

THE END OF THE ABORTION DEBATE

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I.

As the decade ends, advocates and opponents of abortion rights are demonstrating with heightened fervor. Lawyers continue to prepare briefs for a lengthy docket of abortion cases, and elected officials dread having to vote on the matter. But there is reason to believe that this seemingly intractable issue is approaching an unceremonious solution.

The intensity of feelings will not suddenly disappear, but during the next few years recognition will likely seep into the national consciousness that the grounds for the debate have irrevocably changed. The energy presently devoted to influencing political and legal institutions will ultimately subside in the face of a new technological reality, the French abortion pill. This is said not to pass judgment on the pill's propriety, nor on the positions of the protagonists on either side of the abortion question. Like genetic engineering, nuclear power, and automobiles, the pill is a technological development that will comfort some and distress others, but all will feel its impact.

The abortion pill, named RU486, only recently began drawing public attention, and many protagonists in the abortion debate have not yet absorbed its public policy significance. The logic about where the pill will lead is so compelling, however, that people are bound increasingly to recognize the likelihood of its social consequences. As they do, many will question whether the energy and anxiety now so rampant will continue to have purpose.

II.

RU486 is a steroid that was synthesized by Dr. Etienne-Emile Baulieu in 1980. Roussel-Uclaf, a French drug company, holds the patent and has supplied the chemical to investigators around the world. Clinical trials are underway in about 20 countries, including France and China, where the drug is approved for use.

The pill is an antagonist of progesterone, a hormone that is nec-

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essary for the uterus to retain a fertilized egg. Progesterone serves several functions during pregnancy, including conditioning the cell lining of the uterus to accept embryo implantation, and suppressing hormone action that triggers menstrual cycles. RU486 "fools" progesterone receptors on the cell lining and attaches to them in place of the progesterone. In this way it blocks progesterone action. As a result, the pill prevents implantation or retention of the embryo at early stages of pregnancy, and the uterine lining breaks down. The system dispels the fertilized egg along with the sloughed lining.

During the first nine weeks of pregnancy, a single dose of RU486 followed a day or two later by a suppository containing prostaglandin, induces an abortion in nearly all cases. Prostaglandin is a naturally occurring hormone that is also antagonistic to the action of progesterone. Although the reliability of pill-induced abortions falls after the tenth week, investigations with other chemicals and combinations show promise into the second trimester. But, the present technology alone could deal with most American abortions because more than half occur during the first 8 weeks of pregnancy.

The pill's availability for widespread use in France did not come easily. After finding the pill safe and effective in clinical trials during the early 1980s, Dr. Baulieu campaigned to make it generally available. The Roussel company responded slowly, evidently concerned about opposition from antiabortionists. After receiving encouragement and approval from the French government, however, Roussel announced that it would make the drug available in the fall of 1988. In October of that year, the company suddenly announced it had suspended plans to produce the pill because of public protests and boycott threats. Coincidentally, the World Council of Gynecology and Obstetrics was meeting in Rio De Janeiro at the time of the announcement. The company's decision incensed many of the 9,500 physicians and medical experts in attendance. One group announced it was preparing a list of Roussel's products that people should boycott.¹

The French government, which owns 36% of Roussel-Uclaf, responded to the company's announcement by calling the drug "the moral property of women," and ordered Roussel to reverse itself

¹ See Simons, *A Medical Outcry Greets Suspension of Abortion Pill*, N.Y. Times, Oct. 28, 1988, at 1, col. 1.

again.² The company complied, and since November 1988, RU486 has been available to French physicians and hospitals.

