶¹ Only a few hours after the Florida Supreme Court dissolved the stay, U.S. Supreme Court Justice Anthony Kennedy issued an order, once again blocking the young woman's ability to have an abortion.⁶² The U.S. Supreme Court set aside Justice Kennedy's order the following day.⁶³ This paved the way for the young woman to finally have the abortion.⁶⁴

At the same time, *Webster v. Reproductive Health Services*⁶⁵ was pending in the U.S. Supreme Court. One of the issues addressed in *Webster* was whether or not a state could constitutionally declare that life begins at conception.⁶⁶ New appointments to the U.S. Supreme Court led people to believe the courts would be more conser-

55. See *In re Emergency Amendments to Rules of Civil Procedure and Rules of Appellate Procedure*, 536 So. 2d 198, 198 (Fla. 1988); FLA. STAT. § 390.001(4)(a)(3) (Supp. 1988) ("The Supreme Court may promulgate any rules it considers necessary to ensure that proceedings brought pursuant to this paragraph are handled expeditiously and are kept confidential.").

56. See *Jacksonville Clergy*, 707 F. Supp. at 1304.

57. See *In re T.W.*, 543 So. 2d 837, 838 (Fla. 5th DCA), *aff'd*, 551 So. 2d 1186 (Fla. 1989).

58. See *id.* at 841.

59. See *id.*

60. See *id.* at 842.

61. See Stephen Koff, *Justice Kennedy Says No to Florida Teen's Abortion*, ST. PETE. TIMES, May 17, 1989, at A1.

62. See *id.*

63. See Ruth Marcus, *Court Clears Way for Teen-Ager's Abortion*, WASH. POST, May 19, 1989, at A7.

64. See *id.*

65. 492 U.S. 490 (1989).

66. See *id.* at 506.

vative on this issue.⁶⁷ Abortion opponents touted Webster as the case that would overturn Roe.⁶⁸

Florida's anti-abortion Governor, Robert Martinez, was more than ready to take advantage of this possible good fortune. Following the close of the 1989 Regular Session and prior to the Webster decision, Governor Martinez called a special legislative session for mid-October to consider implementing additional restrictions on abortion.⁶⁹ While the decision in *In re T.W.* was pending and after Governor Martinez called for the special session, the U.S. Supreme Court decided Webster.

B. The Effect of Webster on *In re T.W.*

The Webster decision disappointed both supporters and opponents of abortion rights.⁷⁰ Although the Court in Webster allowed Missouri to make the statement that life begins at conception, the Court prohibited the state from making abortion illegal.⁷¹ The plurality decision retreated from the trimester framework established in *Roe* by upholding a Missouri statute requiring physicians to determine whether a fetus is viable prior to performing an abortion if the physician suspects the woman to be twenty weeks pregnant or more.⁷² However, the plurality in Webster failed to clearly articulate what standard would replace the trimester framework.⁷³

All of the briefs had been filed and the oral argument had been held in *In re T.W.* before the Webster decision was issued. As a result, the Florida Supreme Court ordered all parties to submit supplemental briefs on the effect of Webster on *In re T.W.* and Florida abortion

67. Justice Antonin Scalia, a conservative, was appointed to the court by President Ronald Reagan in 1986 to replace the seat left vacant by the resignation of Warren E. Burger. See Ruth Marcus, Rehnquist, Scalia Take Their Oaths; Reagan Lauds Burger at Retirement, *WASH. POST*, June 19, 1986, at A14. Justice Anthony M. Kennedy, a moderate conservative, was appointed by Ronald Reagan to replace the seat vacated by Lewis F. Powell, Jr. See Al Kamen, Kennedy Confirmed, 97-0; Senate Approves Supreme Court Nomination, *WASH. POST*, Feb. 4, 1988, at A1.

68. See Andrea Sachs, Abortion on the Ropes: Is the Historic *Roe v. Wade* Ruling About to Be Overturned?, *TIME*, Dec. 1988, at 58.

69. See Proclamation of Governor Martinez (July 25, 1989) (available at Fla. Dep't of State, Div. of Archives, ser. 13, carton 40, Tallahassee, Fla.); see also Tim Nickens, Capitol Set for Abortion Throng, *ST. PETE. TIMES*, July 28, 1989, at B6.

70. See Robert Post, Webster's Chaotic Aftermath, *L.A. TIMES*, July 6, 1989, § 2, at 7 (detailing the negative impact the decision could have on the pro-choice movement); Ford Fessenden et al., The Abortion Decision Foes Elated by Ruling, *NEWSDAY*, July 4, 1989, at 5.; Ethan Bronner, Ruling in Missouri Case, Narrows *Roe v. Wade*, *BOSTON GLOBE*, July 4, 1989, at 1.

71. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 506 (1989).

72. See *id.* at 519.

73. In Webster, two restrictions were approved. One allowed public medical facilities to refuse to perform abortions unless necessary to save a woman's life. See *id.* at 507. The other required extensive medical tests to determine whether a fetus was viable prior to performing an abortion after 20 weeks gestation. See *id.* at 519-20.

laws. On October 5, 1989, less than two weeks before the special legislative session was to begin, the Florida Supreme Court issued its decision. In sum, the majority decided that the privacy rights provision of the Florida Constitution⁷⁴ protected decisions relating to reproduction more broadly than the federal Constitution.⁷⁵ Therefore, the court invalidated the parental consent law.⁷⁶

After many committee meetings, much marching, and media coverage, the special session of the Florida Legislature convened that October. There were numerous bills pending that would have restricted abortion in various and sundry ways.⁷⁷ After two days of debate, each bill was voted down in committee.⁷⁸ The senators and representatives left Tallahassee without passing a single one.⁷⁹

Abortion law in Florida remained unchanged and continues to follow *Roe*.⁸⁰ Abortion during the third trimester is illegal unless an abortion is necessary to save the life or preserve the health of the pregnant woman.⁸¹ Prior to the third trimester, only laws necessary to protect the health of pregnant women and that do not interfere with a woman's right to choose to have an abortion will be considered valid.⁸²

Since 1989, the Legislature has sought to restrict abortion rights in various ways, but until the passage of the Woman's Right-To-Know Act in 1997, each attempt failed to become law.⁸³ In addition to the Woman's Right-To-Know Act, the 1997 Legislature sought to impose several other restrictions on abortion. Although these efforts were unsuccessful in 1997, House Bill 1701 will be carried over to the 1998 legislative session, pursuant to House Rule 96.⁸⁴ Others will be offered again by legislators.

