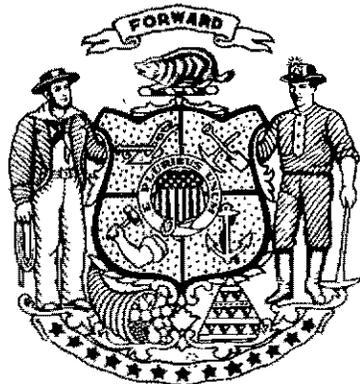

The State of Wisconsin

THE ISSUE OF ABORTION IN WISCONSIN

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INTRODUCTION

Recent court decisions, an aroused public interest, and recent changes in the laws of other states have served to stimulate to the crisis level, the issue of abortion in Wisconsin. The issue has been discussed on legal, moral, and medical bases. This report will focus on each of the primary spheres of contention by an examination of the current status of Wisconsin's law on abortion, a description of the experiences of other states that have enacted changes in their abortion laws, an indication of the arguments pro and con to change Wisconsin law, and a suggestion of possible alternatives to the existing situation.

A number of bills were introduced on this subject in the 1969 session, and by the end of January two bills and one joint resolution had already been introduced for consideration by the 1971 Wisconsin Legislature.

WISCONSIN LAW

Sec. 940.04 is the primary section of the Wisconsin Statutes relating to abortion. It provides that any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than \$5,000 or imprisoned not more than 3 years or both, with unborn child defined as a human being from the time of conception until it is born alive.

Any person, other than the mother, who intentionally destroys the life of an unborn quick child or causes the death of the mother with intent to destroy the life of an unborn child may be imprisoned not more than 15 years.

Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than \$200 or imprisoned not more than 6 months or both.

Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than 2 years.

*Compiled by Ken Sweet, Research Analyst

The provisions of Sec. 940.04 do not apply to a therapeutic abortion which is performed by a physician, is necessary or is advised by two other physicians as necessary to save the life of the mother and, unless an emergency prevents, is performed in a licensed maternity hospital.

Sec. 143.075 prohibits advertising of any abortion or miscarriage producing compound or drug. This is a misdemeanor and punishable upon conviction by a fine of not less than \$25 nor more than \$100.

Sec. 443.18 provides for license revocation for a definite period, not to exceed 2 years, for immoral or unprofessional conduct of a physician, with immoral conduct defined as procuring, aiding or abetting a criminal abortion.

Sec. 979.20 requires reporting of all deaths following an abortion, punishable upon conviction by a fine of not less than \$5 nor more than \$200, or by imprisonment not less than 30 days nor more than 3 months.

REVIEW OF LEGISLATIVE EFFORTS IN THE 1969 SESSION

In the 1969 session of the Wisconsin Legislature, 3 bills were introduced relating to abortion. Two of the bills would have relaxed the provisions restricting abortions, one would have strengthened those provisions. All 3 bills died in committee.

Assembly Bill 33 would have removed the statutory restrictions on abortion.

Assembly Bill 196 dealt with sexual crimes and other crimes which affect the family. One provision of this bill would have eliminated the crime of abortion in Wisconsin.

Assembly Bill 534 would have revamped Sec. 940.04 to delete reference to "therapeutic abortion" as an exception to this criminal law. This bill referred to abortion as the direct attack on the life of an unborn child with intention to destroy its life.

THE IMPACT OF FEDERAL COURT DECISIONS ON WISCONSIN LAW

One case has been in the forefront of the abortion controversy and has greatly precipitated the abortion crisis in Wisconsin. Dr. Sidney Babbitz was arrested for violation of Sec. 940.04 (1) and (5). Dr. Babbitz contended that the law was unconstitutional and proceeded to carry his case to the federal courts to test the alleged unconstitutionality of Wisconsin's law.

In the case of Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), a three-judge federal panel sitting in the Eastern District of Wisconsin developed the concept of a right not to bear children and, in balancing that right against the state's claimed interest in the embryo, declared the Wisconsin abortion act unconstitutional in its prohibition of abortions prior to quickening.

Under consideration by the panel was a request by Dr. Sidney G. Babbitz that the State of Wisconsin be enjoined from prosecuting him for violation of Wis. Stat. Secs. 940.04 (1) and (5) on the grounds that: (1) the statute failed to conform to the requirements of definiteness set out in People v. Belous, 71 Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), wherein the California Supreme Court declared the language of California's abortion law as vague and went on to declare that any definition in the statute that would be definite enough as to warning the doctor of the criminality of his conduct would infringe on the woman's right to life and to choose whether to bear children; (2) that the statute failed to provide equal protection for all residents of the state as guaranteed by the 14th Amendment to the United States Constitution; (3) the statute infringed upon the woman's right to refuse to carry an embryo during the early months of pregnancy.

