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Reply to Critics of the Heartbeat Bill

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The statement of James Bopp regarding the Heartbeat Bill is a repeat of his ongoing opposition to other pro-life measures for over five years. The memorandum that he provided the Ohio Senate Health Committee is a virtual retread of one he authored in 2007 long before heartbeat legislation was being considered. See: http://operationrescue.org/pdfs/Bopp%20Memo%20re%20State%20HLA.pdf.

As such, he has overtly opposed legislation that seeks to affirm the personhood of the unborn child, as well as legislation that protects children conceived by rape, incest, or children with genetic deformities. He also opposed a proposed Republican Party platform amendment that looked to a ban on embryonic stem cell research and cloning.

He often uses the tactic of frightening the pro-life movement by raising the specter of a Supreme Court going on a pro-abortion binge once given the chance. But in relation to the Heartbeat Bill, Mr. Bopp's fears are frankly out of proportion to present realities and to past history.

In his statement on the Heartbeat Bill, he expends much ink quoting Supreme Court opinions declaring that the line of protection for the unborn can only begin after viability. *But quoting Supreme Court opinions on abortion tells us little or nothing of what the Supreme Court will do when faced with a new piece of legislation protecting the unborn*.

- When the Supreme Court considered a Pennsylvania Law adding restrictions to abortion, Planned Parenthood quoted liberally from Roe v. Wade with its trimester formula. But the Court changed the trimester formula in Planned Parenthood v. Casey.
- In attacking the federal ban on partial birth abortion, the lawyers for abortionist Carhart quoted doctrine that the Supreme had declared in Stenberg v. Carhart, which had struck down Nebraska's ban on partial birth abortion. But the Supreme Court upheld the federal ban onpartial birth abortion, despite previous "precedent."
- There was once a "precedent" that struck down a law requiring a woman's informed consent for an abortion.
- There was once a "precedent" that struck down a 24 hour waiting period.
- There were once "precedents" limiting the requirement of parental consent or notification for minors.
- There was once a "precedent" that the abortionist could not be legally required to be the one to give information to the woman as provided by law.
- It used to be judicial practice to invalidate an entire statute if only one part of it constituted an undue burden.

In all of these instances, "precedent" did not stand in the way of pro-life legislatures acting and the Supreme Court responding and changing the law. Mr. Bopp's quoting "precedent," therefore, does no more than state what the Supreme Court has once said and what we are asking it to reconsider.

Instead of seeing the Heartbeat Bill as an historic opportunity for further change, Mr. Bopp pictures a Supreme Court taken over by pro-abortion partisans who will use the Heartbeat Bill as an occasion to undo the victories the pro-life movement has already won. He points to those justices that would like to employ the Equal Protection Clause as an aggressive weapon. But one can count votes in the pro-life direction too. Even if there are four potential votes for an Equal Protection view of abortion law, there are also four (and yes, perhaps five) potential votes for extending the protections of the unborn in a meaningful way.

In any event, Mr. Bopp's doomsday argument "proves too much," as lawyers are wont to say. Even if there is such an activist pro-abortionist wing on the Supreme Court, they won't wait for the four or five years before the Heartbeat Bill reaches them. They have plenty of opportunity to do Mr. Bopp's predicted damage in any of the pieces of pro-life legislation, including the ones that Mr. Bopp supports, that will soon percolate up the legal ladder. There is no doubt that the post-viability ban will be challenged. Pro-abortion partisans already are taking aim at informed consent statutes. Various laws requiring ultra sounds are and will come before the courts.

It doesn't take the Heartbeat Bill for the anti-life forces to try to control the Court's direction. They will do so anyway.

But it does take the Heartbeat Bill to bring about a change that, when approved, will save thousands of lives.

The fact is that the Heartbeat Bill has as much chance, if not more, of enabling a pro-life wing to consolidate.

