Approved 3/3/92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative John Solbach at
Chairperson

3:30 a~~m~~./p.m. on February 27, 1992 in room 313-S of the Capitol.

All members were present except:

Representatives Heinemann and Vancrum who were excused

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Judy Goeden, Committee Secretary

Conferees appearing before the committee:

State Representative Kerry Patrick
Maureen Collins, Planned Parenthood
Amy Bixler, National Organization of Women
Allen Warner, Civil Rights Attorney
Margaret Hu, K. U. Women's Student Union
Carla Dugger, A.C.L.U.
Cleta Reyner, Right to Life
Gary McCallister, Kansas Trial Lawyers Association
Tom Buchanan, Kansas Association of Defense Council
Bob Corkins, KCCI

The chairman called the meeting to order.

Hearing was opened on HB 2255, as a condition of probation, women who are convicted of certain drug offenses are implanted with a contraceptive.

State Representative Kerry Patrick testified in favor of HB 2255. (Attachment #1) He testified he knew of no Norplant complications. He said Kansas would be the first state to pass this type legislation if the bill were passed. He said he had no specific statistics on drug babies in Kansas. He said he believed that possession is presumption of usage. Several committee members suggested there was a constitutional question on the bill under the equal protection act.

Maureen Collins, Planned Parenthood, testified in opposition to HB 2255. (Attachment #2) She answered committee members questions.

Amy Bixler, National Organization of Women, testified in opposition to HB 2255. (Attachment #3) She said NOW's best plan to reduce the number of drug babies would be something similar to what is currently being done in Wisconsin.

Alan Warner, Civil Rights Attorney, testified in opposition to HB 2255. (Attachment #4) He answered committee members questions.

Margaret Hu, K. U. Women's Student Union, testified against HB 2255. (Attachment #5)

Carla Dugger, American Civil Liberties Union, testified in opposition to HB 2255. (Attachment #6)

Cleta Renyer, Right to Life, testified in opposition to HB 2255. (Attachment #7)

Representative Smith moved to report HB 2255 unfavorably for passage. Rep. Macy seconded the motion. Motion carried.

Hearing was opened on HB 3054, statute of limitations on product liability claims.

Gary McCallister, Kansas Trial Lawyers Association, testified in favor of HB 3054. (Attachment #8)

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~xx~~m./p.m. on February 27, 1992.

Tom Buchanan, Kansas Association of Defense Council, testified in opposition to HB 3054. (Attachment #9) He said he thought the bill was anti-small business.

Bob Corkins, KCCI, submitted written testimony in opposition to HB 3054. (Attachment #10) The chairman said hearing on HB 3054 was closed, except for Corkins who was invited bac

The chairman called on Representative Garner to present his subcommittee report.

Representative Garner presented the subcommittee report on HB 2709 and HB 2724. (Attachment #11) The subcommittee recommended amending HB 2709 for passage, and no action be taken at this time on HB 2724.

Representative Garner made a motion that the committee adopt the subcommittee report. Rep. Parkinson seconded the motion. Motion carried.

Representative Smith moved to recommend HB 2709 as amended by the subcommittee favorably for passage. Rep. Gomez seconded the motion. Motion carried.

The chairman said that the subcommittee report being adopted did not preclude any final action on HB 2724, and Rep. Hamilton will be allowed to bring it up when the committee considers SB 35.
The chairman appointed the following subcommittee to consider juvenile records bills in committee:

Rep. Gomez, Chairman
Representative Everhart
Representative Douville

The meeting adjourned at 5:45 P.M.

GUEST LIST

COMMITTEE: House Judiciary DATE: 2-27-92

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATIO
MAUREEN COLLINS	WICHITA	PLANNED PARENTHOOD
KARL TRAUTMAN	BROWNELL CITY	BAKER UNIV.
Ann Inderman	Meadville Mo.	Baker University
Regena Bailey	Burlingame, KS	Baker University
Rebecca Bruce	Leawood, KS	"
David Livingston	Shawnee, KS	"
J. TAYLOR COLLOR	OVERLAND PARK, KS	"
STEVE DEVORE	BALDWIN KS	"
T. Scott Spradling Jr.	Baldwin KS	"
Carla Dugger	Kansas city KS	ACLU
Sheri Reckow	Olathe, KS	KU Student
Audrey Colt	K.C. Ks	KU BSW student
Gary Anderson	Topeka	AIA Kansas
Eva Lee	Leavenworth	St. Mary College
Cleta Renyer	Salina	Right to Life of Ks
Amy Waddle		OJA
Bill Henry	TOPEKA	Phillip Morris
Tom Buchanan	Overland Park	KAJC
Jada D.L. Hodgson	420 15th Osa, Ks	Baker University
George Barbee	Topeka	KS Consulting Engr
Tim Fisher	Box 23 Garden Plain 67050	Ref
Don Lindsey	OSAWATOMIE	UTU

STATE OF KANSAS

KERRY PATRICK
REPRESENTATIVE, TWENTY-EIGHTH DISTRICT
JOHNSON COUNTY
10009 HOWE DRIVE
LEAWOOD, KANSAS 66206

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER:
COMPUTERS, COMMUNICATION, AND TECHNOLOGY
MEMBER: APPROPRIATIONS
ENERGY AND NATURAL
RESOURCES
LEGISLATIVE POST AUDIT

House Judiciary Committee
February 27, 1992
Re: House Bill 2255

I. Provisions of HB 2255

1. A woman must first of all be convicted of felony possession, or distribution of cocaine, heroin or other opiate substance. Possession is a Class C felony; distribution is a Class B felony.

2. After her felony conviction, **if she is granted the privilege of probation**, she must be implanted with the Norplant contraceptive implant or some functional equivalent which has been approved by the Secretary of SRS,

3. The convicted felon must have the implant in for a minimum period of 12 months during which she must under go random drug testing. If the convicted felon tests negative for a 12 month period then the court will order the removal of the contraceptive device.

4. If a physician certifies that it is not medically safe for the woman to be implanted with the Norplant contraceptive implant or some functional equivalent, then this provision of the law is inapplicable and the woman can be granted probation without having to use the contraceptive device.

II. Analysis

Speaker Marvin Barkis has said this is the year for Children's initiatives, I believe this bill is a major initiative to protect children from being poisoned in the womb by

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their own crack smoking mothers. It is a major piece of legislation that is needed if we are to insure every child the equal opportunity of leading a healthy, happy, and productive life. It is a major piece of legislation to reduce demand on already overburdened and limited social service resources.

It is an undisputed and uncontroverted medical fact that a crack smoking, or a heroin using mother, transfers her addiction and a host of other health related problems to her unborn child. Drug abuse by an expectant mother is the ultimate form of child abuse. It is bad enough that the drug assaults children in the womb, but the injury is too often compounded after birth by an environment of neglect, poverty and violence. A drug addicted mother is usually not a good mother, her addiction is the controlling factor in her life.

According to the American Council for Drug Education, 80% of all unborn children whose mothers used cocaine and/or heroin during pregnancy have serious medical problems. Dr. Ira Chasnoff, president of the National Association for Perinatial Addiction Research and Education (NAPARE) said;" We've never seen anything like crack in terms of its potential for damage to the unborn. Using crack even once is like playing Russian roulette with the life of a child."

Also, according to NAPARE about 1 out of 10 newborns in the U.S. is exposed in the womb to one or more illicit drugs. NAPARE predicts by 1995 their will be 4 million crack babies born in the United States.

According to a study done by the General Accounting Office (GAO), the exact number of crack or drug addicted babies is unknown. According to that study;" Nationwide, tens and perhaps hundreds of thousands of drug exposed infants are born each year." **According to that same**

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study, the cost to all levels of government to prepare drug babies to enter kindergarten will soon reach over $15 billion a year.

