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be utilized in the most efficient manner. The primary advantage of the assigned counsel system appears to be the participation of a large percentage of the bar in the administration of criminal justice.

Problems were raised with reference to determining the eligibility of the defendant. On one hand it was found that only those defendants incapable of obtaining competent counsel should be provided with one, and, on the other hand, an attorney should be appointed as soon as possible after arrest so as to allow adequate time for the preparation of a defense. It was also pointed out that if the defendant has some available funds or acquires some during the pendency of the proceedings he should be required to contribute them to court or to the appointed attorney.

What about providing counsel for misdemeanors? It has been shown that no valid distinction can be drawn between felonies and misdemeanors merely on the basis of length of incarceration. If the defendant is subject to a deprivation of life or liberty, he should be supplied with counsel.

The Criminal Justice Act is a congressional recognition of the deficiencies previously found in the federal system. A number of problems, however, were encountered here, too, though: namely, lack of an option for the districts to employ a defender; lack of provision for an attorney at collateral proceedings; and the unrealistically low provision for maximum compensation. The proposed legislation in South Carolina and Illinois substantially improve these areas and others. Now what must be done is for other states to apply this learning and experience.

ABORTION: REFORM AND THE LAW

LOREN G. STERN

The recent proposals to liberalize the abortion laws of various states have sparked an emotion-packed debate of national scope and import. Although this debate is political in nature, it has taken on strong religious overtones due to the influence of the Catholic Church which has become so deeply involved in this debate.

No discussion of abortion laws in the United States can be undertaken without first reviewing the English common law and statutory law which provide the basis for our abortion laws.

Prior to 1803 the common law of England was that an induced abortion before quickening[1] was not a crime. This notion was based upon St. Augustine's belief that the human embryo was inanimate for an indeterminable period of time after conception, but then became animate, after which the destruction of the embryo was murder and punishable by death.[2] To this theory St. Thomas Aquinas added the refinement that life is demonstrated by two actions, knowledge and movement. He theorized that soul is the first principle of life in things that live and soul entered the body of the embryo at the time of its first movement.[3] Bracton, Aquinas' contemporary, equated the perceptible movement in the womb with quickening.[4] The concept of quickening led to the common law rule originated by Coke and stated by Blackstone that "life . . . begins in contemplation of law as soon as the infant is able to stir in the mother's womb" and that the act of abortion came only after quickening.[5] Thus abortion before quickening was not criminal, while induced abortion after fetal activity was murder in Bracton's view, but was only a misdemeanor to Coke.[6] An exception to the rule forbidding abortion after quickening developed rapidly in the common law; if the abortion was done in order to save the life of the woman, it could be done at any period of the gestation, it was not deemed criminal and therefore it was not punishable at common law.

In 1803 the first English statute on abortion, the Miscarriage of Woman Act, abolished the common law rule that the unlawful act of abortion came only after quickening.[7] The Act condemned

[1] Quickening is that stage of gestation, usually sixteen to twenty weeks after conception, when the woman feels the first fetal movement.

[2] Williams, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 150–51 (1957).

[3] *Id.*

[4] *Id.* at 152.

[5] *Id.*

[6] *Id.*

[7] 43 GEO. 3, c. 58 (1803).

the willful, malicious, and unlawful use of any medical substance when used with the intent to induce abortion, without regard to whether the attempt was successful or whether the woman survived. It was a felony in all cases, but punishable by death only if the medical substance was given after quickening.[8] Thus a distinction between abortion before and after quickening was recognized, and a much greater punishment meted out to those attempting abortion after quickening.

In 1828 the Act was amended to apply to abortions induced unlawfully by use of instruments and if the woman lived the punishment was limited to three years in prison.[9] When Queen Victoria came to the throne in 1837, the Act was further amended eliminating all references to quickening and to actual pregnancy.[10]

In 1861 the new 'Offences Against the Person Act' was enacted. This Act is the foundation upon which our abortion laws are built. Section 58 of the Act declares the use of any means by a woman, with intent to effect her own miscarriage, if actually pregnant, or by others with like intent without regard to whether she was actually pregnant or not, to be a felony. Section 59 declares the furnishing of any means effecting abortion with knowledge that it was intended to be used for such purpose on any woman, pregnant or not, to be a misdemeanor.[11] It should be noted that in November, 1965 the English House of Lords voted in favor of a new abortion statute which would permit therapeutic abortions to be performed for medical conditions of the mother, for socio-economic reasons, for eugenic considerations, and for pregnancies which resulted from rape or incestuous intercourse.[12]

The first state to enact an abortion law was Connecticut in 1821.[13] This statute made it unlawful to attempt to abort a fetus by poison after quickening and was punishable by life imprisonment. In 1830 the statute was amended to include attempts to abort a fetus by means other than the use of drugs, but these attempts were unlawful only if done after quickening.[14] 30 years later the statute was further extended to include attempts on any woman, whether she was actually pregnant or not, with the intent to induce abortion. The punishment was reduced to one to five years imprisonment, but more significantly, the statute made an exception for acts "necessary to preserve the life of such woman."[15]

In 1827 Illinois made any attempt to use a noxious substance with intent to induce abortion a crime punishable by imprisonment up to three years,[16] and in 1867 amended this statute to include any attempt, regardless of the means used, and declared such attempt to be murder if it resulted in the death of the woman. This amended statute exempted abortion and attempted abortion if done "for bona fide medical and surgical purposes."[17]

One year later New York made any attempt to abort a quick child second degree manslaughter if the intent was to destroy the child or a misdemeanor if the attempt was only to produce a miscarriage (not defined) at any stage of the pregnancy.[18] The attempt to abort a quick child was excused if it was necessary to preserve the life of the mother or if two physicians had so advised. In 1845 the New York Legislature dropped the alternative of allowing two physicians' opinions and limited the exception to attempts to abort only when necessary to preserve the life of the mother whether before or after quickening.[19]

