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## THE FLORIDA ABORTION LAW—REFORM OR REGRESSION IN 1972?\*

Between 8,000-9,000 legal abortions are performed each year in the United States;<sup>1</sup> this figure is exceeded, however, by the estimated 10,000 deaths<sup>2</sup> from the one-quarter million to two million illegal abortions performed annually.<sup>3</sup> Thus, the nation's abortion laws, generally enacted in the last century, have become the subject of increasing public controversy and discussion.<sup>4</sup> Alterations in the abortion laws of different nations in recent years attest the worldwide uncertainty over moral and legal policy toward abortions.<sup>5</sup> The medical danger of illegal abortions is the only point of global consensus.<sup>6</sup> This commentary examines Florida's current abortion law and evaluates possible alternatives for legislative revision.

### FLORIDA'S ABORTION LAW

An abortion before the "quickening"<sup>7</sup> of the fetus was not criminal at common law.<sup>8</sup> Nevertheless, statutes prohibiting abortion began appearing as early as 1803.<sup>9</sup> Florida's abortion law was enacted in 1868,<sup>10</sup> and it has remained unchanged since that date.<sup>11</sup> The number of cases prosecuted under the Florida abortion law since its inception is unknown; only seven cases have been reported at the appellate level.<sup>12</sup>

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\*EDITOR'S NOTE: Florida's abortion statute was recently declared unconstitutional by the Florida supreme court in *State v. Barquet, Wes & Greene*, No. 41596 (Fla. Feb. 14, 1972). Presently, several abortion bills are being considered by the Florida Legislature.

1. L. LADER, *ABORTION* 24 (1966).

2. *Id.* at 3-4.

3. *Id.* at 2.

4. See, e.g., Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730 (1968).

5. D. CALLAHAN, *ABORTION: LAW, CHOICE AND MORALITY* 1 (1970).

6. *Id.*

7. "Quickening" is the first motion of a fetus felt by the mother. It usually occurs about the middle of pregnancy—from the sixteenth to the twentieth week. B. MALOY, *MEDICAL DICTIONARY FOR LAWYERS* 598 (3d ed. 1960).

8. R. PERKINS, *CRIMINAL LAW* 140 (2d ed. 1969).

9. L. LADER, *supra* note 1, at 79.

10. Fla. Laws 1868, ch. 1637, pt. III, §11.

11. FLA. STAT. §782.10 (1969): "Abortion.—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, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

12. *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971); *Carter v. State*, 155 So. 2d 787 (Fla. 1963); *Johnson v. State*, 91 So. 2d 185 (Fla. 1957); *Grimes v. State*, 64 So. 2d 920 (Fla. 1953); *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898); *Sinnefia v. State*, 100 So. 2d 837 (3d D.C.A. Fla. 1958).

Although the sole attack on the constitutionality of section 782.10 of the Florida Statutes was unsuccessful,<sup>13</sup> the Florida supreme court in *Walsingham v. State*<sup>14</sup> recently indicated in dictum that the constitutionality of the statute is highly questionable.<sup>15</sup> Legislative correction of various deficiencies in section 782.10 was requested by the court.<sup>16</sup>

The primary deficiency of the Florida abortion law arises from the words "necessary to preserve the life of the mother." It is suggested that this phrase is so vague and indefinite that it violates the principle that no person may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes.<sup>17</sup> Although the supreme court in *Walsingham* indicated that the vagueness might be cured by appropriate rewording,<sup>18</sup> it also raised another potential constitutional issue. Since the only legal abortions are those necessary to preserve the mother's life, the court observed that this sole exception is an unreasonable refusal to recognize advances in medical technology.<sup>19</sup> Thus, section 782.10 may also violate substantive due process.

### *Legislative Alternatives*

The judicial request for revision of the abortion statute by the Florida supreme court leaves several legislative alternatives. First, the present statute could be amended to conform with the judicial interpretation set forth in *Walsingham*. An amendment such as this is quite undesirable. Allowing an abortion only when the woman's life or health are endangered is generally referred to as a "restrictive abortion statute"<sup>20</sup> — the most widely used type of abortion law in the United States today.<sup>21</sup> Most states have enacted restrictive statutes for two reasons. First, their implicit cultural background embodied the Judeo-Christian belief in the right to life and the necessity of its preservation.<sup>22</sup> Second, the restrictive abortion laws were meant to protect the health and life of pregnant women by keeping them out of the hands of incompetent abortionists and by restraining them from attempting self-induced abortions.<sup>23</sup> As a result of restrictive statutes, however, many women desiring an abortion are forced to seek the services of a criminal abortionist and, in so doing, may become criminals themselves.<sup>24</sup> The most tragic aspect of this

13. *Carter v. State*, 155 So. 2d 787 (Fla. 1963).

