Current Abortion Laws: Proposals and Movements for Reform

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Erratum
PAGE 397, PARAGRAPH 1, LINE 3: change "dilitation" to "dilatation."

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Current Abortion Laws: Proposals and Movements for Reform

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Criminal statutes and administrative sanctions regulating abortion practices have continually provoked controversy because of the conflicting social, religious, and medical interests which must be considered. Professor George examines the effect of current state abortion statutes and demonstrates their inadequacy in meeting present-day problems. He considers present law unnecessarily strict in light of the tendency of certain women to have sexual relations regardless of legal controls or unpleasant, but remote, physical consequences. The author concludes by proposing three methods of reform: (1) procedural changes to minimize criminal prosecutions; (2) expansion of the scope of justifiable therapeutic abortions; and (3) liberalization of licensing statutes regulating doctors and hospitals.

LAWS REGULATING sexual behavior have no peer at stirring up intense emotional reaction; and when the element of life itself is involved, the reaction is compounded. Abortion is perhaps the only problem in which attitudes toward sexual activity itself and toward life and being are in seething turmoil. This turmoil is reflected in existing legislation and constitutes the controlling element whenever legislative or judicial changes in existing law are proposed. Although the specifics of the conflict are usually the details of statutory language, the real disagreement arises over which interests are of primary importance and how these interests are to be effectuated by law.

I. CONFLICTING INTERESTS AFFECTED BY ABORTION LEGISLATION

There appear to be four foci for a discussion of the interests affected by abortion. The first of these is the fetus itself. Concern for the fetus is generally based upon one of two theories. One is that there is life in being from the time of fertilization of the ovum, and that this life, as any other life, is inviolate. The strongest adherence to this view is of course within the Roman Catholic faith, which condemns abortion under all circumstances; but there is also

2 Canon 2350, § 1. See 8 AUGUSTINE, COMMENTARY ON CANON LAW 397-402 (1931); 3 BOUSCAREN, CANON LAW DIGEST 669-70 (1954); 2 WOYWOD, PRACTI-
strong Protestant support for the idea. The second theory is
that the fate of the fetus, if it goes to term, should be taken into ac-
count. If the child will be born deformed, mentally defective, or
otherwise incapable of living a normal life, or if it will be born into
a highly detrimental environment, which cannot be reasonably com-
penated for, it is preferable that its incipient life be nipped in the
bud. This premise is likely to be an incidental argument to advoca-
cy of liberalized abortion based on social need. Adoption of the
first view of fetal life means rejection of all abortion, or any abor-
tion unnecessary to save the life of the mother; to adopt the second
is usually to favor abortion in at least some situations.

The second focus is the pregnant woman. Most of the proposi-
tions advanced on this point are basically favorable to her position.
The only exception is the argument that pregnancy is the result of
intercourse which itself is licit only if done within marriage and for
procreation. Therefore, if the woman becomes pregnant it is both
her misfortune and her fulfillment of Divine mandate, and she must
carry the child, whatever the consequences. This exception aside,
most statements of policy are sympathetically inclined toward the
pregnant woman, although these do not necessarily favor abortion.
The most obvious point of concern is for her life, because there are
medical indications that she may not survive a pregnancy, because
she may commit suicide if she is not permitted to have an abortion,

2 E.g., Thielicke, The Ethics of Sex 226-47 (Doberstein trans. 1964).
3 Dahlberg, Abortion, in Sexual Behavior and the Law 379, 389 (Slovenko
ed. 1965).
4 THIELICKE, op. cit. supra note 2.
5 For an interpretation of Saint Augustine's view of sexual relations not too far from
this, see Bromley, Catholics and Birth Control 9-15 (1965).
6 With advances in medical knowledge, there are probably fewer instances now than
formerly in which the woman is not likely to survive pregnancy. See Guttmacher,
Abortion Laws Make Hypocrites of Us All, 4 NEW MEDICAL MATERIA 56 (1962);
Hall, Therapeutic Abortion, Sterilization, and Conception, 91 AMERICAN J. OBSTETRIC
& GYNECOLOGY 518 (1965); Russell, Therapeutic Abortion in California in
1950, 60 WESTERN J. SURGERY 497 (1952). The hypothetical cases used in the sur-
vey reported in Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medi-
cine, 11 STAN. L. REV. 417, 431-44 (1959), include several in which the life of the
mother might well be shortened if the pregnancy is carried to completion.
7 This is not a particularly high statistical probability. Bolter, The Psychiatrist's
Role in Therapeutic Abortion: The Unwitting Accomplice, 119 AMERICAN J. PSYCHI-
ATRY 312 (1962); Rosenberg & Silver, Suicide, Psychiatrists and Therapeutic Abor-
tion, 102 CALIF. MEDICINE 407 (1965).
or because she may die at the hands of an untrained abortionist if she is denied the facilities of a reputable hospital or clinic. All of these factors tend to favor liberalized abortion laws. A further concern is for the pregnant woman's health, either physical or mental. Most of these arguments support a broadening of abortion laws, except perhaps the one which asserts that the abortion works irreparable psychological harm to the woman, and therefore should be restricted or prohibited.

A third focus is the family unit of which the pregnant woman is a part and into which the new baby will be born. At times the concern is for the freedom of the sexual partners to decide whether and when they will have children. At other times the emphasis is placed on 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 on the mother's care of the living siblings, which might be detrimentally affected. A person who emphasizes these factors is almost certain to favor liberal abortion, particularly that approved and administered through medical channels.

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 fetus or mother, protection


11 "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 COLUMBIA UNIVERSITY FORUM 10, 13 (1963). See also FLETCHER, *MORALS AND MEDICINE* 92-99 (Beacon Press ed. 1960).

12 Only Japan appears to embody this specifically in its statute. Art. 3(5) of the Eugenic Protection Law (Law No. 156 of 1948; ROPO ZENSHO 1778 [1965 ed.]) permits a discretionary abortion "if there are several children and the mother's health will be seriously impaired if she again delivers." Art. 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 AMERICAN J. PSYCHIATRY 662 (1956); Klintskog, *Survey of Legislation on Legal Abortion in Europe and North America*, 21 MEDICO-LEGAL J. 79 (1953).
of the health of the mother, or protection of the viable family unit), and all of them certainly have this dimension. But there are at least two other concerns evident. 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. In only one country, Japan, does the primary function of the statutes which liberalize abortion appear to be population limitation, and that is because of the traditional belief in Japan that contraceptives are not used by proper married couples; the same attitudes do not apply to the practice of abortion. As contraception becomes more generally accepted among younger couples, as seems to be the case, the population-control function of abortion in Japan will probably decline to about the same level as in Western countries. Some writers suggest that 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 major threat either to private liberties or to population.

The other social factor is the freedom of the medical profession to handle the abortion problem as it would any other medical problem — free from arbitrary legal controls. This factor is usually advanced in support of relaxed abortion laws.

While not necessarily a complete listing of the various policy interests which are affected by and affect the coverage of the abortion statutes, this discussion summarizes the major policy arguments advanced in the debate over abortion legislation. How they are reflected in current legislation is another matter.

13 See Beardsley, Hall & Ward, Village Japan 335-86 (1959).
15 See Thielicke, op. cit. supra note 2, at 215-25.
16 This factor may account for the rescission of the law permitting easy abortion in the U.S.S.R. See Williams, The Sanctity of Life and the Criminal Law 219-20, 224 (1957). This rescission in turn seems to have been modified, however. See Gebhard, Pomeroy, Martin & Christenson, op. cit. supra note 10, at 218.
II. LEGAL REGULATION OF ABORTION PRACTICES

A. Criminal Statutes

(1) Statutes Penalizing Abortion.—Criminal statutes outlawing abortion are of relatively recent vintage; there is so little common law authority covering abortion that it plays no significant role in evaluating the legality of abortion. The statutes may be roughly classified as those which, in form, 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 judgement corresponds "with the average judgment of the doctors in the community in which he practices." In New Jersey the Supreme Court apparently agreed that a doctor can act to save the life of the mother, although it did not agree that he could act merely to protect her health. In New Hampshire

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20 Most common law cases reach only conduct which causes a miscarriage of a pregnant woman after the fetus has quickened. Perkins, Criminal Law 101 (1957). This rules out most abortions, which must be performed within the first trimester of pregnancy if there is not to be serious danger to the pregnant woman.