The panel rejected the vagueness attack, citing with approval an observation by Justice Holmes in United States v. Wurzbach, 280 U.S. 396, 399 (1930):

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk.

This view of the criminal risk led the panel to dismiss, without extended discussion, any contention that the Wisconsin phrase "necessary...to save the life of the mother" failed to satisfy the requirements of the due process clause of the 5th Amendment to the United States Constitution.

The federal panel did find, however, that the Wisconsin statute violated the right of a woman to choose whether or not to bear a child. It reached this decision through an examination of the right of privacy, which it saw as emanating from Union Pacific Railway v. Botsford, 141 U.S. 250, 251 (1891), holding that "the right to one's person may be said to be a right of complete immunity: to be let alone". The panel ruled that such a right now clearly extended to matters of the home, marital relations, and child raising. The panel accepted the premise, underlying the decision in Griswold v. Connecticut, 381 U.S. 479 (1965), that such a right does exist and is applicable to the states.

The Babbitz holding that a woman has a right to an abortion before quickening is an extension of the Griswold doctrine. Furthermore, the panel observed that abortion before quickening was not a crime at common law. The court argued that the expansion of the abortion prohibition in 1858 to cover the period prior to quickening was based upon considerations of risk to the mother which are now relatively nonexistent. Thus, it concluded that its decision was in part a return to the common law, preserved by the 9th Amendment to the United States Constitution.

The panel also considered several "state interest" contentions which must be weighed against the protected right of the mother not to continue pregnancy. Without considering whether the state may have such an interest, it rejected the contention that the law tends to discourage nonmarital sexual intercourse by prohibiting abortions at will. The panel pointed out that the statute involved does not purport to distinguish between married and unmarried women.

The state also contended that its interest in protecting the embryo constituted a sufficient reason to sustain the statute. In dismissing this contention, the panel said:

Upon balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.

Also, the panel in Babbitz refused to consider the arguments that other interests of the state favor either limiting or encouraging abortions:

While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations.

In its decision of March 1970, the three-judge panel made a declaratory judgment in favor of Dr. Babbitz, but did not grant injunctive relief. The March decision was upheld by the Seventh Circuit Court of Appeals at Chicago. The United States Supreme Court refused to hear the March decision appeal, on jurisdictional grounds, because only a declaratory judgment and not an injunction was in-

volved. In November 1970, the three-judge federal panel granted injunctive relief to the plaintiff, Dr. Babbitz, and this decision was upheld in January 1971 by the Seventh Circuit Court of Appeals at Chicago. The state is now appealing the decision to the United States Supreme Court.

Meanwhile, abortion laws of other states are also undergoing judicial scrutiny. On January 29, 1971, a three-judge federal panel declared Illinois' abortion law unconstitutional, holding that the statute (Chapter 38, Article 23, Section 1 (b) of the Illinois Revised Statutes 1969), which permits abortion only when necessary for preservation of the woman's life, was vague in its wording and an invasion of a woman's right of privacy. The court enjoined the state from prohibiting in any manner abortions performed during the first 3 months of pregnancy by licensed physicians in licensed medical facilities.

On February 10, 1971, U.S. Supreme Court Justice Thurgood Marshall issued a temporary order which made the lower court's ruling unenforceable until the Supreme Court acts on it. Justice Marshall granted the petition of an Illinois doctor and a state's attorney who appealed for a stay.

The confusion is further compounded by a recent North Carolina decision. On February 1, 1971, a three-judge federal court upheld North Carolina's law against abortion on the grounds the state can constitutionally determine that a child has "the right to be born".

STATUS OF ABORTION IN THE SEVERAL STATES

Abortion laws are being revised in different states in various ways, either by adding new permissible grounds, leaving the matter to the woman and her physician, or challenging existing laws as invalid under the United States Constitution. Thirty-one states permit abortion only where necessary to preserve the life of the woman, 17 permit abortions on additional grounds and 3 states leave the decision to the woman and her physician.

States Where Abortions Are Permitted Only To Save The Mother's Life:

Arizona	Louisiana	New Hampshire	Texas
Connecticut	Maine	New Jersey	Utah
Florida	Michigan	North Dakota	Vermont
Idaho	Minnesota	Ohio	Washington
Illinois	Missouri	Oklahoma	West Virginia
Indiana	Montana	Rhode Island	Wisconsin
Iowa	Nebraska	South Dakota	Wyoming
Kentucky	Nevada	Tennessee	

States Where Abortions Are Permitted On Additional Grounds:

Alabama	Georgia	North Carolina
Arkansas	Kansas	Oregon
California	Maryland	Pennsylvania
Colorado	Massachusetts	South Carolina
Delaware	Mississippi	Virginia
District of Columbia	New Mexico	

The additional grounds criteria are generally: (1) The continuation of the pregnancy would impair the physical or mental health of the woman; (2) The child is likely to be born with a defect; (3) The pregnancy resulted from rape or incest.

