Masthead Logo

DePaul Law Review

Volume 18
Issue 2 *Issue 2 & 3 Summer 1969*

Article 15

Abortion Laws: A Call for Reform

Robert E. Hall

ABORTIONS LAWS: A CALL FOR REFORM

ROBERT E. HALL*

UNTIL THE nineteenth century, abortion during the early months of pregnancy was not proscribed by the statutory law of any country in the world. The first such law was enacted in England in 1803.[1] The first similar legislation in the United States, prohibiting abortion before quickening (*i.e.*, when the first fetal movements are felt by the pregnant woman—usually about the fourth or fifth month) was passed by the Illinois Legislature in 1827.[2] The first statute to cite a so-called therapeutic exception to this prohibition was passed by the New York Legislature in 1829[3] and copied thereafter by most of the other states.[4] The exception: for preservation of the life of the mother.

Until recently it has been unclear to modern scholars whether these laws were designed to protect the pregnant woman or the intrauterine fetus. An important clue to those legislators' reasoning has now been uncovered in the form of a corollary section of the 1828 New York bill, which failed of passage, but which would have declared culpable "every person who shall perform *any surgical operation* by which human life shall be destroyed or endangered . . . unless it appears that the same was necessary for the preservation of life,"[5] and the accompany-

* DR. HALL *is Associate Professor of Clinical Obstetrics & Gynecology at Columbia University's College of Physicians and Surgeons, New York, and Associate Attending Obstetrician and Gynecologist, Presbyterian Hospital, New York, New York. He did his undergraduate work at Harvard University and received his M.D. from Columbia University's College of Physicians and Surgeons.* DR. HALL *is a member of the American College of Surgeons and the New York Academy of Medicine.* DR. HALL *is the author of numerous articles and books. Among them are: Therapeutic Abortion, Sterilization, and Contraception, in the* AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY, *and The Medico-Legal Aspects of Abortion in* CRIMINOLOGICA. *He is President of the Association for the Study of Abortion and Vice-President of the Abortion Reform Association. The opinions presented in this article are solely those of the author and do not necessarily represent the views of the Law Review, the College of Law, or the University.*

[1] Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803).

[2] *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 450 (1968).

[3] *Id.*

[4] Harper, *Abortion Laws in the United States*, in ABORTION IN THE UNITED STATES 187-92 (Calderone ed. 1958).

[5] *Supra* note 2, at 451 (emphasis added).

ing Reviser's Note, which explains that, "The rashness of many young practitioners, in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint and we are advised . . . that the loss of life occasioned by the practice is alarming."[6] Further evidence is provided by the Supreme Court of New Jersey which commented, regarding its 1849 abortion statute, that its purpose "was not to prevent the procuring of abortions so much as to guard the health and life of the mother against the consequences of such attempts."[7]

Thus it would appear that our forebears narrowly restricted the practice of abortion primarily to protect pregnant women from the risks of surgery; and rightly so, for the risk of even hospital abortions in the nineteenth century was formidable. Anesthesia and bacteria were discoveries of the mid-nineteenth century, and blood banks and antibiotics were not developed until after 1900. At the time the first abortion laws were passed the laws made some medico-legal sense. But now, in view of the progress of medical science, these laws, most of which still remain on the books, make no sense whatsoever. Hospital abortions are now even safer than carrying a pregnancy to term.

In recognition of this discrepancy between medicine and the law, there has been recent effort to seek abortion law reform. Impetus to this search has been added by the recent enhancement of the value placed on individual human dignity, and, more specifically, by the Supreme Court decision of 1965 supporting the right to marital privacy in the practice of birth control.[8] In addition, it is argued that these ancient abortion statutes were enacted before the dangers of German measles in pregnancy were discovered and even before the birth of Sigmund Freud.

So the medical reasons for abortion have changed as well as the risks of the operation. Fifty years ago, most therapeutic abortions were performed for such conditions as diabetes, tuberculosis, and heart disease. But as the medical profession has learned how to protect the *life* of pregnant women with these complications, it has at the same time learned more fully how to protect their *health*—both mental and physical. Most hospital abortions nowadays are done for mental health rea-

[6] *Supra* note 2, at 451.

[7] State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

[8] Griswold v. Connecticut, 381 U.S. 479 (1965).

sons or for fear of the results of German measles, and most of these abortions are, strictly speaking, illegal.

