STORAGE NAME: h0583a.hcs
DATE: March 16, 2000

HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
HEALTH CARE SERVICES
ANALYSIS

BILL #: HB 583

RELATING TO: Termination of Pregnancy

SPONSOR(S): Representative Ball & others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CRIME AND PUNISHMENT YEAS 4 NAYS 2
(2) JUDICIARY YEAS 6 NAYS 1
(3) HEALTH CARE SERVICES YEAS 13 NAYS 3
(4) CRIMINAL JUSTICE APPROPRIATIONS
(5)

I. SUMMARY:

HB 583 creates the "Partial-Birth Abortion Act" which defines the crime of "partial-birth abortion" and makes it a second degree felony to intentionally kill a living fetus while the fetus is partially born. The bill provides definitions for "partially-born," "living fetus," and "suction or sharp curettage abortion." The bill provides an exception for suction or sharp curettage abortions authorized under chapter 390. Also, the bill exempts physicians taking steps necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, provided that reasonable precautions are taken to save the life of the fetus.

The crime of partial-birth abortion as defined in HB 583 would not apply to the pregnant woman. At common law, while a third party can be held criminally liable for causing injury or death to an unborn child, a pregnant woman cannot.

In addition, HB 583 authorizes any member of the Legislature who sponsored or co-sponsored the bill to intervene in any action challenging the constitutionality of the bill.

HB 583 also requires its provisions to be liberally construed to effectuate its purpose. In the event of a conflict between the bill and another provision of law, the bill requires that the provisions of this act shall govern.

Other than the constitutional challenges to the legislation, the Office of State Courts Administrator anticipates that there may be nominal fiscal impact on the state courts arising from criminal prosecutions of persons in violation of the act.

According to the Department of Corrections, there is no anticipated fiscal impact. The bill has not yet been reviewed by the Criminal Justice Estimating Conference.

The bill shall be effective on becoming law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [] No [x] N/A []

A state law prohibiting or criminalizing partial birth abortions would create state action to enforce the ban and prosecute violators.

2. Lower Taxes Yes [] No [] N/A [x]

3. Individual Freedom Yes [] No [x] N/A []

The bill criminalizes the performance of a currently legal medical procedure.

4. Personal Responsibility Yes [] No [] N/A [x]

5. Family Empowerment Yes [] No [] N/A [x]

B. PRESENT SITUATION:

Medical Description

A "partial-birth abortion" refers to a medical procedure identified by the American College of Obstetricians and Gynecologists (ACOG) as "Intact Dilation and Extraction (D&X)." According to ACOG, the procedure is defined by the following elements performed in sequence:

1. Deliberate dilation of the cervix, usually over a sequence of days;
2. Instrumental conversion of the fetus to a footling breech;
3. Breech extraction of the body excepting the head; and
4. Partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

A more general description of this procedure is as follows:

> [T]he physician pulls a lower extremity into the vagina and then uses his fingers to deliver the lower extremity and then the torso followed by the shoulders and the upper extremities. At that point, the skull is lodged at the internal cervical os. Usually the dilation is insufficient for the skull to pass through. At that point, the surgeon slides his or her fingers along the back of the fetus; uses a pair of blunt curved scissors to rupture the base of the skull; and uses a suction catheter to evacuate the contents of the skull and then applies traction to the fetus to remove it from the patient.

Richmond Medical Center For Women v. Gilmore, 144 F.3d 326, (4th Cir. 1998) citation omitted.

When abortion is performed after 16 weeks, D&X is one method of terminating a pregnancy. Other later-term procedures include dilation and evacuation (D&E), intrauterine saline instillation, prostaglandin instillation, and hysterotomies.

Proponents claim that the D&X procedure may be the safest and most medically appropriate procedure in a particular case. Opponents argue that, given the availability of alternative procedures, partial birth abortion is never medically necessary to protect a woman's health or future fertility.

The American Medical Association's (AMA) Policy on Women Physicians and Women's Health Issues issued its policy regarding late-term pregnancy termination in 1997. The policy included the following statement:

> According to the scientific literature, there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion, and ethical concerns have been raised about intact D&X. The AMA recommends that the procedure not be used unless alternative procedures pose materially greater risk to women. The physician must, however retain the discretion to make that judgment, acting within the standards of good medical practice and in the best interest of the patient.

