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NEW YORK ABORTION REFORM—A CRITIQUE

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THE LAST TWO SESSIONS of the New York State Legislature witnessed concerted efforts to enact legislation legalizing abortions in a wide range of circumstances. The moral and social questions presented by the legislative proposals were widely publicized in the various media, but there was a serious lack of public exposition and analysis of the actual terms of those proposals. The impression created in the public mind was that the proposed reforms would limit legal abortions to clearly specified situations.

As a public service, and also out of a desire to communicate the independent view of a professional segment of the Catholic laity on the fundamental moral questions, the Queens Chapter of the Catholic Lawyers Guild of the Diocese of Brooklyn decided to study and take a position with respect to the principal proposal. The result of that study was a report of its Committee on Public Affairs which was adopted, not without dissent, by the membership of the Guild. A copy of that report was placed in the hands of numerous public officials in the State of New York, including each member of the Legislature, prior to consideration of the measure on the floor of the New York State Assembly. After debate, the bill was withdrawn by its sponsor.

As President of the Guild and Chairman of the Committee which prepared the report, I wish to emphasize that the position of the Guild is not a so-called "Catholic" position. The decision to oppose is predicated squarely on the numerous and substantial deficiencies of the bill as a legislative proposal, and upon the

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clear policy it would establish in its practical effect. Disclaimers to the contrary notwithstanding, that policy is one of *unrestricted* abortional practices by hospitals and physicians.

You are respectfully urged to give your careful attention to the report which follows.

REPORT OF COMMITTEE ON PUBLIC AFFAIRS

The Committee on Public Affairs, after a study of the reports of its two subcommittees engaged in this work, and upon its own further analysis and research, made the following report to the members of the Guild concerning a proposal before the 1968 session of the New York State Legislature, known as "An Act to amend the public health law and the penal law, in relation to justifiable abortion and repealing subdivision three of section 125.05 of the penal law, relating thereto" (Senate No. 529; Assembly No. 761). This bill has been commonly referred to as the Blumenthal Bill.

RELEVANCE OF CATHOLIC TEACHING

The Roman Catholic Church teaches that the direct abortion of an unborn child, from the time of conception, is gravely immoral regardless of the justification asserted. At the threshold of its work, therefore, this Committee felt required to determine whether that teaching, by itself, mandated the Committee's opposition to all legislative proposals to relax criminal sanctions for abortion. In the course of its deliberations, it considered all controlling principles, including these:

1. The natural right of each man to form his conscience as he comprehends truth, and to act in accordance with conscience free of external coercion.
2. The obligation of each man, in forming and acting upon his conscience, not to transgress upon the just rights of others or to act inimically to the public order and the common good of society.
3. The right and duty of society to preserve the common good and public order, both by due recognition of individual freedom and due enforcement of the individual responsibility to others, the public order, and the common good.
4. The teaching authority of the Roman Catholic Church in relation to its faithful.
5. The apostolate of the Church and its members to declare truth and right norms of morality as these are revealed and understood.

After extensive discussion of the controlling principles with the Guild's Canonical Consultant, this Committee and its two subcommittees *unanimously* concluded that Roman Catholic teaching on the immorality of abortion *does not require* them to oppose all proposals to relax the penal laws of this State as they apply to abortions. The precise issue of principle relates to the office and purpose of human law, in particular the penal law, and resolution of that basic issue will always depend upon considerations of the public order and common good of society. That view in no manner or degree detracts from or depreciates the moral standards which the members of this Committee hold to be necessary for themselves as faithful members of their Church.

PUBLIC POLICY

The people of the State of New York have long recognized the life of the unborn and, to protect that life, have enacted laws prohibiting acts intended to destroy it for any reason except where necessary to preserve the life of the mother. As a result of enactments at two successive legislative sessions,[1] the law of this State in 1846 provided:

> § 1. Every person who shall administer to any woman pregnant with a quick child, or prescribe for any such woman to take 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, shall, in case the death of such child, or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.
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> § 2. Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ any instruments or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall, upon conviction, be punished by imprisonment in a county jail, not less than three months nor more than one year.
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> § 3. Every woman who shall solicit of any person any medicine, drug, or substance or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail, not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

