ABORTION LAWS: A STUDY IN SOCIAL CHANGE

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The management of "unwanted pregnancy" by the medical practitioner is changing radically in California and in the United States. This change is manifested by the rapid increase in the number of abortions being performed in accredited hospitals throughout the state. Before 1967, under the restrictive law in force up to that time,[1] 1.8 abortions per 1,000 live births were performed in California hospitals.[2] In the first year under the new Therapeutic Abortion Act,[3] the statewide rate was 11.2 abortions per 1,000 live births.[4] Single hospital rates were or have since become much higher; 100 to 300 abortions per 1,000 live births or in some university affiliated hospitals more abortions than live births. What are the reasons for and the implications of this change?

Before 1965, practically all of the statutory jurisdictions in the United States had passed laws pertaining to abortion.[5] One of the pervading implications of all these laws was to protect the pregnant female citizen from the real dangers of induced abortion, which in the days prior to the advent of modern medical and anesthetic techniques were considerable.[6] All laws limited the legal indications to grave or life-threatening maternal risk. But the dangers of abortion, properly conducted, have been reduced significantly in recent years as with many medical procedures. In

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1. CAL. PENAL CODE § 274 (West 1955).

2. 108 CALIF. MEDICINE No. 4 (May 1968).

3. CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1970).

4. California Department of Public Health, Report to the Legislature . . . Relative to a Continuing Study on Abortion, Table 2 (January 20, 1969). *See also* Saylor, *Public Health Report*, 110 CALIF. MEDICINE 362 (1969).

5. For an exhaustive discussion of the various statutes, see George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 375-99 (1965).

6. *See* Gleitman v. Cosgrove, 49 N.J. 22, 60, 227 A.2d 689, 709 (1967) (dissenting opinion); R. LUCAS, ANALYSIS OF ABORTION LAWS OF THE UNITED STATES, ASSOCIATION FOR THE STUDY OF ABORTION, INC., 2-3 (1969). *See also*, FOX, *Abortion Deaths in California*, 98 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY 645 (1967).

fact, abortion in early pregnancy, performed in ideal circumstances, may well be significantly less hazardous than pregnancy carried to and beyond delivery.[7] Neither course has a high rate of complications, but even with modern advancements, the complications of late pregnancy such as toxemia and hemorrhage still result in an overall maternal mortality of approximately 2.0 per 10,000 live births.[8] This fact, as well as the emotionally traumatic effect of unwanted pregnancy,[9] supports the preceding comparison of risk between abortion and term pregnancy.

The impetus for change in the law as occurred in 1967 came from several sources. Physicians themselves were instrumental in the movement.[10] A nation-wide epidemic of "German Measles" (Rubella) in 1964 and 1965 caused many patients, fearing that the pregnancy they were carrying had been damaged by the illness, to present themselves to their physicians seeking abortion. Some were turned away and many of these most likely obtained abortions illegally or in a foreign country.[11] A few physicians, willing to expose themselves to prosecution and supported by scientific data reporting the high incidence of Rubella damage to unborn fetuses, performed therapeutic abortions on these patients.[12] Some contended the law, although restrictive, could be interpreted to allow abortion in these cases; others felt that the law was simply too rigid and could best be tested and eventually changed by proceeding with actions they felt to be the best medical practice. These physicians were subsequently brought to task before the State Board of Medical Examiners and eventually censured. This decision has subsequently been reversed on appeal.[13]

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7. Kolbloya, *Legal Abortion in Czechoslovakia*, 196 J. AM. MEDICAL ASS'N 371 (1969); People v. Belous, 71 Adv. Cal. 996, 1007 and n.7, 458 P.2d 194, 200-01 and n.7, 80 Cal. Rptr. 354, 360-61 and n.7 (1969).

8. Fox, *supra* note 6, at 645.

9. *See* Pike, *Therapeutic Abortion and Mental Health*, 111 CALIF. MEDICINE 318 (1969).

10. *See e.g.*, Niswander, *Medical Abortion Practices in the United States*, 17 W. RES. L. REV. 403 (1965); Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424 (1965); Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435 (1965).

11. Niswander, *supra* note 10, at 412, 417; Ryan, *supra* note 10, at 428-29.

12. Kummer, *New Trends in Therapeutic Abortion in California*, 34 OBSTETRICS & GYNECOLOGY 883 (1969).

13. *Id.* at 884. The sanctions against the physicians, known as the "San Francisco

Even earlier, but with the implied support of these and other physicians, several citizen groups, a majority of them women, were organizing in an effort to bring about some change in the law. Groups such as the local Abortion Counseling Service, the Clergy Counseling Service of Los Angeles, and others, were active in the community and were lobbying in Sacramento for liberalization or repeal of existing laws. The basic principle supported by these organizations is that each woman has the right to decide whether or not she should remain pregnant, and therefore the question of abortion should become an unrestricted choice of the individual, a matter to be decided between the woman and her doctor.

