ABORTION LAWS: A COMPILATION AND ANALYSIS OF SELECTED STATE AND FEDERAL STATUTES AND CASES

JOHN D. SARGENT
Legislative Attorney
American Law Division

October 11, 1972

Table of Contents

Page

Page

ABORTION LAWS: A COMPILATION AND ANALYSIS OF SELECTED STATE AND FEDERAL STATUTES AND CASES

INTRODUCTION

This paper attempts to bring together, in convenient form, the following material:

(1) Statutes of the 50 States and the District of Columbia, which, in some way, either generally permit or conditionally restrict the act of abortion; plus federal statutes which regulate the importation, mailing or transportation in interstate commerce of selected abortion related materials as well as other federal abortion-related laws and executive action

(2) Brief digests of recent, selected, federal and state court decisions which affect the enforceability or applicability of the abortion laws

(3) A glossary of selected terms, the knowledge of which may prove helpful in understanding abortion laws

(4) A selected bibliography of law review articles on the topic of abortion

We do not attempt to include in this report all abortion laws. Thus, no reference is made to those separate State and D.C. laws (a) prohibiting the killing of an unborn quick child, (b) penalizing the woman who seeks an abortion and (c) penalizing activities which facilitate the performance of abortions. (Such or similar laws are included herein, however, where necessary for clarification or to maintain continuity) Additionally, a review of state statutes and cases affecting the dissemination or regulation of birth control devices or information is beyond the scope of this paper.

Statutes

While there are no federal laws directly prohibiting or permitting the act of an abortion, several statutes attempt to prohibit the distribution, through federally regulated channels, of abortion-related materials. Additionally, Congress has provided that funds appropriated to assist in the establishment and operation of voluntary family planning projects may not be used where abortion is a method of family planning. Further, the President has directed that abortions in military hospitals are to be performed in accordance with state laws.

Without question, the totality of current and direct abortion regulation occurs through state laws. Prior to 1967, the almost exclusive condition upon which an abortion was justifiable was where it was necessary to preserve the life of the mother. As the result of recent judicial and legislative activity, the number

of justifiable conditions for an abortion in many states has increased to include factors heretofore not cognizable by the law. These factors will be discussed below.

Today, Alaska, Hawaii, New York and Washington state allow abortions on the woman's request, minimal criteria having first been met. Alaska permits the abortion of a nonviable fetus and requires that the abortion be performed by a licensed physician or surgeon, in an approved hospital or other facility. In addition, parental or guardian consent is required for an unmarried woman less than 18 years of age. Finally, the woman must be domiciled or physically present in the state for 30 days before the abortion.

Hawaii permits the abortion of a nonviable fetus as long as it is performed by a licensed physician or surgeon in a licensed hospital and the woman has been domiciled or physically present in the state 90 days.

New York permits abortions by duly licensed physicians within twenty-four weeks from the commencement of pregnancy except that there is no time requirement where an abortion is necessary to preserve the mother's life.

Washington allows for the termination of pregnancies by a licensed physician, in an accredited hospital or other approved facility when the woman is not quick with child and the pregnancy has not developed to more than four lunar months after conception. (But see note following Washington statutes, infra).

Termination is permitted elsewhere to meet a medical emergency. A married woman residing with her husband must have the husband's consent and an unmarried woman under eighteen must have the consent of her legal guardian. A 90-day residency requirement is imposed.

Several jurisdictions allow abortions, generally, on a showing of one or a combination of the following conditions:

(1) The pregnancy endangers the life or health (generally) of the mother
(2) The pregnancy endangers the life or physical or mental health of the mother
(3) The pregnancy is the result of rape (statutory and/or forcible) or incest
(4) The fetus is deformed

Those jurisdictions are Alabama, Arkansas, California, Colorado, District of Columbia, Delaware, Florida, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. The remainder allow abortions only when necessary to save the life of the mother.

Judicial Activity

There are numerous cases currently docketed for the October 1972 term of the United States Supreme Court which in some way call into review the abortion laws of the states of Texas, Georgia, Connecticut, Missouri, Louisiana, Illinois, North Carolina, Mississippi, Ohio and Kentucky. Other cases may be docketed at any time. In addition, there are numerous other lower court cases

concerning abortion laws in other jurisdictions throughout the country. Set out in the text, following each statutory provision, are brief digests to those recent decisions which affect the enforceability or applicability of the particular law.

What follows is a general description of the major legal arguments which are usually advanced when an abortion law is challenged as unconstitutional. Reference will be made first to the arguments of opponents of restrictive abortion laws and then to that argument most often utilized by the state to justify the laws.

Major Arguments of Opponents of Restrictive Abortion Laws

(1) The argument that a prohibition against abortion in any given statute is unconstitutional, states that laws prohibiting abortion intrude upon a woman's freedom and privacy in matters relating to sex and procreation. Relying on the U.S. Supreme Court's opinion in Griswold v. Connecticut, 381 U.S. 479 (1965) and related cases, which arguably recognize a Constitutional right or zone of privacy (which includes and protects at least certain activities relating to marriage, sex, contraception, procreation, childrearing and education) into which the state may not constitutionally intrude, proponents of liberalized abortion laws have utilized the "right of privacy" argument with not infrequent success. For example, the California Supreme Court, in striking down a pre-1967 abortion statute in People v. Belous,

80 Cal. Rptr. 354, 359; 458 P. 2d 194, 199 (1969), stated:

> The fundamental right of the woman to choose whether to bear children follows from the [U.S.] Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex.

See also, Y.W.C.A. of Princeton, N.J. v. Kugler, 342 F. Supp. 1048, 1072 (D.N.J. 1972): "[This right of privacy] applies equally to all women regardless of marital status" (emphasis added).

(2) It is very often argued that abortion laws are unconstitutionally vague. The U.S. Supreme Court in Connally v. General Construction Co., 269 U.S. 385, 391 (1926), declared that:

> ... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process.

In light of this principle, together with the fact that most criminal abortion provisions disallow abortions except where necessary "to preserve the life of the mother," it is argued that such terminology is insufficient to notify a physician or woman of precisely what conduct is prohibited. As a three-judge federal court in Texas, in the case of Roe v. Wade, 314 F. Supp. 1247 (N.D. Tex. 1970) (per curiam), jurisdiction postponed 402 U.S. 941 (1971), argued, December 13, 1971, 40 U.S.L.W. 3300 (U.S. December 28, 1971), restored to calendar for reargument 40 U.S.L.W. 3617 (U.S. June 26, 1972) (No. 808, 1970 term, renumbered 70-18, 1971 term), recently expressed it:

> How likely must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without

> an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How imminent must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

Unless the statutory terminology in question can be found to be constitutionally precise it will be struck down as unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

Additional arguments include that (3) residency requirements unduly infringe upon the fundamental right to travel guaranteed to all citizens, see Corkey v. Edwards, 322 F. Supp. 1248, 1254 (W.D.N.C. 1971) appeal filed, 40 U.S.L.W. 3098 (U.S. July 17, 1971) (No. 71-92) and (4) that state statutes requiring that abortions be performed only in accredited facilities place an unwarranted limitation on the fundamental constitutional right to receive an abortion. Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972).

State Argument Justifying Abortion Laws

Generally, the state argues that abortion legislation is within the power of the state to regulate conduct inimical to the general welfare and that the state has an interest in creating an environment in which the embryo or fetus is permitted to proceed toward natural birth. However, such an interest on the part of the state usually must be found to be "compelling" in order to justify an intrusion into what some courts have described as the fundamental constitutional right of a woman to receive an abortion.

As Justice Goldberg stated in his concurring opinion in Griswold, supra.,

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuations of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling.' Bates v. Little Rock, 361 U.S. 516, 524. The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissable state policy.' [citations omitted]. 381 U.S. at 497.

As an example of a decision in which this State interest was found paramount, see Crossen v. Attorney General of The Commonwealth of Kentucky, No. 2143 (E.D. Ky., May 19, 1972) appeal docketed, 41 U.S.L.W. 3102 (U.S. August 29, 1972)(No. 72-256) which upheld the constitutionality of a statute prohibiting abortions unless necessary to preserve the woman's life. Said the Court, "It is our opinion that the State has a compelling reason for and interest in the existence of the current abortion statute (citation omitted). The State's interest in the preservation of potential human life outweighs and supersedes any right to privacy a woman or family may claim." Similarly, the Court in Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970), in upholding the Ohio abortion statute, asserted that: "...the State has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive. ...on balance [this interest] is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life."

Glossary of Terms

While the case and statutory law of each state should be consulted for the precise legal meaning of terms used in abortion statutes, the following general definitions may prove helpful in understanding many of the laws.

Embryo refers to the unborn young from conception until approximately the end of the second month of gestation. Stedman's Medical Dictionary 515 (1966). A Fetus is the unborn offspring in the latter stages of development, from the end of the third month until birth. Stedman's Medical Dictionary 587 (1966). A Quick Child is defined as a child that has developed so that it moves within the mother's womb. Quickening is the first motion of the fetus in the womb felt by the mother. Black's Law Dictionary 1415 (4th ed, 1968). Viability is a term used to denote the power a new-born child possesses of continuing its independent existence. Viable is a term applied to newly-born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of its life. Black's Law Dictionary 1737 (4th ed. 1968).

Statutes - Federal

18 U.S.C. §552 (1970 ed.)

§ 552. Officers aiding importation of obscene or treasonous books and articles.

Whoever, being an officer, agent, or employee of the United States, knowingly aids or abets any person engaged in any violation of any of the provisions of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail obscene or indecent publications or representations, or books, pamphlets, papers, writings, advertisements, circulars, prints, pictures, or drawings containing any matter advocating or urging treason or insurrection against the United States or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or means for procuring abortion, or other articles of indecent or immoral use or tendency, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. (June 25, 1948, ch. 645, 62 Stat. 718; Jan. 8, 1971, Pub. L. 91-662, § 2, 84 Stat. 1973.)

(emphasis added)

18 U.S.C. §1461 (1970 ed.)

§ 1461. Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

18 U.S.C. §1461 (cont'd)

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. (June 25, 1948, ch. 645, 62 Stat. 768; June 28, 1955, ch. 190, §§ 1, 2, 69 Stat. 183; Aug. 28, 1958, Pub. L. 85-796, § 1, 72 Stat. 962; Jan. 8, 1971, Pub. L. 91-662, §§ 3, 5(b), 6(3), 84 Stat. 1973, 1974.)

(emphasis added)

18 U.S.C. 1462 (1970 ed.)

§ 1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any

written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

18 U.S.C. 1462 (cont'd)

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. (June 25, 1948, ch. 645, 62 Stat. 768; May 27, 1950, ch. 214, § 1, 64 Stat. 194; Aug. 28, 1958, Pub. L. 85-796, § 2, 72 Stat. 962; Jan. 8, 1971, Pub. L. 91-662, § 4, 84 Stat. 1973.) (emphasis added)

42 U.S.C. §300(a) (1970 ed.)

SUBCHAPTER VIII.—POPULATION RESEARCH AND VOLUNTARY FAMILY PLANNING PROGRAMS

§ 300. Project grants and contracts for family planning services.

(a) Authority of Secretary.

The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects.

42 U.S.C. 300a-6 (1970 ed.)

§ 300a-6. Prohibition against funding programs using abortion as family planning method.

None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning. (July 1, 1944, ch. 373, title X, § 1008, as added Dec. 24, 1970, Pub. L. 91-572, § 6(c), 84 Stat. 1508.)

The following is the text of President Nixon's announcement regarding abortions at Military Hospitals. 7 Weekly Compilation of Presidential Documents 598 (week ending April 10, 1971)

Abortions at Military Hospitals

Statement by the President Upon Directing That Policy Be Made To Correspond With State Laws.
April 3, 1971

Historically, laws regulating abortion in the United States have been the province of States, not the Federal Government. That remains the situation today, as one State after another takes up this question, debates it and decides it. That is where the decisions should be made.

Partly, for that reason, I have directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the States where those bases are located. If the laws in a particular State restrict abortions, the rules at the military base hospitals are to correspond to that law.

The effect of this directive is to reverse service regulations issued last summer, which had liberalized the rules on abortions at military hospitals. The new ruling supersedes this—and has been put into effect by the Secretary of Defense.

But while this matter is being debated in State capitals, and weighed by various courts, the country has a right to know my personal views.

From personal and religious beliefs I consider abortion an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I cannot square with my personal belief in the sanctity of human life—including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.

Ours is a nation with a Judaeo-Christian heritage. It is also a nation with serious social problems—problems of malnutrition, of broken homes, of poverty, and of delinquency. But none of these problems justifies such a solution.

A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands.

NOTE: The statement was released at San Clemente, Calif.

Model Penal Code Provision
(Proposed Official Draft, 1962)

Section 230.3. Abortion.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

As proposed by the American Law Institute, the Model Penal Code provision above is merely a recommended means of legislating the issue of abortion. As it can readily be seen, many of the states which have increased the number of justifiable reasons for which an abortion may be performed, have adopted justifications either identical or closely analogous to those in the Model Penal Code

Uniform Abortion Act
(Final Draft)

SECTION 1. [*Abortion defined; When authorized.*]

(a) "Abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

(b) An abortion may be performed in this state only if it is performed: (1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and (2) within [20] weeks after the commencement of the pregnancy[; unless the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

SECTION 5. [*Severability.*] If any provision of this Act or application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

(1)
(2)
(3)

SECTION 7. [*Time of Taking Effect.*] This Act shall take effect _____

As drafted by the National Conference of Commissioners on Uniform State Laws during the Summer of 1971, The Uniform Abortion Act, similar to The Model Penal Code, is no more than a suggested means of legislating the issue of abortion. To date, it appears that no state has adopted the Act, in part or in whole.

Statutes - State

ALABAMA
(Through 1971 Session Laws)

Ala. Code Title 14, §9 (1959)

§ 9. (3191) (6215) (4305) (4022) (4192) (3605) (64) **Inducing or attempting to induce abortion, miscarriage or premature delivery of a woman.**—Any person who willfully administers to any pregnant woman any drug or substance, or uses or employs any instrument or other means to induce an abortion, miscarriage, or premature delivery, or aids, abets, or prescribes for the same unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1000.00), and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve (12) months. (1911, p. 548; 1951, p. 1630, appvd. Sept. 12, 1951.)

Recent cases - None

ALASKA
(Through 1971 Cummulative Supplement)

Alaska Stat. §11.15.060 (1970):

Sec. 11.15.060. Abortions. (a) No abortion may be performed in this state unless (1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200; (2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Welfare or a hospital operated by the federal government or an agency of the federal government; (3) consent has been received from the parent or guardian of an unmarried woman less than 18 years of age; and (4) the woman is domiciled or physically present in the state for 30 days before the abortion. "Abortion" in this section means an operation or procedure to terminate the pregnancy of a nonviable fetus. Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(b) A person who knowingly violates a provision of (a) of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both. (§ 65-4-6 ACLA 1949; am § 1 ch 103 SLA 1970)

Recent cases - None

ARIZONA

(Through 1971 Regular Session of 30th Legislature-Adjourned May 14, 1971)

Ariz. Rev. Stat. Ann. §13-211 (1956)

§ 13-211. Definition; punishment

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

Historical Note

Source: § 243, P.C. '01; § 273, P.C. '13; § 4045, R.C. '28; 43-301, C. '39, in part. Adopted from California, see West's Ann.Pen.Code § 274.

Recent cases -- None

ARKANSAS
(Through 1971 Legislative Session, Adjourned April 14, 1971)

Ark. Stat. Ann. §§41-301; 41-303 to 41-310 (1964; Supp. 1971)

41-301. Abortion defined—Penalty.—It shall be unlawful for any one to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion, or premature delivery of any foetus before or after the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisonment [imprisoned] in the penitentiary not less than one (1) nor more than five (5) years; provided, that this Section shall not apply to any abortion produced by any regular practicing physician for the purpose of saving the mother's life. [Act Nov. 8, 1875 (Adj. Sess.), No. 4, § 1, p. 5; C. & M. Dig., § 2598; Pope's Dig., § 3286; Acts 1961, No. 443, § 1, p. 1388.]

