

By: Berman

H.B. No. 569

A BILL TO BE ENTITLED

AN ACT

relating to fetal pain prevention; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 170, Health and Safety Code, is amended by adding Subchapter B to read as follows:

SUBCHAPTER B. FETAL PAIN PREVENTION

Sec. 170.051. DEFINITIONS. In this subchapter:

(1) "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(2) "Attempt to perform an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in this state in violation of law.

(3) "Medical emergency" means any condition which, on the basis of the physician's good faith clinical 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 and irreversible impairment of a major bodily function.

1           (4) "Physician" means a physician licensed to practice  
2 medicine in this state, including an osteopath.

3           (5) "Probable gestational age" means what, in the  
4 judgment of the physician, will with reasonable probability be the  
5 gestational age of the unborn child at the time the abortion is  
6 planned to be performed.

7           (6) "Unborn child" means a member of the species Homo  
8 sapiens from fertilization until birth.

9           Sec. 170.052. FETAL PAIN INFORMATION. (a) At least 24  
10 hours before the time an abortion is begun on an unborn child whose  
11 probable gestational age is 20 weeks or more, the physician  
12 performing the abortion or the physician's agent shall inform the  
13 pregnant female, by telephone or in person, that she has the right  
14 to review the printed materials described in Section 170.054, that  
15 these materials are available on a state-sponsored website, and  
16 what the website address is. The physician or the physician's agent  
17 shall orally inform the female that the materials have been  
18 provided by this state and that they contain information on fetal  
19 pain. If the female chooses to view the materials other than on the  
20 website, the materials must either be given to her at least 24 hours  
21 before the abortion or mailed to her at least 72 hours before the  
22 abortion by certified mail, restricted delivery to addressee, which  
23 means the postal employee can deliver the mail to only the  
24 addressee. The information required by this subsection may be  
25 provided by a tape recording if provision is made to record or  
26 otherwise register specifically whether the female does or does not  
27 choose to have the printed materials given or mailed to her.

1       (b) Before an abortion subject to this section is performed,  
2 the female shall certify in writing that the information described  
3 in this subsection has been provided to her and that she has been  
4 informed of her opportunity to review the printed materials  
5 described in Section 170.054. Before the abortion is performed,  
6 the physician who is to perform the abortion or the physician's  
7 agent shall obtain a copy of the written certification and retain it  
8 on file with the female's medical record until at least the third  
9 anniversary of the date the certification was received.

10       (c) This section does not apply in the case of a medical  
11 emergency.

12       Sec. 170.053. FETAL PAIN PREVENTION. Except in the case of  
13 a medical emergency, before an abortion is performed on an unborn  
14 child who is 20 weeks gestational age or more, the physician  
15 performing the abortion or the physician's agent shall inform the  
16 female if an anesthetic or analgesic would eliminate or alleviate  
17 organic pain to the unborn child caused by the particular method of  
18 abortion to be employed and inform her of the particular medical  
19 risks associated with the particular anesthetic or analgesic. With  
20 her consent, the physician shall administer the anesthetic or  
21 analgesic.

22       Sec. 170.054. PRINTED MATERIALS. (a) The department shall  
23 publish, in English and in each language that is the primary  
24 language of two percent or more of the state's population, printed  
25 materials with the following information concerning unborn  
26 children of 20 weeks gestational age and for each two-week  
27 gestational increment after that age:

1           (1) the development of the nervous system of the  
2 unborn child;

3           (2) fetal responsiveness to adverse stimuli and other  
4 indicators of capacity to experience organic pain; and

5           (3) the methods of abortion procedures commonly  
6 employed at this stage of pregnancy.

7           (b) The information provided in the printed materials must  
8 be objective, nonjudgmental, and designed to convey only accurate  
9 scientific information.

10          (c) The information provided in the printed materials must  
11 be presented in such a way as to ensure that the information is  
12 easily comprehensible.

13          (d) The information provided in the printed materials must  
14 be printed in a typeface large enough to be clearly legible.

15          (e) The printed materials required by this section must be  
16 available at no cost from the department on request and in  
17 appropriate numbers to any person, facility, or hospital.

18          (f) The department shall make the information provided in  
19 the printed materials available on the website required under  
20 Section 170.055.