The present Penal Law continues the policy of these early statutes. It basically regards the commission of an abortional act as a crime against society, even if committed by a duly licensed physician or the female herself. The sections of the Penal Law which impose criminal sanctions are so structured that the commission of crime directly depends upon the statutory definitions of an "abortional act" and a "justifiable abortional act." Both these phrases are defined as follows by the Penal Law: [2]

> 'Abortional act' means an act committed upon or with respect to a female, whether by another person or by the female, herself, *whether she is pregnant or not,* whether directly upon her body or by the administering, taking or prescription of drugs or in any other manner, with intent to cause a miscarriage of such female.
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> 'Justifiable abortional act.' An abortional act is justifiable when committed upon a female by a duly licensed physician acting under a reasonable belief that such is *necessary to preserve the life of such female.* A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician that such is *necessary to preserve her life.* The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, and when she acts upon the advice of a duly licensed physician that such is *necessary to preserve her life.*

[1] Laws of New York, 1845, ch.200; 1846, ch.22.

[2] Section 125.05 (2) and (3) (emphasis added).

It should be observed that an abortional act, as defined, does not require that a miscarriage ensue, but only that the act be committed with that intent. The succeeding sections which impose criminal sanctions depend on the commission of an "abortional act," and they exclude a "justifiable abortional act." The crimes are categorized as manslaughter, abortion and self-aborion. There is a first and second degree of each crime.

Manslaughter. The crime of manslaughter is committed when the abortional act causes the death of the female. The second degree of the crime is committed when the abortional act results in such death, regardless of whether the female was pregnant.[3] This is a class C felony, punishable by an indeterminate sentence not exceeding fifteen (15) years.[4] The crime is elevated to first degree if the abortional act is performed upon a female pregnant for more than twenty-four (24) weeks.[5] This is a class B felony punishable by an indeterminate sentence not exceeding twenty-five (25) years.[6] Provision is made in each case for amelioration of the punishment where the ends of justice and the public interest require.[7]

Abortion. Abortion in the second dedegree is committed by the mere performance of an abortional act upon a female, notwithstanding that harm or death were not caused to her or the unborn child.[8] This is a class E felony, punishable by an indeterminate sentence not exceeding four (4) years.[9] The crime is elevated to first degree if the abortional act is performed upon a female pregnant for more than twenty-four (24) weeks and the act causes the miscarriage of the female.[10] This is a class D felony, punishable by an indeterminate sentence not exceeding seven (7) years.[11] Provision is made in each case for amelioration of the punishment when the penalty prescribed seems unduly harsh in the circumstances,[12] and in the case of first degree abortion where the ends of justice and the public interest require.[13]

Self-abortion. Self-abortion in the second degree is committed by a female who performs or submits to an abortional act upon herself at any time during her pregnancy, regardless of whether miscarriage results.[14] This is a class B misdemeanor, punishable by a definite sentence not exceeding three (3) months.[15] The crime is elevated to first degree when the female commits or submits to an abortional act upon herself after the first twenty-four (24) weeks of pregnancy and it causes her miscarriage.[16] It is a class A misdemeanor, punishable by a definite sentence not to exceed one (1) year.[17]

General. Both degrees of manslaughter, and the first degrees of abortion and self-abortion, are regarded by the law as homicide.[18] The provisions

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[3] Section 125.15 (2).
[4] Section 70.00 (2)(c).
[5] Section 125.20 (3).
[6] Section 70.00 (2)(b).
[7] Section 70.00 (3)(b).
[8] Section 125.40.
[9] Section 70.00 (2)(e).
[10] Section 125.45.
[11] Section 70.00 (2)(d).
[12] Section 70.05.
[13] Section 70.00 (3)(b).
[14] Section 125.50.
[15] Section 70.15 (2).
[16] Section 125.55.
[17] Section 70.15 (1).
[18] Section 125.

noted above for the amelioration of punishment do not represent special consideration for the crimes of manslaughter and abortion discussed above, but apply generally to the classes of felonies in which these crimes are included. In addition to the foregoing provisions affecting the immediate participants in the abortional act, it is a class B misdemeanor for one to issue abortional articles. One issues abortional articles " . . . when he manufactures, sells or delivers any instrument, article, medicine, drug or substance with intent that the same be used in unlawfully procuring the miscarriage of a female." [19]

