MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 31, 2003 at 9:00 A.M., in Room 172 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

Please Note:

Audio-only Committees: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Note: Sen. McGee's Opening and Closing Statements on SB 274 were transcribed verbatim as requested by Chairman Grimes.

Committee Business Summary:
Hearing & Date Posted: SB 274, 1/28/2003
Executive Action: SB 25; SB 123; SB 238; SB 226; HB 84; HB 29; HB 149

HEARING ON SB 274

Sponsor: Senator Daniel McGee, SD 11, Laurel.

Proponents: **Julie Millam, Executive Director of the Montana Family Coalition**
Lani Candelora, Montana Catholic Conference,
Jenny Dodge, Citizens' Network
Earl D. Hargis, Pastor of Community Baptist Church, Stevensville
Gilda Clancy, Eagle Forum
Gregg Trude, Executive Director, Montana Right to Life,
Larry Chambers, Self
Bob Kelleher, an attorney from Butte, Montana

Opponents: **Beth Brenneman, Legal Director of ACLU of Montana**
Beth Satre, Public Policy Specialist, Montana Coalition Against Domestic Abuse and Sexual Violence
Mary Caferro, Working for Equality and Economic Liberation (WEEL),
Bob Campbell, delegate to the 1972 Constitutional Convention and the author of the Right to Privacy Clause
Jeri Duran, Intermountain Planned Parenthood
Anita Roessmann, Montana Advocacy Program (MAP)
Morgan Sheets, Executive Director, Montana NARAL
Linda Gryczan, Montana Women's Lobby
Gene Fenderson, Self
Rep. Gutsche, HD 66, Missoula
Rep. Christine Kaufmann, HD 53, Helena
Rep. David Wanzenried, HD 68, Missoula

Opening Statement by Sponsor:

For the record, my name is Dan McGee. I am the state Senator from Senate District 11, which is the southwest area of Billings, Yellowstone County, and the City of Laurel. I bring before you today, SB 274, which is an act to amend the Montana Constitution, specifically Article II, Section 10, the right of privacy clause, to allow for the Montana voters to express themselves on the issue of the protection of unborn human life, in stating that it is, in fact, a compelling state interest. The purpose of this bill is to address certain issues and realities that have arisen

in the thirty years since the adoption of the 1972 constitution. SB 274 proposes, as I said, to submit the issue to the qualified voters of the state of Montana, this amendment to Article II, Section 10, stating that, in fact, the state of Montana does have a compelling interest in the protection of unborn human life. Since 1995, virtually all of the legislation passed dealing with abortion-related issues have been overturned by the Montana Supreme Court. A parent's right to be informed prior to a minor child obtaining an abortion; a woman's right to know of the full effect and consequences of an abortion; the right of a woman to have an abortion performed by a qualified doctor in a qualified facility; and the rights, if any, of an unborn child to his/her inalienable right to life as affirmed in the United States Declaration of Independence. All of these have been overturned by the Montana Supreme Court by reference to Article II, Section 10, the Right of Privacy Clause. However, as I hope to show to you today, members of the Committee, the right of privacy is not an absolute right. It is a qualified right, and that was argued during the 1972 Convention, and I will go to that in just a moment. Furthermore, and this is very important, during the past thirty years, a number of issues have arisen which impact unborn human life directly in either positive or negative ways that could have never been envisioned during the 1972 Constitution. In the 1972 Constitution debate, and I will just paraphrase this, basically, the Bill of Rights Committee proposed Article II, Section 10, the Right of Privacy. At the time, it had the phrase, "without the showing of a compelling state interest" as a qualifier for the right of privacy. Later, as debate was taking place, that phrase, "without the showing of a compelling state interest," was stricken initially. So, it became an absolute right of privacy. Later in the Convention it was reconsidered and the phrase was put back in. During the debate, and I have for the Committee and will make available copies of the Constitutional Convention and you can read it for yourself, during the debate, the concern in 1972, was over wiretapping. That was the focus of the Convention when they were dealing with the right of privacy. The issue of unborn human life, or abortion, or anything to do with unborn human life, was not considered by the Constitutional Convention. You must remember also that in 1972, that was pre- Roe v. Wade, so there was not legal abortion in the United States. The Montana Supreme Court has, as I said, overturned virtually every piece of legislation we have passed, always in relation to the Right of Privacy Clause of the Constitution. But it is interesting, in 1999, in the Armstrong case, the state said, the Montana Supreme Court, made this statement, and I think this is compelling: "We have not heretofore specifically defined what makes a state interest compelling. Rather, leaving that determination to be made case-by-case. Nonetheless, we agree with the United States Supreme Court's test in the First Amendment free exercise cases that to

demonstrate that its interest in justifying infringement on a fundamental constitutional right is "compelling" the state must show, at a minimum, some interest "of the highest order and not otherwise served." I also have the reference to the United States Supreme Court case they were referring to in 1999. It is interesting that we had on the books for thirty years a constitutional provision that is qualified by the term "compelling interest" and has never been defined by the Montana Supreme Court. Today, we have certain realities that we did not have in 1972. Today, abortion is legal. Today, we have the potential for human cloning. Today, we have AIDS, which is a reality and is growing at an exponential rate. Today, we have fetal alcohol syndrom, which is common. Today, we have fetal drug addiction, which is on the rise. Members of the Committee, I feel this is a very important issue to send to the people of Montana so that they may express themselves with regard to their Constitution. I would hope the Committee sees favorably. Mr. Chairman, I would like to let proponents and opponents speak, and then I would like to reserve the right to close.

Proponents' Testimony:

Julie Millam, Executive Director of the Montana Family Coalition, submitted written testimony in favor of SB 274. **EXHIBIT(jus21a01).**

Lani Candelora, representing the Montana Catholic Conference, submitted written testimony in support of SB 274. **EXHIBIT(jus21a02).**

Jenny Dodge, representing the Citizens' Network, supports SB 274. **Ms. Dodge** testified that while there is a movement dedicated to the killing of the unborn, there is a far more powerful movement which is compelled to save the unborn. The United States Congress passed, and the President enacted, the Born Alive Act which protects the life of a child that survives an abortion. In addition, the partial birth abortion ban passed through the U.S. Congress only to be vetoed by President Clinton. A second attempt to pass this legislation is currently underway. Our state legislature has passed numerous laws designed to protect the unborn, only to be overturned by a tyrannical court. In addition, the medical field also shows an interest in protecting the unborn child as shown by its campaign against smoking, drinking, and drug use during pregnancy. **Ms. Dodge** presented an example of a mother-to-be who was sentenced to 12 years in prison for the death of her child due to her use of crack cocaine. **Ms. Dodge** submitted an article about Baby Samuel, who received surgery at 21 weeks and still in the womb to correct spinal bifida. **EXHIBIT(jus21a03).** In addition, insurance companies are

also beginning to cover medical treatment rendered to the unborn. **Ms. Dodge** feels the majority of society is compelled to protect unborn children.

