

Louisiana House Bill 112—An Act To Define and Prohibit Abortions; To Provide for Exceptions; To Provide for Penalties; and To Provide for Related Matters—H.B. 112, 17th La. Leg., Reg. Sess. (1991).*

Louisiana House Bill 112 (hereinafter H.B. 112) prohibits abortion. It amends and reenacts Louisiana's abortion statute.¹ H.B. 112 "criminalizes abortions, imposes a minimum mandatory penalty of one year at hard labor and a minimum mandatory fine of \$10,000 on any person convicted of performing an abortion. The maximum penalty is a \$100,000 fine and ten years at hard labor."² By contrast, these criminal sanctions will not apply to the woman who authorizes a doctor to perform an abortion.³ In fact, the imposition of such penalties on a woman terminating her pregnancy is expressly prohibited.⁴

I. Legislative History

H.B. 112 was introduced in the Louisiana House of Representatives on April 15, 1991.⁵ The bill was passed in the Louisiana House of Representatives by a vote of seventy-two to thirty-

* EDITOR'S NOTE: The issue of abortion rights has once again been pushed to the forefront of the national agenda. For example, the Supreme Court will once again consider the constitutionality of *Roe v. Wade*. See *infra* note 58. In addition, Kate Michelman, President of the National Abortion Rights League announced that her organization is planning an aggressive grass-roots campaign in each of the fifty states to ensure that the legislatures preserve this right. Ms. Michelman noted that the women of Louisiana are in the most danger of losing their right to an abortion. Kate Michelman, Address at the National Press Club (Jan. 7, 1992).

¹ H.B. 112, 17th La. Leg., Reg. Sess. (1991) (amending LA. REV. STAT. ANN. § 14:87 (West Supp. 1991)). H.B. 112 does, however, permit abortions in narrowly prescribed circumstances. See *infra* text accompanying notes 19-28.

² Letter from then-Louisiana Governor Buddy Roemer to Honorable Michael S. Baer, III and Honorable Alfred Speer (June 18, 1991) (discussing the Governor's veto of H.B. 112) (*reprinted in* OFFICIAL JOURNAL OF THE HOUSE, *infra* note 5, at 55) (hereinafter GOVERNOR'S LETTER).

³ H.B. 112, § 2 (A)(2).

⁴ *Id.*

⁵ VOLUME ONE 1991 OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 17TH REGULAR SESSION OF THE LEGISLATURE, at 13 (Apr. 15, 1991) (hereinafter OFFICIAL JOURNAL OF THE HOUSE).

one on May 13, 1991.⁶ The bill was then sent to the Louisiana Senate and passed by a vote of twenty-nine to nine on June 4, 1991.⁷ Then-Governor Buddy Roemer received H.B. 112 for executive approval but vetoed the bill on June 18, 1991.⁸ The House of Representatives then overrode the veto by a vote of seventy-six to twenty-five.⁹ The Senate reconsidered the bill, and also voted to override the Governor's veto by a vote of twenty-nine to nine.¹⁰ On June 18, 1991, H.B. 112 became law without the Governor's signature, due to the legislative override.¹¹

II. *Legislative Intent*

The Louisiana legislature enacted H.B. 112 because of its firm belief that human life begins at conception.¹² The legislature declared that it is the state of Louisiana's policy objective to protect the unborn to the maximum extent possible.¹³ The legislature made clear its intention to protect the unborn from the moment of conception until birth.¹⁴ Louisiana further proclaimed that it is within the scope of the state's police powers to regulate or prohibit the performance of abortions.¹⁵ Furthermore, the legislature believed that the imposition of criminal penalties was an appropriate method for accomplishing this end.¹⁶

III. *Abortion Defined*

Prior to the enactment of H.B. 112, Louisiana defined abortion as:

⁶ OFFICIAL JOURNAL OF THE HOUSE, *supra* note 5, at 13 (May 13, 1991).

⁷ VOLUME ONE 1991 OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 17TH REGULAR SESSION OF THE LEGISLATURE, at 20 (June 4, 1991) (hereinafter OFFICIAL JOURNAL OF THE SENATE).

⁸ OFFICIAL JOURNAL OF THE HOUSE, *supra* note 5, at 55 (June 18, 1991); OFFICIAL JOURNAL OF THE SENATE, *supra* note 7, at 30 (June 18, 1991).

⁹ OFFICIAL JOURNAL OF THE HOUSE, *supra* note 5, at 56 (June 18, 1991).

¹⁰ OFFICIAL JOURNAL OF THE SENATE, *supra* note 7, at 31 (June 18, 1991).