In 1834 Ohio declared any attempt to abort a pregnant woman unless necessary to preserve her life, actually or in the opinion of two doctors, to be a misdemeanor. Any attempt after quickening "with intent thereby to destroy such child" was a high misdemeanor punishable by up to seven years imprisonment.[20]

In 1841 Alabama enacted what had by that time become a standard abortion statute, forbidding attempts to cause miscarriage by any means unless necessary to preserve the life of the mother.[21]

It is apparent that most of the early American statutes distinguished between abortion before and after quickening. Abortion before quickening was punished in a lenient manner, while one attempting to abort after quickening was subject to severe punishment. Many states made abortion lawful if

[8] Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L. J. 395, 432 (1961).
[9] OFFENCES AGAINST THE PERSON Act, 9 GEO. 4, c. 31 (1828).
[10] 7 WILL. 4 and 1 VICT., c. 85 (1837).
[11] 24 & 25 VICT., c. 100 (1861); See Quay, *supra*, note 8 for a complete history.
[12] 270 PARL. DEB., H.L. (11th Ser.) 1139 (1965).
[13] CONN. STAT. tit. 22, §§14, 16, at 152, 153 (1821).
[14] CONN. LAWS ch. 1, §16, at 255 (1830).
[15] CONN. PUB. ACTS ch. LXXI, §1, at 65 (1860).
[16] ILL. REV. CODE §46, at 131 (1827).
[17] ILL. PUB. LAWS §§1, 2, 3, at 89 (1867).
[18] N.Y. REV. STAT. pt. IV, ch. I, tit. II, §§8, 9, at 550 (1828).
[19] N.Y. LAWS ch. 260, §§1, 3, at 285 (1845).
[20] OHIO GEN. STAT. §§111 (1), 112 (2) at 252 (1834).
[21] ALA. ACT ch. 6 §2.

two physicians were of the opinion that it was necessary to preserve the life of the woman. But after a few years' experience, the state legislatures limited the exception to unlawful abortions to cases in which the abortion was *actually* necessary to preserve the woman's life with no substitution of a physician's opinion for the fact itself. Most of these early statutes punished acts done with the intent to produce abortion regardless of whether the abortion was actually effected.[22] These early statutes set the criteria and lay the patterns which are used and followed in nearly all the state abortion statutes today and which have remained basically unchanged for one hundred years.

Today fifty of our fifty-one jurisdictions make the procurement or the attempted procurement of an abortion by any means a possible felony.[23] New Jersey, the lone exception, makes it a possible high misdemeanor.[24] The fifty-one jurisdictions are unanimous in allowing an exception to the law forbidding abortion. Forty-two jurisdictions allow abortion if it is done to preserve the life of the woman.[25] Alabama, Oregon, and Washington D.C. make abortion lawful if it is done to preserve the life or health of the woman.[26] Colorado and her sister state, New Mexico, permit abortion in order to save the life of the woman or to prevent serious or permanent bodily injury to her.[27] Maryland, a state with a large percentage of Catholics, surprisingly has the most liberal abortion statute, permitting abortion by a licensed physician who is satisfied that the fetus is dead, or that no other method will secure the safety of the woman and whose opinion is supported by at least one consulting physician of respectable reputation.[28] Massachusetts and Pennsylvania have enacted statutes declaring that an abortion will violate the statute if done unlawfully[29] while New Jersey requires that the act of abortion be done maliciously or without lawful justification in order to violate the abortion statute.[30] Obviously the terms "unlawfully," "maliciously," and, "without lawful justification" are vague, leaving it to the state courts to define what these terms mean. The Supreme Court of Massachusetts has concurred in the *Bourne*[31] view that an abortion is lawful if done to preserve the health of the woman.[32] Although no Pennsylvania decisions clarify the scope of justifiable abortion, there is dicta to the effect that not all abortions are unlawful.[33] Since the Pennsylvania statute and Massachusetts statute are similar, and

[22] Quay, *supra* note 8 at 437–38.

[23] Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. Cal. L. Rev. 123, 127 (1962).

[24] N.J. Rev. Stat. Ann. §2a:87-1 (1953).

[25] Ariz. Rev. Stat. Ann. §13–212 (1956); Alaska Comp. Laws Ann. §65-4-6 (1949); Ark. Stat. Ann. §41–301 (1947); Cal. Pen. Code §276 (Supp. 1960); Conn. Gen. Stat. Rev. §53–30 (1958); Del. Code Ann. tit. 11, §301 (1953); Fla. Stat. Ann. §782.10 (1944); Ga. Code Ann. §26–1101 (1953); Hawaii Rev. Laws §309-4 (1955); Idaho Code Ann. §18–601 (1948); Ill. Rev. Stat. ch. 38 §3 (1959); Ind. Ann. Stat. §10–105 (1956); Iowa Code Ann. §701.1 (1950); Kan. Gen. Stat. Ann. §21–410 (Supp. 1959); Ky. Rev. Stat. §436.020 (Supp. 1956); La Rev. Stat. Ann. §88–6; Me. Rev. Stat. Ann. c. 134, §9 (1954); Mich. Stat. Ann. §28:555 (1954); Minn. Stat. §617.18 (1953); Miss. Code Ann. 2223 (1956); Mo. Ann. Stat. 559.100 (1949); Mont. Rev. Code Ann. §94–401 (1947); Neb. Rev. Stat. §28–405 (1956); Nev. Rev. Stat. 200.220 (1959); N.H. Rev. Stat. Ann. §585:13 (1955); N.Y. Pen. Laws 80; N.C. Gen. Stat. §14–44 (1953); N.D. Rev. Code §12–2501 (1943); Okla. Stat. Ann. tit. 21, §861 (1958); R.I. Gen. Laws Ann. 11-3-1 (1956); S.C. Code §16–82 (1952); S.D. Code §13.3101 (Supp. 1960); Tenn. Code Ann. §39–301 (1955); Utah Code Ann. §76–2 (1953); Vt. Stat. Ann. tit. 13 §101 (1959); Va. Code Ann. §18.1–62 (Supp. 1960); Wash. Rev. Code §9.02.010 (1951); Wis. Stat. Ann. §940.04 (1958); Wyo. Stat. Ann. 6–77 (1957); Ohio Rev. Code Ann. §2910.16 (Page 1954); Tex. Pen. Code Ann. ch. 9 art. 1191 (1960).

