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Criminal Law--Abortion--The Need for Legislative Reform

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Comments

CRIMINAL LAW—ABORTION—THE NEED FOR LEGISLATIVE REFORM.—To understand the controversy surrounding Kentucky's statute regulating abortion, one must first understand the statute's history. Until 1910, abortion was not considered a crime in the Commonwealth of Kentucky. In *Mitchell v. Commonwealth*¹ the Kentucky Court of Appeals held that at common law abortion was not a punishable offense.

. . . [W]e are forced to the conclusion that it never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child. It was not even murder at common law to take the life of the child at any period of gestation, even in the very act of delivery.²

The Court gives abortion a more detailed discussion in *Peoples v. Commonwealth*:³

. . . conceding it to be the common-law rule that one is not indictable for the commission of an abortion unless the child has quickened. Yet, all the authorities agree that, if from the means used the death of the woman results, it is either murder or manslaughter.⁴

A similar position was taken by the Court of Appeals in other cases.⁵ Yet, despite the Court's holding that abortion was not a crime at common law, the Court's sentiments against abortion are clearly evident.

In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages wilfully produced, at any time during the period of gestation . . . [the common law conception of abortion] presents an anomaly of the law that ought to be provided against by the law-making department of the government. The limit of our duty is to determine what the law is, and not to enact or declare it as it should be. . . .⁶

It took more than thirty years for the "law-making department" to respond to the Court's plea. On January 13, 1910, Dr. R. H. Moss

¹ 78 Ky. 204 (1879).

² *Id.* at 210. The Court never reaches a precise definition as to the meaning of "quick with child." Yet, the court cites several definitions, all of which seem to indicate that quickening refers to "the first physical proof of life."

³ 87 Ky. 487, 9 S.W. 509 (1888).

⁴ *Id.* at 493, 9 S.W. at 512.

⁵ *Wilson v. Commonwealth*, 22 Ky. L. Repr. 1251, 60 S.W. 400 (1901); *Clark v. Commonwealth*, 111 Ky. 443, 63 S.W. 740 (1901).

⁶ *Mitchell v. Commonwealth*, 78 Ky. 204, 209-10 (1879).

introduced a bill in Kentucky's House of Representatives which defined abortion and made it a crime.⁷ A few days later Dr. B. F. Tichenor introduced a similar bill in the Senate.⁸ The General Assembly eventually adopted Dr. Moss' bill, and on March 22, 1910, the commission of an abortion, except to save the life of the mother, became a crime in Kentucky. The original statute read as follows:

It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever unless such miscarriage is necessary to preserve her life. . . .⁹

With only slight modifications, Section I of the Kentucky's original abortion statute has been preserved in the Kentucky Revised Statutes § 436.020.¹⁰ There has been very little litigation involving Kentucky's abortion statute. It has been held that any one who aids a woman in obtaining an abortion is punishable under the statute,¹¹ that actual pregnancy is not necessary so long as the accused has reason to believe the woman is pregnant,¹² and that when a doctor testifies that an abortion was necessary to save the life of the mother, the burden of proving otherwise rests on the state.¹³

The next step in understanding the abortion controversy is to compare Kentucky's statute with those of other jurisdictions and with those proposed by various medical and legal groups. Abortion statutes may be divided into three basic categories—prohibitive, qualified prohibitive, and therapeutic. The "prohibitive" abortion statute is one which allows no abortion whatsoever—Louisiana has a statute of this type.

Abortion is the performance of any of the following acts, for the purpose of procuring premature delivery of the embryo or fetus:

⁷ H.R. JOUR. 104 (1910).

⁸ S. JOUR. 216 (1910).

⁹ Ch. 58, § 1, [1910] Ky. Acts 189.

