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The Evolving Law of Abortion

B. James George, Jr.

LAWS REGULATING SEXUAL BEHAVIOR have no peers when it comes to stirring up intense emotional reactions; when the element of life itself combines with human sexuality, as it does only in the context of abortion, the intensity of emotional disagreement and conflict is compounded. In the short span of years since 1966, the starting date of a definite trend toward liberalization of abortion laws, proponents of liberalized abortion have gained significant ground on both the legislative and judicial fronts. Despite these successes, the battle over abortion law reform or revision remains intense. And this battle is likely to continue because there is fundamental and probably irreconcilable disagreement over the primacy of personal and social interests and the extent to which these interests are to be effectuated through the law.

I. CONFLICTING INTERESTS AFFECTED BY ABORTION LEGISLATION

Any discussion of abortion necessarily revolves around four different foci: the fetus itself, the pregnant woman, the family into which the expected child will be born, and the surrounding community. As to the first of these, the fetus, there is clearly a semantic problem in that the choice from among an array of terms — conceptus, zygote, embryo, fertilized ovum, fetus, and prenate infant — is probably more an index to the thinking of the speaker than it is a scientifically accurate choice of terms.1 Whatever the term selected, concern with the fetus typically reflects two contradictory schools of thought. According to one of these schools, there is inviolate life in being from the time of fertilization of the ovum. The strongest adherence to this view of course, is found within the Roman Catholic faith, which condemns abortion under all circum-

1 On other semantic aspects of the abortion debate, see Hardin, Semantic Aspects of Abortion, 24 ETC.: A REVIEW OF GENERAL SEMANTICS 263 (1967).
stances, although there is also strong Protestant support for the idea. The second view is that the possible fate of the fetus, if it were to go to term, should be taken into account. If the child would be born deformed, mentally defective, or otherwise incapable of living a normal life, or if it would be born into a highly detrimental environment which could not be reasonably compensated for, it is preferable that its incipient life be nipped in the bud. This premise is likely to be an incidental argument to advocacy of liberalized abortion based on social necessity. Adoption of the first view of fetal life means rejection of all abortion, or any abortion unnecessary to save the life of the mother; to adopt the second is usually to favor abortion in at least some greater range of situations.

The second focus is the pregnant woman. Most of the propositions advanced on this point are basically favorable to her obtaining an abortion. The only exception is the contention that intercourse which produces pregnancy is licit only if done within marriage and for procreation, and that an unwanted pregnancy is not only unfortunate, but the fulfillment of Divine mandate. Therefore, the woman must carry the child to term, whatever the conse-

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8 For an interpretation of Saint Augustine's view of sexual relations not too far from this, see D. Bromley, Catholics and Birth Control 9-15 (1965).
quences. This exception aside, most statements of policy are sympathetic inclined in favor of the pregnant woman, although not all of these necessarily favor according her a free choice in the matter of abortion. The most obvious point of concern is for the life of the woman—because there are medical indications that she may not survive a pregnancy, because she may attempt suicide if she cannot obtain an abortion, or because she may submit to the hazards of an illegal abortion at the hands of an untrained physician if she is denied the facilities of a reputable hospital or clinic. A further point of emphasis is the concern for the pregnant woman's physical and mental health. All of these factors, of course, tend to support the rationale in favor of a liberalization of abortion laws. But it should be noted that one area of concern, the mental health

9 E.g., Comment, supra note 7.

10 With advances in medical knowledge, there are probably fewer instances today than formerly in which the pregnant woman is unlikely to survive. See Mahoney, Therapeutic Abortion — The Psychiatric Indication — A Double-Edged Sword?, 72 DICK. L. REV. 270, 278-80 (1968); Guttmacher, Abortion Laws Make Hypocrites of Us All, 4 NEW MEDICAL MATERIA 56 (1962); Hall, Therapeutic Abortion, Sterilization, and Contraception, 91 AM. J. OBSTETRICS & GYNECOLOGY 518, 522 (1965); Russell, Therapeutic Abortions in California in 1950, 60 W. J. SURGERY, OBSTETRICS, & GYNECOLOGY 497, 500 (1952). The hypothetical cases used as the survey reported in Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 STAN. L. REV. 417, 431-44 (1959), include several in which the life of the mother might well be shortened were the pregnancy carried to term. As to one experience under a system of relatively unrestricted medical abortions, see Otossen, Legal Abortion in Sweden: Thirty Years' Experience, 3 J. BIOSOC. SCI 173, 180-81 (1971). The matter of the relative mortality rates of therapeutic abortion and childbirth also figured in the California Supreme Court's interpretation of that state's pre-1967 abortion statute. People v. Belous, 71 Cal. 2d 954, 969-74, 458 P.2d 194, 203-06, 80 Cal. Rptr. 354, 363-66 (1969).

11 This is not a particularly high statistical possibility. See, e.g., Bolter, The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice, 119 AM. J. PSYCH. 312 (1962); Mahoney, supra note 10, at 286-91; Rosenberg & Silver, Suicide, Psychiatrists and Therapeutic Abortion, 102 CALIF. MED. 407 (1965); Walter, Psychologic and Emotional Consequences of Elective Abortion, 36 OBSTETRICS & GYNECOLOGY 482 (1970). For the Swedish experience, see Otossen supra note 10, at 181-85, 187. For a methodology in ascertaining the psychic potential of permitting or refusing a therapeutic abortion, see Butler, Psychiatric Indications for Therapeutic Abortion, 63 SO. MED. J. 647 (1970).


of the woman, is also emphasized in the contrary assertion that an abortion works irreparable psychological harm to the woman. ¹⁴

A third focus is the family unit of which the pregnant woman is a part and into which the new baby will be born. Some stress concern for the freedom of the sexual partners to decide whether and when they will have children. ¹⁶ Others emphasize the economic well-being of the whole family, which may be adversely affected if the same resources must be stretched to care for another member, or concentrate on the mother's care of the living siblings who might be detrimentally affected by yet another addition to the family unit. ¹⁶ A person who emphasizes these factors is almost certain to favor liberal abortion, particularly if approved and administered through medical channels. ¹⁷

The final focus is on the needs of the community. Any of the concerns already listed can of course be restated in terms of social interests (e.g., protection of the life of the fetus or the mother, protection of the health of the mother, or protection of the viable


¹⁵ "Is it not time . . . that we matured sufficiently as a people to assert once and for all that the sexual purposes of human beings and their reproductive consequences are not the business of the state, but rather free decisions to be made by husband and wife?" Rabbi Israel Margolies, quoted in Hall, Thalidomide and Our Abortion Laws, 6 COLUM. U. FORUM 10, 13 (1963). See also J. FLETCHER, MORALS AND MEDICINE 92-99 (Beacon Press ed. 1960); Thomson, supra note 7.

¹⁶ Only Japan appears to embody this specifically in its statute. Article 3(5) of the Eugenic Protection Law of 1948, (Yūseibōdō, Law No. 136, of 1948, ROPO ZENSHO 2108 [1971 ed.]) permits an abortion "if there are several children and the mother's health will be seriously impaired if she again delivers." Article 14 permits a doctor empowered by a district medical association to terminate a pregnancy in his discretion, and with the consent of both husband and wife, for several reasons, including the likelihood of substantial injury to the mother's health for either physical or economic reasons if the pregnancy continues to term (author's translation and paraphrase). Some Scandinavian laws go almost this far. Clemmesen, State of Legal Abortion in Denmark, 112 AM. J. PSYCH. 662 (1956); Klintskog, Survey of Legislation on Legal Abortion in Europe and North America, 21 MEDICO-LEGAL J. 79 (1953). On changing societal attitudes as a result of relatively unrestricted medical abortions, see Ottosson, supra note 10, at 190-91. The recent English statute, The Abortion Act of 1967, c. 87, § 1(2), also permits a medical practitioner to take account of "the pregnant woman's actual or reasonably foreseeable environment" in deciding whether under section 1(1)(a) there is a risk of "injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated." See Simms, Abortion Law Reform: How the Controversy Changed, 1970 CRIM. L. REV. 567, 568-71. Cf. ORB. REV. STAT. § 435.415(2) (1971) permitting consideration of actual or reasonably foreseeable total environment in considering whether pregnancy poses a substantial risk to the woman's physical or mental health.

family unit). But with the community dimension, there are at least two additional concerns. One is the factor of population control. Abortion is clearly one means of birth control, albeit a much less satisfactory method than mechanical or chemical means of contraception. But it is only in Japan that population control appears to be the primary basis for statutes authorizing medical abortion on socio-economic grounds, which is a result of the traditional Japanese belief that contraceptives are not used by proper married couples. As contraception becomes more generally accepted among younger couples, particularly those who set up nuclear family units in urban centers, the population-control function of abortion in Japan will probably decline to about the same level as in Western countries.

Some writers suggest there may be an impermissible exercise of state power inherent in any legal use of abortion as a means of population control, or that there may be too serious a decline in population to permit the state to survive. In general, however, population control is only incidental to the practice of abortion and is not a primary objective, thus, abortion poses no serious threat either to population or to personal liberties. The second social factor frequently advanced in support of relaxed abortion laws is

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18 There is of course the problem, as yet generally ignored, of distinguishing abortion from some forms of contraception, a problem that might be particularly troubling if the so-called "morning-after pill" is perfected and marketed. See Hardin, The History and Future of Birth Control, 10 PERSPECTIVES IN BIOLOGY & MEDICINE 1 (1966); Note, Criminal Law — Abortion — The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law, 46 ORE. L. REV. 211 (1967). Compare COLO. REV. STAT. § 40-6-101(1) (1969) and N.M. STAT. ANN. § 40A-5-1(A) (1969), which define pregnancy as "the implantation of an embryo in the uterus," with KAN. STAT. ANN. § 21-3407(3) (1969), which defines pregnancy as "that condition of a female from the date of conception to the birth of her child."

19 But see Roemer, Abortion Law Reform and Repeal: Legislative and Judicial Developments, 61 AM. J. PUB. HEALTH 500, 505-06 (1971), indicating similar trends in several Pacific Basin Countries.


21 R. DORE, CITY LIFE IN JAPAN 205 n.196 (1958).

22 But cf. Roemer, supra note 19.

23 But cf. Roemer, supra note 19.

24 This factor may account for the rescission of the law permitting easy abortion in Russia. See G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 219-20, 224 (1957). This rescission in turn, however, is reported to have been modified. P. GEBHARD, supra note 14, at 218. So was a similar change in Bulgarian law. Roemer, supra note 19, at 504.

the freedom of the medical profession to handle the abortion problem as it would any other medical problem — free from arbitrary legal controls.26

These, then, while not necessarily all, are the principal policy interests which are affected by and affect the coverage of abortion statutes and underlie the developing body of constitutional precedent. As will be shown,27 in most jurisdictions before 1967, abortions were permitted only to save the life of the pregnant woman. Many still consider this to be the maximum relaxation of a prohibition against abortion that a legal and social system can tolerate. For certain others, even this exception is intolerable; they believe there should be absolute prohibition of all abortions, whatever the circumstances.28 For many individuals in law, medicine, and society in general, however, the traditional law is entirely too strict and must be liberalized in those jurisdictions that have not yet revised their statutes.29

The author of this article stands with the latter group, which of course dictates in large measure the form and content of what follows. Briefly stated, his premises are these: women cannot be deterred from having sexual relations (nor their partners motivated to join them in abstinence) by the fear that they will have to carry a fetus to term if they become pregnant, any more than they will be deterred by being denied contraceptives or anaesthesia during childbirth.30 If they intend to have sexual relations, they will have them despite legal controls or unpleasant but remote physical consequences. To put the matter another way, proscribing abortion does not promote celibacy, nor does liberalizing abortion promote promiscuity. Among those women, married and unmarried, who become pregnant, a certain number will wish to be aborted. Those with money and connections will either find a compliant practitioner who


27 See text accompanying notes 37-47 infra.


29 See text accompanying notes 170-83 infra.

30 These are some of the propositions advanced by strict opponents of reform. Cf. G. WILLIAMS, supra note 24, at 61-65. See also Sturop, Abortion in Denmark, CRIMINOLOGICA, Feb. 1967, at 29, 33-34, noting no increase in "immorality" after liberalization of abortion laws in Denmark and Sweden.
will terminate the pregnancy safely (though not cheaply), or pur-
chase a ticket to a jurisdiction in which an abortion can be per-
formed openly. For those without the means or connections nec-
essary to obtain an abortion in that way, the choice is less satisfac-
tory. The mother may have to carry the fetus to term; if so, it
may not be born into a satisfactory home or may not be adoptable.
She may seek out an unqualified butcher, or she may have to try to in-
duce an abortion herself. Either alternative poses an abnormally
high statistical possibility of serious bodily injury, sterility, or death.

