

# **THE FACTS on H.B. 125** **THE HEARTBEAT BILL**

## **The Experts agree:**

**The Heartbeat Bill is the best chance to save the most lives,  
and the time to pass it is *now*.**

### **What Does the Bill Do?**

The Heartbeat Bill, H.B. 125, introduced by Representative Lynn Wachtmann with 50 co-sponsors in the House, primarily does three things:

1. It requires the abortionist to check to see if the unborn baby the pregnant woman is carrying has a heartbeat. Sec. 2919.19(C).
2. If the child has been found to have a heartbeat, it requires the abortionist to let the mother know this. Sec. 2919.19(D)
3. If the baby is found to have a detectable heartbeat, that child is protected from being killed by an elective abortion. Sec. 2919.19(E).

### **Should we wait to pass a Heartbeat Bill?**

Dr. Jack Willke<sup>i</sup> answered this question with his testimony before the Ohio Health Committee, chaired by Representative Lynn Wachtmann (3-9-11):

My position is unique as a prime founder of the Right to Life Movement in America and Internationally. I believe this offers me a relatively unique position to form a judgment on the wisdom of this bill at this time in history.

I believe the time is ripe to pass such legislation...I believe passing this legislation, with all of the publicity and pro-life effort that will accompany it, will mark a major advance in once again protecting all unborn babies.

... This bill, while not eliminating the abortion problem altogether, nevertheless will, if enforced, eliminate upwards of 90% of all abortions. It avoids controversial issues such as “at fertilization”, such as “before implantation”, such as “before the heart beats” and other markers that in some people's minds are difficult to prove. The presence of a heartbeat does not offer such a problem. It is not only a proven scientific fact. It also carries a certain emotional wallop.

While the pro-life movement has made some modest gains in the last 38 years, there are still 1,200,000 abortions per year in our nation. If we are to succeed in protecting children in our lifetime, something new must now be tried.

**"Should we accept the status quo because we believe the judges won't allow a change?"**  
In his testimony before the House Health Committee (3-9-11) Law Professor, David F. Forte<sup>1</sup> said:

Now, some say that we should not pass a bill that a court might disallow, that we should only pass bills that we are sure will be upheld. Frankly, I must say that this is a strange way of protecting the unborn. It surrenders to the status quo. There is no victory in allowing the vast majority of unborn humans to remain totally at risk.

Besides, such a stand-pat strategy flies in the face of history. Courts never change their minds unless they are invited to.

In 1995, the Ohio General Assembly passed a bill banning partial birth abortions. It was the first in the nation. The law was struck down by a federal court. But Nebraska did not stand pat. It passed its own bill prohibiting partial birth abortions. In the year 2000, the Supreme Court voided the Nebraska statute outlawing partial birth abortion. But Congress did not stand pat. In 2003, Congress passed a federal ban on partial birth abortions and invited the Court to change its mind. The Court did, and now *Gonzales v. Carhart* is the law of the land and partial birth abortions are against the law.

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During the Reagan administration, Professor Forte served as chief counsel to the United States delegation to the United Nations and alternate delegate to the Security Council. He has authored a number of briefs before the United States Supreme Court. He has sat as acting judge on the municipal court of Lakewood Ohio and was chairman of Professional Ethics Committee of the Cleveland Bar Association. He has received a number of awards for his public service, including the Cleveland Bar Association's President's Award, the Cleveland State University Award for Distinguished Service, the Cleveland State University Distinguished Teaching Award, and the Cleveland-Marshall College of Law Alumni Award for Faculty Excellence. He served as Consultor to the Pontifical Council for the Family under Pope John Paul II and Pope Benedict XVI. Dr. Forte was a Distinguished Fulbright Chair at the University of Trento and Senior Visiting Scholar at the Center for the Study of Religion and the Constitution in at the Witherspoon Institute in Princeton. He has given over 300 invited addresses and papers at more than 100 academic institutions.