Maternal Considerations

According to JAMA (The Journal of the American Medical Association),

> [t]here exists no credible studies on intact D&X that evaluate or attest to its safety. The procedure is not recognized in medical textbooks nor is it taught in medical schools or in obstetrics and gynecology residencies. Intact D&X poses serious medical risks to the mother. Patients who undergo an intact D&X are at risk for the potential complications associated with any surgical midtrimester termination, including hemorrage, infection, and uterine perforation...None of these risks are medically necessary because other procedures are available to physcians who deem it necessary to perform an abortion late in pregnancy. As ACOG [American College of Obstetricians and Gynecologists] policy states clearly, intact D&X is never the only procedure available.
> [*Source: JAMA, M. LeRoy Sprang, M.D., and Mark G. Neerhof, D.O., "Rationale for Banning Abortions Late in Pregnancy", Vol 280, pp. 744-747, August 26, 1998.*]

Federal Law

The United States Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) sets forth the limits that the Due Process Clause of the United States Constitution imposes on the states' ability to interfere with abortion procedures. 505 U.S. at 874. In Casey, the Court held that a state has legitimate interests in protecting the life of the fetus, however, the Court held that the following two principles are paramount:

1. A woman has a right to an abortion before viability and to obtain it without undue interference from the state.

505 U.S. at 846.

2. Subsequent to viability, the state in promoting its interest in the potentiality of human life may ... proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

505 U.S. at 879, quoting Roe v. Wade, 410 U.S. at 164-165.

Legislation that does not comply with these two principles is likely to be held unconstitutional unless the United States Supreme Court recedes from Casey.

UNDUE BURDEN

The difficulty in complying with the first principle is that the term "undue interference" is very vague. In an attempt to clarify the term, the Court equated "undue interference" or "undue burden" with a "substantial obstacle":

> An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

505 U.S. at 878.

An undue burden may exist even if a restriction applies only to a minute fraction of women who seek abortions. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. 505 U.S. at 894.

HEALTH EXCEPTION

In Casey, the Court's analysis of a health exception to various Pennsylvania statutes does shed some light on the degree of risk to a woman's health that the Court will allow before it determines that a law is invalid for violating the second principle mentioned above. The exception to the Pennsylvania laws relating to abortion was for a medical emergency which was defined as

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

505 U.S. at 879.

The court in Casey held that this exception for a medical emergency, as it was intended to be applied by the Pennsylvania Legislature, could assure that compliance with the Pennsylvania abortion regulations relating to parental consent, informed consent, and notice to the spouse[1] would not pose a significant threat to the life or health of the mother.

505 U.S. at 880.

VIABILITY

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[1] The spousal notification regulation was struck down in Casey as being an undue burden, but not on the basis of a deficiency with the definition of a "medical emergency." Casey *supra* at 895.

The joint opinion of Justices O'Connor, Kennedy, and Souter in Casey, provided the following reasons for choosing viability as the moment when the rights of the fetus may take priority over the rights of the woman:

1. Viability is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.

2. There is no line other than viability which is more workable.

3. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

4. The precedent of earlier case law should be followed.

505 U.S. at 870.

State Actions

Currently, a total of 30 states have bans on "partial-birth abortions."[2] Of these states, 10 states have bans in effect.[3] Two states have bans in effect with limited enforcement, and 18 states have bans which are blocked by state or federal court.[4] According to a National Abortion and Reproductive Rights Action League Fact Sheet,

> In issuing these orders, courts have concluded that these bans are constitutionally deficient for three main reasons: (1) the bans constitute an undue burden on women seeking pre-viability abortions; (2) the bans fail to provide an adequate exception when necessary to protect a woman's health; and (3) the bans are unconstitutionally vague.

