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NEW MEXICO'S 1969 CRIMINAL ABORTION LAW

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Every state has a criminal abortion law.[1] Most states permit abortion only if necessary to preserve the life or health of the woman. In early 1969, New Mexico radically departed from such strict abortion regulation.[2] It now has one of the most liberal abortion laws in the United States.[3]

New Mexico acted telepathically. During 1969, courts in California and Washington, D.C.[4] ruled their preservation of life and health

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1. See Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Laws,* 46 N.C. L. Rev. 730, 734-35, nn. 22-29, and 778 (1968); George, *Current Abortion Laws: Proposals and Movements for Reform,* 17 W. Res. L. Rev. 371, 375-384 (1965); Stern, *Abortion: Reform and The Law,* 59 J. Crim. L.C. & P.S. 84, 85-87 (1968). Recent reform has occurred since 1967 in New Mexico, Colorado, North Carolina, California, Maryland, Georgia, and Hawaii. See 40 U. Colo. L. Rev. 297 (1968); Leavy and Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure,* 15 U.C.L.A. L. Rev. 1 (1967); 46 N.C. L. Rev. 585 (1968); Note, *Constitutional Aspects of Present Criminal Abortion Law,* 3 Valparaiso L. Rev. 102 (1968).

2. N.M. Laws 1969, ch. 67, § § 1-3, repealing N.M. Laws 1963, ch. 303, § § 5-1, -3. New Mexico's 1963 abortion law permitted abortion if "necessary to preserve the life of the woman or to prevent serious and permanent bodily injury." The 1963 law is set out in full in Appendix C of this article. The 1969 abortion law, cited as N.M. Stat. Ann. § § 40A-5-1, -3 (Supp. 1969), is set out in full in Appendix D of this article.

3. The 1969 abortion law was modeled after the 1967 Colorado abortion law, Colo. Rev. Stat. Ann. § § 40-2-50 to -52 (1963) which, in turn, was modeled after the American Law Institute's Model Penal Code 1959 proposals on abortion. Most, if not all, of the more liberal abortion laws are modeled after the Model Penal Code provisions (see note 1, *supra*). See Model Penal Code § 230.3 (Proposed Draft, 1962). See Comment, 40 U. Colo. L. Rev. 298, 299 (1968). New Mexico's 1969 abortion law is more liberal and administratively easier than Colorado's new law.

Hawaii's 1970 abortion law is now perhaps the most liberal abortion law in the country. The restrictions are: (a) that the abortion must be performed by a licensed physician, in a licensed hospital; and (b) that the woman must have been "domiciled . . . or physically present . . . for at least ninety days immediately preceding such abortion." Abortion is defined as "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 the law. Hawaii Rev. Laws, § 768 (1970). New Mexico's 1969 abortion law has no residency requirement and makes no distinction between a viable and a non-viable fetus.

As this article went to press, the Maryland Legislature enacted a bill which, the April 1, 1970 *Albuquerque Journal* reports, "repeals virtually all state restrictions on abortion and makes the operation a matter of choice." The *Journal* says that the bill contains no residency requirements, and would allow pregnancy to be terminated at any time so long as the termination were done by a licensed doctor in a hospital. The bill awaits the governor's signature.

The April 10, 1970 *Journal* reported that the New York State Assembly "narrowly approved a measure which virtually removes all restrictions on abortion." The April 12, 1970 *Journal* reported that the Alaska Legislature passed a bill similar to the one recently enacted in Hawaii. The Governor of Alaska vetoed the bill.

4. People v. Belous, 71 A.C. 996, 80 Cal. Rptr. 354, 458 P.2d 194 (1969). United States v. Vuitch, and United States v. Boyd, 305 F. Supp. 1032 (D.D.C. 1969). Belous was decided

statutes unconstitutional. These two decisions will no doubt be used to initiate the fall of most, if not all, such abortion laws. But the question remains, what effect will these decisions have on the more liberal abortion legislation enacted by New Mexico's 1969 legislature? This article discusses that question and other aspects of the constitutionality and desirability of the New Mexico 1969 abortion law.

A. *The California and Washington D.C. cases*

1. *California: People v. Belous*

The California Supreme Court, in *People v. Belous*,[5] held the following provision of California's criminal abortion law invalid:

> 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 an 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. . . .[6] (Emphasis added.)

The italicized portion of this provision was the court's target. It was held "not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights."[7] The court looked unavailingly to dictionary definitions, prior court interpretations, various suggested possible meanings, and the common law, to try to remedy the uncertainty.

Of perhaps greater significance, however, is the court's announcement of the fundamental, constitutional rights of a woman to life and to choose whether to bear children.[8] The *Belous* court is the first to assert these rights in the context of criminal abortion law,[9]

on September 5, 1969. Vuitch was decided on November 10, 1969. The New Mexico 1969 abortion law became law without the governor's signature on June 23, 1969, 90 days after adjournment of the legislative session.

5. People v. Belous, 71 A.C. 996, 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

6. *Id.*, at 357, 458 P.2d at 197 (emphasis added).

7. *Id.*

8. The court stated:

> The rights involved in the instant case are the woman's right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death. * * * 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. *Id.* at 359, 458 P.2d at 199.

9. The court relied primarily on the Supreme Court cases which have developed the right of privacy as a personal fundamental right encompassing the rights to direct the education of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1924); to marry, Loving

and to forbid the states' limitation of these rights without some "compelling" state interest in the regulation of abortion practices.[10] The court required that any regulation be based on medical considerations, e.g., the pregnant woman's physical and mental health, and not considerations beyond medical competence, e.g., the protection of the embryo or fetus.[11]

2. *Washington, D.C.: United States v. Vuitch*

The Washington, D.C. decision, *United States v. Vuitch*,[12] held the following provision of the D.C. abortion law unconstitutionally vague:

> Whoever . . . produces an abortion . . . 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. . . .[13] (Emphasis added.)

The court found the word "health," "ambivalent and uncertain," and "not defined and in fact . . . so vague in its interpretation and the practice . . . that there is no indication whether it includes varying degrees of mental as well as physical health."[14] The court cited *Belous* to document the uncertainties in the phrase, "as necessary for the preservation of the mother's life or health."[15]

Significantly, as did the court in *Belous*, the court found that the statute "unquestionably impinges . . . on significant constitutional

v. Virginia, 388 U.S. 1, (1967); and to marital privacy that assures the right of married persons to control the size of their families through the use of contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965).

For other pertinent statements of the Supreme Court on the individual's right of privacy, see Stanley v. Georgia, 394 U.S. 557, 564-65 (1969), wherein the Court asserted the right of individuals to control the moral content of their own thoughts. And see the language in Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891), and the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 478 (1928) which is now controlling, Katz v. United States, 389 U.S. 347 (1967).

10. The court stated:

> The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state . . . , whether the regulation is "necessary . . . to the accomplishment of a permissible state policy" . . . , and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep". . . . [citing cases] 71 A.C. at 1002, 80 Cal. Rptr. at 360, 458 P.2d at 200.

11. Id. at 364-65, 458 P.2d at 204-05.

12. 305 F. Supp. 1032 (D.D.C. 1969). Vuitch's companion case is United States v. Boyd. For convenience, the court's decision is cited in this article as Vuitch.

13. *Id.* at 1033 (emphasis added).

