Abortion Ruling

$.25

Some Good News . . . and Some Bad News

by Lucinda Cisler & James Clapp

an ALF Discussion Paper

☐ The first wave of excitement and relief that the U.S. Supreme Court had finally come up with a pro-abortion ruling has led to some of the greatest celebrations since the Equal Rights Amendment passed Congress. It was clear that women all over the country would now have a legal basis to get abortions more readily, more safely, and closer to home than ever before; the benefits of this are too obvious to need enumeration for the thousandth time. It was also clear that the new feminist movement had played a major role in creating the climate of opinion that made this decision possible.

But as many abortion activists began to dismantle their organizational apparatus with astonishing haste, others began to peer behind the media's confused early reports and look closely at the decision itself, at the concepts underlying it, and at the opposition's reaction to it. What can be found there should give us both encouragement and pause, as we consider what it all portends for the politics of reproductive self-determination.

Justice Blackmun summarized the court's view of women's right to abortion by saying, "appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree . . . the privacy right involved . . . cannot be said to be absolute." Chief Justice Burger put it even more bluntly when he concluded: "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand."

While the concept of no requirement does indicate that it would be *permissible* to have no special abortion laws, the lack of a positive *mandate* warns us that the campaign for true freedom of choice can hardly be considered a total success; the decision has blazed a pathway but has set up many hurdles as well. In what ways did the court reject "abortion on demand"?

Reprinted from *Majority Report*, February 1973 and October 18, 1975; slightly revised and with 1976 addenda. The 1973 portion also appeared in *Feminist Studies* 1:2, under the title "Abortion: A Major Battle Is Over—But the War Is Not."

What the Court Said

In establishing a right of privacy in abortion matters, the court immediately limits that right to such a degree that states may still make it much less private than other medical decisions. The court *asserts* a "compelling" state interest in "protecting" (1) women's health and (2) "potential life." Never do they explain just what compels these special interests to take precedence over a woman's right to decide to abort or deliver. But they do announce in stentorian tones that laws may impose these "interests" more and more heavily as pregnancy progresses.

In the first trimester of pregnancy (about 12 weeks—though never capable of precise definition because conception cannot be pinpointed), the court finds that, because statistically the safety of abortion is greater than that of continuing to delivery, the state may at the most require that a physician perform the abortion. This means that in the many states where self-abortion is legal under certain conditions, and in the 31* states where no special ban on paramedics is on the books, laws may be enacted to force a physicians' monopoly on this particular procedure. Thus, the court allows a state to ignore the rapidly-developing technologies for non-MD methods and even for self-abortion; prices can remain artificially high and the personnel supply artificially low. At least, however, the state may not go beyond this key restriction.

In the second trimester, when relative risks begin to draw even with those of childbirth, the state may also step in and require that all procedures be done in licensed facilities. Surely most mid-pregnancy abortions will be done in hospitals for some time to come; but again, the potential of improved technologies can be quashed by state rules. And other "health-preserving" qualifications might also be fixed into law, again on this procedure as on no other.

But still later in pregnancy, the state may begin to say there can be no abortions unless one's life or health are endangered by continuing to term. Although media reports have called this stage the "last 10 weeks," the court says that it "may occur earlier, even at 24 weeks." It is at this also-indeterminable time that the state may most strongly assert an interest in "protecting" "potential life" (as though sperm, ovum, and one-week embryo are not "life," as indeed is the back of your knee, if cloning research proceeds in the direction it has been going). Even New York's abortion law is not broad enough at this stage, since it now considers the only "justifiable" abortion after 24 weeks to be a procedure meant to save the woman's life. The court's interpretation of "health"—in this decision and in an earlier one—does at least encompass both mental and physical health.

**[as of February 1973; the number is smaller now.]*

The purpose of ALF is to

- *encourage women to become economically self-sufficient and psychologically independent*
- *publicize and promote realistic attitudes toward female competence, achievement, and potential*
- *oppose the abridgement of individual rights by any government on account of sex*
- *work toward changing sexist attitudes and behavior exhibited by individuals*
- *provide a libertarian alternative to those aspects of the women's movement that tend to discourage independence and individuality*

Association of Libertarian Feminists

~~225 Lafayette St • New York, NY 10012~~
~~Room 1212~~ ~~212/274-5059~~

Besides this, the state cannot impose residency requirements or the need for special hospital abortion committees. As to the requirements under some "reform" laws that married women must have their husbands' consent, by implication this might be forbidden at least in the first trimester. But the court sidestepped a ruling on this important issue by saying, in effect, that nobody asked them to rule on it, since neither Texas nor Georgia law requires it. (The question of parental consent for minors was not dealt with either, since the problem of minors' right to consent to all kinds of medical care is in a state of flux. with states having many different laws on the subject.)

