Buffalo Human Rights Law Review

Volume 4 Article 9

9-1-1998

Patriarchy and Dicrimination in Apartheid South Africa's Abortion Law

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PATRIARCHY AND DISCRIMINATION IN APARTHEID SOUTH AFRICA'S ABORTION LAW

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I. INTRODUCTION

South Africa has, until recently,[1] been behind the international trend

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[1] The Choice on Termination of Pregnancy Act was assented to by President Mandela on 12 November 1996 and came into force in February 1997 (Act 92 of 1996). The Act permits abortion on request by a woman during the first twelve weeks of pregnancy without any other conditions. The period of gestation is stated to mean "the period of pregnancy of a woman calculated from the first day of the menstrual period which in relation to the pregnancy is the last." Between 13 and 20 weeks a pregnancy can be terminated if a medical practitioner, after consulting with the pregnant woman "is of the opinion" that one of four conditions are present:

(1) where the pregnancy would pose a risk of injury to the woman's physical or mental health;
(2) where there is "substantial" risk that the fetus will suffer from a "severe physical or mental abnormality;"
(3) where the pregnancy resulted from rape or incest;
(4) where the pregnancy would "significantly affect the social or economic circumstances of the woman."

After 20 weeks a pregnancy can only be terminated if a medical practitioner after consulting with another medical practitioner or registered midwife is "of the opinion" that one of three circumstances are present:

1) the continued pregnancy endangers the woman's life;
2) the pregnancy would result in a "severe malformation of the fetus;"
3) the continued pregnancy "would pose a risk of injury to the fetus."

Terminations during the first twelve weeks can be performed by medical practitioners as well as registered midwives who have completed the prescribed training course. After twelve weeks only medical practitioners can perform an abortion. *See generally* Jeremy

towards abortion liberalization, having its restrictive Abortion and Sterilization Act on the books.[2] This 1975 statute was the law, as control of the law and access to abortion had been in the hands of an extremely small segment of the population throughout South Africa's history.[3]

While it was usual for the state to look at the issue of abortion in terms of religious and political circumstances, a more holistic picture of the effect that the abortion laws have had on women and their children is necessary.[4] The impact that the legislation could have on the lives of South Africa's women, particularly those who are black, was not considered when the law was drafted. While an attempt was made to determine public attitudes toward abortion and what an abortion law ought to be before the Act came into force, the processes set up to gather such data were biased to ensure that a skewed picture emerged. This picture largely bolstered and reflected the attitudes of white, Christian, male South Africans at the expense of all others.

As the Act was intended to reduce the number of abortions occurring in the white population group, the effect that it would have on other race groups was ignored. In fact, a salient feature of the law in South Africa, all the way into the nineties, has been discrimination in terms of race and gender in that laws have favored the dominant minority, men rather than women, and whites rather than blacks. This racial and patriarchal bias was reflected in the workings of the abortion laws.

Apartheid ensured that the structuring of the various classes of South African society mirrored the racial hierarchy. Thus, wealth has played a dynamic role in determining which group has had access to abortion services both in the country and abroad.

While the figure for legal abortions rose from around 500 in 1975 to 1,400 in 1993, the number of abortions that occurred outside of the provisions

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Sarkin, *Health,* 1995 S. AFR. HUM. RTS. Y.B.; *see also* Jeremy Sarkin, *Suggestions For A New Abortion Law For South Africa,* 1996 S. AFR. J. OF CRIM. JUST. 125; *see also* Jeremy Sarkin, *Health,* 1996 S. AFR. HUM. RTS. Y.B. 1.

2 Act 2 of 1975.

3 *See* Jeremy Sarkin, *The Development of a Human Rights Culture in South Africa,* 20 HUM. RTS. Q. (forthcoming 1998).

4 *See* Jeremy & Nancy Sarkin, *Choice and Informed Request: The Answer to Abortion: A proposal for South African Abortion Reform,* 1990 STELLENBOSCH L. REV. 372.

of the Act totaled somewhere in the order of 250,000 per annum.[5] For this reason alone, the Act can be seen as a failure. The very limited grounds permitted by the Act, as well as the exceptional stringency of procedures mandated by the Act are the reasons for the high number of backstreet abortions. Permission for an abortion had to be secured from a myriad of people. The complexity of the procedures, coupled with a lack of privacy, impeded a woman's need for secrecy, confidentiality and immediacy. This perpetuated a continued dependence on backstreet abortions at a great cost to the women involved, such as in terms of health and finance.

When the South African courts were called upon to interpret the law where ambiguity existed, the decision, reflective of the composition of the judiciary, showed a patriarchal and gender-insensitive, white, male, Christian bias.

II. THE SOUTH AFRICAN COMMON LAW

The South African courts have paid little attention to the definition of the crime of abortion in terms of the common law.[6] Clarkson provided an early definition of what constituted abortion in South Africa in 1904, defining it as, "the unlawful taking or administering of poison or other noxious things, or the unlawful use of any instrument or other means whatsoever, with the intent to procure miscarriage."[7] The expulsion of the fetus from the womb, thereby killing it, was seen to be necessary for the common law crime of abortion. In *AP v. The State*,[8] causing the death of a fetus which was still in its mother's womb was determined to be infanticide. This was equated with an abortion, following the writings of the Dutch jurist, Van der Linden, upon whose writings South African courts have often relied.[9] The court, however, per Chief Justice Kotze, suggested law reform, stating that, "[i]t may be desirable that the legislature should make proper provision on this subject, but until that is done the court must follow Van der Linden."[10]

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5 *See* Jeremy Sarkin, *A Perspective on Abortion Legislation in South Africa's Bill of Rights Era*, 1993 *Tydskrif vir Heedendagse Romeinse Hollandse Reg* 83.

6 P.M.A. HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE 312 (J.R.L. Milton ed., 2ed. 1982).

7 H.T. CLARKSON, HANDBOOK OF COLONIAL CRIMINAL LAW 54 (1904).

8 1895 2 Off Rep 103.

9 J. VAN DER LINDEN, INSTITUTES OF HOLLAND 2.5.12 (H. Junta trans., 3d ed. 1897).

10 1895 2 Off Rep 105.

In *R v. Hine,*[11] the possibility was contemplated that abortion could be murder. In *R v. Davies and another,*[12] however, it seems as though the Appellate Division did not regard abortion as murder.[13] While Voet defined abortion as the untimely forcing out or getting rid of an embryo,[14] Gardiner and Lansdowne saw it as "any means by which the untimely expulsion of the fetus is effected,"[15] and De Wet and Swanepoel believed it was the "*afdrywing* [expulsion] *van die lewende vrug*".[16] In the first edition of their book, De Wet and Swanepoel defined abortion as, "the killing and causing expulsion from the uterus of a human fetus".[17] They stated that, according to the common law, killing of the fetus was not sufficient to constitute the crime of abortion; the fetus must also have been expelled from the womb.[18]

If the fetus is not killed but is born prematurely, then the only crime with which the abortionist could be charged was attempted abortion.[19] While jurists, commenting on the common law, regarded expulsion as a necessary element of the crime of abortion, Hunt believes that what they actually contemplated is the killing of the fetus.[20] He bases this on the notion that historically abortion was procured by inducing labor. Therefore, he argues, jurists such as Voet, Huber, van der Linden, Carpzouius and Mathaeus implicitly refer to the killing of the fetus.[21]

In *R v. Freestone*, it was held that an attempt to procure an abortion constitutes a crime, even if the woman involved, in fact, is not pregnant.[22] If the fetus is already dead when the abortion is performed, then according to the common law, no abortion occurred. However, the woman can be prosecuted

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[11] 1910 *Cape Times Reports* 629.

[12] 1956 (3) SA 52 (A).

[13] *See* Phillipus Smit, *Aspekte van die Wet op Vrugafdrywing en Sterilisasie, 1975* Tydskrif vir Reg Wetskap 156, 157-9 (1976).

[14] COMMENTARIUS AD PANDECTAS (1698-1704) 47.11.3 (J. Voet trans.)

[15] F.G. GARDINER & C.W.H. LANSDOWNE, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE (6th ed. 1958).

[16] J.C. DE WET & H.L. SWANEPOEL, DIE SUID-AFRIKAANSE STRAFREG 217 (3d ed. 1975).

[17] J.C. DE WET & H.L. SWANEPOEL, DIE SUID-AFRIKAANSE STRAFREG 308 (1st ed. 1960).

[18] *See id.* at 313.

[19] *See* MILTON, *supra* note 6, at 324.

[20] *See id.* at 323.

[21] *See id.*

[22] 1913 T.P.D. 758.

for attempted abortion.[23]

If a woman is incited to have an abortion,[24] or a third party is incited to perform the abortion,[25] then the person responsible for the incitement can be prosecuted.[26] If a person is prosecuted for inciting a woman to perform an abortion on herself, the woman cannot be found liable as an accomplice.[27]

If a woman dies while undergoing an abortion, the abortionist performing the illegal abortion can be charged with murder or culpable homicide, in addition to being prosecuted for performing the abortion.[28] A backstreet abortionist or a doctor who performs abortions for money will, Hunt suggests,[29] receive a heavy sentence.[30] Where the woman has consented to the abortion, she is also liable as a *socius*.[31] It has been suggested that a man who makes a woman pregnant and then "callously incites her to have an abortion," will also be severely dealt with.[32]

III. PRESSURE FOR LEGISLATION

While the common law was clear that an abortion could take place to save the life of the mother,[33] there was considerable confusion about whether an abortion could legally occur in other circumstances.[34] Before the 1975 Abortion and Sterilization Act was passed, no legislation existed as far as abortion was concerned (except for various sections in the Native Territories Penal Code Act 24 of 1886), and there was no reported case that defined what the legal

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[23] *See* R v Owen, 1942 A.D. 389, 394-5; R v Davies, 1956 (3) SA 52 (AD) 59; and R v O, 1963 (1) SA 43 (SR) 45.

[24] R v Voges, 1958 (1) SA 412 (C).

[25] *See* R v C, 1961 (3) SA 675 (SR).

[26] *See* HUNT, *supra* note 6, at 327.

[27] *See* R v Voges, 1958 (1) SA 412 (C) 417.

[28] *See* R v Hine, 1910 C.P.D 371; and *see also* R v Chitate, 1968 (2) PH H337 (R).

[29] Hunt, *supra* note 6, at 328.

[30] *See* S v King, 1971 (2) PH H103 (T).

[31] *See* R v Freestone, 1913 T.P.D 758; *see also* R v Thielke, 1918 A.D. 373, 378; *see also* R v Owen, 1942 A.D. 389, 392; *see also* R v P, 1948 (4) SA 103 (C) 109; *see also* R v Voges, 1958 (1) SA 412 (C) 417.

