Pre-Implantation Fertility Control and the Abortion Laws

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Scientists throughout the United States and other areas of the world are presently engaged in research with the purpose of finding ideal methods of fertility control. These methods must be effective and safe. In addition, where the users are poor or uneducated, they should be inexpensive and extremely simple to use. One of the more promising areas of current research is directed toward fertility control by the termination of pregnancy after conception, but before implantation of the fertilized ovum in the uterus. This area will be here designated "pre-implantation fertility control." This article is concerned with pre-implantation fertility control and the problems under the abortion laws that will affect the legality of its use.

The various state abortion laws are conveniently grouped into two categories: (1) statutes which do not expressly make pregnancy an element of the offense, and (2) statutes which expressly make pregnancy an element of the offense.

Statutes which do not expressly make pregnancy an element of the offense generally refer to acts toward "a woman," "any woman," or a woman "pregnant or supposed to be pregnant." If pregnancy is not an express element of the statutory offense, specified acts intended to produce an "abortion" or "miscarriage" generally constitute the prohibited conduct. The problem then is: What is an "abortion" or "miscarriage"?

Statutes which expressly make pregnancy an element of the offense generally refer to acts toward a "pregnant" woman, a woman "pregnant with child" or a woman "with child." These statutes present a greater number of problems, one of which is the determination of the earliest stage of pregnancy at which the offense can be committed. Specifically, do such statutes apply to termination of pregnancy before implantation? Some state statutes define the period of pregnancy during which an abortion can be

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committed. Other statutes do not. Some statutes refer to destruction of the “embryo” or the “unborn child.” Under these statutes, what exactly is an embryo or an unborn child? Another problem is whether the statutes apply to the use of pre-implantation fertility control devices and drugs on a non-pregnant woman to terminate future pregnancies.

The difficulties of these problems are compounded by the absence of reported cases concerning the legality of pre-implantation fertility control. Cases which have construed the abortion statutes may not be controlling in cases where the legality of pre-implantation fertility control is at issue because of the unique nature of the problem.

This article will, in addition, consider the problem of proof of a pregnancy terminated prior to implantation, and the hypothetical effect of the Model Penal Code on the legality of the termination of pregnancy in such a manner.

I. PRE-IMPLANTATION MEANS OF FERTILITY CONTROL

For the purpose of this discussion, drugs, mechanical devices, and other means which act to terminate pregnancy after conception but before implantation, will be designated “pre-implantation means of fertility control” or “pre-implantation means.”

“Implantation” is the fixation of a fertilized ovum on the uterine wall. After ovulation the unfertilized ovum enters the Fallopian tubes where “fertilization,” also called “conception,” occurs. Conception marks the beginning of pregnancy. Under normal circumstances, the microscopic, fertilized ovum completes the 2½ inch journey through the Fallopian tubes, enters the uterus and is implanted in the uterine tissue. The time between fertilization and implantation is estimated to be roughly 7 to 8 days.

The pre-implantation means of fertility control, as defined above, act to destroy the fertilized ovum during this journey or to prevent implantation. If implantation does not occur, the fertilized

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1 1 C.J.S., Abortion § 6 (1936); Webster, Third New International Dictionary 1788 (1961); Gould, Medical Dictionary 1136 (5th rev. ed. 1941).
3 Ibid.
ovum is discharged and pregnancy is terminated. It is very important to recognize that we are not here concerned with contraceptives, i.e. means which prevent fertilization. Nor are we here concerned with means that terminate pregnancy after implantation. We are dealing with a small, but extremely important area, namely that of fertility control between the time of conception and implantation.

There are no means of fertility control marketed in the United States which have been proved to prevent implantation. However, various drugs for this purpose are being studied. Mechanical devices—theorized, but not proved, to prevent implantation—are being sold in the United States and used in other countries. A unique factor associated with their legality is the ability to use these devices on a non-pregnant woman to terminate future pregnancies.

II. Abortion Statutes

In most jurisdictions, at common law, a criminal abortion could not be committed upon a woman unless she was pregnant and had reached the stage of quickening. But in a few states pregnancy to the stage of quickening was not required. “Quickening” is that stage of pregnancy where the mother first feels the

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4 The term “contraceptives” is often incorrectly used to designate abortifacients. “Abortifacients” produce an abortion. An abortion can be produced only after conception.
5 Jackson, Antifertility Substances, 11 Pharm. Rev. 135, 154-159 (1959). Drug Trade News, July 1, 1964, p. 13, col. 3 states:
   Possible new vistas . . . in the next few years researchers point out, are drugs which prevent nidation (the implantation of the fertilized egg in the endometrium). One such drug being studied at the Weizman Institute in Israel is called ergocornine . . . .
6 Doctors are not yet sure how these devices operate but a current theory is that they control fertility by preventing implantation of the fertilized ovum. The devices presently used include: a ring made of stainless-steel spring, a polyethylene spiral, a double-S loop of plastic, and a double triangle of plastic. The device is inserted by a physician into the uterus of the woman. See Life, May 10, 1963, p. 37; Time, July 31, 1964, p. 48; 188 J.A.M.A. Medical News, No. 10, p. 40 (1964); Med. World News, Nov. 8, 1963, p. 54.
7 At the 12th annual meeting of the American College of Obstetricians and Gynecologists, (Miami Beach, May, 1964), orders were taken for two of these intrauterine devices. This indicates that the devices are on the market for physician use.
movement of the child and occurs in about the fourth or fifth month of pregnancy.\textsuperscript{10}

The basis of the majority view requiring quickening was that at this stage the unborn child had a separate existence and was a human being. A termination of pregnancy after quickening constituted the destruction of a human. Since the pre-implantation means of fertility control act within the first two weeks of pregnancy, before quickening, their use would not be a criminal abortion in the common law jurisdictions where pregnancy at the stage of quickening was required.

