

Originally Processed With FOIA(s):
2012-2218-F

FOIA Number:
2012-2218-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the George Bush Presidential Library Staff.

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Counsels Office, White House
Series: Liberman, Lee S., Files
Subseries: General Subject Files

OA/ID Number: 45272
Folder ID Number: 45272-021

Folder Title:
Abortion (State Laws)

Stack:	Row:	Section:	Shelf:	Position:
0	0	0	0	0

ABORTION LIMITATION

1991

GENERAL SESSION

*Abortion
State
Law*

Enrolled Copy

S. B. No. 23

By LaRay McAllister

AN ACT RELATING TO ABORTION; PROHIBITING ABORTION EXCEPT UNDER SPECIFIED CIRCUMSTANCES.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

76-7-301, AS ENACTED BY CHAPTER 126, LAWS OF UTAH 1981

76-7-302, AS ENACTED BY CHAPTER 33, LAWS OF UTAH 1974

76-7-314, AS ENACTED BY CHAPTER 33, LAWS OF UTAH 1974

76-7-315, AS ENACTED BY CHAPTER 33, LAWS OF UTAH 1974

ENACTS:

76-7-301 , UTAH CODE ANNOTATED 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-7-301, Utah Code Annotated 1953, as enacted by Chapter 126, Laws of Utah 1981, is amended to read:

76-7-301. Definitions.

As used in this part:

(1) "Abortion" means the termination or attempted termination of human pregnancy after implantation of a fertilized ovum, with an intent other than to produce a live birth or to remove a dead unborn child, and includes all procedures undertaken to kill a live unborn child and includes all procedures undertaken to produce a miscarriage.

(2) "Physician" means a medical doctor licensed to practice medicine and surgery in all branches thereof in this state, or a physician in the

employment of the government of the United States who is similarly qualified.

(3) "Hospital" means a general hospital licensed by the [state] Department of Health according to Chapter 21 of Title 26, and includes a clinic or other medical facility to the extent that such clinic or other medical facility provides equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the [state] Department of Health. It shall be the responsibility of the [state] Department of Health to determine if such clinic or other medical facility so qualifies and to so certify.

Section 2. Section 76-7-301.1, Utah Code Annotated 1953, is enacted to read:

76-7-301.1. Preamble -- Findings and policies of Legislature.

(1) It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Secs. 1 and 7, Utah Constitution, which recognize that liberty and life founded on inherent and inalienable rights are entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

(2) The state of Utah has a compelling interest in the protection of human life, including that of unborn children, and in the protection of

which person's rights under the Utah Constitution, to exercise inalienable rights in accordance with the law.

(3) It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life and liberty, as required by Article I, Secs. 1 and 7, Utah Constitution.

(4) It is also the policy of the Legislature and of the state that, in connection with abortion, a woman's liberty interest, in limited circumstances, may outweigh the unborn child's right to protection. These limited circumstances arise when the abortion is necessary to save the pregnant woman's life or prevent ^{grave} life-threatening damage to her ^{medical} physical health, and when pregnancy occurs as a result of rape or incest. It is recognized that, in cases of rape or incest, the fact that the woman has been an unwilling participant in the reproductive process may justify the preference of her rights over those of the unborn child. It is further the finding and policy of the Legislature and of the state that a woman may terminate the pregnancy if the unborn child would be born with grave and irremediable physical or mental defects, that are ~~incompatible with sustained survival.~~

Section 3. Section 76-7-302, Utah Code Annotated 1953, as enacted by Chapter 33, Laws of Utah 1974, is amended to read:

76-7-302. Circumstances under which abortion authorized.

(1) An abortion may be performed in this state only [under the following circumstances: (1) if performed] by a physician [†] licensed to practice medicine under the Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under the Utah Osteopathic

Medicine Licensing Act and, (2): if performed 90 days or more after the commencement of the pregnancy as defined by competent medical practices, it [is] shall be performed in a hospital; and (3) -- if performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, it is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her health].

(2) An abortion may be performed in this state only under the following circumstances:

(a) the pregnant woman's attending physician has certified that, in the physician's professional judgment, the abortion is necessary to save her life;

(b) the pregnancy is the result of rape or rape of a child, as defined by Sections 76-5-402 and 76-5-402.1, that was reported by the victim to a law enforcement agency prior to the abortion;

(c) the pregnancy is the result of incest, as defined by Subsection 76-5-406 (10) and the incident was reported by the victim to a law enforcement agency prior to the abortion;

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsection (2)(a), (d), and (e).

76-7-304. Considerations by physician--Notice to minor's parents or guardian or married woman's husband.--To enable the physician to exercise his best medical judgment, he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

- (a) Her physical, emotional and psychological health and safety,
- (b) Her age,
- (c) Her familial situation.

