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Should Abortion Laws Be Liberalized Or Repealed?

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CHAPTER ONE
INTRODUCTION

During the past few years one of the most complex moral-legal problems of our history has surfaced. It is the question of whether the abortion laws currently on the state law books should be liberalized or even removed entirely. The question has been argued and discussed in probably every legislature in the land. Special public hearings on the subject have heard emotional witnesses either deploiring the thought of innocent human life being taken or extolling the benefits of a liberalized law that would allow only wanted children to be born.

In Montana's own emotional public hearing on House Bill 554 a packed room heard shocking stories of fetuses being aborted alive, of women dying as the result of illegal abortions and of the threat of a Nazi mentality developing in this country. Although the intentions of both opponents and proponents were sincere, it is my feeling that public hearings such as the one held on HB 554 do as much to obscure the issues as they do to enlighten. Opponents and proponents come well armed with sensational reports they have picked up to buttress their arguments, the testimony becomes emotional and one-sided, the audience becomes caught up in the emotion and polarizes behind one of the sides. The end result is highly irrational. People leave thinking that they have been enlightened and that they
know their own position, when actually all that has happened is
that they have accepted a one-dimensional answer to a many-dimen-
sional question.

The realization that the abortion question has many dimensions
all of which demand painful moral considerations is the first
step in a meaningful analysis. As Daniel Callahan says, "Abortion
is at once a moral, medical, legal, sociological, philosophical,
demographical, and psychological problem, not readily amenable
to one-dimensional thinking."¹ In view of this fact, this paper
will try to deal with the many dimensions of the abortion ques-
tion. It will focus primarily on what the law has said about
abortion. To limit the consideration solely to the legal side
would, however, be meaningless. Attention must also be given to
why people are demanding the right to abortion, what are the
arguments for and against, and what does medical science have to
offer on this difficult question. These are the basic dimensions
that will be treated with the purpose always being to determine
if abortion laws should be removed or liberalized.

For some the fact that the abortion question is being raised
at all in our society today is regrettable. They see it as but
another example of the moral breakdown of this country. For those
who might take this position the following statement by Daniel
Callahan should be meaningful:

An irony of the present situation is that there
would be no intense abortion debate had not soci-
ety moved to a higher plateau of moral sensitivity.
That some groups can seize upon 'women's rights'
as the basis of their advocacy of very permissive
laws or no laws at all is a tribute to the growing emancipation of women in society. That other groups can seize upon the research being done to protect fetuses as an argument for opposing liberalized laws is a tribute to the efforts of scientists to seek more and better ways of enhancing human life ... In other words there would be no abortion debate if there had not been a gradual growth of moral consciousness.

NOTES


2 Ibid., pp.7-8.
Abortion is defined medically as, "the premature delivery or expulsion of a human fetus before he is capable of sustaining life." Legally, abortion has been defined as "the willful bringing about of the miscarriage of a woman without justification or excuse." A therapeutic abortion is one performed in a hospital usually for a reason specified in the law. Any other abortion is termed an illegal abortion.

As the present law now stands in the United States thirty-three states prohibit abortion unless the carrying or delivery of the child threatens the life of the mother. Three states allow abortion if the mother's life and health are threatened. Ten states allow abortion if the pregnancy threatens the life or health of the mother, or if pregnancy is the result of rape, incest, or if there is a possibility of fetal deformity. One state, Pennsylvania, appears to allow for no abortions at all but the statutes are unclear. Three states, Alaska, Hawaii, and New York have changed their laws to allow abortion for any reason. In these states abortion is a matter between patient and physician.

Montana is one of the states that allow abortion only to save the life of the mother. Statute 94-401 (11023) reads:
Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two, nor more than five years.

The problem of abortion has a history reaching back to the beginnings of man himself. We find mention of abortion in the Bible and also Hebrew law forbidding it. As man has continued through the years he has adopted varying approaches to this complex problem, at times allowing abortion at certain stages during the development of the fetus and at times denying it. The following excerpt from a work by Christopher Tietze and Sarah Lewit gives some indication of the historical nature of abortion:

Techniques for abortion are mentioned in some of the oldest medical texts known to man. An ancient Chinese work said to have been written by the Emperor Shen Nung 4,600 years ago contains a recipe for the induction of abortion by use of mercury. In ancient Greece, Hippocrates recommended violent exercise as the best method, and Aristotle and Plato advocated abortion to limit the size of the population and maintain an economically healthy society. With the rise of the Jewish and Christian religions abortion fell under moral condemnation. During the Renaissance, however, popular disapproval of abortion was relaxed considerably. In English common law abortion was not regarded as a punishable offense unless it was committed after "quickening" or the first felt movements of the fetus in the womb ... Abortion did not become a statutory crime in England until 1803; it did not become one in the U.S. until about 1830.
It is difficult to determine what proportions abortion has reached in history, but there are reports today that say the number of abortions in the United States alone varies from 200,000 to 1,000,000. The great majority of these abortions are performed either by doctors as a side line business, by quacks with no medical training at all or by pregnant women themselves.

The high number of illegal abortions with the accompanying dangerous results is one of the key issues in the case for abortion. It is stated by some that, "(b)ungled abortion, self induced or performed by others under illegal circumstances, is now a leading cause of maternal deaths." 4 Suicide, though not so common, is listed as another result of having to bear an unwanted child. In Chile it has been said that hospital cases caused by abortion run at more than 50,000 a year. In Latin America it is estimated that a leading cause of death among women of childbearing age is the after-effects of illegal abortion. 5 Certainly it is easy to imagine the horrible results of thousands of abortions being performed illegally by untrained people. The factor of hemorrhage, infection, human suffering and death is one that must be seriously considered by anyone making a decision on abortion.

If the physical pain and possible death of the woman seeking an abortion must be considered, so must the mental trauma of a woman seeking an illegal abortion. Although there are few instances in fact of women being convicted of having an abortion
performed, surely the realization that she is breaking the law and the fear of being detected must add to the crisis facing the woman. In an abortion performed by an illegal abortionist the woman must also worry about sterility resulting from the amateur operation.