In the common law jurisdiction where pregnancy at the stage of quickening was not required, broad language, going far beyond the necessities of the case, was often used to indicate that a criminal abortion could be committed from the moment of conception. The rationale behind this view is set forth in \textit{Mills v. Commonwealth}.\textsuperscript{12} In that case, the contention was made that failure to charge the killing of a \textit{quick} child in the indictment was fatal to the conviction. The court answered the contention saying:

\begin{quote}
[I]t is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life. . . . [It is not necessary that the woman had become quick.] It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated. . . . [T]he civil rights of an infant \textit{in ventre sa mere} are fully protected at all periods after conception.\textsuperscript{13}
\end{quote}

This statement was much broader than the necessities of the case required since the woman was sufficiently advanced in pregnancy to be “big with child.” However, any pre-implantation means used to interrupt gestation would fall within the broad language used.

Today, in all American jurisdictions, the crime of abortion and related offenses are controlled by statutes, many of which have

\textsuperscript{10} Ballantine, \textit{Law Dictionary} 1069 (1948).
\textsuperscript{11} Gould, \textit{Medical Dictionary} 1174 (5th rev. ed. 1941).
\textsuperscript{12} \textit{Supra} note 9.
\textsuperscript{13} \textit{Id.} at 683.
drastically altered the common law rule. The trend of the statutes has been to omit the requirement of quickening, and in the more liberal jurisdictions even the requirement of pregnancy.

1. Statutes Which Do Not Expressly Make Pregnancy an Element of the Offense

(a) Statutes Referring to "A Woman" or "Any Woman"

Seventeen states and the District of Columbia have criminal abortion statutes referring to acts toward "a woman" or "any woman" with intent to produce an "abortion" or "miscarriage" and which do not contain any express indication that the woman must be pregnant. In effect, the act proscribed is the attempt to produce the abortion. Such statutes can be classified into three types.

One type is the statute which expressly states that the crime can be committed whether or not the woman is pregnant. Cases construing such liberal enactments, consistent with the literal terms of the statute, have recognized that pregnancy is not an element of the offense defined. The significant element in these


Many of the above states have other abortion statutes that are not pertinent here.


17 People v. Kellner, 52 N.Y.S.2d (Sup. Ct. 1945); see cases cited, Annot., 46 A.L.R.2d 1939, 1407 (1956). State v. Keller, 287 Mo. 124, 229 S.W. 203 (1921), cited in this annotation was said to be seemingly in conflict with holdings in Missouri and other states on this point. But Keller can be reconciled. Proof of pregnancy was necessary to indicate that an actual abortion, not merely an attempted abortion, was performed. It was necessary to indicate that an actual abortion had been performed because a Missouri statute provided that no person shall be convicted in abortion cases on the basis of a dying declaration unless there was corroborating evidence that an abortion or miscarriage had taken place. Here the basis of the conviction was a dying declaration and there was no corroborative evidence
statutes is the intent to produce a "miscarriage" or "abortion." In the legal sense, the words "miscarriage" and "abortion" are generally considered equivalent\(^ {18} \) and interpreted to mean the unlawful interruption of pregnancy at any time during gestation,\(^ {19} \) unless accompanying words in the statute imply a particular stage of gestation. Since the pre-implantation means of fertility control are used with intent to interrupt pregnancy, their use would seem to violate these statutes which refer to acts toward "a woman" or "any woman," "whether pregnant or not," with intent to produce a miscarriage or abortion.

The second type of statute referring to acts upon "a woman" or "any woman" is that which does not expressly state that the crime can be committed whether or not the woman is pregnant, yet does not imply that a pregnant condition is necessary to the offense.\(^ {20} \) In construing statutes of this type, courts have held that pregnancy is not an element of the crime.\(^ {21} \) Again the essence of the offense is the intent to produce the "miscarriage" or "abortion." This is typically the intent of the person using or administering the pre-implantation means. There is little doubt, therefore, that the use of such means would fall plainly within the purview of these statutes.

The third type of statute referring to acts upon "a woman" or "any woman" is that which does not expressly state that the criminal offense can be committed whether or not the woman is pregnant, but, on the other hand, contains language which implies

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\(^ {18} \) Mills v. Commonwealth, 13 Pa. 630 (1850), and 1 C.J.S., Abortion § 1 (1936).

\(^ {19} \) See Gray v. State, 77 Tex. Crim. 221, 178 S.W. 337 (1915); 2 Bouvier's Law Dictionary 2221 (Rawles, 3rd rev. 1914); 1 Am. Jur. 2d, Abortion § 1 (1962).

\(^ {20} \) The statutes of California, Florida, Iowa, Massachusetts, Oklahoma, Pennsylvania, and Tennessee cited supra note 14 are of this type.

that a pregnant condition must be terminated or attempted to be
terminated. This implication is made by language excepting acts
done to preserve the life of the woman’s “unborn child” or of the
“mother,” language providing penalties only “if the woman dies or miscarries” or language referring to acts done with an “intent
to destroy her [the woman’s] unborn child.” Whether pregnancy
really is an element of the offense necessarily hinges upon the word-
ing of the statute in question. Nevertheless, even if pregnancy is
required, the use of the phrases referring to an intent to produce
a “miscarriage” or “abortion” has been interpreted to mean that
pregnancy at any stage is sufficient. Thus, under this third type of
statute the use of the pre-implantation means on a pregnant
woman would seem to be illegal. Likewise, the use of the means
on a non-pregnant woman to terminate future pregnancies might
come within the offense set forth, since the methods would be used
on “a woman” or “any woman” and a pregnant condition would
be terminated.

