

Sultan

CONSTITUTIONAL LAW II

Fall 1995

INSTRUCTIONS

The proctor will first distribute the essay question and scrap paper. One hour and thirty minutes later you will receive the blue books. You will then have forty-five minutes to answer the question.

Read the entire examination carefully before you write. Plan your answers. WRITE IN INK. WRITE CLEARLY ON ONE SIDE OF THE PAGE ONLY.

BE AS DETAILED AND SPECIFIC AS IS POSSIBLE. ANSWER THE QUESTION.

DO NOT SURVEY AN AREA OF THE COURSE. RATHER APPLY THE LAW TO THE FACTS. DO NOT REPEAT YOURSELF. No materials of any kind are allowed with you. All question sheets must be handed in with your blue book(s).

Please make sure you have your examination number on each bluebook and that they are sequentially numbered before you submit them to the proctor.

GOOD LUCK

ESSAY QUESTION (50 Points)

The following facts appeared in the media in early October of this year:

As long as there have been teenage sex and teenage pregnancy, there has also been a familiar pattern for young people dealing with this unwelcome event: first denial, then

a creeping fear and perhaps a few fretful, secretive exchanges before the news finally comes out. In the case of "Mary Smith," a 15-year-old freshman at Blair High School, and her 16-year-old boyfriend Heath Mayfield, a junior varsity running back with a spanking-new Ford Mustang, the pregnancy was well into the fifth month before they finally confirmed it with a home-test kit.

That was Sept. 26, 1994. Two days later, Mary (whose parents requested a pseudonym to protect her) told Heath that she had made an appointment for abortion counseling. Within 48 hours, she was detained by police, placed in a foster home and brought before a judge who forbade the abortion.

Now, one year later, her parents have filed a lawsuit against Heath's parents, various police officers and county officials, and a local physician and physician's assistant, charging trespass, false arrest and assault, among other things. The case, which will be heard in federal court in Lincoln, Nebraska...has suddenly thrust Blair, a city of 7,250 that is so placid that mayoral candidates have run unopposed for the past 12 years, deep into the rancorous national debate over who has a right to influence a pregnant woman's decision to get an abortion.

On that emotional afternoon more than a year ago, Heath Mayfield recalls, "I told her she didn't have to do that, and she kept crying." Heath too was upset, and when his mother Cathy Tull discovered why, she got on the phone with Mary's mother and, as she says, "had words." She and her husband John Tull, a printshop owner, then followed Heath to the Smiths' front yard, where the two families battled it out before a gathering audience of passersby. The Tulls claim that Heath was on his knees begging for the life of the baby in front of Mary's father, who was preventing him from speaking to his daughter. Mary's parents contend that

Heath, along with his family and several friends, was screaming and calling them "baby killers." The Smiths called the police, and Heath was arrested for assaulting a police officer (a charge he later pleaded guilty to).

At that point, the Smiths retreated to the nearby home of a relative and the Tulls went to get their son out of jail. But Cathy Tull didn't stop there. That evening she solicited from a local physician's assistant, James Jordan, a letter stating that "any elective abortion could potentially cause medical and emotional damage to the mother at any stage of pregnancy." Though Jordan and the doctor who co-signed the letter, K.C. Bagby, had never examined Mary, they claimed that at 23 weeks an abortion "could not only be harmful...but even in the most extreme case be potentially fatal to the mother."

Tull took the letter to the police, who consulted with Washington County attorney John E. Samson and then proceeded in force--the complaint says with 10 squad cars, the city says it was fewer--to the house of the Smith's cousins. The police believed they had probable cause to take her into custody, the police report states, "because of the health risk to Mary if an abortion was performed at this stage and due to the fact that an abortion was planned." The next day Mary, who had been taken to a foster home outside the city, was questioned by Samson without an attorney or legal guardian present, the Smiths' suit alleges. Samson then drew up a petition to the juvenile court charging that the Smiths "neglect or refuse to provide care necessary for the health, morals or well being" of their daughter. Counters Jeanelle Kleveland, the Smiths' lawyer: "They had put her under the care of a doctor, and that's who she needed, not the cops." Mary's regular physician was on vacation at the time.

