BOOK REVIEWS

ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY. By James C. Mohr. New York, New York: Oxford University Press, 1978. Pp. 328. $12.50.

Readers of the landmark abortion decision *Roe v. Wade*, 410 U.S. 113 (1973), may have been surprised to learn that at the time the Constitution was adopted and throughout most of the nineteenth century "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today." *Id.* at 116. For those who have wondered about the history of abortion in the United States, *Abortion in America: The Origins and Evolution of a National Policy* by James C. Mohr provides a carefully documented and highly readable account of the dramatic change in the prevailing social attitudes towards and the legal status of abortion in the United States between 1800 and 1900.

Throughout the first half of the nineteenth century, abortion during the early stages of pregnancy was not considered to be immoral, nor was it illegal. Under the common law in the United States, as in England, abortion was a crime only after "quickening," that is, after the pregnant woman had felt fetal movement, which usually occurred in the fourth or fifth month of pregnancy. The quickening doctrine, whose origins can be traced to medieval canon law, had a practical basis as well. In the early nineteenth century, fetal movement was the only incontrovertible evidence that a woman was pregnant rather than suffering from some other medical condition with similar symptoms. Women were free to seek treatment to restore normal menstrual flow until quickening established the fact of pregnancy, even though such treatment would abort a fetus in the event that the woman was actually pregnant.

Abortion apparently was fairly common in the early decades of the nineteenth century, particularly among young unmarried women who feared the consequences of an illegitimate birth, and to a lesser extent among married women seeking to limit the size of their families. Information about abortifacient drugs and procedures was available from home medical manuals and local apothecaries. Such drugs could be obtained locally or by mail order, and assistance in accomplishing the abortion was provided by midwives and other medical practitioners.

As of 1840, only a few states had enacted abortion laws. These laws were essentially poison control measures, designed to protect the health of women whose recourse to potent abortifacient drugs sometimes resulted in death or serious physical harm. Either by their own terms, or as interpreted by the courts, these early laws were restricted to cases of abortion after quickening; they did not and were not intended to deter abortion in the early months of pregnancy.

In the years 1840-1880, a number of significant changes occurred in the extent and character of the practice of abortion. Most dramatic was the increase in the sheer number of abortions. Informed observers at the time estimated that between one-tenth and one-third of all pregnancies in the United States were terminated by abortion. As abortion became increasingly prevalent, the business of providing abortion products and services became increasingly visible. Advertisements in newspapers, magazines, and private cards openly advised the public of the availability of abortifacient drugs and abortion clinics, and the practice gained further notoriety with sensational press accounts of the prosecution of several abortionists whose patients had died. Abortion had become a big and lucrative business.

Equally significant for the subsequent history of the abortion laws was the change in the demographic character of the population having abortions. Unlike the earlier part of the century, when abortion was mainly the resort of the unmarried, the poor, and the young, by the mid-1800's middle and upper middle-class white, native-born, Protestant, married women were commonly practicing abortion, like contraception, as a method of limiting family size. The high incidence of abortion and consequent falling birthrate among this population group contrasted sharply with the relatively high birthrate among recent immigrants and non-Protestants, who rarely practiced abortion. Opponents of abortion would later argue that if this trend were permitted to continue, the ethnic composition of the population would undergo a dramatic change for the worse.

Throughout the nineteenth century, only one group in society consistently opposed abortion prior to quickening: the scientifically trained or "regular" medical doctors. In an era when the practice of medicine was totally unregulated, these doctors set themselves apart from the largely untrained medical practitioners, who comprised a majority of the profession. Because of their scientific understanding of gestation as a continuous process of development and because of the Hippocratic Oath, to which they alone subscribed, the "regulars" rejected any distinction between abortion before and after quickening. The ethical codes which they adopted for themselves proscribed all abortion, except to save the life of the mother. As a result, the practice of abortion was left primarily to the "irregulars," who found that it provided not only a lucrative sideline, but also an opportunity to win patients permanently away from the "regulars" who refused to perform abortions.

In the mid-nineteenth century, the "regulars" launched a drive to restrict the practice of medicine to scientifically trained doctors like themselves. Leaders among the "regulars," including professors at prominent medical schools, members of local medical associations and of the newly formed American Medical Association, understood that the passage of strict anti-abortion laws would substantially further their goal of helping to drive the "irregulars" out of business. As a result, they undertook a major campaign, which began in the 1840's and gathered momentum in the years following the Civil War, to persuade the public of the immorality of abortion prior to quickening and to achieve the passage of legislation to outlaw the practice.