It is fascinating, though, that on the question of husband's consent the court suddenly reserved judgment; no one had asked them about whether abortion could be limited to doctors or restricted at certain stages of pregnancy. Texas' law speaks not of a physician but of a "medical advisor," and while Georgia does require physicians, no one was challenging that particular requirement. And the laws of neither state make any distinction among the various stages of pregnancy; in fact, Georgia has allowed abortion at any stage not only for life and health but in cases of rape and threatened fetal deformity, and so could be made even more restrictive under the court's ruling. So could a new Texas law limit abortions to doctors only.

What do these "compelling" state interests in protecting us, and in protecting potential life, imply for closely-related health issues? First, if the reason the abortion environment can be restricted after the first trimester is that these abortions currently appear to be as dangerous as childbirth, the growing interest in midwifery, self-help, and at-home delivery could be cut short by a ludicrous but legally proper requirement that no one can plan to have a baby anywhere but in a medical facility or without a physician to deliver it. (Obviously, women who suddenly deliver in the proverbial taxicab could not be subject to arrest, provided the driver's intended destination was a hospital!) Beyond this, it means that we must work *against* all advances in obstetrical safety, for fear that our relatively unrestricted "right" to early abortion would be chipped away if having a baby becomes safer than an early termination.

Since the current state of technology is a shifting foundation for allowing women to have abortions, we have every reason to be, like Chief Justice Burger, "troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion." And, of course, the Court accepts and reinforces in its ruling the dubious theory that the original English and U.S. laws against abortion were enacted to protect women. Unfortunately, even those challenging the laws use this argument. (For a fuller examination of these questions, see pages 271-274 in *Sisterhood is Powerful.*)

It will also be necessary to oppose the advances in fetology and pediatrics that would help women who want a child but who cannot now go to term: as both welcome and unwelcome fetuses are able to be kept alive outside the uterus earlier and earlier by more and more sophisticated technology, possible legal challenges to the court's fuzzy, time-bound definition of "viability," as the "point" at which "potential life" may take precedence over our needs would become more and more likely to succeed. (The court defines "viable" to mean "potentially able to live outside the mother's womb, albeit with artificial aid.") And who can say how quickly "artificial aid" may push "viability" back so far as to coincide with conception itself?

"Protection" for Whom?

If people are to be protected from taking courses of action that may be more dangerous to themselves than other courses of action, surely we cannot really expect a spate of crank legislation to forbid skiing, driving a car, or--especially for women--leaving home after sundown? People could be forced to seek medical care for every ailment--not simply compelled to be vaccinated, quarantined, or otherwise cooperate in stopping contagious ailments. These absurd extensions lead to an examination of who is being "protected" in this ruling--and why:

(1) If this decision had been made about some area of law that dealt with men as well as women, the notion that the state could simply decide to "protect" a person would surely not have been so blandly asserted. The idea that women should be protected is so ingrained in a sexist culture that only a very feeble rationale for it was found necessary in this ruling. Long observation teaches us that this special protection is almost invariably based not on a real concern for our well-being as autonomous persons but on a desire to exert control over our behavior. Rather than leaving us to take responsibility for our own decisions, making sure that we can find out about the possible consequences of various decisions, and acting to make various courses of action less fraught with risk, the state instead has preferred to forbid us to act, even when we have a reason for doing something "dangerous" that makes sense to us.

Thus, for instance, the problem of rape will not be solved by telling women to refrain from moving about in the world, or by forcing us to "protect" ourselves with special weapons; but rather by disclosing where and when rapists tend to operate now and by trying to curtail the behavior of those who do the raping (fighting the rape mentality, putting rape under the general laws of assault, enforcing these laws, and so on).

In the same way, should the state not make it possible for us to know the consequences of various decisions we may make about our pregnancies and then leave us free to take whatever course of action we find most suitable, while working with us as health consumers to make all such courses as harmless to us as possible? We are already

RECOMMENDED READING

"Abortion Law Repeal (sort of): a Warning to Women," in *Radical Feminism* (Anne Koedt et al., eds.); New York: Quadrangle, 1973. (Reprints, $.30 from New Yorkers for Abortion Law Repeal, Box 240, Planetarium Station, New York, NY 10024.)

"Abortion Legislation in New York State: What Really Happened and What Can Be Learned From It," in *ZPG National Reporter,* August 1970. (Reprints, $.30 from NYALR.)

"Archaic Birth-Control Laws" in *Coronet,* May 1972. (Reprints, $.10 + s.a.e. from NYALR.)