[32] HUNT, *supra* note 6, at 328.

[33] *See* Voet, *supra* note 14.

[34] *See* Second Reading of the Abortion and Sterilization Bill, House of Assembly *Hansard*, 12 Feb. 1975, Col. 601.

grounds for an abortion were.[35] Strauss pointed out that there were many gaps in the law.[36] For example, the law was unclear as to whether an abortion was permitted in instances where the child to be born would suffer from a mental defect or be seriously deformed.[37] This issue could not have been contemplated by jurists of the past as it was only with subsequent advancement that medical science could detect mental or physical defects prior to birth.

It was also unclear whether an abortion could be performed lawfully where pregnancy might constitute serious impairment of the mother's mental or physical health. Saving the mother's life was the only ground for abortion mentioned in the writings of old jurists.[38] Strauss, however, believes that these authorities did not outlaw abortions where there was a danger to the mother's physical or mental health,[39] stating that, "[n]owhere is it unequivocally stated that abortion is justified only where it is necessary to save the very life of the mother."[40]

The courts described the common law pertaining to abortion, in 1971, as a mine-field.[41] Justice Hiemstra recommended law reform to reflect society's more tolerant view of the issue.[42] The court in *Van Druten's* case also called for the enactment of legislation.[43] Judicial attitude toward the law was reflected in *Republic Publications (Pty) Ltd v. Publications Control Board* where Judge Henning declined to deem undesirable a publication which supported abortion legalization.[44]

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[35] *See* HUNT, *supra* note 6, at 308 n.17.

[36] S.A.S. Strauss, *Therapeutic Abortion in South African Law,* 85 S. AFR. L.J. 453, 458 (1968).

[37] *See id.* at 461.

[38] *See e.g.* JOHAN MOORMAN, VERHANDELINGE OVER DE MISDADEN EN DER SELVER STRAFFEN 2.8.10 (1764).

[39] THE SELECT COMMITTEE ON THE ABORTION AND STERILIZATION BILL, REPORT 61 (SC 8-73)(1973).

[40] *Id.*

[41] S v King, 1971 (2) PH H103 (T)(Hiemstra, J.).

[42] *See* D.Z., *A Thought on Abortion,* 90 S. AFR. L.J. 34 (1973); *see also* S.A.S. Strauss, *Criminal Abortion Statistics* 90 S. AFR. L.J. 184 (1973).

[43] Unreported but commented on in S.A.S. Strauss, *Regverdiging van Vrugafdrywing: Twee Belangwekende Uitspraake,* 35 *Tydskrif vir Heedendagse Romeinse Hollandse Reg* 56 (1972).

[44] 1971 (3) SA 399 (D).

In *S v. King*, the court found the South African position very unsophisticated in relation to regimes in other countries,[45] but also found that South African society was becoming more permissive towards abortion.[46] Academics such as Milton and Boberg called for reform of the law, stating that precision was needed in the formulation of circumstances which justified an abortion.[47] Hunt described the law as belonging to the "ultra-conservative category"[48] and as "locked in an ivory tower",[49] suggesting that, "there cannot be respect for a law which is totally divorced from social realities and social needs."[50]

The medical profession in the early 1970s was also vocal about the need for clarity on which circumstances constituted grounds for an abortion. Many felt they could be prosecuted for performing abortions because the law was insufficiently clear.[51] Because lawyers and eminent doctors[52] had complained and made demands for the enactment of legislation, stating that the legal position was untenable,[53] the issue was investigated.

Again, as throughout patriarchal history, men, and particularly the male medico-legal fraternity, controlled adjudication of the abortion issue. Emily Moore noted in 1973 that, "we have a celibate male religious hierarchy which is in the fore-front of opposition to the full recognition of women as persons, a male-dominated legislature and a male-dominated medical profession loathe to relinquish their role as decision makers in this arena."[54] Concern about such factors as the effects of backstreet abortions was of secondary importance to these male reformists although there had been calls for many years from other quarters for the law to be reformed because of the injuries and deaths resulting

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[45] 1971 (2) PH H103 (T) 213.

[46] *See id.* at 214.

[47] *See* JOHN MILTON, ANNUAL SURVEY 505 (1971); PAUL BOBERG, LAW OF PERSONS AND FAMILY 19 (1977).

[48] HUNT, *supra* note 6, at 308.

[49] *Id.* at 307.

[50] *Id.*

[51] *See* CAPE TIMES, May 6, 1971.

[52] *See* MILTON, *supra* note 47, at 505-7.

[53] *See* Helen Bradford, *Her Body, Her Life*, COSMOPOLITAN, Aug. 1991, at 131; *see also* THE SELECT COMMITTEE ON THE ABORTION AND STERILIZATION BILL, REPORT 64 n.60 (SC 8-73).

[54] Emily Moore, TIME, January 29, 1973, at 30, *quoted in* T.P. Boulle, *The Gynaecological Aspects of Abortion*, *in* THE GREAT DEBATE: ABORTION IN THE SOUTH AFRICAN CONTEXT 206 (G.C. Oosthuizen et al. eds., 1974)[hereinafter THE GREAT DEBATE].

from backstreet abortions. Statistics reflect that 1,436 people were treated for incomplete abortions from mid-1958 to mid-1959 at Groote Schuur Hospital,[55] and that there were 302 abortion-related deaths recorded in the Johannesburg area from 1959 to 1964, yet this was not a major concern to male professionals calling for enactment of an abortion law.

While the organized medical profession, in the main, were motivated by concern for their own interests, there were individual doctors who focused on the abortion issue within its wider context. One such doctor was A.C. Keast who was then president of the Border Coastal Region of the Medical Association of South Africa. He noted, "[o]ne of the main arguments in favor of legalizing abortion and of extending its indications is that the present practice, based on Hippocratic principles, encourages criminal abortion with all its attendant hazards."[56]

In any event, as a result of the pressure from doctors and lawyers, a private member's motion was tabled in Parliament in February 1972 by Dr. E. Fisher, which called for a select committee to look into the question of abortion.[57] The Abortion and Sterilization Bill was tabled a year later but was referred to a select committee which could not finish its work.[58] The committee was then converted into a commission of inquiry,[59] consisting exclusively of senior, white, male parliamentarians, with no representation of the gender most affected by the abortion issue.[60] This is not an unusual feature of the process of abortion law enactment. Estrich and Sullivan note:

> The direct impact of abortion restrictions falls exclusively on a class of people that consists entirely of women. Only women get pregnant. Only women have abortions. Only women will endure unwanted pregnancies and adverse health consequences if states restrict abortions. Only women will suffer dangerous, illegal abortions where legal ones are unavailable. And only women will bear children if they cannot obtain abortions. Yet every restrictive abortion law has been

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[55] *See* Strauss, *supra* note 36, at 453.

[56] A.C. Keast, *Therapeutic Abortions,* 45 S. AFR. MED. J. 888 (1971).

[57] House of Assembly *Hansard* 18 Feb. 1972, Col. 1410.

[58] 15 of 1973.

[59] *See* Proc R162 in GG3974 of 6 July 1973 (Reg Gaz 1812). Report of the Commission of Inquiry into the Abortion and Sterilization Bill RP 68 of 1974.

[60] *See* BOBERG, *supra* note 47, at 20 n.23.

> passed by a legislature in which men constitute a numerical majority. And every restrictive abortion law, by definition, contains an unwritten clause exempting all men from its structures.[61]

However, the man who was to become Minister of Health argued in 1975 that women were not a necessary part of an investigation into abortion:

> Women are not the only ones who have a responsibility in regard to abortion. The hon. member for Houghton [Helen Suzman] is completely mistaken. I can forgive her, because she is the only member of this house who is a women, but then she must not abuse her sex and her presence here to raise a hue and cry on behalf of the women of South Africa . . . One need not have women on a committee [to investigate abortion] in order to determine what is right or wrong . . . if one wanted to abolish capital punishment today, surely one would not appoint a bunch of murderers to go into the matter and to see whether it should be abolished.[62]

The attitude of some of the male politicians in Parliament towards women and their ability to make decisions concerning themselves during pregnancy is reflected in the view of Graham McIntosh, United Party Member of Parliament for Pinetown, Natal, during the abortion debate. He stated, "[f]or the first trimester of a woman's pregnancy she is, medically speaking, hormonally drugged. Her hormone level is so high as to make it difficult for her to come to a rational and sensible solution."[63]

A similarly sexist view was expressed during the parliamentary debate by Dr. E.L. Fisher, who declared, "A woman will come and say 'I have been raped. I think I may be pregnant. Will you not do something for me please?' There are a lot of cases like that. Some of them were raped very easily, very easily indeed."[64] In this ambience of extreme sexism, the male-dominated

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[61] S.R. Estrich & K.M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 153 (1989/90).

[62] L.A.P.A Munnik, House of Assembly *Hansard* 12 Feb. 1975, Col. 659.

[63] JUNE COPE, A MATTER OF CHOICE: ABORTION LAW REFORM IN APARTHEID SOUTH AFRICA 84 (1993).

[64] Dr. E.L. Fisher, House of Assembly *Hansard* 10 Feb. 1975, Col. 482.

medico-legal profession maintained control of the abortion issue during the investigative and drafting stages of the bill; four of the ten members of the select committee, all men, were medical practitioners, and two were members of the legal profession. The rest of the committee consisted of a pharmacist, an ex-minister of religion, an ex-policeman and a social worker.[65]

The South African government's position was articulated at the beginning of the second reading of the bill when the Minister of Health stated that, "[r]espect for the unborn child (fetus), recognition of the Christian views and moral norms which characterize our country . . . and the fact that drastic action will be taken against abortions performed outside the legal provisions . . . should be clearly reflected in the legislation."[66]

The bill provided that an abortion could be performed by a medical practitioner only:

> a) where the continued pregnancy may endanger the life of the woman concerned or may constitute a serious threat to her physical health and two medical practitioners certify in writing that the continued pregnancy might, in their opinion, so endanger the women concerned or so constitute a threat to her health; or
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> b) where there is a substantial risk that the child to be born will suffer from physical or mental abnormality of such a nature that it will be seriously handicapped, and two medical practitioners certify in writing that, in their opinion, based on medical scientific grounds, there is such a risk; or
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> c) where the fetus is alleged to have been conceived in consequence of unlawful carnal intercourse; and
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> (i) two medical practitioners certify in writing
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> (aa) in the case of rape or incest, and after such interrogation of the woman as any of them may deem necessary, that the

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[65] *See* House of Assembly *Hansard* 12 Feb. 1975, Col. 606.

[66] House of Assembly *Hansard* 15 Feb. 1975, Cols. 472-473.