Earl D. Hargis, Pastor of Community Baptist Church in Stevensville and a resident of Florence, submitted written testimony in favor of SB 274. **EXHIBIT(jus21a04).**

Gilda Clancy, representing Eagle Forum, testified that the unborn has no defense when it comes to abortion. Over 44 million abortions have been performed. **Ms. Clancy** believes abortion is blatant murder and is hideous. The protection of unborn human life is a compelling state interest. **Ms. Clancy** encouraged the passage of SB 274 and to let the citizens of Montana vote to add this provision to the Montana Constitution.

Gregg Trude, Executive Director of Montana Right to Life, supports SB 274. **Mr. Trude** stated the arrogance of the Montana Supreme Court has overridden every piece of pro-life legislation. **Mr. Trude** feels parental notification of abortion is a no brainer. **Mr. Trude** stated a 14-year-old girl can get an abortion without parental permission; however, the next day she would need permission from her parents to take a Tylenol while at school. Many women have suffered severe and permanent consequences due to abortions; however, the Supreme Court shot down legislation dealing with a woman's right to know. The current law makes no sense to **Mr. Trude.**

Larry Chambers applauded **SENATOR MCGEE** for sponsoring this bill and asked the Committee to allow the people of Montana to celebrate life.

(Tape : 1; Side : B)

Opponents' Testimony:

Beth Brenneman, Legal Director of the ACLU of Montana, stated that they are very concerned about the implications of the language in the amendment and the ACLU strongly opposes SB 274. **Ms. Brenneman** urged the Committee to look at the impact this bill will have on women who carry to term. The language provides for a compelling state interest in a woman's pregnancy, not with the woman herself. This interest can then be used to infringe upon the right of privacy of any individual. In Montana, the right to privacy is broad and includes the right to be protected from unreasonable search and seizures, bodily autonomy, the right to have a child, all medical decisions and information, and in a

very broad sense, protects the right to be left alone. **Ms. Brenneman** believes this bill will affect all pregnant women.

Ms. Brenneman stated that in other states that allow for prosecution of expectant mothers, women have been prosecuted for home births, not receiving enough bed rest during pregnancy, sexual intercourse, and/or too much physical activity. These cases deal with women who wanted their children and suffered miscarriages. There are also cases where women were irresponsible and exhibited self-destructive behaviors such as alcohol and drug abuse. When a woman is prosecuted under these circumstances, it sends a message to other women not to seek help with drugs and alcohol for fear of prosecution. Therefore, these women do not get proper prenatal care. There are many organizations who do not support these types of prosecutions, including American Medical Association, American Academy of Pediatrics, American Public Health Association, American Nurses Association, American Society on Addiction Medicine, and the March of Dimes. **Ms. Brenneman** spoke to two Montana cases where one woman was ordered to take birth control as a condition of her criminal sentence, and another woman was ordered not to become pregnant for ten years. These conditions criminalized the pregnancies of both these women. The judge in both these cases was concerned about fetal health. Therefore, if these women were to become pregnant, they would go to jail and receive medical care in that setting. **Ms. Brenneman** feels jail is not an adequate place for medical supervision, especially if a person is going through withdrawal symptoms from drugs. Ultimately, **Ms. Brenneman** got these conditions of probation struck down because they violated the women's civil rights under right to privacy. If SB 274 passes, **Ms. Brenneman** is not sure she would be able to achieve that ruling in the future.

Ms. Brenneman submitted an op ed she wrote which addresses the implications of these types of prosecutions. **EXHIBIT(jus21a05).**

Beth Satre, Public Policy Specialist form the Montana Coalition Against Domestic Abuse and Sexual Violence, submitted written testimony in opposition to SB 274. **EXHIBIT(jus21a06).**

Mary Caferro, representing Working for Equality and Economic Liberation (WEEL), opposes SB 274 for two reasons. First, increased governmental intervention in the daily lives of pregnant women is unjust and disproportionately impacts low-income women. Judicial measures that punish pregnant women for harm to their fetuses will create a subclass of women with fewer rights than other citizens, thereby setting a dangerous precedent for governmental intrusion in a pregnant woman's decision making. **Ms. Caferro** cited a Washington D.C. case where a woman who was

critically ill with cancer was ordered to undergo a cesarean section despite the risks to the mother. The C-section resulted in the loss of both the baby and mother. **Ms. Caferro** also talked about a multiple birth case in Chicago where a mother had to undergo a C-section under court order. **Ms. Caferro** then cited a Massachusetts case where a woman was ordered to have her cervix sewn shut to prevent miscarriage despite the mother's religious objections.

Ms. Caferro's second objection focuses on quality of life. It is disappointing to see people whose main cause is to preserve life while, at the same time, they are not working for or have supported budget cuts to those very lives. The very programs put in place to support life are being dismantled and eliminated. **Ms. Caferro** feels you cannot have it both ways. Montana's Initiative for the Abatement of Mortality and Infant's Program (MIAMI) serves high-risk pregnant women who live with physical, psychological, or environmental conditions that threaten the mother or children's health. This program is subject to budget cuts. In addition, the drug treatment facility in Butte, which treats many expectant mothers, is slated to be closed down. **Ms. Caferro** suggested supporting public policy that would include access to health care for all.

Bob Campbell, a delegate to the 1972 Constitutional Convention and the author of the Right to Privacy Clause in Article II, Section 10, of the Constitution stated that language has been described as the most elegant and uncompromising statement of privacy in the nation. **Mr. Campbell** is concerned about individual groups who want to amend the Constitution. The majority rules and if the majority wanted to change the law, they could change it through the United States Supreme Court or through the state of Montana. Mr. Campbell has a problem with the proposed language that refers to the protection of unborn life as a compelling state interest since this language is in violation of Roe v. Wade. Mr. Campbell feels this language would be challenged immediately if passed.