Though the community may encourage exhaustion of all other
alternatives before allowing abortion, it should facilitate perform-
ance of abortions in aseptic clinics rather than in motels or filthy
tenement rooms if it is in fact concerned with the life and health of
women who do not want to continue their pregnancies to term.
The logical thrust of these concerns is to authorize the performance
of abortions by qualified practitioners on medical grounds without
any controls other than those found in the law of medical malprac-
tice.

This, however, does not go beyond the freedom desired by those
doctors who want to practice medicine unfettered by special crimi-
nal statutes. There is an ever-increasing pressure from advoc-
cates of women's rights for complete freedom on the part of each
woman to determine the condition of her own body.\textsuperscript{31} Probably
there is no way intellectually or emotionally to resolve the conflict
between this position and that which accords an absolute primacy
to the rights of the zygote-embryo-fetus to life.\textsuperscript{32} Moreover, a recog-
nition of the right to the absolute control of one's own body creates
the problem of the degree to which doctors and hospitals, whether
public\textsuperscript{33} or private,\textsuperscript{34} must accommodate and make effective the
woman's desires despite their own unwillingness to do so. That
such conflicts are beginning to confront the courts and legislatures is
indication in itself that the claim to personal freedom for each wom-
an has made considerable headway in American law.

With this jurisprudential discussion as a background, this article
will turn now to a consideration of the legal regulation of abortion

\textsuperscript{31} See note 7 supra. See also Clark, Religion, Morality, and Abortion: A Constitu-

\textsuperscript{32} Wertheimer, Understanding the Abortion Argument, 1 PHILOSOPHY & PUB.
AFFAIRS 67 (1971).

\textsuperscript{33} Cf. Doe v. General Hospital, 434 F.2d 427 (D.C. Cir. 1970). See also note 210
infra.

\textsuperscript{34} See the statutory exemption of individual doctors and private hospitals in the
recent statutes cited in note 209 infra.
practices in the United States. Because our system of laws has only recently crossed a watershed between restrictive legislation and more permissive legal controls, the article will examine the legal coverage through 1966 and then consider the subsequent legislative and judicial developments.

II. LEGAL REGULATION OF ABORTION PRACTICES BEFORE 1967

A. Criminal Statutes

1. Statutes Penalizing Abortion. — Criminal statutes outlawing abortion are of relatively recent vintage, and there is so little common law authority covering abortion that it should play no significant role in evaluating the legality of abortion. The statutes may be roughly classified as those which prohibit all abortions and those which permit some abortions under carefully limited circumstances.

The statutes in four states — Louisiana, Massachusetts, New Jersey, and Pennsylvania — provide no specific exceptions to the general prohibition against abortion. In Massachusetts, however, the Supreme Judicial Court, by judicial construction, has added a limitation in favor of a physician who acts in the honest belief that the operation is necessary to save the woman from great peril to her life or health, if his judgment corresponds "with the average judgment of the doctors in the community in which he practices."  

35 G. WILLIAMS, supra note 24, at 152-56; Quay, supra note 28, at 231-38.

36 Most common law cases reach only conduct that causes a miscarriage of a pregnant woman after the fetus has quickened. R. PERKINS, CRIMINAL LAW 140 (1969). This rules out most abortions, for abortions generally must be performed within the first trimester of pregnancy to minimize the danger to the pregnant woman. See text accompanying notes 185-87 infra for the legislative handling of this problem in the new statutes.

37 LA. REV. STAT. § 14:87 (Supp. 1972). The only intent required is the intent to procure premature delivery of the embryo or fetus. There is internal inconsistency in Louisiana statutory law, however, in that the statement of causes for revocation of a medical license includes: "Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician . . . ." LA. REV. STAT. § 37:1285 (1964). If both are considered in pari materia, then Louisiana law is in accord with the majority of states as listed in note 46 infra.

38 MASS. GEN. LAWS ANN. ch. 272, § 19 (1968).


40 PA. STAT. ANN. tit. 18, § 4719 (1963). See also Trout, Therapeutic Abortion Laws Need Therapy, 57 TEMP. L.Q. 172, 184-86 (1964), for a discussion of the Pennsylvania abortion law.

In New Jersey the state supreme court apparently agreed that a doctor could act to save the life of the mother, although it did not agree that he could act merely to protect her health.42 In New Hampshire the statute prohibiting attempted abortion43 provides no exception, although the section penalizing an actual abortion44 does justify acts necessary to preserve the mother's life. In all the other states, the legislatures have specifically provided for certain instances in which abortions may be legally performed.45 In 44 states46 and


44 Id. § 585.13 ("unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman ... ").

45 This includes all the jurisdictions discussed in text accompanying notes 142-241 infra that have liberalized their statutes after 1966.

the District of Columbia. An abortion is permissible if it is necessary to save the life of the mother.

Even before the onset of reform legislation, a few states provided for abortion other than that necessary to preserve the woman's life. Seven states have permitted abortions to preserve the life of the unborn child, a qualification that probably has no functional effect other than to make it clear that induced labor is not a violation of the criminal law. Since a fetus has little chance of survival if it is born before the seventh month of gestation, and since most medically justified abortions are performed within the first trimester of pregnancy, this qualification has little impact on the abortion problem as such, and serves only to remove any hypothetical bar to generally legitimate obstetrical practice. A handful of jurisdictions before 1967 granted an even broader license to perform abortions necessary to prevent serious and permanent bodily injury or to protect the health of the mother. Florida and Massachusetts accomplished the same thing by judicial decision. This permits a more normal medical determination to be made than is the case when the law requires proof of a necessity to preserve the pregnant woman's life.

Under all these statutes, a number of difficult legal problems arose over how the statutory exceptions should be administered. One problem has to do with the matter of who is to be permitted to perform an abortion to save the pregnant woman's life or preserve her health. Fourteen states appear to permit anyone to perform the operation; the rest of the states have required that the abortion be

47 D.C. CODE ANN. § 22-201 (1967).

48 Connecticut, Minnesota, Missouri, Nevada, New York (but not under the Revised Penal Law in force since 1967), South Carolina (now repealed), and Washington (but see note 61 infra.]. The statutes still in force are cited in note 46 supra.

49 Both Colorado and New Mexico have since expanded the area of permissible medical abortions beyond this phraseology. COLO. REV. STAT. ANN. § 40-6-101(3)(a) (1971); N.M. STAT. ANN. § 40A-5-1 (Supp. 1971).


51 See, e.g., Walsingham v. State, 250 So. 2d 857 (Fla. 1971) (construing the then current statute which excepted abortions necessary to preserve the woman's life as meaning "physical and mental health"); Commonwealth v. Brunelle, 341 Mass. 675, 171 N.E.2d 850 (1961).

52 Several still continue to be live issues even under the liberalized statutes discussed in text accompanying notes 142-241 infra.

53 Alabama (but see the license revocation statute, ALA. CODE tit. 46, § 270 (1959); Arizona, Connecticut, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia and Wyoming. These statutes are cited in note 46 supra. All 18 states with recently revised legislation were originally in this group also.
done by a physician or surgeon. The Missouri statute seems to favor an unlicensed person. There, an abortion is unlawful unless necessary to preserve the woman's life or that of her unborn child. However, if the person who performs an abortion "is not a duly licensed physician," the abortion is lawful if its performance "has been advised by a duly licensed physician to be necessary for such a purpose." Thus, while a licensed physician is held to a standard of "objective necessity" for abortions he performs, an unlicensed person is apparently justified in acting upon the advice of a licensed physician, whether or not the abortion is objectively necessary. This theoretically protects, for example, the office nurse; but whether she should be protected is a matter on which opinions may well differ.

A second point of difference turns on whether necessity is to be determined on an objective, or strict liability, basis or whether the important issue is the good faith belief that justifying medical grounds exist. Many statutes in form support an interpretation that necessity is an objective element of the crime, although three of them have been interpreted to include a defense of good faith belief of necessity, despite their strict wording to the contrary. The harshness of these statutes is also modified to a degree if the burden is on the state to prove the want of medical necessity. In three states and the District of Columbia, however, statutes make it clear that it is the motivation and not the objective necessity which constitutes the basis for the exception from coverage. It is appropriate to mention here that several of the statutes enacted in

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55 Alabama, Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine (good faith belief no defense, State v. Rudman, 126 Me. 177, 136 A. 817 (1927)), Michigan, Minnesota, Missouri (but see text accompanying note 54 supra), Montana, Nevada, North Dakota (good faith belief no defense, State v. Shortridge, 54 N.D. 779, 211 N.W. 336 (1926)), Oklahoma, Rhode Island, South Dakota, Utah, Vermont and Wyoming. These statutes are cited in note 46 supra. The revised laws in Alaska, California, Delaware, Maryland, New York, North Carolina, Oregon, South Carolina and Washington, all formerly in this group, place the problem in a different perspective. See text accompanying notes 59 & 143-52 infra.
56 Steed v. State, 27 Ala. App. 263, 170 So. 489 (1936) (semble: a woman who consents to an abortion is an accomplice, unless she does so under an honest belief that the abortion is necessary to save her own life). Honnard v. People, 77 Ill. 481 (1875); State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592 (1928).
57 See text accompanying notes 149-50 infra.
1967 and later use the terminology of "reasonable belief." This is an effort to reach a compromise position between strict liability and subjective criminality, but what it achieves is criminality based on negligence, a standard of culpability that appears inappropriate in the context of abortion.

The common law requirement that the child be quick before there could be a criminal abortion has disappeared from the statutory law, which most commonly refers merely to "pregnancy" — 29 states utilize this approach. Five other states specify that

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62 Malpractice, if involved, can best be dealt with in the setting of revocation or suspension of the right to practice medicine. See text accompanying notes 112-22 infra. If death results from a grossly mismanaged operation, it can be brought within manslaughter or dealt with in a personal injury action. See text accompanying notes 132-42 infra.

