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A LAWYER REVIEWS PLAN FOR LEGALIZED ABORTIONS

TAYLOR

AT-LAW

For the past twenty years on the part-time faculty of the University of Colorado. In connection with medical-legal litigation, he addressed the following in a Model Penal Code that legalizes abortions. Mr. Taylor encourage our readers to know to uphold high medical

practicing Colorado lawyer. has been lectures on medical-legal problems at the . He represents clients in connection and individual capacity as an attorney. Law Institute's Director of the work on approval of more and easier grounds for went contributor to our journal and would to any members of the bar they might standards.

MODERN medicine decisions are protecting the unborn and vindicating his. It is hoped that the American Institute does not want age lower. medical and standards. Ethical doctors subscribe to the Hippocratic Oath. The original version provides: "I will not give to any woman anything to produce abortion." The Geneva version of the Hippocratic Oath as adopted by the World Medical Association, comprising thirty-nine national medical societies including our own American Medical Association, in part reads: "I will maintain the utmost respect for human life from the time of conception." The International Code of Medical Ethics, in defining the doctor's duty to all persons, provides: "A doctor must always bear in mind the importance of preserving human life from the time of conception until death."

Modern medicine has encouraged protection for the unborn.

In the law courts in tort actions there is a modern movement giving recognition to an unborn child as, in fact, a living human person. The recent Massachusetts opinion of Justice Holmes held that a child would not maintain a civil action for prenatal injuries sustained prior to his birth. The primitive reasoning was that the unborn child is a part of its mother. Although New York at first followed Massachusetts, Justice Cardozo dissented without giving his reasons. The recent decisions of the United States District Court for the District of Columbia (1946) and of the highest courts of the states of Minnesota and Ohio (1949), of California (1939), of Kentucky and Oregon (1955), and of New Hampshire (1958), recognize the rights of the unborn and permit a civil suit for negligence or malpractice based on prenatal injuries. Ohio, Missouri, Illinois and New York in former times followed the unscientific rule first adopted in Massachusetts. Now

Ohio, Illinois, New York and Missouri have overruled their earlier decisions and today recognize the unborn child as a person and permit recovery for negligent prenatal injuries. In fact, New York and New Hampshire allow recovery whether the infant was viable or not.

Tentative approval by the American Law Institute apparently was given to Section 207.11 (2): "Under Section 207.11 (2), an abortion is declared to be justifiable if performed by a licensed physician on the basis of belief that 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 the pregnancy resulted from rape by force, or its equivalent . . . or from incest."

No careful lawyer would claim that the above quoted provisions are a restatement of the criminal law on abortion as found in the United States. An analysis of the various phrases declaring an abortion to be justified supports the conclusion that the tentatively adopted provisions would stimulate more and easier legalized abortions.

FIRST: An abortion is declared to be justifiable if performed by a licensed physician on the basis of belief that there is substantial risk that continuance of the pregnancy would gravely impair the physical health . . . of the mother. In Britain and thirty-one states of the United States a therapeutic abortion is legal only if performed to

save the *life* of the mother. In only three states (Maryland, New Mexico and Colorado) and the District of Columbia is a therapeutic abortion permitted to prevent *physical harm* to the mother. The Colorado statute is typical and places the burden on the doctor to establish the necessity to prevent serious and permanent bodily injury to the mother. (Colorado Revised Statutes 1953, 40-2-23; *Johnson v. Rice*, 33 Colo. 224; 80 Pac. 133.) In 1899 some competent and conscientious doctors did perform therapeutic abortions to save the life of the mother but in 1949 and 1959 the advances in medicine and obstetrics have made childbearing eight to ten times safer than it was in 1930. These advances have prompted doctors to advocate outlawing any therapeutic abortions even on the assumed ground of saving the life of the mother.

In the November 1951 meeting of the Clinical Congress of the American College of Surgeons, Dr. Samuel A. Cosgrove of Columbia University and Margaret Hague Maternity Hospital, New York and Dr. Roy J. Heffernan of Tufts Medical College and Carney Hospital, Boston, favored the outlawing of therapeutic abortions. "A . . . one who commits therap (legal) abortion today," said Heffernan, "does so because . . . either ignorant of the modern methods of treating the complications of pregnancy or is unwilling to take the time to treat them." Dr. Cosgrove agreed.