In 1995, the State of Ohio was one of the first to adopt a partial birth abortion ban. The Ohio statute provided: "No person shall knowingly perform or attempt to perform a dilation and extraction ("D&X") procedure upon a pregnant woman." The Ohio statute provided that it is an affirmative defense for a doctor to show that all other available abortion procedures would have posed a greater risk to the health of the pregnant woman. The Ohio statute also banned all post-viability abortions, except where necessary to prevent the pregnant woman's death, or to avoid a serious risk of substantial and irreversible impairment to a major bodily function. The statute defined D&X as:

> The termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation

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[2] Source: Alan Guttmacher Institute - http://www.agi-usa.org/pubs/abort_law_status.html 1-27-00 (the Alan Guttmacher Institute is the public policy organization established by Planned Parenthood). Some states' laws do not use the term "partial-birth abortion" but have the same intent and effect. *See*, e.g. Section 565.300, Missouri Revised Statutes.

[3] *Id*. In one of these states (Virginia), the law has been permanently blocked by a federal court, but will continue to be enforced while the matter is pending on appeal.

[4] *Id.*

> and extraction procedure" does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

OHIO REV.CODE ANN. Sec. 2919.15(B) and (A).

In Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), the federal circuit court upheld the decision of the federal district court that the Ohio ban was unconstitutional. The circuit court in Voinovich held that the banned procedure encompasses the more common "dilation and evacuation" ("D&E") procedure which typically entails dismembering the fetus, beginning with the extremities, by means of suction curettage and forceps. The Circuit court concluded:

> Because the definition of the banned procedure includes the D & E procedure, the most common method of abortion in the second trimester, the Act's prohibition on the D & X procedure has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 201.

The Circuit Court in Voinovich held that the ban on post-viability abortions was unconstitutional in part because there was not an exception where there was serious risk of the substantial and irreversible impairment of the pregnant woman's *mental health*. *Id*. at 207. The United States Supreme Court refused to review the Circuit Court's decision in Voinovich with three justices dissenting from the decision not to hear the case.

Florida Law

Under the rule commonly referred to as the "adequate and independent state ground doctrine," a federal court will not disturb a state court judgment which is based on an adequate and independent state ground, even if federal issues are present, provided the result is not violative of the federal constitution. When this occurs, federal courts are without jurisdiction to review these decisions, provided the state ground is both adequate and independent.

Unlike the U.S. Constitution, Florida's Constitution contains an express provision guaranteeing a right of privacy. [Art. I, § 23]. The Florida Supreme Court, in Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985), concluded that this provision provided a strong right of privacy not found in the United States Constitution which is much broader in scope than that of the Florida Constitution. In Winfield, the Court also provided a standard of review, holding that:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

In re T.W., 551 So.2d 1186 (1989), the Florida Supreme Court struck down a state statute requiring parental consent for a minor's abortion as violative of Florida's constitutional right

of privacy stating: “Florida’s privacy provision is clearly implicated in a woman’s decision of whether or not to continue her pregnancy.” *Id*. at 1192. Given the broader protection provided by the Florida Constitution’s express “right of privacy,” and the higher burden that the state must assume to overcome that right, a state law criminalizing the intentional killing of a living fetus while the fetus is partially born will predictably face a challenge as limiting the right of privacy of the mother.

Born Alive Doctrine

At common law, the killing of a fetus was not homicide unless the child was born alive and then died as a result of the prenatal injuries sustained. *See* Knighton v. State, 603 So.2d 71 (4th DCA. 1992); State v. Gonzalez, 467 So.2d 723 (3rd DCA 1985). Also, under common law, it would be possible to have the homicide of a nonviable fetus/child if the child was born alive and then killed after birth but before the child dies from the premature birth. *See* Knighton v. State, 603 So.2d 71 (4th DCA 1992). The common law brings into question the point during the birth process at which the fetus becomes a constitutionally protected person. A court could not reasonably assert that viability after birth is necessary in order to have a constitutionally protected person. A fetus that is not viable could live outside the mother for a substantial period of time. Viability occurs when there is "a realistic possibility of maintaining and nourishing a life outside the womb." Casey, 505 U.S. at 870. It could be difficult for a court to differentiate between a fetus that is partially born, perhaps with only the head extruding, and a fetus that is newly or 4/5ths born.

