NOTES

CHANGING ABORTION LAWS IN THE UNITED STATES

Criminal abortion is big business. While verifiable data is lacking, it is estimated that illegal abortion is one of the largest criminal activities in the nation, involving approximately one million women and an expenditure of $350,000,000 annually.[1] Between 500 and 10,000 of these women die; another 350,000 suffer minor to severe complications and injuries.[2] The majority are married women with children. Only a small minority are teenagers in trouble, single women, divorcees or widows.[3]

A former New York City hospital commissioner said 42 percent of deaths relating to pregnancies in New York were the result of criminal or out-of-hospital abortions, self-inflicted or attempted by abortionists.[4] Of that 42 percent, half the victims were Negro, 44 percent were Puerto Rican, and only six percent were white. By contrast, 93 percent of New York's therapeutic or legal abortions are performed on white women who can afford private rooms. The figures reveal one abortion for every 250 births on private service, but only one abortion for every 10,000 births on ward service.[5]

In California more than 100,000 women each year obtain abortions, nearly all of which are illegal.[6] Though California recently became the third state to liberalize its abortion law, the sponsor of the bill characterized the measure, based on the

1. L. LADER, ABORTION 2-3 (1966); GEBHARD, POMEROY, MARTIN & CHRISTENSON, PREGNANCY, BIRTH & ABORTION 136-37 (1958) (hereinafter cited as GEBHARD); M. KOPP, BIRTH CONTROL IN PRACTICE 222 (1934); Niswander, *Medical Abortion Practices in the U.S.*, 17 W. RES. L. REV. 403 (1965); Leavy & Kummer, *Criminal Abortion: Human Hardship & Unyielding Laws*, 35 So. CAL. L. REV. 123, 124 n.5 (1962); Comment, *Legal Status of Therapeutic Abortion*, 27 U. PITT. L. REV. 669, 677 (1966). But *cf.* E. SCHUR, CRIMES WITHOUT VICTIMS 12 (1965); Packer & Gampell, *Therapeutic Abortion: A Problem in Law & Medicine*, 11 STAN. L. REV. 417 n.2 (1959).

2. LADER, *supra* note 1, at 3; BATES & ZAWADSKY, CRIMINAL ABORTION: A STUDY IN MEDICAL SOCIOLOGY 4, 78 (1964); Williams, *Euthanasia & Abortions*, 38 U. COLO. L. REV. 178, 193-94 (1966); Mills, *A Medico-Legal Analysis of Abortion Statutes*, 31 So. CAL. L. REV. 181, 182 (1958).

3. LADER, *supra* note 1, at 3; GEBHARD, *supra* note 1; KOPP, *supra* note 1; Niswander, *supra* note 1; Leavy & Kummer, *supra* note 1.

4. Niswander, *supra* note 1, at 403 n.4, *reported in* N.Y. Times, Apr. 25, 1965, § 6 (Magazine), at 59.

5. *Id.*

6. Louisville Times, Apr. 4, 1967, § A, at 20, col. 1.

Model Penal Code provisions,[7] as quite conservative, and estimated that it would legalize at most only some five percent of the abortions performed each year in that state.[8] However, Governor Reagan agreed to sign the bill into law only after the provision permitting abortion in the case of a gravely deformed child was omitted. As a consequence, the number of abortions which will be legalized by the new law in California dropped to an estimated two percent.[9]

Britain has passed a law to become effective in April 1968, permitting abortion if two registered doctors find pregnancy would involve risk to the mother, the child or her other children. The operation will be performed free under Britain's National Health Service program. Significantly, the British bill provides that "account of the patient's total environment" may be taken in determining the "risk." This places the burden of responsibility where it belongs, directly on the physician.[10]

Current Laws

Four states—Colorado, North Carolina, California and Mississippi—adopted liberalized abortion laws in 1967, and abortion-reform bills are under study in 26 state legislatures.[11]

Mississippi's law was liberalized to permit abortion only in case of danger to the mother's life or when pregnancy re-

7. MODEL PENAL CODE § 230.3, Comment (Proposed Official Draft, 1962).

8. *Supra* note 6.

9. Courier-Journal, Jun. 14, 1967, § A, at 4, col. 1. Professor Louis Schwartz, one of the authors of the *Model Penal Code*, stated in a paper presented to the International Conference on Abortion in Washington, D.C., on Sept. 6, 1967, that proposals in many states to liberalize current abortion laws would affect only a minority of illegal abortions. Louisville Times, Sept. 7, 1967, § A, at 12, col. 1.