In speeches, pamphlets, and books, the "regulars" appealed to ethnic prejudice and Victorian morality in their campaign against abortion. They ex-

pressed concern over the falling national birthrate and particularly warned of the dire consequences for the nation if abortion were permitted to limit the birthrate among native-born Protestant women, while immigrants and Catholics continued to reproduce at a high rate. They also argued that the widespread practice of abortion was both the cause and effect of a decline in national morality. To condone abortion, they said, was to sanction and foster an immoral style of life in which women, both married and unmarried, sought to evade their God-given, natural role as mothers and homemakers.

In their crusade against abortion, the "regulars" took advantage of a growing public concern that abortion was an inherently dangerous medical procedure, a concern that was fueled by the publicity surrounding several abortion-related deaths. In fact, even in this era, the dangers of medically supervised abortions were not as great as those of childbirth. Nevertheless, the "regulars" did nothing to dispel exaggerated public fears which contributed to the success of their movement. The "regulars" were also helped by the anti-obscenity movement of the 1860's and 1870's, since that movement's definition of "obscene" included anything related to abortion. The Comstock Law, passed by Congress in 1873 to outlaw the interstate shipment of obscene materials, specifically prohibited the sale or advertisement of abortifacient drugs and abortion services.

Although the "regulars" couched their campaign in moral terms and sought support from various church groups, none of the organized religions joined in the anti-abortion movement. Not even the Catholic Church, which was on record as opposing abortion, made common cause with the "regulars" on this issue. Apparently, the churches were unwilling to risk alienating their followers by opposing a practice that was so widely accepted.

But if the "regulars" received scant support from other groups in society, neither did they encounter any organized opposition to their efforts. Even leaders of the nineteenth-century feminist movement refrained from opposing the doctors' campaign. For feminists of that era, the issue of abortion posed a real moral dilemma. On the one hand, they shared the "regulars' " view that abortion was immoral. On the other hand, they sympathized with the plight of women whose husbands selfishly insisted on having sexual relations without regard for the risk of unwanted pregnancy. Because of this fundamental ambivalence about abortion, the feminists remained silent in the face of the "regulars' " crusade.

By 1880, the vigorous publicity and lobbying efforts of the anti-abortion movement had achieved total success. By this time, not only had public opinion become firmly opposed to abortion, but virtually every state had passed stringent abortion laws which explicitly rejected the quickening doctrine. These laws were passed in two waves: the first, between 1840-1860 and the second between 1860-1880. They outlawed abortion and attempted abortion from the moment of conception, regardless of whether the woman suffered any adverse medical consequences. They even punished attempted abortion when the woman was not in fact pregnant. Moreover, these laws for the first time imposed criminal sanctions on the pregnant woman as well as on the abortionist, and, like the Comstock Law, many of the statutes specifically prohibited the advertisement and sale of abortifacient drugs and services. These nineteenth-

century laws, outlawing all abortion except to save the life of the mother, remained essentially unchanged until 1973 when the Supreme Court decided *Roe v. Wade*.

Abortion did not become a serious public issue again until the 1960's. By then neither the participants nor the terms of the debate were the same as in the nineteenth century. "Regular" doctors had long since won their fight for control of the profession, and doctors as a group no longer opposed abortion. Instead, the Catholic Church, which had played no part in the earlier controversy, assumed leadership of the anti-abortion cause. And unlike the nineteenth century, when there were no organized pro-choice forces, by the 1960's and 1970's, advocates of women's rights and of population control were prepared to wage a vigorous fight against the existing abortion laws both in the court of public opinion and in the courts of law.

Responding to such a challenge in *Roe v. Wade*, the Supreme Court articulated a constitutional right of privacy on the part of a woman and her doctor to consider the option of abortion. Against this right, the Court weighed the states' asserted justifications for the prohibition on abortion—concern for maternal health and for the potential life represented by the fetus. Balancing these competing factors, the Court held that no restriction on abortion was justified during the first trimester, when abortion posed virtually no health hazard to the mother and the fetus was in an early stage of development. During the second trimester, because of an increasingly significant risk of medical complications, the Court ruled that states may impose reasonable regulations on the practice of abortion, for the limited purpose of protecting maternal health. Only in the third trimester, when the fetus attains "viability"—the ability to survive independently outside the mother's body—does the states' interest in protecting the potential life of the fetus outweigh the pregnant woman's privacy interest. Therefore, it is only in the third trimester that the states may prohibit abortion.

