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# Abortion in the German-Speaking Countries of Europe

*Leopold Breitenecker, M.D.  
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*In contrast to Denmark and Sweden, legal provisions concerning abortion in the German-speaking countries show a more conservative approach. This article traces the current and proposed code provisions concerning abortion in Austria, Germany, and Switzerland. It also examines various abortion techniques in these countries. The Breiteneckers conclude that one basic attitude toward therapeutic abortion may be discerned in all the German-speaking countries: abortion should be performed only as a last resort, after therapy has been unsuccessfully attempted; few exceptions to this rule are allowed, and any physician disobeying the rule will be punished.*

IT IS THE inviolable right of every man to freely decide upon matters concerning his body. However, this right is limited in women of child-bearing age by age-old laws in all countries, when, through the union of ovum and spermatozoa, a new individual is created, with its own legal rights beginning at the moment of conception. Healthy women under normal living conditions find pregnancy no great cause of concern, while those afflicted by illness or adverse social conditions consider this biological state an unbearable burden. In the distant

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past, it was in the interest of the state to create laws prohibiting abortion, in order to insure that there would be sufficient numbers of subjects to secure the military defense of the country.<sup>1</sup> Reports reveal abortion practices among ancient peoples, such as the Egyptians, Greeks, Romans, Chinese, Eskimos, Indians, Aztecs, Africans, Jews, and Mohammedans, as well as Christians and the peoples of

<sup>1</sup> Baldinger, *Preface* to 1 JOHN, *LEXIKON DER KAISERLICH-KONIGLICHEN MEDIZINAL GESETZE* at ii (1790): "only then are the Dukes mighty and invincible, if they rule over large numbers of healthy and strong subjects, who are capable of using the sword, the cannon, the loom, the plough — not to mention the pen — with brave strength. . . ." 2 FRANK, *SYSTEM EINER VOLLSTÄNDIGEN MEDIZINISCHEN POLIZEY*, 62-163 (3d ed. 1786) (abortion among diverse peoples and its danger to the state).

European countries.<sup>2</sup> One can find legal provisions prohibiting abortion in the first penal code of the Holy Roman Empire.<sup>3</sup> There, the penalty for abortion was set forth: "the man shall be executed by the sword, the woman shall be drowned or put to death by other means . . . ."<sup>4</sup>

But even these drastic penalties were never a complete deterrent. The new eras of Humanism and the "Age of Reason" mellowed such harsh punishment, and the nineteenth century witnessed attempts to legalize abortion. This more lenient attitude has become even more prevalent in the twentieth century and actually became the official attitude in communist countries of Eastern Europe. The first country to break with the traditional conservative principles was Soviet Russia, which legalized abortion in 1920.<sup>5</sup> However, it soon became evident that such policies were detrimental to the welfare of the states. Many of these countries repealed such liberal laws and once again placed abortions under medical and legal controls. The "indications for abortion" then had to be determined by medical specialists, and the procedure was to be performed in hospitals to safeguard the life and health of the woman.

In the move to legalize abortion, two trends can be observed: (1) the liberalization of abortion laws for social reasons, such as in Bulgaria, Czechoslovakia, Hungary, Poland, Russia, and Yugoslavia;<sup>6</sup> and (2) the somewhat veiled inclusion of social considerations and the broadening of the definition of "medical indication," in Denmark, Finland, India, Japan, Sweden, Switzerland, and East Germany. Other countries still recognize only the preservation of the life or health of the woman as a genuine "medical indication."<sup>7</sup>

The number of abortions in recent decades has reached epidemic proportions. It is interesting to note that the number of illegal abortions was found to be inversely proportional to the severity of punishment.<sup>8</sup> The actual number, of course, is difficult to determine

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<sup>2</sup> MEHLAN, INTERNATIONALE ABORTSITUATION, ABORTBEKÄMPFUNG, ANTIKONZEPTION: BERICHT DER INTERNATIONALEN ARBEITSTAGUNG 5 (1961) (introductory comment).

<sup>3</sup> CONSTITUTIO CRIMINALIS CAROLINGA (1532) [hereinafter cited as C.C.C.].

<sup>4</sup> C.C.C., p. 60 (Ausgabe Frankfurt am Mayn 1609); C.C.C., p. 27 (Ausgabe Mayntz 1660).

<sup>5</sup> MEHLAN, *op. cit. supra* note 2, at 6; Vojta, *Die Abortsituation in der CSR, Vortrag auf der Internationalen Arbeitstagung*, in MEHLAN, *op. cit. supra* note 6, at 107-13.

