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The performance of an abortion[1] has been made a felony in virtually all American jurisdictions.[2] The penalty to which a violator is subject varies among the states but generally amounts to a substantial period of imprisonment.[3] Although a few jurisdictions have less restrictive statutes, the only circumstance which is normally recognized as justifying an abortion is a likelihood that the mother will otherwise die.[4] The tests operative in the various states may be summarized as follows:

Forty-two jurisdictions permit an abortion only when necessary to preserve the mother's life.[5] Thirty-one of the states expressly declare this exception in their statutes, and the courts of the remaining eleven achieve the same result by reading such an exception into their enactments.[6] Three jurisdictions allow an abortion to preserve the life and health of the mother,[7] and two states permit one to save the mother's life or prevent her sustaining serious or permanent bodily injury.[8] Maryland has the most liberal abortion statute in the United States, allowing termination of pregnancy by a licensed physician who is satisfied that the fetus is dead or that no other procedure will secure the mother's safety.[9]

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[1]The term "abortion" has been defined as "any untimely delivery voluntarily procured with intent to destroy the fetus." Williams, The Sanctity of Life and the Criminal Law, 146 (1957).

[2]Kummer and Leavy, Criminal Abortion: Human Hardship and Unyielding Laws, 35 So. Cal. L. Rev. 123 (1962). In New Jersey the act is deemed a "high misdemeanor." N.J. Rev. Stat. 32A:87-1 (1951).

[3]The possible punishment ranges from a $1,000 fine to fifteen years' imprisonment. Harper and Skolnick, Problems of the Family 183 (1962).

[4]Note, 12 W. Res. L. Rev. 75 (1960).

[5]Kummer and Leavy, supra note 2, at 127.

[6]Comment, 32 Ind. L. J. 203 (1957).

[7]Alabama, District of Columbia, and Oregon. Ala. Code tit. 14 § 9 1951); D.C. Code Ann. §§ 22-201 (Supp VIII 1960); and Ore. Rev. Stat. §§ 163.060, 677.010, and 677.190 (1959).

[8]Colorado and New Mexico. Colo. Rev. Stat. Ann. §§ 4-2-23 (1953) and N.M. Stat. Ann. §§ 40-3-1 and 2 (1953).

[9]Md. Code Ann. Art. 27, § 3 (1957).

Since the great majority of jurisdictions condone an abortion only when it is essential to save the mother's life, one would suppose that few abortions are performed in this country, for an abortion is rarely the only alternative to the death of the mother. Such a supposition would be far from true, however. Our nation's abortion laws have admittedly kept *legal* abortions to a minimum, just as the eighteenth amendment virtually eliminated the *legal* consumption of liquor, but the abortion enactments have been no more successful in preventing abortions than the eighteenth amendment was in eradicating drinking. The annual number of unlawful abortions has "assumed monstrous proportions"[10] and represents "one of the major medical and social problems of the nation."[11] Approximately one out of every five pregnancies of American women terminates in an illegal abortion.[12] Well over one million criminal abortions were performed in this country in 1962.[13] This amounts to over three thousand per day.

Although America's abortion laws *have* proven singularly unsuccessful at preventing abortions, they have had one notable effect: They have compelled women who obtain criminal abortions to act covertly. The result is that the great majority of women who procure abortions receive their treatment outside an optimal hospital environment. About one-quarter of illegal abortions are performed by the mother herself.[14] Almost another quarter are effected by midwives, and the remaining one-half are accomplished by physicians.[15] One writer says:

> "Our nation's abortion laws have brought about a situation where abortions, instead of being performed in hospitals by competent physicians under aseptic conditions, are now per-

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[10]Comment, supra note 6, at 193.

[11]Harper and Skolnick, op. cit. supra note 3, at 181.

[12]Kummer and Leavy, supra note 2, at 124. This estimate has been corroborated by other sources. The Institute for Sex Research of Indiana University found that over 20 per cent (708) of all pregnancies occurring in 1,329 women studied resulted in abortions and that 93 per cent of the abortions were illegal. Harper and Skolnick op. cit. supra note 3, at 181.

A recent study of 5,000 women revealed that 23 per cent of the pregnancies occurring among them ended in abortions and that all but 6.8 per cent of the abortions were criminal. Gebhard, Pomeroy, Martin, and Christenson, Pregnancy, Birth, and Abortion 54, 93, and 196 (1958).