(b) Statutes Referring to a Pregnant Woman or Woman Sup-
posed to be Pregnant

Six states have criminal abortion statutes referring to acts to-
ward a woman “pregnant or supposed to be pregnant” or using

22 The Connecticut statute, supra note 14b.
23 The District of Columbia statute, supra note 15.
24 The Ohio statute, supra note 14k.
25 The Virginia and West Virginia statutes, supra note 14. The pertinent provisions
of both these statutes read “with intent to destroy her unborn child, or to produce abor-
tion or miscarriage, and thereby destroy such child or produce such abortion or mis-
carriage.”
26 Pregnancy is probably not an element of the crime in one jurisdiction, e.g. the
District of Columbia. Pecklam v. United States, 226 F.2d 34 (D.C. Cir. 1955), cert. denied,
350 U.S. 912 (1955), (construing 31 Stat. 1322 similar to the District of Columbia statute,
supra note 15).

Pregnancy may be an element of the crime in the other jurisdictions having this type
of statute. In Ohio the crime is not complete unless the woman either miscarries or dies.
1 Ohio Jur. 2d, Abortion § 7 (1953). Thus, if there is no maternal death, pregnancy and
consequent miscarriage are required to commit the crime.

Logically, in order to “destroy such [unborn] child or produce such abortion or
miscarriage,” required by the language of the Virginia and West Virginia statutes, supra
note 14, the woman must be pregnant. Such a construction was implied in Anderson v.
Commonwealth, 190 Va. 655, 58 S.E.2d 72 (1950).

But an intention that pregnancy be an element of the offense might be refuted by the
fact that earlier abortion statutes in some states contained an express requirement of preg-
nancy which the later statutes omitted. See earlier statutes set forth in Quay, Justifiable

27 See Gray v. State, 77 Tex. Crim. 221, 178 S.W. 337 (1915); 2 Bouvier’s Law Dic-
tionary 2221 (Rawles, 3rd rev. 1914); 1 Am. Jur. 2d, Abortion § 1 (1962); Coffman v.
Commonwealth, 188 Va. 553, 50 S.E.2d 431 (1948) (by implication).
similar language.\textsuperscript{28} Cases arising under such statutes, in accordance with the express language, have held that actual pregnancy need not be an element of the offense; the supposition is sufficient.\textsuperscript{29}

However, two of the statutes\textsuperscript{80} provide penalties only upon miscarriage by or death of the woman. Proper use of the implantation means should only cause miscarriage, not death. If the woman does not die, miscarriage is necessary for the penalties to apply. Pregnancy is necessary for a miscarriage. Thus, as applied to the pre-implantation means, pregnancy and consequent miscarriage are, practically speaking, elements of the offense under these two statutes.

A question may arise as to whether reference to a woman "pregnant or supposed to be pregnant" under these statutes means a woman in any stage of pregnancy. The Kentucky statute expressly answers the question by referring to a woman pregnant or supposed to be pregnant "at any time during the period of gestation."\textsuperscript{81} There is no doubt that gestation begins at the moment of conception.\textsuperscript{82} But what of the statutes which do not contain an express definition of pregnancy? The general rule of interpretation is that the ordinary meaning is intended.\textsuperscript{88} The ordinary meaning of "pregnancy" is the condition existing from the moment of conception.\textsuperscript{84} Therefore, if the pre-implantation means to control fertility were used after conception, after pregnancy had begun, their use would come within the meaning of these criminal abortion statutes which refer to a woman "pregnant or supposed to be pregnant" or use similar language. But a difficult problem of statutory construction arises when these means are intentionally used on a non-pregnant woman to terminate future pregnancies. Are the statutes violated under these circumstances? Would there be an act

\begin{itemize}
\item \textsuperscript{28} a. Del. Code Ann. tit. 11, § 301 (1953).
\item d. R.I. Gen. Laws Ann. § 11-3-1 (1956).
\item \textsuperscript{29} Annot., 46 A.L.R.2d 1393, 1409 (1956).
\item \textsuperscript{80} The Indiana and Wyoming statutes, \textit{supra} note 28.
\item \textsuperscript{81} \textit{Supra} note 28c.
\item \textsuperscript{82} Webster, Third New International Dictionary 952 (1961); Ballantine, \textit{Law Dictionary} 954 (1948 ed.); Gould, \textit{Medical Dictionary} 554 (5th rev. ed. 1941).
\item \textsuperscript{83} 82 C.J.S., \textit{Statutes} § 516b (1953).
\item \textsuperscript{84} 1 C.J.S., \textit{Abortion} § 6 (1956); Webster, Third New International Dictionary 1788 (1961); Gould, \textit{Medical Dictionary} 1136 (5th rev. ed. 1941).
\end{itemize}
toward a woman "pregnant or supposed to be pregnant"? Literally there would not be.