SECOND: Is it justifiable under the law if a physician performs

an abortion on the basis of belief that there is substantial risk that continuance of the pregnancy would gravely impair the mental health of the mother? No statute of any state of the United States or reported decision has been found to countenance a therapeutic abortion for psychiatric reasons. Nicholas J. Eastman, M.D., Professor of Obstetrics, The Johns Hopkins University, School of Medicine, contributed the Historical Foreword to the Foreword of *Therapeutic Abortions* by Dr. E. Rosen, Ph.D., M.D., in the Foreword Dr. Eastman

By and large, obstetricians who have performed therapeutic abortions for psychiatric indications begrudgingly have been inclined to regard the patients to whom their psychiatric colleagues referred them as too esoteric and idiosyncratic to be convincing, and the thought of an infrequently crossed their mind that a clever, scheming woman is simply trying to hoodwink both psychiatrist and obstetrician. The present volume goes far toward correcting those misapprehensions on the part of obstetricians. Indeed, from the statements and case histories which psychiatrists present in this volume, it is clear that their opinion is veering rapidly toward greater conservatism. The guilt complex which sometimes follows artificially produced abortion receives especial emphasis. Author after author uses such phrases as "the sense of guilt or inadequacy which appears directly related to an abortion," "psychic hangovers from abortion," "traumatic experience of an abortion," "the effect of the termination on the integrity of the woman's personality," "guilt," "emotional trauma" which she will subsequently experience, "to nothing of the stress laid on 'exceedingly depressed hysterectomized patients' and suicidal tendencies in vasectomized men. The feeling is growing apparently among the leaders in psychiatry that therapeutic abortion on psychiatric grounds, even a double edged sword and frequently carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of pregnancy.

Dr. Ewen D. Cameron, Director, Allan Memorial Institute of Psychiatry in the Psychiatric Foreword to the same book states: "The progress of medicine is rendering therapeutic abortion less and less important, and less and less frequent."

THIRD: Is it justifiable under the law if a licensed physician performs an abortion on the basis of belief that there is substantial risk that if the pregnancy is continued the child would be born with grave physical or mental defect? No statute in the United States nor reported decision permits an eugenic abortion. It is true that by reason of certain Australian studies a few doctors in recent years have performed eugenic abortions in the last three months of pregnancy where the mother had German measles or rubella. The later and better studies have withdrawn medical support for such eugenic abortions. For example, the October 12, 1957 issue of the *Journal of the American Medical Association* carries an important article and editorial. The article by M. Greenberg, O. Pellitteri, and J. Barton, "Frequency of Defects in Infants Whose Mothers Had Rubella During Pregnancy" *J.A.M.A.*, 165: 675-678, points out that many of the previous studies were incorrect. The authors state: "Blanket advocacy of therapeutic abortion in pregnant women who develop rubella during the early months of pregnancy is medically unjustified."

The editorial "Rubella in Pregnancy" in the same issue includes

the statement, "The fact that the chances that the infant will be normal in spite of the mother's infection are much better than was formerly thought seems a valid reason not to interrupt the pregnancy." If every woman with German measles in early pregnancy has an 88 per cent chance to have a normal child, should we permit a doctor on his own opinion to destroy the unborn child? Doctors, as yet, are not endowed with infallibility and prescience to predict the sex of an unborn child let alone to determine whether a child will suffer any physical or mental defect.

FOURTH: Does the law countenance an abortion where the pregnancy resulted from rape by force or its equivalent . . . or from incest? Again there is no statute of any state in the United States nor reported decision which countenances such abortions. In cases such as rape the doctor is asked to execute the unborn child because his mother has been ravaged. Some doctors may have aborted a wom-

an in such circumstances but many have felt that the trauma of the abortions would have been more destructive than permitting the pregnancy to go to full term and have the child relinquished for adoption.

It is hoped that the final draft of the American Law Institute's Model Penal Code will not disregard the modern advances in medicine and the better reasoning found in the recent tort cases that give support and protection to the unborn. It would be better if the final draft, if it is to indulge in advocacy, would advocate the outlawing of abortion. If the Penal Code is to be a restatement of the criminal law then it should respect the statutes and decisions of our states. May the final draft not be a pretended code encouraging abortion on more and easier grounds.

This is submitted with respect and as an outgrowth of deep interest in encouraging higher and better medical and legal standards.