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

76-7-307. Medical procedure required to save life of unborn child.--If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure an unborn child may be used unless necessary, in the opinion of the woman's

physician, to save her life or prevent serious and permanent damage to her health.

76-7-308. Medical skills required to preserve life of unborn child.--Consistent with the purpose of saving the life of the woman or preventing serious and permanent damage to the woman's health, the physician performing the abortion must use all of his medical skills to attempt to promote preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

76-7-310. Experimentation with unborn children prohibited-- Testing for genetic defects.--Live unborn children may not be used for experimentation, but when advisable, in the best medical judgment of the physician, may be tested for genetic defects.

76-7-314. Violations of abortion laws -- Classifications.

(1) Any person who performs, procures or supplies the means for an abortion other than authorized by this [chapter] part is guilty of a felony of the [second] third degree. For purposes of this subsection a person who procures an abortion does not include a woman who is seeking to have an abortion performed on herself. A woman who is seeking to have an abortion performed on herself is not criminally liable under Section 76-2-202.

(2) A violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-311, or 76-7-312 is a felony of the third degree.

(3) A violation of any other provision of this [act] part is a class A misdemeanor.

76-7-315. Exceptions to certain requirements in serious medical emergency.

When due to a serious medical emergency, time does not permit compliance with Section 76-7-302 [(2)], Subsection 76-7-304 (2) or Subsection 76-7-305 (and other provisions of those sections [shall] do not apply.

CLARIFICATION OF ABORTION LAW

1991

FIRST SPECIAL SESSION

Enrolled Copy

S. B. No. 4

By Lane Beattie

AN ACT RELATING TO THE CRIMINAL CODE; PROVIDING NO LIABILITY FOR CRIMINAL HOMICIDE ON THE BASIS OF AN ABORTION; REDEFINING THE INCEST EXCEPTION FOR ABORTION; CLARIFYING THE DEFINITION OF PHYSICIAN; CONFORMING OTHER CODE SECTIONS TO LANGUAGE CONTAINED IN EXISTING ABORTION ACT; AND APPROPRIATING \$100,000 TO THE ATTORNEY GENERAL'S OFFICE FOR LITIGATION EXPENSES RELATED TO 1991 S.B. 23; AND PROVIDING AN EFFECTIVE DATE.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

76-5-201, AS LAST AMENDED BY CHAPTER 10, LAWS OF UTAH 1991

76-7-301, AS LAST AMENDED BY CHAPTER 1, LAWS OF UTAH 1991

76-7-301.1, AS ENACTED BY CHAPTER 1 AND LAST AMENDED BY CHAPTER 288,
LAWS OF UTAH 1991

76-7-302, AS LAST AMENDED BY CHAPTER 1, LAWS OF UTAH 1991

76-7-307, AS ENACTED BY CHAPTER 33, LAWS OF UTAH 1974

76-7-308, AS ENACTED BY CHAPTER 33, LAWS OF UTAH 1974

76-7-314, AS LAST AMENDED BY CHAPTER 1, LAWS OF UTAH 1991

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-5-201, Utah Code Annotated 1953, as last amended by Chapter 10, Laws of Utah 1991, is amended to read:

76-5-201. Criminal homicide -- Elements -- Designations of offenses.

licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act.

(3) "Hospital" means a general hospital licensed by the Department of Health according to Chapter 21 of Title 26, and includes a clinic or other medical facility to the extent that such clinic or other medical facility provides equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the Department of Health. It shall be the responsibility of the Department of Health to determine if such clinic or other medical facility so qualifies and to so certify.

Section 3. Section 76-7-301.1, Utah Code Annotated 1953, as enacted by Chapter 1 and last amended by Chapter 288, Laws of Utah 1991, is amended to read:

76-7-301.1. Preamble -- Findings and policies of Legislature.

(1) It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that [~~liberty-and~~] life founded on inherent and inalienable rights [~~are~~] is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

(2) The state of Utah has a compelling interest in the protection of [~~human--life;--including--that~~] the lives of unborn children[~~;-and-in-the~~

~~protection-of-each-person's-rights-under-the-Utah-Constitution;--to
exercise-inalienable-rights-in-accordance-with-the-law].~~

(3) It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life [and liberty] as required by Article I, Sections 1 and 7, Utah Constitution.

(4) It is also the policy of the Legislature and of the state that, in connection with abortion, a woman's liberty interest, in limited circumstances, may outweigh the unborn child's right to protection. These limited circumstances arise when the abortion is necessary to save the pregnant woman's life or prevent grave damage to her medical health, and when pregnancy occurs as a result of rape or incest. [~~It--is
recognized--that;--in-cases-of-rape-or-incest;--the-fact-that-the-woman-has
been-an-unwitting-participant-in-the-reproductive-process-may-justify-the
preference-of-her-rights-over-those-of-the-unborn-child.~~] It is further the finding and policy of the Legislature and of the state that a woman may terminate the pregnancy if the unborn child would be born with grave defects.