21 LA. REV. STAT, § 14:87 (Supp. 1964). The only intent required is the intent to procure premature delivery of the embryo or fetus. There is internal inconsistency in Louisiana statutes, however, in that the statement of causes for revocation of a medical license, in LA. REV. STAT. § 37:1285 (1964), 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. . . .

If both are considered in pari materia, Louisiana law is in accord with the majority of states, as listed in note 31 infra.

22 MASS. GEN. LAWS ANN. ch. 272, § 19 (1956).

23 N.J. REV. STAT. § 2A:87-1 (1953). The statute reads "without lawful justification"; nothing in the license revocation statute, N.J. REV. STAT. § 45:9-16 (1963), provides any clue to what may be lawful justification. See, however, the case cited infra note 26.


and South Carolina, the statutes prohibiting attempted abortion provide no exception, although the statutes penalizing actual abortion do justify acts necessary to save the mother's life. In North Carolina there is a similar discrepancy between the sections on abortion and those on using drugs or instruments with intent to produce a miscarriage.

In all the other states, the legislatures have specifically provided for certain instances in which abortions may be legally performed. In forty-six states and the District of Columbia, an abortion is permissible if it is necessary to save the life of the mother. However, there is a wide variation in the details of how the exception is to be administered.

One difference is in the matter of who is to be permitted to perform an abortion done to save the pregnant woman's life. Thirty-

27 N.H. REV. STAT. ANN. § 585:12 (1955) (attempts to procure miscarriage); S.C. CODE § 16-83 (1962) (attempted abortion; the catchline "abortion or attempted abortion not resulting in death" is a misnomer).

28 N.H. STAT. ANN. § 585:13 (1955) ("unless, by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman... ."); S.C. CODE § 16-82 (1962).

29 The South Carolina statute justifies acts necessary to save the child's life as well.


31 ALA. CODE tit. 14, § 9 (1959); ALASKA STAT. § 11.15.060 (1962); ARIZ. REV. STAT. ANN. § 13-211 (1956); ARK. STAT. ANN. § 41-301 (1964); CAL. PEN. CODE § 274; COLO. REV. STAT. ANN. § 40-2-23 (1964); Conn. GEN. STAT. ANN. § 53-29 (1960); Del. CODE ANN. tit. 11, § 301 (1953); Fla. STAT. ANN. §§ 782.10, 797.01 (1965); Ga. CODE ANN. §§ 26-1101, -1103 (1953); HAWAII REV. LAWS §§ 309-3, -4 (1955); IDAHO CODE ANN. § 18-601 (1948); ILL. ANN. STAT. ch. 38, § 23-1 (Smith-Hurd 1964); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. GEN. STAT. ANN. § 31-410 (Supp. 1963) (this is a manslaughter statute; there is no abortion statute as such unless it be § 31-409); KY. REV. STAT. § 436.020 (1959); ME. REV. STAT. ANN. ch. 17, § 51 (1965); MD. ANN. CODE art. 27, § 3 (1957); Mich. STAT. ANN. § 28.204 (1962); MINN. STAT. ANN. § 617.18 (1964); Miss. CODE ANN. § 2223 (1957); MO. ANN. STAT. § 559.100 (1953); MONT. REV. CODES ANN. § 94-401 (1949); Neb. REV. STAT. §§ 28-404, -405 (1965); Nev. REV. STAT. § 201.120 (1963); N.H. REV. STAT. ANN. § 585:13 (1955) (abortion of quick child); N.M. STAT. ANN. §§ 40A-5-1, -3 (1964); N.Y. PEN. LAW §§ 80-81, N.Y. REV. PEN. LAW §§ 125.05, 125.40-55; N.C. GEN. STAT. §§ 14-44 (1953) (and see the text accompanying note 30 supra); N.D. CENT. CODE § 12-25-01 (1943); OHIO REV. CODE § 2901.16; OKLA. STAT. ANN. tit. 21, § 861 (Supp. 1964); Ore. REV. STAT. § 163.060 (1964) (but see text accompanying notes 46 and 85 infra); R.I. GEN. LAWS ANN. § 11-3-1 (1957); S.C. CODE ANN. § 16-82 (1962) (see text accompanying notes 27-29 supra); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. § 39-301 (1955); Tex. PEN. CODE ANN. art. 1191 (1961); UTAH CODE ANN. § 76-2-1 (1953); VT. STAT. ANN. tit. 13, § 101 (1959); VA. CODE ANN. § 18.1-62 (1960); WASH. REV. CODE § 9.02.010 (1956); W. VA. CODE ANN. § 5923 (1961); WIS. STAT. ANN. § 940.04 (1958); WYO. STAT. ANN. § 6-77 (1959).

one states\textsuperscript{33} appear to permit anyone to perform the operation, but eleven require that it be done by a physician or surgeon.\textsuperscript{34} The Missouri statute seems to favor the 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 the abortion “is not a duly licensed physician,” the abortion is lawful if “the said act has been advised by a duly licensed physician to be necessary for such a purpose.”\textsuperscript{35} Thus, while the licensed physician is held to a standard of “objective necessity” for abortions he performs, the unlicensed person apparently is justified in acting upon the advice of a licensed physician, whether or not the abortion is objectively necessary.

A second point of difference turns on whether necessity is to be determined on an objective, or strict liability, basis or whether the important thing is the good faith belief that necessity exists. Thirty statutes, in form, support an interpretation that necessity is an objective element of the crime,\textsuperscript{36} although five of them have been interpreted to include, as a defense, good faith belief of necessity despite their strict wording to the contrary.\textsuperscript{37} The harshness of these statutes is also modified to a degree if, as in some of these jurisdictions, the burden is on the state to prove the lack of necessity.\textsuperscript{38} In

\begin{itemize}
\item \textsuperscript{33} Ala. \textit{(but see} the license revocation statute, ALA. CODE tit. 46, § 270 (1959)), Alaska, Ariz., Conn., Del., Hawaii (“surgeon or other person”), Idaho, Ind., Iowa, Ky., Me., Mich., Minn., Mont., Neb., Nev., N.C., N.D., Ohio, Okla., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wyo. The statutes are cited note 31 \textit{supra}.
\item \textsuperscript{34} D.C., Ark., Colo., Ill., Md., Miss., Mo., N.M., N.Y. \textit{(Revised Penal Law; the present statute, in effect through Aug. 31, 1967, is not so limited), Ore. (though the statutes are internally inconsistent; see the text accompanying notes 41-42 \textit{infra})), Wis. The statutes are cited notes 31-32 \textit{supra}.
\item \textsuperscript{35} MO. ANN. STAT. § 559.100 (1953).
\item \textsuperscript{36} Ala., Alaska, Ariz., Cal., Conn., Del., Idaho, Ill., Ind., Iowa, Ky., Md. \textit{(good faith belief no defense:} Adams v. State, 200 Md. 133, 88 A.2d 556 (1951)), Me. \textit{(good faith belief no defense:} State v. Rudman, 126 Me. 177, 136 Atl. 817 (1927)), Mich., Minn., Mo. \textit{(but see the text accompanying note 35 \textit{supra})}, Mont., Nev., N.Y. \textit{(but see Revised Penal Law)}, N.C., N.D. \textit{(good faith belief no defense:} State v. Shortridge, 54 N.D. 779, 211 N.W. 336 (1926)), Okla., Ore., R.I., S.C., S.D., Utah, Vt., Wash., Wyo. The statutes are cited note 31 \textit{supra}.
\item \textsuperscript{37} Steed v. State, 27 Ala. App. 263, 170 So. 489 (1936) \textit{(semble}) \textit{(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); People v. Ballard, 167 Cal. App. 2d 803, 335 P.2d 204 (1959); State v. Dunklebarger, 206 Iowa 971, 221 N.W. 392 (1928); Honnard v. People, 77 Ill. 481 (1875); State v. Elliott, 234 Ore. 522, 383 P.2d 382 (1963); “From the statute it is clear that there is to be established for conviction a specific intent to destroy the unborn child, and no intent to preserve the life of the mother.” \textit{Id.} at 528, 383 P.2d at 385.}
\item \textsuperscript{38} See the text accompanying notes 123-28 \textit{infra}.  
\end{itemize}
ten states and the District of Columbia, however, the statutes make it clear that it is the motivation and not the objective necessity which constitutes the basis for the exception from coverage. The new New York Revised Penal Law takes an intermediate position by requiring that the belief be "reasonable" when a duly licensed physician performs the abortion.