[26] Ala. Code tit. 14, §9 (1940), as amended, Acts 1951, p. 1630; Ore. Rev. Stat. §§163.060, 677.010, 677.190 (1959); D.C. Code Ann. §22–201 (Supp. VIII, 1960).

[27] Colo. Rev. Stat. Ann. §40-2-23 (1953); N.M. Stat. Ann. §§40-3-1, -2 -3.

[28] Md. Ann. Code art. 27, §3 (1957).

[29] Mass. Gen. Laws Ann. ch. 272 19 (1959); Pa. Stat. Ann. tit. 18 4718, 4719 (1945).

[30] N.J. Rev. Stat. Ann. 2a:87-1 (1953).

[31] *Rex v. Bourne*, 1 K.B. 687 (1939). The English Court defined the statutory phrase "for the purpose of preserving the life of the mother" not only to mean physical life, but emotional life as well. A woman whose health is threatened by pregnancy should not have to be in the jaws of death before an abortion can be performed lawfully, for in any case, the woman's longevity will most likely be shortened by serious impairment of her health.

[32] Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E.2d 4 (1944). The Massachusetts court concurred in the *Bourne* interpretation and declared that the Massachusetts abortion statute allowed abortion in order "to prevent serious impairment of her health, mental or physical. . . ." *Id.* at 395, 53 N.E.2d at 5. Commonwealth v. Brunelle, 341 Mass. 675, 171 N.E.2d 850 (1961). The court extended their liberal interpretation of the Massachusetts statute holding that the burden of proof was on the Commonwealth to prove the defendant used the instrument unlawfully, that he acted not to preserve the life or health of the woman, and that his judgment was in conflict with that of associated physicians in the community.

[33] Wells v. New England Life Ins. Co., 191 Pa. 207, 43 A. 126 (1899); Commonwealth v. Sindel, 205 Pa. Super. 355, 208 A.2d 894 (1965). "It was for the jury to determine whether the attendance of Barbara Feraldo by Dr. Sindel was lawfully or unlawfully intended." *Id.* at 359, 208 A.2d at 896, 897.

since both statutes have the same common law background, it is very likely that the courts of Pennsylvania will interpret the statute to permit abortions if done to preserve the health of the woman just as Massachusetts has done. The New Jersey statute has recently been interpreted to permit abortion only if it is done to save the life of the woman.[34]

This brief review of abortion law in our United States makes it readily apparent that the major purpose of abortion statutes is to protect the mother's life. But the phenomenal advance of medical science over the last one hundred years has made it extremely rare to find an illness in a pregnant woman that cannot be treated so that her pregnancy can be carried to natural completion without immediately endangering her life.[35] Therefore it appears that very few abortions can lawfully be performed under our existing laws. Yet today one out of every four or five pregnancies in the United States is aborted, totalling over one million abortions a year.[36] Proponents of abortion reform declare that there are other, equally compelling, reasons for permitting abortion. The American Law Institute's proposed guidelines for abortion reform embody the basic features of most reform proposals. The ALI suggests that abortion be permitted when a licensed physician believes there is 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 which includes any illicit intercourse with a girl below the age of sixteen.[37] These guidelines have met with both hearty approval and adamant opposition.

Religion has always played a major role in the American society, thus the stand taken by the major religious groups on the issue of abortion reform will exert a strong influence and be an important factor in determining whether abortion statutes will be liberalized. In general, the Protestants, who are the largest religious group in the United States and who comprise a majority of the population, have come to accept abortion when the woman's life or health is endangered. Primary consideration is given to the woman, abortion being considered "primarily a medical problem for each family to decide after competent medical and clerical consultation."[38] The majority of the Jewish community, made up of the Reformed and the Conservative segments, favor liberalization of the abortion laws to include abortion in order to preserve the health of the woman.[39] The viewpoint of this segment of the Jewish population is summarized in the following statement.

> [t]he fetus is part of its mother, and just as a person may choose to sacrifice a limb of his body in order to be cured of a worse malady, so may the fetus be destroyed for the sake of its mother.[40]

The Orthodox Jews are not unanimous in their attitude toward abortion reform, many condemning abortion unless performed to save the life of the woman while others adhere to the view espoused by the majority of Jewish people.[41]

The Catholic Church does not permit any Catholic to submit to or commit a direct abortion, that is, any direct attack on the live fetus, regardless of the reason.[42] No condition of pregnancy constitutes an exception to this prohibition, and

[34] Gleitman v. Cosgrove, *27* A.*2*d 689 (1967). After the *Gleitman* decision was handed down, Arthur J. Sills, New Jersey's Attorney General, called a meeting of New Jersey's county prosecutors in order to draft a "uniform interpretation" of the New Jersey abortion law. A committee of four county prosecutors and one member of Mr. Sills' staff were appointed to draft the "interpretation". It is probable that the committee will interpret the statute more liberally than did the court. This assumption is given credence by the facts that 1) Sills stated that the committee could retain the court's interpretation or include others such as when the mother's health is seriously endangered, when there is a strong possibility that the child would be deformed, or if the pregnancy resulted from rape or incest and 2) the committee chairman is County Prosecutor Brendan T. Byrne who has never brought criminal charges when the abortion was performed because the mother had had German measles.

[35] Leavy and Kummer, *supra* note 23 at 126.

[36] Kopp, BIRTH CONTROL IN PRACTICE 222 (1934); Lader, ABORTION 2 (1966); Leavy & Kummer, *supra* note 23 at 124; Niswander, *Medical Abortion Practices in the United States*, 17 W. RES. L. REV. (1965).

[37] MODEL PENAL CODE, §230.3 & §207.11.