The pain, the suffering, the mental anguish, all could be avoided, contend the advocates for the liberalization or repeal of abortion laws. In a hospital an abortion performed by a qualified physician is a simple operation involving less risk than a normal childbirth. As Dr. Alan F. Guttmacher, a prominent gynecologist and president of the Planned Parenthood Federation of America Inc., has stated, "We feel that if the operation is properly performed so that no infection or laceration of the cervix results, it will have no effect on either the health of the woman or her reproductive future." Data from Professional Activities Survey show that of 2007 therapeutic abortions performed during the period 1963-65 two patients died.7

Considering the psychiatric implications of a woman facing a possible illegal abortion, studies indicate that therapeutic abortions alleviate many of the traumatic experiences connected with illegal abortions. In a followup study of thirty-five of forty-eight patients who obtained therapeutic abortions for psychiatric reasons from 1964 to 1968 at Michael Reese Hospital in Chicago, the following conclusions were drawn:

Short term effects of the abortion were entirely favorable in twenty patients. The remaining
fifteen patients either continued to experience symptoms or experienced new symptoms for a period of from two to six months. The frequent existence of a "post abortion hangover" which coincides with the time period of the unfulfilled pregnancy is suggested.

Long term effects of the abortion were on the whole quite favorable. Approximately three-fourths of the patients reported subjective impressions of improved emotional states and psychiatric histories were consistent with these impressions. Two patients, each of whom reported submitting to the abortion against her will, experienced prolonged adverse effects which she attributed to the abortion. Twelve patients experienced conscious guilt but only two patients would not have decided to have the abortion if given the choice again. Eight patients reported that the abortion experience eventually led to emotional growth. It is concluded that, with rare exceptions, abortion was genuinely therapeutic."^9

As Lawrence Lader has concluded, "It seems obvious that psychic damage from abortion is mainly the product of myth. In fact, a few experts are beginning to realize that much of the harm that can be substantial is less the result of internal trauma than of guilt imposed on the woman by society."^9

Not only do restrictive laws cause unnecessary suffering mentally and physically, they are also discriminatory, contend the proponents of legalized abortion. The laws discriminate against the poor and the black who are unable to obtain the therapeutic abortions available to the white and more affluent. It is estimated that as many as twenty times more abortions are performed for private patients than for ward or clinic patients, and many municipal hospitals where the poor usually go, have virtually eliminated therapeutic abortion.10
For the poor woman without the five hundred dollars necessary for an abortion in a hospital the choice is either the "kindly neighbor", the "close friend" or the woman herself. In many cases for the woman who is forced to go to the underground for an abortion, the cost may even be higher. The illegal abortionist, realizing the desperate situation of the woman, may charge her much more than would be charged at a hospital.

For the black woman or the Puerto Rican the odds against her having a hospital abortion are equally high. In New York City from 1960-1962 there were 154 deaths attributed to out-of-hospital abortions. Of these women, thirty-two were white, eighty-seven Negro, and thirty-five Puerto Rican. Clearly, the chances of a black woman or a poor woman receiving an abortion and surviving are considerably less than for a white or an affluent woman.

One of the arguments frequently raised by the proponents of HB 554 and by proponents of abortion in general is that laws against abortion are unenforceable and hence unnecessary. A proponent at the hearing on HB 554 made the statement that, "when the need for a law is no longer present, then that law does not exist." (Henry Charles Kayser,III, Billings physician). It is argued that everyone knows that abortions go on but nothing is done to enforce the laws. The result of this de facto unenforcement of the law is that law falls into disrepute and the entire moral fabric is weakened. Even when an arrest is made in an abortion case, the offender is rarely
prosecuted, and usually gets off with a light fine. (In searching for cases of abortion violation in Montana legal history I found to my amazement that there has never been a recorded case in Montana!)

In 1962 two things occurred which increased the demands of proponents of abortion. In Europe the infamous thalidomide tragedy occurred, and here in the U.S. it was the German measles, rubella, epidemic. Both events concentrated people's attention on the question of what to do with a fetus that stands a good chance of being born deformed. The case of Sherry Finkbine, the unfortunate mother who took thalidomide during her pregnancy, can be pointed to as the starting point of much of the concern over abortions. Mrs. Finkbine, who subsequently had an abortion in Sweden, did indeed abort a deformed child.

The dangers resulting from rubella have been known for many years. It has been known, for instance, that the hazards of rubella during the first trimester of a woman's pregnancy include: a sixteen percent fetal death rate, a sixteen percent prematurity rate, a seventeen percent deformity rate and a thirty percent incidence of congenital deafness. Until 1962 when rubella reached an epidemic stage, most abortions were refused. However, at the height of the epidemic, 329 such abortions were done in New York City alone. Since that time the attitude of most doctors regarding rubella patients has liberalized and more abortions are granted on the grounds that a defective child might be born. There remain, however, inconsistencies in the treatment of rubella patients, and
proponents of abortion contend that allowance should be made for every woman who does not want to bear a possibly defective child.

An extension of the argument that women should be allowed to abort possibly deformed children is the argument that women should also be able to abort children that have a high probability of being born retarded. This argument stems from the same rationale that brought about the sterilization of retarded individuals. In the interest of a better future environment it is argued that the option must be available to abort possibly retarded fetuses.

The quality environmentalists further believe that abortion must be allowed in order to slow the birthrate. These environmentalists contend that abortion is already the number one means of birth control in the world. They cite the figures of the United Nations Conference On World Population held in Belgrade in 1965, which estimated thirty million pregnancies terminated by abortion each year, of which one million were estimated to have been performed in the U.S. If abortion was made legal, these proponents contend, the birthrate would drop as has been the experience in Japan. Israel R. Margolies, a Jewish Rabbi and a strong advocate of abortion as a means of population control, says, "it is becoming crystal clear that the undisciplined multiplication of the world's population represents a danger to humanity second only to the uncontrolled spread of nuclear weapons." He says further that, "at a time such as this when all thinking citizens recognize
that human reproduction must be checked if the earth is to be kept safe for humanity ... we are confronted right here in our own country with the ironic spectacle of a continuing battle against the legalization of abortion ..."\textsuperscript{15}

Alice Rossi, a leading abortion proponent has said that, "(t)he majority of the women who seek abortions do so because they find themselves with unwelcome or unwanted pregnancies; abortion is a last resort birth control measure when preventative techniques have failed or have not been used."\textsuperscript{16} The advocates of abortion argue that it is the unwanted child that suffers the most when an abortion is denied. These are the children, they say, who grow up to be psychologically damaged and physically beaten. These children grow up to be delinquents, criminals and poor parents who in turn foster more unwanted children. This vicious cycle of unwanted, psychologically damaged, physically battered children could be alleviated, say the supporters of abortion reform, if abortion were made legal. It is better, they claim, that an unwanted child be aborted than be forced to grow up in an atmosphere where he is subject to psychological and physical damage.