21          Sec. 170.055. INTERNET WEBSITE. (a) The department shall  
22 develop and maintain a stable Internet website to provide the  
23 information described by Section 170.054.

24          (b) Information regarding who uses the website may not be  
25 collected or maintained.

26          (c) The department shall monitor the website on a daily  
27 basis to prevent and correct tampering.

1       (d) The website must be maintained at a minimum resolution  
2 of 70 dots per inch. A picture appearing on the website must be a  
3 minimum size of 200x300 pixels. The letters used by the department  
4 on the website must be in 11-point or larger type. All information  
5 and pictures must be accessible with an industry-standard browser  
6 and may not require the use of an additional plug-in.

7       Sec. 170.056. PROCEDURE IN CASE OF MEDICAL EMERGENCY. When  
8 a medical emergency compels the performance of an abortion, the  
9 physician shall inform the female, before the abortion if possible,  
10 of the medical indications supporting the physician's judgment that  
11 an abortion is necessary to avert her death or that a 24-hour delay  
12 will create serious risk of substantial and irreversible impairment  
13 of a major bodily function.

14       Sec. 170.057. REPORTING REQUIREMENTS. (a) The department  
15 shall prepare a reporting form for physicians containing the text  
16 of this subchapter and blanks for listing:

17               (1) the number of females to whom the physician or an  
18 agent of the physician provided the information described by  
19 Section 170.052(a), separately identifying:

20                       (A) the number of females to whom the information  
21 was provided by telephone, separately identifying:

22                               (i) the number of females to whom the  
23 information was provided in the capacity of a referring physician;  
24 and

25                               (ii) the number of females to whom the  
26 information was provided in the capacity of a physician who is to  
27 perform the abortion or agent of such a physician; and

1           (B) the number of females to whom the information  
2 was provided in person, separately identifying:

3           (i) the number of females to whom the  
4 information was provided in the capacity of a referring physician;  
5 and

6           (ii) the number of females to whom the  
7 information was provided in the capacity of a physician who is to  
8 perform the abortion or agent of such a physician;

9           (2) the number of females who:

10           (A) availed themselves of the opportunity to  
11 obtain a copy of the printed information described in Section  
12 170.054, other than on the website, separately identifying the  
13 number of these females who, to the best of the reporting  
14 physician's information and belief, obtained the abortion; and

15           (B) did not avail themselves of the opportunity  
16 to obtain a copy of the printed information described in Section  
17 170.054, other than on the website, separately identifying the  
18 number of these females who, to the best of the reporting  
19 physician's information and belief, obtained the abortion;

20           (3) the number of abortions performed by the physician  
21 in which information otherwise required to be provided at least 24  
22 hours before the abortion was not provided because an immediate  
23 abortion was necessary to avert the female's death; and

24           (4) the number of abortions performed by the physician  
25 in which information otherwise required to be provided at least 24  
26 hours before the abortion was not provided because a delay would  
27 create serious risk of substantial and irreversible impairment of a

1 major bodily function.

2 (b) The department shall ensure that copies of the reporting  
3 forms are provided to each physician:

4 (1) at the same time the physician is notified that the  
5 physician has become licensed in this state; and

6 (2) not later than December 1 of each year.

7 (c) Not later than February 28 of each year, a physician who  
8 provided, or whose agent provided, information to one or more  
9 females in accordance with Section 170.052 during the previous  
10 calendar year shall submit to the department a copy of the form  
11 required by this section, with the required information entered  
12 accurately and completely.

13 (d) A physician who fails to submit a complete report before  
14 March 28 of the year in which the report is required to be filed must  
15 pay a late reporting fee of \$500 for each additional 30-day period  
16 or portion of a 30-day period the report remains overdue.

17 (e) At the request of the department, the attorney general  
18 may bring an action against a physician who fails to submit a  
19 complete report before the first anniversary of the date the report  
20 is due to compel the physician to submit a complete report within a  
21 period stated by court order. The physician is subject to sanctions  
22 for civil contempt if the physician does not comply with a court  
23 order issued under this subsection.