Currency of Public Policy. The public policy of this State, as manifested by these statutes, is not only clear but recently declared. These provisions of the Penal Law were promulgated as part of the exhaustive revision of the criminal law of this State by the State Commission on Revision of the Penal Law and Criminal Code. That commission was created upon the recommendation of the Governor in 1961, and its work took four years. The Revised Penal Law, including the provisions governing abortions, was enacted into law in 1965—to become effective September 1, 1967. The Governor's Memorandum of Approval, dated July 20, 1965, noted that the new Penal Law "reorganizes and modernizes penal provisions proscribing conduct which has traditionally been considered criminal in Anglo-Saxon jurisprudence." Not only did the new Penal Law receive overwhelming legislative and executive approval, but it was approved by public bodies and legal, law enforcement and numerous civic associations.

[19] Section 125.60.

Policy Based on Life. The public policy of this State is premised on a due recognition by its people of the actual existence of new life during pregnancy. The precise nature of that life poses questions that law is ill-equipped to determine. But the law does recognize the existence of life at least so proximate to the complete human nature that it prohibits acts hostile to its fulfillment except for the gravest cause. This has been society's estimate of what is necessary for the common good.

THE BILL

The Bill provides for the legalization of therapeutic abortions only by duly licensed physicians, for enumerated reasons beyond the necessity to preserve the female's life. In the main, its philosophy is that abortion is essentially a medical procedure justified by health or social considerations involving the alleged well-being of the pregnant woman or the unborn child. It proposes that all its provisions, including the definition of "justifiable abortion," be incorporated into the Public Health Law. These factors, coupled with certain other of the Bill's features, require that a reasonable analysis of its provisions and their effect be governed by the rule of liberal construction.

Hospital Abortion Committee

The Bill contemplates that abortions will be approved by a hospital abortion committee whose duty will be to review applications for abortions. A hospital abortion committee would consist of not less than three (3) nor more than five (5) members of the hospital medical staff, and is initially required to include one specialist in obstetrics, one in internal

medicine, and a psychiatrist. If the hospital medical staff lacks one or more of these specialists, any physician on the medical staff would be authorized to serve if approved by the Department of Health.[20] If the female's physician is a member of the abortion committee, he is excluded from the committee's *consideration* of her application.[21] Upon approval of an abortion by a majority of the hospital abortion committee, for the reasons stated in the Bill (discussed below), a duly licensed physician and surgeon is authorized to perform the abortion in a hospital which certifies its compliance with the *procedural* requirements of the Bill to the Department of Health.[22] Although the Bill seems to contemplate that the abortion be performed in the same hospital whose abortion committee approved the abortion,[23] there is no express prohibition against its performance in a different hospital which also has certified its compliance.

The Bill provides that the hospital abortion committee may "approve" an abortion, but it does not require in terms that it or any single member shall make the underlying examination of the pregnant woman to determine the actual existence of the reasons specified by the Bill as necessary for approval. The definition of "hospital abortion committee" provides only that the committee ". . . shall review cases presented for the performance of a justifiable abortion, in accordance with the provisions of this title, and determine in each such case whether the proposed abortion shall be performed in the hospital."[24] The Bill repeatedly refers to the applicant, but no provision is made for the form and content of the application. Nor does the Bill require that the hospital abortion committee see or interview the applicant. Similarly, it does not require that the pregnant woman's physician appear before the committee or that his examination and conclusions be reduced to writing for presentation to the committee.

There is no requirement that the hospital abortion committee record substantive findings, but only that the hospital in which it functions maintain records "adequate to show that the operations of its hospital abortion committee comply with the *procedural* requirements set forth in this title."[25] The section in question also provides that the hospital ". . . shall furnish to the department [of Health] such reports as the department may require, *provided* that such reports shall not include the name of the patient. . . ." No specific penalty is provided for the failure to keep records, whatever their content.

As a result of all the foregoing an abortion could be approved by a hospital abortion committee on the strength, for example, of a mere oral statement by the female's physician. Whatever might be the actual practices of such committees, it is clear that they would not be circumscribed by the Bill in any important respect.

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[20] Section 2590(c).
[21] Section 2591(d).
[22] Sections 2590(b), 2591(d), 2594 and 2596.
[23] Sections 2590(c) and 2594.
[24] Section 2590(c).
[25] Section 2597 (emphasis added).