2. Statutes Which Expressly Make Pregnancy An Element of the Offense

The criminal abortion statutes which expressly make pregnancy an element of the offense present a great number of problems of construction and interpretation. The requirement of pregnancy in these statutes is derived from language referring to acts toward "a pregnant woman," a "woman pregnant with child" or a "woman with child." The construction of these statutes poses problems because, among other things, in the majority of jurisdictions at common law the woman toward whom the acts were directed had to be pregnant, and at the stage of quickening. The question which commonly arose in the interpretation of these statutes was: Did the statute prohibit interference with pregnancy only after quickening, or did the statute change the common law permitting the offense to be committed during earlier stages of pregnancy? In this discussion, we are concerned with an even narrower point: Can the offense be committed in the earliest stage of pregnancy, between conception and implantation?

Some states have criminal abortion statutes expressly referring to acts done toward a woman with a quick child or to the killing of a quick child. Since the pre-implantation means of fertility control terminate pregnancy before quickening, such statutes would not make those means illegal.

There is no reported case specifically deciding whether the use of pre-implantation means of fertility control violates abortion statutes containing an express requirement of pregnancy, or, in other words, whether a criminal abortion really may be committed by interruption of pregnancy shortly after conception. However, broad language has been used in some cases to indicate that the statutes apply from the moment of conception.

The legality of pre-implantation means under abortion statutes containing an express requirement of pregnancy may seem

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85 Commonwealth v. Bangs, 9 Mass. 387 (1812); see cases cited Annot., 46 A.L.R.2d 1396, 1399 (1956).
academic. Were a case involving the pre-implantation means to arise, the problem of proof of pregnancy would be insurmountable since all practical methods used to determine early pregnancy in humans require for their effectiveness the physiological state present after implantation. But the inability to prove pregnancy would not prevent prosecutions under abortion-related statutes, for example, those prohibiting the manufacture or sale of abortificients. If the use of the pre-implantation means were a criminal abortion, the manufacturer or seller of the pre-implantation means might be prosecuted.

(a) Statutes Referring to Destruction of the Unborn Child

Nebraska and Wisconsin have criminal abortion statutes referring to the destruction of the unborn child at any stage of pregnancy.

In Nebraska, the statute proscribes the use of means on "any pregnant woman with a vitalized embryo, or foetus, at any stage of utero gestation" with a provision that "in case of the death of such vitalized embryo, or foetus, [the person who uses the means] shall be imprisoned in the penitentiary." In *Hans v. State* this provision was said to apply to the destruction of the developing being at any stage of gestation. In that case the defendant was charged with "foeticide" under the state criminal statute for killing an embryo of a woman roughly 1½ months pregnant. The Nebraska constitution prohibited bills relating to more than one subject. The defendant argued that the killing of an embryo and the killing of a fetus made unlawful by the bill were two different subjects, and thus the bill violated the constitution. The court rec-

37 The commonly used Ascheim-Zondek, Friedman, American male frog and other endocrine pregnancy tests are ineffective until development of chorionic tissue. The chorionic tissue is not developed until implantation, and the tests often are not positive until about three weeks after implantation. See generally, Williams, Obstetrics 259-73 (11th ed. 1956); Gray, Attorneys' Textbook of Medicine 693-712 (2d ed. 1940).
40 Neb. Rev. Stat. § 28-404 (1956). The word "vitalized" in "vitalized embryo" has been defined as meaning endowed with life, not dead. *State v. Patterson*, 105 Kan. 9, 181 P. 609 (1919). The court in the *Hans* case did not consider whether the unborn child at 1½ months' pregnancy was "vitalized," nor did it consider the time at which vitalization comes about.
42 147 Neb. 67, 22 N.W.2d 385 (1946), vacated on other grounds, 147 Neb. 730, 25 N.W.2d 35 (1946).
43 § 28-404, R.S. 1943, identical to the statute supra note 41.
ognized that medically a distinction is made between an embryo and a fetus, but rejected defendant's contention on the ground that at law no distinction was made between these terms:

The legislature used the terms ["embryo" and "foetus"] in their ordinary and commonly accepted meaning, and when it used the term "foeticide" it meant the unlawful destruction of an unborn child, in ventre sa mere, in any stage of gestation.44

In this case, the developing individual was advanced to the stage of about 1½ months; it was not a 9-day-old fertilized ovum. However, within the broad language used in this case, the interruption of gestation within two weeks after conception by the pre-implantation means would constitute the destruction of a child "in any stage of gestation" and thus a criminal abortion.

Under the Wisconsin statute45 it is unlawful to intentionally destroy an "unborn child." The latter term is expressly defined as "a human being from the time of conception until it is born alive."46 The use of pre-implantation means would probably violate this statute since an "unborn child," as here defined, would include a fertilized ovum.

(b) Statutes Referring to a "Pregnant Woman" or a "Pregnant Female"

Seventeen states,47 Puerto Rico,48 and the Virgin Islands49

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44 Hans v. State, supra note 42, 22 N.W.2d at 387. The term "uterogestation" used in a prior Nebraska abortion statute has been defined as meaning any stage of pregnancy. Edwards v. State, 75 Neb. 251, 112 N.W. 611 (1907).
have criminal abortion statutes referring to acts done with intent to produce an interruption of pregnancy towards a "pregnant woman" or a "pregnant female." These statutes could easily be held to prohibit use of the pre-implantation means of fertility control.

The language referring to the intent to interrupt pregnancy in these statutes includes reference to the intent to procure a "miscarriage," "abortion," "premature birth" or an "unlawful interruption of pregnancy." The substantive provisions of these statutes are substantially identical. However, the statutes of Louisiana, New Mexico, and Texas differ from the rest of the states in this class by the particularity used in describing the period of pregnancy during which a criminal abortion can be performed, and thus requiring separate consideration.