10. N.Y. Times, Oct. 24, 1967, at 16, col. 4; N.Y. Times, Oct. 26, 1967, at 1, col. 2.

11. The following data is from ASS'N FOR THE STUDY OF ABORTION, INC., ASA NEWSLETTER, No. 2, Summer, 1967: Alabama; Arizona (bill sponsored by Arizona Medical Ass'n tabled in judiciary committee); Connecticut; Florida (bill passed senate); Georgia; Hawaii; Illinois; Indiana (bill vetoed by governor after appeal from five Catholic bishops); Iowa; Maine; Maryland; Michigan; Minnesota; Missouri; Nebraska; Nevada; New Mexico; New York (bill supported by Gov. Rockefeller, Sen. Javits & Sen. Kennedy, killed in committee after N.Y.'s eight Catholic bishops issued their first joint pastoral letter); Ohio; Oklahoma; Oregon (bill defeated); Pennsylvania; Rhode Island; Tennessee; Texas; Wisconsin (two bills introduced: one based on MODEL PENAL CODE; the other would permit abortion upon request).

sults from rape. Colorado, North Carolina, and California based their modified abortion statutes on the American Law Institute's *Model Penal Code* provisions drafted in 1959.

> A licensed physician is justified in terminating a pregnancy if he believes there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect or that the pregnancy resulted from rape, incest or other felonious intercourse.
>
> . . . .
>
> Justifiable abortions shall be performed only in a licensed hospital except in case of an emergency when hospital facilities are not generally accessible. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion.[12]

Four of the remaining 46 states and the District of Columbia provide no statutory exceptions to general prohibitions against abortion;[13] 42 states and the District of Columbia permit abortion if necessary to save the life of the mother.[14] Statutes in 14 states provide that a woman who solicits or submits to abortion commits a criminal act;[15] in the absence of such legislation, a woman is not usually considered an accomplice to the abortion.[16]

12. MODEL PENAL CODE, *supra* note 7.

13. LA. REV. STAT. § 14:87 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 272, § 19 (1956); N.J. STAT. ANN. § 2A:87-1 (1953); PA. STAT. ANN. tit. 18, § 4718 (1963).

14. ALA. CODE tit. 14, § 9 (1959); ALASKA STAT. § 11.15.060 (1962); ARIZ. REV. STAT. ANN. § 13-211 (1956); ARK. STAT. ANN. § 41-301 (1964); CONN. GEN. STAT. ANN. § 53-29 (1960); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. ANN. §§ 782.10, 797.01 (1965); GA. CODE ANN. §§ 26-1101, -1103 (1953); HAWAII REV. LAWS §§ 309-3, -4 (1955); IDAHO CODE ANN. § 18-601 (1948); ILL. ANN. STAT. ch. 38, § 23-1 (Smith-Hurd 1964); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. GEN. STAT. ANN. § 31-409 (Supp. 1963); KY. REV. STAT. § 436.020 (1962); ME. REV. STAT. ANN. ch. 17, § 51 (1965); MD. ANN. CODE art. 27 § 3 (1957); MICH. STAT. ANN. § 28.204 (1962); MINN. STAT. ANN. § 617.18 (1964); MO. ANN. STAT. § 559.100 (1953); MONT. REV. CODES ANN. § 94-401 (1949); NEB. REV. STAT. §§ 28-404, -405 (1965); NEV. REV. STAT. § 201.120 (1963); N.H. REV. STAT. ANN. §§ 585:12, :13 (1955); N.M. STAT. ANN. §§ 40A-5-1, -3 (1964); N.Y. PEN. LAW §§ 80-81, N.Y. REV. PEN. LAW §§ 125.05, .40-.55 (1967); N.D. CENT. CODE § 12-25-01 (1960); OHIO REV. CODE ANN. § 2901.16 (1953); OKLA. STAT. ANN. tit. 21, § 861 (Supp. 1964); ORE. REV. STAT. § 163.060 (1964); R.I. GEN. LAWS ANN. § 11-3-1 (1957); S.C. CODE ANN. § 16-82 (1962); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. §§ 39-301, -302 (1956); TEX. PEN. CODE ANN. arts. 1191-96 (1961); UTAH CODE ANN. § 76-2-1 (1953); VT. STAT. ANN. tit. 13, § 101 (1959); VA. CODE ANN. § 18.1-62 (1960); WASH. REV. CODE § 9.02.010 (1956); W.VA. CODE ANN. § 5923 (1961); WIS. STAT. § 940.04 (1958); WYO. STAT. ANN. § 6-77 (1959); D.C. CODE ANN. § 22-201 (1961).

