ATTORNEY GENERAL OPINION NO. 93-1

To: Mr. Richard H. Schultz, Administrator
Division of Health
Idaho Department of Health and Welfare
450 W. State Street
STATEHOUSE MAIL
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. As the United States Supreme Court has now rejected the trimester approach of Roe v. Wade, 410 U.S. 113 (1973), are the provisions of Idaho Code § 18-608 (which track the Roe v. Wade trimester approach in determining which abortions are permitted in Idaho) valid and enforceable?

2. What are the Department of Health and Welfare's responsibilities under the requirements of Idaho Code § 18-609?

3. Does the parental notification provision contained in Idaho Code § 18-609(6) meet federal constitutional requirements?

4. Does Idaho Code § 18-609 contemplate criminal sanctions if its requirements are violated or does it merely provide civil immunity to medical practitioners who comply with its terms?

5. What agency or entity has the enforcement responsibility for violations of Idaho Code, title 18, chapter 6?

6. Do Idaho's abortion regulations violate a state constitutional right to privacy?

CONCLUSION

1. The United States Supreme Court's rejection of Roe v. Wade's trimester approach to abortion has little bearing on the constitutionality of Idaho Code § 18-608. Most of this section is constitutional. However, regardless of whether a trimester or viability approach is used, the requirement of Idaho Code § 18-608(2), that second-trimester abortions be performed in a hospital, continues to be unconstitutional under established law.

2. Under Idaho Code § 18-609, the Department of Health and Welfare must publish and make available to abortion providers printed materials containing information about fetal development, abortion procedures and risks, and services available to assist a woman through pregnancy, at childbirth and while the child is dependent. The department must also annually compile and report to the public the number of abortions performed in which materials containing the information described above were not provided to the pregnant patient.

3. While precedent on this point is not entirely clear, the parental notification provision contained in Idaho Code § 18-609(6) would survive a facial challenge but is potentially vulnerable to a constitutional challenge under certain factual circumstances as it does not contain any bypass procedure, judicial or otherwise.

4. It is not clear whether Idaho Code § 18-609 carries with it criminal penalties. Reasonable arguments can be raised on both sides of this issue. It is the opinion of this office, however, that the argument against criminal penalties is more persuasive.

5. The county prosecutor is responsible for enforcing the criminal provisions of Idaho Code, title 18, chapter 6.

6. While some state supreme courts have found a right of privacy in their state constitutions broader than that contained in the United States Constitution, there is nothing in Idaho history to indicate the Idaho Supreme Court would do likewise.

ANALYSIS

Question No. 1:

You have asked whether the United States Supreme Court's recent rejection of Roe v. Wade's trimester approach to abortion issues affects the constitutionality of Idaho Code § 18-608. Our opinion is that it does not. However, regardless of whether a trimester or viability approach is used, Idaho Code § 18-608(2), which requires that second-trimester abortions be performed in a hospital, is unconstitutional.

In Roe v. Wade, the Supreme Court held that a woman has a fundamental right to terminate a pregnancy and established what has been characterized as a "trimester approach" to govern abortion regulations. Almost no regulation was permitted during the first trimester of pregnancy. Regulations designed to protect the woman's health, but not to further the state's interest in potential life, were permitted during the second trimester.

Finally, during the third trimester, when the fetus was viable, prohibitions were permitted so long as they did not jeopardize the life or health of the mother. Roe at 163-66.

Last term, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), the Court, in its 5 to 4 ruling, reaffirmed a woman's constitutional right to have an abortion before the fetus reaches viability. However, the Court rejected Roe's trimester construct, reasoning that its "rigid prohibition on all pre-viability regulations aimed at the protection of fetal life . . . undervalue[d] the State's interest in potential life." Casey at 2818. The Court adopted a new "undue burden" test. Under this test, a state may regulate abortion to further its interest in potential life or to foster the health of the mother so long as the "purpose or effect" of the regulation is not to place "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 2821. Once the fetus is viable, the state may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 2821.

Idaho Code § 18-608 outlines when abortions are permitted in Idaho. Because this statute was authored prior to the Casey opinion, it is largely based upon the trimester construct. Thus, Idaho Code § 18-608(1) addresses first-trimester abortions, § 18-608(2) second-trimester abortions and § 18-608(3) third-trimester abortions. The Casey opinion, with its new "undue burden" test, does not render this scheme unconstitutional. Casey's "undue burden" test allows even more state regulation in the first two trimesters than did Roe. Therefore, regulations contained in Idaho Code § 18-608 which were constitutional under Roe remain so today, regardless of any references to "trimesters" in the Idaho statute. Moreover, Idaho Code § 18-604 defines the second and third "trimesters" in terms of "viability" rather than weeks of pregnancy. The trimester framework of Idaho Code § 18-608 can thus be harmonized with Casey's viability approach.[1]