In New Mexico, an abortion is committed by the use of means toward "any pregnant woman . . . whereby an untimely interruption of pregnancy is produced, or attempted to be produced . . . ."50 "Pregnancy" is expressly defined as "that condition of a woman from the date of conception to the birth of her child."51 Under the express language of this statute one who administers means of pre-implantation fertility control could be subject to prosecution for a felony.

The Texas statute52 provides that:

By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.53

In Gray v. State54 this provision was said to apply to interruption of pregnancy at any stage. In that case, the defendant was convicted of abortion of a woman who was three to four weeks pregnant. On appeal, the defendant attacked the sufficiency of the indictment which charged that he used means to produce an abortion on a woman who was "then . . . pregnant," but failed to allege destruction of the fetus or embryo in the womb under the statute. The

50 Supra note 47(1).
52 Supra note 47(p).
53 Ibid.
54 77 Tex. Crim. 221, 178 S.W. 337 (1915).
court held that the language of the indictment embraced the statutory definition and that the terms embryo and fetus were included in the statute simply to indicate that quickening was not required. These terms did not limit "pregnant," which was held to include the whole period from conception to delivery. An abortion could be committed at any time during that period.

The decision in *Gray v. State* typifies the confusion caused by the lack of consistency between the medical and legal definitions of various expressions that permeate the abortion statutes. The *Gray* case implies that to destroy an embryo or fetus is equivalent to the interruption of pregnancy at any stage. But, the weight of medical authority speaks of an initial stage of pregnancy lasting to the time of implantation, or shortly thereafter (about one to two weeks after conception), and known as the "ovum" stage; the "embryo" stage on the other hand begins at or shortly after implantation and ends about 5 to 8 weeks after conception; and the "fetus" stage continues thereafter. [But, clinicians and physiologists do not even agree whether an "abortion" in the medical sense can be committed before implantation.] Thus, the yet unanswered question is whether in the legal sense the term "embryo" really includes the term "fertilized ovum."

The Louisiana statute, makes unlawful the use of means on a pregnant female "for the purpose of procuring the premature delivery of the embryo or fetus." In *Dore v. State* the distinction between "embryo" and "fetus" was recognized, but the court failed to specify the earliest time of pregnancy at which the unborn child could be called an "embryo." The defendant was convicted under that Louisiana statute of attempting to procure the premature delivery of an "embryo." The evidence showed that the unborn child that had been prematurely delivered was about four to five months premature. The State's medical experts had testified that the

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58 *Supra* note 47(f).
embryonic stage ends and the fetal stage begins at about the eighth week of pregnancy. Thus, defendant argued that the unborn child in question was actually a fetus, not an embryo. The appellate court agreed, finding error in the introduction of evidence of the premature delivery of a "fetus" when the conviction was for the attempt to procure the premature delivery of an "embryo."

But the Dore case did not answer the question of what was the earliest time during pregnancy that an unborn child could be called an "embryo" under the statute. There is some question whether the term "embryo" includes the developing individual from the moment of conception, or, on the other hand, refers to this mass of cells only after implantation. Under the latter definition the use of pre-implantation means would not be a criminal abortion in Louisiana. But under the former definition, where the product of conception is an "embryo," the use might violate the statute. However, the definitions of these terms may be significant if the doctrine of the Texas case, Gray v. State, were used. Under that doctrine, the use of the terms "embryo" and "fetus" would not limit the definition of pregnancy to those stages alone, but would cover the whole period from conception to delivery. The terms would be construed to simply indicate that pregnancy at the stage of quickening was not required. Under such an interpretation, the use of the pre-implantation means of fertility control would be unlawful.

With the exceptions of the Louisiana, New Mexico, and Texas statutes referred to above, the substantive provisions of the remainder of the statutes referring to acts toward a "pregnant woman" with intent to terminate pregnancy are substantially identical. Typical of these statutes are those of Michigan and New Jersey. The Michigan statute provides:

Any person who shall . . . administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure a miscarriage . . . shall be guilty of . . .

60 See note 56.
61 77 Tex. Crim. 221, 178 S.W. 337 (1915).
62 Supra note 47(g).
63 Supra note 47(k).
64 Supra note 47(g).
The New Jersey statute provides:

Any person who, . . . with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any . . . drug . . . or uses any instrument or means whatever, is guilty of . . .

Cases interpreting many of these statutes have used broad language not required by the facts of the situation to intimate that the statutes forbid acts done at any stage of pregnancy from the moment of conception. The recent case of State v. Colmer typifies this use of broad language. In that case the woman was about five weeks pregnant when the attempted abortion was performed. Pregnancy was shown by a positive Friedman test made at about three weeks after conception. (This positive result indicates that implantation had occurred.) In construing the statute, the court, following past New Jersey decisions, stated that pregnancy under the abortion statute begins at the moment of conception and terminates with delivery of the child. In light of such broad language the use of pre-implantation means would probably be unlawful in these jurisdictions.

(c) Statutes Referring to a "Woman Pregnant with Child" and a "Woman with Child"

Seven states have abortion statutes referring to acts toward a "woman pregnant with child." Four states have abortion statutes referring to acts upon a "woman with child." In the absence of an express indication of the period of pregnancy during which the crime can be committed, there is no consistency in the decisions as to whether a particular period was meant.