A final point of difference is whether prior consultation with one or more physicians is necessary before a claim of justification can be made. In thirteen states the abortion statute itself requires advice or consultation, while in three others the same thing is accomplished through statutes governing revocation of licenses to practice medicine. In other states, the fact of consultation presumably has no legal relevance, although it probably determines whether any criminal prosecution is ever brought against a doctor who performs an abortion after regular hospital consultation.

A few states provide broader statements of justification. Seven states permit abortions to preserve the life of the unborn child. This qualification 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, the limitation has no very great impact on the abortion problem as such, and serves only to remove any hypothetical bars to legitimate obstetrics practice. A few statutes grant an even broader license to perform abortions when they are necessary to prevent serious and permanent bodily injury or to protect the health of the mother.

89 Ark., Colo., Hawaii, Miss., N.M., Tenn., Tex., Va., W. Va. The statutes are cited notes 31, 32 supra.

40 N.Y. REV. PEN. LAW § 125.05 (3).


44 Colo., N.M. The statutes are cited note 31 supra.

45 D.C., Ala. The statutes are cited notes 31, 32 supra. The Oregon licensing statute, note 42 supra, uses the phrase "health in peril." Whether the Maryland statute, cited note 31 supra, belongs in this category depends on what interpretation is placed on the clause "satisfied . . . that no other method will secure the safety of the mother." No Maryland decision provides an answer.
Massachusetts, as indicated above, has accomplished the same thing by judicial decision. This permits a more normal medical determination to be made than is the case when necessity to preserve the life of the woman is the requirement.

The old common law requirement that the child be quick before there could be a criminal abortion has disappeared from the statute law. This is most commonly achieved by referring to pregnancy; thirty-two states utilize this approach. Five other states specify that quickening does not matter, usually through the phrase "whether quick or not." In the remaining states, this matter is resolved by the statutory provisions dealing with the attempt problem, discussed immediately below. The fact of quickening, however, is determinative of the severity of the punishment in ten states.

Additional problems arise when, despite the effort to abort the woman, no miscarriage is in fact brought about. This may be either because the abortion operation is bungled or because the woman is not pregnant. Forty-one states 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; Texas has a special attempt statute. If the woman is not pregnant, however, it might be argued that the crime was "impossible" to attempt. Several states eliminate this as a possibility either by covering the doing of the prohibited acts to "any woman," to a woman "whether

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46 See text accompanying note 25 supra.
48 Ark., Ky., Me., Neb., Tenn. The statutes are cited note 31 supra.
49 Fla., Hawaii, Kan., N.H., N.Y., N.D., Okla., Pa. (PA. STAT. ANN. tit. 18, § 4719 (1965)), S.C., Wis. Except as otherwise indicated, the statutes are cited note 31 supra.
51 TEX. PEN. CODE art. 1193 (1961) ("provided it be shown that such means were calculated to produce that result . . . ")
53 Ten jurisdictions use this language: D.C., Cal., Fla., Iowa, Mass. (MASS. GEN. LAWS ANN. ch. 272, § 19 (1956)), Ohio, Pa. (PA. STAT. ANN. tit. 18, § 4719 (1963)), Va., Wash., W. Va. Except as otherwise indicated, the statutes are cited notes
pregnant or not;"\textsuperscript{54} or to a woman believed by the defendant to be pregnant.\textsuperscript{55} Several decisions support the idea that under statutes like these the victim need not be pregnant.\textsuperscript{56} In two states, however, punishment varies according to whether or not a miscarriage is actually produced.\textsuperscript{57}

(2) Statutes Prohibiting Killing an Unborn Quick Child.— Eight 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{58} 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 abort without her consent and who uses physical violence against her body to achieve the purpose. Conceptually these statutes clearly accord independent personality to the fetus, for the killing of the fetus under these circumstances is called manslaughter; and the sections themselves are usually found with the other homicide sections.

(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 (a) second degree murder, based either on 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

\textsuperscript{31, 32 supra.} There is some internal inconsistency in the Virginia and West Virginia statutes which speak of "intent to destroy her unborn child," and the woman was pregnant in the reported cases. \textit{E.g.}, Anderson v. Commonwealth, 190 Va. 665, 58 S.E.2d 72 (1950); Coffman v. Commonwealth, 188 Va. 553, 50 S.E.2d 431 (1948); but the exact question has not apparently been presented for decision.

\textsuperscript{54 Ill. ("it shall not be necessary in order to commit abortion that such woman be pregnant . . ."), Mo., N.Y. (in both N.Y. Penal Law and N.Y. Rev. Penal Law). The statutes are cited note 31 supra.}

\textsuperscript{55 Ind. ("whom he supposes to be pregnant"), Ky. ("has reason to believe pregnant"), R.I. ("woman supposed by such person to be pregnant"), Vt. (same), Wyo. ("whom he supposes to be pregnant"). The statutes are cited note 31 supra.}


\textsuperscript{57 Ky., Me. The statutes are cited note 31 supra.}

\textsuperscript{58 ARK. STAT. ANN. § 41-2223 (1964); FLA. STAT. ANN. § 782.09 (1965); KAN. GEN. STAT. ANN. § 21-409 (1964); MICH. STAT. ANN. § 28.554 (1962); MISS. CODE ANN. § 2223 (1957); N.Y. PEN. LAW § 1050 (2) (this is not carried as such into the Revised Penal Law); N.D. REV. CODE § 12-25-06 (1960) (semble); OKLA. STAT. tit. 21, § 713 (1961).}
(b) manslaughter, based on gross criminal negligence. 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, or by characterizing the death as either murder, manslaughter, or assault with intent to murder.

(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 that there is no intent to change the earlier Louisiana case law to the same effect.

