WRITTEN TESTIMONY REGARDING SENATE BILL 23
Ohio Senate Health, Human Services & Medicaid Committee, Mar. 6, 2019
by Brian W. Fox

Chairman Burke, Vice Chair Huffman, Ranking Member Antonio & Members of the Committee:

As this is my first time providing testimony in support of a bill's passage, I'd ask you bear with me should I stumble through my comments. Before I begin, I want to make plain my desire to affirm the humanity of everyone on this Committee. In voicing my support for this bill (and a broader legislative environment affirming the protection of all life), I don't want to ignore that each of you have sacrificed time away from your lives, livelihoods, and families to be here today and to serve the State of Ohio.

What's more, I also want to recognize that, in this representative democracy of ours, each of you represent well-meaning Ohioans and Americans on both sides of this issue. While – as a matter of conscience – I may be firmly convinced that a beating heart signifies the scientific reality of human life, I understand some of you on this Committee – as a matter of your conscience – are firmly convinced, otherwise. My experiences through the birth of my three beautiful children (Baylor, Hudson, and Grant Patrick) and the miscarriage of another child, my review of the scientific data and literature available on the topic, and my philosophical conviction that, minimally, we ought to be a State and Nation of people that protect and affirm all life as best we can…have compelled me to support Senate Bill 23 before this Committee.

It is this matter of conscience, of which I speak, that I hope to free you to follow today. As a former business law and constitutional law professor, I have often lectured on the roles of the executive, legislative, and judicial branch of our government.[1] Accordingly, I am *somewhat* competent to discuss your role in this bicameral legislative body of the Ohio Senate…

I. <u>The Legislative Branch</u>.

Article II, Section One of the Ohio State Constitution provides, "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives…." Legislative power has been defined as the power to make laws. One of my law professors used to drill the concept of separation of powers into our brains by cold-calling on random students during his lectures throughout the semester, the answer always being "Article I, Section One!"[2] His point often being…only the legislature is constitutionally tasked with making laws and not the judicial branch.

[1] Legal Environments of Business at the University of Cincinnati; Constitutional Law at Cincinnati Christian University.
[2] This refers to the companion provision to Article II, Section One, which confers upon the United States Congress all legislative powers under the United States Consitution.

The Ohio Senate is expressly vested with the express constitutional authority to make moral decisions concerning what laws should and should not be passed. While I understand many of you may get heartburn from my use of the word "moral" in the preceeding sentence, hear me out.

Of late, it is has become popular for some to advocate that legislators "should not legislate their morality." Ignoring the irony expressed in that sentiment,[3] I'd offer that I simply do not understand how or why anyone would take that position, publically. I'm convinced that all "laws" are essentially a codified form of morality, or there is at least an ethical component and impetus underlying all enacted legislation. In other words, legislatures and legislators are (or should be) making moral choices about what is right or what is wrong when crafting/passing legislation. And that moral decision-making extends well beyond just criminal statutes.

From employment statutes to public records statutes to traffic statutes, there is some moral sentiment which inheres all enacted legislation. This body, then, is constantly making moral choices about right and wrong even where it's not apparent. Moreover, when this body fails or refuses to act, it is also making a moral choice about right and wrong. All of this is to say, even if you refuse to pass Senate Bill 23, you'll be making a moral choice, nonetheless. You will "legislate your morality," as that's precisely what every Ohio General Assembly has done since Ohio was formed on March 1st, 1803. Indeed, your constituents elected you to make moral choices for their District because they trusted your reasonableness, wisdom, and values.

II. <u>Senate Bill 23's Purpose</u>.

As I've reviewed The Heartbeat Bill, S.B. 23, the legislation amends and augments existing Ohio law in four principal ways…

1. R.C. 2919.192 and R.C. 2919.193 require an aborting physician to determine whether the unborn baby the pregnant woman is carrying has a heartbeat.
2. R.C. 2919.194 requires such physician to inform the mother if the child has a heartbeat.
3. R.C. 2919.195 prohibits physicians from aborting a baby who has a heartbeat.
4. R.C. 2919.196 requires an aborting physician who has conducted an abortion to keep and maintain certain records relating to the abortion. In particular, he or she must note if the abortion is being done for "health" reasons, and if so, record the rationale for drawing that conclusion.

