REVIEWS

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ABORTION REGIMES

By Kerry A Petersen

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ABORTION Regimes offers a finely detailed analysis of abortion practices across a number of societies and jurisdictions. It not only aims to identify the law on abortion but also to locate the legal situation and changes to abortion laws within a social and historical context. Petersen's interweaving of medical and legal concerns is a major strength of her discussion of abortion. An organizing theme of the book is the impact of medical dominance on the control of abortion practices and the role of law in legitimating that dominance.

While the book is consistently aware of the women's movement, the political activism around abortion, public attitudes and community debates, and the moral issues abortion raises, these are not its central concerns. The

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research relies on case reports, statutes, governmental reports, various documents, plus social science, philosophical and legal academic literature. Appendix 2 describes a study of the Australian abortion delivery system. *Abortion Regimes* successfully integrates a concern to describe the legal regulation of abortion with an analysis of professional power, medical dominance, and the medicalization of women's health. This volume complements social science research on the politics of abortion, social movements around abortion and questions of reproductive autonomy and choice. At the same time it lays out clearly and succinctly the relevant case and statute law.

The comparative focus of *Abortion Regimes* is unrivalled in the contemporary literature on abortion. Petersen avoids the reductionist tendency to review all abortion debates and issues as interchangeable regardless of social and political circumstances. She points out, for example that "the rights rhetoric that is such a pervasive aspect of American law has not had a great influence in British or Australian law" (at 112). Furthermore, in Australia, abortion is not a constitutional issue, unlike in the United States. This means that the nature of the abortion debates and the location of political activism will differ. While these differences are not developed in any great degree this would be impossible in a single volume.

Abortion Regimes is divided into two parts. Part I deals with the medicalization and professionalization of reproductive medicine while Part II analyses comparative and professional developments in abortion. The Introduction reminds us that the public controversies surrounding abortion are contemporary, despite the fact of its long history. She also points out ambiguities in the term "abortion", especially given that many new "contraceptives", for example Mifipristone RU 486, are abortifacients.

Chapter 1 provides an historical overview of the medicalization of reproduction and the medical profession's monopolization of abortion services. This entailed the removal of reproductive care from the hands of midwives (women) to those of medical practitioners (men) Petersen later indicates that the first aspect of this process involved the abnormalization of childbirth which came to be seen, especially by middle class women, as dangerous and requiring medical skill based on scientific knowledge and specialized training.

Paralleling this shift was the emergence of a series of criminal abortion statutes, the first being *Lord Ellenborough's Act* which was passed in Britain in 1803. Petersen suggests, however, that no obvious reason or

crisis sparked the passage of this legislation. The subsequent *Offences Against the Person Act* 1861 became a widely adopted model for abortion legislation. It creates an offence for a pregnant woman to attempt to procure her own abortion unlawfully and for any person to attempt to procure the unlawful miscarriage of any person, whether or not she is pregnant.

Petersen demonstrates how these statutes "aided and abetted medical dominance" rather than undermining or replacing it. (at 28). Chapter 2 explores that professionalization of medicine in the nineteenth century. Especially in the United States the abortion issue was linked inextricably to the emergence of the medical profession. The process of professionalization entailed the development of obstetrics and gynaecology as medical specialties with university-based courses, the subordination of midwives as assistants to gynaecologists, and successful claims by medical practitioners to be the only legitimate performers of abortion. The historian James Mohr investigates the rhetoric of professionalism which characterised the US anti-abortion crusade in the second part of the nineteenth century and finds medical journals describing the performers of abortion as "quacks", "doctresses" and "irregulars".[1]

Having gained more control over reproductive health, in the early twentieth century medical practitioners faced considerable pressure to perform abortions for both medical and non-medical reasons. Petersen identifies three main factors to explain this: first, because technology and science provided medicine with the expertise to perform relatively safe therapeutic abortions; secondly because there was a demand for abortions; and thirdly, because the high rate of criminal abortion caused a serious health problem. As a response to this pressure, medical practitioners began to develop the notion of therapeutic abortion. (at 4).

