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Abortion Legislation: The Need for Reform

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LEGISLATION

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I. INTRODUCTION

Widespread national publicity and recent state legislative activity[1] have focused a significant degree of national concern on a serious problem of public health and morals—the question of abortion. Surveys indicate that between 1,000,000 and 1,500,000 abortions take place annually—or, one abortion for every four to five pregnancies.[2] The so-called "back-street abortionists," whether amateur or professional, each year cause the death of 5,000 to 10,000 women who are forced to seek their services.[3]

Because of the highly controversial nature of abortion, statutes attempting to deal with the problem stubbornly resist amendment despite widespread disregard of their provisions.[4] Many hospitals permit abortions under hospital-imposed regulations[5] in open contravention of the law,[6] thus subjecting the physicians involved to the risk of

1. The Association for the Study of Abortion, Inc., located in New York, reported that abortion bills were introduced in the legislatures of 28 states during the 1967 term.

2. Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647 (1966). Estimates of the number of abortions performed must be given cautious weight because of the impossibility of collecting data on the subject. The figures stated in the text are the most often relied on and are supported only by the fact that a number of studies have reached this same approximate figure. *But see* MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959), which reported estimates from 333,000 to 2,000,000 annually.

3. Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172, 178 (1964); Comment, *The Legal Status of Therapeutic Abortion*, 27 U. PITT. L. REV. 669, 677 (1966). This figure is probably conservative in light of a reluctance to record abortion as cause of death in autopsy reports. An indication of the physical injury involved can be found in New York's Hospitals Department's report that 40% of all gynecological admissions to municipal hospitals in 1966 were victims of incomplete abortions. Tolchin, *Two Assemblymen Clash on Abortion Law Change*, N.Y. Times, Feb. 27, 1967, at 1, col. 3 (city ed.).

4. LADER, ABORTION 8 (1966).

5. The current hospital procedure has resulted in discrimination against the poor and the non-white. A survey of New York hospitals showed that only 7% of the abortions were performed on non-whites and that 792 private room patients received abortions as compared with 16 ward patients. LADER, ABORTION 29 (1966). A survey of two Buffalo hospitals revealed that 482 abortions were performed upon private patients while only 22 clinic patients received abortions. Niswander, *Therapeutic Abortion: Indications & Technics*, 28 OBSTETRICS & GYNECOLOGY 124 (1966). *See also* N.Y. Times, Feb. 27, 1967, at 23, cols. 3-4.

6. Ninety per cent of abortions performed at Mt. Sinai Hospital were not strictly within the law. Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 126 (1962). A similar result in Buffalo hospitals is reported in OB. GYN. NEWS, Jan. 1967, at 42, col. 1.

criminal prosecution.[7] Legislation should be thoughtfully considered which would not only remove this threat of prosecution for following accepted medical practices but which would also provide a legally-approved alternative in situations (1) where the physical or mental condition of the patient indicates a need for early termination of pregnancy, or (2) where the patient is either mentally incompetent or a victim of incest or rape. Support for legislative reform has been voiced by the general public[8] and by both medical and legal professions.[9]

The purpose of this note is to consider the religious and legal thought which formed the bases for the present abortion statutes; to discuss the present statutory and case law pertaining to abortions; and to examine the various medical and legal factors indicating need for reform.

II. RELIGIOUS AND LEGAL CONCEPTS OF LIFE

The greatest objection to legalized abortion arises from the theory that there is "life" in the fetus which deserves the protection of the law.

7. However, there has never been a criminal prosecution of a licensed physician performing an abortion for health reasons or fetal indications with approval of concurring doctors and a hospital board. Brief for Amici Curiae at 28, Shively v. Stewart, 55 Cal. Rptr. 217, 421 P.2d 65 (1966).

8. Rossi, Public Views on Abortion, Feb. 1966, at 10 (unpublished paper for Committee on Human Development, University of Chicago):

ATTITUDES OF THE GENERAL POPULATION TO LEGAL ABORTION UNDER SPECIFIED CONDITIONS[a]

	YES	NO	DON'T KNOW
1. If the woman's own health is seriously endangered by the pregnancy	71	26	3
2. If she became pregnant as a result of rape	56	38	6
3. If there is a strong chance of serious defect in the baby	55	41	4
4. If the family has a very low income and cannot afford any more children	21	77	2
5. If she is not married and does not want to marry the man	18	80	2
6. If she is married and does not want any more children	15	83	2

[a]Question read: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion . . ." followed by conditions specified above. The question was put to 1,482 people.

9. Abortion law reform was recommended by the committee for the American Medical Association at its 1965 annual convention, but final determination was left to the individual state medical societies. OB. GYN. NEWS, Jan. 1967, at 42, col. 1. *See also* Niswander, *Medical Abortion Practices in the United States,* 17 W. RES. L. REV. 403 (1965). The legal profession's support for reform is evidenced by the American Law Institute's MODEL PENAL CODE. *See also* N.Y. Times, Feb. 27, 1967, at 21.