74. See FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.")

75. See *In re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989).

76. See *id.* at 1194-95.

77. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1989 SPECIAL SESSION C, HISTORY OF SENATE BILLS at 839, SB 3-C, SB 4-C, SB 9-C, SB 10-C, SB 11-C, SB 13-C; *id.*, HISTORY OF HOUSE BILLS at 840-42, HB 4-C, HB 5-C, HB 9-C, HB 10-C, HB 17-C, HB 18-C, HB 19-C, HB 20-C, HB 21-C, HB 27-C, HB 28-C, HB 29-C, HB 30-C, HB 32-C, HB 34-C.

78. See *id.*

79. See Diane Rado et al., Lawmakers Reject Abortion Limits, ST. PETE. TIMES, Oct. 12, 1989, at A1.

80. See *In re T.W.*, 551 So. 2d at 1191-93 (explaining that the Florida Constitution protects the right to privacy more broadly than the federal Constitution).

81. See FLA. STAT. § 390.0111(4) (1997).

82. See *In re T.W.*, 551 So. 2d at 1189.

83. See *supra* notes 8-12 and accompanying text.

84. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 310, HB 1701.

IV. ATTEMPTS TO RESTRICT ABORTION BY THE 1997 FLORIDA LEGISLATURE

A. The Abortion Method Ban Bill

The "Abortion Method Ban Bill,"⁸⁵ also known as the Partial-Birth Abortion Bill, prohibited abortions where the physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery."⁸⁶ The Governor vetoed the Abortion Method Ban Bill on May 23, 1997.⁸⁷ If the legislation had become law, a person performing such an abortion would have committed a third-degree felony and would have been subject to civil liability.⁸⁸ The only exception would have been when a "partial-birth abortion" was "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, provided that no other medical procedure would suffice for that purpose."⁸⁹

The medical terms for these forms of abortion are dilation and evacuation (D&E) or dilation and intact extraction (D&X). Second and third trimester abortions comprise only a very small percentage of all abortions performed.⁹⁰ D&E and D&X are often used in second or third trimester abortions because they are the safest methods available for particular patients, and they are the methods most likely to assure women's future fertility.⁹¹ The D&X procedure is less invasive than other abortion procedures and, therefore, poses a lower risk to maternal health.⁹² The American College of Obstetricians and

85. Fla. CS for HB 1227 (1997) (substituted for Fla. CS for SB 1398 (1997)).

86. Fla. CS for HB 1227, § 1(5) (1997) (proposed amendment to FLA. STAT. § 390.011 (1995)).

87. See Veto of Fla. CS for HB 1227 (1997) (letter from Gov. Chiles to Sec'y of State Sandra Mortham, May 23, 1997) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.).

88. See Fla. CS for HB 1227, § 2(11)(a), (12) (1997) (proposed amendment to FLA. STAT. § 390.001 (1995)).

89. *Id.* § 2(6)(c). This is not the first attempt by a state to restrict abortion by banning a particular procedure. In 1976, before dilation and evacuation or dilation and intact extraction methods were available, the U.S. Supreme Court found a Missouri statute prohibiting saline induction abortions unconstitutional. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 76-79 (1976), partially overruled by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). No cases have placed this precedent in question.

90. See Michelle Roman, *The Partial-Birth Abortion Ban Act and the Undue Burden It Places on Women's Right to an Abortion: The Controversy over D&E, Dilation and Extraction*, 18 *WOMEN'S RTS. L. REP.* 381, 381 (1997).

91. See *Women's Med. Profl Corp. v. Voinovich*, 911 F. Supp. 1051, 1070-71 (S.D. Ohio 1995), *aff'd*, Nos. 96-3157, 96-3159, 1997 WL 713520, at *1 (6th Cir. Nov. 18, 1997).

92. See *id.* at 1070-71. The court found D&X was safer than fluid induction, D&E, hysterotomy, and hysterectomy. See *id.* at 1070. In comparing the D&X procedure to D&E, which was not banned, the court explained, "it does not require sharp instruments to be inserted into the uterus with the same frequency or extent [] and does not pose the same degree of risk of uterine and cervical lacerations, due to the reduced use of forceps in the uterus." *Id.*

Gynecologists advises against the use of hysterotomy⁹³ and hysterectomy⁹⁴ “because of their prohibitively high mortality and morbidity.”⁹⁵ Fluid induction abortions, such as saline, also have several contraindications, such as when a woman has hypertension or asthma.⁹⁶ Nevertheless, anti-abortion groups have painted D&X abortions as especially cruel and gruesome.⁹⁷

1. Void-For-Vagueness

The Abortion Method Ban Bill would have prohibited most, if not all, D&X and D&E procedures whether performed before or after viability.⁹⁸ The Legislature did not define “living fetus” as opposed to “viable fetus.”⁹⁹ This is clearly an effort to propagate the misconception that, short of a stillbirth, all fetuses are capable of life outside the womb. The fact that the language chosen by the bill’s drafters is intentionally emotionally charged, rather than technically correct, it is also unconstitutionally vague.

