culated to inform the woman's free choice, not hinder it," *ante, 505 U.S. at 877,* the measures must be designed to ensure that a woman's choice is "mature and informed," *ante, 505 U.S. at 883,* not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict "psychological abuse," *ante, 505 U.S. at 893,* designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's "profound respect for the life of the unborn." *Ante, 505 U.S. at 877.*

[*937] The 24-hour waiting period following the provision of the foregoing information is also clearly unconstitutional. The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks, and that it would require two visits to the abortion provider, thereby increasing travel time, exposure to further harassment, and financial cost. Finally, the District Court found that the requirement would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts. *744 F. Supp. 1323, 1378-1379 (ED Pa. 1990).* In *Akron* this Court invalidated a similarly arbitrary or inflexible waiting period because, as here, it furthered no legitimate state interest. n8

n8 The Court's decision in *Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990),* validating a 48-hour waiting period for minors seeking an abortion to permit parental involvement does not alter this conclusion. Here the 24-hour delay is imposed on an *adult* woman. See *id., at 449-450, n.35; Ohio v. Akron Center for Reproductive Health, Inc., 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990).* Moreover, the statute in *Hodgson* did not require any delay once the minor obtained the affirmative consent of either a parent or the court.

As JUSTICE STEVENS insightfully concludes, the mandatory delay rests either on outmoded or unacceptable assumptions about the decisionmaking capacity of women or the belief that the decision to terminate the pregnancy is [*938] presumptively wrong. *Ante, 505 U.S. at 918-919.* The requirement that women consider this obvious and slanted information for an additional 24 hours contained in these provisions will only influence the woman's decision in improper ways. The vast majority of women will know this information — of [**2852] the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic. n9

n9 Because this information is so widely known, I am confident that a developed record can be made to show that the 24-hour delay, "in a large fraction of the cases in which [the restriction] is relevant, . . . will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante, 505 U.S. at 895.*

[***755] Except in the case of a medical emergency, § 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed-consent requirement, generally accepted medical principles would require an in-person visit by the parent to the facility. *744 F. Supp. at 1382.* Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult." *Danforth, 428 U.S. at 74-75* (emphasis added). The requirement of an in-person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor's abortion decision, § 3206 is not narrowly drawn to serve that interest. n10

n10 The judicial-bypass provision does not cure this violation. *Hodgson* is distinguishable, since these cases involve more than parental involvement or approval — rather, the Pennsylvania law requires that the parent receive information designed to discourage abortion in a face-to-face meeting with the physician. The bypass procedure cannot ensure that the parent would obtain the information, since in many instances, the parent would not even attend the hearing. A State may not place

any restriction on a young woman's right to an abortion, however irrational, simply because it has provided a judicial bypass.

[*939]

[***LEdHR6F] [6F]Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. Pennsylvania contends that this requirement is valid under *Danforth*, in which this Court held that record-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. *Id., at 79-81.* The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in abortions at first glance may seem valid, given the Commonwealth's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. *744 F. Supp. at 1392.* The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning abortion or is reasonably related to the Commonwealth's interest [***756] in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are unconstitutional [*940] insofar as they require the name of the referring physician and the basis for his or her medical judgment.

[**2853] In sum, I would affirm the judgment in No. 91-902 and reverse the judgment in No. 91-744 and remand the cases for further proceedings.

III

At long last, THE CHIEF JUSTICE and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Post, 505 U.S. at 944.* If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from THE CHIEF JUSTICE's opinion.

THE CHIEF JUSTICE's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. *Post, 505 U.S. at 951.* This constricted view is reinforced by THE CHIEF JUSTICE's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in *Michael H. v. Gerald D., 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989),* where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* where the Court found no fundamental right to engage in homosexual sodomy, or in a case involving the "'firing [of] a gun . . . into another person's body.'" *Post, 505 U.S. at 951-952.* In THE CHIEF JUSTICE's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called sexual [*941] deviates. n11 Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

n11 Obviously, I do not share THE CHIEF JUSTICE's views of homosexuality as sexual deviance. See *Bowers, 478 U.S. at 202-203, n.2.*

Even more shocking than THE CHIEF JUSTICE's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental — for THE CHIEF JUSTICE, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision. *Post, 505 U.S. at 967-968.* In short, THE CHIEF JUSTICE's [***757] view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Nor does THE CHIEF JUSTICE give any serious consideration to the doctrine of *stare decisis*. For THE CHIEF JUSTICE, the facts that gave rise to *Roe* are surprisingly simple: "women become pregnant, there is a point some-

where, depending on medical technology, where a fetus becomes viable, and women give birth to children." *Post, 505 U.S. at 955.* This characterization of the issue thus allows THE CHIEF JUSTICE quickly to discard the joint opinion's reliance argument by asserting that "reproductive planning could take virtually immediate account of" a decision overruling *Roe. Post, 505 U.S. at 956* (internal quotation marks omitted).

THE CHIEF JUSTICE's narrow conception of individual liberty and *stare decisis* leads him to propose the same standard of review proposed by the plurality in *Webster.* "States may regulate abortion procedures in ways rationally related to a legitimate state [**2854] interest. *Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955);* cf. *Stanley v. Illinois, 405 U.S. 645, 651-653, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).*" *Post, 505 U.S. at 966.* THE [*942] CHIEF JUSTICE then further weakens the test by providing an insurmountable requirement for facial challenges: Petitioners must "'show that no set of circumstances exists under which the [provision] would be valid.'" *Post, 505 U.S. at 973,* quoting *Ohio v. Akron Center for Reproductive Health, 497 U.S. at 514.* In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to *anyone.* Finally, in applying his standard to the spousal-notification provision, THE CHIEF JUSTICE contends that the record lacks any "hard evidence" to support the joint opinion's contention that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. *Post, 505 U.S. at 974, n.2.* Yet throughout the explication of his standard, THE CHIEF JUSTICE never explains what hard evidence is, how large a fraction is required, or how a battered woman is supposed to pursue an as-applied challenge.

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest — a standard which the United States calls "deferential, but not toothless." Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, *with no exception for the life of the mother,* "could raise very serious questions." Tr. of Oral Arg. 48. Perhaps, the Solicitor General offered, the failure to include an exemption for the life of the mother would be "arbitrary and capricious." *Id.,* at 49. If, as THE CHIEF JUSTICE contends, the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or [***758] incest? Is there anything arbitrary or capricious about a [*943] State's prohibiting the sins of the father from being visited upon his offspring? n12

n12 JUSTICE SCALIA urges the Court to "get out of this area," *post, 505 U.S. at 1002,* and leave questions regarding abortion entirely to the States, *post, 505 U.S. at 999-1000.* Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, JUSTICE SCALIA is uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman's right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

IV

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short — the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the [**2855] confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

[*944] CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, concurring in the judgment in part and

dissenting in part.

[*LEdHR16C]** [16C]The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*, but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989)*, and uphold the challenged provisions of the Pennsylvania statute in their entirety.

I

In ruling on this litigation below, the Court of Appeals for the Third Circuit first observed that "this appeal does not directly implicate *Roe;* this case involves the regulation of abortions rather than their outright prohibition." *947 F.2d 682, 687 (1991)*. Accordingly, the court directed its attention to the question of the standard of review for abortion regulations. **[***759]** In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence. After considering the several opinions in *Webster v. Reproductive Health Services, supra*, and *Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990)*, the Court of Appeals concluded that JUSTICE O'CONNOR's "undue burden" test was controlling, as that was the narrowest ground on which we had upheld recent abortion regulations. *947 F.2d at 693-697* ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quoting *Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)* (inte nal quotation marks omitted))). Applying this standard, the Court of Appeals upheld all of the challenged regulations except the one **[*945]** requiring a woman to notify her spouse of an intended abortion.

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe v. Wade, supra*, in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother. n1 We agree with the Court of Appeals that our decision in *Roe* is not directly implicated by the Pennsylvania statute, which does not prohibit, but simply regulates, abortion. But, as the Court of Appeals found, the state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of *Roe*, JUSTICES O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the **[**2856]** Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.

n1 Two years after *Roe*, the West German constitutional court, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. *Judgment of February 25, 1975*, 39 BVerfGE 1 (translated in Jonas & Gorby, West German Abortion Decision: A Contrast to *Roe v. Wade, 9 John Marshall J. Prac. & Proc. 605 (1976)*). In 1988, the Canadian Supreme Court followed reasoning similar to that of *Roe* in striking down a law that restricted abortion. *Morgentaler v. The Queen*, 1 S. C. R. 30, *44 D.L.R. 4th 385 (1988)*.

In *Roe*, the Court opined that the State "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and that it has still another important and legitimate interest in protecting **[*946]** the potentiality of human life." *410 U.S. at 162* (emphasis omitted). In the companion case of *Doe v. Bolton, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)*, the Court referred to its conclusion in *Roe* "that a pregnant woman does not have an absolute constitutional right to an abortion **[***760]** on her demand." *410 U.S. at 189*. But while the language and holdings of these cases appeared to leave States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.

For example, after *Roe*, many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision. Some States have simply required notification of the parents, while others have required a minor to obtain the consent of her parents. In a number of decisions, however, the Court has substantially limited the States in their ability to impose such requirements. With regard to parental *notice* requirements, we initially held that a State could require a minor to notify her parents before proceeding with an abortion. *H. L. v. Matheson, 450 U.S. 398, 407-410, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981)*. Recently, however,

we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to *two* parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. *Hodgson v. Minnesota, supra.*

We have treated parental *consent* provisions even more harshly. Three years after *Roe*, we invalidated a Missouri regulation requiring that an unmarried woman under the age of 18 obtain the consent of one of her parents before proceeding with an abortion. We held that our abortion jurisprudence prohibited the State from imposing such a "blanket provision . . . requiring the consent of a parent." *Planned Parenthood* [*947] *of Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).* In *Bellotti v. Baird, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979),* the Court struck down a similar Massachusetts parental consent statute. A majority of the Court indicated, however, that a State could constitutionally require parental consent, if it alternatively allowed a pregnant minor to obtain an abortion without parental consent by showing either that she was mature enough to make her own decision, or that the abortion would be in her best interests. See *id., at 643-644* (plurality opinion); *id., at 656-657* (WHITE, J., dissenting). In light of *Bellotti*, we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient, see *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983),* but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of *Bellotti*, see *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 439-442, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983).* We have never had occasion, as we have in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components.

In *Roe*, the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances. [***761] Because neither *Roe* nor *Doe* [**2857] involved the assertion of any paternal right, the Court expressly stated that the case did not disturb the validity of regulations that protected such a right. *Roe v. Wade, supra, at 165, n.67.* But three years later, in *Danforth*, the Court extended its abortion jurisprudence and held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion. *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 69-71.*

States have also regularly tried to ensure that a woman's decision to have an abortion is an informed and well-considered one. In *Danforth*, we upheld a requirement that a woman sign a consent form prior to her abortion, and observed that "it is desirable and imperative that [the decision] [*948] be made with full knowledge of its nature and consequences." *Id., at 67.* Since that case, however, we have twice invalidated state statutes designed to impart such knowledge to a woman seeking an abortion. In *Akron*, we held unconstitutional a regulation requiring a physician to inform a woman seeking an abortion of the status of her pregnancy, the development of her fetus, the date of possible viability, the complications that could result from an abortion, and the availability of agencies providing assistance and information with respect to adoption and childbirth. *Akron v. Akron Center for Reproductive Health, supra, at 442-445.* More recently, in *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986),* we struck down a more limited Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure and the assistance available to her if she decided to proceed with her pregnancy, because we saw the compelled information as "the antithesis of informed consent." *Id., at 764.* Even when a State has sought only to provide information that, in our view, was consistent with the *Roe* framework, we concluded that the State could not require that a physician furnish the information, but instead had to alternatively allow nonphysician counselors to provide it. *Akron v. Akron Center for Reproductive Health, 462 U.S. at 448-449.* In *Akron* as well, we went further and held that a State may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman. Although the State sought to ensure that the woman's decision was carefully considered, the Court concluded that the Constitution forbade the State to impose any sort of delay. *Id., at 449-451.*

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be performed in outpatient clinics, see *Simopoulos v. Virginia, 462 U.S. 506, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983),* we concluded in *Akron* and *Ashcroft* that a State could not [*949] require that such abortions be performed only in hospitals. See *Akron v. Akron Center for Reproductive Health, supra, at 437-439;* [***762] *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, supra, at 481-482.* Despite the fact that *Roe* expressly allowed regulation after the first trimester in furtherance of maternal health, "'present medical knowledge,'" in our view, could not justify such a hospitalization requirement under the trimester framework. *Akron v. Akron Center for Reproductive Health, supra, at 437* (quoting *Roe v. Wade, supra, at*

163). And in *Danforth*, the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. *428 U.S. at 77.*

Although *Roe* allowed state regulation after the point of viability to protect the potential **[**2858]** life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti v. Franklin, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)*, the Court struck down a statute that governed the determination of viability. *Id., at 390-397.* In the process, we made clear that the trimester framework incorporated only one definition of viability — ours — as we forbade States to decide that a certain objective indicator — "be it weeks of gestation or fetal weight or any other single factor" — should govern the definition of viability. *Id., at 389.* In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See *id., at 397-401;* see also *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 768-769* (invalidating a similar regulation). In *Thornburgh*, the Court struck down Pennsylvania's requirement that a second physician be present at postviability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. *Id., at 769-771.* Regulations governing the treatment of aborted fetuses have **[*950]** met a similar fate. In *Akron*, we invalidated a provision requiring physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." *462 U.S. at 451* (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. See *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 783* (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"); *id., at 814* (WHITE, J., dissenting) ("The majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See *Ohio v. Akron Center for Reproductive* **[***763]** *Health, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990); Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990); Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989).*

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following *Marks v. United States, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)*, it concluded that in light of *Webster* and *Hodgson*, the strict scrutiny standard enunciated in *Roe* was no longer applicable, and that the "undue burden" standard adopted by JUSTICE O'CONNOR was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe*, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See *Payne v. Tennessee, 501 U.S. 808, 827-828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legislative **[*951]** action is practically impossible" (internal quotation marks omitted)); *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546-547, 557, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).*

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149* **[**2859]** *(1937).* Three years earlier, in *Snyder v. Massachusetts, 291 U.S. 97, 78 L. Ed. 674, 54 S. Ct. 330 (1934)*, we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id., at 105;* see also *Michael H. v. Gerald D., 491 U.S. 110, 122, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)* (plurality opinion) (citing the language from *Snyder*). These expressions are admittedly not precise, but our decisions implementing this notion of "fundamental" rights do not afford any more elaborate basis on which to base such a classification.

In construing the phrase "liberty" incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint. In *Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925)*, we held that it included a parent's right to send a child to private school; in *Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)*, we held that it included a right to teach a foreign language in a parochial school. Building on these cases, we have held that the term "liberty" includes a right to marry, *Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967);* a right to procreate, *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942);* and a right to use contraceptives, *Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965);*

Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972). But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

[*764]** In *Roe v. Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *410 U.S. at 152-153.* We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier **[*952]** opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris v. McRae, 448 U.S. 297, 325, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980).* The abortion decision must therefore "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh v. American College of Obstetricians and Gynecologists, supra, at 792* (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H. v. Gerald D., supra, at 124, n.4* (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, Abortion in America 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. *Roe v. Wade, 410 U.S. at 139-140; id., at 176-177, n.2* (REHNQUIST, J., dissenting). On this record, **[**2860]** it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history **[*953]** supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." In so concluding, we repeat the observation made in *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986):*

> "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due **[***765]** Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id., at 194.*

We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent "with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does." *Webster v. Reproductive Health Services, 492 U.S. at 518* (plurality opinion). The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce, Meyer, Loving*, and *Griswold*, and thereby deemed the right to abortion fundamental.

II

The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding." *Ante, 505 U.S. at 871.* Instead of claiming that *Roe* **[*954]** was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Ante, 505 U.S. at 872-873;* see *Roe v. Wade, supra, at 162-164. Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante, 505 U.S. at 873.*

Stare decisis is defined in Black's Law Dictionary as

meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe*, such as *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983)*, and *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)*, are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. *Ante, 505 U.S. at 881-884.*

In our view, authentic principles of *stare decisis* do not require that any portion of the **[**2861]** reasoning in *Roe* be kept intact. "*Stare decisis* is not . . . a universal, inexorable command," **[***766]** especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405, 76 L. Ed. 815, 52 S. Ct. 443 (1932)* (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for **[*955]** constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. at 557;* see *United States v. Scott, 437 U.S. 82, 101, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978)* ("'In cases involving the Federal Constitution, . . . the Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function'" (quoting *Burnet v. Coronado Oil & Gas Co., supra, at 406-408* (Brandeis, J., dissenting))); *Smith v. Allwright, 321 U.S. 649, 665, 88 L. Ed. 987, 64 S. Ct. 757 (1944).* Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, *e. g., West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); Erie R. Co. v. Tompkins, 304 U.S. 64, 74-78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).*

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante, 505 U.S. at 857-860.* Of course, what might be called the basic facts which gave rise to *Roe* have remained the same — women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive **[*956]** forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante, 505 U.S. at 871-873.* But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for **[***767]** precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "considerations in favor of *stare decisis* are at their acme." *Payne v. Tennessee, 501 U.S. at 828.* But, as the joint opinion apparently agrees, *ante, 505 U.S. at 855-856,* any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe*, and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe*, as "reproductive planning could take virtually **[**2862]** immediate account of" this action. *Ante, 505 U.S. at 856.*

The joint opinion thus turns to what can only be described as an unconventional — and unconvincing — notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante, 505 U.S. at 856.* The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in **[*957]** reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market,

and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. *Ante, 505 U.S. at 856.*

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. *Ante, 505 U.S. at 856.* As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see *Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896),* or that "liberty" under the Due Process Clause protected "freedom of contract," see *Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (1923); Lochner v. New York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905).* The "separate but equal" doctrine lasted 58 years after *Plessy*, and *Lochner's* protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See *Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954)* (rejecting the "separate but equal" doctrine); *West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937)* (overruling [***768] *Adkins v. Children's Hospital, supra*, in upholding Washington's minimum wage law).

Apparently realizing that conventional *stare decisis* principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect [*958] the "legitimacy" of this Court. *Ante, 505 U.S. at 861-869.* Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, *ante, 505 U.S. at 865,* the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolves the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its decision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. *Ante, 505 U.S. at 866.* This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrendering to political pressure" and continued opposition. *Ante, 505 U.S. at 866, 867.* This is a truly [**2863] novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away.*

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are [*959] in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions. See *Payne v. Tennessee, supra, at 828-830, and n. 1* (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe. Ante, 505 U.S. at 861-864* (discussing *Lochner* [***769] *v. New York, supra*, and *Plessy v. Ferguson, supra*). It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. See *West Coast Hotel Co. v. Parrish, supra; Brown v. Board of Education, supra.* One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to *Roe*. There is no reason to think that either *Plessy* or

Lochner produced the sort of public protest when they were decided that *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, *Roe*, so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the [*960] decision at all costs lest it *seem* to be retreating under fire. Public protests should not alter the normal application of *stare decisis*, lest perfectly lawful protest activity be penalized by the Court itself.

