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Legal and Social Control of Abortion

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Notes and Comments

LEGAL AND SOCIAL CONTROL OF ABORTION

The purpose of this note is to discuss the problem of abortion from the criminal, civil, and social aspects. The necessity for this broad treatment is underlined by the fact that although abortion is considered to be a crime everywhere there are perhaps a half million criminal abortions annually[1] in this country, which have resulted in only a negligible number of prosecutions each year.[2] Since this indicates that the frequency of occurrence of criminal abortion is not being lessened materially by the statutes now in force prohibiting it, perhaps the very nature of the problem is such that more than legal enactment is required to combat the problem. Therefore, following a discussion of criminal and civil liability for abortion suggestions for extra-legal control of abortion will be presented.

Abortion As a Crime

At common law the offense of procuring an abortion was treated only as an offense against the life of the child. It was not considered a crime against the person of the mother, or against God and religion. The concept of abortion, existing as a crime against morals, is to be found in modern treatises and modern statutes.[3]

Abortion is made a statutory crime in practically all jurisdictions by statutes which vary to some extent in their respective provisions.[4] The elements of the crime of abortion are twofold: first, there must be the intent to procure or cause the miscarriage and, second, there must be an overt act directed toward carrying out the intent. The mere intention to perform an abortion is not sufficient to constitute the crime.[5] In the words of the Kentucky Statute, the overt act is committed by "any person who prescribes or administers any drug, medicine or other substance, or uses any instrument or other means "[6]

The accused need not personally administer the medicine or drug

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[1] Dunn, *Frequency of Abortions*, THE ABORTION PROBLEM, 1 (1944).

[2] Kross, *The Abortion Problem Seen in Criminal Courts*, THE ABORTION PROBLEM, 108 (1944).

[3] State v. Cooper, 22 N. J. Law 52, 54 *et. seq.* (1849).

[4] The Kentucky statute on abortion is found in KY. REV. STAT., ANN., Sec. 436.020 (1948).

[5] State v. Rudman, 126 Me. 178, 136 A. 817 (1927).

[6] *Supra*, note 4.

to the woman. The sending of medicine and directions for taking it constitutes the overt act requirement of administering or prescribing it.[7] If the defendant induces a woman to use instruments upon herself to effect an abortion, this will be sufficient as an overt act to complete the crime.[8] As to the use of instruments, the exact nature of the instrument need not be established to obtain a conviction under abortion statutes.[9]

Statutes vary as to whether it is an essential element of the crime for the woman to be actually pregnant. The necessity that the woman be pregnant and the requisite stage of pregnancy depends upon the wording of the statute. Under statutes similar to that in Kentucky, which provides that the crime shall consist of administering "to any woman who he has reason to believe pregnant" it has been held that actual pregnancy is immaterial if the accused thought that pregnancy existed.[10] Also, where a statute provides for the punishment of an attempt to procure a miscarriage of "any woman" without stating that she must be a "pregnant" woman, it is immaterial whether the woman was actually pregnant or not.[11] Where, however, the statute penalizes procuring or attempting to procure a miscarriage on a "pregnant" woman, proof of pregnancy is essential.[12]

Another problem arises when the foetus is dead at the time of performance of the abortion. There is a conflict of authority on this point.[13] Of course, if the sole purpose of the statute is to protect the unborn child, proof of death of the foetus will exonerate the abortionist from criminal liability However, where the purpose behind the statute is to protect the life and health of the mother as well as the life of the child,[14] the accused abortionist will be held guilty of the crime regardless of the fact the foetus was dead when the abortion was performed. Under the latter situation, the accused will be exonerated if he can prove that it was necessary to remove the dead foetus in order to save the woman s life.[15]

It may be argued that where the foetus is dead the danger of infection is such as to necessitate an abortion to protect a woman's life.

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[7] Burns v. State, 75 Ark. 453, 84 S.W 723 (.....); State v. Morrow, 40 S.C. 221, 18 S.E. 853 (1893); 1 COR. JUR. SECUN., 315 *et seq.*

[8] Wilson v. State, 36 Okl. Cr. 148, 252 P. 1106 (1927).

[9] Greenwood v. State, 3 Okl. Cr. 247, 105 P. 371 (1909).

[10] Bassett v. State, 41 Ind. 303 (1872).

[11] Eggart v. State, 40 Fla. 527, 25 So. 144 (1898); Comm. v. Henry Taylor, 132 Mass. 261 (1882); People v. Axelsen, 223 N. Y. 650, 119 N.E. 708 (1918).

[12] State v. Stewart, 52 Iowa 284, 3 N.W 99 (1879); Com. v. Nailor, 29 Pa. Super. Ct. 271 (1905).

[13] 1 COR. JUR. SECUN., 318 (1936).

[14] State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913).

[15] *Supra,* note 13.