Analysis of the Arguments

I have tried to indicate some of the basic arguments raised by those who are calling for abortion law reform or cult to enforce. Interest in a civilized nation is the belief that laws must be made to protect the life of all humans. That a law is difficult to enforce has never been a reason for removal. Before moving on to a discussion of some important legal decisions bearing on the subject, I believe it is necessary to analyze the arguments put forth by the proponents of abortion. Such an analysis can perhaps help us to better
understand the legal action on the subject.

Of the arguments presented, the strongest is the argument that restrictive abortion laws cause an untold amount of human misery both mental and physical. That hundreds and even thousands of women are suffering and dying at the hands of unskilled profiteers cannot be denied. Any sensitive person considering the abortion question must recognize these facts, but do these facts justify the complete repeal of abortion laws? In law there is a maxim that says, "hard cases make bad laws." Given that abortion is a hard case, does this mean that there should be no law at all? These are questions that must be answered in the final analysis of whether to remove or liberalize abortion laws.

That the abortion laws in many states are discriminatory also cannot be denied. It is a sad fact that in this country, which has so much, the poor, who have so little, must often pay the dearest prices. It is intolerable that the poor black woman must often pay with her life for illegal services that a rich woman can obtain for a small fee in a foreign country. This fact must also be kept in mind in the final analysis.

That the law is difficult to enforce and should therefore be removed is not a strong argument. No one has ever advocated the removal of laws regulating traffic on the streets and highways of our country even though these laws are equally difficult to enforce. Inherent in a civilized nation is the belief that laws must be had to protect the lives of all persons. That a law is difficult to enforce has never been a reason for
its removal. It is only when a law infringes upon the wishes of a sizable segment of people that an argument such as this is presented.

Those who argue for the removal of abortion laws on the grounds of the possibility that a child may be born deformed are playing a deadly game of statistics. Professionals tell us that the chances of a rubella baby being born deformed range from five to twenty per cent. This means that the highest possibility of a deformed baby being born to a rubella victim is one chance out of five. If five women contract rubella and abort their fetuses, on the average one would be born deformed, the four others would be healthy babies. Perhaps in time researchers will be able to tell more definitely which baby will be born defective, but this still leaves the question— if the deformed baby had had the choice to make would he have chosen death or a life handicapped by defects?

That the prospect could be raised of abortion as a means of population control is to me regrettable. To consider the attainment of a quality environment as being such an absolute goal that fetuses should be sacrificed to achieve it seems to me to be an overreaction. A quality environment is highly desirable and population control is definitely needed, but to hail abortion as the answer is unacceptable.

The unwanted child argument for abortion is equally unacceptable. Throughout our history there have been many unwanted children who, though battered and neglected, were able to rise
above their environment and live successful lives. To have sacrificed one of these children because he was unwanted would have left the world somewhat lacking. This argument is sad and distasteful. It is one of the arguments frequently put forth by proponents of abortion, but to me it is the weakest argument of them all.

NOTES


13. Ibid., p. 1934.


CHAPTER THREE
ABORTION AND THE LAW

The proponents of the arguments just presented are sincerely determined about one thing—that abortion laws must be changed or removed. They have tried to accomplish this in two ways. First, by having the laws changed in the state legislature. Second, by challenging the abortion laws in the courts. In the first area the proponents have been moderately successful, but it is in the second area that the big battle appears to be shaping up. The following pages will present some important cases that have a direct bearing on the many questions underlying the abortion issue. A consideration of these legal decisions will help in deciding if abortion laws should be liberalized or removed.

People vs. Belous (California, 1969)

In January, 1967, Dr. Leon Phillip Belous was convicted after a jury trial, of abortion in violation of section 274 of the Penal Code, and conspiracy to commit an abortion in violation of section 182 of the Penal Code. The court imposed a fine of $5000 and placed Dr. Belous on probation for two years.

Dr. Belous is a physician and surgeon licensed to practice in California since 1931. His specialties are obstetrics and gynecology. In 1966 a young unmarried woman named Cheryl believed she was pregnant by Clifton, who was later to become her husband. Clifton and Cheryl obtained Dr. Belous' telephone number and
called him. Clifton explained the problem to Dr. Belous and said they both were "pretty disturbed" and at their "wits end" and asked for Dr. Belous' help. Dr. Belous told him there was nothing he could do, but Clifton "continued pleading" and finally Dr. Belous agreed to have Cheryl visit him at his office.

Dr. Belous confirmed that Cheryl was pregnant and in good health. The visit reportedly was very emotional with both Cheryl and Clifton crying and pleading. They insisted they were going to have an abortion one way or another and would go to Tijuana if necessary. Finally, in response to their pleadings, Dr. Belous gave them a slip of paper with a Chula Vista number on it. He instructed them that an abortion could cost about $500, gave Cheryl a prescription for some antibiotics, and told her to come back for a checkup later on.

The number given to Cheryl and Clifton was the number of Karl Lairtus, a doctor licensed to practice in Mexico but not in California. Dr. Belous had referred distraught women seeking an abortion to him before. Cheryl and Clifton made arrangements with Lairtus and had an abortion performed. While Cheryl was recovering from the abortion, police raided Lairtus' place and found names of doctors who had referred patients to him, including the name of Dr. Belous. It was upon this evidence that Dr. Belous was tried and convicted.

In 1969 the California Supreme Court heard Dr. Belous' appeal and overturned the lower court decision. In a four to three decision the Supreme Court held the California abortion
law unconstitutional on the grounds of vagueness and on the grounds of invasion of privacy.

In regard to the vagueness argument the court said the term "necessary to preserve" is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without properly infringing on fundamental constitutional rights."¹ The Court said there was no clear meaning of the words "necessary to preserve", and taken separately the words "necessary" and "preserve" are equally undefined. "Necessary" is defined as: "1. Essential to a desireable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like:..."² The Court argued that "necessary" has no fixed meaning, but is flexible and relative.