If you care about kids, it is time to take action now. Drug related crimes are on the rise throughout the State. It is time that we do away with the well meaning but often softheaded approach of social service workers to the drug epidemic.

Nineteen states now have laws that allow child abuse charges to be pressed against any woman who gives birth to a child with illegal drugs in his/her bloodstream. In some East Coast cities, local prosecutors have charged such mothers with a felony: delivering illegal drugs to a minor through the umbilical cord.

This bill takes that concept one step farther and takes positive action to prevent drug abused children from being born. Society has a duty and a obligation to the unborn to insure that if it is born that it is born drug free. WE have a duty and a obligation as lawmakers to help the helpless.

What this bill is ultimately saying to our fellow citizens is this: if a woman has been convicted of a felony narcotic possession or distribution and is free to walk the streets through the granting of probation; until that woman can demonstrate to Society that she is clean from narcotics; Society is not going to allow that felon to bring into this world a drug damaged baby.

Probation is a privilege and not a right. Putting every drug offender into jail is also not the solution. I believe this to be an innovative solution that does not simply call for more jails and more punitive measures.

I understand that there is opposition to this bill on this Committee. I can appreciate your viewpoint. But if you will

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not support this Bill, I ask you what is your solution to reducing the number of crack babies born in Kansas? What is your solution to reducing demand on an already overworked and overburdened social welfare system?

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To: House Judiciary Committee

From: Maureen Collins,
Planned Parenthood of Kansas

Re: Testimony in opposition to House Bill 2255

Date: February 27, 1992

Chairman Solbach and members of the committee, Planned Parenthood opposes House Bill 2255. We believe this Bill is a blatant violation of a woman's constitutional right to privacy, is ethically repugnant, and fails to address the underlying social problems. In the interest of time, however, our testimony shall focus on the latter of these violations, leaving the remainder to other opponents.

First let me state, as family planning providers, we enthusiastically embrace Norplant as a new method of contraception. Since receiving F.D.A. approval in December 1990, demand for Norplant has exceeded supply. For many women troubled by the health risks associated with the Pill and the intrauterine device (IUD), Norplant offers a safe and reliable alternative in birth control.

But because of its effectiveness (approximately 98% effective to the Pill's 96% effectiveness), and the fact that it cannot be removed without medical assistance, many medical ethisists feared Government would abuse Norplant by coercively imposing it upon perceived undesirable classes of women. If passed, this legislation would confirm these fears.

The specter of drug-addicted infants has caused a public outcry which has led some in Government to call for punitive measures against women on the basis of their conduct during pregnancy. These measures frequently compromise or sacrifice important civil rights while undermining the most prominent solution to the problem -- proper prenatal care and drug-treatment programs tailored for pregnant women.

Even though the problem of maternal drug use and drug-exposed infants is increasing, there is no parallel increase of drug programs for pregnant women. In fact, a recent report by the U.S. General Accounting Office states that most drug rehabilitation programs specifically <u>exclude</u> pregnant women.

Several midwestern states have decided to tackle this problem head-on. In June of 1991, a Wisconsin state task force recommended a multi-faceted approach to the problem, including

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early identification of at-risk women, access to affordable prenatal care, family counseling and on-going treatment for substance abuse. In neighboring Kansas City, Missouri, public and private organizations have come together to intervene in high-risk pregnancies in a similar fashion. (See attached.) And in fact, this very legislature is entertaining a variety of bills to address this problem.

Currently, there is no mandatory state-wide reporting system for drug-exposed infants. Although this problem in Kansas is not as wide-spread as in other states, instances of drug-exposed infants have doubled. In 1989, the Department of Social and Rehabilitative Services in Wichita began accumulating area statistics: 28 cases were reported 1990, and 53 in 1991.

It is easy to understand why those who observe first-hand the tragedy of "crack babies" and infants damaged by alcohol should want to punish those who seem most directly responsible -- the mothers. But in practice, this would be little more than an exercise in scapegoating. These problems cannot be viewed in isolation from one another.

Although conventional wisdom holds that the host of problems associated with drug-exposed infants is attributable to substance abuse by the mother, more recent evidence suggests otherwise. A report from the Boston University of Medicine states that other lifestyle factors, including the lack of proper prenatal care and proper nutrition, bear equal, if not greater responsibility for the problems from which these infants suffer.

If Kansas legislators are truly concerned about combating alcohol and other drug use by pregnant women, we would recommend a non-punitive approach as viable alternatives to House Bill 2255.

Accordingly, Planned Parenthood of Kansas urges your sound rejection of this Bill.

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KANSAS CITY STAR FEB 23, 1992

New program to assist pregnant drug abusers

Hall foundations to provide $800,000 for network of agencies.

By DIANE STAFFORD
Staff Writer

Charmaine Gladney ran her hands gently over the mounded white blanket, pausing to pat the fetal monitor atop her stomach.

"My baby's healthy and big. He's got a strong heartbeat," glowed the 25-year-old, resting in a hospital bed.

"Thank God. I've been clean since early January."

Today, she is embraced by counselors at Renaissance West, a Kansas City substance abuse treatment center, and is receiving care at Truman Medical Center.

She typifies the women being helped by an ambitious new drug intervention program unveiled Wednesday at the hospital.

At a news conference, the Hall Family Foundations announced a three-year grant of nearly $800,000 to finance a program named KC PACT.

Gladney vows to stay drug-free and deliver a healthy child. But she couldn't have said that a couple of months ago.

"When you're doing drugs, you don't think of prenatal care," the former crack smoker said. "You don't think clearly at all."

For several months, she failed to recognize the dangers drugs posed to her and her unborn child.

"I even had some drug sellers refuse to sell drugs to me," Gladney said. "They said, 'You're a nice-looking young lady. You're expecting. Seek some help.' "

She finally did.

"The foundations were concerned about the psychological and physiological effects of crack on babies," said Karen Bartz,

See **GRANT, C-8,** Col. 1

Grant aimed at healthy births

Continued from C-1

program officer for the Hall foundations. "We knew we had to attack the problem in the early intervention phase (during pregnancy)."

At Truman Medical Center, Bartz said, the foundations found people who already were trying to address the problem but with limited resources.

The KC PACT grant will formalize a network of social service agencies and volunteers to identify pregnant drug users. Prenatal care, drug abuse counseling and parenting classes are part of the plan.

Babies born to addicted mothers are "a human tragedy and an economic tragedy," said Joel Pelofsky, board chairman of Truman Medical Center, where about 450 cocaine babies are born each year.

David Mundy, an obstetrician and gynecologist at Truman, designed KC PACT to focus on one goal: To increase the number of healthy, drug-free births in Kansas City.

Participants in the program include: Truman Medical Center; the University of Missouri-Kansas City Institute for Human Development; the UMKC School of Medicine; the Ad Hoc Group Against Crime; Ward Chapel A.M.E. Church; Renaissance West; North Star Recovery Program; the Jackson County Jail and the TIES (Teams for Infants Endangered by Substance Abuse) Program.

Church members, jail administrators, doctors, nurses, social service counselors and volunteers will identify pregnant drug users and direct them to help.

Part of the grant also will finance a 24-hour "help line" for pregnant drug users to call. The number is 861-BABY.

Offices for KC PACT are in the Ward Chapel church at 22nd and Prospect.

The Rev. Ronald Williams said the church already has an outreach program to identify and help drug users. KC PACT will be able to take advantage of the church's existing program and contacts, Williams said.

The church, the Ad Hoc group and other community-based organizations will refer pregnant drug users to KC PACT. Billboards, fliers and public service announcements also will promote the program.

Once a woman enters the KC PACT network, she will be assigned to social workers and a volunteer role model — someone from her neighborhood — who can help her with day-to-day decisions and problems.

