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## Crimes and Offenses HB 954

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## CRIMES AND OFFENSES

***Offenses Against Public Health and Morals: Amend Article 5 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, Relating to Abortion, so as to Change Certain Provisions Relating to Criminal Abortion; Change Certain Provisions Relating to When Abortion is Legal; to Amend Title 31 of the Official Code of Georgia Annotated, Relating to Health, so as to Define Certain Terms; Require a Determination of Gestational Age Prior to Abortion; Provide for Certain Reporting Requirements with Respect to Performance of Abortions; to Change Certain Provisions Relating to Civil and Professional Penalties for Violations of the “Woman’s Right to Know Act”; Provide for Confidentiality; Change Certain Provisions Relating to Definitions Relative to the “Woman’s Right to Know Act”; State Legislative Findings; Provide for Other Related Matters; Provide Effective Dates; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 16-12-140 (amended); 16-12-141(amended); 31-9B-1, -2, -3 (new); 31-9A-6.1 (new); 31-9A-2 (amended)
BILL NUMBER:	HB 954
ACT NUMBER:	631
GEORGIA LAWS:	2012 Ga. Laws 575
SUMMARY:	The Act asserts a compelling interest in limiting the time frame in which women may obtain an abortion to the first twenty weeks of gestational age, absent certain medical findings. The Act requires physicians to determine gestational age, adds reporting rules for doctors performing covered procedures, and mandates doctors performing any such measures in a way mostly likely to save the fetus because

the fetus may experience pain at twenty weeks gestational age.

EFFECTIVE DATE: January 1, 2013

### *History*

In the nearly forty years since the Supreme Court's well-known, landmark decision in *Roe v. Wade*,<sup>1</sup> abortion-rights opponents have sought to limit, if not eliminate, the practice.<sup>2</sup> Attempts by the Georgia Legislature to restrict access to abortion have an even longer history. While *Roe* challenged a Texas abortion statute,<sup>3</sup> the Court also overturned certain portions of a 1968 Georgia abortion law in the lesser-known companion case *Doe v. Bolton*.<sup>4</sup> The Georgia law at issue in *Doe* replaced an abortion law dating back to 1876.<sup>5</sup> More recently, the Georgia General Assembly sought to curtail abortive procedures with the 2005 Women's Right to Know Act (Woman's Right).<sup>6</sup> Woman's Right also included the first legislative findings pertaining to the potential for fetuses to experience pain at twenty weeks.<sup>7</sup> The next restriction came in a 2007 amendment to Woman's Right.<sup>8</sup> This amendment required physicians to provide abortion-seeking women an opportunity to see ultrasound or sonogram footage of their fetus prior to performing the abortion.<sup>9</sup>

Anti-abortion rights groups such as Georgia Right to Life (GRTL) continue to pressure the Georgia General Assembly to curtail

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1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. See, e.g., *Why So Much Politics?*, GA. RIGHT TO LIFE, <http://www.grtl.org/?q=node/236> (last visited August 10, 2012) (noting that "a lot of progress has already been made since 1973" and asserting that the group's "efforts to elect prolife candidates" as resulting in legislation aimed at challenging *Roe*).

3. *Roe*, 410 U.S. at 116.

4. *Doe v. Bolton*, 410 U.S. 179, 181 (1973) (overturning O.C.G.A. §§ 26-1201 through 26-1203, 1968 Ga. Laws 1249 at 1277-80).

5. *Id.* at 182 (citing 1876 Ga. Laws 130, § 2, at 113).

6. O.C.G.A. § 31-9A-1 to -8 (2005).

7. See O.C.G.A. § 31-9A-4(a)(3) (2011) (requiring that women seeking an abortion receive notice that "[b]y 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain," fetuses at that developmental stage "seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain," and use of anesthesia is common in "children who are 20 weeks' gestational age or older who undergo prenatal surgery").

8. 2007 Ga. Laws 207, § 3, at 299 (codified at O.C.G.A. § 31-9A-3(2)(C) (2011)).

9. O.C.G.A. § 31-9A-3(2)(C), -(4)(A) (2011). Less relevant to this bill, but also pertaining to abortion, was the 2008 "Parental Notification Act" that pertained to minors seeking abortions. O.C.G.A. §§ 15-11-110 to -118 (2011).

abortion rights thereby ensuring abortion remains on the legislative agenda.<sup>10</sup> For example, in the 2010 primary, GRTL claimed credit for the inclusion of a non-binding referendum polling voter interest on amending the Georgia Constitution.<sup>11</sup> The “personhood amendment” asked respondents whether they would support changing the State constitution “so as to provide that the paramount right to life is vested in each human being from the earliest biological beginning.”<sup>12</sup> According to GRTL over 75% of those polled responded favorably.<sup>13</sup> Also in 2010, GRTL partnered with a pro-adoption group and launched a widely publicized ad campaign targeted at minority abortions.<sup>14</sup> The campaign consisted of billboards depicting a young African-American child and the slogan “Black Children are an Endangered Species.”<sup>15</sup> The Georgia General Assembly responded with what is commonly referred to as the “Prenatal Non-Discrimination Act,” which did not become law.<sup>16</sup> GRTL expressed disappointment and frustration when the bill failed.<sup>17</sup>

Yet another abortion bill was introduced and failed in 2011. Representative Allen Peake (R-137th) introduced House Bill 89 (HB 89), the “Pain-Capable Unborn Child Protection Act,” a predecessor to Act 631.<sup>18</sup> Representative Peake’s bill reiterated the legislative

10. *Why So Much Politics?*, *supra* note 2.

11. Sarah Panko, *GA Right to Life Ask About a “Personhood Amendment” on Ballot*, WRBL NEWS 3 (Jul. 19, 2010), <http://www2.wrbl.com/news/2010/jul/19/ga-right-life-ask-about-personhood-amendment-ballo-ar-599629/>.

12. *Id.*

13. Jim Galloway, *Your Morning Jolt: A Test of Clout for Georgia Right to Life*, POLITICAL INSIDER WITH JIM GALLOWAY (Jul. 22, 2010, 10:19 AM), <http://blogs.ajc.com/political-insider-jim-galloway/2010/07/22/your-morning-jolt-a-test-of-clout-for-georgia-right-to-life/>. The idea that the poll represented actual statewide support for the proffered constitutional amendment is highly dubious considering the question appeared on primary ballots in forty-five Republican counties and only one Democratic county. *Id.* Thus, the majority of respondents were Republicans, a group that generally opposes abortion rights. *See id.*

14. Shaila Dewan, *Anti-Abortion Ads Split Atlanta*, N.Y. TIMES, Feb. 5, 2010, at A9, available at <http://www.nytimes.com/2010/02/06/us/06abortion.html>.

15. *Id.*

16. The measure was first introduced in the 2010 Legislative Session as House Bill 1155, and the Senate sought to revive the bill with Senate Bill 529. Brian Giles, Tracy Hamilton & Diane Kim, *Crimes and Offenses*, 27 GA. ST. U. L. REV. 209, 213–14 (2010).

17. *See* Steven Ertelt, *Georgia Pro-Life Org Upset House Passes No Pro-Life Bills*, LIFENEWS.COM (Apr. 18, 2011, 6:04 PM), <http://www.lifenews.com/2011/04/18/georgia-pro-life-org-upset-house-passes-no-pro-life-bills/> (“Thursday, April 14, marked the end of the annual forty-day legislative session of the Georgia General Assembly, but GRTL says it also marked a new low in the State House’s relationship with Georgia Right to Life and its pro-life membership.”).