Taking the joint opinion on its own terms, we doubt that its distinction between *Roe*, on the one hand, and *Plessy* and *Lochner*, on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling *Plessy* in *Brown* on a deeply divisive issue. And our decision in *West Coast Hotel*, which overruled *Adkins v. Children's Hospital, supra*, and *Lochner*, was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition [**2864] by stubbornly refusing to re-examine the *Lochner* rationale, lest it lose legitimacy by appearing to "overrule under fire." *Ante, 505 U.S. at 867.*

The joint opinion agrees that the Court's stature would have been seriously damaged if in *Brown* and *West Coast Hotel* it had dug in its heels and refused to apply normal principles of *stare decisis* to the earlier decisions. But the opinion contends that the Court was entitled to overrule *Plessy* and *Lochner* in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, *post hoc* rationalization for those decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in *Lochner* only because the Depression had convinced "most people" that constitutional [***770] protection of contractual freedom contributed to an economy [*961] that failed to protect the welfare of all. *Ante, 505 U.S. at 861.* Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simple believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." *Lochner v. New York, 198 U.S. at 53.* Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in our decision in *Holden v. Hardy, 169 U.S. 366, 42 L. Ed. 780, 18 S. Ct. 383 (1898),* and other States followed suit shortly afterwards, see, *e. g., Muller v. Oregon, 208 U.S. 412, 52 L. Ed. 551, 28 S. Ct. 324 (1908); Bunting v. Oregon, 243 U.S. 426, 61 L. Ed. 830, 37 S. Ct. 435 (1917).* These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at *any* wage.

When the Court finally recognized its error in *West Coast Hotel*, it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that "the Constitution does not speak of freedom of contract." *West Coast Hotel Co. v. Parrish, 300 U.S. at 391; Lochner v. New York, supra, at 75* (Holmes, [*962] J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"). Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in *Brown*. In fact, the opinion lauds *Brown* in comparing it to *Roe. Ante, 505 U.S. at 867.* This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in *Plessy* because of its "intensely divisive" [**2865] character. To us, adherence to *Roe* today

under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the [***771] same ground. Fortunately, the Court did not choose that option in *Brown*, and instead frankly repudiated *Plessy*. The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it cannot hardly be argued that this was not urged upon those who decided *Plessy*, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." *Plessy v. Ferguson, 163 U.S. at 562*. It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground [*963] alone the Court was justified in properly concluding that the *Plessy* Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.

There are other reasons why the joint opinion's discussion of legitimacy is unconvincing as well. In assuming that the Court is perceived as "surrendering to political pressure" when it overrules a controversial decision, *ante, 505 U.S. at 867*, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to *adhere* to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision. The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on *Roe* can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court [*964] should make its decisions with [***772] a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. Our decisions in some recent capital cases, and in *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)*, have also engendered demonstrations in opposition. The joint opinion's message to such protesters appears to be that they must cease their activities in order to serve their cause, because their [**2866] protests will only cement in place a decision which by normal standards of *stare decisis* should be reconsidered. Nearly a century ago Justice David J. Brewer of this Court, in an article discussing criticism of its decisions, observed that "many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Justice Brewer on "The Nation's Anchor," *57 Albany L. J. 166, 169 (1898)*. This was good advice to the Court then, as it is today. Strong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion — the "undue burden" standard. As indicated above, *Roe v. Wade* adopted a "fundamental right" standard under which state regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result [*965] in the sort of "simple limitation," easily applied, which the joint opinion anticipates. *Ante, 505 U.S. at 855*. In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion.

Ante, 505 U.S. at 877. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. *Griswold v. Connecticut, 381 U.S. at 502* (Harlan, J., concurring in judgment). Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. *Ante, 505 U.S. at 887.* But the authors would at the same time strike down Pennsylvania's **[***773]** spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. *Ante, 505 U.S. at 895.* And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," JUSTICE STEVENS would hold that they do. *Ante, 505 U.S. at 920-922.*

Furthermore, while striking down the spousal *notice* regulation, the joint opinion would uphold a parental *consent* restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. *Ante, 505 U.S. at 895.* This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and **[*966]** spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out **[**2867]** to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster.* A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955);* cf. *Stanley v. Illinois, 405 U.S. 645, 651-653, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).* With this rule in mind, we examine each of the challenged provisions.

III

A

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. 18 Pa. Cons. Stat. § 3205 (1990). Section 3205(a)(1) requires that the referring or performing physician must inform a woman contemplating an abortion of (i) the nature of the procedure and the risks and alternatives that a reasonable patient would find material; (ii) the fetus' probable gestational **[*967]** age; and (iii) the medical risks involved in carrying her pregnancy to term. Section 3205(a)(2) requires a physician or a nonphysician counselor to inform the woman that (i) the state health department publishes free **[***774]** materials describing the fetus at different stages and listing abortion alternatives; (ii) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; and (iii) the child's father is liable for child support. The Act also imposes a 24-hour waiting period between the time that the woman receives the required information and the time that the physician is allowed to perform the abortion. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante, 505 U.S. at 902-904.*

This Court has held that it is certainly within the province of the States to require a woman's voluntary and informed consent to an abortion. See *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 760.* Here, Pennsylvania seeks to further its legitimate interest in obtaining informed consent by ensuring that each woman "is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear." *Id., at 798-799* (WHITE, J., dissenting).

[*LEdHR2C]** [2C]We conclude that this provision of the statute is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision.

Section 3205(a)(1) requires a physician to disclose

certain information about the abortion procedure and its risks and alternatives. This requirement is certainly no large burden, as the Court of Appeals found that "the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed." *947 F.2d at 703.* We are of the view that this information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." *Akron v.* **[*968]** *Akron Center for Reproductive Health, Inc., 462 U.S. at 446.* An accurate description of the gestational age of the fetus and of the risks involved in carrying a child to term helps to further both those interests and the State's legitimate interest in unborn human life. See *id., at 445-446, n.37* (require disclosure of gestational age of the fetus "certainly is not objectionable"). Although petitioners contend that it is unreasonable for the State to require that a physician, as **[**2868]** opposed to a nonphysician counselor, disclose this information, we agree with the Court of Appeals that a State "may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives." *947 F.2d at 704.*

Section 3205(a)(2) compels the disclosure, by a physician or a counselor, of information concerning the availability of paternal child support and state-funded alternatives if the woman decides to proceed with her pregnancy. Here again, the Court of Appeals observed that "the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed." *Id., at 704-705.* And petitioners do not claim that the information required to be disclosed by statute is in any way false **[***775]** or inaccurate; indeed, the Court of Appeals found it to be "relevant, accurate, and non-inflammatory." *Id., at 705.* We conclude that this required presentation of "balanced information" is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 830* (O'CONNOR, J., dissenting), and in addition furthers the State's interest in preserving unborn life. That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it only demonstrates that this information might **[*969]** very well make a difference, and that it is therefore relevant to a woman's informed choice. Cf. *id., at 801* (WHITE, J., dissenting) ("The ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice"). We acknowledge that in *Thornburgh* this Court struck down informed consent requirements similar to the ones at issue here. See *id., at 760-764.* It is clear, however, that while the detailed framework of *Roe* led to the Court's invalidation of those informational requirements, they "would have been sustained under any traditional standard of judicial review, . . . or for any other surgical procedure except abortion." *Webster v. Reproductive Health Services, 492 U.S. at 517* (plurality opinion) (citing *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 802* (WHITE, J., dissenting); *id., at 783* (Burger, C. J., dissenting)). In light of our rejection of *Roe's* "fundamental right" approach to this subject, we do not regard *Thornburgh* as controlling.

For the same reason, we do not feel bound to follow this Court's previous holding that a State's 24-hour mandatory waiting period is unconstitutional. See *Akron v. Akron Center for Reproductive Health, Inc., supra, at 449-451.* Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions, and the informed consent and waiting period requirements do not apply in the case of a medical emergency. See 18 Pa. Cons. Stat. §§ 3205(a), (b) (1990). We are of the view that, in providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus. It "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences **[*970]** on fetal life, and the possible effects on her own." *462 U.S. at 474* (O'CONNOR, J., dissenting).

B

[*LEdHR4C]** [4C]In addition to providing her own informed consent, before an unemancipated woman under the age of 18 may obtain an abortion she **[**2869]** must either furnish the consent of one of her parents, or must opt for **[***776]** the judicial procedure that allows her to bypass the consent requirement. Under the judicial bypass option, a minor can obtain an abortion if a state court finds that she is capable of giving her informed consent and has indeed given such consent, *or* determines that an abortion is in her best interests. Records of these court proceedings are kept confidential. The Act directs the state trial court to render a decision within three days of the woman's application, and the entire procedure, including appeal to Pennsylvania Superior Court, is to last no longer than eight business days. The parental consent requirement does not apply in the case of a medical emergency. 18 Pa. Cons. Stat. § 3206 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante, 505 U.S. at 904-906.*

This provision is entirely consistent with this Court's previous decisions involving parental consent requirements. See *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983)* (upholding parental consent requirement with a similar judicial bypass option); *Akron v. Akron Center for Reproductive Health, Inc., supra, at 439-440* (approving of parental consent statutes that include a judicial bypass option allowing a pregnant minor to "demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests"); *Bellotti v. Baird, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979).*

We think it beyond dispute that a State "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes [*971] impair their ability to exercise their rights wisely." *Hodgson v. Minnesota, 497 U.S. at 444* (opinion of STEVENS, J.). A requirement of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest. In our view, it is entirely "rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." *Ohio v. Akron Center for Reproductive Health, 497 U.S. at 520* (opinion of KENNEDY, J.); see also *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 91* (Stewart, J., concurring) ("There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child"). We thus conclude that Pennsylvania's parental consent requirement should be upheld.

C

Section 3209 of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating that she has notified her husband of her planned [***777] abortion. A woman is not required to notify her husband if (1) her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency. 18 Pa. Cons. Stat. § 3209 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante, 505 U.S. at 908-909.*

[*972] We first emphasize that Pennsylvania has not imposed a spousal *consent* requirement of the type the Court struck down in *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 67-72.* Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally [**2870] granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id., at 71.* But the provision here involves a much less intrusive requirement of spousal *notification*, not consent. Such a law requiring only notice to the husband "does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." *Hodgson v. Minnesota, supra, at 496* (KENNEDY, J., concurring in judgment in part and dissenting in part); see *H. L. v. Matheson, 450 U.S. at 411, n.17. Danforth* thus does not control our analysis. Petitioners contend that it should, however; they argue that the real effect of such a notice requirement is to give the power to husbands to veto a woman's abortion choice. The District Court indeed found that the notification provision created a risk that some woman who would otherwise have an abortion will be prevented from having one. *947 F.2d at 712.* For example, petitioners argue, many notified husbands will prevent abortions through physical force, psychological coercion, and other types of threats. But Pennsylvania has incorporated exceptions in the notice provision in an attempt to deal with these problems. For instance, a woman need not notify her husband if the pregnancy is the result of a reported sexual assault, or if she has reason to believe that she would suffer bodily injury as a result of the notification. 18 Pa. Cons. Stat. § 3209(b) (1990). Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision "might operate unconstitutionally under some conceivable set of circumstances." *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987).* Thus, it is not enough for petitioners [*973] to show that, in some "worst case" circumstances, the notice provision will operate as a grant of veto power to husbands. *Ohio v. Akron Center for Reproductive Health, 497 U.S. at 514.* Because they are making a facial challenge to the provision, they must "show that no set of circumstances exists under which the [provision] would be valid." *Ibid.* (internal [***778] quotation marks omitted). This they have failed to do. n2

n2 The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the

abortion decision. *Ante, 505 U.S. at 887-898.* In most instances the notification requirement operates without difficulty. As the District Court found, the vast majority of wives seeking abortions notify and consult with their husbands, and thus suffer no burden as a result of the provision. *744 F. Supp. 1323, 1360 (ED Pa. 1990).* In other instances where a woman does not want to notify her husband, the Act provides exceptions. For example, notification is not required if the husband is not the father, if the pregnancy is the result of a reported spousal sexual assault, or if the woman fears bodily injury as a result of notifying her husband. Thus, in these instances as well, the notification provision imposes no obstacle to the abortion decision.

The joint opinion puts to one side these situations where the regulation imposes no obstacle at all, and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a "large fraction" of those cases, the notification provision operates as a substantial obstacle, *ante, 505 U.S. at 895,* and that the provision is therefore invalid. There are certainly instances where a woman would prefer not to notify her husband, and yet does not qualify for an exception. For example, there are the situations of battered women who fear psychological abuse or injury to their children as a result of notification; because in these situations the women do not fear bodily injury, they do not qualify for an exception. And there are situations where a woman has become pregnant as a result of an unreported spousal sexual assault; when such an assault is unreported, no exception is available. But, as the District Court found, there are also instances where the woman prefers not to notify her husband for a variety of other reasons. See *744 F. Supp. at 1360.* For example, a woman might desire to obtain an abortion without her husband's knowledge because of perceived economic constraints or her husband's previously expressed opposition to abortion. The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands (and do not qualify for an exception). *Ante, 505 U.S. at 895.* This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases. But reliance on such speculation is the necessary result of adopting the undue burden standard.

[*974] **[**2871]** The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 69* ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying"); *id., at 93* (WHITE, J., concurring in part and dissenting in part); *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. at 541.* The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have **[***779]** been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "the Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems -- such as economic constraints, future plans, or the husbands' previously expressed **[*975]** opposition — that may be obviated by discussion prior to the abortion." *947 F.2d at 726* (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting "the integrity of the marital relationship." 18 Pa. Cons. Stat. § 3209(a) (1990). This Court has previously recognized "the importance of the marital relationship in our society." *Planned Parenthood of Central Mo. v. Danforth, supra, at 69.* In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity. See *Labine v. Vincent, 401 U.S. 532, 538, 28 L. Ed. 2d 288, 91 S. Ct. 1017 (1971)* ("The power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest;

they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See *Planned Parenthood of Central Mo. v. Danforth, supra, at 103-104* (STEVENS, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) **[*976]** **[**2872]** ordinarily does not render the statute unconstitutional or even constitutionally suspect." *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 800* (WHITE, J., dissenting). The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See *Harris v. McRae, 448 U.S. at 325-326* ("It is not the mission of this Court or any other to decide **[***780]** whether the balance of competing interests . . . is wise social policy").

D

[*LEdHR5D]** [5D]The Act also imposes various reporting requirements. Section 3214(a) requires that abortion facilities file a report on each abortion performed. The reports do not include the identity of the women on whom abortions are performed, but they do contain a variety of information about the abortions. For example, each report must include the identities of the performing and referring physicians, the gestational age of the fetus at the time of abortion, and the basis for any medical judgment that a medical emergency existed. See 18 Pa. Cons. Stat. §§ 3214(a)(1), (5), (10) (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante, 505 U.S. at 909-911*. The District Court found that these reports are kept completely confidential. *947 F.2d at 716*. We further conclude that these reporting requirements rationally further the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

Section 3207 of the Act requires each abortion facility to file a report with its name and address, as well as the names **[*977]** and addresses of any parent, subsidiary, or affiliated organizations. 18 Pa. Cons. Stat. § 3207(b) (1990). Section 3214(f) further requires each facility to file quarterly reports stating the total number of abortions performed, broken down by trimester. Both of these reports are available to the public only if the facility received state funds within the preceding 12 months. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante, 505 U.S. at 906, 911*. Petitioners do not challenge the requirement that facilities provide this information. They contend, however, that the forced public disclosure of the information given by facilities receiving public funds serves no legitimate state interest. We disagree. Records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. See Pa. Stat. Ann., Tit. 65, §§ 66.1, 66.2 (Purdon 1959 and Supp. 1991-1992). As the Court of Appeals observed, "when a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting." *947 F.2d at 718*. These reporting requirements rationally further this legitimate state interest.

E

Finally, petitioners challenge the medical emergency exception provided for by the Act. The existence of a medical emergency exempts compliance with the Act's informed consent, parental consent, and spousal notice requirements. See 18 Pa. Cons. Stat. §§ 3205(a), 3206(a), 3209(c) (1990). The Act defines a "medical emergency" as

> "that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial **[*978]** and irreversible **[**2873]** impairment of major bodily function." § 3203.

[*781]** Petitioners argued before the District Court that the statutory definition was inadequate because it did not cover three serious conditions that pregnant women can suffer — preeclampsia, inevitable abortion, and prematurely ruptured membrane. The District Court agreed

with petitioners that the medical emergency exception was inadequate, but the Court of Appeals reversed this holding. In construing the medical emergency provision, the Court of Appeals first observed that all three conditions do indeed present the risk of serious injury or death when an abortion is not performed, and noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion. See *947 F.2d at 700-701*. Finding that "the Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum," the court read the exception as intended "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id., at 701*. It thus concluded that the exception encompassed each of the three dangerous conditions pointed to by petitioners.

We observe that Pennsylvania's present definition of medical emergency is almost an exact copy of that State's definition at the time of this Court's ruling in *Thornburgh*, one which the Court made reference to with apparent approval. *476 U.S. at 771* ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so"). n3 We find that the interpretation [*979] of the Court of Appeals in these cases is eminently reasonable, and that the provision thus should be upheld. When a woman is faced with any condition that poses a "significant threat to [her] life or health," she is exempted from the Act's consent and notice requirements and may proceed immediately with her abortion.

n3 The definition in use at that time provided as follows:

"'Medical emergency.' That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." Pa. Stat. Ann., Tit. 18, § 3203 (Purdon 1983).

IV

For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution. It bears emphasis that our conclusion in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from those I set forth in my separate opinions in *Webster v. Reproductive* [***782] *Health Services, 492 U.S. 490, 532, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989)* (opinion concurring in part and concurring in judgment), and *Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990)* (*Akron II*) (concurring opinion). The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." *Ante, 505 U.S. at 851*. The Court is correct in adding the qualification that this "assumes a state of [**2874] affairs in which the choice does not intrude upon a protected liberty," *ibid.* — but the crucial part of that qualification [*980] is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example — with which entire societies of reasonable people disagree — intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.* Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected — because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. n1 *Akron II, supra, at 520* (SCALIA, J., concurring).

n1 The Court's suggestion, *ante, 505 U.S. at 847-848*, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was con-

tradicted *by a text* — an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See *Loving v. Virginia, 388 U.S. 1, 9, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)* ("In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also *id., at 13* (Stewart, J., concurring in judgment). The enterprise launched in *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973),* by contrast, sought to *establish* — in the teeth of a clear, contrary tradition — a value found nowhere in the constitutional text.

There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention, *ante, 505 U.S. at 859,* that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

[*981] **[***783]** The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," *ante, 505 U.S. at 847* (citing *Michael H. v. Gerald D., 491 U.S. 110, 127, n.6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)* (opinion of SCALIA, J.)). That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," *ibid.* But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "curb the discretion of federal judges," *ante, 505 U.S. at 847,* is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction — towards systematically eliminating checks upon its own power; and it succumbs.

[*LEdHR2D]** [2D] **[***LEdHR4D]** [4D] **[***LEdHR5E]** [5E]Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have **[**2875]** said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.

> **"The inescapable fact is that adjudication of substantive due process claims may call upon the Court [*982] in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."** *Ante, 505 U.S. at 849.*

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973).* Today's opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's "'important and legitimate interest in protecting the potentiality of human life.'" *Ante, 505 U.S. at 871* (quoting *Roe, supra*, at 162). But "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, *e. g., Roe, supra, at 162; Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); Colautti v. Franklin, 439 U.S. 379, 386, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983)* **[***784]** *(Akron I); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 482, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983).* The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life.* Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.

[*LEdHR16D]** [16D]The authors of the joint opinion,

of course, do not squarely contend that *Roe v. Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis. Ante, 505 U.S. at 853, 861, 871.* But in their exhaustive discussion of all the factors that go into the determination [*983] of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "the Court's power lies . . . in its legitimacy, a product of substance and perception," *ante, 505 U.S. at 865,* the "substance" part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong — even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," *ante, 505 U.S. at 849;* it involves a "most intimate and personal choice," *ante, 505 U.S. at 851;* it is "central to personal dignity and [**2876] autonomy," *ibid.;* it "originates within the zone of conscience and belief," *ante, 505 U.S. at 852;* it is "too intimate and personal" for state interference, *ibid.;* it reflects "intimate views" of a "deep, personal character," *ante, 505 U.S. at 853;* it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," *ante, 505 U.S. at 857;* and it concerns a particularly "'important decision,'" *ante, 505 U.S. at 859* (citation omitted). n2 But it [***785] is [*984] obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986))* has held are *not* entitled to constitutional protection — because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deeply personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis's warning is as timely today as it was 135 years ago:

> "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott v. Sandford, 60 U.S (19 How.) 393, 621, 15 L. Ed. 691 (1857)* (dissenting opinion).