14. *Id.* at 1034.

15. Vuitch was decided after Belous. The court in Vuitch had the Belous decision before it, yet it cited Belous only once, and that was with respect to Belous' discussion and documentation of uncertainties in the phrase, "as necessary for the preservation of the mother's life or health." *Id.*

rights of individuals."[16] The court failed, however, to assert the pregnant woman's rights with the strength with which the court in *Belous* asserted them. The court in *Vuitch* said:

> There has been . . . an increasing indication in 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.[17]

The court went on to say that Congress has the right to regulate abortion and limit the woman's constitutional rights if the limitation is based on informed legislative findings made after a modern review of the pertinent medical, social and constitutional problems.[18]

Vuitch did, however, raise and decide a constitutional question not raised in *Belous,* namely, the denial of equal protection of the law resulting from the absence of uniform medical abortion services for all segments of the population, the poor as well as the rich.[19]

B. *New Mexico's 1969 Criminal Abortion Law*

New Mexico's 1969 abortion law, set out in full in Appendix D, makes it unlawful for any person to produce an untimely interruption of a woman's pregnancy with intent to destroy the fetus. Yet termination of the pregnancy is justified, under certain consensual and medical requirements, in the following instances:

> 1. The continuation of the pregnancy . . . 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 . . . , or
> 4. The pregnancy resulted from incest.

The consensual requirements of the new law are that the termination must be at the request of the woman seeking the termination; if the woman is under 18, both the woman and her "then living parent or guardian" must request the termination. The medical requirements are that the termination be "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 one of the justifications for termination

16. *Id.*
17. *Id.* at 1035.
18. *Id.*
19. *Id.*

of the pregnancy exists." Hospitals may refuse to admit patients for abortion; no person can be required to participate in an abortion if he objects to it on "moral or religious grounds."[20]

The instances in which termination of pregnancy is justified under the 1969 abortion law, based, as they are, on the health of the woman and the defect of the child, are subject to attack under the *Belous* and *Vuitch* cases.

1. *Requirement of Certainty*

The first two conditions under which abortion may be performed under the 1969 abortion law cannot pass the requirement of certainty.[21] The conclusions in *Belous* and *Vuitch* that the phrases in those cases were void for vagueness apply also with respect to the

20. *See* Appendix D for the complete provision (Section 40A-5-2). This provision is apparently for the purpose of protecting hospitals from civil liability or restraint if they refuse to admit patients for abortion, and of protecting the hospital staff and employees from civil liability and discharge. But these questions remain: Will this provision insulate hospitals from suit if they refuse emergency abortion cases which are clearly justified under the law, and such refusal causes harm to the patient? Suppose the refusing hospital were the only hospital in the vicinity?

Is a hospital subject to a civil rights action under Title VII of the Civil Rights Act of 1964 if it refuses to hire, or if it discharges a person because such person, for religious reasons, refuses to participate in abortion procedures? Doesn't a hospital have the prerogative to hire and fire persons who refuse to participate in routine medical and surgical procedures?

The injection of religion into the law raises additional problems. This country's abortion laws derive in large part from the concept of the sacredness and inviolability of the fetus. See Drinan, *The Inviolability of the Right to be Born* in Abortion in the United States, 122 (1967). The laws, therefore, were substantially based on religious principles, and because they were, might be subject to attack under the First Amendment clause prohibiting the establishment of religion. Religious opinion about abortion differs greatly. See note 51, *infra.* In the 1969 abortion law, a hospital can refuse to admit a patient for abortion without giving a reason. But there can be little doubt that the reason for this provision is to attempt to protect those hospitals which object to abortion for religious reasons. But suppose there were localities in which there were but one hospital, and that one hospital refused to admit patients for abortion. Would the effect of the 1969 abortion law be to force a religious belief upon the citizens of the area? If the 1969 abortion law were nonexistent, would a woman in need of an abortion be successful in a suit against such a hospital for admittance? Wouldn't the refusal be arbitrary and a denial of equal protection of the law? Does it make any difference whether there is one or twenty hospitals in any given area?

21. The requirement of certainty in criminal statutes was well expressed in the often quoted Supreme Court cases, Conally v. General Construction Company, 269 U.S. 385 (1926) and Lanzetta v. New Jersey, 306 U.S. 451 (1939), both of which were cited in Belous. In Conally, the Court stated, 269 U.S. at 391:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement . . . And a statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application, violates the first essential of due process of law.

The Court in Lanzetta stated, 306 U.S. at 453:

> No one may be required at the 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. . . .

1969 abortion law. There are no aids on which a court may draw to remedy the infirmity of uncertainty in that law.

New Mexico courts have not interpreted the 1969 abortion law. The few cases decided under prior abortion laws are useless.[22] The New Mexico legislature left no history of its intent. The common law is of no help.[23]

Dictionary definitions are not enlightening. Under the 1969 abortion law, a doctor must define "grave," "impairment," "physical or mental health," and "defect." To what does a doctor look to reach the opinion, for example, that continuation of the pregnancy is likely to result in the grave impairment of the physical or mental health of the woman? "Impairment" is defined in Webster's[24] as "An impairing [making worse; diminishing in quantity, value, excellence, or strength]; deterioration; injury." "Grave" is defined in Webster's[25] as "Deserving of serious consideration or thought," and in Dorland's[26] medical dictionary as "severe or serious."

The doctor must first determine whether, in his opinion, the pregnant woman's health will be impaired during the remainder of her pregnancy or afterwards. This determination requires the doctor to decide what an "impairment" is, i.e., what is a worsening or deterioration of the woman's physical or mental health. He must then decide whether the impairment is "grave," i.e., whether the impairment is deserving of serious consideration. The final decision is whether the continuation of the pregnancy itself is "likely" to result in a worsening or deterioration of the woman's physical or mental health which is deserving of serious consideration.

While making these decisions, the doctor must answer these further questions, among others: At what varying degree of health does health become "impaired"? Does "grave" mean "permanent," or can the impairment be temporary? If temporary, how long must it be expected to last before it deserves serious consideration? Does "grave" mean "disabling"? To what degree must health worsen or deteriorate before the impairment is considered "grave"? What is "health"?

Webster's[27] defines "health" as "state of being hale, sound, or

22. *See* State v. Bassett, 26 N.M. 476, 194 Pac. 867 (1921); State v. Grissom, 35 N.M. 323, 298 Pac. 666 (1931); State v. Lewis, 36 N.M. 218, 12 P.2d 849 (1932); State v. Gutierrez, 75 N.M. 580, 408 P.2d 503 (1965).

23. *See* People v. Belous, 71 A.C. 996, 80 Cal. Rptr. 354, 358, 458 P.2d 194, 198 (1969).

