

Abortion: Legal Aspects*

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Because an abortion is the interruption of pregnancy at any time previous to the attainment of viability by the fetus, it is of legal as well as social, economic, moral, and religious interest. Abortions are divided into three classifications: spontaneous, therapeutic, and unlawful or criminal. The first involves no specific legal problem in itself, but the law relating to the criteria for a therapeutic abortion and what distinguishes it from a criminal one confronts the physician and hospital frequently.

Statutory Provisions

The statutes in the 50 states and the District of Columbia define the offense of abortion with certain exception provisions in 47 states. Louisiana has no exception to the crime of abortion. Massachusetts and Pennsylvania statutes provide that a willful or unlawful abortion is a crime, without any specific exception. The Virginia Code defines the felony of abortion as follows:

Section 18.1-62. Producing abortion or miscarriage. If any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child or produce such abortion or miscarriage, shall be confined in

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the penitentiary not less than one nor more than ten years. No person, by reason of any act mentioned in this section, shall be punishable when such act is done in good faith, with the intention of saving the life of such woman and child.

The West Virginia law has the same provisions as the Virginia statute. Twenty-three states permit the abortion to preserve the life of the mother;¹ six states provide for an abortion to save the life of the mother;² seven states allow an abortion to preserve the life of the mother or that of her child;³ three jurisdictions authorize an abortion to preserve the life or health of the mother;⁴ and the New Mexico statute provides an abortion to preserve the mother's life or prevent serious bodily injury. The Code of New Jersey states that any abortion that is malicious or without justification is a crime. In Denmark, Finland, Iceland, Norway, Russia, Sweden and Eastern Europe a pregnancy may be interrupted when necessary to avoid serious danger

¹ Alaska, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming.

² Arizona, Arkansas, Hawaii, Iowa, Texas, and Wisconsin.

³ Connecticut, Minnesota, Missouri, Nevada, New York, South Carolina, and Washington.

⁴ Alabama, District of Columbia, and Oregon.

to the physical or mental health of the mother (Moore, 1963).

Need for Change

When these abortion laws were enacted, there was no anxiety in the nation regarding birth control. Our nation was expanding westward and with it the desire to increase its population. Over the years, public opinion on abortion has changed, but the laws have remained virtually unchanged. Today medical science can predict that a child may be afflicted with blindness, deaf-mutism, physical deformity, or insanity. Therapeutic abortion has come to be based more on medical opinion than on the strict provisions of the law. Psychiatric recommendations for the termination of pregnancy have become a frequent indication for therapeutic abortion (Wasmuth, 1966). In view of the lack of success in preventing abortions and the fact that women often are forced to procure abortions outside an optimal hospital environment, the American Medical Association last year revised its thinking with this negative phrase: "the AMA is opposed to induced abortion except when . . ." Under this new policy, medical indications for abortion include (1) a threat to the health or life of the mother, (2) evidence that "the infant may be born with incapacitating physical deformity or mental deficiency," and (3) a pregnancy resulting from rape or incest.

Broadening of Provisions for Therapeutic Abortion

In 1967 the abortion laws were rewritten in three states—Colorado, North Carolina, and California. Bills were unsuccessfully introduced in 28 other states (Medical World News, 1967). Colorado and North Carolina laws approved abortion for maternal, fetal, and legal indications. The California law does not authorize abortion in cases of

possible deformity or mental impairment of the fetus. A candidate for abortion in North Carolina must have been a resident for four months. Both North Carolina and Colorado statutes make it mandatory that a committee of three physicians certify that the medical and legal requirements of the procedure have been met. There is an additional restriction in Colorado which requires that the procedure be performed in an accredited hospital. These statutory revisions have the effect of legalizing what some physicians in consultation and in good faith have already done, or what others felt should be done but did not do because of the questionable "gray area" involving what properly constitutes a therapeutic abortion.

This year, the Virginia legislature considered revising its abortion statute but, instead, referred the matter to the Virginia Advisory Legislative Council for a complete study. The Council is to submit its recommendations at the next session of the General Assembly. In March, Georgia became the fourth state to revise its abortion laws. The provisions are similar to those of North Carolina and Colorado. In addition, the Georgia statute requires three separate physicians to examine the woman requesting the abortion, and each must give a written statement setting forth the reasons for which he deems an abortion necessary. Maryland revised its abortion laws in April to conform substantially to those of Georgia, North Carolina, and Colorado. The abortion must be approved by the hospital's review authority, but may not be performed after the 26th week of gestation unless the mother's life is in jeopardy.

Criminal Abortions

Generally, the performance of any abortion solely for social, economic, or humanitarian reasons is illegal. At the present time, in the

absence of a permitting statute, an abortion to prevent financial burden on a family or the public welfare, or where pregnancy is a result of rape, incest, immorality, or mental deficiency would be considered criminal and subject the offender to prosecution. The offense is considered to be a felony. In most jurisdictions, a physician who has been convicted of a felony in any jurisdiction would be subject to the revocation of his license to practice medicine by his respective State Board of Medical Examiners or other similar regulatory administrative body.