18. HB 89, as introduced, 2011 Ga. Gen. Assem.



war on women” and vowed that Georgians “will remember” in the coming 2012 election.<sup>30</sup> Liberal bloggers and other opponents referred to HB 954 as the “Women as Livestock Bill.”<sup>31</sup> The bill’s supporters were no less heated. GRTL referred to the oppositions’ claims as “outlandish” and based on “misinformation, scare tactics and raw emotion.”<sup>32</sup> Dan Becker, GRTL’s President, called opposition to the bill tantamount to supporting “the rise of a new eugenics effort in America.”<sup>33</sup> The group also threatened to campaign against the reelection of any legislators that refused to vote for the bill’s passage.<sup>34</sup> Apparently both sides called on their relative constituencies to contact their representatives.<sup>35</sup> Indeed, the debate became so contentious that the two sides nearly came to fisticuffs.<sup>36</sup>

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*Emotional Day*, ATLANTA J.-CONST., Mar. 29, 2012, available at <http://www.ajc.com/news/georgia-government/georgia-lawmakers-pass-abortion-1401963.html>.

30. *Id.*

31. *E.g.*, *Ga. Lawmaker Compares Women to Livestock*, 11ALIVENEWS.COM (Mar. 19, 2012) <http://www.11alive.com/news/article/233962/40/Ga-lawmaker-compares-women-to-livestock> (“A Georgia lawmaker is being blasted on blogs across the country for comparing pregnant women to livestock. . . . State Rep. Terry England (R-[108th]) suggested that if farm animals can carry a stillborn fetus full term, women should too.”); Lauren Barbato, *At 11th Hour Georgia Passes “Women as Livestock” Bill*, MS. MAGAZINE BLOG (Mar. 31, 2012), <http://msmagazine.com/blog/blog/2012/03/31/at-11th-hour-georgia-passes-women-as-livestock-bill/> (“According to Rep. England and his warped thought process, if farmers have to ‘deliver calves, dead or alive,’ then a woman carrying a dead fetus, or one not expected to survive, should have to carry it to term.”).

32. *A Gathering Darkness*, GA. RIGHT TO LIFE, <http://www.grtl.org/?q=node/229> (last visited May 15, 2012).

33. Kristina Torres, *Senate Panel Votes in Favor of “Fetal Pain” Abortion Bill*, ATLANTA J.-CONST., Mar. 19, 2012, <http://www.ajc.com/news/georgia-government/senate-panel-votes-in-1391208.html>.

34. *Lawmaker Accuses Pro-Life Group of Threats*, WSBTV.COM (Feb. 29, 2012, 3:49 PM) <http://www.wsbtv.com/news/news/local/lawmaker-accuses-pro-life-group-threats/nK8Jb/>. State Rep. Sharon Cooper told the media that Mr. Becker of GRTL “threatened to target her” campaign for reelection. *Id.* Mr. Becker did not deny the allegation. *Id.* Rather, “he said Georgia Right to Life is targeting seven or eight other Republicans they feel are not living up to their pro-life claim.” *Id.* (“I am down here with the unenviable job of delivering messages to various Republicans that this is a political action year, and that their actions have not lived up to their (pro-life) claim. I’m the vehicle to deliver that unfortunate message that various members of the Republican caucus will be targeted this year.”) (quoting GRTL President Becker).

35. See Christopher Collins, *GRTL: “Abortion and Assisted Suicide Bills had Mixed Blessings,”* EXAM’R.COM (Apr. 2, 2012), <http://www.examiner.com/article/grtl-abortion-and-assisted-suicide-bills-had-mixed-blessings#print>. Pres. Becker gave his “heart-felt thanks” to the bill’s proponents for contacting the representatives and noted that “we would not have gotten as far as we did without your help.” *Id.* He also cited strong strength of the opposition to the bill, noting “the other side is very clever in marshaling their forces and you did a great job of responding.” *Id.*

36. President Becker and the Executive Director of the Perinatal Infertility Coalition of Georgia, John Walraven, got into an argument that devolved into physical violence. Torres & Quinn, *supra* note

Proponents and opponents fought about the science behind fetal pain, the bill's potential effect on women, and the constitutionality of the proposed legislation.<sup>37</sup> Despite the Georgia General Assembly's findings on the existence of fetal pain in the 2005 Woman's Right to Know Act, perinatologists and other medical experts assert the science is far from clear.<sup>38</sup> Both the American College of Obstetricians and Gynecologists and the Royal College of Obstetricians and Gynecologists dispute the twenty-week benchmark.<sup>39</sup> These groups maintain that fetuses cannot experience pain until at least the twenty-ninth or thirtieth week of pregnancy.<sup>40</sup> Other experts place the earliest date at twenty-eight weeks.<sup>41</sup> When questioned about the science, Representative McKillip reiterated the 2005 legislative findings in Woman's Right and referred reporters to the website [www.doctorsonfetalpain.com](http://www.doctorsonfetalpain.com) for more information.<sup>42</sup>

In addition to debating whether and when a fetus may perceive pain, public debate also concerned the ability of doctors to detect serious medical problems within the twenty-week period.<sup>43</sup> Opponents of the bill voiced concerns that women would lack the time for follow-up in the event of fetal developmental anomalies.<sup>44</sup> Other opponents feared the bill would force women to carry stillborn babies to term.<sup>45</sup> Representative McKillip dismissed these fears

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29. A State Trooper witnessed the exchange but did not issue any criminal citations. *Id.*

37. See Alyson M. Palmer, *Abortion Bill May Not See Inside of a Court*, DAILY REP., Mar. 26, 2012, available at <http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202551089853&slreturn=20120720133258>.

38. *Id.* Perinatology "also known as maternal-fetal medicine," is "[a] subspecialty of obstetrics concerned with the care of the fetus and complicated, high-risk pregnancies." PERINATOLOGY.COM, <http://www.perinatology.com/dictionary/Perinatologydef.htm> (last visited May 15, 2012).

39. Palmer, *supra* note 37.

40. *Id.*

41. Torres, *supra* note 33 (quoting Dr. Anne Patterson).

42. Palmer, *supra* note 37. The site contains "[a] wealth of anatomical, behavioral and physiological evidence shows that the developing human fetus is capable of experiencing tremendous pain by 20 weeks post-fertilization." DOCTORS ON FETAL PAIN, <http://www.doctorsonfetalpain.com/> (last visited May 15, 2012).

43. Palmer, *supra* note 37.

44. *Id.* According to Atlanta Perinatologist, Doctor Jeffrey Korotkin, a number of development issues are not detectable until eighteen to twenty weeks. *Id.* For example, hydrocephalus is seen at the twenty week mark. *Id.* Hydrocephalus can have either a minimal impact on the child or be so severe as to cause the child to live in a vegetative state. *Id.* Dr. Korotkin says additional testing is needed to help determine the possible outcome. *Id.*

45. Torres, *supra* note 33; Richard Fausset, *Abortion Wars: "Fetal Pain" Bill Advances in Georgia*, L.A. TIMES, Mar. 1, 2012, available at <http://articles.latimes.com/2012/mar/01/nation/la-na-nn-abortion->

stating that doctors could perform the tests earlier and detect many problems at fifteen weeks.<sup>46</sup> Representative McKillip also noted that the way in which the bill calculates gestational age actually translates to twenty-two weeks by most doctors' calculations, affording two more weeks for diagnostic studies.<sup>47</sup> Opponents also criticized this deviation from the standard calculation of the fetal age, worrying that it would pose additional challenges for physicians.<sup>48</sup>

Finally, opponents argued the bill would be unconstitutional under current Supreme Court jurisprudence and accused the bill's supporters of intentionally working to overturn *Roe*.<sup>49</sup> Representative McKillip denied this allegation.<sup>50</sup> Although critical of the viability framework established by *Roe*, Representative McKillip felt the bill fit within the existing constitutional parameters.<sup>51</sup> Indeed, some medical practitioners assert that fetuses have "a reasonable chance of survival" at twenty weeks.<sup>52</sup> Representative McKillip was also quick to note that there are "still 140 days of choice built into the beginning of this bill."<sup>53</sup> Representative McKillip was less certain the bill's failure to provide an exemption for pregnant women with psychological problems was constitutional.<sup>54</sup> Despite this uncertainty,

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limit-bill-georgia-20120301.