<sup>6</sup> MEHLAN, *op. cit. supra* note 2, at 6.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* at 7.

and can only be estimated by comparing a decline in birth with the population and number of marriages. This comparison is not extremely meaningful, however, because the calculated birth deficit is undoubtedly related to present-day contraception practices for "socioeconomic" reasons. The number of abortions in Germany, with a population of approximately 60 million, is estimated at 1 million yearly.<sup>9</sup> Similar numbers are reported in France. In Paris, 95,000 births have been compared to a calculated 150,000 abortions.<sup>10</sup> Reported figures of mortality rates for induced abortions vary from one to eight per cent.<sup>11</sup>

Because of unfavorable experiences, the Soviet Union had to curtail legalized abortion temporarily, but in 1955 it was again legalized.<sup>12</sup> The official explanation was that "the social emancipation of the Soviet woman has brought about the conditions, which allow her to decide herself about the disposition of her fetus."<sup>13</sup> The repeated liberalization of abortion legislation arose from a desire to prevent damage to the health of the woman by unskilled termination of pregnancy. All "indications" were recognized; but in order to avoid an unlimited interruption of pregnancies, a commission was set up to advise the patients and to explain that (1) every such operation constitutes a danger to health, life, and future fertility, (2) the laws protecting motherhood tend to eliminate social "indications,"<sup>14</sup> and (3) each abortion is damaging to the Soviet society.<sup>15</sup>

The other communist countries of Eastern Europe also recognized that even legalizing abortion did not solve the problem of illegal abortions, because many women avoided seeing the appointed commissions and returned to the illegal, private abortions. Some countries now recommend "birth control" by contraception as the solution. However, some consider this to be biologically detrimental to a highly developed civilization with a comparatively lower

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<sup>9</sup> *Ibid.*, citing Bumm's statistics indicating that for the years 1929 and 1930 there were one million abortions resulting in 80,000 deaths and 200,000 to 300,000 cases of chronic disease.

<sup>10</sup> *Ibid.*, citing statistics by Dourlen and Rollier disclosing that for the year 1960 Paris had 150,000 abortions resulting in 20,000 deaths. Monsaingeon's statistics reveal that 61% of these abortions had complications and 25% resulted in subsequent sterility. *Ibid.*

<sup>11</sup> The computations by Mehlan suggest a mortality rate of 8 to 14%. Undoubtedly this figure has been lowered since the advent of sulfonamides and antibiotics. *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

birth rate than that of emerging nations, which are marked by an explosive increase in their populations. Since it seems inevitable that a nation with a high birth rate would eventually overwhelm one with a low rate of birth, artificial birth control would be equivalent to a type of national suicide. This discrepancy in birth rates may have played some part in the decline of ancient civilizations.

## I. LEGAL PROVISIONS AGAINST ABORTION IN AUSTRIA, GERMANY, AND SWITZERLAND

The pertinent laws of these three German-speaking countries will be discussed according to the age of the statutes. This will permit some insight into their legal development.

### A. Austria

(1) *Present Code Provisions.*—In the sixteenth chapter of the Criminal Code of 1852, "About Abortion," which is still in effect in Austria, it is stated: "Every woman being with child who, with intent to procure her own miscarriage, effects such miscarriage or stillbirth, shall be guilty of a felony."<sup>16</sup> The punishment for attempted abortion is imprisonment from six months to one year; for achieved abortion, the punishment is incarceration from one to five years.<sup>17</sup>

Accomplices to the crime of abortion are dealt with as follows:

An accomplice in this crime is anyone who induces the pregnant woman to abort herself or who aids her in doing so, even if such abortion is only attempted. The accomplice is to be punished with incarceration from 1 to 5 years. However, if he "professionally" aids in abortions the punishment is from 2 years to 10 years.<sup>18</sup>

A person who performs an abortion or attempts to perform an abortion on a pregnant woman against her will or without her knowledge is guilty of a felony.<sup>19</sup> The punishment is normally im-

<sup>16</sup> 4 KANIAK, DAS ÖSTERREICHISCHE STRAFGESETZ MIT ERLÄUTERUNGEN § 144, at 301 (5th ed. 1960); MEHLAN, *op. cit. supra* note 2, at 243-76 (app.). The appendix deals with laws concerning abortion and pregnancy interruption in Belgium, Bulgaria, CSR, Denmark, West Germany, East Germany, Great Britain, Finland, France, Holland, Yugoslavia, Norway, Austria, Poland, Sweden, USSR, Hungary, and some of the United States.

<sup>17</sup> 4 KANIAK, *op. cit. supra* note 16, § 145, at 304.

<sup>18</sup> *Id.* at 305.