In several states, however, the legislature has decreed that the

64 See, e.g., Commonwealth v. Follansbee, 155 Mass. 274, 29 N.E. 471 (1892); Petition of Vickers, 371 Mich. 114, 123 N.W.2d 253 (1963) (woman cannot claim self-incrimination); In re Vince, 2 N.J. 443, 67 A.2d 141 (1949) (issue of self-incrimination; the woman is not incriminated 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, 81 S.E. 932 (1914); Smartt v. State, 112 Tenn. 539, 80 S.W. 586 (1904); Willingham v. State, 33 Tex. Crim. 98, 25 S.W. 424 (1894). Contra, Seed v. State, 27 Ala. App. 263, 170 So. 489 (1936); State v. McCoy, 52 Ohio St. 157, 39 N.E. 316 (1894). Iowa has held that even though she is not an accomplice, she can become guilty of a conspiracy by agreeing to have the operation performed upon herself. State v. Crofford, 133 Iowa 478, 110 N.W. 921 (1907). In that case she was not charged (she died as a result of the abortion) and 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, since she is the victim. Commonwealth v. Fisher, 398 Pa. 237, 246, 157 A.2d 207, 212 (1960).
woman commits a criminal act by soliciting or submitting to an abortion.\(^{68}\) These statutes seem to have two significant legal effects, and probably one practical effect as well. First, they are often accompanied by statutes requiring the woman's testimony to be corrobated,\(^{69}\) or are held by judicial construction to require corroboration.\(^{70}\) Second, the fact that the woman is deemed to have committed a criminal act means that the woman may claim privilege when she is summoned to testify for the state.\(^{71}\) 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\(^{72}\) or that immunity against prosecution is conferred upon the woman when she testifies for the state.\(^{73}\) This brings the matter around full circle to about where it would be if the woman were not considered a criminal in the first place.\(^{74}\)

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 cooperates.

(5) Statutes Penalizing Activity Which Facilitates Perform-


\(^{70}\) People v. Peyser, 380 Ill. 404, 44 N.E.2d 58 (1942); State v. McCoy, 52 Ohio St. 157, 39 N.E. 316 (1894).


\(^{72}\) Minn. Stat. Ann. § 617.21 (1964); Wash. Rev. Code § 9.02.040 (1956). Whether or not these statutes are consistent with the privilege against self-incrimination embodied in the respective state constitutions, they appear clearly to be unconstitutional as a matter of fourteenth amendment due process under Malloy v. Hogan, 378 U.S. 1 (1964).


\(^{74}\) See, e.g., Petition of Vickers, 371 Mich. 114, 123 N.W.2d 253 (1963); In re Vince, 2 N.J. 443, 67 A.2d 141 (1949).
ANCE 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; in any event the very nature of the channels which supply equipment to physicians and hospitals makes it unlikely that a layman can casually purchase them. 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 probably with few other modern uses, that some effort at controlling them can be made. In any event, legislatures have fairly consistently tried to regulate their availability.

Advertising abortifacients is penalized in twenty-seven jurisdictions. In twenty-two of them there is a special statute covering the abortifacient either alone or in the context of medicines preventing conception, curing venereal disease, and the like, while in six jurisdictions this sort of advertising is prohibited in the context of obscenity. Whether these statutes are in fact invoked at the local level is uncertain; there is a dearth of appellate opinion construing them.

State legislation also frequently seeks to regulate the actual traffic in abortifacients by prohibiting their manufacture, 

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76 Id. at 85-91.


79 The author has found only two cases: People v. McKeen, 76 Cal. App. 114, 243 Pac. 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, which appears to stress the physician’s misrepresentation or fraud rather than his offering to produce an abortion.

tion,81 distribution,82 furnishing,83 sale or keeping or exposing for sale,84 giving away,85 or lending.86 Two states require that all sales be on prescriptions which are then registered.87 Oregon penalizes one who furnishes a place knowing that abortions, other than those performed as therapeutic under the medical licensing statutes,88 are to be performed there.89 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."90 The limited case law interpreting these sections in the context of traffic in abortifacients91 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 maintained through granting and revoking special licenses to engage in a business or profession, or by imposing administrative fines or penalties; many aspects of prostitution are controlled primarily in this way.92

81 IND. ANN. STAT. § 10-2804 (1956).
82 ILL. ANN. STAT. ch. 38, § 23-2 (Smith-Hurd 1964) (other than to a licensed physician); LA. REV. STAT. ANN. § 14:88 (1951).
83 TEX. PEN. CODE ANN. art. 1192 (1961) (treated as accomplice).
84 D.C. CODE § 22-2001 (1961); COLO. REV. STAT. ANN. §§ 40-9-17 (obscenity statute), 66-3-65 (1964); ILL. REV. STAT. ANN. ch. 38, § 23-2 (Smith-Hurd 1964); IOWA CODE ANN. § 205.51 (1949) (other than on prescription); MD. ANN. CODE art. 27, § 3 (1957); MASS. GEN. LAWS ANN. ch. 272, § 21 (1956); MICH. STAT. ANN. § 28.205 (1962) (except on prescription); MINN. STAT. ANN. § 617.20 (1964); MISS. CODE ANN. § 2289 (1957); MO. REV. STAT. § 563.300 (1959); NEV. REV. STAT. § 201.130 (1955); R.I. GEN. LAWS ANN. § 11-3-4 (1957); VT. STAT. ANN. tit. 13, § 104 (1959); WASH. REV. CODE § 9.02.030 (1956).
86 COLO. REV. STAT. ANN. § 40-9-17 (1964) (obscenity statute); MISS. GEN. LAWS ANN. ch. 272, § 21 (1956); MISS. CODE ANN. § 2289 (1957) (obscenity statute).
87 COLO. REV. STAT. ANN. § 66-3-66 (1964); MICH. STAT. ANN. § 28.205 (1957).
91 Youngs Rubber Corp. v. C. I. Lee & Co., 45 F.2d 103 (2d Cir. 1930) (dictum).
92 George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 MICH. L. REV. 717, 736-42 (1962).
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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 authorize 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 criminal law determines the administration of the medical licensing law. But in three jurisdictions the licensing statute provides for therapeutic abortion procedures not referred to in the criminal statutes themselves. There is no case law reconciling the possible inconsistency between the sections; but where the legislature

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83 Miss. Code Ann. § 2223 (1957) ("The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act."); Mo. Rev. Stat. § 559.100 (1959).

84 Ala., La., Ore., cited note 42 supra.

has carefully spelled out in the licensing statute procedures for performing a therapeutic abortion, it appears unlikely that a court would hold that a doctor is guilty of a crime when he has complied with specific statutory requirements. The specific should still control the general.

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\textsuperscript{96} or unprofessional conduct in general.\textsuperscript{97} Since abortion has been denominated a form of unprofessional conduct,\textsuperscript{98} it is clear that there is no state in which a proven abortionist can continue to practice without his license being subject to revocation.

Many of the statutes cited above also list practitioners of the healing arts other than medical doctors. Some jurisdictions, however, have enacted special statutes covering osteopaths,\textsuperscript{99} nurses,\textsuperscript{100} midwives,\textsuperscript{101} and other practitioners specially regulated by law.\textsuperscript{102}

Most revocation proceedings are carried on as a purely administrative matter, and are subject to review as are administrative proceedings 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{103}

There are, however, two questionable aspects of the use of license

\textsuperscript{96} D.C. CODE ANN. § 2-131 (1961); CONN. GEN. STAT. ANN. § 20-45 (1960); IND. ANN. STAT. § 63-1306 (1962); ME. REV. STAT. ANN. ch. 32, § 3203 (1964); N.H. REV. STAT. ANN. § 329:17 (Supp. 1963); OHIO REV. CODE § 4731.22; S.C. CODE ANN. § 56-1368 (1962) (conviction of "illegal practice" is also included; this may well include abortion).

\textsuperscript{97} MASS. GEN. LAWS ANN. ch. 112, § 61 (1965); MONT. REV. CODES ANN. § 66-1004 (1947). This phrase is also included in the various statutes cited notes 93, 96 supra.

\textsuperscript{98} Lawrence v. Board of Registration, 239 Mass. 424, 132 N.E. 174 (1921); State ex rel. Sorenson v. Lake, 121 Neb. 331, 236 N.W. 762 (1931); cf. Moormeister v. Department of Registration, 76 Utah 146, 288 Pac. 900 (1930).

\textsuperscript{99} ARIZ. REV. STAT. ANN. § 32-1854 (1956); ORE. REV. STAT. § 681.140 (1963).