The word "preserve", the Court concluded, is also vague. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact ... "³ The Court said that the word "preserve" had such a wide range of meaning that it was too vague to be constitutional.

The alleged vagueness of the term "necessary to preserve" is a key issue in the abortion debate. If the decision of the California Court stands it could be a precedent for similar cases in other states. One of the states where the vagueness question has been raised is Ohio.
Ohio's statute prohibiting abortion is similar to that of many other states. It says: "No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life,..."^4

The Ohio court recognized the decision of the California Court in the case of People vs. Belous, but then said:

We believe that the better reasoning is found in those cases which hold that there is no unconstitutional vagueness in the abortion statutes which they consider. It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. The words of the Ohio statute, taken in their ordinary meaning over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept its proscription.\(^5\)

On the basis of this argument and others the Ohio court upheld the constitutionality of its abortion statute.

Justice Burke of the California Supreme Court also felt the abortion statute was constitutional. In a dissenting opinion in the case of People vs. Belous he pointed out that the phrase "necessary to preserve" has been an integral part of California law since its enactment in 1850. For over a hundred years, he stated, doctors, hospitals, judges, and lawyers have given the phrase a common sense interpretation. For the court to find
the language unconstitutionally vague was to him a "negation of experience and common sense."\(^6\)

Repeatedly, California case law has upheld the validity of the phrase "necessary to preserve". Some examples are: People vs. Davis 43, Cal. 2d 661; People vs. Gollards, 41, Cal. 2d 57; and People vs. Powell, 34, Cal. 2d 196. In State vs. Moretti (New Jersey) 244 A. 2d 499, the court stated that when the phrase "lawful justification" as used in a statute prohibiting abortions done maliciously or without lawful justification, is confined "to the preservation of the mother's life", the statute is not subject to constitutional attack on the grounds of vagueness. In People vs. Howard, 70 A.C. 659, the court stated:

A statute should be sufficiently certain as that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practicable construction can be given to its language.

Finally, in Pacific Coast Dairy vs. Police Court, 214 Cal. 668 it was stated:

Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it.

That California case history has at many times dealt with the "necessary to preserve" phrase is clear. What is also clear is that the majority of the California Supreme Court chose to overlook case history in favor of their own conclusion that the phrase was unconstitutionally vague. Justice Burke stated further
in his dissenting opinion that the proper interpretation of "necessary to preserve" could be found in State vs. Power 155 Wash. 63. The court in this case stated, "If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community ... then it cannot be said that the operation was not necessary to preserve the life of the patient." However, the California Court again completely refused to consider this interpretation.

To all indications the majority in People vs. Belous acted in complete disregard of interpretations of "necessary to preserve" offered by other court decisions. In doing so they have deemed irrelevant the obvious intent of the California legislature to protect the unborn fetus. Their decision flies in the face of a hundred years of experience and common sense. As Justice Sullivan said in his dissenting opinion in the Belous case,

The majority, by engaging in a process of elaborate and lavish analysis, transform that which is simple and lucid into something complex and arcane ... I cannot accept so tortured a conclusion, wrenched from a statute which has had its roots in the law's historic solicitude for the priceless gift of life. The statute plainly prohibits an abortion unless it is necessary to save the mother's life.

It has been said that the vagueness question is not the issue in People vs. Belous, but is simply a buffer zone for the real issue. The real issue in People vs. Belous is whether a woman has an absolute right of privacy with herself, with her
physician, and with her family. If a woman has this absolute right of privacy then she can decide if she wishes to bear a child.

The proponents claim that a woman's right of absolute privacy stems from three sources:

1) as a fundamental right of marital privacy, human dignity, and personal autonomy reserved to the pregnant woman acting on the advice of a licensed physician, 2) as a penumbral right emanating from values embodied in the express provisions of the Bill of Rights themselves, and 3) as a necessary and altogether reasonable application of precedent, namely, Griswold vs. Connecticut 381 U.S. 479 (1965).

The first source is a subjective statement which really is not a reason at all. It is a frequent statement made by proponents of abortion to sum up their feelings on the subject, but it is not amenable to objective analysis.

The statement that the Bill of Rights guarantees a woman absolute privacy is weak. The section of the Fourth Amendment that is pertinent to the issue involved here is the part that says: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated ..." Abortion laws do not involve the searching of the marital bedroom but rather prevent the overt act of abortion. If the absolute right of privacy is contained here, it is penumbral at best. Trying to find the basis for this absolute right in the Ninth Amendment is also difficult to do. This amendment says: "The enumeration in the Constitution of certain rights shall not be construed to deny
or disparage others retained by the people." The reading into this wording the right to absolute privacy and, indirectly, abortion seems to me a stretching of the construction to a limit never intended by the drafters of the Bill of Rights.

The Griswold vs. Connecticut case is the argument on which the proponents of absolute privacy for women rely heavily. In this case, Connecticut's anti-contraception laws were tested and found un-constitutional. Griswold was the Executive Director of the Planned Parenthood League of Connecticut. He was convicted on the grounds that he gave medical advice on how to prevent conception. He defended that this was a violation of his rights under the Fourteenth Amendment. In its decision the Supreme Court held that married couples have a legal and moral right to privacy and that privacy is not to be disrupted by the state.\(^9\)

The contention that the declaration given in Griswold vs. Connecticut can be applied to abortion cases does not stand up under examination. The issues involved in the prevention of conception and in abortion seem highly incomparable. To say that the prevention of conception and abortion are on the same level is both unnatural and unrealistic. An ovum and a spermatozoan separately have slight potential, but united that potential takes a giant leap toward great value. The right of privacy provided for in Griswold cannot logically be extended to include abortion cases.

The Ohio court in the case of A.H. Steinberg, M.D. et. al. vs. James A. Rhodes, et. al. US DC Nohio 12/70 also had something
to say about Griswold and the right of privacy. The majority in this decision stated that:

Rights, the provision of which is only implied or deduced, must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law. The difference between this case and Griswold is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only lives were those of the two competent adults. (emphasis added)

The deciding evidence in the question of a woman's absolute right of privacy can be found in judicial history beginning with Raleigh Fitkin—Paul Morgan Memorial Hospital vs. Anderson. At issue in this case was the question of whether a woman of Jehovah's Witness faith must submit to a blood transfusion in order to save the life of the child she is carrying. The court in this case held that a woman in such a situation must submit to a blood transfusion. This case indicates that a woman's private rights, in this case her right not to have a blood transfusion, are superseded by the compelling interest of the state on protecting the life of the unborn child.