The term “partial birth abortion” is ambiguous. In *Planned Parenthood v. Woods*,¹⁰⁰ the court enjoined a Partial Birth Abortion Act because the court found the definition of “partial birth abortion,” which was similar to Florida’s definition, to be susceptible to various interpretations.¹⁰¹ The court held that the Act failed to sufficiently define the conduct it proscribed.¹⁰²

Furthermore, the phrase “necessary to save the life of the mother” is also ambiguous.¹⁰³ In *State v. Barquet*,¹⁰⁴ the Florida Supreme

93. Hysterotomy is basically a Caesarean section performed before term. An alternative to D&X, it is “potentially more dangerous because the uterus is thicker than it is at the end of term, and the incision causes more bleeding and may make future pregnancies more difficult. . . . Both of these methods entail the risks associated with major surgical procedures, and are rarely used today.” *Id.* at 1068.

94. Hysterectomy is more extreme than D&X because it requires the removal of the uterus through major surgery and results in total inability to bear children. See *id.*

95. *Methods of Midtrimester Abortion*, ACOG TECHNICAL BULL. (American College of Obstetricians and Gynecologists, Wash., DC), Oct. 1987, at 2.

96. See *id.*

97. See, e.g., Melissa Healy, *Senate Upholds Veto of Late-Term Abortion Ban*, L.A. TIMES, Sept. 27, 1996, at A13.

98. See Fla. CS for HB 1227, § 2(6) (1997) (proposed amendment to FLA. STAT. § 390.001 (1995)).

99. “‘Partial-birth abortion’ means a termination of pregnancy in which the physician performing the termination of pregnancy partially vaginally delivers a living fetus before killing the fetus and completing the delivery.” *Id.* § 1(5) (emphasis added).

100. No. 97-385 (D. Ariz. Oct. 24, 1997).

101. See *id.* at 22 (quoting the definition of “partial birth abortion” as “partially vaginally delivering a fetus before killing the fetus”). The defendants admitted the term “partial birth abortion” is not used in any medical text or treatise. See *id.*

102. See *id.*

103. See Fla. CS for HB 1227, § 2(6)(c) (1997) (proposed amendment to FLA. STAT. § 390.001 (1995)).

104. 262 So. 2d 431 (Fla. 1972).

Court held that a state statute restricting abortions to instances that are "necessary to preserve the life of [the] mother" is unconstitutionally vague and violates the Fourteenth Amendment of the U.S. Constitution.¹⁰⁵ The Court explained that the treating physician was at risk of being charged with a felony if he erroneously interpreted the language of the statute.¹⁰⁶ The court warned, "[t]his is precisely the kind of situation that the void-for-vagueness doctrine is intended to prevent."¹⁰⁷

2. Failure to Protect Maternal Health

The most obvious constitutional violation is the failure of these bills to permit this form of abortion under circumstances where necessary to preserve the life of the pregnant woman for reasons other than the ones listed in the bill, or where necessary to preserve her health.¹⁰⁸

The Florida Supreme Court has explained the importance of protecting women's health when crafting abortion laws. To be valid, abortion restrictions must protect the women's right to privacy in the first trimester, maternal health in the second and third trimester, and balance between the potential life of the fetus and the health of the pregnant woman in the third trimester.¹⁰⁹ The state's interest in maternal health is compelling after the first trimester, and the state's interest in the life of the fetus is compelling upon viability, when the fetus can potentially sustain a meaningful life outside of the womb, generally after the second trimester.¹¹⁰

105. *Id.* at 435.

106. See *id.* (noting that the treating physician could have been subject to a homicide charge if he failed to proceed with the abortion and the mother died, or up to seven years imprisonment if the pregnant woman did not die).

107. *Id.*

108. See Fla. CS for HB 1227, § 2(6)(c) (1997) (proposed amendment to FLA. STAT. § 390.001 (1995)).

109. See *In re T.W.*, 551 So. 2d 1186, 1193-94 (Fla. 1989).

110. See *id.* Abortion rights supporters generally agree that after viability there must be a compelling reason for a woman to terminate a pregnancy and this reason must relate to the woman's life or her continued physical well-being. The Florida Supreme Court defined viability in *In re T.W.* as occurring "at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures." *Id.* at 1194. The court continued, "Until this point, the fetus is a highly specialized set of cells that is entirely dependent upon the mother for sustenance. No other member of society can provide this nourishment. The mother and fetus are so inextricably intertwined that their interests can be said to coincide." *Id.*

There is a distinction between whether a fetus can be viable outside the mother's body and whether it can survive outside the mother's body. It is generally accepted in the medical community that less than 40% of fetuses born preterm survive at less than 23 weeks. See Estelle B. Gauda & Christine A. Gleason, *Neonatology*, 275 *JAMA* 1823, 1824 (1996). Most of these surviving infants suffer significant disabilities, such as mental retardation, cerebral palsy, hearing loss, and visual impairment. See *id.*

Federal courts have also applied the standard that the promotion of maternal health is an appropriate justification for regulations in the second trimester. In *Roe*, the Court recognized that the state has "important and legitimate" interests in protecting maternal health, and in the potential human life. During the second trimester, the State "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."¹¹¹

The Abortion Method Ban Bill failed to accommodate the need for an abortion where the health of the mother was at stake. Thus, the bill was unconstitutional. The U.S. Supreme Court in *Casey* held that a state must not proscribe abortion when continuing a pregnancy would endanger the mother's health or life.¹¹² Laws very similar to the Abortion Method Ban Bill were enjoined in Arizona and Ohio and held unconstitutional by the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan for being vague and overbroad in their definitions of the prohibited procedure, and for failing to protect maternal health.¹¹³

The Committee Substitute for House Bill 1227 was passed by the House by a vote of 84 to 31.¹¹⁴ It was passed by the Senate by a vote of 28 to 9.¹¹⁵ On May 23, 1997, however, Governor Lawton Chiles vetoed the legislation, citing its failure to provide an exception for the health of the pregnant woman.¹¹⁶

111. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 (1989) (quoting *Roe v. Wade*, 410 U.S. 113, 164 (1973)).