[38] MODEL PENAL CODE, §207.11, Comment (Tent. Draft No. 9, 1959); THERAPEUTIC ABORTION 164 (Rosen ed. 1954); Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647 (1966).

[39] Cohen, A JEWISH VIEW TOWARD THERAPEUTIC ABORTIONS AND RELATED PROBLEMS OF ARTIFICIAL INSEMINATION AND CONTRACEPTION 166–173 (Rosen ed. 1954).

[40] Lader, *supra* note 36 at 97, quoting Rabbi Israel Margolies.

[41] Jakovovits, *Jewish Views on Abortion*, 17 W. RES. L. REV. 480 (1965).

[42] Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285; Lader, *supra* note 36 at 95 (1966).

the punishment for any Catholic taking part in an abortion is excommunication. The Church firmly believes that all abortion is immoral even if done to preserve the life of the woman. Therefore the Church is opposed to the existing abortion laws, believing these to be too liberal, and opposes any further liberalization as morally unjustified and in complete opposition to the laws of nature.

There are many persons who, while specifically embracing theological persuasions, oppose abortion reform on other grounds. An oft-quoted objection to liberalization of the abortion laws is that liberalization would encourage illicit sexual relations, uncontrollable promiscuity, with a resulting "breakdown in public morality." [43] The obvious weakness in this argument is that reliance on, or contemplation of abortion is hardly a factor in illicit sex in a society where contraceptives are so readily available. Quick access to contraceptives renders reliance on the unpleasant and expensive device of an abortion unnecessary and therefore unlikely.[44] Another flaw in this contention is that 90% of all criminal abortions are performed on married women seeking to avoid the economic burden of another child,[45] indicating that comparatively few single girls employ this device as a means of concealing their illicit affairs.

Opponents of abortion reform argue that broadening the present laws will lead to underpopulation.[46]

> If our legislatures a hundred years ago were mainly concerned with American expansion and the perpetuation of the race, this objective has been universally nullified. The rational control, rather than expansion, of population has become one of the crucial challenges of our time. Long recognized by local governments, which have increasingly extended birth-control services through public-health agencies, the challenge was reaffirmed in President Lyndon B. Johnson's State of the Union message in January 1965: "I will seek new ways to use our knowledge to help deal with the explosion of world population and the scarcity of resources." Two former Presidents, . . . Truman and . . . Eisenhower, have become co-chairmen of the nationwide campaign of the Planned Parenthood Federation. . . . Obviously, the vast preponderance of American opinion today is the diametric opposite of the population policies of expansion which helped shape our old abortion laws.[47]

Still other opponents argue that abortion is detrimental to the health of the woman.[48] This argument must fall before the force of scientific studies. The Russian experience with legalized abortion between 1922 and 1936[49] yielded statistics indicating the mortality rate among pregnant Russian women was less than 0.01%.[50] In Sweden, where there are about 5000 legal abortions per year, the fatality rate among pregnant women is about 0.04%.[51] This rate is lower than those mortality rates operative in both the United States and England.[52] Studies of Japan, which legalized abortion in 1948, and those Eastern European countries which provide statistics indicate that physical after effects of abortion are rare and the mortality rate is "exceedingly low." [53] Based on these scientific studies, it is evident that abortion under optimum conditions involves little risk to the life or health of the woman.

Many opponents argue that a liberal abortion statute might be abused by women, who do not in reality come within its provisions.[54] All proposals

[43] Byrn, *The Abortion Question: A Nonsectarian Approach*, 11 CATHOLIC LAW 316, 321 (1965); Jakobovits, *supra* note 41 at 494.

[44] MODEL PENAL CODE, §207.11 (Tent. Draft No. 9, 1959); Moore, *Antiquated Abortion Laws*, 20 WASH & LEE L. REV. 250, 256 (1963).

[45] Note, *The Abortion Law*, 12 W. RES. L. REV. 74, 84 (1960).

[46] Lader, *supra* note 36 at 92.

[47] *Id.*

[48] Moore, *supra* note 44 at 256.

[49] In 1936 the Soviet government banned legalized abortion because of the growing threat of Nazi Germany which convinced Soviet officials that it was necessary to increase the population in order to replenish the army and labor force. The ban on legalized abortion was also due to the fact that the original legalization of abortion was an outgrowth of the Bolshevik revolution. Thus Lader contends that the ban on legalized abortion "was only part of a larger crack-down on the revolutionary enthusiasm of the old Bolsheviks". LADER, ABORTION 122 (1966). Abortion was again legalized in 1955.

[50] Tietze, *Induced Abortion and Sterilization as Methods of Fertility Control*, NAT'L COMM. ON MATERNAL HEALTH, Publication 27 (1965) at 1152. Out of a total of 500,000 pregnant women, 6 per 100,000 died and these deaths were due, in most instances, to other serious disorders and not to induced abortions.

[51] Darby, *Abortion*, 3 OXFORD LAW. 10 (1960).

[52] *Id.* The difference in the mortality rate between Russia and Sweden is due to the fact that the Russian rules for care after abortion were stricter than those of Sweden. In Russia the aborted woman would have to remain in the hospital for at least 3 days and was not permitted to work for at least two weeks after the operation.

[53] Tietze, *supra* note 50; Lader, *supra* note 36 at 125-31.

[54] Moore, *supra* note 44 at 258.

for abortion reform declare that it is for the doctor, the doctor in consultation with other doctors, or a hospital board of doctors to decide if an abortion is necessary in each case.[55] Therefore, the decision is not in the woman's hands at all, it is strictly the doctor's decision based on medical knowledge and judgment.

