IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOJOURNER T., JANE, AND IDA B., et al., Plaintiffs, -versus- BUDDY ROEMER, as Governor of the State of Louisiana; WILLIAM J. GUSTE, JR., as Attorney General of Louisiana and as representative of all others similarly situated; HON. HARRY CONNICK, as District Attorney of the Parish of Orleans, Defendants.	)	NO. 91-2247

BRIEF OF REPRESENTATIVE SAM THERIOT, SENTATOR ALLEN R. BARES, ET AL., AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS

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Rep. Ellis Ackal
Rep. John Alario
Rep. Avery Alexander
Rep. Allen Bradley
Rep. Roy Brun
Rep. Harry Benoit
Rep. Charles Dewitt
Rep. James Donelon
Rep. Huntington Downer
Rep. Clark Gaudin
Rep. Johnny Glover
Rep. Jessie Guidry
Rep. Theordore Haik
Rep. Don Higginbotham
Rep. Chris John
Rep. Charles Lancaster
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Rep. Dale Smith
Rep. Jack Smith
Rep. Jeff Smith
Rep. Art Sour
Rep. Tim Stine
Rep. Francis Thompson
Rep. John Travis
Rep. Warren Triche

Sen. Allen Bares

Sen. Cecil Picard
Sen. John Saunders
Sen. Oswald Decuir
Sen. Armand Brinkhaus

TABLE OF CONTENTS

BRIEF AMICI CURIAE OF CERTAIN LOUISIANA STATE LEGISLATORS IN SUPPORT OF DEFENDANTS

INTEREST OF THE AMICI

Amici, Members of the Louisiana State Legislature, have substantial interests in the outcome of this case. During the past two legislative sessions, they have evaluated and carefully considered legislation that would protect the lives of unborn children and the health of women in Louisiana. In both 1990 and 1991, extensive legislative hearings were held at which expert testimony was presented on the medical, social and legal aspects of abortion. House Bill 112 reflects their efforts to weigh all of the relevant interests in this debate. The disposition of this case will directly affect the constitutional authority of amici to legislate sound public policy for the State of Louisiana on the question of abortion and affect their ability to represent their constituents in the Louisiana Legislature.

ARGUMENT

Introduction

On June 18, 1991, the Louisiana Legislature overrode Governor Roemer's veto of House Bill 112 to protect, "to the greatest extent possible, the life of the unborn child from the time of conception until birth." H.B. 112, §1. The law prohibits abortion except to save the life of the mother and in certain cases of reported rape and incest. On the same day the veto was overriden, plaintiffs filed a pre-enforcement facial challenge to H.B. 112, seeking declaratory and injunctive relief against enforcement of the Act. The law is scheduled to go into effect on September 6, 1991.

Plaintiffs and defendants are expected to file cross-motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on August 5, 1991. This Brief is submitted in support of defendants' motion and in opposition to plaintiffs' motion.

I. LOUISIANA HAS A COMPELLING INTEREST IN PROTECTING UNBORN HUMAN LIFE THROUGHOUT PREGNANCY UNDER WEBSTER V. REPRODUCTIVE HEALTH SERVICES, AND THE RIGHT TO CHOOSE ABORTION IS NOT FUNDAMENTAL IN ANY AND ALL CIRCUMSTANCES.

In their Second Cause of Action, plaintiffs allege, inter alia, that the Act "violates the right of privacy, including informational privacy and medical decision-making, guaranteed by the Fourth, Ninth, and Fourteenth Amendments . . . in that it . . . imposes direct, substantial, and undue burdens on the ability of women . . . to exercise their right to choose to terminate a pregnancy by imposing an absolute prohibition on virtually all abortions." Amended Complaint, ¶114(a). In their Third Cause of Action, plaintiffs allege that the Act "deprives women of liberty without due process of law in violation of the Fourteenth Amendment . . . by denying them their bodily integrity and personal autonomy." Amended Complaint, ¶116. Plaintiffs, however, have failed to meet their burden of proof in this pre-enforcement facial challenge to the constitutionality of H.B. 112.

The Supreme Court has recently stated that plaintiffs "face a heavy burden in seeking to have [an Act] invalidated as facially unconstitutional." Rust v. Sullivan, 111 S.Ct. 1759, 1767 (1991). In fact, they must show that "'no set of circumstances exists under which the Act would be valid.'" Id., citing United States v. Salerno, 481 U.S. 739, 745 (1987). That the Act "'might operate

unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" Rust, at 1767, citing Salerno, 481 U.S. at 745. Accord, Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972, 2980-81 (1990) (citing Webster v. Reproductive Health Services, Inc., 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring)). See also National Treasury Employees Union v. Bush, 891 F.2d 99, 101 (5th Cir. 1989); United States v. Castellano, 848 F.2d 61, 62 (5th Cir. 1988).

Plaintiffs cannot meet their burden in this facial challenge unless they establish each of two propositions: First, that the State's interest in prenatal life is not compelling throughout pregnancy; and second, that there is an absolute, fundamental right to choose abortion at any stage of pregnancy, regardless of reason. The necessity of proving both is evident from Justice White's dissenting opinion in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986):

> Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the State's power to regulate abortion. If either or both of these facets of Roe v. Wade were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

Id. at 796 (White, J., dissenting) (emphasis supplied). If plaintiffs fail to prove either proposition, Louisiana's abortion law cannot be struck down as unconstitutional on its face.

As a matter of law, plaintiffs can prove neither. First, under the Supreme Court's decision in Webster v. Reproductive

Health Services, Inc., 109 S.Ct. 3040 (1989), the State's interest in protecting unborn human life is compelling throughout pregnancy, not just after viability. That interest, which is supported by uncontroverted evidence of human genetics and fetal development,[1] overrides any absolute right to choose abortion, regardless of how that "right" may be characterized.

Second, there is no absolute right to choose abortion, regardless of reason, at any stage of pregnancy. The Supreme Court no longer views the right to choose abortion as fundamental. Hence, an abortion prohibition is subject to review under the rational-basis standard. The Louisiana abortion law satisfies that standard because the prohibition of abortion is rationally related to Louisiana's legitimate interest in protecting unborn human life. Harris v. McRae, 448 U.S. 297, 325 (1980).

A. Louisiana Has A Compelling Interest In Protecting Unborn Human Life Throughout Pregnancy.

The Supreme Court now recognizes that the State's interest in protecting prenatal life is compelling throughout pregnancy, not

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[1] The final report of the Subcommittee on Separation of Powers of the Senate Judiciary Committee on S. 158, the Human Life Bill (97th Cong. 1st Sess.), stated that "contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete." Id. at 7. The report dismissed contrary testimony as "misleading semantic[s]" id. at 12, explaining that "[t]hose witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question [whether the life of an unborn child has intrinsic worth and equal value with other human beings] rather than the scientific question [whether an unborn child is a human being, in the sense of a living member of the human species]. No witness challenged the scientific consensus that unborn children are 'human beings,' insofar as the term is used to mean living beings of the human species." Id. at 11.

just after viability. In Webster, the Court upheld the constitutionality of a Missouri statute that mandated fetal viability testing at 20-weeks gestational age. 109 S.Ct. at 3057. Chief Justice Rehnquist, in an opinion joined by Justices White and Kennedy, determined that the State has a "compelling interest" in protecting "potential human life" throughout pregnancy, and rejected the "rigid trimester analysis" of Roe v. Wade as "unsound in principle and unworkable in practice." Id. at 3055-58. The plurality saw no reason to restrict the State's interest in protecting "potential human life" to viability. Id. at 3057. A fourth member of the Webster Court--Justice Scalia--urged that Roe v. Wade be overruled. Id. at 3064.

A fifth member--Justice O'Connor--shares the view that the State's "compelling interest" extends throughout pregnancy. In Thornburgh, Justice O'Connor reiterated her views, first expressed in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), that "[t]he State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'" 476 U.S. at 828. In Akron Center, Justice O'Connor, after analyzing why "Roe's outmoded trimester framework" (Thornburgh, 476 U.S. at 828) should be rejected (Akron Center, 462 U.S. at 459), pointed out the irrationality of denying the State's compelling interest in fetal life until viability:

> In Roe, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at

> viability or afterward. At any stage in pregnancy, there is the potential for human life. Although the Court refused to "resolve the difficult question of when life begins," id., at 159, the Court chose the point of viability--when the fetus is capable of life independent of its mother--to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

Id. at 460-61 (emphasis in original).[2] See also dissenting opinion of Justice White in Thornburgh, 476 U.S. at 794 ("the Court's choice of viability as the point at which the State's interest [in fetal life] becomes compelling is entirely arbitrary").[3] Thus, Louisiana has a constitutionally-recognized compelling interest in protecting unborn human life throughout pregnancy.

B. As A Matter Of Law, Louisiana's Compelling Interest Overrides Any Absolute Right To Choose Abortion, Regardless Of Reason.

The Supreme Court has expressly rejected the argument that a woman has an "absolute" right to choose abortion throughout

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[2] Accord, Planned Parenthood v. Ashcroft, 462 U.S. 476, 505 (O'Connor, J., concurring in part in the judgment and dissenting in part) ("the State possesses a compelling interest in protecting and preserving fetal life, [which] interest is extant throughout pregnancy").

[3] In Thornburgh, Justice White (joined by Justice Rehnquist) approved of the type of evidence which confirms the legislative finding in H.B. 112:

> [O]ne must . . . recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Id. at 792.

pregnancy for any reason. Roe v. Wade, 410 U.S. at 153-54. Under Roe, the State has a compelling interest in protecting prenatal life after viability which outweighs the woman's right to choose abortion unless the procedure is "necessary to preserve [her] life or health . . . ." Id. at 162-164. But under Webster, the State's interest is compelling throughout pregnancy, not just after viability. Even prior to Webster, Justice O'Connor embraced the view that the State's "compelling interest" in fetal life is sufficient to overcome the indiscriminate exercise of the "abortion right." In fact, Justice O'Connor stated that no matter which standard of review is applied to an abortion statute, the law may be sustained as long as it serves a compelling state interest.[4]

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[4] "[J]udicial scrutiny of state regulation of abortion," according to Justice O'Connor, "should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests [i.e., "ensuring maternal health" and "protecting potential human life"], with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision." Thornburgh, 476 U.S. at 828 (citation omitted). An "undue burden" is an "absolute obstacle" or "severe limitation" on the abortion decision. Id. Even assuming that "a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes 'necessary to apply an exacting standard of review,' . . . the possibility remains that the statute will withstand the stricter scrutiny." Id. (citation omitted).

That possibility was first realized in Akron Center where Justice O'Connor voted to uphold an ordinance mandating a 24-hour waiting period between the time the pregnant woman signs a consent form and the abortion. In her dissent, she stated that the additional cost of obtaining an abortion attributable to the waiting period would not create an undue burden. Id. at 474. However, even if the additional cost did impose an "undue burden on the abortion decision, the State's compelling interests in maternal physical and mental health and protection of fetal life clearly justify the waiting period." Id. at 473-74. The decision to abort "has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve" and a 24-hour waiting period is "a small cost to impose to ensure that the woman's decision is well considered in light of its certain and

Therefore, the compelling interest in fetal life overrides any absolute right to choose abortion at any stage of pregnancy, regardless of how that right might be characterized.

As a result, a court reviewing an abortion statute must examine the specific reasons a particular woman seeks an abortion. This is because after Webster the reasons for an abortion must be balanced against the State's compelling interest in prenatal life since an abortion invariably results in the death of the unborn child. If this interest means anything, it must mean that the State can prohibit abortion at least in some instances. But in a facial challenge, it is plaintiffs' burden to show that "'no set of circumstances exists under which the Act would be valid.'" Ohio v. Akron Center, 110 S.Ct. at 2980-81 (citing Webster, 109 S.Ct. at 3060, O'Connor, J., concurring); United States v. Salerno, 481 U.S. 739, 745 (1987). See also IDK, Inc. v. Clark County, 836 F.2d 1185, 1189 (9th Cir. 1988). Phrased somewhat differently, plaintiffs must show that the law is "unconstitutional in every conceivable application . . . ." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984). Plaintiffs cannot meet this burden because there is no absolute right to choose abortion, regardless of reason, at any stage of pregnancy. Therefore, plaintiffs are not entitled to judgment as a matter of law on their amended complaint.

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irreparable consequences on fetal life." Id. at 474 (emphasis supplied). See also Ashcroft, 462 U.S. at 505 (O'Connor, J., concurring in the judgment in part and dissenting in part) (second-trimester hospitalization requirement was constitutional even if it did impose an "undue burden" because it was "reasonably related" to the State's compelling interest in preserving maternal health).

C. There Is No Fundamental Constitutional Right To Choose Abortion Regardless of Reason At Any Stage Of Pregnancy.

The rational-basis standard of review should be applied to Louisiana's abortion law because there is no fundamental constitutional right to choose abortion, without regard to the reason, at any stage of pregnancy. This is evident from an examination of the plurality and concurring opinions in Webster, Justice O'Connor's dissents in Akron Center and Thornburgh, and the Court's decisions in Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), and Hodgson v. Minnesota, 110 S.Ct. 2926 (1990).