Section 4. Section 76-7-302, Utah Code Annotated 1953, as last amended by Chapter 1, Laws of Utah 1991, is amended to read:

76-7-302. Circumstances under which abortion authorized.

(1) An abortion may be performed in this state only by a physician licensed to practice medicine under the Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act and, if performed 90 days or more

S. B. No. 4

after the commencement of the pregnancy as defined by competent medical practices, it shall be performed in a hospital.

(2) An abortion may be performed in this state only under the following circumstances:

(a) [~~the pregnant woman's attending physician has certified that,~~] in the [physician's] professional judgment of the pregnant woman's attending physician, the abortion is necessary to save [her] the pregnant woman's life;

(b) the pregnancy is the result of rape or rape of a child, as defined by Sections 76-5-402 and 76-5-402.1, that was reported [by the victim] to a law enforcement agency prior to the abortion;

(c) the pregnancy is the result of incest, as defined by Subsection 76-5-406 (10) or Section 76-7-102, and the incident was reported [by the victim] to a law enforcement agency prior to the abortion;

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e).

(4) The name of a victim reported pursuant to Subsection (b) or (c) is confidential and may not be revealed by law enforcement or any other

party except upon approval of the victim. This subsection does not effect or supersede parental notification requirements otherwise provided by law.

Section 5. Section 76-7-307, Utah Code Annotated 1953, as enacted by Chapter 33, Laws of Utah 1974, is amended to read:

76-7-307. Medical procedure required to save life of unborn child.

If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure [an] that unborn child may be used unless necessary, in the opinion of the woman's physician, to [save-her-life-or] prevent [serious-and-permanent] grave damage to her medical health.

Section 6. Section 76-7-308, Utah Code Annotated 1953, as enacted by Chapter 33, Laws of Utah 1974, is amended to read:

76-7-308. Medical skills required to preserve life of unborn child.

Consistent with the purpose of saving the life of the woman or preventing [serious-and-permanent] grave damage to the woman's medical health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

Section 7. Section 76-7-314, Utah Code Annotated 1953, as last amended by Chapter 1, Laws of Utah 1991, is amended to read:

76-7-314. Violations of abortion laws -- Classifications.

(1) (a) Any person who intentionally performs~~(, procures or supplies the means for)~~ an abortion other than authorized by this part is guilty of a felony of the third degree. ~~[For purposes of this subsection a person who procures an abortion does not include]~~

(b) Notwithstanding any other provision of law, a woman who ~~[is seeking to have]~~ seeks to have or obtains an abortion ~~[performed on]~~ for herself is not criminally liable. ~~[A woman who is seeking to have an abortion performed on herself is not criminally liable under Section 76-2-202.]~~


(2) A violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-311, or 76-7-312 is a felony of the third degree.

(3) A violation of any other provision of this part is a class A misdemeanor.

Section 8. Appropriation.

There is appropriated for Fiscal Year 1990-91 \$100,000 from the General Fund to the Office of the Attorney General for litigation expenses related to S.B. 23, 1991 General Session. That money is nonlapsing.

The amount of \$100,000 appropriated for Fiscal year 1991-92 in Item 7 of S. B. 210, 1991 General Session, is hereby repealed and replaced by this appropriation.




S. B. No. 4

Section 9. Coordinating Clause.

The provisions of this act supersede any conflicting provisions contained in S.B. 23, Chapter 1, Laws of Utah 1991, and H.B. 257, Chapter 288, Laws of Utah 1991.

Section 10. Effective Date.

If approved by two-thirds of all the members elected to each house this act takes effect on April 29, 1991.



IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

JANE L., et al.

Plaintiffs,

v.

NORMAN BANGERTER, et. al.

Defendants.

ORDERS VACATING TRIAL,
GRANTING MOTION TO DISMISS
& MOTION FOR SUMMARY JUDGMENT
AS TO CERTAIN ISSUES, AND
DETERMINATION THAT REMAINING
ISSUES MAY BE DECIDED
PURSUANT TO PENDING MOTION
FOR SUMMARY JUDGMENT

Civil No. 91-C-345G

The posture of this case is that fully briefed and extensively argued motions to dismiss and for summary judgment have been submitted for decision and presently are under advisement. As a prelude to those motions, the parties engaged in extensive discovery. Various affidavits, deposition testimony and voluminous other materials have been submitted in direct support of and in opposition to the pending motions, so that both motions are being considered as summary judgment motions. In addition, the parties have prepared and lodged with the court summaries of all depositions which have been taken, as well as the depositions themselves, verified summaries of persons whose depositions were not taken, verified statements of direct testimony of the persons who were deposed and all exhibits which the parties rely upon. In this connection, the court referred all of the materials to the Magistrate Judge for review as to whether these constitute adjudicative facts relate to an actual factual dispute between the parties. Both before and since the

reference to the Magistrate the court has been examining the depositions, written summaries, exhibits and other documents which have been submitted in order to evaluate whether material facts are in dispute, which could prevent disposition of the case on the motions, or whether some or all of the legal issues can be decided pursuant to the motions, or whether a trial is necessary.

