

Book Review

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Book Review

Abortion And The Law. Edited by David T. Smith. Western Reserve Press, Cleveland: 1967. Pp. 248, with index. \$7.00.

In an era of changing moral values, among our more trying and impelling areas of concern is that dealing with human sexuality — its meaning, its function, its consequences. Those disciplines which deal with the human individual and his environment have expended much thought and action on sex education, family life, contraception, population control, and other issues broadly related to sexuality. The most controversial of these has to do with the philosophies and practices regarding induced abortion.

Abortion and the Law is a collection of essays dealing with the legal, medical, and religious aspects of this very sensitive subject. Written by a group of respected and knowledgeable authors, this book represents a reasonably thorough treatment of the issues currently being debated throughout this country and others.

One aspect of abortion is not included; namely, the sociologic — the functions of and the impact of induced abortion in our current society. It is indeed unfortunate that this important area is not presented. The editor explains, in his preface, the underlying motivation for the publication:

It is law, particularly, as the executor of the firmest standards society has, that has the ultimate concern with the rightness and wrongness of abortion. Law is the arena for the conflicting religious, medical, and philosophical values on the subject. Law hopefully will be the agency that determines priority between the religious and philosophical claims of the inviolability of the right to be born and the absolute proscription of the destruction of life, and the medical and sociological claims of the primacy of the mother's life and the necessity of preventing the birth of the defective individual or the individual whom circumstances of environment can only compel to lead a defective life.¹

A presentation of the sociologic aspects by a learned scholar in the social sciences would have added yet another dimension to be reckoned with, as law attempts to be "the executor of the firmest standards society has."²

The opening chapter is an excellent and exceedingly thorough review of the legal philosophies and the actual statutes which prevailed in this country at the time of writing. The author, Professor B. James

1. *Preface* to *ABORTION AND THE LAW* at v (D. Smith ed. 1967).

2. *Id.*

George, Jr., of the University of Michigan Law School, precedes his summary of current law with a succinct analysis of the four "conflicting interests affected by abortion legislation;"³ namely, the fetus, the pregnant woman, the family unit, and the community. His survey of the existing laws includes discussion of the criminal statutes, administrative sanctions, and civil responsibility. As a reference source for the various statutes, judicial decisions, and legal opinions, it probably has no equal in current literature regarding abortion. Professor George closes his chapter with the stated view that "the present law is unnecessarily strict and must be liberalized."⁴ He proceeds to describe the three ways by which this might be accomplished:

(1) Adoption of procedural changes which make it difficult to convict doctors who perform, in a hospital or clinic, dilatation and curettage or other acceptable medical techniques to terminate a pregnancy; (2) embodiment in the criminal code provisions of much broadened categories of therapeutic abortions, the performance of which is exempted from criminal penalties; or (3) complete elimination of criminal law regulation of therapeutic abortions and, in its place, establishment of regulation by the medical profession itself.⁵

This reviewer would strongly endorse the latter approach. Therapeutic abortion has long been part and parcel of the medical-surgical armamentarium. The use of this procedure, by physicians and their patients, should not be subject to sanctions of the State any more than should, or is, any other operative procedure. The medical profession, through its already existing disciplinary procedures, can govern and regulate the role of abortion in medical therapy. Granted that there are those who view this procedure as being different from all others, because they view the early intrauterine fetus as human life and abortion as murder. On the other hand, it is not mandatory that all must share that view. If this philosophy is not shared by the patient, her physician, his consultant, and the hospital, then abortion should be allowed on purely clinical grounds.

While this is the position of many physicians, one cannot entirely ignore the admonition of Professor George to the medical profession. In explaining that such legislation would be of little immediate effect, he states:

One reason is the extreme conservatism of the medical doctors who staff state agencies, hospital boards, and committees of state and local medical societies. Breezes of reform chill these leaders even more, if that is possible, than their counterparts in the legal profession. It might well be two generations before any impact could be made on their armor of conservatism.⁶

3. ABORTION AND THE LAW 1-5 (D. Smith ed. 1967).

4. *Id.* at 22.