41-303. Unlawful to induce abortion by use of medicine or drugs or by any other means—Penalty.—It shall be unlawful for any one to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion, or premature delivery of any foetus before or after the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisoned in the penitentiary not less than (1) nor more than five [5] years. [Acts 1969, No. 61, § 1, p. 177.]

41-304. Conditions which make abortion legal.—Notwithstanding any of the provisions of Section 1 [§ 41-303] of this Act [§§ 41-303—41-310] it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in Arkansas by the Arkansas State Medical Board, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest which was reported to the Prosecuting Attorney, or his deputy within seven (7) days after the alleged rape or incestuous act. The Prosecuting Attorney shall submit a written report of said complaint to the doctor and said report to be made a permanent part of patient's medical records. [Acts 1969, No. 61, § 2, p. 177.]

41-305. Consent required for legal abortion.—No legal abortion may be performed until the pregnant woman has given written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent. [Acts 1969, No. 61, § 3, p. 177.]

Ark. cont'd

41-306. Residence requirement for legal abortion—Exception.—No legal abortion shall be performed unless the pregnant woman shall have resided in the State of Arkansas for a period of at least four [4] months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger. [Acts 1969, No. 61, § 4, p. 177.]

41-307. Restriction on where legal abortions may be performed.—Legal abortions may be performed only in a hospital licensed by the Arkansas State Board of Health and accredited by the Joint Commission of Accreditation of Hospitals. [Acts 1969, No. 61, § 5, p. 177.]

41-308. Filing of certificate justifying abortion prior to performance.—Before any legal abortion shall be performed by a doctor of medicine there must be filed with the hospital where said abortion is to be performed the certificate of three [3] doctors of medicine not engaged jointly in private practice, one [1] of whom shall be the person performing the abortion, which certificate shall state that said doctors of medicine have examined said woman and certify in writing the circumstances which they believe justify the abortion. [Acts 1969, No. 61, § 6, p. 177.]

41-309. Filing of certificate after abortion performed—Emergency.—In the event a medical emergency exists and in the opinion of the three [3] doctors of medicine examining said woman, an immediate abortion must be performed, the certificate provided in the above section may be submitted within 24 hours after the abortion. [Acts 1969, No. 61, § 7, p. 177.]

41-310. Immunity from civil liability of persons who refuse to participate in or perform abortions.—(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the state or any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such persons would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits. [Acts 1969, No. 61, § 8, p. 177.]

Recent cases - Heath v. State, 249 Ark. 217, 219 n.2, 459 S.W. 2d. 420 (1970) cert. denied 404 U.S. 910 (1971): §41-301 of Ark. Stat. Ann. (1964) not changed nor affected by Acts 1969, No. 61

CALIFORNIA
(Through Ch. 251, 1972 Regular Session, Legislative Service pamphlet #3)

Cal. Penal Code §274 (1970):

§ 274. Supplying or administering abortifacient; exception; punishment

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years.
(Enacted 1872. Amended by Stats.1935, c. 528, p. 1605, § 1; Stats. 1967, c. 327, p. 1523, § 3.)

Cal. Health and Safety Code §§25950-25955.5 (Supp. 1972)

§ 25950. Short title

This chapter shall be known and may be cited as the Therapeutic Abortion Act.
(Added Stats.1967, c. 327, p. 1535, § 1.)

§ 25951. Authority to perform or to aid or assist or attempt abortion; requirements

A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

(a) The abortion takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals.

(b) The abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unanimous consent of all committee members shall be required in order to approve the abortion.

(c) The Committee of the Medical Staff finds that one or more of the following conditions exist:

(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother;

(2) The pregnancy resulted from rape or incest.
(Added Stats.1967, c. 327, p. 1535, § 1.)

§ 25952. Pregnancy resulting from rape or incest; procedure

The Committee of the Medical Staff shall not approve the performance of an abortion on the ground that the pregnancy resulted from rape or incest except in accordance with the following procedure:

(a) Upon receipt of an application for an abortion on the grounds that the pregnancy resulted from rape or incest, the committee shall immediately notify the district attorney of the county in which the alleged rape or incest occurred of the application, and transmit to the district attorney the affidavit of the applicant attesting to the facts establishing the alleged rape or incest. If the district attorney informs the committee that there is probable cause to believe that the pregnancy resulted from a violation of Section 261 or Section 285 of the Penal Code, the committee may approve the abortion. If, within five days after the committee has notified the district attorney of the application, the committee does not receive a reply from the district attorney, it may approve the abortion. If the district attorney informs the committee that there is no probable cause to believe the alleged violation did occur, the committee shall not approve the abortion, except as provided in subdivision (b) of this section;

(b) If the district attorney informs the committee that there is no probable cause to believe the alleged violation did occur, the person who applied for the abortion may petition the superior court of the county in which the alleged rape or incest occurred, to determine whether the pregnancy resulted from a violation of Section 261 or Section 285 of the Penal Code. Hearing on the petition shall be set for a date no later than one week after the date of filing of the petition.

The district attorney shall file an affidavit with the court stating the reasons for his conclusion that the alleged violation did not occur, and this affidavit shall be received in evidence. The district attorney may appear at the hearing to offer further evidence or to examine witnesses.

If the court finds that it has been proved, by a preponderance of the evidence, that the pregnancy did result from a violation of Section 261 or Section 285 of the Penal Code, it shall issue an order so declaring, and the committee may approve the abortion. Any hearing granted under this section may, at the court's discretion, be held in camera. The testimony, findings, conclusions or determinations of the court in a proceeding under this section shall be inadmissible as evidence in any other action or proceeding, although nothing herein shall be construed to prevent the appearance of any witness who testified at a proceeding under this section, or to prevent the introduction of any evidence that may have been introduced at a proceeding under this section, in any other action or proceeding.

(c) Notwithstanding any other provision of this section, an abortion shall be approved on the ground of a violation of subdivision 1 of Section 261 of the Penal Code only when the woman at the time of the alleged violation, was below the age of 15 years.

(d) Notwithstanding any other provision of this section, the testimony of any witness in a proceeding under this section shall be admissible as evidence in any prosecution of that witness for perjury.

(Added Stats.1967, c. 327, p. 1535, § 1.)

§ 25953. Medical staff committee; number of members required

The committee of the medical staff referred to in Section 25951 must, in all instances, consist of not less than two licensed physicians and surgeons, and if the proposed termination of pregnancy will occur after the 13th week of pregnancy, the committee must consist of at least three such licensed physicians and surgeons. In no event shall the termination be approved after the 20th week of pregnancy.

(Added Stats.1967, c. 327, p. 1535, § 1.)

Cal. cont'd.

§ 25954. Mental health defined

The term "mental health" as used in Section 25951 means mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.
(Added Stats.1967, c. 327, p. 1535, § 1.)

§ 25955. Refusal to participate in abortion; effect; violation

No employer shall require a registered nurse, a licensed vocational nurse, or any other person employed to furnish direct personal health service to a patient to directly participate in the induction or performance of an abortion, if such employee has filed a written statement with the employer indicating a moral, ethical, or religious basis for refusal to participate in the abortion, and the employer shall not penalize or discipline such employee for declining to so directly participate.

This section shall not apply to medical emergency situations.

Any violation of this section is a misdemeanor.
(Added by Stats.1971, c. 1150, p. —, § 1.)

§ 25955.5 Establishment and maintenance of system for reporting of therapeutic abortions

The State Department of Public Health shall by regulation establish and maintain a system for the reporting of therapeutic abortions so as to determine the demographic effects of abortion and assess the experience in relation to legal and medical standards pertaining to abortion practices. The reporting system shall not require, permit, or include the identification by name or other means of any person undergoing an abortion. The State Department of Public Health shall make a report to the Legislature not later than the 30th calendar day each even-numbered year on its findings related to therapeutic abortions and their effects.

The state department shall seek, in addition to any other funds made available to it, federal funds in order to carry out the purposes of this act.
(Added by Stats.1971, c. 1621, p. —, § 1.)

Recent cases - People v. Belous, 80 Cal. Rptr. 354, 458 P. 2d 194 (1969), cert. denied, 397 U.S. 915 (1970): Penal Code §274 making a person who performs abortion punishable unless abortion is necessary to preserve mother's life as it read before amended in 1967 was invalid where term "necessary to preserve" was not susceptible to a construction which, while satisfying legislative intent was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights of mother to life and to choose whether to bear children, and convictions of abortion and conspiracy to commit abortion could not stand.

Cal. cont'd

People v. Robb, Nos. 149005 and 159061 (Central Orange Cnty. Mun. Ct., Calif, Jan. 7, 1970) and People v. Barksdale, No. 33237C (San Leandro-Hayward Mun. Ct., Alameda Cnty., Calif. March 24, 1970): Robb trial judge found California Statute in violation of U.S. Constitution on various grounds including: Improper delegation of legislative authority, vagueness, denial of equal protection, and interference with the right to privacy. Barksdale judge indicated concurrence with Robb trial judge.

People v. Barksdale, 18 Cal. App. 3d 813, 96 Cal. Rptr. 265, 1 Crim. 9526 (Calif. Dist. Ct. App. 1971): Decision of intermediate Appellate Court invalidating major portions of abortion Act, in particular, a provision limiting abortions to hospitals accredited by the Joint Commission on Accreditation of Hospitals.

People v. Gwynne, No. 173309 (Central Orange Cnty. Mun. Ct., Calif., June 16, 1970): Decision of trial judge that California Statute goes beyond legitimate health purposes and is an unconstitutional infringement of the rights of life and liberty protected by the Fourteenth Amendment. For reference to Robb, first Barksdale case and Gwynne, see Appellant's Supplementary Appendix To Brief For Appellants: Legal, Medical, and Social Science Materials Regarding Abortion Law Restrictions in regard to Roe v. Wade, in the Supreme Court of the United States, No. 70-18, 1971 term.

People v. Pettigrew, 18 Cal. App. 3d 677, 96 Cal. Rptr. 189 (Calif. Dist. Ct. App. 1971); Court affirmed conviction of physician for performing an abortion and upheld constitutionality, as challenged, of Therapeutic Abortion Act.

Ballard v. Anderson, 95 Cal. Rptr. 1, 484 P.2d 1345 (1971); California Supreme Court ruled minors may obtain therapeutic abortions without parental consent and ordered Therapeutic Abortion Committee to consider minors application. Case brought by patient's physician.

Major v. Ferdon, 325 F. Supp. 1141 (N.D. Calif. 1971): Three-judge court refrained from enjoining on-going state prosecution for violation of abortion laws and would not hear challenge to constitutionality of statute.

COLORADO
(Through 48th General Assembly, Adjourned May 17, 1971)

Ch. 40 Colorado Revised Statutes 1963, Colorado Criminal Code (effective July 1, 1972):

ARTICLE 6

OFFENSES INVOLVING THE FAMILY RELATION
(ABORTION)

40-6-101. Definitions. As used in sections 40-6-101 to 40-6-104:

(1) "Pregnancy" means the implantation of an embryo in the uterus.

(2) "Licensed hospital" means one licensed or certificated by the Colorado department of health.

(3) "Justified medical termination" means the intentional ending of the pregnancy of a woman at the request of said woman or, if said woman is under the age of eighteen years, then at the request of said woman and her then living parent or guardian, or, if the woman is married and living with her husband, at the request of said woman and her husband, by a licensed physician using accepted medical procedures in a licensed hospital upon written certification by all of the members of a special hospital board that:

(a) Continuation of the pregnancy, in their opinion, is likely to result in: The death of the woman; or the serious permanent impairment of the physical health of the woman; or the serious permanent impairment of the mental health of the woman as confirmed in writing under the signature of a licensed doctor of medicine specializing in psychiatry; or the birth of a child with grave and permanent physical deformity or mental retardation; or

(b) Less than sixteen weeks of gestation have passed and that the pregnancy resulted from conduct defined as criminal in sections 40-3-401 and 40-3-402, or if the female person is unmarried and has not reached her sixteenth birthday at the time of such conduct regardless of the age of the male; or incest, as defined in sections 40-6-301 and 40-6-302, and that the district attorney of the judicial district in which the alleged rape or incest has occurred has informed the committee in writing over his signature that there is probable cause to believe that the alleged violation did occur.

(4) "Special hospital board" means a committee of three licensed physicians who are members of the staff of the hospital where the proposed termination would be performed if certified in accordance with subsection (3) of this section, and who meet regularly or on call for the purpose of determining the question of medical justification in each individual case, and which maintains a written record, signed by each member, of the proceedings and deliberations of such board.

Colorado cont'd

40-6-102. **Criminal abortion.** (1) Any person who intentionally ends or causes to be ended the pregnancy of a woman by any means other than justified medical termination or birth commits criminal abortion.

(2) Criminal abortion is a class 4 felony, but if the woman dies as a result of the criminal abortion, it is a class 2 felony.

40-6-103. **Pretended criminal abortion.** (1) Any person who intentionally pretends to end the real or apparent pregnancy of a woman by any means other than justified medical termination or birth commits pretended criminal abortion.

(2) Pretended criminal abortion is a class 5 felony, but if the woman dies as a result of the pretended criminal abortion, it is a class 2 felony.

40-6-104. **Failure to comply.** Nothing in sections 40-6-101 to 40-6-104 requires a hospital to admit any patient under said sections for the purposes of performing an abortion, nor is any hospital required to appoint a special hospital board as defined in section 40-6-101 (4). A person who is a member of or associated with the staff of a hospital or any employee of a hospital in which a justified medical termination has been authorized and who states in writing an objection to such termination on moral or religious grounds is not required to participate in the medical procedures which result in the termination of a pregnancy, and the refusal of any such person to participate does not form the basis for any disciplinary or other recriminatory action against such person.

40-6-105. **Distributing abortifacients.** (1) A person commits distributing abortifacients if he distributes or sells to or for any person other than a licensed medical doctor or osteopathic physician any drug, medicine, instrument, or other substance which is in fact an abortifacient and which he knows to be an abortifacient, and reasonably believes will be used as an abortifacient.

(2) Distributing abortifacients is a class 1 misdemeanor.

Recent cases - Caraway v. Colorado, 486 P. 2d 17 (Sup. Ct. Colo., 1971): Colorado Supreme Court affirmed the conviction of a woman defendant for performing an abortion. No indication of challenge to constitutionality of Statute.

Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970): Action challenging constitutionality of Colorado abortion statute. Doctors and Pregnant women found to have standing; claims of psychiatrist and non-pregnant women dismissed.

CONNECTICUT

(Through June Session, 1972, Adjourned June 16, 1972, Legislative Service Pamphlet #4)

P.A. No.1[1972] Conn. Laws 677

PUBLIC ACT NO. 1

An Act concerning abortion.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1.

The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception and in order to effectuate this public policy and intent:

(a) No person shall give or administer to any female person, advise or cause her to take or use anything, or use any means, with intent to procure upon her a miscarriage or abortion, nor shall any female person do or suffer anything to be done, with intent thereby to produce upon herself a miscarriage or abortion.

(b) No person shall sell or advertise medicines or instruments or other devices for the commission of a miscarriage or abortion, except to a licensed physician or a hospital licensed by the state of Connecticut.

(c) The provisions of subsections (a) and (b) of this section shall not apply to an abortion or miscarriage performed by a licensed physician when such abortion or miscarriage is necessary to preserve the physical life of the mother and when such abortion is performed in a hospital licensed by the state of Connecticut.

(d) A violation of this section shall be a Class D felony.

Sec. 2.

If any part of this act shall be held invalid, such holding shall not affect the validity of the remaining parts of this act. If a part of this act is invalid in one or more of its applications, the remaining parts of this act shall remain in effect in all valid applications that are severable from the invalid applications.