He is a member of the Ohio State Advisory Committee to the U.S. Commission on Civil Rights and the Board of Directors of the Bishop Gassis Relief Fund, dedicated to relieving the war-induced famine in the Sudan. He is also a Civil War re-enactor and a Merit Badge Counselor for the Boy Scouts.

He is Senior Editor of The Heritage Guide to the Constitution (2006) published by Regnery & Co, a clause by clause analysis of the Constitution of the United States. He has been teaching Constitutional Law at Cleveland State University for over 30 years.

Some years back Akron passed a law requiring informed consent, a waiting period, and parental consent for minors seeking an abortion. The Supreme Court said that Akron's law was unconstitutional. But other states did not stop inviting the Court to change its mind. And the Court did. Now Ohio and most states have laws requiring informed consent, a waiting period, and parental consent or notification.

It used to be restrictions on abortion had to pass a strict scrutiny test. Now, they have to pass an undue burden test. It used to be that courts would routinely strike down an entire statute limiting abortion if they could find one part of it that was objectionable. But in *Ayotte v. Planned Parenthood of New England*, the Court unanimously instructed a lower court not to strike down an entire abortion regulation statute if only part of it would, in a few instances, inflict an undue burden. It used to be that pro-life protesters could be sued under the Racketeer Influenced and Corrupt Organizations Act (RICO). But invited to look at what the courts were doing, the Supreme Court in 2006 denied the application of RICO to pro-life supporters.

Congress did not stand pat when it passed the Infant Born Alive Act or the Unborn Victims of Crime Act, and many states have done the same and more.

Like *Dred Scott* (overturned by Lincoln's Emancipation Proclamation and the 13th, 14th, and 15th Amendments to the Constitution), and *Plessy v. Ferguson* ("Separate but equal" overturned by *Brown v. Board of Education*), it is *Roe vs. Wade* that is unconstitutional; and the only way to overturn it is to challenge it and keep challenging it until, like slavery and discrimination, it falls into the ash heap of history.

### **Is It Constitutional?**

In his testimony before the Health Committee (3-2-11), Walter M. Weber, Senior Litigation Counsel\* for The American Center for Law and Justice gave the answer:

Yes, the Heartbeat Bill is constitutional under federal constitutional law.

The Supreme Court has affirmed that States can require that a woman contemplating abortion receive informed consent. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). That a child already has a heartbeat plainly will be a material consideration to many women considering abortion. This developmental

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detail brings home the humanity of the child and boldly illustrates the fact that the baby is already alive. The presence of a heartbeat also has a strong correlation with the ultimate prospects of a successful, live birth. Thus, informing the pregnant woman that her child has a heartbeat, in those cases where a heartbeat has been detected, is a constitutionally permissible facet of informed consent.

The requirement that the abortionist test for the heartbeat simply ensures that the predicate for the informed consent is laid and that the woman is given accurate information.

Finally, the disallowance of unnecessary abortions – those not justified for “life or health” -- is consistent with Supreme Court case law. In *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court upheld a law that **prohibited any abortion that was not “necessary”**. The Court reviewed a Georgia statute under which “it still remains a crime for a physician to perform an abortion except when, as § 26-1202 (a) reads, it is ‘based upon his best clinical judgment that an abortion is necessary.’” *Doe*, 410 U.S. at 191. The Supreme Court upheld the statute as constitutional, relying upon a prior case (*United States v. Vuitch*, 402 U.S. 62, 71-72 (1971)), which rejected a challenge to “a District of Columbia **statute making abortions criminal ‘unless the same were done as necessary for the preservation of the mother’s life or health** and under the direction of a competent licensed practitioner of medicine.’” *Doe*, 410 U.S. at 191 (emphasis added). Under this precedent, the prohibition section of the Heartbeat Bill, which has an exception for “life or health,” is constitutionally defensible under current Supreme Court precedent.

