FAMILY PLANNING AND THE LAW

Second Edition

by Roy D. Weinberg

Legal Almanac Series No. 18

FAMILY PLANNING AND THE LAW

by Roy D. Weinberg, B.A., L.L.B.
Member of the New York Bar

This legal Almanac has
by the Oceana Editorial

Irving J. Sloan
General Editor

SECOND EDITION

1979 Oceana Publications, Inc.
Dobbs Ferry, New York 10522

Library of Congress Cataloging in Publication Data

Weinberg, Roy David.
Family planning and the law.

(Legal almanac series; no. 18)
Published in 1968 under title: Laws governing family planning.
Includes index.
1. Birth control--Law and legislation--United States.
2. Abortion--Law and legislation--United States.
I. Title
KF3771.W4 1978 344'.73'048 78-20984
ISBN 0-379-11111-X

Manufactured in the United States of America.

ABOUT THE AUTHOR

Roy D. Weinberg is a graduate of Ohio State University and Columbia Law School. He has engaged in legal editing and research and has written on a variety of legal subjects.

CONTENTS

Chapter I
LEGAL ELEMENTS OF ABORTION

In legal terminology, "abortion" denotes an intentional interruption of pregnancy by removal of the embryo from the womb. Properly performed by a competent obstetrician in an accredited hospital where satisfactory pre-operative and post-operative procedures are observed, it is a comparatively safe operation. However, as a result of the severe legal restriction obtaining in all American jurisdictions, most women are driven to what are at least technically illegal abortions. Although the covert character of such surgical procedures renders reliable statistical estimates difficult, there seems little doubt that criminal abortions in this country approach a figure of close to 1,000,000 annually. It has been estimated that they exceed legal abortions by a ratio of 100 to 1 and that two-thirds of those aborted are married. Technically, of course, most "legal" abortions are actually illicit in the light of the strict terms of most statutes, which authorize abortion only when necessary to preserve the life of the mother. Modern medical advances have virtually eliminated the absolute necessity of abortion to save life in the cases of most maladies formerly recognized as imperative indications for invocation of this procedure.

Ordinarily, authorized abortions are performed during the first trimester of pregnancy when it is a safe and comparatively inexpensive procedure. Such surgery is known as dilatation and curettage. The operation takes about 20 minutes and ordinarily entails hospitalization of one day. Later abortions usually involve hysterotomy, but newer procedures using concentrated oxytocin or intra-amniotic injection into the uterus of hypertonic solutions have also been employed in recent years. The latter procedures are unquestionably

more hazardous than dilatation and curettage (commonly known as D & C). Even a D & C of course, is not infallible and occasional complications, including death, are inevitable. Nevertheless, the overhwelming preponderance of illegal abortions, including attempts at self-abortion and the resort to quacks, is beyond doubt the source of most fatalities. Even wealthy women, who can command the services of skilled criminal abortionists, are exposed to greater hazards than those encountered in authorized hospital abortions because of the impossiblity of ensuring adequate pre-operative and post-operative precautions under such circumstances.

LAWS GOVERNING ABORTION: At common law, abortion before "quickening" was not criminal. A few states deviated from this generally prevailing view and regarded the act as criminal at any stage of gestation. For example, in the case of Mills v. Commonwealth, 13 Pa. 630, the court held that the crime might be perpetrated from the moment "the womb is instinct with embryo life and gestation has begun" and that the rights of "an infant in ventre sa mere are fully protected at all periods after conception." The first statute making abortion a crime irrespective of "quickening" was "Lord Ellenborough's Act" (the British "Miscarriage of Women Act of 1803 (43 Geo. 3, c. 58)) which prohibited an attempt to abort by poison either before or after "quickening".

The first American law prohibiting abortion was enacted in Connecticut. This statute prohibited an attempt to abort by drugs **after** quickening and prescribed a penalty of life imprisonment as against the death penalty authorized by the British statute. In 1830, this penalty was further reduced to a term of from seven to 10 years and the purview of the law extended to include attempts to abort by means other than medication. In 1860, pre-quickening attempts were included within the scope of the prohibition, but the penalty was still further reduced to a term of from one to five years, and an attempt to abort when "necessary to preserve the life" of the mother exempted from the acts prohibited.

The original Connecticut statute was enacted in 1821.

Closely following (in 1827) was the Illinois statute, which also was restricted to the use of poisons on "any woman, being then with child," entailing a penalty, however, of not over three years imprisonment and a fine of not over $1,000. Surgical and other techniques were not mentioned in Illinois law until 1967, when the penalty also was changed to imprisonment of two to 10 years, and abortions or attempts to abort for bona fide medical or surgical purpose exempted from the law. Unlawful attempts resulting in death of the woman became murder.