65 Supra note 47(k).
66 See State v. Fitzgerald, 49 Iowa 260 (1878); see cases cited Annot., 46 A.L.R.2d 1393, 1398 (1956).
The Maryland Statute\(^7\) contains an express provision that the acts made unlawful are those committed for the purpose of procuring a "miscarriage or abortion of a woman pregnant with child at any period of her pregnancy."\(^7\) It would appear that this statute covers a person who sells, uses, or causes the use of the pre-implantation means for fertility control.

Where, contrary to the situation in Maryland, there is no express statutory provision, the cases conflict on the question of whether the crime can be committed at any stage of pregnancy. The Wisconsin case of *Foster v. State*\(^7\) explains the philosophy behind the view that statutes referring to acts upon a "woman pregnant with child" or "a woman with child" relate only to acts done at the stage of quickening. At the period in which the case arose, Wisconsin had two abortion statutes. Under one of these,\(^7\) the use of means on "any woman pregnant with child . . . with intent thereby to destroy such child . . . in the case of death of such child or of such mother" was manslaughter. This provision was found in the chapter relating to "Offenses Against Lives and Persons." Under the other,\(^7\) the use of means on "any pregnant woman . . . with intent thereby to procure the miscarriage of any such woman" was a misdemeanor. This provision was found in the chapter relating to "Offenses Against Chastity, Morality and Decency."

In the *Foster* case the defendant had been convicted under the manslaughter statute for the killing of an unborn child of a pregnant woman. The woman was six to eight weeks pregnant when the alleged abortion was performed; she did not die as a result of the operation. Since the woman was six to eight weeks pregnant, the unborn child was in the embryonic state.

On appeal, the Supreme Court of Wisconsin reversed the conviction on the ground that the manslaughter statute referring to "woman pregnant with child" meant a woman pregnant with a quick child. Since the unborn child in this case was an embryo, not a quick child, defendant should have been prosecuted under the

\(^{70}\) *Supra* note 68(c).
\(^{71}\) *Ibid.*
\(^{72}\) 182 Wis. 298, 196 N.W. 233 (1923).
\(^{73}\) Wis. Stats. § 4352 (1923).
\(^{74}\) Wis. Stats. § 4583 (1923).
misdemeanor statute. The basis of the decision was that the manslaughter statute related to taking a human being's life, while the misdemeanor statute did not—it was simply an offense against morality. An embryo was held not to be a human being in the legal sense. In arriving at its decision, the court said:

In a strictly scientific and physiological sense there is life in an embryo from the time of conception, and in such sense there is also life in the male and female elements that unite to form the embryo. But law for obvious reasons cannot in its classifications follow the latest or ultimate declarations of science. It must for purposes of practical efficiency proceed upon more everyday and popular conceptions... That it should be less of an offense to destroy an embryo in a stage where human life in its common acceptance has not yet begun than to destroy a quick child is a conclusion that commends itself to most men... Both the quick child and the mother are human beings—hence to unlawfully kill either constitutes manslaughter. A two months' embryo is not a human being in the eye of the law, and therefore its destruction constitutes an offense against morality and not against lives and persons.75

It is interesting to note that in this decision the court distinguished a prior Wisconsin case.76 In the prior case, it was said that under the manslaughter statute referring to a "woman pregnant with child" an offense could be committed whether the woman was quick with child or not. The prior case was distinguished on the ground that it involved a situation where the death of the mother resulted.

In states currently having two abortion statutes77 similar to those of Wisconsin at the time of the Foster decision, it would be expected that the view of Foster would prevail. The termination of pregnancy during the embryonic stage (or earlier) would not violate statutes providing the more severe penalties. This expectation has been borne out, where cases have arisen.78 Since such severe statutes would not relate to acts done in earlier stages of

75 182 Wis. at 301-2, 196 N.W. at 235.
76 State v. Dickinson, 41 Wis. 299 (1877). But if the prosecution is for death of the mother, the child need not be quick. State v. Walters, 199 Wis. 68, 225 N.W. 167 (1929).
77 The Georgia and South Carolina statutes cited, supra notes 47, 68, and 69. Tennessee has two abortion statutes: Tenn. Code Ann. §§ 39-301, -302 (1955). The statute providing the more severe penalties, § 39-301, refers to any "pregnant woman with child, whether such child be quick or not..." The reasoning of Foster might not be applicable because of the express provision that quickening is not necessary.
pregnancy, the use of pre-implantation means of fertility control should not violate them.

But the situation is more complex in states having only one abortion statute. In such states many cases have used broad language to the effect that the phrases "woman pregnant with child" or "woman with child" refer to a woman at any stage of pregnancy. This sweeping language has been used even where the offense is manslaughter. In an Oregon case, *State v. Ausplund*, the defendant appealed from a conviction for manslaughter under the state statute which provided that any person who used means on a woman pregnant with a child "with intent to destroy such child . . . in case the death of such child or mother is thereby produced, be deemed guilty of manslaughter." At the time of the alleged abortion, the woman was about three months pregnant. Both mother and child died as a result of the abortion. The defendant had objected to the instruction that a woman is "pregnant with child" from the moment of conception to the time of delivery. The defendant had contended that "pregnant with child" meant "pregnant with a quick child." On appeal, the Oregon Supreme Court sustained the conviction and the instruction was held to be correct. The view of the court was:

> [W]hen a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues and continues until parturition. During all this time the woman is "pregnant with child" within the meaning of the statute . . . . From the moment of conception a new life has begun and is protected by the enactment. The product of conception during its entire course is imbued with life and capable of being destroyed as contemplated by law.