It must be noted, however, that regardless of whether a trimester or viability test is used, Idaho Code § 18-608(2) does raise constitutional concerns. It states that an abortion is not unlawful:

> When performed upon a woman who is in the second trimester of pregnancy, the same is performed in a hospital and is, in the judgment of the attending physician, in the best medical interest of such pregnant

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[1] Not only does Idaho Code § 18-608 track Roe's trimester framework, it also closely tracks Roe's reasoning that, in the first trimester, it is the physician, in consultation with the pregnant woman, who determines whether an abortion should be performed. *See* Roe, 410 U.S. at 163; Idaho Code § 18-608. Since Roe, the Supreme Court has stated that it is the woman's liberty interest in retaining "the ultimate control over her destiny and her body" which is constitutionally protected. Casey, 112 S. Ct. at 2816. While the focus of Idaho Code § 18-608 is on the physician's judgment, this focus was intended to parallel the holding of Roe. It is, therefore, our opinion that a reviewing court would not interpret Idaho Code § 18-608 so as to diminish the woman's right to abortion that was established in Roe.

> woman, considering those factors enumerated in subsection (1) of this section and such other factors as the physician deems pertinent.

(Emphasis added.)

As this office noted in a 1983 guideline, the Supreme Court, in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (Akron I), concluded that medical science had advanced so that some second-trimester abortions can be safely performed without hospitalization. Op. Idaho Att'y Gen. 218 (1983). Therefore, requiring hospitalization for all second-trimester abortions is unreasonable and unconstitutional:

> [A]t least during the early weeks of the second trimester . . . D & E abortions may be performed at an outpatient clinic as in a full-service hospital. We conclude, therefore, that "present medical knowledge," . . . convincingly undercuts Akron's justification for requiring that all second-trimester abortions be performed in a hospital . . . . [T]he lines drawn in a state regulation must be reasonable, and this cannot be said of [the second-trimester hospitalization requirement].

Akron I at 437-38. Idaho Code § 18-608(2) conflicts with this precedent and is, therefore, unconstitutional.

In sum, the Supreme Court's rejection of Roe's trimester framework in the Casey opinion does not affect the constitutionality of Idaho Code § 18-608. However, the hospitalization requirement of Idaho Code § 18-608(2) continues to be unconstitutional just as it was prior to the Casey decision.[2]

Question No. 2:

Your second question concerns the Department of Health and Welfare's responsibilities under Idaho Code § 18-609, which contains Idaho's informed consent provisions. It states in pertinent part:

> (2) In order to provide assistance in assuring that the consent to an abortion is truly informed consent, the director of the department of health and welfare shall publish, after consultation with interested parties, easily comprehended printed material to be made available at the expense

[2] The language of Idaho Code § 18-608(3)--which prohibits third-trimester abortions unless "undertaken for preservation of the life of a pregnant patient"--may also raise constitutional difficulties. In Casey, the Court stated that post-viability abortions may be proscribed unless necessary "for the preservation of the life or health of the mother." Casey at 2821 (emphasis added). If a court were to read Idaho Code § 18-608(3) as not containing an exception for the preservation of the pregnant woman's health, the statute would, therefore, be unduly restrictive.

of the physician, hospital or other facility providing the abortion, and which shall contain the following:

(a) Descriptions of the services available to assist a woman through a pregnancy, at childbirth and while the child is dependent, including adoption services, a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid available;

(b) Descriptions of the physical characteristics of a normal fetus, described at two (2) week intervals, beginning with the fourth week and ending with the twenty-fourth week of development, accompanied by scientifically verified photographs of a fetus during such stages of development. The description shall include information about physiological and anatomical characteristics, brain and heart function, and the presence of external members and internal organs during the applicable stages of development; and

(c) Descriptions of the abortion procedures used in current medical practices at the various stages of growth of the fetus and any reasonable foreseeable complications and risks to the mother, including those related to subsequent child bearing.

(3) No abortion shall be performed unless, prior to the abortion, the attending physician or the attending physician's agent (i) confirms or verifies a positive pregnancy test and informs the pregnant patient of a positive pregnancy test, and (ii) certifies in writing that the materials provided by the director of the department of health and welfare have been provided to the pregnant patient, if reasonably possible, at least twenty-four (24) hours before the performance of the abortion. If the materials are not available from the director of the department of health and welfare, no certification shall be required. The attending physician, or the attending physician's agent, shall provide any other information required under this act. In addition to providing the material, the attending physician may provide the pregnant patient with such other information which in the attending physician's judgment is relevant to the pregnant patient's decision as to whether to have the abortion or carry the pregnancy to term.

