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Survey of Abortion Reform Legislation

anon

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requirement in *Kent* that the statute be read in the light of constitutional principles of due process and the assistance of counsel,[22] the *Kent* result should have been adopted.

Gault established that the loss of liberty attendant upon a juvenile court determination of guilt is analogous to criminal incarceration.[23] If counsel is required at the adjudication stage, counsel should also by implication be required at the waiver proceeding where access to juvenile court is determined.[24]

Adequate consideration of either the critical stage of *Kent-Gault* rationale should have led the court to the conclusion that counsel was required for defendant in the principal case. It is to be hoped that other courts, guided by the *Gault* decision and its interpretation of *Kent*, would require appointment of counsel at waiver. Decisions such as the principal case bode ill for state court reception of Supreme Court cases relating to juvenile court due process.

SURVEY OF ABORTION REFORM LEGISLATION*

During the past year governments have felt increasing pressure for reform of their abortion statutes. California, Colorado, North Carolina, and Great Britain[1] recently enacted new abortion statutes.

Abortion statutes[2] seek two ends: 1) a definition of the crime of

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[22] 383 U.S. at 551 (1966).

[23] *See* note 18 *supra*.

[24] For further discussion on the distinction between juvenile proceedings and criminal proceedings, see note 10 *supra*.

*"Abortion" elicits numerous moral and philosophical responses. This note does not attempt to review the general discussions which surround these responses. This posture was adopted for two reasons: 1) the extent to which the new abortion statutes evidence a shift of moral or philosophical stance is at best conjectural and 2) the doctrinal approach has received generous space in other works. *See generally* ABORTION AND THE LAW (D. Smith ed. 1967), first published in 17 W. RES. L. REV. 369 (1965). *See also*, Lorensen, *Abortion and the Crime-Sin Spectrum*, 70 WEST. VA. L. REV. 20 (1967).

[1] The official text of the British statute is not available at the time of this writing. Reference in this note to that statute is based on the reproduction of the crucial sections of the Abortion Bill as of its second reading in the House of Commons found at Samuels, *Termination of Pregnancy—A Lawyer Considers the Arguments*, 7 MED. SCI. & LAW 10, 11 (1967).

[2] Under the common law, induced abortion prior to "quickening" was not criminal. Comment, *The Legal Status of Therapeutic Abortion*, 27 U. PITT. L. REV. 669, 672 (1965-66). "Quickening" was taken as that stage of gestation—usually sixteen to twenty weeks following conception—when the mother first feels fetal movements. The rule is perhaps best stated by Blackstone: "Life... begins in contemplation of law as soon as the infant is able to stir in the mother's womb." I COMMENTARIES 129 (14th ed. 1803). It was believed that life or soul entered the fetus at this time. This view is often attributed to St. Thomas Aquinas. G. WILLIAMS, THE SANCTITY

abortion and 2) the creation of a procedure for implementing the statute definition. Definition is accomplished by declaring purposeful miscarriage unlawful except in certain generalized situations.[3] The procedure then designates who determines when an excepting situation exists. Therefore, the decision to terminate a pregnancy raises two issues—*who* shall make the decision and on *what* bases. This note will examine the impact of recent abortion reform legislation on these issues.

WHO MAKES THE DECISION?

The most permissive procedure would designate the mother as decision-maker. This could be characterized as termination on demand. The rationale for such a procedure may stem from the feeling that:[4]

> In a pluralist, secular society freedom of choice is a desirable moral and social aim provided that no harm is inflicted upon others, individually and collectively, the interests of society are not adversely affected, and the burden placed upon the medical profession is not unmeasurable.

The failure of any state legislature to adopt this procedure may evidence the non-qualification of contemporary America as "a pluralist, secular society" or merely that "the interests of society" include the preservation of a common attitude toward the sanctity of life as reflected by the criminal code. The rejection is clearly not due to administrative difficulty because demand is the only requisite for termination.

The abortion statute of the State of Washington presents the typical American procedure.[5] Determinations relevant to termination are

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OF LIFE AND THE CRIMINAL LAW 151 (1957). But the 1803 English codification of the law of abortion rejected the common law rule and declared that abortion prior to quickening was a felony—though a lesser crime than abortion committed after quickening. 43 Geo. 3, c. 58 (1803). The crime of abortion could be committed at any time from conception to delivery.

[3] The term abortion thus becomes a term of art usually connoting illegality. That this connotation is less than universal is demonstrated by Colorado's use of the term "Criminal Abortion." This note will refer to abortion as an illegally intended miscarriage.