46. Palmer, *supra* note 37. Rep. McKillip stated that the testing standard was largely dictated by the time frame in which insurance carriers would reimburse. McKillip Interview, *supra* note 26. Although he received no formal assurances, in his informal conversations with carriers it appears insurance providers will reimburse for earlier testing. *Id.*

47. McKillip Interview, *supra* note 26. Physicians generally calculate weeks based upon the last menstrual cycle because it is difficult to determine the precise date of conception. *Calculating Your Dates: Gestation, Conception, and Due Date*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/duringpregnancy/calculatingdates.html> (last visited May 16, 2012). Under the Act, "probable gestational age of the unborn child" means what will, in reasonable medical judgment and with reasonable probability, be the postfertilization age of the unborn child . . . as dated from the time of fertilization of the human ovum." O.C.G.A. § 31-9B-1(a)(5) (Supp. 2012).

48. Video Recording of the House Judiciary Non-Civil Committee Hearings, Feb. 21, 2012 at 1 hr., 30 min., 25 sec. (remarks by Rep. Christian Coomer (R-14th)) <http://www.house.ga.gov/Committees/en-US/CommitteeArchives146.aspx>. [hereinafter House Committee Video Feb. 21, 2012]; *Id.* at 1 hr., 30 min., 47 sec. (remarks by Dr. Anne Patterson of the OB/GYN Society for Georgia).

49. Palmer, *supra* note 37.

50. *Id.*; Rep. McKillip reiterated that the bill was "not meant as a step to abolish *Roe*" in a telephone interview. McKillip Interview, *supra* note 26.

51. Palmer, *supra* note 37.

52. See Torres, *supra* note 33.

53. Palmer, *supra* note 37.

54. *Id.*

he argued it was unlikely the bill would face a constitutional challenge.<sup>55</sup>

### *Bill Tracking of HB 954*

#### *Consideration and Passage by House*

Representatives Doug McKillip (R-115th), Doug Collins (R-27th), Terry England (R-108th), Mark Hamilton (R-23rd), Donna Sheldon (R-105th), and Allen Peake (R-137th) sponsored HB 954.<sup>56</sup> The House read the bill for the first time on February 9, 2012.<sup>57</sup> The House read the bill for a second time on February 15, 2012, and for a third time on February 29, 2012.<sup>58</sup> The bill as introduced adopted a definition of “medical emergency” that differed from the definition of “medical emergency” in Georgia’s Women’s Right to Know Act.<sup>59</sup> Representative B.J. Pak (R-102nd) expressed concern that the definitions should be consistent.<sup>60</sup> Thus, the second version of the bill amended the Women’s Right to Know Act to include the same definition of “medical emergency” as the bill.<sup>61</sup> The Senate made several changes to the bill and the House disagreed with those changes on March 27, 2012.<sup>62</sup> The House officially insisted on its version of the bill on March 29, 2012.<sup>63</sup> The House adopted the House Conference Committee Report on March 29, 2012 by a vote of 106 to 59.<sup>64</sup>

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55. Palmer, *supra* note 37 (“The pro-choice crowd is not in a particularly ‘take it up and test it’ posture.” (quoting Rep. McKillip)).

56. HB 954, as introduced, 2011 Ga. Gen. Assem.

57. State of Georgia Final Composite Status Sheet, HB 954, May 10, 2012.

58. *Id.*

59. Compare HB 954, as introduced, § 3, p. 3–4, ln. 89–97, 2012 Ga. Gen. Assem., with O.C.G.A. § 31-9-2(2) (2011) (amended by O.C.G.A. § 31-9A-2(2) (Supp. 2012)).

60. Video Recording of the House Judiciary Non-Civil Committee Hearings, Feb. 16, 2012 at 27 min., 37 sec. (remarks by Rep. Doug McKillip (R-115th) and Rep. B.J. Pak (R-102nd) [http://media.legis.ga.gov/hav/11\\_12/2012/committees/judiNon/judiNon021612EDITED](http://media.legis.ga.gov/hav/11_12/2012/committees/judiNon/judiNon021612EDITED). [hereinafter House Committee Video Feb. 16, 2012].

61. Compare HB 954 as introduced, § 3, p. 3–4, ln. 89–97, 2012 Ga. Gen. Assem., with HB 954 (HCS) §4, p. 5, ln. 145–59, 2012 Ga. Gen. Assem.

62. State of Georgia Final Composite Status Sheet, HB 954, May 10, 2012.

63. *Id.*

64. Georgia House of Representatives Voting Record, HB 954 (Mar. 29, 2012).

*Consideration and Passage by the Senate*

Senator Tommie Williams (R-19th) sponsored HB 954 in the Senate.<sup>65</sup> The bill was first read March 5, 2012, and assigned to the Senate Health and Human Services Committee by Lieutenant Governor Casey Cagle (R).<sup>66</sup> The Health and Human Services Committee offered a substitute bill that added confidentiality requirements for the physicians performing any abortive procedures.<sup>67</sup> With those additions, the Health and Human Services Committee favorably reported the bill on March 20, 2012.<sup>68</sup> The bill was then read a second time on March 21, 2012.<sup>69</sup> On March 26, 2012, a third reading took place in the Senate, and Senators offered nine floor amendments.<sup>70</sup>

The Senate adopted amendments offered by Senator Jesse Stone (R-23rd), Senator John Bulloch (R-11th), and Senator Fran Millar (R-40th).<sup>71</sup> Their proposals provided that “gestational age” was an “estimate” of when fertilization took place and not “an exact diagnosis.”<sup>72</sup> The adopted amendment also established that civil liability for inaccurately determining the gestational age required “clear and convincing evidence” that the physician was negligent in his or her determination.<sup>73</sup> Additionally, these amendments foreclosed civil or criminal liability in the event a woman seeking covered procedures falsely represented either her name or age.<sup>74</sup> The purpose of these amendments was to avoid exposing physicians to undue liability or excessive sanctions because “gestational age of an

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65. 2011-2012 Regular Session – HB 954 Abortion; Criminal Abortion; Change Certain Provisions, GA. GEN. ASSEMBLY LEGIS., <http://www.legis.ga.gov/legislation/en-US/Display/20112012/HB/954> (last visited May 17, 2012).

66. State of Georgia Final Composite Status Sheet, HB 954, May 10, 2012.

67. Compare HB 954 (HCS) preamble, p. 1, ln. 6, 2012 Ga. Gen. Assem., with HB 954 (SCS) preamble, p. 1 ln. 6, 2012 Ga. Gen. Assem.

68. State of Georgia Final Composite Status Sheet, HB 954, May 10, 2012.

69. *Id.*

70. *Id.*

71. HB 954 (SFA 1), 2012 Ga. Gen. Assem.

72. *Id.* p. 1, ln. 7–9.