In Australia and Britain, because the law did not specifically provide for legal abortion, the legal status of those performed for therapeutic indications remained uncertain. This uncertainty culminated in the first test case on therapeutic abortion, *R v Bourne*.[2] Macnagthen J decided that Dr Bourne could not be found guilty of performing an unlawful abortion if he performed the act in good faith only for the purpose of saving the life of the mother. Petersen points out Glanville Williams' observation that "the real legal principle on which the decision in *Bourne* was based was the defence

1 Mohr, *Abortion in America* (Oxford University Press, New York 1978) pp162-166.

2 (1939) 1 KB 687.

of necessity" (at 65). A ramification of is that whether or not the woman's life is in danger is seen as *medical decision*. The defence of necessity became the basis for the first Australian case, *R v Davidson*,[3] which legalized abortion under certain conditions. Petersen concludes that this "was an acknowledgment by the judiciary of the medical profession's right to autonomy and the historical steps that led to the medicalization of abortion" (at 87). Medical practitioners and various professional bodies also sought decriminalisation. Beside these developments in law Petersen details the impetus for legalizing abortion in the political arena.

Part II of the book addresses the content of abortion laws across several jurisdictions and the general trend toward liberalization. Petersen suggests three models of abortion law and devotes a chapter to each. The "Abortion Reform" model exists where criminal statutes regulate abortion but provide for lawful therapeutic abortion. The critical distinction is between a criminal and a therapeutic abortion. The United Kingdom's *Abortion Act* 1967 (as amended) is an example of abortion reform, and was followed by South Australia and the Northern Territory. These statutes enable a woman to seek a termination if certain conditions exist, for example after two registered medical practitioners have formed a bona fide opinion that the pregnancy is not beyond a certain date and that the termination is necessary to prevent damage to the physical or mental health of the pregnant woman. The effect of this approach is that the availability of abortion services will not be based on women's rights, or any notion of reproductive autonomy but on "medical attitudes and hospital policy" (at 123).

The "Judicial Model" analysed in Chapter 6 focuses on case law developments. Victoria, New South Wales and Queensland adopt this model. In *R v Davidson,* Menhennitt J found that the use of the word "unlawfully" in section 65 of the *Crimes Act* 1958 (Vic) suggests that under certain circumstances abortion could be lawful. He decided that one such circumstances is where the abortion is necessary to save the woman from serious danger to her physical or mental health.

One issue that has recently faced the courts is the question of consent and the role, if any, of the spousal/putative father. In Britain and Australia men claiming to be the "father" of the "unborn child" have sought to prevent women from having abortions. Petersen suggest that the Family Court's recent decision in *F v F*[4] opens up the possibility of enforced pregnancy.

3 [1969] VR 667.
4 (1989) FLC 92-031.

The "Elective" model, as adopted by the United States and Denmark, provides women with limited rights to abortion. In *Roe v Wade* the United States Supreme Court held that the right to privacy means that a woman has a qualified right to seek a termination.[5] It is qualified, *inter alia,* by the State's interests which expand as the pregnancy progresses. The Court resolved the State interest in pregnancy by adopting the trimester construct and balancing between the perceived or assumed competing claims of the mother and the fetus. Interestingly, *Roe v Wade* transformed abortion from an issue for State criminal statutes into a Constitutional question. The case held that State abortion laws, whether criminalizing or decriminalizing abortion, were unconstitutional. Since this decision in 1973, abortion has been a central and controversial issue in US politics. The overturning of *Roe v Wade* has been a central target of anti-abortion activitists. This level of moral controversy has no parallel in either Australia or the United Kingdom.

Petersen returns to the issue of medical autonomy here, as the Supreme Court jurisprudence does not displace the medical practitioner from centrality in the decision making process. She carefully documents post-1973 developments and shows how, even though *Roe v Wade* survives (if only just), access to abortion services has been restricted significantly. *Planned Parenthood of Southeastern Pennsylvania v Casey,*[6] the most recent Supreme Court decision, reduced abortion to a mere "liberty interest", no longer deserving of maximum constitutional protection.

In sum, this is a well-researched analysis of case law and legislation which is linked consistently to the influence of medical knowledge and practice and political movements. *Abortion Regimes* is one of the rare books which successfully straddles both the social science and legal debates surrounding abortion. It will be a valuable and accessible resource for students from a wide array of disciplines and for researchers and policy makers dealing with questions of criminal law, women's rights and health policy.

5 410 US 113 (1973).
6 120 L Ed 2d 674 (1992).