Taussig, who in 1936 calculated that the current annual number of illegal abortions was 681,000, estimated that the ratio of abortions to pregnancies was one to five among rural women and two to five among urban women. Taussig, Abortion, Spontaneous and Induced 17 (1936).

[13]Kummer and Leavy, supra note 2, at 124.

[14]Taussig, op. cit. supra note 12, at 387-88.

[15]Ibid.

formed by women themselves, by incompetent midwives, and by doctors who . . . must operate with secrecy."[16]

The amount of mortality and suffering that results is indicated by the following: The deaths of over eight thousand women per year are attributable to criminal abortions.[17] A conservative estimate of the maternal fatality rate is 1.2 per cent.[18] And for every woman who dies several others are partially disabled or rendered sterile as a consequence. One can readily understand why the mortality and misery ascribable to the abortion laws have been said to constitute "a festering societal ill."[19]

Since our abortion statutes are violated with such great frequency, one would assume that prosecutions of abortionists would be numerous. The very opposite is true, however. The prosecution of an abortionist is a rare occurrence.[20] This fact may be attributable in part to the nature of the offense. For as a general rule the physician or midwife, the woman, and her husband or lover are the only ones who know of the act, and the woman will seldom testify against the abortionist, since she is grateful for his having relieved her of a burden. Consequently, it is uncommon for an abortion to be detected except when the woman dies.[21] Nevertheless, the enormous disparity between the incidence of illegal abortions and the number of prosecutions indicates a more fundamental reason for nonenforcement than mere difficulties of detection and proof. It has been asserted that the only valid estimate of public opinion is the record of public behavior.[22] If this is true, widespread violation of a law would suggest that the conduct deemed illegal is secretly approved by the community. There is every reason to believe that the majority of Americans consider the abortion enactments to be much too rigid.

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[16]Kross, The Abortion Problem 108 (1944).

[17]Mills, A Medicolegal Analysis of the Abortion Statutes, 31 Calif. L. Rev. 181 (1957). In England, which also has a rigid abortion law, the annual number of women's deaths ascribed to illegal abortions is also high, according to Dr. Peter Darby, a London physician. He states that on an average 40 per cent of the gynecological beds in the hospital at which he is employed are occupied by women who have had illegal abortions. Darby, Abortion 3 Oxford Law. 7 (1960).

[18]Mills, supra note 16, at 182. During the two-year period ending on June 30, 1956, the death rate among women admitted to Los Angeles County Hospital following illegal abortions was seven times greater than the rate among all other obstetrical and gynecological cases combined. Los Angeles County Hospital Ann. Rep. 61 (1955) and 82 (1956).

[19]Kummer and Leavy, supra note 2, at 123.

[20]Harper and Skolnick, op. cit. supra notes 3, at 184.

[21]Comment, supra note 6, at 199.

[22]1 Encyc. of the So. Sci. 376 (1930).

Most of the statutes were enacted many years ago when the United States was a sparsely-settled nation desirous of increasing its population, and there has been no significant change in the laws since their passage.[23] As a result the abortion statutes have fallen far behind effective public opinion. That many doctors consider the acts too inflexible is indicated by the fact that one-half of all illegal abortions are performed by doctors[24] and by the fact that numerous physicians refer patients to abortionists, some even in writing.[25] A physician-writer in the *Southern California Law Review* says: "A substantial group of medical judgment... clearly favors cautious relaxation of the present laws."[26] Many clergymen of the Protestant and Jewish faiths share this sentiment.[27] A principal reason why police and other enforcement authorities commonly allow known abortionists to practice is a feeling that there is a need for their services.[28] Dr. Roy E. Fallas, President of the Pacific Coast Obstetrical and Gynecological Society says:

> "When a law is such that a great profession is required, on humanitarian grounds, to repeatedly break it, and when enforcement agencies recognize the law's inadequacy by failing to prosecute flagrant violations, then it's high time that something be done about it."[29]

What, then, should be done about the abortion statutes? Although the sentiment is widespread that the present laws are unduly rigid, few persons advocate unrestricted legalization of abortion. Rather, it is generally felt that the enactments should simply provide exceptions in the following four situations:

(1) Where failure to abort is likely to seriously impair the woman's physical or mental health (although it will probably not imperil her life).

(2) Where the child will probably be born with a grave physical or mental defect.

(3) Where the pregnancy is the result of rape.