In Webster, the plurality opinion characterized the right to choose abortion as a "liberty interest" protected by the Due Process Clause of the Fourteenth Amendment. 109 S.Ct. at 3058. In so doing, the plurality implicitly rejected Roe's formulation of that right as "fundamental." Id. As a "liberty interest," the right is subject to regulation reasonably related to a legitimate governmental purpose. Thus, the plurality opinion found that the viability testing statute was "reasonably designed to ensure that abortions are not performed where the fetus is viable" and concluded that "that is sufficient to sustain its constitutionality." 109 S.Ct. at 3058 (emphasis supplied).

The plurality's application of the rational-basis standard of review is consistent not only with the dissenting opinions of Justices White and Rehnquist in Roe v. Wade, 410 U.S. 113, 172-73; Doe v. Bolton, 410 U.S. 177, 222-23; and Thornburgh, 476 U.S. at 789-96, but also with the Court's recent treatment of abortion

laws. In Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), five members of the Court explicitly relied on the rational-basis standard in upholding Ohio's parental notice statute. Id. at 2983-84 (plurality opinion of J. Kennedy), id. at 2993 (Stevens, J., concurring). And again in Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), a majority of the Court evaluated the Minnesota parental notice statute under the rational-basis standard. Id. at 2944-47 (opinion of J. Stevens), id. at 2949-51 (O'Connor, J., concurring), id. at 2961-72 (Kennedy, J., concurring in the judgment in part and dissenting in part). A fourth justice--Justice Scalia--has called for the overruling of Roe, and clearly does not regard the right to abortion as "fundamental."[5]

Like the Webster plurality, Justice O'Connor has identified the right to choose abortion as a "liberty interest," Hodgson, 110 S.Ct. at 2949, and she has never stated that she regards the right as "fundamental." Akron Center, 462 U.S. at 459. Even if a law imposes an "undue burden" on the abortion decision, it need not be "narrowly drawn" to express only the relevant state interest--rather, it is sufficient if the law is "reasonably related" to the State's "compelling interest." Id. at 467 n.11 (O'Connor, J., dissenting). Thus, the rational-basis standard applies.

Of greater import, however, is that Justice O'Connor has rejected an absolute right to choose abortion. In Akron Center, Justice O'Connor wrote that "state action 'encouraging childbirth

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[5] Webster, 109 S.Ct. at 3064 (Scalia, J., concurring); Ohio v. Akron Center, 110 S.Ct. at 2984 (Scalia, J., concurring); Hodgson v. Minnesota, 110 S.Ct. at 2960-61 (Scalia, J., concurring in the judgment in part and dissenting in part).

except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.'" 462 U.S. at 466 (citations omitted) (emphasis supplied). And for purposes of her analysis of the regulations at issue in Akron Center, she assumed, without deciding, "that there is a fundamental right to terminate pregnancy in some situations." Id. at 459 (emphasis supplied).

Justice O'Connor's repudiation of an absolute right to choose abortion is of particular significance in the context of a facial challenge. In such a challenge, plaintiffs must show that no set of circumstances exists under which the law would be valid. Salerno, 481 U.S. at 745. Clearly, that cannot be demonstrated unless there is an absolute right to choose abortion, regardless of reason. Since the Supreme Court rejects that premise, plaintiffs' facial challenge must fail.

D. As A Matter Of Law, House Bill 112 Is Rationally Related To Louisiana's Interest In Protecting Unborn Human Life, Which Is Not Only Legitimate, But Compelling.

Legislation reviewed under the rational-basis test is presumed to be valid. United States v. Carolene Products Co., 304 U.S. 144, 148, 152-54 (1938). That presumption cannot be overcome unless it is shown that the law in question is not rationally related to a legitimate governmental objective. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). As a matter of law, plaintiffs cannot make this showing.

The Supreme Court has declared that the State has an "important and legitimate interest in protecting the potentiality of human life" throughout pregnancy. Roe, 410 U.S. at 162-63. See

also Harris v. McRae, 448 U.S. 297, 313, 324-25 (1980); accord Beal v. Doe, 432 U.S. 438, 445-46 (1977) (there is "a significant state interest [in protecting the potentiality of human life] existing throughout the course of the woman's pregnancy"); Maher v. Roe, 432 U.S. 464, 478 (1977) ("Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of a fetus . . . throughout the pregnancy"). The express purpose of H.B. 112 is to "protect[], to the greatest extent possible, the life of the unborn from the time of conception until birth." H.B. 112, §1. That purpose, as the Supreme Court has recognized, is unquestionably legitimate.

Moreover, it is equally clear that Louisiana's abortion prohibition is rationally related to the achievement of that objective. This conclusion directly follows from an examination of the abortion funding cases, as well as Roe itself. In Harris, the Supreme Court held that a restriction on public funding of abortion is "rationally related to the legitimate governmental objective of protecting potential life." 448 U.S. at 325. See also Maher, 432 U.S. at 478-49 (State's decision to fund the costs associated with childbirth but not those associated with nontherapeutic abortions was a rational means of advancing the legitimate state interest in protecting potential life by encouraging childbirth). In a similar vein, a prohibition of abortion is rationally related to the governmental interest in prenatal life. In fact, it is the only way in which that interest may be comprehensively and effectively safeguarded.

In Roe v. Wade, the Supreme Court held that the State could

prohibit abortion after viability except when "it is necessary . . . for the preservation of the life or health of the mother." 410 U.S. at 164-65. This acknowledgement of the State's authority, of course, presupposes that a prohibition of abortion is rationally related to the State's interest in "potential" life. Otherwise, the prohibition would fail the rational-basis test. But in Roe, the Court stated that "it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes signficantly involved." Id. at 159. That point, in Roe, was viability because "the fetus then presumably has the capacity of meaningful life outside the mother's womb." Id. at 163. Addressing the reasonableness of this interest, the Court said that "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications," and thus "[]if the State is interested in protecting potential fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id. at 163-64.

In their pleadings filed to date, plaintiffs have not alleged that H.B. 112 fails to satisfy the rational-basis test. They have claimed, however, that the Act will not be effective in achieving its purpose of protecting unborn human life because "some pregnant women" (or "many women") will attempt to abort themselves, seek illegal abortions inside Louisiana, or travel outside the State to obtain legal abortions elsewhere. Amended Complaint, ¶¶39, 40, 129. They claim further that enforcement of H.B. 112 will adversely

affect women's lives and health.

These claims are foreclosed as a matter of law by the Supreme Court's recognition that there is a reasonable relationship between restrictions on abortion and the State's interest in fetal life. Accordingly, defendants are entitled to judgment on the pleadings.

II. ON ITS FACE, HOUSE BILL 112 DOES NOT APPLY TO CONTRACEPTION.

In their Second Cause of Action, plaintiffs also allege that the Act violates the right of privacy in that it "imposes direct, substantial and undue burdens on the ability of women in Louisiana to make procreative, medical, and contraceptive decisions free from unwarranted governmental intrusion." Amended Complaint, ¶114(b).[6] This allegation, however, is based upon a misreading of the Act.

The Act defines "unborn child" as "the unborn offspring of human beings from the moment of conception until birth." §14:87.D(3). "Conception," in turn, is defined as "the contact of spermatozoan with the ovum." §14:87.D(4). The Act, therefore, treats conception as beginning at fertilization, not implantation. Based upon these definitions, and without examining the definition of the substantive offense itself, plaintiffs conclude that the Act "prohibits all contraceptives that may act after conception."[7] This conclusion, however, is clearly erroneous.

First, there is no scientific consensus that either the IUD or the low-dose birth control pill act after fertilization. Indeed, the most recent studies indicate that they probably act before fertilization.[8]

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[6] See also Amended Complaint, ¶109.

[7] Amended Complaint, ¶5. See also ¶¶ 10-14, 43-48, 75, 94-101; Memo, pp. 1, 3 n.3, 14-15; Decl. of Ida B., ¶¶1-8; Decl. of P. Branning, ¶4; Decl. of J. DeGueurce, ¶¶4, 19.

[8] See generally, D. Smolin, "Abortion Legislation After Webster v. Reproductive Health Services: Model Statutes and Commentaries," 20 Cumb. L. Rev. 71, 121-28 & nn. 142-63 (1989-90); D. Smolin, "Why Abortion Rights Are Not Justified By Reference To Gender Equality: A Response To Professor Tribe," 23 The John Marshall Law Review 621, 652-54 & nn. 136-40 (1990). Alvarez, "New

Second, there is no legal consensus that the IUD, the low-dose pill or the so-called "morning-after" pill should be classified as "abortifacients." In Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980), this court construed a Louisiana statute which defined abortion as "the deliberate termination of a human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn child." La. Rev. Stat. Ann. §40:1299.35(1) (West Supp. 1979). The plaintiffs in Margaret S. challenged the constitutionality of this statute, arguing that the definition of abortion was impermissibly vague "because it includes certain birth control methods not normally thought of as abortion," among them the IUD and the "morning-after"

Insights on the Mode of Action of Intrauterine Contraceptive Devices in Women," 49 Fertility & Sterility 768 (1988); Segal, "Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices," 44 Fertility & Sterility 214 (1985); H. Ory, J. Forrest & R. Lincoln,, "Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods," Alan Guttmacher Institute (1983); Batzer, "Formulation and Noncontraceptive Uses of the New Low-Dose Oral Contraceptive," 29 J. Rep. Med. 503 (1984); Bronson, "Oral Contraception: Mechanism of Action," 24 Clinical Obstet. & Gynec. 869-77 (1981); Johnston, Boudreau, Toews, "Effect of Ortho 7/7/7 Tablets on the Uterine Endometrium, 39 Current Therapeutic Res. 343 (1986); Killick, "Ovarian Follicles During Oral Contraceptive Cycles: Their Potential for Ovulation," 52 Fertility & Sterility 580 (1989); Ling, "Serum Gonadotropin and Ovarian Steroid Levels in Women During Administration of a Norethindrone-Ethinylestradiol Triphasic Oral Contraceptive," 32 Contraception 367 (1985); McGuire, "Effects of Low Dose Oral Contraceptives Containing Norethindrone and Ethinyl Estradiol on Serum Levels of Progesterone and Ovarian Responsiveness to a Graded Gonadotropin Releasing Factor Stimulation Test in Women Using a Low-Estrogen or a Regular Type of Oral Contraceptive," 137 Am. J. Obstet. & Gynec. 109 (1980). See also Brief Amici Curiae of the Association of Reproductive Health Professionals in Support of Appellees, p. 34, Webster v. Reproductive Health Services, Inc. ("[t]he most likely working mechanism of an IUD is to prevent fertilization").

pill. Id. at 190. The court rejected this argument, stating that "[a]bortion, as it is commonly understood, does not include the IUD, the 'morning-after' pill, or, for example, birth control pills." Id. at 191. Accord, Brownfield v. Daniel Freeman Marina Hospital, 208 Cal. App.3d 405, 412-13, 256 Cal. Rptr. 240, 244-45 (1989). For the same reason, H.B. 112 should not be construed to prohibit the use of IUD's, the "morning-after" pill or birth control pills.

Third, plaintiffs' argument ignores the definition of the substantive offense itself. The Act defines "abortion" as the performance of certain acts "with the specific intent of terminating a pregnancy." La. Rev. Stat. Ann. §14:87A(1). Regardless of whether a drug or device may, in certain circumstances, operate after fertilization,[9] there can be no specific intent of terminating a pregnancy which is not known to exist. Thus, the prescription of a contraceptive or the insertion of an IUD which may act after fertilization cannot be regarded as an "abortion" because there is no intent of terminating a pregnancy. The Act, therefore, does not affect the prescription or administration of low-dose birth control pills, Norplant or DES, or the insertion of an IUD.

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[9] For example, postcoital insertion of an IUD. A "menstrual extraction" may be an abortion procedure, depending upon when and the purpose for which it is performed. See Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 573-74 (E.D. Pa. 1975) (three-judge court), summarily aff'd in part sub nom. Franklin v. Fitzgerald, 428 U.S. 901 (1976), and summarily vacated in part and remanded sub nom. Colautti v. Franklin, 439 U.S. 379 (1979).

Nor does the Act, on its face, affect in vitro fertilization, as plaintiffs have alleged. Amended Complaint, ¶48. The definition of abortion includes the performance of any of the following acts with the "specific intent" of terminating a pregnancy: "[a]dministering or prescribing any drug, potion, medicine, or any other substance to a female," or "[u]sing any instrument or external force whatsoever on a female." §14:87A.(1)(a), (b) (emphasis supplied). The "acts" prohibited by the law can only be performed "on" (or "to") a woman--they cannot be performed outside of the woman's body. Thus, by definition, the Act does not prevent the "selective implantation" (Amended Complaint, ¶48) of ova fertilized in vitro.[10]

III. HOUSE BILL 112 IS NOT VOID FOR VAGUENESS ON ITS FACE WHERE PLAINTIFFS CONCEDE THAT THE ACT HAS A CORE THAT PROHIBITS NONTHERAPEUTIC, ELECTIVE ABORTIONS.