\textsuperscript{100} ARIZ. REV. STAT. ANN. § 32-1663 (1956); ILL. ANN. STAT. ch. 91, § 35-46 (Smith-Hurd 1956); CAL. BUS. & PROF. CODE §§ 2761 (nursing), 2878 (vocational nursing).

\textsuperscript{101} COLO. REV. STAT. ANN. § 91-4-6 (1964); GA. CODE ANN. § 84-3312 (1955); ILL. ANN. STAT. ch. 91, § 16a (Smith-Hurd 1956).

\textsuperscript{102} FLA. STAT. ANN. §§ 460.13 (chiropractor), 462.14 (naturopath) (1965); NEB. REV. STAT. § 634.010 (1963) (chiropractor); N.Y. EDUC. LAW § 6514 (physiotherapy); ORE. REV. STAT. §§ 684.100 (chiropractor), 685.110 (naturopath) (1963).

\textsuperscript{103} See, e.g., Application of Jones, 4 App. Div. 2d 994, 168 N.Y.S.2d 42 (1957).
revocation procedures against professional persons who are alleged to have committed criminal abortions. It has been held that license revocation proceedings may be begun even though the statute of limitations has run on a criminal prosecution or the defendant has been earlier acquitted in a criminal prosecution based on the same act. Although, as a general matter, agencies which regulate professions should be able to remove the unfit from practice whatever 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 that the medical profession is endeavoring to protect the public against an inept medical practitioner. In this context, it is interesting to note that at least two states have held that revocation of a license is a penalty which is outlawed by a statute conferring immunity in return for incriminating testimony.

The other questionable aspect is that it has been held that disciplinary proceedings may be carried through even though a pending prosecution based on the same act of abortion has not reached final disposition. This places the respondent in the disciplinary proceedings in a difficult position. He may assert, in good faith, the privilege against self-incrimination in the disciplinary proceeding without being disciplined for his refusal to testify, but this may well mean that he will have his license revoked because he does not controvert the testimony adduced by the grievance committee. On the other hand, if he testifies in the license revocation matter, he may find that, in fact, he provides useful information to the state which can be used against him in the criminal prosecution as a party admission. Under circumstances like these, the revocation proceedings have

105 State v. Lewis, 164 Wis. 363, 159 N.W. 746 (1916); FLA. OPS. ATTY GEN. 505, 509 (1962).
107 Florida State Bd. of Medical Examiners v. James, 158 So. 2d 574 (Fla. App. 1964).
little claim to priority over the criminal prosecution, and probably ought to be suspended until the outcome of the criminal case is clear.

C. Civil Responsibility

From time to time the question has arisen as to whether the woman on whom an abortion has been performed, or her representative if she is dead as a result of the operation, can sue civilly 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) or from activities which are by their nature "highly offensive and injurious to society," 109 and are thus both immoral and illegal. If, on the other hand, it were predisposed toward permitting recovery, the court might hold that the state is wronged and, therefore, permits the recovery in indirect enforcement of its policies 110 or that consent to the abortion is not consent to bungled aftercare. 111

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 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. 112 This holding appears fair enough, since in fact the woman and her paramour 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

109 Martin v. Morris, 163 Tenn. 186, 188, 42 S.W.2d 207 (1931).
110 Milliken v. Heddesheimer, 110 Ohio St. 381, 388, 390, 144 N.E. 264, 267 (1924).
111 See the cases cited note 117 infra.
should lend their aid to support 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 any suit may be maintained. Two cases deny the possibility of an inter vivos action no matter how careless the doctor may have been;\textsuperscript{113} but other courts have permitted the woman to recover,\textsuperscript{114} at least to the extent of the injuries actually suffered.\textsuperscript{115}

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 thereafter (like septicemia), it is possible that her survivors may commence a wrongful death action, chiefly against the doctor. Only two cases refuse to permit this action under these circumstances;\textsuperscript{116} the rest of the cases permit recovery.\textsuperscript{117} In these latter decisions it is evident that if the courts can point to wilful 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 they 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 which the plaintiff's attorney should keep in mind as he presents his medical evidence.

Though some reservation has been expressed about permitting civil recovery based on a bungled abortion under any circumstances whatever,\textsuperscript{118} there seems to be no special reason to treat this situation any differently than any other malpractice situation.\textsuperscript{119} If a doctor fails to provide the sort of aftercare which is expected according to generally accepted medical standards, he ought to be liable

\textsuperscript{113} Nash v. Meyer, 54 Idaho 283, 31 P.2d 273 (1934); Martin v. Morris, 163 Tenn. 186, 42 S.W.2d 207 (1931).


\textsuperscript{115} Lembo v. Donnell, 117 Me. 143, 103 Atl. 11 (1918); Miller v. Bayer, 94 Wis. 123, 68 N.W. 869 (1896).

\textsuperscript{116} Szadiwicz v. Cantor, 257 Mass. 518, 154 N.E. 251 (1926) (there is 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{117} 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); Henrie v. Griffith, 395 P.2d 809 (Okla. Sup. Ct. 1964); Andrews v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931) (only for negligent aftercare, not for the abortion itself).

\textsuperscript{118} 40 Ky. L.J. 410, 414-15 (1952).

\textsuperscript{119} Cf. SHARTEL & PLANT, THE LAW OF MEDICAL PRACTICE §§ 1-17, -18 (1959).
in damages whether or not the original operation or technique is an abortion. Holdings in line with the majority position not only promote higher standards of medical care in general, but serve also to support any efforts which may be made to put control over therapeutic abortions primarily in the hands of the medical profession itself. 120

III. TRENDS AND TECHNIQUES TOWARD LIBERALIZATION

Whether one stops at this point and rests content with a description of present statutes and case law, or proceeds to suggest changes in the present law, depends on his basic attitude toward abortion and on the policy considerations which he chooses to stress. For some, the majority position, which permits abortion only to save the life of the mother, is the most liberal that one can safely take; no change is either needed or proper. For certain others, even an exception in favor of saving the mother's life is intolerable; there should be absolute prohibition of all abortions, whatever the circumstances. Roman Catholic writings come close to advocating this position. 121 However, for many in law, medicine, and society in general, the present law is unnecessarily strict and must be liberalized.

The author stands with the latter group; this, of course, dictates in large measure the form and content of what follows, and slants it considerably. The author prefers to make this clear, however, rather than hiding behind a facade of objective legal scholarship. Briefly stated, then, 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 if they become pregnant they will have to carry a child to term, any more than they will be deterred by being denied contraceptives or anaesthesia during childbirth. 122 If they intend sexual relations, they will have them despite legal controls or unpleasant but remote physical consequences. To put it another way, proscribing abortion does not promote celibacy, and liberalizing abortion does not promote promiscuity. Among 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 will terminate

120 See the text accompanying notes 152-64 infra.
122 Williams, The Sanctity of Life and the Criminal Law 61-63 (1957).
the pregnancy safely, though not cheaply, or purchase a ticket to a country in which an abortion can be performed openly. For those without the means or the connections necessary to secure an abortion in that way, the choice is less satisfactory. The mother may have to carry the child to term; if so, it may not be born into a satisfactory home or may not be adoptable. She may have to find an unqualified quack who butchers his patients, or she may have to try to induce an abortion herself. Either of the latter routes 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 performance of abortions on women in aseptic clinics rather than in motels or filthy tenement rooms if it is in fact concerned about the life and health of women who do not want to carry their pregnancies to term. To accomplish this the present criminal law must be modified. There are three ways in which this might be achieved: (1) adoption of procedural changes which make it difficult to convict doctors who perform, in a hospital or clinic, dilitation and curettage or other acceptable medical techniques to terminate a pregnancy; (2) embodiment in the criminal code provisions of much broadened categories of therapeutic abortions, the performance of which is exempted from criminal penalties; or (3) complete elimination of criminal law regulation of therapeutic abortions and regulation of the practice by the medical profession itself.