Since present abortion statutes are primarily based upon concepts of religion and morality, any analysis of the law concerning abortion must of necessity first discuss these various theories.

A. *Religious Concepts*

The Catholic Church has been most active as an institution in resisting the recent proposals for change in the abortion laws.[10] The policy of the Catholic Church stems from its belief that life begins with conception; thus, abortion is considered murder of an innocent without the sacrament of baptism and is punishable by excommunication. The *Casti connubli* of Pope Pius XI in 1930 stated the official doctrine: "The life of each [mother and fetus] is equally sacred and no one has the power, not even the public authority, to destroy it."[11] Under this view the Catholic Church refuses to recognize the exception[12] in the present statutes permitting abortion to save the mother's life. Even if one accepts the validity of the Catholic Church's basic hypothesis, one may question any church's attempt to impose its religious dogma upon the entire community through its opposition to change of today's restrictive abortion statutes.[13]

Because of the diversity of viewpoints within the Jewish faith, it is difficult to define an official Jewish position on abortion, but as early as 1168 A.D. a treatise of Jewish law under the heading of self-defense accepted abortion when the mother's life was in danger,[14] a position expressed in most current legislation. This concept necessarily accepts the premise that life begins with conception. On the other hand, one segment of modern Jewish religious teaching views the development of the fetus in stages, thus permitting abortion to

10. Sands, *The Therapeutic Abortion Act: An Answer to the Opposition,* 13 U.C.L.A. L. REV. 285, 287 (1966). *See also* the first pastoral letter ever issued jointly by the bishops of New York's eight Roman Catholic dioceses calling upon parishioners to fight the recent attempt to change New York's abortion law. N.Y. Times, Feb. 13, 1967, at 1, col. 3 (city ed.).

11. LADER, ABORTION 95 (1966).

12. One exception the Catholic Church does recognize, however, is that which is justified by the doctrine of "dual effect," which excuses the death of a fetus incident to the treatment of a disease. For example, if physical condition indicates the need for a hysterectomy, the Church may permit an operation upon a pregnant woman even though the result might be expulsion of the fetus. Sands, *supra* note 10, at 293.

13. "There is nothing in Catholic teaching which suggests that Catholics should write into civil law the prescriptions of church law, or in any way force the observance of Catholic doctrine on others." Letter from Richard Cardinal Cushing, March 19, 1963, cited in Sands, *supra* note 10, at 296. In addition, there is reason to believe that a portion of the Catholic lay population is not following this particular teaching of the Church. Four studies show that Catholics comprise 20% of all abortion patients, almost equal to the Catholic ratio of about 25% of the total population. LADER, ABORTION 7 (1966).

14. Leavy & Kummer, *supra* note 6, at 133.

preserve the mother's health during the first stage and thereafter, only to save her life.[15]

The position of the various Protestant denominations on abortion is most difficult to analyze because of the lack of unity and central doctrine. Some members of the Episcopal and Unitarian faiths (two of the smaller denominations) have endorsed very liberal approaches to the abortion problem.[16] The National Council of Churches, representing the major Protestant denominations, has issued a statement[17] recognizing human life in the fetus, but condoning abortion in cases involving threats to the life or health of the mother, a view more permissive than that taken by most current statutes.

B. *Legal Concepts*

Is there any legal significance to the concept of "life" in the fetus? The different areas of the law vary in their consideration of the question. Jurisdictions also vary in the application of these considerations to each field of law.

The intentional killing of the fetus was not recognized as homicide at common law, but many jurisdictions have by statute established the crime of foeticide, although there is disagreement as to the extent of physical development which must take place before the fetus is entitled to the protection of the law.[18]

Many who oppose abortion reform point to the law of property and inheritance as recognizing the fetus as a "person" from the time of conception. Closer analysis reveals, however, that this theory is a legal fiction. Since the child must be born alive in order to inherit,[19] these fields of law are actually recognizing only an expected life. An extreme example illustrating that courts are not basing their decisions on the fact that a fetus is a person is the case of *Piper v. Hoard*,[20] where plaintiff was allowed to recover land on the basis of fraud perpetrated prior to her conception.

15. "First, the foetus is an organic part of the mother up to the moment when labour begins, and abortion is strongly condemned on moral grounds unless justified for medical reasons. Second, until the child's head or the greater part of its body has emerged, its life is of inferior value, and its claim to life must he set aside in the mother's interest if the child and not some illness threatens her life. Third, when the major part of the child is born, it assumes human status, and the value of its life is almost equal to that of any adult person." Trout, *supra* note 3, at 176.