In their First Cause of Action, plaintiffs allege that the Act is "void for vagueness" because it "fails to provide adequate notice of the precise nature of conduct prohibited." Amended Complaint, ¶112. They claim, inter alia, that the Act's exception for termination of a pregnancy "for the express purpose of saving the life of the mother" is vague and ambiguous. Amended Complaint, ¶¶53, 55-64. These claims of facial vagueness are meritless.

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[10] Plaintiffs' suggestion that the Act would prohibit "embryo transfers," Amended Complaint, ¶48, is speculative and premature, as the technical problems of such transfers have not been resolved. This is an example of the type of "worst case scenario" which the Supreme Court in Ohio v. Akron Center, 110 S.Ct. 2972, 2981 (1990), specifically said could not be raised in a facial challenge. In any event, the obvious purpose of an "embryo transfer" is to continue the life of the unborn child in another woman's body--the intent is not to destroy the child in utero. The allegation, therefore, falls outside the intended scope of the statute.

A. House Bill 112 Is Not Void For Vagueness.

To succeed in a facial vagueness challenge, plaintiffs must demonstrate that "the law is impermissibly vague in all of its applications." Village of Hoffman Estate v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982). See also Home Depot, Inc. v. Guste, 773 F.2d 616, 627-29 (5th Cir. 1985), reh. den., 777 F.2d 1063 (5th Cir. 1985); Schwartzmiller v. Gardner, 752 F.2d 1341, 1345-48 (9th Cir. 1984).[11] Plaintiffs, however, have neither alleged nor proved that the law is vague "in all of its applications." Thus, their vagueness challenge should be rejected.

House Bill 112 prohibits abortion except "to preserve the life or health of the unborn child or to remove a dead unborn child," §14:87.B(1), "for the express purpose of saving the life of the mother," §14:87.B(2), or when the pregnancy has resulted from rape or incest, §14:87.B(3). Plaintiffs' vagueness challenge focuses principally on the "life-of-the-mother" exception. Although plaintiffs profess not to understand the scope of the exception, the exception clearly does not apply unless, at a minimum, continuation of the pregnancy itself poses some identifiable and measurable risk to the woman's life.[12] But few pregnancies create

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[11] The Fifth Circuit has held that "the fact that a statute imposes criminal penalties in no way changes the rule that a statute challenged as facially vague must be vague in all its applications before it will be held unconstitutional, regardless of the strictness of the vagueness standard applied." Home Depot, 773 F.2d at 628 n.11 (emphasis in original), citing Ferguson v. Estelle, 718 F.2d 730, 732 n.3 (5th Cir. 1983) (per curiam); High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228 (11th Cir. 1982); United States v. Jordan, 747 F.2d 1120, 1131 n.13 (7th Cir. 1984).

[12] Prior to Roe, six, three-judge federal courts, including the District Court for the Eastern District of Louisiana, held that life-of-the-mother exception language similar to that which appears

such risks, as plaintiffs apparently concede.[13]

According to a recent study, cited by one of plaintiffs' declarants, "only three percent of women obtaining abortions put forward their health as the primary reason they were obtaining an abortion," and only seven percent of the women surveyed even mentioned their health as one of the factors that entered into their decision.[14] The same study revealed that only three percent of women sought an abortion principally because of possible problems affecting the health of their unborn child, and only one

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in H.B. 112 was not impermissibly vague. See Rosen v. Board of Medical Examiners, 318 F. Supp. 1217, 1220-21 (E.D. La. 1970), vacated and remanded, 412 U.S. 902 (1973) ("unless done for the relief of a woman whose life appears in peril"); Abele v. Markle, 342 F. Supp. 800, 801 n.4a (D. Conn. 1972), judgment vacated and cause remanded for consideration of question of mootness, 410 U.S. 951, reh'g den., 411 U.S. 940 (1973) ("necessary to preserve her life"); Crossen v. Attorney General, 344 F. Supp. 587, 590 (E.D. Ky. 1972), vacated and remanded, 410 U.S. 950 (1973) (same); Steinberg v. Brown, 321 F. Supp. 741, 745 (N.D. Ohio 1970) (same); Doe v. Rampton, No. C-234-70 (D. Utah 1971) (slip op. at 4-6), vacated and remanded, 410 U.S. 950 (1973) (same); Babbitz v. McCann, 310 F. Supp. 293, 297-98 (E.D. Wis. 1970) ("necessary . . . to save the life of the mother).two, three-judge federal courts held that life-of-the-mother exception language similar to that which appears in the Act was impermissibly vague. But see Doe v. Scott, 321 F. Supp. 1385, 1388-89 (N.D. Ill. 1971), vacated and remanded, sub nom. Hanrahan v. Doe, 410 U.S. 950 (1973) ("necessary for the preservation of the woman's life"); Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. 1970), aff'd in pt. and rev'd in pt., 410 U.S. 113 (1973) ("abortion procured or attempted by medical advice for the purpose of saving the life of the mother") (contra).

[13] The mere possibility that there may be marginal cases in which it is difficult to determine whether the woman's life is at risk has no bearing on the facial constitutionality of the law.

[14] Decl. of S. Henshaw, ¶3 (citing Torres & Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persp. 169, 170 and Table 1 (1988)). Significantly, the survey, included as an Appendix to this Brief, did not ask women to identify or describe the nature of the health problem or evaluate its relative seriousness.

percent because they were victims of rape or incest.[15]

Consistent with the results of this study, plaintiffs have claimed that the Act "prohibits virtually all abortions." Amended Complaint, ¶¶5, 114(a); Memorandum of Points & Authorities in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction (hereinafter "Memorandum"), pp. 3, 5. According to plaintiffs, "it is beyond dispute that the Act erects an impenetrable barrier to abortion at least 95% of the time." Memorandum, p. 12. Plaintiffs assert, without qualification, that "abortions, performed at any stage of pregnancy, are plainly prohibited for all but a few women." Id. (emphasis supplied).[16] These concessions are fatal to their vagueness argument. As the Supreme Court has stated:

> "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Such a provision simply has no core."

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[15] The survey results flatly contradict plaintiffs' extravagant and anecdotal claims regarding the incidence of abortions sought because the pregnancy resulted from an act of rape or incest.

[16] See Decl. of K. Kelley, ¶21 ("[w]e will no longer be able to perform at least 98% of our terminations"); Decl. of R. Rothrock, ¶23 ("[t]he ban would prohibit the performance of at least 95% of the abortions at the [Hope Medical Group for Women] Clinic); Decl. of P. Branning, ¶6 ("its exception for abortions performed 'for the express purpose of saving the life' of the woman is not medically meaningful except in the rarest of circumstances") (emphasis supplied); Decl. of S. Henshaw, ¶3 ("[v]ery few women will qualify for legal induced abortions if the Act is enforced as intended"); Decl. of A. Rosenfield, ¶5 ("the enforcement of this criminal prohibition . . . will preclude at least 99% of women from exercising their choice to terminate pregnancy").

Flipside, 455 U.S. at 495 n.7 (internal citations omitted).

Plaintiffs' admission that the prohibition clearly would apply to "virtually all abortions," and that few abortions could be performed under the exceptions in the Act requires rejection of their facial vagueness argument.

B. No Overbreadth Challenge Can Be Raised Outside The Context Of The First Amendment.

Arguably, there may be circumstances where, because of the woman's condition and the uncertain nature of medical diagnosis, it may be difficult to determine whether an abortion is necessary to save her life.[17] The difficulty in ascertaining whether the exception applies in a few cases, however, has no bearing on the facial validity of the Act. "[T]he fact that [the statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" in a facial challenge because the Supreme Court has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. Salerno, 481 U.S. at 745. See also Massachusetts v. Oakes, 109 S.Ct. 2633, 2637 (1989); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-801 & nn.12-19 (1984). As the Fifth Circuit observed in CISPES v. F.B.I., 770 F.2d 468, 472 (5th Cir. 1985), "the concern with an overbroad statute stems not so much from its application to completed conduct, but rather from the possibility that the threat of its application may deter

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[17] Whatever marginal uncertainty may exist in such circumstances is mitigated by the law's scienter requirement. La. Rev. Stat. Ann. §14:87.A(1). See Screws v. United States, 325 U.S. 91, 101-02 (1945) (plurality opinion).

others from engaging in otherwise protected expression." Accord, Tobacco Accessories & Novelty Craftsmen Merchants Ass'n of Louisiana v. Treen, 681 F.2d 378, 382 (5th Cir. 1982). In a facial vagueness challenge, it is not enough that the law may be unclear in some of its applications--it must be unclear in all of its applications. Flipside, 455 U.S. at 495. Plaintiffs have not alleged that the Act is unconstitutional in all of its applications. In fact, they have admitted that the law "plainly" applies to virtually all abortions performed in Louisiana. Accordingly, their facial vagueness argument should be rejected.

IV. ON ITS FACE, HOUSE BILL 112 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In their Fourth Cause of Action, plaintiffs allege that "[t]he Act denies women in Louisiana . . . equal protection under the law guaranteed by the Fourteenth Amendment . . . because it imposes burdens upon women's reproductive choices and bodily integrity that are not imposed upon the reproductive choices of men, contributes to negative stereotypes about women, and prevents women from becoming full and equal participants in society." Amended Complaint, ¶118. The Act, however, does not discriminate on the basis of gender. Moreover, regardless of the standard of review, the Act withstands equal protection analysis.[18]

For purposes of equal protection analysis, classifications based on pregnancy are not gender-based. The condition of

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[18] The Act prohibits abortion, not "reproductive choices." Abstinence, contraception and sterilization remain available options to avoid conception.

pregnancy is sui generis,[19] and "[t]he regulation of abortion is not a suspect criterion." Leigh v. Olson, 497 F. Supp. 1340, 1343 (D. N.D. 1980). See also Hodgson v. Minnesota, 853 F.2d 1452, 1466 (8th Cir. 1988), aff'd, 110 S.Ct. 2926, 2936 n.19 (1990). In Geduldig v. Aiello, 417 U.S. 494 (1974), the Supreme Court considered an equal protection challenge to a state disability insurance system that excluded pregnancy from coverage. The Court held that the exclusion did not constitute discrimination under equal protection analysis and found that the State had a rational basis for excluding pregnancy. Id. at 494-97. In a footnote, the Court dismissed the issue of gender discrimination:

> [T]his case is . . . a far cry from cases . . . involving discrimination based upon gender as such. . . . While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id. at 496 n.20 (emphasis supplied).[20]

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[19] "There is a natural difference between men and women: only women have the capacity to bear children." Hodgson v. Minnesota, 110 S.Ct. 2926, 2936 (1990) (opinion of Stevens, J.).

[20] Although classifications based on pregnancy may be "gender-based" for purposes of Title VII of the Civil Rights Act of 1964, they are not gender-based for purposes of the Equal Protection Clause. See Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission, 462 U.S. 669, 676-77 (1983) (distinguishing Title VII discrimination analysis from the equal protection standard enunciated in Geduldig). See also Toomey v. Clark, 876 F.2d 1433, 1436-37 (9th Cir. 1989) (recognizing distinction); Tyler v. Vickery, 517 F.2d 1089, 1097-99 (5th Cir. 1975). In Tyler, the Fifth Circuit stated that "the unmistakable

House Bill 112 is intended, not to discriminate against women, but to promote the State's interest in protecting unborn human life. "The legislation is directed at abortion as a medical procedure, not at women as a class." Moe v. Secretary of Administration and Finance, 382 Mass. 629, 664, 417 N.E.2d 387, 407 (1981) (Hennessey, C.J., dissenting). See also Fischer v. Dep't of Public Welfare, 509 Pa. 293, 502 A.2d 114 (1985).[21] Because the

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import of the Supreme Court's method of analysis [in Geduldig] is that a constitutional challenge to a method of classification must be decided by constitutional standards, and that while the EEOC guidelines are entitled to great deference in determining what Congress intended to accomplish through Title VII, . . . they do not carry similar weight in interpreting the minimum commands of the fourteenth amendment." Id. at 1098 (emphasis in original).

[21] In Fischer, the Pennsylvania Supreme Court rejected the argument that a statute prohibiting public funding of abortion except to save life of the mother or in cases of reported rape or incest discriminated on account of sex:

> [W]e cannot accept [the] rather simplistic argument that because only a woman can have an abortion then the statute necessarily utilizes "sex as a basis for distinction, ..." [Citation omitted]. To the contrary, the basis for the distinction here is not sex, but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women.
>
> The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence, there are certain laws which necessarily will only affect one sex. . . . [T]he prevailing view amongst our sister state jurisdictions is that [a state] E[qual] R[ights] A[mendment] "does not prohibit differential treatment [between] the sexes when, as here, that treatment is reasonably and genuinely based on physical characteristics unique to one sex." [Citations omitted].

Id. at 313-14, 502 A.2d at 125.