<sup>19</sup> The statute provides the following: "A person is guilty of a felony, who intentionally, for whatever reason, aborts or attempts to abort a mother against her will or without her knowledge." *Id.* at 307.

prisonment for one to five years; but when the mother's life is endangered or her health damaged, the sentence is incarceration for five to ten years.<sup>20</sup>

From these provisions it can be seen that the special condition of the woman is taken into consideration, since her punishment<sup>21</sup> is less severe than that of the accomplice.<sup>22</sup> The potential father who advises abortion or supplies money or acquaintances who steer the woman to an abortionist, is not the only person who is considered an accomplice; physicians who perform the operation and claim "medical indications" also fall within this category.<sup>23</sup> To cover this area, the code was amended in 1937 with an addition to the malpractice section:<sup>24</sup>

A physician who induces or performs an abortion, or advises such action with the intent to avert a present danger to the life or health of a pregnant woman, but who failed to have conscientiously determined that such danger really existed, is guilty of a misdemeanor. If such danger did not exist in reality, the aforementioned will be imprisoned from 1 to 6 months for the first offense, but will lose his license temporarily or permanently for repeated offenses.<sup>25</sup>

Thus, the physician who performs an abortion does not commit a felony, but rather a misdemeanor. His punishment is accordingly lighter, although under certain conditions he may lose his license to practice medicine.

(2) *Proposals for Reform.*—At the present time, a new criminal code is being written. In it, the proposed section, entitled "Abortion by the Pregnant Woman," will read: "A woman who aborts her fetus or permits abortion by another party will be punished with up to 3 years detention."<sup>26</sup> Thus, "felony" or "incarceration" are not mentioned, and the punishment is considerably less severe.

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<sup>20</sup> The following statutory language provides the punishment: "Such a criminal shall be incarcerated from 1-5 years; and when the mother's life is endangered or her health damaged, from 5 to 10 years." *Id.* at 307.

<sup>21</sup> See text accompanying note 17 *supra*.

<sup>22</sup> See text accompanying note 18 *supra*.

<sup>23</sup> 1 ALTMANN & JACOB, KOMMENTAR ZUM ÖSTERREICHISCHEN STRAFRECHT §§ 144-48, at 375-80 (1928); 2 RITTLER, LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS (BESONDERER TEIL) 16 (1962).

<sup>24</sup> 4 KANIAK, *op. cit. supra* note 16, at 635 (medical intervention in pregnancy).

<sup>25</sup> *Ibid.*

<sup>26</sup> BUNDESMINISTERIUM FÜR JUSTIZ, ENTWURF EINES STRAFGESETZBUCHES (BESONDERER TEIL) §§ 99-103 (1964); see also pertinent comments, *id.* at 13-20 [hereinafter proposed code sections are cited 1964 E.S. §].

"Abortion by other persons" is defined in Section 100 of the proposed code as follows:

(1) Whoever, with consent of a pregnant woman, performs an abortion or renders advice or aid, shall be imprisoned from 6 months to 5 years. If the perpetrator is a professional abortionist or performed the action resulting in the death of the pregnant woman, the punishment is from 1 to 10 years.

(2) Whoever aborts a pregnant woman without her consent shall be imprisoned from 1 to 10 years.<sup>27</sup>

Thus, the punishment for the accomplice is not reduced in the new code. The amended code is particularly directed against the professional abortionist, who performs this action for "social" reasons, while extracting considerable sums of money from economically needy women.

The proposed code further provides that an abortion is not illegal if it is performed to avert present danger to life or prolonged damage to health which cannot otherwise be averted. The judgment as to the existence of these conditions is to be based upon a consideration of the woman's living conditions and her physical and emotional state.<sup>28</sup> This illustrates that not only pathological conditions are decisive, as in the old criminal code, but psychological and social conditions must also be taken into consideration. Thus, abortion for social reasons would be sanctioned in the new criminal code.

The new code provides that if a physician performs an abortion or advises the pregnant woman to obtain an abortion, based on an insincere assumption as to the danger to her life, he is subject to imprisonment up to one year. Anyone not a physician who performs or aids in performing an abortion will be imprisoned up to six months, unless there was immediate danger to the life of the woman and a physician could not be promptly summoned.<sup>29</sup> This

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<sup>27</sup> 1964 E.S. Proposed § 100, and comments at 15.

<sup>28</sup> The pertinent sections of the proposed code provide as follows: "An abortion, which averts present danger to life or prolonged damage to health, which cannot be remedied by other means, is not punishable by § 99 and § 100. The judgment, whether such danger has actually existed, has to take into consideration the physical and emotional state of the pregnant woman, and also the conditions under which she is compelled to live." 1964 E.S. Proposed § 101, and comments at 16.

<sup>29</sup> The statute, as proposed, provides:

A physician, who erroneously assumes that a pregnant woman's life is endangered, as delineated in § 101, and subsequently performs an abortion, or advises her to have the abortion performed by another person, or in any way aids her in the perpetration of this deed, without having previously and conscientiously convinced himself that such danger really existed, will be punished with imprisonment of up to 1 year.