16. LADER, ABORTION 99-100 (1966).

17. Trout, *supra* note 3, at 176.

18. For example, in New York foeticide is manslaughter while the killing of a born child is murder, Gilpin v. Gilpin, 197 Misc. 319, 94 N.Y.S.2d 706, (Dom. Rel. Ct. 1950); Georgia distinguishes between a misdemeanor and murder at the time of quickening. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955). *See generally* 40 C.J.S. *Homicide* §§ 38, 65, 66 (1944).

19. 4 H. TIFFANY, REAL PROPERTY § 1127 (3d ed. 1939).

20. 107 N.Y. 73, 13 N.E. 626 (1887). *H* acquired land from *F* but induced plaintiff's mother to marry *F* representing that *F* owned the land and that their issue would

The recent trend in the law of torts allowing a cause of action for prenatal injuries has been interpreted as legal recognition of the existence of a human personality in the fetus. Although a majority of jurisdictions now permit recovery for prenatal torts, there is no unanimity with regard to the rationale utilized in granting the remedy or the conditions necessary for recovery.[21] The landmark case of *Montreal Tramways Co. v. Léveillé*,[22] allowed compensation to a child for a prenatal injury resulting in a life-long deformity. The court's emphasis upon the *life-long* deformity implies that birth was a prerequisite to recovery. Other courts adhere to a "biological" theory that life begins upon conception in order to allow recovery of damages even if the child is still-born.[23] Under either theory the courts seem to be more interested in providing a remedy for a clearly wrongful act than they are in the theoretical question of the beginning of life.[24]

The concept of therapeutic abortion is not irreconcilable with this trend permitting recovery in tort. First, it should be noted that in the tort cases the interest of the mother and child coincide; whereas in abortion cases the interests of the two are antagonistic. Second, one of the underlying reasons for the development of this cause of action was an advancement of medical knowledge that facilitated proof of the causal relationship; other developments in medical technology make it possible to perform a safe abortion. Finally, with regard to the *Montreal Tramways* line of cases, one must note that the right of a child to recover damages for an injury sustained before birth does not necessarily imply a right to be born.

Of special note is the recent development toward a new tort action which may be labelled "wrongful life." In the case of *Zepeda v. Zepeda*,[25] an illegitimate child sued his natural father for fraudulently inducing his mother to have sexual relations without informing her that he was married, and claimed damages for the disadvantages of illegitimacy. The court was willing to find that a tort had been committed, but denied relief because of difficulty in assessing damages

inherit it. Plaintiff's mother married *F* and plaintiff was conceived and born. The court held that defendant *H* would have to convey the land to plaintiff.

21. *See* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 580 (1965).

22. [1933] 4 D.L.R. 337 (1933).

23. Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966).

24. As the New Jersey Supreme Court once noted, "The semantic argument whether an unborn child is 'a person in being' seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body." Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

25. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

and fear that such a decision would unmanageably increase litigation.[26] In a more recent case the New York Court of Claims held that an illegitimate child had a cause of action against the state for negligently allowing the child's mother, an inmate in a state mental hospital, to be attacked by a male patient, an assault which resulted in the child's conception.[27] Although this particular decision was later reversed,[28] the developments in this area may suggest two arguments supporting legalized therapeutic abortion. First, it may indicate that the law of torts seeks to provide a remedy for a wrong rather than to determine whether there is life in the fetus, since the "wrongful life" tort actually occurs before conception. Second, if the courts recognize that birth under these circumstances is a wrong, an alternative may be to disallow birth in this situation, thereby giving judicial sanction to abortion. However, a more reasonable interpretation of allowing a wrongful life action is that the court reasons that life is always a benefit, but that damages should be allowed so as to compensate the child for the difference between leading a normal life and an abnormal one.[29]

Discussion of the various approaches toward legal recognition of a human personality in the fetus logically leads to the ultimate question: Does the fetus have a constitutional right to be born?[30] This precise question has never been presented to the courts despite the fact that many present statutes allow abortion under some circumstances. At least one decision seems to indicate that the unborn child has *some* rights.[31] In that case a pregnant woman rejected blood transfusions on religious grounds, but upon the hospital's request the court ordered the transfusion to protect the unborn child. Although the court's opinion was not framed in constitutional terms, such an argument is implicit in its holding. Not only does the case seem to imply a constitutional right to be born, but this right seems to supersede the mother's freedom of religion and right to privacy. The case might not be the best precedent for establishing a constitutional right be-

26. *Id.* at 262-63, 190 N.E.2d at 859.

27. Williams v. State, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965). The child claimed damages for the disadvantages of illegitimacy, deprivation of property rights and loss of parental care. *Id.* at 825, 260 N.Y.S.2d at 954.