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KANSAS

To: House Judiciary Committee

From: Amy C. Bixler
National Organization
for Women

Re: In Opposition to
House Bill No. 2255

Date: February 27, 1992

The National Organization for Women (N.O.W.), for the reasons set forth below, oppose the passage of House Bill No. 2255 on the grounds that mandatory Norplant implants as a condition of probation for women convicted of drug possession charges is socially unethical and legally unsound.

First, let us clarify that a woman's constitutionally-protected right to privacy includes the right to bear children and, albeit more controversial, the right to terminate a pregnancy with abortion. These are different sides of the same coin under the right to privacy, and this Bill threatens the particular right to bear children. Thus, leaving aside the issue of abortion, new fetal rights claims involve rights of fetuses which will not be aborted, but whose future well-being is thought to be endangered by the behavior of the pregnant woman. Fetal rights advocates argue that when the actions or nonactions of pregnant women endanger the health of the unborn child, coercive interventions of various kinds may be justified.

Herein lies the first ethical problem: the attempt by Government to interfere with the reproductive rights of its citizens. Reproductive liberty includes, inter alia, the right of individuals and couples to choose the timing and manner of spacing of their children. Norplant was developed for the express purpose of increasing the reproductive choices available to women and "should never be used for any coercive or involuntary purpose." (See attachment #1, editorial of Sheldon J. Segal, originator of implant contraception.)

In choosing the timing and manner of spacing of children, reproductive liberty necessitates the individual selection of the use and method of contraception. Once a woman has even chosen to use birth control, the decision as to which method is most appropriate for her individually is one she should make with her doctor, her church, her conscience, never the State. This Bill would usurp the doctor-patient relationship and possibly interfere in her religious beliefs. Moreover, no pharmaceutical contraceptive is without its contraindications; each carry their own side affects and risks. Thus, it is not true that any woman can use any form of contraception successfully. House Bill No. 2255 ignores this reality by imposing one form, implant contraception, on each woman of the identified class.

The second ethical problem is this Bill's ability and intention to set precedent in granting the Government the awesome power to control human reproduction. The arguments that favor requiring the coercive use of Norplant among women found to be engaging in drug abuse

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(subordinating the rights of women to the welfare of the next generation) make an equally strong case for requiring Norplant insertions among women who carry inheritable genetic defects, or whose partners carry such genetic defects. The eugenics movement, the branding of certain groups in society as unfit to breed and depriving couples of their reproductive capacities, is a dishonorable and alarming chapter in American history. Once the State is permitted to arrogate to itself the power to determine which women shall be allowed to procreate, the right of reproductive choice ceases to exist.

This Bill also talks about using a "functionally equivalent" contraceptive to Norplant. To date, no such technology exists, short of outright sterilization. Surely it is not the intent of Kansas legislators to advocate the sterilization of women who are convicted of drug possession.

The second front of our attack of this Bill is one of a practical legal analysis. Traditionally, the ideas of crime and punishment have been inseparable. "Punishment" is the consequences of a conviction (committing a "crime"), and may be defined as a preventive measure designed to protect society, reform offenders, and educate the community in deterrence. House Bill No. 2255 would accomplish none of the above.

First, it would not "protect society" in the manner desired, i.e., reduce the number of drug-exposed infants. There must be some correlation between the punishment inflicted and the underlying offense. This Bill would impose Norplant on a woman as a condition of probation for drug possession charges. Yet, it presumes to equate "possession" with "use" or "addiction"; definitionally and legally, these are three very different concepts. A woman may be convicted of possession, forced to undergo the Norplant surgery, but may be neither sexually active nor a substance abuser.

Nor would this Bill "reform offenders." An important criterion of "punishment" is that it should have particular significance to the offender. The stigma of forced contraception can hold no rehabilitative value to one who is drug free. Finally, the possible deterring affects this Bill might have on substance-abusing women is minimal at best. If the increasing criminal sanctions and the health risks and life expectancy of drug users and pushers cannot seem to slow the ever-growing drug trade, neither will the threat of Government-mandated contraception.

If it is legislative intent to subjugate certain classes of women, then House Bill No. 2255 is the appropriate vehicle to do so. But it would be accomplished over the National Organization for Women's strong opposition. Coerced contraception, like coerced sterilization, coerced abortion, or coerced childbearing, is now, and must remain, beyond the pale of permissible State regulation.

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ATTACHMENT #1

10TH STOR : Level 1 printed in FULL form

December 29, 1990, Saturday, Final Edition

SECTION: EDITORIAL; PAGE A18; LETTERS TO THE EDITOR

LENGTH: 639 words

HEADLINE: The Purpose of Norplant

SERIES: Occasional

BODY:

As the originator of implant contraception, and director of the international team of scientists that developed Norplant, seeing this new contraceptive win approval from the Food and Drug Administration was the culmination of 24 years of exciting and satisfying work. But the best of scientific and technological advances often are also bent to immoral and destructive purposes. The thrill of success has been dampened by some of the suggested uses of Norplant that have appeared in the print and electronic media.

I was appalled by The Post's account ["Inquirer's Birth Control Bomb," Style, Dec. 18] describing how editorial writers at the Philadelphia Inquirer saw Norplant as a way of reducing the welfare burden resulting from high fertility among the underclass. A radio talk show host suggested that Norplant offers a "solution" to the problem of teenage pregnancy. His proposal was that all young girls reaching puberty should be required to use Norplant, so that in the years ahead they could not become pregnant unless they took the positive step of going to a clinic to have the implants removed.

It has been suggested, also, that Norplant provides the judiciary with a weapon to impose forced sterilization as a punishment for crimes such as child abuse. Some family planning advocates in the United States see in Norplant a powerful addition to the "contraceptive armamentarium," as they call it, for poor countries. "A dream method for birth control programs," they explained, "because once Norplant is inserted, a woman cannot become pregnant unless she is motivated enough to take the positive step to have it removed."

Hold everything! Norplant should never be used for any coercive or involuntary purpose. It was developed to enhance reproductive freedom, not to restrict it. My colleagues and I worked on this innovation for decades because we believe in human dignity and believe that women should have the opportunity to have the number of children they want, when they want to have them -- not just educated and well-to-do women, but all women.

Those who suggest using Norplant for involuntary or coercive sterilization or birth control will find me leading the opposition. Our purpose in improving contraceptive technology is to enrich the quality of human life. Using Norplant, in this country or abroad, to toss aside rights and trample human dignity would be an intolerable perversion.

SHELDON J. SEGAL New York

The writer is director of Population Sciences at the Rockefeller Foundation in New York City.

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To: House Judiciary Committee,
Representative Solbach, Chair

From: Alan G. Warner, Esq.
Attorney at Law

Re: House Bill 2255

Date: February 27, 1992

Mr. Chairman and Committee Members,

My name is Alan G. Warner, and I am an attorney in private practice. For the past six years, I have specialized in federal criminal defense and federal civil rights litigation in Washington, D.C. Currently I maintain offices in D.C. as well as Kansas. I come before you this afternoon in express opposition to House Bill 2255.

There are a couple of accepted propositions of law which are the bases of my opposition. First, although a criminal conviction constitutes a waiver of certain constitutional rights, one who is convicted of a crime does not lose all constitutional rights. For example, upon conviction, individuals do not lose their freedom of speech, nor their right to be secure in their homes or their persons. The second legal proposition is that a condition of probation must be reasonably related to the rehabilitation of the convicted person or to the protection of society, and must be calculated to the least extent possible in interfering with the convicted person's constitutional rights.

The right to procreate has been determined by the U.S. Supreme Court to constitute a fundamental civil right of privacy. Carey v. Population Services International, 431 U.S. 678 (1977). House Bill 2255, amending K.S.A. 21-4610, mandates a direct unconstitutional invasion of a woman's privacy interests in her decision whether or not to beget or bear a child.