> pregnancy is, on a balance of probability, due to alleged rape or incest, as the case may be; or
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> (bb) in the case of carnal intercourse which is alleged to have been in contravention of section 15 of the Immorality Act 23/57 that the woman concerned is an idiot or imbecile; and
>
> (ii) a certificate issued by a magistrate under section 7(3) is produced to the medical practitioner referred to in section 7(1).

The bill obtained the support of many, particularly the medical profession, a representative of which stated that, "[t]he medical profession in general does not favor abortion on demand."[67]

This male, medico-legal domination was completely contrary to the spirit of the investigation into abortion which took place in the United Kingdom. The Lane Commission, appointed to investigate the abortion question in the United Kingdom, was chaired by Mrs. Justice Lane and nine out of the other 15 appointees were women.

The experience in the United Kingdom is pertinent in this context as the same conservative disposition among doctors was apparent there before the 1967 Act was passed. The British Medical Association and the Royal College of Obstetricians and Gynecologists were vehemently opposed to abortion performed for social reasons, citing ethical considerations as grounds for their opposition when the 1967 Act was being discussed.[68] However, after the Act was passed, they became aware of the benefits of the changed policy, both for women and for themselves.[69] The number of complications resulting from backstreet abortions fell rapidly. Treatment of these problems had been a major source of consternation for doctors in the past, and as these problems were largely eradicated by the 1967 Act, doctors came to support this law.[70] By 1975,

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[67] G.C. Geldenhuys, *in* THE GREAT DEBATE, *supra* note 54, at 27 n.76.

[68] *See* D. MARSH & J. CHAMBERS, ABORTION POLITICS 73 (1981); *see also* A. HODERN, LEGAL ABORTION: THE ENGLISH EXPERIENCE 17 (1982).

[69] *See id.* at 78.

[70] *See id.*

therefore, the British medical profession was active in its support for the 1967 law.[71]

In South Africa, as noted earlier, the medical profession supported the local bill, largely for reasons of self-interest but also because it reflected their own conservative position. The chairman [sic] at the time of the Society of Psychiatrists of South Africa, Professor Gillis, stated on behalf of psychiatrists in this country, "[t]hey and I welcome this legislation. I think it is a tidy piece of legislation. I do not know any psychiatrist who is opposed to it in principle."[72]

However, certain reservations about the bill were voiced by doctors such as Dr. P. Bremer, who represented the South African Society of Obstetricians and Gynecologists. He believed the psychiatric grounds for abortion provided for in the bill to be its Achilles' heel, and suggested that this provision would be the area that could be abused by women who wished to obtain an abortion.[73]

Reaction to the bill from the legal profession was generally positive but in some instances, was guarded and unclear. Professor Strauss, for example, testifying before the select committee, acknowledged the hazards of backstreet abortion, and stated, "[s]urely the law cannot forever remain insensitive to the wretched plight of pregnant women in dire need of skilled medical aid, being virtually forced to resort to desperate means."[74] During the same proceedings, however, Strauss went on to say:

> [I]n conditionally supporting the proposed reform of our law, it is not without a certain degree of hesitation that I do so. It is hard to shake off the uneasy feeling that once you ignore or stretch a sacrosanct principle you are taking the first step on the path that leads back to the jungle .... I am definitely not in favor of abortion on demand. These provisions are in my respectful opinion realistic, yet not over-permissive.[75]

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[71] *See id.* at 75.

[72] THE SELECT COMMITTEE ON THE ABORTION AND STERILIZATION BILL, REPORT 20-21 (SC 8-73).

[73] *Testimony before The Select Committee on the Abortion and Sterilization Bill,* 33 (SC 8-73).

[74] *Id.* at 66.

[75] *Testimony before The Select Committee on the Abortion and Sterilization Bill,* 66 n.95 (SC 8-73)(statement of S.A.S. Strauss); *see also* E. Harrison, *Abortion: The Winds of Change Confound* 1(2) NATAL U. L. REV. 44, 48 (1973); Strauss, *Abortion and the Law*

Writing in 1973, at the time that the bill was being debated, Armstrong stated that the proposed legislation had a twofold purpose: to provide clarity and end confusion as to when a lawful abortion could be performed, and to reduce the number of backstreet abortions that were being performed.[76]

Hawthorne, however, disagreed with Armstrong on the latter point, suggesting that the government and the opposition concurred that no legislation, however liberal, would reduce the number of backstreet abortions.[77] Strauss' view was that the Act was "not designed to achieve total eradication of illegal abortions," a comment that reveals the belief that the Act would have a major impact on the number of backstreet abortions performed while not totally ending them.[78]

Armstrong's criticisms of the bill are, in fact, similar to those that continue to be made about the Act today. He stated:

> The bill is inquisitive, [and] it is this very inquisitiveness which results in the bill losing sight of the social need for secrecy and privacy, and thus it fails to alleviate the grave problem of back-street abortion . . . women are driven to illegal abortion by a wealth of factors, i.e. reputation, good name, financial and domestic circumstances, etc . . . . Women need privacy, immediacy and secrecy . . . .[79]

Middleton suggested that countries which had relaxed their abortion laws had begun to rethink this policy,[80] but the reverse was in fact the case. Since the early 1970s, many countries have liberalized their abortion laws. In fact, after surveying the laws of other countries, Armstrong concluded that the bill would not reduce the number of backstreet abortions, stating, "[o]n the balance of probability the bill is doomed to fail in its social purpose."[81]

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in South Africa, in THE GREAT DEBATE, *supra* note 54, at 138.

[76] *See* N.W. Armstrong, *Abortion, The New Abortion Bill - Medicine and Society* 2 RESPONSA MERIDIANA 247, 252 (1973).

[77] Luanda Hawthorne, *The Crime of Abortion: A Historical and Comparative Study, 247 (1982)* (unpublished LL.D. thesis University of Pretoria).

[78] S.A.S. Strauss, Some Comments on the Abortion and Sterilization Act 2 of 1978 After One Year's Operation: Legal Aspects, 1977 S. AFR. CRIM. L. & CRIMINOLOGY 116, 117.

[79] Armstrong, *supra* note 76, at 254.

[80] A.J. Middleton, *Abortion*, 1972 DE REBUS 397, 400.

[81] Armstrong, *supra* note 76, at 253.

Bella Schmahmann went further, noting that the bill, "will not eliminate the disastrous activities of the backstreet abortionist because women intent on abortion will go to any lengths to get it . . . ."[82] Reflecting the lack of input by women, the bill took an extremely conservative stance, severely restricting the circumstances in which an abortion might be performed. Extraordinarily enough, however, Hawthorne argued that the severity of the Act was not rooted in the fact that it was decided by men, but rather in the evidence heard by the Commission which suggested that the electorate was conservative in its attitude towards abortion.[83] But can this be true if, as was noted in Parliament, very few women were prepared to give evidence, at least partly because of the male make-up and bias of the commission?[84] In addition, according to Cope, very few women in South Africa knew that a law about abortion had been proposed, and was being debated and considered by Parliament.[85] Cope states, "[l]ittle, if any, of the debate was published in the national press, and the average South African woman remained ignorant of the legislation which was being considered . . . ."[86]

In addition, the fact that the electorate was white and Parliament was therefore not representative of the population as a whole was of critical importance. Moreover, those who gave evidence about the proposed law, the doctors, lawyers and other interested parties, were white and hardly able to present the views and attitudes of the community at large.

In any event, the evidence heard by the Commission was not all conservative as Hawthorne would have it. Cope suggests that the conclusions drawn by the commission failed to take account of the evidence submitted to it, particularly the written evidence,[87] and that "a serious misrepresentation appeared to have taken place."[88] Asked to comment on this, Professor Tony Mathews, Dean of the Law Faculty of the University of Natal, noted, "[i]n my knowledge no precedent exists for a commission to have misrepresented the facts in such a manner."[89]

Further confirmation of the Commission's failure to reflect the views of individuals outside of government ideology is to be found in the opinions of a

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82 Bella Schmahmann *in* THE GREAT DEBATE, *supra* note 54.

83 *See* Hawthorne, *supra* note 77, at 239 n.179.

84 *See* C.J.S. Wainwright, House of Assembly *Hansard* 12 Feb. 1975, Col. 714.

85 Cope, *supra* note 63, at 14.

86 *Id.*

87 *Id.* at 82.

88 *Id.* at 67.

89 *Id.* at 72.

number of speakers at a symposium on abortion held in Durban during May 1973. They included Dr. Betty Bennet, Ms. Bella Schmahmann, Dr. Pam Sharratt and Dr. Norman Walker, all of whom were in favor of a liberal approach to a new law.[90]

Focusing on the reality of abortion, Walker noted that:

> It is too late for cabinet ministers, church dignitaries or the hierarchy of the legal and medical profession to decide there will or will not be abortion. That decision has long since been taken. The women of the world, the women-at-risk, decided all that irrevocably at least four thousand years ago. All that is left for politicians, priests, lawyers and doctors is to be honest with themselves, uncomfortably honest, eschew wishful thinking, pious hopes, blatant hypocrisy, and boldly face fact. Only one decision remains to be taken. Will the current practice of abortion be permitted to remain the hazardous affair it certainly is now, or will it be made safe?[91]

Sharratt, agreeing with Walker's thrust and pleading for major revisions of the law, stated, "[f]ar too little attention is being paid, in the abortion debate, to the best welfare of women, children and society at large."[92]

Another response to the enactment of legislation was the establishment of South Africa's first abortion-focused groups. The South African Abortion Law Reform Group and the Abortion Reform Action Group (Arag) were founded in the early 1970s, and amalgamated in 1976.[93] To lobby support for abortion liberalization, the Group held meetings with various Members of Parliament including Messrs. Van Hoogstraten, Oldfield, Fisher, Von Keyserlink, Van Rensburg, Dalling and Mrs Helen Suzman.[94] In 1973, Arag presented a petition signed by 1,500 people supporting legalization of abortion to the select

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[90] *See generally* THE GREAT DEBATE, *supra* note 54.

[91] Norman Walker, *Like Lemmings into the Sea*, *in id.* at 199, 202-203.

[92] Pamela Sharratt, *Social, Personal and Psychological Indications for Legalised Abortions*, *in id.* at 112-113.

[93] Annual General Meeting minutes of the South African Abortion Law Reform League 18 August 1976.

[94] Annual General Meeting minutes of the South African Abortion Law Reform League 12 June 1975.

committee,[95] while a Durban group of activists collected 10,000 signatures to a similar petition after only 22 hours of effort.[96] However, reflecting government attitude and predisposition, the Minister of Health refused to see a deputation from the groups that had organized the petition, stating that the matter had already been considered by the select committee.