Whoever, without being a physician (previously § 344 A.C.C.), performs

section also contains a decree against solicitation of abortion and abortifacients: "Whoever publicly solicits abortion or advertises means, objects, or methods thereto, will be imprisoned up to 2 years, or fined 500,000 schillings."<sup>30</sup>

This new criminal code has not been ratified by Parliament as yet. However, these short excerpts are intended to demonstrate the tendency of modern lawmakers to reflect the attitudes of contemporary society.

(3) *Proving the Crime.*—The proof of an abortion, according to Austrian law, involves proof of both a suitable object and suitable means.<sup>31</sup> The former is frequently very difficult to prove, because such a crime is often not reported and investigated until many months after its occurrence. For all practical purposes, a pregnancy leaves no traces, so that one has to depend on the testimony of the woman or of the abortionist. It is quite obvious, however, that they will often give conflicting testimony. In such cases, it is generally felt that the first statement of the woman usually comes closest to the truth; however, the relative weight ultimately given to the evidence depends upon the credibility of the testimony, the interpretation of which is up to the judge, rather than the medical expert. But the expert has to point out to the judge the incredibility of certain statements, based upon his medical knowledge.

Generally, it is also difficult to prove the second element — that suitable means had been employed. This holds true especially with internally applied or only potentially toxic substances and, to a lesser degree, with mechanical instruments. With the latter, one has to decide whether the instrument per se is suitable, and also whether it would have been effective in the particular case at hand. It is often claimed by the accused that a catheter was introduced only into the vagina, to appease a client, without actual intent to perform an abortion, or that a vaginal douche was applied only for the sake of appearance, while the abortion allegedly resulted from natural causes or subsequent intervention by another person. Particularly convincing as evidence would be the examination of recovered

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or aids in an abortion, and whose action is not punishable under § 100, will be imprisoned up to 6 months, unless he acted in an immediate emergency to save the life of a pregnant woman, and conditions prevented prompt summoning of a physician. 1964 E.S. Proposed § 102, and comment at 18.

<sup>30</sup> 1964 E.S. Proposed § 103, and comments at 20. This is equivalent to about \$20,000.

<sup>31</sup> For a list of pertinent legal literature, see 1 ALTMANN & JACOB, *op. cit. supra* note 23, §§ 2, 3, at 376-77; 2 RITTLER, *op. cit. supra* note 23, at 17-18; HOFMANN & HABERDA, *LEHRBUCH DER GERICHTLICHEN MEDIZIN* 211 (2d ed. 1927).



products of conception, but these are usually discarded and destroyed. It requires a great sense of responsibility and experience to answer a question concerning causal relation between a given procedure and abortion in such a way that the court can arrive at a just decision.

### B. Germany

(1) *The Code Provisions of West Germany.*—The legal provisions concerning abortion are set forth in the German Criminal Code of 1871.<sup>32</sup> There, it is provided that any woman who performs an abortion on herself, or permits such an act, and any other person who performs an abortion on another, or is an accomplice thereto, will be imprisoned. The attempt to commit these acts is also punishable.<sup>33</sup> The advertisement or manufacture of objects or methods designed to produce an abortion is also proscribed activity.<sup>34</sup> In addition, the public offering of abortion services is punishable by imprisonment up to two years or by a fine.<sup>35</sup>

(2) *Proposals for Reform.*—This Code of 1871 is slated to be replaced by a new code.<sup>36</sup> Its 1959 draft states: "Impunity is granted when according to prevailing medical knowledge, only this procedure can prevent danger to the life, or severe damage to the health of the mother."<sup>37</sup> Also new is the acknowledgment of an "ethical indication": "Medical intervention is not punishable when pregnancy is the result of rape, when the woman consented to the procedure, and not more than 12 weeks have elapsed since im-

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<sup>32</sup> KOHLRAUSCH & LANGE, DEUTSCHES STRAFGESETZBUCH MIT ERLÄUTERUNGEN §§ 218-20, at 483-89 (1961).

<sup>33</sup> The statute provides: "A woman who performs an abortion on herself, or permits such an act, will be punished with imprisonment. The attempt is also punishable. Any other person who produces an abortion or is an accomplice will be punished with imprisonment." 1964 E.S. Proposed § 218, at 483.

<sup>34</sup> "Whoever advertises or manufactures objects or methods which are supposed to achieve abortion or prevent pregnancy or venereal disease, shall be punished with up to 2 years in prison or a fine." *Id.* § 219, at 488.

<sup>35</sup> The statute states: "Whoever publicly offers his or somebody else's services to perform or aid in an abortion, shall be punished with up to 2 years in prison or a fine." *Id.* § 220, at 489.

<sup>36</sup> BUNDESMINISTERIUM FÜR JUSTIZ, ENTWURF EINES STRAFGESETZBUCHES §§ 140-44 (abtreibung), 157-60 (ärztlicher Eingriff an Schwangeren), and comments (1959) [hereinafter cited as 1959 E.S. Proposed]; BUNDESMINISTERIUM FÜR JUSTIZ, ENTWURF EINES STRAFGESETZBUCHES E. §§ 140-45 (abtreibung), 157-59 (ärztlicher Eingriff an Schwangeren), with reasoning (1962) [hereinafter cited as 1962 E.S. Proposed].

