

1968

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Due Process of Abortion

Luis Kutner*

The life cycle is set into motion by the formation of an embryo which becomes implanted in the womb of the woman. A fetus then develops, and the signs of pregnancy appear. Pregnancy and the giving of birth and motherhood cause elation to most women, but to many these occurrences are, for various reasons, a cause for despair. Thus, a woman may desire to terminate the pregnancy before the embryo or fetus attains viability.

Termination of pregnancies of less than three months' duration is a simple and safe procedure involving a D and C—cervical dilation and curettage. The doctor dilates the neck of the womb—the cervix—by the use of a metal dilator and then scrapes all products of conception from the walls of the womb. After this is completed, drugs are administered to contract the womb to normal size and sanitary packings are used to prevent post-operative infection. This procedure is generally recognized to be safe and requires a minimum of hospitalization.

If the pregnancy is further advanced, a hysterectomy, similar to a Caesarian section, may be performed. This operation is as complex as any major abdominal surgery, but the risks are not great.

Another technique which may be used is "salting out," involving the insertion of a needle through the wall of the womb into the amniotic sac where the fetus is suspended. The amniotic fluid is then removed from the patient's womb by a syringe and is replaced by a salt solution. Within 48 hours the patient experiences labor, and the fetus and placenta are expelled from the womb in a manner similar to spontaneous miscarriage.

These three procedures rarely cause complications and do not interfere with the patient's fertility.¹ However, generally throughout the world the law prohibits the intentional termination of pregnancy—abortion—except for reasons of medical necessity—therapeutic abortion—limited to preserving the life of the mother. Nearly every state in the United States has a

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1. D. LOWE, *ABORTION AND THE LAW* 3-5 (1966).

statute expressly outlawing abortion.²

Clearly, these statutes restrict the freedom of the woman who desires an abortion and the doctor who may be willing to treat her. By restricting her freedom these laws appear to infringe upon her constitutional right of privacy, the doctor-patient relationship, and—at least in the case of a married woman—the family relationship. The contention may be made, however, that the fetus also has certain constitutional rights which require protection.

This article seeks to explore these constitutional issues. The present state of statutory law will be surveyed, followed by a consideration of the actual practice of abortion, a consideration of recent reforms and a presentation of a proposed solution.

I. THE PRESENT STATE OF THE LAW

The procurement, or attempted procurement, of an abortion by any means whatsoever constitutes a possible felony in nearly every state in the Union. But each state statute contains exceptions to this prohibition.³ In most states an abortion is permitted if its purpose is to preserve the *life* of the mother,⁴ while in at least three states an abortion may be performed to preserve the *life or health* of the mother.⁵ Another state allows abortion to save the life of the mother or to prevent serious or permanent bodily injury to her,⁶ and in Maryland abortions are condoned when the physician is "satisfied that the fetus is dead, or that no other method will secure the safety of the mother."⁷

The one noted judicial interpretation of the narrow exception "to preserve the life of the mother," is the famous English case of *Rex v. Bourne*⁸ which involved the prosecution of an eminent obstetrical surgeon who, openly and without compensation, performed an operation to terminate the pregnancy of a fourteen year old girl, victim of a forcible rape by several soldiers.

2. Guttmacher, *Abortion—Yesterday, Today and Tomorrow*, in *THE CASE FOR LEGALIZED ABORTION NOW* 1, 5 (A. Guttmacher ed. 1967).

3. Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Law*, 35 S. CAL. L. REV. 123, 127 (1962); see also Kenny, *Thalidomide Catalyst To Abortion Reform*, 5 ARIZ. L. REV. 105, 107 (1963).

4. See, e.g., MINN. STAT. § 617.18 (1967).

5. ALA. CODE tit. 14, § 9 (1958); ORE. REV. STAT. §§ 163.060, 677.010, 677.190 (1967); D.C. CODE ANN. § 22-201 (1967).

6. N.M. STAT. ANN. § 40A-5-3 (1963).

7. MD. ANN. CODE art. 27, § 3 (1957); Leavy and Kummer, *supra* note 3.

8. [1939] 1 K.B. 687.

The doctor testified that the girl might have suffered a mental breakdown if compelled to bear the child. Judge MacNaughten instructed the jury that a woman need not be in the jaws of death before her pregnancy could be lawfully terminated, and that in any case, a woman's longevity would most likely be shortened by serious impairment of her health, though noting that this defense would not be available to the "professional abortionist." The surgeon was acquitted so the decision was never appealed.

While apparently no appellate court has been squarely faced with the issue, a few American decisions suggest this should be the rule.⁹ A California appellate court did appear to follow the *Bourne* interpretation by holding that not all abortions are illegal.¹⁰ The court held that a showing that the abortion was not necessary to preserve the mother's life, and that the abortee appeared healthy before undergoing the operation does not meet the prosecution's burden of prima facie proof. It held that there is a presumption of necessity in the case of an abortion by a licensed physician which cannot be overturned by a mere showing of prior good health. The court held that the peril to life need not be imminent, but should be great enough that the dangerous condition be potentially present even though its full development might be delayed, nor is it essential that the doctor believe that the death of the patient would otherwise be certain.¹¹

Where the person performing the abortion is not a licensed physician, and where the facts suggest that the person is a "professional abortionist," no such presumption of necessity exists, however. In *State v. Orsini*,¹² the court held that it was not necessary for the state to negate all possibility of the abortion being necessary to preserve the life of the mother in order to make out a prima facie case. It stated that the state could make out a prima facie case "... through a presumption based on common experience that 'the ability to bear and bring forth children is the rule, and . . . the necessity of procuring an abortion or miscarriage in order to save the life of mother or child is the rare exception.'"¹³

In addition to criminal prosecution and potential revocation

9. *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (1959); *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944); *State v. Powers*, 155 Wash. 63, 283 P. 439 (1929).

10. *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (1959).

11. *Id.*

12. 232 A.2d 907 (Conn. 1967).

13. *Id.* at 911. See *State v. Lee*, 69 Conn. 199, 37 A. 79, 80 (1897).

of a physician's license¹⁴ for performance of an illegal abortion, there also may be a civil sanction. A California trial court held that a husband may sue a physician who performs an illegal abortion upon his wife, even though she has consented, on the grounds it constitutes a direct invasion of his personal rights in the prospective relationship with his unborn child.¹⁵ These paternal rights were also asserted by a police officer seeking to block an abortion of his estranged wife. Contending he was threatened with deprivation of the care, comfort, society and companionship of his unborn child, he argued that California's therapeutic abortion law was unconstitutional because it breached the right to have children, and that it had not been shown that bearing the child would endanger his wife's health—the basis upon which her doctors approved the abortion.¹⁶

The particular wording of abortion statutes takes on added significance in light of the increased use of fertility control measures, and the precise effect of these measures. Diethylstilbestrol or the "morning after" pill, does not prevent ovulation or the union of sperm and egg, but prevents implantation of the fertilized ovum on the wall of the uterus, normally occurring about six to seven days after conception.¹⁷ In Sweden a drug known as F6103 which is to be taken once a month is in the process of development. This drug appears to work by interfering with the production or release of progesterone, a hormone for the implantation and growth of a fertilized ovum in the uterus. A woman may take it on the 28th day of the menstrual cycle and menstruation will occur whether or not an egg has been fertilized. Already on the market and approved by the Federal Food and Drug Administration for other purposes are estrogens—compounds composed of female hormones—which can prevent conception up to four days after intercourse and are routinely given in at least one New York hospital to victims of rape. If a high dose of estrogen is given within four days after intercourse, the ova will be prematurely flushed out of the uterus within 48 hours. Intrauterine devices, such as plastic coils which are inserted into the uterus by a physician, are also now in common use. These devices do not prevent passage of the sperm into the uterus and along the Fallopian tubes to meet the egg, but apparently control fertility by preventing implantation

14. *E.g.*, ORE. REV. STAT. § 677.190 (1967).