The Medico-Legal Problem

All but four states permit therapeutic abortion only where the pregnancy endangers the mother's life. Yet virtually no abortions today are "necessary to save the life of the mother."[17] This is the crux of the medico-legal problem.

As a result, it is insisted that a literal interpretation of the abortion laws of most jurisdictions is impractical; that the laws cannot mean that the death of the mother must be imminent before an abortion can be legally performed.[18] Moreover, the majority of these laws do not distinguish between abortions performed by physicians and those performed by any "person."[19]

Although there are laws against non-therapeutic or out-of-hospital abortions in all states, there seems to be much ambivalence in the minds of law enforcement officers and the public concerning the validity and usefulness of such laws.[20]

15. ARIZ. REV. STAT. ANN. § 13-212 (1956); CONN. GEN. STAT. ANN. § 53-30 (1960); IDAHO CODE ANN. § 18-602 (1948); IND. ANN. STAT. § 10-106 (1956); MINN. STAT. ANN. § 617.19 (1964); N.Y. PEN. LAW § 81, N.Y. REV. PEN. LAW §§ 125.50, .55 (1967); N.D. CENT. CODE § 12-25-04 (1960); OKLA. STAT. ANN. tit. 21, § 862 (Supp. 1964); S.C. CODE ANN. § 16-84 (1962); S.D. CODE § 13.3102 (1939); UTAH CODE ANN. § 76-2-2 (1953); WASH. REV. CODE § 9.02.020 (1956); WIS. STAT. ANN. § 940.04 (1958); WYO. STAT. ANN. § 6-78 (1959). For a discussion of these statutes and their legal and practical effects, *see* George, *Current Abortion Laws: Proposals & Movements for Reform*, 17 W. RES. L. REV. 371, 381-82 (1965); Annot., 139 A.L.R. 993 (1942).

16. George, *supra* note 15, at 381 n.64.

17. Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435, 436 (1965). Dr. Alan Guttmacher, past-president of the Planned Parenthood Federation of America and chairman of Obstetrics and Gynecology at Mt. Sinai Hospital in New York City, reported in 1954 that advances in medical science and technology had all but eliminated illness, including pulmonary tuberculosis and cardiac disease, as a consideration in determining whether to terminate a pregnancy. THERAPEUTIC ABORTION: MEDICAL, PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL & RELIGIOUS CONSIDERATIONS 13 (Rosen ed. 1954).

18. LADER, *supra* note 1, at 41. *See* People v. Ballard, 167 Cal. App. 2d 803, 335 P.2d 204 (1959).

19. George, *supra* note 15, at 376-77.

20. GEBHARD, *supra* note 1, at 211; LADER, *supra* note 1, at 42-51 related the case of a Baltimore physician who openly performed over 5,000 non-hospital abortions authorized by the written recommendations of over 350 licensed physicians over a period of 25 years without police interference.

Compared to the number of illegal abortions performed each year, the handful of prosecutions obtained casts a harsh light on the law itself.

> [D]efense lawyers know that their best way to win an abortion case is to secure a jury rather than a court trial. Police and other officials often allow known abortionists to practice since it is felt that there is a need for their services. In 1944 only 116 persons were convicted for illegal abortions in the 24 states of the union reporting on this. This amounts to one abortion conviction for every 625,000 persons in the population in that year. This, again, is a demonstration of society's unwillingness to penalize the abortion specialist. In our own sample we find that the great percentage of the women who had an illegal abortion stated that it had been the best solution to their immediate problem. This widespread difference between our overt culture as expressed in our laws and public pronouncements and our covert culture as expressed in what people actually do and secretly think is as true with abortion as with most types of sexual behavior.[21]

In the rare instance when a conviction is obtained, the punishment is usually either a suspended sentence or a fine. The latter amounts to nothing more than a license fee for the illegal abortionist.

After nearly a century of silence, the American Medical Association has finally spoken on the question of abortion. In its first policy change on the subject since 1871, the Association's 242-member House of Delegates adopted a policy statement similar to the recommendations of the *Model Penal Code*.[22] The slowness of spokesmen for organized medicine in recognizing the need for abortion reform is consistent with the AMA's neutrality on birth control until 1964. On abortion, the AMA noted the opposition of the Roman Catholic Church and stated that doctors would respect the right to "express and practice" such a belief, but that physicians who hold other views "should be legally able to exercise medical judgment

21. GEBHARD, *supra* note 1, at 192.

22. The AMA policy statement would require documented evidence that:

> [C]ontinuance of the pregnancy may threaten the health or life of the mother. That continuance of a pregnancy resulting from rape or incest, may constitute a threat to the mental or physical health of the patient. That the infant would be born with an incapacitating physical deformity or mental deficiency.