The most adamant opponent to and most influential force against the reformation of abortion law is the Roman Catholic Church. Although the Catholic religion is a minority religion in the United States, it presents a formidable foe because of its great influence over the Catholic electorate and the Catholic legislators and because of the Church's awesome ability to levy pressure upon our lawmakers. The Church's influence and power are best exemplified by the recent New York experience. Albert H. Blumenthal, an Assemblyman for five years and chairman of the influential Democratic Advisory Committee, sponsored a bill in the New York Legislature to reform the state abortion law. This bill closely paralleled the reform suggested by the American Law Institute.[56] Upon learning of this bill, the eight Catholic Bishops of New York's eight dioceses, in an unprecedented action, jointly issued a pastoral letter which was read in all the masses in most of the state's seventeen hundred churches urging New York's six and one-half million Catholics to fight the proposed abortion reform "with all their power." [57] Some church leaders characterized Blumenthal's position as un-Christian and unreasonable.[58] Soon after the reading of the pastoral letter, Blumenthal was ousted as chairman of the Democratic Advisory Committee by Speaker of the Assembly Anthony J. Travia, a Roman Catholic. "According to reliable sources, the main reason for the dismissal was Mr. Blumenthal's championing of bills this year to reform the state's 84-year-old abortion law...." [59] Within a month Blumenthal's bill for abortion reform was killed in committee and was never voted upon by the full assembly. Mr. Blumenthal declared he had always been ready to discuss a reasonable compromise, "but all the indications are that nobody is interested in compromise." [60] The Catholic Church, by applying pressure on the Catholic voters and the Catholic lawmakers, swiftly and efficiently aborted the proposed abortion reform in New York.

The Roman Catholic Church's opposition to any direct abortion[61] is historically based upon the horror of bringing about the death of a child without the sacrament of baptism, thus depriving the child of the eternal reward of heaven.[62] Today this argument is not used because of the extraordinary dilemmas which it produces.[63] The Church now argues that "[d]irect and voluntary abortion is intrinsically wrong since it is the direct killing of an innocent human being." [64] This argument is based upon the presumption that the fetus or embryo is invested with a soul from the moment of conception. The Church has decided that life begins at the moment of conception and therefore the embryo is a "person" entitled to all the rights and protection of constitutional law normally given to other persons already born—the right to be born.[65]

But the Church has not always been opposed to all direct abortions. There is no doubt that the Catholic position on abortion has changed throughout the centuries in order to adapt to the changing pressures of our ever-changing worlds.[66] For eighteen hundred years theologians have debated over when the soul first entered the fetus to establish the

[55] See note 37, Leavy & Kummer, *supra* note 23 at 140–43; Moore, *supra* note 44 at 253; Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172, 189 (1963); Comment, *The Legal Status of Therapeutic Abortion*, 27 U. PITT. 669, 671 (1966).

[56] MODEL PENAL CODE §230.3 & §207.11.

[57] N.Y. Times, Feb. 12, 1967.

[58] N.Y. Times, March 7, 1967.

[59] N.Y. Times, Feb. 12, 1967.

[60] N.Y. Times, March 7, 1967.

[61] The Church allows abortion based on the principle of "double effect". The termination of pregnancy is only incident to an operation whose primary effect is good, but whose secondary effect causes the fetus to abort without a direct intention of this occurring.

[62] The soul of the unbaptized child spends eternity in limbo where there is no suffering, and no punishment, but which is void of the divine being.

[63] Canon 747 prescribes baptism for every living fetus and conditional baptism if doubtfully living. If the mother is not aware that she has conceived or spontaneously aborts, then the fetus is denied eternal salvation. Another problem presented is the reconciliation of theology with scientific facts of natural wastage in embryonic development. One of three fertilized human eggs or embryos fails to develop correctly and dies in the uterus, resulting in either a spontaneous abortion or reabsorption before the fifth week after conception. Thus if every fertilized egg is considered a life, it must be baptized. In order to be sure that all fertilized eggs are baptized, the menstrual flow of every woman having matrimonial intercourse must be strained to determine "if there were not some germ there, or, better still, we ought to pour baptismal water on this blood, taking care that the water should penetrate everywhere, ..." Lader, ABORTION 101–102.

[64] Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW 187, 190 (1959).

[65] Leavy & Kummer, *supra* note 38 at 660.

[66] *Id.* at 663.

point at which the fetus died without baptism.[67] For eighteen and one-half centuries the Catholic Church permitted abortion before the fortieth day after conception if the child was a male and before the eightieth day after conception if the child was a female.[68] And in actual practice, the Church did not punish abortion unless committed after quickening. Thus, until 1869 the Church acted in conformity with the common law.[69] In 1869 Pope Pius IX abolished the distinction of abortion before and after quickening and the forty and eighty day rules pertaining to males and females. Pope Pius IX ruled that all direct abortion was considered murder in the eyes of the Church. Sixty-one years later Pope Pius XI supplemented Pius IX's views in his "Casti Connubii" of 1930. Pius XI condemned all attempts to limit offspring as acts against nature[70] and declared that the lives of both mother and child (fetus) were equally sacred, no one, not even the public authority, having the power to destroy it. Thus the position which the Church so staunchly and adamantly supports is a new one, less than one-hundred years old, and is based solely upon the views of Pope Pius IX and Pope Pius XI.

The Church's position that life begins at conception is not a scientifically proven fact. In fact, this premise is the subject of much difference of opinion.[71] It is far from absolute fact; it falls within the realm of opinion, has been debated for centuries and is still being debated without resolution.[72] The Church's assumption that life begins at conception is actually only a presumption as indicated by the following testimony given before the 1965 California Assembly Criminal Procedure Committee.

> [S]ince no one can say positively when life begins, the Church maintains that it must presume that life begins at conception until proven otherwise. Only in this way can the Church be sure that the child is protected from the time life begins, whenever that occurs. Thus the Canon Law is explicit though there is no dogma on the point.[73]

The Church sincerely believes that the only satisfactory view is to regard the fetus as being human from the time of conception. But others, just as knowledgeable as the Church Hierarchy, have other opinions as to when life begins. The philosopher, David Hume, hypothesized that a human being is merely the sum total of his perception which necessarily involves a memory.[74] Since it can not be proven that a fetus has a memory or is capable of perceiving, it is therefore not a human being in Hume's eyes. Who can positively prove that Hume's definition is less valid than that of the Catholic Church? The writer does not contend that the Church's argument is necessarily fallacious for it is impossible to disprove it. But the writer earnestly asserts that the Church's position is no more tenable than that of the proponents of abortion reform.