Bases of Justification

The Bill enumerates the reasons which would justify the approval of an abortion by the hospital abortion committee.[26] In view of the total observations upon the Bill made by this Committee, it is necessary only to focus on some of the more notable aspects of the stated reasons for justification.

Physical and Mental Health. The hospital abortion committee would be authorized to approve an abortion for the reason that:

> (1) there is medical evidence of a substantial risk that continuance of the pregnancy would endanger the life of the pregnant woman; or
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> (2) there is medical evidence of a substantial risk that a continuance of the pregnancy would cause a material impairment of the physical health of the pregnant woman or would cause her to become a mentally ill person as defined in the mental hygiene law; or
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> (3) there is medical evidence of a substantial risk that the foetus, if born, will be permanently and materially physically impaired or will be a mentally ill person or a mental defective as defined in the mental hygiene law.

These provisions are manifestly vague, the problem being compounded by the qualification of vague terms by vague terms.

There is no requirement that there be substantial medical evidence, or that the risk described be clear. There is no necessity for *imminent* impairment. These provisions do not define "physical health" as to which there must be the risk of "material impairment," nor do they define what is "material." They do not require that the impairment be permanent in the case of the pregnant woman. This is manifest by the requirement that there be a risk of permanent impairment in the case of the child.

Regarding the justification based on danger to the life of the mother, the Bill does not contemplate an immediate threat to life itself. That is evident from the subsequent provision which permits abortion by a physician without approval of a hospital abortion committee where he believes "in good faith, that: (a) the life of the pregnant woman is in imminent danger . . . ." [27] Not only need the danger not be imminent, but it may even be remote. The abortion is authorized if there is "medical evidence of a substantial risk that *continuance* of the pregnancy would endanger." Because of the other grounds related to health, vagueness here is significant only as to the period after twenty-four (24) weeks of pregnancy. An abortion on this ground may be approved at any time (discussed below). Does danger to life mean the threat of loss of life? If that is the intent, it will be defeated by medical interpretation as evidenced by the fact that under the more restrictive provisions of the Penal Law abortions are carried out although the mother's life does not hang in the balance (discussed below). In light of these practices, the full scope of this ground is difficult to measure since it works a clear extension of the present Penal Law provision that the abortion be "necessary to preserve the life" of the mother. This change in statutory language is not without significance. What is at stake under this provision is the life

[26] Section 2590(b).

[27] Section 2592.

of an unborn child up to the time of delivery.

The incorporation of Mental Hygiene Law definitions of a "mentally ill person" or "mental defective" seems ill conceived. Those definitions were legislatively prescribed in order to serve the present objects and purposes of the Mental Hygiene Law. They were not intended for use in determining when foetal life should be terminated. It is noted that the definition of a "mental defective" contained in the Mental Hygiene Law does not denote a permanent mental incapacity.[28] In the cited case, the person who had been institutionalized as a mental defective became adjusted and was able to procure and retain permanent employment. That case also held that the standard of whether a person is a "mental defective" is the "incompetency or incapacity of managing oneself and one's affairs." This would seem an impossible judgment to make in the case of the child.

Insofar as the Bill would justify abortion by reason of the expected mental or physical impairment of the child, it must be understood that the risk contemplated is merely a "statistical" risk, at least in the overwhelming number of cases.[29] The following report contained in the cited work (page 65) warrants restatement as an illustration of the problem:

> What should be the attitude toward 'so-called' foetal indications for abortion? The indications that a child will be deformed are usually statistical. During the early months when most abortions are considered, one can predict deformity only by prior overall experience and not specifically in a given case. For example, the risk of a defective child in a mother who develops rubella in the first trimester of pregnancy is about 20 per cent; but the risk is 60 per cent if she develops the disease in the first few weeks of pregnancy and less than 10 per cent at twelve weeks of gestation.
>
> In a careful prospective study that followed the 227 infants of mothers who contracted rubella during pregnancy, the incidence of mental retardation was no different from that in the general population; 92 per cent of the children were attending regular schools eight to eleven years after birth. Many of the defects of these children were correctable. While these statistics may indicate an overly optimistic attitude, they represent the best information available until the figures from the rubella epidemic in 1964-1965 have been similarly analyzed.