The increasing number of women who choose pill abortions rather than surgery is a good gauge of the drug's popularity. In July, 1989 the pill accounted for approximately 15% of French abortions, but by October the proportion rose to about 30% and was still climbing. According to Andre Ulmann, Roussel's medical director, about 30,000 French women used the pill in the eleven months following its general availability.³

The abortion pill induces bleeding comparable to a menstrual period for about a week, and a few patients feel slight nausea and cramps. Complications are rare, but the drug is best taken under a physician's care because of the potential for heavy bleeding. Although researchers and physicians have found the pill largely effective and safe, there may be yet unknown long term health effects, as recent studies suggest may be the case with contraceptive pills. Several observers consider long term problems unlikely, however. Clinical tests with RU486 since 1982 have not revealed untoward effects in the ensuing years and, unlike birth control pills that must be taken on a regular basis, the abortion pill requires a single administration. The drug metabolizes quickly; three-quarters is dissipated within two days.

Beyond efficacy and safety lie other advantages. Unlike surgical abortions, the pill eliminates the risk of injury or infection from physicians' instruments, as well as anesthesia complications. No technique could be easier, more private, or cheaper. An abortion pill costs only a few dollars, a surgical abortion a few hundred dollars. Under the French social security system, women have had to pay the same amount, about \$140, for chemically or surgically induced abortions. The growing number of French women who choose the pill therefore offers all the more testimony to its appeal. If patients had to pay the cost differential for surgery, the rush to the pill doubtless would be faster, but the simplicity and privacy of treatment by the pill alone have been a strong incentive.

III.

The pharmaceutical companies' fear of the reaction from abor-

² See Henry, *Production of Abortion Pill Ordered*, Baltimore Sun, Oct. 29, 1988, at 1, col 1.

³ See Herman, *The Politics of the Abortion Pill*, Wash. Post Health, Oct. 3, 1989, at 12, col. 2.

tion opponents has been the biggest obstacle to bringing RU486 to the United States. Antiabortion groups have announced that they will boycott any company that seeks to market the drug in this country. Indeed, shortly before the French government's 1988 endorsement of RU486, David N. O'Steen, executive director of the National Right to Life Committee in the United States, threatened such action against the French company and its affiliates. In a letter to the French Ambassador in Washington he wrote:

If Roussel-Uclaf or any other pharmaceutical company attempts to manufacture or market RU486, National Right to Life would seriously consider joining with other pro-life groups around the world to initiate a boycott of the products of Roussel-Uclaf and firms affiliated with it through its parent company Hoechst in the Federal Republic of Germany.⁴

The French government ignored the threats, and to date there have been no reported effects on Roussel-Uclaf sales.

Nevertheless, antiabortion groups continue to raise the boycott specter. Dr. John Willke, who heads the National Right to Life Committee, says that any company marketing an abortion agent in the United States "will be hit with an instant, massive, national boycott of every product they [make], except those where there are no other alternative drugs."⁵ In addition to concern about boycotts, drug companies worry about product liability, especially in the birth control area. Legal defense and insurance costs involving the birth control pill have discouraged some from marketing oral contraceptives. By the early 1980s, liability costs climbed higher in this area than for other drug categories.⁶

In any case, no company legally could market the abortion pill in the United States during the next two or three years because the Food and Drug Administration must approve the manufacture and distribution of all new drugs, and its safety and effectiveness review takes at least a few years. Moreover, the antiabortion White House probably would not encourage an expedited review. Thus, despite the promise of profits for the first company that brings the pill to the United States, the effort faces obstacles and risks.

⁴ Letter from David N. O'Steen to His Excellency Emmanuel deMargerie, Ambassador of France (June 21, 1988) (on file with the *University of Pennsylvania Law Review*).

⁵ Chapman, *The Politics of the Abortion Pill*, Wash. Post Health, Oct. 3, 1989, at 13, col. 2.

⁶ See Djerassi, *The Bitter Pill*, 245 SCIENCE 356, 357 (1989) (discussing a 1982 report by the Office of Technology Assessment).

Yet it is hardly inconceivable that the government can keep the pill out of this country. As RU486's popularity grows in France, Roussel-Uclaf will manufacture more. In addition, other countries including Great Britain and the Netherlands are moving closer to permitting domestic distribution, and some stock is bound to appear in the United States; all the sooner if the Supreme Court or state governments substantially restrict abortion rights. If all American abortion clinics closed and the federal and state governments deemed the pill contraband, nothing could stop the tablets from getting into this country. Many people believe that making RU486 available here would be an act of high moral purpose, whatever the drug's legal status. Some have even coldly confided to me that if abortion were illegal in the United States, they would not expect to return empty handed from an overseas visit.

