

# ABORTION, MEDICINE, AND THE LAW

EDITED BY  
J. DOUGLAS BUTLER  
AND  
DAVID F. WALBERT

THIRD EDITION, COMPLETELY REVISED  
(PREVIOUSLY PUBLISHED AS ABORTION,  
SOCIETY, AND THE LAW)

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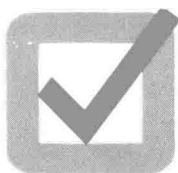
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*We dedicate this book to the memory of Alan F. Guttmacher.*

## **ACKNOWLEDGMENTS**

We would like to express our gratitude to Sharon Butler, Vickie Stroh, Eleanor Wenner, and Charlotte Walbert for their time and their interest in this book.

# Introduction

In 1966, the editors of the *Case Western Reserve Law Review* (then the *Western Reserve Law Review*) commissioned a series of essays on the subject of abortion. Those essays appeared in a special issue of the *Law Review*, and because of the extreme interest in the essays, they were subsequently published by the Case Western Reserve University in 1967 under the title *Abortion and the Law*. That volume was the first major book on abortion that contained legal reviews of the issues.

In 1972, because of the interest in the earlier volume, and with the rapidly changing legal, ethical, medical, and political aspects of the subject, another volume was undertaken at the Case Western Reserve University. These efforts culminated in the publication of the *Case Western University Law Review* of several articles pertaining to abortion, and in the publication of *Abortion, Society, and the Law* in 1973. The editors of this edition were David F. Walbert (then editor-in-chief of the *Case Western Reserve Law Review*) and J. Douglas Butler, who also graduated from the Law School in 1972.

The 1973 volume became the authoritative treatise for lawyers, legislators, doctors, students, and others. It was a comprehensive resource that examined the legal, ethical, religious, psychological, and medical aspects of the subject. The book was very well received, but has been out of print for years.

The 1973 edition contained an exceptionally comprehensive overview of the evolving law of abortion and the status of abortion laws in every state in the nation by Professor B. J. George, Jr.; an article by Dr. Alan F. Guttmacher, whom many consider to be the nestor of the abortion movement, relating his personal involvement in the issues since the 1920s; discussions of ethical and religious

issues by Daniel Callahan, Rabbi Immanuel Jakobovits, and then-Congressman Robert F. Drinan, S.J.; psychiatrists Richard A. Schwartz and Stephen Fleck wrote on the role of psychiatrists in the field of abortion, both from a historical and a current perspective; Dr. Kenneth R. Niswander reviewed abortion practices in the United States from a medical viewpoint; M. Neil Macintyre reviewed the genetic and prenatal diagnosis considerations that are inherent in liberalized abortion choices; Harriet F. Pilpel and Ruth J. Zuckerman wrote on the specific rights of minors in the area of abortion; and Gerald A. Messerman wrote the seminal article on abortion counseling.

The present volume draws only slightly on the previous edition. The same editors are involved, of course, but the selections are almost all new. Because we have had a continuous demand for the previous edition, we have undertaken the new effort in hopes that we can provide a book that responds to the current needs of scholars, students, legislators, practitioners in many fields, and the public at large. With our previous edition, we were always pleased to receive comments from people who found, in one volume, a comprehensive, in-depth, and objective treatment of the topic. Our aim is to do the same for the subject in the new volume, with a realization that the area is even broader today than it was 10 years ago.

Daniel Callahan's article from the last volume has been maintained intact because it remains one of the most concise discussions of the ethical issues relating to abortion. The late Dr. Alan F. Guttmacher's article has also been preserved because of his exceptional role in the abortion movement in the United States and around the world. However, it has been updated for the new volume by Dr. Irwin H. Kaiser.

These two articles account for a small proportion of the new book. Because of the complete revolution in both constitutional and statutory law that affects the abortion area, because of the great changes in medical practice and the abundant sociological data available, and because of the significant changes in the field of genetic analysis and prenatal diagnosis, the remainder of the book is entirely new. Legal articles focus on what has happened since 1973, and what may happen in the future. Professor B. J. George has again written an extraordinary comprehensive review of the laws in all the states as they affect all abortion-related issues. Stephen M. Krason and William B. Hollberg have explored an important, but often-neglected side of the debate. They provide what we feel is the best published criticism of the Supreme Court's decisions from the conservative point of view. Janet Benshoof and Harriet F. Pilpel have written "Minors' Rights to Confidential Abortions: The Evolving Legal Scene." This topic has been the subject of significant litigation in the United States Supreme Court recently, and their article is both timely and informative.

