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THE CALIFORNIA THERAPEUTIC ABORTION ACT: AN ANALYSIS

In June 1967, the California Legislature enacted a Therapeutic Abortion Act.[1] In so doing, California became the third state in the country within the year to significantly revise abortion legislation which had remained unchanged, in many cases, for almost a century.[2] The states of Colorado[3] and North Carolina[4] preceded California in adopting revised abortion measures. Each of these three states relied upon the basic pattern proposed in the *Model Penal Code*.[5] However, there are significant differences between the various enactments, which reflect the deep, underlying religious, social, and legal conflicts which attend the subject of abortion.

The purpose of this note is to examine the California Therapeutic Abortion Act in comparison with the recent Colorado and North Carolina legislation. Desirable modifications will be recommended for the California Act and for consideration by other states contemplating abortion legislation revision.[6]

The Need for Reform

The necessity for a revision of the California abortion legislation arose for three reasons: first, the legislation did not control, but rather fostered illegal action; second, it did not conform to accepted medical practice, nor social ideology; and third, it was discriminatory in its effect. Prior to its amendment by The Therapeutic Abortion Act, section 274 of the California Penal Code made it a felony to perform an abortion on a woman for any reason "unless the same is necessary to preserve her life."[7] Essentially the same provisions exist in 40 other states.[8]

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[1] CAL. HEALTH & SAFETY CODE §§ 25950-54.

[2] L. LADER, ABORTION 85-91 (1966) [hereinafter cited as LADER].

[3] COLO. REV. STAT. ANN. §§ 40-2-50 to -52 (Supp. 1967).

[4] N.C. GEN. STAT. § 14-46 (Supp. 1967).

[5] MODEL PENAL CODE § 230.2 (Proposed Official Draft, 1962).

[6] The American Medical Association has noted that about 20 states are considering liberalization of existing abortion laws. The Wall Street Journal, June 19, 1967, at 14, col. 2.

[7] Cal. Stats. 1935, ch. 528, § 1, at 1605.

[8] J. BATES & E. ZAWADZKI, CRIMINAL ABORTION 9 (1964) (Table I). In addition to the statutes of California, Colorado, and North Carolina, 7 other states have less stringent requirements. Oregon and Alabama prohibit abortions except to preserve the life or health of the mother. ORE. REV. STAT. §§ 163.060, 677.190(2) (1953); ALA. CODE tit. 14, § 9 (1958). New Mexico prohibits abortion except to save the life of the mother or to prevent serious or permanent bodily injury to her. N.M. STAT. ANN. § 40A-53 (1953). Maryland prohibits abortion except when the physician is "satisfied that the foetus is dead, or that no other method will secure the safety of the mother." MD. ANN. CODE art. 27, § 3 (1957). Massachusetts and Pennsylvania require for violation that the abortion be done "unlawfully." MASS. GEN. LAWS ANN. ch. 272, § 19 (1956); PA. STAT. ANN. tit. 18, § 4718 (1963). New Jersey requires that the abortion be done "maliciously or without lawful justification." N.J. STAT. ANN. § 2A:87-1 (1953). For a collection of all state laws on abortion, see Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, U.C.L.A.L. REV. 310-12 (1966).

During the past quarter of a century, there has been a growing recognition that the limitations of abortion laws were forcing many women to seek illegal abortions.[9] Thus, a woman who had been raped and was faced with bearing the assailant's child, or a woman who had contracted German measles during early pregnancy and was faced with bearing a seriously deformed baby, was afforded no relief under the existing laws.[10] The enormity of this problem is reflected in the large number of illegal abortions that are conducted. While it has been noted that accurate statistics are virtually impossible to obtain in determining the number of criminal abortions,[11] it has been estimated that 18,000 illegal abortions are induced annually in California.[12] Furthermore, illegal abortions are one of the major factors in causing maternal deaths. A relatively recent study has indicated that almost one-third of the maternal deaths in California are related to illegal abortions.[13]

The medical profession has long recognized that there are medically justifiable grounds for inducing abortions in addition to that of saving the woman's life.[14] It has been reported that licensed physicians have conducted abortions on therapeutic grounds where there was a risk to the health of the woman or a strong probability of permanent damage to the fetus.[15] And a growing recognition of the psychological trauma attending pregnancy and childbirth has led to therapeutic abortions for mentally unstable women to preserve their mental health.[16] A study of abortion practices of California hospitals revealed that a significant number of the state's major hospitals had established therapeutic abortion committees which had authorized abortions for reasons other than preservation of the mother's life, with full knowledge that this action was illegal.[17]

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[9] *See* F. TAUSSIG, ABORTION SPONTANEOUS AND INDUCED (1936). Taussig wrote the first definitive study of the problems of abortion law inequity in 1936.