15. *Touriel v. Benviniste*, Civil No. 76-6790 (Super. Ct., Oct. 20, 1961), noted in 14 STAN. L. REV. 901 (1962).

16. *Chicago Daily News*, Dec. 7, 1967, at 20 col.

17. *TIME*, May 6, 1966, at 60, col. 1.

of the fertilized ovum, though what actually occurs is not definitely established.¹⁸

Some abortion statutes expressly make pregnancy an element of the offense,¹⁹ while others do not.²⁰ Statutes of the latter category refer to acts toward "a woman," "any woman," or "a woman pregnant or supposed to be pregnant." Specified acts intended to produce an abortion or miscarriage generally constitute the prohibited conduct. The problem with these statutes is the definition of 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 the problem of determining the earliest stage of pregnancy at which the offense can be committed, *i.e.*, whether they apply to pregnancy before implantation. There is an absence of reported cases.²¹

Generally at common law a criminal abortion could not be committed upon a woman unless she was pregnant and had reached the stage of "quickening,"²²—that stage when the mother first feels the movement of the child, occurring in about the fourth or fifth month of pregnancy.²³ The basis of the view was that at this stage the unborn child had a separate existence and was a human being, so that the termination of pregnancy after "quickening" constituted the destruction of a human being.²⁴ Since the preimplantation means of fertility control act before "quickening," their use would not generally be a criminal abortion under the common law, at least within those jurisdictions where "quickening" was required. Today in all jurisdictions the crime of abortion is controlled by statute and the trend is to omit the requirement of "quickening."

Under abortion statutes which refer to acts toward a "pregnant woman," courts have generally held that the woman need not reach any particular stage of pregnancy, and these statutes have been construed to mean that pregnancy begins at the moment of conception and terminates with the delivery of the

18. Note, 46 ORE. L. REV. 211 (1967).

19. See, *e.g.*, NEB. REV. STAT. § 28-404 (1964).

20. See, *e.g.*, MINN. STAT. § 617.18 (1967); N.Y. REV. LAW § 125.05 (McKinney 1967).

21. See Meloy, *Pre-Implantation Fertility Control and the Abortion Laws*, 41 CHI.-KENT L. REV. 183 (1964).

22. Meloy, *supra* note 21; Annot., 46 A.L.R.2d 1396 (1956).

23. BLAKISTON'S NEW GOULD MEDICAL DICTIONARY 999 (2d ed. 1956).

24. Meloy, *supra* note 21.

child.²⁵ Under these statutes the intrauterine devices and other preimplantation fertility control measures could possibly be barred.²⁶

Where the abortion statutes refer to a woman "pregnant with child," court decisions conflict as to whether a particular stage of pregnancy must be established. Some judicial decisions require that the prosecution show the mother was quick with child, while other courts hold the woman pregnant from conception.²⁷ But all the cases are consistent in that pregnancy has to be proved before an illegal abortion may occur. Since pregnancy cannot be proved until after implantation takes place, it would be impossible to prove that any user of a fertility control drug or device had intentionally destroyed the product of conception.

Statutes which do not require pregnancy as an element of the offense do require a showing that the accused believed that the woman upon whom the act was committed was pregnant at the time.²⁸ The taking of a "morning after" pill in the belief that pregnancy has occurred might be prohibited under these statutes. The doctor prescribing the pill could be held to be in violation of such a statute. A similar construction would apply to statutes referring to acts toward a woman pregnant or supposed by the accused to be pregnant.²⁹

II. THE ENFORCEMENT OF THE LAW

Practically every physician has at some time in his career been called upon to perform an abortion.³⁰ Professional ethics and the law inhibit him. In many metropolitan areas the doctor refers the case to a hospital committee and thereby avoids the conflicting pressures placed upon him by his relationship to his patient, professional duties and legal obligations. The decision is made by the committee usually composed of gynecologists, ex-

25. *Id.*; Note, 46 ORE. L. REV. 211 (1967).

26. Some jurisdictions have abortion-related statutes which prohibit the manufacture, sale or distribution of abortifacients. Under these statutes the manufacturer, distributor or druggist might be prosecuted. See, e.g., ARIZ. REV. STAT. ANN. § 13-211 (1956).

27. *Id.* Identical wording in a state statute was construed differently in *Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923), as limited to quickening and *State v. Ausplund*, 86 Ore. 121, 167 P. 1019 (1917), where applied at conception. In the latter case the mother had died.

28. *People v. Murphy*, 60 Cal. App. 2d 762, 141 P.2d 755 (1943); Note, 46 ORE. L. REV. 211, 217 (1967).

29. See, e.g., MD. ANN. CODE art. 27, § 3 (1957).

30. E. SCHUR, CRIMES WITHOUT VICTIMS 25 (1965).

perts in internal medicine and psychiatrists. A survey of committee decisions by hospitals in California revealed that of 24 hospitals, 18 believed that they had authorized the performance of therapeutic abortions which did not strictly conform to the legal norm.³¹ There was a considerable diversity of opinion as to standards for authorizing performance of an abortion. Regarding the hypothetical case of a 15 year old minister's daughter, pregnant as a result of forcible rape, 15 of 22 hospitals indicated approval of therapeutic abortion despite the fact that the law of California was clearly to the contrary.³²

Despite the broad interpretation of statutes by hospital boards, hospitals are severely constrained by statutory requirements so that they now perform very few abortions. In recent years there has been a pronounced decline in the rate of therapeutic abortions. For example, in New York the rate declined 43 per cent from 1943 to 1953 (from 5.1 per thousand to 2.9 in 1953).³³ This decline resulted from medical advances in the treatment of conditions that once constituted major threats to pregnancy so that women with heart disease, hypertensive renal disease, tuberculosis and other serious conditions are increasingly allowed to fulfill the terms of the pregnancy. Abortion is seldom necessary to save the physical well-being of the woman.

The focus today is upon psychiatric considerations. In recent years the number of abortions performed on psychiatric grounds has increased. But a hospital that wishes to abide by the letter of the law in a state prohibiting the termination of a pregnancy except when necessary to save the mother's life may grant an abortion on psychiatric grounds only where the woman presents a very convincing threat of suicide. There obviously is no reliable means for determining if a woman would actually carry out her threat, since a woman seeking an abortion may claim life is no longer worth living even if she has no intentions or tendencies to commit suicide. However, because pregnancy causes physiological and psychological reorientation, the possibility of serious depression is always present and may be increased by socio-economic difficulties. Frequently, such depression may prompt a woman to seek an abortion regardless of the decision of the hospital. Though most hospitals will not take such determination into account when considering an ap-

31. Packer & Gampbell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 430 (1959).

32. *Id.* at 435.