(4) If the attending physician reasonably determines that due to circumstances peculiar to a specific pregnant patient, disclosure of the material is likely to cause a severe and long lasting detrimental effect on the health of such pregnant patient, disclosure of the materials shall not be

> required. Within thirty (30) days after performing any abortion without certification and delivery of the materials, the attending physician, or the attending physician's agent, shall cause to be delivered to the director of the department of health and welfare, a report signed by the attending physician, preserving the patient's anonymity, which explains the specific circumstances that excused compliance with the duty to deliver the materials. The director of the department of health and welfare shall compile the information annually and report to the public the total number of abortions performed in the state where delivery of the materials was excused; provided that any information so reported shall not identify any physician or patient in any manner which would reveal their identities.

Thus, as set out in Idaho Code § 18-609, under Idaho's informed consent provisions, it is the responsibility of the Department of Health and Welfare to publish and make available to abortion providers materials containing: (1) information concerning services available to assist a woman through pregnancy, at childbirth and while her child is dependent; (2) descriptions and scientifically verified photographs of fetal development in two-week intervals; and (3) information concerning abortion procedures and risks. In addition, the department must compile and annually report the number of abortions performed in Idaho where the above-described materials were not provided to the pregnant patient. Any information so reported must not identify either physicians or patients.

This office has previously discussed the constitutionality of Idaho's informed consent provisions. In 1983, the Supreme Court struck down an informed consent provision similar to that contained in Idaho Code § 18-609 (*see* Akron I) and this office issued a legal guideline questioning the constitutionality of Idaho's statute. Op. Idaho Att'y Gen. 218 (1983). Later, in 1991, in a letter to Representative Chamberlain, we again questioned the constitutionality of Idaho's informed consent provision as well as Idaho's 24-hour waiting period, relying both upon Akron I and Thornburgh v. American College of Obst. and Gyn., 476 U.S. 747 (1986).

The legal landscape has changed significantly since Akron I and Thornburgh. The Casey decision, discussed above, not only adopted a new "undue burden" test, it also upheld an informed consent provision and a 24-hour waiting requirement enacted by the Pennsylvania Legislature. In upholding these two provisions, the Court stated:

> As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to

> fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion.
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> . . . .
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> Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." 462 U.S. at 450, 103 S. Ct. at 2503. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.

Casey at 2824-25.

Given this recent Supreme Court holding, our office now believes that Idaho's informed consent provision contained in Idaho Code § 18-609 does not violate the United States Constitution. The information provided to the pregnant woman in Idaho is more comprehensive and detailed than that contained in the Pennsylvania statute at issue in Casey. For example, unlike the Pennsylvania statute, the information contained in Idaho's statute includes scientifically verified photographs of fetal development. Moreover, the Idaho statute requires that the woman be provided with details of fetal development from the fourth to the twenty-fourth week of gestation, as well as a description of the abortion procedures used at the various stages of pregnancy and the reasonably foreseeable risks. In contrast, the Pennsylvania statute merely requires that the woman be informed of the probable gestational age of the fetus at the time of the abortion, the nature and risks of the proposed procedure, and the availability of materials which describe the unborn child. Casey, 112 S. Ct. at 2822, 2833, 2834. Despite these differences between the Idaho and Pennsylvania statutes, it is our opinion that, under the Casey analysis, Idaho's statute does not create an "undue burden" on the woman's constitutional right to terminate her pregnancy. Although the information provided to the

woman is more detailed than that at issue in Casey, it is accurate and furthers the state's legitimate interest in potential life.[3]

As to the 24-hour waiting period, this office believes it is also valid. Certainly, in a state as rural as Idaho, a waiting period may potentially be burdensome upon some women. However, in Hodgson v. Minnesota, 110 S. Ct. 2926 (1990), the Supreme Court upheld a 48-hour waiting period requirement following parental notification. Moreover, Idaho's waiting period need only be complied with if "reasonably possible." Idaho Code § 18-609(3). Thus, it is not an inflexible requirement. The Casey and Hodgson holdings, coupled with the flexibility built into Idaho's waiting period, indicate that the waiting period is constitutional.[4]

In conclusion, under Idaho Code § 18-609, the Department of Health and Welfare has a number of responsibilities involving the publication and provision of materials addressing fetal development, assistance to pregnant women, and abortion procedures and risks. The department must also annually report the number of cases in which these materials are not provided. These responsibilities appear to comport with constitutional strictures and, under Casey, would probably withstand a legal challenge.

Question No. 3:

Your third question concerns Idaho Code § 18-609(6), the parental notification provision. Your concern is whether this provision, which contains no judicial bypass procedure, is constitutional. The precedent on this point is murky and the outcome is unclear.