Anita Roessmann, representing the Montana Advocacy Program, is an advocate for people with mental illness and is here because of the implications for people with mental illness. There is a compelling state interest in protecting people with mental illness who have become dangerous to themselves or others. This allows these individuals to be detained in a treatment facility until they are once again safe to themselves or others. When a woman gets pregnant and can no longer take her psychotropic medications because these medications will harm the fetus, she will become a danger to herself and others. In psychotropic medications there is a risk to the fetus, and none of these

medications are known to be safe. Mental illness itself is a known risk factor for the fetus. Women who do not take psychotropic medications risk suicidal behavior, poor self-care, inadequate nutrition, and poor prenatal care. Studies have found a correlation between anxiety and premature delivery. **Ms. Roessmann** informed the committee that these medications have their greatest impact on fetal development during the first weeks of pregnancy. Up to 30 percent of pregnant women in this country are taking psychotropic medications to deal with depression. Women suffer from depression at a much higher rate than men. The second reason for hospitalization of women between the ages of 18 and 45 is depression.

(Tape : 2; Side : A)

Ms. Roessmann went on to say treatment of mental disorders can sometimes require the use of multiple medications, and sometimes the right medication is only discovered after many trials with other medications. Discontinuing these medications can be tricky to avoid a rapid relapse. Not much is known about the effects of these medications on the fetus. It is not uncommon for women who are mentally ill and on medications to be totally unaware of their pregnancy since these women live in a state of confusion and despair. Will women who are mentally ill and pregnant be institutionalized in order to protect the fetus? Will doctors be unwilling to treat women with serious mental illness because they are afraid of lawsuits and the life of the fetus? **Ms. Roessmann** feels these are not easy questions. **Ms. Roessmann** explained current clinical guidelines require doctors to weigh the risk to the fetus against the benefits to the mother. **Ms. Roessmann** closed by stating this is the best way to deal with these difficult decisions and it should not be changed.

Jeri Duran, representing Intermountain Planned Parenthood, stated she is opposing SB 274 for several reasons, but the main reason is because the implications for pregnant women are limitless. **Ms. Duran** stated that many pregnant women have been arrested in 30 different states. Many of these women are low-income, colored, or addicted to drugs. **Ms. Duran** feels a woman can get arrested for having a glass of wine with dinner. Legislative and judicial measures that punish women who harm their fetuses create a subclass of women with fewer rights than other citizens. It allows the government to intrude into our daily decision making. Every day, pregnant women engage in conduct that threatens their unborn children, including taking prescription medications or over-the-counter medications, having necessary surgery, working long hours, working on their feet, work-related stress, unbalanced nutrition, being over weight, ingesting caffeine, choosing a health care provider. All of these things can impact

a fetus and, therefore, could be subject to government interference and sanctions. Leading health organizations all recognize that society must work to promote health child bearing by ensuring that pregnant women have access to the care they need.

Morgan Sheets, Executive Director of Montana NARAL, the state's Pro-Choice Group, submitted written testimony in opposition to SB 274. **EXHIBIT(jus21a07).**

Ms. Sheets also submitted written testimony from **Professor Mark Kende, a Law Professor at the University of Montana School of Law. EXHIBIT(jus21a08).**

Linda Gryczan, representing the Montana Women's Lobby, testified that the **Montana Women's Lobby** stands in strong opposition to SB 274.

Gene Fenderson explained that he came to the decision on the right of choice and birth control because when he was in high school, it was difficult to get birth control. However, the rich kids were always able to get it and actually made money selling birth control to poor kids. **Mr. Fenderson** recounted his experiences in high school with teenage pregnancies and the social pressures involved. **Mr. Fenderson** feels SB 274 would drive society back to views of teenage pregnancy which were prevalent 40 years ago.

REP. GUTSCHE, HD 66, Missoula, stated that this legislature has passed a series of bills to restrict a woman's right to choose. Everyone of those bills has been struck down either by the district court or the Supreme Court. The federal Constitution does not guarantee a right to privacy, but the Montana Constitution does under the Bill of Rights. Passing this bill will fly in the face of good government in terms of helping women who need access to birth control. This bill will not help women make better decisions.

REP. CHRISTINE KAUFMANN, HD 53, Helena, stands in opposition to SB 274. **REP. KAUFMANN** feels this bill goes to far and invades the pregnant women's privacy.

REP. DAVID WANZENRIED, HD 68, MISSOULA, stated that the Constitution does not provide any guarantee for absolute rights. The Constitution says there needs to be a showing, and SB 274 goes beyond that by saying there does not need to be a showing. The question is, from a policy standpoint, how far and under what circumstances is that absolute power going to be extended by future legislative sessions in exercising the police powers of

the state, and what kinds of liability and financial considerations will need to be addressed. For those reasons, **REP. WANZENRIED** opposes this bill.

Brad Martin, Executive Director of the Montana Democratic Party, stands in opposition to SB 274. Their platform reads that they resist government intervention into private decisions of women regarding reproduction and child bearing.

Questions from Committee Members and Responses:

CHAIRMAN GRIMES posed his first question to **Mr. Bob Kelleher, an attorney from Butte, Montana,** and asked **Mr. Kelleher** to make a short statement regarding SB 274.

Mr. Kelleher addressed the Committee by submitting into the record a letter he wrote to **CHAIRMAN GRIMES** and **SEN. McGEE. EXHIBIT(jus21a09). Mr. Kelleher** said that the AMA Journal of Medicine has reported that the number of deaths due to termination of pregnancy in the third trimester is three times higher than for normal delivery.

Mr. Kelleher reported that to the best of his knowledge the treatment center in Butte is going to remain open.

Mr. Kelleher also stated that 42 U.S.C. 300(a)(6) says that no Title X money shall go to organizations that teach abortion as a method of handling planning. During the Roscoe administration $1.1 million in Title X federal tax dollars were paid to Planned Parenthood in Billings. There are 96 United States Attorneys in the U.S. and its territories and there have been no prosecutions under the U.S. Code.