Several states, as well as the federal government, have had to deal with a probationary term explicitly restricting a woman's right to beget and/or bear children. In each case, the woman had actually been convicted of child abuse or a similar child endangerment violation. The states that have previously dealt with this issue include California, Florida, Ohio, and in 1989, Kansas. Each appellate court for its respective jurisdiction had found that the probationary condition was an unconstitutional invasion of the woman's privacy interests.

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Attach #4
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Also, in each case, the probationary condition was much more closely related to the criminal activity for which she was convicted than is in the current legislation before you. In fact, in House Bill 2255, no such relational requirement is found. Considering these examples, it is clear that a probation condition which does not relate to the underlying crime and violates a woman's right to bear children would be found unconstitutional in a court of law.

This legislation may also have problems with due process and equal protection in that it only applies to women. No rational relationship exists between the crime (drug possession), and the sex of the convicted individual. Hence, imposing additional conditions on probation because the convicted individual is a woman is potentially a violation of due process and equal protection under the law. However, these analyses need not be reached because, first and foremost, House Bill 2255 blatantly violates the woman's constitutionally-protected privacy interests.

Therefore, for the reasons addressed above, I must oppose the passage of House Bill 2255.

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no insurance. The Fund's suggested concern is unwarranted. In any event, that question is not before us in this case.

Reversed and remanded to the district court with the instruction to enter an appropriate order directing that all compensation and benefits payable to Miller be paid by the Fund.

13 Kan.App.2d 257

STATE of Kansas, Appellee,

v.

Diana K. MOSBURG, Appellant.

No. 62250.

Court of Appeals of Kansas.

Feb. 3, 1989.

A defendant was convicted on her plea of no contest to endangering a child in the Seward District Court, Kim D. Ramey, J., and she appealed. The Court of Appeals, Page W. Benson, District Judge, Retired, Assigned, held that: (1) parole conditions were governed by the same law that controlled probation conditions, and (2) probation condition prohibiting defendant from becoming pregnant during term of her probation unduly infringed her right to privacy.

Affirmed in part and remanded.

1. Pardon and Parole ⇐64

Parole conditions are governed by the same law that controls probation conditions. K.S.A. 21–4602(3, 4), 21–4610.

2. Criminal Law ⇐982.5(2)

A probation condition requiring a defendant who was convicted of endangering a child to refrain from becoming pregnant during the term of probation unduly intruded on the defendant's right to privacy.

3. Infants ⇐20

A defendant who was ordered to serve 30 days in jail, after which she would be granted a two-year parole, and to pay restitution of medical expenses incurred by the state, its court costs and attorney fees, failed to show the sentence was unduly harsh for the offense of endangering a child.

Syllabus by the Court

1. Parole conditions imposed under K.S.A. 21–4602(4) are subject to the same limitations as probation conditions imposed under K.S.A. 21–4602(3).

2. A parole or probation condition ordering a woman to refrain from becoming pregnant represents an unconstitutional intrusion of the woman's right to privacy.

Tammie E. Kurth, of Neubauer, Sharp, McQueen, Dreiling, & Morain, P.A., Liberal, for appellant.

Linda S. Trigg, County Atty., and Robert T. Stephan, Atty. Gen., for appellee.

Before BRAZIL, P.J., and PAGE W. BENSON and FREDERICK WOLESLAGEL, District Judges Retired, Assigned.

PAGE W. BENSON, District Judge Retired, Assigned:

Diana K. Mosburg appeals from the sentence imposed following her plea of no contest to endangering a child, K.S.A. 21–3608, contending that the trial court erred in requiring Mosburg to refrain from becoming pregnant during the term of probation and that the trial court abused its discretion in sentencing.

Diana Mosburg, age forty, is the mother of three children, aged seventeen, thirteen, and two at the time of the incident. Mosburg had filed for a divorce from her husband. Mosburg gave birth to a girl, and when the baby was approximately two hours old, Mosburg took the baby to a restaurant parking lot, found an unlocked truck with baby items in it, and left the

baby in the truck without any identification or intent to return.

A complaint was filed against Mosburg charging her with abandonment of a child. K.S.A. 21–3604. A few days later, an amended complaint was filed charging her with endangering a child. K.S.A. 21–3608. Subsequently, Mosburg entered a plea of no contest. Mosburg was sentenced to one year in jail and ordered to pay restitution of medical expenses incurred by the State, court costs, and attorney fees. She was ordered to serve thirty days in jail, after which she would be granted a two-year parole. The trial court ordered: "As terms of this probation the Defendant shall not again violate the law; shall pay costs, attorney's fees and restitution; and shall refrain from becoming pregnant during the term of her parole."

The first question for this court to determine is whether the trial court erred in forbidding Mosburg to become pregnant during the parole period. Mosburg contends on appeal that the parole condition involving pregnancy violates her constitutional right to privacy. This appears to be an issue of first impression in Kansas.

[1] K.S.A. 21–4602(4) provides that "a court of competent jurisdiction of a person confined in the county jail" may release that person "subject to conditions imposed by the court." K.S.A. 21–4602(3) provides for probation "subject to conditions imposed by the court." We conclude that parole conditions are governed by the same law that controls probation conditions.

K.S.A. 21–4610 authorizes the trial court to set conditions of probation and sets out a nonexclusive list of conditions the court may include. The trial court has broad powers to impose probation conditions designed to serve the accused and the community. *State v. Starbuck*, 239 Kan. 132, 133, 715 P.2d 1291 (1986). Setting the conditions of probation lies within the sound discretion of the trial court. *State v. Hargis*, 5 Kan.App.2d 608, 611, 620 P.2d 1181 (1980), *rev. denied*, 229 Kan. 671 (1981).

There are, however, limitations on probation conditions that infringe on constitutionally protected rights. Thus, probation officers may not be given unlimited powers to search a probationer's property. *United States v. Consuelo–Gonzalez*, 521 F.2d 259 (9th Cir.1975), and a probationer may not be prohibited from freely expressing his opinions concerning the validity of public laws, *Porth v. Templar*, 453 F.2d 330 (10th Cir.1971). In *Wiggins v. State*, 386 So.2d 46, 48 (Fla.Dist.App.1980), the court struck down a probation condition prohibiting probationers, who were convicted of uttering a forged instrument or of burglary, from engaging in sexual intercourse with individuals to whom they were not lawfully married, holding the condition was not reasonably related to the probationers' past and future criminality or to the rehabilitative process.

Mosburg contends decisions regarding conception lie within the sphere of choices protected by constitutional rights to privacy. The United States Supreme Court accepted this argument in *Carey v. Population Services International*, 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977):

> "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy.... This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive. 'If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' *Eisenstadt v. Baird* [405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972).]"

Several other jurisdictions have examined the validity of probation conditions prohibiting the probationer from becoming pregnant. All hold such a condition invalid.

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California considered the question in *People v. Pointer*, 151 Cal.App.3d 1128, 199 Cal.Rptr. 357 (1984). In *Pointer*, the defendant followed, and imposed on her children, a strict macrobiotic diet. As a result of that diet, one child was seriously underdeveloped and the other child suffered severe growth retardation and permanent neurological damage. The defendant was convicted of felony child endangerment and sentenced to probation with a condition prohibiting her from conceiving a child. The court held the probation condition was reasonably related to the offense and to possible future criminality. 151 Cal.App.3d at 1138–39, 199 Cal.Rptr. 357. The court observed, however, that the condition infringes on a fundamental privacy right and is therefore subject to special scrutiny. 151 Cal.App.3d at 1139, 199 Cal.Rptr. 357. The court held that the condition was overly broad because there were less restrictive alternatives available, including court-supervised prenatal and neonatal care. 151 Cal.App.3d at 1140, 199 Cal.Rptr. 357.