The select committee did investigate the bill and produce a report but, as noted earlier, the committee gave way to a commission of inquiry whose shortcomings have been discussed. The Abortion and Sterilization Bill was tabled in Parliament in 1974 and debated in February 1975. The bill was adopted by both houses, signed by the State President and published on March 12, 1975.[97]

IV. THE ABORTION AND STERILIZATION ACT

From 1975, abortions in South Africa were permitted only in terms of the provisions of the Abortion and Sterilization Act.[98] The Act specifically stipulated that an abortion could take place only when the stringent requirements of the Act were met.[99] Nevertheless, although it was very conservative legislation, the Act widened the grounds on which a legal abortion could be procured. Thus, Boberg saw the Act as "largely declaratory and explanatory of the common law"[100] while Bertrand complained that, "certain provisions are dangerously more permissive than Judeo-Christian principles allow in that the objective and intrinsic human worth and rights of the unborn child have in some cases, been overruled by subjective values and rights of the mother or society."[101]

Others have argued that the Act did nothing to look after the interests of the "unborn child" and that no one looked after the interests of the fetus.[102] Others called for the appointment of an independent person such as an advocate

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[95] NEWSLETTER (S. Afr. Abortion L. Reform League, Cape Town) 1974, at 2.

[96] *See id.*

[97] *See* A.R.L. Bertrand, *The Abortion and Sterilization Act 2 of 1975: A third opinion (Part II)* 1978 *SACC* 264.

[98] Act 2 of 1975.

[99] *See id.* § 2.

[100] BOBERG, *supra* note 47, at 20.

[101] Bertrand, *supra* note 97, at 284-85.

[102] See Lourens Du Plessis, *Jurisprudential Reflections on the Status of Unborn Life*, 1990 TYVSKRIF VAN SUID AFRIKAANSE REG 41, 44.

or attorney to represent and defend the "rights" of the fetus.[103] They argued that this would be analogous to the appointment of a curator ad litem where the interests of a minor child are at stake.[104]

Van Oosten suggests, by contrast, that the Act aims to continue pregnancy rather than to protect the fetus.[105] This is a suggestion that lends credence to the argument that the intention of the Act was to play a part in fostering growth in the white birth rate.

Criticism has also been levelled at the Act on the basis that it is unclear about what abortion is. Within the English version of the Act, which is the version signed by the State President, abortion is circularly defined as "the abortion of a live fetus of a woman with intent to kill such a fetus."[106] It is seen to be problematic that the drafters of the legislation chose to define abortion by using the word "abortion," thereby creating ambiguity. The Afrikaans version of the Act defines abortion as, "*vrugafdrywing is: die afdrywing van 'n lewende vrug van 'n vrou met die opset om dit te dood.*"

This use of the word "*afdrywing*" (expulsion), does confer some clarity on the definition of abortion. Therefore, although the English text was the one signed by the State President and thus the text to be used for interpretation, the Afrikaans version was used in *S v. Collop* to clarify the English text.[107] This was the solution proposed by Van Oosten who argued that the Afrikaans version must supply the meaning of abortion intended by the Act.[108] Therefore, it was the expulsion and not the killing of a fetus which transgressed the law.[109] That is, if there was a killing of the fetus but expulsion was not caused, there would be no transgression of the Abortion Act.[110] Further, if labor was not induced, that is, if vacuum aspiration was used, this would not constitute an abortion in terms of the Act.[111]

Yet another problem with the Act was its use of the term "fetus" without defining its meaning. In *S v. Kruger*, Judge Erasmus held that "*lewende vrug*" and

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[103] *See* G v Superintendent, Groote Schuur Hospital, and others 1993 (2) SA 255 (C).
[104] *See* B. Bertrand, The South African Abortion Act - An Assault on the image of God 11 (Feb. 1987) (unpublished manuscript, on file with author).
[105] Ferdi van Oosten, *Regmatige Vrugafdrywing*, 1977 *DE JURE* 337, 378.
[106] Act 2 of 1975 § 1.
[107] 1981 (1) SA 150 (A).
[108] *See* Van Oosten, *supra* note 105, at 377.
[109] *See* Smit, *supra* note 13, at 158-9; *see also* Van Oosten, *supra* note 105, at 377.
[110] *See* HUNT, *supra* note 6, at 323.
[111] *See* Smit, *supra* note 13, at 158-9.

"live fetus" mean the same thing.[112] The court held further, that the promulgation of the Abortion and Sterilization Act had repealed the common law relating to abortion. This view was supported in both the lower and appellate court decisions of *S v. Collop,* where it was argued that, medically speaking, the term "embryo" is used for the first eight weeks after conception, and the term "fetus" thereafter.[113] However, the court found that for the purposes of the Act, there is no distinction between these terms, that a "fetus" exists conceptually from the moment of conception, and that any interference with the fetus from conception would transgress the Act.[114] The Appellate Division concurred, defining fetal life as beginning at conception.[115]

For the crime of abortion to have occurred, the following elements must be present: (1) expulsion from a woman (2) of a live fetus (3) unlawfully (4) with the intention of killing the fetus. There is no express requirement that the fetus must die but this, it is suggested, is implied by the Act.[116] The Act stipulates that abortion is permitted only:

> (a) where the continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy so endangers the life of the woman concerned or so constitutes a serious threat to her physical health and abortion is necessary to ensure the life or physical health of the woman;
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> (b) where the continued pregnancy constitutes a serious threat to the mental health of the woman concerned, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy creates the danger of permanent damage to the woman's mental health and abortion is necessary to ensure the mental health of the woman;

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[112] 1976 (3) SA 290 (O) 295-6.
[113] 1979 (4) SA 381 (O); *see* 1981 (1) SA 150 (A).
[114] 166H-67E.
[115] *See* Michael Lupton, *The Legal Status of the Embryo,* 1988 ACTA JURIDICA 197, 207.
[116] *See* Bertrand, *supra* note 97, at 265.

> (c) where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he [sic] will be irreparably seriously handicapped, and two other medical practitioners have certified in writing that, in their opinion, there exists, on scientific grounds, such a risk; or
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> (d) where the fetus is alleged to have been conceived in consequence of unlawful carnal intercourse, and two other medical practitioners have certified in writing after such interrogation of the woman concerned as they or any of them may have considered necessary, that in their opinion the pregnancy is due to the alleged unlawful carnal intercourse; or
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> (e) where the fetus has been conceived in consequence of illegitimate carnal intercourse, and two other medical practitioners have certified in writing that the woman concerned is due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus.[117]

These grounds for legal abortion are examined below.

A. Life and Health of the Mother

Section 3(1)(a) reenacts the common law which permits abortion to save the life of the mother. However, it was more restrictive than the common law because of the additional procedures that were required by the Act. Indeed, the Act was couched in exacting terms whose purpose was precisely to ensure additional restrictions. For instance, there must be a serious threat to the woman's physical health before an abortion was permitted, whereas the 1973 bill merely required the possibility that the pregnancy might endanger or threaten such health.[118]

The use of the term "serious" in this clause, as well as the "mental health" clause, has been criticized by Smit on the grounds that it was too

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[117] Act 2 of 1975 § 3(1).

[118] *See* Bertrand, *supra* note 97, at 275.

vague.[119] Hawthorne in turn criticizes Smit for taking an attitude which "exposes a sad lack of trust in the integrity of the legal profession."[120] The issue, however, is not so much one of integrity, but rather the restrictive effect of the wording of the section. The statistics reveal how seldom this section was invoked, thereby indicating the strict application of its terms by doctors who were able to authorize abortions.

B. Mental Health of the Mother and the Fetus

The mental health clause of the 1975 Act shows a similar narrowing of the formulation in the 1973 bill. It requires that there be a danger of permanent damage to the mental health of a woman seeking an abortion.[121] The extremeness of this requirement functions so as to almost nullify, in practice, access to abortion in terms of this clause.

Comparable constraints exist in the section permitting abortion on the grounds of a serious physical or mental defect that would result in a child that was irreparably, seriously handicapped. The 1973 bill required merely a substantial risk. Here again, the earlier formulation was tightened, again reducing the opportunities for access to abortion.[122]

Criticism of the wording of the "mental health" clause came from different quarters. Helen Suzman, Member of Parliament, for example, attempted to replace the word "permanent" with "serious," but this was rejected.[123] The resulting exceedingly stringent requirements practically abolish access to an abortion on the grounds of protecting the woman's mental health.[124]

A further difficulty when an abortion was requested on the grounds of mental health, is that one of the medical practitioners who must be consulted must be a psychiatrist in the employ of the state.[125] This is another departure from the 1973 bill which empowered an ordinary psychiatrist to authorize an abortion. The restrictive effect of this requirement is clear when one notes that in 1976 there were only 137 state-employed psychiatrists in South Africa, of

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[119] Smit, *supra* note 13, at 161.

[120] Hawthorne, *supra* note 77, at 260.

[121] *See* Bertrand, *supra* note 97, at 275.

[122] *See id.* at 277.

[123] *See* the Second Reading of the Abortion and Sterilization Bill House of Assembly *Hansard* 12 Feb. 1975, Col. 605.

[124] As is evident from the modest number of legal abortions that occured.

[125] Act 2 of 1975 § 3(3)(b).

whom 23 certified that an abortion was necessary.[126] In 1977 there were 135 state-employed psychiatrists of whom only 33 signed such certificates.[127]

Even more critical was the impact, or rather lack thereof, of this requirement on the plight of black women. Women of color had little access to psychiatrists from their own communities. In 1973, in response to a question about the number of "colored or Bantu" psychiatrists in the country, the chairman [sic] of the Society of Psychiatrists replied that there was one colored psychiatrist practicing at Groote Schuur hospital.[128] Indeed, psychiatrists of any description are hard to come by for the vast majority of South Africans, as Helen Suzman pointed out in Parliament, "I am told there is only one single psychiatrist in the homelands or, rather, near the homelands, he is in Mafeking and not even in a homeland. There is hardly a single psychiatrist between Pretoria and the Limpopo."[129]

As for women who live in semi-urban areas such as Pietersburg, access to a psychiatrist was barely easier, though this did not trouble the Chair of the Society of Obstetricians and Gynecologists, who opined that there was no problem as, "*sy gaan net na die private geneesheer, wat haar na die distriksgeneesheer verwys.*"[130]

No consideration was given to the cost implication of this situation, and, more importantly, the needs of women living in the rural areas were ignored. This reflects the bias against black women and it is hardly surprising that there was the view that, "the present abortion legizlation reflects the values and norms of the whites."[131]

In light of the obstacles erected by this clause, it is interesting that about half of all legal abortions were nonetheless performed for psychiatric reasons,[132] the majority on white women at Groote Schuur Hospital in Cape Town.[133]

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[126] House of Assembly *Hansard* 1977 Col. 1410.