The question of the right of the family to absolute privacy has been dealt with in several aspects. In Prince vs Massachusetts 321 U.S. 158 the court ruled that a statute forbidding minor children to distribute religious material at the bidding of their church and parents was constitutional. In this decision, the court stated that "neither the rights of religion nor the rights of parenthood are beyond limitation" and the state as
parents patriae may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. In addition the parents must allow the child to be vaccinated and must call for medical assistance when needed. Clearly, the state has a compelling interest in the welfare of the child and can guard that welfare at the expense of denying an absolute right of privacy.

The contention that a woman has an absolute right of privacy between herself and her doctor has also been the subject of a court ruling. In Jones vs. Jones 208 Misc. 721, 144 N.Y.S. 2d 820 (Sup Crt 1955) a New York court held that the unborn child "became a patient of the mother's obstetrician as well as the mother herself." The unborn child in this case could probably be termed "a third-party beneficiary" or perhaps "a principal for whom the mother acted as an agent." Again a court held in favor of the unborn child and against an assumed right of absolute privacy.

To me judicial history indicated that the right of privacy is not absolute. It says that a woman does have rights but when another being becomes involved the woman's rights are limited. The woman's rights extend only as far as those of the fetus. It seems unjustifiable to me that any court could derive from the right to decide whether to conceive children a right to complete privacy in dealing with an unborn fetus. The Bill of Rights, the Fourteenth Amendment and the various cases cited do contain dicta to support a right to privacy, but this
right of privacy cannot be stretched to include a right to abortion.

After considering the information available, I conclude that the California Supreme Court in the case of People vs. Belous acted incorrectly in declaring the state's abortion law unconstitutional. All evidence indicates that the statute has been definitely understood for years. The Court in their decision disregarded this evidence and imposed their own interpretation on the law. The absolute right of privacy also does not stand up under close scrutiny. In broadening the interpretation of privacy the Court overlooked years of contrary evidence and established a precedent that will have ramifications in many other states.

NOTES

² Webster's New International Dictionary.
³ Ibid.
⁴ Section 2901-16 Ohio Revised Codes.
⁷ Ibid.
CHAPTER FOUR
THE RIGHTS OF THE FETUS

In the previous sections it may have appeared that some key questions were left unanswered. Such questions as: what legal rights does a fetus have, when does human life begin, should morality affect law? It has not been the intention of this paper to beg these important questions, for a consideration of them is essential for the resolving of the question, should abortion laws be liberalized or repealed. If it can be proven, for example, that a fetus is a living person who has been accorded certain legal rights then the resolving of the question will be facilitated. Here, then, are the facts pertinent to a consideration of these questions.

We first find the rights of the unborn fetus mentioned in English common law of property. In Doe vs. Clark, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795) the court interpreted the ordinary meaning of "children" in a will to include a child in the womb. The court stated, "An infant en ventre sa mere, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease'.'"

In 1798 Justice Buller in an English case had this to say about a contention that an unborn fetus is a non-entity:

Let us see what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer in value. He may be an executor. He may take under the statute...
of distributions. He may take by device. He may be entitled under a charge for taking portions. He may have an injunction; and he may have a guardian.1

In Wallis vs. Hodson 2 ATK. 114, 117 26 Eng. Rep. 436, 487, (Nisi Prius 1838) the English court again recognized the fetus as having legal rights. The court stated, "both by the rules of the common and the civil law, (the posthumous child) was to all intents and purposes a child (while unborn) as much as if born in the father's life time."

In America the tradition of protecting the legal rights of the unborn have been continued. In Hall vs. Hancock, 15 Pick. 255 (Mass. 1834) the court was asked to say that "in esse" was not the same as living and that for a child to be "living" the mother must be at least "quick." Chief Justice Shaw based his decision on Wallis vs. Hodson and said that a conceived child fell within the meaning of the language and was indeed "living."

In Barnett vs. Pinkston, 238 Ala. 327, 191 So. 371 (1939) it was established that:

(1) the ordinary person when he uses "children" in a will means to designate by the term children those who are conceived but not yet out of the womb.

(2) the child in the womb has property rights if there is a will, trust or intestate disposition leaving property to a class of living within which he falls.

In Mills vs. Commonwealth, 13 Pa. 630, 632 (1850) a Pennsylvania court stated, "by the well settled and established doctrine of the common law, the civil rights of an infant en ventre sa mere are fully protected at all periods after conception."
From the cases presented it would appear that in property law at least the unborn fetus was given certain rights. An examination of tort law reveals a slightly different history. Early legal decisions in this country were based on the theory expressed in *Dietrich vs. Northampton*, 138 Mass. 14, (1884) which stated that, "the unborn child was a part of the mother at the time of the injury." This decision would seem to indicate that the fetus is a non-person in tort cases.

This approach was reversed, however, in *Scott vs. McPheeters*, 33 Cal. App. 2d 629, 92 P. 678 (1939) in which a California court held that a child might sue for injury to her in delivery before birth. The court stated:

The respondent asserts that the provisions of Section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding.

This case was followed by a Washington D.C. case, *Bonbrest vs. Kotz*, 65 F. Supp. 138 (D. D. C. 1946), which also rejected the *Dietrich* case and permitted a recovery for a pre-natal injury to a viable child. The judge said:

The law is presumed to keep pace with the sciences, and medical science certainly has made progress since 1884 ... from the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as (a) human being, but as such from the moment of conception—which it is in fact.
In *Kelly vs. Gregory*, 282 App. Div. 542, 125 N.Y.S. 2d 696 (S.Ct. 1953) the Bonbrest rule was extended to include pre-natal injuries to non-viable children. The court stated:

the mother's biological contribution from conception is nourishment and protection; but the fetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue.

in *Smith vs. Brennen*, 31 NJ 353, 151 A.2d 497 (1960) the New Jersey Supreme Court held that a child might recover from injuries which he had suffered in the womb before he had reached the stage of viability. The court said:

Medical authorities have long recognized that a child is in existence from the moment of conception... medical authorities recognize that before birth an infant is a distinct entity and the law recognizes that rights which he will enjoy when born can be violated before his birth.