"Liberty finds no refuge in a jurisprudence of doubt." *Ante, 505 U.S. at 844.*

n2 JUSTICE BLACKMUN's parade of adjectives is similarly empty: Abortion is among "'the most intimate and personal choices,'" *ante, 505 U.S. at 923;* it is a matter "central to personal dignity and autonomy," *ibid.;* and it involves "personal decisions that profoundly affect bodily integrity, identity, and destiny," *ante, 505 U.S. at 927.* JUSTICE STEVENS is not much less conclusory: The decision to choose abortion is a matter of "the highest privacy and the most personal nature," *ante, 505 U.S. at 915;* it involves a "'difficult choice having serious and personal consequences of major importance to [a woman's] future,'" *ante, 505 U.S. at 916;* the authority to make this "traumatic and yet empowering decision" is "an element of basic human dignity," *ibid.;* and it is "nothing less than a matter of conscience," *ibid.*

One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe v. Wade*, rather than the revised version fabricated today by the authors [*985] of the joint opinion. The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion — which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin — is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by JUSTICE O'CONNOR in her dissent in *Akron I, 462 U.S.*

416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983). See *ante, 505 U.S. at 876.* n3 Because [***786] the three Justices now wish to "set forth a standard [**2877] of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden." *Ibid.* I certainly agree with that, but I do not agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarification [*986] make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

n3 The joint opinion is clearly wrong in asserting, *ante, 505 U.S. at 874,* that "the Court's early abortion cases adhered to" the "undue burden" standard. The passing use of that phrase in JUSTICE BLACKMUN's opinion for the Court in *Bellotti v. Baird, 428 U.S. 132, 147, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976) (Bellotti I),* was not by way of setting forth the *standard* of unconstitutionality, as JUSTICE O'CONNOR's later opinions did, but by way of expressing the *conclusion* of unconstitutionality. Justice Powell for a time appeared to employ a variant of "undue burden" analysis in several nonmajority opinions, see, *e. g., Bellotti v. Baird, 443 U.S. 622, 647, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979) (Bellotti II); Carey v. Population Services International, 431 U.S. 678, 705, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977)* (opinion concurring in part and concurring in judgment), but he too ultimately rejected that standard in his opinion for the Court in *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420, n.1, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983) (Akron I).* The joint opinion's reliance on *Maher v. Roe, 432 U.S. 464, 473, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977),* and *Harris v. McRae, 448 U.S. 297, 314, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980),* is entirely misplaced, since those cases did not involve regulation of abortion, but mere refusal to fund it. In any event, JUSTICE O'CONNOR's earlier formulations have apparently now proved unsatisfactory to the three Justices, who — in the name of *stare decisis* no less — today find it necessary to devise an entirely new version of "undue burden" analysis. See *ante, 505 U.S. at 877-879.*

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ante, 505 U.S. at 877;* see also *ante, 505 U.S. at 877-879.* An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante, 505 U.S. at 877.* n4 This latter statement cannot [*987] [***787] possibly mean what it says. *Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the [**2878] test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

n4 The joint opinion further asserts that a law imposing an undue burden on abortion decisions is not a "permissible" means of serving "legitimate" state interests. *Ante, 505 U.S. at 877.* This description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness. See, *e. g., Akron I, supra, at 463* (O'CONNOR, J., dissenting) ("The 'undue burden' . . . represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard"); see also *Hodgson v. Minnesota, 497 U.S. 417, 458-460, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990)* (O'CONNOR, J., concurring in part and concurring in judgment in part); *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)* (O'CONNOR, J., dissenting). This confusing equation of the two standards is apparently designed to explain how one of the Justices who joined the plurality opinion in *Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989),* which adopted the rational-basis test, could join an opinion expressly adopting the undue burden test. See *id., at 520* (rejecting the view that abortion is a "fundamental right," instead inquiring whether a law regulating the woman's "liberty interest" in abortion is "reasonably designed" to further "legitimate" state ends). The same motive also apparently underlies the joint opinion's erroneous citation of the plurality opinion in *Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 506, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (Akron II)* (opinion of KENNEDY, J.), as applying the undue burden test. See *ante, 505 U.S. at 876* (using this citation to support the proposition that "two of us" — *i. e.*, two of the

authors of the joint opinion — have previously applied this test). In fact, *Akron II* does not mention the undue burden standard until the conclusion of the opinion, when it states that the statute at issue "does not impose an undue, *or otherwise unconstitutional*, burden." *497 U.S. at 519* (emphasis added). I fail to see how anyone can think that saying a statute does not impose an unconstitutional burden under *any* standard, including the undue burden test, amounts to adopting the undue burden test as the *exclusive* standard. The Court's citation of *Hodgson* as reflecting JUSTICE KENNEDY's and JUSTICE O'CONNOR's "shared premises," *ante, 505 U.S. at 878*, is similarly inexplicable, since the word "undue" was never even used in the former's opinion in that case. I joined JUSTICE KENNEDY's opinions in both *Hodgson* and *Akron II;* I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test.

The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. As THE CHIEF JUSTICE points out, *Roe's* strict-scrutiny standard "at least had a recognized basis in constitutional law at the time *Roe* was decided," *ante, 505 U.S. at 964*, while "the same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," *ibid.* The joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility of laws that do not impose an "undue burden." *Ante, 505 U.S. at 873.* It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. *Ante, 505 U.S. at 874.* I agree, indeed I have [*988] forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, see *R. A. V. v. St. Paul, 505 U.S. 377, 389-390, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992); Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 878-882, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*, but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1 [cent]. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these cases, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness [***788] to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe*." *Ante, 505 U.S. at 873.*

The rootless nature of the "undue burden" standard, a phrase plucked out of context from our earlier abortion decisions, see n.3, *supra*, is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow formulations used in JUSTICE O'CONNOR's earlier opinions. *Ante, 505 U.S. at 876-877.* Those opinions stated that a statute imposes an "undue burden" if it imposes "*absolute* obstacles or *severe* limitations on the abortion decision," *Akron I, 462 U.S. at 464* (dissenting opinion) (emphasis added); see also *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)* (dissenting [*989] opinion). Those strong adjectives are conspicuously missing from the joint opinion, whose authors have for some unexplained reason now determined that a burden is "undue" if it merely imposes a "substantial" obstacle to abortion decisions. See, *e. g., ante, 505 U.S. at 895, 901.* JUSTICE O'CONNOR has also abandoned (again without explanation) the view she expressed in *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983)* (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relates to the preservation and protection of maternal health," *id., at 505* (citation and internal quotation marks omitted). In today's version, [**2879] even health measures will be upheld only "*if they do not constitute an undue burden,*" *ante, 505 U.S. at 878* (emphasis added). Gone too is JUSTICE O'CONNOR's statement that "the State possesses *compelling* interests in the protection of potential human life . . . throughout pregnancy," *Akron I, supra, at 461* (dissenting opinion) (emphasis added); see also *Ashcroft, supra, at 505* (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Thornburgh, supra, at 828* (O'CONNOR, J., dissenting); instead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest, *ante, 505 U.S. at 876, 878.* (That had to be done, of course, since designating

the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of *Roe.* See *Akron I, 462 U.S. at 420, n.1.)* And "viability" is no longer the "arbitrary" dividing line previously decried by JUSTICE O'CONNOR in *Akron I, id., at 461;* the Court now announces that "the attainment of viability may continue to serve as the critical fact," *ante, 505 U.S. at 860.* n5 It is difficult to [*990] [***789] maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

> n5 Of course JUSTICE O'CONNOR was correct in her former view. 'The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. *Ante, 505 U.S. at 870.* Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

Because the portion of the joint opinion adopting and describing the undue burden test provides no more useful guidance than the empty phrases discussed above, one must turn to the 23 pages applying that standard to the present facts for further guidance. In evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in these cases. Thus, the joint opinion would uphold the 24-hour waiting period contained in the Pennsylvania statute's informed consent provision, 18 Pa. Cons. Stat. § 3205 (1990), because "the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk," *ante, 505 U.S. at 885.* The three Justices therefore conclude that "on the record before us, . . . we are not convinced that the 24-hour waiting period constitutes an undue burden." *Ante, 505 U.S. at 887.* The requirement that a doctor provide the information pertinent to informed consent would also be upheld because "there is no evidence on this record that [this requirement] would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Ante, 505 U.S. at 884.* Similarly, the joint opinion would uphold the reporting requirements of the Act, §§ 3207, 3214, because "there is no . . . showing on the record before us" that these requirements constitute a "substantial obstacle" [*991] to abortion decisions. *Ante, 505 U.S. at 901.* But at the same time the opinion pointedly observes that these reporting requirements may increase the costs of abortions and that "at some point [that fact] could become a substantial obstacle." *Ibid.* Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see § 3209, imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length, *ante, 505 U.S. at 888-891.*

[**2880] I do not, of course, have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record or that are properly subject to judicial notice. n6 But what is remarkable about the joint opinion's [***790] fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden." See, *e. g., ante, 505 U.S. at 880, 884-885, 887, 893-894, 895, 901.* We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been [*992] appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue" — subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

> n6 The joint opinion is not entirely faithful to this principle, however. In approving the District Court's factual findings with respect to the spousal notice provision, it relies extensively on nonrecord materials, and in reliance upon them adds a number of factual conclusions of its own. *Ante, 505 U.S. at 891-893.* Because this additional factfinding pertains to matters that surely are "subject to reasonable dispute," Fed. Rule Evid. 201(b), the joint opinion must be operating on the premise that these

are "legislative" rather than "adjudicative" facts, see Rule 201(a). But if a court can find an undue burden simply by selectively string-citing the right social science articles, I do not see the point of emphasizing or requiring "detailed factual findings" in the District Court.

To the extent I can discern *any* meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevents a significant number of women from obtaining an abortion," *ante, 505 U.S. at 893;* whether a "significant number of women . . . are likely to be deterred from procuring an abortion," *ante, 505 U.S. at 894;* and whether the regulation often "deters" women from seeking abortions, *ante, 505 U.S. at 897.* We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As JUSTICE BLACKMUN recognizes (with evident hope), *ante, 505 U.S. at 926,* the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "expressing a preference [*993] for childbirth over abortion," *ante, 505 U.S. at 883.* Reason finds no refuge in this jurisprudence of confusion.

> **"While we appreciate the weight of the arguments . . . that [***791] *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* [**2881] are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."** *Ante, 505 U.S. at 853.*

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. I wonder whether, as applied to *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803),* for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.

I am certainly not in a good position to dispute that the Court *has saved* the "central holding" of *Roe*, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the "undue burden" test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* "has in no sense proven 'unworkable,'" *ante, 505 U.S. at 855.* I suppose the **[*994]** Court is entitled to call a "central holding" whatever it wants to call a "central holding" — which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*. I thought I might note, however, that the following portions of *Roe* have not been saved:

. Under *Roe*, requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is designed to influence her choice. *Thornburgh, 476 U.S. at 759-765; Akron I, 462 U.S. at 442-445.* Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional. *Ante, 505 U.S. at 881-885.*

. Under *Roe*, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. *Akron I, supra, at 446-449.* Under the "undue burden" regime (as applied today, at least) it is not. *Ante, 505 U.S. at 884-885.*

. Under *Roe*, requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional. *Akron I, supra, at 449-451.* Under the "undue burden" regime (as applied today, at least) it is not. *Ante, 505 U.S. at 885-887.*

. **[***792]** Under *Roe*, requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional. *Thornburgh, supra, at 765-768.* Under

the "undue burden" regime (as applied today, at least) it generally is not. *Ante, 505 U.S. at 900-901.*

> **"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . ., its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a [*995] national controversy to end their national division by accepting a common mandate rooted in the Constitution."** *Ante, 505 U.S. at 866-867.*

[2882]** The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue — as it does over other issues, such as the death penalty — but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?" — not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court **[*996]** in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees.

> **"To overrule under fire . . . would subvert the Court's legitimacy . . . .**
>
> **". . . To all those who will be . . . tested by following, the Court implicitly undertakes to remain stead-fast . . . . The promise of constancy, [***793] once given, binds its maker for as long as the power to stand by the decision survives and . . . the commitment [is not] obsolete.**
>
> **. . .**
>
> **"[The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals."** *Ante, 505 U.S. at 867-868.*

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges — leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speaks before all others for their constitutional ideals" — with the somewhat more modest role envisioned for these lawyers by the Founders.

> "The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . ." The Federalist No. 78, pp. 393-394 (G. Wills ed. 1982).

Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no **[*997]** shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior Courts," *ante, 505 U.S. at 866),* with **[**2883]** the more democratic views of a more humble man:

> "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irre-

> vocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 139 (1989).

It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of "constancy," *ante, 505 U.S. at 868,* of "remaining steadfast," *ibid.*, and adhering to "principle," *ante, passim.* Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint opinion's "undue burden" standard) — and that principle is inconsistent with *Roe. See 410 U.S. at 154-156.* n7 To make matters worse, two of the three, in **[***794]** order thus to remain steadfast, had to abandon previously stated positions. See n.4, *supra;* see *supra*, at 988-990. It is beyond me how the Court expects these accommodations to be accepted "as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." *Ante, 505 U.S. at 865-866.* The only principle the Court "adheres" **[*998]** to, it seems to me, is the principle that the Court must be seen as standing by *Roe.* That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik* — and a wrong one at that.

> n7 JUSTICE BLACKMUN's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constant" and "steadfast" than can be believed. He contends that the joint opinion's "undue burden" standard requires the application of strict scrutiny to "all non-*de-minimis*" abortion regulations, *ante, 505 U.S. at 926,* but that could only be true if a "substantial obstacle," *ante, 505 U.S. at 877* (joint opinion), were the same thing as a non-*de-minimis* onstacle — which it plainly is not.

I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced — *against* overruling, no less — by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe.* In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857),* an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937),* which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. (Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade.*" D. Currie, The Constitution in the Supreme Court 271 (1985) (footnotes omitted).)

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution **[*999]** has an evolving meaning, see **[**2884]** *ante, 505 U.S. at 848;* that the Ninth Amendment's reference to "other" rights is not a disclaimer, but a charter for action, *ibid.;* and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition — then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has **[***795]** never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change — to show how little they intimidate us.

Of course, as THE CHIEF JUSTICE points out, we have been subjected to what the Court calls "'political pressure'" by *both* sides of this issue. *Ante, 505 U.S. at 963.* Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception — a job not for lawyers but for political campaign managers — the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided?

(2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.

In truth, I am as distressed as the Court is — and expressed my distress several years ago, see *Webster, 492 U.S. at 535* — about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account **[*1000]** their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," *ante, 505 U.S. at 849,* which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court — not just those mentioned in the text or established in the traditions of our society. *Ante, 505 U.S. at 847-849.* Why even the Ninth Amendment — which says only that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" — is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at "rights," definable and enforceable by us, through "reasoned judgment." *Ante, 505 U.S. at 848-849.*

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here — reading text and discerning our society's traditional understanding of that text — the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily **[***796]** of making *value judgments;* if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation **[**2885]** ceremonies, *Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992);* if, as I say, our pronouncement of constitutional law rests primarily on value **[*1001]** judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school — maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours.* Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN not only regards this prospect with equanimity, he solicits it. *Ante, 505 U.S. at 943.*

* * *

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "call the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante, 505 U.S. at 867.*

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott.* He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There **[*1002]** seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case — its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation — burning on his mind. I expect that two years earlier he, too, had thought himself "calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the **[***797]** sort they both involved — an issue involving life and

death, freedom and subjugation — can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

REFERENCES: Return To Full Text Opinion

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1 Am Jur 2d, Abortion 1.5, 9, 18, 37.5

2 Federal Procedural Forms, L Ed, Appeal, Certiorari, and Review 3:977

1 Am Jur Pl & Pr Forms (Rev), Abortion, Forms 1-3, 5, 6; 19A Am Jur Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 327

13A Am Jur Legal Forms 2d, Parent and Child 191:74, 191:83, 191:84; 15 Am Jur Legal Forms 2d, Physicians and Surgeons 202:129-202:131

1 Am Jur Proof of Facts 15, Abortion and Miscarriage

USCS, Constitution, Amendment 14

L Ed Digest, Abortion 7, 8, 15, 16

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Supreme Court's views as to concept of "liberty" under due process clauses of *Fifth and Fourteenth Amendments. 47 L Ed 2d 975.*

Validity, under Federal Constitution, of abortion laws. *35 L Ed 2d 775.*

Requisites and conditions of judicial consent to minor's abortion. *23 ALR4th 1061.*

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women. *20 ALR4th 1166.*

Woman's right to have abortion without consent of, or against objections of, child's father. *62 ALR3d 1097.*

Right of minor to have abortion performed without parental consent. *42 ALR3d 1406.*

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. *16 ALR2d 949.*

Attachment F

T. Joyce, S.K. Henshaw, J.D. Skatrud, "The Impact of Mississippi's Mandatory Delay Law on Abortions and Births," *The Journal of the American Medical Association*, Volume 278, Number 8, August 27, 1997

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To promote the science and art of medicine and the betterment of the public health.

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The Impact of Mississippi's Mandatory Delay Law on Abortions and Births

Theodore Joyce, PhD; Stanley K. Henshaw, PhD; Julia DeClerque Skatrud, DrPh

Context.—Beginning August 8, 1992, a woman in the state of Mississippi had to wait 24 hours after in-person receipt of state-mandated information regarding abortion and birth complications, fetal development, and alternatives to abortion before an abortion could be performed.

Objective.—To analyze the effect of the law on the abortion and birth rates of Mississippi residents.

Design.—A retrospective analysis of abortion and birth rates before and after the law in Mississippi as contrasted with abortion and birth rates in 2 comparison states, Georgia and South Carolina. Neither Georgia nor South Carolina enforced a mandatory delay law, but both states began enforcement of parental notification statutes during the study period.

Patients.—Female residents of reproductive age in Mississippi, Georgia, and South Carolina between 1989 and 1994.

Main Outcome Measures.—We compared birth rates, abortion rates, the percentage of late abortions, and the percentage of abortions performed outside the state of residence for all women and then by age and race before and after August 1992 among women of Mississippi, Georgia, and South Carolina.

Results.—We found that rate ratios (RRs) of resident abortion rates (rate after law implementation/rate before law implementation) declined 12% more in Mississippi than in South Carolina (95% confidence interval [CI], 8%-15%) and 14% more in Mississippi than in Georgia (95% CI, 10%-17%) in the 12 months after the law went into effect. Rate ratios for white adults declined 22% more in Mississippi than in South Carolina (95% CI, 17%-27%) and 20% more in Mississippi than in Georgia (95% CI, 15%-25%). Changes among nonwhite adults and white teens were more modest but also statistically significant ($P<.05$). For all women, RRs of the percentage of abortions performed after 12 weeks' gestation increased 39% more in Mississippi than in either South Carolina or Georgia ($P<.05$); the increase in the percentage of abortions after 12 weeks' gestation was observed for white and nonwhite adults ($P<.05$). We also show that the percentage of abortions performed out of state increased 42% more among women in Mississippi relative to women in South Carolina after the law (95% CI, 34%-50%).