The Alan Gutbacher(?) Association has unequivocally stated that 94 percent of these women that go through an abortion have a tremendous amount of guilt and have an above-average suicide rate post abortion. **Mr. Kelleher** then cited a 1884 decision made by Justice Oliver Wendell Holmes where he ruled the baby was a part of the mother's body and not a separate entity. By 1900 Justice Boggs in Illinois ruled the baby is a separate entity, and we do not have to wait until the child is born alive before the child has a cause of action. In 1972, the Rhode Island Supreme Court held the baby is not a part of the mother, but a separate entity. In addressing Roe v. Wade, **Mr. Kelleher** reminded the Committee that today, people have admitted there was false testimony given in this case.

CHAIRMAN GRIMES then asked **Mr. Kelleher** to address the Constitutional Convention and the privacy clause.

Mr. Kelleher stated he did vote for the privacy clause, but also he had put in a proposal for the right of a baby to be born. That was defeated. **Mr. Kelleher** stated it was not his intention in voting for the privacy clause that it meant a woman could destroy an unborn child. **Mr. Kelleher** feels, based on his legal training, that before a child is executed, it should have a guardian appointed, have a right to counsel, and the guardian should have the right to demand a jury trial.

Mr. Kelleher referred to invoices attached to Exhibit 9 for body parts taken from aborted babies. **Mr. Kelleher** stated partial birth abortions are a misnomer, and they are, in actuality, full-birth abortions because an unfragmented baby brain can fetch $1,000 on the open market. These babies are being killed after they are born, in opposition to state law. Mr. Kelleher asked why an unborn baby should not have rights of privacy, just as the mother has a right of privacy. These are not the mother's pancreas or kidney, they are separate beings.

(Tape : 2; Side : B)

As separate human beings the unborn have rights, and if it takes changing the private provisions in the Constitution, then they should be amended to protect those rights.

SEN. AUBYN CURTISS asked **Mr. Kelleher** if he had made the information relative to commerce and fetal tissue available to the Committee.
Mr. Kelleher stated **CHAIRMAN GRIMES** has the information and will distribute it to the Committee.

SEN. JEFF MANGAN asked **SEN. McGEE** to address the concerns of pregnant women being criminalized for actions they may take and the unintended consequences.

SEN. McGEE responded that it is important that the Committee, and the Legislature as a whole, understand that his bill seeks to amend the Constitution to the point that we state there is a compelling interest in unborn human life. If there is to be any prosecution, blame, or penalty as a consequence of that language, **SEN. McGEE** maintains it would have to go through the Legislature and become a law that would expressly stipulate those terms. Those issues which have been brought up are brought out of fear and do not attend anywhere near the intent of the language. **SEN. McGEE** claimed the Montana Supreme Court has not, by its own omission, defined "compelling state interest." This bill will define "compelling state interest" in this one arena, and does not find anyone guilty of anything.

SEN. JERRY O'NEIL inquired of **Beth Brenneman** to respond to that same question.

Ms. Brenneman replied, with all due respect, that the two cases she was involved in did not require an act of the Legislature. In the one case, a woman was charged with criminal endangerment for taking drugs while pregnant. This law is currently on the books and does not need statutory approval. Sometimes the only way to challenge a prosecutor is to use a constitutional right. **Ms. Brenneman** has personally worked on two cases, but has heard of other cases where women were subjected to the same type of birth control or pregnancy sentences. The court has articulated governmental interest in many different circumstances. **Ms. Brenneman** explained that compelling governmental interest is a term of art and is a term of art the Supreme Court uses to scrutinize legislation and activities by the agencies that infringe upon a constitutional right. For clarification, **Ms. Brenneman** explained that when a court looks to whether there is a compelling governmental interest, it looks at the specific statute and whether or not there is a compelling interest articulated, and then whether that statute does so. Regarding parental notification, the district court found that at least one of the compelling governmental interests stated by this legislature to keep the family in tact by ensuring parental notification was not actually effectuated by the statute. There were studies which showed that it did not accomplish that goal.

SEN. GARY PERRY then stated to **Ms. Brenneman** that he has tried for many years to consider an analytical approach to this subject. **SEN. PERRY** read 50-22-101 which states, "a person who has sustained either irreversible caseation or circulatory or respiratory functions or irreversible caseation of all functions of the entire brain, including the brainstem, is dead." In an analytical approach, we have to move away from religious beliefs or whatever source guides us in these decisions. Would you agree that this is a law human beings have made based on analytical approach to what we have as laws.

Ms. Brenneman agreed that it is person-made law, and she believes it is based upon medical facts.

SEN. PERRY then asked whether **Ms. Brenneman** agreed it was a reasonable law based upon sound judgment.

Ms. Brenneman agreed.

SEN. PERRY then asked if we could define point of death, we could define life by the same definition.

Ms. Brenneman responded that the definition of life has been debated throughout history, and the Roe v. Wade court struggled with the definition. For lawyers to be defining when life starts is a very difficult process. **Ms. Brenneman** feels this definition should be left to philosophers and religious professionals. **Ms. Brenneman** feels that Roe v. Wade was handed down because women were dying from illegal abortions and reported there are 42 death certificates in the state of Montana which list illegal abortion as the cause of death before Roe v. Wade.

Closing by Sponsor:

Mr. Chairman, members of the Committee, I want to thank all the proponents and the opponents as well. Thank you for coming here and testifying because this is a major issue. Please understand this is policy decision, and I think Beth Brenneman just hit it right on the head. She said that the issue about when life begins is made by philosophers, not in the realm of law. The realm of law is made by policymakers and that means you. You people in this Legislature.