63 An abortion statute, however, may be voided on one of the constitutional grounds being advanced with increasing frequency. See notes 227-37 infra & accompanying text. Should this happen in any state that has not by statute abolished criminal common law, the common law will be revived. See State v. Barquet, 10 Crim. L. Rptr. 2431 (Fla. 1972).

quickening does not matter, usually through the phrase "whether quick or not." Still another legislative cure for the interpretive problem has been accomplished through the employment of "attempt" provisions, which will be discussed below.66

Time of duration of pregnancy, however, has reappeared as an important factor in several of the recently revised statutes. Three states67 specifically limit the period of abortions to the period of nonviability, and six others68 place limits in terms of the weeks or days of pregnancy within which, other than in emergency situations, the operation must be performed. Under several of the older statutes, the fact of quickening or the passage of a specified portion of the gestation period also governs the severity of the punishment.69

Another set of legal problems arises when, despite efforts to abort the woman, no miscarriage occurs. This may happen either when the abortion operation is incompetently performed or when the woman is not in fact pregnant. Thirty-four states and the District of Columbia eliminate the first problem by penalizing the use of instruments, the administration of drugs, or the use of any other means intended to produce an abortion;70 Texas has a special attempt stat-

67 Ark. Stat. Ann. § 41-306 (Supp. 1969) has a four month residency requirement unless there is an emergency endangering the woman's life, which may be intended to have a similar functional effect.
68 See text accompanying notes 70-76 infra.
70 See text accompanying notes 70-76 infra.
ute. If the woman is not pregnant, however, it might be argued that the crime was "impossible" to attempt. Several states eliminate this as a defense, either by covering the doing of the prohibited acts to "any woman," to a woman "whether pregnant or not," or to a woman believed by the defendant to be pregnant. Several decisions support the idea that, under statutes like these, the victim need not be pregnant. In two states, however, punishment varies


according to whether or not a miscarriage is actually produced.\textsuperscript{77}

2. Statutes Prohibiting Killing an Unborn Quick Child. — Six states make it a separate offense wilfully to kill an unborn quick child under circumstances in which, if the mother and not the fetus had been killed, it would have been murder.\textsuperscript{78} The aim of these statutes is not entirely clear from either the language or the interpreting cases, but their target is probably the person who intends to cause a pregnant woman to miscarry without her consent and who uses physical violence against her body in an attempt to achieve that purpose. In legal concept, these laws clearly accord independent personality to the fetus,\textsuperscript{79} for the killing of the fetus under these circumstances is called manslaughter, and the sections themselves are usually found with other homicide provisions.

3. Statutes Penalizing Death of the Pregnant Woman Resulting From Abortion. — If a pregnant woman dies as the result of an abortion, there should be little difficulty in establishing either: (1) second-degree murder, based upon either felony murder in the context of commission of a felony not enumerated in the first-degree murder statute, the intentional infliction of great bodily injury, or the performance of an act with known dangerous consequences; or (2) manslaughter, based on gross criminal negligence.\textsuperscript{80} Several states, however, meet the problem directly in the context of the abortion statutes by providing for increased punishment for abortion if the woman dies as a result of the abortion,\textsuperscript{81} or by characterizing the death as either murder\textsuperscript{82} or manslaughter.\textsuperscript{83}


\textsuperscript{78} ARK. STAT. ANN. § 41-2223 (1964); FLA. STAT. ANN. § 782.09 (1965); MICH. COMP. LAWS ANN. § 750.322 (1968); MISS. CODE ANN. § 2222 (1957); N.D. CENT. CODE ANN. § 12-25-03 (1960) (semble); OKLA. STAT. ANN. tit. 21, § 713 (1958).

\textsuperscript{79} Cf. note 237 infra & accompanying text, where the matter of civil damages for prenatal injuries is discussed.


\textsuperscript{81} COLO. REV. STAT. ANN. §§ 40-6-102(2), 40-6-103(2) (1971); FLA. SESS. LAWS ch. 72-196 (West 1972); MASS. GEN. LAWS ANN. ch. 272 § 19 (1970); N.J. STAT. ANN. § 2A:87-1 (1969); N.M. STAT. ANN. § 40A-5-3 (Supp. 1971); R.I. GEN. LAWS ANN. § 11-3-1 (1970); S.C. CODE ANN. § 16-82 (1962); VT. STAT. ANN. tit. 13, § 101 (1958) (held unconstitutional in Beecham v. Leahy, ___ VT. ___, 287 A.2d 836 (1972)).

\textsuperscript{82} D.C. CODE ANN. § 22-201 (1967) (second degree murder); KY. REV. STAT. ANN. tit. 40, § 435.040 (1969) ("murder or voluntary manslaughter as the facts may
4. Statutes Penalizing the Woman Who Seeks an Abortion. — Absent a specific statute, a woman who seeks or submits to an abortion is usually not considered to be an accomplice to the abortion. Rhode Island and Vermont preserve this doctrine by statute, and the Reporter's Comment to the Louisiana statute indicates there is no intent to change the earlier Louisiana case law to the same effect. In several states, however, the legislatures have decreed that the woman commits a criminal act by soliciting or submitting to an abortion. These statutes appear to have two significant legal effects, and probably one practical result as well. First, they may be accompanied by statutes requiring the woman's testimony to be corroborated, or are held by judicial construction to require corroborated evidence.

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86 See, e.g., Heath v. State, 249 Ark. 217, 219, 459 S.W.2d 420, 422 (1970) (no corroboration of her testimony required); Commonwealth v. Follensbee, 155 Mass. 274, 277, 29 N.E. 471, 471 (1892); In re Vickers, 371 Mich. 114, 118-9, 123 N.W.2d 253, 254-5 (1963) (woman cannot claim self-incrimination); In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949) (no self-incrimination unless the fetus has quickened, in which case the offense is against the fetus and not the mother); State v. Shaft, 166 N.C. 407, 409, 81 S.E. 932, 933 (1914); Smartt v. State, 112 Tenn. 539, 554, 80 S.W. 586, 589 (1904); Williamson v. State, 33 Tex. Crim. 98, 99, 25 S.W. 424, 424 (1894). See also Committee Notes to GA. Code Ann. ch. 26-12 (1971).
87 Contra, Steed v. State, 27 Ala. App. 263, 263, 170 So. 489, 489 (1936); State v. McCoy, 52 Ohio St. 157, 160, 39 N.E. 316, 316 (1894). In Iowa, although a woman cannot be an accomplice to her own criminal abortion, she may be adjudged guilty of conspiracy if she consents to the operation. State v. Crofford, 133 Iowa 478, 480, 110 N.W. 921, 922 (1907). In that case the victim was not charged (she had died as a result of the abortion), but the theory was used to make her statements admissible as a declaration in promotion of the common enterprise. The Pennsylvania Supreme Court has said that the woman cannot be guilty of conspiracy because she is the victim. Snyder Appeal, 398 Pa. 237, 246, 157 A.2d 207, 212 (1960).
88 See, e.g., Heath v. State, 249 Ark. 217, 219, 459 S.W.2d 420, 422 (1970) (no corroboration of her testimony required); Commonwealth v. Follensbee, 155 Mass. 274, 277, 29 N.E. 471, 471 (1892); In re Vickers, 371 Mich. 114, 118-9, 123 N.W.2d 253, 254-5 (1963) (woman cannot claim self-incrimination); In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949) (no self-incrimination unless the fetus has quickened, in which case the offense is against the fetus and not the mother); State v. Shaft, 166 N.C. 407, 409, 81 S.E. 932, 933 (1914); Smartt v. State, 112 Tenn. 539, 554, 80 S.W. 586, 589 (1904); Williamson v. State, 33 Tex. Crim. 98, 99, 25 S.W. 424, 424 (1894). See also Committee Notes to GA. Code Ann. ch. 26-12 (1971).
ration. Second, the fact that the woman is deemed to have committed a criminal act means that she may claim privilege when she is summoned to testify for the state. However, because of the importance in many instances of the woman's testimony in establishing the abortionist's guilt, legislatures have had to provide either that the privilege against self-incrimination does not apply or that immunity against prosecution is conferred upon the woman when she testifies for the state. This brings the matter around full circle to where it would be if the woman were not considered a criminal in the first place. In addition to these two legal problems created by criminal sanctions against the woman, there may be some slight practical advantage to the prosecution in being able to coerce cooperation from the woman by threatening to prosecute her if she does not cooperate, while promising her immunity from prosecution if she does cooperate.

5. Statutes Penalizing Activity Which Facilitates Performance of Abortions. — A medical doctor who performs an abortion utilizes instruments which are part of the regular equipment of any gynecologist or obstetrician. It is not realistic to try to control traffic in these instruments, and in any case, the very nature of the channels which supply equipment to physicians and hospitals makes it unlikely that a layman could casually purchase it. But self-induced abortion is a major medical problem, and the devices or chemical substances used for "do-it-yourself" abortion are sufficiently identified and devoid of legitimate modern uses that some effort at controlling them can be made. In any event, legislatures have fairly consistently tried to regulate their availability.

The advertising of abortifacients is penalized in 23 states. In

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90 People v. Peyser, 380 Ill. 404, 44 N.E.2d 58 (1942); State v. McCoy, 52 Ohio St. 157, 39 N.E. 316 (1894).
96 Id. at 85-91.
19 of those jurisdictions there is a special statute covering the abortifacient either alone or in the context of medicines preventing conception, curing venereal disease, and the like,\textsuperscript{97} while in some jurisdictions this sort of advertising is prohibited in the context of obscenity regulation.\textsuperscript{98} Whether these statutes are in fact invoked at the local level is uncertain; there is a dearth of appellate opinion construing them.\textsuperscript{99} But if the state liberalizes its abortion laws to permit unrestricted medical abortions, efforts to interfere with advertising about the availability of abortions may be voided on constitutional grounds.\textsuperscript{100}

State legislatures also frequently seek to regulate the actual traffic in abortifacients by prohibiting their manufacture,\textsuperscript{101} distribution,\textsuperscript{102} furnishing,\textsuperscript{103} sale or keeping or exposing for sale,\textsuperscript{104} giving


\textsuperscript{99} The author has found only two cases, People v. McKean, 76 Cal. App. 114, 243 P. 898 (Dist. Ct. App. 1925); Commonwealth v. Hartford, 193 Mass. 464, 79 N.E. 784 (1907). See also Shapiro v. Board of Regents, 22 App. Div. 2d 243, 254 N.Y.S.2d 906 (1964), a license suspension case that appears to stress the physician's misrepresentation or fraud rather than his offer to procure an abortion.

\textsuperscript{100} See Mitchell Family Planning Inc. v. City of Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972), striking down an ordinance invoked against a private organization because it advertised its name and telephone numbers through which abortion information might be obtained. Note that Michigan retains a strict abortion statute, note 46 supra, exempting only operations to preserve the life of the pregnant woman. Nevertheless, the advertisement was held to be within first amendment protection because there was nothing to indicate that an unlawful abortion would be performed as the result of a call to a telephone number listed on a billboard.


Two states require that all sales be on registerable prescriptions. Oregon penalizes one who furnishes a place knowing that abortions, other than those performed as therapeutic under the medical licensing statutes, are to be performed there. These statutes have produced no appellate litigation, but their fate may well be that of the federal statutes which prohibit mailing, importing, and transporting various kinds of "obscene" matter, including articles for "producing abortion." The limited case law interpreting these sections in the context of traffic in abortifacients suggests that so long as the substance sold or transported has a legitimate medical or commercial use, it will not in fact be effectively covered by the legislation.

B. Administrative Sanctions

Criminal penalties are blunt instruments with which to regulate human conduct. More efficient control can often be effected through the state power to grant and revoke special licenses to engage in a business or profession, or by imposing administrative fines or penal-


106 COLO. REV. STAT. ANN. § 40-9-17 (1963) (obscenity statute); MASS. GEN. LAWS ANN. ch. 272, § 21 (1968) (see note 111 infra); MISS. CODE ANN. § 2289 (Supp. 1971) (obscenity statute).