33. ABORTION IN THE UNITED STATES 83 (M. Calderone ed. 1958).

plication for abortion, such determination may be regarded as a relevant factor by the psychiatrist.

The psychiatrist, in recommending abortions, may face skepticism by other medical personnel involved in ruling on the case.³⁴ Doctors differ as to whether socio-economic factors should be considered. In the Scandinavian countries there has been a willingness to grant legal abortions for certain well-defined and serious psychosomatic disorders.³⁵ This type of diagnosis would not justify abortion under American law, though such conditions are considered to be relevant by some practitioners.

Medical progress has unearthed eugenic indications of prospects that the fetus is deformed. Since 1941, it has become widely known that at least 30 per cent of children whose mothers have Rubella (German measles) before the twelfth week of pregnancy are born with congenital abnormalities.³⁶ Hospitals will perform abortions on such grounds despite the law to the contrary.³⁷

The case of Sheri Finkbine, which involved the question of aborting a fetus apparently deformed by thalidomide tablets, focused upon this aspect of the abortion problem and served to dramatize the abortion controversy in general. A panel of doctors at a Phoenix hospital agreed that an abortion should be performed but the decision was overruled by the hospital administrator who demanded clarification of the operation's legal status. Mrs. Finkbine then sought a declaratory judgment from a superior court judge which was dismissed for jurisdictional reasons. She then obtained an abortion in Sweden where the laws are less restrictive.³⁸ However, in many hospitals in the United States a therapeutic abortion would be granted in a case such as Mrs. Finkbine's despite the law to the contrary.

It is probable that the majority of therapeutic abortions in the United States are illegal.³⁹ Whether an abortion will be granted in a particular case depends upon the particular hospital. The state will often refrain from prosecuting.

Not all unwillingly pregnant women have an equal opportunity to receive hospital-approved abortions. The poor person

34. E. SCHUR, *supra* note 30, at 16.

35. ABORTION IN THE UNITED STATES, *supra* note 33, at 137.

36. E. SCHUR, *supra* note 30, at 15.

37. *Id.*

38. *Id.* at 11.

39. Packer & Campbell, *supra* note 31.

or the individual with more modest financial means is less likely to obtain one. In New York City the ratio of such operations to live births in private hospitals is almost double that of the voluntary or public hospital.⁴⁰ The city hospitals have the lowest ratio. Almost invariably the private patient receives greater consideration than the clinic patient.⁴¹ Negro and Puerto Rican women are less likely to be granted a therapeutic abortion than those from other ethnic groups.⁴² The unmarried woman stands much less chance of getting a therapeutic abortion than the married. Another inequitable practice is that in many cases the woman obtaining a therapeutic abortion must agree to undergo sterilization.⁴³

The woman unable to obtain a therapeutic abortion at a hospital may seek a doctor who will be willing to perform an abortion despite the law. Some physicians are available to perform an abortion, despite its illegality, because of a sympathetic regard for the plight of the patient. But in most cities professional abortionists are to be found operating a lucrative illicit business. For \$200 to \$500 or more, a woman may obtain an abortion. The annual "take" from illegal abortions has been estimated at over \$350,000,000 and they are considered to be the third largest illegal endeavor in the United States, surpassed only by gambling and narcotics.⁴⁴

An illegal abortion may be a traumatic experience since the woman is at the mercy of the abortionist. In many instances, the abortionist is competent and capable of performing an abortion safely. But there are countless instances of abortions performed by untrained individuals under crude conditions which have caused hemorrhages and aseptic poisoning resulting in

40. ABORTION IN THE UNITED STATES, *supra* note 33, at 77-78. "The private patients of the voluntary hospitals have over three times as many abortions as the service patients in the same type of institution and more than twenty times as many abortions as patients in municipal hospitals." Guttmacher, *supra* note 2, at 9.

41. E. SCHUR, *supra* note 30, at 21. Generally the law enforcement agencies allow the hospitals to police themselves. An individual doctor, in sole charge of the private patient develops a sense of personal responsibility toward her, while the same degree of responsibility is rarely developed toward clinic patients, so that doctors are less prone to breach the statute. The municipal hospital, too often staffed by the same physician as the voluntary, is more timid, perhaps because of political considerations. Guttmacher, *supra* note 2, at 11-12.

42. Pilpel, *The Abortion Crisis*, in *THE CASE FOR LEGALIZED ABORTION* Now 97, 100 (A. Guttmacher ed. 1967).

43. E. SCHUR, *supra* note 30, at 22.

44. D. Lowe, *supra* note 1, at 77.

sterility and death.⁴⁵ Illegal abortions may take the lives of more than 5,000 women each year.⁴⁶ However, the use of antibiotics and the exercise of increased care have decreased the likelihood of death. Known abortion deaths in New York City have declined from 144 in 1921 to 15 in 1951, but a disproportionate number of the women who died were Negroes, and though more of the women who underwent abortions were married, more deaths occurred among those who were single.⁴⁷

A major problem stems from the fact that the laws against abortion are largely unenforceable. The number of illegal abortions performed annually in the United States has been estimated to vary from 300,000 to over one million.⁴⁸ For every legal abortion performed in the United States, 110 are said to be performed illegally.⁴⁹ The odds against being arrested for performing an illegal abortion have been estimated to be

45. The recent case of *State v. Orsini*, 232 A.2d 907 (Conn. 1967) provides a vivid example of the dangerous and frightening methods employed by the professional abortionist. Upon discovering that she was pregnant, complainant arranged with a Dr. Walker for an abortion. "Walker" was an alias, and the defendant was not a medical man. A few days later the woman received a telephone call and was instructed to go to a motel in an outlying town that evening. She met with the defendants, but because she had eaten a few hours earlier and might have become ill, the abortion was postponed.

The following morning complainant was taken to another room where she paid the defendants \$390.00. She was then placed on some towels on the bed and "Dr. Walker" inserted a shoehorn device to effect the abortion. The other defendant gave her "some white pills for bleeding and some green pills for pain." The woman was told that if this attempt was not successful she should take citrate of magnesia, and, if that did not work, mineral oil. The abortion procedure was to be repeated the following week if these methods failed.

After resting in her room for a time, Complainant arose and drove home. Continued excessive vaginal bleeding led to hospitalization and surgical treatment.

46. E. SCHUR, *supra* note 30, at 28.

47. ABORTION IN THE UNITED STATES, *supra* note 33, at 67-69.

48. Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 LAW & CONTEMP. PROB. 593, 597 (1960). The practice of abortion has given rise to a shadow culture of deviance having its own values, norms and patterns of behavior. It even operates by the law of supply and demand with an abortion to fit every pocketbook. Newman, *Between the Ideal and the Reality: Values in American Society*, in THE CASE FOR LEGALIZED ABORTION NOW 61, 65 (A. Guttmacher ed. 1967). See also E. SCHUR, *supra* note 30, at 31-34. All figures as to incidences of abortion are educated guesses, since reliable statistics are lacking. Estimates are derived from population sampling. Those advocating abortion reform cite the higher figures, while those opposed refer to the lower figures. Hellegers, *Law and the Common Good*, 86 COMMONWEAL 418 (1967).