I want to address a few of the concerns. I won't drag this out Mr. Chairman and members of the Committee because I serve on this Committee and I know how these things go. There are a few comments which need to be made. **Ms. Brenneman c**ontinued to refer to the governmental interests. I submit to you it is not the governmental interests. I submit to you it is the state's interest, and it is the state-what is the state? It is the people of Montana. This is not about a governmental agency, it is not about the sheriff's department, it is about the state. I say that the governmental interest she refers to is not. It is the state's interest which is the people of Montana. Secondly, she refers to interest in pregnancy. I say no. This bill is dealing specifically with unborn human life. That's what this is. You heard a lot of testimony about funding for sexual violence and so forth. I submit that this bill does not have anything to do with that. You heard about the 1972 Constitution from Mr. Campbell. Please understand two things. Number one, it was debated, and it was first accepted as an absolute right. In fact, it was submitted to the Constitutional Convention for their vote with the compelling state interest clause. That motion was being debated and was amended by Mr. Campbell to eliminate the compelling state interest clause, and that passed. At a later time, that issue was reconsidered, and the compelling state interest clause was put back into that article. Please understand that was done, and please understand further, in quoting our Constitution, Article II, Section 2, Self-government, the people have the exclusive right of governing themselves as a free, sovereign and independent state. They may alter or abolish

the Constitution and form a government whenever they feel it is necessary. I submit to you in 1972, somebody decided to change the previous Constitution, and that is why you have the one before you today. Today, if you chose to, we could order a new Con-Con and redo the Constitution all over again. I appreciate Mr. Campbell's pride of authorship, and I appreciate the right of privacy he has authored to us, but it is not an exclusive right. Not only does the right itself qualify that right, but so does our Constitution, and you may alter or abolish as you see fit, or the people may.

Anita Roessmann brought up a number of tests, a number of programs, a number of issues about psychotropic drugs. She makes the argument in favor, in fact, of this bill because this proves the compelling interest. You heard testimony today in favor of, or mentioning, a number of groups, including the March of Dimes. No one was here today from the March of Dimes, and I submit to you that had they been here, it is every bit likely they would have testified in favor of this bill, not opposed. You heard from the NARAL Chairman, Morgan Sheets, that there are at least 5,000 dead before Roe and that this is a political statement. According to the National Center for Health Statistics, the legalization of abortion was not responsible for reducing abortion-related deaths. The discovery of antibiotics in the early 40s did that by providing a treatment for infection. That is per the National Center of Health Statistics. This is not a political statement, folks. It takes 100 votes to get this through this Legislature. The Republican Party cannot do that. The Democratic Party cannot do that. This has nothing to do with politics, this has everything to do with policy. Please understand this is not about birth control as was testified. I think that Rep. Wanzenried mentioned something about absolute power and absolute liability-I am not sure he said liability-but this is not about absolute power. This is about a qualifying statement for our right of privacy. You just heard Mr. Kelleher, and I do not know how in the world anyone follows him, quite frankly, and I am so grateful that he was able to come because he had to drive those icy roads from Butte to get here today. Thank you sir. I would like to follow up with-I'll have this handout which I will submit for testimony, Mr. Chairman **EXHIBIT(jus21a10)**, but I have a list here of nine programs administered by the Montana Department of Health and Human Services that tend to unborn human life. I have not totaled this up yet, but the local maternal child health services has received $410,000 a year. Montana's initiative on abatement for mortality of infants (the Miami Project) receives $436,000 a year. The Fetal Alcohol Syndrome and Effect Prevention receives ($327,000 per year). Medicaid, for the physician, hospital, and other medially necessary services providing prenatal and perinatal delivery period care, $17 million. The early Headstart, we do

not have the dollars because it is not part of their program, but we can get them. Women, Infants, and Children (the WIC Program), $162,000 per month. The Title X Family Planning, as you heard Mr. Kelleher testify, it is in the millions of dollars. I do not have it here, because DPHHS said it is unavailable unless they run a special program. The CHIP Program, which is similar to Medicaid, it provides for CHIP clients who become pregnant. Again, it's unavailable because they would have to run a special program. The TANF benefits for support of mothers in the third trimester is $300,000 a year. You are talking tens of millions of dollars, multiple state and federal programs, at least nine state programs that I could point to here, what does this say? To me, it says the state is already expressing its interest in unborn human life. What has happened since the Montana Supreme Court-what has been the effect of their overturning the legislation this Legislature has passed since 1995. The woman's right to know. This negated a woman's right to be fully informed with regard to the physical and psychological affects and consequences of abortion. Physicians only. This negated a woman's right to have an abortion conducted by a qualified doctor in a licensed facility, assuring the woman's health, safety, and welfare. Parental notification. This negated a parent from being even informed, not granting consent, but being informed, of an abortion being performed on his or her minor child. The partial birth abortion ban. This was not even challenged at the Montana Supreme Court because the Montana Attorney General's office decided it would not be upheld anyway, and they did not want to waste the time or the energy on it. But, it was overturned at the lower court because it was assumed and presumed that the right of an unborn child is not 100 percent. Choosing instead to allow an abortionist to choose to partially deliver a baby prior to terminating its life. If you folks could look at what happens in a partial birth abortion, if you could still stand there and not throw up, I would be surprised. The Montana Supreme Court has ruled on virtually all of these abortion statutes. They have overturned each law based on exactly the same provision. Article II, Section 10, the Right of Privacy, ruling in essence that the state does not sufficiently demonstrate a compelling interest in unborn human life. Several, and this is important, of these laws have been challenged all the way to the United States Supreme Court and have been upheld. Yet, when it came back to the Montana Supreme Court, it was overturned. But even it went further, the Montana Supreme Court in the Armstrong case has stated in 1999, four years ago, that they had not even defined compelling state interest. Yet, much has happened in our world that is not the same as it was thirty years ago. We have AIDS in our society growing at an exponential rate. We have fetal alcohol and fetal drug addiction syndromes that we never used to have. Human cloning is right on the edge, and abortion was not legal in 1972 when our Constitution was

drafted. Please keep in mind, and I will give you the testimony so you can see it for yourself the debate at that time over the compelling state interest issue had to do with wiretapping. **EXHIBIT(jus21a11).** Never did it contemplate, never did it consider, unborn human life. Today, our Department of Public Health and Human Services spends millions of dollars on a variety of programs dealing with unborn children and expectant mothers, to deal with the health of the child before and after birth. These expenditures and programs clearly demonstrate that the state has a legal interest. Does it rise to compelling? Compelling is not defined, remember? Everyone of Montana's laws dealing with the protection of women's rights and the rights of unborn children, which has been challenged to the United States Supreme Court have been upheld by that court. Montana's constitution states that the right of privacy shall not be infringed without the showing of a compelling state interest. It is a qualified, not an absolute, right. The United States Supreme Court, in two cases, Casey and Webster, has defined that states may, it allows the states to define a compelling state interest. It left that to the states. It did not do it at the federal level. Jane Roe, thirty years later, has now rescinded her arguments that she put forth. That's not her real name, but she has testified now that there was false testimony given, and she says it was wrong. In Dred Scott, 1857-58, the United States Supreme Court ruled that a black person was chattel. It was property. Do we believe for one minute that is true today? Mr. Chairman, members of the committee, we protect unborn eagle eggs, unborn wolf pups, unborn grizzly cubs. I submit to you that this state does have the compelling interest in the protection of unborn human life.