The materials which have been lodged with the court for the most part are very helpful and meaningful. These materials present extensive historical and medical facts about abortions, pregnancies, professional and expert opinions, statistics, social and economic data, information concerning religious, family and psychological impacts, research, child rearing, adoption, and many other helpful things. These all bear upon such things as balancing the liberty interest of women in making the choice to have an abortion against the state's interest in protecting unborn children, and the validity or invalidity of statutory exceptions in which the state has determined that abortions should not be prevented. This information can be of great assistance to the court in determining the legal issues which are presented here. However, for the most part, these are not the kinds of materials which relate to controversies to be decided at a trial. Rather, these are the type of materials which may require interpretation or evaluation of evidence to derive legal conclusions, or from which inferences from undisputed evidence may be made by the court in arriving at a decision on the legal

issues presented. Some of the materials would not be admissible under the rules of evidence such as those that are conclusory, based upon hearsay, or not relevant to the issues. Some are more helpful and pertinent than others. Nevertheless, the court has determined to look at and consider all of the non adjudicatory materials which have been submitted and to receive them as background facts which will be helpful in ruling upon the legal issues. There are no material disputed adjudicative or historical fact issues which relate to disputes of consequence to the resolution of the case. To the extent there is dispute as to issues of ultimate fact or mixed questions of fact and law, the court can and should make determinations and draw inferences therefrom.

It appears to the court that a sufficient record exists by reason of the many materials which have been submitted by the parties for the court to determine the legal issues in this case by way of summary judgment. Accordingly, the court makes and enters the following rulings at this time and reserves the right to expand these bench rulings and to issue follow up written opinions. Accordingly, it is

ORDERED, that the provisional trial date set in this matter is vacated. The court determines that a trial in this case is not necessary. No disputed material issues of adjudicative fact which relate to disputes of consequence to resolution of the case have been presented, and there is a

sufficient record, including undisputed evidence and non adjudicative evidence, from which the legal issues may be decided. The court is convinced that trial on the merits would reveal no additional substantial data. Hearing and viewing witnesses and subjecting them to crossexamination would not aid the determination since there are no issues of credibility or controversies of material fact concerning matters of consequence which are relevant and admissible in these proceedings. It is

FURTHER ORDERED, that the magistrate's Order of March 25, 1992, denying defendants' motion to strike materials submitted by plaintiffs in opposition to defendants' motion for summary judgment, which materials were classified by the magistrate as background information, is approved and adopted. The court has determined to consider the information as judicial information which may be helpful pertaining to the legal issues. Otherwise, with respect to materials which may constitute adjudicative facts, the magistrate's Order is taken under advisement relative to the issues which will remain under advisement. It is

FURTHER ORDERED, that recommendations of the magistrate as to live witnesses and non live witnesses are not directly adopted since these recommendations go to the scope of a trial which the court has determined to be unnecessary. However, those recommendations are taken under advisement as they might pertain to evidence and issues to be decided in connection with the

motion for summary judgment. To the extent that the magistrate's recommendations would prevent the court from considering testimony and exhibits which have been submitted by the parties as helpful information to assist the court in connection with determining legal issues, the recommendations are disapproved. Plaintiffs' objections and defendants' objections relative to these reports are overruled or are moot, except as may be consistent with this ruling. It is

FURTHER ORDERED, that plaintiffs' motion to reconsider the court's prior ruling of January 29, 1992, is denied. However, the court will take into consideration the testimony and evidence which has been submitted by the witnesses referred to in the motion as judicial information and background information which may be helpful in determining legal issues. It is

FURTHER ORDERED, that the magistrate's recommendation to permit live testimony of Dr. Ward on the so-called fetal experimentation ban on research is not approved. There is no need for a trial on this issue and it is taken under advisement. Whether the statute prohibits prenatal diagnostic and treatment procedures and research - and whether the term "experimentation" is so standardless as to violate due process requirements - are questions of law and the court has ample material before it to make that determination. It is

FURTHER ORDERED, that plaintiffs' proffered live testimony of plaintiffs individually or as representatives of

classes which have been certified is denied. Declarations have been filed by such plaintiffs, including pseudonymous individuals, in support of plaintiffs' application for preliminary injunction, in support of plaintiffs' motion for joinder of party plaintiffs, and in support of plaintiffs' opposition to defendants' motion for summary judgment. All are before the court and will be considered in connection with issues not otherwise ruled upon which are presented on summary judgment. Additional submissions would be cumulative, duplicative and unnecessary to decision on the legal issues. Live testimony would add little if anything. Having reviewed testimony which has been submitted, and there will be further review, the court expresses respect and empathy for the individual plaintiffs. However, there is no need for a trial simply to provide what the court already has. It is