Since 1943, the New York Academy of Medicine has advocated abortion to protect health as well as life.[9] The American Law Institute, in its Proposed Official Draft of the *Model Penal Code*, recommends that abortions be permitted when maternal health is in jeopardy; when there is a significant risk of fetal deformity; and in cases of rape and incest.[10] Not until 1967 were these recommendations incorporated into state law. Since that time, statutes, more or less based upon these provisions, have been enacted in Colorado,[11] California,[12] North Carolina,[13] Georgia,[14] and Maryland.[15] The wording varies from state to state: the fetal-deformity clause was struck in California, and both North Carolina's and Georgia's laws have a residence requirement, but basically the new laws are derived from the A.L.I. proposal. Similar reform measures have been introduced into at least twenty-three other state legislatures.

What will the passage of such laws do to the practice of abortion? Not much. According to the best information available, there are now approximately 1,000,000 criminal abortions[16] and 10,000 hospital abortions[17] performed in the United States every year. First-year experience with the new laws in California and Colorado indicates that hospital abortions will increase six to eightfold.[18] If the laws were similarly modified in all fifty states, therefore, there would probably still be more than 900,000 abortions performed every year outside hospital walls.

[9] COMMITTEE ON PUBLIC HEALTH, THE NEW YORK ACADEMY OF MEDICINE, PIONEERING IN PUBLIC HEALTH FOR FIFTY YEARS, TWENTY-YEAR REPORT OF ITS ACTIVITIES, 1941-1961 110 (1962).

[10] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

[11] COLO. REV. STAT. ANN. § 40-2-50, *et. seq.* (Supp. 1967).

[12] CAL. PEN. CODE § 274 (West 1968); CAL. HEALTH & SAFETY CODE § 25950, *et. seq.* (West Supp. 1968).

[13] N. C. GEN. STAT. § 14-45.1 (Supp. 1967).

[14] GA. CODE ANN. § 26-1202 (Supp. 1969).

[15] MD. ANN. CODE art. 43, § 149E (Supp. 1968).

[16] *Supra* note 4, at 180.

[17] Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 AMER. J. OBSTET. GYNEC. 518 (1965).

[18] Overstreet, *Experience with the New California Law* (soon to be published in ABORTION IN A CHANGING WORLD); Droegemueller, Taylor & Drose, *The First Year of Experience in Colorado with the New Abortion Law*, 103 AMER. J. OBSTET. GYNEC. 696 (1969).

Other countries have faced their abortion problems more realistically. In most of the communist countries, and in Japan, abortion has been completely legalized. This has resulted in an abortion rate as high as fifty per cent of all pregnancies in some of these countries.[19] However, before supposing that such a high rate might pertain if abortion were legalized in the United States, one must bear in mind that contraception is more widely practiced in this country. In the Scandinavian countries and most of the Swiss cantons, the laws have been liberalized to permit abortions for maternal health, fetal risk, and sometimes humanitarian and socio-economic considerations. This has in contrast, led to an abortion rate of about five per cent.[20] Several of these countries are considering further liberalization of their abortion laws in order to reduce further the number of ciminal abortions, despite the fact that the extra-hospital to hospital ratio of abortions in Denmark, for instance, has already been reduced to 4:1,[21] as opposed to the 100:1 ratio existing in the United States.

The total number of abortions, legal plus illegal, seems to remain fairly constant within a given culture. The principal determinant of this rate is not so much the law of the particular land or the prevailing religion of its people, but rather the availability of modern contraception and the desire for a certain family size. Thus, as noted above, whereas the legal difference between Denmark and the United States results in the disparate abortion rates of five per cent and 0.2 per cent, respectively, the cultural similarity of the two countries is responsible for nearly identical estimates of the overall abortion rate for the Americans and the Danes.

One predictable result of the restrictive laws in the United States is that most hospital abortions here are obtained by white upper-class women. One illustrative statistic should suffice: the therapeutic abortion to term birth ratio in the private hospitals in New York City is 1:250; in the municipal hospitals, 1:20,000.[22]

As these and other truths about abortion have become known, the

[19] Tietze, *The Demographic Significance of Legal Abortion in Eastern Europe*, 1 DEMOGRAPHY 121 (1964).

[20] Geijerstam, *Abortion in Scandinavia* (soon to be published in ABORTION IN A CHANGING WORLD).

[21] Hoffmeyer and Nørgaard, *Incidence of Conception and the Course of Pregnancy*, 126 UGESKR. LAEG. 403 (1964).