Sec. 3. This act shall take effect from its passage.

Approved May 23, 1972.

Conn. Gen. Laws §53-29 (1960)

§ 53-29. Attempt to procure miscarriage

Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both. (1949 Rev., § 8363.)

Historical Note

Derivation:

1930 Rev. § 6050.
1918 Rev. § 6200.
1905 P.A. ch. 167.
1902 Rev. § 1157.

Connecticut cont'd

Note: §53-29 above, the old abortion law, does not appear to have been repealed by P.A. No. 1, the new abortion law, also above. However §53-29 was one of the statutes declared unconstitutional in Abele v. Markle, 342 F. Supp. 800, mentioned below, and an injunction against its enforcement has been issued by three-judge federal court.

Recent cases - Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972) appeal docketed, 41 U.S.L.W. 3057 (U.S. July 10, 1972)(No. 72-56): Federal three-judge court declared Connecticut's pre-1972 abortion laws unconstitutional.

Abele v. Markle, Civ. No. B-521 (D. Conn. September 20, 1972): Same three-judge court which heard the above case declared the May, 1972 Connecticut abortion law unconstitutional.

DELAWARE
(Through 1970 Legislative Sessions)

Del. Code Ann. Tit. 24, §§1790-1793 (Supp. 1971-72):

§ 1790. [Prohibition on termination of human pregnancy; exceptions] [1]

(a) No person shall terminate or attempt to terminate, or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by this State may terminate a human pregnancy, or aid or assist or attempt a termination of a human pregnancy, if such procedure takes place in a hospital accredited by a nationally recognized medical or hospital accreditation authority, upon authorizaton by a hospital abortion review authority appointed by the hospital, if 1 or more of the following conditions exist:

(1) continuation of the pregnancy is likely to result in the death of the mother;

(2) there is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;

(3) the pregnancy resulted from

(A) incest, or

(B) a rape committed as a result of force or bodily harm, or threat of force or bodily harm, and the Attorney General of this State has certified to the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur, except that during the first 48 hours after the alleged rape no certification by the Attorney General shall be required

(4) continuation of the pregnancy would involve substantial risk of permanent injury to the physical or mental health of the mother.

(b) In no event shall any physician terminate or attempt to terminate, or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless:

(1) not more than 20 weeks of gestation have passed (except in the case of a termination pursuant to subsection (a) (1) of this section; or where the fetus is dead); and

(2) two physicians licensed by this State, 1 of whom may be the physician proposed to perform the abortion, certify to the abortion review authority of the hospital where the procedure is to be performed that they are of the opinion, formed in good faith, that 1 of the circumstances set forth in subsection (a) of this section exists (except that no such certification is necessary for the circumstances set forth in subsection (a) (3) (B) of this section); where the personal physician of an expectant mother claims that she has a mental

Delaware cont'd

or emotional condition, a psychiatrist licensed by this State shall, in addition to the personal physician, certify to the abortion review authority of the hospital where such procedure is to be performed, that he is of the opinion, formed in good faith, that 1 of the circumstances set forth in subsection (a) of this section exists (except that no such certification is necessary for the circumstances set forth in subsection (a) (3) (b) of this section; and

(3) in the case of an unmarried female under the age of 19, or mentally ill or incompetent, there is filed with the hospital abortion review authority the written consent of the parents or guardians as are then residing in the same household with the consenting female, or if such consenting female does not reside in the same household with either of her parents or guardians, then with the written consent of 1 of her parents or guardians.

(c) The hospital abortion review authority of each hospital in which a procedure or procedures are performed pursuant to this section shall, on or before the first day of March in each year, file with the State Board of Health a written report of each such procedure performed pursuant to the authorization of such authority during the preceding calendar year setting forth grounds for each such authorization, but not including the names of patients aborted.
Added 57 Del.Laws, Ch. 145, § 2; amended 57 Del.Laws, Ch. 235, §§ 1, 2, eff. July 10, 1969.

§ 1791. [Refusal to perform or submit to medical procedures]

(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person, nor a basis for any disciplinary, or other recriminatory action against him.

(b) No hospital, hospital director, or governing board shall be required to permit the termination of human pregnancies within its institution, and the refusal to permit such procedures shall not be grounds for civil liability to any person, nor a basis for any disciplinary, or other recriminatory action against it by the State or any person.

(c) The refusal of any person to submit to an abortion or to give consent shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled, nor shall submission to an abortion or the granting of consent be a condition precedent to the receipt of any public benefits.
Added 57 Del.Laws, Ch. 145, § 2.

Delaware cont'd

§ 1792. [Assistance or participation in an unlawful termination of human pregnancy] [1]

No person shall, unless the termination of a human pregnancy has been authorized pursuant to the provision of section 1790 of this title:

(1) sell or give, or cause to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of such pregnancy; or

(2) give advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of such pregnancy; or

(3) knowingly assist or cause by any means whatsoever the obtaining or performing of a termination of such pregnancy.

Added 57 Del.Laws, Ch. 145, § 2.

§ 1793. [Residency requirements; exceptions] [1]

(a) No person shall be authorized to perform a termination of a human pregnancy within the State upon a female who has not been a resident of this State for a period of at least 120 days next before the performance of an operative procedure for the termination of a human pregnancy.

(b) This section shall not apply to such female who is gainfully employed in this State at the time of conception, or whose spouse is gainfully employed in this State at the time of conception, or to such female who has been a patient, prior to conception, of a physician licensed by this State, or to such female who is attempting to secure the termination of her pregnancy for the condition specified in section 1790(a) (1) of this title.

Added 57 Del.Laws, Ch. 145, § 3(A).

[1] Section enacted without catchline which has been supplied by editor.

Recent cases - None

DISTRICT OF COLUMBIA

D.C. Code Ann. §22-201 (1967)(Cumulative Supp. V):

> **§ 22–201. Definition and penalty.**
>
> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; or if the death of the mother results therefrom, the person procuring or producing, or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 809; June 29, 1953, 67 Stat. 93, ch. 159, § 203.)

Recent cases - United States v. Vuitch, 402 U.S. 62 (1971): The Supreme Court upheld the constitutionality of the statute against a charge of vagueness. Relying on Doe v. General Hospital of the District of Columbia 313 F. Supp. 1170 (D.D.C. 1970) the Court held that properly construed, the word health should be read to include mental health and that the statute permits abortions for mental health reasons whether or not the patient has had a previous history of defects.

Coe v. District of Columbia General Hospital, Civ. No. 1447-71 (D.D.C. June 5, 1972): Requirement that married woman must receive consent of her husband before abortion will be performed declared unconstitutional. Such a requirement was held to deprive poor married women of their right to receive needed medical care, to control their own bodies and to choose whether to bear the greater risks of pregnancy and child birth or the lesser risks of a therapeutic abortion.

In re Guardianship of Boe, 322 F. Supp. 872 (D.D.C. 1971): 18 year old in the District of Columbia, alone, has power over her person and may consent to any form of medical treatment including therapeutic abortion.

FLORIDA
(Through April 11, 1972, Legislative Service Pamphlet #6)

Ch. 72-196 [1972] Fla. Laws 380-382:

Be It Enacted by the Legislature of the State of Florida:

Section 1. Definitions

As used in this act unless the context clearly requires otherwise:

(1) "Physician" as used in this act means a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or 459, Florida Statutes, or a physician practicing medicine or osteopathy in the employ of the United States or this state.

(2) "Approved facility" means a hospital licensed by the state and accredited by the joint commission on accreditation of hospitals or approved by the American osteopathic hospital association or a medical facility licensed by the division of health pursuant to rules and regulations adopted for that purpose, provided such rules and regulations shall require regular evaluation and review procedures.

Section 2. Termination of pregnancy

It shall be unlawful to terminate the pregnancy of a human being unless the pregnancy is terminated in an approved facility by a physician who certifies in writing that:

(1) To a reasonable degree of medical certainty the continuation of the pregnancy would substantially impair the life or health of the female; or

(2) There is substantial risk that the continuation of the pregnancy would result in the birth of a child with a serious physical or mental defect; or

(3) There is reasonable cause to believe that the pregnancy resulted from rape or incest.

Section 3. Written requests required

One of the following shall be obtained by the physician prior to terminating a pregnancy:

(1) The written request of the pregnant woman and the written consent of her husband, if she is married, unless the husband is voluntarily living apart from the wife, or

(2) If the pregnant woman is under eighteen (18) years of age and unmarried, in addition to her written request, the written consent of a parent, custodian, or legal guardian must be obtained, or

(3) Notwithstanding subsections (1) and (2) of this section, a physician may terminate a pregnancy provided he has obtained at least one (1) corroborative medical opinion attesting to the medical necessity for emergency medical procedures and that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman.

Section 4. Reporting procedure

(1) The director of any medical facility in which a pregnancy is terminated pursuant to this act shall maintain a record of such procedures. Such record shall include the date the procedure was performed, the reason for same and the period of gestation at the time the procedure was performed. A copy of such record shall be filed with the department of health and rehabilitative services, which shall be responsible for keeping such records in a central place from which statistical data and analysis can be made.

(2) Records maintained by an approved facility pursuant to this act shall be privileged information and deemed to be a confidential record and shall not be revealed except when ordered to do so by a court of competent jurisdiction in a civil or criminal proceeding.

Florida cont'd

Section 5. Right of refusal

Nothing in this act shall require any hospital or any person to participate in the termination of a pregnancy nor shall any hospital or any person be liable for such refusal. No person who is a member of or associated with the staff of a hospital nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds, shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.

Section 6. Penalties

(1) Any person who performs or participates in the termination of a pregnancy in violation of the requirements in section 2 of this act, which does not result in the death of the woman, shall be guilty of a felony of the third degree, punishable as provided in sections 775.082, 775.083 or 775.084, Florida Statutes.

(2) Any person who performs or participates in the termination of a pregnancy in violation of the requirements in section 2 of this act, which results in the death of the woman shall be guilty of a felony of the second degree, punishable as provided in sections 775.082, 775.083 or 775.084, Florida Statutes.

(3) Any person who violates any provision of sections 3 or 4 of this act shall be guilty of a misdemeanor of the first degree punishable as provided in sections 775.082 or 775.083, Florida Statutes.

Section 7.

The provisions of this act shall not apply to the performance of a procedure which terminates a pregnancy in order to deliver a live child.

Section 8. Paragraph (i) of subsection (1) of section 458.1201, Florida Statutes, is amended to read:

458.1201 Denial, suspension, revocation of license; disciplinary powers

(1) (i) Procuring, aiding or abetting in the procuring of an unlawful termination of pregnancy;

Section 9. Sections 782.10 and 797.01, Florida Statutes, as amended by chapter 71-136, Laws of Florida, are hereby repealed.

Section 10. If any section, subsection, sentence, clause or provision of this act, or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or portions thereof or applications of the act which can be given effect without the invalid provision or portion thereof or application, and to this end the provisions or portions of this act are severable.

Section 11. This act shall take effect immediately upon becoming a law.

Approved by the Governor April 12, 1972.

Filed in Office Secretary of State April 13, 1972.

Florida cont'd

Recent cases - State v. Barquet, 262 So. 2d 431 (Sup. Ct. Fla. 1972): Florida Supreme Court declared pre-1972 abortion law unconstitutionally vague.

State v. Wheeler, No. 1400 (Felony Court of Records, appeal filed Nov. 1971), renumbered 41,708: Defendant convicted of abortion manslaughter under pre-1972 abortion statute and sentenced to two years probation with the condition of either marriage or return to parental home, motion for summary reversal filed April 21, 1972. See Women's Rights Law Reporter, No. 2, Spring 1972, at 52. Reversed, Wheeler v. State, 263 So. 2d 232 (Sup. Ct. Fla., 1972) and remanded for proceedings consistent with State v. Barquet, supra.

Walsingham v. State, 250 So. 2d 857 (Sup. Ct. Fla. 1971): Trial Court conviction for conspiracy to commit abortion reversed for the fact that trial court provided prejudicial and misleading definition of abortion.

GEORGIA

(Criminal Code of Georgia through Regular Session, 1971)

Ga. Code Ann. §§26-1201to-1203 (Criminal Code, 1971 Rev.)

26-1201. Criminal abortion.—Except as otherwise provided in section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

(Acts 1968, pp. 1249, 1277.)

26-1202. Exception.—(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as

Georgia cont'd

amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons enumerated above.

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within 10 days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the con-

Georgia cont'd

stitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

(Acts 1968, pp. 1249, 1277.)

26-1203. Punishment.—A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

(Acts 1968, pp. 1249, 1280.)

Note: It should be noted that Sections 26-9920a through 26-9925a of the Georgia Criminal Code are substantially similar to the provisions set forth above. It is not perfectly clear which statutes are to be consulted for authority. See Editorial Note, Criminal Code of Georgia, 1971 Revision, p. 198.

Recent cases - Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), jurisdiction postponed 402 U.S. 941 (1971), argued, December 13, 1971 40 U.S.L.W. 3300 (U.S. December 28, 1971) restored to calendar for reargument, 40 U.S.L.W. 3617 (U.S. June 26, 1972) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term): A three-judge federal court held the Georgia Statute unconstitutional with respect to limitations on the grounds for abortion, but upheld the Statute's procedural requirements and limitations as to where abortions may be performed.

HAWAII
(Through Regular Session, 1971, Adjourned April 16, 1971)

Act 1, [1970] Hawaii Laws 1;

ACT 1

A Bill for an Act Relating to Abortion and Amending Chapter 768, Hawaii Revised Statutes.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 768, Hawaii Revised Statutes, is amended by repealing sections 768-6 and 768-7.

SECTION 2. The Hawaii Revised Statutes is hereby amended by adding a new section to read as follows:

"**Section . Intentional termination of pregnancy; penalties; refusal to perform.**

(a) No abortion shall be performed in this State unless:

(1) Such abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and

(2) Such abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof; and

(3) The woman upon whom such abortion is to be performed is domiciled in this State or has been physically present in this State for at least ninety days immediately preceding such abortion. The affidavit of such a woman shall be prima facie evidence of compliance with this requirement.

(b) Abortion shall mean an operation to intentionally terminate the pregnancy of a non-viable fetus. The termination of a pregnancy of a viable fetus is not included in this Act.

(c) Any person who knowingly violates this section shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(d) Nothing in this section shall require any hospital or any person to participate in such abortion nor shall any hospital or any person be liable for such refusal."

SECTION 3. If any provision or portion thereof of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or portions thereof or applications of the Act which can be given effect without the invalid provision or portion thereof or application, and to this end the provisions or portions thereof of this Act are severable.

SECTION 4. This Act shall take effect upon its approval.

(This Act became law on March 11, 1970 without the Governor's signature pursuant to State Constitution, Article III, Section 17.)

Recent cases - None.

IDAHO
(Through 1971 Regular and First Extraordinary Sessions)

Idaho Code §18-1505, (effective January 1, 1972)(Supp, 1971)

18-1505. Abortion — Procurement of. — Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two (2) nor more than five (5) years. [Cr. & P. 1864, § 42; R. S., R. C., & C. L., § 6794; C. S., § 8281; I. C. A., § 17-1810.]

Recent cases - None

ILLINOIS
(Through the 77th General Assembly, Regular Session, Act 77-1844, 1972, Legislative Service Pamphlet #1)

Ill. Rev. Stat. Ch. 38, §23-1 (1970)

§ 23-1. Abortion

(a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. A person convicted of abortion shall be imprisoned in the penitentiary from one to 10 years.

(b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed medical facility because necessary for the preservation of the woman's life.

Laws 1961, p. 1983, § 23-1, eff. Jan. 1, 1962.