Nevertheless this necessity of removal of the dead foetus in order to save the woman's life must exist prior to any acts of abortion and must be clearly proved. The wisdom behind this necessity of proof was ably stated in the Ohio case of *State* v *Tippie*.[16]

In Kentucky the death of the foetus is material only where its removal is necessary to save the woman's life.[17] In *Fitch* v *Commonwealth*,[18] a nineteen year old girl went to a physician in Catlettsburg, Kentucky, in order to procure the abortion. The physician performed operations on three different occasions. When he was prosecuted under the Kentucky statutes, he testified that before attempting to operate, he was convinced professionally that the foetus was already dead because of drugs the girl had taken prior to visiting him and that the removal of the foetus was necessary to save her life. The court said that the burden of proving want of necessity could be satisfied by circumstantial evidence, such as by showing (as was done in this case) that the woman was in normal condition when the abortion was performed.

At common law it was no crime to procure a miscarriage until after the quickening of the foetus became manifest. The theory behind this view was that the offense was against the life of the child and could not be complete until the child had, in a legal sense, become alive.[19] However, under the modern type of statute like Kentucky's the crime is complete if the act is committed before quickening,[20] the policy behind the more modern statutes is, as we have seen, to protect the health and life of the mother against the consequences of the act.

Abortion is a crime, with or without the consent of the woman. This is provided by statute in Kentucky[21] where, in fact, the woman is competent to testify as a witness.[22] Abortion statutes are usually directed against persons committing the act and not against a woman upon whom the act is committed, notwithstanding that it may be done

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[16] *Supra*, note 14.

> "If physicians and surgeons may assist wives and mothers who have practiced feticide upon themselves, by giving them relief after the death of the fetus, the policy of the law will be defeated, and the abortionist will have an easy way of evading detection and punishment. He will have only to instruct the woman in the first use of an instrument, and then operate upon the fetus under conditions thus produced, which indicate that it is dead, and, upon his testimony that he *believed* it was dead, evade criminal liability."[17]

[17] *Supra*, note 14 at 36, N.E. at 77.
[18] 291 Ky. 748, 165 S.W 2d 558 (1942).
[19] 1 COR. JUR. SECUN., 318 (1936).
[20] *Supra*, note 4.
[21] *Supra*, note 4 (subsection 3).
[22] *Ibid.*

with her knowledge and consent, and that she, as a general rule, incurs no criminal liability [23] There is authority, however, for the view that the woman is a participant in the crime,[24] and it has been held that she may be convicted of a conspiracy with others to commit the crime of abortion on herself.[25] There are statutes which punish the woman for soliciting abortive medicine from any person or for submitting to an illegal operation.[26]

In conclusion of the discussion of the criminal aspect it can be said that Kentucky s abortion law is a comprehensive one[27] covering all the phases of this offense, from the attempt to commit the abortion and the causing of a miscarriage, to the subsequent death of an unborn child or a mother. For each more serious phase a more stringent penalty is provided. However, in order to discourage women from seeking to have abortions performed it is submitted that the woman, too, should be penalized by the statute. After all, it is often she who initiates the commission of the crime. As the law now stands in this and many jurisdictions the woman knows she will be considered the "innocent victim" while the person from whom she sought help will be the one to serve the prison term. The following statute is therefore respectfully submitted to correct this anomaly in the law It is on the statute books in New York:

> "A pregnant woman, who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than 4 years."[28]

Since the necessity of having an abortion performed in order to save the woman s life is the only valid defense in prosecution for abortion, it is suggested that this necessity be determined by at least two physicians, and that their signed statements be required. This will help avoid the possibility of a fraudulent declaration of necessity by one physician.

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[23] State v. Smith, 99 Iowa 26, 68 N.W 428 (1896); 1 AM. JUR. 134 (1936).

[24] State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901); Wells v. New Eng. Mut. Life Ins. Co., 191 Pa. 207, 43 A. 126 (1899).

[25] State v. Crofford, 133 Iowa 478, 110 N.W 921 (1907).

[26] ARIZ. CODE ANN., Sec. 43-301 (1939); N. Y. Penal Law, Art. 1, Sec. B1 (Thompson s, 1939).

[27] GREGORY, KENTUCKY CRIMINAL LAW PROCEDURE AND FORMS, section 184 (1918).

[28] N. Y. Penal Law, Art. 6, Sec. 81 (Thompson, 1939). See also, ARIZ. CODE ANN., Sec. 43-301 (1939).

Civil Liability

It is a well settled rule[29] in civil actions that a woman who consents to the illegal act of abortion is barred from recovery for injuries resulting from the operation. The court applied the maxim of *volenti non fit injuria;* that is, no legal wrong is done to her who consents.

Kentucky has long been in accord with this rule. In an early case[30] an action was filed on the ground that the plaintiff was induced to go to Louisville and submit to an attempted abortion by a doctor hired by the defendants. The court of appeals reversed for the defendants on appeal and held that one who consents to an assault or injury at the hands of another cannot maintain a civil action for damages sustained thereby The court gave the additional reason that "one cannot profit by his own wrong."