[10] LADER 4-9.

[11] PLANNED PARENTHOOD OF AMERICA, INC., ABORTION IN THE UNITED STATES 50 (M. Calderone ed. 1958) [hereinafter cited as CALDERONE].

[12] *Hearing on AB 2614 Before California Assembly Interim Comm. on Criminal Procedure*, at 74 (Dec. 17, 18, 1962).

[13] Montgomery, Lewis & Hammersby, *Maternal Deaths in California, 1957-1962*, 100 CAL. MEDICINE 412, 415 (1964). There has been a general decline in deaths from criminal abortions, probably because of the increased availability of antibiotics. CALDERONE 68.

[14] In 1964, it was reported that a study of 420 therapeutic abortions conducted in 5 major Los Angeles hospitals and 14 hospitals in various eastern states revealed that 41% were for medical illnesses; 32% were for psychiatric illnesses of the mother; and 27% were given for fetal involvement. *Hearing on AB 2310 Before California Assembly Interim Comm. on Criminal Procedure*, at 34 (Sept. 29, 1964).

[15] Kummer & Leavy, *Therapeutic Abortion Law Confusion*, 195 A.M.A.J. 96, 97 (1966); *see* MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

[16] A survey of therapeutic abortions in 61 California hospitals during 1950 disclosed that approximately 25% were performed for reasons of mental disease or nervous disorder. Russell, *Therapeutic Abortions in California in 1950*, 60 WESTERN J. OF SURGERY, OBSTETRICS & GYNECOLOGY 497 (1952).

[17] Packer & Gampbell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 430 (1959).

Tacit acceptance of this medical practice is evidenced by the almost total lack of enforcement of abortion laws when the abortionist is a reputable physician.[18] The courts, too, have recognized the inadequacy of this legislation and have occasionally attempted to mitigate the force of the law by straining its interpretation to protect physicians acting in good faith.[19]

A leading case illustrating this principle is *The King v. Bourne*,[20] in which an esteemed English surgeon was prosecuted for terminating the pregnancy of a 14-year-old girl who had been forcibly raped. Although the law as previously interpreted made an abortion legal only for the purpose of preserving the life of the mother, the court felt that such extreme circumstances deserved a more "reasonable" interpretation of the exception:

> As I have said, I think that those words ought to be construed in a reasonable sense, and if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, in these circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the woman.[21]

A similar position was taken by a California appellate court in the case of *People v. Ballard*.[22] The court considered the case of a licensed physician with a reputable background who was prosecuted for violation of section 274 of the Penal Code. In asserting that there was a presumption favoring the physician's determination that the abortion was necessary to save the life of the woman, the court said:

> Surely, the abortion statute (Penal Code, § 274) does not mean by the words "unless the same is necessary to preserve her life" that the peril to life be imminent. It ought to be enough that the dangerous condition "be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief."[23]

The restrictive abortion legislation had its harshest effect on women in the lower socio-economic groups.[24] Women able to afford the price of a progressive, private hospital were favored by a more liberal interpretation of the rules governing abortion, while public hospital patients were confronted by a conservative interpretation of the law, and were generally denied abortions.[25] Furthermore, women of means who were unable to obtain a hospital abortion could be relatively confident of obtaining a foreign or a safe non-hospital abortion,

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18 E. SCHUR, CRIMES WITHOUT VICTIMS 35-36 (1965).

19 Cases cited notes 20-22 *infra*.

20 [1939] 1 K.B. 687.

21 *Id.* at 693-94.

22 167 Cal. App. 2d 803, 335 P.2d 204 (1959).

23 *Id.* at 814, 335 P.2d at 212.

24 E. SCHUR, CRIMES WITHOUT VICTIMS 21 (1965).

25 *Id.* An illustration of this inequality is shown by the statistical extremes of Russell's study, *supra* note 16, at 497, which found that the highest abortion rate of 1 in 52 deliveries was in a private California hospital, while the lowest abortion rate of 1 in 8,196 deliveries was in the Los Angeles County Hospital.

while the poor had to resort to self-induced abortions or unskilled "midwives."[26] A consequence of this inequitable system is revealed in the abnormally high rate of abortion deaths occuring among minority groups. Almost 80 percent of all abortion deaths occur among non-Caucasian women.[27]

In spite of the obvious schism between the theory of the law and reality itself, there has been a general social reluctance to openly confront the abortion problem in this country. Nevertheless, within the last decade an increasing amount of literature has been devoted to the subject and has generally contributed to the increased public awareness of the need for abortion law reform.[28] Confronted by conflicting religious beliefs, the California Abortion Act faced 6 years of extensive legislative study and debate, and underwent several modifications before it was finally enacted into law.[29]

Therapeutic Abortion Act

The Therapeutic Abortion Act of California has been added to the Health and Safety Code, and is an exception to the criminal abortion provisions in section 274 of the Penal Code.[30] The Act contains important substantive and procedural provisions, which, for purposes of analysis, will be considered separately.