Recent cases - People v. Anast, No. 69-3429 (Ill. Cir. Ct. Cook Cnty., July 29, 1970): Decision of trial judge holding Illinois anti-abortion statute unconstitutionally vague and in violation of a woman's right to privacy. The Court also held that the indictment failed to state the crime of "solicitation" in alleging only that the defendant encouraged women to procure abortions. See appellant's Supplementary Appendix To Brief For Appellants: Legal, Medical, and Social Science Materials Regarding Abortion Law Restrictions in regard to Roe v. Wade, in the Supreme Court of the United States, No. 70-18, 1971 Term.

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971) appeals docketed sub noms. Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. March 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106 1971 Term): Three judge federal court held Illinois abortion statute unconstitutional on the grounds of vagueness and invasion of privacy.

INDIANA

(Through February 18, 1972, 1972 Cummulative Pocket Supplement)

Ind. Ann. Stat. §10-105 (Indiana Code §35-1-58-1)(1956):

10-105 [2435]. **Attempt to procure miscarriage.**—Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman, or, with like intent, uses or suggests, directs or advises the use of any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, on conviction, if the woman miscarries, or dies in consequence thereof, be fined not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000], and be imprisoned in the state prison not less than three [3] years nor more than fourteen [14] years. [Acts 1905, ch. 169, § 367, p. 584.]

Recent cases - None

IOWA

(Through 64th General Assembly, Second Regular Session, Adjourned March 24, 1972, Legislative Service Pamphlet #3)

Iowa Code §701.1 (1950)

701.1 Administration of drugs—use of instruments

If any person, with intent to produce the miscarriage of any woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars.

History and Source of Law

Derivation:

Codes 1939, 1935, 1931, 1927, 1924, § 12973.
Code Supp.1915, § 4759.
Acts 1915 (36 G.A.) ch. 45, § 1.
Code 1897, § 4759.
McClain's Code 1888, § 5163.
Acts 1882 (19 G.A.) ch. 10.
Code 1873, § 3804.
Revision 1860, § 4221.
Acts 1858 (7 G.A.) ch. 58, § 1.

Prior to amendment in 1915, the offense described by this section consisted of an attempt to produce the miscarriage of any "pregnant" woman. The amendment struck out the word "pregnant."

Recent cases - State v. Abodeely, 179 N.W. 2d 347 (Sup. Ct. Iowa, 1970), appeal dismissed and cert. denied, 402 U.S. 936 (1971): Phrase in abortion statute prohibiting the producing of miscarriage "unless the same is necessary to preserve her life" is not unconstitutionally vague or uncertain; defendant was fully appraised of his rights before pleading guilty.

KANSAS
(Through 1971 Session Laws)

Kan. Stat. Ann. §§65-443 -- 65-445; 21-3407 (Supp. 1970)

65-443. Termination of human pregnancy; performance or participation in medical procedures not required. No person shall be required to perform or participate in medical procedures which result in the termination of a pregnancy, and the refusal of any person to perform or participate in those medical procedures shall not be a basis for civil liability to any person. [L. 1969, ch. 182, § 1; July 1, 1970.]

65-444. Same; performance in hospital; refusal to permit; adoption of criteria and procedures; conditions; emergency. No hospital, hospital administrator or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person. A hospital may establish criteria and procedures under which pregnancies may be terminated within its institution, in addition to those which may be prescribed by licensing, regulating or accrediting agencies: *Provided*, No pregnancy shall be purposely terminated until the opinions of three (3) duly licensed physicians attesting to the necessity of such termination have been recorded in writing in the permanent records of the hospital, except in an emergency as defined in section 21-3407 (2) (*b*) of the Kansas criminal code. [L. 1969, ch. 182, § 2; July 1, 1970.]

65-445. Same; records; annual report to state board. Every hospital shall keep written records of all pregnancies which are lawfully terminated within such hospital and shall annually submit a written report thereon to the state board of health in the manner and form prescribed by said board. Such report shall include the number of pregnancies terminated within such hospital during said period of time and such other information as may be required by the state board of health, but said report shall not include the names of the persons whose pregnancies were so terminated. [L. 1969, ch. 182, § 3; July 1, 1970.]

Kansas cont'd

21-3407. Criminal abortion. (1) Criminal abortion is the purposeful and unjustifiable termination of the pregnancy of any female other than by a live birth.

(2) A person licensed to practice medicine and surgery is justified in terminating a pregnancy if he believes there is substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse; and either:

(*a*) Three persons licensed to practice medicine and surgery, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the hospital licensed by the state board of health and accredited by the joint commission on accreditation of hospitals where it is to be performed, or in such other place as may be designated by law; or

(*b*) An emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother.

(3) For the purpose of this section pregnancy means that condition of a female from the date of conception to the birth of her child.

(4) For the purpose of subsection (2) of this section all illicit intercourse with a female under the age of sixteen (16) years shall be deemed felonious.

(5) Criminal abortion is a class D felony. [L. 1969, ch. 180, § 21-3407; July 1, 1970.]

Recent cases - State v. Jamieson, 206 Kan. 491, 480 P. 2d 87 (1971): Supreme Court of Kansas discharged defendant from lower court conviction for abortion for failure of information to negative exception of abortion statute. Constitutionality issue raised but not reached.

State v. Darling, 208 Kan. 469, 493 P. 2d 216 (1972): Supreme Court of Kansas affirmed lower court conviction of abortionist.

Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972): Three-judge district court held that provisions of Kansas abortion statutes requiring certification of circumstances justifying abortion by three physicians and limiting performance of procedure to state licensed hospitals accredited by Joint Commission on Accredation of Hospitals are violative of due process and equal protection but objectionable provisions may be severed from statutes without perverting ultimate purpose of allowing therapeutic abortions under certain specified circumstances.

KENTUCKY

(Through Regular Session of the 1972 General Assembly, Adjourned March 17, 1972)

Ky. Rev. Stat. §436.020 (1969):

> **436.020 [1219a-1; 1219a-2; 1219a-4] Abortion or miscarriage.**
>
> (1) Any person who prescribes or administers to any pregnant woman or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or other substance, or uses any instrument or other means, with the intent to procure the miscarriage of that woman, unless the miscarriage is necessary to preserve her life, shall be fined not less than five hundred dollars nor more than one thousand dollars, and confined in the penitentiary for not less than one nor more than ten years.
>
> (2) If, by reason of any of the acts described in subsection (1) of this section, the miscarriage of the woman is procured and she does miscarry, causing the death of the unborn child, whether before or after quickening time, the person violating the provisions of subsection (1) of this section shall be confined in the penitentiary for not less than two nor more than twenty-one years.
>
> (3) In any prosecution under subsection (1) or (2) of this section, or under KRS 435.040, the consent of the woman to the performance of the operation or the administering of the drug, medicine or other substance shall be no defense, and she shall be a competent witness in the prosecution. For the purpose of testifying she shall not be considered an accomplice.

Recent cases - Crossen v. Breckenridge, 446 F. 2d 833 (6th Cir. 1971): Court of Appeals reversed district court's dismissal of challenge to Kentucky Abortion Statute, ruling that physicians, ministers, and pregnant women had standing and remanded for convening of three-judge court. Lower court dismissal as to non-pregnant women plaintiffs was affirmed.

Crossen v. Attorney General of The Commonwealth of Kentucky, No. 2143 (E.D. Ky. May 19, 1972) appeal docketed 41 U.S.L.W. 3102 (U.S. August 29, 1972)(No. 72-256): Abortion statute upheld against claim that it was unconstitutional.

LOUISIANA
(Through January 1, 1972)

La. Rev. Stat. §14:87 (Supp. 1972)

§ 87. Abortion

Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:

(1) Administration of any drug, potion, or any other substance to a female; or

(2) Use of any instrument or any other means whatsoever on a female.

Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years. As amended Acts 1964, No. 107.

La. Rev. Stat. §37:1285(6)(1964)

§ 1285. Causes for refusal to issue, suspension or revocation of certificates

The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this Part for any of the following causes:

****

(6) 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;

****

Louisiana cont'd

Recent cases - Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970) appeal docketed, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970)(No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term): Louisiana was empowered to place value upon prenatal human life, and such valuation, as manifested by its abortion statutes could not be struck down by Federal Court.

State v. Shirley, 256 La. 665, 237 So. 2d 676 (1970), cert. denied 401 U.S. 926 (1971), rehearing denied 402 U.S. 925 (1971): Legislative enactment outlawing abortion is constitutional.

State v. Pesson, 256 La. 201, 235 So. 2d 568 (1970): This statute is constitutional.

State v. Scott, 260 La. 190, 255 So. 2d 736 (1971): Abortion Statute is not arbitrary, unreasonable, or vague as to be unconstitutional and is not violative of rights under Ninth and Fourteenth Amendments of Federal Constitution on theory that it infringes the right of a woman to choose whether to bear children.

MAINE

(Through first special session of the 105th Legislature, adjourned March 3, 1972, Legislative Service Pamphlet #1)

Me. Rev. Stat. Ann. Tit. 17, §51 (1965):

§ 51. Penalty; attempts

Whoever administers to any woman pregnant with child, whether such child is quick or not, any medicine, drug or other substance, or uses any instrument or other means, unless the same was done as necessary for the preservation of the mother's life, shall be punished, if done with intent to destroy such child and thereby it was destroyed before birth, by a fine of not more than $1,000 and by imprisonment for not more than 5 years; but if done with intent to procure the miscarriage of such woman, by a fine of not more than $1,000 and by imprisonment for less than one year, and any person consenting and aiding or assisting shall be liable to like punishment.

R.S.1954, c. 134, § 9.

Recent cases - None

MARYLAND
(Through "Synopsis of Laws - Regular Session 1972")

Md. Ann. Code Art. 43, §§137, 138, 139 (1971)

§ 137. Conditions under which termination of pregnancy permitted; records and reports.

(a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:

(1) Continuation of the pregnancy is likely to result in the death of the mother;

(2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;

(3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;

(4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

(b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant to subsection (a) (1) or where the fetus is dead) ; and

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereon. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted. (1968, ch. 470, § 2; 1970, ch. 736.)

Maryland cont'd

§ 138. Refusal to perform or participate in or submit to abortion; refusal of hospital to permit.

(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the State or any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits. (1968, ch. 470, § 2; 1970, ch. 736.)

§ 139. Unlawful acts.

(a) A person is guilty of a misdemeanor if he

(1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by such physician in such a hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital.

(b) Any person who violates any provision of this section, upon conviction, is subject to a fine of not more than five thousand dollars for each offense, or to imprisonment for not more than three years, or both such fine and imprisonment. The penalties in this section are in addition to and not in substitution for any other penalty or penalties applicable to particular classes of persons under other laws of this State. (1968, ch. 470, § 2; 1970, ch. 736.)

Maryland cont'd

Recent cases - Lashley v. Maryland, 10 Md. App. Rpts. 136, 268 A. 2d 502 (Md. Ct. Sp. App. 1970), cert. denied 402 U.S. 991 (1971); The Court dismissed defendants appeal from a decision of the Maryland Court of Special Appeals affirming a conviction, under pre-repeal statute, of non-physicians, and holding that defendant didn't have standing to contest the Statute's constitutionality.

Vuitch v. Maryland, 10 Md. App. Rpts. 389, 271 A. 2d 371 (Md. Ct. Sp. App. 1971) cert. denied 404 U.S. 868 (1971): The Court declined to review a decision of the Maryland Court of Special Appeals denying relief on ground that physicians failed to preserve constitutional issues for appellate review.

Vuitch v. Hardy, Civil No. 71-1129-Y (D. Md. June 22, 1972): Hospitalization requirement of abortion statutes, art. 43, §139, unconstitutional as placing unnecessary burdens on fundamental personal right to seek an abortion

MASSACHUSETTS
(Through June 30, 1972, Legislative Service Pamphlet #3)

Mass. Gen. Laws Ann. Ch. 272. §19 (1970)

§ 19. Procuring miscarriage

Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars.

Historical Note

St.1845 c. 27. G.S.1860 c. 165 § 9. P.S.1882 c. 207 § 9. R.L.1902 c. 212 § 15.

Note: While the statute does not appear to provide any specific exception to the general prohibition against abortion, it has been held that a physician is justified in effecting an abortion where he has exercised his skill and judgment in the honest belief that his acts were necessary to save the woman from great peril to her life or health, provided that his judgment corresponds with the average judgment of the doctors in the community in which he practices. See Commonwealth v. Brunelle, 341 Mass. 675, 171 N.E. 2d 850 (1961).

Recent cases - Commonwealth v. Brunelle, 277 N.E. 2d 826, 1972 Mass. Adv. Sh. 131 (1972): Abortion Statute could be applied to defendant, not a licensed physician, and he was in no position to assert unconstitutionality of Statute.

MICHIGAN
(Through April 27, 1972, Legislative Service Pamphlet #2)

Mich. Comp. Laws §750.14 (1968)

750.14 Miscarriage, administering with intent to procure

Sec. 14. ADMINISTERING DRUGS, ETC., WITH INTENT TO PROCURE MISCARRIAGE—Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

Historical Note

Source:
P.A.1931, No. 328, § 14, Eff. Sept. 18.

Prior Laws:
R.S.1846, c. 153, §§ 34, 35.
C.L.1857, § 5744.
P.A.1867, No. 61.
C.L.1871, §§ 7543, 7544.
How. §§ 9108, 9109.
C.L.1897, §§ 11503, 11504.
C.L.1915, §§ 15225, 15226.
C.L.1929, §§ 16741, 16742.

Recent cases - State v. Ketchum, (Mich. Dist. Ct., March 30, 1970): Decision of trial judge holding Michigan anti-abortion law void for vagueness and in violation of the right to privacy. See Appellant's Supplementary Appendix to Brief for Appellants: Legal Medical and Social Science Materials Regarding Abortion Law Restrictions, in regard to Roe v. Wade in the United States Supreme Court, No. 70-18, 1971 Term.

State v. Nixon, No. 9579 (Mich. St. Ct. App., August 23, 1972): A 2-1 decision of the Michigan Court of Appeals has declared that a licensed physician may perform abortions in accredited hospitals on women in their first trimester of pregnancy and not be subject to prosecution under the law.

MINNESOTA
(Through March 1, 1972)
Minn. Stat. §617.18 (1964)

617.18 Abortion, how punished

Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life, or that of the child with which she is pregnant, shall

(1) prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take, any medicine, drug, or substance; or

(2) use, or cause to be used, any instrument or other means—

Shall be guilty of abortion and punished by imprisonment in the state prison for not more than four years or in a county jail for not more than one year.

History and Source of Law

Derivation:
St.1927, § 10175.
Gen.St.1923, § 10175.
Gen.St.1913, § 8093.
Rev.Laws 1905, § 4042.
Gen.St.1894, § 6545.
Pen.Code § 251.

Prior Laws:
Gen.St.1878, c. 94, §§ 16, 17.
Laws 1873, c. 9, §§ 1, 2.

Recent cases - Hodgson v. Minnesota, appeal dismissed and cert. denied, 402 U.S. 968 (1971): The court dismissed the appeal of a Minnesota woman physician from a decision of the Supreme Court of Minnesota denying a writ of prohibition to challenge the constitutionality of the abortion statute under which she was indicted.

Doe v. Randall, 314 F. Supp. 32 (D. Minn. 1970) aff'd. sub nom. Hodgson v. Randall, 402 U.S. 967 (1971): The Court affirmed a three-judge court's dismissal of a suit challenging the constitutionality of the State's Abortion Law brought by Dr. Hodgson and her patient.

MISSISSIPPI
(Through 1971 Legislative Sessions)

Miss. Code Ann. §2223 (Supp. 1971)

§ 2223. Abortion or miscarriage.

1. Any person wilfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician:

(a) where necessary for the preservation of the mother's life;

(b) where pregnancy was caused by rape,

Said person shall, upon conviction, be imprisoned in the State Penitentiary not less than one (1) year nor more than ten (10) years; provided, however, if the death of the mother results therefrom, the person procuring, causing or attempting to procure or cause the illegal abortion or miscarriage shall be guilty of murder.