49. D. Lowe, *supra* note 1.

about 200 to one, assuming there are over a million illegal abortions annually. Only 500 cases reach trial each year.⁵⁰ Alabama had only forty prosecutions resulting in only five convictions between 1892 and 1935. In Michigan over a 42-year period there were only forty convictions.⁵¹ Occasionally, law enforcement officers in a particular area may engage in a concerted effort to round up abortionists, but even such efforts merely scratch the surface of the illegal abortion problem. Women unwillingly pregnant are usually determined to obtain abortions despite the law. Therefore, the goals of law enforcement officials are, in practice, limited to the control of abortion rather than to its elimination.⁵²

The obtaining of evidence to convict an abortionist involves almost insurmountable difficulties. Rarely will the woman who has undergone an abortion willingly file a complaint and she is usually reluctant to testify despite the immunity which may be granted her in some jurisdictions.⁵³ Ordinarily a hospital will report the case of a patient admitted for treatment who appears to have undergone an abortion. In New York this is required by ordinance. But doctors may disagree as to whether a woman has in fact undergone an abortion. Clearly, not much information is likely to be obtained by this procedure.⁵⁴ The prosecutor will be informed about an abortion through the death of a woman or through clear evidence of the criminal abortion of a woman who has subsequently been hospitalized. Female investigators may then be sent to the physician's office to see if he will perform an abortion. But mere preparation to perform the operation may be insufficient for criminal liability.⁵⁵ Although the most fruitful device is a well-prepared and timed raid at the time when the abortion is in fact being performed or just after it has been completed, it is difficult to justify ignoring the risks to the woman to obtain a conviction.

Even after the evidence has been obtained, the prosecution still has to prove that the abortion was not medically necessary, and in the case of a physician, there is a presumption of good faith.⁵⁶ Juries are loathe to convict physicians, and judges re-

50. *Id.*

51. Note, 29 J. CRIM. L. 595, 596 (1937); Note, 35 COLUM. L. REV. 87 (1935).

52. E. SCHUR, *supra* note 30.

53. *Id.*

54. *Id.*

55. *People v. Gallardo*, 41 Cal. 2d 57, 251 P.2d 29 (1953).

56. *Id.*; Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Law*, 35 S. CAL. L. REV. 123, 127 (1962).

frain from imposing harsh sentences.

Thus, the woman wanting an abortion who cannot obtain a therapeutic abortion at a hospital is able to have an illegal abortion in this country if she is willing to pay the price. The abortionist can efficiently arrange his affairs to avoid detection by law enforcement authorities and possible conviction.

Abortions, though illegal, are easily obtained in neighboring countries such as Puerto Rico and Mexico, to which many unwillingly pregnant women travel.⁵⁷ Though Mexican law prohibits abortions, large scale illegal abortion rings operate in Tijuana. Generally, Mexican and California law enforcement authorities attempt to control (but not eliminate) the situation by cracking down upon the incompetent abortionists. Border police will stop girls under 18 years of age. However, the wealthier woman will travel to Tokyo where she may legally obtain an abortion in a hospital and receive excellent medical care.⁵⁸ In contrast, the woman unable to find or pay for an abortionist may attempt a self-induced abortion by resorting to such crude methods as bougies, hairpins, or coat hangers which may endanger her health.

III. THE CONSTITUTIONALITY OF THE ABORTION LAWS

If a woman is prevented by law from having an abortion when she so desires, or if her doctor is prevented from prescribing or performing an abortion, her liberty is being infringed upon and state authority has interfered with the doctor-patient relationship. When the state imposes such restrictions, constitutional issues arise.

A. *Rights of the Mother*

Though the Supreme Court has abandoned notions of "substantive due process" in deferring to the legislature's authority to engage in social and economic experiments,⁵⁹ the Court has manifested particular concern with regard to legislative interference regarding family relationship and the right to bear

57. D. LOWE, *ABORTION AND THE LAW* 41-43 (1966).

58. *Id.*

59. *Ferguson v. Skrupa*, 372 U.S. 728 (1963); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Gossert v. Cleary*, 335 U.S. 464 (1948); *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, 313 U.S. 236 (1941); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

and rear children.⁶⁰ In *Griswold v. Connecticut*,⁶¹ the Court asserted a constitutionally protected "right of privacy" which is derived from the enumerated rights of the first eight amendments, and from the "other" rights retained by the people through the ninth amendment as applied to the states through the fourteenth amendment. This right has been held to encompass the marital relationship by protecting against state interference with the use of contraceptives.⁶²

The *Griswold* case, however, involved the use of contraceptives as affecting married couples, and the Court found the Connecticut birth control statute unconstitutional. But the constitutional protections could also be deemed to encompass a physician who prescribes contraceptives. The case arose out of the prosecution of a birth control clinic which had prescribed contraceptives. Applying the same rationale, a physician prescribing and performing an abortion could also assert the constitutional right of privacy. The law, in prohibiting his action, interferes with the rights of his patient. Moreover, a woman may claim that the law, in preventing the doctor from performing an abortion, interferes with her rights. Clearly, the laws forbidding abortion interfere with her right to determine whether or not to bear children. As applied to married women, the laws infringe upon the marital relationship.

The Court traditionally upholds such laws only if it can be established that an overriding legitimate legislative purpose exists to justify interfering with individual and family privacy. To prevent abortion as a means for discouraging fornication and other illicit sexual conduct would probably not be regarded as a proper overriding legislative purpose to justify such interference, especially since the abortion laws apply to married women.⁶³ The abortion laws cannot be justified as needed to protect the health of women, since safe and simple methods for performing an abortion have been developed.⁶⁴

60. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

61. 381 U.S. 479 (1965).

62. *Id.*

63. The concurring opinions of Justices Goldberg and White in *Griswold v. Connecticut*, 381 U.S. 479 (1965) held that the state could not properly discourage fornication by interfering with the marital relationship through prohibiting the use of contraceptives by married couples.

64. In Hungary where abortion is completely legal a study of a quarter million cases indicated a death rate of less than 6 per 100,000 to be contrasted with 17 per 100,000 in the United States for the re-

Another purpose of the abortion laws may be to maintain population levels. Nations which permit abortion—such as Japan, Poland and Hungary—have had a decline in the birth rate.⁶⁵ However, contemporary concern has generally been focused upon overpopulation rather than decline in population. Thus, it is unlikely that courts would regard maintenance of the population level as an overriding legislative purpose.

The prohibition of abortion as a means for upholding public morality or because abortion itself is immoral would not be a proper legislative purpose. The notion of the state seeking to regulate private activity which does not threaten public health, safety or order may be regarded as an invasion of privacy and an arbitrary restraint upon individual liberty.⁶⁶ The state should not be permitted to inflict punishment where there is no infringement upon the rights of others.⁶⁷ Also, justification of abortion laws on moral grounds alone may result in a finding of an infringement on the religious establishment clause of the first amendment, in that the abortion statutes establish a religion by enforcing a religious morality.⁶⁸

The argument might also be made that the abortion statutes deprive poor persons of the equal protection of the laws, because in practice the woman of means is able to obtain an abortion by having a reputable physician label it "therapeutic."⁶⁹ The fact that patients receiving medical attention through a clinic, or in a public supported hospital, are less likely to receive permission for an abortion may indicate a denial of equal protection.