N.Y. Times, Jun. 25, 1967, § IV, at 8, col. 1.

which they and their colleagues feel to be in the best interest of the patient."[23]

The timid position of the medical profession, a group dedicated to the relief of pain and suffering, on birth control and abortion can be attributed to several factors, including: medical committees and abortion quotas established by hospitals whose boards fear public as well as private disapproval;[24] administrative sanctions which can be used in every state to take away a physician's license to practice;[25] rigid requirements in church-affiliated hospitals;[26] and, perhaps most significantly, a pervasive climate of social hypocrisy which discriminates heavily in favor of white women of means and does not permit medical decisions on abortion to be based on socio-economic factors.[27]

In states which allow the defense of necessity to a charge of illegal abortion, even though the state must plead and prove the lack of necessity, the doctor's good-faith judgment as to necessity is not enough; objective necessity must be proved.[28] It cannot seriously be urged that any physician should risk loss of his license to practice medicine by performing abortions on this uncertain fringe of existing laws.

23. *Id.*

24. For a description of the operations of hospital boards *see generally* Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. MT. SINAI HOSP. 115 (1954), *reprinted in* DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW (1962); Hall, *Thalidomide & Our Abortion Laws*, 6 COLUM. UNIV. FORUM 10, 11 (1963); Packer & Gampell, *supra* note 1, at 417; Williams, *supra* note 1, at 189-90.

25. George, *supra* note 15, at 385-88.

26. *See generally* authorities cited *supra* note 24.

27. Rosen, *supra* note 17, at 435 *et sq.* *But cf.* text accompanying note 10 *infra*.

28. George, *supra* note 15, at 377-78:

> Thirty states, in form, support an interpretation that necessity is an objective element of the crime, although five of them have been interpreted to include, as a defense, good faith belief of necessity despite their strict wording to the contrary. The harshness of these statutes is also modified to a degree if, as in some of these jurisdictions, the burden is on the state to prove the lack of necessity. In ten states and the district of Columbia, however, the statutes make it clear that it is the motivation and not the objective necessity which constitutes the basis for the exception from coverage. The new N.Y. Rev. Penal Law takes an intermediate position by requiring that the belief be 'reasonable' when a duly licensed physician performs the abortion.

History versus Roman Catholic Opposition

Richard Cardinal Cushing of Boston announced:

> Catholics do not need the support of civil law to be faithful to their religious convictions, and they do not seek to impose by law their moral views on other members of society.[29]

However liberal Cardinal Cushing's statement might seem, it is not the official Catholic position on abortion reform.[30] Within the Catholic Church any abortion from the moment of conception is considered murder, the penalty for which is excommunication, and this sanction can be relieved only by the Pope.[31]

Proponents of the Catholic opposition argue that the life of an innocent human being is too sacred ever to be sacrificed for the health or happiness of someone else;[32] that we can never allow the taking of one human life to protect another;[33] that abortion is tantamount to infanticide, and only one step from euthanasia.[34]

The Catholic opposition claims that abortion in any form violates natural law dating back to the dawn of history. Actually, the Catholic Church did not adopt its current position until 1869.[35] Prior to 1869, the Church adhered to the so-called "40 and 80-day rule"—a strange concept of animation that can best be understood in light of the historical development of abortion law.

In antiquity, abortion was widely practiced without social stigma or condemnation.[36] Plato urged abortion for every woman after the age of 40 or in the case of pregnancy resulting from incest;[37] Aristotle favored all forms of population control and abortion "before life and sense have begun."[38] Even after the Roman Empire officially allowed Christianity, abortion continued to be free of criminal sanction or social stigma.

The canon law followed Aristotle's idea of the three-stage soul—vegetable, animal and rational—, and punished abortion as murder only after the soul became rational. This time was arbitrarily fixed at 40 days after conception for the male fetus, and 80 or 90 days after conception for the female fetus.[39] This manifestation of pre-natal male chauvinism has no medical justification, and it remains a mystery how fetal sex was determined. All abortions before 40 days were exempt from any sort of penalty until the 13th century when, with the publication of *The Laws and Customs of England*,[40] abortion was placed under civil law for the first time, but, as before, there was no sanction until the fetus became "animated."