<sup>37</sup> 1959 E.S. Proposed § 157, at 47; 1962 E.S. Proposed § 157.

pregnation, provided that rape was reported to the authorities in time."<sup>38</sup>

According to present German law, even an attempt with unsuitable means *or* on an unsuitable subject, as well as an attempt with unsuitable means *and* an unsuitable subject, is punishable.<sup>39</sup> In contrast, according to the Austrian Code, an attempted abortion by unsuitable means or with an unsuitable subject is not punishable.<sup>40</sup>

(3) *Pre-1947 East German Code Provisions.*—Prior to 1947 in East Germany, the provisions of the code described above for West Germany were in force. However, in that year they were repealed.<sup>41</sup> In view of the prevailing poor economic conditions, a liberalization of the "indication" for abortions was decided upon. Together with the medical "indication," broadened sociomedical, ethical, and eugenic "indications" were introduced. This resulted in an increase in the legal as well as the criminal abortions and created a dangerously liberal attitude regarding abortion among women.<sup>42</sup> Therefore, when the economic and social conditions improved in East Germany, a law protecting mother and child was decreed in 1950. Limitation of acceptable "indications" coupled with financial aid to promote the number of marriages were supposed to increase the desire for more children. Nevertheless, the increase in the number of births of only four-tenths of one per cent over the number of deaths<sup>43</sup> hardly guarantees preservation of the present population.

(4) *Current Code Provisions of East Germany.*—In East Germany, the procedure is governed by a new law guaranteeing the protection of mother and child.<sup>44</sup> The code provides that abortion will be permitted only if the pregnancy would seri-

<sup>38</sup> 1959 E.S. Proposed § 160, at 48. The 1962 draft eliminated this section. See 1962 E.S. at 296.

<sup>39</sup> MAURACH, *GELTENDES DEUTSCHES STRAFRECHT (BESUNDERER TEIL)* 52-70 (4th ed. 1964).

<sup>40</sup> See text accompanying note 31 *supra*.

It is interesting to note that in Germany, permission by designated medical experts is required for therapeutic abortion. The procedure has to be performed in a hospital. MUELLER, *GERLICHICHE MEDIZIN* 917 (1953). See Hermesen, *Die Abortsituation in der Deutschen Bundesrepublik (West-Deutschland) Referat auf der Internationalen Arbeitstagung*, in MEHLAN, *op. cit. supra* note 2, at 41-51.

<sup>41</sup> Mehlán, *Die Abortsituation in der Deutschen Demokratischen Republik (Ost-Deutschland) Referat auf der Internationalen Arbeitstagung*, in MEHLAN, *op. cit. supra* note 2, at 53.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Id.* at 63.

<sup>44</sup> MEHLAN, *op. cit. supra* note 2, at 52-63, 254-57 (app.).

ously endanger the life or health of the woman, or if one parent suffers from a severe hereditary disease.<sup>45</sup> Even the permissible abortion can be performed only with the consent of a commission consisting of physicians, representatives of the health department, and members of the Democratic Women's League.<sup>46</sup>

### C. *Switzerland*

According to Swiss law,<sup>47</sup> a pregnant woman may be imprisoned if she commits an abortion on herself or has such an operation performed by another.<sup>48</sup> The abortionist will be punished, whether or not he obtained the woman's consent before performing the operation; however, the punishment is more severe if he did not obtain her consent prior to the operation.<sup>49</sup>

The Swiss Code does, however, grant impunity for abortions committed under certain circumstances. Thus, an abortion may be performed by a licensed physician to obviate danger to the life and health of a pregnant woman, provided: (1) the written consent of the pregnant woman is obtained; (2) the expert opinion of a second physician has been obtained; and (3) the physician reports such a procedure within twenty-four hours to the appropriate authorities.<sup>50</sup> Also, punishment will be mitigated if the pregnancy is

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<sup>45</sup> The code provides in § 11: "In the interest of protecting the health of the woman, and in providing for the desired increase in the birth rate an artificial abortion is only permissible when pregnancy seriously endangers the life, or health of the woman, or one parent is afflicted with a severe hereditary disease. Any other termination of pregnancy is prohibited, and will be punished according to the law." For a discussion of § 11 of the code, see *id.* at 245.

<sup>46</sup> *Ibid.*

<sup>47</sup> The legal provisions concerning abortion are outlined in articles 118 to 121 of the Swiss Criminal Code. GERMANN, SCHWEIZERISCHES STRAFGESETZBUCH MIT KURZEN ERLÄUTERUNGEN 178-82 (1962).