¹¹ OFFICIAL JOURNAL OF THE HOUSE, *supra* note 5, at 56 (June 18, 1991); OFFICIAL JOURNAL OF THE SENATE, *supra* note 7, at 31 (June 18, 1991).

¹² H.B. 112, § 1. Conception is defined as "the contact of spermatozoa with the ovum." *Id.* § 2 (D)(4).

¹³ *Id.* § 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Performance of one of the following acts with the 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.¹⁷

In comparison, the language of H.B. 112 is far more direct and forceful than that used in the earlier definition. Louisiana now defines abortion as:

Performance of *any* of the following acts, with the specific intent of *terminating a pregnancy*:

- (1) *Administering or prescribing* any drug, potion, *medicine* or any other substance to a female; or
- (2) *Using* any instrument or *external force* whatsoever on a female.¹⁸ (emphasis added)

A. *Permissible Abortions*

The Louisiana abortion statute, as amended by H.B. 112, permits Louisiana physicians¹⁹ to perform abortions under certain, narrowly defined circumstances.²⁰ Physicians may perform abortions in Louisiana only if the pregnancy is terminated "to preserve the life or health of an unborn child,²¹ to remove from the woman a dead, unborn child, or for the express purpose of saving the life of the mother."²² A physician is further permitted to terminate a pregnancy resulting from incest;²³ provided, however, that law enforcement officials²⁴ are notified of the crime and the physician performs the abortion within thirteen weeks of the time of conception.²⁵ Additionally, an abortion is permissible under the statute when a physician terminates a pregnancy as a

¹⁷ LA. REV. STAT. ANN. § 14:87(A) (West 1986).

¹⁸ H.B. 112, § 2 (A).

¹⁹ Physician is defined as "any person licensed to practice medicine in this state." *Id.* § 2 (D)(4).

²⁰ *Id.* § 2 (B).

²¹ Unborn child is defined as "the unborn offspring of human beings from the moment of conception until birth." *Id.* § 2 (D)(4).

²² *Id.* § 2 (B).

²³ LA. REV. STAT. ANN. § 14:87 (West 1986).

²⁴ Law enforcement official or officer is defined as "any peace officer or agency empowered to enforce the law in criminal matters within his or its respective constable, local police officer, and district attorney." H.B. 112, § 2 (D)(4).

²⁵ *Id.* § 2.

result of a rape,²⁶ provided that the following three requirements are met before the physician terminates the pregnancy:²⁷

- (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 forcibly restrained or unconscious and incapable of obtaining the exam. If the victim is incapacitated, then a report shall be made within seven 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 forcibly restrained or unconscious and 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 thirteen weeks of conception.²⁸

B. *Examining Physician*

The statute further requires every physician who examines a rape victim within five days of the rape to immediately provide written verification of the examination, upon the victim's written request or the written request of the physician who is to terminate the pregnancy.²⁹

C. *Physician Performing the Abortion*

H.B. 112 requires the physician terminating the pregnancy to obtain from the incest or rape victim written proof that she has taken the required physical examination.³⁰ The physician performing the abortion is also required to obtain written verification from law enforcement officials that signifies the victim has reported the rape within the mandatory time period.³¹

²⁶ Rape is defined pursuant to LA REV. STAT ANN. §§ 14:42, :42.1, :43 (West 1986 & Supp. 1991).

²⁷ H.B. 112, § 2 (B)(3)(a)-(c).

²⁸ *Id.*

²⁹ *Id.* § 2 (B)(2).

³⁰ *Id.* § 2 (B)(4).

³¹ *Id.*

D. *Law Enforcement Officials*

H.B. 112 requires all law enforcement officials receiving timely reports from incest or rape victims to immediately provide written verification of such reports to the physician planning to perform the abortion or the victim herself, upon written request.³²

E. *Severability Provisions*

In addition, House Bill 112 contains a severability provision. The provision states that in the event that any item, provision or application of the act is held invalid, such invalidity shall not serve to nullify the other items, provisions or applications of the act.³³

IV. *The Governor's Veto*

Governor Roemer, in his veto message of June 18, 1991, clearly enunciated his reasons for rejecting the bill.³⁴ Roemer described H.B. 112 as a piece of legislation that "dishonors women, shows great mistrust of doctors and their professional judgment, and unduly burdens the traumatized victims of rape."³⁵ Moreover, he generally criticized the bill as being too restrictive and harsh.³⁶ The Governor additionally disparaged the bill for permitting self-abortion while prohibiting professional, safe, medical abortions.³⁷

Despite strong opposition to the statute, Governor Roemer endorsed the legislature's goal of restricting abortions.³⁸ He emphasized, however, that the state must draw meaningful exceptions to the abortion proscription so as to protect the rights and lives of the women involved.³⁹ The Governor then proposed three amendments to the bill, which, in his opinion, would have provided meaningful exceptions to the H.B. 112's general re-

³² *Id.* § 2 (B)(3).