It is thought that the concept of "quickening" evolved from the addition of Aquinas' idea of "motion" as a principle

29. LADER, *supra* note 1, at 165.

30. *See generally* Canon 2350 § 1 in 8 AUGUSTINE, COMMENTARY ON CANON LAW 397 (1931); 3 BOUSCAREN, CANON LAW DIGEST 669 (1954); 2 WOYWOOD, PRACTICAL COMMENTARY ON THE CODE OF CANON LAW 545 (Smith rev. 1948); POPE PIUS XI, *Casti Canubil* (1939), *reprinted in* ASS'N. OF AM. L. SCHOOLS, SELECTED ESSAYS ON FAMILY LAW 132, 149 (Sayre ed. 1950); Byrn, *The Abortion Question: A Nonsectarian Approach*, 11 CATH. LAW. 315, 321 (1965); Drinan, *The Inviolability of the Right to be Born*, 17 W. RES. L. REV. 465, 476 (1965). Perhaps the best treatment of the Catholic position can be found in J. NOONAN, CONTRACEPTION, A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS & CANONISTS (1965).

31. *See* authorities cited *supra* note 30.

32. Drinan, *supra* note 30, at 479.

33. N. ST. JOHN-STEVAS, THE RIGHT TO LIFE 35 (1963).

34. Drinan, *Strategy on Abortion*, 116 AMERICA 177, 179 (1967). *But see* Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 O. STATE L. J. 647, 650-51 (1966):

> Although the Catholic hierarchy denies neither the high abortion rate, nor that the great majority of medical opinion today would terminate pregnancy for reasons other than to preserve life, it stresses the importance of maintaining the present penal sanctions as a deterrent to widespread sexual promiscuity with the resulting 'breakdown in public morality.' The poor deterrent effect, however, is indicated by four studies which show Catholics to comprise over twenty percent of all abortion patients. This almost equals the Catholic ratio in the U.S., twenty-five percent of the total population.

35. There is a three-year exception to this: from 1588 to 1591, Pope Sixtus V declared all abortions murder at any period of fetal development. The next pope, Gregory XIV, quickly revoked the measure less than three years after its passage on the ground that it had led to constant sacrilege; that is, Catholics affected by the sanctions had simply ignored their excommunicated status. *See* NOONAN, *supra* note 30, at 362-63, 405.

36. G. DEVEREUX, A STUDY OF ABORTION IN PRIMITIVE SOCIETIES (1955); LADER, *supra* note 1, at 75.

37. PLATO, REPUBLIC V, 327c *cited in* DEVEREUX, *supra* note 36, at 52 *and in* NOONAN, *supra* note 30, at 18.

38. ARISTOTLE, POLITICS 7.16, 1335b *cited in* DEVEREUX, *supra* note 36, at 52 *and in* NOONAN, *supra* note 30, at 18.

39. ARISTOTLE, HISTORY OF ANIMALS 7.3 *cited in* NOONAN, *supra* note 30, at 90; *see also* Quay, *Justifiable Abortion—Medical & Legal Foundations*, 49 GEO. L.J. 395, 414-15, 419, 425 (1961); R. HUSER, CRIMINAL ABORTION IN CANON LAW, CANON LAW STUDIES No. 162 (1942).

40. DE BRACTON, THE LAWS & CUSTOMS OF ENGLAND 3.2.4 (1640) *cited in* NOONAN, *supra* note 30, at 215 n.23.

of life to Aristotle's three-stage-soul theory. As a result, the common law punished abortion only if it was performed at a time after the mother felt the quickening, or movement of the child, in her womb. Though in our time post-morten examinations have determined the fifth month of pregnancy to be approximately that stage in fetal development when the fetus becomes animated, no attempt to define this time was made either in England or the United States, and only the woman or her husband was permitted to testify as to the time of quickening.[41] Blackstone's *Commentaries* adopted Coke's position that the offense of abortion even after the quickening was not murder but "great misprison,"[42] a misdemeanor.

It was not until 1803 that abortion became the subject of legislation in England.[43] Even then, the British law was only concerned with abortion by poisoning or other noxious substances, and no mention was made of abortion by surgery or other methods. Popularly known as the Ellenborough Act, this statute kept in force the common-law dividing line of quickening. The bill is described as a

> . . . catch-all piece of legislation inspired by a fanatical chief justice who seemed determined to excoriate the British for a raft of sins that had long been overlooked or ignored. The bill was hustled through Parliament, there was no debate in either House, nor any mention of the bill in the London *Times*. The fact that poison to induce miscarriage was simply grouped together with other types of poisoning indicates that no particular concern was given abortion, and the bill passed as a routine measure to strengthen existing laws.[44]

In 1869, the Roman Catholic Church eliminated the distinction between a non-animated and an animated fetus, and declared that henceforth, under canon law, all abortion would

41. *See generally* authorities cited *supra* note 30.