[127] House of Assembly *Hansard* 1978 Col. 924.

[128] THE SELECT COMMITTEE ON THE ABORTION AND STERILIZATION BILL, REPORT 32 (SC 8-73).

[129] Helen Suzman, House of Assembly *Hansard* 10 Feb. 1975, Col. 401.

[130] THE SELECT COMMITTEE ON THE ABORTION AND STERILIZATION BILL, REPORT 34 (SC 8-73).

[131] Ferdi van Oosten & Monica Ferreira, *Republic of South Africa, in* INTERNATIONAL HANDBOOK ON ABORTION 416, 422 (P. Sachdev ed., 1988).

[132] *See* L. Luti & M. Mamaila, *Time to Change Abortion Laws*, CITY PRESS, July 14, 1991.

[133] *See* S. Taylor, A Six Year Review of Legal Abortions Performed in a Teaching Hospital (1986) (unpublished M.A. thesis, University of Cape Town).

Therefore, it must be asked whether white women were more likely than others to suffer the effects of psychiatric illness, and whether women from Cape Town were more ill than their counterparts in the rest of the country. The answer is surely one of access to abortion at some hospitals as a result of a progressive attitude among doctors at these institutions.

C. Rape and Incest

Section 3(1)(d) was originally used to permit abortions in cases of incest, rape or sex in violation of section 15 of the Immorality Act, which prohibited sexual intercourse with a girl who was an imbecile or idiot.

Section 3(1)(d) as amended, permited abortion only where rape or incest has occurred. Where pregnancy results from sexual intercourse with a girl under the age of 16, termed statutory rape, an abortion was not provided for by the Act.[134] An abortion in the case of statutory rape was rejected in the debate in Parliament on the basis that:

> it is possible for such a girl who in a moment of indiscreet passion and emotion, finds herself in such a situation, to contract a legal marriage; in fact, two years ago we made it possible for a girl to marry at the age of 15 years without the need for ministerial permission.[135]

Incest was defined in the Abortion and Sterilization Act as, "carnal intercourse between two persons who are related to each other and by reason of such relationship incompetent to marry each other."

An abortion was permitted where the parties to the pregnancy were related to each other by affinity, consanguinity or adoption.[136] There is, however, a dispute as to what the effect was where the parties did not know

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[134] *See* J.C. Stassen, *Die Wet op Vrugafdrywing en Sterilisasie 2 van 1975*, 1976 TYDSKRIF VIR SUID AFRIKAANS REG 260, 263. The meaning of the rape clause as well as the procedures to be followed by a woman who has been raped were investigated by the court in *G v Superintendent Groote Schuur Hospital* 1993 (2) SA 255 (C).

[135] H.J. Coetzee, House of Assembly *Hansard* 12 Feb. 1975, Col. 613.

[136] *See* Desiree Hansson and Diana Russell, *Made to Fail: The Mythical Option of Legal Abortion For Survivors of Rape and Incest*, 9 S. AFR. J. HUM. RTS. 500, 518 (1994); *see also* Michael Lupton, *Medico - Legal Aspects*, *in* FAMILY LAW SERVICE J54 (Ivan Schaëfer ed., 1994).

they were related.[137]

The Act stipulates that when abortion was sought on the ground of rape or incest, one of the certifying medical practitioners must be the district surgeon who examined the woman where a complaint was lodged with the police.[138] Further, a magistrate must issue a certificate[139] specifying:

> (a) that the police have been informed, or the reason why not;[140]
>
> (b) that after examining the woman and whatever other evidence, on the balance of probability the pregnancy is the result of rape or incest;
>
> (c) that if the abortion is as a result of incest, then the degree of relationship transgresses the laws of incest;
>
> (d) that the woman has submitted an affidavit, or sworn under oath that the pregnancy is the result of rape or incest.

Kunst and Meiring report that magistrates issued a certificate only if the police had been informed and if the medical evidence showed that rape or incest was the cause of the pregnancy.[141]

The reality of the situation was that, in most cases, neither rape nor incest victims report these occurrences since they fear a whole host of consequences. In addition to the trauma of rape or incest, women endure the burden of society's attitudes. Responsibility for pregnancy, even in the case of rape or incest, was almost exclusively imposed on the woman. Such attitudes had ramifications in terms of the law. For instance, the law imposed no requirements on the state to provide counselling or support of any kind to victims of rape or incest.

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[137] *See* Hunt, *supra* note 6, at 319; *see also* Stassen, *supra* note 134, at 263.

[138] Act 2 of 1975 § 3(3)(c).

[139] *See* G v Superintendent, Groote Schuur Hospital, and others 1993 (2) SA 255 (C).

[140] Act 2 of 1975 § 6(4)(a).

[141] Jennifer Kunst & Rita Meiring, *Abortion law - A need for Reform*, DE REBUS June 1984, at 264, 265; *see also* G v Superintendent, Groote Schuur Hospital, and others 1993 (2) SA 255 (C).

The complicated bureaucratic process of obtaining permission for an abortion was the antithesis of a system which safeguarded and promoted physical and mental health. Many women who would have been entitled to an abortion, even within the rigid restrictions of the Act, often resorted to backstreet abortions because of the insensitive procedural requirements which took no account of an already traumatized woman's need for immediacy, empathy and confidentiality.[142] Women, quite simply, did not wish to navigate the cold passages of the bureaucracy of the police and the courts.

Much criticism has been levelled at the procedures necessary to obtain an abortion, some of which existed even before the bill became law. Arag stated in its memorandum to the select committee, "[i]n the consideration of a rape victim, the procedure demanded by the legislation - that of a woman seeing in all, four doctors, the police, a magistrate, and writing an affidavit to the magistrate who in turn has authority to question her, is nothing short of inhuman."[143]

The Law Commission investigated these questions in 1985[144] and held discussions with those who apply the procedures in the case of rape. The Commission noted that, while the majority of respondents favored the procedures,[145] members of the South African Police asserted that one of the major causes of additional trauma to a woman who had been raped was the fact that she had to appear personally before a magistrate. According to these police officers, this was not necessary as an affidavit could be given by the police to the magistrate.[146] Members of the South African Police and the magistrates in particular, favored a procedure that caused less trauma to the women involved.[147]

While the Law Commission noted the views of the police and magistracy,[148] the Commission nonetheless held:

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[142] *See* Strauss, *supra* note 78, at 117 (commenting on the lack of confidentiality); *see also* Kunst & Meiring, *supra* note 141, at 265 (commenting on the procedural problems).

[143] Memorandum to the Select Committee on the Abortion and Sterilisation Bill from the Abortion Reform ActionGroup, *cited in* Bertrand, *supra* note 97, at 279 (arguing that the criticism is unfounded).

[144] SOUTH AFRICAN LAW COMMISSION, THE WOMEN: SEXUAL OFFENSES IN SOUTH AFRICA 3 (1985) [hereinafter LAW COMMISSION].

[145] *Id.* at 4.83.

[146] *Id.* at 4.90.

[147] *Id.* at 4.83.

[148] *Id.*

> it is not clear how the present procedure can humiliate her.... The only personal contact... is the examination by the district surgeon and reporting to the police[149]... [and] ... appearing before a magistrate is not obligatory since in terms of sec 6(4)(a)(ii) the magistrate must interrogate either the victim or any other person.[150]

But who else would the magistrate have wished to "interrogate"? How many people were usually present at a rape? Would a magistrate have really wanted to interrogate a person other than the victim?

The Commission nonetheless suggested the elimination of the personal appearance requirement[151] and stated that it should not have been obligatory to interrogate the woman who had been raped. It also noted that the decision whether to grant an application for an abortion after rape should rest in the hands of a trained multi-disciplinary team attached to a provincial hospital. This team should have consisted of, medical practitioners, a forensic scientist, social workers, a representative of the SAP and a representative of a rape crisis service.[152]

In the alternative, if this was not acceptable, the Commission held that the decision of the magistrate should be assisted by the recommendation of such a team.[153] The Commission also suggested that the "victim" (or any other person, for example a relative, husband or member of a rape crisis organization) be able to apply directly to the magistrate without the involvement of the police.[154]

The Commission drew attention to the view that a woman who had been raped ought to be able to "claim an automatic right to an abortion and this service should be rendered free of charge to victims (that is to say at state expense)."[155] In spite of all these recommendations and proposals, the Law Commission nevertheless found that the then status quo should have been maintained.[156]

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[149] *Id.* at 4.91 n.70.
[150] *Id.* at 4.91.
[151] *Id.* at 4.93.
[152] *Id.* at 5.54.
[153] *Id.* at 4.93.
[154] *Id.*
[155] *Id.* at 4.89.
[156] *Id.* at 4.100.

D. Stringent Procedures

In addition to the conditions laid down in section 3(1), stringent procedures stipulated by the Act had to be meticulously complied with to obtain an abortion.[157] In effect, this limited access to abortion as there was insufficient information available to women about the requisite procedures. Language also played a key part in reducing access for women who do not speak either of the former two official languages, English and Afrikaans.

There were not many requests for abortion from black women as they do not know about its availability.[158] Soon after the Act came into force Strauss noted, that there had been very few applications by African women.[159] Part of the reason was fear that the record of the application for a termination would be used later as evidence in a criminal case when no child is born. This perception continued to exist as it was known by women that less than half the applications for abortions were granted.[160] But in spite of these fears, those who were refused permission to have an abortion went to the backstreets.[161]

The Act permited an abortion to be performed only by a medical practitioner. However, a doctor could refuse to perform the abortion on the basis of a conscience clause which was included in the Act.[162] At first glance the language used in this clause does not appear problematic, but it is, in practice, since doctors who refuse to perform an abortion were not required to refer women to other practitioners who would render this service.[163]

If a doctor performed an abortion in an emergency, without complying with the requirements of the Act, in order to save the life of a woman, he or she was subject to criminal sanction. The defense of necessity could have been available in these circumstances, however.[164] An abortion carried out by a health professional who was not a medical practitioner, as defined by the Act, would

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[157] *See* G v Superintendent, Groote Schuur Hospital, and others 1993 (2) SA 255 (C).

[158] *See* THE STAR, Jan. 7 1987.

[159] Strauss, *supra* note 78, at 117.

[160] *See* WEEKLY MAIL, Nov. 6-12, 1992.

[161] *See* THE STAR, *supra* note 158.

[162] Act 2 of 1975, § 9.

[163] *See* Steve Taylor, *supra* note 133, at 11; *see also* Sarah Jane Drower, A Survey of Patients Referred for Therapeutic Abortion on Psychiatric Grounds in a Cape Town Provincial Hospital 65 (1977) (unpublished Ph.D. thesis, Univ. of Cape Town).