³³ *Id.* § 3.

³⁴ GOVERNOR'S LETTER, *supra* note 2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

strictions on abortions.⁴⁰ Governor Roemer's proposed amendments, as outlined below, were not considered by the Louisiana House and were expressly rejected by the Senate.⁴¹

A. *Proposed Amendment I: Protection for Rape Victim*

The Governor asserted that H.B. 112 fails to provide rape victims with adequate protection.⁴² He proposed an amendment which would change the bill's required reporting periods for rape.⁴³ Governor Roemer, emphasizing that women need more time in order to make a meaningful choice in the traumatic atmosphere surrounding a rape, suggested that the bill's reporting periods for rape provide that the women have thirty days after the rape to obtain the medical examination required by law and forty-five days to report the crime to law enforcement.⁴⁴ These proposed reporting periods, if accepted by the legislature, would have replaced the legislature's requirements of obtaining a medical exam within five days of the rape, and reporting the crime to law enforcement within seven days of its occurrence.⁴⁵

The Governor opined that the legislature's reporting requirements are unrealistic and unworkable in many cases.⁴⁶ He also stressed that requiring a rape victim to seek medical treatment and report to law enforcement officials all within seven days of the rape is an onerous burden.⁴⁷ Governor Roemer recog-

⁴⁰ *Id.*

⁴¹ *Id.* The Governor recalled:

As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Id.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* The Governor stated, "[t]he lives and rights of women in Louisiana de-

nized that prompt reporting may be optimal, but contended that the notion of prompt reporting ignores reality, since many women do not go to a doctor immediately after a rape.⁴⁸ The Governor explained that "rape is the most underreported violent crime in our nation, with less than twenty percent of all rapes ever being reported to law enforcement."⁴⁹

The bill's proponents asserted that expanding the permissible reporting period for rape or incest would invite women to lie and result in physicians conspiring with women seeking abortions.⁵⁰ Governor Roemer countered this argument by stating that the proponents failed to recognize that rape is a pervasive, terrible reality in this country.⁵¹ The Governor added that the bill's proponents ignored the basic trustworthiness and dignity of women in addition to the professional ethics and honor of the physicians with whom the women consult.⁵²

B. *Proposed Amendment II: Clarifying the Bill's Language*

In his veto message, the Governor criticized the language of the bill.⁵³ Governor Roemer stated that the bill's terminology and definitions are so vague that physicians will refuse to perform even permissible abortions under the statute because they will be unwilling to risk their professional careers and the possible imposition of criminal penalties.⁵⁴ The proposed amendment, which was requested by many of the state's gynecologists and obstetricians, would have set forth a clear definition of pregnancy and expressly permitted certain accepted medical procedures such as insertion of intrauterine devices and the

mand balanced and thoughtful consideration. . . . Under this bill, ignorance of the law would force a woman to bear and give birth to a child conceived in brutality if she is unable to meet this artificial and narrow seven day test." *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The Governor asserted, "[m]uch of this refusal to report stems from fear, humiliation and a reluctance to go through a public trial." *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The Governor contended, "[t]hey ignore the fact that rape is a terrible, pervasive reality in this country with the Los Angeles Commission on Assaults Against Women reporting that approximately one in three women in America will be raped." *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

termination of tubal pregnancies.⁵⁵

C. *Proposed Amendment III: Exception for Severe Birth Defects*

Governor Roemer also proposed an exception to the bill's abortion proscription in cases where a fetus is profoundly deformed.⁵⁶ He stressed that the decision to carry a profoundly deformed fetus to full term or to terminate the pregnancy when the deformity of the fetus is incompatible with life itself, should be determined by the woman and her family, not the legislature.⁵⁷

V. *Conclusion*

While the legislature may have a legitimate compelling interest in protecting the life of the unborn, the concerns Governor Roemer raised cannot be ignored. Clearly, H.B. 112 is vulnerable on several grounds.

First, H.B. 112 is a direct challenge to the Supreme Court's holding in *Roe v. Wade*.⁵⁸ In *Roe*, the Court ruled that during the first trimester, a woman is free to terminate her pregnancy "without regulation by the [s]tate."⁵⁹ The Court also decided that although the state did have a legitimate interest in regulating abortion procedures, such interest did not trump that of the woman until the fetus became "viable," which typically occurs sometime in the third trimester.⁶⁰ In H.B. 112, however, the Louisiana Legislature decided that the state's interest is always compelling and that a woman does not have the unfettered discretion to terminate her pregnancy.

