



Jan. 5, 2010

Sen. Richard Sears  
Chair, Senate Judiciary Committee

Dear Sen. Sears:

We wanted to provide you with our views on the bill that you and Sen. Mullin plan to introduce, “Assault of pregnant woman.”

The American Civil Liberties Union of Vermont feels it is unnecessary to revisit the issue of enhanced penalties where a woman loses a pregnancy as the result of a car accident. The Legislature already addressed this issue, in 1991, following the 1989 Vermont Supreme Court case of *State v. Oliver*.

*State v. Oliver* involved a situation very similar to the one that occurred this year in your district. A woman suffered injuries sufficient to terminate her pregnancy. The state wanted to charge grossly negligent operation, as a way of seeking a stiffer penalty for the driver who caused the crash. But the Court ruled it could not do so. The grossly negligent operation statute (23 VSA 1091) covered the death of a person resulting from an accident. Since a fetus is not considered a person under Vermont law, the statute didn’t apply, the Court said.

The Legislature took up the issue following the *State v. Oliver* decision and came up with a way to provide an enhanced penalty without getting into the legal status of a fetus. Act 55 in 1991 amended 23 VSA 1091 to cover NOT JUST death resulting from an accident, but ALSO serious bodily injury. That produced the result of broadening the offense to cover pregnancies terminated by injury, because the mother is almost always the victim of serious bodily injury in such a crash.

So the state already has the ability to seek enhanced penalties in such crashes, through the current grossly negligent operation statute. The enhanced penalty is up to 15 years in jail. I believe that the defendant in the current case could face up to 45 years in jail, given all the charges against her. As you will recognize, a sentence of that magnitude is quite punitive.

The bill that you and Sen. Mullin are co-sponsoring, “Assault of pregnant woman,” goes beyond the situation (a horrific car crash) that originally prompted this debate. We think it’s unnecessary, and not an issue that would benefit from legislative action. If you do take up the bill, however, we think two changes should be made.

The first is the addition of an intent requirement. Other states have included an intent requirement in their pregnant person protection statutes (Maine is one such state, and I believe you were planning to use the Maine law as a guide for drafting your bill). The intent requirement could be added to subsection (a) of the bill, so subsection (a) would read, “A person is guilty of assault of a pregnant woman if the person, knowing or having reason to know that the woman is pregnant, is convicted of commits one of the following offenses and serious bodily injury to a pregnant woman results from the violation:”

The second change we think is necessary is stronger disclaimer language. We think that the current disclaimer at the end of the bill, in subsection (e), should be more specific: “This section is intended to provide additional protections for pregnant women, and not fetuses. Nothing in this section shall modify the absence of legal rights accorded to fetuses under Vermont law shall not be construed to confer, deny, expand, or contract the legal status or legal rights of a fetus.”

We and others have said publicly that this is an emotional issue. Let me suggest why that’s the case. We view with suspicion any legislation that could someday -- intended or not -- lead to restrictions on our rights to decide whether and when to bear children. That view is based, in no small part, on Vermont’s existing criminal prohibition against abortion (13 VSA 101). Were *Roe v. Wade* to be abandoned by the federal courts, Vermonters could find themselves cut off from abortion. That is a worrisome prospect -- not just for ACLU members, but for many women, and men, in Vermont.

I, or our staff attorney, Dan Barrett, would be happy to appear before the committee to answer any questions you may have about our position.

Thank you for your consideration.

Sincerely,

Allen Gilbert  
Executive director

Cc: Sens. Campbell, Cummings, Mullin, and Nitka