[164] *See* Ferdi van Oosten, *Abortion - Adieu Common Law?*, 93 S. AFR. L.J. 393, 394 (1976); *see* Bertrand, *supra* note 97, at 284-5 n.120.

also transgress the law.[165] The defense of necessity could not have been invoked in these circumstances.[166]

A further procedural requirement of the Act was that a doctor performing an abortion had to do so in a hospital designated by the Minister of Health as a place where abortions could be performed.[167] The person in charge of the hospital was required to give written approval for the abortion[168] subsequent to a doctor's request for such permission, a request which had to set out a myriad of details[169] for the hospital superintendent, who must then report such details to the Director-General of Health.[170] Two additional, independent doctors, not in partnership with the original doctor or in the employ of the same employer,[171] had to attest to the legitimacy of the grounds for the abortion[172] and could not have participated in the abortion.[173] At least one of these doctors was required to have been in practice for at least four years.[174]

Further, the certifying doctor was not permitted to perform the operation. This limited a woman seeking an abortion even further as she could not decide to let her own doctor do the termination.[175]

Prescribed forms had to be used by the various individuals who had to give permission and by those who had to check the legitimacy of the grounds for the abortion. The extent to which these requirements limited access has been noted by Dr. Marj Dyer, who suggested that black women "would never be able to wade through the welter of man-devised forms and certificates required."[176] Bertrand replied correctly that it was the doctor who had to complete the necessary forms[177] but Dyer's statement is true in so far as women, especially

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[165] *See* Hunt, *supra* note 6, at 316.
[166] *See id.* at 317.
[167] *See* Act 2 of 1975 § 5.
[168] *See id.* § 6(1)(a).
[169] *See id.* § 6(2).
[170] *See id.* § 7. This has to include name, age, marital status, race, place where and when the abortion was done, the reasons therefore, and the names and qualifications of the doctors involved at any stage. *See id.*
[171] *See id.* § 3(2)(a).
[172] *See id.* § 3(1)(a), (b), (c) and (d).
[173] *See id.* § 3(2)(a).
[174] *See id.* § 3(3)(a).
[175] *See* Kunst & Meiring, *supra* note 141, at 265.
[176] Marj Dyer, CAPE TIMES, Feb. 27, 1975
[177] Bertrand, *supra* note 97, at 264.

black women, had immense difficulty navigating all the obstacles placed in the way of obtaining an abortion, even when they met the strict requirements of the Act in regard to the circumstances in which abortion was permitted.

Each step of the process required by the Act placed the onus for organization, time and finance on the woman in crisis. This had obvious repercussions for working women, economically disadvantaged women, and those living in rural areas where finding any doctor is a struggle. Job security is of major concern for many women, especially those in the agricultural and domestic fields who did not have statutory protection and were guaranteed neither maternity leave nor the sick leave necessary for the numerous appointments which were prerequisites for obtaining an abortion.[178] The women who were hit hardest were black,[179] those who have been excluded from the benefits of the law and included into the lowest social and economic class because of their race and gender.

The Law Commission refused to acknowledge the fact that the complicated procedures required by the Act compelled women to endure backstreet abortions.[180] The difficulty of obtaining an abortion, even for those few women whose circumstances were covered by the Act, lead thousands of women to the backstreets, at great risk to their health and lives.

Parliament was no more willing than the Law Commission to acknowledge the discriminatory effect of the law. When it was being enacted it was stated in Parliament that the "rich have always been able to do what the poor could not, however when it comes to abortion there is talk of discrimination."[181]

Similarly, Noonan has stated that it is a:

> sad and harsh probability that a large number of criminal laws bear with unequal severity in practice on the poor, who are more likely than the rich to be caught, to be prosecuted, to be unskillfully defended, to be convicted and to be punished.

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[178] *See* JACKLYN COCK ET AL., CHILD CARE AND THE WORKING MOTHER: A SOCIOLOGICAL INVESTIGATION OF A SAMPLE OF URBAN AFRICAN WOMEN IN SOUTH AFRICA 45-48, 69-80 (1983); *see also* JACLYN COCK, MAIDS AND MADAMS: A STUDY IN THE POLITICS OF EXPLOITATION 260 (1984); *see also* Barabara. Klugman, *The Politics of Contraception in South Africa*, 13 WOMEN'S STUDIES INTERNATIONAL FORUM 261, 265 (1990).

[179] *See* Van Oosten & Ferreira, *supra* note 131, at 423.

[180] LAW COMMISSION, *supra* note 144, at 4.97.

[181] Dr. E.L. Fisher, House of Assembly *Hansard* 10 Feb 1975, Col. 480 .

> These de facto defects in a system of law are reasons to urge reform of the administration of criminal justice and not for the selective invalidation of criminal statutes.[182]

These comments fail to take into account the realities of South African society where a person's economic class is very often dependent on that person's race, because the privileges and opportunities available to white people have not been available to others.

Abortion was thus more accessible to wealthy women who, because of apartheid, tended to be white. Those with money were more able than their impoverished counterparts to find doctors willing to perform safe abortions, thereby avoiding the backstreets. One avenue for wealthy women was to travel overseas to have the procedure performed. A number of women resident in South Africa, almost exclusively white, went to England and Wales to have abortions. Official numbers recorded are 560 in 1983, 609 in 1985, 517 in 1986, 447 in 1987, 400 in 1988 and 439 in 1989,[183] but it was suggested that the real figure was at least double the official number, as many South African women give a local address rather than a South African one.[184] This racial aspect to abortions performed abroad was noted in 1987 when the Pregnancy Advisory Services of the Charlotte Street Clinic in London, refused to continue to permit white South African women to come to the clinic to have abortions. The clinic stated that these women were the fortunate ones who, because of the situation in South Africa, were able to afford the travel costs.[185] In the light of the foregoing, therefore, it was not remarkable that backstreet abortion was an option resorted to frequently by South African women.[186]

V. LEGAL ABORTIONS

With all the limitations and procedural complexities imposed by the Act, it was not surprising that the number of legal abortions carried out in terms of the

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[182] THE MORALITY OF ABORTION - LEGAL AND HISTORICAL PERSPECTIVES 237 (J. Noonan ed., 1970).

[183] *See* B. Botting, *Trends in Abortion*, 64 POPULATION TRENDS 19, 20 (1991).

[184] *See* NEWSLETTER (Abortion Reform Action Group) Oct. 23, 1983.

[185] *See* NEWSLETTER (Abortion Reform Action Group) Aug. 1987.

[186] *See* Helen Rees, *Women and Reproductive Rights*, *in* PUTTING WOMEN ON THE AGENDA 213 (Susan Bazilli ed., 1991).

Act were paltry. A demographic breakdown of the data revealed that the women who braved illegal, backstreet abortions in South Africa were mostly from a low socio-economic background, under-educated[187] and stereotypically young, unmarried, black women living in urban townships. The majority of women who obtained legal abortions were white women from more privileged socio-economic backgrounds.

TABLE I
RACIAL BREAKDOWN OF LEGAL ABORTIONS PERFORMED
DURING THE FIRST YEARS OF THE ACT.

	1975	1976	1977
Whites	485	509	399
Blacks	21	28	46
Coloureds	56	77	78
Asians	8	11	16
TOTALS	570	625	539

In the first year of the Act, 570 legal abortions were effected, almost exclusively within the white population.[188] The same was true for legal abortions performed in subsequent and more recent years. For example, in the period from November 1984 to October 1985, 712 legal abortions were performed in South Africa. Of the women undergoing these abortions, 78.7 percent were white, 11.1 percent were colored, 4.9 percent were Asian and 5.3 percent were black.[189] During this same period (1985), 609 South African women had abortions in the United Kingdom, putting South Africa fourth on the list of source countries of women who travelled to the United Kingdom specifically to have an abortion.[190]

The figures for legal abortions in the year ending June 31, 1989, show that the racial trend remained constant, with 735 (76.3 percent) of a total of 963 legal abortions performed on white women.[191] In 1992, 1,449 legal abortions

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[187] *See generally* Derek Larsen, *Induced Abortion*, 53 S. AFR. MED. J. 853 (1978).

[188] *See* JANET WESTMORE, ABORTION IN SOUTH AFRICA AND ATTITUDES OF MEDICAL PRACTITIONERS TOWARDS SOUTH AFRICAN ABORTION LEGALITIES 9 (1977).

[189] *See* David Bourne, *Abortions in England and Wales on South African Residents*, 74 S. AFR. MED. J. 87 (1988).

[190] *See id.*

[191] *See generally* 1989 DEPT. OF HEALTH AND POPULATION DEV. ANN. REP.

occurred, of which 1,002 or 69.2 percent were on white women.[192] In 1993, until the end of November, 1,301 legal abortions were performed of which 868, or 66.7 percent, were performed on whites.[193] These figures reflect the racial and economic barriers to access abortion.

If the intent of the Act was to restrict access to abortions, then it was a dismal failure, as evidenced by the various strategies employed to circumvent its provisions. For example, there were suggestions that retinoids were being used as a pretext to obtain a legal abortion. Retinoids used in the treatment of acne are known to cause fetal disorders. When doctors were told that patients had taken this drug, they felt bound to authorize an abortion. Another example was the use of Rubella vaccines by pregnant women for the same purpose. The difference between actual German measles, a disease that causes fetal defects, and a higher antibody count resulting from the vaccine, cannot easily be detected.

VI. BACKSTREET ABORTIONS

Very little research has been done on illegal abortions in South Africa,[194] but it was estimated that every year between 100,000 and 500,000 women had a backstreet abortion in the country.[195]

In 1975, the number of backstreet abortions was estimated to be about 250,000.[196] In 1982, Grobler calculated that 200,000 were performed annually, while in the same year,[197] Brown suggested that conservative estimates of the number of illegal abortions was 200,000 a year.[198] In the 1990s, Erica Greathead, Director of the Family Planning Association of South Africa, stated

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[192] *See generally* 1992 DEPT. OF HEALTH AND POPULATION DEV. ANN. REP.

[193] See generally 1993 DEPT. OF HEALTH AND POPULATION DEV. ANN. REP.

[194] *See* Van Oosten & Fereira, *supra* note 131, at 420.

[195] *See* Jeremy Sarkin, *A Perspective on Abortion in South Africa's Bill of Rights Era*, 56 *Tydskrif vir Heedendagse Romeinse Hollandse Reg* 83 (1993).

[196] *See* M.G.T. Cloete, *Abortion: A Criminological Review*, *in* THE GREAT DEBATE, *supra* note 54, at 146; *see also* THE CAPE TIMES, Feb. 13, 1975, at 11; *see also* C.J.S. Wainwright, House of Assembly *Hansard* 12 Feb. 1975, Col. 715; *see also* Marj Dyer, SUNDAY TIMES, Nov. 3, 1974, at 10.