Idaho Code § 18-609(6) states:

> In addition to the requirements of subsection (1) of this section, if the pregnant patient is unmarried and under eighteen (18) years of age or

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[3] It is important to note that, while Casey allows a state to provide a woman with information which "might cause the woman to seek childbirth over abortion," such information must be "truthful and not misleading." Casey at 2821, 2823. Idaho Code § 18-609 expressly states that the photographs provided to the mother be "scientifically verified." Of course, under Casey, it is essential that all other information provided also be accurate.

[4] The Fifth Circuit recently addressed an argument that a 24-hour waiting period constitutes an undue burden in rural states. Rejecting this argument, the court stated:

> In their post-*Casey* supplemental brief, plaintiffs reduce their argument to the aphorism "Mississippi ain't Pennsylvania," stating, "The record in this case proves what all know empirically: Mississippi ain't Pennsylvania." This speaks volumes about the invalidity of their challenge to the Mississippi Act on its face; in fact, no more really need be said.

Barnes v. Moore, 970 F.2d 12, 15, n.5 (5th Cir. 1992), *cert. denied*, ____ U.S. ____ (1992).

> unemancipated, the physician shall provide notice, if possible, of the pending abortion to the parents or legal guardian of the pregnant patient at least twenty-four (24) hours prior to the performance of the abortion.

Thus, in Idaho, if a pregnant patient is unmarried and under 18, her parents must be notified "if possible" of the pending abortion. Idaho's statute does not define the term "if possible" and contains no bypass procedure, judicial or otherwise, to this requirement. Consequently, it is uncertain when notice to the parents may be excused.

In H.L. v. Matheson, 450 U.S. 398 (1981), the Supreme Court upheld an almost identical statute. In that case, the Court reviewed a Utah statute which stated that the doctor should:

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

While the statute did withstand a facial challenge, the challenger in Matheson failed to offer any evidence that she was a mature minor; that is, a minor with adequate capacity to give a valid and informed consent. *Id.* at 406. The Court stressed this factor and concluded that, as applied to immature and dependent minors, the Utah statute served important state interests. *Id.* at 413. The Court also held that, as the statute might in the future be construed by the state judiciary to excuse mature minors, the Supreme Court would not invalidate the statute based on a facial challenge alone. *Id.* at 407. "We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors." *Id.* at 406.

Matheson indicates that Idaho's parental notification provision could withstand a facial challenge. Whether the statute would survive a challenge if a minor could prove that she has adequate capacity to give a valid and informed consent could depend on the Court construing the "if possible" language so as to exempt demonstrably mature minors.

Since Matheson, the Supreme Court has twice more examined parental notification statutes. Unfortunately, neither opinion clarifies the issue. In Hodgson v. Minnesota, 110 S. Ct. 2926 (1990), the Court examined a two-parent notification requirement without a judicial bypass. The Court concluded that a two-parent notification provision without a bypass procedure was unconstitutional. While this opinion might be interpreted as governing the issue at hand, the Court made a further point of distinguishing statutes, such as that in Hodgson, which require notification to "two parents," as opposed to statutes like Idaho's which merely refer to "parents":

> Although the Massachusetts statute reviewed in *Bellotti v. Baird*, 428 U.S. 132, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976) (Bellotti I), and Bellotti II required the consent of both parents, and the Utah statute reviewed in *H.L. v. Matheson*, 450 U.S. 398, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981), required notice to "the parents," none of the opinions in any of those cases focused on the possible significance of making the consent or the notice requirement applicable to both parents instead of just one.

Hodgson at 2938. The Court, after highlighting this fine distinction between "two parents" and "parents," did not conclude what the legal consequences would be.

To confound matters, in another opinion issued that same day, Justice Kennedy stated that the Court had "not decided whether parental notice statutes must contain [bypass] procedures" and that the Court would "leave the question open . . . ." Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2979 (1990) (Akron II). Adding to the confusion, in his concurring opinion, Justice Stevens opined that the Court had "squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional" and "although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests." Akron II at 2994. (Stevens, J., concurring.)

Thus, the United States Supreme Court precedent on parental notification and bypass procedures is confusing. Nevertheless, it appears that a number of the Justices believe there must be some way to excuse minors from notifying their parents if the minor has adequate capacity to give a valid and informed consent or if notification would not be in her best interest. Certainly, Matheson strongly hints at this position and at least Justice Stevens thinks this principle has been settled. Whether the mechanism to avoid parental notice must be a judicial bypass procedure is uncertain.

As noted, Idaho Code § 18-609(6) contains no express bypass provision, judicial or otherwise, nor does it provide any other formal mechanism for exempting mature minors from its terms. However, the statute does require parental notification only "if possible," thus seemingly providing a safety valve in the notification requirement. Problems with Idaho's statute would thus arise only in the unlikely event that the doctor and minor disagree as to whether notification is, in fact, "possible." In that situation, the statute does not protect the mature minor's decision-making ability by affording that minor the protection of a formal bypass procedure. Under these circumstances, a court reviewing Idaho Code § 18-609(6) might well require some bypass mechanism to ensure that the mature minor can be excused from the statute's terms. While Idaho Code § 18-609(6) could perhaps survive a pure facial challenge, if a challenger demonstrated she had adequate capacity to give a valid or informed consent or that notification was not in

her best interests, it is our opinion that the statute would be vulnerable to attack unless a court were to find that the safety valve language--"if possible"--is flexible enough to provide an outlet for such a challenge.