### **Could the Heartbeat Bill hurt any other pro-life law?**

No. The bill itself clearly specifies that it will not affect any other existing pro-life law restricting or regulating abortion: Section 2919.19 - "(4) Division (E) of this section does not repeal any other provision of the Revised Code that restricts or regulates the performance of an abortion by a particular method or during a particular stage of a pregnancy." (lines 133-136)

### **Could the Heartbeat Bill compromise the scientific fact (and pro-life position) that life begins at conception and our eventual goal to protect babies from that point?**

The Heartbeat Bill, like the Post-viability abortion ban, is an incremental bill. As the Post Viability ban doesn't compromise our desire or eventual ability to protect younger babies--including frozen embryos or those killed for stem cell research--likewise, the Heartbeat Bill doesn't affirm other abortions simply because it doesn't protect every child. The Heartbeat Bill's increment, however, is one that will save far more lives--upwards of 20,000 Ohio lives per year.

While it's not the beginning of life, the heartbeat is an "indicator" of life that is recognized in hospitals across the nation. In fact, the abortion lobby has written that the Heartbeat Bill is "more dangerous than Personhood Amendments" because they realize it takes from them the usual scare tactics of "rape and incest" and standard argument of "choice," and, instead, focuses on a baby with a beating heart. It's a new and yet unheard (in the courts) approach addressing the humanity of the child.

There is also information from two former clerks to Justice Kennedy who have indicated that in their estimation this bill would not only be one Justice Kennedy would be interested in reviewing should it be struck down, but one which would likely "work" in moving the line of protection all the way back to heartbeat.

While the post-viability bill is a good bill that will protect hundreds of lives, the line of protection drawn by it measures *our technology*--it changes based on the year and hospital in which one is born. The Heartbeat bill will push the line of protection to a distinctive point--detectable heartbeat which is either heard or not as with hospital patients every day.

Regarding our eventual goal of restoring protection to every child, the Heartbeat Bill will make that *more likely*, not less likely. Once we draw the line of protection from virtually none to almost all babies who'll be protected for the first time in four decades, our goal will actually be within reach. One strategic approach would be to introduce legislation to move the line back to "presence" of a heartbeat instead of detection of one. That moves the line to 18 days and would protect virtually every child. Then, with the unique DNA which appears at conception, we move the line 18 days from there: a short distance has always been easier to travel than a long distance.

Like a fireman outside a burning building, we are merely carrying out as many children as we can in one trip. When 95 percent of the babies are safe, we will go back to rescue the rest.

### **Is the Heartbeat Bill a Good Idea?**

From Walter Weber's testimony:

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

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

questions of morality and justice, reducing the number of abortions definitely would reflect sound public policy.

The immediate adverse effects of abortion upon the child in the womb are obvious. In the years since abortion has become a widespread practice in the United States and elsewhere, other, less-obvious effects upon other persons have become clear. For example, abortion, especially when repeated, increases the odds that a future pregnancy will miscarry or result in a premature birth, the former resulting in the undesired loss of a child's life in the womb, the latter posing the threat of developmental difficulties to children successfully born alive after the abortion of one or more prior pregnancies.<sup>2</sup> Moreover, the negative effects of abortion upon a woman's physical and mental health after abortion have now been documented extensively.<sup>3</sup> In addition, the social problems abortion was theorized to ameliorate have not in fact been eliminated, and in many cases have increased, in the wake of liberalized recourse to abortion.<sup>4</sup>

Furthermore, scientific developments over the past decades have heightened society's awareness of the uniqueness, humanity, and sensitivity of prenatal human beings at earlier and earlier stages of gestation.<sup>5</sup> Likewise, the

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<sup>2</sup> Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?*, 13 J. AM. PHYSICIANS & SURGEONS, no. 4, 2008 at 102, 102–03.