What is "medical evidence of a substantial risk" in the case of the child? This ground necessarily postulates that the law should authorize the termination of perfectly healthy foetal life in the course of a highly speculative selective process. It is noted that this provision, as drawn, does not depend upon an adverse effect on the mental or physical health of the mother by reason of the possible disability of the child.

Rape, Incest, Non-Age and Incapacity.

The hospital abortion commitee would also be authorized to approve an abortion for the reason that

> (4) the pregnancy of the woman resulted from an act of rape in the first degree or from an act of incest, as defined in the penal law, or the pregnancy occurred while the female was thirteen years of age or less; or
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> (5) the pregnancy of the woman occurred while the woman was declared to be a mentally disabled or incompetent

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[28] Lee v. State, 187 Misc. 268 (Ct. Cl., 1946).
[29] SMITH, ABORTION AND THE LAW, 45-59, 64-67 (1967 ed.).

person as defined in the Mental Hygiene Law.

It is first noted that abortion is authorized notwithstanding that the pregnancy does not result in any adverse effect upon the mental or physical health of the mother. The mere fact of pregnancy would give rise to the right to abort.

The inclusion of incest as justification raises special questions. The crime of incest is defined by the Penal Law as follows:

> A person is guilty of incest when he marries or engages in sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.[30]

The inclusion of this ground permits the abortion of a perfectly healthy unborn child in the absence of an unjust transgression upon the female, even where pregnancy results from the act of *consenting adults.* Further, if this ground is intended to avoid the possibility of deformity or other deficiency in the child, it fails of its total purpose when it refers to the crime of incest as defined in the Penal Law. The cohabitation of married persons within most, if not all, the degrees of consanguinity stated in the statute would not constitute a crime where the marriage was valid in the forum in which it was contracted.[31]

The allowance of abortion where the pregnancy occurred while the woman was declared to be a "mentally disabled" person calls into play the definition of that term by the Mental Hygiene Law, as follows:

> 'Mentally disabled' shall mean a person who is mentally ill, mentally defective, epileptic or otherwise psychiatrically or neurologically disordered, and who requires care and treatment in a hospital or institution, or requires the services provided such a person pursuant to the provisions of this chapter, and 'mental disability,' 'psychiatric disorder' or 'neurological disorder' shall mean the conditions with which the mentally disabled are afflicted.[32]

The objection noted above to the use of Mental Hygiene Law definitions applies here. The breadth of this definition is likewise noted.

Under the Bill the hospital abortion committee would make the determination that the crime of rape in the first degree was perpetrated. The competence of that committee to make the legal judgment required is at least open to grave doubt. The difficulty is compounded by reason of the fact that the judgment would be made solely upon the applicant's uncorroborated sworn written statement of the facts concerning the act, provided that a copy of that statement has been filed with the appropriate district attorney and that a report of the rape was made to law enforcement authorities within seven (7) days after the act.[33] The Penal Law wisely provides that a person shall not be convicted of rape in the first degree on the uncorroborated testimony of the victim.[34] While the question under the Bill is admittedly

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[30] Section 255.25.

[31] 1933 Opinions of Attorney General of New York 83.

[32] Mental Hygiene Law § 2(21).

[33] Section 2591(e).

[34] Section 130.15.

not the guilt of the perpetrator, nevertheless the law's experience with the unreliability of the victim's testimony suggests that the occurrence of the rape be more satisfactorily established if life is to depend upon an actual unjust transgression upon the female. The Penal Law requirement of corroboration also applies to incest, in which case the Bill likewise only requires the uncorroborated sworn written statement of the applicant (but now adding identification of the perpetrator), provided that the statement has been filed with the district attorney.

Time Limitations

The effort to limit the authorization of an abortion in terms of the stage of pregnancy is contained in the section of the Bill entitled "Procedures" which includes the following provision:

> Except in a case where continuance of the pregnancy would endanger the life of the pregnant woman, the hospital abortion committee shall not approve the performance of a justifiable abortion unless it shall find that not more than twenty-four weeks have passed since the date of conception.[35]

This provision plainly does not require, by its terms, that the abortion be *performed* not later than the twenty-four (24) weeks after conception, but only that it shall not be *approved* thereafter. If it was the intent to prohibit the performance of abortions after twenty-four (24) weeks, with the exception noted, that intent has not been effected by clear statutory language. If it was not, then the purpose of the provision is obscure.