Act does not discriminate on account of gender (and does not otherwise impinge upon fundamental rights),[22] the appropriate equal protection standard of review is rational-basis. See Harris v. McRae, 448 U.S. 297, 324-26 (1988).[23] The Act must be sustained if it is "rationally related to a legitimate governmental interest." Id. at 326.[24]

The stated purpose of the Act is to protect "to the greatest extent possible, the life of the unborn from the time of conception

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[22] The Equal Protection Clause prohibits only purposeful discrimination--a law is not unconstitutional solely because it may have a disproportionate impact on a given class. See Washington v. Davis, 426 U.S. 229, 239 (1976). Thus, even assuming that "pregnancy and childbirth disadvantage women," which is certainly debatable, the law is not invalid. D. Smolin, "Why Abortion Rights Are Not Justified By Reference To Gender Equality: A Response To Professor Tribe," 23 The John Marshall Law Review 621, 638 (1990).

[23] The principle that treating women differently due to pregnancy is not a form of unconstitutional gender discrimination applies with even greater force in the context of abortion, since "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." Harris, 448 U.S. at 325.

[24] The Supreme Court has consistently rejected what may be termed "economic" equal protection challenges to restrictions on public funding of abortion services, i.e., claims that poverty is a "suspect" classification and that governmental subsidization of childbirth but not abortion unconstitutionally discriminates against the indigent. Harris, 448 U.S. at 322-23; Maher v. Roe, 432 U.S. at 470-71 (1977); Poelker v. Doe, 432 U.S. 519 (1977). See also Webster, 109 S.Ct. at 3050-53 (1989).

There is reason to believe, however, that the Court has also rejected a "noneconomic" equal protection challenge to abortion regulation, i.e., the claim that statutes prohibiting abortion unconstitutionally discriminate against women as a class. Such an argument was advanced in an amicus brief filed in Roe v. Wade. See "Brief Amicus Curiae on behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition," pp. 25-33. Had the Court in Roe accepted that argument, it would not have recognized the States' right to proscribe abortion at any stage of pregnancy.

until birth." H.B. 112, §1. The Supreme Court has acknowledged that the State has an "important and legitimate interest in protecting the potentiality of human life." Roe, 410 U.S. at 162. That interest was found to exist throughout a pregnancy, "grow[ing] in substantiality as the woman approaches term." Id. at 162-63.[25] A prohibition of abortion is not only rationally related to that objective--it is the only direct means by which that objective may be attained.

Even assuming, arguendo, that the intermediate standard of review applicable to gender-based classifications is appropriate, the Act passes constitutional muster. Under that standard, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). There can be little dispute that the prohibition of abortion is "substantially related" to the achievement of the State's objective of protecting prenatal life. The Supreme Court has acknowledged that that interest is compelling throughout pregnancy.[26] Thus, regardless of the standard of review, H.B. 112 does not violate the Equal Protection Clause of the Fourteenth Amendment.

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[25] See also Beal v. Doe, 432 U.S. 438, 445-46 (1977); Maher v. Roe, 432 U.S. 464, 478-79 (1977) (Connecticut decision to fund costs associated with childbirth but not those associated with nontherapeutic abortions was a rational means of advancing the legitimate state interest in protecting potential life by encouraging childbirth).

[26] See Webster, 109 S.Ct. at 3040, 3055-58 (plurality opinion), 3063 (O'Connor, J., concurring), 3064 (Scalia, J., concurring) (1989); Thornburgh, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); Akron Center, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

V. HOUSE BILL 112 DOES NOT VIOLATE THE PROHIBITION OF INVOLUNTARY SERVITUDE IN THE THIRTEENTH AMENDMENT.

In their Fifth Cause of Action, plaintiffs allege that "[t]he Act violates the prohibition on involuntary servitude of the Thirteenth Amendment . . . by forcing unwanted pregnancy on all women seeking abortions in Louisiana, thereby robbing women of their bodily integrity and dignity and causing risks to their lives and health." Amended Complaint, ¶120. This argument, unsupported by any case authority,[27] would mandate abortion on demand at any stage of pregnancy (because the physical burdens of pregnancy generally increase during the gestational period) and would invalidate state statutes requiring parental consent or notice before a minor may obtain an abortion (because such restrictions would constitute "child slavery"). The Supreme Court, however, has expressly rejected abortion on demand and has accepted the

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[27] Amici are unaware of any case in which a court has held that pregnancy and the labor of childbirth are "work" or that statutes prohibiting abortion result in the "involuntary servitude" which the Thirteenth Amendment was intended to eradicate. See generally, United States v. Kozminski, 487 U.S. 931 (1988); United States v. Shackney, 333 F.2d 475 (2nd Cir. 1964). In Holton v. Crozer-Chester Medical Center, 419 F. Supp. 334, 337 (E.D. Pa. 1976) vacated on other grounds, 560 F.2d 575 (3rd Cir. 1977), the District Court rejected an argument that a hospital's policy of refusing to sterilize a woman without her husband's consent "subjects a wife to involuntary servitude by subordinating her to the control of her husband and compelling her to bear his children." It should also be noted that with the exceptions of rape and incest, for which abortion is allowed under the Act, all pregnancies result from consensual acts that entail obvious risks that the woman will conceive. See Steinberg v. Brown, 321 F. Supp. 741, 748 (N.D. Ohio 1970) (three-judge court) ("if it is known generally that an act has possible consequences that the actor does not desire to incur, he has always the choice between refraining from the act, or taking his chance of incurring the undesirable consequences. . . . This is peculiarly true with respect to the bearing of children").

principle of parental involvement.

In Roe, the appellant and certain amici argued that because of the physical and other burdens an unwanted pregnancy imposes on a woman, her "right [to choose to have an abortion] is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 153.[28] The Court disagreed:

> [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. [Citations omitted].
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

Id. at 154.

The Court then held that the State could proscribe abortion after viability except where the procedure is necessary to preserve the life or health of the mother. 410 U.S. at 164-65.[29] This

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[28] One of the amicus briefs in Roe and Doe argued that laws that restrict or regulate abortion as a special procedure violate the Thirteenth Amendment by imposing involuntary servitude without due conviction for a crime. See "Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case." Under the reasoning of the brief, no State could forbid abortion at any stage of pregnancy without running afoul of the Thirteenth Amendment. Br. at 5, 8-9, 16, 24-25.

[29] In the companion case of Doe v. Bolton, 410 U.S. 179, the Court reiterated its holding in Roe that "a pregnant woman does not have an absolute constitutional right to an abortion on her

acknowledged authority to prohibit abortion after viability undermines plaintiffs' argument that the prohibition of abortion at any stage of pregnancy violates the Thirteenth Amendment.[30] Therefore, the prohibition of involuntary servitude does not affect the power of the States to enact statutes restricting abortion.[31]

Plaintiffs' involuntary servitude argument also has been rejected sub silentio in the Supreme Court's decisions upholding

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demand." Id. at 189. Three justices wrote separate concurrences in which they recognized that the right to an abortion is not absolute and may be limited by the State's interest in protecting "potential life." Roe, 410 U.S. at 170 (Stewart, J., concurring) (state interest in "protection of . . . potential future human life" is legitimate and may be sufficient "to prohibit [abortion] in the late stages of pregnancy"); Doe, 410 U.S. at 208 (Burger, C.J., concurring) (disavowing abortion on demand), id. at 220 (Douglas, J., concurring) ("protection of the fetus when it has acquired life is a legitimate concern of the State").

[30] In Webster, the Supreme Court upheld the validity of a Missouri statute mandating viability testing at 20-weeks gestational age, even though the statute arguably conflicted with the trimester framework of Roe v. Wade. Id. at 3054-58. Notwithstanding the plurality's decision to abandon the "rigid trimester analysis" of Roe v. Wade, the Court declined appellees' suggestion to remand the cause for "consideration of what other constitutional principles can support the right recognized in Roe," including "the right to be free of involuntary servitude." Brief of Appellees at 18-19.

[31] The widespread enactment of abortion statutes prior to the adoption of the Thirteenth Amendment negates any inference that either the framers or ratifiers intended to restrict the States' authority to prohibit abortion. As of December 18, 1865 (the date on which the Amendment was declared to have been ratified), twenty-seven of the thirty-six States had enacted statutes prohibiting abortion, including twenty-one of the twenty-seven ratifying States. U.S.C.A., Amendment XIII, Historical Notes; Roe v. Wade, 410 U.S. 113, 176 n.1 (Rehnquist, J., dissenting).

the principle of parental consent (or notice).[32] Statutes mandating parental involvement have the potential of "forcing" a minor to carry a pregnancy to term. Yet, these statutes have been sustained by the Supreme Court.

To strike down the Act on the basis of the Thirteenth Amendment would expand the prohibition against involuntary servitude far beyond its intended scope and would contravene the acknowledged power of the States to restrict abortion. Thus, plaintiffs' "involuntary servitude" claim should be rejected.

VI. TRE CLERGY PLAINTIFFS LACK STANDING TO CLAIM THAT HOUSE BILL 112 VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

In their Sixth Cause of Action, plaintiffs allege that "[t]he Act violates free exercise of religion as guaranteed by the First Amendment . . . in that it seriously inhibits the religious liberty of plaintiffs Rabbi Matuson and Reverend Korb, and their congregants." Amended Complaint, ¶122.[33] However, neither Rabbi Matuson nor Rev. Korb has standing to challenge the Act on free exercise grounds, either individually or as representatives of their congregants.

In Harris v. McRae, 448 U.S. 297 (1980), the Supreme Court considered a free exercise challenge to the Hyde Amendment, which limited federal funding of abortions under the Medicaid assistance

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[32] Hodgson v. Minnesota, 110 S.Ct. 2926 (1990); Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990); Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 490-93 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981).

[33] See also Amended Complaint, ¶¶18, 19, 37.

program. The free exercise claim was made by indigent pregnant women who sued on behalf of other women similarly situated, two officers of the Women's Division of the Board of Global Ministries of the United Methodist Church, and the Women's Division itself. The Supreme Court held that none of these parties had standing to attack the Hyde Amendment on free exercise grounds. The first group--indigent pregnant women--lacked standing because "none alleged, much less proved, that she sought an abortion under compulsion of religious belief." 448 U.S. at 320.[34] The second group--officers of the Women's Division--lacked standing because "they failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid." Id.[35] Finally, the Women's Division lacked standing because the rights of its individual members were asserted, rather than the rights of the organization as a collective body. Id. at 322-21.[36]

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[34] Neither "Sojourner T." nor "Jane" has alleged that she seeks an abortion "under compulsion of religious belief." Nor has either Rabbi Matuson or Rev. Kolb alleged that any of his or her congregants has sought an abortion for such reasons.

[35] For a similar reason, plaintiff "Ida B." lacks standing because she has not alleged that she is or expects to become pregnant. Decl. of Ida B., ¶¶1-4. In Roe v. Wade, the Supreme Court held that neither a married woman, who was not pregnant and did not anticipate becoming pregnant, nor her husband had standing to challenge the Texas abortion statutes. 410 U.S. at 127-29. See also Abele v. Markle, 452 F.2d 1121, 1124-25 (2nd Cir. 1971); Y.M.C.A. of Princeton, N.J. v. Kugler, 342 F.Supp. 1048, 1056-58 (D. N.J. 1972), vacated and remanded, 475 F.2d 1398 (3rd Cir. 1973), judgment reinstated, Civil No. 264-70 (D. N.J. July 24, 1973), aff'd mem. op., 493 F.2d 1402 (3rd Cir. 1974); Doe v. O'Bannon, 91 F.R.D. 442 (E.D. Pa. 1981).

[36] The Women's Division conceded that "'the permissibility, advisability and/or necessity of abortion according to circumstance is a matter about which there is diversity of view within . . . our membership, and is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before

The Supreme Court's opinion in Harris is dispositive on the question of Rabbi Matuson's and Rev. Korb's standing to raise a free exercise argument. Neither possesses the standing required to challenge the Act because they are attempting to assert the rights of individual members of their congregations and not the rights of their temple or church as an institution. See Harris v. McRae, 448 U.S. at 322-21.

Other courts have reached the same result. In American College of Obstetricians & Gynecologists v. Thornburgh, 552 F. Supp. 791 (E.D. Pa. 1982), remanded, 737 F.2d 283 (3rd Cir. 1984), aff'd on other grounds, 476 U.S. 747 (1986), the District Court held that plaintiff clergymen did not have standing, either in their individual or representative capacities, to challenge the Pennsylvania Abortion Control Act of 1982 on free exercise grounds. The court found that the Abortion Control Act had no "direct impact on the clergymen as individuals because the Act has no provisions which directly or indirectly concern religious counseling." 552 F. Supp. at 795. The clergymen, therefore, failed to establish any injury-in-fact.

As in ACOG, the plaintiff-clergy in the case at bar have not proven any injury-in-fact. The Act has no "direct impact" on

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God.'" 448 U.S. at 321. In light of this concession, the Supreme Court concluded that "the participation of individual members of the Women's Division is essential to a proper understanding and resolution of their free exercise claims." Id. The declarations of Rabbi Matuson and Rev. Korb also stress the diversity of religious opinion regarding the morality of abortion and assert the primacy of individual conscience. See Decl. of K. Korb, ¶¶ 2, 4, 8; Decl. of M. Matuson, ¶¶4, 9, 10. See also Amended Complaint, ¶¶18, 19.

either of these plaintiffs individually because it has no provisions which "directly or indirectly concern religious counseling." The Act does not purport to restrict in any fashion the ability of women to seek, or members of the clergy to provide, religious counseling on abortion.