Question No. 4:

You have also asked whether the informed consent provisions in Idaho Code § 18-609 carry criminal penalties. Responding to your question requires interpretation of language found at Idaho Code § 18-609(3):

> No abortion shall be performed unless, prior to the abortion, the attending physician or the attending physician's agent (i) confirms or verifies a positive pregnancy test and informs the pregnant patient of a positive pregnancy test, and (ii) certifies in writing that the materials provided by the director of the Department of Health and Welfare have been provided to the pregnant patient, if reasonably possible, at least twenty four (24) hours before the performance of the abortion.

(Emphasis added.)

The fundamental rule of statutory construction is to give force and effect to legislative intent and purpose. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991); Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990). If the language of a statute is not ambiguous, the language must be given its plain and ordinary reading. Sherwood v. Carter, *supra*; Bunt v. City of Garden City, 118 Idaho 427, 797 P.2d 135 (1990). The language "no abortion shall be performed unless," by its plain and ordinary meaning, prohibits abortions that do not comply with subsection (3). However, it is not clear what legal sanction can be imposed against a physician who performs an abortion in violation of subsection (3). Although written in mandatory terms, the statute contains no express criminal sanction. Because the legislative meaning of the introductory language in subsection (3) is ambiguous, a court would apply rules of statutory construction to ascertain the legislature's intent and purpose. In particular, a court would examine the legislative history of the statute (Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983)), and would apply the principle that related or similar statutes be construed in a consistent fashion ("*in pari materia*"). George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

A. Legislative History: The 1973 Legislation

In 1973, the Idaho legislature enacted Senate Bill 1184, as amended, which is codified as Idaho Code §§ 18-604 to 18-615.[5] Therefore, Idaho Code § 18-609, as originally codified, was part of a comprehensive act regulating abortions consistent with the Supreme Court's decision in Roe v. Wade. Applying the principle of "*in pari materia*," it is necessary to construe Idaho Code § 18-609 in relation to the other sections of Senate Bill 1184.

Senate Bill 1184, as adopted and printed in chapter 197 of the 1973 Idaho Session Laws, is divided into 16 sections. The first section contains a statement of legislative purpose; the second repeals Idaho Code §§ 18-601 and 18-602. Section 3 defines key words, and sections 4, 5 and 6 define criminal conduct and applicable criminal penalties. Section 4 provides in pertinent part:

> Every person who, except as permitted by this act, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then pregnant woman with the intent thereby to produce an abortion shall be guilty of a felony . . . .

(Emphasis added.) Section 5 provides in pertinent part:

> Except as provided by this act:
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> (1) every person who, as an accomplice or an accessory to any violation of Section 4 of this act, induces or knowingly aids in the production or performance of an abortion; and,
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> (2) every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony.

(Emphasis added.)

For the purpose of this opinion, the key language in sections 4 and 5 is the phrase "except as permitted by this act." This language indicates that, elsewhere in the same "act" (Senate Bill 1184), the legislature spells out the conditions under which abortions may be performed without criminal penalties. The authority to perform legal abortions is

[5] Senate Bill 1184 repealed existing code sections prohibiting abortions contained in Idaho Code §§ 18-601 and 18-602 that would not survive constitutional challenge based upon the 1972 United States Supreme Court decision in Roe v. Wade.

found in logical sequence in section 7 (codified as Idaho Code § 18-608), which immediately follows the criminal penalty provisions in sections 4, 5 and 6. Section 7 permits abortions by physicians under certain conditions within the trimester framework contained in Roe v. Wade.

Section 8 of Senate Bill 1184 provides protection from civil liability for the physician and hospital based upon the "absence of actual negligence" and the dual consent of the patient and her husband (absent abandonment). The introductory language provides:

> Any physician may perform an abortion not prohibited by this act, and any hospital may provide facilities for such procedures without, in the absence of actual negligence, incurring civil liability therefor to any person, ...

(Emphasis added.)

The phrase "an abortion not prohibited by this act" obviously refers back to section 7 which describes when an abortion is permitted. The focus and purpose of section 8 was embodied in the section heading: "[P]hysicians and hospitals not to incur civil liability-consent to abortion-notice."

