



Brief 98-6

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WISCONSIN'S PARTIAL-BIRTH ABORTION LAW

1997 Wisconsin Act 219, passed by the legislature and signed into law by Governor Tommy Thompson to take effect May 14, 1998, prohibits the performance of partial-birth abortions with certain exceptions.

Act 219, introduced as 1997 Assembly Bill 220, defines a partial-birth abortion as one "in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child." The act defines a child as "a human being from the time of fertilization until it is completely delivered from a pregnant woman".

A partial-birth abortion, which is medically known as "dilation and extraction", is a procedure sometimes used in the second or third trimester of pregnancy. The surgeon dilates the woman's cervix and then induces a breech delivery with forceps exposing only the fetus' legs, arms and torso. The surgeon inserts a sharp object into the back of the skull and inserts a suction curette. The contents of the skull are suctioned to collapse it, which kills the fetus. Delivery is then completed.

Exceptions. The law does not prohibit a partial-birth abortion when required to save a woman whose life is endangered by a physical disorder, physical illness or physical injury and there is no other medical procedure to save her. These life-endangering circumstances include those caused by the pregnancy.

Criminal Penalties. Any person who intentionally performs a partial-birth abortion is guilty of a Class A felony. The penalty for a Class A felony is life imprisonment, but parole is possible after a minimum of 13 years and 4 months, unless the judge decides otherwise. The act also defines a partial-birth abortion as a "serious felony" under Wisconsin's repeat offender ("three strikes") law whereby three convictions for any of the serious felonies results in life imprisonment with no possibility of release.

Civil Liability. Civil damages can be assessed when an illegal partial-birth abortion is performed. These may include payments for personal injury and emotional and psychological distress, as well as exemplary damages equal to three times the cost of the abortion.

Persons eligible to receive damages are the parents of a minor child on whom a partial-birth abortion was performed and the father of the child. They are eligible for damages if they did not consent to the abortion, even if the mother did, unless the pregnancy was the result of a sexual assault or incest.

FEDERAL RESPONSE

The U.S. Congress twice passed bills that would prohibit partial-birth abortions and President Bill Clinton vetoed both. The more recent bill, H.R. 1122 (1997), was introduced with the support of the American Medical Association (AMA), which had declared the procedure "not good medicine".

H.R. 1122 defined a partial-birth abortion as one in which the person performing the operation vaginally delivers a living fetus and deliberately and intentionally kills the fetus

before completing the delivery. Physicians who performed the operation could be fined and/or imprisoned for two years. Exceptions were made if the procedure was necessary to save the life of a mother endangered by physical disorder, illness or injury.

The bill also provided for civil damages for the father, if married to the mother, and maternal grandparents of the fetus, including damages equal to three times the cost of the abortion. Persons consenting to the surgery or who are guilty of criminal conduct leading to the pregnancy are not eligible for damages.

The bill received the backing of the AMA when congressional sponsors agreed to include a provision that allowed a hearing before a state medical board on whether the physician's conduct was necessary to save the life of the mother.

STATE RESPONSE

As many as 23 states, including Wisconsin, have enacted partial-birth abortion bans, and several others have considered bills banning the procedure. Most state laws enacted since 1996 have been patterned after H.R. 1122, including the definition of the procedure. State laws generally provide for an exception to save the life of the mother, civil damages, a hearing before a state medical society prior to prosecution, and a lower felony classification resulting in fine and/or maximum imprisonment of two or three years.

STATE LAW AND THE COURTS

Most of the challenges to current state laws argue that they are unconstitutionally vague and impose an undue burden on the right of a woman to terminate a pregnancy. At least 11 states have been enjoined by the federal courts from enforcing their partial-birth abortion bans. In the case of Ohio, the U.S. Court of Appeals for the Sixth Circuit declared Ohio's laws unconstitutional and the U.S. Supreme Court refused to review that decision in March of 1998. In the appellate case, *Women's Professional Corp v. Voinovich*, 130 F. 3d. 187, the court held the description of the procedure was vague; that it did not make an exception for women who might suffer "severe psychological or emotional injury"; and doctors were not granted enough latitude in making good faith medical judgments.

In Wisconsin, an appeal for a restraining order to a U.S. District Court was denied on May 13 and the U.S. Court of Appeals refused to overrule the denial, holding that the appeals court lacked jurisdiction. Arguments on the constitutionality of the law are scheduled for a June 2 hearing in the district court. Abortion providers canceled all procedures beginning on May 14 claiming they did not want to risk prosecution for any abortion under Act 219. Subsequently, clinics in Appleton, Madison and Milwaukee reopened under guarantees from the local district attorneys that there would be no prosecutions under the new law for first trimester abortions.