Substantive Provisions

The most significant substantive addition to the law made by the Therapeutic Abortion Act is the increase in conditions under which an abortion may legally be induced. Under section 25951 of the California Act, a licensed physician is authorized to perform an abortion where there is "(1) substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; [or] (2) the pregnancy resulted from rape or incest."[31] Both of these provisions are included in the acts of Colorado[32] and North Carolina.[33]

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26 LADER 66.

27 *Id.*

28 *E.g.*, ABORTION AND THE LAW (D. Smith ed. 1967); J. BATES & E. ZAWADZKI, CRIMINAL ABORTION (1964); B. DICKENS, ABORTION AND THE LAW (1966); A. JENKINS, LAW FOR THE RICH (1961); L. LADER, ABORTION (1966); PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ABORTION IN THE UNITED STATES (M. Calderone ed. 1958); E. SCHUR, CRIMES WITHOUT VICTIMS (1965); N. ST. JOHN-STEVAS, THE RIGHT TO LIFE (1964); G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957).

29 For a summary of the legislative history of the Therapeutic Abortion Act in its previous forms, see Sands, *supra* note 8, at 286-87.

30 In its amended form, CAL. PEN. CODE § 274 provides:

"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."

31 CAL. HEALTH & SAFETY CODE § 25951(c).

32 COLO. REV. STAT. ANN. § 40-2-50(4)(a) (Supp. 1967).

33 N.C. GEN. STAT. § 14-46 (Supp. 1967).

The addition of a physical health indication[34] as a ground for therapeutic abortion is a major step in conforming the law to accepted medical practice. Advancements in medical technology have eliminated many of the risks attending childbirth which previously represented serious threats to the health of women who suffer from some form of physical disability.[35] Notwithstanding these medical advancements, there remain certain physical conditions which can be seriously aggravated by childbirth, and for which an abortion is deemed necessary to conserve the health of the pregnant woman.[36]

Preservation of mental health as a justification for abortion was also necessary to align the abortion statutes with the current medical practice. The development of psychiatry has led to an increased realization that pregnancy and childbirth may be a psychologically damaging experience to the unstable personality.[37] Furthermore, in certain cases of unwanted pregnancies, or pregnancies in which there is a high risk of fetal damage, there may be permanent injury to the mental health of even a normal individual.[38]

Unfortunately, however, the effectiveness of the mental health indication for abortion may be limited by the statutory definition of "mental health" in section 25954:[39]

> 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.

There is no such definition of mental health in the *Model Penal Code* nor in the statutes of Colorado or North Carolina. The definition was incorporated into the California Act "to gain legislative support, in answer to the fear that 'mental health' by itself would be a catchall for abortions."[40] The language of the section is derived from the statutory definition of mentally ill persons eligible for judicial commitment to a mental hospital.[41]

It has been suggested that the probable effect of this statutory definition will be to perpetuate the inequities of abortion treatment between socio-economic groups.[42] Private hospitals will tend to liberally construe the terms of the statute to comply with the psychiatric needs of their patients, while the more conservative public hos-

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[34] As used in this discussion the term "indication" denotes the operative facts which may justify a therapeutic abortion.

[35] Niswander, *Medical Abortion Practices in the United States*, in ABORTION AND THE LAW 37, 51 (D. Smith ed. 1967).

[36] A partial list of the physical indications still recognized as justifying abortion includes: cancer of the cervix; severe cardiac disease; severe hypertension; nephritis or kidney disease; breast cancer. LADER 39.

[37] Murdock, *Experiences in a Psychiatric Hospital*, in THERAPEUTIC ABORTION 201 (H. Rosen ed. 1954).

[38] Interview with Dr. Bernard J. Diamond, M.D., Assistant Chief of Psychiatry, Mt. Zion Hospital, San Francisco, California, in Berkeley, California, July 18, 1967.

[39] CAL. HEALTH & SAFETY CODE § 25954.

[40] Letter from State Senator Anthony C. Beilenson (co-author of the California Therapeutic Abortion Act) to the author, July 17, 1967, on file in Hastings Law Journal office.

[41] CAL. WEL. & INST. CODE § 5550.