Section 8 was unique in requiring consent not only by the physician's patient but also by her husband. Normally, a physician would be required to obtain only the consent of a patient who has the legal capacity to give consent. The dual consent provision of Section 8 required the physician to overcome an additional legal obstacle to avoid civil liability even assuming the physician was not negligent. Therefore, the actual effect of the language in Section 8 was not to grant immunity to a physician unless the dual consent requirement was met.

As originally enacted, therefore, Idaho Code § 18-609 addressed the civil liability of a physician performing a legal abortion and did not expressly provide for criminal penalties. Neither the title reference to section 8 ("providing that physicians may perform, and hospitals may provide, facilities for abortions without civil liability if proper consent is given and providing guidelines for such consent") nor the section heading for § 18-609 as codified suggests that the legislature intended criminal penalties for a violation of that section.

Based upon this analysis, it is our conclusion that the legislature did not intend in 1973 to apply the criminal penalties of Idaho Code §§ 18-605 or 18-606 to an abortion performed in compliance with the trimester provisions contained within Idaho Code § 18-608 but lacking the husband's consent as required by Idaho Code § 18-609. Rather, the sole purpose of § 18-609 was to condition a physician's civil liability on obtaining

consent of both the patient and her husband (assuming the physician knew the patient was married or had been at any time since conception).

B. Legislative History: The 1983 Amendments

In 1983, the original language of Idaho Code § 18-609 was modified in two significant areas: (1) the word "informed" was added immediately before the word "consent," and (2) the provision requiring the consent of the patient's husband was deleted. The remainder of the original 1973 language was codified as subsection (1) to Idaho Code § 18-609. The statute still provided immunity from civil liability for physicians and hospitals, but to be guaranteed such immunity, the physician was now required to: (1) "perform an abortion not prohibited by this act," (2) be non-negligent, and (3) obtain the patient's "informed" consent. The obstacle to avoiding civil liability was no longer "dual" consent but "informed" consent. If the patient did not give such consent, the physician would not be protected from civil liability even assuming the abortion was otherwise legal and the physician was non-negligent.

The meaning of "informed" consent was spelled out by the addition of subsections (2) and (3) to Idaho Code § 18-609. Subsection (2) imposed a duty upon the Department of Health and Welfare to prepare for distribution detailed information about adoption services, fetal development, abortion procedures and medical risks to the patient. Subsection (3) imposed a two-fold requirement upon physicians: (1) to confirm a positive pregnancy test and so inform the patient, and (2) to certify in writing that the "informed consent materials" provided by the Department of Health and Welfare were given to the patient at least 24 hours before the abortion. Idaho Code § 18-609(3).[6]

The question that arises from the 1983 amendments to Idaho Code § 18-609 is whether the legislature intended to impose criminal penalties against a physician for failure to comply with the informed consent provisions. We shall examine both the legal case for and the legal case against criminal sanctions.

1. Criminal Sanctions

The language in the first line of subsection (3), "[n]o abortion shall be performed unless," is prohibitory on its face and is the foundation for the argument that the legislature intended to impose criminal sanctions. When a statute is amended, it is presumed the legislature intended to change the prior law. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987). A court will construe a statute to avoid surplusage or superfluous language. Hartley v. Miller-Stephan, 107 Idaho 688, 692 P.2d

[6] The new language added in 1983 also provided certain escape clauses for physicians that excused the requirement to provide the Department of Health and Welfare materials to the physician's patient.

332 (1984). Furthermore, the legislature is presumed to have consulted earlier or existing law on the same subject. State v. Long, 91 Idaho 436, 423 P.2d 858 (1967).

In 1973, the legislature authorized only those abortions that complied with the conditions described in Idaho Code § 18-608. By adding subsection (3) to Idaho Code § 18-609, the legislature expanded those conditions to include the "informed" consent provisions of § 18-609(3). It did so knowing that both Idaho Code §§ 18-605 and 18-606 prohibited all abortions "except as permitted by this act." If the legislature did not intend to criminalize abortions that did not comply with subsection (3) of Idaho Code § 18-609, it did not need to include the language "no abortion shall be performed." Subsection (1) of Idaho Code § 18-609 addressed the issue of civil liability of physicians and hospitals. The language of subsection (3), "no abortion shall be performed," would be surplus or superfluous unless it went beyond the civil liability of physicians and imposed criminal penalties for failure to comply with Idaho Code § 18-609(3).