<sup>3</sup> E.g., Priscilla Coleman, *A Tidal Wave of Published Data: More Than 30 Studies in Last Five Years*

*Show Negative Impact of Abortion on Women*, THE UNCHOICE CAMPAIGN, <http://www.theunchoice.com/News/colemanresearcharticle.htm> (providing a list of more than thirty studies detailing the after-effects of abortion on the mental and physical health of the women) (last visited Jan. 17, 2011); *see also* Priscilla Coleman et al., *The Choice to Abort Among Mothers Living Under Ecologically Deprived Conditions: Predictors and Consequences*, INT'L J. MENTAL HEALTH & ADDICTION 7, 405–22 (2009). *See generally* SHADIA HRICHI, NAMELESS NO MORE: A JOURNEY OF HEALING AFTER ABORTION (Judith Robl, ed., 2010) (recounting the author's own post-abortion experience); THOMAS W. STRAHAN, DETRIMENTAL EFFECTS OF ABORTION: AN ANNOTATED BIBLIOGRAPHY WITH COMMENTARY (3d ed. 2001).

<sup>4</sup> The number of births, the birth rate, and the percentage of births to unmarried women have all steadily increased since the 1970s. Stephanie J. Ventura, U.S. DEP'T OF HEALTH & HUM. SERVS, *Changing Patterns of Nonmarital Childbearing in the United States* (May 2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>. Further, more than half (60%) of all births to women between the ages of 20 and 24 were out of wedlock in 2007. *Id.* Significantly, instances of child abuse to children of unwed mothers have increased as well. In a study published by Child Welfare Information Gateway just last year, "child maltreatment fatalities remain a serious problem" throughout the United States, and boyfriends of unwed mothers are among those most likely to be responsible for child abuse deaths. Child Welfare Info. Gateway, *Child Abuse and Neglect Fatalities: Statistics and Interventions* (2010), available at <http://www.childwelfare.gov/pubs/factsheets/fatality.cfm>.

<sup>5</sup> The advent of 4-D ultrasounds has produced poignant images unveiling the humanity of the developing unborn child. *See* Brian Handwerk, *4-D Ultrasound Gives Video View of Fetuses in the Womb*, NAT'L GEOGRAPHIC NEWS (Feb. 25, 2005), available at [http://news.nationalgeographic.com/news/2005/02/0225\\_050225\\_tv\\_ultrasound.html](http://news.nationalgeographic.com/news/2005/02/0225_050225_tv_ultrasound.html) (describing movement by the unborn visible as early as 8 weeks into gestation and the gleeful responses of parents

public has begun to appreciate the horrific nature of particular abortion methods, such as partial birth abortion and dismemberment abortion.

Finally, there is a growing body of evidence that, in many cases, abortion represents, not an empowering of women, but rather an instrument for facilitating male irresponsibility or sexual predations.<sup>6</sup>

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

The U.S. Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a constitutional right protected, at least to a certain broad extent, by the federal Constitution. While this decision has been subject to serious and sustained academic criticism and has, at least in part, been overruled by the Supreme Court itself, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the High Court has

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who are “immediately” able to recognize the ultrasound images because the fetus actually looks like a baby). Evidence of fetal pain also points to the humanity of the unborn and has posed a challenge for abortion activists who argue that unborn babies are incapable of feeling pain. *E.g.*, Annie Murphy Paul, *The First Ache*, N.Y. TIMES MAGAZINE (Feb. 10, 2008), available at <http://www.nytimes.com/2008/02/10/magazine/10Fetal-t.html> (describing the research of Drs. Kanwaljeet Anand and Nicholas Fisk, both of whom have discovered that unborn and premature babies are capable of experiencing tremendous pain and have subsequently begun to administer anesthesia to infant patients). Finally, the advances in preterm birth survival rates also have provided strong confirmation of the unborn child’s independent humanity. *See* Dara Brodsky & Mary Ann Ouellette, *Introduction: Transition of the Premature Infant from Hospital to Home*, in PRIMARY CARE OF THE PREMATURE INFANT 1, 1 (Brodsky & Ouellette eds., 2008) (explaining that “medical advancements in obstetric and neonatal care have led to dramatically greater chances for survival of extremely premature infants [of whom those] born at 24 weeks’ gestation currently have a survival rate of approximately 40% to 60%” and “almost 100% of infants born at 34 weeks’ gestation survive”).