24. Webster's New Int'l Dictionary, Unab. (2nd Ed. 1959).

25. Webster's New Int'l Dictionary, Unab. (2nd Ed. 1959).

26. Dorland's Illustrated Medical Dictionary (23rd Ed.).

27. Webster's New Int'l Dictionary, Unab. (2nd Ed. 1959).

whole, in body, mind, or soul; well-being; esp., state of being free from physical disease or pain." Dorland's[28] defines "health" as "a normal condition of body and mind, i.e., with all parts functioning normally." "Health" has been perhaps more accurately defined as a "state of complete physical, mental and social well-being, not simply the absense of illness or disease."[29] At what degree of deterioration from the "normal" does "impairment" occur? A diagnosis of the mental health of a pregnant woman will be based at least in part on the history of the woman's social and economic stresses. A prognosis of her mental health will take into consideration her future social and economic problems. But to what extent can socio-economic indications for abortion be relied on to justify abortion?[30]

The word "defect" is defined by Webster's[31] as "Want or absence of something necessary for completeness or perfection; deficiency;—opposed to excess." Dorland's[32] defines "defect" as "an imperfection, failure, or absence." A "defect" would appear to be nothing more than an impairment of health.

These definitions are not helpful. Used separately, as well as in the context of the phrases in which they appear, the words have no fixed meaning; they are relative and flexible.[33] The court in *Vuitch* specifically condemned the word "health."[34] The use of the words "likely" and "health" in one phrase[35] with the use of the words "probably" and "defect" in the other phrase[36] simply adds to the difficulty in finding a meaning.

The law itself contains no definitions of these words. It contains no evaluative criteria with which to make a judgment concerning the health of the woman or child. There is no body of either legal or medical knowledge which delineates what degree of mental or physical health is required to justify abortion under the law.

28. Dorland's Illustrated Medical Dictionary (23rd Ed.).

29. This is the definition given "health" by the World Health Organization, 1960. *See* Louisell, *Abortion, The Practice of Medicine and Due Process of Law,* 16 U.C.L.A. L. Rev. 233, 234 (1969).

30. "Psychiatrists themselves have expressed concern at the shadowy line between medical and social justification" for abortion. Model Penal Code § 207.11, Comment (Tent. Draft No. 9, 1959). California Therapeutic Abortion Act. Cal. Health and Safety Code, § 25954 (West Supp. 1970) strictly defines mental health as "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."

31. Webster's New Int'l Dictionary, Unab. (2nd Ed. 1959).

32. Dorland's Illustrated Medical Dictionary (23rd Ed.).

33. *See* People v. Belous, 71 A.C. 996, 80 Cal. Reptr. 354, 358, 458 P.2d 194, 198 (1969).

34. United States v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C. 1969).

35. "The continuation of the pregnancy . . . is *likely* to result in the death of the woman or the grave impairment of the physical or mental *health* of the woman." (Emphasis added.)

36. "The child *probably* will have a grave physical or mental *defect.*" (Emphasis added.)

a. *Uncertainty Denies Doctors Due Process of Law*

Under the 1969 abortion law, doctors are made judges of legal questions by reason of their professions. Yet they are given no clear standards with which to judge. They may be subject to criminal prosecution[37] and to deprivation of their right to practice medicine[38] for an error in judgment. It was this denial of due process with which the *Belous* and *Vuitch* cases were primarily concerned; this particular peril was a primary cause for which the courts in these two cases held the language in the abortion laws unconstitutionally vague.

If the 1969 abortion law is to remain enforceable against anyone, its application to doctors should be made only in cases in which doctors fail to follow the procedural requirements established in the law and to act in good faith. The *Belous* court may have helped to pave the way for such an application.

The preservation of life statute, held unconstitutional in *Belous*, was replaced before the *Belous* decision by the California Therapeutic Abortion Act.[39] This California Act is similar to the 1969 New Mexico abortion law in many respects, one being the establishment of procedures for hospital abortions which are justified under certain conditions. The Therapeutic Abortion Act was not at issue in Belous. The court nevertheless volunteered that:

> At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statutes.[40]

With *Belous* in hand, the threat of state prosecution under the 1969 abortion law may be more theoretical than real. As it is written, the 1969 abortion law might be read to make the special hospital board's certification conclusive on the question whether an abortion is justified under the law.[41] N.M. Stat. Ann. section 40A-5-3 (Supp. 1969) states that criminal abortion does not consist of terminations

37. Under Section 40A-5-3 of the 1969 abortion law, the person who commits criminal abortion is guilty of a fourth degree felony; if the woman dies, the abortionist is guilty of a second degree felony.

38. Under N.M. Stat. Ann § 67-5-9 (Repl. 1961), a doctor's license may be revoked or suspended if he is found guilty by the Board of Medical Examiners of "unprofessional or dishonorable conduct," which includes "procuring, aiding or abetting a criminal abortion."

39. Cal. Health and Safety Code § § 29590 *et seq.* (West Supp. 1970).

40. People v. Belous 71 A.C. 996, 1008, 80 Cal. Reptr. 354, 366, 458 P.2d 194, 206 (1969).

41. If the law were interpreted in this manner, then as long as doctors followed the procedures outlined in the 1969 abortion law and acted in good faith, they presumably would not be "procuring, aiding or abetting a criminal abortion" and their licenses would not be in jeopardy under N.M. Stat. Ann. § 67-5-9 (Repl. 1961).

which are justified. Terminations are justified under Section 40A-5-1(C) if the consensual requirements are met and if the abortion is done

> 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 one of the conditions (impairment of health, defect, rape or incest) exist. *Belous* has interpreted similar language as giving doctors immunity upon adherence to the procedures.[42]

But the issue whether doctors are immune is undecided in New Mexico. If the New Mexico legislature had intended immunity for doctors from prosecution, it could easily have said so. It did not.[43] The threat of prosecution exists, and doctors may have a very real fear of making a judgment that will be the subject of a criminal action. They may refuse to make the judgment rather than run the risk of prosecution.

Moreover, the possibility of investigation exists, notwithstanding

42. A plausible construction of both the 1969 abortion law and the California Act is that if a doctor makes an error in judgment as to the justification for an abortion, he still may be immune from punishment if he follows the procedural requirements and if he makes his decision in good faith. The burden to prove lack of good faith should be upon the prosecution. The issue would be submitted to the jury.

The Model Penal Code § 207.11 (2) (a), Comment (Tent. Draft No. 9, 1959), states the following concerning this means real and good faith:

> Under Section 207.11 (2) (a) the physicians' honest belief in the existence of the justifying circumstances will exculpate; and the burden of disproving honest belief will be on the prosecution, once the defense has been raised. Only a minority of American jurisdictions now permit the defense of good faith belief in the necessity for therapeutic abortion. Twelve [including New Mexico] of these permit justification otherwise than by actual necessity only where one or two physicians join in advance in the judgment of necessity. * * * In view of the required concurrence of two physicians in a written certification, which will be subject to the scrutiny of hospital or other authorities, there is no occasion to depart from the ordinary rule that the state must establish every element of criminal guilt.

Section 207.11 (2) (a) of the Tentative Draft states that "A licensed physician is *justified* in terminating a pregnancy if . . . (a) *he believes* that there is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother. . . . " (Emphasis added). The proposal goes on to say that "Justification of abortion is an affirmative defense."

43. The New Mexico 1969 abortion law, N.M. Stat. Ann. § § 40A-5-1 to-3 (Supp. 1969), does not read like the Model Penal Code provisions mentioned in footnote 42, *supra*, in that the 1969 abortion law contains no stated affirmative defense or presumption. The "belief" of the special hospital board that abortion is justified appears irrelevant except with respect to the justification, "the continuation of the pregnancy, *in their* (the board's) *opinion*, is likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman." In no other stated justification is the board's or a dcotor's belief or opinion an element. Could it be that lack of good faith or honest belief need be proven by the state only when the stated justification involves the impairment of the health, or the death of the woman?

possible immunity from prosecution. What if decisions of a hospital board "shock the conscience" of some state legislators, the local district attorney, or the Board of Medical Examiners? Would a special hospital board certification really stop an investigation?