[22] Gold, *Therapeutic Abortion in New York City: A 20-Year Review*, 55 AMER. J. PUBLIC HEALTH 968 (1965).

vast majority of American citizens have recognized the need for law reform in this area. Most recent polls show that about eighty-five per cent of public and professional groups support such reform,[23] as do most prominent organizations in the fields of medicine (*e.g.*, the American College of Obstetricians and Gynecologists), law (*e.g.*, Association of the Bar of the State of New York), religion (*e.g.*, the Council of Churches of New York, Iowa, and other states; the Union of American Hebrew Congregations), and civil liberties (*e.g.*, the American Civil Liberties Union). The only significant opposition comes from the hierarchy of the Roman Catholic Church, although the polls also show that their parishioners want reform.[24] The vigorous disavowal by these particular religious leaders of the evolution in medicine and morality, although rationalized in this instance by uniquely equating a fetus and a human being, can be explained, in this author's opinion, only by discovering whatever motivates the uniqueness of their position on other sexual matters, such as birth control, sterilization, divorce, and celibacy. Yet even the threat of Catholic opposition has, single-handedly, thwarted abortion reform in most states where it has been sought.

Ideally, though, what kind of abortion laws should we have? Are the changes proposed by the A.L.I. sufficient? Actually they would merely legitimize the abortions already being done by the more courageous doctors in most non-Catholic hospitals, and the five new state laws based upon these proposals are so riddled with restrictive requirements that they will prevent the performance of some abortions which might now be done. For example, the proposals require that each case be approved by a board of doctors from various medical specialties. The abortion rate fell by two-thirds when such a board was formed at my hospital. Further, many of these requirements are unrealistic. For instance, the new state laws demands that in order to qualify for an abortion on grounds of rape, a woman must report the incident to the police within one week after it occurred. How many rape victims are going to risk the humiliation and publicity involved in doing this before knowing whether a pregnancy has occurred? These are the

[23] Rossi, *Abortion Laws and Their Victims*, TRANS-ACTION 25 (Sept./Oct. 1966); *American Attitudes on Population Policy: Recent Trends*, STUDIES IN FAMILY PLANNING, No. 30 1-7 (1968); Westoff and Ryder, *Recent Trends in Attitudes toward Fertility Control and the Practice of Contraception in the United States*, in FERTILITY AND FAMILY PLANNING: A WORLD VIEW (in press); Oliver Quayle & Co., *A Survey of Public Opinion in New York*, reported in 3 ASA NEWSLETTER 2 (Spring 1968).

[24] *Supra* note 23.

clumsy initial attempts at reform, which will soon be found impractical and ineffective.

Some reformers would permit abortions automatically for women with a large number of children. This would be especially humane in offering recourse to the poor, who practice contraception less often and less reliably. Some reformers would allow abortion automatically for women over a certain age. This could be medically defended on the grounds that pregnancy imposes a higher risk upon these older women. But any such arbitrary dividing lines are clearly illusory. If abortion is allowed the healthy 41 year old, what about the 39 year old with migraine? And if abortion is allowed the affluent mother of five normal children, what of the poverty-stricken mother of three children with behavior problems?

One can see the difficulty that will arise from any attempt to establish a formula for the qualifications for abortion. The efforts to devise such a formula are based upon a false assumption, namely, that abortion is strictly a medical matter. To be sure, abortions should be performed only by qualified physicians, but does it necessarily follow that doctors, or legislators for that matter, possess the wisdom to determine who should have an abortion? It does not. The person best qualified to make this decision is the pregnant woman herself—with the help of her husband, her obstetrician, and whoever else's judgment she respects. Ideally, then, in this author's opinion, the practice of abortion should not be regulated by law, except for the following recommendations.

First, each applicant for abortion should be interviewed in some depth by a nongovernmental, non-profit agency of professionals—such as an obstetrician, a psychiatrist, and a social worker. The function of this agency would be to explore with the candidate all the alternative solutions to her situation. Hopefully, this procedure would prevent impulsive decisions from being acted upon before saner courses were investigated.

Second, all abortions must be done only by registered physicians in accredited hospitals.

Third, every effort should be made to see that abortions are done by the twelfth week of pregnancy, after which time they become more difficult and more dangerous. There would be some conflict between the first and third recommendations, since thorough exploration of the reasons for alternatives to abortion will sometimes have to extend beyond the twelfth week; but this difficulty will become minimized as

women are educated to make their requests as early in pregnancy as possible.