Finally, in *Gleitmen vs. Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967) the court stated:

The right to life is inalienable in our society... we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort...

The history of tort law indicates that the unborn child is to be guaranteed legal rights of a person. The preponderance of property and tort cases point out that the courts of the land have considered the fetus a person deserving legal rights. The cases lead me to believe that legal thinkers have long accepted
the fetus as a "legal person" and have sought to give it legal
rights. The contention is sometimes raised that the fetus should
not be recognized as a legal person until it has quickened.

By quickened is meant that the woman carrying the fetus has
felt its movement in her womb. It is argued that when the
fetus has quickened it is viable and can assume its legal rights.

This contention has a number of difficulties. Medical stud-
ies reveal that the exact moment when a fetus begins to move
in the womb is difficult to determine. For some women the fetus' movements may be detected as early as eight weeks. For others movement may not be noticed until the very last stages of the pregnancy. Some women have gone through a pregnancy fearing that their child was dead because they felt no movement, only to subsequently give birth to a live child.

Whether or not a woman feels a baby depends on body fat and
the position of the placenta. If the woman is fat or "if the
placenta lies in front of the mother's uterus, serving as a
sort of buffer between the unborn and his mother's abdominal wall, she may feel her baby only slightly."²

Thus it seems that quickening is a subjective test and
varies with the woman. It is "a phenomenon of maternal percep-
tion rather than fetal development." As Robert Lyrn, a noted
author on the subject of abortion, says, "If quickening is fac-
tually irrelevant on the question of when life begins, it ought
to be legally irrelevant to the issue of abortion and the
protection of a human life already begun."³
Ultimately, the abortion issue must be approached in terms of when does human life begin. For the proponents of abortion who contend that a fetus at two or three months is a part of the mother's body and does not represent individual life, the abortion question is simplified. For them it is simply the removal of a piece of tissue much like the removal of a tumor. One pro-abortionist characterized abortion as being no different than an operation on a woman's nose. For those who oppose abortion, the fetus is very much alive and entitled to life. Any attempt to remove it from the mother's womb, they say, is a violation of that fetus' right to life.

To me the question of when life begins is indeed the key issue to be considered. If it can be shown that a fetus is in fact alive, then it seems that this fact should assume primary importance in the consideration. In addition, if the fetus can be proven to be alive, the question must also be asked, when does the fetus have value? Is it when he is termed alive, is it at birth, or is it sometime after birth?

To consider the question of when does life begin, the logical place to look for clues to the answer is in the study of fetology. The following are facts concerning fetal development taken from Zabriskie's Obstetrics For Nurses:

Embryo Life at One Month--The embryo is about one quarter of an inch long if measured in a straight line from head to tail ... This embryo has the beginnings of eyes, ears and nose, spinal cord, nervous system, thyroid glands, lungs, stomach, liver, kidney and intestines. Its primitive heart, which began beating haltingly on the eighteenth day, is now pumping confidently. (emphasis added)
Fetal Life at Two Months—The fetus has a central nervous system, well developed muscles, and nerves, an ingestive, digestive, and excretory system, an identifiable cranium with brain cells, ears, eyes, nose, toes, fingers, arms and even sweat glands.

Fetal Life at Three Months—The fetus now measures somewhat over three inches in length and weighs almost an ounce. The sex can now be distinguished... Fetal movements can now be detected by medical science.

Fetal Life at Four Months—The fetus from head to toe is now six and one-half inches long and about four ounces in weight... the movement in the womb is much stronger.

Fetal Life at Five Months—The length of the fetus is now approximately ten inches, while its weight is about eight ounces... At this period, the physician often is able to hear the fetal heart for the first time. If a fetus is born now it may make a few efforts to breathe.4

Dr. Bart Heffernan, Chief of the Department of Medicine at St. Francis Hospital in Evanston, Illinois had the following to say in the case of U.S. vs. Vuitch:

(At seven weeks) the new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinate the functions of the other organs. The brain waves have been noted at forty-three days. The heart beats sturdily. (emphasis added)

Dr. Heffernan also noted the work done by the famous embryologist, Davenport Hooker, M.D. Dr. Hooker has worked at recording the movements of the fetus on film, some as early as six weeks. Dr. Heffernan stated:

The prerequisites for motion are muscles and nerves. In the sixth to seventh weeks, nerves
and muscles work together for the first time. If the area of the lips, the first to become sensitive to touch, is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a total pattern response because it involves most of the body, rather than a local part. Localized and more appropriate reactions such as swallowing follow in the third month.

By the beginning of the ninth week, the baby moves spontaneously without being touched. Sometimes his whole body swings back and forth for a few moments. By eight and a half weeks the eyelids and the palms of the hands become sensitive to touch. If the eyelid is stroked the child squints. On stroking the palm, the fingers close into a small fist.

I have quoted extensively from the above sources because I believe the information has great bearing on the subject of fetal life. The information on the development and activity of the fetus at various stages does much to discredit the view that the fetus is a quiescent vegetable in the mother's womb. During the first five months of development, when most abortions are performed, the fetus goes through rapid and dramatic development. The latest discoveries in fetology show that the fetus becomes active at a very early age, often the seventh or eighth week. The fetus also develops many of its expressions and mannerisms which characterize him for the rest of his life. It seems clear that the fetus is an individual and not a mere piece of tissue.

The facts presented in the passages quoted which I find especially pertinent to the question of when life begins are the facts relating to when the fetus' heart begins to beat.
and when brain waves are first detectable. If we approach the question from the opposite end of the spectrum—when death occurs—I believe we can better come to a decision of when life begins.

If we accept a definition of death as, "the irreversible cessation of spontaneous heart and circulatory pulsation in the human subject," then life could logically be defined as the beginning of spontaneous heart and circulatory pulsation. If this logic is accepted, then we see that life could begin as early as the eighteenth day of pregnancy. If this definition is accepted, then abortion involves the direct taking of the life of a human entity.