It has already been shown that the general attitude of both Protestants and Jews, easily comprising a majority of the population of the United States, is to permit abortions for reasons other then the preservation of the woman's life. The only substantial opposition to liberalizing the abortion laws is the Catholic Church which freely admits that neither presently, nor in the future, is there likely to be any scientific proof as to when life begins.[75] Therefore the leading argument against reform cannot even be substantiated.

If the state legislators are pressured into accepting the Church's argument, the criminal law, which must be enacted with a view toward our society as a whole, will be governed by the religious convictions of a minority of the population.

> Use of the criminal law contrary to a substantial body of public opinion is definitely alien to our basic principles, as criminal punishment traditionally has been reserved for behavior falling below the universally accepted standards of conduct.[76]

Even members of the Catholic Church Hierarchy do not believe that it is the Church's place to impose its moral beliefs upon the rest of the population through criminal statutes. Msgr. George Casey has stated, "Catholics do not wish to

[67] *Id.* See Lader, ABORTION 185 n. 9 (1966).

[68] It is unknown how the physician could determine if the fetus was a male or female.

[69] Leavy & Kummer, *supra* note 65 at 663.

[70] *Id.*

[71] *Id.* at 661.

[72] Sands, *supra* note 42 at 294; Lader, *supra* note 36 at 95.

[73] 1962 transcript of the California Assembly Committee on Criminal Procedure 124 as cited in Leavy & Kummer, *supra* note 65 at 662.

[74] Hume, A TREATISE ON HUMAN NATURE, Book I, part IV, section 6.

[75] Sands, *supra* note 42 at 294.

[76] Leavy & Kummer, *supra* note 65 at 666.

impose their moral position on non-Catholics."[77] This position was supported by a letter written by Cardinal Cushing.

> There is nothing in Catholic teaching which suggests that Catholics should write into civil law the prescriptions of church law, or in any other way force the observance of Catholic doctrine on others. Catholics have no right to do this . . . while we should make every effort to see the law upholds human rights and values and reflects the moral consensus of the community we should not look upon it as an opportunity for promoting specifically religious teachings, especially when this may be offensive to some citizens.[78]

Furthermore, if Catholics do not want to avail themselves of the liberalized abortion statutes, then they are certainly under no obligation to do so. Quoting Cardinal Cushing again, "Catholics do not need the support of civil law to be faithful to their religious convictions. . . ."[79]

The existing abortion statutes are repugnant to the philosophy of the Catholic Church, yet this did not prevent the state legislators from passing these statutes. Once again the legislators are confronted by the moral standards of the Catholic Church and once again they must not allow these strict standards to deter them from adopting a more liberal abortion statute.

The existing abortion laws must be liberalized, for the fact to be kept in mind is that we are seeking to preserve the well-being of the woman. In a recent study of fifty-six women from the United States seeking abortions in Sweden, only eight were granted permission to have the abortion. Of the remaining forty-eight women, twelve admitted to later abortions performed by physicians in the United States and Europe which were undoubtedly illegal. Twenty women were known to have also procured abortions although where and by whom was not determined. Thus, out of fifty-six women seeking abortions, seventy-two percent (forty women) procured them. And of these forty abortions, thirty-two were illegally procured. Only three women carried their pregnancies to term and all three adopted out the child immediately after birth. The remaining thirteen women could not be contacted to determine the results of their pregnancies.[80] The conclusion reached by this study is not unusual—if a woman wants an abortion, she will succeed, even if it means risking her life.[81]

Although the purpose of existing abortion law is to safeguard the woman, in fact,

> [these laws] . . . have had an adverse effect on the mother's health. Although the statute may on occasion act as a deterrent to the would-be abortionist, the more usual effect is merely to drive him underground. The operation is often performed incompetently and under unsanitary conditions. Even more serious is the fact that patients rarely receive the proper post-operative care following one of these clandestine operations.[82]

Today it is estimated that there are over one million illegal abortions annually in the United States[83] as compared with eight thousand legal abortions yearly.[84] Kummer and Leavy pose the question "is society in fact protecting the mother's welfare by maintaining harsh and unyielding laws which drive her to unskilled criminal abortionists?"[85] These writers suggest that a lesson can be learned from the prohibition era when the indirect

[77] Maisel, *The New Battle Over Birth Control*, READERS DIGEST, Feb. 1936, p. 56.

[78] Sands, *supra* note 42 at 296, quoting from a letter from Richard Cardinal Cushing, Archbishop of Boston, March 19, 1963.

[79] Lader, ABORTION 93 (1966).

[80] Rapoport, *American Abortion Applicants in Sweden*, 13 ARCHIVES OF GENERAL PSYCHIATRY 24–33, July 1965.

[81] Earlier research has also corroborrated this conclusion. In a study of 1329 pregnant women, 708 of the pregnancies were aborted. 93% of these abortions were criminal. HARPER, PROBLEMS OF THE FAMILY (1952). In another study of 5000 pregnant women, 23% of these women were aborted. 93.2% of these abortions were criminal abortions. Gebhard, Pomeroy, Martin, and Christianson, PREGNANCY, BIRTH, AND ABORTION 54, 93, 196 (1958).

[82] Note, *The Law of Criminal Abortion: An Analysis of Proposed Reforms*, 32 IND. L.J. 193, 196 (1956). Lack of space and the everpresent risk of detection forces the criminal abortionist to require patients to leave his office as soon as possible after the operation, often within thirty minutes. Contrasted to this is the five–ten day rest period deemed absolutely essential by the legitimate practitioner. Bates, *The Abortion Mill: An Institutional Study*, 45 J. CRIM. L.C. & P.S. 157, 161 (1954); Taussig, ABORTION, SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 171 (1936).