(4) Where the pregnancy is the consequence of an incestuous relationship.

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[23]Note, 34 Temp. L.Q. 146 (1960).

[24]Taussig, op. cit. supra note 12, at 387-88.

[25]Calderone, Abortion in the United States 62 (1958).

[26]Kummer and Leavy, supra note 2, at 138. (Leavy is not a doctor but Kummer is.)

[27]Note, supra note 4, at 86.

[28]Gebhard, Pomeroy, Martin, and Christenson, op. cit. supra note 12, at 192.

[29]Fallas, Address to Members, 60 West. J. of Surgery, Obstetrics and Gynecology 259 (1952).

Under the laws operative in the large majority of American jurisdictions, it makes no difference that pregnancy and childbirth will be extremely detrimental to a woman's physical or mental health. It is of no moment that she will be left partially disabled or in need of confinement in a mental institution. The only question that is asked is whether an abortion is imperative to save her life. If not, then none is permissible. It does not seem unreasonable to suggest that a woman's life should be considered in relation to its quality, as well as its duration. Serious physical or mental harm to the mother, who is, after all, a human being subject to pain and suffering, would seem to be something to be avoided if possible. A California doctor says:

> "It is indeed difficult for one trained in medical science to limit the scope of his efforts merely to the immediacy of life or death. The patient is an entire functioning unit, not just a living mass of protoplasm. Without minimizing the importance of being alive, usefulness is of at least equal value, and that usefulness is based on the combined mental and physical health of the person."[30]

Taking into consideration a woman's physical and mental health necessarily involves taking into account her economic and social situation. It becomes important to know such facts as how much money she has or can expect to obtain, how many children she has, whether she lives in an adequate home, whether she is an alcoholic, and what effect another child would probably have upon each of these considerations. These factors are currently given weight in Denmark, Finland, Iceland, Norway, Russia, Sweden, and some of the countries of Eastern Europe, where the laws allow interruption of pregnancy when necessary to avoid serious danger to the physical or mental health of the mother.[31]

The breeding of gravely defective children would seem to constitute a highly deplorable phenomenon. Yet no American jurisdiction permits an abortion on the ground that the child will probably be afflicted with blindness, deaf-mutism, grave physical deformity, or idiocy. This problem is not one that only rarely arises. If a woman contracts German measles during the first twelve weeks of pregnancy the chances are one out of three that her child will be born seriously abnormal.[32] Two out of three women whose fetuses are exposed to deep X-ray treatments give birth to children with badly defective

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[30]Mills, supra note 17, at 196.

[31]Harper and Skolnick, op. cit. supra note 3, at 185 and Mills, supra note 17, at 136.

[32]Note, supra note 4, at 82.

central nervous systems.[33] and well over one-half of the women who took the now-notorious drug Thalidomide during the first four months of pregnancy have given birth to seriously deformed offspring.[34] There are other conditions under which it is predictable that the child will be born insane, physically defective, or distinctly retarded. In situations of this kind the performance of an abortion would spare the parents and society an onerous burden and would relieve the unborn child of a life of misery.

It is difficult to understand how a law can be supported that compels a woman to give birth to a child conceived by her as a consequence of a rape. Yet this is the result produced by the existing abortion acts in the United States. Dr. Matthew S. Guttmacher has described the plight of a twelve-year-old child who was impregnated by her father. After the latter had been convicted of the offense Dr. Guttmacher told the girl that something would surely be done to relieve her of the pregnancy. Johns Hopkins Hospital agreed to abort her if a letter could be obtained from a judge authorizing the operation. Each judge approached expressed his concern *and* his inability to act. Dr. Guttmacher writes: "The hurt look in the eyes of that spindly-legged child when she was told there was no help available to her is a haunting memory."[35] The inadequacy of the narrow "only-to-save-mother's life" exception was illustrated in the landmark English case of *Rex v. Bourne*.[36] This was a prosecution of an English physician for performing an abortion on a fourteen-year-old girl who had been raped by a gang of soldiers. After terminating the pregnancy, Dr. Bourne himself reported the act to the authorities, making this a test case. At the trial he indicated that inability to obtain an abortion would have caused the girl very serious mental distress. In his charge to the jury, Justice Macnaghten stated what has since represented the English view: that the statutory exception "for the purpose only of preserving the life of the mother" should not be limited in meaning to the peril of instant death. Rather, if the probable consequences of the pregnancy's continuance would be to make the girl a "physical or mental wreck," the jury could find justification for the abortion. Dr. Bourne was acquitted, but the liberal interpretation adopted by Justice Macnaghten has, regrettably, seldom been followed in the United States.