The proponents of liberalization were apparently winning the battle. First in Mississippi,[14] then in Colorado,[15] California,[16] Georgia,[17] Maryland,[18] North Carolina,[19] Arkansas, [20] Delaware,[21] Kansas,[22] New Mexico,[23] Oregon,[24] and most recently Hawaii,[25] bills liberalizing abortion practices have been passed by their legislative bodies. Most of these laws are similar in content to that proposed by the American Law Institute in its Model Penal Code,[26] and the American Medical Association.[27] Some of the new

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Nine," ranged from "public reprimand" to revocation of license (suspended for a one-year probationary period), but were reversed by the superior court.

14. MISS. CODE ANN. § 2223 (1957).

15. COLO. REV. STAT. ANN. § 40-2-50-53 (Supp. 1967).

16. CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1970).

17. GA. CODE ANN. § 26-1201 (Rev. 1969).

18. MD. ANN. CODE art. 43, § 149E (Supp. 1969). *But see* note 28 *infra*.

19. N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

20. ARK. STAT. ANN. § 41-304 (Supp. 1969).

21. DEL. ANN. CODE § 301 (1953).

22. KAN. STAT. ANN. § 21-3407 (Supp. 1969).

23. N.M. STAT. ANN. § 40A-5-1 (1953).

24. ORE. REV. STAT. § 465.110 (Supp. 1967).

25. *See* Los Angeles Times, Feb. 21, 1970, at 22, col. 1 (home ed.), and Los Angeles Times, March 12, 1970, at 2, col. 4 (home ed).

26. MODEL PENAL CODE § 230.3(2) and (3) (Proposed Official Draft, 1962), provides:

> (2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are

laws are even more liberal, Hawaii is the best example, making abortion a free choice between patient and doctor for the resident of the state.[28] Bills are currently pending in the legislatures of several states which are designed to remove the matter entirely from the law and leave it in the hands of the physician and patient.[29] The popular support for this approach has been confirmed by several public opinion polls. A recent Harris Poll found that 64 percent of the respondents agreed with this view.

Legal decisions of recent times have also abetted the liberalizing trend. Most important is the well-publicized *People v. Belous*[30] decision, in which the California Supreme Court held the pre-1967 abortion law to be unconstitutionally vague, placing the physician in the untenable position of having an interest, *i.e.* fear of penalties, which prevented an unbiased determination of proper medical care for his patient. In addition, the court felt the law unconstitutional on the grounds that it required the woman to risk a high probability of death before qualifying for relief through abortion, infringing upon the woman's right to life, her liberty to choose whether to bear a child and to obtain proper medical assistance. The majority opinion in the case serves as an excellent

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unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

For a discussion of the Model Penal Code, see Giannella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257 (1968).

27. Kummer, *supra* note 12, at 884.

28. *See* note 25 *supra*. Maryland has recently surpassed Hawaii's liberal laws. All abortion laws were repealed, permitting any licensed doctor to perform an abortion in any licensed hospital without requirements exceeding those he would have to meet for any other operation. There is no residence requirement. Los Angeles Times, April 1, 1970, at 2, col. 4 (home ed.).

29. Colorado state legislator Richard Lamm, who was instrumental in the passage of Colorado's reform bill is reputed to be asking that the Colorado law be voided on the basis that it (1) violates a woman's right to privacy in sex, marriage, and reproduction, and (2) interferes with a doctor's obligation to practice medicine as he thinks best. Lilliston, *Court Ruling on Old Law May Affect Other States*, Los Angeles Times, Mar. 3, 1970, Part IV, at 6, col. 1 (home ed.).

30. 71 Adv. Cal. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

review of the social, legal and medical arguments favoring wider use of abortion. Reference is made in the opinion to the new Therapeutic Abortion Act of 1967 and emphasis placed on the interpretation that liberalization was the intent of the law.[31] In the final footnote the court refers to arguments of unconstitutional vagueness applicable to the new law without reaching the issue.[32]

Whatever the legislative intent, the result of passage of the Therapeutic Abortion Act of 1967 has been dramatic. In some California hospitals more abortions than live births are occurring. Every hospital where active staff committees exist has been receiving increasing numbers of applications. In San Diego, the facilities and personnel of some hospitals are being taxed to their extreme by this increase. An increasing percentage, now 90 percent or higher, are being done on the ground that continuation of the pregnancy represents a significant risk to *mental* health, one of the indications allowed by law. Although some hospitals in the state have done away with the requirement, most committees still require psychiatric consultation when a request for abortion is presented on this ground.[33] The medical argument as to what conditions must be met to qualify under the law has been quite heated. Now more and more, committees have been approving requests for abortion simply on the assumption that an unwanted pregnancy is in itself a threat to the emotional stability of the woman and therefore a threat to mental health; the difference between institutions is what is required to document the risk for the individual patient. Studies in Scandinavia[34] and in the United States[35] have produced statistical evidence that a woman forced to carry an unwanted pregnancy incurs a significant risk of psychiatric illness requiring treatment, both in herself and in the unborn child.