[42] Interview with Dr. Bernard J. Diamond, *supra* note 38.

pitals will tend to adhere to the letter of the law and deny abortions for mental health reasons, except in cases of obvious psychosis.[43] The incorporation of the mental health definition in the California statute, which would permit this double standard of treatment in mental health cases, may prove to be an undesirable feature for that reason.[44]

Each of the three states has included the offenses of rape and incest as a grounds for authorizing therapeutic abortions.[45] An abortion after rape or incest can probably be justified as necessary to preserve the mental health of the patient, in view of the psychological trauma which would attend carrying such a fetus to term.[46] However, the statutes adopt a more direct approach by making rape or incest a nonmedical justification for an abortion, in recognition of the social policy favoring relief when pregnancy results from these offenses.[47]

Of greater difficulty has been the question of whether or not similar authorization should be granted in the case of "statutory rape."[48] The American Law Institute included no provision authorizing an abortion for statutory rape in its tentative drafts of the *Model Penal Code*,[49] but in its final Proposed Draft of 1962 it authorized abortion in the case of a pregnancy resulting from illicit intercourse with a girl below the age of 18.[50] The North Carolina legislation will apparently provide a therapeutic abortion only for a girl under the age of 12.[51] Girls between the ages of 12 and 16 who might be the victims of the separate statutory offense of carnal knowledge will not be afforded abortion relief in the absence of judicial construction interpreting "rape" in the abortion act to include this offense.[52]

In California and Colorado the age of consent in determining statutory rape is 18.[53] However, California has limited the application of its Therapeutic Abortion Act to girls under the age of 15,[54] while

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[43] *See* text at note 25 *supra*.

[44] Interview with Dr. Bernard J. Diamond, *supra* note 38.

[45] CAL. HEALTH & SAFETY CODE § 25951(c); COLO. REV. STAT. ANN. § 40-2-50(4)(a)(ii) (Supp. 1967); N.C. GEN. STAT. § 14-46 (Supp. 1967).

[46] Interview with Dr. Bernard J. Diamond, *supra* note 38.

[47] *See* MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

[48] CAL. PEN. CODE § 261 states in part:

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years . . . ."

[49] MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

[50] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, May 4, 1962).

[51] N.C. GEN. STAT. § 14-46 (Supp. 1967) authorizes a therapeutic abortion in the case of "rape or incest." N.C. GEN. STAT. § 14-21 (1953), defines rape, in part, as "carnally knowing and abusing any female child under the age of 12 years."

[52] N.C. GEN. STAT. § 14-26 (1953) makes it a felony to carnally know or abuse a female child over 12 years and under 16 who has never before had sexual relations.

[53] CAL. PEN. CODE § 261; COLO. REV. STAT. ANN. § 40-2-25 (1963).

[54] CAL. HEALTH & SAFETY CODE § 25952(c) states:

"Notwithstanding any other provision of this section, an abortion shall be approved on the grounds of a violation of subdivision 1 of section 261 of the

Colorado requires that a girl be under the age of 16 in order to qualify for an abortion on grounds of statutory rape.[55]

This disparity between the age of consent and the age for which an abortion is justified is illogical. It is unreasonable for a state to declare girls under the age of 18 legally incapable of consenting to sexual intercourse but to hold them responsible for their conduct by denying them an abortion unless under the age of 15 or 16.[56] The designation of the lower age limit in the therapeutic abortion statutes is arguably a tacit admission by the legislatures that the age for statutory rape is too high in California and Colorado.[57] Whether or not this is true, the legal age for aborting statutory rape victims should be made to correspond with the legal age of consent.

The California Legislature excluded from the adopted statute a third indication which would justify a therapeutic abortion. A provision was rejected which would have permitted a therapeutic abortion when "there is substantial risk that the child would be born with grave physical or mental defect."[58] The statutes of both Colorado[59] and North Carolina[60] include this provision.

Permitting abortions for eugenic reasons constitutes the most controversial ground for terminating a pregnancy because an abortion on these grounds involves a certain degree of medical speculation whether or not the child will be born defective. However, certain conditions occurring during pregnancy are known to cause a relatively high percentage of serious birth defects. Examples of such conditions are: (1) disease of the mother during pregnancy, such as rubella; (2) harmful drugs taken by the mother during pregnancy, such as Thalidomide; (3) irradiation to the pelvic region before pregnancy is discovered; and (4) evidence of serious genetic defects.[61] The risk that any child will be born with serious defects as a result of these factors varies between 20 and 60 percent.[62]

Opponents of this rejected provision have suggested that the probability of defect is an inadequate justification for terminating the

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Penal Code only when the woman at the time of the alleged violation, was below the age of fifteen years."