Conclusion.—The timing of the decline in abortion rates in Mississippi, the lack of similar declines in comparison states, the rise in percentage of late abortions and abortions performed out of state and the apparent completeness of abortion reports suggest that Mississippi's mandatory delay statute was responsible for a decline in abortion rates and an increase in abortions performed later in pregnancy among residents of Mississippi. The effect of delay laws in other states will likely depend on whether statutes require 2 separate visits to the abortion provider (ie, clinics, hospitals, or physicians' offices where abortions are performed) and the availability of abortion services.

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THE US SUPREME COURT, in *Planned Parenthood of Southeastern Pennsylvania v Casey*,[1] ruled that laws requiring waiting periods of 24 hours after receipt of state-mandated information about abortion complications, fetal development, and alternatives to abortion did not on their face represent an undue burden on a woman's constitutional right to abortion. The Court left open the possibility that the laws might be unconstitutional if experience demonstrated an undue burden. Since then, 11 states have begun to enforce mandatory waiting periods and 8 states have had similar legislation enjoined or not enforced.[2] Sponsors of mandatory waiting period legislation argue that the law insures that women have the information and time needed to make an informed decision. Opponents contend that the law creates an unnecessary barrier to abortion and increases the health risks by causing delay.

Of the approximately 6.5 million pregnancies in the United States in 1992, 1.5 million or 23% were voluntarily terminated.[3] Despite the importance of abortion as a method of fertility control, there has been little analysis of the effect of mandatory waiting periods on reproductive behavior. Mandatory delay laws could discourage abortion and cause an increase in births resulting from unintended pregnancies. Conversely, the laws could induce fewer births and abortions if women increased contraceptive efforts to avoid compliance with the law. Finally, whether delay laws affect the number of abortions and births, they may cause women to terminate pregnancies later in gestation.

Mississippi's mandatory waiting period statute went into effect on August 8, 1992. The law requires that women who seek an abortion in the state of Mississippi must be told the name of the physician who will perform the abortion, medical risks associated with the procedure, probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. In addition, the woman must be told that she may be eligible for medical assistance and that the father is liable for child support. The information must be given by either the referring or performing physician at least 24 hours before the abortion is performed. Only in Mississippi, Louisiana, and Utah have delay laws been interpreted as requiring that the information be given to women in person, necessitating 2 visits to the clinic.

One preliminary report estimated that 6 months after Mississippi's mandatory waiting period became effective, abortions to residents of Mississippi declined 11% and a larger proportion of abortions were terminated later in pregnancy.[4] The study, however, lacked data from other states for comparison and covered too short a period to adequately assess effects of the law on birth rates.

The objective of this study was to analyze effects of Mississippi's mandatory

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waiting period statute on 4 outcomes: abortions, abortions performed outside the state of residence, abortion delay, and births. Toward this end, we examined changes in live births and induced abortions for all women and then separately by age and race to residents of Mississippi before and after August 1992, the month Mississippi's mandatory delay statute went into effect. We compared the experience of Mississippi residents with changes in births and abortions in Georgia and South Carolina, 2 southern states with no mandatory delay statute.

METHODS

Data

Data on births and induced abortions are from vital records in Mississippi, Georgia, and South Carolina. We chose South Carolina and Georgia as comparison states for several reasons. First, neither state imposed a 24-hour waiting period between 1989 and 1994. Second, both are southern states with comparably large nonwhite populations, permitting a race-specific analysis. Third, except for mandatory delay, abortion policies in Mississippi, Georgia, and South Carolina are similar: none of the states funds abortions through Medicaid except in cases of rape or incest, and all 3 states began enforcement of parental notification or consent statutes between 1990 and 1993. Finally Mississippi, South Carolina, and Georgia all maintain computerized records of induced termination as part of their vital statistics and all have reciprocal agreements with neighboring states to exchange information on residents who have abortions out of state.

Completeness of Abortion Data

Comparison with data from the Alan Guttmacher Institute (AGI), New York, NY, which periodically surveys all abortion providers (defined as clinics, hospitals, and physicians' offices where abortions are performed, here and throughout the text), indicates that counts of abortion by state of occurrence are quite complete for Mississippi and reasonably complete for Georgia and South Carolina. The Mississippi Department of Health reported 7555 abortions performed in the state in 1992 (AGI, 7550). The South Carolina Department of Health reported 11 008 abortions (AGI, 12 190), and the Georgia State Department of Health reported 38 052 abortions (AGI, 39 680).[5,6]

Counts of abortions by state of residence are more difficult to assess, yet consistent counts by state of residence are important to our assessment. If, for instance, more residents of Mississippi seek abortions in other states in response to a mandatory waiting period and if a proportion of these abortions are not recorded by the Mississippi Department of Health, then we will overestimate the effect of the law on abortion rates to residents of Mississippi. As a partial check on the quality of reporting across states, we compared resident data on abortions as reported by the Mississippi Department of Health with occurrence data as collected by agencies in Tennessee and Alabama on Mississippi residents. The Tennessee Department of Health[7] reported that 793 abortions to residents of Mississippi were performed in Tennessee in 1992. The Mississippi Department of Health[8] reported that 785 abortions to residents of Mississippi were performed in Tennessee. The Alabama Department of Health[9] recorded 766 abortions to residents of Mississippi as compared with 762 abortions reported by the Mississippi Department of Health. The agreement among the 3 states indicates that reciprocal reporting arrangements of known abortions are effective.

Another potentially important border state, Louisiana, does not collect data on abortions to residents of Mississippi. However, a sample survey of Louisiana abortion providers by AGI suggests that about 1000 Mississippi residents have abortions in Louisiana each year (S. K. H., unpublished data, March 1996). Finally, the Arkansas Department of Health recorded only 9 abortions to Mississippi residents in 1991.

We analyzed births and abortions for all women and then separately by age (≤19 years or ≥20 years) and race (white or nonwhite). We analyzed data for teens separately since during the time period under study all 3 states imposed parental consent or notification statutes for minors seeking abortion. Except for a subgroup of minors in South Carolina, parental involvement laws are associated with a relatively minor decline in teen abortions to residents of Mississippi and South Carolina. Parental involvement laws, however, are associated with an increase in the number of minors who obtain abortions out of state.[10,11] They may also be associated with increases in abortions performed later in gestation.

Abortion rates are expressed as abortions per 1000 women aged 15 to 44 years. For the subgroup analysis, we used race-specific women aged 15 to 19 years or 20 to 44 years as denominators. For birth rates, we lagged population figures by 6 months to match births and abortions to women who became pregnant during the same time period. Population figures by age, race, sex, and state for July 1 for each year from 1988 through 1993 were taken from US Census Bureau data files (Larry Sink, MA, MS, unpublished data for 1988-1993, Population Branch, US Bureau of the Census, Washington, DC, November 1995). For July 1994, we estimated rates of growth for each age, race, and sex grouping based on national figures for July 1, 1993, and July 1, 1994.[12] We projected state-specific totals by age and race for 1993 by the national rate of growth to obtain state estimates for July 1994. Monthly totals incorporate proportionate changes between annual totals. Rates for 12-month periods are based on the average of the monthly population estimates for the period.

Stratification by age and race resulted in a minor loss of data because of missing information on one or both of the characteristics (ie, age or race). In Mississippi and South Carolina, we eliminated less than 0.5% of abortions and less than 0.1% of births due to missing age, race, or both. In Georgia, we eliminated 5.2% of abortions. This percentage was relatively stable between 1989 and 1994, and almost half of these cases were to residents of Georgia who obtained an abortion out of state. As a result of the small number of reported abortions to residents of Georgia performed in another state, we do not analyze out-of-state abortions to residents of Georgia.

Gestational age was computed as the difference between the date of the termination and the date of the last menstrual period. If data were lacking on the day of the last menstrual period but were available for month and year, we assumed the last menstrual period took place on the 15th day of the month. If more than the day was missing, we used the physician's estimate of gestational age. Based on this algorithm, we had no missing information on gestational age in any of the 3 states after elimination of cases with missing data on age and race.

Statistical Methods

Mississippi's mandatory waiting statute took effect on August 8, 1992. To assess the impact of the law on abortion, we compared abortion rates for the 12 months preceding August 8, 1992, with those for the 12-month period after the law took effect. For births, we used the same preperiod as abortions, but we defined March 1993 through February 1994 as the postlaw period since we would not expect any change in births for at least 6 months after the law went into effect.

We used rate ratios (RRs) to measure association between Mississippi's mandatory delay law and birth and abortion rates. Specifically, we divided the abortion rate for the 12 months after enforcement of the law by the abortion rate for the 12 months prior to the law. We used the large sample standard error of the natural logarithm of the RR to estimate 95% confidence intervals (CIs) around the RR.[13] We analyzed birth rates similarly. To compare the change in abortion rates in Mississippi to changes in South Caro-

lina and Georgia, we divided the RR for abortion in Mississippi by the RR for abortion in South Carolina and Georgia. We termed these relative RRs. We analyzed birth rates similarly.

Relative RRs will not eliminate time-varying factors unique to each state that may generate changes in abortion and birth rates coincident with the law. As an additional strategy, we created state-specific time series of monthly abortion rates from January 1989 through December 1994. We pooled these series by state and regressed the natural logarithm of the abortion rate on a dichotomous indicator for the mandatory delay statute that equals 1 after the law was implemented (August 1992). We included controls for seasonal variation, linear and quadratic trends, and interactions between state and law as well as state and trend.

RESULTS

Figures 1 and 2 display annual abortion and birth rates by race for residents of Mississippi, Georgia, and South Carolina. Abortion rates are plotted for 12 months from August through July, beginning with August 1989, to distinguish the prelaw and postlaw periods. We do the same for birth rates, except for the final segment, which covers the 12 months from March 1993 through February 1994, the earliest period in which any potential effects of the law on birth rates would be evident.

Based on visual inspection, we noted that annual abortion rates among white and nonwhite women in Mississippi had been increasing up to the 12-month period ending July 1992 and declined thereafter (Figure 1). Abortion rates of white women in South Carolina and Georgia declined almost continuously during the 5-year span. Birth rates for nonwhites in both South Carolina and Georgia declined more rapidly after July 1992 than did nonwhite birth rates in Mississippi (Figure 2). Among whites, birth rates were approximately the same in all 3 states.

Rate Ratios

Total abortions to residents of Mississippi, including those obtained in Alabama and Tennessee, declined from 7801 prior the law to 6591 after the law. Expressed as rates per 1000 females aged 15 to 44 years, they declined from 12.9 to 10.8 (Table 1). The RR indicates that the postlaw abortion rate was 84% of its prelaw level ([10.8/12.9] × 100), a decline of 16%. Rate ratios for the comparison states indicate that the abortion rate was 95% of its prelaw level in South Carolina ([14.9/15.6] × 100) and 97% of its prelaw level in Georgia ([19.9/20.4] × 100). Based on relative RRs, the abortion rate in Mississippi decreased 14% compared with South Carolina ([0.84/0.95] × 100), and 12% compared with Georgia ([0.84/0.97] × 100) in the first year after the law.

Changes in the timing and occurrence of abortions associated with the law among residents of Mississippi, South Carolina, and Georgia are shown in Table 1. The percentage of total resident abortions obtained outside of Mississippi increased 6.8 percentage points, from 18.6% to 25.4%, in the first year after the law went into effect. The relative RR between Mississippi and South Carolina was 1.42 (1.37/0.96). With respect to timing, the percentage of total resident abortions performed after 12 weeks' gestation increased by 4 percentage points from 10.4% to 14.5% in Mississippi during the 12 months after the law. No such change occurred in either South Carolina or

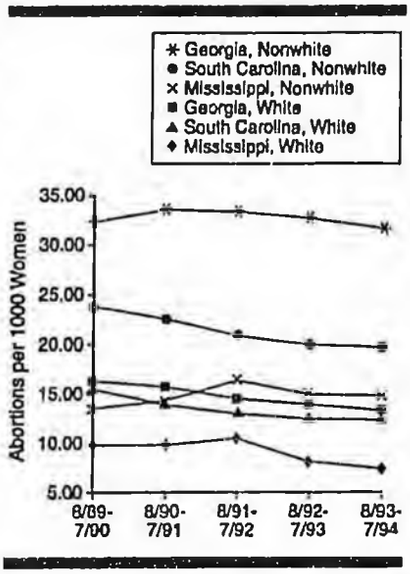

Figure 1.—Annual abortion rates for whites and nonwhites in Mississippi, Georgia, and South Carolina from August 1989 through July 1994.

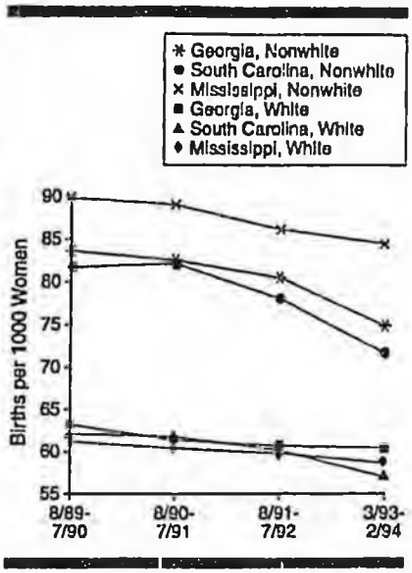

Figure 2.—Annual birth rates for whites and nonwhites in Mississippi, Georgia, and South Carolina from August 1989 through February 1994.

Table 1.—Resident Births and Abortions in Mississippi, South Carolina, and Georgia Before and After Mississippi's Mandatory Delay Law*

	Before, No. (Rate)†	After, No. (Rate)†	RR (95% CI)‡	Relative RR (95% CI)§
Resident births				
Mississippi	42695 (70.64)	42164 (69.27)	0.98 (0.97-0.99)	...
South Carolina	56711 (66.30)	53192 (62.05)	0.94 (0.93-0.95)	1.05 (1.03-1.07)
Georgia	110843 (67.37)	110485 (65.73)	0.98 (0.97-0.98)	1.00 (0.99-1.02)
Resident abortions‖				
Mississippi	7801 (12.9)	6591 (10.8)	0.84 (0.81-0.87)	...
South Carolina	13375 (15.6)	12770 (14.9)	0.95 (0.93-0.98)	0.88 (0.85-0.92)
Georgia	33768 (20.4)	33442 (19.9)	0.97 (0.96-0.99)	0.86 (0.83-0.90)
	Before, No. (%)	**After, No. (%)**	**RR (95% CI)**	**Relative RR (95% CI)**
Resident abortions obtained out of state¶				
Mississippi	1448 (18.6)	1676 (25.4)	1.37 (1.29-1.46)	...
South Carolina	2436 (18.2)	2244 (17.6)	0.96 (0.92-1.02)	1.42 (1.34-1.50)
Resident abortions after 12 weeks' gestation¶				
Mississippi	810 (10.4)	958 (14.5)	1.40 (1.28-1.53)	...
South Carolina	886 (6.6)	852 (6.7)	1.01 (0.92-1.10)	1.39 (1.26-1.52)
Georgia	4554 (13.5)	4529 (13.5)	1.00 (0.97-1.04)	1.39 (1.30-1.49)

*Period of 12 months before law defined as August 1991 through July 1992. After defined as August 1992 through July 1993. Period after law for resident births lagged 9 months and is defined as March 1993 through February 1994.
†Rates are resident abortions or births per 1000 female residents aged 15 to 44 years.
‡For each outcome, the rate ratio (RR) is the outcome 12 months after the law divided by the outcome 12 months before the law. CI indicates confidence interval.
§The relative RR is the RR for Mississippi divided by the RR for South Carolina or Georgia. Ellipses indicate referent. The SE for the relative RR is the square root of the sum of the variances for the respective RRs.
‖Resident abortions include all known abortions to residents of a state regardless of where they were performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee.
¶The percentage of abortions obtained out of state or after 12 weeks' gestation is the number of abortions to residents performed out of state or the number performed after 12 weeks' gestation divided by all resident abortions.

Table 2.—Resident Abortions in Mississippi, South Carolina, and Georgia, by Age and Race, 12 Months Before and After Mississippi's Mandatory Delay Law

	Before, No. (Rate)*	After, No. (Rate)*	RR (95% CI)†	Relative RR (95% CI)‡
White adults, ≥20 y§				
Mississippi	2850 (9.27)	2188 (7.06)	0.76 (0.72-0.80)	...
South Carolina	5591 (11.38)	5456 (11.13)	0.98 (0.94-1.01)	0.78 (0.73-0.83)
Georgia	13 110 (13.40)	12 518 (12.73)	0.95 (0.93-0.97)	0.80 (0.75-0.85)
Nonwhite adults, ≥20 y§				
Mississippi	2979 (15.37)	2749 (13.98)	0.91 (0.86-0.96)	...
South Carolina	4564 (19.32)	4522 (18.94)	0.98 (0.94-1.02)	0.93 (0.87-0.99)
Georgia	13 762 (31.19)	14 287 (30.94)	0.99 (0.97-1.02)	0.92 (0.87-0.97)
White teens, ≤19 y‖				
Mississippi	987 (17.53)	782 (13.62)	0.78 (0.71-0.85)	...
South Carolina	1789 (22.74)	1573 (20.34)	0.89 (0.84-0.96)	0.87 (0.77-0.97)
Georgia	3302 (21.07)	3188 (20.98)	0.97 (0.92-1.02)	0.80 (0.72-0.89)
Nonwhite teens, ≤19 y‖				
Mississippi	985 (20.15)	911 (18.58)	0.92 (0.84-1.01)	...
South Carolina	1431 (28.08)	1219 (23.88)	0.85 (0.79-0.92)	1.08 (0.98-1.22)
Georgia	3612 (43.96)	3449 (41.37)	0.94 (0.90-0.98)	0.98 (0.89-1.08)

*Period before law defined as August 1991 through July 1992, and after law defined as August 1992 through July 1993. Resident abortions include all known abortions to residents of a state regardless of where they are performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee.

†For each outcome, the rate ratio (RR) is the outcome 12 months after the law divided by the outcome 12 months before the law. CI indicates confidence interval.

‡The relative RR is the RR for Mississippi divided by the RR for South Carolina or Georgia. The SE for the relative RR is the square root of the sum of the variances for the respective RRs. Ellipses indicate referent.

§White adult abortion rates are all resident abortions to women aged 20 years or older per 1000 white female residents aged 20 to 44 years. Nonwhite adult abortion rates are defined analogously.

‖White teenager abortion rates are all resident abortions to adolescents aged 19 years or younger per 1000 white female residents aged 15 to 19 years. Nonwhite teenager abortion rates are defined analogously.

Georgia. The relative RRs indicate that the increase in the percentage of late abortions was 39% greater in Mississippi compared with South Carolina or Georgia during the 12 months after the law.

Birth rates decreased in all 3 states after the law. Relative RRs indicate that birth rates declined approximately 5% less in Mississippi relative to South Carolina [(0.98/0.94)−1]×100), but declined by the same percentage in Mississippi and Georgia.

Age-specific and race-specific resident abortion rates are shown in Table 2. Abortion rates in the year ensuing the law were 0.76 of their prelaw level among white adults, 0.78 among white teens, 0.91 among nonwhite adults, and 0.92 among nonwhite teens. The decline in abortion rates for each group except nonwhite teens was greater in Mississippi than in each of the 2 comparison states. Abortion rates declined 22% more among white adults in Mississippi relative to South Carolina and 20% more relative to adults in Georgia. Abortion rates for white teens in Mississippi decreased 13% compared with South Carolina and 20% more compared with Georgia. For nonwhite adults, the decline in Mississippi was 7% and 8% relative to South Carolina and Georgia, respectively. There was no difference between nonwhite teens in Mississippi as compared with nonwhite teens in either South Carolina or Georgia.