<sup>48</sup> Article 118 of the Swiss Criminal Code of 1942 provides the following: "If a pregnant woman commits abortion on herself or has such abortion performed, she shall be imprisoned. The statute of limitations is 2 years." *Id.* at 179.

<sup>49</sup> Article 119 of the Swiss Criminal Code of 1942 provides the following:

(1) Whoever aids a pregnant woman with abortion or performs the abortion with her consent, shall be punished with imprisonment up to 5 years. The statute of limitations is 2 years.

(2) Whoever performs an abortion without consent of the pregnant woman, shall be punished with imprisonment up to 10 years.

(3) Imprisonment is not to be less than 3 years: if the perpetrator is a professional abortionist, if the pregnant woman dies as the result of the abortion and if the perpetrator could anticipate such an event. *Id.* at 179-80.

<sup>50</sup> Article 120 of the Criminal Code provides:

(1) An abortion within the meaning of the law does not exist, when the pregnancy is interrupted with written consent of the pregnant woman, performed by a licensed physician, who has obtained an expert opinion of

interrupted because of some other emergency.<sup>51</sup> If a physician fails to report an abortion under the above procedure, he can be arrested or fined.<sup>52</sup>

The above provisions of the Swiss Criminal Code demonstrate that a genuine social or eugenic indication *expressis verbis* is not recognized; however, the interpretation of the legal limits in the Code is very broad. For instance, the statute of limitations is only two years,<sup>53</sup> and the provision on mitigation of punishment where there is "some other serious emergency"<sup>54</sup> opens the door for possible "social" or "eugenic indications." Harsh punishment is directed particularly against professional abortionists who, devoid of social conscience, take advantage of destitute women for financial gain, although they claim social reasons as justification of their actions. Punishment is harsher if death, which could have been foreseen by the operator, occurred.<sup>55</sup> However, proving "foreseeable death" is very difficult most of the time, if the abortionist is not a physician.

A comparison of the codes of the three countries indicates that the Swiss Criminal Code is similar to the German Criminal Code, but is basically quite different from the Austrian Criminal Code.

## II. ABORTION TECHNIQUES

### A. *Drugs and Related Substances*

The scope of this article does not permit discussion of innumer-

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a second physician, in order to avert otherwise unpreventable danger to the life or permanent damage to the health of the pregnant woman.

The expert opinion (see Section 1) must be rendered by a competent specialist, who is authorized by the local authorities, where the pregnant woman resides or where the operation is to be performed. If the pregnant woman is not competent to judge, written permission from her legal guardian is necessary.

(2) The regulations concerning an emergency (Art. 34, No. 2) remain extant, if an immediate, not otherwise avertable, danger to life or gross danger of permanent damage to the health of the pregnant woman exists, and the abortion is performed by a licensed physician.

In such cases, the physician has to report such a procedure within 24 hours to the appropriate authorities. *Id.* at 181-82.

<sup>51</sup> Article 120 of the Criminal Code concludes:

(3) In cases where the pregnancy is interrupted because of some other serious emergency, the judge can extenuate the punishment, according to his judgment. (Art. 66).

(4) Article 32 is waived. *Id.* at 182.

<sup>52</sup> Article 121 of the Swiss Criminal Code states: "A physician, who fails to report an abortion, performed under Art. 120, No. 2, shall be arrested or fined." *Id.* at 182.

<sup>53</sup> See notes 48, 49 *supra*.

<sup>54</sup> See note 51 *supra*.

<sup>55</sup> See Article 119, No. 3 quoted in full at note 49 *supra*.

able plant extracts, drugs, hormones, and chemical substances that have been employed over the years to induce abortion. The ingestion of chemical substances as abortifacients has given way to more effective external methods. At best, chemical methods are still used to supplement mechanical means. The desired effect of these toxic substances is to destroy the fetus or to produce congestion of the uterine mucosa with resulting hemorrhage at the implantation site of the fertilized ovum.<sup>56</sup> Essentially, there are no effective substances which can be taken internally and will destroy the fetus or produce labor contractions without concomitant danger to the mother. If the ingestion of such substances results in a miscarriage, the woman may have been prone to abort spontaneously regardless of the ingested substance, or the abortion may have constituted only one manifestation of a generalized poisoning of the pregnant woman.

Quinine, for example, one of the commonly used abortifacients, is not, in itself, as effective as popularly claimed. If large enough doses are given to produce labor contractions, the systemic toxicity may be fatal to the mother. Experts report that if an abortion follows smaller, non-lethal doses, a condition of barely perceptible contractions pre-existed.