The present Connecticut and Illinois laws are set forth below:

Connecticut: "Any person who gives or administers to any woman, or advises or causes her to take anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison for not more than five years or both." (Section 53-29 (Conn. Gen. Stat. Rev. (1958)

"Any woman who does or suffers anything to be done, with intent to produce upon herself miscarriage or abortion, unless necessary to preserve her life or that of her unborn child, shall be fined not more than five hundred dollars or imprisoned not more than two years or both." (Section 53-30)

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

(b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed medical facility because necessary for the preservation of the woman's life." (*Ill. Ann. Stat.*, Chapter 38, Section 23-1 (1961))

"Any person who sells or distributes any drug, medicine, instrument or other substance whatever which he knows to be an abortifacient and which is in fact an abortifacient to or for any person other than licensed physicians shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both." (Section 23-2)

"Any person who advertises, prints, publishes, distributes or circulates any communication through print, radio or television media advocating, advising or suggesting any act which would be a violation of any Section of this Article, shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both." (Section 23-3)

The original proposed draft of the 1961 Illinois amendment included three affirmative defenses which would have provided:

1. That the abortion is medically advisable because continued continuance of the pregnancy would endanger the life or gravely impair the health of the pregnant woman; or
2. That the abortion is medically advisable because the fetus would be born with a grave and irremediable physical or mental defect; or
3. The pregnancy of a woman has resulted from forcible rape or aggravated incest.

These liberal proposals, similar in substance to those of the Model Penal Code, were, however, rejected in the final draft as adopted.

The somewhat peculiar provision of the Connecticut statute regarding the preservation of the life of the "unborn child" as a qualifying exception to the general terms of the law appears also, either in identical or equivalent terms, in the statutes of a number of other jurisdictions. States having abortion statutes of this character include the following:

Minnesota
Missouri
Nevada
New York
South Carolina
Virginia
West Virginia

The ostensible self-contradiction of legalizing abortion, which in medical terms means destroying the fetus, in cases where it is "necessary" to save or preserve the life of the "unborn child," has caused consternation in both legal and lay circles. While many attempts to explain its meaning, if any, have been made, the most logical and appealing is that it results from the failure of the law to observe the technical distinctions between abortion and premature birth or induced labor. In any case, the only coherent construction of such a provision is that it refers to premature delivery, and this conclusion is supported, for example, by a provision of the Texas statute, which provides as follows:

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By abortion is meant that the life of the foetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused." (Article 1191, Chapter 9 (Tex. Pen. Code Ann. (1960))

Minnesota law, which includes the exception under discussion, contains comprehensive coverage of the crime of abortion. The principal pertinent provisions are the following:

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

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

(2) Use, or cause to be used, any instrument or other means—shall be guilty of abortion and punished by imprisonment in the state prison for not more than four years or in a county jail for not more than one year." (Section 617.18 (Minn. Stat. Ann. (1953)

"A pregnant woman who takes any medicine, drug, or

substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant shall be punished by imprisonment in the state prison for not less than one year nor more than four years." (Section 617.19)

"Whoever shall manufacture, give, or sell an instrument, drug, or medicine, or any other substance, with intent that the same may be unlawfully used in producing the miscarriage of a woman, shall be guilty of a felony." (Section 617.20)

"Every person who shall sell, lend, or give away, or in any manner exhibit, or offer to sell, lend, or give away, or have in his possession with intent to sell, lend, give away, or advertise or offer for sale, loan, or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion; or shall write or print, or cause to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or shall give oral information, stating when, where, how, of whom, or by what means such article or medicine can be obtained or who manufactures it, shall be guilty of a gross misdemeanor, and punished by imprisonment in the county jail for not more than one year, or by a fine of not more than $500, or by both." (Section 617.25)

"Every person who shall deposit or cause to be deposited in any post-office in the state, or place in charge of any express company or other common carrier or person for transportation, any of the articles or things specified in section 617.24 or 617.25, or any circular, book, pamphlet, advertisement, or notice relating thereto, with the intent of having the same conveyed by mail, express, or in any other manner; or who shall knowingly or wilfully receive the same with intent to carry or convey it, or shall knowingly carry or convey the same by express, or in any other manner except by United States mail, shall be guilty of a misdemeanor. The provisions of this section and section 617.25 shall not be construed to apply to an article or instrument used by physicians lawfully practicing, or by their direction

or prescription, for the cure or prevention of disease." (Section 26)

While the Texas law tends to confirm the suggested construction of the technically self-contradictory concept of saving a fetus by aborting it, it does so by expressly defining abortion in the same defective terms. South Carolina law, on the other hand, contains an accurate and unmistakable confirmation of this conclusion by providing that:

"Any person who shall administer to any woman with child, prescribe for any such woman or suggest to or advise or procure her to take any medicine, substance, drug or thing whatever or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, shall be punished by imprisonment in the penitentiary for a term not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman." (Section 16-82 (S.C. Code (1952)

Section 16-84 of the same statute covers solicitation of such acts by the woman involved, but makes the crime a misdemeanor punishable by imprisonment of not over two years or fine of not over $1,000, or both, at the discretion of the court. No reference is made to the "death" of the child.

Section 16-83 is almost identical to section 16-82, except for the omission of any reference to death of the mother or child or any exception regarding the necessity of perserving the life of either. The prescribed penalty is imprisonment of not over five years or fine of not over $5,000 or both, at the discretion of the court. The reduction in degree of the offenses mentioned in 16-83 and 16-84 indicate an implicit recognition of the common law distinction between abortions before and after quickening.