112. See *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992). The Court has also struck down a statutory ban on saline amniocentesis abortions because the ban forced women to terminate their pregnancies through procedures that were considerably more dangerous to their health than the banned procedure. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 78 (1976).

113. See *Planned Parenthood v. Woods*, No. 97-385 (D. Ariz. Oct. 24, 1997); *Women's Med. Prof'l Corp. v. Voinovich*, Nos. 96-3157, 96-3159, 1997 WL 713520, at *1 (6th Cir. Nov. 18, 1997), aff'g 911 F. Supp. 1051, 1057 (S.D. Ohio 1995); *Evans v. Kelly*, 1997 WL 471906 at *37 (E.D. Mich. July 31, 1997).

In December 1995, a federal district court in Ohio granted an injunction against an Ohio law that was even narrower than the Florida bill. See *Voinovich*, 911 F. Supp. at 1057, 1092, aff'd, Nos. 96-3157, 96-3159, 1997 WL 713520, at *1 (6th Cir. Nov. 18, 1997). The Ohio bill created two separate bans. See *id.* at 1057. The first banned the use of the D&X procedure in all abortions performed before viability. See *id.* The bill also banned all D&X abortions performed after viability except where performed to save the life of the pregnant woman or to avoid serious risk of substantial damage to a major bodily function. See *id.* The United States Court of Appeals for the Sixth Circuit affirmed the injunction and found the law unconstitutional. See *Women's Med. Prof'l Corp. v. Voinovich*, Nos. 96-3157, 96-3159, 1997 WL 713520, at *1 (6th Cir. Nov. 18, 1997).

114. See FLA. H.R. JOUR. 1095 (Reg. Sess. Apr. 28, 1997).

115. See FLA. S. JOUR. 1148 (Reg. Sess. May 1, 1997).

116. See Veto of Fla. CS for HB 1227 (1997) (letter from Gov. Chiles to Sec'y of State Sandra Mortham, May 23, 1997) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.). The Florida Legislature failed to take up the vetoed legislation for an override vote

B. Restricting Coverage for Abortion by Private Insurance Companies

During the 1997 Regular Session, Representative Mark Flanagan¹¹⁷ and Senator John Grant¹¹⁸ introduced House Bill 1701 and Senate Bill 2304, respectively. House Bill 1701 has been carried over to the 1998 session pursuant to House Rule 96.¹¹⁹ Senate Bill 2304 died in the Committee on Banking and Insurance on May 2, 1997.¹²⁰ If House Bill 1701 were to pass, the legislation would usurp a doctor's authority to determine when an abortion is medically necessary under certain private health insurance plans.¹²¹ For coverage under a small employer standard or basic health benefit plan, the bill defines a "termination of pregnancy" as "medically necessary" only when "necessary to save the life of the mother."¹²² The standard and basic health benefits plans must cover all medically necessary procedures, including inpatient hospitalization and outpatient services for "induced abortions and related procedures" unless "performed to save the life of the mother."¹²³ This excludes coverage of any hospitalization required to treat complications from a legal, outpatient abortion, such as a hemorrhage, unless the medical care is necessary to save the pregnant woman's life.¹²⁴

Restrictions such as these influence and interfere with the ability of women, their families, and other loved ones in making what are clearly very private decisions about whether and when to have children. The fact that some may be able to afford an abortion without insurance reimbursement does not detract from the fact that this bill

during the Special Session held November 3-7, 1997, and is now precluded from overriding the veto. See FLA. CONST. art. III, § 8(b).

117. Repub., Bradenton.

118. Repub., Tampa.

119. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 310, HB 1701.

120. The Senate does not have a carry-over provision in its rules. If the Senate sponsor wishes to pursue this issue, the bill must be refiled.

121. See Fla. HB 1701 (1997) (proposed amendment to FLA. STAT. § 627.6699 (Supp. 1996)).

The standard health benefit plan shall include:

a. Coverage for inpatient hospitalization, except coverage for inpatient hospital care for induced abortions and related procedures is required only when such services are medically necessary to save the life of the mother;

b. Coverage for outpatient services, but such coverage is required for induced abortions and related procedures only when such services are necessary to save the life of the mother;

c. Coverage for newborn children pursuant to s. 627.6575;

Id. § 1(12)(b)(4)(a)-(c). "Medically necessary" means, for purposes of covering procedures related to termination of pregnancy, those procedures and accompanying services necessary to save the life of the mother." Id. § 1(3)(m).

122. Id. § 1(3)(m).

123. Id. § 1(12)(b)(4)(a)-(b) (emphasis added).

124. See id.

would provide a government incentive to insurance companies to make terminating a pregnancy more costly than carrying a pregnancy to term. The bill would impose administrative burdens on companies wishing to include coverage for abortion in circumstances that are not life threatening, but are medically necessary.