"A Campaign to Repeal Legal Restrictions on Nonprescription Contraceptives: The Case of New York," in *The Condom: Increasing Utilization in the United States* (Myron Redford et al., eds.); San Francisco: San Francisco Press, 1974.

Rebirth of Feminism, by Judith Hole and Ellen Levine; New York: Quadrangle, 1971. Chapter 7, "Abortion."

Roe v. Wade, 410 U.S. 113 (1973) and *Doe v. Bolton,* 410 U.S. 179 (1973).

"Unfinished Business: Birth Control and Women's Liberation," in *Sisterhood is Powerful* (Robin Morgan, ed.); New York: Random, 1970.

free not to seek prenatal care or other medical care for noncontagious diseases, as noted above; in many states we are even legally free to attempt suicide. Clearly, the state would seem to have a logical interest in "protecting" our health and restricting our medical decisions only where we may otherwise inflict harm on someone else. And in this distinction lies the real meaning of why we are still being "protected" out of our full rights in the abortion area:

(2) The state's real interest here in protecting our health is actually an extension of its other "compelling interest:" protecting potential life—not in keeping us from harm, since the existing body of general medical laws and practices can be relied upon to safeguard us (or at least can be challenged by us without special attention to one procedure). We are subjects of special control not because of our own value as individuals but because we harbor fetuses. In other words, "someone else" *is* involved in our decision-making and the state *may* force us to give precedence to its desire that this other being be born, unless we provide the state with satisfactory reasons why we should not give birth. *We are still owned by the state,* and can still be faced with this stunning fact on top of the ordinary problems we face in the search for someone who will help us end a late pregnancy.

In this context, the language used by the court, by many state laws, and by careless people generally, when they refer to pregnant women, is very meaningful: over and over every one of us is called a "mother;" our health is called "maternal" health; and so on. Those of us who have never borne children may or may not think of ourselves as "mothers" when we become pregnant; but when the law calls all pregnant women mothers, we are immediately defined in terms of a *relationship* that we explicitly reject when as separate individuals we choose to abort.

Our submerged status in society has long depended upon the disabilities society has chosen to impose on those who have the potential for childbearing, usually calling these protections or even privileges. And again this decision tells us we can be made to justify our desire to refrain from bearing children we do not want, and calls us "mothers," when being a mother (again, or at all) may be the last thing we wish to become.

Although few of us need or want late abortions now, and still fewer of us will be in this situation as early abortions become easier to get, this does not erase the fact that each of us is still imprisoned as long as any woman is owned by the state. The concept that fetuses have priority over women was not completely rejected by the court, while the concept of fully human autonomy for women was clearly not affirmed. And the court's decision did not actually answer the contention of Lynette Perkes and Cheriel Jensen that fetuses now have *more* rights than persons: fetuses may use our bodily systems and resources without our permission, but you can refuse an ordinary person who wants to use your kidney or your heart.

So Philadelphia's Cardinal Krol was right when he said, "apparently the court was trying to straddle the fence and give something to everybody."

Right-to-Life's New Ploy

Like feminists, the anti-abortion forces obviously feel they have been "given something"—though not precisely what they want: already a committee of Catholic bishops has called for state legislatures to "restrict the practice of abortion as much as they can," apparently with special emphasis on making sure abortion facilities are limited after the first trimester. New York people have already seen right-to-lifers push for extra local and state regulations ever since the 1970 reform law passed.

It is also quite probable that they will try to enact requirements for husband's consent, doctors-only, and time limits in that great majority of states where such specifications do not now exist. Since such conditions appear sensible to many legislators, feminists must be especially on guard against all imaginative "protective" proposals—particularly because many people who are generally pro-abortion but not committed to it as a woman's right find them very reasonable, too.

Many states now have laws against disseminating information about how to get abortions; abortion opponents are likely to try to keep these laws, add bans on advertising and certain kinds of referrals, and extend them to other states. The Federal criminal code itself, in a remnant of the 100-year-old Comstock law [1872], forbids mailing of such information; it has not yet been decided whether this law meets a constitutional test.

But the manifest fury of anti-abortion people will not be appeased by mere attempts to make abortions as scarce, as costly, and as hard to get as the court "permits." At this writing, January 27 [1973], their best strategists are meeting in Washington and at the state level to circumvent or override the court's ruling.