Florida Legislation

The State of Florida has previously enacted legislation criminalizing Intact D&X. CS/HB 1227 was passed during the 1997 Legislative session and subsequently vetoed by the Governor. In 1998, the veto was overridden, and the bill became law as Chapter 98-1, L.O.F. Several sections of chapter 390, F.S., were amended by chapter 98-1, L.O.F. Specifically, chapter 390, F.S., was amended to prohibit a physician from performing a "partial-birth" abortion except to save a woman whose life is physically endangered. "Partial-birth" abortion was defined to mean 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. Under chapter 390, F.S., a physician who knowingly performed such a procedure was guilty of a third degree felony and subject to a civil action by either the father and husband of the woman upon whom the procedure is performed, or the parents of the mother if she was a minor. Relief in the form of monetary damages for all psychological and physical injuries plus three times the cost of the partial-birth abortion could be awarded.

Subsequently, chapter 98-1, L.O.F., was challenged. In A Choice For Women, et al v. Robert A. Butterworth, Case No. 98-0774-CIV-GRAHAM, the plaintiffs sought declaratory and injunctive relief from the applications of the provisions of the law with the United States District Court for the Southern District of Florida. The court held that the act had the unconstitutional purpose and effect of placing "a substantial obstacle in the path of a woman seeking an abortion prior to the fetus attaining viability." Additionally, the court found the act to be void for vagueness because "it fails to define the conduct it prohibits with the required degree of certainty." The court granted the plaintiffs declaratory and permanent injunctive relief. A Notice of Appeal was filed and subsequently withdrawn; the Eleventh Circuit has now dismissed the State's appeal with prejudice.

During the 1999 Legislative session, two bills (HB 1775 and SB 1874) prohibiting partial-birth abortion were filed, but did not pass.

Recent Events

Recently, two federal appeals courts addressed the constitutionality of partial-birth abortion ban statutes which have resulted in a conflict between the federal appeals courts. In September of 1999, the Eighth Circuit Court of Appeals determined that partial-birth abortion statutes in Arkansas, Iowa, and Nebraska were unconstitutional. *See* Little Rock

Family Planning Serv., P.A., et al. v. Jegley et al. (No. 99-1004EA), slip opinion (8th Cir. Sept. 24, 1999); Carhart v. Stenberg, et al., (No. 98-3245NE, 98-3300NE), slip opinion (8th Cir. Sept. 24, 1999); and Planned Parenthood of Greater Iowa, Inc. v. Miller, (No. 99-1372SI), slip opinion (8th Cir. Sept. 24, 1999). The Court held that the statutes (the language of which varied slightly) placed an undue burden on women seeking pre-viability abortion as the statute potentially encompassed more than the banned procedure. In contrast, the Seventh Circuit Court of Appeals recently held that substantially similar partial-birth abortion ban statutes in Illinois and Wisconsin could be constitutionally applied. *See* The Hope Clinic et al. v. Ryan (No. 98-1726), slip opinion (7th Cir., Oct. 26, 1999). The two statutes in Hope Clinic are "limited" in their application to only the "medical procedure that each state insists is its sole concern." *Id*.

On January 14, 2000, the United States Supreme Court announced it will review the case of Stenberg v. Carhart, *supra*, which held Nebraska's partial-birth abortion ban statute to be unconstitutional. The U.S. Supreme will review the 8th Circuit's decision/The Nebraska statute in controversy is generally similar to most of the 30 statutes adopted by various states. The statute defines "Partial-Birth Abortion" and criminalizes the performance of it unless it is "necessary to save the life of the mother whose life is endangered by a physical disorder."[5] Oral arguments in the case could be heard as early as April, 2000.

Criminal Penalties

Chapter 782, F.S., provides, among other things, definitions for various types of homicides including: murder; attempted felony murder; manslaughter; vehicular homicide; vessel homicide; assisting in self-murder; killing of unborn child by injury to mother; and unnecessary killing to prevent an unlawful act.

Section 775.082, F.S., provides for a mandatory sentence of 15 years for a person convicted of a second degree felony.