The legislative history of Senate Bill 1121 as adopted in 1983 does not reveal any specific discussion of criminal penalties for a violation of Idaho Code § 18-609. This issue was, however, apparently discussed in 1982 concerning a predecessor "informed consent" bill that contained the same language ("no abortion shall be performed unless"). Reports in the *Lewiston Morning Tribune* and the *Idaho Statesman* at the time suggested that language similar to that of Senate Bill 1121 (1983) and Senate Bill 1415 (1982) was viewed in 1982--at least by some--as imposing felony penalties against any physician who violated the informed consent provisions of Idaho Code § 18-609.[7]

These points supporting felony penalties for abortions performed in violation of Idaho Code § 18-609(3) are reinforced by the fact that, when the subsection was enacted in 1983, Idaho had an unbroken history of a conservative and punitive policy toward

[7] In 1983, neither the minutes for the senate and house state affairs committees nor newspaper articles in the *Idaho Statesman* and *Lewiston Morning Tribune* reflected any discussion of the issue of criminal penalties pursuant to Senate Bill 1121. In 1982, the minutes for Senate Bill 1415 in the senate and house state affairs committees do not reflect any discussion of criminal penalties except a brief reference in the House State Affairs Committee to a question by Rep. Bengson to the bill's sponsor, Senator Watkins, "about a penalty." The senator's response was, "The penalty was presently in the law." The senator's response may be referring to Idaho Code § 18-609, although that conclusion would be contrary to our interpretation of that section prior to its amendment in 1983. In 1982, both the *Idaho Statesman* and the *Lewiston Morning Tribune* contained references that support the view that felony penalties could be imposed under the present language of Idaho Code § 18-609. In reference to Senate Bill 1415, the *Lewiston Morning Tribune* reported, "Senate Bill 1415, however, requires physicians to obtain 'informed consent' from any patient before an abortion is performed and makes failure to do so a felony. . . . It requires doctors to provide the materials at least three hours before an abortion is performed leaving open the possibility of a 'two-hour and 59-second felony,' according to IMA representative, Tim Hart." *Lewiston Morning Tribune*, March 12, 1982. The *Idaho Statesman* wrote, "Senate Bill 1415 sponsored by Sen. Dane Watkins, R-Idaho, would mandate that doctors give abortion patients the materials at least three hours before the operation. Those who failed to do so could be prosecuted." *Idaho Statesman*, March 12, 1982.

abortions. The statutes were liberalized solely because of decisions of the United States Supreme Court.

2. Lack of Criminal Sanctions

The more persuasive reading is that Idaho Code § 18-609 is not criminally enforceable but merely provides civil immunity to physicians who comply with its terms. To begin with, Idaho Code § 18-608, which refers to sections of the act which provide for felony sanctions, also states that those sections "shall not apply to and neither this act, nor other controlling rule of Idaho law, shall be deemed to make unlawful an abortion performed by a physician" if the requirements contained within Idaho Code § 18-608 are followed. (Emphasis added.) This language, providing that an abortion performed in compliance with Idaho Code § 18-608 is not unlawful, any other provision of law notwithstanding, suggests that Idaho Code § 18-609 is not criminally enforceable.

Added to this is the contrast between the language of Idaho Code §§ 18-608 and 18-609. If a legislature includes particular language in one section but omits it from another section of the same act, it is presumed to have intentionally excluded the particular language. *See generally*, Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979). While Idaho Code § 18-608 expressly refers to sections of the act which provide felony sanctions, Idaho Code § 18-609 contains no such reference and would, therefore, be interpreted to have intentionally excluded such language.

Moreover, if it was the intent of the legislature to impose criminal sanctions for a violation of Idaho Code § 18-609, it was not stated in the title, in the statement of purpose or in the fiscal note for Senate Bill 1121.

Earlier in this opinion, we indicated there was limited discussion by the legislature of criminal penalties in 1982 concerning Senate Bill 1415 (House State Affairs Committee Minutes; *Idaho Statesman* and *Lewiston Morning Tribune* articles). Reviewing the same sources for 1983 does not reveal any discussion related to the imposition of criminal penalties pursuant to Senate Bill 1121. Although legislative history is typically sketchy, it is unusual that the minutes of the testimony of numerous opponents to Senate Bill 1121 (including the Idaho Hospital Association and the Idaho Medical Association) do not include any recorded objections to the criminal sanctions arguably imposed against physicians under Idaho Code § 18-609.

Therefore, if it was the intent of the legislature to change prior law by imposing criminal penalties under Idaho Code § 18-609, the legislature failed to provide notice to the public by appropriate language in the title, in the statement of purpose or in the fiscal note or, apparently, by committee discussion or floor debate. Moreover, we found no record in other contemporaneous documents of legislative history or related information

to signal that it was the 1983 legislature's intent to impose criminal penalties by Senate Bill 1121.

Finally, one other rule of statutory construction must be considered. Criminal statutes must be strictly construed, "and courts are without power to supply what the legislature has left vague." State v. Thompson, 101 Idaho 430, 437, 614 P.2d 970, 977 (1980) (quoting State v. Hahn, 92 Idaho 265, 267, 441 P.2d 714, 716 (1968)). Given the failure of Idaho Code § 18-609 to expressly provide for criminal sanctions, it is our opinion that a court would be reluctant to attach criminal penalties to the statute.