States That Leave The Decision To The Woman And Her Physician:

Alaska	Hawaii	New York
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The law of Alaska states that an abortion must be performed by a licensed physician and in a hospital or other approved facility, the consent of parent or guardian of an unmarried female less than 18 years of age must be received, and the woman must be domiciled or physically present in the state for 30 days before the operation. The law covers termination of a nonviable fetus, which means that a legal abortion can be performed only before the fetus becomes viable (usually construed to be at 3 to 4 months).

Hawaii's law specifies that an abortion must be performed by a licensed physician and in a licensed hospital, and that the woman must be domiciled in Hawaii or have been physically present in the state for at least 90 days. Again, the law only covers a nonviable fetus.

The New York law, which went into effect on July 1, 1970, states that an abortion is justifiable when done with the woman's consent by a duly licensed physician acting under the belief that such is necessary to preserve her life, or within 24 weeks from the commencement of her pregnancy. Also justifiable is a female's commission of an abortifacient act upon herself when she acts upon the advice of a physician that is necessary to preserve her life, or, within 24 weeks from the commencement of her pregnancy. There is no residence requirement.

EXPERIENCE OF STATES THAT HAVE RECENTLY WIDENED THEIR PERMISSABLE GROUNDS FOR ABORTION

Those states which have relaxed their prohibitions on abortion have done so within the last 3 to 4 years. Because these changes have been so recent, the data available is incomplete, and it is difficult, therefore, to make an overall statement of results.

In Colorado, for the period April 25, 1967 to June 30, 1968, the following figures for legal abortions were reported:

Total	338
For mental health reasons	195
For suicide risks	2
For medical reasons	32
Rape victims	33
German measles early in pregnancy	20
Reason unreported	56

For the entire year of 1968, there were approximately 500 legal abortions and approximately 825 in 1969.

In California, for the period November 8, 1967 to December 31, 1967, the following figures were reported for legal abortions:

Total number of requests	549
Total number of requests approved	479
Total number of applications on mental health grounds	438
Total number of applications on mental health grounds approved	390
Out of state applications	11

There were approximately 10,000 legal abortions in California in 1970.

In Maryland, in 1969, 2,134 legal abortions were performed, with requests received totaling 5,153. Approximately 1/2 of the requests were from nonresidents, but only 13% of these nonresident requests were granted.

In those states that have widened their permissible grounds for legal abortions, three complaints were consistently noted: (1) high cost; (2) large amounts of red tape; (3) reluctance of many doctors and hospitals to handle surgery which long carried a stigma of illegality and social disapproval. From both an informational standpoint and from a financial standpoint, de facto prohibitions appeared to exist that mitigated against the poor obtaining abortions and replaced the de jure prohibitions existant prior to the enactment of laws widening the permissible grounds for obtaining a legal abortion. In order to obtain an abortion on mental health grounds, it is usually necessary to have 2 psychiatrists stipulate that continuation of pregnancy would endanger the mental health of the woman. These consultation fees greatly increased the medical costs. In addition, in many cases the waiting period for this consultation is lengthy. As a result, a different surgical procedure which greatly increases the risk of complications is often necessary to terminate pregnancy.

Although extensive information on New York is not yet available, "The Preliminary Report on Abortions Performed in New York State from July 1 through October 31, 1970", prepared by the New York State Department of Health, reported the following:

"From July 1 through October 31, there were 34,175 induced abortions reported in New York State, of which 21,568 were to New York State residents;

"No reports of deaths that occurred incident to abortifacient acts outside of New York City;

"There were 13 deaths associated with induced abortions in New York City. Five of these were in hospitals, and among these there is some doubt whether two cases should be considered as hospital related deaths;

"Only one of the eight deaths that occurred following an out-of-hospital abortion is known to have taken place after an abortion in a physician's office;"

Distribution by Age of Legal Abortions in New York

	<u>Total</u>	<u>Under 15</u>	<u>15-19</u>	<u>20-24</u>	<u>25-29</u>	<u>30-34</u>	<u>35-39</u>	<u>40+</u>	<u>Not Stated</u>
Number	34,175	345	7,410	11,887	6,557	4,073	2,688	1,168	47
Percent	100.0	1.0	21.7	34.8	19.2	11.9	7.9	3.4	0.1

Distribution by Procedure

<u>Procedure</u>	<u>Number</u>	<u>Percent</u>
Total	34,175	99.9
Dilation and curettage	14,028	41.0
Suction and curettage	10,278	30.1
Saline injection	5,302	15.5
Hysterotomy	798	2.3
Other	73	0.2
Not stated	3,696	10.8