Twelve other states have struck similar restrictions as violative of privacy rights and equal protection.¹²⁵ In Florida, a lawsuit on related restrictions is pending in the Second Judicial Circuit in Leon County, Florida, challenging the prohibition against Medicaid funding for abortion unless it is necessary to preserve the life of the woman or if the pregnancy was the result of rape or incest.¹²⁶ Medicaid funds all medical services for eligible indigents that are deemed "medically necessary" except for abortion.¹²⁷ "Medically necessary" services have been defined as those that are "reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of a conditions" threatening life, causing pain or suffering, or resulting in illness.¹²⁸

1. Privacy Rights

The Florida Supreme Court in *In re T.W.* discussed the privacy interests that are implicated when abortion restrictions are imposed:

The decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman. The Florida Constitution embodies the principle that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."¹²⁹

125. See *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 799 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986); *Roe v. Harris*, No. 96977 (Idaho Dist. Ct. Feb. 1, 1994); *Doe v. Wright*, No. 91 CH1959 (Ill. Cir. Ct. Dec. 2, 1994); *Moe v. Secretary of Admin. and Fin.*, 417 N.E.2d 387, 405 (Mass. 1981); *Women of Minnesota v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995); *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 940 (N.J. 1982); *New Mexico Right to Choose v. Danfelter*, No. 95-867 (N.M. Dist. Ct. July 3, 1995); *Planned Parenthood Ass'n v. Department of Human Resources*, 663 P.2d 1247, 1261 (Or. App. 1983), *aff'd*, 687 P.2d 785 (Or. 1984); *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986); *Women's Health Ctr. v. Penepinto*, 446 S.E.2d 658, 667 (W. Va. 1993).

126. See *Renee B. v. State*, No. 97-3983 (Fla. 2d Cir. Ct. filed March 8, 1995) (transferred from Palm Beach County July 21, 1997).

127. See FLA. ADMIN. CODE R. 59G-4.150(4)(a)(12), -4.160(4)(a)(5), -4.230(4)(a)(11) (1996).

128. *Orlando Gen. Hosp. v. Department of HRS*, 567 So. 2d 962, 963 (Fla. 5th DCA 1990).

129. *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986)) (emphasis added) (citations omitted).

In addition, the Florida Supreme Court has also addressed the privacy violations that result when the state interferes with medical decisions in general.

Patients do not lose their right to make decisions affecting their lives simply by entering a health care facility. . . . [A] health care provider's function is to provide medical treatment in accordance with the patient's wishes and best interests, not as a "substitute parent" supervening the wishes of a competent adult. . . . A health care provider cannot act on behalf of the State to assert the state interests in these circumstances.¹³⁰

The Florida's Constitution's stringent protections of reproductive choice require, at minimum, that the state remain neutral as to the exercise of the choice. Once the Legislature takes the steps to dis-pense funding that impacts women's constitutionally protected right to privacy, it must do so in a non-discriminatory fashion.¹³¹

2. Void-For-Vagueness

House Bill 1701 uses terms that have been consistently found un-constitutionally vague for more than twenty-five years. There is no substantive distinction between the bill's term "save the life" and the term "preserve the life" of the woman or mother.¹³² The phrase "necessary to preserve the life of the mother" was found unconstitu-tionally vague by the Florida Supreme Court.¹³³ The court in Barquet reiterated the U.S. Supreme Court's position that the words "necessary" and "preserve" are susceptible to various interpreta-tions.¹³⁴

House Bill 1701 was scheduled to be heard twice in the House Health Care Services Committee.¹³⁵ Both times the Committee de-

130. *In re Dubreuil*, 629 So. 2d 819, 823 (Fla. 1993) (holding that a patient has a con-stitutional privacy right to refuse medical treatment).

131. See *Women's Health Ctr. v. Penepinto*, 446 S.E.2d 658, 666 (W. Va. 1993); *Moe v. Secretary of Admin. and Fin.*, 417 N.E.2d 387, 402 (Mass. 1981).

132. "Medically necessary" means, for purposes of covering procedures related to the termination of pregnancy, those procedures and accompanying services necessary to save the life of the mother." Fla. HB 1701, § 1(3)(m) (1997) (proposed amendment to FLA. STAT. § 627.6699 (Supp. 1996)) (emphasis added).

133. See *State v. Barquet*, 262 So. 2d 431, 435 (Fla. 1972); see also *supra* Part IV.A.1.

134. See *Barquet* 262 So. 2d at 435 (noting that "necessary" is "a word susceptible of various meanings . . . [i]t may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought") (quoting *Doe v. Scott*, 321 F. Supp. 1385, 1388 (N.D. Ill. 1971)). The Supreme Court has held that a statute reading "necessary for the preservation of the mother's life or health" instead of "necessary to preserve the life," if applicable after viability, could be constitutional and not void due to vagueness. See *United States v. Vuitch*, 402 U.S. 62, 70-72 (1971) (recognizing that physicians must routinely decide if an operation is necessary for mental or physical health whenever surgery is considered).

135. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 309-10, HB 1701.

ferred a vote on the bill.¹³⁶ Conversely, Senate Bill 2304 was never placed on the agenda for hearing in the Banking and Insurance Committee.