Both Rabbi Matuson and Rev. Korb, however, claim that their right to provide religious counseling to members of their congregations is violated by virtue of the application of other provisions of the Louisiana Penal Code, specifically §§ 14:24 and 14:26, to the Act.[37] These claims, however, are foreclosed by virtue of plaintiffs' failure to seek declaratory or injunctive relief against any provision of Louisiana law other than the Act itself. Amended Complaint, pp. 41-42 (Prayer for Relief).[38] In ACOG, the district court found further that the clergymen did not have standing to sue in a representative capacity, either. Citing Harris, the court held that "[a] free exercise claim ordinarily requires individual participation,"[39] and concluded that "a free exercise claim in this case can be pursued only by a woman who seeks 'an abortion under compulsion of religious belief.'" Id.

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[37] Amended Complaint, ¶¶18, 19, 37, 104, 106-108; Decl. of M. Matuson, ¶¶4, 9, 10; Decl. of K. Korb, ¶¶8, 9.

[38] The bare possibility that §§14:24 and 14:26 might be applied in an unconstitutional fashion to "religious counseling" is too speculative to support declaratory and injunctive relief in this facial challenge. See Ohio v. Akron Center, 110 S.Ct. 2972, 2981 (1990).

[39] "It is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." Abington School District v. Schempp, 374 U.S. 203, 223 (1963).

Since no plaintiff had standing to raise a free exercise claim, the court did not address the merits of plaintiffs' argument regarding the Free Exercise Clause. Id. at 795-96.

Under Harris v. McRae, neither Rabbi Matuson nor Rev. Korb possesses the requisite standing to challenge the Act on free exercise grounds. Accordingly, they should be dismissed as party-plaintiffs, and their free exercise claims must be denied.

VII. PLAINTIFFS CANNOT RAISE THEIR FREE SPEECH CLAIMS IN A FACIAL CHALLENGE BY INVOKING OTHER PROVISIONS OF LOUISIANA LAW WHERE HOUSE BILL 112, ON ITS FACE, REACHES ONLY CONDUCT.

In their Seventh Cause of Action, plaintiffs allege that "[t]he Act violates the right to free speech guaranteed by the First Amendment . . . by prohibiting physicians, clergy and others from counseling women to obtain abortions, ..." Amended Complaint, ¶124. Although the Act itself prohibits only conduct, plaintiffs argue that it reaches protected speech through application of the accountability and conspiracy provisions of the Louisiana Penal Code. La. Rev. Stat. Ann. §§14:24, 14:26 (West 1986). Amended Complaint, ¶¶20, 104-110; see also Memorandum, pp. 1-2, 5, 13-14, 18-19.[40] Plaintiffs' argument is speculative and meritless.

First, this is precisely the kind of hypothetical situation that the Supreme Court in Ohio v. Akron Center, 110 S.Ct. 2972,

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[40] Specifically, plaintiffs allege that "[t]he threat of prosecution as either an accessory to an illegal abortion or a co-conspirator to an illegal abortion, as well as the accompanying threat of prosecution as a party to a crime, chills physicians' and other health care providers' ability to provide accurate and complete information and assistance consistent with their best medical judgment." Amended Complaint, ¶110.

2981 (1990), said could not be raised in a facial challenge.

Second, the argument on its own terms fails. Section 14:24 provides:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are participants.

La. Rev. Stat. Ann. §14:24 (West 1986). Section 14:26.A provides:

> Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

La. Rev. Stat. Ann. §14:26 (West 1986). Plaintiffs essentially contend that these provisions, taken in conjunction with the substantive provisions of H.B. 112, may reach protected speech. This contention, however, is based on a misunderstanding of Louisiana law. The Louisiana Supreme Court has held that §§14:24 and 14:26 are "directed at persons who knowingly participate in the planning or execution of a crime." State v. Knowles, 392 So.2d

651, 657 (La. 1980). Such conduct is not protected speech.[41] Both sections have withstood free speech challenges.[42]

The three-judge federal court opinion in Shaw v. Garrison, 293 F. Supp. 937 (E.D. La. 1968), is particularly instructive. There, the plaintiff claimed that §14:26 violated the free speech provision of the First Amendment because "it punishes a person for merely expressing his thoughts about committing a crime." Id. at 957. The court noted that "the statute does not punish a person for saying he would like to commit a crime, but only for entering into an 'agreement or combination' with one or more persons to commit a crime." Id. "Such an agreement," the court determined, "is much more than the mere expression of one's thoughts; it is conduct which leads directly to criminal consequences and against which society has the right to protect itself." Id. (emphasis supplied).

Plaintiffs have failed to demonstrate that §§14:24 and 14:26

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[41] "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech." Frohwerk v. United States, 249 U.S. 204, 206 (1919) (opinion of J. Holmes). All of the free speech cases cited by plaintiffs in their Memorandum (p. 19) involved advertising of legal abortion or contraceptive services. See Carey v. Population Services Int'l, 431 U.S. 678, 700-01 (1977); Bigelow v. Virginia, 421 U.S. 809, 822-25 (1975); Valley Family Planning v. State of North Dakota, 489 F. Supp. 238, 242 (D. N.D. 1980), aff'd on other grounds, 661 F.2d 99 (8th Cir. 1981). None addressed the constitutionality of laws that made criminal the solicitation or conspiracy to commit conduct that in itself was illegal.

[42] See State v. McAllister, 366 So.2d 1340, 1343 (La. 1978) (rejecting vagueness and overbreadth attack on §14:24); State v. Harvey, 358 So.2d 1224, 1234 (La. 1978) (same); Shaw v. Garrison, 293 F. Supp. 937, 957 (E.D. La. 1968) (three-judge court) (rejecting free speech attack on §14:26).

have been, or would be, applied in such a manner as to jeopardize their free speech rights. Moreover, the bare possibility that these provisions could be applied in an unconstitutional manner is an insufficient basis on which to declare them unconstitutional. Plaintiffs, it must be noted, do not ask for any relief against enforcement of either section--they seek declaratory and injunctive relief only against the Act itself. See Amended Complaint, pp. 41-42 (Prayer for Relief). But the Act itself does not reach speech, much less protected speech. Accordingly, plaintiffs' free speech claims should be rejected.[43]

VIII. LOUISIANA HOUSE BILL 112 DOES NOT VIOLATE EITHER THE SUPREMACY CLAUSE OR THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

In their Eighth Cause of Action, plaintiffs allege that "[t]he Act violates §521(a) of the Food, Drug & Cosmetic Act (21 C.F.R. §§ 521(a), 808 (1990)), and the Supremacy Clause "by prohibiting certain forms of contraception which are regulated by the FDA as part of a comprehensive federal scheme." Amended Complaint, ¶126. See also ¶¶94-98. In their Ninth Cause of Action, they allege that the Act violates the Commerce Clause "by prohibiting the prescription and distribution of certain forms of contraception, thereby directly interfering with interstate commerce." Amended Complaint, ¶128. See also ¶¶ 99-101.

For the reasons set forth in our analysis of plaintiffs' Second Cause of Action (Contraception), these allegations are based

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[43] It should not go unnoticed that plaintiffs' free speech attack on §§14:24 and 14:26, if sustained, would preclude the State of Louisiana from prosecuting anyone under either statute.

upon a misreading of the Act, which does not criminalize the prescription, administration, insertion or use of contraceptives. Accordingly, plaintiffs are not entitled to relief under either their Eighth or Ninth Cause of Action.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Honorable Court grant defendants' motion for judgment on the pleadings and deny plaintiffs' motion for judgment on the pleadings.

Respectfully submitted,

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August 5, 1991

CERTIFICATE OF FILING AND SERVICE

I certify that on August 2, 1991, one (1) copy and an original of the MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS and the BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS were filed with:

Office of the Clerk
United States District Court
Eastern District of Louisiana
500 Camp St.
New Orleans, Louisiana 70130

I further certify that on August 2, 1991, copies of the MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS and BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' RULE 14(C) MOTION FOR JUDGMENT ON THE PLEADINGS MOTION were served on:

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by depositing same, properly addressed, first class postage prepaid, in the United States Post Office, Chicago, Illinois.

Dated this 2nd day of August, 1991

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HLSX 91-191

REENGROSSED

Regular Session, 1991

HOUSE BILL NO. 112

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

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

AN ACT

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

Be it enacted by the Legislature of Louisiana:

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

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

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

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

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

§87. Abortion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DIGEST

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

Sam Theriot, et al. Act HB No. 112

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

(1) Administration of any drug, potion, or any other substance to a female; or

(2) Use of any instrument or any other means whatsoever on a female.

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

(1) Administering or prescribing a drug, potion, medicine, or other substance to a female; or

(2) Using any instrument or any external force whatsoever on a female.

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

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

(1) The pregnancy is terminated to preserve the life or health of the unborn child or to remove a dead unborn child.

(2) The pregnancy is terminated for the express purpose of saving the life of the mother.

(3) The abortion terminates a pregnancy which is the result of rape as defined by law and in which all of the following requirements are met prior to the termination:

(a) The rape victim obtains a physical examination and/or treatment from a physician other than the one who is to perform the abortion within five days of the rape in order to determine if a pregnancy existed prior to the rape and to prevent pregnancy or venereal disease, unless the rape victim is incapacitated. If the victim is incapacitated, then an examination shall be performed within five days after the incapacity is removed.

(b) The rape victim reports the rape to law enforcement officials within seven days of the rape, unless the victim is incapacitated. If the victim is incapacitated, then a report shall be made within seven days after the incapacity is removed.

(c) The abortion is performed within 13 weeks of conception.

REENGROSSED

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

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

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

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

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

Proposed law defines the following terms:

(1) "Law enforcement official or officer" means any peace officer or agency empowered to enforce criminal law, including a state police officer, sheriff, constable, local police officer, and district attorney.

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

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

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

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

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

Proposed law provides a specific severability provision.

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

(Amends R.S. 14:87)

Summary of Amendments Adopted by House

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

1. Deleted the provision allowing a physician to perform an abortion in order to "treat a physical condition or illness which is diagnosed and treatable during pregnancy".

2. Changed the time within which an abortion can be performed from "within the first 13 weeks of pregnancy" to "within 13 weeks of conception".

3. Shifted the burden from "the victim notifying the physician performing the abortion that she has complied with the requirements for a medical examination and for reporting to law enforcement officials" to requiring "the physician to obtain written statements from the victim and from law enforcement".

Why Do Women Have Abortions?

By Aida Torres and Jacqueline Darroch Forrest

Summary

Most respondents to a survey of abortion patients in 1987 said that more than one factor had contributed to their decision to have an abortion; the mean number of reasons was nearly four. Three-quarters said that having a baby would interfere with work, school or other responsibilities, about two-thirds said they could not afford to have a child and half said they did not want to be a single parent or had relationship problems. A multivariate analysis showed young teenagers to be 32 percent more likely than women 18 or over to say they were not mature enough to raise a child and 19 percent more likely to say their parents wanted them to have an abortion. Unmarried women were 17 percent more likely than currently married women to choose abortion to prevent others from knowing they had had sex or became pregnant.

Of women who had an abortion at 16 or more weeks' gestation, 71 percent attributed their delay to not having realized they were pregnant or not having known soon enough the actual gestation of their pregnancy. Almost half were delayed because of trouble in arranging the abortion, usually because they needed time to raise money. One-third did not have an abortion earlier because they were afraid to tell their partner or parents that they were pregnant. A multivariate analysis revealed that respondents under age 18 were 39 percent more likely than older women to have delayed because they were afraid to tell their parents or partner.

Background

Each year since the late 1970s, approximately 30 percent of all pregnancies in the United States have ended in abortion (miscarriages excluded).[1] The likelihood that a pregnant woman will have an abortion differs substantially among subgroups of women,[2] reflecting the influence of two factors—the frequency of unintended pregnancy and the likelihood that an unintended pregnancy will be resolved by abortion. The latter factor raises the question of whether there are differences in the reasons women have abortions, across the subgroups of women who do so.

By means of a survey of abortion patients, the study reported in this article addresses the question of why certain women elect to have an abortion. The study also examines why some women who have abortions obtain them fairly late in gestation. Nationally, four percent of abortions occur at 16 or more weeks of gestation.[4] Medical data show that the normally low rates of complication and death associated with induced abortion increase substantially at later gestations.[5] In addition, obtaining late abortions poses difficulties because they are more expensive,[6] providers are fewer and harder to find,[7] and many find late abortions more troubling than those performed early in gestation. Previous studies have looked exclusively at the social and demographic characteristics of women who have late abortions,[8] at problems related to access[9] or at personal factors, such as the ability to recognize signs of pregnancy.[10] In the study reported here, we investigate all these factors simultaneously and provide some indication of their relative importance.