109 Id. § 465.110.


111 Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103 (2d Cir. 1930) (dictum). See also Eisenstadt v. Baird, 40 U.S.L.W. 4503 (U.S. Mar. 22, 1972), where the Court held unconstitutional MASS. GEN. LAWS ANN. ch. 272, §§ 19, 21, 21A (1968). Specifically the Eisenstadt Court voided the conviction of a birth control advocate under the Massachusetts statute which prohibited distribution of contraceptive materials to unmarried persons except for the prevention of disease. This dissimilar treatment of married and unmarried persons violated the equal protection clause of the 14th amendment.
ties. For example, many aspects of prostitution are controlled primarily in this way. In the context of abortion, however, only licensed medical personnel and hospitals are subject to control through administrative action; a layman or a person with medical training whose license to practice has been revoked can be reached only through criminal prosecution. This does not mean, however, that licensing statutes and license revocation proceedings are unimportant in the context of abortion control. The claim that an abortion is justified because it is necessary to preserve the life, or the life or health, of the pregnant woman on whom it is performed is either limited in law to, or asserted in fact by, licensed medical personnel. Loss of a license to practice is such a fearsome thing to a professional person that medical licensing and license-revocation standards and procedures must be considered as prime controls on the availability of therapeutic abortions.

The overwhelming majority of jurisdictions authorizes revocation of a medical doctor's license when he has committed or participated in the commission of a criminal abortion. (Two states provide for revocation of the license in the criminal provision itself.) In most of these states the reference is to "criminal abortion" or "unlawful abortion," which seems to mean that the administration of the medical licensing law determines the administration of the medical licensing law. But in a growing number of states, as the concept of therapeutic abortion is established as part of legitimate therapeutic abortions.

112 George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717, 736-43 (1962).


medical practice, the regulation of which in turn is covered in the licensing provisions, the criminal code provisions serve the residual function of reaching those who either are not medical practitioners or are medical practitioners who do not comply with the provisions affecting them.\(^{115}\)

Performance of a criminal abortion is not mentioned as a ground for revocation of a license in the laws of the remaining jurisdictions. However, in these states there is statutory authorization for revocation based on conviction of a felony\(^{116}\) or unprofessional conduct in general.\(^{117}\) Since abortion has been denominated a form of unprofessional conduct,\(^{118}\) it is clear that there is no state in which a proven criminal abortionist can continue to practice without rendering his license subject to revocation. Many of the statutes cited above also include practitioners of the healing arts other than medical doctors. Some jurisdictions, however, have enacted special statutes covering osteopaths,\(^{119}\) nurses,\(^{120}\) midwives,\(^{121}\) and other practitioners specially regulated by law.\(^{122}\)

Most revocation proceedings are carried on as a purely administrative matter and are subject to review as are administrative proceed-

\(^{115}\) ALASKA STAT. § 11.15.060 (1970), § 08.64.105 (Supp. 1971); CAL. HEALTH & SAFETY CODE §§ 25950-54 (Supp. 1971); DEL. CODE ANN. tit. 24, § 1790 (Supp. 1970); HAWAII REV. STAT. § 453-16 MD. ANN. CODE art. 43, § 137(a) (1971); ORE. REV. STAT. §§ 435.405-495 (1969). The Alabama and Louisiana statues (see notes 46, 113 supra) have the licensure sections in terms broader than the criminal code provisions, which could create a problem of construction as to which controls. See note 37 supra.

\(^{116}\) D.C. CODE ANN. § 2-131 (1961); CONN. GEN. STAT. ANN. § 20-45 (1969); IND. ANN. STAT. § 63-1306 (1962); ME. REV. STAT. ANN. ch. 32, § 3203 (1964), as amended (Supp. 1972); N.H REV. STAT. ANN. § 329:17 (1966); OHIO REV. CODE § 4731.22 (Page 1953), as amended (Supp. 1970); S.C. CODE ANN. § 56-1368 (Supp. 1971) (conviction of "illegal practice" is also included; this may well include abortion).

\(^{117}\) MASS. GEN. LAWS ANN. ch. 112, § 61 (1965); MONT. REV. CODES ANN. § 66-1037 (2d Replacement vol. 1970). This phrase is also included in the various statutes cited notes 113, 116 supra.


\(^{120}\) ARIZ. REV. STAT. ANN. § 32-1663 (Supp. 1971-72). ILL. ANN. STAT. ch. 91, § 35.46 (Smith-Hurd Supp. 1972); CAL. BUS. & PROF. CODE § 2761 (West 1962) (nursing); id. § 2878 (vocational nursing).

\(^{121}\) COLO. REV. STAT. ANN. § 91-4-6 (1965); GA. CODE ANN. § 88-1405 (Rev. 1971); ILL. ANN. STAT. ch. 91, § 16a (Smith-Hurd Supp. 1972).

\(^{122}\) FLA. STAT. ANN. § 462.14 (1965) (naturopath), § 460.13 (Supp. 1971-72) (chiropractor); N.J. REV. STAT. tit. 54, § 634.010 (1967) (chiropractor); N.Y. EDUC. LAW § 6514 (1953) (physiotherapist); ORE. REV. STAT. § 684.100 (Supp. 1971) (chiropractor); id. § 685.110 (naturopath).
ings in general. Reviewing decisions usually examine only whether the administrative agency stayed within the proper limits of discretion in determining that charges were properly laid and substantiated and that disciplinary penalties were properly assessed.\textsuperscript{123} There are, however, two questionable aspects of the use of license revocation procedures against professional persons who are alleged to have committed abortions. It has been held that license revocation proceedings may be begun even though the statute of limitations has run on a criminal prosecution\textsuperscript{124} or the defendant has been acquitted in an earlier criminal prosecution based on the same act.\textsuperscript{125} Although as a general matter agencies which regulate professions should be able to remove the unfit from practice regardless of what may happen in specific criminal prosecutions or civil actions against them, it is doubtful that a properly performed abortion creates any medical problem as such or reflects adversely in any way on the level of professional skill of the person who performs it. Therefore, to revive an outlawed transaction or to proceed despite an acquittal looks as if the state is seeking again to exact retribution, rather than to protect the public against an inept medical practitioner. If the former is the case, it would seem close to or within the United States Supreme Court holding incorporating the doctrine of collateral estoppel into the constitutional concept of double jeopardy;\textsuperscript{126} furthermore, there are decisions holding that revocation of a license is a penalty which is outlawed by a statute conferring immunity in return for incriminating testimony.\textsuperscript{127}

Even more critical constitutional problems are raised if the disciplining authority insists on proceeding before pending or potential criminal charges are disposed of.\textsuperscript{128} The United States Supreme Court made it clear in \textit{Spevak v. Klein} that a professional license cannot be revoked or suspended merely on the ground that the person under investigation interposed a valid claim of privilege against self-incrimination.\textsuperscript{129} Therefore, if the licensing agency bases any


\textsuperscript{124} Blumberg v. State Bd. of Medical Examiners, 96 N.J.L. 331, 115 A. 439 (Sup. Ct. 1922).

\textsuperscript{125} State v. Lewis, 164 Wis. 353, 159 N.W. 746 (1916); Fla. Op. Att'y Gen. 505, 509 (1962).


\textsuperscript{127} Florida State Bd. of Architecture v. Seymour, 62 So. 2d 1 (Fla. 1952) (architect's license); Malouf v. Gully, 187 Miss. 331, 192 So. 2d 2 (1939) (liquor license).

\textsuperscript{128} See, e.g., Florida State Bd. of Medical Examiners v. James, 158 So. 2d 574 (Fla. App. 1964).

\textsuperscript{129} Spevak v. Klein, 385 U.S. 511 (1967). On the related matter of discharge or
part of its action on the claim of privilege, it denies due process to the respondent. Moreover, an insistence on carrying through with the matter may result in an impairment of any criminal prosecution that has been or may be brought. If incriminating statements are in fact elicited from one who seeks to avoid loss of license or employment by cooperating with the investigating agency, those statements cannot be used by the state without impairing the respondent-defendant's privilege against self-incrimination. Although there is post-Spevack authority that disciplinary proceedings do not always have to be stayed until the courts have disposed of all possible criminal charges, it would be far safer from the point of view of both prosecutor and licensing agency if revocation proceedings were suspended at least until the trial court stages of the criminal prosecution are completed.

C. Civil Responsibility

On occasion the question has arisen whether a woman on whom an abortion has been performed, or her representative if she is dead as a result of the operation, can bring a civil action to recover damages. If a court were disposed to deny recovery, it might invoke the traditional concept that one cannot recover for injuries arising from activities in which he voluntarily engaged (volenti non fit injuria), especially if they are, by their nature, "highly offensive and injurious to society." If, on the other hand, it were predisposed toward permitting recovery, a court might hold that the state is wronged, and therefore permit the civil recovery in indirect enforcement of the state's policies, or that consent to an abortion is not


\[\text{130 Garrity v. New Jersey, 385 U.S. 493 (1967). The Court noted that "[t]he choice given petitioners was either to forfeit their jobs or incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Id. at 497.}\]

\[\text{131 DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970) (no requirement to defer disciplinary hearings against attorney-judge until all criminal charges disposed of). The court relied on United States v. Kordel, 397 U.S. 1 (1970), holding that interrogatory practice under FED. R. CIV. P. 33 in a civil forfeiture proceeding against a corporation need not be suspended until pending criminal charges are disposed of, although there are several important factors on which the two situations may be distinguished. The corporate status of the defendant and the availability of needed evidence through testimony not incriminating to the one responding to interrogatories are two such grounds.}\]

\[\text{132 Martin v. Morris, 163 Tenn. 186, 188, 42 S.W.2d 207, 208 (1931).}\]

\[\text{133 Milliken v. Heddesheimer, 110 Ohio St. 381, 388-89, 144 N.E. 264, 267 (1924).}\]
consent to bungled aftercare.\textsuperscript{134}

As one might expect, the cases are not in agreement, although something of a consistent pattern develops if one ascertains: (1) whether the action is against the doctor himself or the male friend of the woman plaintiff who both made her pregnant and put her in contact with the abortionist; (2) whether the woman is alive or dead; and (3) whether death, if it occurred, stemmed from the abortion itself or can be attributed to a failure to provide adequate aftercare when the woman was in a position of peril in which emergency treatment by the physician might have been expected. It seems unlikely that a woman will be permitted to maintain an action against someone who cooperated with her in making contact with the abortionist who performed the bungled operation.\textsuperscript{135} This holding appears fair enough, for in fact the woman and her sexual partner were in trouble together and equally motivated to have the abortion performed. There is, therefore, no good legal or practical reason why he, rather than she, should bear the economic burden of the aftermath of the abortion (at least as long as joint tortfeasors in general cannot distribute losses among themselves) or why courts should lend their aid in support of a subsequent falling-out between the couple.