The element of violence is present in a large percentage of incest

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[33]Ibid.

[34]Akron Beacon Journal, Aug 5, 1962, p. 2A, col. 3.

[35]Guttmacher, Therapeautic Abortion 185 (Rosen ed. 1954).

[36](1939) 1 K.B. 687 (1938).

cases, but even where it is absent there are good reasons for allowing an abortion here. Perhaps the most persuasive one is the fact that the offspring of nearkin unions are commonly defective.[37] Because of their common ancestry the parents are possessors, to a greater degree than usual, of the same inheritable characteristics. And the coming together of like genes into the same individual, the child, enables recessive genes to express themselves.[38] Consequently, if a harmful recessive gene is present in the family strain, there is a good possibility that the child will exhibit the undesirable character, for he may receive the gene in double dose. The afflictions most commonly ascribed to inbreeding are sterility, idiocy, insanity, deaf-mutism, albinism, and hemophelia.[39]

An additional reason for condoning an abortion where the conception is the result of an incestuous relationship is that the child's prospects of enjoying a reasonably normal home environment are slim. He cannot even hope to be rendered legitimate by the marriage of his parents.

The fact that our country's abortion statutes have, for the most part, remained unchanged despite frequent criticism suggests that some people are opposed to any liberalization of the abortion laws. And such is the case. The principal grounds advanced in opposition to any modification of the abortion statutes appear to be five:

First, it is contended that broadening the abortion laws would encourage illicit sexual relations. The obvious infirmity in this contention is that the present availability of contraceptives in nearly all the states renders reliance on the unpleasant and expensive device of an abortion unnecessary and therefore unlikely.[40] Moreover, today 90 per cent of criminal abortions are performed on married women, which indicates that comparatively few single girls employ this device as a means of concealing the excessive intimacy of a love affair.[41]

Secondly, it is argued that liberalizing the abortion laws would be detrimental to the health of mothers. Statistics do not support this argument. During the period between 1922 and 1936, when abortions were completley legal in Russia, the mortality rate among Russian

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[37]East, Heredity and Human Affairs 156 (1927).

[38]Dunn, Heredity and Variation 100 (1934).

[39]Moore, A defense of First-Cousin Marriage 139-40 (1961).

[40]Connecticut and Massachusetts are currently the only two jurisdictions which disallow the sale of contraceptives. Sulloway, The Legal and Political Aspects of Population Control in the United States 601 (1960).

[41]Note, supra note 4, at 84.

Women was 0.01 per cent.[42] In Sweden, where approximately five thousand legal abortions are performed each year, the fatality rate has been 0.04 per cent.[43] This rate, though slightly higher than that achieved by Russia, is lower than that operative among women giving birth to children in the United States and in England.[44] And in the Eastern European countries that have recently broadened their abortion laws, the mortality rate is reported to be "exceedingly low."[45] These facts demonstrate that an abortion performed under optimum conditions involves very little risk to the mother. Even if the contrary were true, one could hardly contend that the existing American laws are beneficial to the mother's health when they are currently driving over one million women each year to undergo the risks involved in illegal abortions.[46]

Thirdly, it is asserted that broadening the abortion laws might lead to an underpopulation problem. One hundred years ago this argument might have had some force, but this force has long since evaporated. In the first place, the problem now confronting the United States, is not how to maintain our population growth, but how to control it. On December 1, 1962, the population of this country was 187,844,000, and we are presently growing at the rate of approximately three million per year.[47] Hardly a week passes that one does not read about the difficulties involved in the building of enough schools, highways, and water-piping systems to accommodate this growth. So far from deploring a proposal that might have a moderating effect upon this growth, it should be welcomed. In the second place, to worry about the effect of a liberalized abortion law upon the population growth of a society that makes contraceptives readily obtainable is comparable to worrying about the effect of cigarette smoking upon the health of a community experiencing a diphtheria epidemic.

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[42]Comment, supra note 5, at 196. In 1936 Russia enacted a restrictive abortion law, as part of a program designed to increase its population growth. However, the law was liberalized in 1955 and has remained liberal since then. Kummer and Leavy, supra note 2, at 136.

[43]Darby, supra note 17, at 10.