Even if it were the intent to prohibit abortions after twenty-four (24) weeks, with the exception noted, the reason for that limitation is difficult to perceive. If it was taken automatically from the fact that the present crimes of manslaughter, abortion and self-abortion are increased to the first degree where committed after the first twenty-four (24) weeks, then it would seem the limitation was based upon considerations hardly analogous. There is an obvious difference between increasing the degrees of a crime and authorizing the taking of life. If that limitation is predicated upon risk to the mother, it arbitrarily ignores the fact that an abortion can be successfully performed after twenty-four (24) weeks—a fact acknowledged by the Bill itself in case of danger to the life of the pregnant woman. If it is based upon the physical development of the child, it is noted that foetal movement occurs prior to the twenty-fourth week.

Consents

The Bill requires *initially* (see "Judicial Review" below) that the hospital abortion committee withhold its approval in the case of minors, married women and persons declared mentally disabled or incompetent, unless consent is given by the parents, guardian, husband or committee—as may be appropriate to the given case.[36] The written consent of the pregnant woman is also required. There is no requirement that the hospital abortion committee make an independent finding, based on inquiry, that the consent of the pregnant young girl or woman was freely given.

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[35] Section 2591(c).

[36] Section 2591(b).

Judicial Review

The Bill provides for judicial review by the Supreme Court in cases where the requisite consent (other than the woman's) is not given or where a hospital abortion committee fails or refuses to act on or approve an application for abortion within ten (10) days after submission.[37] It provides: "A hearing shall be held on the petition by the court *within two days* after the filing thereof on *due notice* to the hospital abortion committee *and* to the husband, parent, guardian or judicial committee, if there be any, of the pregnant woman" (emphasis added). If the court should find, as the case may be,

(a) that the hospital abortion committee's failure or refusal to act or approve, or that failure or refusal to give the requisite consent, is arbitrary, capricious or unreasonable, or

(b) that the requisite consent cannot be obtained "with due diligence,"

and if it should also find that the performance of the abortion is justifiable within the terms of the Bill, then the court would be *required* to authorize the abortion.

Among the more notable difficulties with the provision for judicial review are these: (a) Where the basis of review is the lack of requisite consent, why should the court's judgment on "justifiability" be substituted for that of the hospital abortion committee, notwithstanding the committee's presumed competence and willingness to review the application on the merits if the requirement of consent is excused? (b) Where justification is predicated upon physical or mental health considerations, no provision is made with regard to the nature and quantum of proof. May the court's judgment rest solely on the testimony of the woman's physician? He could not serve on a hospital abortion committee reviewing her application. (c) In all cases notice must be given to the hospital abortion committee *and* the husband, parent, guardian or committee "if there be any." Why should notice be given to the parent of a competent, unmarried adult female? (d) Is a husband *capricious* if he withholds consent for religious or philosophical reasons? If so, does he really have rights in the matter? (e) Does "due notice" to the hospital abortion committee mean its members are always *indispensable* parties to the proceeding? Should they not be? (f) Is the non-consenting husband, parent or guardian afforded sufficient opportunity to offer expert or other testimony on the question of justification? What is "due notice?" (g) This being an adversary proceeding, what are the practical effects of the right to appellate review?

In the Committee's view the provision for judicial review requires considerable re-examination.

Emergencies

The Bill provides:

> Emergencies. Nothing herein contained shall prevent a physician from performing a justifiable abortion *without complying with the provisions of this title* if the physician shall believe, in good faith, that:
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> (a) the life of the pregnant woman is in imminent danger, and
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> (b) there is insufficient time to comply with the procedural requirements hereof.

[37] Section 2593.