¹⁰ KRS § 436.020 (1962) provides as follows:

(1) Any person who prescribes or administers to any pregnant woman or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or other substance, or uses any instrument or other means, with the intent to procure the miscarriage of that woman, unless the miscarriage is necessary to preserve her life, shall be fined not less than five hundred dollars nor more than one thousand dollars, and confined in the penitentiary for not less than one nor more than ten years.

¹¹ *Richmond v. Commonwealth*, 370 S.W.2d 399 (Ky. 1964).

¹² *Dotye v. Commonwealth*, 289 S.W.2d 206 (Ky. 1956).

¹³ *Fitch v. Commonwealth*, 291 Ky. 748, 165 S.W.2d 558 (1942).

- (1) Administration of any drug, potion, or any other substance to a pregnant female; or
- (2) Use of any instrument or any other means whatsoever on a pregnant female.

Whoever commits the crime of abortion shall be imprisoned¹⁴

The "qualified prohibitive" abortion statute is one which forbids abortion but does allow an exception when necessary to save the mother's life. Kentucky's present statute is representative of this group.

The "therapeutic" abortion statute is a very recent legislative approach to the problem of abortion.¹⁵ While making the performance of an abortion a crime, these statutes do allow exceptions in certain circumstances. The number of exceptions vary from state to state. In California the exceptions are limited to cases where "[t]here is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" and where "[t]he pregnancy resulted from rape or incest."¹⁶ On the other hand, North Carolina's statute is somewhat broader, allowing an abortion where "[t]here is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of said woman," where "[t]here is substantial risk that the child would be born with grave physical or mental defect," and where "[t]he pregnancy resulted from rape or incest."¹⁷ Colorado's statute is very similar to that of North Carolina with the exception that it is more explicit in specifying that an abortion may take place if continuation of the pregnancy is likely to result in the "serious permanent impairment of the physical health of the woman" or "serious permanent impairment of mental health of the woman."¹⁸

At first glance, it might seem that these "therapeutic" abortion statutes are extremely liberal, but closer examination reveals that they contain numerous restraints which are intended to prevent abuse. First, all the statutes require some formal process of authorizing the abortion—certification by a committee of the medical staff of the hospital where the abortion is to be performed¹⁹ or certification by

¹⁴ LA. REV. STAT. § 14.87 (1950).

¹⁵ At the time this comment was written the only states known to have "therapeutic" abortion statutes were California, Colorado, Georgia, Maryland, and North Carolina. For purposes of this discussion, only the California, Colorado, and North Carolina statutes will be examined since they are representative of the total group.

¹⁶ CAL. HEALTH & SAFETY CODE § 25951 (c)(1)(2) (West 1967).

¹⁷ N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

¹⁸ COLO. REV. STAT. § 40-2-50(4)(a)(i)(ii) (1967).

¹⁹ CAL. HEALTH & SAFETY CODE § 25951(b) (West 1967).

three doctors not engaged jointly in private practice²⁰ or certification by all the members of a special hospital board.²¹ Also, each state requires that the abortion be performed in a licensed hospital.²²

A second form of restraint provided by these statutes concerns itself with aborting a pregnancy resulting from rape or incest. In California, the hospital committee must notify the district attorney of the county in which the alleged rape or incest occurred and only after he informs the committee that there is probable cause that the alleged rape or incest occurred may the committee approve the abortion. If the district attorney fails to find probable cause, the committee may petition the superior court of the county in which the alleged rape occurred. If the court finds that it has been proved by a preponderance of the evidence that the pregnancy did occur as a result of the alleged rape or incest, the committee may approve the abortion.²³ In North Carolina, only rapes reported to the authorities within seven days after the alleged rape occurred qualify for an abortion under the statute.²⁴ In Colorado, the district attorney of the judicial district in which the alleged rape occurred must inform the committee that there is probable cause that the alleged rape occurred in order for the pregnancy to qualify under the statute. Also, the Colorado statute requires that, in the case of rape, no more than sixteen weeks of gestation shall have passed.²⁵

In addition to these general restraints, there may be certain other specific requirements which must be adhered to in the various states. In Colorado, a "doctor of medicine specializing in psychiatry" must certify that there will be "permanent impairment of the mental health of the woman."²⁶ In North Carolina, there is a four month residency requirement unless the abortion is necessary to save the life of the mother.²⁷

It is interesting to note how closely these enacted statutes conform to the proposals of the American Law Institute and the American Medical Association. The Model Penal Code proposed by the American Law Institute provides as follows:

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuancy

²⁰ N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

²¹ COLO. REV. STAT. § 40-2-50(4)(a) (1967).