C. Abortion Consent: The Woman's Right-To-Know Act

During the 1997 Regular Session, Representative Bob Brooks¹³⁷ and Senator Charles Clary¹³⁸ introduced House Bill 1205 and Senate Bill 746, respectively. The Committee Substitute for Senate Bill 746 was replaced by the Committee Substitute for House Bill 1205 on May 1, 1997,¹³⁹ and the Florida Legislature passed the bill on the same day.¹⁴⁰ On June 5, 1997, the Woman's Right-To-Know Act became law without the Governor's signature.¹⁴¹

The Woman's Right-To-Know Act requires a doctor performing abortions to provide prescribed, detailed information about abortion and its alternatives orally and in person to every patient, rather than using his or her judgment about what degree of information is appropriate for each patient and which of the office staff members would be best suited to provide this information.¹⁴² The Woman's Right-To-Know Act also requires that an abortion patient be offered printed materials, prepared by the Florida Department of Health, describing fetal development and providing information on assistance for prenatal care, delivery, and adoption services.¹⁴³

136. See *id.*

137. Repub., Winter Park.

138. Repub., Destin.

139. See FLA. S. JOUR. 1270 (Reg. Sess. May 1, 1997).

140. See Act effective July 1, 1997, ch. 97-151, 1997 Fla. Laws 2501 (amending FLA. STAT. ch. 390 (1995 & Supp. 1996)).

141. See Press Release from Exec. Office of the Gov., Gov. Lawton Chiles (May 23, 1997) (explaining the reasons for allowing the Woman's Right-To-Know Act to become law without his signature) (on file with the Exec. Office of the Gov., Tallahassee, Fla.).

142. See FLA. STAT. § 390.0111(3)(a)-(c) (1997):

(a) Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

1. The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of:

a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.

b. The probable gestational age of the fetus at the time the termination of pregnancy is to be performed.

c. The medical risks to the woman and fetus of carrying the pregnancy to term.

Id.

143. See *id.* § 390.0111(3)(a)(2):

a. Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

....

2. Printed materials prepared and provided by the department have been provided to the pregnant woman, if she chooses to view these materials, including:

On July 2, 1997, the Woman's Right-to-Know Act was temporarily enjoined by the Fifteenth Judicial Circuit in Palm Beach County, Florida.¹⁴⁴ The court found:

[W]omen seeking to terminate pregnancies will be subjected to inaccurate and/or misleading information, be subjected to costly (both in time and emotion) delays waiting for physicians to personally, orally give the information required, and suffer needless emotional stress in receiving needless information in cases where a medical necessity (i.e. miscarriage) has mandated the termination of pregnancy.¹⁴⁵

The Woman's Right-To-Know Act imposes a substantial burden on a woman's right to choose to have an abortion. Because the information required to be disseminated is misleading and emotionally charged, it could effectively dissuade some women from terminating their pregnancies, even when carrying the pregnancies to term may effect their health in a variety of ways, and perhaps even their lives.

The Florida Supreme Court has forbidden the state from expressing a preference for childbirth over abortion, especially in the first trimester of pregnancy. In *In re T.W.*, the court said, "The state must prove that the statute furthers a compelling state interest through the least intensive means. Under Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state."¹⁴⁶ The state has articulated no risk to women's health requiring this prescribed consent procedure or any other compelling reason to dictate the informed consent process for abortion. Moreover, the state does not require this provision of information in any other medical situation. Because the Woman's Right-To-Know Act applies at any point in a pregnancy, it clearly and improperly applies to first trimester abortions.

1. Privacy Rights and Consent

Based on the privacy rights provision of the Florida Constitution, the Florida Supreme Court in *In re T.W.* decided that restrictions and extra regulations on abortion could not be imposed without a clear showing that they were necessary to protect the woman's

- a. A description of the fetus.
- b. A list of agencies that offer alternatives to terminating the pregnancy.
- c. Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.

Id.

144. See *Presidential Women's Ctr. v. State*, No. 97-5796 (Fla. 15th Cir. Ct. July 2, 1997) (order granting preliminary injunction), appeal docketed, No. 97-2557 (Fla. 4th DCA filed July 24, 1997).

145. Id.

146. *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (emphasis added) (citations omitted).

health and life after the first trimester.¹⁴⁷ The U.S. Supreme Court warned in *Thornburgh v. American College of Obstetricians and Gynecologists*¹⁴⁸ that “[t]he states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.”¹⁴⁹ The Florida Supreme Court has also held that a health care provider should not be forced to decide between the wishes of the state and the wishes of the patient.¹⁵⁰

Laws mandating biased counseling for abortion treat women seeking abortions as though they were less thoughtful and informed about their medical decisions than any other group of people seeking medical care. These laws require pregnant women to be given information to inflict not-so-subtle state-sanctioned pressure on women to consider the interest of the fetus above their own, even when their lives or health may be at stake. This is a blatant intrusion of government into the private relationship between a woman and her doctor. Such an intrusion constitutes the Florida Legislature practicing medicine without a license.

2. Equal Protection

More often than not, terminating a pregnancy is a difficult and sad decision, but its physical ramifications are no more important than other forms of invasive surgery. However, the Act does not mandate that a doctor thrust detailed medical information on a man advised to undergo prostate surgery.¹⁵¹ Moreover, this legislation does not require that information be provided to a woman about to experience other pregnancy-related medical procedures, such as Caesarean sections and prenatal care, despite the fact that Caesarean sections and vaginal childbirth both carry higher risks to the life and health of the woman than abortion does at any stage of the pregnancy.¹⁵²

Clearly, the Legislature seeks to dissuade abortion. Since such precise information is not required to be given to women undergoing

147. See *id.* at 1194 (striking down a parental consent statute as a violation of article I, section 23 of the Florida Constitution, which guarantees a broader privacy right than that implicated in the federal Constitution).

148. 476 U.S. 747 (1986), overruled by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

149. *Id.*

150. See *In re Dubreuil*, 629 So. 2d 819, 823 (Fla. 1993).

151. It would be absurd to pass a law requiring that informed consent for any life-saving surgery, such as an appendectomy or melanoma removal, include information on hospice care and the availability of burial alternatives if the patient should choose not to undergo the procedure.