When the action is by the woman against the doctor, there is a split of authority over whether a suit may be maintained. Some decisions deny the possibility of an intervivos action no matter how careless the doctor may have been;\textsuperscript{136} but some other courts have permitted the woman to recover,\textsuperscript{137} at least to the extent of the injuries actually suffered.\textsuperscript{138}

If the woman has died from the abortion operation itself (as in a case in which an embolism results from the insertion of instruments into the uterus) or because of complications arising afterwards (like septicemia), it is possible that her survivors may commence a wrongful death action, chiefly against the doctor. Only two cases have refused to permit the action under these circum-

\textsuperscript{134} See note 140 infra & cases cited therein.
\textsuperscript{136} Nash v. Meyer, 54 Idaho 283, 31 P.2d 273 (1934); Martin v. Morris, 163 Tenn. 186, 42 S.W.2d 207 (1931).
\textsuperscript{138} Lembo v. Donnell, 117 Me. 143, 103 A. 11 (1918); Miller v. Bayer, 94 Wis. 123, 68 N.W. 869 (1896).
stances;\textsuperscript{139} the remaining decisions permit recovery.\textsuperscript{140} In these latter cases it is evident that if the courts can point to willful or negligent failure to provide adequate medical aftercare for the aborted woman whom the defendant doctor knows to be in need of qualified medical attention, they find it easier to justify a recovery of damages than do if they must base recovery on the fact of the abortion itself. This showing of subsequent neglect can probably be made in many instances and is something the plaintiff's attorney should bear in mind as he presents his medical evidence.

Although some reservations have been expressed about permitting civil recovery based on a bungled abortion under any circumstances whatever,\textsuperscript{141} there seems to be no special reason to treat this situation any differently than any other malpractice situation.\textsuperscript{142} If a doctor fails to provide the sort of aftercare expected of him according to generally accepted medical standards, he ought to be liable in damages whether or not the original operation or technique is legally an abortion. Holdings in line with the majority position not only promote higher standards of medical care in general, but also serve to support the rapidly accelerating trend to place control over therapeutic abortions principally in the hands of the medical profession itself. It is to a consideration of this trend that we now turn our attention.

III. THE ACCELERATING TREND TOWARD LEGALIZED THERAPEUTIC ABORTION

A. Checklist of Preliminary Considerations for a Legislature

Most of the changes in the law of abortion since 1966 have been accomplished through legislative action, although there is a recent trend evident on the part of some courts to intervene on constitutional grounds. The article will examine both trends in this section. But at the outset, certain problems will be discussed that a legisla-

\textsuperscript{139} Szadiwicz v. Cantor, 257 Mass. 518, 154 N.E. 251 (1926) (no indication in the report that the defendant was in fact a doctor; the negligence consisted of using "non-sterile instruments"); Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949).

\textsuperscript{140} Wolcott v. Gaines, 225 Ga. 373, 169 S.E.2d 165 (1969); Martin v. Hardesty, 91 Ind. App. 239, 163 N.E. 610 (1928); True v. Older, 227 Minn. 154, 34 N.W.2d 700 (1948); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264 (1924); Andrews v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931) (only for negligent aftercare, not for the abortion itself).

\textsuperscript{141} Cf. B. SHARTEL & M. PLANT, THE LAW OF MEDICAL PRACTICE §§ 1-17, -18 (1959). See also GA. CODE ANN. § 26-1202 (d) (Rev. 1971) (no wrongful death action for death of fetus if abortion performed under therapeutic abortion act).
ture should consider in the event it is preparing a revised abortion statute, however broad or narrow it ultimately decides such a statute should be.

1. Burden of Proving Justification or Non-Justification. — Lawyers know that more cases are won or lost because of the placement of burdens of proof and persuasion than on the basis of the propriety or impropriety of the substantive law underlying the litigation. An astute legislator who opposes expansion of therapeutic abortion can achieve a considerable restriction on what otherwise seems, on its face, to be a much-expanded authorization for medically supervised abortion by simply placing the burden of establishing medical justification on the doctor who performs the abortion. The fear of having to defend criminal charges can be a powerful deterrent to a professional person. On the other hand, if the prosecutor has to attack the medical judgment of a doctor, particularly one who performs an abortion in a hospital or public clinic under the supervision of his peers on a special committee, and sustain that attack in court subject to a burden of proving non-compliance with law beyond a reasonable doubt, it is unlikely that he will proceed at all. As at least circumstantial evidence of this, under restrictive abortion statutes, doctors have written openly in medical journals about abortions performed by them that were hospital-approved but probably not within the proper scope of the test of necessity to preserve the life of the mother; yet no prosecutions were brought. This may suggest only that prosecutors do not read medical journals, but it may also suggest that elected prosecutors by and large are not anxious to lock horns with the organized medical profession.

From the point of view of traditional statutory construction, whether the burden of disproving or proving medical justification under the particular statute lies with the prosecution or the defendant depends upon whether that element is considered an exception to the statute or a proviso. Sometimes the statute itself is specific, either relieving the prosecution of any necessity to disprove justification, or characterizing the issue as an affirmative defense.143


In the absence of a specific legislative indication, the matter is left to judicial interpretation. The overwhelming weight of authority places the burden on the state to plead and prove the want of medical justification,\(^{146}\) provided the defendant is shown to be a licensed medical practitioner.\(^{147}\)

Does a legislature today have the option to reject the weight of judicial opinion and place the burden of medical justification on the doctor defendant? It is doubtful that it does. In *United States v. Vuitch*,\(^ {148}\) the Supreme Court examined the question of whether the federal courts in the District of Columbia had construed the abortion statute there properly when they placed the burden of proving medical justification on the defendant. Exercising its power to construe District of Columbia legislation on other than constitutional grounds, it held that the lower courts had not properly interpreted the statute. Although not, therefore, a constitutional precedent, the Court's opinion contains language that should be given close attention by legislative drafters. The Court stated: "Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment . . . ."\(^ {149}\)

The burden of pleading, proof, and persuasion of non-justification,

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\(^{147}\) *State v. Abodeely*, 179 N.W.2d 347 (Iowa 1970); *State v. Hawkins*, 255 Ore. 39, 463 P.2d 838 (1970). If before or during trial the fact appears that the defendant is indeed a licensed medical practitioner within the class defined in the abortion statute, then presumably the burden will rest on the prosecution under the decisions in note 146 supra.


\(^{149}\) Id. at 70. *See also Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *appeal docketed*, 40 U.S.L.W. 3098-99 (U.S. Sept. 14, 1971) (No. 92), holding that despite statutory language (see note 145 supra), the burden to show nonjustification is on the prosecution.
therefore, should be clearly on the state whenever a licensed medical practitioner is the defendant.

One may, of course, ask whether at a minimum a doctor-defendant ought not bring forward the hospital records showing compliance with board or committee review procedures, a common feature in revised abortion statutes, since perhaps that information is more readily available to the doctor than to the prosecutor; presumptions based on procedural convenience have been sustained as valid. The answer probably is that the prosecutor should have little difficulty in identifying the hospital or hospitals in which the doctor is permitted to practice or perform surgery, and he has adequate subpoena powers or available discovery procedure to obtain the needed records. Admittedly, in a metropolitan area this may be a burden, but the police investigation should reveal where the abortion apparently was performed. If it was not done in a hospital, the doctor has failed to comply with a statutory condition in most of the states with revised abortion laws; if it was done in a hospital, investigation of records need take place only there. Therefore, although it may be convenient for the prosecutor to have the burden of bringing forth evidence placed on the medical practitioner, that convenience is clearly outweighed by the danger of constitutional attack under \textit{Vuitch}.

2. \textit{Corroboration}. — Mention has already been made of the problems in law enforcement that arise if the woman on whom an unlawful abortion is performed is denominated a criminal, particularly if corroboration of her testimony against the abortionist is required. The need in many instances to have her available to testify as the principal witness against the abortionist far outweighs any deterrent effect in the abstract that denoting her conduct as criminal may have. Therefore, criminality should be eliminated as to the woman herself, thus converting abortion into a species of “victimless crime.”

3. \textit{Placement of Revised Provisions}. — Abortion probably has been the only aspect of medical practice regulated by criminal stat-

\textsuperscript{150} See text accompanying notes 190-95 infra. See also ORE. REV. STAT. § 435.425(3) (1968) (rebuttable presumption arises, from a failure to follow certification requirements, that termination of pregnancy was unjustified).
\textsuperscript{151} See C. McCORMICK, LAW OF EVIDENCE 157 (1954).
\textsuperscript{152} See text accompanying notes 202-05 infra.
\textsuperscript{153} See text accompanying notes 88-94 supra.
\textsuperscript{154} Cf. E. SCHUR, CRIMES WITHOUT VICTIMS 169 (1965); Johnson, Rethinking the Abortion Problem: A Sociological Critique, CRIMINOLOGICA, Feb. 1967, at 20, 22-23.
As a result, lawyers preparing drafts of revised legislation have tended to work within the context of a criminal code rather than with statutes regulating the medical profession; the Model Penal Code is the prototype of this approach. With the advantage of a decade's hindsight, this legislative approach to the problem appears undesirable.

For one reason, much of the weight behind the drive for liberalized abortion laws has come from those segments of the medical profession that wish abortion to be simply a matter of normal medical practice unfettered by special legal regulations. If this approach is accepted by a legislature, then the most appropriate setting for the new legislation is the body of rules regulating the practice of medicine in general. This placement is likely to promote an in pari materia construction of the new law with other aspects of medical licensure, rather than with the crimes of homicide and assault that have been the statutory "companions" of traditional abortion statutes.

As a second reason, if changes in newly devised screening and approval procedures become necessary in light of experience under the revised statute, it is far easier to make changes in the context of licensure laws than in a criminal code. Indeed, it may be possible in time to leave the matter essentially as one of administrative law with relatively few details of therapeutic abortion practice spelled out by statute. Accordingly, medical proponents of liberalized abortion should make every effort to have legislation introduced as amendments to licensing laws, with conforming amendments in the criminal code only if absolutely necessary.

4. Definitions of Terms. — The Model Penal Code provisions if enacted would authorize termination of pregnancy on any of three grounds: (1) that continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) that the child would be born with a grave physical or mental defect; and (3) that the pregnancy resulted from rape, incest, or felonious intercourse, defined to include illicit intercourse with a girl below the age of sixteen. Each term, of course, raises a need for interpretation as cases arise under new legislation patterned on the Model Penal Code. But some disputes are resolved relatively easily — for example, definitions of rape and incest which can be drawn from specific criminal statutes. Other terms are essentially undefinable screening terms like "gravely." Falling between these is another interpretation problem, which has to do with the scope of the term...
"health" if that word alone is used. The Vuitch decision holds that an attack on the term as vague and indefinite can be obviated if it is construed to include both physical and mental health considerations. Vuitch no doubt will provide the standard for interpreting the word, but as a matter of legislative drafting technique it is preferable to include the specific qualifiers to cut down somewhat the potential scope of litigation under the new statute.

5. Requirement of Consent. — A legislature may need to grapple with the issue of consent to therapeutic abortion. One might question whether, from the point of view of traditional criminal law theory, any special mention need be made of the matter. Nonconsensual abortions are as rare as nonconsensual appendectomies. Indeed, written consents or waivers for surgery are apparently obtained as standard hospital practice, the fact that the patient has sought treatment and enters the hospital voluntarily constitutes consent by conduct to nonnegligent treatment that ensues, and if a rare instance of coerced abortion should arise in which the defendant doctor operates with knowledge of the coercion, a standard felonious assault statute is all that is needed. Nevertheless, revised abortion legislation usually contains a reference to consent, which suggests that some attention ought to be paid to the matter.

The requirement of a written consent from the woman may accomplish the same thing as a request or application, being nothing more than a means of triggering the committee or board action that is a prerequisite to lawful performance of the operation. It is clear from the context in other statutes, however, that a consent is viewed as a condition precedent to the invocation of the statute by the performing physician. From the standpoint of the latter, this is an undesirable detail to be written into a statute bearing criminal penalties, in that there is at least a possibility that want of a signed consent in the hospital records might be asserted as a failure to comply with the statute, rendering the doctor criminally re-
sponsible. If the legislative desire is to make clear that the woman must take the initiative in obtaining her own abortion, the "request" or "application" approach is by far preferable.