The percentage of abortions performed after 12 weeks' gestation rose among the 4 age and racial groups in Mississippi, but the relative increase was greater for whites than nonwhites (Table 3). The RR was 1.55 for white adults, 1.69 for white teens, 1.25 for nonwhite adults, and 1.27 for nonwhite teens. Except for nonwhite teens, the proportion of late abortions by age and race increased in Mississippi compared with South Carolina and Georgia.

Regression Analysis

Table 4 displays the average change in the natural logarithm of abortion rates between Mississippi and South Carolina and between Mississippi and Georgia in the period following implementation of Mississippi's mandatory delay statute by age and race. Changes were adjusted for state-specific linear and curvilinear trends in the natural logarithm of monthly resident abortion rates. Interpreting changes in the natural logarithm as proportionate changes, we showed that overall abortion rates declined between 10% and 13% in Mississippi after the law compared with South Carolina and Georgia. Among white adults, abortion rates decreased between 17% and 23% in Mississippi relative to South Carolina and Georgia, and among white teens there was an 18% decline in Mississippi relative to white teens in Georgia. Changes among nonwhites, although consistent in magnitude to changes in the relative RRs in Table 2, were statistically insignificant. Regarding differences in variance between the binomial and regression approaches, the binomial was likely to underestimate the variance as it did not incorporate between-month variation.

COMMENT

Beginning in August 1992, women seeking abortion in Mississippi had to wait 24 hours from the time they received state-mandated information on complications of abortion and birth, fetal development, abortion alternatives, and financial assistance for prenatal and infant care before the abortion could be performed. In response to the law, abortion providers required women to make at least 2 separate visits to the abortion facility. There were only 8 abortion providers in Mississippi in 1992, 5 of whom were located in Jackson, Miss.[6] For some women then, 2 visits may present a substantial cost in terms of time and out-of-pocket expenses. In this study, we have investigated whether Mississippi's delay statute is associated with changes in abortion and birth rates by comparing Mississippi's rate with those of 2 neighboring states lacking this requirement.

We found a substantial and statistically significant decline in abortion rates among residents of Mississippi 12 months after the law went into effect. From this we conclude that the fall in abortion rates is unlikely spurious and is related to enforcement of the 24-hour mandatory delay statute. Our conclusion is bolstered by corroborating increases in the percentage of abortions performed out of state and the percentage of abortions performed after 12 weeks' gestation. We also found no similar increases in abortion rates, the percentage of late abortions, or the percentage of out-of-state abortions in 2 comparison states, Georgia and South Carolina. Finally, our findings do not appear to be an artifact of underreporting. The numbers of abortions performed in Mississippi in 1992 as measured by vital records are almost identical to totals obtained by the AGI survey of providers.[5,8]

The percentage decline in the abortion rate of teens in Mississippi was about as great as that of adults, but the comparisons with Georgia and South Carolina show less difference because teen abortion rates also fell in those states. In South Carolina, teen abortion rates decreased 11% among whites and 15% among nonwhites, compared with a 2% decline among adults. The large decline in teen rates relative to adult abortion rates of both races in South Carolina implies that factors specific to South Carolina had a unique impact on the abortion rate of teens in that state.

One explanation for these findings is that enforcement of the parental consent statute enacted in May 1990 in South Carolina may have precipitated a downward trend in teen abortion rates. Georgia also enacted a parental notification statute in September 1991 that may have

had an impact on teen abortion rates in South Carolina as well. Georgia borders South Carolina, and previous research has shown that a substantial proportion of minors from South Carolina went out of state for an abortion in the first year after South Carolina's parental consent was enforced.[11] Mississippi's parental notification law did not go into effect until the end of May 1993. In sum, legislation tightening access to abortion services for teens in South Carolina and Georgia around the time of our study period may have compromised their usefulness as comparison states for teens in Mississippi.

Differences in abortion rates by race are more difficult to interpret. We suggest 2 possible explanations. One possibility is that whites are more likely than nonwhites to substitute contraception for abortion in response to laws limiting abortion. This is consistent with our finding that birth rates among nonwhites in Mississippi decreased 2.4% after the law relative to declines of 6.4% and 8.3% in Georgia and South Carolina, respectively (results available on request). There was no differential change in birth rates by state among whites associated with the law, even though the proportionate decline in abortion rates among whites was substantially greater than among nonwhites in Mississippi. Another possibility is that cost of compliance was less for nonwhites than for whites, since a greater proportion of nonwhites live closer to abortion providers. Ten percent of all nonwhite residents of Mississippi in 1990 lived in the city of Jackson, compared with 5% of all whites, and 5 of the 8 abortion providers in the state also are located in Jackson. Proximity to abortion providers, especially central-city providers, would lower the time and travel costs associated with a delay statute that requires 2 separate visits.

A consistent finding by age and race was the substantial increase in the percent of abortions performed after 12 weeks' gestational age. It is important to note that the increase represents a rise in the absolute number of second trimester abortions in spite of the decline in total abortions. In results not shown, we found a proportionate increase in late abortions to Mississippi residents performed both in state as well as out of state. We found no significant change in the distribution of the timing of abortions among residents of South Carolina and Georgia. In short, the Mississippi law was associated with a substantive and statistically significant increase in abortion delay. We do not know if the increase in later abortions has resulted in an increase in complications. At a minimum, however, the law has increased the average costs per abortion in Mississippi since second trimester procedures are more expensive than first trimester abortions.

Table 3.—Resident Abortions Performed After 12 Weeks' Gestation in Mississippi, South Carolina, and Georgia, by Age and Race, 12 Months Before and After Mississippi's Mandatory Delay Law

	Before, No. (%)*	After, No. (%)*	RR (95% CI)†	Relative RR (95% CI)‡
White adults, ≥20 y§				
Mississippi	210 (7.4)	248 (11.4)	1.55 (1.30-1.85)	...
South Carolina	317 (5.7)	259 (4.7)	0.84 (0.71-0.98)	1.85 (1.62-2.09)
Georgia	1438 (11.0)	1321 (10.6)	0.96 (0.90-1.03)	1.61 (1.42-1.80)
Nonwhite adults, ≥20 y§				
Mississippi	339 (11.4)	392 (14.3)	1.25 (1.09-1.44)	...
South Carolina	280 (6.1)	299 (6.8)	1.08 (0.92-1.26)	1.16 (0.95-1.37)
Georgia	1763 (12.8)	1886 (13.2)	1.03 (0.97-1.09)	1.22 (1.07-1.38)
White teens, ≤19 y‖				
Mississippi	86 (8.7)	112 (14.7)	1.69 (1.29-2.20)	...
South Carolina	143 (8.0)	138 (8.8)	1.11 (0.88-1.38)	1.52 (1.18-1.87)
Georgia	557 (16.9)	540 (16.9)	1.00 (0.90-1.12)	1.68 (1.39-1.97)
Nonwhite teens, ≤19 y‖				
Mississippi	175 (17.8)	208 (22.6)	1.27 (1.06-1.52)	...
South Carolina	146 (10.2)	155 (12.7)	1.24 (1.01-1.54)	1.02 (0.74-1.30)
Georgia	798 (22.1)	782 (22.7)	1.03 (0.94-1.12)	1.24 (1.04-1.44)

*The period 12 months before the law is defined as August 1991 through July 1992; and the period 12 months after the law as August 1992 through July 1993. Resident abortions include all known abortions to residents of a state regardless of where they are performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee.

†For each outcome, the rate ratio (RR) is the outcome 12 months after the law divided by the outcome 12 months before the law. CI indicates confidence interval.

‡The relative RR is the RR for Mississippi divided by the RR for South Carolina or Georgia. The SE for the relative RR is the square root of the sum of the variances for the respective RRs. Ellipses indicate referent.

§For white adults, the percentage of abortions after 12 weeks' gestation is the number of resident abortions to white women aged 20 years and older performed after 12 weeks' gestation divided by all resident abortions to white women aged 20 years and older. Nonwhite abortion rates are defined analogously.

‖For white teenagers, we used resident abortions to white adolescents aged 19 years or younger performed after 12 weeks' gestation divided by all resident abortions to adolescents aged 19 years or younger. Nonwhite abortion rates are defined analogously.

Table 4.—Average Difference in the Natural Logarithm of Resident Abortion Rates Between Mississippi and South Carolina and Between Mississippi and Georgia*

	Proportionate Changes in Monthly Abortion Rates (SE)				
	All Women (n=216)	White Adults (n=216)	Nonwhite Adults (n=216)	White Teens (n=216)	Nonwhite Teens (n=216)
Mississippi vs South Carolina	−0.126† (0.050)	−0.230‡ (0.061)	−0.083 (0.081)	−0.127 (0.080)	0.083 (0.084)
Mississippi vs Georgia	−0.101† (0.050)	−0.170‡ (0.061)	−0.040 (0.081)	−0.183† (0.080)	0.006 (0.084)
Adjusted R^2	0.938	0.909	0.944	0.850	0.907

*Figures, based on period from January 1989 through December 1994, are the coefficients on the interaction between an indicator variable for the state and an indicator variable for the law that is 1 in the postimplementation period. Because the dependent variable is the natural logarithm of the abortion rate, coefficients can be interpreted as proportionate changes in the abortion rate. Separate regressions were estimated for all women and then for each age and racial group separately. All regressions were estimated by ordinary least squares. Additional controls included indicator variables for each month of the year as well as linear and quadratic trend terms interacted with state. Resident abortions include all known abortions to residents of a state regardless of where they are performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee. R^2 indicates multiple correlation coefficient.

†$P<.05$.

‡$P<.01$.

The number and proportion of abortions to Mississippi residents performed in Alabama and Tennessee increased after the law for each age and race group. The proportion of abortions performed out of state increased more for whites than nonwhites. The absolute magnitudes, however, were not large. Thus, if all states that border Mississippi had imposed mandatory delay laws, abortion rates of Mississippi residents might have declined more, but not substantially. This also suggests that omission of data from Louisiana would have relatively little effect on our results. To see this, note that only the change in out-of-state abortions, not the level, matters for our analysis. We reported an increase of 228 abortions performed in either Alabama or Tennessee after the law (Table 1). Assume an additional 228 abortions to Mississippi residents performed in Louisiana went unrecorded. If we add these 228 abortions to the postlaw totals, the abortion rate increases from 10.8 to 11.2 and the RR reported in Table 1 increases from 0.84 to 0.87, but remains statistically significant.

The results were inconclusive with respect to birth rates, although not inconsistent with the hypothesis that the law caused an increase in the number of unintended pregnancies carried to term.

Definitive tests of the hypothesis were impossible because the expected effects on the birth rates of the observed decline in abortions are small and can be masked by unmeasured state-specific factors that also affect the birth rate. For example, abortions declined by 1210 a year after the law took effect (Table 1). If carried to term, these pregnancies would have resulted in approximately 1089 live births after adjustment for fetal loss. This would have increased the postlaw birth rate by 1.79 per 1000 women aged 15 to 44 years, or 2.5%. In fact, the birth rate decreased by 2% in Mississippi, 6.4% in South Carolina, and 2.4% in Georgia after the law. Thus, although the law may have contributed to the relatively slower decline in Mississippi, other factors may have played an even larger role.

The delay law may have stimulated greater contraceptive use, causing unintended pregnancies to decrease. If this happened, the relative increase in the birth rate among residents of Mississippi would be less than the 2.5% that would have been observed had the decline in abortions resulted in a one-for-one increase in births. In this case, the power of our statistical procedures to detect an effect on birth rates would be even further diminished.

We have no way of assessing whether illegal abortions increased as a result of the law. An analysis of illegal abortion following enforcement of the Hyde amendment found no evidence of a meaningful increase in illegal abortions associated with a decrease in Medicaid-financed abortions.[14] Another assessment estimated that there may have been a 1% increase in illegal abortion associated with the Hyde amendment.[15] An increase in illegal abortion of 1% in Mississippi would not alter our conclusions.

Could other changes have occurred in Mississippi during the study period to precipitate the observed decline in abortion rates? Although we cannot exclude the possibility, our research design eliminated several sources of potential confounding. A before-and-after analysis within a state removes state-specific confounders that do not vary during the study period. Marital status, for instance, is an important correlate of abortion, but unless the marriage rate within a state changes during the 24-month study period, marital status cannot be a confounder for the law. The same argument pertains to other potential confounders such as the percentage of the population residing in metropolitan areas or per capita income. In fact, we could find no demographic or socioeconomic shifts to explain the decline. The marriage rate and per capita income varied by less than 3% in the 3 study states between 1992 and 1993, and the percentage of the population living in metropolitan areas varied by less than 2% between 1992 and 1993.[3,16] There were no major changes in abortion service availability to account for the observed decline. The number of abortion providers in Mississippi increased from 7 to 8 between 1991 and 1992, while the number of abortion providers fell from 59 to 55 in Georgia and from 20 to 18 in South Carolina (S. K. H., unpublished data, March 1996).

A before-and-after analysis, however, will not eliminate confounding by factors that vary during the study period. If, for example, abortion rates in Mississippi have been trending downward because of changing attitudes toward abortion, then a decline in abortion rates after the law may reflect changing sentiment toward abortion and not the effects of the mandatory delay statute. We attempted to eliminate time-varying confounders in 2 ways. First, we divided the RR for abortion and births in Mississippi by the RR for abortion and births in Georgia and South Carolina. We termed these relative RRs. The objective was to eliminate time-varying factors common across Mississippi and our comparison states that were related to abortion and birth rates, but unrelated to the law. If, for example, the abortion rate were to decline 10% in Mississippi after the law, but also decline 10% for the same period in South Carolina, the relative RR would be 1. We would interpret such a finding to mean that changes in Mississippi's abortion rate associated with the law were indistinguishable from general trends in abortion that existed in comparative states. Finally, we used regression analysis to control for state-specific linear and quadratic trends in the natural logarithm of monthly abortion rates. The pattern of results was consistent across methodologies.

Are the results from Mississippi relevant to the effects of mandatory delays in other states? We believe so, but our findings are most germane to states in which the law has been interpreted as requiring 2 visits to an abortion provider. Of the 10 states in addition to Mississippi with enforced mandatory delay statutes, only Louisiana and Utah have interpreted their laws to require 2 separate visits to an abortion provider. Other states permit counseling and state-mandated information regarding the fetus and alternatives to abortion to be communicated via the telephone or through the mail.

The availability of abortion providers is also important to consider. The effect of mandatory delay statutes necessitating 2 visits to a provider may be greater in states that have relatively fewer abortion providers. In Mississippi, there were only 8 abortion providers in the entire state in 1992 or 1.3 providers per 100 000 women aged 15 to 44 years; South Carolina had 2.1, Georgia had 3.3, and the national average was 4.0.[6] Thus, the large decline in abortion rates we observed in Mississippi may not occur in states with greater availability of abortion providers both within state and among neighboring states. Still, some women in all states have difficulty gaining access to abortion services, and a law that created a barrier for a substantial proportion of Mississippi women would undoubtedly have a similar effect on many women in other states.

References

1. *Planned Parenthood of Southern Pennsylvania v Casey* 112 SCt, 2791 (1992).
2. National Abortion and Reproductive Rights Action League. *Who Decides? A State-by-State Review of Abortion and Reproductive Rights*. Washington, DC: NARRAL Foundation and National Abortion and Reproductive Rights Action League (NARRAL); 1997.
3. US Bureau of the Census. *Statistical Abstract of the United States: 1995*. 115th ed. Washington, DC: US Bureau of the Census; 1995.
4. Althaus F, Henshaw S. The effects of mandatory delay laws on abortion patients and providers. *Fam Plann Perspect*. 1994;26:228-231, 233.
5. Centers for Disease Control and Prevention. Abortion Surveillance—United States, 1992. *MMWR CDC Surveill Summ*. 1996;45:1-36.
6. Henshaw S, Van Vort J. Abortion services in the United States, 1991 and 1992. *Fam Plann Perspect*. 1994;26:100-106.
7. Bureau of Health Services Administration, Tennessee Dept of Health. *1992 Induced Terminations* [microdata tape]. Nashville, Tenn: Bureau of Health Services; 1996.
8. Dept of Vital Records, Mississippi Dept of Health. *1992 Induced Terminations* [microdata tape]. Jackson, Miss: Department of Vital Records; 1996.
9. Statistical Service Branch, State of Alabama Dept of Public Health. *1992 Induced Terminations* [microdata tape]. Montgomery, Ala: Statistical Service Branch; 1996.
10. Henshaw S. The impact of requirements for parental consent on minor's abortions in Mississippi. *Fam Plann Perspect*. 1995;27:120-122.
11. Joyce T, Kaestner R. State reproductive policies and adolescent pregnancy resolutions: the case of parental involvement laws. *J Health Econ*. 1996; 15:579-607.
12. Deardorff KE, Hollmann FW, Montonery P. *US Population Estimates, by Age, Sex, Race, and Hispanic Origin: 1992-1994*. Washington, DC: Population Estimation Branch, US Bureau of the Census; 1995. Publication PPL21.
13. Rothman KJ. *Modern Epidemiology*. Boston, Mass: Little Brown & Co Inc; 1986.
14. Selik RM, Cates W, Tyler CW. Effects of restricted public funding for legal abortions: a second look. *Am J Public Health*. 1981;71:77-81.
15. Cates W. The Hyde amendment in action: how did the restriction of federal funds for abortion affect low-income women? *JAMA*. 1981;246:1109-1112.
16. US Bureau of the Census. *Statistical Abstract of the United States: 1994*. 114th ed. Washington, DC: US Bureau of the Census; 1994.

ALASKA STATE LEGISLATURE

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Sectional Analysis
HB 292

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Section 1: FINDINGS language describes the interests and intentions of the Legislature's intervention in this issue. Interests include regulating medical practice, protecting the life and health and choices of pregnant women, and clarifying a physician's requirements to obtain inform consent, which will in turn, conserve legal and judicial resources.

Section 2: directs the Department of Health and Social Services to develop a website designed to assist a pregnant woman with her reproductive choices. This pamphlet will provide resources for women to use in order to make and implement these decisions. The material will include information specific to geographic region, adoption services, counseling, abortion, clinics, medical assistance benefits, requirements for doctors who performs abortions, the father's liability, fetal development, and medical risks/rewards for each procedure option.

Section 3: adds that abortion may not be performed unless informed consent is obtained, as outlined in Section 4. This elevates 12 A.A.C. 40.070 to statute.

Section 4: adds civil liability for a person who performs or induces an abortion without meeting the informed consent provisions. A doctor who prints the website's information and distributes it to the pregnant woman is not liable under this section.

Section 5: states the terms of qualification for consent to an abortion to be informed and voluntary. Medical emergency, as defined in this section, bypasses the informed consent requirements. The pregnant woman or her parent/guardian/etc. will certify the requirements in writing as met. Voluntary informed means: at least 24 hours before the procedure, in an individual and private and confidential setting, the physician will provide information on the women's individual circumstances including the physician's name, gestational estimation of the pregnancy, and the nature and risks of the procedure and its alternatives, and the availability of the website's information.

Section 6: adds to the current abortion reporting law. In preparing the report, the state registrar must require whether or not the pregnant woman received the website's information.

Section 7: provides severability of this legislation.

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. CSHB 292(HES)

ANALYSIS CONTINUATION

web-based materials required under this bill.

Although this fiscal note is created under the Maternal, Child, & Family Hlth component, this program has been transferred to the Child Health Services BRU, Womens and Adolescents Services component in FY04.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note: 1
Bill Version: CSHB 292(HES)
(H) Publish Date: 5/17/03

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: INFORMED CONSENT BEFORE ABORTION
BRU: State Health Services
Component: Maternal, Child, & Family Hlth

Sponsor: DAHLSTROM
Requester:

Component No.: 290

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	20.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	20.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	20.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill requires that information be prepared and made available via the Internet, to every woman seeking an abortion, on the medical risks of abortion, pregnancy, and where services can be sought, by geographic region. The Department of Health and Social Services already produces, procures, and disseminates a range of materials regarding how to have a healthy baby and ways to keep the baby safe and healthy after birth. In addition, the Department maintains a 24-hour referral line for services. Ensuring the intent of this bill is addressed will require resources for the production of the additional informational materials on abortion.