The rule of consent as applied to the abortion cases is contrary to the majority rule as applied to other civil actions involving a breach of the peace or acts forbidden on grounds of public policy "In an action for assault and battery, if the act complained of amounts to a breach of the peace, or if forbidden on grounds of public policy, it is held by courts that the consent is illegal, and the maxim of *volenti non fit injuria* does not apply"[31] Thus, recovery can be had for injuries sustained on ground that one cannot consent to an illegal act. Kentucky has not recognized this public policy of treating the consent as illegal, but applies the same rule to breach of the peace cases as it does to abortion cases where a civil action is filed to recover from injury from these illegal acts and bars recovery in both instances.[32]

It might be argued that society would be better protected from abortions if the plaintiff's consent were disregarded and the woman were allowed to sue for injuries to her. This encouragement of civil suits in abortion cases would perhaps bring to light facts which may be used in criminal actions. Criminal abortions are by their nature secret transactions, and, as has been pointed out, *supra,* ordinarily escape the criminal laws. Thus, by making the abortionist respond in damages to the woman, the public policy is served better than by not penalizing him at all.[33] Perhaps, too, the abortionist would be deterred from his illegal profession if he knew he might subject himself to civil liability thereby, as well as to criminal liability However, this argu-

[29] Note, 34 IOWA LAW REV. 719 (1949).
[30] Goldnamer v. O'Brien, 33 S.W 831, 98 Ky. 569 (1896).
[31] Note, 23 MICH. LAW REV. 80 (1924).
[32] Lykins v. Hamrick, 144 Ky. 80, 137 S.W 852 (1911).
[33] Miller v. Bayer, 94 Wis. 123, 68 N.W 869 (1896); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264 (1924); Lembro v. Donnell, 117 Me. 143, 103 A. 11 (1918).

ment seems to be outweighed by the fact that such a rule might encourage blackmail. Also, the woman is in *pari delicto* with the abortionist and in most cases she is probably the initiator of the crime, and should not be allowed to profit by her own wrong. Furthermore, it may be pointed out that to permit the woman to recover in a civil action might be inconsistent with the imposition of the proposed criminal liability on her, suggested previously by the writer, because she would be allowed to recover civilly for the very act for which she could be punished criminally

Social Aspect

There are good reasons why the law alone cannot effectively solve the abortion problem. The strictness with which criminal statutes are enforced is in direct ratio to public opinion. When the public is aroused by the viciousness of a particular crime, the law is likely to be strictly enforced. However, when public opinion is lukewarm or divided, the problem of law enforcement is tremendously increased. " It is safe to say that the greatest obstacle so far encountered to the legal control of abortions is public indifference."[34] Many citizens and public officials look upon criminal abortions with toleration, the citizens because they don't care, and some officials because (as in the gambling situation) it is easier for them to convince themselves that there is nothing morally reprehensible in accepting bribes or protection money from abortionists.[35] It is difficult to obtain evidence to secure convictions. The only alternative, then, if the problem of abortion is to be solved, is to turn to control other than statutory and punitive.

It is submitted that the abortion problem is primarily a problem of education because the law itself cannot overcome the lack of knowledge, the lack of social opportunity, and the lack of religious training.[36] One solution, therefore, is to give more thorough sex education in our public schools and colleges. Should young married couples have to wait until they are overwhelmed with the problems of a large family before being informed of contraceptive measures of planned parenthood?[37] It is fallacious to look to the courts or to the legislature alone for the solution to the abortion problem. It is the job of the educators. It is the task of the medical profession, at whose command lies a vast store of knowledge on this subject, to suggest measures

[34] Amen, *Some Obstacles to Effective Legal Control of Criminal Abortion*, THE ABORTION PROBLEM, p. 133, 135 (1944).
[35] *Ibid.*
[36] *Op cit., supra*, note 2 at 109.
[37] *Id.* at 110.

essential to the community The legislatures will set up agencies to carry out these measures and then the doctors must see that the agencies are properly enlightened and that the men and women placed in charge of administration are equipped with knowledge.[38]

Doctor George M. Cooper assembled the suggestion for abortion control given by specialists in obstetrics and gynecology in North Carolina and presented these suggestions to a conference on abortion held at the New York Academy of Medicine in 1942.[39] Here are a few of the major suggestions he offered.

1. Sex education, especially for girls, should be given in high schools, colleges and other places where girls are available in groups.

2. Contraceptive clinics should be established for the poorer class of women.

3. Better teaching should be given in all the medical schools on all these subjects.

4. Sterilization of one partner or the other when medical indications and economic conditions justify should be allowed. (This writer would hasten to disagree with this suggestion of sterilization merely because economic conditions justify Where sterilization is given for medical reasons there can be little disagreement.)

5. Institutions should be established to take care of many of the girls who slip for the first time, such institutions to provide adequate medical care, complete protection from publicity in their home communities, and satisfactory adoption of the babies later on. Such institutions would have to provide also for the economic rehabilitation of such girls and their restoration back to their families. In this way many of them would perhaps profit by their mistakes.

In the final analysis, any plan to promise success for the control of abortion, should be set up on sound medical principles, and to be permanent must be administered through and by the responsible public agency such as the state board of health.[40]

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[38] *Ibid.*
[39] Cooper, *The Possibilities of a Statewide Program on Abortion Control,* THE ABORTION PROBLEM, p. 163, 168 (1944).
[40] *Id.* at 169.