Distribution by Gestation (in weeks)

	<u>Total</u>	<u>Under 12</u>	<u>12</u>	<u>13</u>	<u>14</u>	<u>15</u>	<u>16-18</u>	<u>19-23</u>	<u>24+</u>	<u>Not Stated</u>
Number	34,286	20,849	2,732	1,715	1,064	893	2,972	2,749	132	1,180
Percent	100.0	60.8	8.0	5.0	3.1	2.6	8.7	8.0	0.4	3.4

Limits To Abortion

Up to twelve weeks	Dilation and suction (with or without curretage)
13 to 16 weeks	Abdominal hysterotomy
16 to 20 weeks	Amniocentesis with injection of a hypertonic saline solution
20-24 weeks	Hysterotomy or saline amniocentesis

ARGUMENTS OVER ELIMINATING OR RELAXING THE PROVISIONS OF WISCONSIN'S ABORTION LAW

Arguments For

1. If a woman feels that her pregnancy seriously threatens her physical or mental health or if the pregnancy is unwanted, she has a right to control over her own body and, therefore, a right to have an abortion.
2. If a woman has reason to believe that the child she is carrying will be deformed, she has a right to have an abortion.
3. If an abortion does not affect anyone but the patient and her physician, then to make abortion illegal is an infringement on individual liberty and equality.
4. There must be room in medicine for personal judgment by a physician, and when a physician in good judgment performs an abortion, neither he nor his patient should be legally censured.
5. The fetus prior to quickening is an appendage of the mother and does not have any intrinsic or legal right to life.
6. Legalized abortion would reduce the economic burden on persons who cannot provide the financial resources necessary for the proper care of the child.
7. Abortions would reduce the number of illegitimate children and might thereby result in decreasing welfare payments.
8. The existing abortion law discriminates against the poor, who do not have the resources to obtain an abortion either legally in another state or country or illegally in Wisconsin.

Arguments Against

1. Only God, not man, has the right to terminate life.
2. If a pregnancy originated irresponsibly, it should not be interrupted, because even though the child may suffer, it is not usual to destroy a person's life because he may or even does suffer.
3. We do not know that legalized abortion will decrease the criminal abortion rate.
4. There is still considerable debate, even among experts, as to when life begins.
5. Rather than diminishing emotional suffering as proponents of change contend, abortion may cause greater emotional disturbance resulting from a deep sense of guilt.
6. Easy availability of abortion will encourage premarital sex relations.
7. If abortions were legalized throughout the United States, the erection of the necessary facilities to handle the cases would be financially unfeasible. The alternative would be abortions on an out-patient basis, which might, because the patient was not given enough time in a hospital, increase the possibility of physical and emotional complications.
8. Abortion tends to weaken the reverence for life. Will it lead eventually to justifying euthanasia?
9. There are still deaths from abortion, even when performed under medically-approved circumstances.

POSSIBLE ALTERNATIVES TO THE EXISTING SITUATION

At the present time, that portion of Wisconsin's abortion law which makes it a crime to abort an unquickened fetus has been declared unconstitutional by a U.S. Court and has been appealed to the Supreme Court. The state can either amend its law to conform to the decision of the lower federal court; it can amend its law to widen the permissible grounds for an abortion, using the experience of other states as guidelines; or it can repeal the statutory prohibitions on abortion altogether. To that end, 1971 Assembly Bill 14 has been introduced. This bill would repeal the statute making it a felony to perform, or have performed, an abortion. In addition, another bill has been introduced to strengthen the law relating to death certificates. 1971 Assembly Bill 161 requires that when death occurs because of an induced abortion, the death certificate shall so state.

The United States Constitution, as interpreted by the United States Supreme Court, is, of course, the supreme law of this nation and supersedes any conflicting provisions in the state's statutory or constitutional law. If the decision of the three-judge federal panel is upheld by the United States Supreme Court, that part of Wisconsin's anti-abortion law which makes it a crime to abort an unquickened fetus would be invalid, but aborting a quickened fetus would continue to be a crime under Wisconsin law. If the Supreme Court overrules the decision of the lower federal courts, Wisconsin's anti-abortion law, which continues on the books, would continue as fully valid criminal law. The state might then review the possibility of prosecuting physicians, who, since the decision, have performed abortions in reliance on the law's alleged unconstitutionality.

A decision by the United States Supreme Court is final unless reversed by a later decision of the court or by constitutional amendment. To this end 1971 Senate Joint Resolution 8 has been introduced into the Wisconsin Legislature, proposing a federal constitutional convention to adopt an amendment to the Constitution of the United States reserving to the states the right to regulate abortion, and outlining how the convention is to be organized. The convention would be convened for this one precise purpose only.