It has also been suggested that abortion statutes are subject to attack on the ground that they are vaguely worded. Such vagueness makes application of the statute difficult and results in differing interpretations by hospital boards.⁷⁰

moval of tonsils and adenoids or 24 per 100,000 for childbirth among the white population. Childbirth is four times as dangerous as competently performed abortion. Psychological effects will depend on social attitudes. Hardin, *Abortion and Human Dignity*, in *THE CASE FOR LEGALIZED ABORTION NOW* 69, 72 (A. Guttmacher ed. 1967).

65. Rossi, *Abortion Laws and Their Victims*, TRANS-ACTION, Sept./Oct., 1966, at 7, 10.

66. Katin, *Griswold v. Connecticut: The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW. 680, 702 (1967).

67. H. HART, *LAW, LIBERTY AND MORALITY* (1963); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

68. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Katin, *supra* note 66, at 696-97.

69. Pilpel, *supra* note 42, at 100.

70. *Id.*

B. *Rights of the Fetus*

Perhaps the one basis upon which the Court may find the abortion laws constitutional would be that these statutes seek to protect the life of the fetus. If the Court regarded the fetus as a person, the state would be justified in protecting its right to birth and life.

In religion and medicine life may begin at conception; in most legal systems personality begins only at birth. As one writer observes, at about the sixth day of pregnancy, the fetal organism "is probably entitled by force of nature to claim a potential 'natural personality'; but it is only a fact in nature and is independent of the law, since 'legal personality' is the grant of the law."⁷¹ This natural personality is not concerned with legal capacities or prohibitions.⁷²

However, rights of the fetus were sometimes recognized at common law. Blackstone explained:

An infant in [sic] *ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the Civil law agrees with ours.⁷³

Thus, to protect interests at birth, courts have granted the fetus certain contractual benefits and property rights, provided it is subsequently born alive.⁷⁴ Moreover, the common law recognized that the fetus had a claim to life by requiring the execution of a pregnant woman be stayed until after its birth.⁷⁵

Clearly, the Supreme Court could find medical and legal support for regarding the fetus, at least when capable of developing to a human being, as a person entitled to constitutional protection. But if the fetus is regarded as a person entitled to such protection, it would be a denial of equal protection of the laws to deny this protection to some fetuses because they may be born defective or for other reasons.⁷⁶ An abortion, par-

71. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 587 (1965).

72. R. GRAVESON, *STATUS IN THE COMMON LAW* 111 (1953), quoted in Gordon, *supra* note 71, at 587 n.46.

73. 1 BLACKSTONE, *COMMENTARIES COMM. I*, 129-30 (4th ed. 1771), quoted in Gordon, *supra* note 71.

74. Gordon, *supra* note 71, at 586-87.

75. *Id.* at 582; 2 W. HAWKINS, *PLEAS OF THE CROWN* 251.9 (J. Curwood ed. 1824); 2 M. HALE, *PLEAS OF THE CROWN* 412 (Dogherty ed. 1800).

76. Comment, 37 U. COLO. L. REV. 283 (1965).

ticularly if performed in a government supported hospital, could be construed as a taking of life without the due process of law and, therefore, make the hospital and physician liable under the Civil Rights Act.⁷⁷

However, it is possible for a legislature to protect the fetus without the necessity that it be regarded as a person entitled to full constitutional protection. Inasmuch as legal precedent has conferred limited legal rights upon the fetus, the Supreme Court could find that the legislature may act to protect such rights and that this would constitute a legitimate legislative purpose.

It thus becomes clear that the legal question of what constitutes human life is an important one. This is a question which arises both at the beginning and at the end of life. Should life be said to begin at conception? At the point where the fetus possesses the potentiality of becoming a human being? When it may exist outside the womb? Or at birth? Reliance on scientific criteria alone will not resolve these questions.⁷⁸

Science can only contribute in a secondary way to the solution of the question of the origin of the human individual. The criteria defining what constitutes a human person must come from the disciplines of philosophy and theology. The Roman Catholic Bishops of California issued a statement in 1966 which attempted to base their position regarding the status of the fetus upon biology, but scientists are unable to tell whether an embryo at a certain stage is a *human* person. Whether an arbitrary point should be set is a moral question.⁷⁹

At any rate, legal protection cannot rationally extend before the point where the organism may potentially develop fully to human life. Obviously, an abortion statute constitutionally grounded upon the rights of the fetus may not be extended to outlaw preimplantation fertility control.⁸⁰ Intrauterine devices

77. 42 U.S.C. § 1983 (1964).

78. That abortion is a moral rather than a medical problem is pointed out by Szasz, *THE ETHICS OF ABORTION, HUMANIST, TRANS-ACTION*, Sept./Oct., 1966, at 147. For some the destruction of the fetus constitutes *fetal euthanasia*. D. BONHOEFFER, *ETHICS* 130 (1955); Hanley, *Rights of the Unborn Child*, 25 *TRANS. PAC. OBST. GYN. SOC.* 1 (1957); Ramsey, *The Sanctity of Life*, *THE DUBLIN REV.* (Spring, 1967). Others have considered abortion as the "loss of conception before viability," defined as 20 weeks gestation or 400 grams. *ILLINOIS CITIZENS FOR THE MEDICAL CONTROL OF ABORTION, FACT SHEET ON LEGAL STATUS OF ABORTION*. Still others regard the fetus as similar to a limb of the woman's body. Leavy and Kummer, *supra* note 56, at 133-37.

79. Hayes, *Abortion: A Biological View*, 85 *COMMONWEAL* 676 (1967).

80. See note 62 *supra*, and accompanying text.

and "morning after" pills actually are forms of contraceptive drugs and devices. Also, any policy consideration regarding the rights of the fetus as balanced against the rights of the woman bearing it, and those of society generally, should be made initially by the legislature unhampered by judicial restrictions as to constitutionality.

IV. RECENT REFORM MEASURES

The widespread violation of the abortion laws, even by hospitals in granting therapeutic abortions, has stimulated agitation for legislative reform. Abortion has become a private as well as a public health problem. Since 1965, the American Medical Association and some state medical groups have adopted resolutions urging reform, and bills for amending abortion laws were introduced in 26 states during 1967.⁸¹ Generally, attempts for reform have been thwarted because of pressure from religious groups, particularly from Catholic clergy.⁸² However, some Protestant and Jewish clergy have manifested greater sympathy, as in New York where a group of clergymen have provided consultation services for women seeking an abortion.⁸³

81. MEDICAL WORLD NEWS, Sept. 29, 1967, at 47.

82. The Catholic position has been that any direct attack on the fetus is murder. Both mother and child are patients of the Catholic physician and each has an equal right to live; he must attempt to save them both, and cannot choose between saving one or the other. However, the mother is not morally required to forego medicine or treatment which will save her life if, by so doing, the death of her unborn child is permitted. An indirect abortion is permitted as where a cancerous womb must be removed or, in ectopic pregnancy, where a portion of the Fallopian tube is cut because an ovum has embedded itself in the wall of the tube. The Canon Law punishes all who effectively procure abortion and all abortionists.

Early Christianity, influenced by Aristotle, distinguished between early and later pregnancy. To Augustine, aborting the unformed fetus was punishable only by a fine, while aborting the formed fetus was punishable by the penalty for murder, the difference being a period fixed at forty days. This distinction appeared in the Gratian Code which influenced the common law position. Innocent III gave it recognition by canonical legislation in 1211. However, Pius IX abandoned the distinction in 1869 and the prohibition applied to the embryo at conception. N. ST. JOHN-STEVAS, *RIGHT TO LIFE* 31, 32 (1964).