²² CAL. HEALTH & SAFETY CODE § 25951(a) (West 1967); COLO. REV. STAT. § 40-2-50(4)(a) (1967); N.C. GEN. STAT. §§ 14-45.1 (Supp. 1967).

²³ CAL. HEALTH & SAFETY CODE § 25952(a)(b) (West 1967).

²⁴ N.C. GEN. STAT. §§ 14-45.1 (Supp. 1967).

²⁵ COLO. REV. STAT. § 40-2-50(4)(a)(ii) (1967)

²⁶ *Id.* § 40-2-50(4)(a)(i).

²⁷ N.C. GEN. STAT. §§ 14-45.1 (Supp. 1967).

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 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 a case of emergency when hospital facilities are unavailable.

(3) *Physicians' Certificates; Presumption of Noncompliance.* 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 police. . . .²⁸

The American Medical Association is opposed to induced abortion except when:

- (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother, or
- (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or
- (3) There is documented medical evidence that continuance of a pregnancy, resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient;
- (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and
- (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.²⁹

Thus, it is evident that recently enacted and proposed legislation makes a broad departure from the "prohibitive" and "qualified prohibited" statutes found in most jurisdictions. Yet, this departure is far short of common law practices and still maintains tight regulation of abortion.

The question remaining is why groups such as the American Medical Association and the American Law Institute as well as several states are making such a departure from the traditional abortion statutes in calling for or enacting "therapeutic" abortion statutes. The answer may be that these groups and jurisdictions have come to view abortion as a social problem which must be dealt with by appropriate social legislation. The "prohibitive" and "qualified prohibitive" abortion statutes are primarily concerned with protecting the interest of live birth without regard to what effects that birth may have on the mother or society as a whole. On the other hand, the "therapeutic" abortion statute, while maintaining the basic protection of live birth,

²⁸ MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962).

²⁹ *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (1967).

also considers the interest of the mother in protection from a harmful pregnancy and the interest of the child in well birth so that it may become a happy, normal, and productive member of society, not a burden upon it. Some actual cases will illustrate this point.³⁰

In September of 1968 the staff of the University Hospital at the University of Kentucky was requested to perform a therapeutic abortion on, and to sterilize, a twenty-one year old woman. The woman was severely retarded—she had to be constantly cared for and was mute as a result of her retardation. The woman's parents, who had two other retarded children, requested the operations. The parents had no idea as to how the girl became pregnant, when the sexual relationship had occurred, or who was the father of the child. The staff at the hospital surmised that the pregnancy was a result of sexual molestation.

The woman's family history, together with the fact that a sister had given birth to a retarded child, led the staff to conclude that chances of the child being normal were "slim". The situation was further complicated by the fact that continuation of the pregnancy might have serious effects on the mental and physical health of the woman. The parents of the woman also indicated that because of their family situation, the child, if allowed to be born, would have to be institutionalized whether or not it was normal. In either case, the child would be totally unadoptable.