FURTHER ORDERED, that the magistrate's ruling denying pending Motions to Compel is adopted in part and overruled in part. To the extent that the magistrate's ruling was entered in contemplation of a trial it is moot. To the extent that the magistrate's ruling has to do with discovery materials, it is also moot. As will be seen, the information sought is no longer relevant to any issues presented for decision because those issues are here determined. Proceeding by way of subpoena for trial purposes or any other purpose is not authorized at this time. Also, no further discovery may be conducted. The

discovery cut-off date is long since passed and it appears in any event that what the parties seek is immaterial to any factual dispute. The magistrate's dismissal of the motions with prejudice is clearly erroneous and therefore is disapproved, so that dismissal is without prejudice in the event of future proceedings. Otherwise, the magistrate's denial of motions to compel at this time is approved and adopted. It is

FURTHER ORDERED, that plaintiffs' motion to reopen depositions or in the alternative to submit further direct testimony is denied. It is

FURTHER ORDERED, that defendants' pending motion to dismiss is converted by the court to a motion for summary judgment. Even though plaintiffs argued the motion to dismiss as based only upon the allegations of the Amended Complaint, plaintiffs attached many materials in opposition to that motion, and defendants argued it both as a pure motion to dismiss and as a converted motion for summary judgment. However that may be, the court converts that speaking motion to dismiss into a motion for summary judgment. The court enters the following rulings with respect to federal constitutional issues raised therein and in defendants' motion for summary judgment. These rulings do not involve the privacy issues and certain other issues which will remain under advisement.

1. Vagueness

The court rules as a matter of law that provisions

of the Utah anti abortion statute set forth in Utah Code Ann. 76-7-302 (Supp 1991), sub sections 2(a), (d) and (e) are not void for vagueness. Commonly accepted meanings of the terms "necessary to save the mother's life," "grave damage to the woman's health" and "grave defects" exist so that physicians of common intelligence can determine a core meaning as to the standard of conduct. In all events, since the statutory meanings are to be made in the good faith clinical and professional judgment of the attending physician, there could be no criminal prosecution under the law. The Utah laws relating to "medical emergencies" and fetal "experimentation" are not here ruled upon and are taken under advisement.

2. Establishment Clause

The court holds that recognition of rights in unborn children in Utah's Preamble does not constitute an establishment of religion in violation of the United States Constitution. The Utah preamble provides that "[t]he State of Utah has a compelling interest in the protection of the lives of unborn children." The Supreme Court has upheld a similar preamble in the State of Missouri.

This court also rules that regardless of similarities with LDS Church positions on abortion, Utah's Statute does not constitute establishment of religion. In affirming the trial judge in McRae v. Califano, a case in which it was claimed that the Roman Catholic Church exerted undue

religious influence, the Supreme Court said:

[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions' That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."

McRae, 448 U.S. at 319.

Finally, this court holds that neither does the Utah statute offend the Establishment of Religion Clause as constituting an endorsement of religion. This court rules as a matter of law that the Utah statute does not convey a message of endorsement of religion. Manifestly, the statute is as consistent with society's traditional moral framework as it is with any one or several religions.

3. Free exercise - Free speech

This court holds that the Utah statute as a matter of law does not interfere with free exercise of religion. In a controlling recent case the Supreme Court rejected use of the Free Exercise Clause to "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground that the law proscribes . . . conduct that his religion prescribes . . ." Employment Division v. Smith, 494 US. 872, 879 (1990). An apparent exception exists involving so-called "hybrid" rights where other constitutional rights such as free speech in combination with free exercise of religion would

constitute a violation of the free exercise clause. In this case, there is no free speech violation because there is no free speech right to solicit criminal acts. As the Supreme Court has said, "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." Osbourne v. Ohio, 495 U.S. 103, 110 (1989).

Another argument is asserted by some clergy plaintiffs: that not to provide abortion counselling - even of the active and facilitating type which might amount to conspiracy to break the law - would interfere with their right to the free exercise of religion. However, as we have seen, the Supreme court has upheld valid neutral laws of general applicability - that is, laws which are not specifically aimed at interference with free exercise of religion even though that right might be abridged in the application of the law.

For the foregoing reasons, this court rejects the contentions that the law violates the constitutional prohibition against interference with the free exercise of religion. In this facial challenge case, it follows that the counsellor, clergy, and doctor plaintiffs whose only role is to provide counsellor type information should be and are dismissed. Valuable and thoughtful information submitted by these now dismissed parties will be considered by the court as background and judicial

information in connection with matters taken under advisement.

