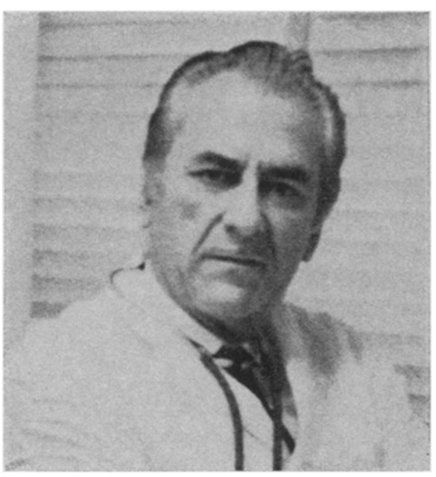
Abortion legislation: a fundamental challenge

Recent court decisions have led abortion-law opponents to abandon reform movements

by Lawrence Massett

Harris and Ewing

Judge Gerhard A. Gesell upheld . . .



Washington Post

. . . Dr. Milan Vuitch's abortion plea.

Although many hospitals are reluctant to report such figures, the Population Council has estimated that at least 8,000 abortions are performed legally every year in the United States. Statistics for the annual number of illegal abortions are even harder to obtain, but the usual estimate, as reported by the American Institute of Public Opinion, is between 800,000 and a million.

The vast difference between the two estimates gives some indication of the social problem abortion has become in the United States. There has been an increasingly successful movement toward liberalizing abortion laws in the last decade, and most observers expected the trend to continue indefinitely as opposition to legal abortions gradually faded.

However, a number of court decisions in the last few months have drastically altered the expectations of the reform movement and have revived public controversy over abortion.

In September 1969, the California Supreme Court invalidated that state's abortion law, which permitted abortion when "necessary to preserve life," on the grounds that such a phrase was unconstitutionally vague.

And in November, U.S. District Court Judge Gerhard A. Gesell ruled unconstitutional the abortion law in the District of Columbia, which permitted abortions to preserve a mother's health as well as her life. No jury, he ruled, should attempt a verdict on the basis of "an individual doctor's interpretation of the ambivalent and uncertian word 'health.'" The law was further unconstitutional, he added, because it placed the burden of proof on Dr. Milan Vuitch, an accused physician, who was thus presumed to be guilty rather than innocent.

The immediate effect of the California ruling was nil; the law the court invalidated had already been replaced by one allowing abortion to preserve a woman's mental or physical health. The impact was more radical in the District of Columbia, where any woman who wants an abortion may now obtain one legally from any licensed medical practitioner for any reason whatsoever, although many doctors still refuse to perform the operation.

But together the two rulings, along with subsequent court decisions bearing on the same points, amount to a challenge to all abortion laws.

There are essentially only two kinds of laws governing abortion in the United States. In 38 states, whose laws typically date back to the middle of the 19th century, abortion is tolerated only to preserve the life of the mother. In recent years, 11 states have passed reform abortion laws that differ from the older ones by adding the words "health," "physical health" or "mental health" as legal grounds for abortion. Some states, in addition, permit abortion in the event of fetal deformity or if a pregnancy was caused by rape or incest.

The court rulings in California and the District of Columbia thus may be applicable to nearly every state in the country if they are upheld on appeal. Both rulings are presently being appealed to the United States Supreme Court, and advocates of abortion reform feel that the Court may well see things their way.

According to Roy Lucas, a New York consultant on abortion law, the traditional requirement that pregnancy constitute a danger to the mother's life before abortion is permitted is legally disputable because it may imply "a possibility of immediate death, or it may imply a danger to the quality of future life." The health requirement that figures in the reform laws, he says, "does not provide the physician, judge, jury or prosecutor a list of specific physical and mental conditions or symptoms signifying a 'danger to health.'" The reform abortion law in Oregon, for example, elaborates on the term "health" by stipulating that "account may be taken of the mother's total environment, actual or reasonably foreseeable," but such a stipulation scarcely clarifies matters.