**A. Procedural Changes to Minimize Prosecutions in Therapeutic Abortion Cases**

It is easy to equate the fact of legislation with the fact of control, or to state it somewhat differently, to assume that by the act of legislating the problem is solved. But in many circumstances it is not so much the content of the statute which concludes the case as it is the matter of who has the burden of proof. Therefore, enforcement of inherited legal standards to prevent the gradual development of medical and hospital practice can either be promoted or retarded by the rules, in effect in the jurisdiction, establishing burden of proof or requiring a special quantum of proof.

Whether the burden of disproving medical necessity, as defined in the particular state statute, is on the state depends upon whether that element is considered an exception to the statute or a proviso. One state, Michigan,\(^{123}\) relieves the prosecution by statute from any

obligation to disprove necessity, and Illinois uses the terminology of affirmative defense concerning the issue of necessity. Otherwise the matter has been left to judicial interpretation. Only two courts have stated clearly and directly that the burden of proving necessity is on the defendant; these cases are overbalanced by decisions in fifteen other states which require the state to plead and prove the want of necessity.

If one's purpose is to encourage medical personnel in licensed hospitals and clinics to develop their own concepts of what "life" or "life and health" mean, the burden of proving non-necessity must remain with the state. A zealous prosecuting attorney would then have to assume the obligation of establishing that the collective medical judgment of those who authorized the abortion to be performed in the hospital or clinic was itself not medically sound, an almost impossible burden for him to discharge. Several medical journals contain descriptions of abortions which might not have met the statutory tests for legality if they were tested in the courtroom but which were approved openly in hospitals; no prosecutions were brought, which suggests that prosecutors are not anxious to lock horns with the organized medical profession. Conversely, if one's aim is to discourage activity by the medical profession, one should place the burden of proving necessity on the doctor. He could probably do so in many instances, but the fear of being called upon to prove medical necessity (which contrasts strongly with the attitude of "let the prosecuting attorney impeach the validity of our medical

124 ILL. ANN. STAT. ch. 38, § 23-1 (b) (Smith-Hurd 1963).
125 Williams v. United States, 138 F.2d 81 (D.C. Cir. 1943); Fitch v. People, 45 Colo. 298, 100 Pac. 1132 (1909).
126 People v. Gallardo, 41 Cal. 2d 57, 257 P.2d 29 (1953); State v. Lee, 69 Conn. 186, 37 Atl. 75 (1897); State v. Brown, 26 Del. 499, 85 Atl. 797 (1912); Holloway v. State, 90 Ga. App. 86, 82 S.E.2d 235 (1954); State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592 (1928); Commonwealth v. Stone, 300 Mass. 160, 14 N.E.2d 158 (1938); Ladnier v. State, 155 Miss. 348, 124 So. 432 (1929); State v. DeGroote, 259 Mo. 364, 168 S.W. 702 (1914); People v. Harrison, 40 Misc. 2d 601, 243 N.Y.S.2d 432 (Sup. Ct. 1963); Moody v. State, 17 Ohio St. 110 (1866); State v. Elliott, 206 Ore. 82, 289 P.2d 1075 (1955); State v. St. Angelo, 72 R.I. 412, 52 A.2d 513 (1947); State v. Wells, 35 Utah 400, 100 Pac. 681 (1909); State v. Montifoire, 95 Vt. 508, 116 Atl. 77 (1921); State v. Bates, 52 Wash. 2d 207, 324 P.2d 810 (1958). The Connecticut, Oregon, and Washington decisions, however, hold that the state carries the burden by proving that the woman was healthy immediately prior to the time the abortion was performed.
judgment if he wishes") is likely to encourage the timid to shun all abortions.\textsuperscript{128} Liberalization requires that the burden of proving non-necessity remain with the state.

Mention has already been made of statutes and cases which require corroboration of the aborted woman's testimony in order for there to be a conviction. It might be contended that this requirement be extended in order to encourage the performance of abortions by licensed doctors in hospitals. This is not likely to be the result achieved, however. If an abortion is performed after due consultation, hospital records are almost certain to contain corroborating documentation. It is also doubtful that the doctors who were consulted in advance of the abortion could refuse to testify, unless possibly on the basis of the privilege against self-incrimination, by asserting that they might be charged as conspirators with the doctor who in fact performed the abortion. The only type of defendant who is likely to profit from the corroboration requirement is the clandestine abortionist, and it is doubtful that anyone particularly wants to encourage him in his practice.

B. Liberalized Scope For Therapeutic Abortion as Defined in the Criminal Code

A second means of liberalizing the abortion law is to broaden the scope of justifiable abortions in the criminal code itself. Mention has already been made\textsuperscript{129} of a few statutes which permit abortions intended to preserve the health of the mother. To include this alternative is certainly to encourage the performance of therapeutic abortions in hospitals by licensed physicians; all hospital abortions are in fact performed for health reasons. Whether the term "health" includes psychic health is partly a medical and partly a legal issue. It seems clear that many therapeutic abortions now performed are motivated more by mental health considerations than by strictly physiological considerations, although, of course, the two cannot be totally separated.\textsuperscript{130} Whether, however, a court will construe the

\textsuperscript{128} Cf. the cowed attitude of the medical profession toward administering narcotics to hold an addict at the level of his addiction while he is being treated. \textsc{Lindesmith, The Addict and the Law} 246-52, 254-66 (1965); \textsc{Rubin, Psychiatry and Criminal Law} 122-31 (1965). The reason is primarily the vigorous crusading and brow-beating attitude of federal narcotics authorities.

\textsuperscript{129} See text accompanying notes 44-46 supra.

statutory term "health" to include mental health is somewhat less clear. About all one can cite in favor of a broad interpretation is a portion of the charge in the famous case of *Rex v. Bourne*131 and one Iowa decision132 in which the court described the aborted woman as being in a distraught condition, although in fact it decided the case on a point of statutory construction. Unless the statute refers specifically to mental health, it is not at all clear that the word "health" will be extended by judicial construction beyond "physical health."133

No American statute authorizes an abortion to be performed on eugenic grounds, *i.e.*, based on the possibility that the fetus may be born in a mentally or physically abnormal condition. No lawful relief is, therefore, available to a woman who has contracted rubella134 during the first trimester of pregnancy or who has taken thalidomide or other drugs which may produce deformed offspring.135

Nor do American statutes take into account either the psychological damage which may result to a woman if she is forced to carry to term a child conceived through an act of rape (and the possible non-adoptibility of the resulting child) or the fairly high possibility that a child born of an incestuous relationship may be mentally retarded.136 If no relief is authorized in cases like these, it follows, of course, that there is no authorization of abortions intended to prevent either economic hardship to the family unit into which the child will be born or diminution in the level of maternal care to be given all of the children in the family. And there is not a shred of legal basis for an abortion based on the convenience of the mother, whatever the personal considerations may be.

The drafters of the American Law Institute Model Penal Code moved strongly to expand the scope of justifiable abortion beyond its common form in the United States. Section 230.3137 defines

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131 [1939] 1 K.B. 687, 694; Hudson v. Foster, [1939] 3 All E.R. 615, 619 ("that the probable consequences of the continuance will be to make the woman a physical or mental wreck").

132 State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592 (1928). The doctor apparently acted because the woman "was in a highly nervous condition, and was threatening to kill herself, and was complaining of much pain." *Id.* at 972, 221 N.W. at 593.

133 If, however, the abortion is performed in a hospital after appropriate consultations, the chances of a prosecution are minimal. See the materials cited note 127 *supra*.

134 Commonly known as German measles.

135 The statutes cited at note 43 *supra* do not cover this situation, since abortion in eugenic cases is intended to destroy, not preserve, the fetal life.