Thus the present climate is one in which "abortion on request" is effectively being practiced.[36] The heretofore significant

31. *Id.* at 1013, 458 P.2d at 204, 80 Cal. Rptr. at 364.

32. *Id.* at 1016 n.15, 458 P.2d at 206 n.15, 80 Cal. Rptr. at 366 n.15.

33. *See* Pike, *supra* note 9, at 318.

34. Hook, *Refused Abortion*, 37 ACTA PSYCHIAT. 203 (1961); Aren, *The Prognosis in Cases in Which Legal Abortion Has Been Granted, But Not Carried Out*, 36 ACTA PSYCHIAT. 203 (1961).

35. Simon, *Psychiatric Indications for Therapeutic Abortion and Sterilization*, 7 CLINICAL OBSTETRICS AND GYNECOLOGY 67 (1964).

36. Kummer, *supra* note 12, at 885.

problem of medical complications following illegal and improperly performed abortions[37] has been drastically reduced. In fact, there seems no valid reason to dispute the frequently made statement that any woman desiring an abortion may obtain it through legal channels. Still, the so-called "red tape" necessary to obtain an abortion legally is a significant factor. Delays necessitated by seeing a psychiatrist, awaiting preparation and delivery of his report, presentation of the request to a hospital committee which meets at specific intervals, and scheduling the procedure into the already busy activities of the hospital, often result in increased risk to the woman seeking abortion. As stated earlier, abortion performed by curettage in the first three months of pregnancy is quite safe. But after the first three months, simple curettage becomes more hazardous, and other methods of interrupting pregnancy, such as abdominal operation (hysterotomy) or injection of solutions into the uterine cavity, *e.g.* intra-amniotic hypertonic saline,[38] carry with them increased risks of complication. Even the cost of these procedures becomes an increased problem since abortions performed later in pregnancy frequently require longer periods of hospitalization for treatment and observation even when uncomplicated.

Some argue that since abortion on request is presently available, why should there be continued efforts to repeal or change the law? In dicta, *Belous* interpreted the new abortion law as making the matter of abortion a strictly medical concern; the decision to allow an abortion to be done, when made according to statute, is not a matter for review by the courts. The opinion states, "At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statute."[39] Nevertheless, the argument seems compelling that even the new law is too vague, since the court's decision suggests that arguments questioning the validity of the old law apply to the wording used in the 1967 legislation. Specific words and phrases used, such as "significant risk," "dangerous," and "in need of supervision and

37. Fox, *supra* note 6, at 645.

38. *See* Goodlin, *Therapeutic Abortion with Hypertonic Intra-amniotic Saline*, 34 OBSTETRICS AND GYNECOLOGY 1 (1969). *See also* Niswander, *supra* note 10, at 420.

39. 71 Adv. Cal. at 1016, 458 P.2d at 206, 80 Cal. Rptr. at 366.

restraint," leave much latitude for interpretation.[40] Even the provision in section 25953[41] that, "In no event shall the termination be approved after the 20th week of pregnancy . . . ." leaves considerable doubt. Does this refer to 20 weeks from conception or 20 weeks from the onset of the last menstrual period? How is this time to be determined—by history obtained from the patient correlated by the findings on physical examination? Certainly. Yet these data are often inaccurate even in the most experienced hands. Is the physician who delivers a live fetus while intending to do an abortion liable to a charge of murder should the fetus inevitably die? This is a question which remains unanswered.

As cited previously, the delays inherent in the present procedures also serve to increase the hazards of the event the law allows. In practice, the law serves to allow abortions to be done freely, not to limit them to a select few. But at the same time it makes the process more difficult, to the advantage of no one. In the final analysis, the decision-making rests with the pregnant woman and should abortion be chosen, she need only find a willing physician who knows the procedural requirements. Petitions are now being circulated in this state which would place a referendum on the ballot amending the laws to allow abortion to be performed by any licensed physician when requested by any pregnant woman. It seems only a matter of time until this becomes law as it has become the practice.

Abortion is neither the only nor the best answer to the problem of unwanted pregnancy. What is needed most is an intensive program of education to the responsibilities—social, moral, and biological responsibilities, inherent in sexual intercourse. Society has apparently accepted abortion as proper. The hope is that abortion will be necessary only when responsible efforts to prevent pregnancy have failed, an infrequent occurrence with the safe modern contraceptive techniques. When necessary, abortion can then be performed early with minimum risk, minimum expense, and minimum social or psychological trauma.[42]

40. *See* CAL. HEALTH & SAFETY CODE §§ 25951(1), 25954 (West Supp. 1970).

41. CAL. HEALTH & SAFETY CODE § 25953 (West Supp. 1970).

42. *See* Peck and Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 J. NERV. & MENTAL DIS. 417 (1966); Kummer, *Post-Abortion Psychiatric Illness—A Myth?*, 119 AMER. J. PSYCHIAT. 980 (1963).