



**House
Legislative
Analysis
Section**

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REPEAL ABORTION PROHIBITION

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House Bill 5170 as introduced
First Analysis (11-1-89)

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Sponsor: Rep. Teola P. Hunter
Committee: Judiciary

Mich. State Law Library

THE APPARENT PROBLEM:

In 1973, the United States Supreme Court decided Roe v. Wade (93 S.Ct. 705), issuing a landmark opinion that legalized abortion nationwide. The court said that states may not regulate abortion during the first trimester of pregnancy, that states may regulate abortion during the second trimester "to the extent that the regulation reasonably relates to preservation and protection of maternal health," and that "if a state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

In a companion case, Doe v. Bolton (93 S. Ct 739), the court struck down certain restrictions on where an abortion may be performed, and upheld a state requirement that a physician's decision to perform an abortion be "based upon his best clinical judgment that an abortion is necessary." The court reasoned that "the medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient," and that this would operate "for the benefit, not the disadvantage, of the pregnant woman."

In the years since 1973, the national controversy over abortion has continued to rage, and, if anything, increase in intensity whenever another major Supreme Court decision was handed down. Thus did later decisions on governmental funding for abortions (Maher v. Roe, et al [1977], McRae v. Califano [1980]) stimulate bitter battles in the states over Medicaid funding for abortions.

On July 3, 1989, the United States Supreme Court issued another opinion widely regarded as a milestone. In Webster v. Reproductive Health Services, the court said that the Roe trimester framework was "unsound in principle and unworkable in practice." The court upheld, among other restrictions on abortions, a Missouri law requiring a physician to perform viability tests before performing an abortion on any fetus believed to have a gestational age of 20 or more weeks. The plurality opinion pronounced the court "satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life." (Not at issue in the case was Missouri's prohibition against abortions of viable fetuses.) To many the implications were clear: the court was replacing the Roe trimester standard with a fetal viability standard.

On the whole, Webster has been applauded by those described as "pro-life" and decried by those characterized as "pro-choice." Its issuance has, not surprisingly, led many to re-examine Michigan statute in light of Webster's modification of Roe, and the expectation that Roe will be further narrowed, if not overturned, in the near future.

Section 14 of the Michigan Penal Code prohibits performing an abortion. That prohibition, first enacted in 1846 and retained in the codification of 1931, was neither amended

nor repealed following Roe. A 1973 Michigan Supreme Court decision (People v. Bricker, 389 Mich. 524) interpreted that prohibition in light of Roe and Doe and noted that the statute could not stand "as related to abortions in the first trimester of pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment." However, the court also construed the statute to mean that physician may not perform an abortion "after viability except where necessary, in his medical judgment, to preserve the life or health of the mother." The statute seems to have fallen into relative obscurity after 1973, remaining unenforced since that time.

Abortion rights advocates seek repeal of Section 14 of the Michigan Penal Code.

THE CONTENT OF THE BILL:

The bill would repeal Section 14 of the Michigan Penal Code, which says that it is a felony to perform an abortion, unless necessary to save the life of the mother.

MCL 750.14

FISCAL IMPLICATIONS:

Fiscal information is not available at present. (10-31-89)

ARGUMENTS:

For:

The bill would repeal an obsolete law that has been unenforceable since 1973, when the United States Supreme Court issued its decisions on Roe v. Wade and Doe v. Bolton, and the Michigan Supreme Court issued its decision on People v. Bricker.

Response: The statute may not have been unenforceable so much as unenforced. Bricker affirmed the validity of the statute with regard to third trimester abortions, saying that a physician may not perform an abortion after viability except where necessary to preserve the life or health of the mother. It appears that the state also retained the ability to regulate second trimester abortions in accordance with Supreme Court decisions. That it did not do so may reflect beliefs holding sway in the state, and/or the difficulty of regulating second trimester abortions, given the breadth of Doe's concept of health and the factors that may affect medical judgment.

The bill presents not a simple repeal of an obsolete law, but rather an important action in response to the changing circumstances of the law on abortion. For that reason, it warrants careful attention to the many and complex issues surrounding that subject. Those issues include matters of ethics, medicine, and human rights. They demand answers to questions on when human life may be said to begin,

H.B. 5170 (11-1-89)

what is a person, and to what degree does a woman have the right to control her own body. Forceful arguments have been advanced both for and against abortion rights, and those arguments should be considered in conjunction with the bill.

For:

In his dissent from Webster, Justice Blackmun, the author of Roe v. Wade, said that "today, Roe v. Wade . . . and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure." Pro-choice advocates argue that because women can no longer rely on Roe and the United States Supreme Court to secure abortion rights, the state should act affirmatively to protect those rights, and that among the actions the state should take is the repeal Section 14 of the Penal Code. Without repeal or change, Section fourteen's broad prohibition against abortions could be resuscitated by future U.S. or Michigan Supreme Court decisions.

Response: Pro-life advocates view abortion as a murderous practice, not something that is a woman's right. They argue that the practice of abortion be curbed wherever possible, and so argue against the repeal of Section 14.

Against:

Pro-life advocates fear that the repeal of Section 14 would mean the legalization of post-viability abortions in Michigan. Such an outcome could be possible because of the Bricker decision, which upheld Section 14 to the degree that it prohibited third trimester or post-viability abortions.

Response: Even with the repeal of Section 14, Michigan would continue to outlaw post-viability abortions. Section 323 of the penal code (MCL 750.323) prohibits a person from performing an abortion on a "quick child." In a companion decision to Bricker, the Michigan Supreme Court held that the term child as used in this statute means "a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community." The court said that beyond the first trimester of pregnancy, the burden is "upon the people in a prosecution for manslaughter by abortion to prove beyond a reasonable doubt that the subject of the manslaughter was in fact a viable child" in its mother's womb. So interpreted, the court ruled, Section 323 was not unconstitutional (Larkin v. Wayne Prosecutor, 389 Mich. 533 [1973]).

Against:

Any statutory approach to abortion issues is inadequate, because it can be changed at any time by the legislature. For something approximating a permanent resolution to the matter, attention should be given to amending the state constitution.

Response: Even constitutional law is subject to change, by way of amendment and changing interpretation. Further, a constitutional approach would no more quell the abortion controversy than a statutory approach. Many people have strong opinions on abortion, and those opinions would not be modified by the nature of the law that conflicted with their beliefs.

POSITIONS:

The American Civil Liberties Union of Michigan supports the bill. (10-31-89)

Lansing Area Advocates for Choice supports the bill. (10-31-89)

The Michigan Abortion Rights Action League supports the bill. (10-31-89)

Michigan NOW (the Michigan chapter of the National Organization for Women) supports the bill. (10-31-89)

The Michigan Nurses Association supports the bill. (10-31-89)

The Michigan Women's Commission supports the bill. (10-31-89)

The American Association of University Women, Michigan Division, supports the concept of the bill. (10-31-89)

Planned Parenthood Affiliates of Michigan supports the bill. (10-31-89)

Representatives of the following organizations indicated support of the bill before the House Judiciary committee:

League of Women Voters/ Michigan

Michigan Coalition Against Domestic Violence

National Lawyers Guild

Pro-choice Task Force

Religious Coalition for Abortion Rights

Right to Life of Michigan opposes the bill. (10-31-89)