[55] COLO. REV. STAT. ANN. § 40-2-50(4)(a) (Supp. 1967).

[56] *See* Sands, *supra* note 8, at 300. In the Model Penal Code the age of consent of 16 years is utilized as the legal age for which an abortion may be given. MODEL PENAL CODE § 230.2 (Proposed Official Draft, 1962).

[57] As to this discrepancy, Senator Beilenson stated: "There is obvious inconsistency between having statutory rape apply to all girls up to eighteen, and permit them to have abortions only up to fifteen. The undercurrent of feeling on the matter was that the older girls, who consent to intercourse, are more responsible for their acts, even though the law still tries to discourage them from these acts, while there is much greater sympathy for the younger girls. Again, the final decision on the age limit was political, and necessary to gain sufficient support." Beilenson letter, *supra* note 40.

[58] 1967 CAL. J. SENATE 2220.

[59] COLO. REV. STAT. ANN. § 40-2-50(4)(a) (Supp. 1967).

[60] N.C. GEN. STAT. § 14-46 (Supp. 1967).

[61] *See* Niswander, *supra* note 34, at 45-49.

[62] *See* Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12, 20-21 (H. Rosen ed. 1954); Ryan, *Humane Abortion Laws and the Health Needs of Society*, in ABORTION AND THE LAW 65 (D. Smith ed. 1967).

life of a fetus.[63] However, the social and personal tragedy arising from the birth of a seriously deformed child is a cogent reason for interrupting a pregnancy when there is such a probability that serious defect exists. This argument gains additional weight from the knowledge that the psychological distress created by such a pregnancy can do permanent damage to the mental health of a woman,[64] and that she would generally be fully capable of bearing a normal child after a therapeutic abortion, in the absence of genetic defects.[65]

The exclusion of the fetal defect indication from the California Act is contrary to the recognized policy and practice of the medical profession.[66] It can be expected that abortions will continue to be given for cases of fetal deformity in the progressive private hospitals, which will justify the operation by a liberal interpretation of the mental and physical health indications in the existing law.[67] Thus, the most significant effect of omitting abortions for eugenic reasons will be the continuation of socio-economic discrimination in therapeutic abortion practices.[68]

The California Abortion Act contains a substantive provision consisting of a 20 week limitation from the time of conception after which a therpeutic abortion may not be given for any reason.[69] Such a limitation is not found in the statutes of Colorado[70] or North Corolina. The effect of this provision is to extend to the fetus an expanded legal protection not contemplated in the previous California abortion legislation.[71]

Three reasons may be advanced to explain the inclusion of this new provision in the California Act. The most obvious explanation is that it was a politically necessary concession to gain support of those opposed to the passage of the legislation on religious and moral grounds.[72] Second, it may be considered a reflection of the develop-

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[63] Mandy, *Reflections of a Gynecologist*, in THERAPEUTIC ABORTION 292-93 (H. Rosen ed. 1954).

[64] G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 174-75 (1957) [hereinafter cited as WILLIAMS]. The draftsmen of the MODEL PENAL CODE recognized this, but stated: "The criminal law should speak unambiguously on the authority of the physician to act where he believes that continuance of the pregnancy entails substantial risk that the offspring will be a physical or mental casualty. The prospective birth of a seriously defective child may even constitute a threat to the mental health of the apprehensive mother, but it seems preferable to rest the matter directly on scientific prognostication of the child's state of health rather than on the more uncertain prediction of the mother's reaction." MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

[65] Interview with Dr. Bernard J. Diamond, *supra* note 38.

[66] *See* text at note 17 *supra*. Senator Beilenson stated the section was omitted "solely to gain the withdrawal of the Governor's opposition." Beilenson letter, *supra* note 40.

[67] *See* text at note 24 *supra*.

[68] *Id.*

[69] CAL. HEALTH & SAFETY CODE § 25953.

[70] Colorado did, however, include a 16 week limitation for abortion authorization after rape. COLO. REV. STAT. § 40-2-50(4)(a)(ii) (Supp. 1967).

[71] Cal. Stats. 1935, ch. 528, § 1, at 1605.

[72] The Roman Catholic Church and its members presented the most vigorous dissenting voice against reformation of the California abortion laws.

ing trend in the law toward recognition of the separate biological existence of the fetus by affording it legal rights.[73] Third, the legislature may have intended to give legal expression to the general attitude of society against the calculated destruction of a fetus in an advanced state of maturity.[74] It is likely that an amalgum of these reasons, rather than any sole factor, represents the most accurate explanation of the motivation underlying the inclusion of this provision.