CONTRACTUAL: $20.0 for a professional services contract in Year 1 for the production and posting of the

Prepared by: Doug Bruce, Director — Phone 465-3090
Division: Public Health — Date/Time 05/06/2003
Approved by: Joel S. Gilbertson, Commissioner — Date 05/06/2003
Agency: Department of Health and Social Services

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 292(HES)
(H) Publish Date: 5/17/03
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):
Title INFORMED CONSENT BEFORE ABORTION
BRU State Health Services
Component Bureau of Vital Statistics

Sponsor DAHLSTROM
Requester

Component No. 961

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	30.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**30.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	30.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	**30.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill would add a requirement to the report of Induced Termination of Pregnancy (ITOP) program that the Bureau of Vital Statistics collect and record data on whether or not each reported patient requested and received a written copy of information on reproductive options required to be maintained on the Internet.

CONTRACTUAL: $30.0 in GF for contractual services costs would be required in Year 1 (one-time cost) to provide for 1) a contract to revise the BVS ITOP computer program ($20,000); 2) to produce, print and distribute revised ITOP reporting forms to providers throughout Alaska ($2,000); and 3) to contract for the drafting of regulations to implement AS 18.50.245(e) ($8,000).

Prepared by: Doug Bruce, Director — Phone 465-3090
Division Public Health — Date/Time 05/06/2003
Approved by: Joel S. Gilbertson, Commissioner — Date 05/06/2003
Agency Department of Health and Social Services

ALASKA STATE LEGISLATURE

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REPRESENTATIVE NANCY DAHLSTROM

ELMENDORF AFB • FORT RICHARDSON • BIRCHWOOD • FIRE LAKE • GOVERNMENT HILL • MULDOON

Representative_Nancy_Dahlstrom@legis.state.ak.us

HB 292
SPONSOR STATEMENT

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Since the early 1970's, Alaskan physicians who perform or induce abortions are required, in regulation, to inform patients "of the medical implications and the possible emotional and physical sequelae (consequence) of the procedure" (12 A.A.C. 40.070). HB 292 raises these regulations into statute, and standardizes the information presented to the patients by means of a website maintained by the Department of Health and Social Services. This website will list accurate, objective information that explains resources available to a pregnant woman that may assist her in making and implementing her own reproductive decisions. This bill will enable women to make healthy, educated choices regarding their own individual and private circumstances.

ARTICLE 2.
ABORTIONS

Section

60. Termination of pregnancy
70. Informed consent
80. Medical procedures
90. Evaluation
100. Consultation requirements
110. Abortion procedures
120. Standards for hospitals and facilities
130. Records
140. Limitation

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110.

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart.

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications.

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available.

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information.

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered nonviable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact.

Informed Consent/Abortion Info

AS 08.64.105. Regulation of abortion procedures.
The board shall adopt regulations necessary to carry into effect the provisions of AS 18.16.010 and shall define ethical, unprofessional, or dishonorable conduct as related to abortions, set standards of professional competency in the performance of abortions, and establish procedures and set standards for facilities, equipment, and care of patients in the performance of an abortion.

12 A.A.C. 40.070
Unless otherwise provided in 12 AAC 40.060 (Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.), a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

History: Eff. 12/20/70, Register 36; am 8/29/73, Register 47

Sec. 18.16.010. Abortions.

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200 ;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for
purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated; and

(4) the woman is domiciled or physically present in the state for 30 days before the abortion.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both.

(d) [Repealed, Sec. 6 ch 14 SLA 1997].

(e) A person who performs or induces an abortion in violation of(a)(3) of this section is civilly liable to the pregnant minor and the minor's parents, guardian, or custodian for compensatory and punitive damages.

(f) It is an affirmative defense to a prosecution or claim for a violation of (a)(3) of this section that the pregnant minor provided the person who performed or induced the abortion with false, misleading, or incorrect information about the minor's age, marital status, or emancipation, and the person who performed or induced the abortion did not otherwise have reasonable cause to believe that the pregnant minor was under 17 years of age, unmarried, or unemancipated.

(g) It is an affirmative defense to a prosecution or claim for violation of (a)(3) of this section that compliance with the requirements of (a)(3) of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection, "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

(1) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the pregnant minor.

Sec. 18.16.020. Consent required before minor's abortion.

A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 17 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) one of the minor's parents or the minor's guardian or custodian has consented in writing to the performance or inducement of the abortion;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(3) a court, by its inaction under AS 18.16.030 , constructively has authorized the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion.

Sec. 18.16.030. Judicial bypass for minor seeking an abortion.

(a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the
performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

(b) The complaint shall be made under oath and must include all of the following:

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 17 years of age, and unemancipated;

(3) a statement that the complainant wishes to have an abortion without the consent of a parent, guardian, or custodian;

(4) an allegation of either or both of the following:

(A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without the consent of a parent, guardian, or custodian; or

(B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

(d) If the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of

an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(f) If the complainant makes only the allegation set out in (b)(4)(B) of this section and the court finds that there is clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse of the complainant by one or both of the minor's parents or the minor's guardian or custodian, or by clear and convincing evidence the consent of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(g) If the complainant makes both of the allegations set out in (b)(4) of this section, the court shall proceed as follows:

(1) the court first shall determine whether it can make the finding specified in (e) of this section and, if so, shall issue an order under that subsection; if the court issues an order under this paragraph, it may not proceed under (f) of this section; if the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;

(2) if the court under (1) of this subsection does not make the finding specified in (e) of this section, it shall proceed to determine whether it can make the finding specified in (f) of this section and, if so, shall issue an order under that subsection; if the court does not make the finding specified in (f) of this section, it shall dismiss the complaint.

(h) The court may not notify the parents, guardian, or custodian of the complainant that the complainant is pregnant or wants to have an abortion.

(i) If the court dismisses the complaint, the complainant has the right to appeal the decision to the supreme court, and the superior court immediately shall notify the complainant that there is a right to appeal.

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the
supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(k) Each hearing under this section, and all proceedings under (j) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 40.25.110 - 40.25.120.

(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.

(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required
under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;

(2) no court costs will be assessed against the minor for procedures under this section;

(3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;

(4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present.

Sec. 18.16.050. Partial-birth abortions.

(a) Notwithstanding compliance with AS 18.16.010 , a person may not knowingly perform a partial-birth abortion unless a partial-birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury and no other medical procedure would suffice for that purpose. Violation of this subsection is a class C felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section or under any other law if the prosecution is based on this section.

(c) In this section, "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

Sec. 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

(A) save the life or preserve the health of the unborn child;

(B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or

(C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

(A) entered the armed services of the United States;

(B) become employed and self-subsisting;

(C) been emancipated under AS 09.55.590 ; or

(D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

Alaska Civil Liberties Union

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To: Rep. Lesil McGuire, Chair, and Members of the House Judiciary Committee
From: Jennifer Rudinger, Executive Director
Date: February 11, 2004
Re: Comments on House Bill 292 – Requirements for Informed Consent for Abortion

Dear Rep. McGuire and Members of the House Judiciary Committee:

Unfortunately, I am unable to call in for today's hearing on HB 292, but I would appreciate the opportunity to alert you and the Committee to some of our concerns about this bill, and I ask that these comments be distributed to the Committee and included in the bill packets.

HB 292 raises a number of constitutional concerns and questions, and we wish to go on record opposing the bill. HB 292 singles out one specific medical procedure – abortion – and imposes extra burdens on women seeking to exercise their fundamental constitutional right to terminate their pregnancy. For example, for no other medical procedure is a 24-hour waiting period required. Women who do not have access to the Internet and who cannot use a phone line in privacy without being overheard would likely have to undergo an extra visit to the doctor's office – once to receive the state-mandated counseling, and then a second time, 24 hours or more later, to be able to give informed consent for the procedure.

Furthermore, a waiting period insults women by implying that they have not thought through this medical decision and that they need to go home and reconsider before their informed consent will be deemed valid. Women seeking to carry their pregnancy to term are not forced to receive counseling that encourages them to consider other options. Thus, the only logical conclusion is that this bill is intended to discourage women from exercising their right to choose because only these women are being directed by the state to go "think it over again" before they will be allowed to give informed consent. For the past two sessions that this bill has been introduced, doctors have repeatedly and consistently testified on the record that physicians already spend a great deal of time counseling their patients and advising them of their options before performing abortion or any other surgical procedure. HB 292 is unnecessary.

There are incorrect definitions in the bill that include:

-- "unborn child" means the offspring of a human being in utero at various stages of biological development.

-- "gestational age" means the age of the unborn child as calculated from the first day of the last menstrual period of a pregnant woman. [Note the use of the biased, non-medical term "unborn child," which appears throughout the bill.]

-- "relevant information about the possibility of an unborn child's survival at various gestational ages" is something that people in the medical field do not agree on. The gestational age of "viability" is hotly debated and shifts with developing technology (and the availability of that technology).

Finally, in reviewing this bill, we noticed that it purports to amend AS 18.16.010(a), and we wish to alert the House Judiciary Committee to a provision in that existing law that this Committee should delete in order to protect women's constitutional rights. The 30-day residency/physical presence requirement in 18.16.010(a)(4) raises serious constitutional concerns, and we strongly urge this Committee to remove that requirement from existing statutes.

Thank you very much for your consideration of this matter. Please feel free to contact me at (907) 258-0044 if I may be of further assistance.

Sincerely,

Jennifer Rudinger

Jennifer Rudinger
Executive Director

Subject: Abortion
Date: Mon, 16 Feb 2004 17:51:20 -0900
From: "Dr. Bob Johnson" <dr.bob@keaconnect.net>
To: "McGuire, Lesil" <Rep.Lesil.McGuire@legis.state.ak.us>

Lesil:

I will not be able to testify on this bill on Wednesday since Kodiak is not included in the hearing. The issue of abortion is important enough for each of you to take the time to consider my expert opinion. You have been exposed to a number of lay opinions. I choose this means of communication as the simplest and most efficient to reach you.

The task of legislators, intended by our Constitution as I am sure you must know, is to pass legislation the protects the right of individuals to engage in whatever activity they please as long as it does no harm to anyone else. This right is the whole basis of our system. It is not the business of legislators to restrict or eliminate individual choice. It is not the business of legislators to determine what is, or is not, morally right or wrong. Abortion legislation does both, and I will try to illustrate why.

HB 292 and SB 30, in particular, definitely restrict the choice of both women, who would *choose* an abortion, and physicians, who would *choose* to provide this service! Those who propose these bills have used the term *unborn child* which is an arbitrary judgement declaring the fetus a person, which *has not been determined* and indicates a bias! Those who propose these bills are a select group who feel that abortion is a sin. They, and others who pursue the use of the term *unborn child,* are interested in establishing the *personhood* of the fetus which opens the door to the consideration of fetal injury as a crime and, eventually, to the reversal of Roe vs. Wade.

I was in practice in Kodiak before the passage of Roe vs. Wade. At that time, women who became pregnant and did not want children, had no alternative. Unwanted children fared poorly. Many were abused. Most became wards of the State. I applauded the legalization of abortion which, after passage, was quickly adopted by the States, indicating that it was sorely needed. I have subsequently done approximately 700 abortions, and my experience does not support many of the problems that those who oppose the procedure would lead you to believe.

<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

I am retired and have nothing to gain by speaking against this kind of legislation. My purpose in writing to you, is to prevent obstacles being placed before women who, for multiple reasons, feel they need an abortion. I appeared to testify on HB 292 last year, at which time the committee spent about 30 minutes discussing various aspects of the bill. During this process, Senator Dyson appeared and cautioned the *house* committee *not to entertain objections* to the term *unborn child,* which clearly indicated his bias, not to mention his obvious *conflict of interest.* This was to have been a hearing, not a discussion of the bill or testimony of the committee in favor of the bill, which it became apparent that it was. Because of this only two were able to testify that afternoon.

My experience with abortion is not exceptional. Each of my patients was presented with options available for them in addition to an abortion. Each was told as much as they wanted to know about the procedure, the risks and the outcomes. Each was scheduled for a follow up visit two weeks after the procedure. Only two of my patients developed post-abortion depression requiring treatment, which is less than the

incidence of post-partum depression. Both of these recovered. None lost enough blood to require a transfusion. Two had minor post-abortion infections, which responded promptly to treatment. Those, who so desired, went on to have normal pregnancies. I saw no fertility problems associated with abortion.

There is no indication for this kind of legislation. Legislators have no business telling patients what they must know, in spite of what advice they receive or from whom. It is an insult to the intelligence of women who, in my opinion, know exactly what they want to know and, if encouraged, will make sure their physician tells them. Do you think that physicians are not familiar with their responsibility to explain the options, risks, benefits and procedural details of any treatment?

This legislation places more obstacles in the path of those who need an abortion. It, along with much inaccurate publicity, complicates the decision and tends—indeed, *intends,* I believe—to make women who elect to have an abortion feel guilty. I think the occasional suicide I have heard mentioned in connection with abortion is a direct result of this.

Ladies and Gentlemen, I ask you. Should anyone have the right to make decisions for others regarding their choice? Should anyone have the right to set up rules of procedure for others that serve as an impediment to their exercise of choice? Should anyone have the right to determine what is, or is not, morally right, for someone else? In the name of compassion for women who cannot manage to bear or raise a child, for whatever reason, I implore you to reject any legislation that has to do with abortion.

Sincerely.

Dr. Bob Johnson

LEGAL SERVICES

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MEMORANDUM February 2, 2004

SUBJECT: Informed Consent for an Abortion (HB 292)

TO: Representative Nancy Dahlstrom
Attn: Brent

FROM: Jean M. Mischel
Legislative Counsel

You have asked about the similarities and differences between HB 292 and a Texas bill (SB 319). The only similarities between these two bills is that they both pertain to pregnant women and both allow for a civil remedy and criminal penalties against a licensed physician for performing an abortion without the requisite informed consent. Otherwise, these two bills are completely different.

HB 292 is an informed consent bill providing that certain information be provided to a pregnant woman by a licensed physician before an abortion. The bill contains a civil liability provision for failing to do so and adds a violation of the informed consent provisions to the list of violations that could result in criminal penalties.

The Texas bill provides for civil and criminal penalties for the death of an "unborn child" caused by anyone other than the mother and by some means other than a lawful medical procedure done for the purpose of causing the death and with the "requisite consent." It is conceivable, then, under the Texas bill, that a health care provider performing an abortion without informed consent could be held criminally as well as civilly liable. The bill would also cover third parties, who, cause the death of a fetus in some other way such as a motor vehicle accident.

In order to amend HB 292 to do what the Texas legislation does, HB 292 would have to be rewritten to add civil and criminal penalties for the death of an "unborn child." For instance, adding the contents of HB 294, of which you are a cosponsor, would be an option, although the single-subject rule might require omission of some of the material in HB 292 that is not strictly related to unborn children, such as material related to post-abortion counseling.

If I may be of further assistance, please advise.

JMM:lmb
04-017.lmb

S.B. No. 319

AN ACT

relating to the death of or injury to an unborn child; providing penalties.

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

ARTICLE 1. CIVIL REMEDIES

SECTION 1.01. Section 71.001, Civil Practice and Remedies Code, is amended by adding Subdivisions (3) and (4) to read as follows:

(3) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

(4) "Individual" includes an unborn child at every stage of gestation from fertilization until birth.

SECTION 1.02. Section 71.003, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 71.003. APPLICATION; CERTAIN CONDUCT EXCEPTED. (a) This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual [~~he~~] had lived or had been born alive.

(b) This subchapter applies whether the injury occurs inside or outside this state.

(c) This subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against:

(1) the mother of the unborn child;

(2) a physician or other licensed health care provider, if the death is the intended result of a lawful medical procedure performed by the physician or health care provider with the requisite consent;

(3) a person who dispenses or administers a drug in accordance with law, if the death is the result of the dispensation or administration of the drug; or

(4) a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.

SECTION 1.03. Subchapter A, Chapter 71, Civil Practice and Remedies Code, is amended by adding Section 71.0055 to read as follows:

Sec. 71.0055. EVIDENCE OF PREGNANCY. In an action under this subchapter for the death of an individual who is an unborn child, the plaintiff shall provide medical or other evidence that the mother of the individual was pregnant at the time of the individual's death.

SECTION 1.04. The changes in law made by this article apply only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law as it existed

immediately before the effective date of this Act and that law is continued in effect for that purpose.

ARTICLE 2. CRIMINAL PENALTIES

SECTION 2.01. Subsection (a), Section 1.07, Penal Code, is amended by amending Subdivision (26) and adding Subdivision (49) to read as follows:

(26) "Individual" means a human being who [~~has been born and~~] is alive, including an unborn child at every stage of gestation from fertilization until birth.

(49) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

SECTION 2.02. Chapter 19, Penal Code, is amended by adding Section 19.06 to read as follows:

Sec. 19.06. APPLICABILITY TO CERTAIN CONDUCT. This chapter does not apply to the death of an unborn child if the conduct charged is:

(1) conduct committed by the mother of the unborn child;

(2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;

(3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or

(4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

SECTION 2.03. Section 20.01, Penal Code, is amended by adding Subdivisions (4) and (5) to read as follows:

(4) "Person" means an individual, corporation, or association.

(5) Notwithstanding Section 1.07, "individual" means a human being who has been born and is alive.

SECTION 2.04. Chapter 22, Penal Code, is amended by adding Section 22.12 to read as follows:

Sec. 22.12. APPLICABILITY TO CERTAIN CONDUCT. This chapter does not apply to conduct charged as having been committed against an individual who is an unborn child if the conduct is:

(1) committed by the mother of the unborn child;

(2) a lawful medical procedure performed by a physician or other health care provider with the requisite consent;

(3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or

(4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

SECTION 2.05. Chapter 49, Penal Code, is amended by adding Section 49.12 to read as follows:

Sec. 49.12. APPLICABILITY TO CERTAIN CONDUCT. Sections 49.07 and 49.08 do not apply to injury to or the death of an unborn child if the conduct charged is conduct committed by the mother of the unborn child.

SECTION 2.06. Chapter 38, Code of Criminal Procedure, is amended by adding Section 38.40 to read as follows:

Sec. 38.40. EVIDENCE OF PREGNANCY. (a) In a prosecution for the death of or injury to an individual who is an unborn child,

the prosecution shall provide medical or other evidence that the mother of the individual was pregnant at the time of the alleged offense.

(b) For the purpose of this section, "individual" has the meaning assigned by Section 1.07, Penal Code.

SECTION 2.07. (a) The changes in law made by this article apply only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

ARTICLE 3. EFFECTIVE DATE

SECTION 3.01. This Act takes effect September 1, 2003.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 319 passed the Senate on May 22, 2003, by a viva-voce vote; and that the Senate concurred in House amendments on May 31, 2003, by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.B. No. 319 passed the House, with amendments, on May 28, 2003, by the following vote: Yeas 112, Nays 15, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

ARTICLE 2.
ABORTIONS

Section

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110.

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart.

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications.

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available.

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information.

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered nonviable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 5, 2004

SUBJECT: Informed Consent for Abortion (CSHB 292(JUD))

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Jean M. Mischel
Legislative Counsel

Enclosed is the bill draft you requested.

You have asked whether, in reference to the above bill, the phrase "unborn child" is legally recognized. I have done a search of Alaska law and have found two references, one in statute and one in regulation, neither of which contains a definition. The statutory reference, at AS 18.16.090, pertains to abortions. The regulatory reference, at 7 AAC 45.510, pertains to temporary assistance eligibility for pregnant women.