This Committee must make a moral choice regarding these four principal changes. Presuming the Committee has heard voluminous testimony regarding the morality of each, I'll briefly discuss the policy reasons for supporting this legislation.

[3] There is frequently a specific morality espoused by rejecting other so-described *moral* legislation.

The enhancement of informed consent spares pregnant mothers the heartbreak and regret that can occur when women discover more about their baby's development in the womb after they've undergone a procedure. Moreover, I think we'd all acknowledge that medical and moral choices are more soundly made where there's a symmetry, and even an abundance, of information.

The reporting requirement provides important epidemiological data. Again, more scientific information and data may prove additive to the medical and scientific communities and is valuable for the voting public. This is especially the case where legislatures and constituents are making moral choices about what laws to pass. If the health of a pregnant mother is rarely at issue, then that is valuable scientific and public information that should help this deliberative body in crafting future legislation more responsive to medical realities.

As for the heartbeat requirement in the legislation, that is a moral distinction grounded in medical science's view of the heart's role in sustaining life. For me, fundamental principles of justice and morality require I do what I can to prevent the intentional taking of a child's life even if that child has not been declared alive outside the womb. I understand my choice of nouns in the preceding sentence may, philosophically speaking, be considered "stacking the deck;" however, the words we use around this debate are revelatory. My experiences and analysis cause me to view an unborn baby as a child.[4] I hope this Committee draws the same conclusion, which it is constitutionally authorized to do.

III. <u>The Judicial Branch</u>.

By contrast to this legislative body, Article IV, Section One of the Ohio State Constitution provides, "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof…." Judicial power has been defined as the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[5] It is my opinion that judicial power has, throughout the course of our State's and Nation's history, remained the most elusive thing to define and describe.

Both the Ohio Constitution and United States Constitution give the judicial branch short shrift, and there's ample historical evidence of executive branches maneuvering to utilize the judicial branch to effectuate policy change. I think this is a constiutional problem with dire consequences,[6] and something this Committee and Senate should not shrink from. Allow me to explain.

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[4] It's worth noting, I'm also concerned for how our State treats that child after they are born. But addressing the fundamental injustice of abortion is, to me, a necessary prerequisite to making moral choices about what happens after a child is born.

[5] Justice Samuel Miller, <u>On the Constitution</u> (1891).

[6] This attempt to manipulate and coopt the judicial branch yields both procedural inefficiencies and distrust. In addition, such actions violate the plain language and express authority of the legislative branches of government across the country.

Many have restrained from supporting statutes restricting, and thereby reducing, abortion because they fear such legislative efforts are destined to be struck down as unconstitutional. I think this view is problematic on a number of fronts, but specifically because it relies upon a misunderstanding of the role of *stare decisis* and case law,[7] the role of the judicial branch, and the current posture of existing legal authorities.

Legal precedent is important. It's important because it helps stabilize our system of justice and allows litigants to have some measure of predictability when utilizing courts to resolve controversies. However, legal precedent (often referred to as case law) is not static. *Stare decisis*, while a helpful doctrine, is neither unchanging nor predictably determinative. The classic civil rights case of *Brown v. Board of Education of Topeka* illustrates the elusive authority of precedent.[8] In 1954, the U.S. Supreme Court in *Brown* was evaluating the fundamental fairness of school segregation policies that relied upon previously-decided legal precedent from *Plessy v. Ferguson*.[9] *Plessy* was decided in 1896 and held that segregation was constitutional so long as facilities were "separate but equal." A little over fifty years later, the *Brown* majority declared the separate but equal doctrine to be unconstitutional. As society's views and morality regarding the dignity of human beings evolved, so, too, did the Court's understanding of (and articulation as to) what was constitutional.