14. 250 So. 2d 857 (Fla. 1971).

15. The court reversed the case on grounds of an erroneous instruction to the jury and thus avoided any constitutional issues. *Id.* at 862.

16. *Id.*

17. *Id.* at 861.

18. The court indicated that the statute may be cured by substituting the word "health" for the word "life." *Id.* at 860-61.

19. *Id.*

20. See George, *Current Abortion Laws: Proposals and Movements for Reform*, in *ABORTION AND THE LAW* 36 (D. Smith ed. 1967).

21. D. CALLAHAN, *supra* note 5, at 126.

22. *Id.*

23. *Id.*

24. See e.g., Lucas, *supra* note 4.

situation is that an operation that would be relatively safe and simple if performed under proper conditions becomes a serious health hazard.<sup>25</sup> Thus, restrictive laws prevent a woman from making her own decision concerning the continuation of a pregnancy without a compelling societal justification.<sup>26</sup>

The second choice available to the Florida Legislature is to specify a wide range of acceptable circumstances allowing an abortion and to establish prescribed abortion procedures. This type of statute is commonly referred to as a "therapeutic abortion act."<sup>27</sup> The American Law Institute has recommended such an act for medical, psychiatric, fetal, and humanitarian reasons.<sup>28</sup> With some variations eleven states have adopted therapeutic abortion laws.<sup>29</sup> Although the therapeutic statute appears liberal, estimates indicate that it would legitimize no more than five per cent of presently illegal abortions.<sup>30</sup> Therapeutic abortion acts thus offer little material improvement over restrictive abortion laws.

The third legislative alternative represents a significant shift of interest from the first two categories. The first two types of abortion laws emphasize the interest of the unborn fetus; the third alternative shifts the concern to the individual interest of the woman and permits an abortion for almost any reason. Statutes of this type can be classified as limited abortion by choice.

No state has enacted a limited abortion by choice law. Much the same result, however, has been achieved by New York.<sup>31</sup> New York's statute permits an abortion within twenty-four weeks of commencement of pregnancy; justification for the operation is not required.<sup>32</sup> If the pregnancy has advanced beyond the twenty-fourth week, however, an abortion is permitted only to preserve the mother's life.<sup>33</sup> Asserting that medical advances no longer justified a restrictive abortion law, the New York legislators felt an individual's freedom of choice should prevail over limitations on the right to an abortion. One

25. D. CALLAHAN, *supra* note 5, at 131.

26. *Id.* at 129-30.

27. See George, *supra* note 20, at 26-30. "Therapeutic abortion" is the common term used to designate abortions for medical reasons.

28. MODEL PENAL CODE §220.3 (Proposed Official Draft 1962). This includes abortions for conception after rape or incest. Since adoption of the Therapeutic Abortion Act in California, almost 80% of the abortions there have been performed for psychiatric reasons. D. CALLAHAN, *supra* note 5, at 140-41.

29. ARK. STAT. ANN. §41-304 (1969); CAL. PENAL CODE §274 (West Supp. 1970); COLO. REV. STAT. ANN. §§40-20-50 to -53 (1967); DEL. CODE ANN. tit. 24, §1790 (1970); GA. CODE ANN. §26-9920a (1969); KAN. STAT. ANN. §21-3407 (Supp. 1970); MD. CODE ANN. art. 43, §137 (1971); N.M. STAT. ANN. §40A-5-1 (Supp. 1971); N.C. GEN. STAT. §14-45.1 (1969); ORE. REV. STAT. §435.415 (1969); VA. CODE ANN. §§18.1-62 to -62.1 (Supp. 1970).