136 *Taboos Against Incest Prove Well-Founded*, 6 MEDICAL WORLD NEWS 94 (1965) reporting double the normal incidence of mental retardation anticipated on the basis of classical genetic theory.

justifiable abortion to be termination of a pregnancy by a licensed physician on any of three grounds: (1) that continuance of the pregnancy would gravely impair the physical and mental health of the mother (this builds on the exception in the present Alabama and District of Columbia statutes, and makes it clear that psychic considerations can justify an abortion); (2) that the child would be born with a grave physical or mental defect (this embodies eugenic considerations not hitherto known in American law); 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. (This exception combines considerations of mental and physical welfare of the pregnant woman with humanitarian considerations. It is intended to embody considerations set out in the Bourne case, and to prevent repetition of a case in which the housewife victim of a rapist conceived and was forced to carry the child to term because she could not obtain a lawful abortion.)

However persuasive the arguments in support of the Model Penal Code provisions may be to those who are pre-disposed to favor liberalized abortion, they have so far been repudiated by state legislatures to which they have been submitted. The drafters of the proposed Illinois Criminal Code advocated, like the proponents of the Model Penal Code, that justifiable abortion include abortions "medically advisable because continuance of the pregnancy would endanger the life or gravely impair the health of the pregnant woman" or because the fetus would be born with a "grave and irremediable physical or mental defect" and abortions of women pregnant through "forcible rape or aggravated incest." The legislature, however, rejected the draft and limited the exception for justifiable abortion to operations necessary to preserve the woman's life. The authors of the Minnesota Criminal Code proposed that rape victims be permitted an abortion if a complaint has been filed with prosecuting authorities, and that therapeutic abortions be permitted, if performed on the advice of two licensed physicians, "to save the life of the mother, or to avoid grave impairment of the physical or mental condition of the mother or to prevent the birth of a child with grave

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140 Ibid. The revised Committee Comments state: "Due to the opposition, and criticism of the entire Code, encountered because of the inclusion of these affirmative defenses to abortion, the Joint Committee agreed to their deletion and to the draft of the section in its present adopted form."
physical or mental defects.'" The legislature struck out the whole chapter on sex crimes, including abortion, and preserved the existing statute which limits lawful abortions to those necessary to preserve the life of the mother. In New York the matter did not progress even this far. The proposed penal law was drawn to include as justification only the necessity "to preserve the life of the female or of an unborn child with which she is pregnant," though the revision commission suggested that it still had the question of a more liberal provision under advisement. When the Revised Penal Code was adopted, however, the only justifying factor retained was necessity to save the life of the mother. Efforts at liberalization in New Hampshire are also reported to have failed in the legislature.

There are, however, two other ways in which the lot of the medical profession may be improved even though no liberalization of grounds for abortion is achieved. One is to make it explicit that the doctor's belief in the necessity for the abortion is sufficient to legitimate the abortion, even though after the fact it might appear that from an objective point of view there was no necessity. This is now the position taken in some of the states—a position embodied in the Model Penal Code as well. Mention has already been made of the qualification in the New York Revised Penal Law that the belief be reasonable; the Model Penal Code requires certificates from two physicians and creates a presumption that the abortion was unjustified unless the certificates are produced. Either device is preferable to a strict liability concept based on objective necessity.

The other method to improve the lot of the medical profession is to set out, in the criminal code itself, procedures which a doctor may follow to gain legal standing to commit a therapeutic abortion. Some states now permit abortions to be performed if there is advice or certification by physicians that an abortion is necessary. These

143 Proposed N.Y. Penal Law § 130.05 (Thompson ed. 1964).
144 Proposed N.Y. Penal Law § 130.05 (Thompson ed. 1964) (Commission Staff Notes).
147 See the text accompanying notes 36-42 supra.
151 Fla. Stat. Ann. § 782.10 (1965) ("advised by two physicians to be neces-
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provisions, however, do not give much assistance to doctors in determining what procedures are appropriate in giving advice to the physician or other person who performs the abortion; the qualifying term "reputable" in the Mississippi statute adds another complicating factor. A more detailed provision establishing basic procedural norms is desirable. The chief question is whether detailed procedural provisions belong in the criminal code\textsuperscript{160} or whether they should be placed among the statutes regulating the medical profession and hospitals. The author believes the latter preferable, in part because it is better not to clutter up the criminal code with details which can just as easily be incorporated by reference from other statutes, and in part because changes in regulations are more easily made when the legislature is asked by the profession or group affected by a proposed change to amend the laws relating to that profession or group than when it is the criminal code itself which is sought to be changed. However, any of the detailed provisions discussed in the section which follows can as well be included in the criminal code as in regulatory statutes.

C. Liberalized Abortion Authorized by Medical Licensing Statutes

If in fact it is the medical profession, or segments of it, that wishes liberalization of abortion laws, so that decisions to perform dilatation and curettage or other medical operations can be made as any other medical determination might be, it seems appropriate to make the primary legal context within which those decisions are to be made that of the statutes regulating doctors and hospitals. On the face of it, this has certain advantages. Interpretation of statutory terms can be made within the framework of civil provisions affecting the medical profession rather than the penal concepts of the criminal code; this might lead to primacy of medical considerations rather than penal. Furthermore, pressures from within the

\textsuperscript{160} An illustration is the legislation proposed in Leavy & Kummer, Criminal Abortion: Human Hardship and Unyielding Laws, 35 So. CAL. L. REV. 123, 146-48 (1962).
medical profession for change can be exerted along familiar channels to reach officials who are themselves members of that profession. In theory, this should work changes more efficiently than if the same energies are directed through non-existent or unfamiliar paths toward laymen in the legislature. And, perhaps, it makes it crystal clear that claims of medical necessity cannot be advanced in criminal prosecutions by those who are not in the licensed group.

There are at least two ways in which this change of context can be accomplished — one which has been tried and one which has not. The first is to incorporate, either in the provisions governing revocation of medical licenses or as a part of the statutes regulating hospital practices in general, specific requirements for the performance of therapeutic abortions. There are three states which have experimented with this first alternative by setting up standards for consultation which can be asserted as a defense to license revocation. Two of them, Alabama and Louisiana, require only consultation, without providing any further procedural details. Oregon is the one state which to date has sought to provide further guidelines. Medical doctors and osteopaths are given a standard — “health... in peril because of her pregnant condition” — by which to make their determinations and are also given procedures of consultation and recording by which the basis for their decision can be ascertained and perpetuated.

In confirmation of the monopoly of lawful abortions by medical doctors and osteopaths, chiropractors and naturopaths are specifically forbidden to perform abortions under any circumstances.

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153 Ala. Code tit. 46, § 270 (Supp. 1963) ("before resorting to any of said methods of saving a woman's life the attending physician shall use diligence to obtain the advice and help of one or more consulting physicians"; there is internal inconsistency with the abortion statute itself, Ala. Code tit. 14, § 9 (1959), which legitimizes abortion done to preserve the woman's "life or health." Piecemeal amendment may be the practical cause.) La. Rev. Stat. Ann. § 37:1285 (1964) ("after due consultation with another duly licensed physician").


156 Ore. Rev. Stat. § 677.190 (1963). A medical doctor is required to have "due consultation" with "another duly licensed medical physician and surgeon who is not an associate or relative of the physician or surgeon and who agrees that an abortion is necessary." Ore. Rev. Stat. § 681.140 (1963). An osteopath is permitted consultation with "another duly licensed osteopathic or medical physician and surgeon who is not an associate or relative." In either case, "the record of this consultation shall be in writing and shall be maintained in the hospital where the consultation occurred or in the offices of all the physicians and surgeons participating in the consultation for a period of at least three years after the date of the abortion."