Another recent request for a therapeutic abortion was made by a twenty-one year old, unmarried junior in college. The girl had threatened to commit suicide to avoid giving birth to a child out of wedlock. Psychiatric tests indicated that the girl had fallen into a

³⁰ The following case histories were obtained on October 2, 1968, in an interview with Dr. John W. Greene, Professor and Chairman of the Department of Obstetrics and Gynecology, University of Kentucky Medical Center. It is virtually impossible to determine how many similar cases arise in Kentucky each year. Perhaps the reader can obtain some insight into this area by examining related statistics from Colorado. A recent article by Leland H. Rayson, a member of the Illinois State Legislature, reported the following statistics:

One year after the enactment of the Colorado law on abortion, the Colorado Department of Public Health reported a total of 227 therapeutic abortions. State residents accounted for 162 of them. In the vast majority of cases, 123, psychiatric reasons were advanced for the operation. Other reasons were included medical risk, 28; rape, 21; rubella, 13. Such figures do not presuppose a gush of legal abortions resulting from the enactment of therapeutic abortion legislation.

* * *

It is estimated that from one in ten to one in four of all pregnancies end in abortion. Overall the figure of illegally induced abortions in the United States are estimated at about one million a year. Certainly, most authorities would agree the figure is in excess of 500,000. Rayson, *Abortion Law Reform in Illinois?*, STUDENT LAWYER J., Dec. 1968, at 18.

state of deep depression and that it was highly probable that she might take her own life.

A third case involved the request for a therapeutic abortion made by a woman who had already given birth to six mentally retarded children and feared her seventh pregnancy would yield a similar offspring. The staff at the hospital fully agreed that such might be the case.

In each of these cases the staff at the Hospital thought an abortion should be performed, but in each case the abortion was refused because the operating doctor would be subject to a felonious prosecution under Kentucky's abortion statute. Thus by statute, the Commonwealth of Kentucky has dictated that: (1) a mentally retarded woman who was probably impregnated by a felonious sexual assault must bear the impact of that pregnancy on her physical and mental health and that the unadoptable and probably retarded child produced by that assault will have to spend a part, if not all its life, in a state institution; (2) that a college coed must bear the risk that an out-of-wedlock pregnancy might have a serious effect on her mental health or even drive her to commit suicide;³¹ and (3) that a mother of six retarded children may have to give birth to a seventh who, along with the other six, may eventually have to be institutionalized. Thus, while protecting the fetus' interest of live birth, the Commonwealth has totally disregarded the mother's interest in protection from a harmful pregnancy and the fetus' interest in being born with adequate faculties to become a productive member of society instead of a burden upon it. Also, no consideration was given to the agony the child might suffer as an institutionalized retardate. The following comment by Dr. Allan C. Barnes³² gives additional dimension to the above considerations:

Thus, a woman who is six weeks pregnant acquires a full blown case of German measles. I am not interested in your personal views of the statistical risk of that baby being damaged, because this is a gamble where one is concerned not with the odds but with the stakes. Or let us say she consumes a large quantity of thalidomide, where nobody knows epidemiologically what the odds may be. Carrying the potentially damaged child to term will not risk the life of the mother, and abortion is therefore illegal.

Or let us say that at five or five and a half months one establishes by X-ray that the fetus is an acranial monster. Again this pregnancy must, according to the various state laws, proceed to term. I changed

³¹ In this case, the subject was able to go to another state and receive a legal abortion.

³² Professor and Chairman, Department of Gynecology and Obstetrics, the Johns Hopkins University; Gynecologist-Obstetrician-in-Chief, the Johns Hopkins Hospital.

from a first trimester example to a second trimester example partially to remind you that the child had in the interim gained a significant legal protection. An abortion performed in the first trimester for a fetal indication is a felony usually calling for about 17 years in prison; after four and a half months, in most states, it would become manslaughter permitting 99 years in prison.