2. No act prohibited in paragraph 1 hereof shall be considered exempt under the provisions of subparagraph (a) thereof unless performed upon the prior advice in writing, of two (2) reputable licensed physicians.

3. The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act.

SOURCES: Laws, 1966, ch. 358, § 1, eff from and after passage (approved June 8, 1966).

Recent cases - Spears v. Mississippi, 257 So. 2d 876 (Sup. Ct.Miss., 1972) appeal docketed 41 U.S.L.W. 3028 (U.S. July 11, 1972) (No. 71-1528): Conviction under Mississippi abortion statute.

MISSOURI

(Through 1972 Regular Session, Adjourned May 15, 1972, Legislative Service Pamphlet #3)

Mo. Rev. Stat. §559.100 (1953)

559.100. Manslaughter—abortion

Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion. (R.S.1939, § 4385)

Former Revisions. 1020, § 3001; 1010, § 3230; 1000, § 4458; 1800, § 1825; 1880, § 3468.

Recent cases – Rodgers v. Danforth, C.A. No. 18360-2 (W.D. Mo. September 10, 1970) appeal docketed, 40 U.S.L.W. 3017 (U.S. July 13, 1971)(No. 70-89): Three-judge federal court dismissed challenge to abortion laws under abstention doctrine.

State v. Mucie, 448 S.W. 2d 879 (Sup. Ct. Mo. 1970): Doctor convicted of manslaughter by abortion did not seek protection of statute providing exception to prohibition of abortions where necessary to preserve woman's life and thus could not raise issue that statute was unconstitutional on appeal.

MONTANA
(Through 1971 Cummulative Pocket Supplement)

Mont. Rev. Codes Ann. §94-401 (1969)

94-401. (11023) Administering drugs, etc., with intent to produce miscarriage. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

History: En. Sec. 41, p. 184, Bannack Stat.; amd. Sec. 42, p. 276, Cod. Stat. 1871; re-en. Sec. 42, 4th Div. Rev. Stat. 1879; re-en. Sec. 42, 4th Div. Comp. Stat. 1887; amd. Sec. 480, Pen. C. 1895; re-en. Sec. 8351, Rev. C. 1907; re-en. Sec. 11023, R. C. M. 1921. Cal. Pen. C. Sec. 274.

Recent cases - None

NEBRASKA

(Through Second Session of Eighty-Second Legislature, Adjourned April 5, 1972)

Neb. Rev. Stat. §28-405 (1965)

28-405. Abortion, defined; penalty. Any physician or other person who shall willfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars, or by both.

Source: G.S. p. 727; R.S.1913, § 8585; C.S.1922, § 9548; C.S.1929, § 28-405.

Recent cases - None

NEVADA

(Through Fifty-Sixth Session of Legislature, Adjourned April 26, 1971)

Nev. Rev. Stat. §201.120 (1969)

201.120 Abortion: Definition; punishment. Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall:

1. Prescribe, supply or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or
2. Use, or cause to be used, any instrument or other means;

shall be guilty of abortion, and punished by imprisonment in the state prison for not less than 1 year nor more than 10 years.

[1911 C&P § 182; RL § 6447; NCL § 10129]—(NRS A 1967, 475)

Recent cases - None

NEW HAMPSHIRE
(Through Close of Special Session in 1970)

N.H. Rev. Stat. Ann. §§585:12, 585:13 (1955)

585:12 Attempt to Procure Miscarriage. If any person shall wilfully administer to a pregnant woman any medicine, drug, substance, or thing whatever, or shall use or employ any instrument or means whatever, with intent thereby to procure the miscarriage of such woman, he shall be imprisoned not more than one year, or fined not more than one thousand dollars, or both.

SOURCES: 1848, 743:1. CS 227:11. GS 282:11. PS 278:11. PL 392:12. RL 455:12.

585:13 Intent to Destroy Quick Child. If any person shall administer to a woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or means whatever, with intent thereby to destroy the child, unless, by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman, or shall have been advised by two physicians to be necessary for that purpose, he shall be fined not more than one thousand dollars and imprisoned not more than ten years.

SOURCES: 1848, 743:2. CS 227:12. GS 264:12. GL 282:12. PS 278:12. PL 392:13. RL 455:13.

Recent cases - None

NEW JERSEY
(Through June 1, 1972, Legislative Service Pamphlet #1)

N.J. Rev. Stat. §2A:87-1 (1969)

2A:87-1. Causing miscarriage; increased penalty if death results

Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

Historical Note

Source: R.S. 2:105-1. L.1898, c. 235, § 110, p. 827 [C.S. p. 1784, § 110].

Note: While the statute does not appear to provide any specific exception to the general prohibition against abortion, it has been held that preservation of the mother's life is lawful justification. State v. Brandenberg, 137 N.J.L. 124, 58 A. 2d 709 (1948), State v. Moretti 52 N.J. 182, 244 A. 2d 499 (1968).

Recent cases - Y.W.C.A. of Princeton, N.J. v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972): Three-judge court granted declaratory judgment that New Jersey's abortion statute is unconstitutional on vagueness and privacy grounds. No injunction issued.

NEW MEXICO

(Through Second Regular Session of Thirtieth Legislature, Adjourned February 18, 1972)

N.M. Stat. Ann. §40A-5-1 To 40A-5-3 (Supp. 1971)

40A-5-1. Definitions.—As used in this article [40A-5-1 to 40A-5-3]:

A. "pregnancy" means the implantation of an embryo in the uterus;

B. "accredited hospital" means one licensed by the health and social services department;

C. "justified medical termination" means the intentional ending of the pregnancy of a woman at the request of said woman or if said woman is under the age of eighteen [18] years, then at the request of said woman and her then living parent or guardian, by a physician licensed by the state of New Mexico using acceptable medical procedures in an accredited hospital upon written certification by the members of a special hospital board that:

(1) the continuation of the pregnancy, in their opinion, is likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman; or

(2) the child probably will have a grave physical or mental defect; or

(3) the pregnancy resulted from rape, as defined in sections 40A-9-2 through 40A-9-4 NMSA 1953. Under this paragraph, to justify a medical termination of the pregnancy, the woman must present to the special hospital board an affidavit that she has been raped and that the rape has been or will be reported to an appropriate law enforcement official; or

(4) the pregnancy resulted from incest.

D. "special hospital board" means a committee of two [2] licensed physicians or their appointed alternates who are members of the medical staff at the accredited hospital where the proposed justified medical termination would be performed, and who meet for the purpose of determining the question of medical justification in an individual case, and maintain a written record of the proceedings and deliberations of such board.

History: C. 1953, § 40A-5-1 enacted by Laws 1969, ch. 67, § 1.

New Mexico cont'd

40A-5-2. Persons and institutions exempt.—This article [40A-5-1 to 40A-5-3] does not require a hospital to admit any patient for the purposes of performing an abortion, nor is any hospital required to create a special hospital board. A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital, in which a justified medical termination has been authorized and who objects to the justified medical termination on moral or religious grounds shall not be required to participate in medical procedures which will result in the termination of pregnancy, and the refusal of any such person to participate shall not form the basis of any disciplinary or other recriminatory action against such person.

History: C. 1953, § 40A-5-2 enacted by Laws 1969, ch. 67, § 2.

section 40A-5-2 (Laws 1963, ch. 303, § 5-2) and enacted a new section 40A-5-2.

40A-5-3. Criminal abortion.—Criminal abortion consists of administering to any pregnant woman any medicine, drug or other substance, or using any method or means whereby an untimely termination of her pregnancy is produced, or attempted to be produced, with the intent to destroy the fetus, and the termination is not a justified medical termination.

Whoever commits criminal abortion is guilty of a fourth degree felony. Whoever commits criminal abortion which results in the death of the woman is guilty of a second degree felony.

History: C. 1953, § 40A-5-3 enacted by Laws 1969, ch. 67, § 3.

Recent cases - None

NEW YORK
(Through July 1, 1972, Legislative Service Pamphlet #8)

N.Y. Penal Law §125.05 (3)(McKinney Supp. 1971-72)

§ 125.05 Homicide, abortion and related offenses; definitions of terms

* * * * * * * * *

3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.
As amended L.1970, c. 127, eff. July 1, 1970.

Recent cases - Robin v. Incorporated Village of Hempstead, New York Law Journal, June 5, 1972 (N.Y. St. Ct. App. June 1, 1972): Holding by State Court of Appeals that local village did not possess authority to pass ordinance requiring abortions to be performed in hospitals.

Kim v. Town of Orangetown, 321 N.Y. S.2d 724, 66 Misc. 2d 364 (Supreme Ct., Rockland Cnty., 1971): Ordinance requiring abortions in hospitals only struck down as beyond local towns power to regulate medical practice.

Byrn v. New York City Health and Hospitals Corporation, No. 210 (Ct. App. N.Y. July 7, 1972): Court affirmed a lower appellate division court's declaration that New York's abortion law is constitutional and that foetuses are not persons within meaning of the Fourteenth Amendment. Court acknowleging that the issue was novel, i.e. "whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life" deferred to legislature for such a determination.

Klein v. Nassau County Medical Center, No. 72-C-386 (E.D.N.Y. August 24, 1972): A three-judge Constitutional Court has ordered that medicaid payments be available to pay for abortions for eligible women desiring to terminate a pregnancy within 24 weeks.

New York cont'd

Matter of Schulman, New York Law Journal, August 2, 1972 (N.Y. Sup. Ct. August 1, 1972): State Supreme Court declared that requirement that patients name and address be included on fetal death certificate in abortion cases, violated right of privacy.

NORTH CAROLINA
(Through the 1971 Session of the General Assembly)

N.C. Gen. Stat. §§14-44, -45, -45.1 (1969, Supp. 1971)

§ 14-44. Using drugs or instruments to destroy unborn child.—If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (1881, c. 351, s. 1; Code, s. 975; Rev., s. 3618; C. S., s. 4226; 1967, c. 367, s. 1.)

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court. (1881, c. 351, s. 2; Code, s. 976; Rev., s. 3619; C. S., s. 4227.)

§ 14-45.1. When abortion not unlawful.—Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest and the said alleged rape was reported to a law-enforcement agency or court official within seven days after the alleged rape, and

Only after the said woman has given her written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent, and

Only when the said woman shall have resided in the State of North Carolina for a period of at least 30 days immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger, and

Only if the abortion is performed in a hospital licensed by the North Carolina Medical Care Commission, and

Only after two doctors of medicine shall have examined said woman and certified in writing the circumstances which they believe to justify the abortion, and

North Carolina cont'd

Only when such certificate shall have been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, such certificate may be submitted within 24 hours after the abortion.

All abortions performed under the provisions of this section shall be reported to the State Board of Health within five days of the date of operation. The report shall be for statistical purposes only and the confidentiality of the patient relationship shall be protected. The report shall be submitted on a form provided by the State Board of Health. The administrator of the hospital in which an abortion is performed shall be responsible for insuring that a report is submitted in accordance with this paragraph. The requirements of G.S. 130-43 are waived for abortions as provided in this section. (1967, c. 367, s. 2; 1971, c. 383, ss. 1, 1½.)

Recent cases - Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971) appeal filed 40 U.S.L.W. 3098 (U.S. July 17, 1971) (No. 71-92): Abortion statute upheld but four month residency requirement declared unconstitutional.

NORTH DAKOTA

(Through 1971 Pocket Supplement and 42nd Session of Legislative Assembly, Adjourned March 16, 1971)

N.D. Cent. Code §12-25-01 (1960)

12-25-01. Procuring an abortion—Punishment.—Every person who administers to any pregnant woman, or who prescribes for any such woman, or who advises or procures any such woman to take, any medicine, drug, or substance, or uses or employs, or procures or advises the use, of any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be punished by imprisonment in the penitentiary for not less than one year nor more than three years, or in a county jail for not more than one year.

Source: Pen. C. 1877, § 337; R. C. 1895, § 7177; R. C. 1899, § 7177; R. C. 1905, § 8012; C. L. 1913, § 9004; R. C. 1943, § 12-2501.

Recent cases - None

OHIO
(Through 1971, 109th General Assembly)

Ohio Rev. Code Ann. §2901.16 (Page, 1954)

§ 2901.16 Attempt to procure abortion. (GC § 12412)

No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.

Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years.

HISTORY: GC § 12412; RS § 6815; S&S 272; S&C 440; 82 v 20, § 1; 64 v 135, § 2. Eff 10-1-53.

Recent cases - Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970): The state has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive, and this interest is superior to claimed right of a pregnant woman or anyone else to destroy fetus except when necessary to preserve her own life....The Ohio abortion statute is not unconstitutionally vague, and does not deprive persons of privacy protected by the federal Constitution.

Kruze v. Ohio, No. 72-11 (Sup. Ct. Ohio March 10, 1972) appeal docketed 41 U.S.L.W. 3064 (U.S. July 25, 1972) (No. 72-69): Conviction under Ohio abortion law.

OKLAHOMA

(Through Second Regular Session of the 33rd Legislature, Adjourned March 31, 1972)

Okla. Stat. Tit. 21, §861 (Supp. 1971-72)

§ 861. Procuring an abortion

Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than five years. As amended Laws 1961, p. 229, § 1.

Effective Oct. 27, 1961.

Recent cases - None

OREGON

(Through Regular Session of the Fifty-Sixth Legislative Assembly, Adjourned June 10, 1971)

Ore. Rev. Stat. §§435.405 -- .495 (1971)

ABORTION

435.405 Definitions for ORS 435.405 to 435.495. As used in ORS 435.415, 435.425, 435.455 and 435.465, unless the context requires otherwise:

(1) "Felonious intercourse" means acts constituting a crime under ORS 163.355, 163.365, 163.375 or 163.525.

(2) "Hospital" means a hospital licensed under ORS chapter 441 but not including nursing homes or convalescent homes.

(3) "Physician" means a person licensed to practice medicine by the Board of Medical Examiners for the State of Oregon.

[1969 c.684 §1; 1971 c.743 §370]

435.415 Justifiable termination of pregnancy by physician. (1) A physician is justified in terminating the pregnancy of an Oregon resident if he has reasonable grounds for believing that:

(a) There is substantial risk that continuance of the pregnancy will greatly impair the physical or mental health of the mother;

(b) The child would be born with serious physical or mental defect; or

(c) The pregnancy resulted from felonious intercourse.

(2) In determining whether or not there is substantial risk under paragraph (a) of subsection (1) of this section, account may be taken of the mother's total environment, actual or reasonably foreseeable.

(3) A justifiable termination of a pregnancy shall be performed only by a physician in a hospital.

[1969 c.684 §3]

Oregon cont'd

435.425 Physicians' certificate; copy to district attorney under certain circumstances; presumption on failure to comply. (1) No pregnancy shall be terminated unless two physicians who are neither related to each other by blood or marriage nor associated with each other in the practice of medicine have certified in writing the circumstances which they believe justify the termination. A signed copy of the certificate shall become part of the hospital record. However, no pregnancy shall be terminated after the 150th day of pregnancy except in accordance with ORS 435.445.

(2) When there is reason to believe that the pregnancy was the result of felonious intercourse, the administrator of the hospital shall send a copy of the certificate to the district attorney of the county where the hospital is located.

(3) Failure to comply with any of the requirements of this section gives rise to a rebuttable presumption that termination of the pregnancy was unjustified.

[1969 c.684 §4]

435.435 Consent to termination required; effect of failure to consent. (1) No pregnancy shall be terminated without the written consent of the pregnant woman and:

(a) The written consent of a parent who has custody or the guardian if the pregnant woman is an unmarried minor.

(b) The written consent of the guardian if the pregnant woman has been judicially declared a mentally incompetent person.

(c) The written consent of the husband if the pregnant woman is married and the husband and wife have been living together.

(2) Copies of the consents required under this section shall become part of the hospital record.