Unless a legislature is prepared to say that a woman has absolute control over her own body, it must deal with the question of involvement of her husband if she is married, or her parent or guardian if she is a minor or incompetent. Some of the new statutes require consent by the spouse, whatever the woman's age, at least if the couple lives together. Others require the husband's consent only if the woman is a minor as defined in the statute. Consent by a parent or guardian is required if the woman is an unmarried minor or an incompetent.

Should a legislature attempt to settle this problem specifically in the revised abortion statute, or should it be left to judicial decision as it is in related matters like voluntary sterilization? Certainly as far as the husband is concerned there are ample family law analogies in matters like the use of contraceptives, artificial insemination by a donor, and sterilization to enable a court to resolve the issue should it arise between spouses who have fallen out with one another.

But what of parental consent for unmarried minors? This is certainly an aspect of liberalized abortion in which emotional feelings will run high. Staffs of university student health services or clinics serving street people will no doubt confirm the frequency with which young girls living away from home seek aid in terminating pregnancies, as well as the difficulty or impossibility of obtaining parental consent to performance of an abortion. Though the risk of civil suit is slight as a practical matter, doctors may be reluctant to terminate a pregnancy, particularly with the long tradition of criminal sanctions against performance of abortions not necessary to pre-

160 Colorado, South Carolina (unless emergency endangering life), and Washington. The statutes are cited notes 158-59 supra.

161 This is the case in Oregon and Virginia. See statutes cited in note 159 supra. The provision in the Virginia statute only applies if the abortion is to be performed on eugenic grounds because the child will likely be born with an irremediable and incapacitating mental or physical defect.

162 See, e.g., the Arkansas, Colorado, North Carolina, South Carolina, and Virginia statutes cited in notes 158-59 supra.


serve the pregnant woman's life. Clearly, this area of law needs clarification.

A few of the new statutes try to meet the problem at least partially, either by limiting the requirement of parental consent to those under 18 or 19 (rather than the traditional age of 21),165 or by providing that the consent of only one parent is necessary if the unmarried minor lives away from home.166 As in the instance of spousal consent, however, it may be better to solve the basic problem of pregnant minors in a broader setting. A recent illustration of that approach is *Ballard v. Anderson*,167 a mandamus action against a therapeutic abortion committee to require it to consider an application by an unmarried pregnant minor for an abortion; the committee had refused to consider the request because no parental consent was tendered. Relying on a general civil code provision governing medical contracts by minors,168 the court held that an abortion was "surgical care related to" pregnancy under the applicable pregnancy care statute, so that any pregnant minor would be deemed emancipated for purposes of therapeutic abortion procedures. While the quite specific provisions of the civil code were no doubt of help to the *Ballard* majority, the combination of a liberalized abortion statute and pressures toward elimination of common law property-oriented aspects of parent-child relationships is probably sufficient to enable other courts to do the same thing without the benefit of such a statute. Silence in the therapeutic abortion statute on the matter of parental consent would help rather than hinder that judicial approach.

In an Orwellian world, it may be only a short step from permitting consent to therapeutic abortion to a withholding of benefits unless consent is given. Such a shift of emphasis came about fairly rapidly in the matter of contraception. Until *Griswold v.*

165 See the Alaska, Delaware, New Mexico, Virginia and Washington statutes cited in notes 158-59, 163 supra.


167 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

168 Section 34.5 provides that:

Notwithstanding any other provision of the law, an unmarried, pregnant minor may give consent to the furnishing of hospital, medical and surgical care related to her pregnancy, and such consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents of an unmarried, pregnant minor shall not be necessary in order to authorize hospital, medical and surgical care related to her pregnancy. CAL. CIV. CODE § 34.5 (1954).
Connecticut\textsuperscript{160} the principal question was whether the state could prohibit the sale and use of contraceptives, but now the major issue seems to be whether public agencies can make available contraceptive information and devices, or condition welfare grants on their use. Although the matter may be more covert than not, one may rationally entertain more than a slight suspicion that some legislators have voted for therapeutic abortion in the hope that the number of ADC cases may decrease. It is conceivable, therefore, that local welfare agencies might not only give information about the availability of abortions to pregnant welfare mothers, but might also suggest a diminution or termination of benefits if an abortion is not obtained. To forestall this possibility, four of the recent statutes specifically prohibit the use of a refusal to submit to an abortion as grounds for the loss of privileges or immunities, and they also state that submission to an abortion or giving consent to one cannot be made a condition precedent to the receipt of any "public benefit."\textsuperscript{170}

B. Coverage of the New Legislation

1. \textit{Grounds for Therapeutic Abortion}. — A survey of the statutes enacted since 1966 reveals how substantial the influence of the Model Penal Code\textsuperscript{171} has been, particularly in terms of the grounds stated to authorize abortions. The first is the necessity of the abortion to prevent impairment of the physical or mental health of the woman.\textsuperscript{172} Thirteen statutes now recognize this factor as a basis for a lawful abortion,\textsuperscript{173} as does the recently enacted English statute.\textsuperscript{174}


\textsuperscript{170} ARK. STAT. ANN. § 41-310(C) (Supp. 1969); DEL. CODE ANN. tit. 24, § 1791(c) (Supp. 1971); MD. ANN. CODE art. 43, § 138(c) (1971); ORE. REV. STAT. § 435.435(3) (1971).

\textsuperscript{171} \textit{See text accompanying note 156 supra.}

\textsuperscript{172} Id.

\textsuperscript{173} ARK. STAT. ANN. § 41-304 (Supp. 1969) ("substantial risk" that pregnancy will "threaten the life or gravely impair the health"); CAL. HEALTH & SAFETY CODE § 25951(c)(1) (West Supp. 1972) ("substantial risk" to "physical or mental health"); \textit{id.} § 25954 (mental health equated to civil commitment standards); COLO. REV. STAT. ANN. § 40-6-101(3)(a) (1971) ("serious permanent impairment of the physical . . . or . . . mental health of the woman"); DEL. CODE ANN. tit. 24, § 1790(a)(1) (Supp. 1971) ("likely to result in the death of the mother"); \textit{id.} § 1790(a)(4) ("substantial risk of permanent injury to the physical or mental health of the mother"); FLA. SESS. LAWS ch. 72-196 (West 1972); GA. CODE ANN. § 26-1202(a)(1) (1971) (endanger the mother's life or "seriously and permanently injure her health"); KAN. STAT. ANN. § 21-3407(2) (Supp. 1971) ("substantial risk" of impairing physical or mental health); MD. ANN. CODE art. 43, § 137(a)(2) (1971) ("substantial risk" of grave impairment of physical or mental health); N.M. STAT. ANN. § 40A-5-1(C)(1) (Supp. 1971) (death or "grave impairment of the physical or mental health of the woman"); N.C. GEN. STAT.
The chief point of vulnerability in these statutes is the use of qualifiers like "substantial," "serious," "permanent," and "grave." The legislative purpose obviously is to discourage overly liberal use of medical grounds to justify therapeutic abortions. However, several recent decisions cast doubt on whether necessity to preserve life or health is sufficiently precise to pass constitutional muster. If the qualifications should be ruled unconstitutionally vague, the result would be unrestricted abortion on medical grounds.

A second ground for abortion — recognized in 12 states and England — permits termination of pregnancy on eugenic grounds if the fetus, if born, would be seriously handicapped mentally or physically. Although there are no decisions as yet on the constitutionality of the qualifiers, determinations of vagueness as far as the pregnant woman's health is concerned probably will affect this...
ground as well, thus accelerating a trend toward abortion on request.

A third ground, based on humanitarian considerations, permits a victim of rape\(^{180}\) or incest\(^{181}\) to have her pregnancy terminated. Because the legal content of rape and incest is well established through statutory definitions and precedent, it is unlikely that any constitutional basis can be validly asserted to strike down this portion of a revised abortion statute.

These three grounds together do not exhaust the possibilities of liberalization, since each imposes legislative restrictions on the freedom of the pregnant woman to seek, and a medical practitioner to perform, an abortion. Four states have now eliminated from their statutes any substantive qualifications whatever on medically performed abortions;\(^{183}\) the only controls are in terms of qualifications of the person performing the abortion, the place where the abortion is performed, and the duration of the pregnancy at the time of its termination. The English Abortion Act of 1967 reaches about the same result by permitting a medical practitioner to consider the pregnant woman's actual or reasonably foreseeable environment in determining whether she faces injury to her physical or mental health, as well as whether the risk to existing children is greater if an additional child is born.\(^{183}\)

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\(^{180}\) ARK. STAT. ANN. § 41-304 (Supp. 1969) (rape); CAL. HEALTH & SAFETY CODE §§ 75951(c)(2), 25952 (West Supp. 1972) (rape); COLO. REV. STAT. ANN. § 40-6-101(3)(b) (1971) (forcible and statutory rape); DEL. CODE ANN. tit. 24, § 1790(a)(3)(B) (Supp. 1971) ("rape committed as a result of force or bodily harm, or threat of force or bodily harm"); FLA. SESS. LAWS ch. 72-196 (West 1972); GA. CODE ANN. § 26-1202(a)(3) (1971) (forcible or statutory rape); KAN. STAT. ANN. § 21-3407(2) (Supp. 1971) ("rape ... or other felonious intercourse"); id. § 21-3407(4) (intercourse with girl under 16 is felonious); MD. ANN. CODE art. 43, § 137(a)(4) (1971) (rape through force or bodily harm, or threat of force or bodily harm); MISS. CODE ANN. § 2223(1)(b) (Supp. 1971) (rape); N.M. STAT. ANN. § 40A-5-1(C)(3) (Supp. 1971) (forcible or statutory rape); N.C. GEN. STAT. § 14-45.1 (Supp. 1971) (rape); ORE. REV. STAT. § 435.415(1)(c) (1971) (felonious intercourse); S.C. CODE ANN. § 16-87(3) (Supp. 1971) (rape); VA. CODE ANN. § 18.1-62.1(c)(2) (Supp. 1971). Whether the unadorned term "rape" applies both to forcible and statutory rape can be determined only by reference to the rape provision elsewhere in the criminal code of the particular state.


\(^{182}\) ALASKA STAT. § 11.15.060 (1971); HAWAII REV. LAWS § 453.16 (Supp. 1971); N.Y. PENAL LAW § 125.05(3)(b) (McKinney Supp. 171); WASH. REV. CODE § 9.02.070 (Supp. 1971).

\(^{183}\) Abortion Act of 1967, ch. 87, §§ 1(1)(a), (2).
abortion as such are eliminated from the criminal statutes, this seems to be the maximum relaxation that can be anticipated in the United States.

2. *Length of Pregnancy.* — Mention has already been made in another context184 of the relevance of the length of pregnancy to the lawfulness of therapeutic abortions. To the extent that such a limitation is imposed by statute, it constitutes an arbitrary limitation on medical practice. Since the four most liberal states in terms of substantive grounds185 impose time limitations, doctors in some instances may be barred from performing abortions that are necessary to the good physical or mental health, but not necessarily the life, of the pregnant woman. If so, this invites constitutional attack on equal protection grounds.186

3. *Residency Requirements.* — As legislatures decide to expand the permissible scope of abortion, a commonly shared fear is that the state will become an abortion haven for residents of other states with restrictive laws. Therefore, many of the new laws contain requirements of residency within the state for specified periods before an application for a therapeutic abortion may be made.187 The language used places the burden on the woman to reveal, and not on the doctor or board to ascertain the truth of her claim of residency; only the Georgia and Virginia statutes specifically attach perjury consequences to her declaration of residency.