Suffice it to say, that the notorious unreliability of ingested substances has diminished their use as abortifacients, while mechanical means have gained in popularity.<sup>57</sup>

### B. *External Methods*

The pregnant uterus is relatively well-protected against external trauma. Ordinary activities of daily life and even more strenuous pursuits, such as dancing, horse-back riding, driving on bumpy roads, and lifting heavy objects have been wrongly accused of being causally related to abortion. Only if this activity is superimposed on an already existing constitutional tendency to abort spontaneously can speculation of a causal relationship have some validity.<sup>58</sup> Direct trauma to the abdomen is significant only if actual injury to the uterus or to placental attachment can be proven. Occasionally, more bizarre methods are employed, such as the application to the abdo-

<sup>56</sup> HOFMANN & HABERDA, *op. cit. supra* note 31, at 222-39; MUELLER, *op. cit. supra* note 40, at 919-27.

<sup>57</sup> 8 REUTER, BIOLOGIE UND PATHOLOGIE DES WEIBER 967-1342. For a discussion on abortion, see *id.* at 1173-1235.

<sup>58</sup> HOFMANN & HABERDA, *op. cit. supra* note 31, at 239-58; MUELLER, *op. cit. supra* note 40, at 930-33; 8 REUTER, *op. cit. supra* note 57, at 1193-1202.

men of electric shocks (frequently fatal), ultra-sonic therapy, or ultra-short wave radiation.

A great variety of poisonous substances introduced into the vagina by douche or by hand are only potential abortifacients.<sup>59</sup> They are only effective by penetration into the uterine cavity itself or by toxic action of the poison after its absorption through the vaginal mucosa into the circulation.

Far more effective is mechanical manipulation of the uterine cervix and the uterine cavity itself.<sup>60</sup> Elongated objects may be inserted by the woman herself or, more frequently, by another person. The desired uterine contractions are produced by several mechanisms: (1) laceration of the fetal membranes allowing the amniotic fluid to escape with subsequent contractions of the uterine muscle and expulsion of the fetus;<sup>61</sup> (2) introduction of long, thin, sharp objects into the uterus which can injure the site of implantation and cause hemorrhage which precipitates premature separation and expulsion of the placenta;<sup>62</sup> (3) direct injection into the uterus of a great variety of irritating substances, such as soapy water and various disinfectants. Beyond the potentially toxic effects of these irritating substances, air embolism is a common complication. The use of abortifacient pastes, on the other hand, may result in oil embolism. More recently, formalin or saline solutions have been injected into the uterus as a bona fide method of producing therapeutic abortion.<sup>63</sup>

Fatal complications of mechanical manipulation are frequently related to perforation of the uterus by the probing instrument. It is noteworthy that this is more frequently observed with physicians who perform the abortion rather than with amateurs, who prefer other methods. The most common cause of death in induced abortions, however, is a septic infection. Poor techniques, even when the instruments are properly sterilized, allow pathogenic bacteria from the vagina to gain entrance to the inner lining of the uterus. At the operative site, their growth and spread are enhanced by the damaged tissues and associated blood clots. For a more detailed discussion of the characteristic complications and causes of death, the reader is referred to appropriate medical texts.<sup>64</sup>

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<sup>59</sup> MUELLER, *op. cit. supra* note 40, at 929.

<sup>60</sup> *Id.* at 930.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Id.* at 931, 934.

<sup>63</sup> *Id.* at 934.

<sup>64</sup> *Id.* at 937-39. See generally GONZALES, VANCE, HELPERN, & UMBERGER, *LEGAL MEDICINE, PATHOLOGY AND TOXICOLOGY passim* (1954).

### III. MEDICAL INDICATIONS FOR "THERAPEUTIC ABORTIONS"

Modern advances in therapy have greatly changed medicine's attitude toward therapeutic abortions.<sup>65</sup> Present knowledge shows that one must proceed cautiously in broadening the definition of a "medical indication." A number of "medical indications" of the past have proven to be erroneous, as for example when a particular disease was found to be curable by modern techniques. Today, conscientious physicians and medicolegal experts should only rarely accept a medical indication as convincing. Frequently, in disputed cases, the problem is really not a scientific one, but rather a pseudo-scientific attempt to justify abortion for personal reasons. "Eugenic indications" must be scrutinized just as thoroughly as other medical indications, since our knowledge of the transmission of hereditary diseases is frequently quite fragmentary.

Generally speaking, termination of pregnancy may be considered in three categories: diseases resulting from pregnancy; diseases aggravated by pregnancy; and diseases of the reproductive organs.<sup>66</sup> The following considerations predominantly reflect the current concepts in Germany. The diseases under discussion, of course, are only representative, and it does not necessarily follow that the presented point of view is one accepted by everybody.

#### A. *Diseases Resulting From Pregnancy*

Termination of pregnancy for hyperemesis gravidarum<sup>67</sup> is no longer an accepted indication, while acute yellow atrophy of the liver, whether or not related to pregnancy, is a definite one. Pyelonephritis<sup>68</sup> of pregnancy should only rarely demand an interruption. As with other kidney diseases, abortion is only indicated if the symptoms become progressively worse, in spite of therapy. Therapeutic abortion in the case of postpuerperal<sup>69</sup> recurrent depression may be an acceptable indication, according to psychiatric consultants.