[4] Samuels, *supra* note 1, at 16.

[5] WASH. REV. CODE § 9.02.010 (1950):

> Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—
>
> (1) Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or,
>
> (2) Use, or cause to be used, any instrument or other means;
>
> Shall be guilty of abortion, and punished by imprisonment in the state penitentiary for not more than five years, or in the county jail for not more than one year.

implicitly left to the person performing the operation. Under this procedure, the practitioner examines his patient, reads the statute, and then acts. Like termination on demand, the Washington procedure provides for a preoperation decision to be made by a single individual. Unlike the former, however, the practitioner's decision to terminate under Washington law is reviewable in a criminal proceeding. The problem of the traditional approach is one of precisely controlling conduct through the criminal code. Because the practitioner's decision creates potential liability, he may hesitate to perform termination in any but the most obvious case. In this way the statute may have an unintended "chilling effect" on conduct. The Washington procedure may also lead to modification of the statute by the medical profession. This is possible because case law indicates that the decision to terminate will be judged in terms of prevailing medical opinion.[6] An operation which seems to violate the statute becomes immune from prosecution if the medical profession approves of the termination.

The recent reforms in California, Colorado, North Carolina, and Great Britain attempt to construct an authoritative preoperation procedure which can operate within the time limits of human gestation. The California law requires that the operation be approved by the medical staff committee of an accredited hospital.[7] The Colorado procedure is similar.[8] North Carolina requires three doctors, not engaged in joint practice, to certify that examination indicates legal

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[6] In State v. Powers, 155 Wash. 63, 67, 283 P. 489 (1929) the court said:

> If the appellant, in performing the operation, did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community with him and the same line of practice, then it cannot be said that the operation was not necessary to preserve the life of the patient.

[7] CAL. HEALTH AND SAFETY CODE § 25951 (West Supp. 1967):

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

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

[8] Ch. 190, [1967] Colo. Sess. Laws 284:

> (4) (a) "Justified medical termination" means the intentional ending of the pregnancy of a woman at the request of said woman or if said woman is under the age of 18 years, then at the request of said woman and her then living parent or guardian, or if the woman is married and living with her husband at the request of said woman and her husband, by a licensed physician using accepted medical procedures in a fully accredited hospital upon written certification by all of the members of a special hospital board. . . .
>
> (5) "Special hospital board" means a committee of three licensed physicians who are members of the staff of the hospital where the proposed termination would be performed if certified in accordance with this act and who meet

termination under the statutory conditions.[9] The English reform allows termination upon the good faith agreement of two licensed physicians that the termination is appropriate.[10]

The differences between reform and traditional approaches may affect the liability of physicians. The California and Colorado statutes have added an element to the crime of abortion—the non-existence of medical committee approval. The performing physician can insulate himself from prosecution for abortion by proving committee approval.[11] These two statutes do not require the doctor to evaluate the decision of the committee, but only to obtain its approval. While the decisions of Washington doctors who perform terminations are judicially reviewed, California and Colorado shift that review and the attendant liability to the hospital committees.[12] It should be noted, of course, that a showing of bad faith or collusion between

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regularly or on call for the purpose of determining the question of medical justification in each individual case, and which maintains a written record, signed by each member, of the proceedings and deliberations of such board.

[9] N.C. GEN. STAT. § 14-45.1 (Supp. 1967):

> Only after the said woman has given her written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent, and
>
> Only when the said woman shall have resided in the State of North Carolina for a period of at least four months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger, and
>
> Only if the abortion is performed in a hospital licensed by the North Carolina Medical Care Commission, and
>
> Only after threee doctors of medicine not engaged jointly in private practice, one of whom shall be the person performing the abortion, shall have examined said woman and certified in writing the circumstances which they believe to justify the abortion, and
>
> Only when such certification shall have been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, such certificate may be submitted within twenty-four hours after the abortion. (1967, c. 367, s. 2.)

[10] The English statute states: "A person shall not be guilty of an offence when a pregnancy is terminated by a registered medical practitioner if that practitioner and another registered medical practitioner are of the opinion, formed in good faith...," Samuels, *supra* note 1.

[11] Doctors in these two states can now predict quite reliably their potential criminal liability. All intended terminations which are not emergencies and are not performed pursuant to prior medical committee approval are violations of the statutes. Those terminations receiving committee approval no longer fit the statute definition of the illegal act.