The *Pointer* court also expressed concern about attaching criminal sanctions to pregnancy. The court noted that the probation condition would make it less likely that the defendant would seek prenatal care should she become pregnant and would make it more likely that she would seek an abortion; the court deemed judicially coerced abortion improper. 151 Cal.App.3d at 1140, 199 Cal.Rptr. 357. The court finally noted that even the best contraceptive methods sometimes fail and questioned the wisdom of attaching criminal status to such failure. 151 Cal.App.3d at 1141 n. 12, 199 Cal.Rptr. 357.

In *Rodriguez v. State*, 378 So.2d 7 (Fla.Dist.App.1979), the defendant was convicted of aggravated child abuse and as conditions of her ten-year probation lost custody of all her children and was prohibited from having custody of any children and from becoming pregnant. The court reversed the pregnancy condition, noting that, although constitutional protections are diminished by probationary status, the condition pertaining to pregnancy had no relation to child abuse because the defendant would not have custody of any children during the probationary period. 378 So.2d at 10.

In *State v. Livingston*, 53 Ohio App.2d 195, 372 N.E.2d 1335 (1976), the defendant was convicted of felony child abuse; as part of her sentence she was placed on probation with the condition that she not have another child for five years. The court voided that part of the sentence, holding that the condition unconstitutionally oppressed or restricted the liberties of the defendant, and implied that the condition was not reasonably related to rehabilitating the defendant. 53 Ohio App.2d at 197, 372 N.E.2d 1335.

[2] The probation condition regarding pregnancy unduly intrudes on Mosburg's right to privacy. There would be significant enforcement problems should Mosburg become pregnant, forcing her to choose among concealing her pregnancy (thus denying her child adequate medical care), abortion, or incarceration. The State should not have the power to penalize Mosburg if she uses contraceptives which for some reason fail to prevent pregnancy.

The probation condition ordering Mosburg to refrain from becoming pregnant should be stricken.

Mosburg next contends that, although no single factor constitutes abuse of discretion, a combination of the following factors demonstrates that her sentence was unreasonable and an abuse of discretion. The trial judge (1) failed to state the factors he considered in passing sentence, (2) failed to expressly consider the statutory sentencing factors, (3) failed to request or consider a presentence report, (4) witnessed the original complaint charging Mosburg with a felony, (5) disregarded the prosecutor's sentencing recommendation, and (6) imposed an allegedly unconstitutional probation condition.

In general, a sentence within the statutory limits will not be disturbed on appeal in the absence of special circumstances showing abuse of discretion. *State v. Linsin*, 10 Kan.App.2d 681, 682, 709 P.2d 988 (1985). Judicial discretion is abused when no reasonable person would take the view adopted by the trial court. *Stayton v.*

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Stayton, 211 Kan. 560, 562, 506 P.2d 1172 (1973).

Mosburg was convicted of endangering a child, a class A misdemeanor. K.S.A. 21–3608. The maximum sentence for a class A misdemeanor is confinement in the county jail for one year. K.S.A. 21–4502. A misdemeanant may receive a maximum probation period of two years. K.S.A. 21–4611. Mosburg received the statutory maximum sentence but was required to spend only part of it incarcerated.

Mosburg concedes that none of these factors standing alone requires a finding of abuse of discretion. She relies on *State v. Goering*, 225 Kan. 755, 594 P.2d 194 (1979), and *State v. Buckner*, 223 Kan. 138, 574 P.2d 918 (1977), in which the sentences were vacated in the absence of a statement of reasons. In *Goering*, the defendant was convicted of aggravated kidnapping, kidnapping, aggravated robbery, burglary, and two counts of attempted murder and received consecutive sentences of life, fifteen years to life, three to ten years, five to twenty years, and five to twenty years, despite having no prior criminal record and being unarmed during the commission of the crime. 225 Kan. at 762, 594 P.2d 194. In *Buckner*, the defendant was convicted of three counts of aggravated robbery arising from a single incident and received consecutive maximum sentences of thirty years to life, despite a favorable presentence report. 223 Kan. at 146–47, 574 P.2d 918.

[3] The present case is considerably less harsh in its treatment of Mosburg. She received only thirty days in jail out of a possible year for an offense involving endangering the life of an infant. The disparity between the actual sentence and the State's recommended sentence was only six months. Although the trial court stated that it had "no sympathy for someone that would cast a newborn upon the mercy of strangers," there is no evidence of bias or personal prejudice against Mosburg.

We remand this case to the trial court to delete the probation condition that Mosburg refrain from becoming pregnant during the term of the parole and affirm the remainder of the sentence.

13 Kan.App.2d 251

In the Matter of the INTEREST OF M.L.K.

No. 61846.

Court of Appeals of Kansas.

Feb. 3, 1989.

Couple who had power of attorney for care of child brought action to terminate parental rights of natural parents. The Norton District Court, Charles E. Worden, J., terminated parental rights and awarded attorney fees to appointed counsel for natural parents. Biological parents appealed through counsel. The Court of Appeals, Carl B. Anderson, District Judge, assigned, held that: (1) parent's right to and in children was of paramount importance and was entitled to due process protection under Fourteenth Amendment; (2) proceeding for termination of parental rights was exception to "minimum contacts" rule for personal jurisdiction and thus personal jurisdiction over a parent who could not be located or over an unknown parent was not required to meet due process considerations; and (3) court could not take judicial notice of attorney's overhead or expenses in awarding attorney fees.

Affirmed.

1. Constitutional Law ⇐274(5)
Infants ⇐155

A parent's rights in termination or custody proceedings are of paramount importance and entitled to due process protection under the Fourteenth Amendment. U.S.C.A. Const.Amends. 5, 14.

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Testimony by Margaret Hu, Lawrence
Bill No. 2255
February 27, 1992

A dangerous precedent is established by allowing judges to sentence women to Norplant, a form of temporary sterilization. On January 4, 1991, California's Tulare County Superior Court Judge Howard Broadman ordered that a woman child abuser submit to Norplant, surgically implanted birth control, as a condition of probation, (Johnson v. State of California). Bill No. 2255, by allowing the Kansas court to order Norplant as a condition of probation or suspension for women drug abusers, would both condone and continue of that dangerous precedent. Therefore, for the following reasons, it is the obligation of this committee to make clear that Norplant is not an acceptable option in any Kansas court.

Imposing a form of birth control under the guise of sentencing is unconstitutional. The U.S. Supreme Court has consistently and repeatedly ruled that the right to privacy, in regard to reproductive decisions, is protected by the Constitution. In 1942, the Supreme Court specifically set a precedent against state-imposed sterilization by striking down an Oklahoma statute which imposed sterilization as a penalty for certain convicted individuals. (Skinner v. State of Oklahoma).

Available by prescription only, Norplant is an unsafe form of punishment and should only be recommended by a medical professional. Research has shown that Norplant use can cause headaches and irregular bleeding. Because of substantial health risks, women with liver disease, breast cancer, blood clots, or heart problems are advised against Norplant use. Therefore, Sheldon Segal, the originator of Norplant, said that to use Norplant as a form of judicial punishment is " a gross misuse of the method." [1]

State-imposed use of Norplant has racist and classist implications as well. The majority of women who are tried and found guilty of drug or child abuse in the U.S. are women of color and/or recipients of social welfare. What will prevent a jury or judge from deciding a certain "type" of woman should not be allowed to reproduce?

Imposing Norplant as a judicial order is only a vindictive, temporary answer to a much larger problem. Although it is critical that we protect abused children and infants who are born addicted to drugs, sentencing a woman to be implanted with Norplant will not prevent further abuse by the welfare mother or protect the abused child or the already born "crack baby." The cycle of poverty and abuse spirals on because a sense of hopelessness and a lack of opportunity continues to throw this "type" of woman into a state of violence and despair. The true solutions are equal protection under the law, education, decent living standards, healthcare and treatment facilities, and job opportunities -- not Norplant.