No state has yet tried the second alternative, which is to place the requirements for performance of a therapeutic abortion in the affirmative context of statutes regulating hospitals rather than in the negative context of license regulation. One state, California, has experienced attempts to do this, though so far without success. An ambitious regulatory statute, based on recommendations of two law school professors,159 was introduced in the California Legislature to establish minimum procedural requirements for the performance of therapeutic abortions.160 The bill sought to permit hospital "therapeutic abortion committees" of five members or more, to include at least two specialists in obstetrics, one in internal medicine and one in psychiatry. Each committee was to be certified by the State Department of Public Health. A physician wishing to perform a therapeutic abortion was to file a written request supported by written opinions of not less than two medical practitioners, one of whom was to be a specialist in the field of medicine within the ambit of which the stated basis for the abortion fell; these practitioners could not be members of the committee. Written consent by the woman and either her husband, if she were married, or her parent or guardian, if she were not, also was to be submitted to the committee. If the committee approved, the abortion could then be performed in the hospital.161 The bill died in committee in both the 1961 and 1963 sessions; it was reported out of committee in the 1965 session, although it was thereafter referred to another committee, from which it was withdrawn by its sponsor for want of sufficient support.162

A second approach to the problem — that of delegating the decision-making to an appropriate administrative agency — has not been attempted directly in the context of abortion, although it is


160 It also proposed elimination from Penal Code coverage of any abortion performed under the therapeutic abortion statute, and expansion of the grounds for abortion to include pregnancy resulting from rape or incest or which created substantial risk that the mother, or the child if born, would suffer grave and irremediable impairment of physical or mental health. This corresponds closely to the Model Penal Code recommendations described in the text accompanying notes 137-38 supra.

161 Two states, incidentally, now require that lawful abortions be performed in a medical facility, though this requirement is in the criminal code provision. ILL. ANN. STAT. ch. 38, § 23-1 (Smith-Hurd 1964) ("in a licensed hospital or other licensed medical facility"); WIS. STAT. § 940.04 (1963) ("unless an emergency prevents, is [to be] performed in a licensed maternity hospital").

162 Information supplied through the courtesy of Assemblyman John T. Knox, the sponsor of the original bill. See also Kummer & Leavy, Therapeutic Abortion Law Confusion, 195 A.M.A.J. 140, 143 (1966).
well established in other areas. To achieve this, the criminal code provision would be amended to exempt from its coverage (1) any abortion necessary, or believed to be necessary by a licensed physician, to preserve the life, or life or health if that is the existing statutory phrase, of the pregnant woman, and (2) any therapeutic abortion performed under duly promulgated regulations of the state commissioner of hospitals, department of health, or whatever (depending on the state), embodying (a) medical grounds for therapeutic abortion and (b) general hospital procedures governing performance of therapeutic abortions. The first part of the proposal is necessary to prevent construction of the amended statute as retroactive in coverage; abortions lawful prior to amendment of the penal code section would continue to be lawful afterwards. The second part would leave extension of the concept of therapeutic abortions to administrative regulation.

If there are constitutional problems inherent in this scheme, they are within the field of administrative law and not criminal law. There is no delegation of power to determine affirmative criminal norms; any regulations promulgated by the specified state agency would inure to the benefit of a defendant doctor and not to his detriment. Most case law appears to support the power of the legislature to delegate norm-creating functions to administrative bodies. Regulation of the professions has been consistently upheld in the face of claims of denial of equal protection or due process; only if regulation of medical practice is delegated to a private agency is there any major problem. Accordingly, it would appear that experimentation along these lines could readily survive constitutional attack.

Would delegating legislation make any practical difference in the availability of safe therapeutic abortion through medical channels? In the abstract it has advantages. It gives members of the medical profession the opportunity of making gradual alterations in hospital practices based on expanded medical knowledge; specifics are not encysted in statutes. Changes would be promulgated by an agency largely composed of members of the medical profession, and

164 Hawker v. New York, 170 U.S. 189 (1898); Dent v. West Virginia, 129 U.S. 114 (1889); State ex rel. Bond v. State Bd. of Medical Examiners, 209 Ala. 9, 95 So. 295 (1923).
thus in one sense answerable to it. Amendments of norms are more quickly and easily accomplished by administrative agencies than by the legislature itself. There is not the same likelihood of campaigns in the press about the morality of abortions, campaigns which have occurred each time liberalization of the abortion provisions in state criminal codes has been attempted. The total impact ought to be a transition toward exercise of considered medical opinion in place of gladiatorial combat.

In fact, however, this legislation or any other legislation which ties issues of therapeutic abortion to the regulation of the medical profession in general is likely to be of little immediate effect. One reason is the extreme conservatism of the medical doctors who staff state agencies, hospital boards, and committees of state and local medical societies. Breezes of reform chill these leaders even more, if that is possible, than their counterparts in the legal profession. It might well be two generations before any impact could be made on their armor of conservatism.

But there is probably a more basic reason. For generations much of the medical profession has been able to avoid coming to grips with the problem of abortion because it has had the ready excuse that discussion of liberalized therapeutic abortion is moot as long as the penal law of the state forbids it. At the same time, however, it has apparently tolerated the marginal practitioners who perform the abortions which its more prestigious members shun out of fear or distaste; the medical profession, as well as the legal, has its prostitutes. The primary reason why most doctors shun abortions is because of their view of themselves as preservers of life; abortion creates, although perhaps to a somewhat lesser degree than the related problem of euthanasia, a real tension between the physician’s desire to preserve life and his awareness that by performing an abortion he is terminating life. When he practices in a field of medicine in which he sees the hardships which refusal to perform an abortion works on his pregnant patients, 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. Certainly, the strongest advocates of liberalized abortion are specialists in gynecology, obstet-

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108 Dr. George L. Timanus was a defendant in the case of Adams v. State, 200 Md. 133, 88 A.2d 556 (1951). See his complaint that doctors who had referred patients to him were unwilling to come forward and testify at his trial. Abortion in the United States 62-63 (Calderone ed. 1958). This looks very much like the "status dilemma" described in Carlin, Lawyers on Their Own 173-84 (1962).
rics, and psychiatry, who encounter pregnant women as persons and not as a non-specific class. To make the medical profession face the fact that it has its own responsibility to determine where it stands on the issue of therapeutic abortions, which is what results from elimination of the problem from the coverage of the criminal code, is to place it in a position of stress and trauma. One might expect no very great increase in the number of therapeutic abortions actually performed, and a very great effort to defer the problem to some other segment of the community, like welfare agencies or the legal profession, so that the medical profession can avoid these internal and external pressures. These efforts ought to be resisted; for if the problem rests with medicine for solution, the medical profession will be forced to recognize that the abortion dilemma is as much its own responsibility to resolve as it is that of any other group in society. In that event, perhaps it will begin to reconsider its attitudes toward abortion in the same way the legal profession has begun to reconsider its attitudes with respect to the practice of criminal law.

IV. CONCLUSION

To continue the present restrictive laws on abortion is to purchase the illusion of security at the cost of considerable human loss. Enforcement of criminal statutes in their present form may accomplish about all the protection possible against untrained abortionists, but with corresponding disadvantages which perhaps more than offset the gains. These disadvantages are the harassment of the medical profession by zealous prosecutors, and the creation of intolerable tension in the doctor who is torn between his desire to perform an abortion, which he believes to be necessary on humanitarian grounds, and his fear of performing it because it is illegal. In the long run the best way to salvage pregnant women from the hands of unqualified abortionists is to make it possible for them to receive proper treatment, openly, in licensed hospitals. This can be achieved by liberalizing the definition of justifiable therapeutic abortion in the criminal code or by incorporating by reference similar expanded provisions in statutes or regulations affecting the medical profession directly. Doctors will face considerable emotional crisis if the second avenue is followed; ingrained emotional expectations and traditions in society make the former difficult to accomplish. If neither alternative is attempted, however, doctors and lawyers must bear on their own consciences the injustices inherent in the present law.