[197] House of Assembly *Hansard*, Mar. 1982, Cols. 2023-2024.

[198] B. Brown, *Facing the "Black Peril": The Politics of Population Control in South Africa* 13 J. OF S. AFR. STUDIES 267 (1987).

that 500,000 backstreet abortions were performed in South Africa each year.[199]

The Law Commission in 1985 was willing to accept that only 15,000 women had backstreet abortions each year.[200] However, it seems that this figure was based on an estimate of the number of women who had abortions after being raped. The Law Commission itself stated that the figure of 15,000 was based on figures suggested at the fifth national conference of Rape Crisis held in April 1984[201] and derived from the "assumption that 150,000 rapes per annum occur in South Africa" and that 10 percent of rape victims fall pregnant.[202]

Table 2 compares the number of legal abortions performed annually with the total of reported "operations for removal of residues of pregnancy", which was only one of the commonly used alternative channels to achieve an abortion.[203]

TABLE 2

LEGAL ABORTIONS PERFORMED IN TERMS OF THE 1975 ACT

	Legal Abortions[204]	Operations to Remove Residues of Pregnancy
1975	570	No figures available
1976	625	.
1977	539	.
1978	541	.
1979	423	.
1980	347	29,979
1981	381	33,194
1982	464	35,759
1983	474	32,839
1984	566	29,596
1985	712	32,500
1986	770	36,062
1987	810	35,882
1988-89	963	35,038

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[199] SOUTH, Dec. 13-17, 1990.

[200] LAW COMMISSION, *supra* note 144, at 4.97 n.72.

[201] *Id.* at 4.87 n.64.

[202] *See* T. Segal & D. Labe, *Family Violence: Wife Abuse*, *in* PEOPLE AND VIOLENCE IN SOUTH AFRICA 251 (B. Mckendrick & W. Hoffman eds., 1991).

[203] Eleanor Nash, *Teenage Pregnancy - Need a Child Bear a Child?*, 77 S. AFR. MED. J. 147, 148 (1990).

[204] *See generally* DEPT. OF NAT'L HEALTH & POPULATION DEV. ANN. REP.

1989-90	916	38,020
1991	1,021	33,305
1992	1,449	-
1993	1,301 (until November)	-[205]

It was believed that the real number of "operations for removal of residues of pregnancy", which were resorted to in the main as an alternative means to achieve an abortion,[206] was far higher than the official figure, partly because many health-care workers ignore the laborious reporting mechanisms[207] demanded by the Abortion and Sterilization Act.[208] In any event, 90 percent of operations for removal of residues of pregnancy were seen to be the result of backstreet abortions.[209] Figures suggest that 95,000 such operations were performed between 1983 and 1985, with only 21 percent involving white women and 60 percent involving black women. Again, the implication was that many more black women than white women resort to the dangerous alternatives of the backstreets.[210] June Cope notes:

> South Africa's restrictive legislation creates an industry of backstreet abortion. Gynecological wards are crowded with its victims. Some of the women die; those who survive are nursed back to health, to be exposed to the same risk on their return home. Their vacated hospital beds are immediately filled. Hospitals across the country, particularly in the urban areas, suffer from an overload on their nursing and financial services caused by this pressure on gynecological wards, pressure which is a direct result of a law which denies a basic human right: the right to early, safe and low-cost medical care for women faced with unwanted pregnancy.[211]

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[205] No figures are available for the removal of the residues of pregnancy for 1992 & 1993. It is believed that these figures were not released because they were too inaccurate.

[206] *See* Nash, *supra* note 203, at 148.

[207] Letter from the South African Society of Obstetricians and Gynaecologists to its members (June 1991).

[208] Act 2 of 1975.

[209] *See* Van Oosten & Ferreira, *supra* note 131, at 419.

[210] *Id.*

[211] COPE, *supra* note 63, at 1.

Serious complications resulting from backstreet abortions were common.[212] Abortion was the major reason for gynecological admission to hospitals in South Africa[213] and as many as 70 percent of maternal deaths in hospitals in 1976 were the result of backstreet abortions.[214] A total of 2,881 out of 6,274 admissions to Baragwanath hospital in 1978 were for complications arising from abortions.[215]

The cost of backstreet abortions for the women involved, as well as for the health care system, was enormous. Kunst and Meiring document that the 2,881 women treated for post-abortion complications in 1978 at Baragwanath[216] spent an average of 19 days in hospital. A total of 85 days between them was spent in intensive care, costing them R150 per day.[217] The cost involved in caring for the 1,085 patients who spent more than three days in the hospital was R162, 750.[218]

In Pelonomi hospital in Bloemfontein, between 1980 and 1985, 12 out of 81 maternal deaths were ascribed directly to abortion.[219] At least 36 women died because of abortion, according to a study of hospitals in South Africa from 1980-1982.[220]

At King Edward VIII hospital in Durban, 141 women were treated for problems associated with backstreet abortions in 1991, while 228 were treated in 1989.[221] Only 17 legal abortions were performed there in that year, while up to four women a day were treated at Edendale hospital for problems arising from backstreet abortion.[222]

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[212] *See* A. Richards, et al., *The Incidence of Major Abdominal Surgery after Septic Abortion - An Indicator of Complications Due to Illegal Abortion*, 68 S. AFR. MED. J. 799, 800 (1985).

[213] *See id.*

[214] RAND DAILY MAIL, Oct. 1, 1976.

[215] *See* J. Mbere & A. Rubin, S. AFR. J. OF HOSP. MED. 193 (1979).

[216] *See* Kunst & Meiring, *supra* note 141, at 265.

[217] *See id.*

[218] *See id.*; *see also* Marj Dyer, *Abortions' Act - A Plea for a Commission of Inquiry*, 15 SOCIAL WORK 185 (1979).

[219] *See* B.F. Cooreman et al., *Maternal Deaths at Pelonomi Hospital, Bloemfontein 1980-85*, 76 S. AFR. MED. J. 24 (1989).

[220] *See* E.G.M. Boes, *Maternal Mortality in Southern Africa 1980-82*, 71 S. AFR. MED. J. 158 (1984).

[221] *See* DAILY NEWS, Jan. 24, 1991.

[222] *See* THE NATAL WITNESS June 8, 1991.

About 300 women a month were admitted to Baragwanath hospital for abortion-related complications of which 60 percent were estimated to be the result of backstreet attempts.[223]

While these figures were extremely disquieting in themselves, the real statistics are unknown as there was very poor reporting of African deaths and, indeed, injuries and illness, in South Africa. It was suggested that as much as 50 percent of all deaths were not registered.[224] Nevertheless, existing figures for deaths due to backstreet abortion have been questioned. Some have callously asked where all the dead bodies are of the women who died from backstreet abortions.[225] Reliable statistics for maternal mortality rates do not exist,[226] although it was thought that about three black women die daily in South Africa because of backstreet abortions.[227]

The state argued consistently that the estimated number of backstreet abortions was highly exaggerated. One view stated in Parliament in 1975 was:

> If we are to take literally the views of a good cross-section of members of this House, not only is there a communist under every bed in South Africa; there is in fact on top of every bed a pregnant women waiting for an abortion. That is bad enough, but then there is also a cross-section in this House who find a direct correlation between what is under the bed and what is on top of it. Their confusion goes much further than that because then they want to destroy what is under the bed and preserve what is on top of the bed.[228]

The Minister of Health, on receiving a delegation of women on May 15, 1986, stated that backstreet abortion was not a problem in South Africa.[229] When the 28,596 operations to remove the residues of pregnancy in 1984 increased to 32,500 the following year, he noted that only 18 of the women

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[223] *See* I. Motsapi, *Bara's Abortion Shocker*, SOWETAN, Nov. 25, 1991.

[224] M. Jacobs, *Situation Analysis of Children and Women in South Africa Child Health Status* (United Nations Children's Rights Committee, 1992).

[225] *See* Bertrand, *supra* note 104, at 16.

[226] *See generally* L. RISPEL & G. BEHR, HEALTH STATUS INDICATORS: POLICY IMPLICATIONS (1992).

[227] *See* THE ARGUS, May 15, 1992.

[228] R.M. De Villiers, House of Assembly *Hansard* 12 Feb. 1975, Col. 616.

[229] NEWSLETTER (Abortion Reform Action Group), Sept. 1986.

involved showed signs of damage from foreign objects or injuries resulting from interference, opining that even the 1,578 septic cases had been due to endocrine imbalances.[230] He also disputed the 2,881 cases of complications from backstreet abortions treated at Baragwanath in 1978.[231]

Whatever the doubt concerning the incidence of backstreet abortion and resultant maternal mortality rates, backstreet abortions clearly lead to "permanent infertility and disability, drain on medical resources and expend of public funds."[232]

If one of the purposes of the Act was to limit the number of illegal abortions, as was suggested,[233] then the Act was been a dismal failure. The sanctions set out for transgressing the law were of little effect in curbing backstreet abortions. Identical penalties were set out for medically unqualified people who perform abortions and for qualified medical practitioners who abort without the correct certification, or who issue a false certificate, or who operate from an institution not authorized for that purpose.[234] The relatively minor penalty involved was fundamentally ineffective as a deterrent, considering the monetary gains to be made in supplying abortions to a captive market.

VII. THE REALITY OF WOMEN'S LIVES

The effect of the restrictive abortion legislation on the lives of women was far-reaching and destructive. Both backstreet abortions and the continuation of unwanted pregnancies in a context often devoid of prenatal care caused irreparable harm to women's mental and physical health. Poor health and unplanned children have a negative effect on women's employment prospects and performance, undermining women's attempts at establishing economic stability for existing family structures.[235]

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[230] *See id.*

[231] *See id.*

[232] *See* Kunst & Meiring, *supra* note 141, at 265.

[233] *See* Armstrong, *supra* note 76, at 252.

[234] Act 2 of 1975, § 10.

[235] *See generally* Nicola Caine, *Maternity Rights of Black Working Mothers in South African Law* 5 RESPONSA MERIDIANA 444 (1989); *see also* Barbara Klugman, *Maternity Rights and Benefits and Protective Legislation at Work*, 9 S. AFR. LAB. BULL. 25 (1983).

Studies have shown that 49 percent of black women in Cape Town and the Ciskei were pregnant by the age of 20[236] and 30 percent of all mothers in Cape Town who carry their pregnancies to term are aged 19 or younger, with five percent under the age of 16.[237] Further studies show that South African teenage mothers are more likely than others to give birth prematurely and to receive insufficient antenatal support.[238] Associated with this was the finding that the younger the woman is when she has her first child, the fewer years of schooling she has completed. Teenage mothers are, therefore, unable to obtain employment and find themselves, "locked into unwanted motherhood, poverty, and the lack of opportunity to achieve their full potential."[239]

A poor relationship between mother and baby has been associated with premature childbearing, and it has been observed that children born to younger mothers exhibit lower IQ levels than those born to older, more mature mothers. According to Ncayiyana and Terhaar,[240] children born to younger mothers are often abused, neglected and malnourished.