> The physician shall report the performance of such justifiable abortion to the hospital abortion committee of the hospital with which such physician is affiliated or to the department in such manner as such hospital or department may require.[38]

If it is intended that this provision shall be limited to a situation in which there is a present danger of actual loss of life, that intent should be more clearly stated in view of present interpretations of the Penal Law (discussed below). In the context of the entire Bill, nothing less should be suggested. Note is also made of the fact that the content of the physician's report is left to the discretion of the Department of Health or the hospital with which the physician is affiliated. No penalty is specifically prescribed for the failure to report. Finally, this provision should be specifically related to another which provides: "The hospital abortion committee shall meet at a regularly appointed time and place and at such other times and places as the hospital shall provide *in emergency cases.*" [39]

Criminal Responsibility

The Bill would not repeal the Penal Law definition of an "abortional act," but it would repeal the Penal Law definition of a "justifiable abortional act" by substituting a new provision which, in pertinent part, provides: "*An abortional act* is justifiable when performed in accordance with the provisions" of the Bill.[40] Particularly in the case of the hospital abortion committee, whether a crime was committed might depend therefore upon the vague test of "compliance" with a host of statutory provisions. Would exoneration from crime depend upon literal or merely substantial compliance? Whatever the degree of compliance, must it be with respect to both the substantive and procedural provisions? Would a physician, for example, who performs an "emergency" abortion be guilty of a crime if he failed to file the necessary report?

Performing Physician. The Bill defines a justifiable abortion thusly:

> 'Justifiable abortion' means a procedure for the termination of pregnancy performed in a hospital by a licensed physician and surgeon and approved by the hospital abortion committee, for the reason that [enumeration of reasons follows].[41]

In another section it provides:

> Justifiable abortion. A physician and surgeon licensed to practice in this state may lawfully perform a justifiable abortion, and other licensed practitioners of the healing arts and hospital employees may, as necessary, assist such physician and surgeon, in a hospital which has complied with the provisions of this title, if the performance of such abortion has been approved by the hospital abortion committee or authorized by court order.[42]

Except in the emergency situation (and there doubt abounds), the physician is plainly exonerated if three conditions are met, namely, (a) that he is duly licensed, (b) that the abortion was in fact approved, and (c) that the abortion take place in a hospital participating in ac-

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[38] Section 2592 (emphasis added).
[39] Section 2591(a) (emphasis added).
[40] Section 4 (emphasis added).
[41] Section 2590(b).
[42] Section 2594.

cordance with the Bill. Given those facts, the physician would have performed the abortion ". . . in accordance with the provisions" of the Bill. He would be exonerated notwithstanding that the abortion was approved for unauthorized reasons, or for authorized reasons not sufficiently supported.

Hospital Abortion Committee. The question of the criminal responsibility of the hospital abortion committee requires close examination of the existing Penal Law definition of "abortional act" which bears repetition here:

> 'Abortional act' means an act committed upon or with respect to a female, . . . whether directly upon her body or by the administering, taking or prescription of drugs or in any other manner, with intent to cause a miscarriage of such female.

The hospital abortion committee merely approves the abortion. The Bill does not redefine an "abortional act" so as to include specifically such act of approval, and in the context of the revolutionary proposal of the Bill it would be unreasonable to interpret the existing definition as contemplating or including the procedures of the hospital abortion committee. The new Penal Law definition of what is "justifiable," as proposed by the Bill, depends upon the phrase "abortional act," as presently defined, and refers to it when it provides: "an abortional act is justifiable when *performed* in accordance with the provisions" of the Bill. When the Bill speaks of "justifiable abortion," it refers in terms to the act of the performing physician and surgeon in terminating pregnancy.[43] The conclusion seems inescapable that the hospital abortion committee would not be subject to the sanctions of the Penal Law. But even if these provisions could be construed as subjecting the hospital abortion committee to criminal sanctions for abuse, the vague test would be compliance with a broad statutory scheme. In view of the context of the entire Bill, and especially in view of the well-settled constitutional requirement that penal statutes be certain in their application, the Bill must be viewed as providing no penal sanctions for abuses by the hospital abortion committee.

Even if there were clear statutory provisions, imposing criminal responsibility on the hospital abortion committee in cases of abuse, the probability of enforcement is practically nonexistent in view of the elusive phrasing of the major grounds for legal abortion coupled with the absence of any requirement for the sufficient recording of the data upon which the committee acted.

Other Observations

The Bill contains no provision which would prevent a pregnant woman from making successive applications for an abortion to different hospital abortion committees. There is no requirement that the applicant be a resident of the State of New York.