Unless this legislation passes with the definition of "unborn child," courts rely on common law, plain meaning, and legislative intent to supply a definition.

If I may be of further assistance, please advise.

JMM:lmb
04-020.lmb

Enclosure

ALASKA

Parental consent law struck down

ABORTION: Statute goes too far in its effort to protect teens, jud says.

By SHEILA TOOMEY
Anchorage Daily News

(Published: October 15, 2003)

A state law requiring the consent of a parent or judge before pregnant minors can get an abortion has been struck down as unconstitutional.

In a decision signed Monday, Superior Court Judge Sen Tan agreed the state had several compelling reasons for enacting a parental consent law, but said the existing law is more restrictive than it needs to be to protect endangered teens, according to Anchorage attorney Kevin Clarkson, who defended the statute at trial in January.

The law has been on hold since shortly after it was passed in 1997 by the Legislature over a veto by Gov. Tony Knowles. It was challenged in court by Planned Parenthood of Alaska.

In written comments, Lt. Gov. Loren Leman criticized Tan's decision, saying it "undermines the rights of parents to be involved in one of the most difficult decisions that a child will ever make."

Leman sponsored the law when he was a member of the state Senate.

Clarkson said he expects the governor and attorney general will appeal Tan's ruling to the Alaska Supreme Court.

"I just think it's a good law," Clarkson said. "You have to be for protecting young and believing that most parents care about their children."

Tan first threw out the law in 1998, saying a trial was not necessary. At that tim said the issue was equal rights.

<ron_irwin@legis.state.ak.us>, <senator_bettye_davis@legis.state.ak.us>, <senator_con_bunde@legis.state.ak.us>, <senator_donny_olson@legis.state.ak.us>, <senator_fred_dyson@legis.state.ak.us>, <senator_gary_stevens@legis.state.ak.us>, <senator_gary_wilken@legis.state.ak.us>, <senator_gene_therriault@legis.state.ak.us>, <senator_georgianna_lincoln@legis.state.ak.us>, <senator_gretchen_guess@legis.state.ak.us>, <senator_hollis_french@legis.state.ak.us>, <senator_johnny_ellis@legis.state.ak.us>, <senator_john_cowdery@legis.state.ak.us>, <senator_kim_elton@legis.state.ak.us>, <senator_lyda_green@legis.state.ak.us>, <senator_lyman_hoffman@legis.state.ak.us>, <senator_ralph_seekins@legis.state.ak.us>, <senator_robin_taylor@legis.state.ak.us>, <senator_scott_ogan@legis.state.ak.us>, <senator_tom_wagoner@legis.state.ak.us>, <seward_lio@legis.state.ak.us>, <sitka_lio@legis.state.ak.us>, <tok_lio@legis.state.ak.us>, <valdez_lio@legis.state.ak.us>, <wrangell_lio@legis.state.ak.us>, <loren@lorenleman.com>, <editor@matsuvalleynews.com>, <lruskin@mcclatchydc.com>, <ksko@mcgrathalaska.net>, <psgpub@mitkof.net>, <kjnp@mosquitonet.com>, <kska@mtaonline.net>, <tgtnews@mtaonline.net>, <vfcm@mtaonline.net>, <feedback@nativevoice.org>, <seth.linden@nbc.com>, <wolf98@newnw.com>, <commnews@newsminer.com>, <editor@newsminer.com>, <letters@newsminer.com>, <newsroom@newsminer.com>, <rboyce@newsminer.com>, <sbishop@newsminer.com>, <tmoran@newsminer.com>, <nancym@nome.net>, <bbtimes@nushtel.com>, <mwdnt@nushtel.com>, <sounder@otz.net>, <levans@peninsulaclarion.com>, <kfsknews@pobox.alaska.net>, <dbass@political1.com>, <srparne@ppco.com>, <ddonalds@ptialaska.net>, <foxnet@ptialaska.net>, <hartwell@ptialaska.net>, <kathtv@ptialaska.net>, <kdmnews@ptialaska.net>, <kiny@ptialaska.net>, <krbd@ptialaska.net>, <kubdtv@ptialaska.net>, <msfish@ptialaska.net>, <debbiewilliams@radiokenai.com>, <JimHeim@radiokenai.com>, <Bill_Corbus@revenue.state.ak.us>, <astrong@rga.org>, <bjenkins@rga.org>, <log@seward.net>, <thad@sitkasentinel.net>, <editor@sitnews.org>, <wsen@starband.net>, <dbass@statepulse.com>, <editors@straffordpub.com>, <mmarois@thedailydeal.com>, <darryl@tvtv.com>, <aykrual@uaa.alaska.edu>, <northernlight@uaa.alaska.edu>, <paul.jenkins@veco.com>, <james.b.coffin@verizon.net>, <bettymills@worldnet.att.net>, <dianenenananews@yahoo.com>, <ktnanews@yahoo.com>, <kuhb@yahoo.com>, <snlinden@yahoo.com>, <michael_faubion@ykhc.org>

FOR IMMEDIATE RELEASE: February 5, 2004

State Seeks to Uphold Alaska Parental Consent Act in Appeal to Alaska Supreme Court

(Juneau, AK) *Attorney General Gregg Renkes announced today that the State filed an appeal to the Alaska Supreme Court from a recent superior court decision that found the Alaska Parental Consent Act unconstitutional.

The Parental Consent Act prohibits doctors from performing abortions on girls aged 16 and under who are both unmarried and unemancipated, unless the girl has first obtained the consent of either one of her parents or a superior court judge. The law applies only to elective abortions; it contains an exception for medically necessary emergency abortions. Similar laws have been upheld by the United States Supreme Court and are in operation in nearly 40 other states.

Attorney General Renkes expressed confidence that the State amassed a substantial and impressive evidentiary record proving that the Parental Consent Act furthers the State's multiple compelling interests.

"We developed an extensive record in the superior court," Renkes said. "We will argue on appeal that the record establishes that the Parental Consent Act serves the compelling state interests at stake here."

The superior court found that the State has a compelling interest in protecting minors from their own immaturity; protecting the physical, emotional, and psychological health of minors; ensuring that doctors obtain informed consent from minor patients; protecting minors from sexual abuse; fostering and protecting the family structure; and protecting the rights of a minor child to bring a civil action against the doctor performing the abortion.

"We look forward to presenting our arguments to the Alaska Supreme Court," Renkes concluded. "I am hopeful that on review, the high court will reverse this decision. I believe we have the evidence needed to prove that we should be allowed to provide these important protections for Alaskan families and children."

This is the state's second appeal in this case to the Alaska Supreme Court. The Alaska Legislature enacted the Parental Consent Act in 1997. Planned Parenthood of Alaska brought suit challenging the new law's constitutionality. The superior court initially held the Act unconstitutional. The State appealed to the Alaska Supreme Court, which decided that the lower court should have considered evidence on whether the State has a compelling interest in enforcing the Parental Consent Act, and whether the Act is properly tailored to promote the state's interest. Following a three-week hearing, the superior court ruled in October of 2003 that the State established numerous compelling interests, but that the Act is not sufficiently tailored to serve those interests.

###

Parental Consent.doc	**Name:** Parental Consent.doc **Type:** WINWORD File (application/msword) **Encoding:** base64 **Download Status:** Not downloaded with message

readers are sending to their friends.

Crossword
Play our interactive puzzle online.

ALASKA.com
Get information on travel, relocation and entertainment. The business directory allows you to locate stores and services statewide.

School News
Find your child's classroom in SchoolNews. Also, learn about Newspapers in Education.

Community News
Check our free Web sites for non-profit groups.

A pregnant teen who decides to have her baby has a legal right to make treatme birth decisions without anyone's consent. Pregnant teens who choose not to give are entitled to the same freedom, he concluded.

In 2001, the state Supreme Court sent the case back to Tan with instructions to testimony about whether the state has a compelling interest in requiring minors consent. The vote was 3-2, with two justices ready to forego an evidence hearin uphold the law.

After listening to experts on both sides, Tan has concluded the state does have compelling interests, Clarkson said Tuesday, including protecting minors from th immature judgment, protecting their physical and emotional health, and protecti them against sex abuse.

But the law, as written, doesn't accomplish these goals in the least restrictive wa according to the decision.

No one from Planned Parenthood could be reached Tuesday evening for commer

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

ALASKA STATE LEGISLATURE

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Resources

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Joint Armed Services Committee

Member:
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Representative_Nancy_Dahlstrom@legis.state.ak.us

HB 292
SPONSOR STATEMENT

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Since the early 1970's, Alaskan physicians who perform or induce abortions are required, in regulation, to inform patients "of the medical implications and the possible emotional and physical sequelae (consequence) of the procedure" (12 A.A.C. 40.070). HB 292 raises these regulations into statute, and standardizes the information presented to the patients by means of a website maintained by the Department of Health and Social Services. This website will list accurate, objective information that explains resources available to a pregnant woman that may assist her in making and implementing her own reproductive decisions. This bill will enable women to make healthy, educated choices regarding their own individual and private circumstances.

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Sectional Analysis
HB 292

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Section 1: FINDINGS language describes the interests and intentions of the Legislature's intervention in this issue. Interests include regulating medical practice, protecting the life and health and choices of pregnant women, and clarifying a physician's requirements to obtain inform consent, which will in turn, conserve legal and judicial resources.

Section 2: directs the Department of Health and Social Services to develop a website designed to assist a pregnant woman with her reproductive choices. This pamphlet will provide resources for women to use in order to make and implement these decisions. The material will include information specific to geographic region, adoption services, counseling, abortion, clinics, medical assistance benefits, requirements for doctors who performs abortions, the father's liability, fetal development, and medical risks/rewards for each procedure option.

Section 3: adds that abortion may not be performed unless informed consent is obtained, as outlined in Section 4. This elevates 12 A.A.C. 40.070 to statute.

Section 4: adds civil liability for a person who performs or induces an abortion without meeting the informed consent provisions. A doctor who prints the website's information and distributes it to the pregnant woman is not liable under this section.

Section 5: states the terms of qualification for consent to an abortion to be informed and voluntary. Medical emergency, as defined in this section, bypasses the informed consent requirements. The pregnant woman or her parent/guardian/etc. will certify the requirements in writing as met. Voluntary informed means: at least 24 hours before the procedure, in an individual and private and confidential setting, the physician will provide information on the women's individual circumstances including the physician's name, gestational estimation of the pregnancy, and the nature and risks of the procedure and its alternatives, and the availability of the website's information.

Section 6: adds to the current abortion reporting law. In preparing the report, the state registrar must require whether or not the pregnant woman received the website's information.

Section 7: provides severability of this legislation.

Informed Consent/Abortion Info

AS 08.64.105. Regulation of abortion procedures.
The board shall adopt regulations necessary to carry into effect the provisions of AS 18.16.010 and shall define ethical, unprofessional, or dishonorable conduct as related to abortions, set standards of professional competency in the performance of abortions, and establish procedures and set standards for facilities, equipment, and care of patients in the performance of an abortion.

12 A.A.C. 40.070
Unless otherwise provided in 12 AAC 40.060 (Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.), a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

History: Eff. 12/20/70, Register 36; am 8/29/73, Register 47

Sec. 18.16.010. Abortions.

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200 ;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for
purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated; and

(4) the woman is domiciled or physically present in the state for 30 days before the abortion.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both.

(d) [Repealed, Sec. 6 ch 14 SLA 1997].

(e) A person who performs or induces an abortion in violation of(a)(3) of this section is civilly liable to the pregnant minor and the minor's parents, guardian, or custodian for compensatory and punitive damages.

(f) It is an affirmative defense to a prosecution or claim for a violation of (a)(3) of this section that the pregnant minor provided the person who performed or induced the abortion with false, misleading, or incorrect information about the minor's age, marital status, or emancipation, and the person who performed or induced the abortion did not otherwise have reasonable cause to believe that the pregnant minor was under 17 years of age, unmarried, or unemancipated.

(g) It is an affirmative defense to a prosecution or claim for violation of (a)(3) of this section that compliance with the requirements of (a)(3) of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection, "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

(1) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the pregnant minor.

Sec. 18.16.020. Consent required before minor's abortion.

A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 17 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) one of the minor's parents or the minor's guardian or custodian has consented in writing to the performance or inducement of the abortion;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(3) a court, by its inaction under AS 18.16.030 , constructively has authorized the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion.

Sec. 18.16.030. Judicial bypass for minor seeking an abortion.

(a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the
performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

(b) The complaint shall be made under oath and must include all of the following:

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 17 years of age, and unemancipated;

(3) a statement that the complainant wishes to have an abortion without the consent of a parent, guardian, or custodian;

(4) an allegation of either or both of the following:

(A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without the consent of a parent, guardian, or custodian; or

(B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

(d) If the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of

an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(f) If the complainant makes only the allegation set out in (b)(4)(B) of this section and the court finds that there is clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse of the complainant by one or both of the minor's parents or the minor's guardian or custodian, or by clear and convincing evidence the consent of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(g) If the complainant makes both of the allegations set out in (b)(4) of this section, the court shall proceed as follows:

(1) the court first shall determine whether it can make the finding specified in (e) of this section and, if so, shall issue an order under that subsection; if the court issues an order under this paragraph, it may not proceed under (f) of this section; if the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;

(2) if the court under (1) of this subsection does not make the finding specified in (e) of this section, it shall proceed to determine whether it can make the finding specified in (f) of this section and, if so, shall issue an order under that subsection; if the court does not make the finding specified in (f) of this section, it shall dismiss the complaint.

(h) The court may not notify the parents, guardian, or custodian of the complainant that the complainant is pregnant or wants to have an abortion.

(i) If the court dismisses the complaint, the complainant has the right to appeal the decision to the supreme court, and the superior court immediately shall notify the complainant that there is a right to appeal.

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the
supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(k) Each hearing under this section, and all proceedings under (i) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 40.25.110 - 40.25.120.

(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.

(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required
under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;

(2) no court costs will be assessed against the minor for procedures under this section;

(3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;

(4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present.

Sec. 18.16.050. Partial-birth abortions.

(a) Notwithstanding compliance with AS 18.16.010 , a person may not knowingly perform a partial-birth abortion unless a partial-birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury and no other medical procedure would suffice for that purpose. Violation of this subsection is a class C felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section or under any other law if the prosecution is based on this section.

(c) In this section, "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

Sec. 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

(A) save the life or preserve the health of the unborn child;

(B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or

(C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

(A) entered the armed services of the United States;

(B) become employed and self-subsisting;

(C) been emancipated under AS 09.55.590 ; or

(D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

ARTICLE 2.
ABORTIONS

Section

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110.

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart.

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications.

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available.

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information.

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered nonviable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note: 1
Bill Version: CSHB 292(HES)
(H) Publish Date: 5/17/03
Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services
Title: INFORMED CONSENT BEFORE ABORTION
BRU: State Health Services
Component: Maternal, Child, & Family Hlth
Sponsor: DAHLSTROM
Requester:
Component No.: 290

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	20.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	20.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	20.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill requires that information be prepared and made available via the Internet, to every woman seeking an abortion, on the medical risks of abortion, pregnancy, and where services can be sought, by geographic region. The Department of Health and Social Services already produces, procures, and disseminates a range of materials regarding how to have a healthy baby and ways to keep the baby safe and healthy after birth. In addition, the Department maintains a 24-hour referral line for services. Ensuring the intent of this bill is addressed will require resources for the production of the additional informational materials on abortion.

CONTRACTUAL: $20.0 for a professional services contract in Year 1 for the production and posting of the

Prepared by: Doug Bruce, Director — Phone 465-3090
Division: Public Health — Date/Time 05/06/2003
Approved by: Joel S. Gilbertson, Commissioner — Date 05/06/2003
Agency: Department of Health and Social Services

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. CSHB 292(HES)

ANALYSIS CONTINUATION

web-based materials required under this bill.

Although this fiscal note is created under the Maternal, Child, & Family Hlth component, this program has been transferred to the Child Health Services BRU, Womens and Adolescents Services component in FY04.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 292(HES)
(H) Publish Date: 5/17/03

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: INFORMED CONSENT BEFORE ABORTION
BRU: State Health Services
Component: Bureau of Vital Statistics

Sponsor: DAHLSTROM
Requester:

Component No.: 961

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	30.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**30.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	30.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	**30.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill would add a requirement to the report of Induced Termination of Pregnancy (ITOP) program that the Bureau of Vital Statistics collect and record data on whether or not each reported patient requested and received a written copy of information on reproductive options required to be maintained on the Internet.

CONTRACTUAL: $30.0 in GF for contractual services costs would be required In Year 1 (one-time cost) to provide for 1) a contract to revise the BVS ITOP computer program ($20,000); 2) to produce, print and distribute revised ITOP reporting forms to providers throughout Alaska ($2,000); and 3) to contract for the drafting of regulations to implement AS 18.50.245(e) ($8,000).

Prepared by: Doug Bruce, Director — Phone 465-3090
Division: Public Health — Date/Time 05/06/2003
Approved by: Joel S. Gilbertson, Commissioner — Date 05/06/2003
Agency: Department of Health and Social Services

HB 303

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 7, 2003 **FURTHER REFERRALS:** Finance

Date of Committee Action: May 12, 2003

The JUDICIARY Committee considered: HB 303

HOUSE BILL NO. 303 **USE CRIMINAL FINES FOR YOUTH COURTS**

"An Act relating to youth courts and to the recommended use of criminal fines to fund the activities of youth courts; and relating to accounting for criminal fines."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CRT				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	SAMUELS	✓			
	Holm	✓			
	Crawford	✓			
	Greenberg	–			
	Ogg	✓			
Chair:	McKinnon	✓			
Chair:					

Alaska State Legislature

Committee Assignments:

Member:
House Special Committee on Fisheries
House Special Committee on Education
House Transportation Committee
House Judiciary Committee

Dan Ogg
Representative

Session:
Room 409
Capitol Building
Juneau, Alaska 99801
Phone: 907-465-2487
Toll Free: 800-865-2487
Fax: 907-465-4956
Email: rep.dan.ogg@legis.state.ak.us

Interim:
112 Mill Bay Road
Kodiak, Alaska 99615
Phone: 907-486-8872
Fax: 907-486-5264

MEMORANDUM

DATE: May 9, 2003

TO: Representative Lesil McGuire, Chair
House Judiciary Committee

FROM: Representative Dan Ogg

SUBJ: Request for Scheduling – House Bill 303

I respectfully request the House Judiciary Committee schedule a hearing for HB 303 at your earliest convenience.

This bill establishes a separate account for fines imposed and collected under AS 12.55.035 for the funding of Youth Courts. Nothing in this bill creates a dedicated fund.

Copies of the bill and sponsor statement are attached for your information. A fiscal note will be forthcoming as soon as this bill is posted for a hearing.

Please contact Cliff Stone of my staff at 2696 as necessary.

Thank you for your consideration.

Alaska State Legislature

Committee Assignments:

Member:
House Special Committee on Fisheries
House Special Committee on Education
House Transportation Committee
House Judiciary Committee

Dan Ogg
Representative

Session:
Room 409
Capitol Building
Juneau, Alaska 99801
Phone: 907-465-2487
Toll Free: 800-865-2487
Fax: 907-465-4956
Email: rep.dan.ogg@legis.state.ak.us

Interim:
112 Mill Bay Road
Kodiak, Alaska 99615
Phone: 907-486-8872
Fax: 907-486-5264

Sponsor Statement – House Bill 303

5/09/03

"An Act relating to youth courts and to the recommended use of criminal fines to fund the activities of youth courts; and relating to accounting for criminal fines."