[83] Niswander, *Medical Abortion Practices in the United States*, 17 W. RES. L. REV. (1965); Lader, ABORTION 2 (1966); Kopp, BIRTH CONTROL IN PRACTICE 222 (1934); Leavy & Kummer, *Criminal Abortion: Human Hardships and Unyielding Laws*, 35 So. CAL. L. REV. 123, 124, n. 5 (1962).

[84] Lader, ABORTION 3 (1966).

[85] Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52, 53 (1964).

evils of the prohibition law far exceeded the evil at which the law was directed.

In order for abortion legislation to protect the well-being of the woman, it must force her to have any abortion performed in a hospital where conditions are safe and medical attention constantly at hand. It would seem that in order to accomplish this result, abortion statutes must either be so liberal as to encompass every situation in which abortion is desired, or impose such a severe penalty upon those performing illegal abortions that these people will be discouraged from attempting them.

But it does not appear that either of these alternatives alone accomplish complete abolition of illegal abortions. Studies in Eastern European countries[86] which have legalized all abortion indicate that twenty to forty-eight percent of all abortions are still illegal ones.[87] The reason for these illegal abortions appears to be that both married and single women dislike news of an abortion reaching their families and friends and, although hospital officials make every effort to disguise the abortion as some other operation, leaks through hospital clerks persist.[88] This is especially true in countries which require that the legal abortion be performed in the woman's home district.[89]

Imposing a severe punishment upon those performing illegal abortions hopefully will deter many criminal abortionists from performing these operations. But severe punishment will not drive all criminal abortionists out of business. No one believes that *he* will be caught, and the monetary reward for illegal abortions makes the risk worthwhile. An analogous situation is that many states imposing the death penalty on anyone found guilty of first degree murder. Though the punishment is the harshest possible, the would-be murderer is usually not deterred from fulfilling his plans and murdering his victim.

In order to have a workable and useful statute which each state could adopt, the abortion statute must be liberal enough to encompass many of the situations where illegal abortions now occur, impose severe penalties upon those attempting to perform illegal abortions, balance the rights of the woman against any rights, moral and legal, which the putative child may have, and still be consistent with the feelings and beliefs of the majority of the population.

It is suggested that the states adopt the statute contained in the Appendix of this article. The purpose of Sections 1 and 2 is to protect the woman from an unskilled termination of the pregnancy which will undoubtedly be performed in conditions that can never begin to approach those provided in a hospital where only licensed physicians can practice. The severe punishment of a penitentiary sentence or possibly death should dull the incentive of even the most greedy nonphysician abortionist and hopefully drive them out of business. The physician, on the other hand, who performs an illegal abortion, although probably not done under optimum medical conditions, will employ his medical knowledge and skill to make the operation a great deal safer than one performed by a layman. This is a great deal more advantageous in terms of the woman's health. This conclusion is supported by the experience of Dr. G. Loutrell Timanus who performed over fifty-two hundred criminal abortions. There were two deaths among these fifty-two hundred cases and "Whether these two deaths were attributable to my negligence or whether they were incidental, I would find it hard to say." [90] None of Timanus' other patients had any serious after effects of the abortion which required hospitalization.[91]

Since the purpose of these sections is the protection of the woman's health, the necessity of pregnancy and fetal life is dispensed with in defining abortion. The dangerous consequences are inherent in the act of aborting, not in the pregnancy.[92] Where the purpose of an abortion law is to eliminate the act of aborting, then liability must be imposed for any act upon a woman when it is done with the intent to cause an abortion. The fact that a woman may not be pregnant does not mean that the chance of infection or hemorrhage is absent. Whenever any drug is taken by, or any instrument is used on, a woman, the chance that injury will result is ever present; the risk is even greater if the person performing the abortion is not a physician. Therefore, these sections contain no distinction between abortion attempted upon a pregnant woman and abortion attempted upon a non-pregnant woman; the danger to each is equally as great.

Section 3 of the proposed statute does away with

[86] The Soviet Union, Hungary, Poland, Rumania, and Bulgaria.

[87] Lader, ABORTION 129 (1966).

[88] *Id.* at 130.

[89] Czechoslovakia requires all legal abortions to be performed in the woman's home district.

[90] Lader, ABORTION 47 (1966), quoting Dr. Timanus speaking to a medical conference.

[91] Calderone, ABORTION LAWS IN THE UNITED STATES 62 (1958).

[92] Comment, *A Medico Legal Analysis of Abortion Statutes*, 31 So. CAL. L. REV. 181, 191 (1958).

the distinction made by existing statutes between the woman's life and her health.

> The distinction between saving the mother's life and preserving her health seems both tenuous and artificial.... [It is] frequently difficult to ascertain what constitutes a peril to life as opposed to impairment of health...[93]

It is quite difficult to rationalize why one is morally acceptable and the other isn't. Therefore, the law must necessarily take into account the effect of the pregnancy on the woman as a whole. The law must consider whether the pregnancy will leave the woman partially disabled physically or mentally. It is of great consequence to the woman's total health whether the bearing of another child will shorten the mother's life or make the mother unbearably miserable. A woman's health is not only determined by the longevity of her years, but also by the quality of life she leads in her years.

> Without minimizing the importance of being alive, usefulness is of at least equal value, and that usefulness is based on the combined mental and physical health of the person.[94]

Thus the quality and duration of a woman's life are dependent upon her present and future mental and physical well-being. Any serious physical or mental harm to the mother, who is a human being subject to pain and suffering, must be avoided if possible[95] and that is exactly what this section of the proposed statute seeks to achieve.

Consideration of the woman's mental and physical health involves consideration of the woman's economic situation for her mental and physical health is often dependent upon the economic circumstances in which she finds herself. The law must take into account whether the woman is the sole support of herself and her family; whether she has or can obtain enough money to live on during her pregnancy; whether she has other children; whether she lives in an adequate home; and what effect another child will have upon each of these circumstances. "A large, poor family faced with an extra mouth to feed and a mother not able to work at full capacity will surely suffer."[96] An increase in the size of the welfare check will not support this extra child properly.[97] Shouldn't the law consider the mother and the other young children in this type of situation?