St. Thomas Aquinas had taken the position that no human life exists until the seventh week of pregnancy and some Catholic theologians still adhere to this position. McCormick, *Abortions*, 112 AMERICA 877 (1965).

COMMONWEAL, the liberal Catholic periodical, while opposing abortion reform, announced it will assume an open mind. 85 COMMONWEAL 667 (1967).

83. New York Times, May 22, 1967, at 1, col. 2.

On February 27, 1968, a coalition of 48 organizations in New York

Abortion law reforms have been enacted in Colorado, North Carolina and California.

The American Law Institute has proposed reform as part of its Model Penal Code.⁸⁴ The Code adopts Roscoe Pound's sociological jurisprudence approach in attempting to resolve the conflicting interests. The proposal is somewhat similar to the statutes presently in force in Denmark and Sweden which allow an abortion when the pregnant woman's physical or mental health is gravely impaired, the child is likely to be born with grave physical or mental defects, the mother is underaged, or when the pregnancy is the result of rape or incest.⁸⁵ Unlike the Scandinavian statutes, however, the Code does not provide for abortion where there is "anticipated weakness" or what the comments seem to refer to as "individual hardship." The Code also omits the Scandinavian provision for an independent board or committee to determine whether an abortion should be performed, providing instead for an abortion when two physicians [one of whom may be the person performing the abortion] have certified in writing the circumstances which they believe justified.⁸⁶ The Code avoids the problem of preimplantation fertility control by stating that the prohibition against abortion shall not 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

announced their intention to lobby for abortion law reform. The Organizations for abortion law reform include civic, political, medical, religious and social-welfare groups.

Forty-two New York legislators have sponsored a bill to permit abortion when there is substantial risk that pregnancy would gravely impair the physical or mental health of the mother, where there is substantial risk that the child would be born with gross physical or mental defects, or when the pregnancy results from rape or incest. The present law permits abortion only to save the life of the mother. However, the proposal to amend the New York law on abortion was sent back to the committee and effectively killed despite the fact that supporters claimed they had sufficient votes for passage in the Assembly. Pressures from Catholic groups contributed to the defeat of the bill in an election year. *New York Times*, Apr. 4, 1968, at 1, col. 2.

After five years of study, a special legislative commission recommended a sweeping revision of Connecticut's criminal laws, including new grounds for abortion. Abortions which are now permitted in Connecticut only to save a pregnant woman's life would be made legal also in cases of rape or incest, and for any unmarried girl under the age of 17 regardless of the circumstances of her pregnancy. *New York Times*, June 4, 1968, at 22, col. 1.

84. MODEL PENAL CODE § 207.11 (Tent. Draft No. 9, 1959).

85. Barnard, *An Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion*, 18 W. RES. L. REV. 540, 547 (1967).

86. *Id.* at 547.

method that operates before, at, or immediately after fertilization," though some problem might arise as to whether this provision would also apply to mechanical devices.⁸⁷

Though the Code has been generally ill-received by state legislatures⁸⁸—having been, in substance, enacted in only three states—it has been more favorably received by commentators because of its more liberalized approach.⁸⁹ However, it has been criticized for its failure to consider the moral aspects of the problem,⁹⁰ and for neglecting the rights of the unborn child.⁹¹ Also, one writer has criticized the Code's characterization of the fetus as an inchoate being, arguing that it is indisputably complete and integrated in its essential elements, requiring nothing but food to grow.⁹²

Groups such as the Illinois Citizens for the Medical Control of Abortion as well as some noted lawyers who advocate reform of the abortion laws to permit abortion upon request, have been critical of the Code proposals for being too limited.⁹³ Though it provides some relief, it does not solve the abortion problem because most of the abortions performed outside of hospitals today do not, in fact, fall into the categories proposed by the Code. It is also contended that, if present laws were constitutionally and reasonably interpreted, they would probably permit most of the abortions permitted by the Model Penal Code.⁹⁴

The New York City and Southern California Civil Liberties

87. Meloy, *Pre-Implantation Fertility Control and the Abortion Laws*, 41 CHI.-KENT. L. REV. 183 (1964).

88. *Id.*

89. Barnard, *supra* note 85, at 540.

90. Tinnelly, *Abortion and Penal Law*, 5 CATH. LAW 187 (1959).

91. Comment, 37 U. COLO. L. REV. 283 (1965).

92. Mietus & Mietus, *Criminal Abortion: "A Failure of Law" or a Challenge to Society?*, 51 A.B.A.J. 924, 925 (1965).

93. Pilpel, *see* note 42 *supra*, believes the abortion statutes may be modified through judicial interpretation rather than by legislative amendment.

94. Drinan, *The Right of the Fetus to Be Born* (Paper prepared for the International Conference on Abortions, Sept. 6-8, 1967, Washington, D.C.). Drinan criticizes the Code for singling out certain types of individuals whose lives, for the first time in American jurisprudence, can be taken not because of any offense they may have committed but only because their existence is inconvenient to others. He urges:

Abortion on request—or an absence of law with respect to abortion—has at least the merit of not involving the law and society in the business of selecting those persons whose lives may be legally terminated. A system of permitting abortion on request has the undeniable virtue of neutralizing the law so that, while the law does not forbid abortion, it does not on the other hand sanction it—even on a presumably restricted basis.

Id. at 9.

Unions have urged that a statute dealing with abortion should merely provide that abortions must be performed by physicians, thereby making the decision as to whether to perform an abortion a medical problem. Other groups have suggested that abortions must be performed in hospitals and that at least two doctors should concur in performing the abortion. Still others urge that the abortion statutes should simply be repealed and the same legal rules applied as are applicable to medical practice generally.

American public opinion apparently does not support far reaching reformation of the abortion statutes. A survey in 1965 by the National Opinion Research Council indicated that the majority would favor abortion only for those reasons adopted by the Code provisions.⁹⁵ The questions asked and answers given were as follows:

Please tell me whether or not you think it should
be possible for a pregnant woman to obtain a
legal abortion . . .

	Yes	No	Don't Know
If the woman's own health is seriously endangered by the pregnancy?	71%	26%	3%
If she became pregnant as a result of rape?	56%	38%	6%
If there is a strong chance of serious defect in the baby?	55%	41%	4%
If the family has a very low income and cannot afford any more children?	21%	77%	2%
If she is not married and does not want to marry the man?	18%	80%	2%
If she is married and does not want any more children?	15%	83%	2%

There was very little difference in response between Catholics and Protestants or Jews, though frequent church attendance among both Protestants and Catholics indicated a more restrictive attitude toward abortion. Attitudes toward abortion cut across both political orientation and party lines. Clearly, there is majority support for abortion as a safeguard of mental health or a prevention of the anguish associated with bearing a deformed child. But, although the American public approves the use of contraceptives as a means for family planning, it opposes the use of abortion.

95. Rossi, *supra* note 65, at 8-9. The sample is discussed in greater detail in Rossi, *Public Views on Abortion*, in *THE CASE FOR LEGALIZED ABORTIONS* MOVE 26 (A. Guttmacher ed. 1967).