4. Involuntary servitude

In their Sixth Cause of Action, plaintiffs allege that the Utah Act violates the Thirteenth Amendment. The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Plaintiffs argue that prohibiting elective abortions forces women into "slavery" or "involuntary servitude" by carrying a child to term. In 1897 the Supreme Court held that this amendment "was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards." Robertson v., 165 U.S. 275, 282 (1897). More recently, the Supreme Court observed that "in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction." United States v. Kozminski, 487 U.S. 931, 943 (1988) (emphasis added).

It strains credulity to equate the carrying of a child to term with "compulsory labor," and the argument borders on the frivolous. In all events, however, the Utah statute does not create a situation where the woman has no available choice but to

bear the child or be subject to legal sanction. No criminal penalties at all apply to a woman who chooses to abort by going to another state that permits abortion.

This court holds that the Utah statute as a matter of law does not violate the constitutional prohibition against involuntary servitude.

5. Equal Protection

Plaintiffs' Fourth Cause of Action alleges that because only women's reproductive choices and rights to bodily integrity are being denied, the Utah Act discriminates on the basis of gender in violation of the Fourteenth Amendment to the United States Constitution. Again, the Supreme Court has ruled against this kind of challenge. In Michael v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981), the Supreme Court said, "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." This court holds that the Utah anti-abortion statute does not violate the Equal Protection Clause.

Based upon the foregoing, defendants' motion to dismiss and portions of defendants' motion for summary judgment are granted, and plaintiffs' First Cause of Action to the extent heretofore discussed, and plaintiffs' Fourth, Fifth, Sixth and Seventh Causes of Action are dismissed as concerns claims arising under the United States Constitution. All clergy plaintiffs, all

counsellor plaintiffs, and all medical plaintiffs whose only role is to provide counsellor type information and who do not themselves perform abortions are dismissed. It is

FURTHER ORDERED, that plaintiffs' motion to voluntarily dismiss claims asserted under the Utah Constitution is taken under advisement. The privacy claims and certain claims pertaining to Utah's pre-existing abortion statutes are also taken under advisement. These claims will be ruled upon pursuant to the pending motion for summary judgment in due course after careful review of the applicable record.

The Supreme Court in the Casey case now before it will determine the level of scrutiny to be applied to statutes restricting abortion. Although the Utah statute involves an abortion ban based upon the state's declared compelling interest in unborn children, the new standard of review likely to be announced by the court will be of great relevance to this case. The fully developed record which exists here is such that when the Supreme Court makes that determination we will be in a position to apply that new standard of review and thus determine the remaining issues.

BY: (801) 366-6061

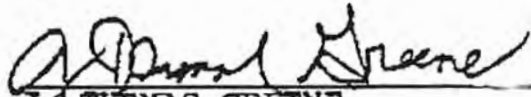
; 4-15-92 : 13:23 :

WOOD AND WOOD-

812 232 2940:#15

The standby hearing and trial set for April 21, 1992 is vacated. All remaining matters are under advisement.

DATED: April 10th, 1992.



J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO:



Regular Session, 1991

HOUSE BILL NO. 112

BY REPRESENTATIVE SAM THERIOT, SENATOR BARES, REPRESENTATIVES DIMOS, LANCASTER, LABORDE, SITTIG, HIGGINBOTHAM, ACCARDO, ACKAL, DIEZ, DONELON, GLOVER, GUIDRY, HAIK, HERRING, LEBLANC, LEMOINE, MARTIN, STELLY, AND STINE AND SENATORS MCPHERSON, PICARD, CRAIN, SAUNDERS, AND BRINKHAUS

ABORTION: Prohibits abortion except under certain circumstances (Governor's signature)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

AN ACT

To amend and reenact R.S. 14:87, relative to abortion; to define and prohibit abortions; to provide for exceptions; to provide for penalties; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Legislative findings and purpose. Life begins at conception.

It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

In furtherance of this compelling interest we declare it to be a reasonable and proper exercise of the police power of the state to prohibit and otherwise reasonably regulate, through the imposition of criminal penalties, the performance of abortions.

Section 2. R.S. 14:87 is hereby amended and reenacted to read as follows:

CODING: Words in ~~struck through~~ type are deletions from existing law; words underlined are additions.

1 §87. Abortion

2 A.(1) Abortion is the performance of any of the following
3 acts, with the specific intent of ~~procuring~~ premature delivery
4 of ~~the embryo or fetus~~ terminating a pregnancy:

5 (1) ~~(a) Administration of~~ Administering or prescribing any
6 drug, potion, medicine, or any other substance to a female; or

7 (2) ~~(b) Use of~~ Using any instrument or ~~any other means~~
8 external force whatsoever on a female.

9 (2) This Section shall not apply to the female who has an
10 abortion.