Although the statutes involved were substantially identical, the language and holdings of *State v. Ausplund* and *Foster v. State* are conflicting. A distinction between the two can be made: In *Foster*, the prosecution was for the death of the unborn "child," the mother was not killed. In *Ausplund*, the prosecution involved

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80 L. Ore. L. § 1900. The Oregon statute, *supra* note 68(f), contains identical language.
81 The accepted theory today is that fertilization occurs in the Fallopian tube.
82 86 Ore. at 131, 167 Pac. at 1022-3.
83 *Supra* note 79.
84 182 Wis. 298, 196 N.W. 233 (1923).
the death of both the mother and unborn "child." Whether the Oregon statute construed in Ausplund would really be held to apply to the destruction of an embryo, or even a fertilized ovum before implantation, in a case where there is no maternal death, remains unknown. The language of Ausplund indicates that the Oregon statute would be held to apply.

Thus, in states having only one abortion statute, which refers to a "woman pregnant with child" or a "woman with child" two problems are presented. First, does the statute apply to the termination of the pregnancy before the stage of quickening? Some statutes\(^85\) expressly answer the question by stating that they apply before or after quickening. Second, even if the statute expressly states that it applies, or has been held to apply to pregnancy before the stage of quickening, does it really prohibit interference with pregnancy \textit{from the moment of conception}? The broad language of the decisions in accord with Ausplund say yes.\(^86\) However, the legality of the use of such means has never been in issue.

III. PROBLEMS ASSOCIATED WITH ABORTION STATUTES REQUIRING PREGNANCY

The abortion statutes in which pregnancy is an element of the offense present two further problems.

The first problem is whether they apply to the use of means on a non-pregnant woman to terminate future pregnancies. As discussed before, the pre-implantation means may be used on a non-pregnant woman to terminate a future pregnancy. In fact, in practice this may be the predominant method of their use.

The abortion statutes in which pregnancy (or supposed pregnancy) is an element of the offense commonly speak of acts upon a pregnant woman. The exact terms used to denote the unlawful acts vary from statute to statute. Typical are: the administration

\(^85\) The Arkansas and Maine statutes, \textit{supra} notes 68 and 69. Hawaii's statute cited, \textit{supra} note 69(c), prescribes different punishments depending on whether or not the woman is "then quick with child."


In regard to the statutes where the killing of the unborn child constitutes manslaughter, see \textit{State v. Cooper}, 22 N.J.L. 52 (1848). "[F]or certain civil purposes the law regards an infant as \textit{in being} from the time of conception, yet it seems no where to regard it as \textit{in life}, or to have respect to its preservation as a living being." \textit{Id.} at 57.
of a medicine, drug or other substance; the use of an instrument or other means; providing, supplying, prescribing, giving, or advising the use of the medicine, drug or other substance, instrument or other means. The legislatures drafting these statutes probably never contemplated, or perhaps fully appreciated, that modern science could develop methods that could be used on a non-pregnant woman to terminate future pregnancies. Illustrative of these laws in which pregnancy, or supposed pregnancy is an element of the offense is the Delaware statute which provides:

Whoever, with the intent to procure the miscarriage of any pregnant woman, or any woman supposed by such person to be pregnant . . . administers, advises, prescribes or causes to be taken by her, any . . . drug . . . or uses any instrument or other means . . . is guilty of a felony.

Must the act of administration, advising, prescribing . . ., etc., within the terms of this statute be done at the time of pregnancy or supposed pregnancy? Or is the act continuous, the administration . . . prescribing, etc., continuing as long as the means can produce a miscarriage? Does “her” as used in the statute mean the woman when pregnant or merely the woman on whom the means are used with intent to procure the miscarriage? These questions cannot be answered with any reasonable degree of certainty until a prosecution is commenced for use of the pre-implantation means.

The second problem concerns the proof of pregnancy under statutes in which pregnancy is an element of the offense. Nothing can indicate the existence of pregnancy before implantation. This means that under statutes in which pregnancy is a requirement, the State would be unable to prove an element of the crime. But this inability to prove the crime would not prevent prosecutions under abortion-related statutes which are found in numerous states, including those where pregnancy is not an element of the offense under the abortion statutes. The term “abortion-related statutes” used here means those laws which prohibit the manufacture, sale, or distribution of abortifacients. The manufacturer, distributor, or druggist might be prosecuted under such statutes.

87 Supra note 28(a).
88 Supra note 37.
IV. THE MODEL PENAL CODE

The American Law Institute's Model Penal Code has obviated the problems under current state laws associated with the use of pre-implantation means of fertility control. Section 230.3 (1) of the Code\(^9\) provides:

"A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree."

Section 230.3 (7) \(^9\) further provides:

"Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization." (Emphasis added.)

But the problem that still could arise in the interpretation of this Code is whether the provision of § 230.3 (7) applies to mechanical devices which are used to prevent implantation of a fertilized ovum. Mechanical devices for fertility control, referred to as intrauterine devices, are in current use.\(^9\) If the prevailing theory that these devices can prevent implantation of the fertilized ovum is proved, it seems questionable whether they have been included in Section 230.3 (7) \(^9\) which excepts from the model abortion law "drugs or other substances for avoiding pregnancy" which prevent implantation. An intrauterine device is not a "drug." Whether it is a "substance" within this provision is not clear.