In Virginia and West Virginia, the qualifying clause

respecting the saving of the life of mother or child appears separately at the close of the principal paragraph. The Virginia statute (Sections 18.1-62 and 18.1-63) (Supp. 1960) provides that:

"If any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than one nor more than ten years. No person, by reason of any act mentioned in this section, shall be punishable when such act is done in good faith, with the intention of saving the life of such woman or child." (Section 18.1-62)

"If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, she shall be guilty of a misdemeanor." (Section 18.1-63)

The West Virginia law closely parallels that of Virginia, but is slightly more severe with respect to the penalty, and also provides that if the mother dies, the offender is guilty of murder. Appearing in section 5923 (W. Va. Code Ann. (1955), the Act provides:

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

The prohibition of abortion in Nevada is set forth in several sections of the Revised Statutes of 1959. Section 200.210 provides that:

"The willful killing of any unborn quick child, by any injury committed upon the mother of such child, is manslaughter."

Submission to, or an attempt at self miscarriage, is made criminal, in the event of the death of the child, by Section 200.220 in the following terms:

"Every woman quick with child who shall take or use, or submit to the use of, any drug, medicine or substance, or any instrument or other means, with intent to procure her own miscarriage, unless the same is necessary to preserve her own life or that of the child whereof she is pregnant, and thereby causes the death of such child, shall be guilty of manslaughter."

The principal provisions respecting the crime of abortion appears in Section 201.120 as follows:

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

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

2. Use, or cause to be used, any instrument or other means, shall be guilty of abortion, and punished by imprisonment in the state prison for not more than 5 years, or in the county jail for not more than 1 year."

Nevada also (like Massachusetts, Minnesota, New York, and Washington) prohibits the manufacture of abortifacients. The pertinent provision appears in Section 201.130 as follows:

"Every person who shall manufacture, sell or give away any instrument, drug, medicine or other substance, knowing or intending that the same may be unlawfully used in procuring the miscarriage of a woman, shall be guilty of a gross misdemeanor."

The erroneous employment of the term "abortion" as a possible means of saving or preserving the life of an unborn child, the exact reverse of its true medical meaning, is by no means the only misnomer found in birth control laws. As noted in the chapter on contraceptives, the latter term

is sometimes used interchangeably with prophylactics (which accurately refer only to disease prevention), and a similar confusion is occasionally found in the use of the terms "contraceptives" and "abortifacients." Abortion is possible only following conception, yet, as noted earlier, the Louisiana law apparently fails to take this into account. Its abortion statute, whose principal provisions appear in Sections 14.87 and 14.88 (La. Rev. Stat. Ann. (1950), defines and prescribes the penalties for abortion and the distribution of abortifacients.

Section 14.87 provides as follows:

"Abortion is the performance of any of the following acts, for the purpose of procuring premature delivery of the embryo or fetus:" (also involving an inaccurate definition)

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

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

Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years."

The erroneous equating of abortifacients with contraceptives appears in the following section (14.88) which provides as follows:

"Distribution of abortifacients is the intentional:

(1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of procuring an abortion; or

(2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing abortion or miscarriage.

Whoever commits the crime of distribution of abortifacients shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

The first jurisdiction to sanction a "medical" abortion was New York. Its statute of 1828 provided that:

"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 of the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

The present New York statutes (appearing in the Penal Law, sections 80, 81, 81-a, 82 (Article 6, "Abortion") and 1050 (Article 94, "Homicide") provide as follows:

Section 80: "A person, who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child with which she is pregnant, either:

1. Prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug, or substance; or

2. Uses, or causes to be used, any instrument or other means,

Is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year.

Section 81: "A pregnant woman, who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than four years."

Section 81-a: "A female who has violated section eighty-a of this article" (probably means section "eighty" as no "eighty-a" existed) "or who has committed an attempt to violate such section shall not be excused from attending and testifying or producing any evidence, documentary or otherwise, in any investigation or trial relating to violations" (of several sections relating to abortion) "or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of her, may tend to convict her of a

crime or subject her to a penalty or forfeiture; but no such female shall be prosecuted or subjected to any such penalty or forfeiture for or on account of any transaction, matter or thing concerning which she is compelled, after having claimed her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against her upon any criminal investigation, proceeding or trial."

Section 82: "A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony."

Section 1050: "Such homicide is manslaughter in the first degree, when committed without a design to effect death:

1. By a person engaged in committing, or attempting to commit a misdemeanor, affecting the person or property, either of the person killed, or of another; or

2. In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon."

The section then continues with the definition of first degree manslaughter in the case of abortion:

"The wilful killing of an unborn quick child, by any injury committed upon the person of the mother of such child, is manslaughter in the first degree.

A person who provides, supplies, or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant is thereby produced, is guilty of manslaughter in the first degree."

Following New York in the recognition of "medical" abortion came Ohio, in 1834, and Missouri and Indiana, in 1835. The current statutes of these states are as follows:

Ohio: "No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other