In making this observation I do not endorse unlawful activity, but merely present a realistic scenario. People drank liquor when it was illegal and smoke crack today. Even people in poor economic circumstances will not be denied a substance they dearly want, as cocaine and heroin addicts demonstrate daily. How much simpler for a person to obtain a contraband tablet or two than an endless supply of illegal narcotics.

The strength of commitment in the medical community to marketing the abortion pill may be gleaned from the vigorous objections raised by the thousands of physicians at the 1988 Rio conference, when Roussel tried to suspend distribution plans. American abortion rights leaders have suggested they will settle for nothing less than the pill's availability here. Molly Yard, president of the National Organization for Women, said her organization would meet with drug company officials to encourage research and distribution. As for keeping RU486 out of the United States, she said, "I know the feminist community will not allow it."⁷ As long as companies produce the pill in France or anywhere else, its ultimate accessibility here is assured.

IV.

There is a precedent for the contentiousness related to the abortion pill. A generation ago the legality of contraceptive devices divided much of the nation. Then, as now, there were harsh debates. In August 1966, a group of pickets carried signs in front of New York

⁷ Chapman, *supra* note 5, at 13, col. 2.

City's St. Patrick's Cathedral claiming that "Rome fiddles as the world yearns for birth control." Although the civil rights March on Washington was held three years earlier, demonstrations for social or political causes were not yet commonplace. A news report said the contraception rights demonstration was "the first protest that could be recalled taking place before the cathedral itself."⁸ In taking this action, contraception rights advocates conveyed their extraordinary sense of purpose.

The opposition was no less determined. The American Roman Catholic Bishops issued a statement that deplored "pressures for a contraceptive way of life" and government activities that "seek aggressively to persuade and even coerce the underprivileged to practice birth control."⁹ Meanwhile, the then recently created birth control pill was becoming popular, and the new technology settled the contraception argument as much as the government decision did. A few years later, the birth control issue faded from the public agenda.

Not all the mid-1960s conditions are analogous to today's. Unlike the current executive branch which unambiguously opposes abortions, the 1960s White House was not involved in the birth control debate. Moreover, the Supreme Court had just issued *Griswold v. Connecticut*.¹⁰ The *Griswold* Court held that states could not interfere with a married couple's right to use birth control devices, and this decision lent momentum to contraception rights efforts. No court edict, however, could suddenly uproot an individual's moral rationale for opposing birth control, a justification that arises from attitudes, feelings, and values. Nevertheless, once the contraception pill was available, its widespread use became matter of fact, and questions about whether or not it *should* be used became irrelevant. A technological reality defused the controversy.

The intensity of conviction on both sides of the abortion question is greater for many than it was with birth control, and a political accommodation on abortion seems beyond reach. If the courts continue to protect abortion rights, opponents will remain angry. If states restrict abortion, abortion rights advocates will chafe, but *Roe v. Wade*¹¹ created new conditions and new expectations.

The legal norm that has prevailed during the past 16 years has

⁸ N. Y. Times, Aug. 13, 1966, at 14, col. 2.

⁹ N. Y. Times, Nov. 15, 1966, at 25, col. 1.

¹⁰ 381 U.S. 479 (1965).

¹¹ 410 U.S. 113 (1973).

strengthened the sense of legitimacy that abortion rights advocates feel. The number of physicians, nurses, counselors, and others willing to help facilitate abortions will be greater than before *Roe*, whatever the government says; so will the number of women who want an abortion and believe that having one is their right.

Any government attempt to revoke this perceived right will leave battalions of citizens prepared to act in defiance. The early pregnancy abortion pill can only make their efforts easier. In the end, this new technology is likely to render early pregnancy abortions as much a nonissue as birth control is today, and in the process will have rescued the nation from a political nightmare.