At a juvenile-court hearing on Sept. 30, Samson presented the findings of another gynecologist, who had

examined Mary and determined that she was 27 weeks pregnant and therefore beyond the point where abortion was even an option (legal elective abortions are all but impossible to obtain after 24 weeks.) The court returned Mary to her parents on the condition that she not have an abortion even though it was a moot point. In the Smiths' view, however, the fact that Mary's pregnancy was too far along for an abortion does not erase their basic complaints about the authorities' treatment of her. (While Mary was still pregnant, the Smiths contacted the Nebraska Civil Liberties Union, which helped them prepare their suit.) Nor did any of this stop the harassment and intimidation that the Smiths say they endured for months before finally moving out of Blair last summer. The day after the front-yard showdown, flyers turned up around town branding the Smiths "murderers." Constant sniping made it impossible for Mary to continue classes at Blair High School and left her afraid to leave home alone...The Smiths, who refuse to speak to the press, now live across the border in Iowa, where Mary attends school and cares for her daughter, who was born Dec. 7, 1994....

In Blair last week people were talking more about the invasion of the national media than about the abortion. Though pro-life sentiment runs strong here, it is by no means universal, and Blair city attorney Wyman Nelson insists that ideology played no role in the Mary Smith incident. "This wasn't about the issue of abortion, it was about the threat to the health of a juvenile," he says. In a small town such as Blair, the word of a "very well-respected physician" like Bagby is not questioned when he claims that such a threat exists. (Most gynecologists say abortion at 23 weeks is medically acceptable but carries many times the risk of a first-trimester abortion.) Says Nelson: "If it had been a tonsillectomy or an appendectomy, we would have done the same thing."

But unlike appendicitis, pregnancy is governed by a host of special laws, from Roe v. Wade to the 1994 Freedom of Access to Clinic Entrances Act, Kleveland observes. "The point is that Heath Mayfield and his family and government officials had no right or standing to interfere with the young woman's decision to have an abortion..."

"We were made aware that my son had no right and the baby had no right," acknowledges Cathy Tull. "But I just wanted to talk about the risk to the mother, and I was unable to communicate with her."

....In light of the lawsuit, the Tulls are also considering a petition for custody of the child. "After all, whose interest is the other side looking out for?" asks the Tulls' local lawyer, Andrew Ferguson. "Eventually someone is going to have to explain to this young girl why her maternal grandparents sued her father for trying to prevent her from being aborted." And, for that matter, why her conception became a cause celebre in Blair.

An attorney in practice in Lincoln, Nebraska, all of the defendants in the civil suit join together and engage you for their defense. Researching the 1994 Congressional Act (18 U.S.C.A. 248) you find the following relevant statutory provisions:

§ 248 Freedom of Access to Clinic Entrances.

"(a) Prohibited Activities.--Whoever--"(1) by force or threat of force or by physical obstruction intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been,

or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;....

"(c) Civil Remedies--

"(1) Right of Action.--

"(A) In General.--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services....

"(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses....

"(d) Rules of Construction.--Nothing in this section shall be construed--

"(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution "

"(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference....

"(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

"(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

" (e) Definitions.-- As used in this section:

"(2) Interfere with.--The term \interfere with' means to restrict a person's freedom of movement.

"(3) Intimidate.--The term \intimidate' means to place a person in reasonable apprehension of bodily harm to him or herself or to another.

"(4) Physical obstruction.--The term \physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services or to and from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

"(5) Reproductive Health Services.--The term \reproductive health services' means reproductive health services provided in a hospital, clinic, physician's office, or other facility and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

List in the order of their priority all the constitutional issues that you feel you can use in the defense of Smith's civil lawsuit against your clients. Then, in that priority, discuss each issue so listed giving the reasons for their ultimate acceptance or rejection.

DO NOT use any "straw-man" arguments--setting up issue(s) with little substance or possibility of success, then knocking them down.

END OF THE EXAMINATION