Essentially, one's position with regard to legal reform is determined by the focus placed upon the problem. Those who focus upon the fetus reach a different result than those who focus upon the needs of the woman who becomes pregnant. The revisers of the Model Penal Code assumed a sociological approach, but their findings have been criticized as being based upon incomplete sociological data.⁹⁶ Though they refer to the Scandinavian experience, they do not manifest a true understanding of the problems confronted in these countries. Significantly, Sweden is considering further liberalization since many Swedish women, unable to obtain an abortion in their home country, have gone to Poland and the Soviet Union. The Advisory Committee appeared to have "collected an incomplete set of sociological data, followed a 'hunch,' and reached a decision which the realists would say they wanted all along."⁹⁷

The effect of the Code is to legalize those abortions which are performed in hospitals for humanitarian reasons. This has been the Colorado experience after liberalization of its statute along the lines of the Code, though with some modifications.⁹⁸ Since the law was changed, the number of abortions has increased somewhat.

The Colorado law places the burden upon the physician to determine precisely the medical and legal indications favoring abortion. The Guidelines of the Colorado Medical Society, in clarifying the new Abortion Statute, provide two sets of standards for justifying medical termination of pregnancies. The medical standard relates to the patient's physical or mental health or the likely condition of the fetus, while the socio-legal standard relates to pregnancies resulting from certain crimes of rape and incestuous marriage.

In the medically justified cases, the initial evaluation is made by the attending physician, who obtains the pertinent medical history and makes the examinations and tests considered necessary. If eligibility for abortion is based on impairment of mental health, the statute requires that the attending physician acquire the written confirmation of a psychiatrist and include it in his documentation of the case. If he concludes that the case presents one or more of the medical conditions for which the Statute authorizes a termination of pregnancy, he has the responsibility of preparing a documented report of his findings and

96. Barnard, *supra* note 85, at 561.

97. *Id.*

98. COLO. REV. STAT. ANN. § 40-2-50 (Supp. 1968).

conclusions to present to a special hospital board. The report should include the medical history, the examinations and tests made, and specific findings as to the condition or conditions which bring the case within the statutory standards. This documentation is to be made before the patient is admitted to the hospital to avoid unnecessary expense, greater anxiety and disappointment, and the possibility of generating pressures on the special hospital board to rush its deliberation. It is recognized that exceptions may arise in "processing" a case.

In rape and incest cases, participation by the District Attorney of the judicial district in which the alleged rape or incest occurred is required. Once consulted by a patient who professes to have been the victim of such a crime and seeks termination of the resulting pregnancy, the attending physician, upon confirming the pregnancy, causes the matter to be brought to the attention of the appropriate District Attorney. An investigation is made to determine whether there is probable cause to believe the alleged violation occurred and a report of the findings is made to the special hospital board. The attending physician also has the responsibility of determining the duration of the period of gestation. Generally, the preliminary evaluation of the case, including the District Attorney's findings, will be completed prior to the actual admission of the patient to the hospital. Initiation of hospital admission, at the appropriate stage, is also the responsibility of the attending physician. In this type of case, the abortion must be performed before sixteen weeks of gestation have passed. Where the age or marital status of the patient is an important factor, particularly as to the statutory standard applicable to the case, verification of such conditions through certified copies of birth and marriage certificates may be required. The attending physician procures them for inclusion in his documentation of the case.

The intentional termination of pregnancy must be requested by the woman in written form and, depending on her age and marital status, by other persons. The need for informed consent is stressed.

Although in rape and incest cases the statute is interpreted to mean that the crimes must have been committed in Colorado, the Guidelines state that the law is not limited in terms of the residence or domicile of the patient. Great restraint in the acceptance of a patient from outside of Colorado is recommended, however. The attending physician's need for personal knowledge of the patient's medical history and present condition justifies the

voluntary limitation of the statute to Colorado residents.

Abortion reform has also been instituted in Britain. Under a bill recently passed by Parliament, a pregnancy may be terminated if any two physicians find that a continued pregnancy might threaten the mother's life, injure her physical or mental health, or cause serious physical or mental abnormalities to her existing children.⁹⁹ The British law permits abortion on broader grounds than does the Colorado statute. While the Colorado law requires a unanimous finding by a three-member panel that the pregnancy would result in the mother's death or serious or permanent impairment of her physical or mental health, the British law merely requires that the risk of an injury to the mother's health would be greater than if the pregnancy were terminated. The "social clause"—the consideration of risk to other children—allows consideration of overcrowding in a large family, inadequate housing, and strain upon the mother. The legislation permits that account be taken of the woman's actual or reasonably foreseeable environment. This "social clause" was opposed by the medical profession.¹⁰⁰

V. A PROPOSAL AND CONCLUSIONS

Clearly, the laws relating to abortion need to be reformed. When 250,000 to over one million abortions are performed annually, of which an estimated 8,000 to 10,000 are legal, and when in cities such as New York illegal abortion is one of the prime causes of maternal death, a serious social problem exists. The incidence rate indicates a need for public and legislative concern.

Medical researchers do not avoid attempts to find a cure for a rare disease because the chances are it will cripple or kill only 10,000 people a year. We do not consider unemployment a minor social problem because more than 90 percent of the labor force is employed. We do not rest content with educational attainment of American youth because the majority now complete a high school education.

The same reasoning should apply to the abortion problem. Those who argue with the incidence estimates, or resist change in our abortion laws on the grounds that it is not an extensive social problem, are either deluding us or themselves as to what is really at the heart of their disclaimers: they do not wish to see any liberalization of abortion laws because they are opposed to abortion *per se*; or they have little or no empathy for the women who want to obtain one; or they consciously or unconsciously believe the psychologically punishing and medically

99. Abortion Act 1967, ch. 87.

100. The New York Times, Oct. 26, 1967, at 1, col. 2.

and legally risky experience of securing an illegal abortion is deserved—it is a *punishment* for becoming pregnant if you are poor or unmarried or already have a large family.¹⁰¹

Those who are concerned about protecting the rights of the unborn child should also advocate reform. The present state of the law with its nonenforcement clearly does not protect the rights of the fetus. The obstacles for more stringent enforcement are insurmountable. A solution must be found.

Conceivably, the problem might be resolved to some extent by scientific advancement. Perhaps it may be possible to remove the fetus at an early stage of pregnancy and allow it to develop fully under laboratory conditions.¹⁰² Medicine may now predict with a great degree of certainty whether a fetus under certain circumstances will develop into a defective child. But it is conceivable that medical science will be able to treat the fetus, either inside or outside the womb, so that the abnormalities will be averted. These developments will undoubtedly create ethical and legal problems, but may lead to a resolution of the abortion problem. A woman not wanting to bear a child could have the fetus removed but kept alive outside the womb. The child could then be given to her or adopted by someone else. The pregnant woman would then not be required to undergo a pregnancy which would be damaging to her physical or mental health or adversely affect her social or economic position and yet the rights of the fetus would be protected. The ultimate solution of the abortion problem lies in scientific and social advancement. Priority should be given in the allocation of resources to resolve this problem.