<sup>6</sup> *See* ELLIOT INSTITUTE, REVERSING THE GENDER GAP at 13 (2010) [hereinafter Elliot Institute], available at <http://www.afterabortion.info/pdf/gendergapbooklet.pdf> (last visited Jan. 18, 2011) (compiling data related to, *inter alia*, coerced abortions) (“[Sixty-four] percent [of women] reported that they were pressured to abort by others. Indeed, most abortions are primarily the result of lack of support, pressure, emotional blackmail, coercion, manipulation, deceptive counseling, threats or even violence from partners, parents, employers, doctors, counselors or others with influence over women’s lives”) (footnotes omitted); *see also* Vincent M. Rue et al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, MEDICAL SCIENCE MONITOR, Oct. 2004, available at <http://www.artsenverbond.nl/abortion.pdf> (last visited Jan. 17, 2011). Studies show that most women feel coerced into, or at least inadequately informed about, having an abortion: “More than 50 percent [of post-abortive women] described themselves as feeling rushed or uncertain before the abortion; 79 percent said they were not counseled on alternatives to abortion; 84 percent said they did not receive adequate counseling before abortion; and 67 percent said they received no counseling before abortion.” *Elliot Institute, Reversing the Gender Gap* at 14 (2010) (footnote omitted). Furthermore, coercive action can become violent and deadly. *See, e.g.*, Jeb Phillips & Kathy Lynn Gray, *Bond set in abortion kidnapping*, THE COUMBUS DISPATCH (Oct. 8, 2010), [http://www.dispatch.com/live/content/local\\_news/stories/2010/10/08/bond-set-in-abortion-kidnapping.html](http://www.dispatch.com/live/content/local_news/stories/2010/10/08/bond-set-in-abortion-kidnapping.html) (last visited Mar. 1, 2011) (“man who police say tried to force his pregnant girlfriend to have an abortion”); Kim Curtis, *Murder: The Leading Cause of Death for Pregnant Women*, NOW.ORG, <http://www.now.org/issues/violence/043003pregnant.html> (last visited Jan. 17, 2011).

not yet restored to the States the authority to deal with abortion that States enjoy with regard to other destructive practices such as child abuse, drug abuse, and animal abuse. Consequently, absent new developments in the pertinent case law from the Supreme Court, States are constrained in their ability to confront the harms abortion poses.

Nevertheless, States are not completely powerless in the face of abortion. The Supreme Court has expressed a willingness to uphold common-sense, defensible measures to limit or regulate abortion, *id.*, and in fact has upheld a variety of measures ranging from waiting periods, *id.* at 885-87, to informed consent requirements, *id.* at 887, to bans on the use of State resources to facilitate abortion, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977), to bans on abortions by non-physicians, *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *see also City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 447 (1983) (stating that “[the Supreme Court has] left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions”), to parental involvement statutes, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326-27 (2006), to a ban on a particularly heinous method of abortion. *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003). These examples certainly do not exhaust the possible responses a State could undertake. For example, States presumably can ban forced abortions, can protect the consciences of medical students, nurses, and pharmacists who do not wish to participate in abortions, can require basic sanitary conditions in abortion facilities, etc.

**The Heartbeat Bill attempts to follow the path laid out by these cases, namely, to enhance a woman’s right to know what abortion entails prior to giving her consent, and to try to provide as much protection against abortion as current federal constitutional law permits.**

### **What if the Court Strikes it down?**

Professor Forte testified:

**Even if the courts at the present time decline this invitation, this bill remains a victory for life.** First, because of Ohio’s severability statute, O.R.C. 1.51, the section of the bill requiring testing and the informed consent of the woman remains in effect. It will have a significant effect. Everyone knows that when an entity has a heartbeat, it is unquestionably a living being. And when a woman is

informed of the very high chances that this living human being within her will be carried safely through pregnancy to birth, it must surely help her to make a more considered judgment of what she shall do.