This limitation is an apparent attempt to strike a balance between the statutorily recognized rights of the pregnant mother and the legal interests of the unborn child. However, it is suggested that the legislature's 20 week dividing point weighs unreasonably in favor of the fetus and slights the needs of the mother.

Medical science has established that the fetus does not become viable, *i.e.*, capable of extra-uterine existence, until sometime between the 24th and 28th week.[75] Therefore, the expulsion of a nonviable fetus—an abortion—is possible after the 20th week. Notwithstanding this possibility, under the existing statute, the expulsion of a nonviable, 20-week-old fetus must be denied a woman regardless of the circumstances justifying the request. Thus, the very life of the mother might be jeopardized in favor of a fetus not yet capable of an independent existence.

A more reasonable balance between the competing interests of the woman and the fetus would be achieved by utilizing the time of viability.[76] The capacity of the fetus for an independent existence at that time argues forcefully for affording it greater protection under the law.[77]

Sands, *supra* note 8, at 293. It is part of Catholic teaching that ensoulment occurs shortly after conception. Therefore, an abortion at any time is considered the killing of a human being and murder. WILLIAMS 196-97. For a summary of the position taken by the California Catholic opposition, see O'Dwyer, *Is Therapeutic Abortion Justified?*, in *Hearing on AB 2614 Before California Assembly Interim Comm. on Criminal Procedure*, at 264 (Dec. 17, 18, 1962). The apparent intent of this provision is to prevent delay which might hinder proper determination as to probable cause.

[73] *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 139 (D.D.C. 1946) (child's right of action against physician for prenatal injuries sustained during delivery upheld); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939) (similar right of action upheld under a statute); W. PROSSER, TORTS 354-57 (3d. ed. 1964); Byrne, *The Legal Rights of the Unborn Child*, 41 L.A.B. BULL. 24 (1965); Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965). It has been noted, however, that, with the exception of wrongful death cases, the legal rights of the unborn child have been predicated upon its subsequent live birth. Sands, *supra* note 8, at 302. *See* PROSSER, *supra* at 356.

[74] *See* WILLIAMS 230; MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

"As the fetus develops to the point where it is recognizably human in form (4-6 weeks), or manifests life by movement perceptible to the mother ('quickening': 14-20 weeks), or becomes 'viable', *i.e.*, capable of surviving though born prematurely (24-28 weeks), it increasingly evokes in the greater portion of mankind a feeling of sympathy as with a fellow human being, so that its destruction comes to be regarded by many as morally equivalent to murder." *Id.* (footnotes omitted).

[75] WILLIAMS 230.

[76] *Id.*

[77] The MODEL PENAL CODE recognizes viability as a natural dividing point

Procedural Provisions

The new abortion legislation incorporates extensive provisions which establish stringent controls in the administration of therapeutic abortions.

Hospital Administrative Controls

An important innovation provided by each of the three new abortion acts is that a therapeutic abortion is legal only when performed in an accredited hospital by a licensed physician.[78] This is an obvious improvement over the previous law which made no requirement as to how a therapeutic abortion was to be performed.

A second procedural provision is that the decision to induce a therapeutic abortion is not left to an individual physician whose judgment may be subject to the pressures of personal involvement. In California and Colorado, hospital committees are vested with the responsibility of determining whether an abortion is authorized under the conditions set forth in the statutes.[79] North Carolina requires a certification by three doctors as to the circumstances justifying an abortion, but there is no requirement for a determination by a committee selected from the hospital staff.[80]

The hospital therapeutic abortion committee can be a propitious device for administering the statute. As an established body with semistable membership, it has a greater opportunity for objective, uniform interpretation of the justifiable grounds for abortion.[81]

Membership on a therapeutic abortion committee is also subject to statutory controls. In California, the committee must consist of "not less than two licensed physicians and surgeons, and if the proposed termination will occur after the 13th week of pregnancy, the committee must consist of at least three such licensed physicians and surgeons."[82] If the committee consists of no more than three licensed physicians, committee consent must be unanimous.[83] In Colorado, the committee must be "three licensed physicians who are members of the staff of the hospital where the proposed termination would be performed . . . ."[84]

The attending physician is not disqualified from membership on the committee in the California and Colorado statutes. Therefore, in

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by making an illegal abortion after the 26th week a more aggravated offense. MODEL PENAL CODE § 230.3(1) (Proposed Official Draft, 1962); MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

78 CAL. HEALTH & SAFETY CODE § 25951; COLO. REV. STAT. ANN. § 40-2-50 (4) (a) (Supp. 1967); N.C. GEN. STAT. § 14-46 (Supp. 1967).