5. *Id.* at 23-24.

6. *Id.* at 35.

The American Medical Association has recently adopted a resolution advocating a policy toward abortion⁷ which parallels, somewhat, that of the American Law Institute.⁸ This is the first change in its previous stand, taken in 1871, and it represents a positive move in the direction of social responsibility and contemporary medical practice.

The three consecutive essays which follow delineate the role of therapeutic abortion in medical practice and the associated socio-medical problems in relation to society's needs. Dr. Kenneth R. Niswander of the Department of Obstetrics & Gynecology of the State University of New York at Buffalo outlines the indications — medical, fetal, psychiatric, and socio-economic — which influence physicians in deciding for or against abortion in any given case. He also describes actual medical practices, including the currently acceptable operative procedures and their hazards, as well as the usual administrative procedures for obtaining approval and some demographic material on these patients. Dr. Kenneth J. Ryan, department head in Obstetrics & Gynecology at the Case Western Reserve University, translates this clinical information into the socio-medical. He relates the role of abortion to the needs of the smaller and larger segments of society; this includes such issues as fetal defects, status of unborn child, threats to the life and health of the mother, rape, incest, illegitimacy, control of world population, and the closely related problem of criminal abortion. Dr. Harold Rosen of the Department of Psychiatry at the Johns Hopkins Hospital writes of the psycho-social aspects of both therapeutic and illegal abortion and of the social hypocrisy evident in the medical and legal applications. Of importance in Dr. Rosen's paper is the fact that he addresses himself to two aspects not discussed by the others — prevention of the need for abortion and alternative solutions. His extensive bibliography is noteworthy.

These three medical writers agree with the need to change current abortion statutes, but they differ in the degree of change recommended. Dr. Niswander suggests the legalization of abortion to help answer the problem of unsafe and unwanted pregnancies. Dr. Ryan favors abortion to preserve the life or health of the mother, but he seems more conservative when fetal defect, rape, incest, or illegitimacy are involved. Dr. Rosen actually favors abolition of all abortion statutes, thereby leaving the decision to the patient and her physician. Actually, this spectrum of recommendations is representative of the American physician in general. A survey of physicians' attitudes on abortion was recently conducted by *Modern Medicine*.⁹ Of 40,089 physicians who completed and returned a questionnaire, 86.9% favored liberalization of existing laws. While over 70% favored abortion for physical reasons, or in cases of rape and incest, or where there was positive

7. *American Medical Association's Policy On Therapeutic Abortions*, 201 J.A.M.A. 134 (1967).

8. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962). The liberal policy has been the basis for recent proposed legislation which would permit abortions in rape cases or where birth defects were expected, or in a case where a definite danger to the mother's physical or mental health existed.

9. *Abortion: The Doctor's Dilemma*, MODERN MEDICINE, April 24, 1967, at 12.

evidence of fetal defect, only 45-63% favored such indications as possible fetal defect or danger to mental or emotional health as a proper basis for abortion. About 25-30% favored abortion for illegitimacy for socio-economic reasons, and 14% would permit it for any reason at the patient's request.

The ethical aspects of abortion are described in essays by the Reverend Robert F. Drinan, S.J., Dean and Professor of Family Law at the Boston College, and by Rabbi Dr. Immanuel Jakobovits, formerly Rabbi of the Fifth Avenue Synagogue in New York City and presently the Chief Rabbi of England.

Father Drinan, a leading legal authority on family law, outlines the issues not disputed by any of the parties in the discussion of abortion laws as well as the areas of disagreement. He then presents the traditional ethical arguments for sanctions against abortion. These revolve around the interpretation of the early intrauterine fetus as human life with the same values as in the case of the extra-uterine human capable of survival and function. These arguments are said to lead to the conclusion that "no logically defensible or rational change of a substantial nature can take place in America's abortion laws unless the proponents of less strict sanctions against abortion confront and resolve the issue underlying all the other issues: what or whose moral values should the law endorse and enforce?"¹⁰ This may very well be at the core of solution of the controversy — indeed, whose values? Is it or is it not the will of the majority that abortion laws be liberal? Someday, one or more of the states may have to resort to public referendum to determine the answer to this basic question.