(Tape : 3; Side : A)

They have to, not us, they have to amend the Constitution. You can stop it here. You can vote no on this bill, and not send it to the people so they can rule on their own Constitution. You may do that, but I ask you not to. If you have a doubt, one tiny bit of doubt, about whether an unborn human life has a right to inalienable rights guaranteed by and enumerated by the Declaration of Independence of our country, the basis upon which we're founded, the first inalienable right, if there is any doubt at all, send this bill through. Vote yes. Send it to the people and let them decide. If they do not want it to be their policy, let it rest with them.

Mr. Chairman, I will just close with this. I watched my twins born. They were seven weeks premature. I could hold each one in the palm of my hand, and they did not come up to my elbow. They spent four weeks in the hospital. Seven weeks premature. We couldn't take them home. We had to feed them by a thing called a

gavage, a tube down the throat. They couldn't receive even mother's milk. I challenge anybody in this room to keep up with those girls on a basketball court or on a softball field. They are wonderful, and I watched them born. And, they were born naturally. The doctor came in and said "okay you can start to push," and there's one! Fire two! We didn't even know we were going to have twins until seven hours before. I watched my daughter Elizabeth, full term, taken by Caesarean section. I have seen the insides of my wife, that she would never see unless she swallowed a hand grenade. Fascinating! The uterus, the fallopian tubes. All that stuff spread out on her tummy and I went, "You can do that?" And, they took that baby out of there. Let me ask you a question, ten seconds before they made the incision, was that a baby? Was that a living human being? Or did we have to wait until the incision was done and the doctor reached in and grabbed the child and pulled it out to say, this is a human being? How far back do you go? I remember two years ago or four years ago, that we were talking about 22 or 24 weeks for viability. We've just had testimony about operations on 16-week-old babies. Sixteen weeks! I don't know that you will make a more important policy decision during this session or perhaps any other. I ask you please give serious, and I know you will, consideration to SB 274. Pass this thing through, and let the people of Montana choose their right, their constitutional right, to amend their Constitution if they see fit.

Mr. Chairman, members of the Committee, thank you all.

EXECUTIVE ACTION ON SB 25

Motion: **SEN. MANGAN** moved SB **25 DO PASS.**

Motion: **SEN. MANGAN** moved that **AMENDMENT SB002503.avl BE ADOPTED.**

Discussion:

SEN. MANGAN explained for the Committee's recollection that SB 25 was introduced on behalf of the Department of Corrections regarding placement of youth with mental disorders in a state correctional facility. After full discussion by the Committee on the definition in **SEN. KEENAN'S** bill, **SEN. MANGAN** thought it was best to review the definition used in his bill. He said the first thing they did was to get rid of borderline personality disorder. Many proponents suggested using the SED definition in the Administrative Rules. **SEN. MANGAN** informed the Committee he is still not sure whether the SED definition or the definition contained in the proposed **Amendment SB002503.avl** is least restrictive. The proposed Amendment was developed by the Department of Corrections and uses some of the same language used

in **SEN. KEENNAN'S** bill, and then adds schizophrenia, bipolar, and major depression. **SEN. MANGAN** feels the definition meets his intent.

SEN. MANGAN added that the original bill inadvertently eliminated Section 3, which provides once a youth is placed in a secured correctional facility, and they were found to have one of those disorders, they had to stay there. That was never the intention of SB 25. Rather, it was supposed to be the other way around. Therefore, the amendment re-establishes Section 3.

CHAIRMAN GRIMES questioned whether this will still allow the original intent of gaining more medicaid dollars, and have the same net effect.

SEN. MANGAN explained that currently once youth are placed in secure correction, they cannot access medicaid dollars. This was one of the issues in the first place, and will be addressed by passing SB 25.

SEN. MIKE WHEAT asked if this was the same definition approved in **SEN. KEENAN'S** bill.

Valencia Lane explained the definition is very similar, but it is not the same. They did not want to use an adult definition on children, so the definition was more crafted to apply to young people then adults.

SEN. MANGAN stated one of the concerns of probation officers, as well as the Committee, was what happened if a youth poses a significant danger to the community. **SEN MANGAN** suggested adding language, "unless the court determines the youth presents a significant danger to the community."

CHAIRMAN GRIMES asked for clarification since the bill presently reads a youth must be moved to "a more appropriate placement," and does not refer to a "less secure placement."

Ms. Lane explained this amendment can be accomplished by adding language on page 1, line 22, following "facility," which reads "unless the judge determines the youth poses a significant danger to the community."

SEN. WHEAT wanted to know if a judge has a youth in front of him who has a mental disorder as defined, and the judge feels the youth poses a substantial danger to the community, that youth can be placed in a secure correctional facility.

SEN. MANGAN replied that was correct.

SEN. O'NEIL wanted to know what would happen if the youth posed a danger to himself and whether he would then be placed in a secure facility.

SEN. MANGAN responded that would be an appropriate reason not to put the youth in a facility. This is one of the reasons for the bill.

SEN. O'NEIL then wanted to know where a youth who was a danger to himself would be placed under this bill.

SEN. WHEAT explained that, as a practical matter, the youth court would opt to have the youth examined under the civil commitment statutes rather than going through the criminal aspect of court.

SEN. MANGAN added for clarification that one of the problems right now is youth cannot be admitted to Warm Springs, so commitment would probably be to a private treatment facility.

CHAIRMAN GRIMES expounded saying that because it was not included in the amendment, you are assuming those kids who may present harm to themselves would be placed in an alternative setting, rather than a correctional facility.

SEN. MANGAN responded they would be placed in an appropriate treatment facility to be determined by the court and DPHHS.

CHAIRMAN GRIMES confirmed that the only people **SEN. MANGAN** is intending to include in his amendment are those who could be violent toward others.

SEN. MANGAN stated that was correct.