Even if the 1969 abortion law were interpreted by our courts to make doctors immune from both investigation and prosecution, that would not end the problem caused by the vagueness of the language. As long as uncertain language exists in the statutory conditions for abortion, the law may be applied unequally, in violation of equal protection of the law.

b. *Uncertainty Causes Unequal Application of the Law*

In *Vuitch's* companion case, *United States v. Boyd*, the defendant's evidence showed that the abortion law had been more liberally applied in some private hospitals than in the city hospitals.[44] The court found that the statute had received different interpretations in the hospitals and held that:

> It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under the Constitution require that policies in our public hospitals be liberalized immediately.[45]

The court observed that as a result of its ruling (eliminating unconstitutionally vague language) there would be no reason why the statute could not be "evenly applied throughout the city in a way which removes the principle basis for existing uncertainty and confusion."[46]

The 1969 abortion law may be unequally applied, for its imprecise language leaves little room for equal application. Hospital boards will

44. 305 F. Supp. at 1035. This accentuates the problems caused by vagueness. The Court in Belous also found the problems caused by vagueness "accentuated" because of the delegation of decision-making power to the doctors. The court held such delegation to be in violation of the Fourteenth Amendment because it gave the power to a person directly involved and interested, *viz.*, a doctor who has a ' "direct, personal, substantial, pecuniary interest in reaching a conclusion' " that the woman should not have an abortion. The court also said:

> The inevitable effect of such delegation [viz., the decision-making power] may be to deprive a woman of an abortion when under any definition of . . . [the abortion law] she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed. 71 A.C. 996 at 1008, 80 Cal. Rptr. at 366, 458 P.2d at 206.

45. 305 F. Supp. at 1035.

46. *Id.*

very likely disagree on the health conditions and prognoses which justify abortions. They may disagree on whether to perform abortions for persons who do not reside in New Mexico. Hospitals may gain reputations for being conservative or liberal; doctors will make abortion requests on behalf of their patients to the hospitals with a reputation for being more liberal. If the public hosptial is more conservative than a private hospital, the poor will be denied the equal protection of the law; if the poor person had money, she could pay a private doctor to request an abortion for her at the more liberal private hospital.

The following statistics of abortions requested and approved by three private and one public hospital in Albuquerque, from June 1969 to March 1970, tend to point up the different application of the law:

Private	*Abortions Requested*	*Abortions Approved*	*Other*
Hospital A	2	2	1[a]
Hospital B	18	13[b]	5[b]
Hospital C	NA[c]	241[d]	NA[c]
Public			
Bernalillo County Medical Center	33	25[e]	8[e]

[a]This was a mimeographed request from Las Vegas, Nevada, which the hospital ignored.

[b]Of those approved, 2 changed their minds before the abortion was performed. Of the remaining 5, 4 were denied; one changed her mind before approval.

[c]This hospital did not yet have these statistics available for distribution.

[d]This is a very close approximation.

[e]Of those approved, 3 changed their minds before the abortion was performed. The remaining 8 were denied.

Of course, these statistics alone do not prove the point. One needs to know the reasons why few requests are made to some hospitals, and many requests are made to other hospitals. The various interpretations of the law are needed.[47] Yet the statistics must be considered as evidence of varying interpretations of the law.

47. Some varying interpretations can be seen from the article in the *Albuquerque Journal* of February 4, 1970, written by Melissa Howard, wherein the following persons were quoted as saying the following:

Dr. Melvin Bivens, chief obstetrician and gynecologist at Bataan Hospital:

> The law might be construed as permitting abortion on demand, but we don't go by this. * * * The psychiatrist's attitude—whether he thinks a woman is mentally prepared to have a child—is the key in many cases. . . .

Dr. William C. Johns, chairman of the Therapeutic Abortions Committee at Presbyterian Hospital:

> We interpret the law liberally and, because Presbyterian is large enough to give

Differences in the application of the law will no doubt result primarily from interpretation of the phrase, "grave impairment of the . . . mental health of the woman."[48] Psychiatrists are given no definitions or evaluative criteria with which to make judgments.[49] One doctor will include socio-economic indications for abortion; another will exclude such indications. Doctors will not agree on what stages of a woman's mental illness or impairment are "grave", or on a prognosis of her mental condition if she continues the pregnancy. It may be enough for one doctor that the child is unwanted. Another doctor may require an acute neurosis; another may require a psychosis or may further require that the woman be dangerous to herself. In predicting the nature and extent of the mental health of a pregnant woman, scientific accuracy is difficult. How can legal accuracy be required of doctors?

Differences of interpretation can arise as well under the justification based on rape.[50] One hospital may require proof that the woman *has reported* the rape to the district attorney; another hospital may require only an affidavit that she had been raped. There is no guideline as to what the affidavit is to contain. One hospital might require the name of the rapist or detailed facts; another may not.

Furthermore, doctors' interpretations will vary because doctors, as everyone else, are influenced by their religious, ethical and philosophical convictions and learnings, social values, and professional associations which inevitably cause inconsistency in attitudes toward interruption of pregnancy.[51]

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patients the greatest degree of anonymity, we probably perform the majority of the legal abortions in the state.

The Albuquerque Journal of March 11, 1970, in a UPI article (Santa Fe) states:

> [Assistant Attorney General Gary] O'Dowd said the application of the law made it possible for virtually any woman to receive an abortion if *she* felt her mental health would be impaired by having or raising a child. (Emphasis added.)

48. N.M. Stat. Ann. § 40A-5-1 (C) (1) (Supp. 1969). The decision whether to interrupt pregnancy will be easier in cases in which the physical health of the mother is at issue. "Psychiatric justifications for abortion are harder to classify and verify . . . " Model Penal Code, §207-11, Comment at 153 (Tent. Draft No. 9, 1959); see Aarons, *Therapeutic Abortion and the Psychiatrist*, 124 Am. J. Psychiatry 745, 747 (1967). In most cases of therapeutic abortion, the decision whether to interrupt the pregnancy depends in a large measure on the judgment of psychiatrists.

49. No generally accepted evaluative criteria have yet been established. The range of opinion among psychiatrists is from rejection of any justification for abortion to extreme permissiveness.