(3) The refusal of any person to consent to a termination of pregnancy or to submit thereto shall not be grounds for loss of any privilege or immunity to which the person is otherwise entitled nor shall consent to or submission to a termination of pregnancy be imposed as a condition to the receipt of any public benefits.

[1969 c.684 §§7, 12]

Oregon cont'd

435.445 Exception in emergency. (1) Nothing in ORS 435.405 to 435.495, 465.110, 677.188 and 677.190 prevents a physician from terminating a pregnancy without complying with ORS 435.405 to 435.495, 465.110 677.188 and 677.190 if the physician believes in good faith that:

(a) The life of the pregnant woman is in imminent danger; and

(b) There is insufficient time to comply with the requirements of ORS 435.405 to 435.495, 465.110, 677.188 and 677.190.

(2) A physician who terminates a pregnancy under subsection (1) of this section must report within 48 hours thereafter the termination to the appropriate committee of the hospital in which the termination occurred or to the State Board of Health if the termination occurred other than in a hospital. The report shall include his certification of the circumstances, conditions and reasons for which the pregnancy was terminated and the reasons why he was unable to comply with ORS 435.405 to 435.495, 465.110, 677.188 and 677.190.

[1969 c.684 §8]

435.455 Prohibited acts. (1) A person who purposely terminates the pregnancy of another for purposes other than delivery of a viable birth, unless justified under ORS 435.415, shall be punished upon conviction by imprisonment in the penitentiary for not more than 15 years or by a fine not exceeding $5,000, or both.

(2) Except as justified under ORS 435.415, a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy other than by viable birth shall be punished upon conviction by imprisonment in the penitentiary for not more than five years.

[1969 c.684 §§2, 5]

435.465 Effect of ORS 435.405 to 435.495 on sale of certain substances. Nothing in ORS 435.405 to 435.425, 435.455 and this section applies to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

[1969 c.684 §6]

Oregon cont'd

435.475 Effect of ORS 435.405 to 435.495 on hospital admissions. (1) Except as provided in subsection (3) of this section, no hospital is required to admit any patient for the purpose of terminating a pregnancy pursuant to ORS 435.415. No hospital is liable for its failure or refusal to participate in such termination if the hospital has adopted a policy not to admit patients for the purposes of terminating pregnancies as provided in ORS 435.415. However, the hospital must notify the person seeking admission to the hospital of its policy.

(2) All hospitals that have not adopted a policy not to admit patients seeking termination of a pregnancy under ORS 435.415 shall admit patients seeking such termination in the same manner and subject to the same conditions as imposed on any other patient seeking admission to the hospital.

(3) No hospital operated by this state or by a political subdivision in this state is authorized to adopt a policy of excluding or denying admission to any person seeking termination of a pregnancy under ORS 435.415.
[1969 c.684 §9]

435.485 Medical personnel not required to act under ORS 435.405 to 435.495. (1) No physician is required to give advice with respect to or participate in any termination of a pregnancy as provided in ORS 435.415 if his refusal to do so is based on an election not to give such advice or to participate in such terminations and he so advises the patient.

(2) No hospital employe or member of the hospital medical staff is required to participate in any termination of a pregnancy as provided in ORS 435.415 if he notifies the hospital of his election not to participate in such terminations.
[1969 c.684 §§10, 11]

435.495 Reports to State Board of Health. (1) The State Board of Health shall require reports from hospitals at such intervals and in such form as the board may require to assist the board in determining the operation of ORS 435.405 to 435.495, 465.110, 677.188 and 677.190.

(2) Reports submitted under this section shall not disclose the names or identities of hospital patients.
[1969 c.684 §13]

Oregon cont'd

Recent cases - State v. Schulman, 485 P. 2d 1252 (Or. App. 1971): Court of Appeals affirmed conviction under Abortion Statute, denying defendant unlicensed physician standing to raise constitutional challenge and ruling it was procedural error to deny committing act rather than demurring.

PENNSYLVANIA
(Through June 1, 1972, Legislative Service Pamphlet #1)

Pa. Stat. Tit. 18, §§4718, 4719 (1963)

§ 4718. Abortion

Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug or substance, or unlawfully uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both. 1939, June 24, P.L. 872, § 718.

§ 4719. Abortion causing death

Whoever unlawfully administers to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison or other substance, or unlawfully uses any instrument or other means, with the intent to procure the miscarriage of such woman, resulting in the death of such woman, or any child with which she may be quick, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding six thousand dollars ($6,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding ten (10) years, or both. 1939, June 24, P.L. 872, § 719.

Recent cases - Berman v. Duggan, 119 Pitsburgh Legal Journal 242 (Pa. Com. Pl. 1971): The failure of the Abortion Act to clearly set forth which acts are intended to be unlawful is a denial of due process in violation of the Fourteenth Amendment of the United States Constitution.

McGarvey v. Magee-Womens Hospital, 340 F. Supp. 751 (W.D. Pa. 1972): Single federal judge granted defendant's motion for judgment on the pleadings for failure to state a chose of action in suit brought by Catholic physicians as guardian ad litem for a class of foetuses to enjoin abortions pending establishment of judicial or administrative adversary proceedings to determine merits of abortion requests. Court held that foetuses are not "persons" under the Fourteenth Amendment whose rights are violated by lack of such procedures.

Pennsylvania cont'd

Commonwealth v. Page, No. 1968-353 (Pa. Ct. Comm. Pl., Centre Cnty., July 23, 1970): Court of Common Pleas judge in Centre County held Pennsylvania abortion statute unconstitutional.

Commonwealth v. King, (Pa. Ct. Common Pleas): Conviction of Pittsburgh doctor under abortion laws.

For reference to both Page and King see 332 F. Supp. 26 (E.D. Pa. 1971).

Ryan v. Specter, 332 F. Supp. 26 (E.D. Pa. 1971): Federal Court would abstain from deciding constitutionality of Pennsylvania abortion statutes in light of the fact that Pennsylvania Supreme Court was about to make similar decision in the cases of Commonwealth v. Page and Commonwealth v. King (cited above). To date, disposition of both cases is unknown.

RHODE ISLAND
(Through January, 1971, Session of General Assembly)

R.I. Gen. Laws Ann., §11-3-1 (1970)

11-3-1. Procuring, counseling, or attempting miscarriage.—Every person who, with the intent to procure the miscarriage of any pregnant woman or woman supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever or shall aid, assist or counsel any person so intending to procure a miscarriage, shall if the woman die in consequence thereof, be imprisoned not exceeding twenty (20) years nor less than five (5) years, and if she do not die in consequence thereof, shall be imprisoned not exceeding seven (7) years nor less than one (1) year: provided that the woman whose miscarriage shall have been caused or attempted shall not be liable to the penalties prescribed by this section.

History of Section.

G. L. 1896, ch. 277, § 22; G. L. 1909, ch. 343, § 23; G. L. 1923, ch. 395, § 23; G. L. 1938, ch. 606, § 22; G. L. 1956, § 11-3-1.

Recent cases - None

SOUTH CAROLINA
(Through Reconvened Regular Session Adjourning November 9, 1971)

S.C. Code Ann. §§16-82, -83, -84, -87 (1962; Supp. 1971)

§ 16-82. Death resulting from abortion or attempted abortion.—Any person who shall administer to any woman with child, prescribe for any such woman or suggest to or advise or procure her to take any medicine, substance, drug or thing whatever or who shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman. (1952 Code § 16-82; 1942 Code § 1112; 1932 Code § 1112; Cr. C. '22 § 12; Cr. C. '12 § 150; Cr. C. '02 § 122; R. S. 122; 1883 (18) 547.)

§ 16-83. Abortion or attempted abortion not resulting in death.—Any person who shall administer to any woman with child, prescribe, procure or provide for any such woman or advise or procure any such woman to take any medicine, drug, substance or thing whatever or shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or produce the miscarriage, abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years or by fine of not more than five thousand dollars or by such fine and imprisonment both, at the discretion of the court. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman. (1952 Code § 16-83; 1942 Code § 1113; 1932 Code § 1113; Cr. C. '22 § 25; Cr. C. '12 § 170; Cr. C. '02 § 139; R. S. 137; 1882 (18) 547.)

§ 16-84. Punishment of woman in such cases.—Any woman with child who shall apply to or solicit from any physician, druggist or other person whomsoever any medicine, drug, substance or thing whatever, shall take or administer the same or shall submit to or perform upon herself any operation of any sort or character whatever, with intent thereby to cause or produce a miscarriage, abortion or premature labor, unless the same shall have been necessary to preserve her life or the life of such child, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail or State Penitentiary for a term not more than two years or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, at the discretion of the court. (1952 Code § 16-84; 1942 Code § 1114; 1932 Code § 1114; Cr. C. '22 § 26; Cr. C. '12 § 171; Cr. C. '02 § 140; R. S. 138; 1882 (18) 547.)

South Carolina cont'd

§ 16-87. Legal abortions; when and how performed.—Notwithstanding the provisions of §§ 16-82 through 16-84 it shall be lawful for a doctor of medicine or osteopathy licensed to practice in this State to recommend or cause the miscarriage of a pregnant woman when it can be reasonably established that:

(1) There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the mental or physical health of the woman; or

(2) There is substantial risk that the child would be born with grave physical or mental defect; or

(3) The pregnancy resulted from alleged rape which was reported within seven days of the alleged offense to a law-enforcement agency having jurisdiction of the place where the offense is alleged to have occurred or the pregnancy resulted from alleged incestuous relationship which was reported within sixty days of the alleged offense to a law-enforcement agency having jurisdiction of the place where the offense is alleged to have occurred; and a warrant has been issued for the alleged offender; and the chief law-enforcement officer of the city or county where the offense is alleged to have occurred certifies to the doctor requested to perform the miscarriage that these requirements have been complied with and that his investigation reveals that there is reasonable cause to believe that the alleged offense has been committed.

Only after the woman has given her written consent for the miscarriage to be performed, and if the woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to the minor or incompetent; and

Only when the woman shall have been in the State of South Carolina continuously for ninety days immediately preceding the operation being performed and if married and living with her husband, the written consent of her husband except in the case of emergency where the life of the woman is in danger; and

Only if the miscarriage is performed in a hospital licensed by the State Board of Health; and

Only after three doctors of medicine or osteopathy no one of which shall be engaged in private practice with any other, one of whom shall be the person performing the miscarriage, shall have examined the woman and certified in writing to the existence of the circumstances set forth in items (1), (2) or (3) of this section; *provided, however,* that at least two of the certifying doctors shall be medical doctors; and

Only when such certificate shall have been submitted to the hospital before the operation is performed; *provided, however,* that where an emergency exists and the certificate so states, such certificate may be submitted within twenty-four hours after the operation. (1970 (56) 1892; 1971 (57) 303.)

Recent cases - None

SOUTH DAKOTA

(Through 47th Session of the Legislature, Adjourned February 11, 1972)

S.D. Code §22-17-1 (1969)

22-17-1. Abortionist—Procuring abortion not necessary to preserve life—Punishment.—Every person who administers to any pregnant woman or who prescribes for any such woman or advises or procures any such woman to take any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year.

Source: PenC 1877, § 337; CL 1887, § 6538; RPenC 1903, § 342; RC 1919, § 4116; SDC 1939, § 13.3101.

Recent cases - State v. Munson, No. 24949 (S.D. 7th Cir. Ct. April 6, 1970): Abortion law held unconstitutional.

TENNESSEE

(Through First Regular Session of the Eighty-Seventh General Assembly, 1971)

Tenn. Code Ann. §§39-301, -302 (1955)

39-301. Criminal abortion—Penalty.—Every person who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one (1) nor more than five (5) years. [Acts 1883, ch. 140, § 1; Shan., § 6463; Code 1932, § 10791.]

39-302. Attempt to procure criminal miscarriage—Penalty.—Every person who shall administer any substance with the intention to procure the miscarriage of a woman or shall use or employ any instrument or other means with such intent, unless the same shall have been done with a view to preserve the life of such woman, shall be punished by imprisonment in the penitentiary not less than one (1) nor more than three (3) years. [Acts 1883, ch. 140, § 2; Shan., § 6464; Code 1932, § 10792.]

Recent cases - Tennessee Woman v. Peck, (D. Tenn.): Three-judge court convened, denied plaintiff pregnant woman's motion for a temporary restraining order in a suit attacking Tennessee's abortion law on constitutional grounds. Hearing held on preliminary injunction motion in March 1972. See Women's Rights Law Reporter, No. 2, Spring 1972, at 55.

TEXAS
(Through September 1, 1971)

Tex. Pen. Code Ann. Arts. 1191-1196 (1961)

Article 1191. [1071] [641] [536] **Abortion**

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. Acts 1907, p. 55.

Art. 1192. [1072] [642] [537] **Furnishing the means**

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 1193. [1073] [643] [538] **Attempt at abortion**

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Art. 1194. [1074] [644] [539] **Murder in producing abortion**

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Art. 1195. [1075] [645] [540] **Destroying unborn child**

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

Art. 1196. [1076] [646] [541] **By medical advice**

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Texas cont'd

Recent cases - Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam) jurisdiction postponed, 402 U.S. 941 (1971), argued December 13, 1971 40 U.S.L.W. 3300 (U.S. December 28, 1971), restored to calendar for reargument, 40 U.S.L.W. 3617 (U.S. June 26, 1972)(No. 808 1970 Term; renumbered 70-18, 1971 Term): Articles 1191-1194 and 1196, prohibiting abortions except for purpose of saving life of mother deprived single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children.

Thompson v. Texas, No. 44,071 (Ct. Crim. App. Tex. November 2, 1971) appeal docketed 40 U.S.L.W. 3470 (U.S. March 28, 1972)(No. 71-1200): Conviction under Texas abortion law.

UTAH

(Through Second Special Session of Thirty-Ninth Legislature, Adjourned February 11, 1972)

Utah Code Ann. §76-2-1 (1953)

76-2-1. Definition—Penalty.—Every person who provides, supplies or administers to any pregnant woman, or procures any such woman to take, any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than ten years.

History: R. S. 1898 & C. L. 1907, § 4226; C. L. 1917, § 8118; R. S. 1933 & C. 1943, 103-2-1.

Recent cases - Doe v. Rampton, Civ. No. 234-70 (D. Utah, September 29, 1971): Three-judge court denied declaratory and injunctive relief in constitutional challenge to Utah abortion statute, ruling plaintiff pregnant woman had no standing to challenge provision addressed to abortionists, and held procuring provision constitutional. Court rejected overbroadness, due process, privacy and equal protection arguments. The state was found to have a compelling interest in the embryo/fetus and weighing Ninth and Fourteenth Amendments interest is properly a matter for state legislature.

VERMONT
(Through 1971 Session, Adjourned April 20, 1971)

Vt. Stat. Ann. Tit. 13, §101 (1958)

§ 101. Definition and punishment

A person who wilfully administers, advises or causes to be administered anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, if the woman dies in consequence thereof, shall be imprisoned in the state prison not more than twenty years nor less than five years. If the woman does not die in consequence thereof, such person shall be imprisoned in the state prison not more than ten years nor less than three years. However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section.

HISTORY

Source. V.S. 1947, § 8474. P.L. § 8608. G.L. § 7013. P.S. § 5889. V.S. § 5063. R.L. § 4247. 1867, No. 57, § 1. G.S. 117, § 10. 1846, No. 33.

Recent cases - State v. Bartlett, 270 A. 2d 168 (Sup. Ct. Vt. 1970): This section, under which petitioner for post-conviction relief was charged with willfully assisting the procurement of abortion of two women, was not unconstitutionally vague as to petitioner.

Beecham v. Leahy, 287 A. 2d 836 (Sup. Ct. Vt. 1972): The legislature, having affirmed the right of a woman to abort, cannot simultaneously, by denying medical aid in all but cases where it is necessary to preserve her life, prohibit its safe exercise.