The Sample

The Alan Guttmacher Institute (AGI) has periodically surveyed U.S. abortion providers to obtain data on the number of abortions performed in a year; the last such survey was conducted in 1985. A total of 819 abortion facilities in the United States performed at least 400 abortions each in 1985; they represented 31 percent of all abortion providers, but accounted for 90 percent (1.4 million) of all abortions.[11] Only such facilities were eligible for the study, and priority was given to providers that had participated in past AGI surveys. The selected providers were primarily (but not exclusively) nonhospital facilities.*

Some 42 facilities were originally invited to participate in the study; these included six at which a relatively large number of late abortions (those at 16 or more weeks' gestation) were performed. However, five general facilities and one provider of late abortions refused to participate. The latter was replaced by another such provider, and one more facility where a large proportion of late procedures were performed was added because of uncommonly low attendance during the survey period at one facility providing late abortions.†

Over a five-month period beginning in November 1987, patients at each partici-

Aida Torres is senior research associate and Jacqueline Darroch Forrest is vice president for research with The Alan Guttmacher Institute. The authors thank Stanley K. Henshaw for his invaluable statistical help, Barbara Okun for her programming assistance, Susan Eisman for having supervised the fieldwork and Lisa Bezak for her help throughout the project. The authors are also very grateful to the providers and patients who participated in the pretest or study, as well as to all who helped develop and refine the questionnaire, especially Ann Cook, a private consultant, and Barbara Radford and Lois Schoenbrun of the National Abortion Federation. The research was supported in part by the Robert Sterling Clark Foundation, The General Service Foundation and The Prospect Hill Foundation.

*The 689 nonhospital facilities that provided 400 or more abortions in 1985 accounted for 81 percent of all procedures in that year (see reference 1).

†Although such a purposive sample departs from the goal of having a random probability sample of all providers, it was deemed necessary because past experience led us to believe that obtaining agreement for participation from some facilities, especially hospitals, would have cost a great deal of staff time. The characteristics of patients at facilities included in the study were compared with those of patients at facilities not included, based on information from a larger study involving a probability sample of 9,480 patients in 103 facilities (see S. K. Henshaw and J. Silverman, page 158 of this issue); there were no substantial differences between patients at the two groups of facilities.

pating general abortion facility were surveyed during a 1–3-week period (the length depended on the facility's caseload). Providers of later abortions were asked to administer the survey to 60 consecutive patients; this process took 4–6 weeks. Although providers were asked to give a questionnaire to each woman obtaining an abortion during the study period, responses were not received from every patient, primarily because some facilities skipped some days or did not give out surveys during very busy times. Because of concern that such lapses in the administration of the study could yield a biased sample of patients from some providers' failure to supply the questionnaire to every patient, we established a minimum response rate that would have to be met before a facility's patients could be included in the analyses. Eight facilities (none providers of large proportions of late abortions) had a total response rate of less than 56 percent and were eliminated.

The data analyzed below come, therefore, from a sample of 30 providers, seven of which had high proportions of patients who obtained abortions at 16 or more weeks' gestation. All but three of the 30 are nonhospital facilities; each of the four regions of the country is represented, but midwestern providers are somewhat overrepresented. The average patient response rate was 80 percent, and was 81 percent or higher in 17 of the 30. The number of respondents per facility ranged from 12 to 127, with an average of 63.

In all, 1,900 women responded with usable information, of whom 420 had been pregnant for 16 or more weeks. Because such women had been oversampled, their responses concerning their reasons for having an abortion were weighted to reflect the proportion of U.S. abortion patients who obtain midtrimester abortions. Analyses of causes of delay are based on unweighted responses, however.

Distributions of respondents by age, race, ethnicity, Medicaid status, marital status and region were compared with available national data. Respondents were more likely than all abortion patients nationally to be white (75 percent vs. 69 percent) and less likely to be Hispanic (seven percent vs. 13 percent). The discrepancies probably arose because a greater proportion resided in the North Central region than is the case among all abortion patients (34 percent vs. 18 percent) and a lesser proportion were from the South (23 percent vs. 29 percent) or Northeast (20 vs. 26 percent). Distributions of respondents by age and marital status were quite similar to those of all abortion patients, but 17 percent of respondents were covered by Medicaid, compared with 24 percent nationally.

There was little difference among regions in the most important reasons given for obtaining an abortion, but there were differences by race and by Medicaid status. In an attempt to obtain a more appropriate description of the reasons U.S. women have abortions, responses were weighted by these two factors, as well as by the gestational distribution of abortions.

Table 1. Percentage of abortion patients reporting that a specific reason contributed to their decision to have an abortion, by age, and percentage saying that each reason was the most important

Reason	Total*	Age†					% most important*
	(N= 1,900)	<18 (N= 275)	18–19 (N= 309)	20–24 (N= 645)	25–29 (N= 337)	≥30 (N= 319)	(N= 1,773)
Woman is concerned about how having a baby could change her life	76	92	82	75	72	69	16
Woman can't afford baby now	68	73	73	70	64	58	21
Woman has problems with relationship or wants to avoid single parenthood	51	37	46	56	55	50	12
Woman is unready for responsibility	31	33	40	36	25	18	21
Woman doesn't want others to know she has had sex or is pregnant	31	42	41	35	21	22	1
Woman is not mature enough, or is too young to have a child	30	81	57	28	7	4	11
Woman has all the children she wanted, or has all grown-up children	26	8	12	23	31	51	8
Husband or partner wants woman to have abortion	23	23	29	25	18	20	1
Fetus has possible health problem	13	9	13	12	14	17	3
Woman has health problem	7	3	4	7	8	15	3
Woman's parents want her to have abortion	7	28	12	4	3	2	‡
Woman was victim of rape or incest	1	1	1	1	1	‡	1
Other	6	2	5	8	5	8	3

*Ns are unweighted.

†The Ns upon which the age-breakdowns are based do not add to 1,900 because age was not available for some women.

‡Less than 0.5 percent.

The Questionnaire

Information was collected by means of a self-administered questionnaire distributed by clinic staff to patients. The survey instrument was reviewed by a number of professionals with some experience in the provision of abortions and was pretested with some 150 patients at seven facilities. It was made available in both English and Spanish. The questionnaire explained that participation was voluntary and that the information collected would remain confidential. The questionnaire covered both the women's reasons for choosing to have an abortion and (for those at least 16 weeks pregnant) their reasons for having delayed obtaining an abortion.

An attempt was made to include as precoded, closed-ended questions every possible reason for having an abortion, so that the survey form would be easy for respondents to fill in quickly. However, most questions contained an additional, unspecified category, where women could add information if their reason was not covered by the precoded options. They were asked a series of questions about whether specific factors had contributed to their abortion decision, but they were not asked to identify the degree to which each reason contributed to their decision or to state the relative importance of each.

Both to ensure that no reasons were missed and to find out which were most important, respondents were also asked to write, in their own words, why they were having an abortion; if they had more than one reason, they were requested to note the most important first. This question preceded the precoded questions, so as not to influence respondents' replies.

The five precoded questions asked: "Is one reason you are having an abortion

- because you cannot afford a baby now?"
- because you don't want to be a single mother or because of problems with your

relationship with your husband or partner?"
• because having a baby would dramatically change your life in ways you are not ready for?"
• because of some physical problem or problem with your health?"
• because of possible problems affecting the health of the fetus?"

The first three questions had subcategories offering several factors to further describe the woman's situation; the others simply asked the respondent to give more information about her situation. The woman was asked to circle one or more of these subcategories or to provide further information in her own words.

A sixth question asked "What other reasons contribute to your decision to have an abortion?" Respondents were to select as many of the following eight precoded subcategories or two or more open-ended subcategories as were relevant:
• "My husband/partner wants me to have an abortion."
• "My parents want me to have an abortion."
• "I don't want my parents or other people to know I had sex."
• "I don't want my parents or other people to know I got pregnant."
• "I was raped."
• "I became pregnant as a result of incest."
• "I do not feel I am mature enough to raise a(nother) child."
• "I already have as many children as I want."
• "I have another reason."
• "None of the above."

All of the 1,900 survey respondents checked at least one of the six precoded reasons (including "other"), and 1,773 (93 percent) wrote in a reason in response to the open-ended question. If a reason offered in response to the latter question also fell into one of the precoded categories (including "other"), it was classified there; if not, a new category was developed. If a respondent gave a reason spontaneously and later checked it from among the precoded categories, the response was counted only once. If only one reason was provided, whether written spontaneously or circled in answer to a specific question, it was coded as the most important reason.

Almost all of the responses to the open-ended question fell into one of the 13 precoded categories listed above. However, some women said in their replies to that question that they were choosing to have an abortion now because they were "not ready for the responsibility of having a child." As is discussed below, these women did not fall clearly into any one of the 13 categories, so their response was left as a separate category.

The question of why women have later abortions was explored by means of another set of questions directed only at respondents 16 or more weeks pregnant at the time of their abortion. They were asked to answer the following set of precoded questions: "Is one reason you are having an abortion now instead of earlier
• because it took some time before you knew you were pregnant or how far along you were?"
• because it took you a long time to decide to have an abortion?"
• because it was hard for you to make arrangements for an abortion?"

Women who replied that one of these factors contributed to the delay were asked to further describe their situation; the first and third listed possible explanations, while the second was open-ended.

These women were also asked to mark which, if any, of a series of other factors described why they were having a later abortion. These were:
• "I did not think it was important to have it earlier."
• "I did not know I could get an abortion."
• "I was waiting or hoping for my relationship with my husband or partner to change."
• "I was afraid to tell my partner or my parents that I was pregnant."
• "Someone I am close to put pressure on me not to have an abortion."
• "I found out late in the pregnancy that the fetus has a defect or is not normal."
• "Something in my life changed since I became pregnant."
• "I have another reason."
• "None of the above."

Respondents were also asked to specify which of the reasons they cited for having a late abortion had delayed their obtaining the abortion for "the longest amount of time." Of the 420 respondents at 16 weeks or more of gestation, 95 percent gave a reason for having delayed, but only 74 percent also cited the reason responsible for the largest share of delay.

Reasons for Choosing Abortion

Most respondents said that more than one factor had contributed to their decision to have an abortion: Only seven percent cited just one reason for having decided to obtain an abortion. Even among the few women who said their pregnancy had resulted from rape or incest, 95 percent gave at least one other factor that had contributed to their decision. On average, the respondents cited 3.7 reasons, with 63 percent reporting 3–5 different reasons and 12 percent noting 6–9.

No strong patterns tied different reasons together. An examination of cross-tabulations and correlations among reasons and an attempt to identify a smaller number of more general reasons through factor analysis both indicated little justification for collapsing categories further. Women who cited a specific reason gave other factors as having contributed to their decision in proportions similar to women who did not give that specific reason.

In the cases of four reasons, there were significant differences between the respondents who described themselves as not ready for the responsibility of having a child and those who did not say they were unready. However, there were no significant differences for the remaining reasons and most respondents in both groups gave a number of other reasons. Because "not ready" was not clearly substituting for one or more other reasons, it was kept as a separate category.

Three reasons were each cited by at least half of all respondents, as shown in Table 1. Three-quarters said they had decided to have an abortion because they were concerned about how having a baby would change their life. About two-thirds said they could not afford to have a child now; half said that they did not want to be a single parent or had relationship problems.

Slightly fewer than one-third of respondents said they had decided to have an abortion because they were not ready for the responsibility of having a child, because they did not want others to find out that they were sexually active or had become pregnant or because they were not mature enough to have a child. Ninety-nine percent who did not want others to know said they were concerned about people finding out that they had become pregnant; 15 percent specified that they did not want others to know they were sexually active (not shown). As noted above, there was no precoded question regarding unreadiness for the responsibility of having a child; the proportion giving this response might have been higher if it had been offered as a precoded question.

The six most commonly mentioned factors were given by 82 percent of the patients as the most important reason they were having an abortion. The rank order of the most important reasons differed, however, from the overall ranking of factors reported to have contributed to the women's decision. The two factors most frequently given as most important were

that the woman could not afford a child and that the woman was not ready for the responsibility (both cited by 21 percent). Although feeling concerned about the changes a baby would bring or about single parenthood or relationship problems were noted by over half of all respondents, these reasons were described as most important by only 16 and 12 percent of respondents, respectively. These four were mentioned by 70 percent of all respondents. The other factors cited by many respondents as having contributed to their decision were in most cases mentioned by few as the most important reason.

Respondents were asked to provide more descriptive detail about five of the precoded reasons. Table 2 shows these more specific descriptions, given by women who cited the three most common reasons for abortion and who offered additional details. Two-thirds of those who said they were concerned about the changes their lives would undergo explained that they chose abortion because having a child now would interfere with their job, employment or career. (This represented half of all abortion patients in the survey.) Almost half said that having a child now would conflict with their schooling, while more than a quarter reported that children or other people depended on them for care. Overall, only eight percent of the women failed to provide any additional, explanatory information.

Some 33 percent of those who said they could not afford to have a baby gave no further explanation. Of those who did, two in five said they were students or were planning to study, one in five that they were unmarried or unemployed and one in seven that they had a low-paying job.

Among women who said that they did not want to be single parents or that they had relationship problems, the reasons most commonly reported were that they did not want to marry their partner (given by half of such women who provided explanations), that their current relationship might break up soon (by one-third), that their partner or was unable to marry them (by three-tenths) or that they were not in a relationship with anyone (one-quarter). Nineteen percent gave no further information.