The point at which brainwaves are first detected also may have some bearing. If a live human being is one who is transmitting brain waves, then we see that a fetus can meet this definition at the forty-third day. If this early date is accepted, then without a doubt millions of live human beings have lost their lives through abortion.

Although the above reasoning may establish a point in the fetal development when life begins, the question still has to be answered, when does the fetus assume a value greater than the interests of the woman carrying him? Some argue that the fetus should only be considered to have this value when he is viable—capable of living outside the womb. This argument presents the difficult problem of determining when is the fetus viable? For some time it was believed that a fetus could not survive if it was born before the twenty-eighth week.
of pregnancy. However, modern advances in caring for premature births have pushed this point back as far as the twentieth week. Premature babies born at the twentieth week have actually survived. With the continued work on the artificial placenta, this standard will undoubtedly be pushed back even further. As one author noted, "In this day of DNA synthesis, test tube incubation, intrauterine transfusions, talk in high circles of chromosome manipulation and in vitro generation, the twenty week survivability standard is about as sacred as the four-minute mile." 

It has been suggested that perhaps at some other point in the development the fetus attains value great enough to disallow its being sacrificed for the concerns of the mother. This argument also presents problems because there is no clear way of determining when this point is reached. To say, for instance, that a fetus at seven months has more value than it had at three is incapable of being proven and thus unacceptable as an objective determinant.

Birth has also been suggested as the time when the fetus attains value. This is also unacceptable because there appears to be nothing in the act of giving birth to a baby that instills it with more value than it had hours before the labor process began. To me it would seem that the words of several noted authors on this subject contain the proper understanding of birth. B. Patton says, "(B)irth is but a convenient landmark in a continuing process ... It is just another stop along the way." A. Montagu states, "Birth is not a beginning ...
is birth an ending. It is more nearly a bridge between two
stages of life."

The medical facts dealing with fetal development lead me
to conclude that human life begins at least at the time when
the heart begins to beat and blood flows through the veins of
the fetus. At this time, life for the fetus becomes as sacred
as the life of any other human. In terms of value it seems to
me to be equally acceptable that the fetus has value from the
moment of conception. Although the fetus is not living at
that time, he will be in a mere eighteen days. The potentiality
of the fetus alone warrants his protection. I am convinced
that life is a continuum, that there is no arbitrary point
where it receives value. From the time that the fetus' tiny
heart begins to beat at eighteen days until the fetus in the
form of an old man lies upon his death bed, life is present and
must be protected. Any decision to the contrary represents
not a decision based on medical fact or legal history, but a
subjective decision on the part of the person making that
decision.

Any decision to abort involves, then, the taking of life
whether it be actual or potential. The enunciation of this
fact has a macabre note to it that is out of harmony with our
taken-for-granted assumption that we as Americans are entitled
to "life, liberty and the pursuit of happiness." It has long
been felt in this country that there is a certain moral con-
sensus as to what principles we accept as inviolable. Robert
Byrn says this about the moral consensus:
The moral consensus, in turn, must be distinguished from majority opinion and current trends in thought on a particular issue. The consensus is not majoritarianism; rather it consists of the profound first principles which a society holds to be true, indeed, self evident. In America, these are the sanctity of life, fundamental human equality, decency and freedom.  

It should be emphasized that the sanctity of life is one of these first principles. Judicial history has also shown that life must be constantly guarded by laws and judicial rulings. Medical history reveals intensive efforts to protect life, to extend it and make it better. The tremendous sums of money expended to find a cure for cancer, heart disease, and other killing diseases point to a deeply felt concern for the absolute nature of life. Humanitarian efforts by people risking their own lives to save the starving masses of Biafra or Pakistan show heroically the deeply ingrained concern in man for the lives of others. No argument about the quality of the environment, or the hardships of life could stand in the way of these efforts to protect at any price the life of all people.

The growing movement to determine through abortion which life is of value threatens to break down this moral consensus. There is fear that already this consensus may have broken down. People demonstrating in the morning for an end to the sacrifice of life in Vietnam and then in the afternoon for the removal of anti-abortion laws indicate that there is indeed confusion over which life is sacred. In an age that cries out for an end to Vietnam and an end to capital punishment, the life of the unborn child also must be remembered.
The position has been put forth by some that there should be no connection between morality and law. Father Robert Drinan has long been an advocate of this no-law approach. Daniel Callahan in his book, *Abortion: Law, Choice And Morality* concludes that law and morality can be separated. He reasons that abortion is morally unacceptable but not legally so. What these writers are saying is that those who oppose abortion do not have to have laws to enforce their beliefs.

This argument might be acceptable if it were not for the fact that law and morality do influence each other. They stand in reciprocal relation to each other. Law influences morality and morality influences law. Morality is shaped by the law. What the law says about a subject definitely has an effect on what is accepted as morally correct.

But the question of abortion is more than just one of morality, it is also a question of life. If it were a question of private morality then indeed there would be some grounds for saying that the law has no business in regulating it. As case law has shown, the law cannot decide if a woman must allow herself to become impregnated. After she is impregnated, however, another life becomes involved—the life of the fetus, and it must be accorded the equal protection under the law given to all people.

Under the defective child argument for abortion the contention has been made that death through abortion would be preferable to a life filled with the hardship associated with physical defects. This point was raised in the case of *Gleitman*.
vs. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) where a mother had contracted rubella during the first trimester of pregnancy. The mother brought the case on behalf of the deformed child on the grounds that death would have been preferable to life with defects. The New Jersey Supreme Court denied her a recovery on two grounds:

1. The Court stated it was impossible to ascertain the compensatory damages normally associated with a negligence action. It reasoned that in order to fix damages a comparison would have to be made between the relative values of life with defects and the 'utter void of nonexistence' and that such comparison was impossible because there was no method by which one could place a value on nonexistence. (2) The Court reasoned that the 'preciousness' of human life outweighed the need for recovery.

In Stewart vs. Long Island College Hospital, 58 Wisc. 2d 432, 296 (1968) the same issue was raised. The New York Supreme Court in this case set aside the verdict and dismissed the case. The Supreme Court cited Gleitman and reasoned that "no remedy exists for being born under a handicap when the only alternative is not to have been born at all." Further, the Court stated, "public policy concerning the preciousness of human life dictated that abortion was as much murder as the ultimate wrong would be." As one justice in the case stated, "(O)ur felt intuition of human nature tells us he (Jeffrey) would almost surely choose life with defects as against no life at all." And in quoting from Theocritus he reminded, "For the living there is hope, but for the dead there is none."
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3. Ibid. p. 12.