50. The rape provision, N.M. Stat. Ann. §40A-5-1(C)(3) (Supp. 1969), reads as follows:

> (3). . . 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. [See Appendix D]

51. There is no collective conscience or one tradition of the people in this country.

Vague standards permitting varied interpretations and discriminatory decisions by physicians and hospital boards deny the pregnant woman the equal protection of the law.[5 2]

Opinions of religious groups differ greatly as to the value to be given to embryonic or fetal existence. See Curran, *Religious Implications,* Abortion in America 153 (Rosen ed. 1967); Cohen, *A Jewish View Toward Therapeutic Abortion and the Related Problems of Artificial Insemination and Contraception,* Abortion in America (Rosen ed. 1967); Jacobvits, *Jewish Views on Abortion,* Abortion and the Law 124 (Smith ed. 1967); R. Cooke, A. Hellegers, R. Hoyt, H. Richardson, The Terrible Choice: The Abortion Dilemma, 81-92 (1968); Stern, *Abortion: Reform and the Law,* 59 J. Crim. L.C. & P.S. 84, 87-91 (1968); Clark, *Religion, Morality, and Abortion; A Constitutional Appraisal,* 2 Loyola U.L.A. L. Rev. 1, 4-5 (1969). There is divergence of opinion within the Catholic Church on state limitation of abortion. A major spokesman representing the Catholic viewpoint on the inviolability of the right of the fetus to be born, Father Robert F. Drinan, advocates withdrawal from the criminal law. Drinan, *The Right of the Fetus to be Born.*

Each lawmaker no doubt takes his own and the ethical and religious attitudes of others into consideration when deliberating on abortion legislation. Criminal abortion laws are being liberalized, and who is to say whether this is a mark of moral decline or simply the elimination of undesirable, outgrown, and restrictive taboos.

Law makers cannot agree. Neither the physicians nor the sociologists are in accord. See T. Clark, *supra* at 5; R. Cooke et al., *supra,* at 59, 67-8, 80,87.

52. United States v. Boyd, 305 F. Supp. 1032 (D.D.C. 1969). A woman may arbitrarily be denied an abortion simply because of the attitude and interpretation of the particular psychiatrist or hospital board. She is forced to hospital shop, first in town, and if unsuccessful, throughout New Mexico, other states, and perhaps even to Juarez, or Nogales, Mexico.

The harm of unequal application, as well as restrictive application of the law, then, is carried much beyond that of forcing an addition of an unwanted ingredient to the population explosion. The estimates, at least as of 1967, of illegal abortions obtained annually in the United States vary from 200,000 to 1,200,000.

Abortion in the United States, 178-180 (1958); See R. Cooke, et al., *supra* note 52, at 40-46 (1968); Rossi, *Public Views on Abortion,* in The Case For Legalized Abortion 26, 27 (Guttmacher ed. 1967); Hardin, *Abortion and Human Dignity,* in The Case for Legalized Abortion 69, 70-1 (Guttmacher ed. 1967); Fisher, *Criminal Abortions,* in Abortion in America 3, 6 (Rosen ed. 1967); Rosen, *A Case Study in Social Hypocrisy,* in Abortion in America 299 (Rosen ed. 1967); Nyswander, *Medical Abortion Practices in the United States,* in Abortion and the Law 37 (Smith ed. 1967). *But see* Bryn, *Demythologizing Abortions Reform,* 14 Cath. Law, 180, 193 (1968). People v. Belous, 71 A.C. 996, 80 Cal. Reptr. 354, 361, 458 P.2d 194, 201 (1969) cites Fox, *Abortions Deaths in California,* 98 Am. J. Obst. & Gynec. 645, 650 (1967) to point out that "criminal abortions are the most common single cause of maternal deaths in California," and that, "in California, it is estimated that 35,000 to 100,000 such abortions occur each year." In Kansas, between 3,500 and 5,000 illegal abortions are thought to have been performed annually. Presentation of Mental Health Ass'n of Johnson County, Kansas, Legislators, January 9, 1969.

The Davalos Clinic in Juarez was a well-known and well-used abortion clinic. It was closed down in 1969. The February 13, 1969 *Albuquerque News* reported that a report on the Clinic prepared by five University of New Mexico Medical students says that the Clinic performed at least 60 to 80 abortions a week and that about 90% of these were on women from the United States. Juarez, however, still has abortionists. Nogales is now reputed to be "open" for abortions.

Related to the problem of unequal application of the law is the problem of discrimination under the law against the poor. Conferences with doctors and hospital abortions can be very expensive. If a private hospital would perform the abortion, but a public hospital would not, then a woman who is unable to pay a private physician and the private hospital will be denied an abortion simply because she cannot pay for it. *See* United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969) and *see* text accompanying notes 44 and 45, *supra.*

2. *The Requirement of a Compelling State Interest*

Belous and *Vuitch* declare that a woman has fundamental constitutional rights to life and to choose whether to bear children.[53]

The 1969 abortion law requires a woman to use her body to produce a child, even against her will, upon "the implantation of an embryo in the uterus," unless termination is "justified" under the law. The state substitutes its judgment for that of the woman and, usually, for that of her husband, parents, guardians and physicians.

New Mexico has no law requiring the use of the body to engage in intercourse to procreate. Such control of the minds and bodies of women and men would derogate our guarantees of personal liberty. If such regulation were ever permissible, it would require great and compelling necessity to exist.

Similarly, the state should have no law regulating the use of the body to produce a child. This substituted judgment reaches into the most private and personal lives of men and women; it is an intrusion that inhibits life and the pursuit of happiness. The state must, therefore, have a compelling, indeed an overwhelming need to protect the health, welfare, or safety of society if it is to regulate and inhibit the rights of a woman to life and to choose whether to bear children.

Both *Belous* and *Vuitch* reiterate well settled law that constitutional rights cannot be limited except by laws enacted with a compelling state interest in the subject matter and its regulation.[54] The 1969 abortion law serves no valid or compelling state interest which should override the constitutional rights involved.

The 1969 abortion law serves no state health interest. It creates, rather than eliminates, a health problem. It "drives desperate women into the hands of criminal abortionists . . . instead of allowing them the safety of medical science."[55] The law could require that all abortions be performed in hospitals by licensed physicians without limitation of the circumstances under which abortions are "justified."[56]

Anti-abortion laws were first adopted in the United States in the middle nineteenth century.[57] New Mexico's first abortion law was enacted in 1907.[58] Indications are that such laws were passed pri-

53. See text at notes 8 and 16-18, *supra.*

54. People v. Belous, 71 A.C. 996, 1001, 80 Cal. Rptr. 354, 359, 458 P.2d 194, 199 (1969); United States v. Vuitch, 305 F. Supp. 1032, 1034-35 (1969).

55. Amici Curiae Brief on Behalf of Medical School Deans and others in Support of Appellant, submitted in People v. Belous, at 26.

56. Hawaii's 1970 abortion law does just this. See note 3, *supra.* In this way, the law can protect against unsafe practices with criminal sanctions aimed only at the unqualified abortionist.

57. See articles cited in note 1, *supra.*

58. Act of March 18, 1907; N.M. Laws, 1907, ch. 36, § 6. This law was codified in N.M.

marily for health reasons; these reasons no longer exist.[59] There is little question that it is now safer for a woman to have a hospital abortion during her first trimester than to bear a child.[60]

The 1969 abortion law serves no state interest if an intended effect is to prohibit illegal sexual conduct. New Mexico does not outlaw adultery or fornication by means of the abortion law. It simply slaps the hands of unmarried persons who cohabit together as man and wife.[61] It does not discourage rape or incest, for women pregnant from these acts are allowed to have an abortion. If any sexual conduct is to be prohibited, the prohibition should be direct, by specific statutes "tailored to the specific ends,"[62] and not indirectly, by an abortion law.

The 1969 abortion law serves no state welfare or safety interest. Concern for the welfare of persons and families means concern for their social and economic problems. Abortions may help eliminate those problems; the 1969 abortion law helps perpetuate them.