73. *Id.* p. 1, ln. 18–21.

74. *Id.* p. 1, ln. 22–25. The amendment sought to release physicians from civil liability by denying standing to the mother making false representations. *Id.* Additionally, the amendment would provide that no “agency or instrumentality of the state” would be able to pursue actions based on the abortion at issue. *Id.*

unborn child is to some degree an educated guess.”<sup>75</sup> Moreover, supporters of the amendment feared doctors may decide not to practice in Georgia if establishing liability were not dependent on a heightened evidentiary standard.<sup>76</sup>

Senators Bulloch, Fran Millar (R-40th), Johnny Grant (R-25th), and Cecil Staton (R-18th) proposed additional amendments that the Senate also adopted.<sup>77</sup> These amendments added an exception to the twenty-week prohibition in the event of a pregnancy diagnosed as “medically futile.”<sup>78</sup> The amendment also defined “medically futile” as a “congenital or chromosomal anomaly that is incompatible with life.”<sup>79</sup> The purpose of this amendment was to authorize abortive procedures in “rare circumstances” where there is a strong chance the fetal anomalies mean the child would not survive.<sup>80</sup>

Several Senators offered amendments that failed. An amendment by Senators Nan Orrock (D-36th), Gail Davenport (D-44th), Gloria S. Butler (D-55th), Horacena Tate (D-38th), and Freddie Powell Sims (D-12th) would have added an exception to the twenty-week prohibition where the “unborn child is not viable,” defining viability as “reasonable likelihood of the fetus’s sustained survival outside of

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75. Video Recording of Senate Floor Debate, PM2, Mar. 26, 2012 at 35 min., 7 sec. (remarks by Sen. Jesse Stone (R-23rd)), <http://www.gpb.org/lawmakers/2012/day-38> [hereinafter Senate Floor Debate].

76. *Id.* at 1 hr., 0 min., 4 sec (remarks by Sen. Curt Thompson (D-5th)).

77. HB 954 (SFA 9), 2012 Ga. Gen. Assem.

78. *Id.* p. 1, ln. 3–5; 14–20.

79. *Id.* p. 1, ln. 7–10. Senators George Hooks (D-14th) and Steve Thompson (D-33rd) offered amendments that were withdrawn. Withdrawn Senate Amendments Two and Three to HB 954, Mar. 26, 2012. Amendment three was withdrawn after a determination that the identical language appeared in Amendment One. Compare HB 954 (SFA 1), 2012 Ga. Gen. Assem., with Withdrawn Senate Amendment Three to HB 954, Mar. 26, 2012. Amendment Two would have provided for certain “administrative proceedings” and would have altered Code section 31-9B-2(b) pertaining to professional misconduct of doctors who failed to conform to the requirements by reiterating the exceptions in the case of the probable death or “serious risk of substantial and irreversible physical impairment” of the mother. Withdrawn Senate Amendment Two to HB 954, at p. 1, ln. 5–7, 14–28, p. 2, ln. 29–41, Mar. 26, 2012. The amendment would have also modified the reporting requirements. First, only “health facilities licensed by the department as an abortion facility,” would have to report, as opposed to requiring “any physician” to report. *Id.* p. 2, ln. 43–45. Furthermore, these confidentiality measures would not have been limited to the physician filing the report, but would have applied to “any physician included in” the report. *Id.* p. 2, ln. 47, 48. Finally, the sanctions imposed for failing to report within the specified period would be deleted. *Id.* p. 2, ln. 49. According to Sen. Hooks, these amendments were to avoid unreasonable costs of malpractice insurance if the provisions remained within the criminal, as opposed to civil code. Senate Floor Debate, *supra* note 75, at 40 min., 50 sec (remarks by Sen. Hooks (D-14th)).

80. Senate Floor Debate, *supra* note 75, at 1 hr., 33 min., 30 sec. (remarks by Sen. John Bulloch (R-11th)).

the womb.”<sup>81</sup> The rationale behind this proposed amendment was to allow doctors greater flexibility in decision-making and to reassure providers that the Georgia Legislature was neither interfering with nor “prejudg[ing]” physicians’ findings.<sup>82</sup> Opposition to this amendment argued that viability advances with medical science, and a determination of viability was too dependent upon a doctor’s prediction that could prove inaccurate.<sup>83</sup>

These same Senators also proposed an alteration that would have defined “medical emergency” to apply to any “serious risk to the pregnant female’s health,” as opposed to a “serious risk of substantial or irreversible impairment of a major bodily function.”<sup>84</sup> This amendment was said to address situations where a risk was not immediately serious, but if left unaddressed, could eventually cause irreparable harm.<sup>85</sup> Senator Jason Carter (D-42nd) also argued that without this amendment the bill would be unconstitutional.<sup>86</sup> Senators Butler, Tate, Sims, Henson, and Miriam Paris (D-26th) would have moved the prohibition to twenty-four weeks instead of twenty.<sup>87</sup> Senator Paris urged this change because of physician testimony that doctors preferred more time to address medical issues given the differences in individual pregnancies.<sup>88</sup> Also, she argued that the State did not have a legitimate interest in moving the date at which females could obtain abortions.<sup>89</sup> Both the suggestion to change the risk requirement and to move the date to twenty-four weeks were viewed as “gut[ting] the bill.”<sup>90</sup>

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81. Failed Senate Floor Amendment Four to HB 954, introduced Mar. 26, 2012.

82. Senate Floor Debate, *supra* note 75, at 1 hr., 5 min., 29 sec. (remarks by Sen. Nan Orrock (D-36th)).

83. *Id.* at 2 hr., 52 min., 11 sec. (remarks by Sen. Renee S. Unterman (R-45th)).

84. Failed Senate Floor Amendment Six to HB 954, introduced by Sens. Nan Orrock (D-36th), Gail Davenport (D-44th), Gloria S. Butler (D-55th), Horacena Tate (D-38th), and Freddie Powell Sims (D-12th), Mar. 26, 2012.

85. Senate Floor Debate, *supra* note 75, at 1 hr., 19 min., 46 sec. (remarks by Sen. Jason Carter (D-42nd)).

86. *Id.* at 1 hr., 22 min.

87. Failed Senate Floor Amendment Seven to HB 954, introduced by Sens. Miriam Paris (D-26th), Gloria S. Butler (D-55th), Horacena Tate (D-38th), Freddie Powell Sims (D-12th), and Steve Henson (D-41st), Mar. 26, 2012.

88. Senate Floor Debate, *supra* note 75, at 1 hr., 24 min., 16 sec., (remarks by Sen. Miriam Paris (D-26th)).

89. *Id.*

90. *Id.* at 1 hr., 26 min., 29 sec., (remarks by Sen. Renee S. Unterman (R-45th)).