SEN. CURTISS inquired whether there were an adequate number of appropriate facilities in Montana that would meet the definition and, if not, would that mean youth would have to be committed to out-of-state facilities.

SEN. MANGAN stated one of the reasons for the conceptual amendment is to address the concerns of the juvenile probation officers for that small few who might meet that standard. Currently, you could be placed in a variety of facilities, treatment or residential facilities, both in and out of state. They cannot access medicaid dollars while they are in a secured correctional facility.

Ms. Lane clarified the amendment and suggested using "court" rather than "judge" and "finding" rather than "determining." **Ms.**

Lane suggested using the language "unless the court finds that the youth poses a significant danger to the community."

Vote: The motion **AMENDMENT SB002503.avl with changes BE ADOPTED carried 9-0. EXHIBIT(jus21a12).**
Note: The new Amendment SB002504.avl was submitted to the secretary on January 31, 2003. **EXHIBIT(jus21a13).**

Motion: **SEN. MANGAN** moved SB 25 **DO PASS AS AMENDED.**

Discussion: **SEN. O'NEIL** remembered the only opposing testimony was from Glen Welsh, Montana Juvenile Probation Officers' Association, and stated Mr. Welsh's concern was that it simply removes one part of the youth justice system from any involvement in treatment and rehabilitation of serious juvenile offenders. **SEN. O'NEIL** stated he is not sure the amendments address this concern.

SEN. MANGAN believes the last amendment addresses that and says the bill will only address a handful of youth, possibly four or five per year. The amendment will not preclude youth court, the juvenile probation officers, or the county attorney from requesting and presenting evidence to the court that Pine Hills, for example, is an appropriate placement based on the youth's violent tendencies. The bill does make it clear, however, that if that is not the case, an appropriate treatment center needs to be looked for.

Vote: The motion that SB 25 **DO PASS AS AMENDED carried 9-0.**

EXECUTIVE ACTION ON SB 123

Motion: **SEN. WHEAT** moved **SB 123 DO PASS.**

Discussion:

CHAIRMAN GRIMES feels that use of the driver's license as a tool in MIPs was extensively debated by the Drug and Alcohol Task Force. The general feeling was that it was the only place you were going to get the kids' attention. The Task Force did not consider a ten-day suspension, but rather pulling the license entirely, for repetitive behavior.

SEN. WHEAT commented about his 15-year-old son and favors this kind of legislation because of the implications having a driving license has on youth.

SEN. McGEE is in favor of this legislation but is concerned about

the fact that the bill applies to the third conviction and requires only ten hours of instruction, without stating whom the instruction should come from.

CHAIRMAN GRIMES informed that he has an MIP bill coming forward that deals with this same statute. **CHAIRMAN GRIMES** suggested the Committee may want to gently lay this bill on the table and, when his bill comes forward, they may want to form a subcommittee to deal with the issue of MIPs.

SEN. MANGAN feels this bill will be killed in House Judiciary and feels **CHAIRMAN GRIMES'** suggestion is good. **SEN. MANGAN** would like to send a MIP bill to the House that will be passed.

SEN. WHEAT WITHDREW HIS MOTION.

Motion/Vote: **SEN. MANGAN** moved **SB 123 BE TABLED.** The **motion carried 9-0.**

EXECUTIVE ACTION ON SB 238

Motion: **SEN. MANGAN** moved **SB 238 DO PASS.**

(Tape : 3; Side : B)

Discussion:

CHAIRMAN GRIMES admitted it makes him a little nervous to be changing law by changing definition. The law of unintended consequences can come into play because they may be unaware of the way that law has been used or interpreted by the statutes.

SEN. MANGAN insisted the federal law would not allow them to move a status offender to a delinquent offender for a probation violation. In addition, this provision is rarely used by probation officers. Generally, if there is a status offender or youth in need of intervention, and he is moved to a delinquent youth status, it is because he has committed another chargeable offense, not another status offense. This was pointed out during an audit. The other option, which is unrealistic for the state of Montana, is to change our whole consent adjustment procedure in order to put in the federal valid court order exception. This is an easy way to comply without affecting many people in the state. **SEN. MANGAN** feels this bill will not have an adverse affect on anyone, in fact, we should be embracing this proposed legislation.

SEN. WHEAT wondered if SB 238 was a companion bill to the one heard earlier on the Senate Floor.

SEN. MANGAN replied that, although he would not refer to this as a companion bill, it did come from the Montana Youth Justice Council.

CHAIRMAN GRIMES pointed out that on page 6 the definition of "youth in need of intervention" also includes a youth who has committed any acts of a delinquent youth.

SEN. MANGAN reminded the Committee that was discussed in the hearing. Probation officers can use their discretion and instead of bumping up an offender, which is addressed by this bill, they can charge as a youth in need of intervention rather than a delinquent youth. This means they can ratchet down, but they cannot ratchet up, for status offenses. Under current law, they

are allowed to bump up to delinquent youth. Federal law prohibits this.

CHAIRMAN GRIMES wondered why "youth in need of intervention" and "status offense" are not just redefined. **CHAIRMAN GRIMES** suggested more exhaustive clean-up could be needed.

SEN. MANGAN stated this was a good point and could be done. The term for status offenders is youth in need of intervention. They are the same thing. People who work in this field know that a youth in need of intervention is a status offender.

Ms. Lane agreed that it is confusing when everyone talks about status offender but the definition is actually a youth in need of intervention. **Ms. Lane** said to go back and define status offender and make the change throughout, would be a rather large task.

CHAIRMAN GRIMES questioned whether it was reasonable to amend the bill and put in status offense on page 5, line 26.

Ms. Lane did not think that was a good suggestion because the definition itself is that of a status offender. **Ms. Lane** suggested defining "status offender" with the language on page 5, line 26. **Ms. Lane** also suggested changing the language on page 6, line 3, changing "or" to "and" and then renumbering (c) to (b). This would provide for the ratcheting down effect.

CHAIRMAN GRIMES summarized that the net affect of this would be to provide a very clear distinction between a status offense and youth in need of intervention.

Ms. Lane corrected **CHAIRMAN GRIMES** and stated they would both be called "youth in need of intervention." However, the youth that has been ratcheted down in (c) on page 6 would not be confused with someone who has committed an offense that would not be considered an offense if committed by an adult.

