



American Civil Liberties Union
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TESTIMONY OF DEBORAH SMITH
ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF MONTANA

HB 403
HEARING, HOUSE JUDICIARY COMMITTEE
FEBRUARY 2, 2007

HB 403 would amend Article II, section 3, of the Montana Constitution to grant a newly fertilized egg the same inalienable rights as a person. The American Civil Liberties Union of Montana opposes HB 403 because it would diminish a pregnant woman's inalienable and fundamental rights, and would create an intrusive governmental interest in every pregnancy "from the moment of conception." It would also interfere with other constitutional rights, such as a due process requirement against unacceptably vague laws. This bill is a dangerous affront to the liberty of Montana's people, and must be defeated.

If a fertilized egg a few hours or days old holds the same constitutional rights as a person born alive, then that egg has a right to have its existence protected the same way a person would. The problems with such a viewpoint are many, but I'll start with the very real problem of a woman who does not know she is pregnant in the early days or weeks of her pregnancy. She may take an aspirin for a headache, or an antihistamine for a cold, or have coffee with breakfast or a glass of wine with dinner that potentially could significantly harm the tiny cells beginning to form a fetus inside her. If this amendment were in the Constitution, that woman -- who may very much want the child she doesn't yet know she is carrying -- could be prosecuted for assault or homicide if the fetus suffered from birth defects, miscarriage, or stillbirth possibly caused by the aspirin, cold medicine, coffee or wine she had before she even knew she was pregnant. Having to rely on a prosecutor's discretion to decline to pursue criminal charges against this woman hardly protects the fundamental, inalienable rights to privacy and due process that she rightly possesses under existing law.

Moreover, a state DPHHS officer or court-appointed guardian ad litem might well claim a chair in every patient room where a doctor was seeing a pregnant patient, or even a patient seeking fertility treatment or counseling. Women could say goodbye to doctor/patient privilege under HB 403. The rights of pregnant women to consult privately and in confidence with their physicians about their bodies, their pregnancies, their lives, and their unborn children would be tossed out the door so the state could attempt to police the interests of fertilized egg cells in women's bellies that under this bill would hold the same rights as mothers. What do we do with the mother whose physician advises that bed-rest would be best for the fetus, but whose family's financial situation requires her to work during her pregnancy? Can the state obtain a court order mandating bed-rest for the mother? If so, does the public pick up the tab to support the woman's family during her bed-rest? What if she and her physician decided that the odds were decent that she could work without harming the fetus? The government simply has no business meddling in,

or second-guessing, such intensely personal decisions, which solely and uniquely should be made by a pregnant woman based on confidential advice from her physician or other health-care provider.

Implications of HB 403 on women who have at-risk pregnancies are even more profound. For example, pregnant women taking anti-depressant medications, or who are HIV positive, or who are addicts, or who are critically ill may be at risk of having no say at all in how their pregnancies are managed from their inception. A doctor's advice to protect the health of the mother might be overruled by a DPHHS caseworker or guardian ad litem acting to protect the "life" of the fertilized egg. In this way, HB 403 is similar to fetal homicide laws in other jurisdictions where women are prosecuted for harming their fetuses during pregnancies. Women and children have died or suffered due to state interventions in high-risk pregnancies. To give but one example, in the District of Columbia in 1987, against the wishes of the woman and her family, and against the advice of her physicians, a caesarian section was court-ordered on a critically ill woman with cancer to try to save the child; the child did not survive and the woman died two days later. No doubt, high-risk pregnancies due to drug abuse or presence of HIV or other sexually transmitted diseases are an important concern for state authorities. But the proper focus is on prevention of such pregnancies or on good prenatal care during such pregnancies; it should not involve bureaucratic, authoritarian interference in medical decisions best left to women and their doctors.

Finally, to address the implications for abortion, the obvious purpose of HB 403, it is worth emphasizing that this constitutional amendment would not and cannot overrule a woman's federal constitutional right to choose a pre-fetal-viability abortion under *Roe v. Wade*. What the bill may be trying to achieve, at any cost to any pregnant woman, in the event that *Roe* is overruled or fundamentally altered by the United States Supreme Court, is a situation in Montana where any abortion or certain forms of contraception would be unconstitutional because a newly fertilized egg would have a "paramount and fundamental right to life." Any action that might harm a fetus could be prosecuted as a crime against a person, subjecting women, doctors, midwives, nurses, and other health-care providers to prison terms and hefty fines. Tort claims could be brought on behalf of fetuses or their estates for damages due to wrongful death, negligence, gross negligence, or any of a number of related causes of action.

HB 403 regards a pregnant woman and her fetus as separate, independent, and even adversarial, entities. It purports to override a woman's fundamental right of privacy, bodily integrity, and self-determination.* It may infringe on constitutional due process rights because the constitutional amendment is unacceptably vague in meaning. In short, the bill would wreak havoc with criminal and civil statutes and court precedents. It would create an Orwellian world where the state has a police-interest in monitoring procreation and gestation in every pregnancy. For these reasons, HB 403 should be left to lie on this Committee's table. On behalf of our members, ACLU urges you to vote "NO" on HB 403.

* See Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harvard Women's Law Journal 9, 37, 57 (1987), cited in ACLU, *What's Wrong with Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses* (7/31/96), found at <http://www.aclu.org/reproductiverights/fetalrights/16530res19960731.html>