The commentary on Section 230.3 (7) \(^9\) suggests that chemicals as opposed to mechanical devices were contemplated. In the commentary it is said:

Subsection (7) draws the line between abortion and contraception so as to prevent application of the Section to techniques for

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\(^9\) See discussion, supra note 6.
\(^9\) Supra note 91.
preventing pregnancy even if these operate shortly after fertilization. Recent research in contraception points to methods of birth control by oral ingestion of drugs that prevent the fertilized ovum from establishing itself on the uterine wall, a necessary pre-condition of fetal development.  

(Emphasis added.)

The suggestion that chemicals, as opposed to mechanical devices, were contemplated is seen from the reference in that commentary solely to drugs, but not to mechanical devices, which prevent implantation.

A further suggestion that chemicals, as opposed to mechanical devices, were contemplated in the Model Code is seen from the way the term "substance" is used in current state abortion statutes. The statutes of the majority of the states use the term "substance" in their abortion laws. The statute of Arizona typifies the way in which this term is used:

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman . . . shall be punished . . .

The term "substance" is used in the same clause with "medicine" and "drugs." Medicines and drugs used to procure a miscarriage are by definition chemicals; they procure a miscarriage by a pharmacological action. The term "use of instruments or other means" is used in a separate clause, distinct from that relating to "any medicine, drug or substance." Instruments which have been used to procure a miscarriage are mechanical devices; they procure a miscarriage by a mechanical, not a pharmacological action, i.e., the detachment of the unborn child from the uterus. Chemicals, with which the term "substance" is associated, are distinct—both in physical form and in mode of action—from instruments. An intrauterine device is not a chemical; if it does prevent implantation it is probably by a physical action. Since an intrauterine device does

95 Id. at 161.
97 The following physical mechanisms of action of the devices have been proposed.
   a. They cause excessive contraction of the uterine muscle so that the uterus is not receptive to implantation of the fertilized ovum.
   b. They set up a chronic irritation in the uterine tissue which prevents implantation.
   c. They cause excessive Fallopian tube peristalsis (motion of the Fallopian tube walls consisting of alternate contractions and dilations that move the contents of the tube onward) so that the ovum, even if fertilized, is too immature to implant.
not seem to come within the term "substance," the Model Penal Code would seem to prohibit its use as an abortifacient.

The ambiguity could be resolved by the insertion of the phrase "or other means" after the word "substances" in Subsection (7).

**Conclusion**

Research of ever increasing importance is being carried out on pre-implantation means of fertility control—means which terminate pregnancy after conception but before implantation of the microscopic fertilized ovum in the uterus.

The question of whether the use of these pre-implantation means would violate the abortion laws has never been decided. In virtually every one of the states, there are abortion statutes which could be or have been judicially construed, by the use of sweeping statements, to apply to acts done with an intent to terminate pregnancy at any time, from the moment of conception. Where judicial construction has been given, the broad statements were made at a time when the courts did not consider, or perhaps fully appreciate, the possibility of safely terminating pregnancy shortly after conception.

Statutes referring to acts toward "a woman" or "any woman" with intent to produce an abortion or miscarriage have been construed to proscribe the use of means on any woman, whether pregnant or not, with intent to interrupt pregnancy at any stage. The same construction has been applied to statutes referring to a woman "pregnant or supposed . . . to be pregnant." Likewise, statutes referring to acts toward a "pregnant" woman and a woman "pregnant with child" or "with child" specifically state or have been construed to mean that acts done at any time during pregnancy, from the moment of conception, may be unlawful. Some decisions say a later stage of pregnancy is meant.

Statutes referring to the destruction of an "embryo" have been said to apply from the moment of conception. Medically speaking, however, the embryonic stage may not begin until after implantation. In the absence of a statutory definition of the term, the cases conflict as to whether an "unborn child" exists from the moment of conception.
The broad language of statutes and cases would suggest that to use the pre-implantation means on a pregnant woman would be unlawful. If these devices are used on a non-pregnant woman to terminate future pregnancies, their legality is uncertain. Thus, some statutes that prohibit acts upon a woman who is pregnant may not technically cover the use of pre-implantation means on a non-pregnant woman to terminate future pregnancies. But it is uncertain whether the technical wording of the statutes would be followed or whether the broad purpose would instead be considered.

It is impossible to prove pregnancy before implantation. Thus, under statutes where pregnancy is an element of the offense, prosecution under the abortion statutes might be futile. But the manufacturers, distributors or sellers of the pre-implantation means might be prosecuted under statutes prohibiting the manufacture, distribution or sale of abortifacients.

Even the abortion statute of the Model Penal Code is not completely free from ambiguity. Whether mechanical devices are included within its section excluding “drugs or other substances,” which prevent implantation, from the abortion provisions is an open question.

The development of effective and safe, and preferably inexpensive and simple to use, means of fertility control is necessary for our society. Fertility control is necessary to increase or perhaps even to maintain current standards of living. The development and use of means of fertility control which terminate pregnancy before implantation of the fertilized ovum in the uterus should not be retarded by sweeping language—language used at a time when termination of pregnancy before implantation was not a practical procedure.

If termination of pregnancy before implantation is to be considered unlawful, the legislatures should explicitly so provide. If the legislatures do choose to so provide, they must consider whether they are using the penal laws to punish matters on which a substantial number of moral citizens may reasonably disagree.

But whatever the result of the legislatures’ provisions, the development of pre-implantation means of fertility control should not be retarded because the applicable abortion law is uncertain.