Second, the Louisiana Legislature definitively stated that life begins at conception.⁶¹ The *Roe* court, after surveying a vast body of literature, declined the invitation to answer this question.⁶²

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 410 U.S. 113 (1973). *But see* Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3rd Cir. 1991) (stating that *Roe* is "no longer the law of the land"); *cert. granted in part*, 60 U.S.L.W. 3388 (U.S. Jan. 21, 1992) (No. 91-744); *cert. granted in part*, 60 U.S.L.W. 3446 (U.S. Jan. 21, 1992) (No. 91-902)).

⁵⁹ 410 U.S. at 163.

⁶⁰ *Id.*

⁶¹ *See supra* text accompanying notes 12-14.

⁶² *Roe*, 410 U.S. at 161.

H.B. 112 will undoubtedly be challenged on substantive due process grounds.⁶³ The United States Supreme Court recognizes the right of privacy as a constitutionally protected fundamental liberty right.⁶⁴ Accordingly, when an opponent challenges the constitutional validity of the bill, the Court will examine it with strict scrutiny.⁶⁵ The Court could likely find that H.B. 112 is unconstitutional, reasoning that it is unduly burdensome on fundamental privacy rights and that the state could have achieved its desired end by way of less intrusive means.⁶⁶

The bill limits the “penumbral right to privacy”⁶⁷ in at least three areas. First, it prevents women from making abortion decisions without governmental intrusions.⁶⁸ Also, it denies pregnant rape and incest victims the option of avoiding disclosure of this highly personal information.⁶⁹ Finally, H.B. 112 limits the rights of obstetricians and gynecologists to fully engage in their chosen occupations since the Act’s vague language will dissuade them from performing abortions that do not fall neatly into one to the categories of permissible abortions enunciated in the statute.⁷⁰

⁶³ The Due Process Clause of the fourteenth amendment guarantees that a state will not deny any person life, liberty, or property absent due process of law. U.S. CONST. amend. XIV, § 1.

⁶⁴ See, e.g. *Boyd v. United States*, 116 U.S. 616 (1886); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

⁶⁵ See *Skinner*, 316 U.S. at 535 (determining strict scrutiny is applied to a statute limiting one’s right of procreation since procreation is a fundamental right).

⁶⁶ See *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating a state statute prohibiting abortion since statute overly burdened women’s right of privacy); See generally John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State*, 51 LA. L. REV. 685 (1991).

⁶⁷ E.g., *Griswold*, 381 U.S. at 479 (holding right of married persons to use contraceptives is a privacy interest guaranteed by a zone or “penumbra” of privacy protections inherent in the Bill of Rights).

⁶⁸ H.B. 112. *Accord Griswold*, 381 U.S. at 479; *Roe*, 410 U.S. at 113; *Webster*, 492 U.S. at 490; *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986).

⁶⁹ H.B. 112. See *Thornburgh*, 476 U.S. at 747 (invalidating state requirement that a physician performing a second or third trimester abortion report detailed information about the women involved to the state).

⁷⁰ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (determining “liberty” guarantee of the fourteenth amendment gave teachers the right to teach).

Aside from constitutional objections, one can fault the legislature for drawing arbitrary lines in the drafting of H.B. 112. The bill designates thirteen weeks from conception as the cut-off point for permissible abortions.⁷¹ The legislature stated that life begins at the moment of conception, but then drew a line stating that in certain instances an abortion performed within thirteen weeks of conception is acceptable. Louisiana, however, failed to justify why an abortion performed within thirteen weeks and one day would be unlawful.⁷² The statute permits abortions when a pregnancy is the product of incest or rape, yet, by criminalizing other abortions, arguably draws another arbitrary line, implying that a fetus which is conceived through violence is less deserving of the right to enjoy the protection of the legislature than one that was not the product of a crime.⁷³

Although some may view Louisiana's desire to prohibit abortions as a salutary goal, H.B. 112 as enacted, raises a plethora of concerns which may ultimately lead to the demise of this legislation. Alternately, when the law is challenged, the bill's severability provision may be sufficient to enable H.B. 112 to remain law after undergoing only slight modifications. Whether this controversial legislation can withstand opposition and ultimately pass constitutional muster remains uncertain.

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⁷¹ H.B. 112. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). The Court stated that "[t]he rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases . . . making constitutional law in this area a virtual Procrustean bed." *Id.* at 517.

⁷² H.B. 112.

⁷³ *Id.*