Finally, Norplant inherently implies a gender biased sentencing procedure. As a punishment, Norplant is gender biased because it can be applied only to women and intrinsically blames a woman's reproductive organs for half the crime. Moreover, thirty states have established gender bias task forces or commissions and, of the nine states

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that have published their research, the evidence overwhelmingly establishes that women are victimized by gender discrimination in the courts.[2] Therefore, by allowing Kansas judges to sentence women to Norplant implantation, Kansas would be adding to and perpetuating a more complex problem of gender biased sentencing procedures.

The fact that one court in the United States has already attempted to use Norplant under the guise of sentencing is reason enough for alarm and justification to prohibit Bill No. 2255 from advancing beyond this committee.

Thank you.

1. The Washington Post, Jan. 5, 1991 at A1
2.Schatran, "Overwhelming Evidence: Reports on Gender Bias in the Courts," Trial, February 1990, p. 28

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American Civil Liberties Union
of Kansas and Western Missouri
201 Wyandotte, #209
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(816) 421-4449

TESTIMONY
HOUSE BILL 2255
HOUSE JUDICIARY COMMITTEE
Thursday, March 27, 1992

Submitted by the American Civil Liberties Union of Kansas

Good afternoon. Thank you very much for considering this testimony on House Bill 2255, which would add forced implantation of a contraceptive device to the probation requirements of women convicted of drug-related crimes. My name is Carla Dugger, and I am the registered lobbyist for the American Civil Liberties Union of Kansas.

The position of the ACLU on the issue of forced contraception is that state-mandated or court-ordered surgical implantation of a contraceptive device is unnecessary, unrelated to the legitimate aims of probation, and unduly restrictive of personal liberties.

Norplant justifiably has been heralded as a major advance in the technology of reproductive choice. However, the very fact of its effectiveness renders Norplant subject to governmental abuse. Because Norplant works automatically, is easily monitored and cannot be removed without medical assistance, it could once again place within the grasp of governmental authority a potent tool for reproductive control.

Probation conditions which bar the exercise of fundamental constitutional rights must be subject to a very high level of scrutiny. Before a probationer may be deprived of a constitutional right, the probation condition must directly relate to the offense, the restriction's benefit to society must significantly outweigh the defendant's loss of a fundamental liberty, and the condition must achieve its end in a manner that minimizes the impact on the defendant's exercise of constitutional rights. The Norplant condition does not meet these standards.

The bill before you places a condition on all women convicted of certain drug-related offenses. The bill itself does not specifically address the issue it apparently is attempting to remedy -- that of women whose drug involvement detrimentally affects their children, thus seeming to invite state intervention into these women's most personal and heretofore protected rights to privacy and reproductive freedom.

Alternative probation conditions exist which are less violative of fundamental rights and more directly and effectively advance rehabilitation goals for women convicted of child abuse. Parenting counseling, job assistance, prenatal care, and, in extreme cases, temporary removal

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of children and the monitoring of reunited families, are among the array of less restrictive options available. Greater access to reproductive health services generally, and increased public assistance to poor women who wish to use a contraceptive method, including Norplant if they choose, would be a significant benefit. Accordingly, forced contraception unnecessarily deprives probationers of reproductive freedom and decisional autonomy.

On January 3, 1991, A California judge ordered that Darlene Johnson be implanted with Norplant as a condition of her probation for child abuse charges. The case is currently on appeal by the American Civil Liberties Union. The case, like the bill before you now, challenges the wisdom and efficacy of governmental policies that strike only at the manifestations of social problems, instead of tackling them at their root. Contraceptive penalties and prosecutions of women using drugs, even if pregnant, only victimize women. They do little to change the realities that lead to drug abuse and child abuse in the first place.

Far from being part of a new trend, the Darlene Johnson case and HB 2255 hark of old-fashioned eugenics: plans designed to "improve" society by ensuring the "undesirables," usually low-income women and women of color, do not reproduce. Unless this trend is stopped, it will be extended to further restrict women's rights, to divert attention from the core social problems, and to derail any progress that could be made in solving these complex issues.

Please oppose House Bill 2255. Thank you very much.

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RIGHT TO LIFE OF KANSAS, INC.

Crosby Place Mall
717 S. Kansas Ave. Topeka, Ks. 66603 (913) 233-8601

February 27,1992

Testimony House Judiciary

We appear in opposition to House Bill 2255. We oppose this bill for the following reasons;

NORPLANT is not just a contraceptive. It sometimes acts as an abortifacient to abort a tiny living preborn child.

House Bill 2255 is antithetical to traditonal moral values and will encourage promiscuity.

The safety of NORPLANT is highly questionable.

Contrary to saving the State money, it could cost the State a great deal of the taxpayer's money.

NORPLANT provides no protection against sexually transmitted diseases.

This Bill is coercive and violative of the rights of minorities.

NORPLANT is being sold as a contraceptive -- eihter as suppressing ovulation or preventing conception by inhibiting sprem migration. Nevertheless, its mode of action includes a prominent abortifacient effect. While surgical abortions may be avoided in women using NORPLANT, early chemical abortions will occur. The abortifacient ffect occurs when the lining of the womb (endometrium) is made adverse to the implantation of the developing human after fertilization. In a test of NORPLANT, 24 women had supressed womb lining, 12 were irregular and 5 were normal.

NORPLANT has the same side effects as the pill. However, these claims must be viewed with suspicion, Since women with contrindication that would prevent

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them from taking the pill were excluded from the testing.
Some of the highest damage awards ever, have been made to women who have suffered severe damage from contraceptive use. A few multimillion dollar lawsuits from this inadequately tested drug would cost more than the money it is supposed to be saving in welfare costs.

It has been proven that women taking the pill are at a substantially increased risk of contracting a venereal disease. Since the action of this drug is similar to that of the pill. We presume the same is true of NORPLANT.

Can we foresee an increase in promiscuity and therefore as well as in venereal diseases and AIDS? Undoubtedly. We do not believe the people of Kansas are prepared to abandon the Judo-Christian ethic on which this nation was founded or to supplant morality with technology.

Finally, we object to the coercive nature of this legislation. Kansas once led the nation in forcefully sterilizing patients in our institutions and prisons. House bill 2255 is a step back toward those days.

We urge the committee to report this bill adversely.

Respectfully submitted,

Cleta Renyer

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KANSAS
TRIAL LAWYERS ASSOCIATION
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TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
HOUSE JUDICIARY COMMITTEE

February 27, 1992

HB 3054 - Products Liability, Limitations of Action

The Kansas Trial Lawyers Association appreciates the opportunity to appear before you today presenting its testimony in support of HB 3054 which is a bill designed to restore the statute of repose as embodied in the Kansas Products Liability Act found at K.S.A. 60-3303.

As the committee is aware, K.S.A. 60-3301, et seq., commonly known as the Kansas Product Liability Act, was thoroughly investigated and the subject of considerable debate before its enactment in 1981. This legislation provided a comprehensive and, in our view, a more restrictive than most, statutory scheme addressing products liability actions. This statute created a presumption that the "useful safe life" of a product had expired if harm to the plaintiff had been caused more than ten (10) years after the time of delivery, meaning after the time the product was delivered to its first purchaser who was not engaged in the business of either selling such products or using them as a component part of another product to be sold. This statute of repose provided that a product designer and manufacturer would not be liable if the useful safe life of the product had expired (10 years) and the rebuttable presumption created by the concept of "useful safe life" was not rebutted by the highest standard of proof, clear and convincing evidence.

Prior to 1987, K.S.A. 60-513, the statute of limitations relating to general tort actions, which included product liability claims, provided:

> The cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but

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in no event shall the period be extended, more than ten (10) years beyond the time of the act giving rise to the cause of action.