[12] One must doubt the practical likelihood of abortion convictions against members of a hospital committee. This would be especially true if the Washington standard of prevailing medical opinion were applied. *See* note 6, *supra*. Even if these conceptual problems were overcome, the technical problem arises of whether a vote in favor of termination approval could be a violation of the abortion statute. If the committee approval is characterized as advice rather than mere permission, the committee would seem liable for erroneous decisions. Under this analysis what

the doctors and the examining board would negate the doctor's immunity.

In contrast, the procedures adopted by Great Britain and North Carolina merely extend the traditional approach. The decision and the liability is still with the practitioner, but he must now demonstrate some prior professional agreement.[13] The doctors will not be insulated from prosecution, but their evidentiary positions will improve. Because both statutes call for belief (explicitly "good faith" in the English statute and impliedly so in the North Carolina law) on the part of the examiners that statutory conditions exist, the prosecution will be able to impeach the doctors' testimony only through a showing of collusion or professional inadequacy by all the examiners.[14] One should note that the hospital committees in California and Colorado would stand on similar footing.[15]

The construction of these official procedures in no way evidences a "right" of the mother to have a legal termination. The California law *authorizes* its physicians to terminate upon committee approval.[16] North Carolina simply states that to produce a miscarriage in compliance with statutory procedure is *not unlawful.*[17] Colorado explicitly denies the existence of an affirmative duty on the part of any hospital to form an examining committee or to approve an appropriate termination.[18] Only the English statute, which provides that the expense

would be the position of a member of the committee who dissented from a committee denial of permission?

[13] *See* notes 9 and 10, *supra.*

[14] There exists the remote possibility of good faith inadequacy of agreeing physicians. More likely, an opinion "formed in good faith" implies the existence of an adequate basis for forming the opinion.

[15] Note 12, *supra.*

[16] CAL. HEALTH & SAFETY CODE § 25951 (West Supp. 1967):

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

[17] N.C. GEN. STAT. § 14-45.1 (Supp. 1967):

> ... it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that....

[18] Ch. 190, [1967] Colo. Sess. Laws 285, § 4:

> Nothing herein shall require a hospital to admit any patient under the provisions of this act for the purposes of performing an abortion, nor shall any hospital be required to appoint a special hospital board as defined in this act. 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 shall state in writing an objection to such termination on moral or religious grounds shall not be required to participate in the medical procedures which will result in the termination of a pregnancy and the refusal of any such person to participate shall not form the basis for any disciplinary or other recriminatory action against such person.

of the operation will be borne by the National Health Service, suggests that the qualifying applicant would be able to assert such a right.[19]

Like the mother, the fetus has failed to achieve an improved procedural position in the reform legislation. Some contemporary notions of the reproductive process fix life at the time of conception.[20] It is a short step from life to a right to life as protected in the fifth and fourteenth amendments. Can it be that termination pursuant to committee approval denies the fetus its right to counsel? As absurd as the notion appears at first blush, it takes on some plausibility in view of property rights and tort remedies afforded the fetus.[21] Who could establish standing to assert the rights of the fetus, assuming that both parents have consented to the operation? These questions will be mooted in most cases since human gestation tends to operate at a faster pace than does the judicial system.

On What Bases is the Decision Made?

Popular interest in abortion reform arises from the definitions which the new statutes supply for the examiners. These definitions attempt to generalize the conditions which justify termination. Under the traditional approach only terminations necessary to preserve the life of the mother are excluded from the crime of abortion.[22] All the reform acts expand this notion to provide termination where there is substantial risk of grave impairment of the physical or mental health of the mother or where the pregnancy is the result of rape or incest.[23] North Carolina and Colorado further allow termination

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[19] Samuels, *supra* note 1, at 11.

[20] *See generally* Drinan, *The Inviolability of the Right to Be Born*, in Abortion and the Law 107 (D. Smith ed. 1967).

[21] *See* T. Atkinson, Wills 75 (2d ed. 1953) and W. Prosser, Law of Torts 354-57 (3d ed. 1964).

[22] Wash. Rev. Code § 9.02.010 (1950) is one example. Only four state statutes provide no exception to the prohibition aginst intended miscarriage—Louisiana, Massachusetts, New Jersey, and Pennsylvania. George, *Current Abortion Laws: Proposals and Movements for Reform*, in Abortion and the Law 1 (D. Smith ed. 1967). Courts in two of these states have read in the "necessary to preserve the mother's life" exception. Commonwealth v. Brunelle, 341 Mass. 675, 171 N.E.2d 850, 852 (1961). State v. Brandenbur, 137 N.J.L. 124, 58 A.2d 709 (1948). This exception is important because it admits that even in these states protection of the fetus is not absolute. Reform statutes simply define expanded exceptions to this protection.