The concept of "viability," which forms the linchpin of the *Roe* decision, bears a startling resemblance to the nineteenth-century quickening doctrine. However, upon reflection, this similarity is not surprising. Like lawmakers of an earlier era, the Supreme Court sought to define a point in gestation at which the fetus is sufficiently "human" to warrant the protection of the state. For the nineteenth century, fetal movement provided such a point. For the Supreme Court in the twentieth century, the viability of the fetus seemed a more reasonable line of demarcation. In the years since the *Roe* decision, critics of the opinion, including both pro-abortion and pro-choice advocates, have argued that distinctions on the basis of viability are philosophically indefensible and, in light of evolving technology, will ultimately prove unworkable. But for the present, the *Roe* decision has had the practical effect of restoring to women—at least to those who can afford it—virtually the same, if not a more liberal, right to abortion than they possessed in the early nineteenth century.

LAURA SAGER

MOCKING JUSTICE: AMERICA'S BIGGEST DRUG SCANDAL. By Hamilton E. Davis. New York, New York: Crown Publishers, Inc., 1978. Pp. 242. $8.95.

This book unfolds the tale of the corrupt career of Police Officer Paul D. Lawrence. It traces the development of his illegal methods of effecting the arrests of alleged drug dealers, and his demise once these methods were discovered.[1] Underlying Lawrence's personal saga is the conflict that his actions triggered between the young and old residents of a small Vermont town in the early 1970's.

Officer Lawrence succeeded in arresting scores of alleged drug users during his brief career in St. Albans, Vermont. Although many of the young people arrested on Lawrence's complaint were natives of the St. Albans area, the older townspeople perceived them as outsiders and consistently chose to believe a single narcotics officer instead of dozens of accused young people. On the basis of Lawrence's testimony alone, most of those arrested were convicted of drug offenses ranging from possession of marijuana to sale of heroin. Those convicted protested, claiming that Lawrence had lied when he testified that they sold drugs to him. Though juries in St. Albans rejected these claims of innocence, the persons convicted by Lawrence's testimony ultimately were vindicated. Lawrence had never bought drugs from any of them during his service as an undercover narcotics officer.

After two major drug arrests involving about fifty persons, Lawrence's undercover identity was "blown" in St. Albans. He was, therefore, loaned to the police department in Burlington, Vermont. In Burlington, the largest city in Vermont, fellow undercover agents noticed that Lawrence was particularly ineffective while being observed, but could buy drugs from suspects seemingly at will when operating alone. When Lawrence claimed to have bought drugs from an individual whom he was unable to recognize two days later, his partner became suspicious and reported the incident to his superiors. The resulting investigation revealed that Lawrence had totally fabricated each of his drug buys, that dozens of people had been convicted illegally, and that Lawrence had even kept the money intended to be used for buying the illegal drugs.

The book does more, however, than tell an interesting story of how a town was panicked into convicting innocent people. The author deals with the problems in the criminal justice system that are illustrated by the convictions of these people. The experiences of the defendants, from arrest through sentencing, enable the reader to comprehend the conflicts and pressures that face a defendant who wishes to maintain his innocence. Should he go to trial or plead guilty and perhaps avoid imprisonment? If he goes to trial and chooses to testify, how will he explain any past misdeeds which might be introduced to impeach his testimony? Of the more than fifty people arrested on Lawrence's

1. Lawrence was tried and convicted. State v. Lawrence, 133 Vt. 330, 340 A.2d 67 (1975) (granting bail pending appeal); 134 Vt. 373, 360 A.2d 55 (1976) (conviction affirmed); 135 Vt. 75, 369 A.2d 1368 (1977) (motion for discharge of judgment denied).

charges, only three asserted their right to a trial. Only after Lawrence's dishonesty was discovered were the innocent people pardoned.

The broad discretionary power of the trial judge, who excluded evidence that might have tended to impeach Lawrence's credibility, is also demonstrated. Finally, the author points out that only one defendant was wealthy enough to mount an effective defense. In the part of the book dealing with the trials of Lawrence, himself, author Davis is less than sympathetic to the defendant's claims that the trials were unfair. Nevertheless, he explains in a clear manner the particular evidentiary objections of the defendant and the reasons why the appellate court rejected them.

Mocking Justice is not merely easy and engrossing reading. It is an exposé of continuing weaknesses in the criminal justice system.

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