VIRGINIA
(Through 1972 Session of the General Assembly, Adjourned March 11, 1972)

Va. Code Ann., §§18.1-62 to 18.1-62.3 (Supp. 1972)

§ 18.1-62. Producing abortion or miscarriage, etc.; penalty.—If any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than one nor more than ten years. (Code 1950, § 18-68; 1960, c. 358; 1970, c. 508.)

§ 18.1-62.1. Same; when lawful.—Notwithstanding any of the provisions of § 18.1-62, it shall be lawful for any physician licensed by the Board of Medical Examiners for the State of Virginia to practice medicine and surgery to terminate or attempt to terminate a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman provided the following conditions are met:

(a) The woman has been a resident of the State for one hundred twenty days immediately preceding the date of such termination of pregnancy or attempt to terminate such pregnancy, which residency is established by an affidavit of the woman including a statement of her age.

(b) Said operation is performed in a hospital accredited by The Joint Committee on Accreditation of Hospitals and licensed by the Department of Health in the State of Virginia.

(c) (1) Before performing any abortion or inducing any miscarriage, the physician shall sign an affidavit, and file such affidavit in the hospital records of the woman, stating that in his medical opinion:

(i) The continuation of the pregnancy is likely to result in the death of the woman, or substantially impair the mental or physical health of the woman; or,

(ii) There is a substantial medical likelihood that the child will be born with an irremediable and incapacitating mental or physical defect.

(2) In lieu of a physician's affidavit as required by subsection (c) (1) of this section, an affidavit from the woman filed in her hospital records stating that the pregnancy resulted from incest or from forcible rape; provided, however, said alleged rape must have been reported to a law-enforcement agency or Commonwealth's attorney within seven days after the occurrence of the alleged rape, or as soon thereafter as possible in the case of a kidnap or abduction victim; and further provided, in the case of incest, that said affidavit identify the male committing said act of incest.

(d) Written consent is given by a majority of the members of the Hospital Abortion Review Board of the hospital in which the abortion takes place.

(e) Written consent is given by the woman if legally competent to give such consent, and if there is substantial medical likelihood that the child will be born with an irremediable and incapacitating mental or physical defect, the written consent of the husband shall be required if the woman and husband are living together as man and wife. Provided, however, if th said woman shall be an infant or incompetent as adjudicated by any court of competent jurisdiction, then only after permission is given in writing by a parent, or if married by her husband, guardian or person standing in loco parentis to said infant or incompetent.

Any person who submits a false affidavit as required under this section shall be guilty of a misdemeanor. (1970, c. 508; 1972, c. 823.)

Virginia cont'd

2)

§ 18.1-62.2. **Same; hospital abortion review boards.**—The hospital abortion review board referred to in § 18.1-62.1 shall consist of at least three physicians and shall have at least one physician who is a specialist in obstetrics or gynecology licensed to practice medicine and surgery. For purposes of this section the phrase "specialist in obstetrics or gynecology" shall mean and include any physician who is recognized by the American Board of Obstetrics and Gynecology as certified, eligible, or qualified, as these terms are defined by such Board, or who limits his practice to obstetrics and gynecology. No hospital shall be required to establish a hospital abortion review board and no abortion shall be performed in a hospital which does not establish a hospital abortion review board. Nor shall any physician be liable or held legally accountable for his refusal to serve on any hospital abortion review board or to perform any abortion. (1970, c. 508; 1971, Ex. Sess., c. 255.)

§ 18.1-62.3. **Same; when necessary to save life of woman.**—In the event it is necessary for a licensed physician to terminate a human pregnancy or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman in order to save her life, in the opinion of the physician so performing an abortion or causing a miscarriage, §§ 18.1-62 and 18.1-62.1 shall not be applicable except that subsection (e) of § 18.1-62.1 shall remain in effect. (1970, c. 508.)

Recent cases - Smitherman v. Virginia _____ S.E. 2d_____ (1971), cert. denied, 40 U.S.L.W. 3484 (U.S. April 3, 1972) (No. 71-716): Conviction for attempted abortion.

WASHINGTON

(Through Second Extraordinary Session of Forty Second Legislature, Adjourned February 23, 1972)

Wash. Rev. Code §§9.02.060 -- 9.02.080 (Supp. 1971); 9.02.010 (1961)

9.02.060 Lawful termination of pregnancy

Neither the termination by a physician licensed under chapters 18.71 or 18.57 RCW of the pregnancy of a woman not quick with child nor the prescribing, supplying or administering of any medicine, drug or substance to or the use of any instrument or other means on, such woman by a physician so licensed, nor the taking of any medicine, drug or substance or the use or submittal to the use of any instrument or other means by such a woman when following the directions of a physician so licensed, with the intent to terminate such pregnancy, shall be deemed unlawful acts within the meaning of this act. [Added by Laws 2d Ex Sess 1970 ch 3 § 1.]

9.02.070 —— Requirements—Consent—Ninety day residency—Accredited or approved hospital facility—Penalty

A pregnancy of a woman not quick with child and not more than four lunar months after conception may be lawfully terminated under RCW 9.02.060 through 9.02.090 only: (a) with her prior consent and, if married and residing with her husband or unmarried and under the age of eighteen years, with the prior consent of her husband or legal guardian, respectively, (b) if the woman has resided in this state for at least ninety days prior to the date of termination, and (c) in a hospital accredited by the Joint Commission on Accreditation of Hospitals or at a medical facility approved for that purpose by the state board of health, which facility meets standards prescribed by regulations to be issued by the state board of health for the safe and adequate care and treatment of patients: *Provided*, That if a physician determines that termination is immediately necessary to meet the medical emergency the pregnancy may be terminated elsewhere. Any physician who violates this section or any regulation of the state board of health issued under authority of this section shall be guilty of a gross misdemeanor. [Added by Laws 2d Ex Sess 1970 ch 3 § 2.]

9.02.080 —— Objecting to participation

No hospital, physician, nurse, hospital employee nor any other person shall be under any duty, by law or contract, nor shall such hospital or person in any circumstances be required, to participate in a termination of pregnancy if such hospital or person objects to such termination. No such person shall be discriminated against in employment or professional privileges because he so objects. [Added by Laws 2d Ex Sess 1970 ch 3 § 3.]

Washington cont'd

9.02.010 **Defined.** Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—

(1) Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or,

(2) Use, or cause to be used, any instrument or other means;

Shall be guilty of abortion, and punished by imprisonment in the state penitentiary for not more than five years, or in the county jail for not more than one year.

LEGISLATIVE HISTORY

Enacted Laws 1909 ch 249 § 196 p 948. Based on:
(a) Code 1881 § 821.
(b) Laws 1873 p 188 § 42, Laws 1869 p 209 § 40, Laws 1854 p 81 § 38.
See RRS § 2448.

While the new laws, §§9.02.060, 9.02.070, 9.02.080, above, are the newer more liberal abortion laws, it does not appear that the old abortion provision, §9.02.010, also above, has been repealed. It is arguable, therefore, that while abortions may only be performed within 4 lunar months after conception under the new laws, the old law is authority for the performance of abortions anytime when necessary to save the life of the woman or the child. See George, The Evolving Law of Abortion, 23 Case Western Reserve Law Review 708, 720 at n. 67 (Summer 1972).

Recent cases - None

WEST VIRGINIA
(Through 1972 Cummulative Supplement)

W. Va. Code Ann. §61-2-8 (1966)

§ 61-2-8. Abortion; penalty.

Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child. (Code 1849, c. 191, § 8; Code 1860, c. 191, § 8; Code 1868, c. 144, § 8; 1882, c. 118, § 8; Code 1923, c. 144, § 8.)

Recent cases - None

WISCONSIN

(Through Chapter 332 of the Eightieth Legislature, 1971-73 Biennial Session, Legislative Service Pamphlet #3)

Wis. Stat. §940.04 (1958)

940.04 Abortion

(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

(a) Intentionally destroys the life of an unborn quick child; or

(b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than 6 months or both.

(4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than 2 years.

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section "unborn child" means a human being from the time of conception until it is born alive.

History and Source of Law

Source:

R.S.1849 c. 133 §§ 10, 11.
R.S.1858 c. 164 §§ 10, 11; c. 169 §§ 58, 59.
R.S.1878 §§ 4347, 4352, 4583, 4584.
St.1898 §§ 4347, 4352, 4583, 4584.
L.1925 c. 4.
St.1925 §§ 340.11, 340.16, 351.22, 351.23.
St.1947 c. 446; c. 447.
St.1947 § 340.005.
L.1955 c. 696 § 1.
St.1955 § 940.04.

Recent cases - Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970) appeal dismissed 400 U.S. 1 (1970), later opinion of 320 F. Supp. 219 (E.D. Wis. 1970), vacated and remanded on other grounds 402 U.S. 903 (1971): Abortion statute is not unconstitutionally vague and does not deny equal protection of the laws, but is an unconstitutional invasion of woman's private right to refuse to carry an unquickened embryo during the early months of pregnancy.

WYOMING

(Through 1971 Cummulative Supplement and Forty-First State Legislature, Adjourned February 20, 1971)

Wyo. Stat. Ann. §6-77 (1959)

§ 6-77. **Criminal abortion.**—Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years. (Laws 1890, ch. 73, § 31; R. S. 1899, § 4969; C. S. 1910, § 5808; C. S. 1920, § 7086; R. S. 1931, § 32-222; C. S. 1945, § 9-223.)

Recent cases - None

BIBLIOGRAPHY

Selected Law Review Articles on the Topic of Abortion

_____ Abortion and The Constitutional Question, 15 South Dakota Law Review 318 (1970).

_____ Abortion - Constitutional Law - A Law Prohibiting All Abortions Except Those Performed "For the Purpose of Saving the Life of the Mother," Which does not Augment a Compelling State Interest, Unconstitutionally Infringes on the Mother's Ninth Amendment Right to Choose Whether to Bear Children, 49 Texas Law Review 537 (March, 1971).

_____ Abortion - Constitutional Law - A Law that Allows an Abortion Only When "Necessary to Preserve" the Life of the Mother Violates a Oualified Constitutional Right to an Abortion and is Unconstitutionally Vague. 48 Texas Law Review 937 (1970).

_____ Abortion Laws : A Constitutional Right to Abortion, 49 North Carolina Law Review 487 (April, 1971).

_____ Abortion Legislation and the Establishment Clause, 15 Catholic Lawyer 108 (1969).

_____ Abortion Reform: History, Status, and Prognosis, 21 Case Western Reserve Law Review 521 (1970).

Barnard, Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion, 18 Western Reserve Law Review 540 (1967).

Baude, Constitutional Reflections on Abortion Reform, 4 Journal of Law Reform 1 (1970).

Charles and Alexander, Abortions for Poor and Nonwhite Women: A Denial of Equal Protection? 23 Hastings Law Journal 147 (November, 1971).

Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola University of Los Angeles Law Review 1 (1969).

_____ Constitutional Law - Abortions: Abortion as a Ninth Amendment Right, 46 Washington Law Review 565 (May, 1971).

_____ Constitutional Law - Abortion - Does a Woman Have a Constitutional Right Under the Ninth Amendment to Choose Whether to Bear a Child After Conception, 2 Texas Tech. Law Review 99 (1970).

_____ Constitutional Law - Abortion Statute as Invasion of a Woman's Right of Privacy, 15 St. Louis University Law Journal 642 (Summer, 1971).

_____ Constitutional Law - Abortion - Statute Prohibiting Abortion of Unquickened Fetus Violates Mothers Constitutional Right of Privacy, 23 Vanderbilt Law Review 1346 (1970).

_____ Constitutional Law - Criminal Abortion - Statute Prohibiting Intentional Destruction of Unquickened Fetus Violates Mother's Right of Privacy, 4 Georgia Law Review 907 (1970).

_____ Constitutional Law - Denial of Medicaid Reimbursement for Elective Abortions - City of New York v. Wyman, 36 Albany Law Review 794 (1972).

_____ Constitutional Law - Due Process and Abortion, 51 Nebraska Law Review 340 (Winter, 1971).

_____ Constitutional Law - State Regulation of Abortion, 1970 Wisconsin Law Review 933 (1970).

Duffy, Law on Abortion, 43 Pennsylvania Bar Association Quarterly 212 (January, 1972).

_____ Fetus as a Legal Entity-Facing Reality, 8 San Diego Law Review 126 (1971).

Forer, Case for Abortion on Demand, 43 Pennsylvania Bar Association Quarterly 212 (January, 1972).

Gerber, Abortion: Two Opposing Legal Philosophies, 15 American Journal of Jurisprudence 1 (1970).

Himble, Abortion on Request: Is it Really "Liberal?" 1 Texas Southern Intramural Law Review 173 (1971).

Kindregan, Abortion, The Law, and Defective Children: A Legal Medical Study, 3 Suffolk University Law Review 225 (1969).

Kindregan, Eugenic Abortion, 6 Suffolk University Law Review 405 (Spring, 1972).

_____ Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Lawyer 349 (Winter, 1971).

_____ Law, Morality, and Abortion: A Symposium, 22 Rutgers Law Review 415 (1968).

Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A. Law Review 233 (1969).

Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 North Carolina Law Review 730 (1968).

Means, Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 New York Law Forum 411 (1968).

Means, Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty? 17 New York Law Forum 335 (1971).

Moore, Abortion and Public Policy: What are the Issues?, 17 New York Law Forum 411 (1971).

_____ New Jersey's Abortion Law: An Establishment of Religion? 25 Rutgers Law Review 452 (Spring, 1972).

_____ New York Abortion Law Reform: Considerations, Application, and Legal Consequences - More Than we Bargained for?, 35 Albany Law Review 644 (1971).

Noonan, Abortion and the Catholic Church: A Summary History, 12 Natural Law Forum 85 (1967).

Noonan, Constitutionality of the Regulation of Abortion, 21 Hastings Law Journal 51 (1969).

_____ Parent and Child: Minor's Right to Consent to an Abortion, 11 Santa Clara Lawyer 469 (Spring, 1971).

_____ Procedural Due Process Limitations on State Abortion Statutes, 55 Marquette Law Review 137 (Winter, 1972).

_____ Right of Equal Access to Abortions, 56 Iowa Law Review 1015 (April, 1971).

_____ Right to Privacy: Does it Allow a Woman the Right to Determine Whether to Bear Children?, 20 American University Law Review 136 (1970).

_____ Role of the Law of Homicide in Fetal Destruction, 56 Iowa Law Review 658 (February, 1971).

Roy, Abortion: A Physician's View, 9 Washburn Law Journal 391 (1970).

Shaffer, Abortion, The Law and Human Life, 2 Valparaiso University Law Review 94 (1967).

Sigworth, Abortion Laws in the Federal Courts - The Supreme Court as Supreme Plutonic Guardian, 5 Indiana Legal Forum 130 (Fall, 1971).

Smith and Wineberg, Survey of Therapeutic Abortion Committees, 12 Criminal Law Quarterly 279 (1970).

_____ Symposium: Abortion and the Law, 23 Case Western Reserve Law Review 705 (Summer, 1972).

_____ Unborn Child and the Constitutional Conception of Life, 56 Iowa Law Review 994 (April, 1971).

_____ Unborn Child: Consistency in the Law, 2 Suffolk University Law Review 228 (1968).

Williams, Euthanasia and Abortion, 38 University of Colorado Law Review 178 (1966).

Table of Cases Cited Following Statutes

Page

Page

Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) argued before the U.S. Supreme Court December 13, 1971 reargued October 11, 1972.

Jane ROE, Plaintiff,

v.

Henry WADE, Defendant,

v.

James Hubert HALLFORD, M.D., Intervenor.

John DOE and Mary Doe, Plaintiffs,

v.

Henry WADE, Defendant.

Civ. A. Nos. 3-3690-B, 3-3691-C.

United States District Court,
N. D. Texas,
Dallas Division.
June 17, 1970.

