

13
2/17/05
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TESTIMONY OF ACLU MONTANA OPPOSING HB617
Requiring Fetal Death Certificates
Sponsor: Representative Koopman
2/17/05

Since this is the third bill of this type, i.e. bills to restrict a woman's right to obtain a lawful abortion, heard in this Committee, I want to talk about the proper role of the legislature in matters regarding constitutionally protected individual rights.

During the question and answer period on a previous anti-choice bill heard in this Committee, this bill's sponsor began a question of me by referring to one of our country's founding fathers. Representative Koopman said that this particular founder had said it was up to the three branches of government to interpret the constitution. I do not remember which particular founding father he was referring to, but whomever it was, that father lost the constitutional debate on that one. In this country and this great state of Montana, it is, in fact, the sole responsibility of the courts to interpret constitutions. This is especially important with respect to the Bill of Rights in the federal constitution, and the individual rights clauses of the Montana constitution. Why? The reason the legislature has no role in interpreting the constitution, and in particular individual rights protections, is that the legislature passes bills by majority vote. Hence, a legislature could easily pass bills infringing on the rights of the minority. If a legislature does so, it is then the court's role to strike down such infringements to the extent that such bills are inconsistent with those protections we reserved to ourselves individually in the Constitution. If this were not the case, individual rights protections in constitutions would have no meaning.

Legislators in this great state take an oath to uphold the constitutions of the United States and the State of Montana. That means that legislators who swear to that oath have agreed to be mindful of and to follow the Constitutions as interpreted by the courts.

Let us turn now to this bill whose aim, as stated by the sponsor in a different venue, is to cause women who exercise their constitutional rights to obtain an abortion to regret their decisions for the rest of their lives. Our Montana Supreme Court, whose job it is to interpret the Montana Constitution, has made it crystal clear that Montana's high regard for individual privacy, as embodied in Article II, Section 10, of the Montana Constitution, protects a woman with respect to medical decision-making about reproduction, including abortion. It has also made it crystal clear that the right may not be infringed without a compelling state interest. "Compelling state interest" is a term of art, and it puts upon a legislature that wants to restrict an individual right a high burden of showing that the state has a very significant and justifiable reason for restricting the right.

In the case of this bill, the purported "compelling state interest" is found in the recitals in lines 11 - 17. In these lines this bill says that the State of Montana has an interest in reducing the number of abortions, that that goal can be reached by telling women seeking abortions that they would be

“terminating a human being.” It further says that by telling these women that a death certificate would have to be issued, the state might save them from “years of regret.” Rather than tell you what I think our Supreme Court might have to say about such statements as embodying compelling state interests, let me simply read you some relevant language from the *Armstrong*¹ case in which our Supreme Court unanimously struck down a legislative enactment that would have prevented licensed physician assistants from performing abortions:

Indeed, the history [of the legislation restricting abortion providers], and the record of this case demonstrate how unrelenting pressure from individuals and organizations promoting their own particular values influence politicians to legislate, often via the back door, in matters of personal conscience, belief and choice, and concomitantly, infringe the zone of personal autonomy and procreative autonomy protected by the right of individual privacy. The reality of this case is that, while the legislature could not make pre-viability abortions facially unlawful, it could, and did – under the facade of “protecting women’s health” and the lesser “undue burden” test of *Planned Parenthood [v. Casey]* – attempt to make it as difficult, as inconvenient and as costly as possible for women to exercise their right to obtain, from the health care provider of their choice, a specific medical procedure protected by the Due Process Clause of the federal constitution and, independently of the Fourteenth Amendment, protected by their greater right of individual privacy under Article II, Section 10 of the Montana Constitution. Furthermore, ...there was no predicate compelling state interest justifying the amendments in the first place.

In light of this language, imagine what our Court might have to say about the “compelling state interest” found in lines 11-17 of this bill. Indeed, we know that the real reason for this bill is the promotion of a particular view of a fetus as a “human being” that should be protected against abortion procedures. Here’s what our Supreme Court says is wrong with this kind of legislative action:

Unfortunately, however, it is these doctrines, values, beliefs and convictions which invariably fuel the hurricane of *legal* debate on this issue. And that, of course, is precisely the problem. *The government can demonstrate no compelling interest for legislating on the basis of any sectarian doctrine nor may the state infringe individual liberty and personal autonomy because of majoritarian demands to safeguard some intrinsic value unrelated to the protection of the rights and interests of persons with constitutional status.* The fundamental right to personal and procreative autonomy and, in the broader sense, to individual privacy, prohibits the government from dictating, approving or condemning values, beliefs and matters ultimately involving individual conscience, where opinions about the nature of such values and beliefs are seriously divided; where, at their core, such values and beliefs reflect essentially religious convictions that are fundamental to moral personality; and where the government’s decision has a *greatly disparate impact on the persons whose individual beliefs and personal commitments are displaced by the State’s legislated values.* [Emphasis supplied]

¹*Armstrong et al v. State*, 296 Mont 361, 989 P.2d 365 (1999)

Further, in the words of our Montana Supreme Court:

For this reason, and without abandoning their own personal beliefs and convictions, those in government who make, execute and interpret the law and who are sworn to support, protect and defend the Constitution may not, except in violation of their oaths of office, succumb to the pressure of those who would engraft the sectarian tenets and personal values of some onto the laws which govern all. [Emphasis supplied.]

What is the Montana Supreme Court saying to legislators? If you think abortion is morally wrong, just keep it to yourself? Not at all. Specifically, the *Armstrong* Court noted that an *individual's* right to express strong beliefs against abortion, and to try to persuade others of the rightness of those beliefs, is protected in the same Constitution that guarantees privacy and hence protects a woman's right to abortion. What it is saying, in no uncertain terms, is that once an individual takes the legislative oath of office, however, legislative activity aimed at undermining the Constitution, as interpreted by the Court, is a violation of that oath. In other words, as individuals, go ahead and disagree with certain constitutional provisions all you want. The Montana Constitution will protect you. (In fact, ACLU Montana might assist you if your First Amendment rights are violated.) But once you take that oath to uphold the Constitution, keep your word. Uphold the Constitution by not proposing, not supporting and certainly not passing laws that are clearly unconstitutional infringements of individual rights.

HB617, like the other similar bills before this Committee earlier, is clearly inconsistent with the privacy protections in the Montana Constitution. We urge you to honor your oaths of office and kill this bill.