Nearly fifty years ago in *Roe v. Wade*, the U.S. Supreme Court held that abortion was a constitutional right.[10] The *Roe* majority determined this right exists (among other "penumbral" rights) because it is supposedly implicated by other rights expressly listed in the Bill of Rights. The Court's attempt to stretch the four corners of the Constitution has been besieged with criticism and *Roe* has already been partially overruled by the Supreme Court, itself. The criticism of *Roe*'s musty positions rightfully revolves around the fundamental function of the judicial branch, and whether it is violating Article I, Section One of the U.S. Constitution by indirectly legislating when that is the constitutionally-exclusive function of the legislature.[11] In addition, others have properly criticized the federalization of the issue, arguing that, at a minimum, the authority to regulate and legislate the boundaries of what's permissible should remain with state legislatures.

Even with parts of *Roe* remaining undisturbed, States are not without precedential authority to limit or regulate abortion. In fact, the following restrictive measures have been upheld as constitutional by the U.S. Supreme Court since *Roe* was decided in 1973:

- Waiting periods;[12]
- Informed consent requirements;[13]

[7] *Stare decisis* is a Latin term, which means "stand by things decided."
[8] 347 U.S. 483.
[9] 163 U.S. 537.
[10] 410 U.S. 113.
[11] See Ohio's version in Article II, Section 1 of the Ohio State Constitution.
[12] *Planned Parenthood v. Casey*, 505 U.S. 833 at 885-87.
[13] *Casey* at 887.

- Recordkeeping and reporting requirements;[14]
- Prohibitions regarding the use of State resources to facilitate abortion;[15]
- Prohibitions against abortions by non-physicians;[16] and
- Banning partial-birth abortion.[17]

That said, the Ohio Senate should not feel constrained to push beyond the aforementioned regulations as constitutionality has proven a persistently elusive target since the formation of this Nation. And given the express delegation of constitutional authority provided by the Ohio Constitution, I'd advocate that this Committee and Senate demonstrate moral courage to follow its conscience to legislate to pass Senate Bill 23.

IV. Senate Bill 23's "Constitutionality".

With respect to Senate Bill 23's regulations, the testing, informed consent, and recordkeeping requirements are likely to be upheld by the U.S. Supreme Court even if there is no philosophical shift away from the penumbral rights categorization of abortion. However, the bill's designation of a heartbeat as the line of prohibitory demarcation would provide additional protections for unborn children and test whether the Court still relies upon *Roe*'s conception of life and fundamental liberties.

In the approximately fifty years since *Roe*, there have been significant advances in medical technology, particularly ultrasonography. That technology continues to provide a clearer and more vivid picture of the fundamental humanity of unborn children. What's more, doctors have also advanced their understanding of the early stages of development and in their ability to perform lifesaving in-utero surgeries on babies who develop abnormally. While I understand the most contested portion of Senate Bill 23 will be the heartbeat component, the heartbeat signifies a sure sign of life.

In closing, I know that some of you, as a matter of conscience, are not going to vote to pass this bill. I trust you've arrived at your conclusions because you believe it's morally right to vote that way and you're serving your District as best you can given what you believe. Some of you, however, believe what I believe. You see the sonogram and believe that's a child moving around inside; you hear the heartbeat and believe the spark of life has been inarguably kindled. I ask that you vote to protect and affirm all life by passing Senate Bill 23. In this grand American (and Ohioan) experiment, you folks hold the keys and I ask you to lean into your delegated authority without fearing a judicial infringement upon your Article II, Section One powers. Please pass this bill.

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[14] *Casey* at 900-01.
[15] *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).
[16] *Mazurek v. Armstrong*, 520 U.S. 968 (1997).
[17] *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

Respectfully submitted,

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