In any event, many groups that have been seeking to reform abortion laws are now abandoning their efforts. "We have stopped pushing for new laws," says Miss Jimmye Kimmey, executive director of the Association for the Study of Abortion, a New York group. "The idea now is to file as many lawsuits in as many states as possible so that at least one will reach the Supreme Court in such a way that the Court can rule on the constitutionality of any abortion law."

In New York, where the state legislature has been considering proposals to liberalize the abortion law, lawyers have already filed suit on behalf of more than 400 women, arguing that women have a basic constitutional right to choose whether they want to bear children.

. . . abortion

In the past, abortion reform groups have gathered a good deal of support by arguing that the old laws were based on antiquated considerations: In New York, for example, the current abortion law was passed in 1828 in connection with another bill that would have forbidden patients to request the amputation of their limbs. The reasoning in both cases was that, at the time, such operations were dangerously unsanitary.

Organizations such as the American Psychiatric Association, the American Baptist Convention, the American Medical Association, the American Law Institute, the National Board of the Young Women's Christian Association, the American Jewish Congress and the American Civil Liberties Union have all given their support to abortion law reforms.

Whether as much support will be generated for the repeal of abortion laws altogether remains to be seen. A Gallup Poll taken three months ago claimed that 40 percent of the public believes a woman should have the legal right to terminate pregnancy at any time during the first three months. Nevertheless, the prospect of eliminating abortion laws brings forth irreconcilable differences of opinion about the morality of the operation.

Those who told the Gallup Poll they were opposed to abortion most frequently gave as their reason the idea that "it's against religious teachings" or is "the taking of a human life." A minority, equating abortion with contraception, felt "women should rely on birth control devices."

According to orthodox theologians in the Catholic Church, a human soul is created immediately after conception; an abortion at any stage of pregnancy is therefore equivalent to murder. Abortion may be justified, says a spokesman for the Catholic Information Center, only as a secondary consequence of some other operation necessary to save the mother's life, and even then "neither the mother nor the doctor may directly will the death of the child," the policy declares.

Since there is no empirical way of determining whether, or at what point, a human embryo is invested with a soul, the religious objections to abortion are inherently unanswerable. Yet in a national Louis Harris poll taken last year, 60 percent of the Roman Catholic respondents agreed that abortion is a matter of private ethics that should not be controlled by Government regulation.

Whatever the strength of religious objections to abortion, the advocates of repeal prefer to concentrate their arguments on more pragmatic areas. They claim that even the liberalized abortion laws simply do not work. The reform laws, they argue, have not significantly reduced the number of women willing to undergo the hazards and expenses of an illegal operation because a legal abortion is too difficult to arrange.

Usually, under the reform laws, a woman who wants an abortion for mental health reasons must obtain an examination from her own physician, then from another physician who must report back to the first physician in writing, and then from at least one psychiatrist who must also report in writing. A hospital abortion committee then considers the written documents, consults with the original physician and passes judgment. Such a procedure is sufficiently expensive and complicated, it is said, to discourage poor women from even trying to get an abortion through legal channels.

In Colorado, where a reform abortion law went into effect three years ago, the number of legal abortions has climbed from 50 in 1966 to more than 800 last year, but many of the state legislators responsible for the reform feel that too many people are still excluded by the law. "We made a bad law better," Richard D. Lamn, the Colorado state representative from Denver, said last month, "but it's still a bad law."

It may soon make very little difference how well any of the abortion laws have been working, though. Speaking at the International Conference on Abortion held in 1968, John D. Rockefeller 3rd noted that the "crucial element" in liberalizing abortion laws was "to make certain that the mental health provision is clear, unambiguous and liberal." He went on to state that eliminating abortion laws entirely "would give each individual freedom of choice," and added, "In my opinion it will inevitably be the long-range answer."

No one can predict how the Supreme Court will rule on the constitutionality of abortion laws, but there is a real possibility that what Rockefeller proposed as the long-run answer to the problem of abortion will wind up, sooner than anyone expected, as the short-term solution.

There is, Judge Gesell says, "an increasing indication in decisions of the Supreme Court of the United States that . . . a woman's liberty and right of privacy extends to family, marriage and sex matters, and may well include the right to remove an unwanted child, at least in the early stages of pregnancy." □