On occasion the hospital will receive a patient who has recently aborted or has only partially aborted. There is the probability that the abortion has been induced accidentally or criminally. The hospital should make every effort to obtain a complete history from the patient and make a record of any and all persons who accompany her to the hospital; and where possible, a statement should be obtained to the effect that the patient's condition occurred before admission to the hospital. This would relieve any accusation that the hospital was aiding or abetting the performance of a criminal abortion. It is presumed that an abortion performed in the hospital is for therapeutic purposes unless proven to the contrary (Jordan and Mann, 1962).

Criminal and Civil Liability

The performance or the aiding in the performance of an abortion that by definition does not come within the respective state statutory provisions constitutes a criminal act, and all contributing parties cognizant of the criminal intent are equally guilty. The written consent of the patient gives no relief to a criminal charge against the parties for performing a non-therapeutic abortion. The consent form may be used by the physician as a defense in a civil action brought by the patient; but generally the physician will be held civilly liable for negligence in the

methods or procedures used, or for the death of the patient resulting from such unlawful operation.

Neither the physician nor the hospital will be subjected to any liability where, in good faith, either reports to the police any information concerning the commission of a crime. Any communication made to the physician or hospital personnel by the patient, a relative, or other person, who requests assistance in obtaining an abortion or an admission to the hospital for one already aborted or partially aborted, is not privileged. Furthermore, such information may be released to the local law enforcement agency without fear of being sued subsequently (Jordan and Mann, 1962).

What is the liability of the physician who had a pregnant patient that has rubella (measles) in the first trimester, and failed to tell her that her child may be defective, thereby precluding the possibility of obtaining a questionable therapeutic abortion, and such child was born with speech, hearing and sight defects? Last year two New Jersey physicians were sued by the mother on behalf of her 7-year-old child for just such an occurrence. Both doctors were charged with failing to inform the mother that the infant might be born with physical and mental defects. The

court held for the defendant physicians and said that there is no contention that anything the defendants could have done would have decreased the likelihood of the infant being born with defects. The issue is not that the child would have been born without defects, but that he should not have been born at all. The court continued, "We cannot weigh the value of life with impairment against the nonexistence of life itself" (Gleitman v. Cosgrove, 1967).

This case indicates a further need for revision of the abortion laws. The overcautious physician, in failing to advise the patient of a potential indication for an abortion, may be subjected several years later to the harassment of a civil suit by the infant with birth defects. Then, too, if the oversympathetic physician does advise his patient that there is a substantial risk of the child's being deformed and does perform an abortion at the request of the mother, he may be subjected to action by the State Board of Medical Examiners in all but four states, i.e., North Carolina, Colorado, Georgia, and Maryland. This year two California physicians were publicly reprimanded by the California State Board of Medical Examiners. The board charged that they had participated in illegal abortions during the period 1963 to

1965 on women who had had rubella.

It should be noted that the statute of limitations for personal injury usually doesn't begin to apply for an infant until he reaches his majority (generally 21 years of age). It should also be noted that many states permit a cause of action for prenatal injury provided such fetus is born alive (Sylvia v. Gobeille, 1966).

Conclusion: Criteria for Therapeutic Abortion

The line between the criteria that classify an abortion as therapeutic and those which consider it to be criminal can be so fine that a decision is often left to the conscience of the physicians confronted with the problem of a patient desiring to terminate her pregnancy. If the physicians in consultation and in good faith rule in favor of the abortion, then, in the absence of any collusion, it will be considered to be for therapeutic purposes. If the physicians decide that the abortion would not be for therapeutic purposes under the definition of an abortion by the respective state statute, then any subsequent abortion obtained by other means would probably be criminal. For every crime there must be a complainant, but persons involved in a criminal

abortion are not likely to talk, particularly to prosecutors. So without a complainant, there will be no prosecution.

Until such time as each state broadens its laws to conform more nearly to those suggested by the AMA, the hospital administrator and physician are advised that, whenever they are confronted with the problem of an abortion, criteria should be established to determine whether it is for therapeutic purposes. A therapeutic abortion may be indicated where two or more physicians (one should be a member of the medical staff, and another may be a psychiatrist) in good faith and as a result of consultation have concluded that in accordance with the provisions of the respective state statute the procedure is necessary to preserve or save the life of the mother or that of the child. The question of whether the abortion is therapeutic in nature becomes more difficult where pregnancy has caused the patient mental disturbance. Are there sufficient grounds for an abortion being held therapeutic when the patient, married or unmarried, takes an overdose of sleeping pills as a method of attempting to commit suicide presumably because she is pregnant? Though the respective state statute may require that the procedure must be necessary to pre-

serve or save the life of the mother, it does not mean that the physicians in consultation must feel that without the abortion it would be a medical certainty that the patient would die. Nevertheless, the therapeutic nature should not be interpreted to apply to every emotionally upset patient. To do so would permit every unmarried female or unhappily married wife, who becomes pregnant against her desire, to have an abortion merely by threatening suicide. This problem as to the legality of a given abortion will exist until the time when more permissive statutes are enacted.

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