In 1987, K.S.A. 60-513 was amended. The 1987 amendment (HB 2386) was proposed and favorably acted upon without study and without any meaningful debate. This legislative change was proposed by representatives of the building industry. The only pertinent item appearing in the legislative history is a letter from Mr. Crockett, an attorney in Wichita, declaring that unfairness existed to contractors who were being held responsible for buildings having an age greater than ten years. It was claimed that the Ruthraff decision, which was the current law, was terribly unfair as it was applied to builders. Even though the Ruthraff case had been in existence for approximately fourteen (14) years, legislative action was taken to alter the effect of that case and, indeed, enact an absolute statute of limitations which bars the bringing of claims, including product liability actions, which did not accrue until more than ten (10) years after the act of negligence had occurred. Unfortunately, no consideration was given to what effect, if any, this legislative enactment might have upon the Kansas Products Liability Act, and in particular the ten (10) year statute of repose as found in K.S.A. 60-3303.

The 1987 change made by the Legislature to K.S.A. 60-513(b) was as follows:

> "Except as provided in sub-section (c), the causes of action listed in sub-section (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitations shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. That in no event shall an action be commenced more than ten (10) years beyond the time of the act giving rise to the cause of action."

HB 3054 proposes to leave the general statute of limitations of ten (10) years, as found in sub-section (b) of K.S.A. 60-513, but excise out product liability claims so they may be interpreted, processed, and judged by the comprehensive 1981 Legislative enactment, the Kansas Products Liability Act. The enactment of HB 3054 will restore the ten (10) year statute of repose in products liability actions which was accidentally eliminated by the 1987 Amendment to K.S.A. 60-513.

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There can be little debate that many products utilized by Kansans on a daily basis are reasonably expected by both sellers and buyers reasonably to last far longer than ten (10) years. This is particularly true when these products can be renewed and made practically new with replacement and renewal parts which form a very lucrative profit center for manufacturers distributing these products. Products such as factory equipment, construction equipment, farm equipment, motor vehicles and trucks, oil field equipment, power generating engines operated by many small Kansas towns, for the generation of electricity are but a few examples of the type of equipment that is clearly intended to remain in service for more than ten (10) years. Regrettably, many of these products may have been designed in an inherently defective manner with latent defects that prove to be unreasonably dangerous to the user of the product resulting in a debilitating injury that occurs more than ten (10) years after the time of delivery as defined in our Products Liability Act. Indeed, the intent of the Legislature was to directly address these types of situations by the enactment of K.S.A. 60-3303 while at the same time making a public policy decision that recoveries may result in those limited circumstances where the presumption of useful safe life can be rebutted by clear and convincing evidence or in those instances where other recognized exceptions apply. Clearly, the Legislature did not intend to have an absolute ten (10) year statute of limitations apply across the board to all product liability claims where injury occurs more than ten (10) years after the act of negligence whether or not such acts of negligence can be reasonably discovered.

We anticipate there will be opponents to the bill suggesting HB 3054 will be harmful to small Kansas manufacturers and that it will be harmful to the Kansas business environment as a result of our manufacturers not being able to be competitive in domestic and international markets. On the contrary, the existing law, without adopting HB 3054, unfairly discriminates against innocent Kansas injury victims while doing nothing to promote the competitiveness any Kansas company. For example, a manufacturer located in Michigan which sends it products into all fifty (50) states submits itself to the liability laws of all fifty states. If it distributes an unreasonably dangerous product as a result of defective design into the stream of commerce and injures a person in a state contiguous to Kansas having a more liberal limitations period or, perhaps, a statute of repose similar to that in Kansas, then that state's resident may be entitled to receive compensation from the Michigan manufacturer under certain circumstances. The Kansas resident, on the other hand, is simply out in the cold for no other reason than geography. In this scenario, how is the business environment or the competitive advantage of a Kansas business enhanced? It is not.

Conversely, in the situation where a Kansas company manufactures a product in Kansas and distributes that product into all fifty (50) states the Kansas manufacturer submits itself to the liability laws of the other 49 states. Kansas product liability law does not have extraterritorial effect and any protection which is believed to be afforded to a Kansas manufacturer by retaining the law in its current form is nonexistent. Claims brought in another state will be controlled by the limitation periods of the other state Indeed, rights of innocent Kansans who are injured by defectively designed and manufactured products where the injury occurs more than ten (10) years after the act of negligence have been sacrificed. The statute of repose, as codified in K.S.A. 60-3303, provides no relief for this injured Kansan notwithstanding the clear intent of the legislature to provide a remedy in certain limited circumstances.

To enact HB 3054 will be to enact sound public policy as it applies to products liability actions and to utilize the Kansas Product Liability Act which has been in effect and successfully working within our state for the past decade.

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KADC

TO: HOUSE JUDICIARY COMMITTEE

DATE: FEBRUARY 27, 1992

RE: HOUSE BILL 3054

The Kansas Association of Defense Counsel opposes House Bill 3054. The proposed legislation is both ambiguous, unnecessary, and apparently is intended to make substantial modifications to Kansas law to the detriment of businessmen, manufacturers, governmental entities and others. A summary of our main points is as follows:

1. H.B. 3054 is proposed as a "return to the law as it existed prior to 1987." That is completely untrue. The H.B. 3054 would create a statute of limitations provision that has never existed in Kansas, nor so far as we can yet determine would it be similar to the provision of any other jurisdiction.

2. H.B. 3054 could effectively eliminate any outside limitations period for product liability claims.

3. Because there may be no meaningful outside limitations period, not only would manufacturers and retailers be unable to determine what period of time their exposure existed for product liability claims, they wouldn't even be able to make meaningful decisions about the length of time that they should procure insurance coverage for such claims.

4. Thus, the bill adversely affects Kansas businesses. Because K.S.A. 60-3302 defines "product seller," "manufacturer," and "product liability claim" so broadly, this proposed change adversely effects many more businesses than just true manufacturers. It affects retailers, home builders, and many others.

5. Jury trials would almost always be required to determine whether or not a product was being used beyond its "useful safe life," the operative provision of K.S.A. 60-3303, substantially increasing litigation expense.

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6. The "problem" portrayed by the plaintiffs' bar of latent disease was specifically dealt with in 1990 by Amendment to K.S.A. 60-3303.

DISCUSSION

The current statute of limitations framework for most tort causes of action may be summarized as follows:

K.S.A. 60-513.

(a) Two (2) years for most tort actions.

(b) Accrues upon first substantial injury, or when fact of injury first becomes reasonably ascertainable to injured person, but no more than ten (10) years, which is the period of repose.

(c) Medical malpractice actions subject to four (4) year statute of repose.

I. The Proposal Provides No Meaningful Repose Period

Two years ago, the plaintiff's bar requested an extended statute of repose for asbestosis cases. That was enacted with the cooperation of the Kansas Association of Defense Counsel. K.S.A. 60-3303(d). However, now a bill has been proposed in an effort to make the statute of repose for products liability actions complete inoperative. The basis for that analysis is as follows:

1. House Bill 3054 would exempt product liability actions from the ten (10) year period of repose in K.S.A. 60-513.

2. The only period of repose for product liability actions would be that contained in K.S.A. 60-3303, the relevant provisions of which may be summarized as follows: K.S.A. 60-3303 provides that a product seller has no liability after a product's useful safe life expires. There is a rebuttable presumption of a 10 year period of useful safe life. However, the 10 year period has had virtually no effect on litigation as it does not apply:

> (D) . . . if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of

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delivery, or if the harm caused within 10 years after the time of delivery, did not manifest itself until after that time. (emphasis added).

If a court were to attempt to interpret the repose provisions of K.S.A. 60-3303, whether a particular action would be barred would almost always be a fact issue for the jury and not a legal issue for the court. After all, whether the "injury-causing aspect of the product . . . was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery," would almost always be subject to factual dispute. Such a result is inconsistent with the very purpose of statutes of repose, which are designed to define certain periods of limitation.

II. The Proposal Affects More Than Just Large Manufacturers

The few words contained in the proposal do not impart its potential for dramatic effect and those effected are more than appear at first blush. First, the obvious point - not all manufacturers are large industries. Often they are the small producers on which many Kansas communities depend for survival.