Of those women who said that possible fetal problems had contributed to their decision and who gave further details (not shown), 42 percent were worried about medication they had taken before discovering they were pregnant, and 45 percent reported having used alcohol or drugs before realizing they were pregnant. Only eight percent said, however, that a physician had advised them that the fetus had a defect or was abnormal. Among women who said that their own health had contributed to their decision to have an abortion and who provided additional information, 79 percent cited a serious physical problem, 13 percent mentioned other physical complaints and 11 percent gave a mental or emotional problem. In all, 53 percent of those having an abortion because of a health problem said that a doctor had told them that their condition would be made worse by being pregnant.

*Because the sample was not a random probability sample, standard statistical tests of significance are used here only as rough indicators. The differences discussed in the text were "significant" at a level of probability less than 0.05 percent.

Differences in Reasons for Abortion

The reasons women gave for having decided to have an abortion differed by age, as can be seen in Table 1. At all ages, the most commonly cited reason was that the respondent was concerned about the ways in which having a baby would change her life; respondents under age 18 were most likely to have cited this factor (92 percent), while women 30 and older were least likely to have mentioned it (69 percent).* Not being mature enough to have a child was the second most commonly cited reason among the youngest patients, and financial problems ranked third. These reasons were ranked third and second, respectively, by women aged 18–19. Financial reasons were cited by an equal proportion of 18–19-year-olds and those under 18; in fact, financial concerns were the second most important reason for those 18 and over, although women 25 and older were less likely than younger women to have obtained an abortion for this reason. Among those aged 20–29, the desire to avoid single parenthood or relationship problems (given by 55–56 percent of respondents) was the third most common reason, while the fact that they had completed childbearing was cited by substantially fewer (23–31 percent). Among respondents 30 and over, however, the latter reason was given by about the same proportion as the former (51 percent and 50 percent, respectively).

In contrast to the large proportion of teenagers who said they were not mature enough to have a child, only 28 percent of 20–24-year-olds gave this as a reason, as did only 4–7 percent of those 25 and older. Younger women were most likely to say they did not want others to find out that they were having sex or had become pregnant; however, unexpectedly, we found that 21–22 percent of respondents 25 and older also gave this reason. As anticipated, adolescents were more likely than older women to say that their parents wanted them to have an abortion; 18–29 percent of women of all ages reported that their husband's or partner's desire that they have an abortion influenced their decision.

Never-married respondents were the most likely to attribute their abortion decision to their concern about the effect bearing a child would have on their lives (82 percent), but this reason was also noted by 58 percent of currently married abortion patients (not shown). Both never-married and formerly married women were more likely to say they could not afford to have a child (69–71 percent) than were currently married women (52 percent). Thirty-eight percent of never-married and 26 percent of formerly married women said they were having an abortion because they did not want others to know they were having sex or had become pregnant. (Surprisingly, 10 percent of currently married women gave this reason as well.) Seventy percent of formerly married and 53 percent of never-

Table 2. Percentage of respondents offering various additional details for each of the three leading reasons women gave for having an abortion

Reason	% citing main reason
Unready for how having a baby could change her life (N=1,339)	
A baby would interfere with job, employment or career	67
A baby would interfere with school attendance	49
Children or other people depend on her for care	28
Can't afford baby now (N=856)	
Woman is student or is planning to study	41
Woman is unmarried	22
Woman is unemployed	19
Woman has low-paying job	14
Woman can't leave job	9
Woman is on welfare	7
Woman's husband or partner is unemployed	6
Woman can't afford basic needs	5
Woman receives no support from her husband or partner	4
Problems with relationship or with single parenthood (N=790)	
Woman doesn't want to marry partner	49
Couple may break up soon	32
Partner doesn't want to or can't marry	29
Woman is not in a relationship	25
Woman's husband or partner mistreats respondent or children	6
Woman is unready to commit herself to a relationship	5

married women cited relationship problems as an explanation, compared with 18 percent of currently married women. Unexpectedly, the proportions reporting that they were influenced by their partners' desire for them to have an abortion differed little between these groups, ranging from 19 percent of formerly married women to 24 percent of currently married or never-married women.

Some 77 percent of women with incomes under 100 percent or between 100 and 149 percent of the poverty level* said they were having an abortion because they could not afford to have a child, compared with 69 percent of those with incomes between 150 and 199 percent and 60 percent of those with incomes at or above 200 percent of the poverty level (not shown). In addition, women with incomes under the poverty level were more likely than those with incomes at or above 200 percent of poverty level to report that they already had all of the children they wanted (34 percent vs. 22 percent) or that they had relationship problems (57 percent vs. 48 percent); such women were also less likely than high-income women to be seeking abortion because of concern that others would find out they were pregnant (27 percent vs. 35 percent). Finally, women with incomes between 100 and 200 percent of the poverty level were less likely to say they were having an abortion because they were not ready to raise a child or because their parents wanted them to than were those with lower or higher incomes.

There also were several substantial differences by race (not shown). For example, black women were less likely (25 percent) to have elected to have an abortion in order to keep others from knowing they were having sex or had become pregnant than were whites (33 percent) and "other" women† (40 percent), and were less likely (eight percent) than whites and others (15–16 percent) to cite fetal health problems. On the other hand, white women (26 percent) were more likely than blacks or others (17–18 percent) to say that they were influenced by their partner's desire for them to have an abortion. Twenty-five percent of white patients and 30 percent of blacks said they had had enough children, compared with 20 percent of other women.

A multivariate analysis was conducted so that numerous variables could be taken into account simultaneously. Table 3 shows the results of regression analyses incorporating a wide range of personal characteristics that might affect the likelihood that a specific reason contributed to a woman's decision to have an abortion.

Table 3. Multivariate regression coefficients (unstandardized) showing association between selected independent variables and reasons for choosing to have an abortion

Independent variable	Reasons				
	Unready for change in life	Don't want sexual activity or pregnancy known	Not mature	Have enough children	Parents want abortion
<18	—	–0.091	0.315	—	0.186
≥30	—	—	–0.126	0.103	—
Unmarried	0.110	0.166	—	—	0.039
Hispanic	—	—	—	–0.079	—
Student	0.178	0.139	0.096	—	—
Employed	0.069	0.052	–0.055	—	–0.033
No children	0.094	0.121	0.269	–0.432	0.032
≥16 weeks' gestation	—	—	—	—	0.032
Catholic	—	0.077	—	—	–0.028
No religious affiliation	0.060	—	—	—	—
Covered by Medicaid	—	–0.095	—	—	—
No previous abortions	—	0.083	0.047	—	—
R^2	0.105	0.114	0.293	0.295	0.096

Note: Only coefficients significant at $p < 0.05$ and equations for which the R^2 was 10 percent or greater are shown in this table. Measures of poverty status (<100 and 100–149 percent of poverty level) and of race (black) were included in each equation, but are not shown here because they were not significant.

All variables used in these analyses are expressed as dummy variables—coded as "1" if a respondent has the characteristic and as "0" if she does not. Thus, the unstandardized coefficients shown in Table 3 can be interpreted as showing the likelihood that a woman with a given characteristic (net of all other characteristics, or independent variables, in the analysis) will report a specific reason for having an abortion. Again, standard tests of significance have been used as a rough guide, and only the regression coefficients with less than a five percent probability of occurring by chance are shown.

Regression analyses were conducted separately for each of the 13 reasons shown in Table 1, using as dependent variables both whether a woman cited a specific reason at all and whether the reason was the most important one. Results of the two analyses were similar, so Table 3 shows outcomes based on whether a specific reason was cited at all. The factors included in the analysis explained anywhere from 0.4 to 29.5 percent of the variance in the likelihood that each reason would be cited, an indication that other factors not included in the analyses had a substantial influence in determining whether a woman cited a specific reason. The results shown in Table 3 exclude equations in which less than 10 percent of the variance was explained. All regressions were run using unweighted data, since the factors used to calculate weights (race, Medicaid status and gestation) were included as independent variables in the equations.

Confirming the earlier bivariate analyses, Table 3 shows that women under 18 were 32 percent more likely than those 18 or older to have decided to obtain an abortion because they weren't mature enough to raise a child, and they were 19 percent more likely to have elected to have an abortion because their parents wanted them to do so. Women 30 and over were 10 percent more likely than those younger than 30 to have made such a decision because they did not want to have more children and 13 percent less likely to have done so because they thought they were not mature enough.

A surprising result is that women under 18 were less likely than older women to say that concern about others knowing that they were having sex or that they had become pregnant was a factor in their decision. Table 1 shows this factor to have been cited by nearly one-third of all women and by two-fifths of those under 20. However, given the negative coefficient seen in the multivariate analysis, factors other than young age must have contributed to the higher proportion observed among those under 20. This also may reflect the fact that young adolescents concerned about others knowing are underrepresented among abortion patients because they are less

*In 1987, the federaly designated poverty level for a nonfarm family of four was $11,200. (See: *Federal Register*, 52:5341, 1987.)

†Asian and Native American women, as well as some Hispanic women, classify themselves as "other," rather than as "black" or "white."

Table 4. Percentage of women who reported that various reasons contributed to their having a late abortion and who cited specific reasons as accounting for the longest delay

Reasons	All (N= 399)	Longest delay (N= 311)
Woman did not recognize that she was pregnant or misjudged gestation	71	31
Woman found it hard to make arrangements for abortion	48	27
Woman was afraid to tell her partner or parents	33	14
Woman took time to decide to have abortion	24	9
Woman waited for her relationship to change	8	4
Someone pressured woman not to have abortion	8	2
Something changed after woman became pregnant	6	1
Woman didn't know timing is important	6	*
Woman didn't know she could get an abortion	5	2
A fetal problem was diagnosed late in pregnancy	2	1
Other	11	9

*Less than 0.05 percent.

likely to confide in an adult and to receive help in arranging access to services.

Unmarried women were 17 percent more likely than currently married women to have chosen to obtain an abortion to prevent others from knowing they were having sex or had become pregnant, and were 11 percent more likely to have done so because having a child would interfere with other plans or responsibilities.

Surprisingly, race and poverty status were not significantly related to any of the reasons. Although women with an income less than 200 percent of poverty were significantly more likely to say they were having an abortion because they could not afford to raise a child, the regression explained only five percent of the variance in the range of those giving that reason.

It was expected that students would be more likely than nonstudents to be concerned about the changes a baby would bring or to feel that they lacked the necessary maturity, but students were also 14 percent more likely not to want others to find out about their sexual activity or pregnancy. Roman Catholic respondents were eight percent more likely than those with other religious beliefs to be having an abortion because they did not want others to know, and were three percent less likely to say that their parents wanted them to have an abortion.

Reasons for Delay

A multivariate regression analysis was conducted with gestation as the dependent variable (a dummy variable equal to "1" if gestation was 16 weeks or more) and patient characteristics and the reasons for abortion as independent variables. The equation explained only 9.7 percent of the variance in whether a women has an abortion at less than 16 weeks' gestation, indicating that these factors were relatively poor predictors of who has later abortions. Independently of other factors, teenagers under 18, black women, unemployed women and women covered by Medicaid were significantly more likely than others to be obtaining a later abortion; in addition, women were more likely to be having a later abortion if they were obtaining an abortion because of possible fetal health problems, if their parents wanted them to have an abortion or if their pregnancy had resulted from rape or incest. They were less likely to be having a later abortion if they were 30 or older, if they had no religious affiliation, if they were having health problems or if their husband or partner wanted them to have an abortion. However, these analyses simply indicate which women were more likely to have later abortions, without indicating why later abortions occur. This question can be explored by studying the responses of the 399 women who had abortions at 16 or more weeks' gestation and provided reasons for why they had not obtained an earlier abortion.

Of all the factors contributing to delay, one stood out: For 71 percent of all respondents who were having a later abortion, some time had passed before they had realized they were pregnant or had learned the actual gestation of their pregnancy (see Table 4). Thirty-one percent of respondents said this factor accounted for the longest segment of delay, and 20 percent said it was the only factor explaining why they did not get an abortion earlier (not shown).

Close to half of the respondents said that they had been delayed because they had found it difficult to make arrangements for the abortion, and 27 percent said this had contributed most to their delay. In fact, some 45 percent of women having abortions at 16 or more weeks' gestation had tried to get an abortion from another provider, compared with only five percent of those obtaining earlier abortions (not shown). Only five percent of women reported that they had not known they could get an abortion.

One-third of all women having a later abortion said that they had not had it earlier because they were afraid to tell their partner or their parents; 63 percent of minors who were having later abortions cited this reason for delay (not shown). Even though no participating facilities performing abortions at 16 or more weeks' gestation required parental consent or notification, some younger women may have come from states with such requirements or may have sought services from a provider with such requirements.[12] Fifteen percent of all women under age 18 having a later abortion said they had not had it earlier because of the time taken to notify or get consent from their parents (not shown). About one-quarter of women having a later abortion said their delay was attributable (at least in part) to the long time they had needed to make the abortion decision.