30. N. MIETUS, THE THERAPEUTIC ABORTION ACT A STATEMENT IN OPPOSITION 6 (1967).

31. N.Y. Penal Law §125.05 (3) (McKinney Supp. 1970-1971).

32. "An abortifacient act is justifiable when committed upon a female with her consent by a duly licensed physician . . . (b) within twenty-four weeks from the commencement of her pregnancy." *Id.*

33. "An abortifacient act is justifiable when committed upon a female with her consent by a duly licensed physician . . . (a) under a reasonable belief that such is necessary to preserve her life . . ." *Id.*

sponsor of the New York bill stated: "One of the most important things that we felt we were doing when we brought the legislation out in its current form was that we would be preserving freedom of choice and insuring freedom of choice with respect to the individual herself."<sup>34</sup>

A fourth type of abortion act is one that would simply prescribe the abortion process to be followed without a limitation on the period in which the abortion may be performed; the choice is left completely to the woman. This represents the most liberal approach to abortion law in the United States. Alaska,<sup>35</sup> Hawaii,<sup>36</sup> and Washington<sup>37</sup> have enacted such legislation. These statutes provide that all abortions must be performed by licensed physicians in a licensed hospital and establishes residency requirements for those seeking an abortion. This represents the ultimate of freedom of choice legislation; any decision not to have an abortion on either religious or moral grounds is left exclusively to the woman and is not imposed upon her by the state.

Another possible approach to abortion is to leave it completely unregulated by repealing all abortion laws. Unregulated abortion, however, is as undesirable as very restrictive abortion laws and no state has adopted this approach.<sup>38</sup> Complete repeal would permit someone without medical training to perform an abortion under any circumstances, regardless of sanitary conditions. The undesirable effects of having no abortion laws are apparent.

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34. New York City Bd. of Health, Public Hearing on Proposed Amendment (Article 42—Abortion Services to New York City Health Code) 78 (1970).

35. ALASKA STAT. §11.15.060 (1970).

36. HAWAII REV. STAT. §453-16 (Supp. 1970).

37. WASH. REV. CODE §9.02.010 (1970).

38. All fifty states and the District of Columbia have legislation regulating abortion to some degree: ALA. CODE tit. 14, §9 (1958); ALASKA STAT. §11.15.060 (1970); ARIZ. REV. STAT. ANN. §13-211 (1956); ARK. STAT. ANN. §41-304 (1969); CAL. PENAL CODE §274 (West Supp. 1970); COLO. REV. STAT. ANN. §§40-2-50 to -53 (1967); CONN. GEN. STAT. ANN. §53-29 (1958); DEL. CODE ANN. tit. 24 §1790 (1970); FLA. STAT. §782.10 (1969); GA. CODE ANN. §26-9920a (1969); HAWAII REV. LAWS §453-16 (Supp. 1970); IDAHO CODE ANN. §18-601 (1948); ILL. ANN. STAT. ch. 38, §23-1 (Smith-Hurd 1970); IND. ANN. STAT. §10-105 (1956); IOWA CODE ANN. §701.1 (1950); KAN. STAT. ANN. §21-3407 (Supp. 1970); KY. REV. STAT. §436.020 (1969); LA. REV. STAT. §14:87 (1971); ME. REV. STAT. ANN. tit. 17, §51 (1965); MD. ANN. CODE art. 43, §137 (1971); MASS. GEN. LAWS ANN. ch. 272, §§19, 20 (1962); MICH. STAT. ANN. §750.14 (1968); MINN. STAT. ANN. §617.18 (1964); MISS. CODE ANN. §2223 (1968); MO. ANN. STAT. §559.100 (1953); MONT. REV. CODES ANN. §94-401 (1969); NEB. REV. STAT. §28-405 (1965); NEV. REV. STAT. §201.120 (1963); N.H. REV. STAT. ANN. §285.13 (1955); N.J. STAT. ANN. §2A-87-1 (1969); N.M. STAT. ANN. §40A-5-1 (Supp. 1971); N.Y. PENAL LAW §125.05 (1970); N.C. GEN. STAT. §14-45.1 (1969); N.D. CENT. CODE §12-25-01 (1960); OHIO REV. CODE ANN. §2901.16 (1954); OKLA. STAT. ANN. tit. 21, §861 (1970); ORE. REV. STAT. §435.415 (1969); PA. STAT. ANN. tit. 18, §4718 (1963); R.I. GEN. LAWS ANN. §11-3-1 (1956); S.C. CODE ANN. §16-82 (1962); S.D. LAWS ANN. §22-17-1 (1967); TENN. CODE ANN. §39-301 (1956); TEX. PENAL CODE ANN. art. 1191 (1961); UTAH CODE ANN. §76-2-1 (1953); VT. STAT. ANN. tit. 13, §101 (1958); VA. CODE ANN. §§18.1-62 to -62.1 (Supp. 1970); WASH. REV. CODE §9.02.010 (1961); W. VA. CODE ANN. §61-2-8 (1966); WIS. STAT. ANN. §940.04 (1958); WYO. STAT. §6-77 (1959); D.C. CODE ANN. §22-201 (1961).