28. Williams v. State, 25 App. Div. 2d 906, 269 N.Y.S.2d 786 (1966).

29. In the recent New Jersey case of Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967), the court refused a child born deformed recovery against two doctors who allegedly told the mother that her infection with German measles would not affect the development of the child. With reference to the tort of "wrongful life" the court said: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination." 227 A.2d at 692.

30. If in fact the fetus is a legal person entitled to constitutional protection, there remains the question of the nature of this protection.

31. Raleigh Fitkin-Paul Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

cause the peculiar circumstances may have caused the court to voice the child's rights in an effort to save the woman from herself. Despite the holding, this case is not completely inconsistent with concepts of therapeutic abortion since both give legal sanction to accepted medical practice.[32]

The Supreme Court of New Jersey was recently presented with the abortion problem in a malpractice suit by the parents[33] of a deformed child against two doctors who allegedly did not inform the woman that her infection with German measles created a danger that her child might be born deformed, or that it might be possible to obtain an abortion. The court sustained the dismissal of the complaint stating: "When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child."[34] Although the court did not rule on the constitutionality of abortion, it did state: "The right to life is inalienable in our society,"[35] and "we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury."[36] Both of these statements suggest a constitutional right to be born.

The present abortion statutes[37] give little indication that the fetus is a person entitled to any legal rights. While at one time the objective of statutes forbidding abortion may have been protection of the unborn child, today's statutes emphasize protecting the mother from the danger of "back street abortionists,"[38] as evidenced by the fact that many jurisdictions hold that the woman obtaining the abortion is neither a felon nor an accomplice.[39] In addition, many of the abortion statutes do not require death of the fetus,[40] or even that the woman be in fact pregnant,[41] in order to convict the abortionist.

In addition to the legal status of the fetus, consideration must be given to the rights of the mother to seek therapeutic abortion. In *Griswold v. Connecticut*,[42] the Court held an anti-contraceptive statute unconstitutional as an invasion of privacy. The majority opinion

32. *Id.* at 423, 201 A.2d at 538. "The blood transfusion . . . may be administered . . . as the physician in charge at the time may determine."

33. Gleitman v. Cosgrove, *supra* note 29. The case involved two causes of action: one brought by the child discussed in footnote 29 and another brought by the parents discussed in the above text.

34. 227 A.2d at 693.

35. *Id.*

36. *Id.*

37. *See* notes 50-52, 58-61, 63, 65-68 *infra* and accompanying text.

38. Leavy & Kummer, *supra* note 6, at 134.

39. *See, e.g.*, Seifert v. State, 160 Ind. 464, 67 N.E. 100 (1903); State v. Smith, 99 Iowa 26, 68 N.W. 428 (1896).

40. Dougherty v. People, 1 Colo. 514 (1872).

41. Schoenen v. Board of Medical Examiners, 54 Cal. Rptr. 364 (Dist. Ct. App. 1966).

42. 381 U.S. 479 (1965).

stated that the statute "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[43] The contraception problem is remarkably analogous to that of abortion[44] and similar reasoning might well be applied in support of legalized abortion. The major distinction, of course, is that in the latter the conception has already taken place. Thus, the only generally accepted right of the mother to secure an abortion is to protect her own life.[45]

III. CURRENT STATUS OF THE LAW

Only one state statute prohibits abortion without exception,[46] while the great majority of states permit abortion where necessary to save the woman's life.[47] None of these statutes defines the term "life" and interpretation has been left to the courts. The weight of authority requires the prosecution to prove that the abortion was *not* necessary to save her life, but this burden may be easily met by the woman's testimony that she was in good health before the operation.[48] More recently, however, a California court indicated that this testimony alone would not be sufficient evidence to establish a prima facie case that the woman's life was not in danger.[49]

The statutes of Massachusetts,[50] Pennsylvania[51] and New Jersey[52] prohibit only "unlawful" abortions, again leaving the task of interpre-

43. *Id.* at 482.

44. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

45. *See* note 47 *infra* and accompanying text. Furthermore, advances in medical science place the physician in a difficnlt position with regard to abortion. In the past, courts have not only recognized the doctor's rigbt to practice his profession, but have also required the doctor to exercise his skill in conformity with medically accepted practices for the betterment of his patient. *See* United States v. One Package, 86 F.2d 737 (2d Cir. 1936), where the court reversed the conviction of a doctor for violation of the Comstock Act prohibiting the mailing of any item for contraception or for causing abortion. The court said the Act's design "was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients." *Id.* at 739. Another federal court has held that a statute enacted during Prohibition which restricted physicians in prescribing alcohol was unconstitutional as infringing "upon the duty of the physician to prescribe in accord with his honest judgment . . . ." United States v. Freund, 290 F. 411, 414 (D. Mont. 1923).

46. LA. REV. STAT. ANN. § 14:87 (1950).

47. Sands, *supra* note 10, at 310. Since the date of this article, several states have enacted new legislation. These statutes are cited at notes 65-68 *infra*.