24 (f) Not later than June 30 of each year, the department  
25 shall issue a public report providing statistics for the previous  
26 calendar year compiled from all of the reports covering that year  
27 submitted in accordance with this section for each of the items

1 listed in Subsection (a). The public report must also provide the  
2 statistics for all previous calendar years, adjusted to reflect any  
3 additional information from late or corrected reports. The  
4 department shall take care to ensure that none of the information  
5 included in a public report under this subsection could reasonably  
6 lead to the identification of any individual providing or provided  
7 information in accordance with Section 170.052.

8 (g) The board by rule may alter the dates established by  
9 Subsection (b)(2), (e), or (f) or consolidate the forms or reports  
10 described in this section with other forms or reports to achieve  
11 administrative convenience or fiscal savings or to reduce the  
12 burden of reporting requirements. In acting under this subsection,  
13 the board shall ensure that reporting forms are sent to all licensed  
14 physicians in this state at least once each year and the public  
15 report described by Subsection (f) is issued at least once each  
16 year.

17 Sec. 170.058. CRIMINAL PENALTIES. (a) A person commits an  
18 offense if the person knowingly or recklessly performs or attempts  
19 to perform an abortion in violation of this subchapter. An offense  
20 under this subsection is a state jail felony.

21 (b) A person commits an offense if the person is a physician  
22 and knowingly or recklessly submits a false report under Section  
23 170.057. An offense under this subsection is a Class C misdemeanor.

24 Sec. 170.059. CIVIL REMEDIES. (a) A person who knowingly  
25 or recklessly performs an abortion in violation of this subchapter  
26 is liable in a civil action for actual damages and exemplary damages  
27 in accordance with Chapter 41, Civil Practice and Remedies Code,



1 to:

2 (1) the person on whom the abortion has been  
3 performed;

4 (2) the father of the unborn child who was the subject  
5 of the abortion; or

6 (3) a grandparent of the unborn child.

7 (b) A person who knowingly or recklessly attempts to perform  
8 an abortion in violation of this subchapter is liable in a civil  
9 action for actual damages and exemplary damages in accordance with  
10 Chapter 41, Civil Practice and Remedies Code, to the person on whom  
11 the abortion has been attempted.

12 Sec. 170.060. ACTION TO COMPEL STATISTICAL REPORT. If the  
13 department fails to issue the public report required by Section  
14 170.057(f), a group of 10 or more residents of this state may bring  
15 an action against the commissioner for an injunction requiring that  
16 a complete report be issued within a period stated by court order.  
17 The commissioner is subject to sanctions for civil contempt if the  
18 department does not comply with a court order issued under this  
19 section.

20 Sec. 170.061. ATTORNEY'S FEES. (a) If judgment is  
21 rendered in favor of the plaintiff in an action under Section  
22 170.059 or 170.060, the court shall award reasonable attorney's  
23 fees in favor of the plaintiff against the defendant.

24 (b) If judgment is rendered in favor of the defendant in an  
25 action under Section 170.059 or 170.060 and the court finds that the  
26 action was frivolous and brought in bad faith, the court shall award  
27 reasonable attorney's fees in favor of the defendant against the

1 plaintiff.

2 Sec. 170.062. DEFENSE. (a) It is a defense to prosecution  
3 under Section 170.058 for failure to obtain the written  
4 certification under Section 170.052 that the department had not  
5 made the printed materials available at the time the physician or  
6 the physician's agent was required to inform the female of her right  
7 to review them.

8 (b) A person may not be found civilly liable for violation  
9 of the requirement to obtain the written certification under  
10 Section 170.052 in the circumstances described by Subsection (a).

11 Sec. 170.063. FEMALE NOT LIABLE. A female on whom the  
12 abortion is performed or attempted to be performed is not  
13 criminally or civilly liable under this subchapter.

14 Sec. 170.064. PROTECTION OF PRIVACY IN COURT  
15 PROCEEDINGS. (a) In a civil or criminal proceeding or action  
16 brought under this subchapter, the court shall rule whether the  
17 anonymity of any female on whom an abortion has been performed or  
18 attempted to be performed, and who does not consent to public  
19 disclosure of her identity, shall be preserved from public  
20 disclosure.

21 (b) The court, on motion of a party or sua sponte, shall make  
22 a ruling under this section and, on determining that the female's  
23 anonymity should be preserved, shall issue orders to the parties,  
24 witnesses, and counsel and shall direct the sealing of the record  
25 and exclusion of individuals from courtrooms or hearing rooms to  
26 the extent necessary to safeguard the female's identity from public  
27 disclosure.