42. BLACKSTONE, COMMENTARIES, Book 4, at 1595 (Lewis ed. 1902).

43. 43 GEORGE 3, c. 58 *in* A COLLECTION OF THE PUBLIC GENERAL STATUTES PASSED IN THE 43RD YEAR OF THE REIGN OF HIS MAJESTY KING GEORGE III (1803).

44. LADER, *supra* note 1, at 82.

be punished as murder from the moment of conception.[45] This move was related to the emergence of contraceptive practices and a decrease in the birth rate of France, the largest Catholic country in Europe. The birth-control movement progressed to Belgium and other nations of sizeable Catholic population, and gained strength in the United States under Margaret Sanger.[46]

In America, the old quickening rule was retained in many states into the 20th century. As late as 1879, a Kentucky court decided that

> [I]t never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child.[47]

The common-law right of abortion in early pregnancy or before quickening was preserved until well after the Civil War. Indeed, abortion before quickening was not punished in Arkansas until 1947; in Mississippi, not until 1956.[48]

The medico-legal aspect of the abortion problem began as an attempt to ease the break with the common law. Abortion based on medical decision was introduced into law in a New York statute in 1828.[49] Though the New York statute introducing the medical exemption was founded on the original British law of 1803, the latter made no provision for any such medical exemption, and, in fact, Britain amended her law in 1837 to do away with any lesser punishment for abortion be-

45. NOONAN, *supra* note 30, at 405; *see generally* Rev. Roger Huser, Catholic scholar, in a personal letter to Lawrence Lader in LADER, *supra* note 1, at 185 n.9:

> Pius IX's apostolic constitution, '*Apostolicae sedis*,' abolished the 40-80 day theory in regard only to incurring the *censure* of excommunication for the crime of abortion. It simply disregarded entirely the matter of incurring an *irregularity* (prohibition to exercise or receive 'orders') and certain other penalties. Hence, canonists almost universally admitted that the animation distinction remained applicable in the church law relative to incurring irregularity, etc., for the crime of abortion down to the present Code of Canon Law enacted in 1918. This law relative to irregularity for abortion was that of Popes Sixtus V and Gregory XIV.

46. LADER, MARGARET SANGER & THE FIGHT FOR BIRTH CONTROL (1955).

47. Mitchell v. Commonwealth, 78 Ky. 204, 39 Am. Rep. 227 (1879).

48. Quay, *supra* note 39.

49. The *Revisers' Notes* of the legislative committee state that the provision "is founded upon an English statute, 43 Geo. 3, c. 58; but with a qualification that is deemed just and necessary." Revisers' Notes of N.Y. Statutes of 1828, *cited in* LADER, *supra* note 1, at 186 n.1.

fore quickening; in 1861, the punishment was extended to any abortion attempt whether, in fact, the woman was pregnant or not.[50]

The enactment of abortion laws in the United States during the latter half of the 19th century and into the 20th century has been viewed as part of the increasing role of positive government endeavoring to protect the health and welfare of its people through medical exemptions. The acts sought to protect the mother from hack abortionists. Glanville Williams, Cambridge University legal scholar and president of the British Abortion Law Reform Association, points out that

> [The] chief evil of an abortion is no longer thought to be the loss of the unborn child, but the injury done to the mother by the unskilled abortionist.[51]

Is There a "Life" Before Birth?

If the crux of the medico-legal problem is that virtually no abortion today is really necessary to save the life or preserve the health of the mother, then the crux of the social and moral problem is the disagreement as to when the fetus becomes a human being infused with such personality that the law will deny the taking of this "life." The problem is further complicated by religious concepts of ensoulment. Only the Roman Catholic Church has maintained the position of ensoulment from the moment of conception; it is reported that no

50. 9 Geo. 4, c. 31 (1803); 7 Will. 4 & 1 Vict., c. 85 (1837); 24 & 25 Vict., c. 100 (1861).

51. G. WILLIAMS, THE SANCTITY OF LIFE & THE CRIMINAL LAW 154 (1957). LADER, *supra* note 1, at 88, cites two New Jersey cases which underscore this point:

> The design of the statute was not to prevent the procuring of abortions so must as to guard the health and life of the mother against the consequences of such attempts. State v. Murphy, 27 N.J.L. (3 Dutch.) 112, 114 (1858).

