

# HOUSE BILL REPORT

## ESHB 2395

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### As Amended by the Senate

**Title:** An act relating to limiting partial-birth abortions.

**Brief Description:** Limiting partial-birth abortions.

**Sponsors:** By House Committee on Law & Justice (originally sponsored by Representatives Sterk, Mulliken, D. Schmidt, Johnson, D. Sommers, Koster, Sherstad, Sheahan, Thompson, Mielke, Smith, Dunn, Boldt and Backlund).

**Brief History:**

**Committee Activity:**

Law & Justice: 1/30/98, 2/4/98 [DPS].

**Floor Activity:**

Passed House: 2/16/98, 58-40.

Senate Amended.

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### HOUSE COMMITTEE ON LAW & JUSTICE

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Sheahan, Chairman; McDonald, Vice Chairman; Sterk, Vice Chairman; Carrell; Lambert; Mulliken; Robertson and Sherstad.

**Minority Report:** Do not pass. Signed by 5 members: Representatives Costa, Ranking Minority Member; Constantine, Assistant Ranking Minority Member; Cody; Kenney and Lantz.

**Staff:** Bill Perry (786-7123).

**Background:** Abortion has been the subject of great debate and considerable legislative and judicial activity over the past few decades. Since 1973, both the United States and Washington State Supreme Courts have spoken on the subject, as have the federal Congress, the state Legislature, and the people of the state through the initiative process.

Particular attention has been paid in recent years to abortions performed by a procedure involving partial delivery of the fetus.

FEDERAL COURT DECISIONS. The U.S. Supreme Court held in Roe v. Wade, that a woman could choose, in consultation with her doctor, whether or not to have an abortion during the first trimester of her pregnancy. State interference with such a decision was not allowed. The Court held, however, that during the second trimester of a pregnancy, state regulation was permissible at least to the extent of protecting the health of the pregnant woman. The Court further held that during the third trimester, or after "viability," state prohibition of an abortion was permissible, except to the extent that an abortion was necessary to preserve the health or life of the woman.

In 1992, in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court significantly altered its holding in Roe. The Court did not overturn the basic premise of Roe that a woman has a constitutionally protected right to choose whether or not to have an abortion, although four of the Court's justices would have done so. The Court also retained "viability" as the critical point beyond which a state can prohibit abortions. However, the Court significantly expanded the authority of states to regulate abortions prior to viability. Under Casey, the test to be employed in judging the constitutionality of a state law is whether or not the law is an "undue burden" on a woman's right.

This test prohibits state legislation that has the primary purpose of placing a substantial obstacle in the way of a woman seeking an abortion of a nonviable fetus. Permissible purposes include protection of a woman's health and expressing a preference for childbirth over abortion. The undue burden test prohibits interference with a woman's right to make the ultimate decision about abortion. The test does not prohibit laws that have incidental effects on the expense or difficulty of obtaining an abortion.

The Court has dealt, to a limited extent, with the issue of legislative attempts to proscribe particular abortion procedures. In 1976, Planned Parenthood of Central Missouri v. Danforth, the Court declared unconstitutional a state law banning a certain abortion procedure (saline amniocentesis after the 12th week of pregnancy). The court declared the law arbitrary in light of the fact that the method banned was in fact the most commonly used procedure and its ban would require the use of potentially more dangerous procedures in its place.

FEDERAL LEGISLATION. Recently, Congress passed legislation to generally prohibit "partial-birth" abortions. However, this legislation was vetoed by the President.

STATE COURT DECISIONS. Following Roe v. Wade, the state supreme court declared a parental consent requirement in Washington law unconstitutional. In State v. Koome, the court expressly relied on federal constitutional provisions in striking down the parental consent statute. The court has not addressed the question of whether, or to what extent, independent state constitutional provisions might be used to analyze various issues related to abortion. To date, the court has not considered a case related to regulation or prohibition of particular methods of performing abortions.

STATE LEGISLATION. In 1991, the voters of the state, by a vote of 756,653 to 752,354, approved Initiative 120 which codified the basic holding of Roe v. Wade. The initiative provides that "every woman has the fundamental right to choose or refuse to have an abortion," except as specifically limited by the terms of the initiative. The initiative further declares that, except as specifically permitted by the initiative, "the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion prior to viability of the fetus."

The initiative also prohibits interference with a woman's right to choose an abortion "to protect her life or health." It is a class C felony to perform an abortion on a viable fetus for any reason other than the protection of a woman's life or health.

**Summary of Bill:** It is a class C felony for a physician to perform a partial-birth abortion.

A partial-birth abortion is defined as intentionally delivering a fetus or a substantial portion of a fetus into or partially through the birth canal for the purpose of terminating the life of the fetus, and then terminating the life of the fetus before the complete removal of the fetus from the birth canal.

The crime does not apply to a fetus that has not reached viability, or to a procedure done to preserve the life or physical health of the mother. The exception for preserving the physical health of the mother requires the presence of a threat to the mother's health that necessitates immediate termination of the pregnancy to avoid serious risk of substantial and irreversible impairment of a major bodily function of the mother.

Initiative 120 is specifically amended to make this act an exception to the declared fundamental right to choose or refuse to have an abortion.

**EFFECT OF SENATE AMENDMENT(S):** The Senate amendment strikes all provisions in the bill and replaces them with a restatement of the criminal penalty provisions of the current abortion law. The current law makes it a class C felony for any person to perform an abortion on a viable fetus other than for the purpose of protecting a woman's life or health. The amendment provides that it is a class C felony for a physician to perform a partial-birth abortion on a viable fetus except to protect the life or health of the mother. No definition of partial-birth abortion is provided.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** Partially delivering a healthy baby and then killing it is a heinous act. As many as 80 percent of these partial-birth abortions are elective. Even the developer of the procedure doesn't claim it is "necessary." There are better alternatives. It is a risky procedure that requires great skill. It causes pain to the fetus and risk to the mother.

**Testimony Against:** Sometimes this procedure is the best choice. A C-section may be more dangerous to the mother. The term "partial-birth" is vague and open to broad interpretation. The bill violates both state and federal constitutions by placing an undue burden on a woman's right to choose.

**Testified:** Representative Sterk, prime sponsor; Dr. Donovan Hanson (pro); Shavanna Schilling, Washington State Grange (pro); Camille DeBlasi, Human Life of Washington (pro); Dr. Suzanne Poppenna, Associate Clinical Professor, University of Washington School of Medicine (con); Lisa Stone, Pro Choice of Washington and Northwest Women's Law Center (con); and Dr. Joe Mancuso, American College of Obstetricians and Gynecologists, Washington Section (con).