1       (c) Each order issued under Subsection (b) must be  
2 accompanied by specific written findings explaining:

3           (1) why the anonymity of the female should be  
4 preserved from public disclosure;

5           (2) why the order is essential to preserve the  
6 anonymity of the female;

7           (3) how the order is narrowly tailored to serve the  
8 interest identified by the court; and

9           (4) why no reasonable less restrictive alternative  
10 exists.

11       (d) In the absence of written consent of the female on whom  
12 an abortion has been performed or attempted to be performed, any  
13 person, other than a public official, who brings an action under  
14 Section 170.059 must bring the action under a pseudonym. This  
15 section may not be construed to conceal the identity of the  
16 plaintiff or of witnesses from the defendant.

17       Sec. 170.065. SEVERABILITY. If any one or more provisions,  
18 sections, subsections, sentences, clauses, phrases, or words of  
19 this subchapter or the application of this subchapter to any person  
20 or circumstance is found to be unconstitutional, the provision,  
21 section, subsection, sentence, clause, phrase, or word is declared  
22 to be severable and the balance of this subchapter remains  
23 effective notwithstanding that unconstitutionality. The  
24 legislature declares that the legislature would have enacted this  
25 subchapter, and each provision, section, subsection, sentence,  
26 clause, phrase, or word of this subchapter, irrespective of the  
27 fact that any one or more provisions, sections, subsections,

1 sentences, clauses, phrases, or words are declared  
2 unconstitutional.

3 SECTION 2. Sections 170.001 and 170.002, Health and Safety  
4 Code, are redesignated as Subchapter A, Chapter 170, Health and  
5 Safety Code, and a subchapter heading is added to read as follows:

6 SUBCHAPTER A. GENERAL PROVISIONS

7 SECTION 3. Section 170.001, Health and Safety Code, is  
8 amended to read as follows:

9 Sec. 170.001. DEFINITIONS. In this subchapter [~~chapter~~]:

10 (1) "Abortion" means an act involving the use of an  
11 instrument, medicine, drug, or other substance or device developed  
12 to terminate the pregnancy of a woman if the act is done with an  
13 intention other than to:

14 (A) increase the probability of a live birth of  
15 the unborn child of the woman;

16 (B) preserve the life or health of the child; or

17 (C) remove a dead fetus.

18 (2) "Physician" means an individual licensed to  
19 practice medicine in this state.

20 (3) "Viable" means the stage of fetal development  
21 when, in the medical judgment of the attending physician based on  
22 the particular facts of the case, an unborn child possesses the  
23 capacity to live outside its mother's womb after its premature  
24 birth from any cause. The term does not include a fetus whose  
25 biparietal diameter is less than 60 millimeters.

26 SECTION 4. (a) Not later than the 90th day after the  
27 effective date of this Act, the Texas Department of Health shall

1 publish the printed materials required by Section 170.054, Health  
2 and Safety Code, as added by this Act, and shall make available the  
3 website required by Section 170.055, Health and Safety Code, as  
4 added by this Act.

5 (b) Not later than the 90th day after the effective date of  
6 this Act, the Texas Department of Health shall prepare the  
7 reporting form for physicians required by Section 170.057, Health  
8 and Safety Code, as added by this Act. Not later than the 120th day  
9 after the effective date of this Act, the department shall  
10 distribute the reporting form to each physician licensed to  
11 practice medicine in this state. Notwithstanding Section  
12 170.057(b)(2), Health and Safety Code, as added by this Act, the  
13 department is not required to distribute reporting forms to  
14 physicians on December 1 of the year in which the initial  
15 distribution of reporting forms is made under this subsection.

16 (c) Each physician required to report under Section  
17 170.057, Health and Safety Code, as added by this Act, shall make  
18 the initial required report in accordance with that section not  
19 later than February 28, 2004. The report made under this subsection  
20 shall cover the period beginning on the effective date of this Act  
21 and ending on December 31, 2003.

22 SECTION 5. This Act takes effect immediately if it receives  
23 a vote of two-thirds of all the members elected to each house, as  
24 provided by Section 39, Article III, Texas Constitution. If this  
25 Act does not receive the vote necessary for immediate effect, this  
26 Act takes effect September 1, 2003.