CONCLUSION

The foregoing analysis is not a comprehensive statement of all of the Committee's observations concerning the Bill. The language, scope and practical effect of the Bill are such that it was deemed necessary only to set forth the major considerations which impelled the Committee's conclusion.

[43] Sections 2590(b) and 2594 (emphasis added).

Quite apart from its policy and objectives, the observations made demonstrate that the Bill was ill-considered and poorly drafted. In an area of such obvious and critical importance, the utmost precision and care are indispensable. The condition of the Bill requires a practical assessment of its provisions.

In its present form the Bill, by necessary effect, would eviscerate the essence of the public policy of this State. Under the Bill the law would no longer declare a value on life as it is manifested and present in the unborn. The value of such life would be whatever individuals might choose to ascribe under the pressures and circumstances of the moment. A majority of the proposed justifications for abortion are so loosely and vaguely phrased that even clear provision for penalties in the event of non-compliance would be of doubtful salutary effect. But the fact that the Bill would effectively eliminate criminal responsibility for abuse within its procedural framework literally insures that the lives of the unborn in this State would ultimately depend only upon the choice of individuals for reasons they deem sufficient. Beyond that, the Bill would establish this State as a haven for migratory abortions thereby depriving other states of their rightful interest in their unborn children and their own public policy. Lest this appraisal of the practical operation of the Bill seem extreme, the Committee would point out that even under the existing Penal Law, abortions are carried out by physicians for reasons that go far beyond the intent and plain words of the statute, namely, where "necessary to preserve the life of the female." [44]

[44] SMITH, *supra* note 29.

If the Bill is intended to accomplish only limited legalization of abortions for specific statutory reasons, and otherwise to preserve the integrity of the Penal Law in cases of abuse, then it fails of its purpose by the greatest imaginable degree. If, however, the Bill was drawn with a view towards accomplishing the clear practical results noted, then it attempts not only to adjust the public policy of this State but to import into its body of law an entirely new policy which in actual practice would view the lives of the unborn as outside the scope of society's legitimate interest and concern. It proposes a social judgment on life which is so casual as to be fundamentally abhorrent and clearly adverse to the common good of society, if not the public order. This Committee cannot perceive of any public necessity or justification for unfettered abortional practices even within the structure of the medical profession for which the Committee has the highest regard.

By reason of the numerous and serious objections to the Bill, the Committee is of the opinion that it is beyond sufficient improvement by any reasonable process of correction or change. It is deficient in numerous fundamental respects. Any attempt to re-work its provisions in order to achieve an enactment at this legislative session would exalt expedience over the vital substantive and procedural necessities of the situation.

In the judgment of the Committee there are certain minimal standards that must be met by any legislative proposal for the relaxation of the penal laws of this State insofar as they govern the matter of abortion. They are:

1. Clear description and limitation *in the Penal Law* of the grounds of legalization which permit of the least possible extension of those grounds in practice, on the theory that the public policy of this State is to be established by the legislature and not by loose individual interpretation.
2. Clear provision for criminal sanctions in cases of abuse.
3. Complete procedural provisions that insure observance of the law and safeguard the rights and interests of all interested parties, including society.
4. Where a case falls outside the statutory authority, provision designed to assist pregnant women in overcoming emotional, social and other difficulties presented by the pregnancy, toward the end that they may give birth in the best possible mental, physical and social circumstances.
5. Clear provision to insure against the use of this State as a base for migratory abortion.

Such a proposal would present the occasion for direct assessment of the acceptable limits for legalized abortion measured by the common good of society. Regrettably, the *carte blanche* presented by this Bill does not.

The Committee, therefore, recommended to the members of the Guild that they adopt the following resolutions:

RESOLVED, that the Queens County Chapter, Catholic Lawyers Guild of the Diocese of Brooklyn (the "Guild") hereby adopts the report of its Committee on Public Affairs dated February 28, 1968, relating to a certain bill introduced at the 1968 session of the New York State Legislature, known as "An Act to amend the public health law and the penal law, in relation to justifiable abortion and repealing subdivision three of section 125.05 of the penal law, relating thereto" (Senate No. 529—Assembly No. 761);

RESOLVED, that the Guild is opposed to the passage of the Bill;

RESOLVED, that the President of the Guild take all reasonable measures to make known the position of the Guild to the Legislature and the public.