79 CAL. HEALTH & SAFETY CODE § 25950; COLO. REV. STAT. § 40-2-50(4) (a) (Supp. 1967).

80 N.C. GEN. STAT. § 14-46 (Supp. 1967).

81 Guttmacher, *supra* note 61, at 15-16.

82 CAL. HEALTH & SAFETY CODE § 25953. The rationale behind this increase to three doctors is that after the first 12 weeks of pregnancy an abortion usually requires abdominal surgery and is of far greater seriousness. *See Hearing on AB 2614 Before the California Assembly Interim Comm. on Criminal Procedure* at 161 (Dec. 17, 18, 1962).

83 CAL. HEALTH & SAFETY CODE § 25951.

84 COLO. REV. STAT. ANN. § 40-2-50(5) (Supp. 1967).

California, it will be legally possible to have the determination for therapeutic abortion placed in the hands of two licensed physicians, one of whom may be the patient's attending physician. This reduces the effectiveness of the committee decision as a control device and lessens the chance for a uniform and impartial administration of therapeutic abortion practices. It would seem preferable to exclude the attending physician from taking part in deciding his own cases.[85]

Special Procedure for Rape or Incest Cases

The California Act contains special procedures for determining the permissibility of an abortion in rape and incest cases. The hospital committee is required to notify the district attorney of the county where the alleged rape or incest occurred of the application and to "transmit [to him] . . . the affidavit of the applicant attesting to the facts establishing the alleged rape or incest."[86] The committee cannot authorize an abortion unless the district attorney reports to the committee that there is "probable cause" to believe a rape or incest did occur; or if it receives no reply from the district attorney within 5 days, the committee is authorized to approve the abortion. An adverse finding by the district attorney may be appealed in an informal hearing before the superior court within 1 week after the finding of no probable cause.

The Colorado procedure is similar though less extensive.[87] It does require that the district attorney where the offense occurred inform the committee in writing that there is probable cause to believe rape or incest has occurred. However, there is no alternative authorization for an abortion in the event of a district attorney's silence, and there is no procedure for judicial appeal in the face of an adverse finding by a district attorney.

North Carolina merely requires that the alleged rape be reported to a law enforcement agency or a court official within 7 days.[88] There is no similar requirement for cases based upon incest.[89]

Since abortion authorization in the case of an alleged rape or incest turns upon the legal determination of probable cause, it is meritorious to require the participation of the district attorney in this procedure. However, the language of these provisions may have created unforeseen limitations upon the California and Colorado enactments which will be discussed below.[90]

Residency

California and Colorado do not include a residency requirement in their Therapeutic Abortion Acts. On the other hand, North Carolina requires 4 months of residency in the state prior to the abortion, except in cases "of emergency, where the life of said woman is in

85 *See* Packer & Gampbell, *supra* note 17, at 455.
86 CAL. HEALTH & SAFETY CODE § 25952.
87 COLO. REV. STAT. ANN. § 40-2-50(4)(a) (Supp. 1967).
88 N.C. GEN. STAT. § 14-46 (Supp. 1967).
89 *Id.*
90 *See* text at note 95 *infra.*

danger . . . ."[91] The apparent legislative intent underlying the North Carolina provision is to prevent the state from becoming an "abortion haven" for nonresidents.[92] While this measure may be of present importance, the increased trend toward modernization of abortion legislation in all states makes it only a temporary problem.[93]

In spite of the absence of any express residency requirement in the legislation of California and Colorado, there appears to be an implicit territorial limitation imposed by the procedural mechanism governing abortion for rape and incest. The provision in the two statutes, which requires certification of probable cause by the district attorney where the offense occurred[94] will probably be construed to limit abortions for rape and incest to only those offenses which have occurred within the state.[95] This would deny relief of therapeutic abortion to not only the nonresident, but also to a resident who was in another state when the offense occurred. These situations are likely to arise in view of the great volume of interstate travel. It is suggested that amendments be enacted to clarify the legislative intent on this matter.

Consent By Next Of Kin

The final procedural provision to be considered is the form of consent required by the next of kin of the woman as a prerequisite to obtaining a therapeutic abortion. The California Act contains no express requirement for the additional consent by family members of the woman requesting the abortion. The North Carolina statute requires the written consent of the woman, and, if she is a minor or incompetent, the consent of her parents, guardian, or husband if she is married.[96] The language of the Colorado provision is ambiguous,[97]

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[91] N.C. GEN. STAT. § 14-46 (Supp. 1967).

[92] The Wall Street Journal, Aug. 18, 1967, at 1, col. 1.