One cannot adequately address the abortion revolution of the past decade without devoting significant attention to the ongoing counterrevolution. Therefore, we include an article by Senator Bob Packwood describing the efforts of the anti-abortion members of Congress to overturn the Supreme Court's 1973 decision by statute and constitutional amendment. We have included an article by Professor Albert M. Pearson and Paul M. Kurtz of the University of Georgia, who write from a more scholarly and less personal view, about the legislative and constitutional efforts as a mixture of law and politics.



A wealth of extraordinary material was developed during the Senate hearings that arose in conjunction with the conservatives' efforts to overturn legislatively the *Roe v. Wade* and *Doe v. Bolton* decisions. Senator Orrin Hatch, a critical actor in the legislative drama (as chairman of the Judiciary subcommittee that specifically reported on the proposals), switched his vote in light of the testimony that was submitted to his subcommittee, contributing to the demise of the conservatives' efforts. We have reviewed all the presentations to the Senate, as well as all the Senate reports of recent years concerning the abortion proposals introduced, and we have chosen certain portions that we think are of particular value. We have taken the materials that include the most well-developed, well-reasoned, and scholarly commentary on the issues that were before the Senate.

Mark Tushnet has given us a detailed study of the relevant Supreme Court cases on abortion. This list of cases continues to grow as the Court defines the meaning of the *Roe* decision.

The concluding legal article is from Don C. Smith, Jr. who writes on what is now only an emerging topic among practicing lawyers and law professors: the legal implications for "wrongful birth" and "wrongful life" issues that arise uniquely in the context of abortion and genetic evaluations.

Dr. M. Neil Macintyre and his coauthors have again provided us with what we believe will be the authoritative review of prenatal diagnosis and selective abortion.

We felt especially fortunate to have Dr. Christopher Tietze agree to write for us because of his stature, knowledge, and experience in the issue of abortion throughout the world. His article, published posthumously, will provide the reader with a concise discussion and summary of the actual practice of abortion since the Supreme Court's liberalizing decisions in 1973. His information should be of profound value to sociologists, legislators, and students of this topic.

Dr. Kenneth R. Niswander and Manuel Porto describe the medical practices associated with abortion, past and present. Dr. Willard Cates, Jr., who is with the Centers for Disease Control, provides a short article that includes a provocative discussion of what, from a medical viewpoint, would likely occur in the event that the law should change and the nation return to a conservative position on abortions. Finally, Dr. Irwin Kaiser, from the Albert Einstein College of Medicine, completes the review of the medical and sociological aspects of abortion as it exists today.

Dr. Richard A. Schwartz addresses the psychiatric implications of abortion, providing new and current material.

Finally, two important spokesmen of the Right-to-Life movement, Ronald Reagan and John T. Noonan, Jr. through powerfully expressed writings, present the conservative view.

These articles represent what we believe is the best available in-depth coverage of a vast area. In terms of the overall percentage of the book, the ethical and religious dimensions comprise a less significant portion than in the past volume because those topics have changed little and discussions of them are adequately available in print elsewhere. As to the legal and historical aspects of abortion, we have selected those topics that are of the most compelling scholarly and political interest today and those that will remain so in the future. While we

well recognize that the Senate material is extensive, we feel it is very important. Most readers have no practical access to these materials, and even knowledgeable students and researchers could get them only with great effort. These materials fully round out the legal and historical material in the book.

The medical and sociological articles will provide the most comprehensive and up-to-date information available in any one source, and will be of tremendous value to a wide potential readership.

J. Douglas Butler, D.P.M., J.D.  
David F. Walbert, M.S., J.D.

# Contributors

Janet Benshoof, J.D.

American Civil Liberties Union, New York, New York

Daniel Callahan

Director of Hastings Center, New York, New York

Willard Cates, M.D., M.P.H.

Centers for Disease Control, Atlanta, Georgia

B. J. George, Jr., J.D.

Professor of Law, New York Law School, New York, New York

Alan F. Guttmacher, M.D.

Past President of Planned Parenthood—World Population (deceased), New York, New York

William B. Hollberg, J.D.

Attorney, Atlanta, Georgia

Irwin H. Kaiser, M.D.