Furthermore, the expulsion of the embryo or fetus does not endanger the welfare or safety of society. Bigamy is prohibited because it deleteriously affects the basic family structure and order of our society. It ultimately contributes to, if not causes, the breakdown of that structure or order. Murder is prohibited because the killing of a human being is injurious to the well being of society. If murder or other serious felonies were permitted, each of us would exist at our peril as though living in a jungle rather than exist as we do in the relative security of our homes. Abortion, however, will rarely disrupt the family structure. Rather, it will probably contribute to the successful management of that structure. Abortion certainly does not make us insecure or unsafe or give us a feeling of peril. Society is not threatened as long as it can be reasonably assured that the woman desiring the termination of her pregnancy knows and understands its nature and effect, and if the abortion is performed according to safe and sound medical practice and procedure.[63]

Code § 1464 (1915). It was impliedly repealed by N.M. Laws 1919, ch. 4, § § 1-3. The 1907 and 1919 laws are set out in full in Appendices A and B to this article.

59. Amici Curiae Brief, supra note 55, at 25-26. *See* People v. Belous, 71 A.C. 996, 80 Cal. Rptr. 354, 360-61, 458 P.2d 194, 200-01 (1969); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 513 (1968); Hardin, *Abortion and Human Dignity,* in The Case for Legalized Abortion 69, 72 (Guttmacher ed. 1967); Stern, *Abortion: Reform and the Law,* 59 J. Crim. L.C.&P.S. 84, 87 (1968).

60. *Id.*

61. N.M. Stat. Ann. § 40A-10-2 (Repl. 1964). First offenders are warned to cease and desist.

62. Amici Curiae Brief, *supra* note 55, at 27.

63. One can argue, however, that society is threatened if the fetus is destroyed after it has become viable and that, therefore, the state has an interest in protecting the viable fetus.

The state has no interest in population increase.[64] New Mexico's policy is to promote family planning and population control.[65]

By passing a liberal abortion law, the state has shown that it has no compelling interest to protect the embryo or fetus. Such permissive abortion legislation subordinates the right of the fetus to be born to other human rights and needs.[66] The 1969 abortion law

The rationale is that once the fetus is able to live apart from the mother, feticide is indistinguishable from murder. The California Abortion Act, Health and Safety Code § 25953 (West Supp. 1970) proscribes the approval of termination of pregnancy after the 20th week of pregnancy. Hawaii's 1970 abortion law defines abortion as "an operation to intentionally terminate the pregnancy of a non-viable fetus." The New Mexico 1969 abortion law, however, permits "justified" terminations during any week of pregnancy, since it simply outlaws termination of "pregnancy" with an intent to destroy the fetus without any limitation based upon viability or the week of pregnancy. N.M. Stat. Ann. § 40A-5-3 (Supp. 1969). Feticide is punishable in New Mexico only under the 1969 abortion law. N.M. Stat. Ann. § 40A-5-3 (Supp. 1969).

64. The state has no interest in population increase at this time. The question whether the state can at some future time have such an interest, to the extent that the state can override the woman's constitutional rights and limit termination of pregnancy on the basis of such interest, is an open question.

65. The State of New Mexico promotes family planning and population control through various services. The planned parenthood program in New Mexico is funded by federal funds and is supported by the State of New Mexico.

The 1969 abortion law changed the definition of "pregnancy." Under the 1919 and 1963 laws, abortion was impermissible from conception; "pregnancy" meant "that condition of a woman from the date of conception to the birth of her child." Law of Feb. 21, 1919, ch. 4, § 3, (1919) N.M. Laws 1919 (repealed 1963); Law of Mar. 25, 1963, ch. 303, Art. 5 § 2 (1963) N.M. Laws 1963 (repealed 1969). The 1969 abortion law defined pregnancy as "the implantation of an embryo in the uterus." N.M. Stat. Ann. § 40A-5-1(A) (Supp. 1969). This change should be desirable from the point of view of New Mexico's planned parenthood program. This program promotes the use of intrauterine devices; it did so before 1969. Intrauterine devices may prevent implantation of the ovum after conception. See Amici Curiae Brief, *supra* note 55, at 28, which states:

> Substantial medical opinion holds that the IUD does not act to prevent conception, but acts to interfere with the product of conception; it acts to prevent the growth of the fertilized ovum.

The 1969 abortion law removes any question of the legality of intrauterine devices.

66. Abortion at common law was permitted if termination of pregnancy was produced before "quickening," that is, the state of pregnancy when motion is felt, usually about 16 to 20 weeks. People v. Belous, 71 A.C. 996, 80 Cal. Rptr. 354, 358, 458 P.2d 194, 198 (1969), and articles cited therein. New Mexico's 1907 abortion law merely adopted the common law in this respect. Law of Mar. 18, 1907, ch. 36, § 6 (1907) N.M. Laws 1907 (impliedly repealed 1919). New Mexico's 1919 and 1963 abortion laws made impermissible abortion illegal from conception, but at the same time slightly expanded the conditions under which abortion was permitted. Law of Feb. 21, 1919, ch. 4, § 3, (1919) (repealed 1963); Law of Mar. 25, 1963, ch. 303, Art. 5, § 3 (1963) N.M. Law 1963 (repealed 1969). The 1969 abortion law makes impermissible abortion illegal at implantation, but it substantially expands the conditions under which abortion is permitted. N.M. Stat. Ann. §§ 40A-5-1 to 3 (Supp. 1969).

The 1969 abortion law, in effect, refuses to recognize any fundamental right to survive, or status as a human being, that the fertilized egg may have enjoyed before implantation for the last fifty years. Also, by expanding the conditions under which abortion may be performed, the 1969 abortion law effectively diminishes the relative importance or any absolute nature of any such right or status on the part of the embryo or fetus. The more permissive abortion becomes, the less absolute and important is any right or moral entitle-

therefore compromises and diminishes any right to survive or status as a human being that the embryo or fetus may have enjoyed, subordinating it to the woman's health, the woman's, the parent's, or the child's living convenience, and the woman's psychological distress likely to result from pregnancy from rape or incestuous intercourse.[67]

A health or welfare danger, and any insecurity or peril, come not from permission for abortion, but from the limitation of it. Thousands of illegal abortions are produced each year, mostly on married women; thousands of women die each year from ill-performed abortions or lack of post-procedure treatment and care.[68] Qualified and respected physicians no doubt quietly disregard the abortion laws by either referring patients desiring abortion to abortionists who they feel are qualified, or performing the abortion themselves.[69] The population explosion is a peril;[70] yet population continues to increase from the wombs of unwanting mothers. It is detrimental to the welfare of society to increase the socio-economic strain on parents, the economic drain on state funds through the welfare system, and the emotional pain and unhappiness of a substantial number of citizens, by criminal abortion limitations.

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ment of the embryo or fetus to survive; the right of the woman to control the use of her own body is reinforced.

The 1907 law, as did the common law, gave no recognition to the fetus's or embryo's rights, if any they had, until quickening.

There is no indication that New Mexico has ever recognized a constitutional or moral right of the fetus or embryo to survivie, at least before "quickening", if the mother wants an abortion. A statement of the New Mexico Supreme Court in State v. Bassett, 26 N.M. 476, 480-81, 194 Pac. 867, 868 (1921) indicates the contrary:

> One (abortion after quickening) involves murder; the other (abortion before quickening) involves nothing more than a disregard of the finer feelings of humanity with which the law, in the absence of statutory regulation, is not concerned.