Until the laws of this country genuinely recognize the right to be well born, we shall continue to waste reproductive time for the mother and condemn the damaged child to hopeless institutional care.³³

No matter how strong one's religious and moral beliefs may be about therapeutic abortion, it should be recognized that this question also involves very critical social issues. The time has come when we must re-examine our stand against therapeutic abortion. How can a nation which constantly proclaims itself to be dedicated to the alleviation of human suffering continue to allow the pain and suffering that is arbitrarily thrust upon innocent persons by our antiquated abortion statutes? Is it *right* to force a woman to carry a child to term if the pregnancy will cause a total breakdown of her physical or mental facilities? Is it *right* to allow a child to be born knowing that he will be condemned to hopeless institutional care? Perhaps one can go so far as to ask, is it *right* to allow a child to be born knowing that he will be unwanted, unloved, and denied the proper social training required to become a member of society?³⁴ Other jurisdictions have faced these issues and now Kentucky should give them proper consideration.

The *Outline For Proposed Criminal Law Revision* prepared by the Kentucky Crime Commission fails to give the abortion question adequate consideration. Although the Commission proposes that Kentucky's abortion statute be examined,³⁵ the Commission offers no "commentary" on the subject.³⁶ Also, the Commission's proposal of "preferred" sources for the revision includes both Kentucky's present statute and a very similar Illinois statute.³⁷ In fact, the only "therapeutic" abortion statute mentioned in the report is a listing of the Model Penal Code in the list of secondary sources.³⁸

In view of the very important social issues raised by Kentucky's abortion statute and similar statutes in other jurisdictions, the 1970

³³ Address by Dr. Allan C. Barnes, Second International Conference on Congenital Malformation, July 14-19, 1967.

³⁴ It would be interesting to know how many so-called unwanted children either raised in a hostile home atmosphere or in state institutions eventually exhibit social tendencies and are confined to penal institutions.

³⁵ 2 KENTUCKY CRIME COMMISSION, *OUTLINE FOR PROPOSED CRIMINAL LAW REVISION* § 3220 (1968).

³⁶ *Id.*, Vol. 1.

³⁷ ILL. REV. STAT. ch. 38, § 23-2 (1965).

³⁸ 2 KENTUCKY CRIME COMMISSION, *OUTLINE FOR PROPOSED LAW REVISION* § 3220 (1968).

General Assembly ought to give this subject more attention than it received from the Crime Commission.³⁹ Even if the General Assembly finds adoption of a "therapeutic" abortion statute absolutely unfeasible in view of the political, religious, and social atmosphere of Kentucky, it ought to give such reform proper consideration. At the very minimum, a therapeutic abortion statute should be introduced and sensibly debated. If the General Assembly were to raise these issues and rationally discuss their underlying social significance without resort to emotionalism, perhaps others would follow the lead and reshape their own thinking. No matter what, the General Assembly should not avoid the issue—there is too much at stake. The very heart of the democratic process is the proposition that the government is formed to serve the people. How better can a government serve its people than by passage of legislation leading to the removal of human pain and suffering?

Sidney M. Morris

³⁹ During the 1968 Kentucky General Assembly there was a futile attempt to enact the following "therapeutic" abortion statute:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

A new section of the Kentucky Revised Statutes is created to read as follows:

(1) Notwithstanding the provisions of KRS 436.020, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when it is performed by a doctor of medicine licensed to practice medicine in Kentucky, if he can reasonably establish that:

(a) There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman, or

(b) There is substantial risk that the child would be born with grave physical or mental defect, or

(c) The pregnancy resulted from forcible rape or incest and the alleged forcible rape was reported to a law enforcement agency or court official within seven days after the alleged forcible rape.

(2) The miscarriage may be caused, or the abortion performed:

(a) Only after the woman has given her written consent for the abortion or miscarriage, and if the woman is a minor or is incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married her husband, guardian or person or persons standing in loco parentis to her, and

(b) Only if the abortion is performed in a hospital licensed under the provisions of KRS 216.400 to 216.500, and

(c) Only after three doctors of medicine not engaged jointly in private practice, one of whom shall be the person performing the abortion, have examined the woman and certified in writing the circumstances which they believe to justify the abortion, and

(d) Only when the certificate has been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, the certificate may be submitted within twenty-four hours after the abortion. H.B. 120 1968.