Senators Gloria S. Butler (D-55th), Doug Stoner (D-6th), Donzella James (D-35th), Steve Henson (D-41st), and Freddie Powell Sims (D-12th) would have added an exception where “the pregnancy is the result of rape or incest.”<sup>91</sup> This amendment would have addressed the unique problems faced by rape victims, such as failing to disclose the pregnancy for fear of retribution.<sup>92</sup> Opponents argued this amendment was unnecessary because a victim of rape or incest would have “five months” following the event to obtain an abortion.<sup>93</sup> Finally, Senators Butler, Tate, James, Sims, along with Senator Valencia Seay (D-34th) would have also removed the requirement that any procedure done after the twentieth week be performed in a manner which “provides the best opportunity for the unborn child to survive.”<sup>94</sup> Senator Seay argued that doctors should be permitted to opt for the procedure that was best for the patient-mother’s health, as opposed to that best guaranteed to preserve the fetus’ life.<sup>95</sup> This was perceived as creating too large an exception to the twenty-week prohibition.<sup>96</sup>

The Senate passed the substitute bill by a vote of thirty-six yeas to nineteen nays.<sup>97</sup> The House disagreed with all of the adopted amendments on March 27, 2012.<sup>98</sup> The Senate insisted on March 29, 2012.<sup>99</sup> Later that same day a Conference Committee Substitute was adopted by both the House and the Senate.<sup>100</sup> The bill passed the Senate by a vote of thirty-six yeas to nineteen nays.<sup>101</sup> The adopted Substitute incorporated virtually all of the Senate changes including the addition of confidentiality for physicians, an exception for

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91. Failed Senate Floor Amendment Five to HB 954, introduced Mar. 26, 2012.

92. Senate Floor Debate, *supra* note 75, at 1 hr., 12 min., 0 sec. (remarks by Sen. Gloria S. Butler (D-55th)).

93. Senate Floor Debate, *supra* note 75, at 2 hr., 54 min., 22 sec. (remarks by Sen. Renee S. Unterman (R-45th)).

94. Failed Senate Floor Amendment Eight to HB 954, p. 1, ln. 5, introduced Mar. 26, 2012. This amendment would have deleted lines 65–76 of the bill, which would require a doctor performing any post-twenty-week procedure to do so in the manner most likely to save the child. *Id.*

95. Senate Floor Debate, *supra* note 75, at 1 hr., 30 min., 43 sec. (remarks by Sen. Valencia Seay (D-34th)).

96. *Id.* at 2 hr., 57 min., 12 sec. (remarks by Sen. Renee S. Unterman (R-45th)).

97. Georgia State Senate Voting Record (Mar. 26, 2012).

98. State of Georgia Final Composite Status Sheet, HB 954, May 10, 2012.

99. *Id.*

100. Georgia State House Voting Record (Mar. 29, 2012); Georgia State Senate Voting Record, HB 954 (Mar. 29, 2012).

101. Georgia State Senate Voting Record, HB 954 (Mar. 29, 2012).

“medically futile” pregnancies, and the added protections for doctors from civil liability.<sup>102</sup> Governor Nathan Deal (R) signed the bill, rendering it law, May 1, 2012.<sup>103</sup>

### *The Act*

The Act amends Title 16 of the Official Code of Georgia Annotated to change provisions pertaining to criminal abortion and the circumstances under which abortion may be performed.<sup>104</sup> The Act also amends Title 31 of the Official Code of Georgia Annotated.<sup>105</sup> The amendments to Title 31 provide certain definitions, require physicians to determine gestational age prior to performing an abortion, and changes provisions of the “Woman’s Right to Know Act,” (Woman’s Right) including the civil and professional penalties for violation of Woman’s Right.<sup>106</sup> Finally, the Act states legislative findings.<sup>107</sup>

The General Assembly’s findings state that “there is substantial evidence that an unborn child has the physical structures necessary to experience pain” at twenty weeks.<sup>108</sup> This is supported by findings that fetuses at twenty weeks “seek to evade certain stimuli in a manner” consistent with pain avoidance in infants or adults, “[a]nesthesia is routinely administered to unborn children” at twenty-weeks development, and prior to twenty weeks, fetuses “have been observed to exhibit hormonal stress responses to painful stimuli” that “were reduced when pain medication was administered.”<sup>109</sup>

In addition, the Act defines gestational age as “an estimate made to assume the closest time to which fertilization” occurred, clarifying that such a determination “does not purport to be an exact

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102. HB 954 (CCS), p. 1, ln. 6–7, 24–25; p. 2, ln. 58–60; p. 4, ln. 96–98, 2012 Ga. Gen. Assem. The Act as adopted slightly modified the Senate’s proposed definition of “medically futile.” Compare HB 954 (SFA 9), p. 1, ln. 7–10, 2012 Ga. Gen. Assem., with HB 954 (CCS) p. 4, ln. 96–98, 2012 Ga. Gen. Assem.

103. State of Georgia Final Composite Status Sheet, HB 954, May 10, 2012.

104. O.C.G.A. § 16-12-140-41 (Supp. 2012).

105. O.C.G.A. §§ 31-9A-2, -6.1, 31-9B-3 (Supp. 2012).

106. *Id.*

107. 2012 Ga. Laws 575, at 575.

108. *Id.*

109. *Id.* at 575-76.

diagnosis.”<sup>110</sup> The Act also notes the intent of “the State of Georgia to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.”<sup>111</sup>

The Act amends Code sections 16-12-140 and 16-12-141.<sup>112</sup> The changes to Code section 16-12-140 are a minor tightening of the language.<sup>113</sup> The Act eliminates “except as otherwise provided” and adds the female pronoun “she,” so the Code section now addresses both men and women administering abortions.<sup>114</sup> Code section 16-12-141 contains the bulk of changes to Title 16.<sup>115</sup> The Act provides all abortions shall comply with the amendments to Code section 31-9B-2.<sup>116</sup> Also, “no abortion is authorized or shall be performed if the probable gestational age” is determined to be twenty weeks or older.<sup>117</sup> There are three exceptions to the twenty-week prohibition: (1) where the pregnancy is “medically futile,” as defined in section 31-9B-1 of the Act; (2) to avoid either death or “serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman;” or (3) to save the fetus.<sup>118</sup>

This section also provides that diagnoses based on the “mental or emotional condition of the pregnant woman,” or aversions by the expectant mother that she will intentionally harm herself are specifically excluded from the exemptions.<sup>119</sup> This means that a diagnosis based on psychological issues or threats of suicide or other self-harm would not serve as medical exemption to the twenty-week prohibition.<sup>120</sup> This exclusion of mental health issues is probably the most likely to face a constitutional challenge.<sup>121</sup>

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110. *Id.* at 576.

111. *Id.*

112. O.C.G.A. §§ 16-12-140, -141 (Supp. 2012).

113. *See id.* § 16-12-140(a).

114. *Id.*

115. *See id.* § 16-12-141.

116. *Id.* § 16-12-141(a).

117. *Id.* § 16-12-141(c)(1).

118. O.C.G.A. § 16-12-141(c)(1)(A)–(B) (Supp. 2012).

119. *Id.* § 16-12-141(c)(2).

120. *See id.*

121. *See* Palmer, *supra* note 37 (reporting arguments that a failure to provide for exceptions based upon mental health does not fit within the existing jurisprudence surrounding the constitutional right to access an abortion to protect the health of the mother); discussion, *infra* *Analysis*.

This section also requires any physician performing a procedure pursuant to one of the aforementioned exceptions to use the abortive procedure that “provides the best opportunity for the unborn child to survive.”<sup>122</sup> This requirement is not mandatory when selecting the procedure best suited to the unborn child would pose the risk of death or “substantial and irreversible physical impairment of a major bodily function” to the mother.<sup>123</sup> Diagnoses based on the mother’s mental health are also inapplicable to this exception.<sup>124</sup> Like the foregoing, this provision could face a constitutional challenge because the health of the unborn child is deemed to be paramount to the mother’s health.<sup>125</sup> The Act also alters when medical aid is to be rendered following a post-twenty week abortion.<sup>126</sup> The amended law stated that “the product of the abortion” was to receive medical care provided the child was “capable of a meaningful or sustained life.”<sup>127</sup> Under the Act, medical aid is rendered where “the child is capable of sustained life.”<sup>128</sup> Finally, the Act requires medical facilities make their records available to the district attorney in the relevant judicial circuit.<sup>129</sup>

Title 31 of the Official Code of Georgia Annotated is also amended by the Act.<sup>130</sup> First, the Act adds Chapter 9B.<sup>131</sup> This chapter references Code section 31-9A-2 for the definitions of “abortion,” “medical emergency,” “physician,” and “unborn child.”<sup>132</sup> This portion also provides that “[m]edically futile” means that, in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth.<sup>133</sup> The subsection also defines “probable gestational age” as the mostly likely “postfertilization age” as it dates “from the time of fertilization”

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122. O.C.G.A. § 16-12-141(c)(2) (Supp. 2012).