48. People v. Gallardo, 41 Cal. 2d 57, 62, 257 P.2d 29, 32 (1953).

49. People v. Ballard, 167 Cal. App. 2d 803, 814, 335 P.2d 204, 211 (1959). "[I]t is not a rare occurrence for a person who has gone to a doctor's office in apparently reasonably good health, only to learn from the doctor that he is inflicted with a fatal disease. Every presumption is in favor of the defendant's innocence."

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

51. PA. STAT. ANN. tit. 18, § 4718 (1963).

52. N.J. STAT. ANN. § 2A:87-1 (1953).

tation to the courts. In *Rex v. Bourne*,[53] a classic interpretation of a similar statute, the court instructed the jury that the question of unlawfulness turned on whether the operation was performed in order to save the life of the woman, and that:

> [T]hose words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of the continuance of the pregnancy will be to make the woman a *physical or mental wreck*, the jury are quite entitled to take the view that the doctor . . . is operating for the purpose of preserving the life of the mother.[54]

The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Brunelle*,[55] interpreted the term "unlawful" to allow a physician to perform an abortion where he has exercised his honest judgment in deciding that the abortion is necessary to save the woman's life or health, provided his decision conforms to the general opinion of competent practitioners in the community.[56] The New Jersey court in *Gleitman v. Cosgrove*[57] pointed out that the courts of that state have interpreted the statutory language of "without lawful justification" to require that the woman's life be in danger, but added that a doctor may perform an abortion upon a good faith determination in accordance with medically accepted standards and not be guilty of a crime.

Alabama,[58] New Mexico[59] and the District of Columbia[60] have expressly provided by statute that an abortion may be performed not only to save the life of the mother but also to preserve her health or protect her from serious bodily injury. In Maryland[61] an abortion may be performed where no other method will secure the safety of the mother. Although there has been no ruling on the scope of the term "safety," the Attorney General of Maryland has stated that "safety" means "health."[62] Most of these statutes apply irrespective of the amount of medical training or professional status of the actor. Some states, however, either by statute[63] or through court interpretation[64] have established a different standard for the practicing physician.

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53. [1939] 1 K.B. 687.
54. *Id.* at 693-94 (emphasis added).
55. 341 Mass. 675, 171 N.E.2d 850 (1961).
56. *Id.* at 677, 171 N.E.2d at 851-52.
57. 49 N.J. 22, 227 A.2d 689 (1967).
58. ALA. CODE tit. 14, § 9 (1958).
59. N.M. STAT. ANN. § 40A-5-3 (1953).
60. D.C. CODE ANN. § 22-201 (1961).
61. MD. CODE ANN. art. 27, § 3 (1957).
62. THERAPEUTIC ABORTION 182 (Rosen ed. 1954).
63. LA. REV. STAT. § 37:1285 (1964); ORE. REV. STAT. § 677.190 (1965).
64. In Illinois it has been held that there is a presumption of necessity in the case of an abortion by a licensed physician. People v. Davis, 362 Ill. 417, 200 N.E. 334 (1936). This principle was also cited by a California court in People v. Ballard, 167 Cal. App. 2d 803, 335 P.2d 204 (1959). Washington has established a test of whether

In the past year the movement for legislative reform has met with some success in several states. A new law was enacted in Mississippi[65] permitting abortion in cases where the pregnancy resulted from rape, but making no provisions regarding the determination of the authenticity of the alleged rape. The 1967 California statute[66] permits abortions performed by a licensed physician in an accredited hospital upon unanimous approval of a special hospital board in cases where either the life or the physical or mental health of the woman is in danger. Abortions may also be granted in cases of rape or incest upon the certification of the district attorney after establishing probable cause. A recent North Carolina statute[67] goes one step further in allowing abortion where there is substantial risk that the child would be born with "grave" physical or mental deformity. The North Carolina act, however, requires that the applicant have been a resident for the four months preceding the operation and replaces the hospital committee provision with a requirement that two other doctors certify that the circumstances justify an abortion. The much publicized Colorado statute,[68] like the one in California, provides for unanimous approval by a hospital committee and has no residency requirement. The statute includes the life and health of both the mother and child as justification for abortion, but requires that the injury, whether physical or mental, be both grave and permanent.

IV. MEDICAL-LEGAL INDICATIONS

Before suggesting new legislation one must examine the various medical and legal indications which justify abortion.