152. See Lisa M. Koonin et al., *Pregnancy-Related Mortality Surveillance—United States, 1987-1990: Results* (visited Dec. 15, 1997) <<http://www.amaassn.org/special/contratreatment/guide/mmwr0897/preg/preg3.htm>> (information provided by the Journal of the American Medical Association).

a more risky procedure or assuming the higher risks of continuing their pregnancies,¹⁵³ this legislation is intended to discourage women from following through on the constitutionally protected right to choose to terminate pregnancy.¹⁵⁴

Even if the legislation is able to meet the U.S. Supreme Court's relaxed standards for abortion restrictions, it will not meet the more stringent standards required by the Florida Constitution. Despite the fact that the U.S. Supreme Court has upheld properly crafted parental consent requirements for minors' abortions,¹⁵⁵ the Florida Supreme Court has made it clear that such laws are unconstitutional under our state constitution unless the state has a compelling interest.¹⁵⁶

3. Void-For-Vagueness

The Woman's Right-To-Know Act violates the due process clause of the Fifth and Fourteenth Amendments to the federal Constitution because it fails to set standards for what constitutes a pregnancy that is life-threatening. Moreover, it contains apparently conflicting provisions. Due process mandates that laws provide persons subject to regulation "a reasonable opportunity to know what [conduct] is prohibited, so that [they] may act accordingly."¹⁵⁷ A statute that is punitive in nature must be sufficiently defined "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."¹⁵⁸ The Woman's Right-To-Know Act contains numerous provisions that are vague and susceptible to challenge.

In an emergency situation where it is not possible to obtain the pregnant woman's written informed consent, the physician must still

153. "Due to technological developments in second-trimester abortion procedures, the point at which abortions are safer than childbirth may have been extended into the second trimester." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989).

154. Florida law already requires informed consent of all patients undergoing medical procedures. See FLA. STAT. § 766.103 (1997). A pregnant woman seeking an abortion knows if she does not have one she will almost certainly give birth to a child and that adoption, child support, and assistance with medical care for the indigent are options.

155. See *Lambert v. Wickland*, 117 S. Ct. 1169, 1172 (1997) (Montana statute); *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992) (Pennsylvania statute); *Ohio v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 (1983) (Ohio statute).

156. See In re T.W., 551 So. 2d at 1195.

157. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

158. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); see also *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385 (1926)); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (warning that due process is violated if a statute provides no clear standard of conduct and provides enforcement authorities with the unfettered freedom to act on nothing but their own preferences and beliefs); *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 854 (Fla. 1971) ("The underlying principle is that no man shall be held responsible for conduct which he could not reasonably understand to be proscribed.").

obtain at least one corroborative medical opinion attesting to the medical necessity for the procedure and the fact that the woman's life is threatened.¹⁵⁹ The only exception states, "In the event no second physician is available for a corroborating opinion, the physician may proceed but shall document reasons for the medical necessity in the patient's medical records."¹⁶⁰

This provision threatens the life and health of women whose pregnancies are life-threatening. Physicians may act conservatively when aggressive medical measures are necessary. If a corroborating physician cannot be found, this provision does not make it clear that the physician can proceed without risk of sanction. It only makes it clear that if he or she does proceed, the medical records must distinctly document the circumstances that threatened the woman's life.

Unlike other medical procedures, the Woman's Right-To-Know Act does not allow for appropriate forms of substitute consent, such as next-of-kin consent.¹⁶¹ The only substitute consent the legislation allows is for mental incompetents who have had guardians appointed by a court.¹⁶²

In a circumstance where a competent woman is unconscious, a physician risks losing his license to practice medicine if he or she is not certain that the patient has an imminent life-threatening condition caused by the pregnancy.¹⁶³ This is true even if the pregnant woman had earlier expressed her wish to undergo the procedure in the event that circumstances arose placing her life in jeopardy, unless the physician had also provided the required consent information and obtained her written consent.

159. See FLA STAT. § 390.0111(3)(b)-(c) (1997).

(b) In the event a medical emergency exists and a physician cannot comply with the requirements for informed consent, a physician may terminate a pregnancy if he or she has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman. In the event no second physician is available for a corroborating opinion, the physician may proceed but shall document reasons for the medical necessity in the patient's records.

(c) Violation of this subsection by a physician constitutes grounds for disciplinary action under § 458.331 or § 459.015. Substantial compliance or reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under this paragraph.

Id.

160. Id.

161. See id. § 766.103.

162. See id. § 390.0111(3).

163. See id. § 390.0111(3)(c).

The dangers of the Woman's Right-To-Know Act are not cured by the inclusion of the provision stating that "[s]ubstantial compliance or a reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under this paragraph."¹⁶⁴ The bottom line is that states may not constitutionally impose restrictions on abortion if it is necessary to preserve the woman's life or health at any time during a pregnancy.¹⁶⁵ The substantial compliance or reasonable belief provision still requires an interpretation of whether the physician acted appropriately when not seeking informed consent. Knowing that a decision to proceed without informed consent may be subject to "second guessing," a physician may not proceed in a manner that is in the woman's best interest for fear of civil or criminal prosecution.

A statute may also be vague if it is subject to arbitrary and discriminatory enforcement because it fails to provide explicit standards for those applying the law. As the Court explained in *Grayned v. City of Rockford*,¹⁶⁶ a law that does not provide clear standards for those who must apply it is void-for-vagueness because it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."¹⁶⁷

The Woman's Right-To-Know Act expressly states that the physician must inform the woman of the "medical risks to the woman and fetus" of carrying the pregnancy to term.¹⁶⁸ However, the Act also requires the physician to inform the woman of the "nature and risks of undergoing or not undergoing the proposed procedure," and does not limit itself to medical risks.¹⁶⁹ The principle of statutory construction that "express mention is implied exclusion"¹⁷⁰ indicates that the Act requires that information concerning only the medical risks related to carrying a pregnancy to term be provided, but that information concerning all the risks related to abortion be provided.¹⁷¹ However, the plain meaning of the latter provision dictates that this information be broader than just the medical risks, and the legislative his-

164. *Id.*

165. See *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992).

166. 408 U.S. 104, 108 (1972).