Rabbi Jakobovits, a scholarly authority in Jewish medical ethics, describes the Orthodox Jewish laws based on interpretation of references in the *Old Testament*, the *Talmud*, and the *rabbinic responsa*. These laws, after a discussion of the moral and social considerations, lead to a conclusion that abortion is permissible only "if the pregnancy . . . poses a threat to the mother's life."¹¹ This would suggest a position just short of the absolute proscription in Catholic theology and much more restrictive than the views of the Conservative and Reformed rabbinate. However, the Rabbi includes in his presentation several qualifications which are noteworthy: (1) The threat to the mother "need not be either immediate or absolutely certain;"¹² (2) "[e]ven a remote risk of life invokes all the life-saving concessions of Jewish law;"¹³ and (3) "Jewish law would consider a grave psychological hazard to the mother as no less weighty a reason for an abortion than a physical threat."¹⁴

In order to compare the American experience with abortion with that of other countries, the editor has included essays on the laws and

10. ABORTION AND THE LAW 122 (D. Smith ed. 1967).

11. *Id.* at 142.

12. *Id.* at 143.

13. *Id.*

14. *Id.* at 134.

practices in Denmark, Austria, Germany, and Switzerland. The Danish laws and their implementation are described by Vera Skalts and Magna Norgaard, officials at the Mothers Aid Center in Copenhagen. There are eleven such centers in Denmark and they are charged by the Danish government "to provide personal, social, legal, and medical assistance and guidance to pregnant women and mothers, as well as to families with infants and young children."¹⁵ They actually implement the Danish law which allows for abortion for the life or health of the woman, pregnancy by criminal acts, likelihood of congenital abnormality or mental illness in the child, or where because of physical or psychic defects or other medical reasons the woman is deemed unfit to take proper care of her child.

Dr. Henrik Hoffmeyer, until recently the Chief of Psychiatry at the Mothers Aid Center in Copenhagen, describes the medical practices, administrative and clinical, under the Danish system. One is impressed with the totality of medical management in that country, as exemplified by the closing sentence: "It is hoped that better sex information, improved contraceptive instruction, new developments in contraceptive methods, and last, but not least, further development in social and family policy will reduce the need for more liberal abortion legislation."¹⁶

Abortion in the German-speaking countries is described by Dr. Leopold Breitenecker, Professor and Chairman of the Institute for Legal Medicine at the University of Vienna, and his son, Dr. Rudiger Breitenecker, Assistant Medical Examiner of the State of Maryland. In general, these countries allow abortion only to preserve the life or health of the mother. The authors describe a rather conservative definition of "health" and suggest that psychiatric disease does not satisfy the requirement. Furthermore, they conclude that abortion should be performed "[o]nly if the patient's condition deteriorates and she is resistant to therapy . . . and then only as a last effort to change the course of the patient's disease."¹⁷

The closing essay is a commentary by Dr. Robert E. Hall of the Department of Obstetrics & Gynecology at Columbia University and President of the Association for the Study of Abortion. He is one of the country's leading authorities on the medical and social aspects of abortion and is one of the leading spokesmen for those who favor a liberalization of existing statutes. His essay is a chapter-by-chapter review, reflecting the attitudes and expected responses from the liberal end of the spectrum. He closes with a comparison of abortion laws throughout the world and poignantly classifies them as follows: "Countries with legalized abortion have sanctioned unchangeable social custom. Countries with liberal abortion laws have legitimized current medical practice. Countries with stringent abortion laws have buried their heads in the sands of time."¹⁸

15. *Id.* at 147.

16. *Id.* at 205.

17. *Id.* at 223.

18. *Id.* at 234.

Abortion and the Law is an excellent reference source for all who are interested in this subject. It is vital reading for those immediately involved in the development of legislation and social and medical policy — attorneys, physicians, legislators, social scientists, and hospital administrators. Would that it be also read by some of those most seriously involved — the mature American woman who might some day be in need of a therapeutic abortion.

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