*Constitutionality of Abortion Laws*

In adopting new legislation to resolve the abortion dilemma in Florida, the legislature must recognize that any restrictive bill may not survive a constitutional challenge at the federal level or, in light of *Walsingham*,<sup>39</sup> the state level. Abortion statutes have been successfully challenged as being unconstitutionally void for vagueness.<sup>40</sup> In *Lanzetta v. New Jersey*<sup>41</sup> the United States Supreme Court held that a statute violates due process of law if it forbids or requires the doing of an act in terms so vague that reasonable men must guess at the meaning of the statute and will differ as to its application.<sup>42</sup>

Much of the conflict over the constitutionality of abortion laws may have been resolved by a recent decision by the United States Supreme Court. In *United States v. Vuitch*<sup>43</sup> the Court upheld a statute prohibiting all abortions except those "necessary to preserve the health of the mother." It was observed that physicians were routinely called upon to decide whether an operation was necessary to a person's mental or physical health, and therefore the word "health" presented no problem of vagueness.<sup>44</sup> Significantly, the Court stated that "health" contemplates mental health as well as physical well-being.<sup>45</sup>

A second major challenge to the constitutionality of abortion statutes has centered on judicial acknowledgment of a right of privacy in matters related to family, marriage, and sex.<sup>46</sup> The right of privacy doctrine is derived from the United States Supreme Court's landmark decision in *Griswold v. Connecticut*,<sup>47</sup> which held that birth control involved a personal relationship that lay within a zone of privacy protected by several constitutional guarantees.<sup>48</sup>

39. 250 So. 2d 857 (Fla. 1971).

40. A vagueness attack on such phrases as "necessary to preserve the life of the mother" has been made upon the abortion statutes of several states with a resulting morass of conflicting opinions. The California supreme court held that neither dictionary definitions nor judicial interpretations have provided a clear meaning to the words "necessary" or "preserve" or the phrase "necessary to preserve." *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). A federal district court in Texas held that these words contained fatal uncertainties, *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971). But a federal district court in Wisconsin disagreed and held that the words were not so vague that a person may guess at their meaning. *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970); *accord*, *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970).

41. 306 U.S. 451 (1939).

42. *Id.* at 453.

43. 402 U.S. 62 (1971).

44. *Id.* at 72.

45. *Id.* Justice Douglas would have affirmed the lower court's holding that the statute was void for vagueness. In support of his dissent he cited the decisions of *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971); *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354, *cert. denied*, (1969) 397 U.S. 915 (1970). 402 U.S. 62, 75, 76 (1971) (dissenting opinion). See note 40 *supra*.

46. *People v. Belous*, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970).

47. 381 U.S. 479 (1965).

48. *Id.* at 485.

The *Griswold* concept of privacy has been utilized to invalidate the abortion laws of several states.<sup>49</sup> In these decisions the courts held that a woman may not be deprived of the right to decide whether to have children.<sup>50</sup> Nevertheless, courts have recognized that certain aspects of abortion may be regulated by the state police power where a compelling state interest is shown. Thus, the state may require abortions to be performed by competent persons<sup>51</sup> in adequate surroundings.<sup>52</sup> Furthermore, under the *Griswold* concept the state may regulate consultation requirements prior to the abortion, but the number of reasons for an abortion may not be limited.<sup>53</sup>

Abortion statutes have also been challenged as a denial of equal protection. There are two main bases for this contention: (1) that a poor woman in a state where abortions were illegal could not afford a legal abortion elsewhere and (2) that a variance of the quality of medical facilities within a state may make an abortion necessary to save the mother's life in a rural area and unnecessary in an urban area.<sup>54</sup> The equal protection challenges have been unsuccessful, however, and have been considered an unwarranted extension of the equal protection doctrine.<sup>55</sup>

When considering abortion statutes, courts have set aside problems of over-population as well as theological and ecclesiastical arguments as being secondary decisional factors in the judicial resolution of the constitutionality of abortion laws.<sup>56</sup> The courts have also recognized the changing public opinion toward the propriety of criminal abortion statutes, but have said that public opinion cannot be substituted for the legislative enactments.<sup>57</sup>

Although the Supreme Court has expressed no opinion on abortion per se, the court is considering whether to hear two cases in which the constitutionality of abortion laws is at issue.<sup>58</sup> While the outcome of these decisions is not easily predicted, Mr. Justice Douglas has already stated that abortion is within the constitutionally protected right of privacy as expressed in *Griswold*.<sup>59</sup>

49. *E.g.*, *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970).