Second, the proposal affects retailers and other merchants. The proposal directs one's attention to K.S.A. 60-3303. However, that statute is part of a much broader enactment, the Kansas Product Liability Act. Under the Act, retailers are often exposed to liability as "product sellers." As one court which interpreted the Act noted, retailers which place their own labels on the product can be considered a manufacturer for purposes of Kansas products liability law. Alvarado v. J.C. Penney Co., Inc., 713 F. Supp. 1389 (D. Kan. 1989).

The Product Liability Act contains some protection for retailers under certain limited circumstances, but that is not substitute for a clearly defined statute of repose.

Governmental entities may be subject to liability under the Kansas Product Liability Act. See Attorney General Opinion No. 86-173, which concluded that a county may be exposed to liability for claims arising from the sale of chemicals, even though those sales are required by noxious weed laws. Even if that particular concern were cured by amending the Kansas Tort Claims Act, the very act of protecting governmental entities from extended liability from the sale of chemicals demonstrates why businesses are concerned about unknown - and often unknowable - future liability.

Although it has not yet been decided by any reported judicial decision, a good plaintiff's attorney may well argue that a farmer is subject to liability under the Kansas Product Liability

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Act. After all, "product seller" is any person engaged in the business of selling products. K.S.A. 60-3302(a). In turn, "manufacturer" includes a product seller who produces the product he sells. Farmers fit those definitions.

III. The Proposal is Harmful to the Business Environment

The uncertainty of this proposal is contrary to the very purpose of limitations periods and statutes of repose. They are designed to provide a substantial measure of certainty and stability by defining the period of time in which a suit may be brought. Statutes of repose have been adopted by many, if not most, of the states during the last ten years to provide certainty of liability exposure and thus enhance the business environment by reducing the litigation environment. As the respected Brookings Institute recent report on the high costs of civil litigation in America observed:

> The high costs of litigation burden everyone. Our businesses spend too much on legal expenses at a time when they are confronted with increasingly intense international competition.

IV. The Proposal Will Result in Statutory Ambiguity

The proposal would add certain language to the 10 year period of repose contained in K.S.A. 60-513(b), as follows:

> The provisions of this subsection shall not be interpreted to shorten the time to bring a product liability claim, as defined in K.S.A. 60-3302 and amendments thereto, to a period of time less than that provided in K.S.A. 60-3303 and amendments thereto.

A summary of the provisions of K.S.A. 60-3303 is as follows:

K.S.A. 60-3303.

(a) (1) No liability after product's useful safe life expires.

(b) (1) Ten (10) year rebuttable presumption of useful safe life.

(2)(A) - (D) Exceptions to 10 year period.

(c) Nothing in (a) and (b) modify K.S.A. 60-513.

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(d) The ten (10) year limitation does not apply to latent disease caused by exposure to a harmful material.

Thus the Legislature will have enacted two contradictory and circular provisions:

1. K.S.A. 60-513(b) will provide that nothing herein shortens the time provided in K.S.A. 60-3303 to bring a product liability action.

2. K.S.A. 60-3303's "time" is set forth in sections (a) and (b), yet subsection (c) states that nothing in those sections modify K.S.A. 60-513.

Clearly, the confusion resulting from enactment of the proposal will cause litigation in an effort to gain clear judicial guidance as to what "the legislature intended."

If the purpose of H.B. 3054 truly is to harmonize K.S.A. 60-513 and K.S.A. 60-3303, then the amendment to 60-513 should read as follows:

> The provisions of this subsection shall not be interpreted to shorten the time to bring a product liability claim arising out of a disease that is latent caused by exposure to a harmful material, as defined in K.S.A. 60-3303(d)(2), to a period of time less than that provided in K.S.A. 60-3303(d)(1).

In our opinion, the proposed language in H.B. 3054 is unclear and is entirely inconsistent with Kansas' present statute of repose. The proposal is unnecessary and harmful to many groups including large and small manufacturers, retailers, governmental entities and others.

Respectfully submitted,

Thomas R. Buchanan
KANSAS ASSOCIATION OF DEFENSE COUNSEL

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LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

HB 3054

February 28, 1992

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
House Committee on Judiciary
by
Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry. I appreciate the chance to express our members' views today on HB 3054 regarding the products liability statute of repose.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

Prior to the enactment of KSA 60-3302 in 1981, KCCI was deeply involved in its legislative debate. Our support of the ultimate legislation -- as is typically the case

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-- evolved from compromises with other interested parties. Originally, KCCI supported a proposal which would have placed a definitive 10 year "cap" on the time period in which products liability claims may be filed. The law, through statutory amendments and judicial interpretation, has now come full circle back to that concept.

KCCI still supports the idea of a more certain definition of the liability exposure period for claims of this sort. Manufacturing costs would be more predictable, business management efficiency could be increased, and Kansas firms could better compete in the world marketplace if such restraint upon products liability litigation could be assured.

We do not address today the appropriateness of a specific 10 year limitation upon these claims. Instead, KCCI's position is that ***some*** upper limit on the time for filing a products liability suit is warranted. The appropriate cap might be 10 years, or it may be longer. KCCI will need more information from our manufacturing members in various types of industries before we could make a more specific recommendation.

Consequently, KCCI opposes the effort of HB 3054 to preclude application of a definitive liability limitation period.

Thank you for your time and consideration of these concerns.

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REPORT OF SUBCOMMITTEE
HOUSE JUDICIARY COMMITTEE
ON DRIVE-BY SHOOTING (H.B. 2709)

February 25, 1992

The subcommittee recommends the passage of H.B. 2709 as amended.

The subcommittee recognizes that drive-by shootings are a very real problem in some communities in Kansas and wants to address the problem.

Presently, some gaps exist in the ability to fully prosecute some drive by shooting situations. We believe our work product fills these gaps without creating additional crimes simply to stack charges against the accused.

New Section 1 (a) addresses the situation in which a drive-by shooting of an unoccupied dwelling does not rise to the level of a felony because less than $500. of property damages results. Subsection (a) simply makes the act of willful, malicious and unauthorized shooting at an unoccupied dwelling a class E felony, regardless of the amount of damage.

New Section 1 (b) addresses the situation when aggravated assault and aggravated battery fails to cover the act. Malicious and willful shooting at an occupied building or vehicle, but where the individual is not placed in immediate apprehension of bodily harm, is a class D felony. This is the same class of felony as aggravated assault and will cover the situation where aggravated assault would fail. The willful and malicious shooting at an occupied building or vehicle which results in bodily injury is a class C felony. This is the same class felony as aggravated battery and will cover those situations where the requisite intent to injure, required for battery, cannot be shown.

The subcommittee believes the creation of these three new felonies addresses the gaps in current law discussed by the conferees supporting H.B. 2709. The subcommittee also includes language that a class A felony murder charge is available for cases in which a drive-by shooting results in death.

In addition, the subcommittee explored other legislative proposals for addressing the problem of drive-by shooting. The subcommittee added a provision for forfeiture to apply to those convicted of the crimes created in this bill. In addition, we recommend amending K.S.A. 21-4206 (1991 Supp.) to allow for the seizure and disposal of any weapons used it such crimes. We do not believe the seized weapons should be sold and, thus, allowed to reenter the streets of our communities.

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The subcommittee did review and consider H.B. 2724. However, we believe that H.B. 2709, as amended, sufficiently addresses the problems in prosecuting drive-by shooting cases. Therefore, the subcommittee recommends that the full House Judiciary committee take no action of H.B. 2724.

In summation, the subcommittee suggests that H.B. 2709, as amended by the subcommittee, is necessary to help deal with this problem and that the bill in the form as amended by the subcommittee should be passed.

APPROVED By :

Rep. Jim D. Garner, Chair

Rep. Jan Pauls

Rep. Mark Parkinson

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