A. *Physical Indications*

Physical indications, including tuberculosis, heart and kidney disease,[69] have been considered sufficient justification even under those current statutes permitting abortion to save the life of the mother. Recent advances in medical science, however, have diminished the

the operation would be recognized and approved by those reasonably skilled in their profession practicing in the same community. State v. Powers, 155 Wash. 63, 283 P. 439 (1929). In view of the statutory provision for revocation of a physician's license, the Oregon court has held that a doctor is not subject to the criminal statute. State v. Buck, 200 Ore. 87, 262 P.2d 495 (1953). The Massachusetts courts have recognized a distinction when the abortion is performed by a physician when his judgment conformed to that of fellow practitioners. Commonwealth v. Brunelle, 341 Mass. 675, 171 N.E.2d 850 (1961). Even in the classic case of Rex v. Bourne, [1939] 1 K.B. 687, the judge indicated that a non-physician would not be entitled to the instruction he gave the jury.

65. MISS. CODE ANN. § 2223 (1942), *as amended,* H.B. No. 562 (1966 session).

66. CAL. HEALTH & SAFETY CODE § 25950 (added by S.B. No. 462 (1967)).

67. N.C. GEN. STAT. § 14-44 (1965), *as amended,* S.B. No. 104 (May 9, 1967).

68. COLO. REV. STAT. § 40-2-50 (added by H.B. No. 1426 (1967)).

69. For a full discussion of the physical indications for a therapeutic abortion *see*

significance of physical indications since it is now possible with proper care and treatment to carry almost all pregnancies to full term.[70] These indications seem to be limited to the direct physical effect of the pregnancy and the delivery, and only by broad interpretation could they include the long-term effect resulting from the strain on the mother's health caused by rearing another child. For example, a woman with a serious heart disease may go to term with extensive care and confinement to bed for the entire pregnancy, but she would be unable to provide adequately for the child or perform any of the maternal duties of raising the child.

B. *Psychiatric Indications*

In recent years psychiatric indications have played a proportionately greater role in the justification of abortion.[71] Most of the recent reform attempts have included mental health as an indication for abortion, but there seems to be no agreement even within the medical profession as to the precise relationship of abortion to mental and emotional health. First, there is a split between psychiatrists as to whether there is ever a psychiatric justification for abortion.[72] Even among those who recognize psychiatric indications there are wide differences in attitudes and practices. In one survey a great majority of those favoring psychiatric indications recognized such need in cases of psychosis or where suicidal tendencies appear.[73] Technically, even those statutes allowing abortions only to save the life of the mother should be construed to allow the abortion of a suicidal woman since refusal, in effect, could mean her death. There seems to be general acceptance, however, that suicidal risk is minimal.[74] The greater threat is said to lie with those women who state that if refused a therapeutic abortion they will abort themselves.[75] The survey also indicated that a large proportion of psychiatrists also favor abortion for patients with a history of severe postpartum or antecedent mental illness.[76] In one sense it would seem useful to require an antecedent history of mental illness, since abortion is one

Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 185-220 (1960).

70. Trout, *supra* note 3, at 180; Comment, 27 U. PITT. L. REV. 669, 674 (1966).

71. Niswander, *supra* note 5, at 125. A study of two Buffalo hospitals showed that psychiatric indications accounted for 10% of the abortions in 1943, whereas in 1964, 85% of the abortions were performed with psychiatric justifications.

72. Anderson, *Psychiatric Indications for the Termination of Pregnancy*, 13 WORLD MED. J. 81 (1966).

73. Rosenberg & Silver, *Suicide, Psychiatrists & Therapeutic Abortion*, 102 CAL. MEDICINE 407, 408 (1965).

74. *Id.* at 409.

75. Anderson, *supra* note 72, at 82.

76. Rosenberg & Silver, *supra* note 73, at 408.

area in which the woman stands to gain by deceiving the psychiatrist.[77] Psychiatric indications for abortion may be created by eugenic indications concerning the child. The chance that a child will be born deformed may raise such fear in the mother that her mental health will be jeopardized. Similarly, the mental well-being of the mother might also be disturbed in a pregnancy resulting from a brutal rape.

However, there is difficulty in separating purely psychiatric considerations from those of social significance. For instance, a woman from a low income group who has several children and perhaps no husband is likely to have mental and emotional repercussions if forced to go through with a current pregnancy. The same reasoning might also apply to the young single girl who becomes pregnant, and who, due to mental immaturity, or the adverse effect of the illegitimate child upon her home life, might become mentally unbalanced if refused an abortion.[78]

Finally, there is a split within the profession concerning the emotional after-effects of abortion. One group believes post-abortion psychiatric illness rarely occurs and is mild in those cases in which it does occur.[79] Although guilt feelings may result in some cases, this group believes that refusal would only worsen the mental state.[80] At the opposite pole is a group headed by a Swedish doctor, Martin Ekblad, who concluded that the greater the psychiatric indications for an abortion, the greater is the risk of unfavorable psychic after effects.[81]

C. *Eugenic Indications*

A third indication for therapeutic abortion involves the possibility that the child will be born deformed as a result of disease, drug or injury. The birth of a deformed child places a financial and emotional burden upon the parents in addition to the emotional effect upon the child forced to live with the handicap. In many cases these children must be institutionalized at the expense of the state. The most notable example of a eugenic abortion is the case in which the mother con-

77. Tredgold, *Psychiatric Indications for Termination of Pregnancy*, 2 LANCET 1251, 1252 (1964). Some hospitals already require that the patient have a history of acute mental illness treated at that institution. LADER, ABORTION 25 (1966).