Thus, solid arguments can be made for and against the legislative intent to impose criminal sanctions for a violation of Idaho's "informed consent" law. After careful legal analysis and full consideration of both viewpoints, it is the opinion of this office that the argument against criminal sanctions is more persuasive. Therefore, it is our conclusion that the legislative intent and purpose behind Idaho Code § 18-609 was to provide legal protection from civil liability for physicians performing abortions in compliance with both Idaho Code §§ 18-608 and 18-609. Further, it was not the intent or purpose of the legislature to impose criminal sanctions against a physician for non-compliance with Idaho Code § 18-609.

Question No. 5:

You have also asked what agency or entity has the enforcement responsibility for violations of the provisions of title 18, chapter 6, Idaho Code. Idaho Code § 31-2227 provides that:

> [I]t is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties.

The statute goes on to provide that those officers can call upon municipal peace officers and the Department of Law Enforcement when assistance is needed. Under Idaho Code § 31-2604, it is the duty of the prosecuting attorney to prosecute all felony criminal actions within his or her county, and all misdemeanor actions involving violations of state laws where the arresting or charging officer is a state or county employee. The city attorney or contract counsel has responsibility for prosecuting state misdemeanors committed within the municipal limits. Idaho Code § 50-208A. These provisions are fully applicable to the provisions of Idaho Code §§ 18-605, 18-606 and 18-607 making certain violations criminal offenses. Thus, prosecutions for unlawful abortions under Idaho Code §§ 18-605 and 18-606, which are declared to be felonies, would be the responsibility of the prosecuting attorney.

Question No. 6:

Your final inquiry concerns the Idaho Constitution. You asked whether article 1, sections 1 and 21, of the Idaho Constitution contain a right of privacy which might be violated by the provisions of title 18, chapter 6, Idaho Code, even if federal constitutional mandates are met.

Certainly, a state supreme court may construe its own state constitution more broadly than the United States Constitution. Indeed, a number of state courts that have considered the abortion issue have afforded greater individual rights to their citizens under their state constitutions than those recognized under the United States Constitution. *See, e.g.,* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. App. 1981); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986). The Idaho Supreme Court has already held that it may afford citizens greater protection under the Idaho Constitution than is afforded under the United States Constitution. *See, e.g.,* State v. Guzman, ____ Idaho ____, ____ P.2d ____ (slip op. no. 126, Nov. 5, 1992); Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984). Additionally, in Murphy v. Pocatello School District No. 25, 94 Idaho 32, 480 P.2d 878 (1971), the Idaho Supreme Court appeared to recognize a right of privacy in our state constitution.

Despite these holdings, it is our opinion that it would be premature and speculative to assume the Idaho Supreme Court would be willing to go beyond *Casey* and other federal precedent. Until 1973, when Roe v. Wade was decided, abortion was criminalized in Idaho and, in fact, was a crime when our constitution was adopted. *See* Idaho Crimes & Punishment, 1864, § 42. Worth noting is State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901), an early Idaho Supreme Court opinion characterizing abortion as both illegal and immoral. There is little in the history or tradition of this state to indicate that the framers of our constitution intended to protect a woman's right to terminate her pregnancy. This is not to suggest that our state constitution is necessarily frozen as of a century ago, but merely that, at this point, neither Idaho history nor legal precedent suggests that our state constitution is more protective of abortion rights than is the United States Constitution.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. 1, sec. 1.
Art. 1, sec. 21.

2. Idaho Code:

Title 18, chapter 6.
§ 31-2227.
§ 31-2604.
§ 50-208A.

3. Idaho Cases:

Bunt v. City of Garden City, 118 Idaho 427, 797 P.2d 135 (1990).

George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

Hartley v. Miller-Stephan, 107 Idaho 688, 692 P.2d 332 (1984).

Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984).

Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979).

Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

Murphy v. Pocatello School District No. 25, 94 Idaho 32, 480 P.2d 878 (1971).

Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901).

State v. Guzman, ___ Idaho ___, ___ P.2d ___ (slip op. no. 126, Nov. 5, 1992).

State v. Hahn, 92 Idaho 265, 441 P.2d 714 (1968).

State v. Long, 91 Idaho 436, 423 P.2d 858 (1967).

State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980).

Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

4. Other Cases:

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

Bellotti v. Baird, 428 U.S. 132 (1976).

Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. App. 1981).

Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986).

H.L. v. Matheson, 450 U.S. 398 (1981).

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990).

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992).

Roe v. Wade, 410 U.S. 113 (1973).

Thornburgh v. American College of Obst. and Gyn., 476 U.S. 747 (1986).

5. Other Authorities:

Op. Idaho Att'y Gen. 218 (1983).

Idaho Crimes & Punishment, 1864, § 42.

DATED this 10th day of February, 1993.

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