Section 775.083, F.S., provides for a fine not to exceed $10,000, for a person convicted of a second degree felony, and allows the court to defer payment of the fine to a date certain.

Section 775.084, F.S., provides for enhanced penalties for a violent career criminal. In the case of a person convicted of a second degree felony, the term of years may not exceed 30, and the offender is not eligible for release for 10 years.

C. EFFECT OF PROPOSED CHANGES:

HB 583 creates the "Partial-Birth Abortion Act" which defines the crime of "partial-birth abortion" and makes it a second degree felony to intentionally kill a living fetus while the fetus is partially born. The bill defines "partially born" to mean when:

(1) . . . the living fetus's intact body with the entire head attached, is presented so that:
(a) There has been delivered past the mother's vaginal opening:
1. The fetus's entire head, in the case of a cephalic presentation, up until the point of complete separation from the mother whether or not the placenta has been delivered or the umbilical cord has been severed; or

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[5] Section 28-328. Partial-birth abortion; prohibition; violation; penalties. (1) No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

2. Any portion of the fetus's torso above the navel, in the case of a breech presentation, up until the point of complete separation from the mother whether or not the placenta has been delivered or the umbilical cord has been severed.

The bill also provides a definition of "partially- born" to cover partial-birth abortions performed by cesarian section.[6] The bill defines "living fetus" to mean "any unborn member of the human species who has a heartbeat or discernible spontaneous movement." The bill provides definitions for "suction or sharp curettage abortion[s]" and provides an exception for such abortions as authorized under chapter 390. Also, the bill exempts physicians taking steps necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, provided that reasonable precautions are taken to save the life of the fetus.

In addition, HB 583 authorizes any member of the Legislature who sponsored or co-sponsored the bill to intervene in any action challenging the constitutionality of the bill.

HB 583 also requires its provisions to be liberally construed to effectuate its purpose. In the event of a conflict between the bill and another provision of law, the bill requires the provisions of this act to control over the conflicting law.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Providing the title of the act as the Partial-Birth Abortion Act.

Section 2. Creating s. 782.32, F.S., providing definitions.

Section 3. Creating s. 782.34, F.S., creating the crime of Partial-Birth Abortion.

Section 4. Creating s. 782.36, F.S., creating exceptions to the crime of Partial-Birth Abortion.

Section 5. Creating a right to intervene in legal actions challenging the constitutionality of the act for sponsors and cosponsors.

Section 6. Relating to statutory construction and application.

Section 7. Providing a severance clause.

Section 8. Providing an effective date.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

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[6] Cesarean section- [is] an operation performed to remove a fetus by cutting into the uterus, usually through the abdominal wall. *On-line American Medical Association Medical Glossary.*

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

Other than the constitutional challenges to the legislation, the Office of State Courts Administrator anticipates that there may be a nominal fiscal impact on the state courts arising from criminal prosecutions of persons in violation of the act.

According to the Department of Corrections, there is no anticipated fiscal impact. The bill has not yet been reviewed by the Criminal Justice Estimating Conference.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Under the bill, the legality of any partial-birth abortion procedure depends on the *physical location of the fetus during the delivery*. However, under federal law, the extent of a woman's right to an abortion turns on fetal viability which the Supreme Court has defined as that point when "there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." Casey, *supra* at 870. Presumably, a determination of viability would typically be made in accordance with the professional medical judgment of the individual physician and could depend on a variety of factors or other evidence of life in addition to or in lieu of a "heartbeat or discernible spontaneous movement." The courts may find that the bill unduly interferes with a woman's right to an abortion before fetal viability by placing a "substantial obstacle" in the path of a woman seeking an abortion, particularly if the described medical procedure was deemed the most medically appropriate or sole option available to the mother to secure an abortion.