[23] *E.g.*, Cal. Health & Safety Code § 25950 (West Supp. 1967):

> (c) The Committee of the Medical Staff finds that one or more of the following conditions exist:
>
> (1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother;
>
> (2) The pregnancy resulted from rape or incest.

where there is substantial risk of a gravely defective child.[24] The English statute goes beyond any American statute to justify termination when the "pregnant woman's capacity as a mother will be severely overstrained by the care of a child or of another child. . . ."[25]

Each of the reform statutes passed in the last year has included grave impairment of the mother's physical health as a justification for termination. This is partly a recognition of the advance of medical science. Few medical conditions exist which are complicated by pregnancy to the extent that the mother's life is actually endangered.[26] But conditions which no longer endanger the mother's life may still condemn her to lasting ill health.[27] Thus preservation of life becomes preservation of healthy life. The granting of this exception relieves doctors from interpreting ambiguous symptoms as fatal. By eliminat-

[24] Ch. 190, [1967] Colo. Sess. Laws 284 (4) (a) (i): "[o]r the birth of a child with grave and permanent physical deformity or mental retardation. . . ." N.C. GEN STAT. § 14-45.1 (Supp. 1967): "When abortion not unlawful. . . . There is substantial risk that the child would be born with grave physical or mental defect. . . ."

[25] Samuels, *supra* note 1.

[26] Dr. Kenneth R. Niswander, M.D. reviewed the subject in his article, *Medical Abortion Practices in the United States* in ABORTION AND THE LAW 41 (D. Smith ed. 1967). The following appears at 41-45:

> (1) *Cardiovascular Disease*. . . . With improved prenatal care (including the significant advances recently provided by cardiac surgery), the number of women with cardiovascular disease whose life is actually in danger during pregnancy has decreased substantially.
>
> (2) *Gastrointestinal Diseases*. . . . There is general agreement that emotional factors affect the medical course of the patient with ulcerative colitis. Since pregnancy regularly and sometimes severely affects the emtional stability of women, it has been felt that pregnancy may adversely affect the outcome of this hazardous disease. Fortunately, the disease is not a common one.
>
> (3) *Renal Disease*. . . . The risk of nephrolithiasis cannot be minimized, but the instances when it might actually increase the risk of death in a pregnant patient seem remote.
>
> (4) *Neurologic Disease*. . . . There appears to be little evidence that the disease (multiple sclerosis) actually increases the risk of death during pregnancy. Much the same can be said about epilepsy in a pregnant patient.
>
> (5) *Pulmonary Disease*. . . . With the advent of drug therapy, tuberculosis has practically disappeared as an indication for therapeutic abortion.
>
> (6) *Diabetes Mellitus*. . . . The maternal mortality rate, however, is currently considered to be essentially the same among diabetic patients as with the overall pregnant population.
>
> (7) *Malignancy*. . . . Majury says that "no convincing evidence has been produced which shows that subsequent pregnancy affects adversely the prognosis sion, carcinoma in other locations) has also been an accepted indication for in extra-uterine malignancy." A history of carcinoma of the bowel (or, on occa- therapeutic abortion; however, there is no convincing evidence that pregnancy in any way adversely affects the outcome of these neoplastic diseases.
>
> (8) *Other Medical Diseases*. Rheumatoid arthritis, hyperthyroidism, lacerated cervix, multiple fibroids, mumps in the first trimester, and other miscellaneous diseases too numerous to mention have also indicated therapeutic abortion. It is difficult to prove that many of these diseases actually threaten the life of the pregnant patient, and social factors often seem to be a prominent consideration in the decision to abort.

[27] K. Ryan, M.D., *Humane Abortion Laws and the Health Needs of Society*, in ABORTION AND THE LAW 60, 69 (D. Smith ed. 1967).

ing this conflict—between absolute medical honesty and legal commands—the reforms may only be a more accurate description of the current medical interpretation of "necessary to preserve life."