167. *Id.* at 108-09 (footnote omitted).

168. FLA. STAT. § 390.0111(3)(a)(1)(c) (1997).

169. *Id.* § 390.0111(3)(a)(1)(a).

170. *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (construing a restaurant licensing statute); see also *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) (construing a statute establishing time bars for worker's compensation); *Moonlit Waters Apartments, Inc. v. Cauley*, 651 So. 2d 1269, 1270 (Fla. 4th DCA 1995) (construing a statute governing cooperative leaseholds).

171. See FLA. STAT. § 390.0111(3)(a)(1)(c) (1997).

tory of the Act bears this out.¹⁷² Thus, the Act is subject to a reasonable interpretation that the information provided must include, but is not limited to, financial risks, social risks, emotional risks, and educational risks. All of these areas of a woman's life are undeniably and directly affected by her decision of whether and when to have a child.

The Act provides no guidance on which of a multitude of risks of undergoing or not undergoing the proposed procedure must be discussed and which might be skipped to avoid the statutory penalties. Thus, it is impermissibly vague. It requires doctors to become proficient in fields for which they are not professionally trained as specialists, such as neonatology, genetics, pathology of fetal abnormality, theology, philosophy, religion, and bioethics.

4. First Amendment Violations

The Woman's Right-To-Know Act requires the attending physician to recite the state-prescribed information and offer state-authorized materials to the patient.¹⁷³ Because these requirements may require physicians to act against their best medical judgment and to be couriers of the state's ideological message on abortion, the Act violates a physician's right to free speech as guaranteed by the First Amendment of the United States Constitution.¹⁷⁴

The Act requires a physician to inform the woman about certain aspects of the nature of abortion and childbirth about which there is no consensus and for which a physician may not be trained. The Act requires a doctor to guess as to exactly what information is required to be provided to the patient and, if he or she speculates incorrectly, to be subject to disciplinary action.¹⁷⁵ This will have a chilling effect upon speech, deny women their constitutional rights, and deny physicians the right to speak and act as their professional training and consciences dictate.

V. CONCLUSION

No consensus exists in our society regarding the non-medical nature of abortion. Some see it as the cessation of a potential human life, but not an actual human life. Some see it as murder. Some see it as immoral. The Florida Supreme Court has described abortion as a

172. See FLA. H.R. JOUR. 1086, 1087 (Reg. Session Apr. 28, 1997).

173. See FLA. STAT. § 390.0111(3) (1997).

174. See *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943) (holding that the First Amendment right to free speech includes the right to refrain from speaking). The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." See *id.* at 637.

175. See FLA. STAT. § 390.0111(3)(c) (1997).

most basic fundamental constitutional privacy right that a person may, up to the point of viability, exercise without governmental intrusion under Florida law.

The legislation's requirement that physicians inform women about the non-medical nature of continuing pregnancies to term presents similar difficulties. For some, the nature of childbirth represents a contribution to overpopulation, to others the most glorious and remarkable event in a person's life, to others a blessed occurrence and a gift from the Almighty, to others a shameful punishment for sin or the worst crisis they have ever faced, to others an opportunity to enlarge a family, and for others the potential destruction of the family unit. In the case of a pregnancy resulting from rape or incest, the stress and emotional difficulty of discussing the nature of abortion or childbirth are greatly compounded.

Nonetheless, the Woman's Right-To-Know Act requires physicians to provide information that is "material" to a woman's decision whether or not to undergo a termination of pregnancy, no matter what her particular circumstance might entail. There are no guidelines, standards, or definitions to advise the physician in understanding how much of the pregnant woman's medical or other personal history must be known to assure the physician's compliance.

The physician could be required to be aware of all factors that might possibly cause any complications or bad outcomes during stages of the pregnancy far more advanced than the stage at which the abortion would be performed. Physicians could also be required to be aware of exceedingly rare or statistically insignificant possibilities of complications depending on the physical condition of that particular patient. Physicians could also be required to be up-to-the-minute on statistical information if or when new medical developments begin to decrease or increase risks. The Act fails to specify with clarity the physician's responsibility concerning the information he or she is required to provide if the procedure or method being used is relatively new and if the degree of risk has changed or is not statistically known.

The statistics for Florida show that 80,040 abortions were induced in 1996.¹⁷⁶ Of these abortions less than one percent, or fewer than twelve, were performed after viability. Women still die in childbirth and from pregnancies that go wrong. Sometimes this is unexpected. At other times, however, women know how high the risk is and take it anyway.

The Woman's Right-To-Know Act did not change the preferential consideration given to a woman's life and health when either of these

176. See Fla. S. Comm. on Health Care, CS for SB 1398 (1997) Staff Analysis 1 (Apr. 18, 1997) (on file with comm.).

is in conflict with the life and health of her fetus. The Florida statute says:

If a termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. . . . Notwithstanding the provisions of this subsection, the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.¹⁷⁷

This has been the law in Florida for nearly twenty years¹⁷⁸ and continues to be the law. It constitutes an appropriate recognition that the protection of an existing human should take precedence over the protection of a fetus, whether viable or unviable. This is a good balance and should not be changed.

177. FLA. STAT. § 390.0111(4) (1997) (emphasis added).

178. See Act effective July 1, 1979, ch. 79-302, § 1, 1979 Fla. Laws 1596, 1615 (codified at FLA. STAT. § 458.505(5) (1979)).