Yet New Mexico does give respect to both the embryo and fetus by preventing execution of a pregnant woman until after she gives birth. N.M. Stat. Ann. § 41-14-8 to -9 (Repl. 1964).

67. In case of incest, the 1969 abortion law allows termination of pregnancies occurring through voluntary sexual conduct. N.M. Stat. Ann. §40A-5-1(C)(4) Supp. 1969). If the embryo or fetus were to have a right to survive, surely that right would prevail over the woman's right to abortion in the case where the woman voluntarily enters into incestuous intercourse. If the rationale behind the incest justification is that the offspring will probably be defective, the incest justification may merely duplicate the second justification, viz., that "the child probably will have a grave physical or mental defect," and is therefore unnecessary.

68. See note 52, *supra.*

69. Dr. Leon Belous and Dr. Milan Vuitch are good examples. See Hardin, *Abortion and Human Dignity,* in The Case for Legalized Abortion 69 (Calderone ed. 1967).

70. The threat of over-population is frightening. It took from the "beginning of man" until about 1830 A.D. for man to number one billion. One hundred years later, by 1930, he numbered two billion. The third billion was added in 30 years, between 1930 and 1960. Johnson, *Life Without Birth, An Inquiry into the "Population Problem,"* 5 Vista 14 (U.N. Ass'n of the U.S.A. 1969).

3. *Other Problems With the Law*

The following problems exist with respect to the 1969 abortion law in addition to those raised by *Belous* and *Vuitch.*

a. *Administrative Procedure*

The usual decision-making procedure under the 1969 abortion law will be that a doctor who agrees to perform the abortion will prepare a report containing a history and his examination of the patient, his diagnosis and prognosis, and probably the diagnosis and prognosis of a psychiatrist in consultation, and a recommendation for abortion. This report will be submitted to a special hospital board for consideration. When the board next meets, it will consider the report, and write its own recommendation.

This could take hours; it could take weeks. Time considerations take on greater importance as the fetus grows older, because the health risks to the mother become greater. The first consideration of doctor and board must be the stage of pregnancy of the patient, and the decision-making procedure should bend to accomodate the exigencies of the situation.

The patient may find, however, worrisome delays in the procedure. The requesting doctor, in cases involving the health of the woman or a defect in the child, may have to take time to write a clear and persuasive report. The doctors on the hospital board, usually more than two,[71] may have difficulty meeting at one time. This may be complicated by the availability of the patient to appear before the board. The board must then deliberate, record its deliberations, and prepare a recommendation.

Under New Mexico's 1907 abortion law, an abortion could be performed upon the advice of a doctor that the abortion was necessary to preserve the life of the mother.[72] Under New Mexico's 1919 and 1963 laws, an abortion could be performed "when two physicians, licensed to practice in the State . . . in consultation,"[73] deemed it necessary to abort under the justified instances specified.

Is the more complex procedure of the 1969 abortion law really necessary? Is it more desirable than the procedures of the older laws? It appears useless in cases in which rape or incest are the grounds for abortion. The "certification" adds nothing, since if the certification insulates the board and doctors from prosecution, there is no reason

71. Under the 1969 abortion law each special hospital board is to be composed of two physicians. N.M. Stat. Ann. § 40A-5-1 (D) (Supp. 1969). This composition is unworkable, since disagreement would end in stalemate. The hospitals recognize this and have more than two members on their special boards.

72. Appendix A, *infra.*

73. Appendices B and C, *infra.*

to believe that the decision of two physicians, in consultation, under the former laws, would not have been any less a protection from prosecution. Whether the certification insulates them from liability, or not, there is no reason to believe that the certification of a hospital board is any more or less valid or desirable than the decision of two doctors in consultation as authorized under the older laws. In fact, the two doctors in consultation may be an obstetrician and a psychiatrist; the two on the hospital board may be specialists in fields unrelated to the medical problems which may arise from a continuation of the pregnancy.[74]

No special hospital board is required to decide whether delicate brain surgery is to be performed on any particular patient. This is the surgeon's decision, in consultation with and upon the consent of the patient. If the surgeon makes a mistake, he is subject to civil liability for malpractice. Why should the decision-making and liability be any different in the case of abortion?

The prior laws did not require abortions to be performed in a hospital—the 1969 law does. The requirement is not objectionable, but it may be unnecessary. The doctor will use the hospital for abortion if hospitalization is necessary or desirable. If he does not use the hospital, and he is negligent for that reason, he will be sued. The situation would be no different than any other medical problem. In addition, it is conceivable, if not likely, that abortions in the future will be produced by a pill, and hospitalization would then be completely unnecessary.

b. *The Rape Justification*

A victim of rape must "present"[75] an affidavit "that the rape has been or will be reported to an appropriate law enforcement official." This is unfair to the woman and to her family. In many, if not most cases of rape, the woman and her husband or parents do not want to publicize the incident. They certainly may not want to go through a trial on the issue. Why force the publicity and trial, and why refuse an abortion, where the woman will not reveal the rapist? The lawmakers seem to have forgotten the presumed purpose of permitting an abortion on the ground of rape, *viz.*, the psychological distress of

74. The 1969 abortion law has no requirement that one of the physicans on the board be a psychiatrist, or an obstetrician, or any particular specialist. The basis for consultation between doctors on a medical question is for educated and expert advice and opinion by specialists about a medical condition. There is no reason to believe that consultation of two physicians constituting a special hospital board would have any more competence than two physicians in consultation under older laws. Even consultation should not be required, unless necessary. Hawaii's 1970 abortion law does not require it.

75. The law does not say that the woman must "make" or "sign" an affidavit. She need only "present" one. N.M. Stat. Ann. §40A-5-1(C)(3) (Supp. 1969).

the victim. The shock of a rape trial could be psychologically as bad for the victim as the rape itself.

The woman pregnant from incest need not report the crime. Why is rape treated differently?[76] The distinction is discriminatory and irrational.

The affidavit is probably useless. Unless the hospital delays abortion until the rape has been reported to the law enforcement officials, or unless the hospital itself reports the rape, the woman may obtain the abortion and not report the rape. If she does report the rape, she can refuse to testify at trial, and the district attorney would probably not subpoena her and prosecute.

c. *The Incest Justification*

The incest ground for abortion does not cite the New Mexico criminal incest statute. The rape ground, however, expressly cites the New Mexico criminal rape provisions. There is no definition of incest in the 1969 abortion law.[77] Does the exclusion of the New Mexico criminal incest statute under these circumstances mean that the legislators did not intend to limit the definition of incest to that which is in the New Mexico criminal statute? What definition did the legislators have in mind?

Incest is defined differently in different states. What is the special hospital board to do if the intercourse occurs in another state and is "incestuous" under the laws of that state, but is not incestuous under the laws of New Mexico? By omitting the references to New Mexico's laws defining incest, to what guidelines does the board turn when considering the justification for abortion?

d. *What is the "Untimely Termination of Pregnancy"?*

The 1969 abortion law appears to cover all unjustified terminations of pregnancy from the time the fertilized ovum starts to be implanted in the uterus until childbirth. But does it really?