The California, Colorado, and English statutes explicitly allow termination to protect the mental health of the mother.[28] California 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."[29] This apparent discrimination in favor of violent forms of psychosis may be the outgrowth of the practice under traditional statutes of granting "psychiatric abortions" where there is a threat of suicide. Colorado requires certification by a medical doctor specializing in psychiatry that the continued pregnancy will result in "serious permanent impairment of the mental health of the woman."[30] The English statute places no restrictions on the definition of the term,[31] and North Carolina relies only on the word "health."[32] Once the very real tragedies of mental illness resulting from carrying a child to term are recognized, this exception stands on the same justifying grounds as the exception for preservation of physical health. This too may be a reflection of medical practice under the traditional statutes which has seen a striking increase in the number of "psychiatric abortions."[33]

Only the California reform does not include substantial risk of a gravely defective child as justification for termination. The inclusion of this provision in the other statutes is empirically explainable by the 1964 rubella epidemic and the 1962 thalidomide tragedy.[34] Theoretical justification for such termination assumes either that the

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[28] CAL. HEALTH & SAFETY CODE § 25950 (West Supp. 1967); ch. 190, [1967] Colo. Sess. Laws 284: "(4) (a) (i) ... or the serious permanent impairment of the mental health of the woman as confirmed in writing under the signature of a licensed doctor of medicine specializing in psychiatry...."; English statute per Samuels, *supra* note 1. "(a) that the continuance of the pregnancy would involve serious risk to the life or of grave injury to the health, whether physical or mental, of the pregnant woman whether before, at or after the birth of the child...."

[29] CAL. HEALTH & SAFETY CODE § 25954 (West Supp. 1967).

[30] Note 28, *supra.*

[31] Note 28, *supra.*

[32] Under N.C. GEN. STAT. § 14-45.1 (Supp. 1967) abortion is not unlawful when "There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman...."

[33] Niswander, *supra* note 26, at 52.

[34] *Id.* at 46-47. The case receiving most publicity was that of Mrs. Sherri Finkbine who was denied a therapeutic abortion when it was discovered she had inadvertantly taken thalidomide. She eventually travelled to Sweden and obtained a termination. *See generally* Lader, *Scandal of Abortion Laws,* N.Y. Times, April 25, 1965, § 6 (Magazine), at 32.

defective unborn are better dead than alive,[35] or that social and psychological preferences outweigh the infringement of fetal rights. This view poses the operation in terms of preventive medicine. The doctor is allowed the full extent of his medical expertise in diagnosing and remedying the abnormality. Opponents of this view doubt that termination of life is a proper remedy in the science of healing.[36]

Termination of pregnancies resulting from rape is excused by all the reform statutes. To the extent that such a pregnancy risks serious impairment of the mother's mental or physical health, this provision does no more than enumerate a specific case already covered in general exceptions. To the extent the pregnancy does not produce that degree of impairment, this provision grants an exception on grounds other than medical. The rationale for the exception is questionable. If the fact of an unwanted pregnancy were the only criterion, termination upon demand would be the appropriate approach. The difference between unwanted pregnancies resulting from rape and other unwanted pregnancies is consent to sexual intercourse. Isolation of this element demonstrates the retributive focus of abortion prohibitions. Furthermore, one reform disallows termination for statutory rape where the girl is 15 or over,[37] thus requiring absence of consent for termination but not for a statutory rape conviction.

Only the British statute allows termination where "... the pregnant woman's capacity as a mother will be severely overstrained by the care of a child or of another child...."[38] To the extent that a woman's "capacity as a mother" includes factors other than her physical and mental health, this exception allows termination for social and economic reasons. What is the justification for this exception? The answer is a rather bold admission that the well-being of the mother and her other children is being favored over the well-being of the unborn. The condition requires a procedure which will act quickly taking into account medical conditions and their social impli-

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[35] Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967), held that even if the mother had been misled as to the chances of a defective child, and even if legal termination would have been possible, there could be no recovery since: 1) It is impossible to compare a defective baby with no baby at all, and 2) The right of mother and father not to be injured emotionally and financially does not outweigh right of the child to live.

[36] N. MIETUS, THE THERAPEUTIC ABORTION ACT—A STATEMENT IN OPPOSITION 35 (1967).

[37] CAL. HEALTH & SAFETY CODE § 25952 (c) (West Supp. 1967).

[38] Samuels, *supra* note 1.

cations. If doctors are not qualified to make these predictions, this exception may be challenged as desirable, but impractical.[39]

Satisfaction of the statute definition does not automatically allow termination. The North Carolina act further restricts the class of pregnancies eligible for termination by requiring a four month prior residency of the mother.[40] Apparently this requirement is a reaction to the fear that the new law would create an "abortion mill." One must note the ambiguous social policy resulting. The purpose of the statutory procedure is to discover certain facts. If those facts are found to exist, the termination is not criminal. If not encouraged, such terminations are at least approved. What is the characteristic of state residency that makes these terminations appropriate for North Carolina women, but inappropriate for similarly situated women from neighboring states? No state expense is incurred by the North Carolina procedure. Denying non-residents access to this procedure may be explained as non-interference in the legislative judgments of other states. Legal termination thus joins divorce as a guarded state privilege.