Moreover, as Professor Michael New of the University of Alabama has shown through sophisticated statistical studies, such statutes, like parental consent laws, have a ripple effect, not only lessening abortions by those directly affected, but in educating others of what an abortion truly entails.<sup>7</sup>

Second, even if a court does enjoin Section E of the bill, the bill does not die, but remains parked, if you will, to be revived when the Attorney General determines that the precedents have changed to allow the bill to go back into effect. That's what's known as the trigger clause, found at lines 793-807 of the bill (I understand that these lines need to be underlined to show that they are what is to be adopted). With the trigger clause in effect, if the precedents change, we won't have to pass this bill all over again. It will have already been done.

... **That is why I say this bill has much to gain and nothing to lose.** At the minimum, the heartbeat testing and informed consent provisions should have a direct and indirect effect of saving hundreds of lives. And based on Ohio's abortion statistics, if the full bill goes into effect, either now, or revived at a later date, many more thousands could be saved.

Because we are living under *Roe v. Wade*, where children are aborted for any reason virtually any time before birth, if it is reaffirmed, we lose nothing; we only stand to gain.

### **Could Passing the Heartbeat Bill hurt the Pro-life movement in any way?**

Professor Forte further testified:

HB 125, the Heartbeat Bill, is the most valuable for protecting the lives of the unborn. With this law, I say unhesitatingly, there is much to gain, and nothing to lose.

First, for the first time, this bill establishes that "fetal heartbeat is the key medical predictor that an unborn human individual will reach viability and live birth."

This is a momentous milestone on the way to protecting the unborn.

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<sup>7</sup> Michael P. New, Analyzing the Effect of State Legislation on the Incidence of Abortion Among Minors, available at <http://www.heritage.org/research/reports/2007/02/analyzing-the-effect-of-state-legislation-on-the-incidence-of-abortion-among-minors>

Second, absent a medical emergency, it requires that the physician test for a fetal heartbeat, and if the physician find one, inform the pregnant woman that the fetus she is carrying possesses a heartbeat and that the chances of the child reaching term are very high.

Third, it moves the time line of protection of the unborn forward by prohibiting abortions after a heartbeat is detected.

### **What about Justice Kennedy, the swing vote on the court?**

In *Issues in Law & Medicine*<sup>ii</sup> (Spring 2010), Gregory J. Roden, J.D.<sup>iii</sup> noted a "shift" from *Gonzales v Carhart*, he now says indicates that "a Heartbeat approach will work." He bases that opinion on the following:

The plea of pregnancy also directly refutes Justice Blackmun's obfuscation in *Roe*, that the question of when life begins could not be answered:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.<sup>304</sup>

Instead, Justice Blackmun denoted unborn persons as only having "potential life,"<sup>305</sup> and the Court stuck to that mystification, and similar derivations, ever since: e.g., "potential human life," "potentiality of human life," "potential life of the fetus," "fetus' potential human life," "life of the fetus that may become a child."<sup>306</sup> Until, at least, *Gonzales v. Carhart*.<sup>307</sup>

Significantly, the Court in *Gonzales* dropped the use of the "potential life" euphemisms at the same time it asserted a more substantial state interest in prenatal life. Indeed, the Court went far beyond this and resolved "the difficult question of when life begins." **In doing so, the Court in *Gonzales* affirmed the notion, inherent in the plea of pregnancy, that the determination of when life begins is a factual inquiry capable of being answered.**

In *Gonzales*, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 (the "Act"). The Act provides that any physician who "knowingly performs a partial-birth abortion and thereby kills a *human fetus* shall be fined under this title or imprisoned not more than 2 years, or both." Congress used very specific in the language of the Partial-Birth Abortion Ban Act because the Court, in *Stenberg v. Carhart*,<sup>308</sup> struck down Nebraska's similar ban of partial-birth abortions for lack of "sufficient definiteness" in defining the abortion procedures being proscribed.