50. *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971); *Babbitz v. McCann*, 310 F. Supp. 293, 302 (E.D. Wis. 1970).

51. *Babbitz v. McCann*, 310 F. Supp. 293, 302 (E.D. Wis. 1970).

52. *Roe v. Wade*, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970).

53. *Doe v. Bolton*, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971).

54. *Babbitz v. McCann*, 310 F. Supp. 293, 298 (E.D. Wis. 1970).

55. *Steinberg v. Brown*, 321 F. Supp. 741, 748 (N.D. Ohio 1970).

56. *Babbitz v. McCann*, 310 F. Supp. 293, 299 (E.D. Wis. 1970).

57. *Steinberg v. Brown*, 321 F. Supp. 741, 749 (N.D. Ohio 1970); *State v. Shirley*, 237 So. 2d 676, 678 (La. 1970).

58. *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971).

59. *United States v. Vuitch*, 402 U.S. 62, 78 (1971) (dissenting opinion).

## CONCLUSION

Commentators have noted that legislatures are reluctant to undertake any abortion reform.<sup>60</sup> Attempts have been made to reform the abortion laws in Florida, but all have failed.<sup>61</sup> Nevertheless, the dictum of the Florida supreme court in *Walsingham v. State*<sup>62</sup> indicates that the legislature must again attempt to change the Florida abortion laws.<sup>63</sup> The judicial request by the Florida supreme court for legislative reform could be an opportunity to liberalize our abortion laws,<sup>64</sup> but unfortunately this does not seem to be the approach taken by the Judiciary-Criminal Committee studying abortion bills. The committee is particularly interested in a bill that would allow abortion "of any fetus that with medical certainty, is afflicted with a genetic defect causing severe mental retardation."<sup>65</sup> "Reform" such as this would be little more than rewording the present abortion statute and would not resolve the dilemma of a woman who desires an abortion for other than medical reasons.

Hopefully, the 1972 Florida Legislature will move toward a limited freedom of choice abortion statute such as that enacted in New York.<sup>66</sup> This type of statute would reduce the number of illegal abortions by insuring proper medical facilities and licensed physicians in those instances where a woman wants an abortion for reasons other than "preserving her life."

The attitude of many can be summed up by the words of one Florida supreme court justice: "[T]he [abortion] statute intrudes into the area of personal liberty of women and does it crudely in vague, uncertain, archaic language."<sup>67</sup>

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60. See, e.g., Note, *Toward a Judicial Reform of Abortion Laws*, 22 U. FLA. L. REV. 59, 72 (1969).

61. Six separate bills calling for reform were killed in committee by the 1971 legislature. St. Petersburg (Fla.) Times, March 19, 1971, §B at 1, cols. 1-8. A bill based on the model statute of the American Law Institute passed the house. St. Petersburg (Fla.) Times, April 29, 1969, §A at 1, col. 6. However, the bill was defeated in a senate committee. St. Petersburg (Fla.) Times, May 16, 1969, §B at 1, col. 7.

62. 250 So. 2d 857 (Fla. 1971).

63. When considering reform of the abortion statute the legislature should also take a close look at FLA. STAT. §797.02 (1969), concerning advertising for abortion. It is quite likely that this statute could be struck down as void for vagueness. The statute prohibits all printing of abortion information regardless of the nature of the material promulgated. Thus, several national magazines could be found in violation of this statute, since they frequently print articles and advertisements indicating where *legal* abortions may be obtained.

64. "Abortion should be a personal judgment between a woman and her doctor. They [sic] should be performed in a licensed hospital or clinic. That's the only law Florida really needs." St. Petersburg (Fla.) Times, July 14, 1971, §A at 18, col. 2.

65. St. Petersburg (Fla.) Times, Sept. 1, 1971, §B at 3, col. 8.

66. See text accompanying notes 31-34 *supra*.

67. *Walsingham v. State*, 250 So. 2d 857, 864 (Fla. 1971) (Ervin, J., concurring).