More detailed information on specific reasons for delay was requested for three of the reasons given; the responses are shown in Table 5. Nearly all (99 percent) of those who attributed their delay to problems in recognizing that they were pregnant provided more detailed responses. Half said that they had not felt any physical changes, such as morning sickness or breast tenderness, and half indicated that they had been hoping they were not pregnant and would get their period; these reasons each represented more than a third of all women having later abortions (not shown). One-third did not know they had missed a period because their periods were irregular, and almost as many (32 percent) believed they had had a period. Others had suspected or known they were pregnant, but had received inaccurate or misleading information: One in five said that a doctor had misjudged the duration of the pregnancy, and one in 10 claimed that a pregnancy test had indicated they were not pregnant.

Ninety-eight percent of those who had delayed because of problems in making arrangements gave more detailed information. Some 60 percent said they had needed time to raise money; such women represented 29 percent of all later abortion patients (not shown). About one-third said they had been delayed because the first provider or providers they had contacted did not offer the needed services. The study did not question the women as to the specific reasons these providers could not help them (e.g., the providers did not offer abortion services, did not provide them at the relevant gestation, cost too much or put other restrictions on whom they would serve). More than one-quarter said they could not find a provider nearby

and had had to arrange transportation to a provider in another area; 20 percent said they had been delayed because they had not known where to get an abortion.

Of the respondents delayed because of the time it took them to make the decision, 78 percent gave more detailed information. Of these, 78 percent volunteered that deciding whether to have an abortion had been difficult, 19 percent specifically mentioned religious or moral reasons and 11 percent said that their decision-making was lengthy because they had included their parents or their husband or partner.

Multivariate regression analyses using the social and demographic characteristics of respondents and the reasons they were having abortions were conducted to explore the reasons that might account for delay. As with the regressions reported above, all measures were expressed as dummy variables, and the data were unweighted. Only results with a minimum explained variance of 10 percent and regression coefficients with less than a five percent likelihood of occurring by chance are discussed here.

Independently of other sociodemographic characteristics and of reasons for having an abortion, respondents under age 18 were 39 percent more likely than those 18 or older to say they had delayed because they were afraid to tell their parents or their partner about the pregnancy; women covered by Medicaid were 17 percent less likely than those not covered to have delayed for this reason. Not surprisingly, respondents whose pregnancies had resulted from rape or incest were 35 percent more likely to have delayed because they were afraid to tell others than were those whose pregnancies had not. In addition, women who did not want others to know about their sexual activity or pregnancy and those who had relationship problems were more likely (13 percent and 11 percent, respectively) to have delayed because they were afraid to tell others. It is somewhat unexpected, however, that delay associated with the fear of telling others was 17 percent more common among young women whose parents wanted them to have an abortion; this finding may indicate that they delayed telling their parents because they themselves either were undecided or did not want to have an abortion but believed their parents would pressure them to do so. Delay associated with fear of telling others was 14 percent more common among those saying they were not mature enough to raise a child.

Those who reported that relationship problems or pressure from their husband or partner had contributed to their abortion decision were significantly more likely to have delayed obtaining an abortion because they hoped their relationship would change (11 percent and 10 percent more likely, respectively), while students were nine percent more likely to cite this factor. Similarly, women 30 or older or those seeking an abortion because of fetal health problems were more likely than younger women or those with no such problems to have attributed delay to late diagnosis of a fetal defect (nine percent and six percent, respectively), and women citing this reason were less likely to be having an abortion because they felt worried about the changes they would face in having a baby or because of relationship problems (six percent and three percent, respectively).

Discussion

The women who participated in this study obtained abortions for a myriad of reasons that do not fit into simple patterns. Primarily, these reasons show concern about the effects of having a child at that time; they do not indicate that these women want no more children at all. However, perhaps the most striking finding from this study is not that subgroups of women choosing abortion have a wide variety of reasons for doing so, but that most individual women have several reasons. Ninety-three percent of respondents cited more than one reason for having decided to have an abortion, and on average they reported almost four. On average, women having abortions at 16 or more weeks' gestation reported that more than two factors had contributed to their delay. The multiplicity of reasons for choosing to have an abortion suggests that even if one specific problem is solved, it will not be enough to change most women's decision. It is also striking that social and demographic variables explained such small proportions of the variance in the reasons for abortion, indicating that other unmeasured, perhaps idiosyncratic, factors played an important role. This suggests that actions directed toward helping women who are unintentionally pregnant avoid abortion would be most effective if tailored to the individual.

Five of the six factors most commonly cited as reasons for having decided to obtain an abortion—feeling concerned about the impact that having a child would have on their lives, being unable to afford a baby, not wanting to be a single parent or having relationship problems, not being ready for the responsibility of raising a child, and not being mature enough to raise a child—reflected the high proportion of women who had unintended pregnancies when they were young, unmarried or trying to delay childbearing.

The findings of this research indicate the difficulties many women face in delaying childbearing until they feel able to care for a baby and are in a relationship that they believe will last. Having a baby and raising a family can be an expensive proposition.[13] Many young, unmarried or poor women are not covered for the costs of even prenatal care and delivery.[14] Maintaining an adequate standard of living increasingly requires that women work, and to do so they must have an adequate education. Both aims can be threatened by an accidental pregnancy, not just among young, unmarried women, but among older, married women as well: About three-quarters of abortion patients aged 20–29 and more than two-thirds of those 30 and older said that having a child would interfere with various responsibilities, and 58–70 percent of those 20 and older said they could not afford a baby now.

The proportion of women who reported that they had decided to seek an abortion because they did not want others to know

Table 5. Among women who provided additional information relating to three specific reasons for having abortions at 16 or more weeks' gestation, percentage who gave various detailed reasons for delay

Reason	%
Woman failed to recognize pregnancy or misjudged gestation (N=277)	
She didn't feel physical changes	50
She hoped she was not pregnant	50
She had irregular periods	33
She thought she had had her period	32
Her MD underestimated gestation	20
She was practicing contraception	20
Her pregnancy test was negative	9
She didn't know where or how to get a pregnancy test	7
Woman found it hard to make arrangements for an abortion (N=185)	
She needed time to raise money	60
She tried to get an abortion from a different clinic or MD	32
She had to arrange transportation because there was no nearby provider	26
She didn't know where to get an abortion	20
She couldn't get an earlier appointment	16
She took time to notify her parents or get their consent	11
She needed child care or a Medicaid card	9
She needed time to obtain court permission	0
Woman took time to decide to have an abortion (N=74)	
She found having an abortion to be a difficult decision	78
She had religious or moral reasons for waiting	19
She talked with her parents/husband/partner	11

they were sexually active or had become pregnant is surprising; this finding may reflect the degree of ambivalence about sexuality in the United States, as well as the continued societal disapproval of young and unmarried women who become pregnant and have children. Yet, although adolescents and unmarried women were more likely to have cited this reason, two in 10 women 25 and older and some married women did so as well. Such responses may represent communication problems with partners or disagreements between spouses or partners over whether to have a child or what type of relationship to have. Many of these respondents were unmarried and had relationship problems; it is not clear, however, how many of these women were generally embarrassed to have become pregnant or feared displeasure (or even harm) from family, partners or employers. Especially for the youngest women, such concerns result in a delay in obtaining an abortion, which probably increases both the difficulty of getting an abortion and its cost, as well as the risk of complications. About one-third of those having an abortion at 16 or more weeks' gestation—and as many as 63 percent of those under age 18 having a later abortion—attributed the delay to their reluctance to reveal that they were pregnant.

Concern about the reactions of partners or parents is also reflected in the proportion saying that others' wishes figured in their decision. More than one in five women chose to have an abortion at least in part because their husband or partner wanted them to. Almost one-quarter of married women said they had been influenced by their husband's desire for them to have an abortion, and more than one-quarter of those under age 18 were influenced by their parents' wishes.

Women's reasons for having an abortion and for delay indicate the degree to which unexpected events can intervene: Seven percent of women in this study decided to have an abortion because of a personal health problem, and 13 percent did so because of possible fetal health problems. Six percent of women having a later abortion said they delayed because something in their lives had changed after they became pregnant—for example, a relationship had ended or a job had been lost.

In their reasons for deciding to terminate a pregnancy, women having a later abortion were more likely than others to cite factors over which they had little control, such as their own health or that of the fetus, or experience with rape or incest. Those who had delayed were somewhat more likely to be having an abortion because their parents wanted them to, and less likely to be doing so because their husband or partner wanted them to. Most of those who had delayed said the chief reason was that they had not recognized that they were pregnant early enough. Smaller proportions got faulty results from a pregnancy test or received inaccurate information from a physician. Although some might have avoided delay if they had had better knowledge of their bodies and the signs of pregnancy, delay may have been unavoidable for many, especially for those who delayed because they needed time to make the decision. Almost half of the women having later abortions, however, were delayed because of problems in obtaining abortion services. Many could not immediately afford the cost or had problems either finding or getting to a provider who would serve them.

Findings from this survey indicate that eliminating (or even substantially reducing the number of) abortions once women have become unintentionally pregnant will be very difficult, if not impossible, because the reasons women turn to abortion are so numerous and varied. The level of unintended pregnancy is in part a reflection of poor contraceptive practice among American women.[15] About half of all unintended pregnancies occur among women who become pregnant despite use of a contraceptive method, either because of inconsistent or incorrect use or because of method failure.[16] The number of unintended pregnancies and abortions could be lessened if these women were helped to practice contraception more effectively, either by changing from less-effective methods to those with lower failure rates or by improving their use of less-effective methods. Nonetheless, as is described elsewere in this issue (Henshaw and Silverman, p. 158), a number of abortion patients do not use any contraceptive method around the time of conception. While education and discussion focused on the real health risks and benefits of using and not using contraceptives could help such women avoid unintended pregnancy; some who do not use any method may only be helped if new methods of contraception are developed and made available.

One recent study shows that women's attitudes toward oral contraceptives and the condom are becoming more favorable, and that reliance on these methods has been increasing.[17] Nevertheless, these changes are slower and smaller than what is needed if levels of unintended pregnancy and abortion are to be substantially reduced. The research reported in this article indicates that preventing a large proportion of abortions among women with unintended pregnancies will be a difficult and complex task. Experience from other countries has shown that lower abortion rates can be achieved through improved contraceptive use, even with continued ready accessibility of abortion services.[18]

References

1. S. K. Henshaw, J. D. Forrest and J. Van Vort, "Abortion Services in the United States, 1984 and 1985," *Family Planning Perspectives*, 19:63, 1987.

2. S. K. Henshaw, "Characteristics of Women Having Abortions, 1982–1983," *Family Planning Perspectives*, 19:5, 1987.

4. S. K. Henshaw, 1987, op. cit. (see reference 2).

5. D. A. Grimes, "Second Trimester Abortions in the United States," *Family Planning Perspectives*, 16:260, 1984.

6. S. K. Henshaw et al., 1987, op. cit. (see reference 1).

7. Ibid.; and J. D. Forrest, "Changes in the Provision of Abortion After the First Trimester," paper presented at the National Abortion Federation's Fall Risk Management Seminar, Seattle, Sept. 1987.

8. D. A. Grimes, 1984, op. cit. (see reference 5); and S. K. Henshaw, 1987, op. cit. (see reference 2).

9. S. K. Henshaw and L. S. Wallisch, "The Medicaid Cutoff and Abortion Services for the Poor," *Family Planning Perspectives*, 16:170, 1984; P. Donovan, "Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions," *Family Planning Perspectives*, 15:259, 1983; and S. K. Henshaw and K. O'Reilly, "Characteristics of Abortion Patients in the United States, 1979 and 1980," *Family Planning Perspectives*, 15:5, 1983.

10. W. A. Burr and K. F. Schultz, "Delayed Abortion in an Area of Easy Accessibility," *Journal of the American Medical Association*, 244:44, 1980.

11. S. K. Henshaw et al., 1987, op. cit. (see reference 1).

12. A. Torres, J. D. Forrest and S. Eisman, "Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services," *Family Planning Perspectives*, 12:284, 1980; and M. T. Orr and J. D. Forrest, "The Availablility of Reproductive Health Services from U.S. Private Physicians," *Family Planning Perpectives*, 17:63, 1985.

13. AGI, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States*, New York, 1987; and H. W. Ory, J. D. Forrest and R. Lincoln, *Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods*, AGI, New York, 1983, p. 24.

14. S. Singh, R. B. Gold and A. Kenney, *The Financing of Maternity Care in the United States*, The Alan Guttmacher Institute, New York, 1987.

15. E. F. Jones et al., "Unintended Pregnancy, Contraceptive Practice and Family Planning Services in Developed Countries," *Family Planning Perspectives*, 20:53, 1988.

16. C. F. Westoff, "Contraceptive Paths Toward the Reduction of Unintended Pregnancy and Abortion," *Family Planning Perspectives*, 20:4, 1988.

17. J. D. Forrest and R. R. Fordyce, "U.S. Women's Contraceptive Attitudes and Practice: How Have They Changed in the 1980s?" *Family Planning Perspectives*, 20:112, 1988.

18. E. F. Jones et al., 1988, op. cit. (see reference 15).