Fourth, abortions should be permitted after the twentieth week only for the preservation of maternal life. Some might argue for the twenty-second week, or the twenty-eighth, or some time limit in between, but, medically speaking, an abortion is defined as the termination of pregnancy before or during the twentieth week, and surely most such decisions can be made by then.

Fifth, the million abortions which would be done every year under such a system would obviously overtax present medical facilities and personnel. In the larger cities, it would be necessary to construct, equip, and staff special clinics which would deal with this increased need, and with the concomitant need for general sex education, occasional sterilizations, and post-abortal instruction in birth control. Paramedical personnel would eventually have to be trained to do early abortions—a simple, two-minute procedure with modern techniques. Eventually, most abortions could be performed on an outpatient basis, as they are in the Soviet Union today.

It would be unrealistic to hope for such a solution from all fifty state legislatures. Timidly and slowly legislatures will approve reform bills based upon the American Law Institute proposals. The ultimate solution will, in this author's opinion, come from the courts. And this day may not be so far off. A few recent cases have already illustrated the trend in judicial thinking.

In 1967, a New Jersey woman sued her physicians for not having advised her of the dangers imposed by her having contracted German measles in early pregnancy, the outcome having been the birth of a malformed infant. In a 4-to-3 decision, marked by vigorous dissent, the cause for recovery on negligence grounds was denied by the state Supreme Court.[25] As an outcome of this, the state's attorney general convened the twenty-one county prosecutors, who thereupon declared that they would not prosecute any doctor who performed a hospital abortion for reasons generally approved by the medical community.[26]

A similar case in 1968 resulted in an opposite decision.[27] Here the parents and their deformed child sued their local hospital in Brooklyn,

[25] Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

[26] N.Y. Times, June 24, 1967, at 31.

[27] Stewart v. Long Island College Hosp., N.Y.L.J., December 5, 1968, at 1, col. 4.

New York, for negligence in not having performed an abortion and in not having advised the parents to seek an abortion elsewhere after the Catholic chief of obstetrics had countermanded the decision to perform the operation. The Brooklyn supreme court jury awarded $100,000 to the child, $10,000 to the mother, and $1.00 to the father. The court disallowed the child's claim, but permitted the other awards to stand.

Also in 1968, two reputable obstetricians in San Francisco were reprimanded by the State Board of Medical Examiners for professional misconduct in having performed abortions on women who had contracted German measles. The license of one of the doctors was suspended for ninety days, but the order was stayed for a one year probationary period. This decision was appealed to the California Superior Court, which overruled the Board's decision.[28]

Two women crusaders were arrested in 1967 in Redwood City, California, for conducting a class in self-induced abortion. A municipal court released the defendants, declaring that the law under which they were arrested was unconstitutional.[29]

Another recent California case involved a fourteen year old mentally retarded girl who had been forcibly raped by her brother. After trying to obtain a therapeutic abortion at several local hospitals, the child's parents appealed to the Superior Court which, sitting as a juvenile court, declared the girl to be a dependent of the court and consented to the abortion.[30]

In 1967, a Catholic husband, in the process of divorcing his wife, sought to have the court rule unconstitutional the law permitting his wife's prospective hospital abortion on the grounds that it deprived the potential offspring and himself of due process. The court held that the issue was medical rather than legal, that the wife's rights superseded the husband's, and that in simultaneously seeking to divorce his wife the husband had indeed forfeited his "normal family rights."[31]

Other cases are pending. A California doctor, convicted at the trial level for referring a patient to an unlicensed physician for an abortion,

[28] Shively v. Bd. of Medical Examiners, No. 590333 (Cal. Super. Ct., September 24, 1968).

[29] People v. Gurner, No. 7 F 460 (Cal. Sup. Ct., June 1, 1967).

[30] 42 CAL. ST. B. J. 256 (1967).

[31] O'Beirne v. Superior Court, 1 Civ. 25174 (Cal. Sup. Ct., Dec. 6, 1967); *see* Los Angeles Herald-Examiner, Dec. 7, 1967, at B-4, col. 1; *id.*, Dec. 8, 1967, at A-20, cols. 1-3.

is appealing to the Supreme Court for a hearing on the limited issue of the constitutionality of the abortion law.[32] A group of obstetricians in New York is planning to request a declaratory judgment on the same issue from a three-man federal bench. Some cases will succeed, some will fail; but ultimately, all these laws must be found to impose an unconstitutional limitation upon human rights.

[32] California v. Belous, Crim. No. 12739 (Cal. Sup. Ct., argued March 3, 1969).