While the problem is too pressing to wait for science to provide the solution, law reform must anticipate possible scientific development. For example, if a law is to permit abortion at any point before the fetus would be capable of existing and

101. Rossi, *supra* note 65, at 10.

102. H. KAHN & A. WIENER, *THE YEAR 2000* (1967). A team of surgeons at the Cleveland Clinic Foundation recently developed an artificial placenta made of a silicone membrane which can add oxygen to blood and remove carbon dioxide from it to save babies whose lungs have suffered from hyaline membrane disease or failed to open up after birth. This apparatus suggests the possibility of saving babies whose lungs have not developed. This placenta, combined with the system of grem-free isolators and water-soluble diets offers the eventual possibility of duplicating conditions in the womb for babies whose lungs and digestive system could not possibly sustain extra-uterine existence and are certain to die if accidentally delivered or deliberately aborted from the womb. Thus, abortion may not mean the death of the fetus. Pleasants, *A Morality of Consequences*, 86 *COMMONWEAL* 413 (1967).

developing outside the womb, it should be anticipated that in the future a fetus might be kept alive even before sixteen weeks of pregnancy. Similarly, the law should not take an irrevocable position of negating the right to life of the fetus on the assumption that the needs of the mother are superior, when the two might be reconciled. *Fetal euthanasia* should not be committed unnecessarily. The mere fact that a fetus is defective should not be grounds for an abortion, since such defects may be subject to treatment. Moreover, even a defective child can contribute to social well-being. The thalidomide babies who have reached school age have been able to make remarkable adjustments. Many of these children have manifested excellent intellectual ability and, despite their handicaps, have been accepted by classmates.¹⁰³

A mechanism must be provided for protecting the rights of the woman, her fetus, the interests of society, and conceivably her husband, or donor of the sperm. The woman has a right to life, to physical and mental health, and to protection from what may result if she were compelled to give birth. On the other hand, she should not be compelled to undergo an abortion. The fetus has a right to life, but not at the expense of the life or health of the mother. Society is concerned in protecting the mother from being compelled to undergo an abortion against her will, as well as from having her health endangered by the pregnancy. Society is also concerned, as part of the public order, in protecting the rights of the fetus. Each fetus is capable of developing into a unique human being potentially able to make a unique contribution to society. The husband or donor of the sperm has an interest in the fetus because he has contributed to its existence—it is a part of him and the child would be his offspring. But his interest is subordinate to the health of the mother. Legal guidelines must be formulated.

The starting point for legal reform lies in the Model Penal Code provisions. An abortion law should provide that an abortion may be performed where the life or health of the mother may be endangered or adversely affected. Each case should be determined by an administrative board comprised of a physician, obstetrician, psychiatrist, social worker, housewife, lawyer and representative of the general public. Provision should be made for judicial review. The law should further provide that the board would particularly focus upon facts establishing that the pregnancy results from rape or incest, the mother is under six-

103. Chicago Tribune, Nov. 19, 1967, § 1A, at 1, col. 4.

teen years of age, or the fetus would result in the birth of an abnormal child. Similarly, it should be recognized that a woman's ultimate realization that she will give birth to a deformed child may traumatically affect her in such a manner as to endanger her health. The board would not, however, be precluded from considering other circumstances under which a woman's health may be adversely affected. Thus, a woman who has had a number of children may be permitted to have an abortion if an additional child would adversely affect her health. The board would consider the effect of the pregnancy upon her relationship with her other children as a mother and upon the marital relationship. The concept of health involves considering the individual as a whole within his social environment.¹⁰⁴ The board would adhere to this concept in considering the effect upon the health of a woman for whom abortion may be indicated.

The same approach would be taken with an unmarried woman. The mere fact that she happens to be unmarried should not preclude an abortion. However, her marital status may be a factor in considering the effect of the pregnancy upon her health. If the pregnancy causes severe depression and the birth of the child may lead to neurosis, an abortion may be indicated. In addition, a woman's determination to undergo an abortion should also be considered.

The administrative mechanism should operate to keep the woman's identity and her problem strictly confidential. The case of a woman for whom an abortion is indicated would be referred to the board by her physician, and an independent physical and psychiatric examination would be undertaken. A woman could also approach the board on her own initiative. This would allow a troubled, pregnant woman to seek help. She would receive consultation services from a social worker. In all cases a preliminary determination would be made to determine if, in fact, the woman seeking the abortion is acting upon her own free will, without coercion. Writers on the abortion problem have ignored the possibility that a woman undergoing an abortion may be acting because of psychological or physical pressure or threats by the father. In all such instances, a

104. Report of the Royal Medico-Psychological Association, *British Policy on Therapeutic Abortion*, 199 JOURN. OF AM. MED. ASS'N 199 (1967):

When considering the possibly deleterious effects of pregnancy, and the desirability of terminating it, psychiatrists have to bear in mind not only the direct, but also the remote effects on the health and well-being of the mother. . . .

woman should be given protection, so that she may safely have her child.

On the other hand, in making a determination, the board should also consider the attitude of the father. Though his opposition to the abortion should not be the dispositive factor, it should be considered within the context of the particular case.

The woman may elect to appear before the board personally to argue her case or have a representative act upon her behalf. In most cases, decisions would be made upon the submission of written reports. Provision would also be made for the presence of an advocate who would be paid by the state to assert the rights of the fetus in presenting arguments to establish that the pregnancy would not adversely affect the woman's health and that provision would be made for the adoption or other care of the child when born. In the case of an unwanted child, provision may be made for adoption or other care even before its birth. Facilities for unwed mothers and unwanted children might be established.

The alternative to therapeutic abortion need not be the criminal abortionist. Though any restriction upon the legal performance of abortions will inevitably give rise to a significant number of criminal abortions, the problem can be limited by providing sound assistance to the woman who is denied a therapeutic abortion so that she will become reconciled to her pregnancy. When an abortion is denied, the administrative process should provide social services for assisting the woman in going through with the pregnancy and in bearing the child. If the case arose because the woman felt she was incapable of caring for the child she should be given psychotherapy so that she will become reconciled to having the baby, and arrangement should be made either for its adoption or for assisting the woman with a monetary subsidy or necessary social services. Indeed, upon giving birth, she may find such a joy in motherhood that she will want the child after all. On the other hand where therapeutic abortion is indicated, the state should provide financial assistance for the operation where the woman lacks the financial means. Society must recognize that the woman seeking an abortion is in need of help and should provide her with guidance and assistance.

In no circumstances should a woman who is receiving public assistance be compelled to undergo an abortion against her will. Provision should be made to protect such women, who may, because of their relationship and dependence upon case

workers, feel they are being coerced. In addition, no doctor should be compelled to perform an abortion if such an act is contrary to his moral scruples. Similarly, a nurse, medical aid or anesthetist should not be compelled to assist in an abortion.

Clearly, abortion as a social problem involves a myriad of conflicting economic and moral issues. Yet, the present state of the law does not cope with these issues. Statutes such as the Model Penal Code merely resolve one aspect of the problem—that affecting the woman who is in need of a narrowly defined therapeutic abortion. Real legal reform must attack the problem by permitting abortion where the mother's health is adversely affected and by broadening the concept of "health" to encompass the complete physical and mental health of the woman as affected by her total environment. Facilities must be provided to help the troubled, pregnant woman. However, adequate emphasis must also be placed upon the rights of the fetus, the concern of the husband or donor of the sperm, the family relationship and the general social order. Only after consideration of all these factors can reasonable and just laws be adopted and applied.