It appears that while they may take some forthright steps, such as pressure on state legislatures and on Congress to pass laws and constitutional amendments bestowing legal personhood on fetuses, such approaches may serve only as doomed stalking-horses for more "moderate"—and thus more dangerous—measures that will not put lawmakers so directly on the spot about abortion *per se.*

For instance, the court itself, in dealing so extensively with what restrictions the states do and do not have the right to impose, has stirred up states' rights resentments. As Justice Rehnquist said in his dissent, the court's complex decision about various stages of pregnancy and various "permissible" restrictions "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." And Justice White agreed that "this issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."

Thus the courses of action most likely to be pursued by anti-abortion forces are ones designed to build upon this sentiment and appeal to a kind of false populism. State and federal lawmakers will be asked to pass legislation returning all regulation of pregnancy-related matters to the people through their state legislatures. This regulation could then become a virtual ban. There are mechanisms to pass state resolutions without governors' signatures, so the views of governors like Nelson Rockefeller may be irrelevant.

It will be hard for harassed state legislators to vote against resolutions memorializing Congress to amend the Constitution in this way, and Congresspeople would find refusal difficult as well, especially since the Catholic lobby is notably powerful on the federal level, having already restricted a 1970 family planning bill to exclude funding for abortion services.

Since proposals both for "reasonable" restrictions and for returning "power to the people" will be insidiously attractive to many politicians under fire, feminists and our allies must combat them through providing an alternative of still greater political appeal to state lawmakers.

Strategy Alternatives

The least attractive alternative would be to try to "liberalize" a state law to fit the template allowed by the court. This is essentially one of right-to-life's tactics, and as has also been noted, in every state it could entail enactment of new restrictions.

Another proposed strategy, one often heard from those who don't mind if some women are denied abortions as long as most women can get them, is to "leave well enough alone" and let non-conforming laws be challenged in test cases. To abandon the political field is to leave it to the fervent, well-funded anti-abortion forces. Besides, all states have abortion laws on the books that need change in one respect or another. It's also easy enough to say "let doctors test the laws," but even now physicians shy away from even approaching the boundaries of current laws—especially in regard to time limits—for fear of accidentally crossing them. If invalid state laws are left on the books, every physician planning a "gray-area" abortion will need an "attending attorney" to help decide whether or not the law might be enforced in such a case.

Clearly, the only effective political alternative is to work for complete abortion law repeal. The prospect of getting the issue off the books, and therefore off their backs, appeals to weary legislators considerably; it saves them from haggling over the fine points of whole new sets of conditions for abortion—which would plague them again even if they tell Congress to throw it back in their laps later.

Most legislators who have voted against abortion in the past are not anti-abortion *fanatics*, and may also find the notion that repeal eliminates both state disapproval *and approval* to be more conciliatory and graceful than the approach of right-to-lifers. For instance, now that the Catholic bishops of Texas cannot have the ban on abortion they want most, they may accept what they claim (in a 1971 statement) that they prefer to reforms: complete state silence. In fact, Sarah Weddington, the attorney who argued the Texas case, has just taken her seat in the Texas legislature, has filed a repeal bill, and even has the backing of the state medical society for its passage.

(In the majority of states, where restrictive contraception laws still exist, bills to repeal these can enhance the attractiveness of abortion law repeal still further; not only because such laws are ridiculous, but because you can take the wind out of anti-abortionists' sails by showing that *you* are trying to help *prevent* pregnancies—and therefore abortions.)

Perhaps the most dramatic development has occurred here in New York: as soon as the court decision came down, Ithaca Assemblywoman Constance Cook resumed leading sponsorship of abortion law repeal and announced that she already had over 30 colleagues behind the bill. Mrs. Cook introduced the nation's first such bill in 1969; feminists and others worked hard for her "utopian" bill that year, and their efforts paved the way for the liberalization of 1970—which itself has been surpassed by the new court ruling.

Repeal was in the legislature in 1971 and '72 as the Ohrenstein-Leichter bill, with over 20 sponsors (including Mrs. Cook). No one, of course, expected the bill to pass, but it did keep the goal alive at the same time it provided an invaluable vehicle for those who wanted to counter the opposition through working for their real desires.

The paradox this year is that although the Supreme Court's ruling has given comfort to opponents of women's rights, it has also made extreme anti-abortion efforts more difficult, and thus has made passage of repeal bills more possible now than it may ever be again—*if* those who want it continue to press their demands. The new potential for New York's bill is shown by the change in its lead sponsors: the fact that Mrs. Cook's co-sponsor is another Republican, NYC Senator Roy Goodman, shows that they feel the bill could go somewhere. In New York's Republican-controlled legislature, a bill led by Republicans gets farther than the same measure led by Democrats. [This report was based on current information from Cook's staff; the actual lead Senate sponsor was Democrat Manfred Ohrenstein.]