CONCLUSION

The abortion reforms were produced by legislatures reacting to long-term changes in communal mores. The expanded conditions resulted from the feeling that the traditional prohibition was too inclusive. But a feeling that such expansion should be cautious produced procedural requirements not previously felt to be necessary. These results were not achieved by deciding that a fetus is more like an

[39] There is some feeling that this condition will be interpreted primarily in medical terms, minimizing its socio-economic aspects. To the extent that "capacity as a mother" includes more than medical evaluation, opinions of social workers, psychologists, and others may be helpful. But the British currently prefer uncomplicated decision-making in this area. *See* Samuels, *supra* note 1, at 13.

[40] N.C. GEN. STAT. § 14-45.1 (Supp. 1967). The chance of complication increases significantly after the twelfth week of pregnancy. H. Hoffmeyer, M.D., *Medical Aspects of the Danish Legislation on Abortion* in ABORTION AND THE LAW 179 at 196 (D. Smith ed. 1967). A non-resident who discovers her pregnancy one month after conception would not meet the residency requirement until the twenty-second week of pregnancy. Only in extreme cases will termination be performed during the late stages of pregnancy. Hoffmeyer, *supra,* at 196. Thus non-residents seeking termination in North Carolina must show the urgency required by the medical profession to justify termination in a late stage of pregnancy. And if this higher standard is met, the non-resident is subjected to greater dangers resulting from the delay. The California statute requires that no terminations will be allowed past the twentieth week of pregnancy. CAL. HEALTH & SAFETY CODE § 25953 (West Supp. 1967).

The Colorado statute requires that terminations on the basis of rape take place within the first sixteen weeks of pregnancy. Ch. 190 [1967] Colo. Sess. Laws 284.

appendix than a citizen; rather, they present a compromise between those who would allow all terminations and those who would permit none.

WRONGFUL DEATH OF A MINOR CHILD: THE CHANGING PARENTAL INJURY

In Washington, an action may be brought by a parent for the wrongful death of a child along either[1] of two statutory avenues.[2] The general wrongful death statute creates a right of action in the decedent's personal representative for the benefit of parents who *may be* dependent upon the deceased for support.[3] Under the so-called "child-

[1] Election of remedies problems created by the overlapping statutes are treated briefly in Comment, *Damages in Washington Wrongful Death Actions,* 35 WASH. L. REV. 441, 443 (1960).

[2] WASH. REV. CODE §§ 4.20.010, .020 (1965) and WASH. REV. CODE § 4.24.010 (1965).

Under early Anglo Saxon law the "wergild" system of monetary awards allowed recovery by parties affected by the death of another: his King, lord, and next of kin. The system functioned primarily however in a punitive fashion and disappeared with the development of criminal process. (*See* 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 52 (1895). This qualification aside, there was at common law no action for wrongful death. Hedrick v. Ilwaco R. & Nav. Co., 4 Wash. 400, 30 P. 714 (1892). Recovery is therefore exclusively by statute in all jurisdictions except, perhaps, Hawaii.

"Wrongful death" and "survival" statutes enacted in various jurisdictions differ with respect both to parties entitled to maintain the action and measure of damage. "Survival" statutes preserve the cause of action the deceased himself could have maintained had he lived. *See* WASH. REV. CODE § 4.20.060 (1965) for Washington's survival statute. WASH. REV. CODE § 4.20.010, .020 provide for "true" wrongful death recovery. Patterned basically after Lord Campbell's Act (Fatal Accidents Act, 9 & 10 Vict. c. 93 (1846)), these provisions do not merely prevent termination of the decedent's claim; they *create* an action for "wrongful death" in named statutory beneficiaries. Although some jurisdictions allow recovery by the decedent's estate for its losses, Washington has no such "estate" statute.

[3] In Washington, the general wrongful death statute provides:

> WASH. REV. CODE § 4.20.010—Right of Action. When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.
>
> WASH. REV. CODE § 4.20.020—Beneficiaries of Action. Every such action shall be for the benefit of the wife, husband, child or children or the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters, or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death.
>
> In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

"Dependent" has been construed to mean "substantial," though not total, dependence. *See* note 37 *infra.*