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To: All Interested Parties

From: Sheila Kuehl and Abby Leibman
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Re: Crime Victim's Justice Reform Initiative-impact on California Constitutional Right to Privacy, an Analysis

The following brief analysis represents our opinion of the effect the Initiative could have, if passed as presently drafted, on the right to privacy contained in the state Constitution of California.

I. Could the Initiative Limit the Right to Reproductive Choice as Specifically Protected by the California Constitution?

We believe, without question, that the particular language limiting the privacy rights of criminal defendants and contained in the Crime Victim's Justice Reform Initiative would impact the privacy rights of women seeking to terminate pregnancies in California.

A. Does the claim that the Initiative only applies to criminal prosecutions alter this opinion?

No. The claim that the Initiative was only meant to apply to criminal prosecutions does not alter our opinion since Penal Code Sections 274, 275 and 276, which criminalize specific actions pertaining to abortion, are still part of the criminal law in California.

Section 274 makes it a crime to perform an abortion except under the terms of the Therapeutic Abortion Act, Health and Safety Code Section 25950, et seq. Section 275 makes it a crime punishable by imprisonment in the state prison for a woman to solicit an abortion except as provided in the Therapeutic Abortion Act.

Section 276 makes it a crime punishable by time in the county jail or by a $10,000 fine to solicit a woman to have an abortion, except under the terms of the Therapeutic Abortion Act. Each of these sections actually refers, not to abortion, but to "procuring a miscarriage."

The only legal abortions in California before Roe v. Wade were those performed under the terms of the Therapeutic Abortion Act: in a hospital, approved in advance by a hospital committee (if the committee had three or less members, the decision had to be unanimous), and there had to be a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or the pregnancy had resulted from rape or incest. The Therapeutic Abortion Act was considered a liberal law before 1973.

After Roe v. Wade, the landmark decision of the United States Supreme Court holding that the right to privacy contained in the Federal Constitution included the right to choose to terminate a pregnancy, neither the Therapeutic Abortion Act nor the Penal Code sections could be applied or prosecuted.

There are, however, in addition to the Constitutional protections announced in Roe v. Wade under the federal Constitution, independent state grounds under which the constitutional rights of women to terminate their pregnancies overcome the Penal Code sections and the provisions of the Therapeutic Abortion Act. There is a state constitutional right to privacy and such a right was announced by the California Supreme Court even before the word "privacy" was actually added to the state Constitution by the voters.

These grounds for overturning state statutes that infringe on rights are called "independent" because they depend not on the Federal Constitution, but only on the State Constitution as interpreted by the State Supreme Court, which is the last word on the meaning of provisions of the state Constitution.

The California Supreme Court announced that the California State Constitution protects physicians providing abortions and women seeking them from prosecution under the Penal Code in People v. Belous, 458 P. 2d 194 (1969). The primary ground for the decision was that the Penal Code sections were unconstitutionally vague. But the Court also struck the sections down on the basis of the fact that women had a constitutional right to choose whether or not to bear children, in other words, privacy.

In People v. Barksdale, 503 P. 2d 257 (1972), the Court declared most of the Therapeutic Abortion Act unconstitutional on state grounds--that the provisions were impermissably vague and did not satisfy the state requirement of due process. No mention was made in that case (about a civil, not a criminal statute) of privacy rights but since an explicit right to privacy was added to the state Constitution, lower courts in California have ruled that the Act is unconstitutional on both federal and state privacy grounds.

B. How might the Initiative affect this independent right?

So far, even should the federal court decide that states can infringe even more deeply on the federal privacy right, the state court could, as things now stand, interpret our state right to privacy as offering more protection.

The Initiative, however, specifically limits the state right to privacy for criminal defendants to the limits of the federal right as interpreted by the Supreme Court. It requires that the state right to privacy be "construed by the courts in this state in a manner consistent with the Constitution of the United States. This Constitution (California's) shall not be construed by the (state) courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States." This can clearly impact on the right to choose whether or not to terminate a pregnancy. It would be a crime in California to do so were it not for Roe v. Wade and People v. Belous. Indeed, Roe overturned a criminal statute in Texas.

As the federal court shrinks the right to privacy by expanding a state's ability to infringe upon the federal right, as it did in Webster, and shows signs of continuing in the next term, the state of California would have an expanded ability to limit the state constitutional right to privacy, unfettered by any independent state constitutional grounds. Where the California Constitution might have provided independent constitutional grounds to overcome civil and criminal statutes, it would be limited by the Initiative to the scope of the federal right to privacy as announced by the federal Supreme Court.

Without question, this could allow California to criminalize abortion, should the federal court allow it, and nothing would limit the scope of those laws constitutionally but the decisions of the federal Supreme Court.

C. Could passage of the Initiative affect the civil rights of women seeking abortion in California?

Possibly. In 1981, in Committee to Defend Reproductive Rights v. Myers, the Court stated plainly that the independent right to privacy contained in the State Constitution was broader in scope than that interpreted by the federal Supreme Court. In Myers, the Court held that the state constitution did not allow the state to forbid MediCal funding for abortion while allowing funding for the medical expenses of women who decided to bear a child. The underpinning of the decision, which went exactly opposite to that announced by the federal court in Harris v. McRae, was that the receipt of government benefits could not be conditioned on waiving a fundamental state constitutional right, such as the right to privacy contained in the California Constitution.

The Initiative would not, on its face, limit the Myers interpretation of the state right to privacy and create an immediate threat to MediCal funding of abortions. This fact has led some to argue that the Initiative, since it applies only to criminal defendants, does not actually threaten the right to choose in California. However, the California Supreme Court is not immune to public pressure. The Justices may possibly be more concerned about that public pressure since the defeat of three Supreme Court Justices at the polls.

It is equally possible that the Justices would read passage of the Initiative as an expression of the will of the people that the whole right to privacy should be considerably limited in California.

Finally, even should the ballot arguments contain an indication that the proponents of the measure really don't mean to limit a constitutional right to choose whether or not to terminate a pregnancy, such a ballot argument would not necessary impact on a state court's interpretation of the measure, since the court is required to look at the plain language of the Initiative, as passed. Only if the language is found to be ambiguous in some supportable way can the Court even look to the ballot arguments and, in our opinion, the language of the Initiative does not seem to be that ambiguous.