123. *Id.*

124. *See id.*

125. *See discussion infra Analysis.*

126. O.C.G.A. § 16-12-141(c)(2) (Supp. 2012).

127. O.C.G.A. § 16-12-141(c)(2) (2011) (amended 2012).

128. O.C.G.A. § 16-12-141(c)(2) (Supp. 2012).

129. *Id.* § 16-12-141(d).

130. *Id.* §§ 31-9A-2, -9A.61, -9B-1 to -3.

131. *Id.* § 31-9B-1 to -3.

132. *Id.* § 31-9B-1(a)(1), (2), (4), (7).

133. *Id.* § 31-9B-1(a)(3).

based upon “reasonable medical judgment.”<sup>134</sup> Lastly, “[r]easonable medical judgment” is defined as the “medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.”<sup>135</sup>

Code section 31-9B-2 adds the requirement that, absent a medical emergency or a medically futile pregnancy, a physician must make a determination of the gestational age prior to performing an abortion.<sup>136</sup> Non-compliance constitutes professional misconduct.<sup>137</sup>

The Act’s reporting requirements are addressed in section 31-9B-3.<sup>138</sup> A doctor is required to report an abortion in accordance with Code section 31-9A-6, and that report must include either the probable gestational age, or a determination of medical emergency or medical futility.<sup>139</sup> In the case of a post-twenty week abortion the physicians must also indicate whether the method used was that most likely to save the fetus.<sup>140</sup> If not, one of the statutory exceptions must be indicated in the report.<sup>141</sup> Physicians who fail to report within the grace period are “subject to sanctions.”<sup>142</sup> The Department of Health is required to maintain and release statistics based on these reports.<sup>143</sup> The Department is also tasked with ensuring that the women who underwent reported procedures remain anonymous.<sup>144</sup>

Under the Act, a plaintiff attempting to pursue a civil action based upon an inaccurate determination of gestational age must prove by “clear and convincing evidence that the physician determining the probable gestational age of the fetus or the physician whose determination was relied upon was negligent.”<sup>145</sup> This subsection also prohibits action for wrongful determination of gestational age on

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134. O.C.G.A. § 31-9B-1(a)(5) (Supp. 2012).

135. *Id.* § 31-9B-1(a)(6).

136. *Id.* § 31-9B-2(a).

137. *Id.* § 31-9B-2(b).

138. *Id.* § 31-9B-3(a)–(e).

139. *Id.* § 31-9B-3(a)(1)–(2).

140. O.C.G.A. § 31-9B-3(a)(4) (Supp. 2012).

141. *Id.*

142. *Id.* § 31-9B-3(d).

143. *Id.* § 31-9B-3(b).

144. *Id.* § 31-9B-3(c).

145. *Id.* § 31-9A-6.1(b).

the part of a putative plaintiff or a state agency where the would-be plaintiff used “false representation of her age or name.”<sup>146</sup>

Finally, The Act alters the definition of “medical emergency” to conform with the exceptions to the twenty-week prohibition.<sup>147</sup> Medical emergency is “any condition which, in reasonable medical judgment, so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial or irreversible impairment of a major bodily function of the pregnant woman or death of the unborn child.”<sup>148</sup> Like the foregoing, there is no medical emergency where the diagnosis is based upon a threat of self-harm, or other mental or psychological condition.<sup>149</sup>

### *Analysis*

Abortion policies invoke passions like few other topics in American politics. Organizations that provide abortion services have long been the target for physical attacks. Most recently, in April of 2012, unknown perpetrators bombed a Planned Parenthood Clinic in Wisconsin.<sup>150</sup> In Georgia, several robberies occurred at the clinics of doctors who testified against Act 631.<sup>151</sup> In addition, a doctor who testified against the previous “Pain-Capable” bill reported receiving threats via telephone.<sup>152</sup> Indeed, the contemporary measures by state legislatures to limit abortion rights based on a theory of fetal pain returned abortion to the forefront of the American political debate.

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146. O.C.G.A. § 31-9A-6.1(c) (Supp. 2012).

147. *Id.* § 31-9A-2(2).

148. *Id.*

149. *See id.*

150. Elizabeth Flock, *Planned Parenthood Clinic in Wisconsin Fire-Bombed; Officials say Damage was Minimal*, BLOG WASH. POST (Apr. 2, 2012 5:06 PM), [http://www.washingtonpost.com/blogs/blogpost/post/planned-parenthood-clinic-in-wisconsin-fire-bombed/2012/04/02/gIQASCXWtS\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/planned-parenthood-clinic-in-wisconsin-fire-bombed/2012/04/02/gIQASCXWtS_blog.html).

151. Andria Simmons, *Doctors Shaken by Clinic Burglaries*, ATLANTA J.-CONST., Mar. 27, 2012, available at <http://www.ajc.com/news/doctors-shaken-by-clinic-1399871.html>.

152. *Id.*

*Abortions in Georgia compared to the United States*

In 2008, 1.2 million American women obtained abortions.<sup>153</sup> For every 1,000 pregnant women, approximately 19.6 women obtained abortions.<sup>154</sup> In Georgia, 39,820 women obtained abortions in 2008, which is equivalent to a rate of 19.2 for every 1,000 women.<sup>155</sup> The Act outlaws post twenty-week abortions with very few exceptions. The exact number of women the Act affects is unknown, but in 2009, doctors in Georgia aborted 1,281 fetuses older than twenty weeks.<sup>156</sup>

*The Supreme Court's Framework*

The Supreme Court of the United States, in *Roe v. Wade*, established the states' ability to prohibit and regulate abortions based on the viability of the fetus:

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the 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.<sup>157</sup>

The Court in *Roe* determined that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution extended to a woman's decision to have an abortion.<sup>158</sup> But this decision is not

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153. GUTTMACHER INST., STATE FACTS ABOUT ABORTION: GEORGIA 1 (2011), available at <http://www.guttmacher.org/pubs/sfaa/pdf/georgia.pdf>.

154. *Id.* This rate is virtually unchanged from 2005. *Id.*

155. *Id.*

156. House Committee Video Feb. 16, 2012, *supra* note 60, at 51 min., 09 sec. (remarks by Rep. Doug McKillip (R-115th)). Rep. McKillip references the most recent findings from the Guttmacher Institute, a non-profit organization that seeks to advance reproductive rights through research and policy. See *About the Guttmacher Institute*, GUTTMACHER INST. <http://www.guttmacher.org/about/index.html> (last visited May 12, 2012).

157. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

158. *Id.* at 164.

unqualified—the Court further found that a woman’s right to choose to abort her fetus must be balanced against a state’s compelling interests of protecting both unborn fetuses and women’s health.<sup>159</sup> The Court applied a trimester framework and determined that states’ interests become compelling after the second trimester when the fetus becomes viable.<sup>160</sup> The Court overruled the trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, however, and instead determined that states’ right to preserve fetal life takes effect when the fetus reaches the point of viability.<sup>161</sup> It no longer considered viability based on the trimester framework.<sup>162</sup> In *Casey*, the Court recognized that viability was generally considered to be at twenty-three or twenty-four weeks, but that such a demarcation is not absolute.<sup>163</sup> As technology improved, the debate as to exactly when a fetus becomes viable evolved.<sup>164</sup>

*Casey* expanded state interests beyond protecting the fetus and the mother and included the possibility of states having “some other valid . . . interest,” but failed to define what those “other” interests include.<sup>165</sup> The Court further opened the door for a state’s right to protect an unborn fetus in *Gonzales v. Carhart* where it upheld a federal ban on partial-birth abortion despite the absence of an exception for the health of the mother.<sup>166</sup> With these cases as the background, the Georgia legislature limited abortions based on a theory other than viability—a theory of fetal pain.

*Is the Act within the limits set forth by the Supreme Court?*

For the Act to be constitutional, it must fall within the framework established in *Roe* as modified by *Casey* and *Gonzales*. Rather than focusing on viability as a measure for state intervention, the Act

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159. *Id.* at 164–65.

160. *See id.* at 160.

161. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

162. *Id.*

163. *Id.*

164. *See* John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327 (2011) (discussing the changes in sonogram technology as well as the advancement in medicine which increased a fetuses chance of survival outside of the womb prior to seven months).

165. *Casey*, 505 U.S. at 877.

166. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

focuses on fetal pain. While some medical experts believe fetuses can feel pain at twenty weeks, other medical experts believe it is impossible for a fetus to feel pain at such a time.<sup>167</sup> During the committee and floor debates for the bill, Georgia legislators on both sides of this issue presented expert findings and testimony to support their competing views. For example, during the Judiciary Non-Civil Committee hearing on February 16, 2012, Dr. Emidio Novembre, an anesthesiologist specializing in pain management testified:

By 20 weeks, the fetus is able to feel and sense and respond to pain and also be aware. The fetus actually not only feels the pain but actually feels more pain than a newborn baby or an adult. . . . When the fetus at 20 weeks is being dismembered . . . [i]t's actually being burned to death, chemically. [T]he fetus not only feels it but it's actually more excruciating than any pain that anyone ever feels when they have pain. And this occurs maybe even as early as 16 or 18 weeks, depending on the fetus but definitely by 20 weeks.<sup>168</sup>

On the contrary, during the second Judiciary Non-Civil Committee hearing on February 21, 2012, Dr. Anne Patterson, a gynecologist, stated:

There is no fetal research done in this country. It has not been legal for over 30 years. . . . It is pretty well known, both from looking at MRI and histochemical studies that between twenty-four and twenty-five weeks the neurons advance into a subplate into the brain. And they sit. Past that, then they begin to grow into the cortex. So, prior to 24 weeks, we can pretty well identify that those pathways are not present that would identify pain.<sup>169</sup>

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167. Professional groups including the American College of Obstetricians and Gynecologists and the Royal College of Obstetricians and Gynecologists disagree with assertions that fetuses feel pain at twenty weeks. Palmer, *supra* note 37. Other physicians, such as those in the group Doctors on Fetal Pain subscribe to the twenty week mark. DOCTORS ON FETAL PAIN, *supra* note 42.

168. House Committee Video Feb. 16, 2012, *supra* note 60, at 1 hr., 31 min., 57 sec. (remarks by Dr. Emidio Novembre).

169. House Committee Video Feb. 21, 2012, *supra* note 48, at 1 hr. 08 min., 46 sec. (remarks by Dr. Anne Patterson).

As evidenced by the competing expert opinions, the medical research is not definitive.<sup>170</sup> Thus, the debate continues as abortion opponents believe a fetus can feel pain beginning at twenty weeks and abortion-rights advocates strongly disagree.

Despite the inconclusive nature of the medical research, the constitutionality of the Act depends on whether fetal pain is a compelling state interest, thus enabling states to limit abortions once the fetus can feel pain.<sup>171</sup> Although the Court in *Roe* and *Casey* said that states have a compelling interest in protecting fetal life based on viability, it did not say this is the *only* time states have a compelling interest.<sup>172</sup> The question then becomes: Do states have a compelling interest to limit abortions to only those instances where the fetus cannot feel pain? The Court has yet to answer this question; however, since Nebraska passed the first fetal pain law in the country on April 13, 2010, eight states have followed suit.<sup>173</sup> North Carolina instituted a twenty-week bright line rule for banning abortions and made no mention of fetal pain.<sup>174</sup>

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170. Alia Beard Rau, *Abortion Bill Stirs Debate on Fetal Pain*, ARIZ. REPUBLIC, (Mar. 16, 2012, 11:37 PM) <http://www.azcentral.com/news/politics/articles/2012/03/09/20120309arizona-abortion-bill-stirs-debate-fetal-pain.html>. Conflicting expert opinions were voiced in other state legislatures that proposed similar bills. For example, Dr. Paul Liu, a pediatrician and anesthesiologist in Arizona, testified to the Arizona legislature, “[a]t 20 weeks, fetuses have all the nerves on their skin as well as the pathways between the nerves and the brain. But some of the finer details of the brain’s cortex . . . don’t fully develop until 24 or 26 weeks.” *Id.* He further testified that because the science is not definitive, the legislature should err on the side of “being humane” and asked the legislature to pass the fetal pain bill. *Id.* Arizona’s fetal pain bill became law on April 16, 2012. *Id.* On the other hand, Dr. David Grimes, a clinical professor at the University of North Carolina School of medicine testified to the Arizona legislature, “Fetal pain at 20 weeks is an impossibility. . . . It’s like trying to make a telephone call on a landline when there’s no telephone poles laid yet.” *Id.*

171. Existing jurisprudence requires states to advance a compelling state interest in order to overcome a woman’s due process right to an abortion. For example, the Supreme Court recognized that protecting a viable fetus is a compelling state interest sufficient to justify limiting access to abortion. *Roe v. Wade*, 410 U.S. 113, 163 (1973). It is less clear whether the Court will agree with the State that prevention of fetal pain is a compelling enough interest to contravene the rights of the pregnant woman to terminate her pregnancy at the twenty-week mark.

172. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837, 878 (modifying the trimester framework in *Roe* and “accommodating the State’s profound interest in potential life”); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).

173. ALA. CODE §§ 26-23B-1 to -9 (2011); 2012 Ariz. Legis. Serv. Ch. 250 (H.B. 2036) (West); O.C.G.A. §§ 16-12-140,-141; 31-9B-1, -2, -3; 31-9A-6.1; 31-9A-2 (Supp. 2012); IDAHO CODE ANN. §§ 18-501 to -510 (2011); IND. CODE §§ 16-34-1-9(a) (2011); KAN. STAT. ANN. § 65-6722 (2011); NEB. REV. STAT. § 28-3,102-11 (2010); OKLA. STAT. tit. 63, §§ 1-738.6-17 (2011).

174. N.C. GEN. STAT. § 14-45.1 (2011); House Committee Video Feb. 16, 2012, *supra* note 60, at 24 min., 02 sec. (remarks by Rep. McKillip).