The New Jersey court in 1956 said "health" was the crucial word in the statute's clause, "life and health of the mother." State v. Siciliano, 21 N.J. 249, 121 A.2d 490 (1956).

other organized religion has failed to endorse liberalization of abortion laws.[52]

While ensoulment seems to be a question of theology, rather than of law, recent attempts to solve the abortion problem through legislation have been frustrated without sufficient hearing largely by pressures from the Catholic Church. The New York bill to liberalize that State's antiquated abortion law never got out of committee. For the first time in New York's history, her eight Catholic bishops issued a joint pastoral letter condemning the proposed measure as an attempt to legalize murder. In spite of the bishops' letter, 40 prominent Catholic laymen urged the legislature to ignore Church pressures and act on their own consciences, stating in a letter to the legislators:

> Legislating morality has always been a fruitless and wrong act and we, as Catholics, know that no merit is gained through such compulsion.[53]

The desirability of laws which permit the taking of a life to prevent the rape of a woman is unquestioned, yet the innocent victim of rape is forced to carry the child of her attacker to term in all but four states. To prevent the abortion of a pregnancy resulting from incest seems both cruel and un-

52. SCHUR, *supra* note 1, at 62; Leavy & Kummer, *supra* note 34, at 659-60:

> The only organized opposition to reforming the law of therapeutic abortion comes from the leadership of the Catholic Church and its hospitals. A number of organizations vigorously opposed the Beilenson Bill in California, but they have all manifested the religious philosophy of the Roman Catholic Church. Even the ostensibly medical and legal arguments proffered by these groups bear the same stamp of theological doctrine.

E.g., Catholic Physician Guild; Guild of Catholic Psychiatrists; St. Thomas More Society; California Council of Catholic Hospitals; Catholic Parent Teachers' Ass'n. *See generally* Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 12 U.C.L.A. L. REV. 285, 287 n.18. *But see* Drinan, *supra* note 34, at 179:

> The advocates of a 'liberalization' of America's abortion laws assume . . . that Catholics constitute the only group in America opposed to a repeal of the nation's existing abortion laws. . . . Catholics in America have always been reluctant to take affirmative positions with regard to the legal institutions of this country. Catholics came to this country just after divorce had become the law of almost every State; Catholics generally have not sought to change or even improve these laws. Catholics have often reacted against any lessening of the moral content of American law, but they have seldom if ever taken the initiative to alter the nation's legal institutions.

53. N.Y. Times, Mar. 6, 1967, at 28, col. 4. For text of pastoral letter *see* N.Y. Times, Feb. 13, 1967, at 50, col. 7.

scientific, yet if the abortion is performed in most of our states today, it is illegal. The fact that physicians and psychiatrists have cooperated to abort therapeutically victims of rape and incest does not excuse the deficiencies of our abortion laws but, rather, it emphasizes the need for change of such laws.

Arguments on behalf of abortion for victims of rape or incest, however, do not justify abortion for the majority of women who seek such operations today: women who conceive an unwanted child by their husbands. Herein lies the most basic conflict, for the majority of public opinion in the United States may still be opposed to granting abortion to the women who seek it most frequently—the married woman who has the number of children she wants.[54]

In other sensitive areas of the law, particularly when a decision must be made between the rights of two innocent parties, an attempt is sometimes made to achieve a balance of interests. Our laws protect the unborn child who is subsequently born alive,[55] but it does not follow that our law must protect the right of a fetus to be born alive "when the interests of the fetus oppose the interests of the mother."[56] Those who favor abortion reform urge that the interest most deserving of protection is that of the individual who is a living, functioning member of society, the mother.

> The mere potential for being a person—a potential which may be spontaneously aborted in as much as one out of three and maybe two conceptions—seems too slight an interest to protect by inflicting a vast amount of human misery on those who created that potential, often unintentionally, and will be responsible for it.[57]

54. Drinan, *supra* note 34, at 177; authorities cited *supra* note 3.

55. *See generally* Recent Decisions, 31 COLUM. L. REV. 710-11 (1931) (procedural status of unborn infant); Anderson, *Rights of Action of an Unborn Child*, 14 TENN. L. REV. 151 (1936); Comment, 33 MICH. L. REV. 414 (1935) (law of property); PROSSER, TORTS 56 (3rd ed. 1964); Winfield, *The Unborn Child*, 8 CAMB. L.J. 76 (1942); Annot., 10 A.L.R.2d 639 (1950).