And the contraception law repeal bill is also being reintroduced in New York: under Goodman-Cook sponsorship it got to the floor in 1972 against even the expectations of everyone who worked so hard for it; 1973 could be the year it passes, too.

• • •

A great many people are being led to believe that the court decision ended the legal problem and that now they can turn their attention entirely to other issues. The media may soon find the politics of abortion a stale topic and resume their traditional silence on the work done for repeal. But if defeat is not to be snatched from the jaws of victory, it is essential that everyone throughout the country who cares about giving *all* women the right to abortion seize this opportunity and take action to make it a legal reality.

Only when all abortion laws are repealed can we say at last that abortion is a right—not a privilege. □ □ □

Authors' note, October 1975 – It is worth pointing out that the expressions of optimism at the close of this article were not borne out by later events; but, as most readers well know, the article's gloomier predictions have generally been shown to be valid.

Few of the people who had always said they favored abortion law repeal actually felt strongly enough to work for it after January 22, 1973, although several public-opinion polls show a majority of the public favoring "further liberalization." The old feminist goal of the right to abortion may thus never be attained; the so-called "right" to "choose" is still the privilege of some women to make some choices some of the time at prices inflated by special legal strictures.

Planned Parenthood's Alan Guttmacher Institute has just released a report estimating that 30 to 50% of American women who want abortions still can't get legal ones (in 1972 it was 50 to 70%), because of problems with geographic and economic accessibility—problems rooted not only in anti-abortion attitudes but also in restrictive laws. Illegal abortion persists but meets little of this demand; as the study's chief author, Dr. Christopher Tietze, says, "Most of the unmet need ends up in the cradle." And in its 1975-76 term, the U.S. Supreme Court will consider cases from Missouri and Massachusetts raising the questions of husband's and parent's consent, parental rights over aborted fetuses that survive, doctors' responsibility toward helping late-trimester fetuses survive, state proscription of saline abortion, and that old favorite, the "definition" of "viability."

In New York State, even the contraception law—the nation's worst, restricting where and to whom contraceptives may be distributed and banning advertising and display—is still on the books, although parts of it may be declared invalid in a case now pending in the federal courts. In general, forward motion on birth-control issues, as opposed to strenuous running-in-place, has virtually ceased, the victim of organizational poverty and widespread political apathy.

For an illuminating legal analysis of the Supreme Court's attitude toward women on various issues, including abortion, see Nancy S. Erickson's "Women and the Supreme Court: Anatomy is Destiny," 41 *Brooklyn Law Review* 209. ~~Reprints are available from ALF for $2.00.~~

Authors' note, September 1976 – On July 1, 1976, the Supreme Court handed down two important follow-up decisions in the Mo. and Mass. cases mentioned above, *Planned Parenthood v. Danforth* and *Baird v. Bellotti.*

In *Baird*, the court suggested that it might be all right to require minors to ask their parents for permission before getting an abortion, so long as the minor has the right (if she has the resources) to go to court and contest her parents' refusal of permission, in which case the judge would decide to go along with the parents or with the pregnant woman and her doctor.

In *Planned Parenthood*, the court held that a husband cannot veto his wife's abortion decision, at least in the first trimester, but also implied that the wife might not have any right to keep that decision private from her husband. The court also emphasized that the right to abortion may indeed diminish as "viability" becomes earlier (those challenging the Missouri law had *complained* that the statute failed to spell out "rules" for each trimester, while objecting to other parts of the law that did impose restrictions on professional judgment). In a wide variety of ways the court also reinforced its heavily protectionist view of women, particularly in its muddled treatment of the question of whether certain abortion methods may be prohibited because they seem more dangerous than other methods.

The court also upheld special state requirements for keeping records on women who have abortions, and special "informed-consent" requirements that not only go beyond what is required for other medical procedures, but also open the door to the giving of distorted "information" designed to dissuade women from having abortions under any circumstances.

In discussing the statutory obligation of physicians to keep aborted fetuses alive, after *and during* abortion (a violation of the ordinary understanding of the very aim of abortion), the court implied that this might be required after "viability" though not before; thus we see the specter of women being able to get only those "abortions" that are actually fetal transplants.

And in this Presidential-election year, it cannot go unnoticed that abortion has been raised as a campaign issue between the major candidates, both of whose expressed views seem singularly uninformed by facts or common sense. Once again, one of women's basic rights is being used as a political football, on a field whether neither pair of goalposts represents true individual liberty. □ □ □

Reprinted from *Majority Report*, February 1973 and October 18, 1975; slightly revised and with 1976 addenda. The 1973 portion also appeared in *Feminist Studies*, vol. 1, no. 2, with a different title.