It is estimated that ninety percent of all criminal abortions are performed on married women who are in situations of economic distress, or who desire to maintain a higher living standard.[98] By considering economic circumstances, this section encompasses many of the situations in which illegal abortions are presently performed.[99] The proposed statute will permit many women who find themselves in economic distress to have legal abortions performed by licensed physicians under optimum hospital conditions. Thus, the number of situations in which a woman's health is safeguarded will be increased with a resultant decrease in the number of deaths due to illegal abortions. Under this section the woman's right, the right of a living person, to lead a full, happy, healthy, productive life outweighs any right that the fetus, who we are not sure is living, may have.

It is emphasized that this section does not encompass those situations in which a woman seeks an abortion in order to maintain or raise her standard of living. There is a valid distinction between the woman who desires to terminate her pregnancy because she is the sole support of her family and her pregnancy will prevent her from adequately supporting her family and the woman who seeks to terminate her pregnancy because she wishes to be certain that she will be able to afford to send her present children to Harvard.

At this point it is noted that the proposed statute makes no specific reference to termination of pregnancy in those situations where there is great likelihood that the child may be physically or mentally defective. Termination of pregnancy if the child is likely to be defective will be permitted under this section only if the bearing of a defective child will seriously impair the woman's mental or physical health. Under this section termination will be permitted in cases where the woman will suffer severe mental effects if forced to bear a defective child; or if the woman will find it physically impossible to care for the defective child; or if the woman will find herself economically in-

[93] Note, IND. L. J., *supra* note 82 at 205.
[94] Moore, *supra* note 44 at 254, quoting a California physician.
[95] *Id.* at 254.
[96] *Id.*
[97] *Id.*
[98] MODEL PENAL CODE 207:11, Comment 2 at 149; Comment, *The Abortion Law*, 12 W. RES. L. REV. 74, 84 (1960).
[99] These estimates do not indicate what percentage of criminal abortions are performed for economic distress alone or for raising the standard of living alone. But it is certain that the desire to have an abortion because of economic distress does comprise a large part of the ninety percent figure.

capable of giving the defective child adequate care. In cases where there is no severe economic, mental, or physical distress, the rights of the fetus to be born outweigh the woman's right to renounce motherhood. There is always the possibility that the child will not be born defective, that a miracle drug will be invented, or that the child will be rehabilitated and lead a useful life.

Section 4 of the proposed statute permits abortion for any pregnancy which is the result of rape, incest, or other felonious assault. Rape and incest is repugnant to our society. In these situations society places an everlasting stigma on the woman and on the child—the product of the unnatural relationship. In the case of incest the child can never hope to be legitimatized and in the case of rape legitimation is very unlikely. The law should not force a woman to bear the product of an unnatural relationship nor force her to bear the child of a rapist, a man she probably does not know nor will ever want to know. It is unreasonable to force a woman to bear a child whose creation was the result of a relationship which the woman neither desired nor consented to.

Most states have statutes punishing male adults for having sexual relations with girls under a specified age even though the girl consented. These criminal statutes do not punish the girl, presuming that the girl could not engage in sexual intercourse because she was incapable of knowing the nature of her act. This presumption does not mean that the lawmakers believed every girl under the specified age was incapable of knowing the nature of their acts, but it does indicate that the legislators believe that some girls under this age are truly naive and therefore the law must be liberal enough to protect these innocents even though it means protecting the non-innocents.

The abortion statute is a criminal statute and as such should be consistent with other, closely related criminal statutes such as the statutory rape statutes. Therefore, this section permits the termination of pregnancy of any girl under the age specified in the state statutory rape statute. It would be inconsistent for the law to tell a girl that she cannot engage in sexual intercourse because she is incapable of knowing the nature of her acts, and then, after she becomes pregnant, tell her that she must face the consequences of motherhood. If a girl is too immature to understand the consequences of the sexual act, it is difficult to understand how nine months later she will be mature enough to withstand the possible mental trauma of an illegitimate birth, and to assume the responsibilities of motherhood.[100] Again it is granted that many of these girls under the specified age will be fully capable of being good mothers, but there will also be those who actually are too naive and too immature to take adequate care of a child. Forcing these girls to bear the child is, in reality, punishing them for the crime of statutory rape.

The task of determining which applicants deserve abortions falls upon the hospital committee. The hospital committee is of benefit to the physician, the patient, and the court. When a physician is confronted with the decision of whether to abort, his decision rests upon his own interpretation of the law and his own judgment. Just as each person differs, so shall each physician's interpretation of the abortion law differ. Thus a doctor may find himself faced with criminal prosecution because his interpretation of the law did not conform to that of the public authority. The committee will relieve the physician of this burden, thereby ending his fear of criminal prosecution. The committee is personally disassociated from each case, giving the committee "a broader perspective and an objectivity not attained by the physician personally involved in the individual case."[101] These committeees will develop a body of law, using their previous decisions as precedents, which will, over a period of time, provide a general basis for the interpretation of abortion statutes.[102] The committee will be made up of an obstetrician, a gynecologist, a psychiatrist, a sociologist, and a lawyer who will determine through their judgment as experts whether the woman's condition warrants abortion for mental, physical, or economic reasons and whether this abortion will be legal.

Conclusion

Today there are over one million illegal abortions annually. The proposed statute will cut deeply into this astronomical figure by legalizing abortion in many situations where illegal abortions presently occur and by making the punishment for performing illegal abortions extremely severe. Although the proposed statute may be termed liberal, it is simply an attempt to keep an important area of criminal law up to date with our ever-changing society. The statute is based upon rational foundations which conform to the desires of the majority of the United States' population.

[100] Sands, *supra* note 42 at 300.
[101] Calderone, *supra* note 91 at 123.
[102] *Id.*