CHAPTER FIVE

CONCLUSION: THE FUTURE OF ABORTION LAWS

In Chapter two the case for liberalizing or repealing abortion laws was presented. My analysis of this case was that the arguments presented were not convincing enough to warrant a change of the law on these grounds. The only arguments which I found convincing were the arguments that abortion laws force women into the hands of illegal abortionists and abortion laws are discriminatory. The appeal of these arguments was so strong to me that I considered opting for the removal of abortion laws simply on the grounds of the alleviation of human suffering. However, whenever I considered this choice I always ran into the unavoidable medical facts presented on pages thirty-three and thirty-four. If the fetus is alive at such an early stage of development, then it is undeniable that abortion is the taking of human life. If abortion involves the taking of life then it is inconsistent with our long acceptance of the sanctity of life. The only possible way that proponents of abortion can justify abortion is by proving that it does not involve the taking of life. I can see no way for this to be possible in view of the recent findings in fetology.

The only other possible way that I see of justifying abortion is to say that although the heart is beating and life
may be present it is not of a value great enough to take
priority over the interests of the mother. This is, of course,
a moral decision and everyone’s choice will differ. My choice is
in favor of all life wherever it exists. It seems to me but a
short step from the decision that fetal life is not of value to
the decision that certain infants or old people are also not of
value. Mankind has come too far in developing a love and res-
pect for life wherever it is found to allow a regression such
as abortion would involve.

If abortion does involve the taking of life, under what
conditions should it be allowed? I believe the answer can be
found in what the law already says. The law says that a life
may be taken in self defense. At present all states allow the
aborting of a fetus that threatens the life of the mother. I
believe this is just and should be extended to include situa-
tions where the carrying of the fetus might cause such psychia-
tric harm to the woman that it would drive her to suicide or
result in placing her in an irreversible psychiatric condition.

The determination of the psychiatric condition of the woman
should be made by three psychiatrists and a decision to abort
should involve the consent of at least two of the three.

I do not believe that the abortion problem can be remedied
by a no-law policy. Despite the difficulties involved in en-
forcing these laws they do serve a purpose. Experience has
shown that in countries where abortion laws have been removed
the number of abortions has taken a gigantic leap. In view of
my conclusion that life is involved in any decision to abort,
this situation would be deplorable.

In the future with the development of the artificial placentas, a partial solution might be found in having the state take on the care of all aborted infants. This would be an extension of the state supported foster homes and although it has inherent problems, this idea might be a solution.

Family planning groups are another partial solution which I feel should be strengthened. With the advances made in contraception it seems possible that a contraceptive device with one hundred per cent efficiency and without harmful side effects may some day be developed. A well administered low-cost contraceptive program reaching all segments of society would be a great help in alleviating the problem of abortion.

One of the dangers inherent in legalizing abortion is that it leads to an abortion mentality. Such a mentality makes it difficult for an effective contraceptive program to be developed. A Japanese official commenting on this said:

I have been informed that some countries are preparing a law which would legalize induced abortion, or enlarge the conditions under which the operation may be permissible. I don't object to this idea. But one thing I would like to suggest is that if people at large were once accustomed to induced abortion, it might be extremely difficult to make them come back to the previous reproductive behavior.1

Apparently in Japan where abortion is legal it is difficult to get women to use contraceptives carefully when they have abortion as a back-up measure.

The real solution to the abortion problem, I believe, is to deal not with the symptoms, but with the causes of the problem.
Surely it cannot be natural for a woman to want to abort the child she is bearing. There must be a cause for this desperate situation, and it is to the removal of that cause that mankind should be addressing itself. If the poor black woman is unable to afford an extra child then somehow we as a society have failed her. Neither opponents nor proponents in discussing the abortion question spend much time on the causes of the problem. In a way, perhaps, the frenzy created over the issue has clouded people's minds so that the heart of the problem is ignored. The money and energy expended in opposing or defending abortion could better be spent in trying to ameliorate the conditions that create the problem. It is for us the living to create the favorable conditions under which those who now must die might live.

In Chapter Three a discussion of a woman's rights was presented especially in the case of *People vs. Belous*. I concluded that a woman's rights were limited by those of the fetus. In Chapter Four the judicial history spelling out the legal rights of the fetus was presented. Despite this judicial history protecting the rights of the unborn it appears that concerted attempts are going to be made to change if not remove abortion laws. Alaska, Hawaii, and New York have all changed their laws through the legislature. Abortion laws have been declared unconstitutional in California, South Dakota, and Washington D.C. It is likely that one of these cases will be appealed to the U.S. Supreme Court and if the decision is upheld, a precedent could be formed for the removal of all state abortion laws. The American
Civil Liberties Union plans to challenge the constitutionality of the anti-abortion statutes of Indiana, New Jersey and South Carolina. If the efforts on the state level fail there is the possibility that all state abortion laws may be overruled by a bill introduced by Senator Packwood in the United States Senate to allow abortion everywhere.

In Montana the initial effort to repeal the abortion laws was unsuccessful, but the question will doubtlessly be raised again. The bill, which was an outgrowth of a study done by the Governor's Commission On The Status of Women, would have made abortion strictly a matter between physician and patient. The bill received widespread attention but was overwhelmingly defeated. It appears that anti-abortion laws are safe in Montana, at least for the present.

In view of my conclusion that the taking of life is involved in the question of abortion, I recommend that more be done than just the defending of anti-abortion laws. An attempt should be made to spell out the rights of the unborn child under the law. Only Wisconsin has a statute of this nature. It reads, "In this section 'unborn child' means a human being from the time of conception until it is born alive." Montana's laws should be changed to accord the fetus these same rights.

My limited investigation of the abortion question leads me to conclude that abortion laws should not be completely repealed but only liberalized as indicated. I make this conclusion because of the years of judicial history recognizing the fetus as a person entitled to the right to live. Abortion must not
become the answer to the social problems we have allowed to get out of hand. This conclusion is reached with the hope that someday all people will be able to live in a world where the question of who shall live and who shall die need never be raised.

NOTES


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