Though we disagree with Mr. Bopp's harsh, and we believe, unwarranted statements regarding the Heartbeat Bill, we still praise him for his long service to the pro-life cause. For years, Mr. Bopp worked assiduously to try to pass a Human Life Amendment and to seek to have the Supreme Court reverse Roe v. Wade. When those efforts failed most conspicuously in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey, Mr. Bopp's disappointment led him to his present position of essentially waiting for a hoped-for change in the make up of the Supreme Court before attempting anything significant legislatively. As one of the most activist members of the Republican Party, he has placed the bulk of his efforts on a political solution.

But the pro-life movement has been consistently disappointed in political solutions over the past decades. Even in the most optimistic view, years will pass before we can have a Supreme Court that will follow the true meaning of the Constitution in regard to abortion. A pro-life President must be elected. He must have an opportunity to appoint someone to the Supreme Court who would replace a pro-abortion vote. His nominee must understand the invalidity of Roe v. Wade, and usually we only can

guess at that. The nominee must be confirmed by the Senate. The nominee must, unlike so many who have gone before, fulfill the expectations of those who supported him or her.

Even if all this happens, and finally Mr. Bopp approves passing legislation that can truly protect the unborn, we still have to wait perhaps even more years. Legislation protecting the unborn must still be passed somewhere. It must be taken through the gauntlet of the lower courts. The Supreme Court must take jurisdiction of the case. It must be argued and decided. Meanwhile, the years pass, and the pro-life movement must watch and wait before it can measurably help those persons who would be born but for the violence of abortion.

Let's be realistic. If the Heartbeat Bill is passed, it likely would not be before the Supreme Court for four or five years anyway. By then, if Mr. Bopp's efforts succeed, and there is a pro-life majority on the Court, there will be no waiting. The Bill will be ready-made for the change we seek.

If, on the other hand, we still have a divided Supreme Court, the bill still provides an opportunity for a change. As a judicial tactic, Mr. Bopp suggests that at present laws be passed that accord with Supreme Court principles. But those kinds of laws need not be timid. The Heartbeat Bill is fashioned precisely because it accords with an expressed principle in current Supreme Court caselaw, but one that we think invites the Court to move the line protecting the unborn forward to a more reasonable point. This bill is not a flat ban on abortion. It does not confront the Court with an all or nothing choice. It is based on evidence not brought forward in the same way as in the past.

In recent studies, pre-natal research now reveals that, although as many as thirty per cent of natural pregnancies end in spontaneous miscarriage, less than five per cent of all natural pregnancies end in spontaneous miscarriage once a heartbeat is detected. As one gynecologist has related, there are innumerable things that need to happen biologically for a sperm to reach an ovum, and once there is fertilization, there are innumerable things that need to happen before formation and implantation of the fetal body. But once cardiac activity is seen, "it's pretty clear sailing to full term birth."

The scientific and moral bona fides of this bill are clear. This is a human individual. It has a beating heart. There is a high degree of certainty that this human will reach live birth, and that, in the main, only abortion can prevent it from seeing the light of day. The state's interest in "preserving the life of a fetus that may become a child" could not be clearer. The Heartbeat Bill only asks, albeit in a dramatic way, that the principle that fuels the state's interest in the continuing life of the fetus may now be more properly seen as beginning at the time of cardiac activity.

Nor does this bill upset other interests that the Court has found to be important.Contraceptives are exempted from the bill. Nothing in the case of Griswold v. Connecticut is questioned. The issue regarding the status of embryos is also outside the compass of the bill, for the bill only covers fetuses in a pregnancy that already possess a detectible heartbeat. The clear intent of the bill is that it should apply to normal intrauterine pregnancies that do not constitute a serious health risk to the mother.

Lastly, Mr. Bopp praises those pieces of legislation that increase the moral position of the pro-life movement in the public eye. The ban on partial birth abortion is one salient example. But we should remember that the ban on partial birth abortion also contradicted evident Supreme Court precedent. It lost numerous times in the lower courts and even in the Supreme Court. But that did not make the legal or moral effort futile.

There can be no greater moral victory in the present situation than the passage of the Heartbeat Bill. All will see that that fetus with a beating heart is a person destined to be born, not because pro-lifers say so, but because nature has decreed it.