11 B. It shall not be unlawful for a physician to perform any
12 of the acts described in Subsection A of this Section if
13 performed under the following circumstances:

14 (1) The physician terminates the pregnancy in order to
15 preserve the life or health of the unborn child or to remove a
16 dead unborn child.

17 (2) The physician terminates a pregnancy for the express
18 purpose of saving the life of the mother.

19 (3) The physician terminates a pregnancy which is the
20 result of rape as defined in either R.S. 14:42, R.S. 14:42.1, or
21 R.S. 14:43 and in which all of the following requirements are
22 met prior to the pregnancy termination:

23 (a) The rape victim obtains a physical examination and/or
24 treatment from a physician other than the physician who is to
25 terminate the pregnancy within five days of the rape to
26 determine whether she was pregnant prior to the rape and to
27 prevent pregnancy and venereal disease, unless the rape victim
28 is incapacitated to such a degree that she is unable to obtain
29 this examination. If the victim is unable to obtain the
30 examination due to such incapacity, then an examination shall be
31 performed within five days after the incapacity is removed; and

1 (b) The rape victim reports the rape to law enforcement
2 officials within seven days of the rape unless the victim is
3 incapacitated to such a degree that she is unable to report the
4 rape. If the victim is unable to report the rape due to such
5 incapacity, then a report shall be made within seven days after
6 the incapacity is removed; and

7 (c) The abortion is performed within thirteen weeks of
8 conception.

9 (4) The physician terminates a pregnancy which is the
10 result of incest as defined in R.S. 14:78, provided the crime is
11 reported to law enforcement officials and the abortion is
12 performed within thirteen weeks of conception.

13 C.(1) Prior to the performance of any abortion under
14 Subsection (B)(3) or (B)(4) of this Section, the physician who
15 is to perform the abortion shall obtain from the victim a
16 statement in writing verifying that she has obtained the
17 physical examination and shall obtain written verification by a
18 law enforcement official that the victim reported the rape to
19 law enforcement officials as required under this Section.

20 (2) Every physician who conducts a physical examination of
21 a rape victim within five days of the rape shall immediately,
22 upon written request of either the victim or the physician who
23 is to perform the abortion on the victim, provide to the victim
24 or the requesting physician written verification of his
25 examination.

26 (3) Every law enforcement official who receives a report
27 of a rape victim within seven days of the rape or receives a
28 report of incest shall immediately, upon written request of
29 either the victim or the physician who is to perform the
30 abortion, provide to the victim or requesting physician written
31 verification of the report which was made to the official.

1 D. As used in this Section, the following words and
2 phrases are defined as follows:

3 (1) "Law enforcement official or officer" means any peace
4 officer or agency empowered to enforce the law in criminal
5 matters within his or its respective jurisdiction, including but
6 not limited to a state police officer, sheriff, constable, local
7 police officer, and district attorney.

8 (2) "Physician" means any person licensed to practice
9 medicine in this state.

10 (3) "Unborn child" means the unborn offspring of human
11 beings from the moment of conception until birth.

12 (4) "Conception" means the contact of spermatozoan with
13 the ovum.

14 E.(1) Whoever commits the crime of abortion shall be
15 imprisoned at hard labor for not less than one nor more than ten
16 years and shall be fined not less than ten thousand dollars nor
17 more than one hundred thousand dollars.

18 (2) This penalty shall not apply to the female who has an
19 abortion.

20 Section 3. If any provision or item of this Act or the
21 application thereof is held invalid, such invalidity shall not affect
22 other provisions, items, or applications of this Act which can be
23 given effect without the invalid provisions, items, or applications,
24 and to this end the provisions of this Act are hereby declared
25 severable.

26 Section 4. This Act shall become effective upon signature by
27 the governor or, if not signed by the governor, upon expiration of
28 the time for bills to become law without signature by the governor,
29 as provided in Article III, Section 18 of the Constitution of
30 Louisiana.

DIGEST

The digest printed below was prepared by House Legislative Services.
It constitutes no part of the bill.

Sam Theriot, et al.

Act

HB No. 112

Present law defines abortion as the performance of one of the following acts with intent of procuring premature delivery of the embryo or fetus:

- (1) Administration of any drug, potion, or any other substance to a female; or
- (2) Use of any instrument or any other means whatsoever on a female.

Proposed law defines abortion as the performance of one of the following acts with specific intent to terminate a pregnancy:

- (1) Administering or prescribing a drug, potion, medicine, or other substance to a female; or
- (2) Using any instrument or any external force whatsoever on a female.

Proposed law does not apply to a female having an abortion.