SEN. MANGAN feel **Ms. Lane's** suggestion provides for a cleaner definition for the ratcheting down process.

Motion/Vote: **SEN. MANGAN** moved the amendment as suggested by **Ms. Lane**. The **motion carried 9-0.**

Note: **Amendment SB023801.avl** was delivered to the secretary on January 31, 2003. **EXHIBIT(jus21a14).**

Motion/Vote: **SEN. MANGAN** moved **SB 238 DO PASS AS AMENDED. Motion carried 9-0.**

EXECUTIVE ACTION ON SB 226

Motion/Vote: **SEN. MANGAN** moved **SB 226 BE REMOVED FROM THE TABLE. Motion carried 9-0.**

Motion: **SEN. BRENT CROMLEY** moved **SB 226 DO PASS.**
Motion: **SEN. CROMLEY** moved **AMENDMENT SB022603.avl BE ADOPTED.**

Discussion:

Ms. Lane explained that attached to the proposed amendment is a marked up bill. The subcommittee drafted amendments to accomplish what the subcommittee believed was intended in the first instance. This required amending 70-24-303 and 70-24-321. One section deals with obligations of a landlord to maintain a premises. The second deals with the tenant's obligation to maintain the premises and the dwelling unit. The amendments make it incumbent upon both to not engage or knowingly allow a person to engage in any activity that creates reasonable potential the premises may be damaged or destroyed or neighboring tenants may be injured. These activities include criminal manufacture of dangerous drugs, operation of a clandestine laboratory, and gang-related activities. The amendment also includes a three day notice requirement and a provision for a hearing to regain the premises.

SEN. CROMLEY commented that it is interesting to him that the word "knowingly" was once again a key word in this bill, as it was also key in the open-container bill.

SEN. PERRY questioned whether the Committee had amended SB 226 already and whether those amendments need to be removed in light of the new amendment being proposed.

Motion/Vote: **SEN. PERRY** moved that all prior amendments to **SB 226 BE REMOVED.** The **motion carried 9-0.**

Vote: The motion that **Amendment SB022603.avl BE ADOPTED carried 9-0.** **EXHIBIT(jus21a15).**

Motion/Vote: **SEN. CROMLEY** moved **SB 226 DO PASS AS AMENDED.** The **motion carried 9-0.**

EXECUTIVE ACTION ON HB 84

Motion: **SEN. McGEE** moved **HB 84 BE CONCURRED IN.**

Discussion:

SEN. WHEAT stated he likes the fact that the bill strips out any kind of an affirmative defense on the defendant during a case and allows both sides to present evidence of mitigation. **SEN. WHEAT** feels this bill clarifies the line between deliberate homicide and mitigated deliberate homicide.

Vote: Motion that **HB 84 BE CONCURRED IN carried 9-0. SEN. McGEE** will carry HB 84 on the Senate floor.

EXECUTIVE ACTION ON HB 29

Motion: **SEN. MANGAN** moved **HB 29 BE CONCURRED IN.**

Discussion:

CHAIRMAN GRIMES reminded the Committee that they had previously had discussion on whether the inclusion of the term length termed the intent and whether this would eliminate, or in any way weaken, use of the boot camp.

(Tape : 4; Side : A)

CHAIRMAN GRIMES suggested on line 8, page 2, deleting "request and" so they would just have to consider the recommendation. This amendment would put the burden on the prosecutors.

Ms. Lane said the amendment, as proposed, would change the title of the bill.

SEN. WHEAT feels if we are going to require consideration of the recommendation of the prosecuting attorney, then that recommendation should be in writing and be part of the record. **SEN. WHEAT** feels it should say written recommendation.

Motion/Vote: **SEN. WHEAT** moved that the word "written" be inserted on page 2, line 9, before "recommendation. **Motion carried 9-0.**

Motion: **SEN. MANGAN** moved that **HB 29 BE CONCURRED IN AS AMENDED.**

Discussion:

CHAIRMAN GRIMES commented this could upset the balance between the prosecuting attorney's office and the courts in requiring them to request. **CHAIRMAN GRIMES** feels the Committee might want to be more sensitive in balancing this.

SEN. CURTISS reminded the Committee that one of the comments made at the hearing was that there was no provision whereby corrections must go back to the prosecutors to make sure the inmates are suitable for a program.

SEN. WHEAT stated this was a good point, because if you read (4)(a) it says admission is discretionary with the department and it is the department that has to make the request, not the judge. This alleviated **CHAIRMAN GRIMES'** concern.

SEN. O'NEIL wondered what would happen if the prosecuting attorney said a person was not suitable for this program. Could the enrollment be revoked based upon that information.

SEN. WHEAT responded that the recommendation is to be relied upon when they are making the decision. This recommendation is made prior to them being able to participate in the program.

Vote: The motion that **HB 29 BE CONCURRED IN AS AMENDED carried 9-0. CHAIRMAN GRIMES** will carry HB 29 on the Senate floor.

Note: Amendment HB002901.avl was delivered to the Committee Secretary on January 31, 2003. **EXHIBIT(jus21a16).**

EXECUTIVE ACTION ON HB 149

Motion: **SEN. McGEE moved that HB 149 BE** CONCURRED IN.

Discussion:

SEN. McGEE reminded the Committee that the bill provides that the review division of the Supreme Court can review at places other than Deer Lodge. There are a few other technical amendments.

Motion: **SEN. O'NEIL** moved to strike "or more" from line 22. **SEN. O'NEIL** feels this language is redundant since it says "at least four times a year".

Ms. Lane agreed with **SEN. O'NEIL** that the language is redundant.

Motion/Vote: **SEN. PERRY** made a substitute motion, which included **SEN. O'NEIL'S** motion, to strike "or more" on line 22, and to also strike "Deer Lodge, Billings, or other" on lines 23-24. The motion **carried 9-0.**

Note: Amendment HB014901.avl was delivered to the Committee Secretary on January 31, 2003. **EXHIBIT(jus21a17).**

Motion/Vote: SEN. CROMLEY moved **HB 149 BE CONCURRED IN AS AMENDED.** Motion **carried 9-0. SEN. McGEE** will carry the bill on the Senate floor.

ADJOURNMENT

Adjournment: 12:10 P.M.

_____
SEN. DUANE GRIMES, Chairman

_____
CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus21aad)