[93] *See* note 6 *supra.*

[94] *See* text at note 86 *supra.*

[95] The authors of both the Colorado and California acts agree that such an interpretation may be given to the present language of the statutes, but that there was no intention to create such a requirement. Beilenson letter, *supra* note 40. Colorado State Representative Richard D. Lamm, author of the Colorado act, stated:

"It was my intention in drafting the law to have no resident requirement whatsoever. However, on re-reading the final product of many long weeks of legislative compromise, I agree that the law is sufficiently ambiguous that as a conservative lawyer I have recommended to my clients and professional associates that the category of rape and incest be restricted to Colorado residents. This is because of the wording in 40-2-50(4)(a)(ii) which states that 'the district attorney of the judicial district in which the alleged rape or incest has occurred.' This may be construed by a court in a case brought by a crusading district attorney to mean a Colorado district attorney by implication, consequently, we have advised our doctors to treat only residents in this category." Letter to the author, September 12, 1967, on file in Hastings Law Journal office.

[96] N.C. GEN. STAT. § 14-46 (Supp. 1967).

[97] COLO. REV. STAT. ANN. § 40-2-50(4)(a) (Supp. 1967) states:

"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 18 years, then at the request of said woman and her then living

but appears to require the consent of her parent or guardian if she is under 18 years of age, or the consent of her husband if she is married and living with him, regardless of her age or competency.

Despite the obvious impact of a therapeutic abortion on the family unit, the California Legislature felt that a requirement of consent of the husband was unnecessary. The co-author of the Act pointed out[98] that in almost all cases the husband would naturally take part in the woman's decision to request an abortion. By omitting a requirement for the husband's consent, the situation is avoided where a medically necessary abortion might be denied a woman because her husband was unavailable or had strong religious objections to an abortion.

Parental consent in the case of a minor or incompetent was also deemed unnecessary since "no hospital will perform surgery on such persons in California without such consent, and the bill requires all legal abortions to be done in hospitals."[99]

The conclusions reached by the California Legislature as to consent by next of kin appear to be sound, particularly since the fetal defect indication has been omitted from the legislation. Should the fetal defect indication ever be incorporated in the California Act, consideration should be given to requiring the husband's participation in the request for the abortion.[100]

In this case, neither medical necessity nor strong social policy is present to justify authorizing an abortion without the husband's consent. The economic and psychological consequences associated with the question of whether or not to interrupt a pregnancy where there is a substantial risk of serious fetal deformity, would seem to present a joint burden for both the husband and wife.

Conclusion

The Therapeutic Abortion Act recently enacted in California represents a necessary change in the law to conform with the developing needs of society. The expansion of the substantive indications of therapeutic abortions to include the preservation of physical and mental health of the woman, is a propitious addition to the law. However, the omission from the Act of the fetal defect indication, and the addition of an ambiguous definition of mental health, are defects of the legislation which may have their greatest effect in perpetuating discrimination in therapeutic abortion administration along socio-economic lines. The time of viability of the fetus, rather than the arbitrary period of 20 weeks, would provide a more natural demarcation for limiting abortions.

The extensive procedural provisions of the Act provide a practicable framework for controlling the administration of therapeutic

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parent or guardian, or if the woman is married and living with her husband, at the request of said woman and her husband . . . ."

This section could be interpreted also to mean that the husband's participation is required only if the woman is under the age of 18.

98 Beilenson letter, *supra* note 40.

99 *Id.*

100 See Drinian, *The Inviobility of the Right to be Born*, in ABORTION AND THE LAW 107, 113 (D. Smith ed. 1967).

abortions. The requirements that all therapeutic abortions be conducted in accredited hospitals by licensed physicians, and that abortion authorization be made by impartial hospital committees, are highly desirable measures to ensure uniform application of the law The failure to disqualify the attending physician from taking part in the abortion committee decision, however, may weaken the effectiveness of committee decisions as a control device.

The authorization of therapeutic abortions following rape or incest is sensibly regulated by requiring the participation of the district attorney However, the procedure for his participation contains implicit territorial limitations which do not appear to have been intended, as is indicated by the omission of a residency requirement. In addition, limiting therapeutic abortions for statutory rape to an age below the age of consent is an unreasonable inconsistency which should be corrected.

The failure to include a parental consent provision in the case of minors or a requirement that husbands join in the request for an abortion is not a serious omission from the California Act. But, consideration should be given to such a requirement if a fetal defect indication is later added to the legislation.

While this analysis has shown that the California Therapeutic Abortion Act is not without defects, they weigh less in the balance than the positive contribution the legislation affords in the reform of the antiquated law With the few exceptions that have been noted in this discussion, the California Act provides a useful model for other legislatures contemplating reform of abortion legislation.

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