These residency requirements appear vulnerable to attack on the basis that they infringe the freedom of citizens to travel from one state to another.188 One three-judge federal district court has al-

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184 See text accompanying notes 62-69 supra.
185 See note 182 supra.
186 See notes 175 supra, 233 infra.
187 ALASKA STAT. § 11.15.060(a) (4) (1971) ("domiciled or physically present" 30 days before abortion); ARK. STAT. ANN. § 41-306 (Supp. 1969) (resident at least 4 months, unless emergency endangering woman's life); DEL. CODE ANN. tit. 24, § 1793(a) (Supp. 1971) (resident at least 120 days); GA. CODE ANN. § 26-1202(b)(1) (1971) (bona fide legal resident); HAWAI'I REV. LAWS § 435-16(a)(3) (Supp. 1971) (domiciled in state or physically present at least 90 days immediately before abortion); N.C. GEN. STAT. § 14-45.1 (Supp. 1971) (resident at least 30 days immediately before operation); ORE. REV. STAT. § 455.415(1) (1971) (Oregon resident); S.C. CODE ANN. § 16-87 (Supp. 1971) (continuously in state for 90 days immediately preceding operation); VA. CODE ANN. § 18.1-62.1(a) (Supp. 1971) (resident 120 days immediately preceding termination of pregnancy); WASH. REV. CODE § 9.02.070(b) (Supp. 1971) (resident at least 90 days prior to date of termination). Section 3 of the English Abortion Act of 1967 imposes no residency requirement, but makes provision for visiting forces and dependents.
ready voided this aspect of the revised North Carolina statute.\textsuperscript{189} If the constitutional premise invoked in that case is endorsed by the Supreme Court, an additional legal limitation on the practice of medicine in this area will have been removed.

4. Preliminary Approval by Medical Peers. — Even before the abortion law revision movement began, a number of states required\textsuperscript{190} or permitted as an alternative to the operating physician's own belief the advice of two other independent physicians.\textsuperscript{191} The recent statutes generally require preliminary consultation with or approval by medical colleagues before an abortion can be performed. This approval may be in the form of a certification by medical practitioners other than the practitioner who wishes to terminate pregnancy; the certifying practitioners cannot be relatives of or associated in medical practice with the physician on the case.\textsuperscript{192} Others require a more elaborate procedure involving a hospital review board or authority.\textsuperscript{193} Two states combine these two systems.\textsuperscript{194} Because a certain amount of time is required to process the necessary requests, certi-


\textsuperscript{190}LA. REV. STAT. § 37:1285(6) (1964); MISS. CODE ANN. § 2223(2) (Supp. 1971).

\textsuperscript{191}FLA. STAT. ANN. § 782.10 (1965), repealed, FLA. Sess. Laws ch. 72-196 (West 1972); NEB. REV. STAT. § 28-404 (1964); N.H. REV. STAT. ANN. § 585:13 (1955); OHIO REV. CODE ANN. § 2901.16 (Page 1953); WIS. STAT. § 940.04(5)(b) (1958). MO. REV. STAT. § 559.100 (1949) provides for advice by one duly licensed physician if the abortion is performed by one not a duly licensed physician. See note 54 supra & accompanying text.

\textsuperscript{192}ARK. STAT. ANN. § 41-308 (Supp. 1969) (three doctors, one of whom may be the attending physician); DEL. CODE ANN. tit. 24, § 1790(a), (b)(2) (Supp. 1971) (two doctors, one of whom may be the attending physician; certification is to hospital review authority; see note 193 infra & accompanying text); GA. CODE ANN. § 26-1202(b)(3) (1971) (two additional physicians certify necessity; medical staff committee then reviews under id. § 26-1202(b)(5); see note 193 infra & accompanying text); KAN. STAT. ANN. § 21-3407(2)(a) (Supp. 1971) (three licensed doctors, one of whom may be the attending physician, certify necessity to hospital); N.C. GEN. STAT. § 1-45.1 (Supp. 1971) (two doctors certify necessity to hospital); ORE. REV. STAT. § 435.425 (1971) (two physicians certify necessity to hospital); S.C. CODE ANN. § 16-87 (Supp. 1971) (three doctors, one of whom is the attending physician, certify circumstances of necessity to hospital). The English Abortion Act of 1967, ch. 7, § 1(1), requires the good faith opinion of two medical practitioners.

\textsuperscript{193}CAL. HEALTH & SAFETY CODE § 25951(b) (West Supp. 1972) (medical staff committee operating within standards promulgated by Joint Commission on Accreditation of Hospitals; if no more than three members, unanimous approval required); id. § 25953 (committee must have at least two members, or at least three if termination is to be after 13th week); COLO. REV. STAT. ANN. §§ 40-6-101(3), -(4) (1971) (hospital board of three licensed staff physicians of hospital where abortion to be performed, who meet regularly or on call to review requests); DEL. CODE ANN. tit. 24, § 1790(b)(2) (Supp. 1971) (hospital abortion review authority); GA. CODE ANN. § 26-1202 (b)(5) (1971) (hospital medical staff committee operating under standards of
fications, and approvals, several of the statutes make an exception for emergency situations, with the necessary certification to follow in a very brief time after the abortion is performed.198

5. Special Approval in Rape and Incest Cases. — The article earlier discussed199 the inclusion in some states of rape or incest as a basis for abortion on humanitarian grounds. Most of these statutes require some form of substantiation of the claim because the usual medical grounds do not necessarily underlie the performance of these abortions. Occasionally, all that is required is some form of complaint or affidavit on the part of the victim.200 It is more

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198 Joint Commission on Accreditation of Hospitals; majority vote of committee of at least three members, with attending physician’s vote not counted; MD. ANN. CODE art. 43, § 137(b)(2) (1971) (hospital abortion review committee); N.M. STAT. ANN. § 40A-5-1(C)-(D) (Supp. 1971) (special hospital committee of two licensed physicians or appointed alternates, on medical staff of hospital where abortion to be performed); VA. CODE ANN. § 18.1-62.1(d) (Supp. 1971) (hospital abortion review board of hospital where abortion to take place; written consent by majority); id. § 18.1-62.2 (Supp. 1971) (board to consist of at least three physicians, one of whom is a specialist in obstetrics or gynecology; such a board required before hospital can perform abortions). The matter is left to administrative regulations by ALASKA STAT. § 08.64.105 (Supp. 1971).

199 See notes 180, 181 supra & accompanying text.

200 See notes 180, 181 supra & accompanying text.
common, however, to require some sort of approval or certification by a prosecuting agency as a condition precedent. The California procedure is the most elaborate. The hospital medical staff committee reports the rape and forwards the applicant's affidavit to the district attorney. If he indicates probable cause or makes no indication within 5 days, the committee may approve the abortion. If within this period he indicates a lack of belief of probable cause, the applicant may petition a superior court for a review of that decision, and the matter must be heard within one week. A finding of probable cause by the superior court will then clear the way for further committee action.

6. Persons Authorized to Perform Abortions. — Because the underlying purpose of the reformed abortion statutes is to see that abortions are performed by qualified practitioners on medical grounds, all the new statutes require that the pregnancy be terminated by a medical practitioner licensed in the particular state. This requirement poses two potential problems of interpretation.

198 CAL. HEALTH & SAFETY CODE § 25952 (Supp. 1971) (district attorney informs committee that there is probable cause to believe that offense was committed); COLO. REV. STAT. ANN. § 40-6-101(3)(b) (1971) (prosecutor informs committee over signature that there was probable cause to believe offense was committed); DEL. CODE ANN. tit. 24, § 1790(a)(3)(B) (1970) (attorney general certifies in writing that there was probable cause; this is unnecessary if proceeding within 48 hours after rape); GA. CODE ANN. § 26-1202(b)(6) (Rev. 1971) (after report, prosecutor of jurisdiction certifies on best information probable cause to believe rape occurred); MD. ANN. CODE art. 43, § 137(a)(4) (1971) (state's attorney informs hospital abortion review committee, in writing over signature, belief of probable cause); ORE. REV. STAT. § 435.425 (1969) (semble: certificate by woman sent to district attorney of county in which hospital is located); S.C. CODE § 16-87(3) (Supp. 1971) (warrant must issue for offender; chief law enforcement officer of county in which hospital located certifies reasonable cause to believe offense committed). This requirement of the Georgia statute was held unconstitutional in Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), jurisdiction postponed, 402 U.S. 941 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term).


200 Evidence at the hearing is inadmissible in any proceeding other than a perjury prosecution, although a witness called at the special hearing may appear as a witness in other proceedings. The burden of proof is by a preponderance of the evidence.

One concerns the status of those who assist in the procedures. (Or, as techniques like aspiration become increasingly simple so that a registered nurse or medical paraprofessional might safely perform them, the concern is with who actually performs the abortion under the general direction of a medical practitioner.) If medical skill and the patient’s safety are the paramount considerations, it seems unnecessary to require that only licensed physicians perform the abortion. A second problem concerns a staff physician of a state hospital who is not yet qualified to practice medicine in the state but is nonetheless hired to perform general medical duties. There might be a technical question whether he is “licensed by the state” within the meaning of the abortion statutes. These questions, while hardly earth-shaking, suggest that it is probably a better legislative drafting technique to leave the matter of professional qualifications to administrative regulation.

7. Place of Performance of Abortions. — Those statutes that limit the grounds for abortion to health, eugenic, or humanitarian grounds almost always restrict the performance of abortions to hospitals. However, once the qualifications or conditions are wholly or largely eliminated, so that the determination to terminate a pregnancy is made by the woman and her doctor, the way is likely to be opened to the performance of abortions in clinics outside of licensed or accredited hospitals. This is the case in three states and En-

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203 Alaska Stat. § 11.15.060(a)(2) (1970) (hospital or other facility approved by state department, or hospital operated by Federal Government); Wash. Rev. Code §§ 9.02.070(c) (Supp. 1971) (accredited hospital or medical facility certified by state board
gland. If state law permits a state-level agency to authorize performance of abortions outside a hospital, a local governmental unit lacks the power to impose its own requirement that only the facilities of an accredited hospital be used.

8. Required Records and Reports. — When statutory conditions precedent to the performance of hospital abortions are created, it usually follows that various reports and records are required. Sometimes all that must be filed are the applications or certificates, to be retained in permanent hospital files. In some states, however, reports of therapeutic abortions performed or refused are to be filed by the hospital with a state agency within a stated period. These statutes generally require that the identity of the women applying for or receiving abortions be kept strictly confidential.

9. Freedom of Conscience Exemptions. — Many doctors, nurses, and hospital employees have strong religious or moral scruples against abortion, and many private hospitals, particularly church-related ones, will not tolerate the performance of abortions on their premises. As legal controls on medical abortion are reduced or eliminated, the question arises whether these individuals or hospitals can refrain from participation. To maintain freedom of conscience, most of the statutes state specifically that no individual need participate in abortions, no (private) hospital need permit abortions, and no civil liability, disciplinary action, or recriminatory action can flow

and meeting standards set by the board). The New York statute, N.Y. PENAL LAW § 125.05(3) (Supp. 1971), is silent as to place, and permits termination of pregnancy for any reason within 24 weeks.