Although fetal pain laws have existed since 2010, only one constitutional challenge has been filed.<sup>175</sup> Jennie Linn McCormack is currently challenging Idaho's fetal pain law claiming the legislation is a violation of privacy rights.<sup>176</sup> Months before Idaho's governor signed a fetal pain bill into law, a pregnant McCormack ordered pills via the Internet, which she used to administer an abortion on herself.<sup>177</sup> She was approximately five months pregnant at the time of the abortion.<sup>178</sup> McCormack was criminally charged for performing an unlawful abortion.<sup>179</sup> Authorities eventually dismissed the charges, but McCormack decided to challenge the fetal pain law.<sup>180</sup> Although it is uncertain how the federal district court will rule, McCormack's case faces significant obstacles. Most notably, the United States District Court for the District of Idaho found that she lacked standing because McCormack was neither pregnant nor seeking an abortion when she filed suit.<sup>181</sup> To overcome the standing issue, McCormack's lawyer, who is also a doctor, Rick Hearn, recently joined the suit.<sup>182</sup> Hearn intervened based upon the rationale that he may want to prescribe abortive medications banned by the bill.<sup>183</sup> Hearn's intervention appears to solve many of the issues surrounding standing.<sup>184</sup>

The Act may be declared unconstitutional because the Due Process Clause prohibits a state from banning abortions prior to a fetus' viability.<sup>185</sup> And, even the Act's supporters conceded that at twenty

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175. Laura Zuckerman, *Idaho Woman Challenges Abortion Laws After Prosecution* (Aug. 31, 2011, 9:02AM) <http://www.reuters.com/article/2011/08/31/us-abortion-idaho-idUSTRE77U2JP20110831> ("The lawsuit is believed to be the first federal court case against any of several late-term abortion bans enacted in Idaho and four other states . . .").

176. Jessie L. Bonner, *Doc-Lawyer Will Intervene in Idaho Fetal Pain Case*, U-T SAN DIEGO NEWS, Jun. 6, 2012, <http://www.utsandiego.com/news/2012/jun/06/doc-lawyer-will-intervene-in-idaho-fetal-pain-case/>.

177. Zuckerman, *supra* note 175.

178. *Id.*

179. Bonner, *supra* note 176.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* The intervention by Hearn is viewed by legal analysts as "unique and unusual." Bonner, *supra* note 176.

185. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (finding that "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

weeks a fetus' chance of survival outside of the womb is probably small.<sup>186</sup> The Constitution further mandates that a state cannot prohibit abortion without providing an exception for aborting a fetus when it is necessary to protect a woman's life or health.<sup>187</sup> The Act does include an exception for women who face death or "serious risk of substantial and irreversible physical impairment of a major bodily function," but the Act does not include an exception for the mental or emotional health of a woman.<sup>188</sup> If a suicidal or severely mentally disabled woman needs medication to stabilize herself but those medications threaten the viability of a fetus, the Act presumably places doctors in the tough predicament of choosing to take the mother off of her medications to protect the fetus or choosing to continue to prescribe the medications and face the possibility of criminal prosecution.<sup>189</sup> Such issues will likely reach Georgia and federal courts, and because it is an issue of first impression, the result is unpredictable.

The Act's sponsor, Representative Doug McKillip, believes the Act is constitutional as he thinks it is in line with *Roe*, *Casey*, and *Gonzales*.<sup>190</sup> McKillip interprets *Casey* to have further expanded the definition of a state's compelling interest to include protecting the reputation of the medical community and promoting societal respect for unborn life.<sup>191</sup> In particular, he believes the viability standard is not challenged in the Act because of the way probable gestational age is defined and calculated under the legislation.<sup>192</sup> The Act defines probable gestational age of the unborn child as "in reasonable medical judgment and with reasonable probability, . . . the postfertilization age of the unborn child at the time the abortion is

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186. See House Committee Video Feb. 16, 2012, *supra* note 60, at 31 min., 25 sec. (remarks by Rep. McKillip).

187. *Roe v. Wade*, 410 U.S. at 113; *Casey*, 505 U.S. at 833.

188. O.C.G.A. § 16-12-141(c)(2) (Supp. 2012).

189. See Senate Floor Debate, *supra* note 75, at 2 hr., 30 min., 18 sec. (remarks by Sen. Nan Orrock (D-36th)).

190. See McKillip Interview, *supra* note 26.

191. House Committee Video Feb. 16, 2012, *supra* note 60, at 41 min., 05 sec. (remarks by Rep. McKillip).

192. McKillip Interview, *supra* note 26. The Act requires that "[e]xcept in the case of a medical emergency or when a pregnancy is diagnosed as medically futile, no abortion shall be performed or attempted to be performed unless the physician performing it has first made a determination of the probable gestational age of the unborn child or relied upon such a determination made by another physician." O.C.G.A. § 31-9B-2 (Supp. 2012).

planned to be performed or induced, as dated from the time of fertilization of the human ovum.”<sup>193</sup> The focus of the Act is not on viability, but rather on fetal pain, and he believes the State has a compelling interest to protect an unborn fetus from feeling pain.<sup>194</sup>

*What Does the Act Mean for Women in Georgia Going Forward?*

Women in Georgia are significantly hindered by this Act. The Act contains no exceptions for rape or incest, nor does it contain an exception for the mental or emotional state of the mother.<sup>195</sup> Further, many rural Georgia women may face significant hurdles as a result of the Act. As of 2008, 94% of Georgia counties had no abortion facilities (compared to 87% of counties nationally) with 57% of Georgia women living in these counties.<sup>196</sup> Additionally, 39 of the 159 counties in Georgia have no gynecologists.<sup>197</sup> This lack of access poses particular problems for poor and middle class women.<sup>198</sup> To exacerbate the problem, there are only six obstetrician specialists south of Macon.<sup>199</sup> Often poor women cannot see a gynecologist until the nineteenth or twentieth week of pregnancy, not only because of financial reasons, but also because of the small number of gynecologists in Georgia.<sup>200</sup> Such doctors are often so busy that it can take weeks or months to get an appointment. Georgia ranks forty-eighth in the nation for the number of physicians per 100,000 people.<sup>201</sup> As of 2008, there were only 10.9 physicians for every 100,000 people in the state.<sup>202</sup> Due to the lack of gynecologists and physicians in general, many Georgia women will no longer be able to make a decision for their own family if they are unable to see a doctor prior to twenty weeks of pregnancy.

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193. O.C.G.A. § 31-9B-1(a)(5) (Supp. 2012).

194. McKillip Interview, *supra* note 26.

195. O.C.G.A. § 16-12-141(c)(2) (Supp. 2012).

196. GUTTMACHER INST., *supra* note 153, at 2.

197. GA. BD. OF PHYSICIAN WORKFORCE, PHYSICIAN WORKFORCE 2000, 5 (2000), available at <http://gbpw.georgia.gov/sites/gbpw.georgia.gov/files/imported/GBPWF/Files/Physician%20Workforce%202000.pdf>.

198. Video Recording of House Floor Debate, Feb. 29, 2012 at 2 hr., 10 min., 16 sec. (remarks by Rep. Sharon Cooper (R-41st)), <http://www.gpb.org/lawmakers/2012/day-28>.

199. *Id.* at 2 hr., 09 min., 45 sec.

200. *Id.* at 2 hr., 10 min., 20 sec.

201. *Id.* at 2 hr., 04 min., 52 sec.

202. *Id.* at 2 hr., 05 min., 53 sec.

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Georgia is just one among several states that have passed fetal pain laws. While there has only been one legal challenge to a fetal pain law in the country, as more states pass such laws, the challenges will likely increase. Rather than focusing on viability, the Act purports that the State has a compelling interest in protecting a fetus from feeling pain, and the constitutionality of such an approach for limiting abortions remains uncertain.

*Jenna Perkins Cooley & Kimberly Reeves*