#### B. *Diseases Aggravated by Pregnancy*

Skin diseases should justify an induced abortion only in extreme cases. The same holds true for bronchial asthma, chronic

<sup>65</sup> MUTH & ENGELHARDT, SCHWANGERSCHAFTSUNTERBRECHUNG UND STERILISATION IN NEUERER SICHT 34-149 (1964).

<sup>66</sup> *Id.* at 34-53.

<sup>67</sup> Pernicious vomiting in pregnancy. See *id.* at 35, 37.

<sup>68</sup> Interstitial inflammation of one or both kidneys. See *id.* at 42-44.

<sup>69</sup> After pregnancy. See *id.* at 49-51.

emphysema,<sup>70</sup> and most heart diseases. Even myocardial infarction<sup>71</sup> is not an acceptable indication, since the operation itself may be more dangerous than an uninterrupted pregnancy. Pulmonary tuberculosis was long considered as being unfavorably influenced by pregnancy; but today, experts deny that the influence is significant.<sup>72</sup> Since the progressive course of blood-dyscrasias<sup>73</sup> and lymphomas<sup>74</sup> is not altered by termination of the pregnancy, this group of diseases, too, does not constitute a bona fide "indication." Other conditions which are generally unacceptable are Grave's disease,<sup>75</sup> tetany,<sup>76</sup> manic-depressive psychoses, and suicidal threats. The latter are frequently used to obtain permission for abortion by putting the psychiatrist under duress.

Other neurological or psychiatric diseases should only constitute an "indication" when the concurrence of pregnancy and aggravated symptomatology are evident. Thus, epilepsy should only be considered an "indication" when the seizures during pregnancy become so frequent that a status epilepticus<sup>77</sup> can be anticipated. However, diseases such as severe Korsakow-psychosis<sup>78</sup> or schizophrenia are commonly accepted as an "indication." Abortion in the case of diabetes mellitus,<sup>79</sup> cirrhosis of the liver, and ulcerative colitis<sup>80</sup> is only justified if the symptoms are severe, progressive, and therapy-resistant.<sup>81</sup>

### C. *Diseases of the Reproductive Organs*

As to diseases of the uterus itself, a therapeutic abortion for

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<sup>70</sup> A condition in which there is overdistention of the air spaces in the lungs or in which there is abnormal presence of air or gas in the body tissues. See *id.* at 44, 75-81.

<sup>71</sup> A kind of heart attack. See *id.* at 84.

<sup>72</sup> *Id.* at 65.

<sup>73</sup> An abnormality of the blood condition. See *id.* at 69.

<sup>74</sup> A group of malignant or premalignant conditions of lymphoid tissue. See *id.* at 102.

<sup>75</sup> A disease caused chiefly by overproduction of the thyroid hormone, characterized by goiter, etc. See *id.* at 104.

<sup>76</sup> A disease characterized by intermittent bilateral, painful tonic spasms of the muscles, in children and young adults. See *id.* at 105.

<sup>77</sup> A condition in which epileptic attacks occur in rapid succession, the patient not regaining consciousness during the interval.

<sup>78</sup> Polyneuritis with loss of memory, a retrograde amnesia. See *id.* at 130.

<sup>79</sup> A disease in which the metabolism (body utilization) of sugars is greatly impaired, due to the faulty secretion of insulin by the pancreas.

<sup>80</sup> An inflammation of the colon (the large bowel) characterized by ulceration of its lining membrane.

<sup>81</sup> *Id.* at 137.



uterine leiomyomata<sup>82</sup> is generally denied. On the other hand, there is little controversy if a fetus has to be sacrificed subsequent to surgery for a malignant tumor, discovered during the early stages of pregnancy.<sup>83</sup> At a later stage, radical surgery can be preceded by a Cæsarian section.

#### IV. CONCLUSION

In the German-speaking countries, one basic attitude toward therapeutic abortion may be discerned. Only if the patient's condition deteriorates and she is resistant to therapy should the termination of the pregnancy be allowed, and then, only as a last effort to change the course of the patient's disease. Never should this form of treatment mark the beginning of therapeutic efforts, but rather it should constitute a means of last resort. A physician who does not follow this rule becomes subject to punishment. As a matter of course, there are always exceptions to the rule. But if an exception is to be made, it must have justification. It should be emphasized that no medicolegal expert will condemn an honest opinion by a conscientious physician. Such cases rarely come before a tribunal. The instances where typical cases of abortion by physicians are tried in court are those in which pseudo-scientific facts are employed to justify "medical indications" for an unethical procedure.

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<sup>82</sup> A benign tumor consisting largely of smooth muscle cells; these tumors are usually multiple when in the uterus. See *id.* at 53-65.

<sup>83</sup> *Id.* at 59.