The English Abortion Act of 1967, ch. 87, § 1(3) permits performance of abortions in a hospital or place approved by the Minister of Health or Secretary of State, with emergency exception in section 1(4).


Del. CODE ANN. tit. 24, § 1790(c) (1970); Fla. Sess. LAWS ch. 72-196 (West 1972); Ga. CODE ANN. § 26-1202(b)(8), (9) (Rev. 1971); Md. ANN. CODE art. 43, § 137(c) (1971); S.C. CODE § 16-88 (Supp. 1971) (report by physician on standard form within 7 days after abortion). Ore. REV. STAT. § 435.495 (1971), leaves the matter to administrative regulation, which is also the approach in the English Abortion Act of 1967.

See Lefkowitz v. Woman's Pavilion Inc., 66 Misc. 2d 743, 321 N.Y.S.2d 963 (Sup. Ct. 1971), holding that the attorney general investigating alleged fraudulent practices in an abortion referral clinic had no right to the names of individual clients; only fiscal information need be supplied.
from such a refusal. But this same freedom to opt out of the system may not pertain to public hospitals, and even private hospitals may be barred from adopting restrictions on abortion eligibility more severe than those imposed by state law. It is clear that the delicate balancing of the interests of private practitioners and hospitals, women who desire abortions, and the governmental apparatus in promoting relatively free medical abortion, still remains to be achieved through the judicial process.

C. The Judicial Frontier: Constitutional Attacks on Abortion Legislation

Even before the surge of revised abortion legislation, a wide array of attacks was made on traditional abortion legislation; new statutes have if anything accelerated the resort to federal courts for relief against application of abortion statutes to medical practitioners, pregnant women, and even unpregnant women. While the United States Supreme Court may soon take a position on some of the issues being currently litigated, chiefly before three-judge federal district courts, one may well expect a large amount of litigation over


210 See the Oregon and South Carolina statutes cited in note 2 supra; cf. Doe v. General Hospital, 313 F. Supp. 1170 (D.D.C. 1970) (public hospital must consider an indigent's application for a therapeutic abortion). Under a broad national health services program, a duty can be placed on every medical practitioner to perform abortions to save life or prevent grave permanent injury to physical or mental health; in other cases a recognition of conscientious objection exists, but the burden of proof is on the practitioner claiming reliance. English Abortion Act of 1967, ch. 87, § 4.


212 See the equal protection litigation discussed in the text accompanying notes 231-33 infra.


the next few years. Therefore, it seems appropriate to survey briefly the principal legal points to be resolved.

1. **Standing to Litigate.** — In each federal case, attacks are made on the standing of the plaintiffs to bring the action. There is general agreement that medical practitioners have standing even though they may not be able to obtain concrete relief in a particular case because the duration of the litigation will render termination of pregnancy impossible.\textsuperscript{215} The fact that invocation of a state’s laws will affect the doctor’s professional activities is enough to confer standing. Naturally, if a doctor has been convicted of abortion and has exhausted his state remedies, federal habeas corpus will lie.\textsuperscript{216}

A pregnant woman, whether married or unmarried, also has standing to attack the statute under which an abortion has been denied to her,\textsuperscript{217} and expiration of a statutory period of eligibility while the litigation progresses does not render the action moot as to her.\textsuperscript{218} If she proceeds to obtain an unlawful abortion within the state or goes somewhere else where she can obtain a lawful abortion, however, she will lose her standing to sue.\textsuperscript{219} Women not pregnant at the time the action is commenced are not permitted to maintain a class action on the basis that they might become pregnant in the future and be denied an abortion upon request.\textsuperscript{220}

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\textsuperscript{216}United States ex rel. Zelker, 445 F.2d 451 (2d Cir. 1971).


\textsuperscript{218}Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).


sions have given them the same standing as physicians, but others have refused them permission to proceed.

The recent decisions of the United States Supreme Court limiting the power of federal courts to issue declaratory judgments and injunctions against present or future application of state laws in alleged violation of the Federal Constitution must also be taken into account in the area of abortion legislation. A district court may avoid the necessity to decide the matter by finding no imminent irreparable injury under Younger and dismissing the action. If it does not do so, it may still be required to by a higher court. Nonetheless, two recent decisions assert the power of a district court to rule a state statute unconstitutional, even though no emergency existed warranting the issuance of an injunction against its future invocation by state officials. This, too, is an area of federal procedure calling for clarification.

2. Grounds for Attack: Vagueness. — Legislation that uses language too general to give any concrete indication of the acts it is intended to control is constitutionally defective. This theory has proven to be fairly successful in recent attacks on state abortion legislation, although there is some contrary authority.


Supreme Court consideration of the concept in *Vuitch*\(^{230}\) certainly suggests that the vagueness theory has to be taken into account in the setting of abortion legislation.

3. **Grounds for Attack: Equal Protection.** — The fourteenth amendment equal protection clause can be violated either through the use of arbitrary legislative classifications\(^{231}\) or by placing indigents at a procedural disadvantage in comparison to those with greater financial means.\(^{232}\) Attacks on both grounds have been advanced contending either that denial of abortions to some pregnant women but not to others constitutes an arbitrary and unreasonable legislative classification, or that insistence on hospital certification and review procedures works in fact to the detriment of the indigent. Thus far, however, neither ground has gained judicial acceptance;\(^{233}\) courts desiring to void state abortion statutes seem to prefer vagueness or right of privacy grounds over equal protection arguments.

4. **Grounds for Attack: Right of Privacy.** — The Supreme Court's holding in *Griswold v. Connecticut*\(^{234}\) that a right of individual privacy exists under the ninth amendment clearly offers a great potential for attacks on restrictive abortion legislation on the part of women who want to control their own bodies and medical practitioners who want to practice medicine without arbitrary restriction.\(^{235}\) Although some decisions refuse to recognize the appli-


\(^{232}\) E.g., Mayer v. Chicago, 404 U.S. 189 (1972).


cation of the concept to abortion laws, a growing number of holdings finds this the most acceptable constitutional basis for striking down restrictions on medical abortion. The cases now pending before the Supreme Court should produce a clear ruling on the applicability of ninth amendment considerations to abortion statutes.

5. Grounds for Attack: Rights of Fetus. — The preceding three grounds of attack are those utilized by proponents of free medical abortion. Obviously, a great many doctors and laymen wish to outlaw all abortions or all but those necessary to preserve the life of the mother. When legislatures have broadened the scope of lawful abortion, attacks against the new statutes have been founded primarily on ninth amendment grounds, but this time in terms of the claimed right of a fetus to develop to term and to be born. The attack typically relies on an analogy to those decisions that have permitted recovery after birth by the infant and his parents for prenatal injuries.

Because of the novelty of the expanded abortion statutes in this country, there is no clear body of precedent on which to rely; the new statutes themselves usually avoid language suggesting any fetal


right to life.\textsuperscript{239} Therefore, the issue when raised is essentially one of first impression for the judiciary. Probably because the prevailing federal judicial attitude is hostile to restrictions on medical abortion practice, and because some state benches appear to share that attitude, the assertion of a fetal right to life has been thus far uniformly rejected.\textsuperscript{240} The analogy of the prenatal injury cases is disposed of by pointing out that no cause of action arises unless the fetus is born alive, and that the recovery is primarily for the benefit of the parents.\textsuperscript{241}

\section*{IV. Conclusion}

Now that 18 states have expanded the scope of lawful medical abortion, some of them quite radically, it can be expected that the "bandwagon" effect will be increasingly felt. Indeed, within a very few years, it may be that only those states with a heavy representation of adherents to conservative religious tenets will fail to respond to the pressures of example. Moreover, unless the United States Supreme Court puts an end to it, either through a restricted interpretation of the scope of ninth amendment personal privacy in the abortion context or by a requirement of federal abstention under \textit{Younger v. Harris},\textsuperscript{242} it is very likely that federal and state courts will strike down statutes restricting abortions to those necessary to

\textsuperscript{239} An exception is GA. CODE ANN. § 26-1202(c), (d) (1969), which gives the local prosecutor or anyone who would be a relative of the child, if born, the power to seek a declaratory judgment as to whether the projected abortion would "violate any constitutional or other legal rights of the fetus"; the attending doctor and the woman are the respondents. The matter must be heard expeditiously and the court may enjoin the projected abortion. However, if the statute is complied with, then section 26-1202(d) rules out any wrongful death claim. A three-judge federal district court has ruled this portion of the statute unconstitutional, apparently because the mother's right is paramount. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), \textit{jurisdiction postponed}, 402 U.S. 941 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term).

\textsuperscript{240} Y.W.C.A. v. Kugler, 10 Crim. L. Rptr. 2469 (D.N.J. Feb. 29, 1972); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969); Byrn v. New York City Health & Hospitals Corp. 38 App. Div. 2d 316, 329 N.Y.S.2d 722 (1972), aff'd, N.Y. Times, July 8, 1972, at 1, col. 2. \textit{Byrn} is an interesting case in that a state supreme court justice appointed a law professor guardian ad litem for all unborn fetuses in the city, and then granted a preliminary injunction against the performance of all abortions not necessary to preserve the life of the mother. The upper courts vacated the order because it found the New York penal law constitutional, infringing no rights of fetus to life.

\textsuperscript{241} Cf. Stewart v. Long Island College Hospital, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), disallowing an action for damages by a child born with birth defects caused by rubella, and its parents, against the hospital and therapeutic abortion committee members who had refused to authorize an abortion under the 1967 version of the statute; the refusal occurred in 1968, two years before liberalization of the statute.

\textsuperscript{242} See text accompanying notes 223-26 supra.
preserve the pregnant woman's life; perhaps even the Model Penal Code list will prove vulnerable. As other legislative restrictions such as residency requirements and limits on duration of pregnancy at the time of termination also fall on constitutional grounds, the legal system will come close to recognizing abortion as an unfettered medical procedure to be agreed upon by the pregnant woman and her attending physician.

But one additional limitation will have to be removed if such a result is to occur, that of a requirement that medical abortions be performed in hospitals subject to hospital committee review. Most doctors are wary of or even hostile toward abortion, no doubt primarily because they view themselves as preservers of life. Abortion creates, although perhaps to a lesser degree than the related problem of euthanasia, a real cognitive dissonance between the physician's desire to preserve life and his awareness that by performing or approving an abortion he is terminating life. If he practices in a field of medicine in which he sees the hardships that refusal to perform an abortion works on the pregnant patient, he probably arrives by stages at a satisfactory accommodation between his abstract image of himself as a healer and preserver of life and his feelings as to what the best interests of his patients require. The strongest advocates of liberalized abortion certainly are specialists in gynecology, obstetrics, and psychiatry who interrelate with pregnant women as persons and not as a nonspecific class. But in most hospitals, the administrators and specialists in other medical fields who view abortion with distaste, and abortionists as pariahs of the profession, will control the review committees and thus render therapeutic abortion unavailable to a great many patients.

Therefore, it is necessary as quickly as possible to permit the performance of medical abortions in public and private clinics away from hospitals, so that women of all income groups can obtain inexpensive abortions if they wish. In such a setting, relevant counseling also can be made available, which may in fact cause women contemplating abortions to change their minds. Until statutory restrictions on clinical abortion practice are removed or voided, legislatures may expand the substantive grounds for abortion and courts may void those that remain, without in fact overcoming the injustices and hardships inherent in the traditional law of abortion.

243 Compare this situation to the status dilemma of marginal lawyers as described in J. CARLIN, LAWYERS ON THEIR OWN 173-84 (1962).