78. The study of the two Buffalo hospitals showed that one-half of the abortions for psychiatric indications were performed upon young unwed girls. Niswander, *supra* note 5, at 126.

79. Kummer, *Post-Abortion Psychiatric Illness—A Myth?* 119 AM. J. PSYCHIATRY 980 (1963); Tredgold, *supra* note 77, at 1253.

80. Anderson, *supra* note 72, at 82.

81. LADER, ABORTION 22 (1966); Comment, 37 U. COLO. L. REV. 283, 289-90 (1965).

tracts German measles during the early months of pregnancy, a situation accounting for the second highest indication for therapeutic abortion.[82] The chances of a seriously deformed child are estimated at between fifteen and twenty percent when the mother has contracted the disease in the first trimester.[83] If the disease is contracted in the first month, the chances of deformity are as high as eighty-five per cent.[84] These figures refer only to the possibility of serious deformity. The figures including both serious and minor deformities are substantially higher.[85] Since there is no way of knowing which child will have the serious deformity it is urged that parents and doctors should not be forced to take the chance.

Voluntary sterilization laws in 28 states[86] and the laws against incest[87] reflect a present legal recognition of the dangers of hereditary deformities, both mental and physical. It seems reasonable to expect this same awareness when considering reform measures in therapeutic abortion.

D. *Procedure for Determination*

Proposal for reform of the abortion laws should establish some procedure for a case-by-case determination of the advisability of performing an abortion for the above-mentioned medical indications. A typical legislature should be less reluctant to pass reform legislation that contains proper safeguards against abuse. The most liberal procedure is that proposed by the Model Penal Code requiring certification by the attending physician and attestion by one other physician.[88] A more cautious approach has been taken by hospitals throughout the country[89] which have established committees of staff members[90] to consider each case presented and to vote, either unanimously or by majority, to grant an abortion. Although this procedure has been criticized as overly conservative,[91] a partial explanation may be found in the fact that these committees realize that

82. Niswander, *supra* note 5.
83. Horstmann, *Rubella and the Rubella Syndrome,* 102 CAL. MEDICINE 397 (1965).
84. B. DICKENS, ABORTION AND THE LAW 136 (1966).
85. D. REID, A TEXTBOOK OF OBSTETRICS 901 (1962).
86. Trout, *supra* note 3, at 179 n.27.
87. *See, e.g.,* CAL. PENAL CODE § 285 (1955); TENN. CODE ANN. § 39-705 (1956).
88. MODEL PENAL CODE § 230.3(3) (Official Draft, 1962). Three states now require the advice of one physician, and six states require the advice of two. Trout, *supra* note 3, at 183.
89. LADER, ABORTION 24-27 (1966).
90. One proposal for membership of an abortion committee would include permanent representatives of four hospital divisions: Obstetrics, Surgical, Medical, and Psychiatric. Interview with Donald A. Goss, M.D., Professor and Chairman of the Department of Obstetrics and Gynecology, Vanderbilt University School of Medicine, in Nashville, Tenn., Feb. 20, 1967 [hereinafter cited as Interview].
91. LADER, ABORTION 26-27 (1966).

they are operating outside the law.[92] Once reform legislation is passed sanctioning the various medical indications and giving legal recognition to the hospital committee, a case-by-case determination can be made more objectively and without restraint.

E. *Humanitarian Indications*

There would seem to be little to gain in forcing the victim of rape to carry and give birth to an unwanted child, the reminder of her horrible experience. Although pregnancy rarely results from rape,[93] it is the duty of the law to provide for such an eventuality. The major practical problem is the opportunity for fraudulent assertions by women seeking an abortion. Thus a means of determination must be developed to show that the woman was in fact raped and that the rape caused the pregnancy. Since rape is not a medical indication, the determination should be made within the legal structure. The customary criminal process of capturing the attacker, bringing him to trial, proving his guilt beyond a reasonable doubt, and providing him with means to appeal his conviction will be inadequate in the abortion proceeding because of the time element. Once the rape has occurred, pregnancy cannot be easily diagnosed until approximately two weeks after the woman's first missed menstrual period.[94] Once the diagnosis of pregnancy has been established, the decision of the abortion committee should be made promptly, so that the operation may still be safely performed.[95] Two of the recent statutes call for a determination by the district attorney.[96] Another suggestion is an ex parte hearing before a judge, or if the attacker can be found, a non-jury civil trial with the decision based upon a preponderance of the evidence.[97] This judicial determination will help to eliminate the possibility of fraud. The fact that the woman reports the rape to the authorities before she knows that she is pregnant will also help to negate an allegation of fraud on her part.[98]

92. Since no other medical proeedure requires the approval of a committee, *id.* at 27, it has been suggested that the committees were established as a protection against the possibilities of prosecution. Trout, *supra* note 3, at 184.