Proposed law does not apply to a physician if the abortion is performed under the following circumstances:

- (1) The pregnancy is terminated to preserve the life or health of the unborn child or to remove a dead unborn child.
- (2) The pregnancy is terminated for the express purpose of saving the life of the mother.
- (3) The abortion terminates a pregnancy which is the result of rape as defined by law and in which all of the following requirements are met prior to the termination:
 - (a) The rape victim obtains a physical examination and/or treatment from a physician other than the one who is to perform the abortion within five days of the rape in order to determine if a pregnancy existed prior to the rape and to prevent pregnancy or venereal disease, unless the rape victim is incapacitated. If the victim is incapacitated, then an examination shall be performed within five days after the incapacity is removed.
 - (b) The rape victim reports the rape to law enforcement officials within seven days of the rape, unless the victim is incapacitated. If the victim is incapacitated, then a report shall be made within seven days after the incapacity is removed.
 - (c) The abortion is performed within 13 weeks of conception.

Page 5 of 7

REENGROSSED

CODING: Words in ~~struck through~~ type are deletions from existing law; words underlined are additions.

- (4) The abortion terminates a pregnancy which is the result of incest as defined by law, provided the crime is reported to law enforcement officials and the abortion is performed within 13 weeks of conception.

Proposed law requires the physician performing the abortion to obtain from the rape or incest victim a written statement that she has obtained the required physical examination and to obtain from law enforcement officials written verification that the victim has timely reported the rape.

Proposed law requires every physician who examines a rape victim within five days of the rape to immediately provide, upon written request of the victim or the physician who is to terminate the pregnancy, written verification of the examination.

Proposed law requires every law enforcement official who receives a timely report of a rape or incest victim to immediately provide, upon written request of the victim or the physician who is to terminate the pregnancy, written verification of the report to the officials.

Proposed law defines the following terms:

- (1) "Law enforcement official or officer" means any peace officer or agency empowered to enforce criminal law, including a state police officer, sheriff, constable, local police officer, and district attorney.
- (2) "Physician" means any person licensed to practice medicine in this state.
- (3) "Unborn child" means the unborn offspring of human beings from the moment of conception until birth.
- (4) "Conception" means the contact of spermatozoan with the ovum.

Present law requires imprisonment at hard labor for not less than one nor more than 10 years for persons convicted of performing an abortion.

Proposed law retains this penalty provision but requires imposition of a fine of not less than \$10,000 nor more than \$100,000. Proposed law prohibits the imposition of these penalties on the female having the abortion.

Proposed law provides a specific severability provision.

Effective upon signature by the governor or upon lapse of time for gubernatorial action.

(Amends R.S. 14:87)

Summary of Amendments Adopted by House

Committee Amendments Proposed by House Committee on
Administration of Criminal Justice to the original bill

1. Deleted the provision allowing a physician to perform an abortion in order to "treat a physical condition or illness which is diagnosed and treatable during pregnancy".
2. Changed the time within which an abortion can be performed from "within the first 13 weeks of pregnancy" to "within 13 weeks of conception".
3. Shifted the burden from "the victim notifying the physician performing the abortion that she has complied with the requirements for a medical examination and for reporting to law enforcement officials" to requiring "the physician to obtain written statements from the victim and from law enforcement".

STATUTES POTENTIALLY SUBJECT TO REVIVAL IF ROE REVERSED

Statutes Protecting All or Most Unborn Children (11)

<u>State</u>	<u>Circumstance under which abortion permitted</u>
Arizona	life of mother at risk
Arkansas	none stated
Michigan	life of mother at risk
Mississippi	life of mother at risk; rape
New Hampshire	life of mother at risk
Oklahoma	life of mother at risk
South Dakota	life of mother at risk
Texas	life of mother at risk
Vermont*	life of mother at risk
West Virginia	life of mother at risk
Wisconsin	life of mother at risk

* There is a serious possibility that the Vermont statute would be struck down by state courts relying on their interpretation of the Vermont state constitutions as prohibiting protective legislation.

Statutes Providing No Effective Protection (9)

<u>State</u>	<u>Circumstance under which abortion permitted</u>
Alabama	life or health* of mother
Alaska	abortion on demand until viability
California	gravely impair physical or mental health* of mother; rape; incest

Colorado	serious permanent impairment of physical or mental health* of mother; child with a disability; rape (incl. statutory rape under 16); incest
Delaware	permanent injury to physical or mental health* of mother; child with a disability; forcible rape; incest
D.C.	life or health* of mother
Hawaii	abortion on demand until viability
Kansas	physical or mental health* of mother; child with a disability; rape (incl. statutory rape under 16); incest
New Mexico	grave impairment of physical or mental health* of mother; rape; incest

* Statutes with a "health" exception are classified as providing no effective protection because of the way in which the word "health" has been defined by the Supreme Court. The Court construed the word "health" in an abortion statute in Doe v. Bolton, the companion case to Roe v. Wade, to include "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient." An abortion for "health" reasons, as interpreted by the courts, effectively means any and every abortion. See generally, National Right to Life Committee, "Fact Sheet: Abortions for Mental Health" (January 1991).

National Right to Life Committee
 State Legislative Department
 April 1992