**Consequently, the Act contains a scienter requirement that the abortionist knows the fetus is alive, as the Act does not punish an intact D&E of a fetus which is already dead. In the Court’s discussion of this scienter requirement in *Gonzales*, there is a notable absence of the use of the “potential life” euphemisms. Instead, there is plain language affirming the live inherent in the unborn child:**

[T]he person performing the abortion must “vaginally delive[r] a *living* fetus.” The Act does not restrict an abortion procedure involving the delivery of an expired fetus.... The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus *is a living organism* while within the womb, whether or not it is viable outside the womb. We do not understand this point to be contested by the parties.<sup>309</sup>

Given the Court’s previous strict adherence to the term “potential life” and synonymous expressions,<sup>310</sup> the plain language in *Gonzales* affirming the actual life of the unborn child is startling. So too is the declaration that this is no longer a contested issue. Said agreement was reached about in a lower court decision leading up to *Gonzales*, *Planned Parenthood Federation v. Ashcroft*.<sup>311</sup> **There, the United States District Court for the Northern District of California, in its findings of fact, made this definitive statement, “The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D & E or induction, and may be considered a ‘living fetus.’”<sup>312</sup> The Supreme Court accepted these findings noting that the parties in *Planned Parenthood Federation* agreed with that conclusion.<sup>313</sup> Consequently, the Supreme Court has now again embraced the idea that there does exist medical evidence which allows a court to make a finding of fact that life exists in the womb. Ergo, the procedures implicit in any plea of pregnancy are no longer in conflict with Supreme Court abortion jurisprudence.**

This is no small matter as Justice Blackmun declared in *Roe*, “In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”<sup>314</sup> Thereafter, the states were prohibited from regulating abortion in a manner “inconsistent with the Court’s holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions,” as the Court delimited in *Akron v Akron Center for Reproductive Health*.<sup>315</sup> Indeed, the states were prohibited from adopting any theory at all other than the unborn child only possessed “potential life.” Now, states adopting an evidentiary theory of when life begins would not be in conflict with *Roe* and *Akron* in this regard. Rather, the states would be following the theory of when life begins from *Gonzales v. Carhart*. Abortion jurisprudence, as it now stands, is self refuting.

## **If you *could* protect nearly every baby in Ohio--Would You?**

Ohio led the way by passing the nation's first partial birth abortion ban in 1995. It was struck down in Federal court and many claimed that it failed. But history says otherwise: 30 states followed Ohio in passing similar laws including Nebraska which the U.S. Supreme Court reviewed. They said "no." Was it a failure? No. Because we kept sending them case after case until seven years later, in 2007, the Supreme Court finally said "yes" to a Congressional version of the bill, and for the first time in history a brutal method of abortion was declared to be illegal.

Already states are lining up behind Ohio (as in times past) to pass our bill. Louisiana is now interested. Georgia, Texas, and Oklahoma already have our Heartbeat Bill and are drafting their own versions while Arizona and Kansas are planning to introduce it in their next session. As Dr. Willke said in his letter to the Ohio General Assembly, we can see history repeat.

We are not exempt from our responsibility to protect human life (as Jefferson pointed out was the "first and only legitimate object of government") because some judge may not like it. As Professor Forte remarked: "Courts never change their minds unless they are invited to." We must ask.

Like in *Plessy v. Ferguson* which went before the Court eight times before being overturned by *Brown v. Board of Education*, we must persist in the asking--like the Biblical Persistent Widow--knocking on the door until even an "unrighteous judge" gives us the justice we seek.

And who knows what the court will be by the time this law reaches them? It took five years before our Ohio Parental Notification reached the Supreme Court and was eventually upheld.

THIS IS OUR MOMENT. We have the ability to do what is right--and even if we lose initially we educate the public and save lives. With the severability, we will at least inform the women of the presence of a heartbeat, and with the "Trigger Clause" we will have the ability to resurrect this law when a court upholds it eventually.

### **The Experts agree:**

**The Heartbeat Bill is the best chance to save the most lives, and the time to pass it is *now*.**

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<sup>ii</sup> *Issues in Law & Medicine* Vol. 25, No. 3 (Spring 2010): Pages 244-246,  
[http://www.personhood.net/index.php?option=com\\_content&view=article&id=260:unborn-children-as-constitutional-persons&catid=law&Itemid=642](http://www.personhood.net/index.php?option=com_content&view=article&id=260:unborn-children-as-constitutional-persons&catid=law&Itemid=642)

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