The law forbids producing an "untimely termination of . . . pregnancy." Pregnancy is defined as "the implantation of an embryo in the uterus." The law forbids, therefore, producing an untimely ter-

76. Incest is different from rape in one major respect. The case for aborting incestuous offsprings may be stronger because there is some basis for believing that inbreeding involves some chance of producing defective offspring. Also, there is no possibility that the offspring can be legitimized by marriage of the parents. *See* Model Penal Code § 207.11, Comment at 155 (Tent. Draft No. 9, 1959). Still, however, both are crimes in New Mexico. The rape sections are N.M. Stat. Ann. § § 40A-9-2 to 4 (Repl. 1964). The incest section is N.M. Stat. Ann. § 40A-10-3 (Repl. 1964). Notwithstanding differences, or that one may be voluntary and the other involuntary, there is no reason to treat them differently procedurally.

77. Incest is defined in the criminal section, N.M. Stat. Ann. § 40A-10-3 (Repl. 1964), and in the section which declares incestuous marriages void, N.M. Stat. Ann. § 57-1-7 (Repl. 1962).

mination of the implantation of an embryo in the uterus. A strict reading of this language is that all that is unlawful is an abortion during those few days within which the embryo becomes implanted in the uterus.

The law nowhere defines the words "embryo" or "fetus." "Embryo" appears in the definition of "pregnancy" and "fetus" appears in the definition of criminal abortion as an ingredient of the element "with intent to destroy the fetus." The embryo and the fetus are not the same.[78] The embryo exists about 12 weeks, and then becomes a fetus. Again, a strict reading of the law would be that it is not a crime to terminate pregnancy if the intent is to destroy the embryo, rather than the fetus. Strictly construed, only the untimely termination of pregnancy from approximately the 13th week of pregnancy to childbirth, when the fetus exists, would be unlawful.

e. *The Consent Requirement*

If a woman is under 18 years old, under the 1969 abortion law the hospital board must have both the woman's consent and that of "her then living parent or guardian." Does living parent mean one parent or two?[79] Suppose a single 17 year old woman's parents are alive, but unlocatable. Is she to be denied an abortion?

The consent of a husband is not required in any case under the 1969 law. He is not his wife's guardian.[80] If a 17-year-old woman is married, is it still necessary for her to have the consent of a parent or guardian?[81]

CONCLUSION

The direct, immediate, and intimate effect of embryonic and fetal

78. *See* People v. Belous, 71 A.C. 996, 80 Cal. Rptr. 354, 362, 458 P.2d 194, 202 (1969), Abortion in America (Rosen ed. 1967); R. Cooke, A. Hellegers, R. Hoyt, H. Richardson, The Terrible Choice: The Abortion Dilemma, 35-39 (1968).

79. The intent of the drafter of the 1969 abortion law was that just one parent's consent be necessary, so that the objection of an "irate father" could not stop a justified abortion, and also to permit an abortion in cases in which the pregnant woman has only one parent available, e.g., in broken home situations, and in cases in which the father is a migrant worker.

80. N.M. Att'y Gen. Op. No. 4462, (1941-1944).

81. These questions remain: Will she be considered emancipated, and will the emancipation be considered reason to dispense with the consent of the parent or guardian? If, when married, the consent of her parent or guardian is unavailable or considered by a court unnecessary, can she obtain an abortion upon her own request, without her husband's consent?

Once married, a woman cannot have a guardian of her own person. N.M. Stat. Ann. § 32-1-42 (1953). She may marry with the consent of her parents or guardians if she is 16 years old. N.M. Stat. Ann. §57-1-6 (Repl. 1962). A district court can authorize the marriage of a woman under 16 years old where the woman is pregnant. N.M. Stat. Ann. § 57-1-6 (Repl. 1962).

existence and the termination thereof is upon the family. It is not upon society. When desired, agreed to, and understood by the woman seeking it, termination of pregnancy possesses no element of evil which detrimentally affects the public as a whole or endangers the health, welfare, or safety of society. There is no collective judgment of the people of this country that the embryo or fetus is morally entitled to survive. Termination of pregnancy under medically safe conditions should not be a crime. It is abritrary and unreasonable to punish conduct such as this based on a consensual patient-physician relationship wherein a decision to terminate pregnancy is usually always formed from serious consideration of the consequences.

Any plea for the inviolability of embryonic and fetal existence, to support criminal abortion laws such as the 1969 abortion law, should not override the mother's right to choose whether to bear children. The notion of a moral right to survive is religious and should be imposed solely upon those who volunteer to accept it. Criminal abortion laws should be based only on contemporary medical and sociological knowledge; not ethical or religious beliefs.

There is no good reason for the 1969 criminal abortion law. There are good reasons for its abolition. It is unnecessary, undesirable, and unconstitutional. It should be repealed.

Appendix

APPENDIX A

New Mexico's 1907 Abortion Law N.M. Code § § 1463, 1464 (1915)

§ 1463. Killing unborn child.

SEC. 14. The willful killing an unborn infant child by any injury to the mother of said child which would be murder if it resulted in the death of such mother shall be deemed murder in the second degree.

§ 1464. Abortion

SEC. 15. Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother and shall have been advised by a physician to be necessary for such purpose, shall, in case the death of such child or such mother be thereby produced, be deemed guilty of murder in the second degree.

APPENDIX B

New Mexico's 1919 Abortion Law N.M. Stat. Ann. § § 40-3-1, -3 (1953)

40-3-1. Abortion—Penalty.—Any person who shall administer to any pregnant woman any medicine, drug or substance whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand ($2,000.00) Dollars, nor less than five hundred ($500.00) Dollars, or imprisoned in the penitentiary for a period of not less than one [1] nor more than five [5] years, or by both such fine and imprisonment in the discretion of the court trying the case.

40-3-2, Abortion causing death—Murder in second degree—When abortion permitted.—Any person committing such act or acts mentioned in section 1 [40-3-1] hereof which shall culminate in the death of the woman shall be deemed guilty of murder in the second degree; Provided, however, an abortion may be produced when two [2] physicians, licensed to practice in the state of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury.

40-3-3. "Pregnancy" defined.—For the purpose of the act, the term "pregnancy" is defined as that condition of a woman from the date of conception to the birth of her child.

APPENDIX C

New Mexico's 1963 Abortion Law, N.M. 1964 Stat. Ann. § § 40A-5-1, -3 (Repl. 1964)

40A-5-1. Criminal abortion.—Criminal abortion consists of administering to any pregnant woman any medicine, drug or other substance; or operating upon her; or using any method or means whereby an untimely interruption of her pregnancy is produced, or attempted to be produced, with intent to destroy the fetus.

Whoever commits criminal abortion upon another is guilty of a fourth degree felony; provided whoever commits criminal abortion which results in the death of the woman is guilty of a second degree felony.

40A-5-2. "Pregnancy" defined.—The term "pregnancy" is defined as that condition of a woman from the date of conception to the birth of her child.

40A-5-3. Permissive abortion.—An abortion may lawfully be permitted when two [2] physicians who are licensed to practice in this state, in consultation, deem it necessary to preserve the life of the woman or to prevent serious and permanent bodily injury.

APPENDIX D

New Mexico's 1969 Abortion Law, N.M. Stat. Ann. § § 40A-5-1, -3 (Supp. 1969)

40A-5-7. 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.

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.

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.