Professor of Obstetrics and Gynecology, Albert Einstein College of Medicine, New York, New York

Llew Keltner, M.D., Ph.D.

Department of Biometry, Case Western Reserve University School of Medicine, Cleveland, Ohio

Dorothy A. Kovacevich, Ph.D.

Assistant Professor of Special Education, Kent State University, Kent, Ohio

Stephen M. Krason, Ph.D., J.D.

Eastern Director of Intercollegiate Studies Institute, Bryn Mawr, Pennsylvania

Paul M. Kurtz, J.D.

Professor of Law, University of Georgia School of Law, Athens, Georgia

M. Neil Macintyre, Ph.D.

Professor Emeritus of Developmental Genetics, Medicine and Pediatrics,  
Case Western Reserve University School of Medicine, Cleveland, Ohio

Kenneth R. Niswander, M.D.

Professor of Obstetrics and Gynecology and Chairman of the Department at  
the School of Medicine, University of California, Davis, Sacramento,  
California

John T. Noonan, Jr., J.D.

Professor of Law, University of California, Berkeley, California

Bob Packwood

U.S. Senator from Oregon, Washington, D.C.

Albert M. Pearson, J.D.

Professor of Law, University of Georgia School of Law, Athens, Georgia

Harriet F. Pilpel, J.D.

Attorney, New York, New York

Manuel Porto, M.D.

Assistant Professor of Obstetrics and Gynecology, School of Medicine at the  
University of California, Davis, Sacramento, California

Ronald Reagan

40th President of the United States, Washington, D.C.

Richard A. Schwartz, M.D.

Euclid Clinic Foundation, Chief of Department of Psychiatry and Psychol-  
ogy, Senior Clinical Instructor, Department of Psychiatry, Case Western  
Reserve University School of Medicine, Cleveland, Ohio

Don C. Smith, J.D.

Attorney, Denver, Colorado

Christopher Tietze, M.D.

Senior Consultant, The Population Council, New York, New York

Mark Tushnet, J.D.

Professor of Law, Georgetown University Law Center, Washington, D.C.

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1 • LAW

Senator Packwood presents a 10-year history of abortion in Congress. As early as 1973, some 18 constitutional amendments on the topic had been proposed, but often there was disagreement among the many groups proposing the amendments. The amendments took several focuses: states' rights to decide the legality of abortion, life begins at conception, the unborn are persons within the meaning of the Fifth and Fourteenth Amendments. The article also discusses the issues of fetal research, abortion funding, and the "Baby Doe" legislation. Senator Packwood, the junior senator from Oregon, has long been a champion of reproductive freedom and equal rights for women. He is Chairman of the Senate Finance Committee.



# 1 • The Rise and Fall of the Right-To-Life Movement in Congress: Response to the Roe Decision, 1973–83\*

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*Senator Bob Packwood\*\**

It has been 10 years since the historic *Roe*<sup>1</sup> decision, 10 years of legislative and judicial skirmishes to guarantee a woman's right to reproductive freedom. During this decade, the right-to-life movement has grown into a singularly effective single-issue grass roots organization. But not effective enough. The right-to-lifers have tried repeatedly during the past 10 years to reverse *Roe*. They have tried to pass constitutional amendments; they have tried to enact laws; they have tried to limit the availability of abortions by restricting funding; they have tried to change the philosophical orientation of the Senate by promoting the election of candidates whose primary platform is an opposition to abortion rights; and they have tried to get courts to reverse or qualify *Roe*. In a few of these efforts they have succeeded. But they lost the big ones in 1983.

June 1983 may come to be viewed as a pivotal month in the battle to guarantee a woman's right to choose. In two weeks' time, the right-to-life movement suffered as many major defeats. The first was the Supreme Court's decision in *Akron v. Akron Center for Reproductive Health*,<sup>2</sup> a strong reaffirmation of *Roe*. Thirteen days later, the Republican-controlled Senate overwhelmingly rejected a proposed constitutional amendment that stated: "A right to abortion is not secured by this Constitution."<sup>3</sup> This 49–50 defeat is particularly significant for several reasons: First, in addition to falling far short of the two-thirds vote (67 votes) required to approve a constitutional amendment, the

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\*This article was completed for publication in December, 1983.

\*\*I am grateful for assistance in preparing this chapter from two of my legislative assistants, Jill Beimdiek and Eleanor Wenner, and from my administrative assistant, Sana F. Shtasel.