In addition, the plain language of the bill provides for an exemption in cases where the life of the mother is at risk, but is silent on the issue of an exemption in cases where the health of the mother is at risk. This omission departs from the Casey guidelines.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

The bill uses the term "child's torso" instead of "fetus' torso," in its description of a breech presentation outside the mother's abdominal wall on page 2, line 14. The term "child" is not used elsewhere in the bill. Black's Law Dictionary (6th Edition) defines "child" as: "Progeny; offspring of parentage. Unborn or recently born human being. . . " In contrast, Black's Law Dictionary defines "fetus" as: "An unborn child. . . (in man from seven or eight weeks after fertilization until birth)." This inconsistency does not appear to have any basis in law and is therefore questionable.

Section 5 of the bill grants any member of the Legislature who sponsored or co-sponsored the bill the right to intervene in any legal action challenging the act's constitutionality. Intervention in a state civil action is governed by Rule 1.230, Fla.R.Civ.P. That rule allows intervention for "anyone claiming interest in pending litigation ... but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." Rule 1.230, Fla.R.Civ.P. The trial court has complete discretion to allow a nonparty to intervene in a civil action, and the court's decision on intervention will not be disturbed absent a showing that the court abused its discretion. Grimes v. Walton County, 591 So.2d 1091 (Fla. 1st DCA 1992). While the rule is liberally construed as a matter of practice, the court's discretion is not without limits. A court may not allow a nonparty to intervene in a civil action if the nonparty's interest in the case is "indirect, inconsequential, or contingent." Faircloth v. Mr. Boston Distiller Corp., 245 So.2d 240, 244 (Fla. 1970), receded from on other grounds, National Distributing Co. v. Office of Comptroller, 523 So.2d 156 (Fla. 1988).

The test for determining whether a party may intervene centers on an interest that:

> [M]ust be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation.

Morgareidge v. Howey, 75 Fla. 234, 78 So. 14, 15 (Fla. 1918).

Therefore, while the bill may seek to confer a right of intervention on the sponsors and co-sponsors of the legislation, the rule of civil procedure and the cases construing that rule may limit members' ability to intervene in any legal challenges to the resulting law. In addition, the bill raises the related question of whether the right of intervention can be conferred by the Legislature, when the practice of intervention is governed by a rule of procedure adopted by the Florida Supreme Court.

Moreover, the intervention provision will have no effect on a constitutional challenge filed in federal court. In federal court, intervention is governed, at a minimum, by Rule 24, Fed. R.Civ.P., under which a party may have: 1) an unconditional right to intervene as conferred by federal statute, or based on an interest relating to the property or transaction, or 2) a permissible right to intervene as conferred by federal statute or based on a claim or defense that has a common question of law or fact with the main action.

The bill does not contain any exemption for a partial-birth abortion caused in an effort to protect the *health* of the woman, which was one of the central principles of the Supreme Court's decision in Casey. *See* 505 U.S. at 879.

This bill targets the D&X abortion procedure, however, it would also cover any abortion where the physician induces preterm labor, stops the process at a point where the "living fetus" is "partially-born," kills the fetus by any means, and then removes the dead fetus. For example, a physician would violate this bill if, with the intent to kill the living fetus, the physician brought the fetus to the point of being partially born, cut the umbilical cord, allowed the fetus to bleed to death, and then removed the dead fetus.

The crime of partial-birth abortion as defined in HB 583 would not apply to the pregnant woman. At common law, while a third party can be held criminally liable for causing injury or death to an unborn child, a pregnant woman cannot. *See* State v. Ashley, 701 So.2d 338 (Fla. 1997) (holding that the common law immunity of a pregnant woman for causing injury or death of her fetus was not abrogated by the felony murder, manslaughter, or termination of pregnancy statutes).

Chapter 98-1, L.O.F. and HB 583:

Whereas, ch. 98-1, L.O.F., sought to prohibit partial-birth abortions by amending chapter 390, F.S., relating to termination of pregnancies, HB 583 seeks to prohibit partial-birth abortions by amending ch. 782, F.S., relating to homicide.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:	Staff Director:
David M. De La Paz	David M. De La Paz

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:	Staff Director:
Michael W. Carlson, J.D.	P.K. Jameson, J.D.

AS FURTHER REVISED BY THE COMMITTEE ON HEALTH CARE SERVICES:

Prepared by:	Staff Director:
Tonya Sue Chavis, J.D.	Phil E. Williams