AS 47.12.400 established Youth Courts in the State of Alaska. Youth Courts allow minors to have their case heard, determined and disposed of in a court of their peers. The department may use Youth Courts for any minor whose alleged act constitutes a violation of a state law that is a misdemeanor or a violation of a municipal ordinance that prescribes a penalty not exceeding the penalties for a class A misdemeanor under state law.

Youth Courts are an efficient and effective approach for dealing with the problem of juvenile crime. Studies show that Youth Courts provide a meaningful response to offenders that effectively reduces the likelihood that they will commit additional crimes within their community. In Anchorage, the recidivism among Youth Court participants was only 6%, compared to 23% utilizing the traditional approach. Another advantage to this program is the fact that approximately 1,000 Alaskan students are involved in the adjudication process located in 15 communities statewide. Their participation fosters respect for the law through education and action. Not only is it estimated that cases processed through Youth Courts cost less than half of the amount of cases processed through district and superior courts, but it allows officers of the court to focus on the most serious offenses or repeat offenders.

The foremost concern facing Youth Courts in the State of Alaska is funding. These programs are dependent on the Juvenile Accountability Incentive Block Grant (JAIBG), a federal gran. administered through the Division of Juvenile Justice. The current federal budget for FY04 does not include any funding for the JAIBG.

This bill would separately account for fines that have been imposed under the Sentencing and Probation statutes. The legislature may then appropriate a prescribed percentage of those fines that have been collected to the Youth Courts.

The permissive "may" and the inclusion of the final sentence of the bill has been found by the Alaska Supreme Court to not constitute unconstitutional dedicated funds because the legislature continues to be able to appropriate money as it sees fit.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 303
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Youth Court and Criminal Fines
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Representative Ogg
Requester: House Judiciary
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 303.

Prepared by: Douglas Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 5/11/03 10:46 AM
Approved by: Stephanie Cole, Administrative Director
Date 5/11/2003
Agency: Alaska Court System

(Revised 9/2002 OMB)

8663 Dudley St.
Juneau, Alaska 99801
February 20, 2003
APRIL

Representative Dan Ogg,
Alaska State Capitol Building
Juneau, Alaska 99811-0001

Dear Representative Ogg,

Thank you for your support of Alaska Youth Courts and for volunteering to sponsor the proposed legislation. I've attached the information you requested during our recent meeting regarding the legislation. The attachments provide additional information about Youth Court's past funding, a list of legislators with Youth Courts in their district, and an informal list of our supporters.

After talking with supporters, we'd like to recommend two changes to the bill before its introduction. First, that the percentage of fines be changed from 25% to 15%. Second, that an effective date clause of July 1, 2003 be added. Our coalition is very excited about the bill and would like to work with you to get co-sponsors and help get the bill through the legislature expeditiously. The attached sheet shows that we have received positive reactions from numerous legislators about this legislation. We'd like to work with you and your staff to encourage legislators to co-sponsor this bill, since this would increase its chances of passage. Thank you very much for your time and your continued support. Please contact me if you need additional information.

Sincerely,

Weston Eiler

Weston Eiler, Chair
Alaska Youth Court Sustainability Coalition
(907)-789-5053
westoneiler@hotmail.com

Attachments

March 24, 2003

Representative Dan Ogg
Alaska State Capitol Building
Juneau, Alaska 99811-0001

Dear Representative Ogg:

I am writing to seek your support for State funding of Youth Courts in Alaska. Youth Courts have served Alaska since the 1980s, and have provided a positive alternative to the traditional juvenile justice system. The Alaska State Legislature first empowered Youth Court through Alaska Statute *47.12.400*. Youth Courts allow first-time juvenile offenders to have their case heard in a court of their peers. This format has been successful both nationally and in Alask

Youth Courts are an effective approach for dealing with the problem of juvenile crime. In the report *The Impact of Teen Courts on Young Offenders* published by the Urban Institute (Washington D.C.), the recidivism (repeated criminal behavior) rate of juvenile offenders in Alaska, Arizona, Maryland, and Missouri was significantly less in Youth Court programs than the traditional juvenile justice system. In Anchorage, recidivism among Youth Court participants was only six percent, compared to twenty-three percent using the traditional approach. This study shows that Youth Courts provide a meaningful response to offenders that effectively reduces the likelihood that they will commit additional crimes within the community. Helping to break the cycle of criminal behavior at this early age increases the chance that these individuals will become productive members of society.

Youth Courts provide swift, meaningful, appropriate consequences, so that juveniles committing minor offenses relate consequences to actions and are more likely to take personal responsibility. This process of restorative justice, where offenders repair the harm they've caused, allows Youth Courts to construct tough sentences that fit the crime and demonstrate to the juveniles the true impact of their actions. The report also stated that Youth Courts can be very cost-effective since they operate with volunteer support and comparatively low budgets.

The impact of Youth Court is felt throughout Alaska. There are over 15 Youth Courts statewide which involve approximately 1,000 Alaskan students in implementing restorative justice in their communities. Programs exist in many areas of Alaska, including Anchorage, Fairbanks, Juneau, Mat-Su, Sitka, Ketchikan, the Kenai Peninsula, Nome, Kodiak, and Kotzebue. The most populace town without a Youth Court program is Bethel, and according to the Division of Juvenile Justice, the number of juvenile offenses and the recidivism rate are substantially greater there, compared to cities of similar size with programs. Currently, the Anchorage Youth Court assumes nearly 20% of the juvenile caseload, which reduces the burden on the judicial system. It is estimated that cases processed through Youth Courts cost less than half the amount of cases processed through district and superior courts. This allows for more efficient justice, at a lower cost. The enclosed information lists some other tangible advantages that Youth Courts can provide to the State of Alaska.

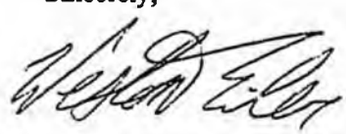
The major issue facing Youth Courts in Alaska is the lack of funding. These programs are currently dependent on the Juvenile Accountability Incentive Block Grant (JAIBG), a federal grant administered through the Division of Juvenile Justice. These funds go towards office space, operating expenses, and training,. In FY03, Alaska Youth Courts receive about $400,000 through this grant. According to the Division of Juvenile Justice, the most optimistic outlook for funding in FY04 is $200,000 which would be a significant reduction. However, the most recent outlook, based on the

Federal Omnibus Spending Bill, is that JAIBG will be cut further and there may be little or no money left for Youth Court programs. There is a very real possibility that no funding will be available in FY04. The current Presidential Budget for Federal FY04 does not include any funding for JAIBG.

Youth Courts can have a significant impact on juvenile justice and deserve a stable source of funding. This program can play an important role in addressing the issues of juvenile crime and public safety. We are requesting legislation that five percent of collected court fines go to Alaska Youth Courts. This would greatly assist in the operation of this program and make it possible for these local organizations to focus on their primary objectives -- helping juvenile offenders. The Alaska Conference of Mayors as well as the Alaska Association of Student Government have endorsed funding for Alaska Youth Courts.

On behalf of the Youth Courts of Alaska, I request your support for legislation that would set aside five percent of collected court fines to support Youth Court programs in Alaska. Please contact me if you need additional information. Thank you very much for your time.

Sincerely,



Weston Eiler, Chair
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For Many Teen Offenders, Peer-Run Court Means Less Recidivism

April 15, 2002

Teen courts may be a positive alternative to the normal juvenile justice process for jurisdictions that want to expand intervention options for young, first-time juvenile offenders and reduce youth recidivism. Recidivism rates among teen court youth were similar and in some cases lower than those of youth in the regular juvenile justice system, according to a four-state evaluation by the Urban Institute. Findings from the evaluation were released today by U.S. Assistant Attorney General Deborah J. Daniels at the National Youth Court Conference.

The report, "The Impact of Teen Court on Young Offenders," by Urban Institute researchers Jeffrey Butts, Janeen Buck, and Mark Coggeshall, is an evaluation of the impact of teen courts on youth recidivism in four states: Alaska, Arizona, Maryland, and Missouri. The jurisdictions in these states use the full range of teen court models currently in use across the country.

Teen courts are designed for young offenders who have committed less serious acts of delinquency, such as theft, shoplifting, possession of stolen property, or vandalism. They rely on the premise that if peer pressure can cause teenagers to get into trouble, positive peer pressure might help steer them away from future trouble.

Researchers measured pre-court attitudes and post-court recidivism among more than 500 juveniles referred to teen court for non-violent criminal charges, including theft, shoplifting, and vandalism. Recidivism of teen court youth was compared to that of nearly 500 similar youth in the regular juvenile justice system.

Key Findings

In Alaska, Arizona, and Missouri, teen courts were compared with the average juvenile justice response to young, first-time offenders. Youth handled by teen court were less likely to commit another crime and be re-referred to the juvenile justice system within six months. In Alaska, recidivism among teen court youth was 6 percent, compared with 23 percent of those handled by the traditional process. In Missouri, the recidivism rate was 9 percent for teen court youth and 27 percent for the traditional process. In Arizona, the rate was 9 percent, compared with 15 percent in the traditional system—though this difference is not statistically significant.

In Maryland, the results of the teen court process were compared with a more proactive police diversion program that provided similar services, but was managed and delivered by police officers and a police department social worker, and did not require youth to appear in court. Recidivism rates of both groups were extremely low, with 8 percent among teen court youth and 4 percent among youth in the police diversion program—but that difference is not statistically significant.

"Our evaluation shows that teen court might be a better alternative to the regular juvenile justice process in jurisdictions that do not, or cannot, provide a meaningful response for every young, first-time nonviolent offender," concludes Butts. "And, given the fact that teen courts operate with largely volunteer labor and with very low budgets, their cost-effectiveness might be very high."

Background

Teen courts (or youth courts) are specialized diversion programs for young offenders. The typical youth referred to teen court is 14 to 16 years old, in trouble with the police for the first time, and probably charged with vandalism, stealing, or some other non-violent offense. Teen courts offer these youth an alternative to the regular juvenile court process. Rather than going to juvenile court and risking formal prosecution and possible adjudication, a young offender can go through teen court and avoid what might have been the first stain on his or her legal record.

In return, however, a young person in teen court is almost certain to get a rather stiff sentence. Many are required to do community service and pay restitution for any damages they may have caused. They may be ordered to write apology letters to their parent(s) and the victim of their offense, and perhaps an essay about the effects of crime on the community. Often, they must return to teen court to serve on juries for other cases. Compared to what they might have received in the regular juvenile court process for a first-time, non-violent offense, youth that agree to go to teen court get relatively severe sanctions.

Teen courts operate much like juvenile courts except that fewer adults are involved in the process. The young offender (usually with a parent or guardian) may meet with an adult staff person before the teen court hearing. The purpose of the meeting is to explain the teen court process and obtain the youth's formal agreement to abide by the teen court's decision. In the teen court hearing itself, however, young people are responsible for much of the process, from calling the case, to reviewing the charges and presenting the facts, to choosing the proper sentence. Teenagers may serve as the court clerks, bailiffs, attorneys, jurors, and in some cases, even the judges that hear each matter brought before the court. Most of the youth who work in teen court are volunteers, but many are former defendants who return to participate in other cases as a condition of their sentence.

2003 Alaska Youth Court Sustainability Coalition
INFORMATION SHEET

- **Youth Courts involve youth and communities throughout Alaska.**
  There are presently more than 15 youth courts statewide which directly involve nearly 1,000 volunteer Alaskan students in implementing restorative justice in their communities. These courts historically hear an average of over 900 cases a year.

- **Youth Courts foster a respect for the law through education and action.**
  Youth Courts provide criminal justice training to the volunteer members. The teen members are then empowered by their roles as judge, prosecutor, and defense attorney in actual cases involving their peers, gaining an invaluable appreciation for the law. Youth Courts enhance respect for the law in the offenders as well as in the student members.

- **Youth Courts produce a marked reduction in recidivism.**
  The Anchorage Youth Court produced a 94% reduction in recidivism, dramatically decreasing the amount of cases to be processed in the court systems. (Based on a study titled "The Impact of Teen Court on Young Offenders" by Jeffrey A. Butts, Janeen Buck, and Mark B. Coggeshall.) This was the highest success rate of the four courts studied in this recent nationwide study by the Urban Institute.

- **Youth Courts ease the caseload of state officials.**
  By providing diversion services for District and Superior Court Judges as well as Juvenile Probation Officers, Youth Courts allow these officials to focus on the most serious offenses or repeat offenders.

- **Youth Courts save the state money.**
  It is estimated that cases processed through Youth Courts cost less than half the amount of cases processed informally or through district and superior courts. In Alaska's largest youth court, the Anchorage Youth Court operates with a 6% recidivism spending only $574 per defendant, far lower than the equivalent juvenile justice system and substantially more effective for the cost. (Note: McLaughlin Youth Center costs $40,000 per year per patient. If AYC prevents just 7 juveniles from going to McLaughlin, it equals AYC's entire operating budget.)

- **The juvenile population is increasing.**
  The juvenile population in our state is expected to increase by 27% by 2015. With this dramatic increase in the juvenile population, juvenile delinquency will likely rise, making the sustainability of youth courts even more critical.

- **Alaska has already entrusted our Youth Courts with the most comprehensive legislation in the nation.**
  Alaska was identified in another recent national study as the one state with the most comprehensive Youth Court legislation, in that our statute AS 47.12.400 specifically entrusts Youth Courts with adjudicatory as well as dispositional authority. (See The Organization and Operation of Teen Courts in the United States, A Comparative Analysis of Legislation, Michele Heward, JD, Juvenile and Family Court Journal, Winter 2002.)

Youth Courts do important work, save the state money and have good track records.

The time for sustainable funding is now.

Weston Eiler
Chair – Alaska Youth Court Sustainability Coalition
(907) 789-5053 - westoneiler@hotmail.com

Alaska Conference of Mayors

A Resolution Supporting Continued Funding and Support for Alaska's Youth Courts

Whereas, the Alaska Conference of Mayors and the Alaska Municipal League have been encouraging youth to participate in student governmentthroughout Alaska;

Whereas, the Alaska Association of Student Governments represents students and individuals throughout Alaska and has passed a statewide resolution supporting the Alaska Youth Court System;

Whereas, Youth Court is an innovative alternative to the traditional juvenile justice system and is empowered by state statutes to make a difference in Alaskan communities;

Whereas, for the past decade Youth Courts have served as a great method of decreasing repeat crime amongst juvenile offenders;

Whereas, Youth Court allows students to take a role as a judge or attorney in a courtroom to judge, prosecute, or defend first juvenile offenders in a court of their peers;

Whereas, Youth Court programs also ease the case load of district court judges and juvenile probation offices;

Whereas, there are at least 15 youth courts statewide which involve nearly 1,000 Alaskan students in implementing restorative justice in their communities;

Whereas, Alaska's Youth Courts are currently dependent of federal grants and uncertain avenues of funding;

Whereas, a program as beneficial and successful as Youth Court should not be left to uncertain means of funding;

Whereas, the Alaska Legislature first empowered youth courts and has the authority secure sustainable funding for the future of Alaska's Youth Courts;

Now Therefore, Be It Resolved that the Alaska Conference of Mayors commends Alaska's Youth Courts and encourage the Alaska State Legislature to implement a stable method of funding for Youth Courts across Alaska.

Alaska Association of Student Governments
Sustained Support and Funding for Alaska's Youth Courts
Fall 2002 Conference

Be it resolved by the Alaska Association of Student Governments;

Whereas, the Alaska Association of Student Governments represents high school students and student leaders throughout Alaska;

Whereas, Youth Court is an innovative alternative to the traditional juvenile justice system and is empowered by Alaska Statute *47.12.400* to make a positive difference in Alaskan communities;

Whereas, Youth Courts are established for the purpose of decreasing juvenile crime and the recidivism amongst juvenile offenders as well as to involve students in implementing restorative justice;

Whereas, Youth Court allows students valuable experience in assuming the role and responsibility of a judge or attorney in a courtroom to judge, prosecute, or defend first-time juvenile offenders in a court of their peers;

Whereas, Youth Court programs help ease the case load of district and superior courts, juvenile probation offices, and school districts;

Whereas, for the past decade Youth Courts have served as an effective method of decreasing repeat-crime amongst juvenile offenders in Alaska;

Whereas, there are at least 15 Youth Courts statewide which involve approximately 1,000 Alaskan students in implementing restorative justice in their communities;

Whereas, Alaska's Youth Courts are currently dependent on a federal juvenile justice grant which is in the process of being cut by 30% over a three year period and which is not guaranteed due to lack of congressional authorization;

Whereas, a program as beneficial and successful as Youth Court should not be left to unreliable means of funding;

Whereas, the Alaska State Legislature first empowered youth courts and has the authority to secure sustainable funding for the future of Alaska's Youth Courts;

Therefore, be it resolved by the Alaska Association of Student Governments, that AASG commend Alaska's Youth Courts and encourage the Alaska State Legislature to establish a stable base of funding for Youth Courts across Alaska.

Alaska Court System
Schedule of State Fines Collected

State Fines Collected by Alaska Court System (as Reported in AKSAS)				
FY02	FY01	FY00	FY99	FY98
3,708,100.00	3,910,300.00	3,715,900.00	3,627,200.00	3,649,100.00

In addition to fines and forfeitures applied to fines this data also includes: bail forfeitures, other forfeitures not applied to fines, contempt sanctions, and court costs not related to Criminal Rule 8.

State Fines Collected by Court Location			
	FY02	FY01	FY00
Court Location	State Fines	State Fines	State Fines
Anchorage	335,442.29	392,442.89	369,543.32
Barrow	61,097.29	63,900.00	34,161.10
Bethel	42,471.00	64,287.25	81,549.15
Cordova	26,535.00	28,629.50	38,535.55
Craig	5,229.00	48,932.00	52,399.62
Delta Junction	62,066.69	50,436.73	39,826.75
Dillingham	77,088.25	95,479.00	49,438.50
Fairbanks	353,787.17	419,229.27	470,699.19
Glennallen	53,655.30	49,121.49	54,996.75
Haines	7,684.50	15,638.69	8,201.87
Healy	39,336.00	87,101.62	59,551.00
Homer	54,977.50	65,049.15	67,137.61
Juneau	152,040.30	128,677.92	137,933.38
Kenai	176,385.00	150,831.09	207,522.21
Ketchikan	104,661.47	103,568.98	130,234.37
Kodiak	138,273.54	177,135.86	146,537.00
Kotzebue	76,999.96	83,867.26	71,467.84
Naknek	96,045.00	145,588.79	105,803.30
Nenana	19,968.00	19,828.86	21,286.18
Nome	29,382.14	37,744.27	27,952.08
Palmer	476,417.39	531,066.18	412,801.28
Petersburg	27,288.90	27,417.34	23,193.31
Seward	49,592.50	50,618.50	47,953.00
Sitka	63,810.15	66,354.39	29,759.55
Tok	46,125.53	43,430.09	39,900.12
Unalaska	95,620.53	83,043.00	178,737.87
Valdez	52,293.25	41,953.70	35,610.50
Wrangell	24,106.00	16,790.00	30,680.00

State Fines Collected by Court System and Dept. of Law			
Agency	FY02	FY01	FY00
Alaska Court System	2,748,379.65	3,088,163.82	2,973,412.40
Department of Law	1,583,794.49	1,963,548.38	1,099,498.93
Totals	4,332,174.14	5,051,712.20	4,072,911.33

Court Data Source:

The fine data includes fines and forfeitures applied to fines and reflected on each court's Receipt Distribution Reports for the periods indicated. The dollar amounts represent actual funds receipted. Additional fines were collected and are not included in the analysis because the data is not readily available and the dollar amounts would not significantly impact the overall financial picture.

Department of Law :

Fines listed for the Department of Law include fines (court, traffic, and minor offense) and bonds.