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The Therapeutic Abortion Law

A Fight For A Life

JAMES V. McNULTY, M.D.

Over the past ten years throughout this country and the world, there has been a calculated and deliberate campaign to revise the present laws regarding therapeutic abortion.

The present statutes in California and in most other states permit therapeutic abortion only when the life of the mother is in danger. These laws have existed for more than 100 years without change.

Most of us agree that the statutes should be reviewed, perhaps revised, if this is the will of the majority. However, the present proposals, including those of the Model Penal Code from New York and California are unsound proposals because of the enormous difficulty in interpretation by the courts and enforcement by those agencies that must carry out the laws.

The Model Penal Code recites the case for *Justifiable Abortion*. A licensed physician is justified in terminating a pregnancy if:

(a) he believes it is a 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 as defined in Section 207.4¹ or from incest as defined in Section 207.3; and

(b) two physicians, one of whom

may be the person performing the abortion, have certified their belief in the justifying circumstances and have filed such certificate prior to the abortion in the licensed hospital where it is to be performed, or in such other place as may be designated by law.

Justification of abortion is an affirmative defense.² The California proposals are but an extension of the above.

Let us look at the terms which justify. Certainly it is not defined. If we accepted the common usage, it would mean i.e.; to show an act to be just, reasonable, and righteous. In simple terms this would mean that the Government and State Agencies will define right and wrong for the citizens.

Another term not defined is "gravely." This term would elicit an extremely wide range of definition by medical personnel, to say nothing of the manner in which the courts would interpret it.

The term "mental health" escapes definition in standard medical dictionaries. English and English³ defines mental health as "A relatively enduring state whenever the person is well adjusted, has a zest for living and is attaining self-actualization or self-realization. It is a positive state, and not mere absence of mental disorder."

It would appear that every individual practitioner of medicine will be left to define "mental health" for himself.

Therapeutic abortion is now advocated for eugenic reasons to prevent a child being born with a grave physical or mental defect. There have been significant advances made in our knowledge of genetically determined disorders, of rubella embryopathy, of teratogenic drugs, of the effect of irradiation upon the fetus, and of hemolytic disease of the newborn. In a recent article by R. W. Smithells in *Lancet*, he points out how difficult it is for the medical man to be certain that a fetus will have a serious disease. Statistics vary so widely in the literature as to make consistent and accurate prediction of deformity impossible. Or to place this more concretely, if in 100 suspect deliveries, we might expect 60-80 babies to manifest abnormalities ranging from a minor to a major degree and 20-40 babies to be completely normal, why sacrifice so many babies in order to be sure that all deformed conceptions are destroyed. In an address before the Los Angeles Obstetrical and Gynecological Assembly in 1951, Harold Sheehan of England advised the audience to permit all pregnancies to go to term and then destroy the damaged ones. Only in this way could one reasonably avoid the destruction of normal conceptions.

Neither rape nor incest is a medical indication for induced abortion. Rape could be only a social ground for abortion; incest, social and eugenic. Yet the invocation of these

grounds for abortion would be made the responsibility of doctors of medicine, not doctors in the economic or social sciences nor genetics. The danger to medical practitioners in giving them authority to make this decision, and thereby responsibility for making it, is obvious and serious. The medical man dealing with a pregnancy allegedly due to rape or incest would face not only the peril of prosecution if he performed the operation but also the danger of an action for heavy damages whether he decided for or against it.

The proposed composition of "Therapeutic Abortion Committees" always proves interesting and provocative. The Model Penal Code calls for two physicians on the committee while the California proposals call for five physicians. With naivete, the California proposal sets out to prevent collusion by enlarging the number of physicians on the committee. Yet, the California State Legislature recently ordered a lay member to sit with all licensing agencies in an effort to forestall paternalism, favoritism, and collusion. How well this will work, only time will tell.

The term "licensed hospital" according to the Health and Safety Code of California⁴ means any institution, place, building, or agency which maintains and operates organized facilities for one or more persons for the diagnosis, care and treatment of human illness, including convalescence and including care during and after pregnancy, or which maintains and operates organized facilities for any such purposes, and to which persons may be admitted for over-

night stay or longer. "Hospital" includes sanitarium, nursing home, and maternity home.

It takes little imagination to visualize a spate of hospitals consisting of one bed or more being built for the sole purpose to specialize in therapeutic abortion.

WHEN DOES LIFE BEGIN?

The blueprint of a human being is set down when the ovum and sperm unite. As the fertilized ovum grows and develops, this is simply an extension of the blueprint drawn at the moment of conception. By any other name, this is growth.

The fertilized egg is either a blob of protoplasm or else it is a human being endowed with all the rights and privileges guaranteed by the Constitution of the United States. Mr. Bielson, the author of the California Proposals, in a recorded discussion held at Loyola Law School, Los Angeles, California, on October 15, 1965, stated, "I don't have problems with birth control but I have problems with abortion because there is a little something there who if left alone will develop into some kind of human being. There is no question about that."

Article VI and Article XIV of the Constitution guarantee an individual the right of counsel and the right of due process of the law.

This, I believe, is the very heart of the matter. When one is charged with a capital offense, he must be indicted. An attorney must be provided for any defendant who cannot hire his own. Time is given for the preparation of defense. The

defendant must confront his accusers, have an open trial, and a record made. If convicted, the defendant is entitled to the right of appeal.

Can we do less for the voiceless, voiceless, and helpless minority—the unborn child?

If therapeutic abortions to continue on an expanded medical basis as the Model Penal Code and California proposals wish to enact, it is recommended:

(1) that it be confined to large no-fee clinics affiliated with a teaching university. Two of these clinics would be located in Northern California and two in Southern California;

(2) that it be done only on the recorded judgment of the staff or a specially qualified committee, on specified medical grounds, reciting the facts of each case and the authority for holding that therapeutic abortion is necessary and will be beneficial in such case without offsetting after-effects;

(3) that such judgment be entered only after appearance of a public guardian, physician or attorney for the unborn. The right of appeal is implicit and must be understood;

(4) that a follow-up record on each patient be required, with a clearing house for reports of all cases and continuous revision of acceptable indications in the light of additional experience, development of therapies et cetera;

(5) that the statutory excuse of necessity of therapeutic abortion for the preservation of the life of the mother be an affirmative defense,

to be proved by the defendant as a fact, not as a mere opinion;

(6) that there be denied to any staff or committee the authority to approve therapeutic abortion in any case in which it is asked on social or other non-medical grounds, or on a record in which entries have been made of such non-medical elements.

As a medical man specializing in the practice of obstetrics and gynecology and relying on the legal profession, I have quoted extensively the work of Mr. Eugene Quay² who is the founder and first editor-in-chief, *Georgetown Law Journal*.

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²Model Penal Code, Sec. 207.11 (1), (2) (Tent-Draft No. 9, 1959).

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⁴Health and Safety Code of California, Chap. II, Sec. 1401.

⁵*Georgetown Law Journal*, Volume 49, No. 2, 1960; Volume 49, No. 3, 1961.

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