Action for judgment declaring Texas abortion laws unconstitutional and to enjoin their enforcement. The three-judge District Court held that laws prohibiting abortions except for purpose of saving life of the mother violated right secured by the Ninth Amendment to choose whether to have children and were unconstitutionally overbroad and vague, but Court would abstain from issuing injunction against enforcement of the laws.

Order accordingly.

1. Constitutional Law ⇐42

Physician challenging constitutionality of Texas abortion laws had standing to raise rights of his patients, single women and married couples, as well as rights of his own. Vernon's Ann.Tex. P.C. arts. 1191–1194, 1196.

2. Constitutional Law ⇐42

Logical nexus existed between status asserted by plaintiffs, a married couple, single woman and practicing physician challenging constitutionality of Texas abortion laws, and claim sought to be adjudicated, and plaintiffs had standing. Vernon's Ann.Tex.P.C. art. 1196; 28 U.S.C.A. § 2201.

3. Courts ⇐300

Contentiousness between pregnant woman, physician and district attorney of Dallas County was sufficient to establish a "case of actual controversy" with respect to constitutionality of Texas abortion laws. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⇐260.4

In absence of possibility that adjudication in state courts would eliminate necessity for federal district court to pass upon plaintiffs' Ninth Amendment claim respecting constitutionality of Texas abortion laws or physician's attack on laws for vagueness, abstention as to plaintiffs' request for declaratory judgment was unwarranted. Vernon's Ann. Tex.P.C. arts. 1191–1194, 1196; U.S.C.A. Const. Amend. 9.

5. Abortion ⇐1

Texas laws prohibiting abortions except for purpose of saving life of mother deprived single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

6. Constitutional Law ⇐48

District attorney had burden to demonstrate that infringement by state abortion laws upon plaintiffs' fundamental right to chose whether to have children was necessary to support compelling state interest. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

7. Constitutional Law ⇐38

Fact that statutory scheme serves permissible or even compelling state interests will not save it from consequences of unconstitutional overbreadth.

8. Abortion ⇐1

While Ninth Amendment right to choose to have abortion is not unqualified or unfettered, statute designed to regulate circumstances of abortions must restrict its scope to compelling state interests. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

9. Abortion ⇐1

Texas laws prohibiting abortions except for purpose of saving life of mother are unconstitutionally overbroad in failing to limit scope to compelling state interests. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

10. Criminal Law ⇐13

Texas laws prohibiting abortions except for purpose of saving life of mother are unconstitutionally vague in failing to provide physicians with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

11. Courts ⇐508(7)

Federal policy of noninterference with state criminal prosecutions must be followed except in cases where statutes are justifiably attacked on their face as abridging free expression, or where statutes are justifiably attacked as applied for the purpose of discouraging protected activities. U.S.C.A.Const. Amends. 1, 9.

12. Courts ⇐508(7)

Texas abortion laws, although unconstitutional in depriving single women and married couples of right secured by Ninth Amendment to choose whether to have children and as being vague and overbroad, could not be justifiably at-

tacked on their face as abridging free expression or as being applied for purpose of discouraging protected activities, and federal court would abstain from enjoining enforcement of the laws. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S. C.A.Const. Amends. 1, 9.

Linda N. Coffee, Dallas, Tex., Sarah Weddington, Austin, Tex., for plaintiffs.

Fred Bruner, Daugherty, Bruner, Lastelick & Anderson, Ray L. Merrill, Jr., Dallas, Tex., for intervenor.

John B. Tolle, Asst. Dist. Atty., Dallas, Tex., Jay Floyd, Asst. Atty. Gen., Austin, Tex., for defendant.

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

PER CURIAM:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

[1] From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

1. On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-B under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M.D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA 3-3691-C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA-3-3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

2. *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. Compare Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965),[3] with Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

[2] On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[3] Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of Zwickler v. Koota, 389 U.S. 241, 248–249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967):

"The judge-made doctrine of abstention * * * sanctions * * * escape only in narrowly limited 'special circumstances.' * * * One of the 'special circumstances' * * * is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

The Court in Zwickler v. Koota subsequently quoted from United States v. Livingston, 179 F.Supp. 9, 12–13 (E.D. S.C.1959):

"Regard for the interest and sovereignty of the state and reluctance

3. By the authority of *Griswold*, Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

4. "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

5. Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Cameron v. Johnson, 390 U.S. 611, 615, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. * * * The decision in [Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. * * * Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit." [6]

[4] Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. Compare City of Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 84, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), with Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970).

[5] On the merits, plaintiffs argue as their principal contention [7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 492, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965):

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." * * *
>
> "The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.) [9]

Relative sanctuaries for such "fundamental" interests have been established

6. 389 U.S. at 250-251, 88 S.Ct. at 396-397. (Citations omitted.)

7. Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

8. "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

9. At 492, 85 S.Ct. at 1686 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] * * * as to be ranked as fundamental'. Snyder v. [Commonwealth of] Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674]. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." * * *' Powell v. Alabama, 287 U.S. 45, 67 [53 S.Ct. 55, 77 L.Ed. 158]."

for the family,[10] the marital couple,[11] and the individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. Babbitz v. McCann, 312 F.Supp. 725 (E.D. Wis.1970); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (Cal.1969); State v. Munson, (South Dakota Circuit Court, Pennington County, April 6, 1970). *Accord*, United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal.Rptr. at 359, 458 P.2d at 199.

The District Court in *Vuitch* wrote:

> "There has been * * * an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F.Supp. at 1035.

Writing about Griswold v. Connecticut, *supra*, and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."[13]

[6] Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

10. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); and Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

11. Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex.1970).

12. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

13. Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. L.Rev. 1, 8 (1969). Mr. Justice Clark goes on to write, "* * * abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

14. "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. [City of] Little Rock, 361 U.S. 516, 524 [80 S.Ct. 412, 4 L.Ed.2d 480]." Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). *See also* Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed "for the purpose of saving the life of the mother." [16]

[7–9] It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E. g.*, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

[10] Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). *See also* Giaccio v. Pennsylvania, 382 U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

15. It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician.*

16. Article 1196.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from Zwickler v. Koota,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254, 88 S.Ct. at 399.

[11] The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in Dombrowski v. Pfister, 380 U.S. 479, 484–485, 85 SCt. 1116, 1120–21, 14 L.Ed. 2d 22 (1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. at 489–490, 85 S.Ct. at 1122.

[12] Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression."[17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstrain from issuing an injunction against enforcement of the Texas Abortion Laws.

CONCLUSION

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

17. "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." Porter v. Kinzey, 309 F.Supp. 993, 995 (N.D.Ga.1970).

JUDGMENT

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D., and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of Law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws, is warranted.

It is therefore ordered, adjudged and decreed that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) argued before the U.S. Supreme Court December 13, 1971 reargued October 11, 1972.

Mary DOE et al.,

v.

Arthur K. BOLTON, as Attorney General of the State of Georgia, Lewis R. Slaton as District Attorney of Fulton County, Georgia and Herbert T. Jenkins, as Chief of Police of the City of Atlanta.

Civ. A. No. 13676.

United States District Court,
N. D. Georgia,
Atlanta Division.

July 31, 1970.

Supplemental Opinion Oct. 14, 1970.

Class action attacking validity of state abortion statute. A Three-Judge District Court held that claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abor-

tions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy and that statute was invalid to extent it limited cases in which abortion could be performed.

Order accordingly.

1. Federal Civil Procedure ⇐9

State Attorney General who was required to represent state in legal proceedings or to give opinion on abortion statute when requested by Governor and who was head of department which was vested with jurisdiction in all matters of law relating to governmental departments, boards and agencies was proper defendant in class action attacking state abortion statute. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26-1201 et seq., 40-1602, 40-1614; Const.Ga. art. 6, § 10, par. 2.

2. Declaratory Judgment ⇐292

Physicians, nurses, ministers and social workers who claimed that because of state statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions had standing to bring action seeking declaratory judgment as to validity and injunction against enforcement of statute. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. § 26-1201 et seq.

3. Declaratory Judgment ⇐274

For federal courts to have jurisdiction in declaratory judgment proceeding attacking validity of state statute, there must be actual controversy in which constitutionality of statute is drawn into question in truly adversary context. U.S.C.A.Const. art. 3, § 2.

4. Declaratory Judgment ⇐121

Where plaintiff's request for therapeutic abortion had been denied by hospital committee on ground that her situation did not come within terms of state abortion statute, there was actual interference with claimed constitutional right by decision of body which state had vested with power to grant or deny legal abortions and plaintiff's declaratory judgment action attacking statute presented justiciable controversy. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26-1201, 26-1202, 26-1202(a) (1-3), (b).

5. Declaratory Judgment ⇐123

Claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26-1201, 26-1202, 26-1202(a) (1-3), (b).

6. Courts ⇐489(1)

There is no requirement that litigant in federal court exhaust state judicial remedies, where he is asserting claim in proceeding other than habeas corpus involving subject over which federal and state courts have concurrent jurisdiction.

7. Abortion ⇐1

State may not unduly limit reasons for which woman may obtain abortion but may legitimately require that decision to terminate her pregnancy be one reached only on consideration of more factors than desires of woman and her ability to find willing physician. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26-1201 et seq.

8. Constitutional Law ⇐82

Concept of personal liberty embodies right to privacy which apparently is also broad enough to include decision to abort pregnancy. U.S.C.A.Const. Amend. 9.

9. Abortion ⇐1

Once embryo has formed, decision to abort its development cannot be considered purely private one affecting only man and woman and state may assert legitimate area of control short of invasion of personal right of initial decision. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26-1201 et seq.

10. Constitutional Law ⇐250

Mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to wealthy than to indigent, is not in itself a violation of equal protection. U.S.C.A.Const. Amend. 14; Code Ga. § 26–1201 et seq.

11. Abortion ⇐1

Reasons for abortion may not be prescribed but quality of decision as well as manner of its execution are properly within realm of state control. U.S.C.A. Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

12. Abortion ⇐1

Declaratory Judgment ⇐22

State abortion statute to extent it limited cases in which physician could legally perform abortion to cases where continuation of pregnancy would endanger life of woman, fetus would very likely be born with irremediable mental or physical defect or pregnancy resulted from forcible or statutory rape in which case woman must give written statement under oath as to time and place of rape and name of rapist, if known with copy of statement going to law enforcement officials and to extent it provided for declaratory judgment action as to validity of abortion to be performed was unconstitutional. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1202(a) (1–3), (b) (3, 6), (c).

13. Courts ⇐508(7)

Although federal court found that state abortion statute was unconstitutional in certain respects, injunction against state prosecutions which had not been instituted would be denied. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. § 26–1201 et seq.

Supplemental Opinion

14. Federal Civil Procedure ⇐331

Where hospital which had previously denied application for abortion reconsidered and granted application, motion by party seeking abortion to intervene in class action attacking state abortion statute would be denied.

15. Federal Civil Procedure ⇐331

In absence of showing that pregnant woman who had been denied abortion at one hospital because of state statute could not adequately represent tangential interest of another pregnant woman who had been denied abortion at another hospital, motion by latter woman to intervene in class action attacking state abortion statute would be denied.

16. Abortion ⇐1

Where court declared state abortion statute invalid to extent it limited reasons for granting of abortion but upheld requirement of approval by hospital committee before abortion is performed, any action of committee in adopting same reasons for permitting abortion as had been declared invalid was itself invalid.

Margie Pitts Hames, Tobiane Schwartz, Elizabeth Rindskopf, Bettye Kehrer, Atlanta, Ga., for plaintiffs.

Arthur K. Bolton, Atty. Gen., Tony H. Hight, Asst. Dist. Atty., Atlanta, Ga., for Slaton.

Ralph H. Witt, Atlanta, Ga., for Jenkins.

Ferdinand Buckley, Atlanta, Ga., for unborn child of Mary Doe.

Before MORGAN, Circuit Judge, and SMITH and HENDERSON, District Judges.

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §§ 2201 and 2202, and 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343. It is a class action attacking Ga. Code Ann. § 26–1201 et seq. (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel

performance of legal abortions; and ministers and social workers who wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

[1] As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. § 2-4502 (1933) requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. § 40 1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. § 40 1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D.Wash.1928); Jackson v. Colorado, 294 F.Supp. 1065, 1072 (D.Colo.1968); James v. Almond, 170 F.Supp. 331, 341-342 (E.D.Va.1959); International Longshoremen's & Warehousemen's Union v. Ackerman, 82 F. Supp. 65, 124 (D.Haw.1948), rev'd on other grounds 187 F.2d 860 (9th Cir. 1951); Bevins v. Prindable, 39 F.Supp. 708, 710 (E.D.Ill.1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M. D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian ad litem will be dealt with in connection with the discussion under MERITS below.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justi-

1. The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

cisable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. §§ 2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. § 26-1201 et seq. (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, 314 F.Supp. 1217 (N.D.Tex., June 17, 1970); Doe v. Randall, 314 F.Supp. 32 (D.Minn., May 19, 1970); Doe v. Scott, 310 F.Supp. 688 (N.D.Ill., March 27, 1970); Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis.1970); United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), app. docketed, No. 1155 (February 5, 1970); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L. Ed.2d 96 (1970).

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L. Ed.2d 510 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U.S. 83, 100 n. 21, 99 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enactment attacked and the nature of the constitutional infringement alleged. 392 U.S. at 102, 88 S.Ct. 1942.

[2] Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

[3] Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22

L.Ed.2d 113 (1969); Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, citing United Public Workers of America v. Mitchell, 330 U. S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Poe v. Ullman, 367 U.S. at 501, 81 S.Ct. 1752. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

> "It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U.S. at 507, 81 S.Ct. at 1758.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U.S. at 101–102, 89 S.Ct. 266. Apparently, then, the majority felt that the appeal presented a "substantial controversy * * * of sufficient immediacy and reality." Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959–960 (1969).

In the instant case, the plaintiff Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. § 26–1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. § 26–1202(a) (1) (1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. § 26–1201 (1969). However, Ga. Code Ann. § 26–1202(a) establishes three circumstances

under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. § 26-1202(b) (1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. § 26-1202(b) (1969) provides in relevant part:

> "No abortion is authorized or shall be performed under this section unless each of the following conditions is met:
>
> * * * * * *
>
> (5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose."

[4, 5] Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this statute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very real and lively controversy, amenable to judicial resolution.

Accordingly, it appears that Mary Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

[6] There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

[7] Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. *See* Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Loving v. Virginia, 388 U. S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (dissenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). While the Court agrees that the breadth

of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of protected freedoms with maximum destructive effect upon that relationship. 381 U.S. at 485, 85 S.Ct. 1678. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

[8] For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[2] Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

[9] Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

[10] The whole thrust of the present Georgia statute[4] is to treat the problem as a medical one. Such approach is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decisions—personal and medical—is not one

2. We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e. g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

3. This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here. And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

4. Apparently patterned after the American Law Institute, Model Penal Code § 230.3 (Proposed Official Draft, 1962)

undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); MacQuarrie v. McLaughlin, 294 F.Supp. 176 (D.Mass. 1968), aff'd 394 U.S. 456, 89 S.Ct. 1224, 22 L.Ed.2d 417 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

[11] Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970). The question becomes a matter of statutory overbreadth.

[12] Based upon the above, the court finds the following portions of Georgia Code § 26–1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a) (3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code § 26–1202 to constitute a proper exercise of state power within the context of this opinion.[5]

5. It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

[13] It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

> "* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted * * * that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U.S. 808, 828, 86 S.Ct. 1800, 1812, 16 L.Ed.2d 944 (1968).

However under the authority of Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

It is so ordered.

SUPPLEMENTAL OPINION

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

[14] First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

[15] Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See* Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 141, 64 S.Ct. 905, 88 L.Ed. 1188 (1944); Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D.Ark.1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1948); Bros. Incorporated v. W. E.

Grace Mfg. Co., 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code § 26-1202b(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

[16] From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[1] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the admitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

It is so ordered.

1. The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.
By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.