93. DICKENS, *supra* note 84.

94. REID, *supra* note 85, at 222.

95. Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 193 (1966). Actually, pregnancy may be terminated safely at any time; only the method differs. Interview, *supra* note 90.

96. CAL. HEALTH & SAFETY CODE § 25950 (added by S.B. No. 462 (1967)); COLO. REV. STAT. § 40-2-50 (added by H.B. No. 1426 (1967)).

97. The result of this proceeding will have no effect upon the subsequent criminal trial for rape. This position is taken by the new California bill, CAL. HEALTH & SAFETY CODE § 25950 (added by S.B. No. 462 (1967)).

98. The new North Carolina legislation requires that the woman report the rape within seven days of the act. N.C. GEN. STAT. § 14-14 (1965), *as amended*, S.B. No. 104 (May 9, 1967).

The court or district attorney must not only judge the credibility of the woman's allegation of rape, but must also determine that the pregnancy resulted from the rape and not from an act of consensual intercourse taking place at approximately the same time. This latter judgment will also turn on the credibility of the participants, since it is medically impossible to judge the precise time of conception while the woman is still carrying the child.[99] A similar legal process should also be utilized in cases involving incest or incompetency.

A further question concerns the applicability of these standards to cases of "statutory rape," a term applied to those statutes proscribing intercourse with an unmarried girl under a stated age[100] even though consent is given. The rationale of these statutes lies in the belief that until a certain stage of development a girl is not mature enough to know the consequences of giving consent; thus by necessity and for the protection of the girl from herself, the legislature must arbitrarily set an age. It would be inconsistent for the law to set an age at which a girl is incapable of consenting and punish her partner but to refuse an abortion to this same girl. However, the public fear that such a measure would promote promiscuity in young women would make passage of such a proposal difficult.

V. Conclusion

The time has come for legislatures to bring the abortion statutes into conformity with modern medical practice and with the changing attitudes of the public. The moral and theoretical questions concerning abortion will remain unanswerable, but this debate should not prevent legislatures from providing access to appropriate medical care for those who desire it.

Proposals for reform legislation should provide for abortion not only to save the mother's life, but also to preserve her health—both physical and mental,[101] and for cases where there is substantial risk[102] that the child will be born with a grave deformity. These provisions should apply only to abortions performed in a hospital by a licensed physician with the approval of a hospital board. The criminal prohibition should be retained for all abortions performed by non-physicians. Women impregnated by rapists should also be entitled to a legal abortion after a judicial determination of the validity of the woman's allega-

99. Interview, *supra* note 90.

100. Model Penal Code § 207.4 (10), Comment (Tent. Draft No. 4, 1955). The established ages range from 7 to 21 with most states choosing either 16 or 18.

101. In addition to the effects of the pregnancy upon health, consideration should also be given to the health hazards of raising the child if an abortion is denied.

102. "Substantial risk" should be given a liberal interpretation because of the impossibility of determining during pregnancy whether the child will be deformed and the nature of the deformity.

tions. Public opinion may prevent the application of these standards to cases of statutory rape, but a proper compromise would be to permit an abortion for any pregnant, unwed girl under the age of fourteen or fifteen.[103]

It is not suggested that these proposals will completely eliminate the "back-street abortionist."[104] The better solution to the problem of unwanted pregnancy is broad distribution of effective contraceptives. This would leave legal abortion as the solution both for those who actually desire children, but due to events intervening between conception and birth find it unwise to carry the pregnancy to termination, as well as for those who are unable to make any choice—victims of rape or incest, and the mentally incompetent.

103. CAL. HEALTH & SAFETY CODE § 25950 (added by S.B. No. 462 (1967)) (fourteen); COLO. REV. STAT. § 40-2-50 (added by H.B. No. 1426 (1967)) (fifteen).

104. It has been estimated that 90% of the criminal abortions are performed on married women seeking relief for social and economic reasons, snbjects not provided for in this suggested legislation. Roemer, *Due Process and Organized Health Services*, 79 PUBLIC HEALTH REPORTS 664, 667 (1964). Liberal abortion laws in the Scandinavian countries have not eliminated the serious problem of criminal abortions. Leavy & Kummer, *supra* note 6, at 136. *See also* N.Y. Times, Feb. 27, 1967, at 23, col. 7.