56. Sands, *supra* note 52, at 303.

57. Williams, *supra* note 2, at 199. *See Abortion Legislation: The Need for Reform*, 20 VAND. L. REV. 1313 (1967).

Conclusion

What, arguably, should be a medical problem to be solved between physician and patient has become a legal problem of enormous proportions, complicated by a penumbra of doubtful moral and social alternatives. Still, the question is not whether to legalize abortion—nearly every jurisdiction permits destruction of the fetus to save the life of the mother—but when; that is, in which instances and under what circumstances will abortion be permitted? The right of a woman and her husband, together with her physician, to decide whether or not she will bear a child is a problem of personal freedom more urgently in need of consideration than many of the problems now facing our legislatures.

The Supreme Court in 1965 held Connecticut's law prohibiting use of contraceptives to be unconstitutional. Seven justices agreed that the law impinged upon a basic "right of privacy . . . older than the Bill of Rights",[58] and that the statute was a deprivation of liberty without due process of law. How reasonable are current abortion laws which deny a woman the right to decide whether and when she will bear a child, especially a fetus which is medically determined to be severely defective, the product of rape or incest, or a serious threat to the life or health of the mother? Yet no court to date has squarely decided the constitutionality of making abortion a crime.

Proposals for reform other than the *Model Penal Code* provisions have included recommendations by the New York City and the Southern California Civil Liberties Unions that all abortion laws provide merely that abortions shall be performed by physicians; in other words, to treat abortion as a medical question to be decided as any other medical question, between physician and patient. Others have urged that all abortion laws simply be repealed and that abortion be treated as any other aspect of medical practice, subject to the same

58. Griswold v. Connecticut, 381 U.S. 479, 486 (1965); *cf.* Note, 6 J. FAM. L. 371 (1966).

legal rules. Some have compared current attempts at liberalization with the experience of Japan, where laws similar to the *Model Penal Code* provisions were adopted in the 1930's.[59] The abortion problem in Japan was not solved by the liberalization and, in 1948, abortion was legalized as a method of mass population control.[60]

> It is unlikely that the Western Culture, which is so steeped in the traditions of the rights of the individual, will alter the status of the fetus at any gestational age, either legally or emotionally, in a manner which would allow abortion upon demand.[61]

To construe abortion performed by a licensed physician as a crime would seem to be an arbitrary and unreasonable interference both with a physician's right to practice medicine and with the right of an individual to total medical care and attention. Abortion should be a crime when performed by an individual who is not a duly licensed physician. Currently, however, there are no sufficient exemptions for doctors and, in fact, they are treated as any other person for legal purposes, such as sentencing. Clearly, no law since prohibition has been so widely evaded. The result is knowing violation of the law

59. Tietze, *Induced Abortion & Sterilization as Methods of Fertility Control*, NAT. COMM'N ON MATERNAL HEALTH, Publication 27 (1965) *cited in* Leavy & Kummer, *supra* note 28, at 648:

> Only in Japan has abortion been openly acknowledged as a method of mass population control. It was legalized in 1948 along with requirements for maintaining minimal medical standards, and has since reduced the birth rate by more than one-third. The crash program of abortion, brought on by the serious population crisis following World War II, did not offend the mores and religious beliefs of the Japanese, however, as might be the case in the West.

60. *Id.*

61. Ryan, *Humane Abortion Laws & the Health Needs of Society*, 17 W. RES. L. REV. 424, 427-28, 433 n.28 (1965):

> As other causes of maternal death decline under the impact of adequate medical care, the proportion due to criminal abortion by non-medical practitioners will undoubtedly increase. . . . The plea for a liberal abortion law has often been based on the supposition that it would decrease this traffic in criminal abortions. Barring a law that allows abortion upon demand, it is unlikely this activity can be abolished. . . . In Sweden, the advent of liberal abortion laws was accompanied by a decline in criminal abortion only to be followed by a resurgence due to the time and bother of justifying an abortion before a reviewing committee.

by purportedly "law-abiding" people and disrespect for the entire legal process.

It is submitted that we should amend our abortion laws to enable physicians to treat the medical problem without fear or threat of losing their licenses to practice medicine or of being sanctioned or ostracized by an impersonal hospital board. We should ensure that criminal abortion will not be the only means available to a woman in need of medical attention. The dimensions of the abortion dilemma demand that we take action to relieve and remedy a major health problem by enacting new laws which are sensible and which can be accepted by the public in general and the medical profession in particular.

James Voyles