[44]Ibid. That Russia achieved a somewhat lower mortality rate than Sweden has attained is probably explained by the fact that Russian law was very solicitous of the woman's health. It required her to remain in the hospital for three days after the operation and forbade her returning to work until she had been out of the hospital for two weeks. Comment, supra note 5, at 195.

[45]Tietze, Abortion in Eastern Europe 175 A.M.A.J. 1149 (1961).

[46]See text accompanying note 13, supra.

[47]U.S. Bureau of the Census, Current Pop. Rep., Series P-25, No. 261 (Jan. 17, 1963).

Fourthly, it is said that a broadened abortion statute would be abused by women who did not in reality come within its provisions.[48] This contention might have merit if the determination of who qualified for an abortion were left up to the woman herself. But the model enactment proposed by this writer, which differs little from those suggested by others, places this decision in the hands of a hospital committee comprising three doctors. A large number of hospitals already use committees to decide whether an applicant falls within the existing "only-to-save-mother's-life" exception to the state's abortion statute.[49] These hospitals could simply use their present committees to decide whether applicants fall within the exception provided by the liberalized act. Such a committee would constitute a body of responsible opinion adequate to insure against exploitation of the law.

Finally, it is contended by the Roman Catholic Church, which opposes even the exception provided by most existing statutes, "to save the mother's life," that any direct attack on the fetus is the equivalent of murder, regardless of the reasons.[50] Hence to broaden the abortion laws would be morally unjustifiable. It is believed that a sufficient answer to this argument is the following: The criminal law is imposed upon Catholics and non-Catholics as well. It should therefore be enacted with a view toward society as a whole and not be governed by the religious convictions of one segment of the population. If members of the Catholic faith do not desire to avail themselves of the exceptions provided by a liberalized abortion law, they need not do so. And if the Catholic Church wishes to make certain that its members do not take advantage of a broadened statute, it can effectuate this aim by indicating a readiness to employ ecclesiastical punishment.[51] But as many Catholics themselves admit,[52] to impose the religious beliefs of one sect upon the general public is clearly unjustifiable.

For the reasons set forth above this writer recommends adoption of the following abortion statute:

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[48]"Assistant Prosecutor George Pappas... was among the first to put himself among those favoring keeping the law as it is: 'To change it might mean its use promiscuously... To change at this point would be to open the door to all sorts of abuses.' " Akron Beacon Journal, Aug. 5, 1962, p. 14B, col. 5 and 6.

[49]Mills, supra note 17, at 197.

[50]Kummer and Leavy, supra note 2, at 133.

[51]See Williams, op. cit. supra note 1, at 232.

[52]Among such Catholics is Msgr. George J. Casey, vicar general of the archdiocese of Chicago, who recently stated, with reference to a related matter (birth control): "Catholics do not wish to impose their moral position on non-Catholics." Maisel, The New Battle Over Birth Control, Reader's Digest, Feb. 1963, p. 56.

"1. Notwithstanding the provisions of [the existing abortion enactment]it shall be lawful for a licensed physician to terminate a pregnancy in good faith if he believes:

(a) The same is necessary to prevent grave impairment of the physical or mental health of the mother; or that the child would be born with a grave physical or mental defect; or that the pregnancy resulted from rape or incest; and

(b) A committee of three licensed physicians have certified in writing their belief in the justifying circumstances and have filed such certificate prior to the abortion's performance in the licensed hospital where it is to be performed.

"2. After the sixteenth week of gestation a pregnancy shall not be terminated under the provisions of this Act.[53]

"3. Justification of an abortion under the provisions of this Act is an affirmative defense, and the burden of proving the same shall be upon the accused.

"4. A licensed physician shall not be deemed to be guilty of a breach of duty, if because of a conscientious objection, he fails to advise or perform a termination of pregnancy declared to be lawful by this Act, provided he has informed the patient of his conscientious objection."[54]

Until the states enact this or a similar statute there will be no change in the appalling number of criminal abortions, and the concomitant mortality and misery will continue to be a major social problem.

[53]There are two reasons for the insertion of this restriction: the generally accepted principle that the life of a mature fetus should not be sacrificed unless necessary to save the mother's life, and the medical consideration that after the sixteenth week the interruption of a pregnancy is no longer a simple operation. See Darby, supra note 17, at 13.

[54]This provision is intended to protect Roman Catholic practitioners, as well as any others who may have reservations about acting under the new dispensation.