Also of concern are illegitimacy rates that average 67 percent for black mothers, 81.6 percent for colored mothers and 20 percent for white mothers.[241] In Cape Town, 68.2 percent of all African children born in 1988/1989 were born to single mothers.[242]

As far as the ability of women to claim maintenance was concerned, research in Cape Town shows that over 85 percent of African fathers default on their maintenance orders at some time.[243] Burman and Berger have shown that, "awards are too low, the default rate extremely high, and unless a women displays the utmost determination in instituting the case and subsequently

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[236] *See* Mary Roberts & M.R. Rip, *Black Fertility Patterns - Cape Town and Ciskei*, 66 S. AFR. MED. J. 481, 482 (1985).

[237] *See* J. De Villiers, *Tienderjarige Swangerskappe in die Paarl-Hospitaal*, 67 S. AFR. MED. J. 301 (1967).

[238] *See* Nash, *supra* note 203, at 148.

[239] Jacobs, *supra* note 224, at 31.

[240] *See* D. J. Ncayiyana & G. Terhaar, *Pregnant Adolescents in Rural Transkei*, 75 S. AFR. MED. J. 231, 232 (1989).

[241] *See* De Villiers, *supra* note 237, at 301-2.

[242] *See* Sandra Burman, *Capitalising on African Strengths: Women, Welfare and the Law*, *in* PUTTING WOMEN ON THE AGENDA, *supra* note 186, at 104.

[243] *See id.*

pursuing arrears, she may well receive no maintenance."[244] This does not take into account the many women who do not apply for such an order at all.[245]

The financial burden of raising a family is disproportionately heavy for poor women,[246] in South Africa primarily black women. The relative position of black women is one of severe oppression and poverty. Many of them are the sole sources of income for their families. Pregnancy often results in a loss of employment,[247] especially in a climate of increasingly high unemployment. Even if a pregnant woman is lucky enough to keep her job or find a new one, day-care for the new infant is a financial drain. Women's wages are substantially lower than those of their male counterparts.[248] It is therefore extremely difficult for a single mother to bring up a child. Child care is near impossible for those who have migrated from the rural areas.

While those opposed to abortion often point to the alternatives supposedly available to women who have an unplanned pregnancy, in reality these "alternatives" expand or shrink in relation to race. Adoption and foster care are often suggested as viable alternatives. For example, it was noted in 1975 during the abortion debate in Parliament that, "we have satisfied ourselves that the unwanted child does have a place in our community and that he is accepted as such by implication. I shall tell hon. members why. We have orphanages and other institutions which adopt such children. They are not rejected but given the best."[249]

But was this true, when there were homes in South Africa for only 2,000 black children in need of care?[250] This is in contrast to the 10,000 places available for white children, a much smaller section of the population.[251]

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[244] S. Burman & S. Berger, *When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part 1)*, 4 S. AFR. J. HUM. RTS. 194 (1988); *see also* S. Burman & S. Berger, *When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part 2)*, 4 S. AFR. J. HUM.RTS. 334 (1988).

[245] *See* Burman, *supra* note 186, at 104.

[246] *See National Council of Negro Women Amicus Brief*, WOMAN'S RIGHTS LAW REPORTER 297, 303 (1989).

[247] *See* COCK ET AL., *supra* note 178, at 45-48.

[248] *See* Burman, *supra* note 186, at 104.

[249] H.J. Coetzee, House of Assembly *Hansard* 12 Feb. 1975, Col. 613.

[250] DAILY NEWS, Sept. 18, 1991.

[251] *See id.*

VIII. LEGAL DEVELOPMENTS AROUND ABORTION FROM 1975 TO 1994

In spite of many calls over the years for a review of the legislation,[252] the apartheid government was consistent in its attitude that it would not investigate the views and attitudes of the general public and that no amendments would be enacted to change the basic tenet of the law.

In 1981 Minister of Health LAPA Munnik said, "[w]e do not intend to liberalize abortion in this country as long as we are in power."[253] Even the draft bill (1981) that permitted an abortion in cases where there had been a failed sterilization was withdrawn[254] after objections from the churches.[255]

The appointment of an inquiry into the working of the Act was requested repeatedly but unsuccessfully both in and outside of Parliament. The Minister of Health, who chaired the earlier commission in 1974, stated in 1983, and repeated subsequently, that such a commission would serve no purpose, as the Act was working well. He noted that the SA Society of Obstetricians and Gynecologists was satisfied with the Act at the time it was passed. But, in fact, of the obstetricians and gynecologists surveyed by Dommisse in 1980,[256] 82 percent favored changes to the Act while 32 percent favored abortion on request. These figures were replicated in a second survey in 1990: 85 percent of obstetricians and gynecologists believed that the Act ought to be changed and 40 percent supported abortion on request.[257]

In 1990, the Department of Health asked for submissions with regard to the feelings of the public about the Abortion and Sterilization Act. The invitation for submissions was never advertised but on March 20, 1990, the department issued a press release inviting members of the public to send in comments and motivations. This request for submissions was particularly strange as the Minister, Rina Venter, had stated repeatedly that there was no intention to change the Act. However, the Minister justified the invitation of comments on the basis that this was "an attempt to test the broader opinion of the community."

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[252] *See* HELEN SUZMAN, IN NO UNCERTAIN TERMS 260-61 (1993).

[253] NEWSLETTER (Abortion Reform Action Group), May 21, 1982.

[254] *See* Van Oosten & Ferreira, *supra* note 131, at 421.

[255] NEWSLETTER, *supra* note 253

[256] *See* George Dommisse, *The South African Gynaecologists' Attitude to the Present Abortion Law*, 57 S. AFR. MED. J. 1044 (1980).

[257] *See* George Dommisse, *Current Attitudes of Members of SASOG to the Present Law on Abortion*, 74 S. AFR. MED. J. 702, 702-703 (1990).

According to the Minister, there were a total of 48,486 responses to the invitation.[258] In a political culture where the state took little notice of the views of the community, 48,000 submissions was all but unimaginable.[259] The Minister's response to this observation was to note that, in fact, there had been only 2,187 responses, consisting of 1,876 letters and memoranda and 311 petitions. She said that the figure of 48,846 had been arrived at by counting each name appearing on the lists attached to the petitions.[260]

The Minister claimed further that less than one percent of the submissions had been in favor of change to the law,[261] thereby implying that fewer than 500 people were against the provisions of the Act. But groups known to have made submissions and who supported changes to the Act had memberships far greater than 500. The South African Society of Obstetricians and Gynecologists had 350 members, Arag had 400, the Civil Rights League had 400, which was over 1,000 already. Beyond these bodies, other groups and individuals made submissions supporting amendment of the law.

But no changes were made to the Act, despite many criticisms and the justification for this by the Minister was, "pointed out that well-motivated submissions which can improve the present Act, without changing its basic principles, will be considered. A very good response from people from all walks of life and population groups was received. It was clear that no submission made any contribution to improve the Act."[262]

But one has to doubt that not one of the nearly 50,000 people who made "submissions" made any suggestion that was worth implementing. It is not surprising, therefore, that the following comment appeared in a women's magazine, "Nobody ever got anything by being polite in South African politics. We need a female equivalent of MK (the armed wing of the African National Congress) before Rina Venter alters legislation."[263]

The only case dealing directly with the Act and its implementation since the *Collop* case, was the 1993 case of *G v. Superintendent, Groote Schuur Hospital, and others*.[264] In this case, the applicant attempted to interdict her 14-year-old daughter from having an abortion after having been raped. The main

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[258] THE ARGUS, May 30, 1991.

[259] *See* author's comments *in* Pippa Green, *Abortion*, COSMOPOLITAN, Jan. 1991, at 80.

[260] *See id.*

[261] THE STAR, May 30, 1991.

[262] Letter from Minister Rina Venter to Pippa Green, *Cosmopolitan* (on file with author).

[263] C. Scott, COSMOPOLITAN, Aug. 1993, at 16, 17.

[264] 1993 (2) SA 255 (C).

questions for the court were whether the provisions of the Act had been met and whether consent for the abortion had been properly obtained in terms of the Child Care Act, which provided for alternatives where the guardian of the child would not, or could not, consent.[265] The financial involvement in the case of Pro-Life, an organization concerned with the protection of the fetus, marked the beginning of a trend which is likely to continue as the abortion issue is fought within the constitutional arena.[266]

G v. Superintendent, Groote Schuur Hospital, and others specifically involved the interpretation of two Acts of Parliament: the Abortion and Sterilization Act and the Child Care Act. Because parliamentary supremacy still existed, all the court was able to do was to determine whether the procedures called for by the Acts had been followed.

Some of the points raised by counsel for the applicant in the case and discounted by the court were the following:

> 1) that the Act applies to a woman and not a female under the age of 18;
>
> 2) that the certificates issued by the doctors were invalid because of discrepancies;
>
> 3) that the magistrate's certificate was invalid as the magistrate had issued it without having all the information about the case before him;
>
> 4) that no valid consent for the abortion had been obtained as the provisions of the Child Care Act had not been complied with.

The court disagreed with the objections raised by the plaintiff and permitted the abortion, finding that the provisions of the Abortion and Sterilization Act and the Child Care Act had been complied with.

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[265] *See* G v Superintendent, Groote Schuur Hospital, and others, 1993 (2) SA 255 (C) (Seligson, AJ).

[266] *See id.* at 258J.

IX. CONCLUSION

Abortion regulation in Apartheid South Africa was underpinned by racism and patriarchy which were the major reasons for the enactment of the 1975 abortion law. While the role of religion has been important, it should not be overstated in the light of the fact that the law did not give legal status to the fetus. The law only permitted certain rights to accrue to the fetus and then only if it was subsequently born alive. The fetus did not have legal personality until birth. This will be a crucial factor when the issue of whether a fetus is a person or not comes before the Constitutional Court.

The motivation for enactment of the 1975 South African abortion law was not protection of the fetus or assistance to women but rather the interests of the male medico-legal fraternity. White male doctors, white male lawyers, white male judges, white male members of the clergy and white male politicians have ensured that white male interests took precedence over those of women, for whom the abortion issue had much more relevance. White men controlled the process of adopting a new law and white men determined the content of the law. Their attitudes towards women were dismissive and sexist in the extreme.

The 1975 law was not, in the main, intended to impact on the black population. The attitudes of this major segment of the population and, indeed, the attitudes of women, were ignored. Where alternative attitudes were known, they were dismissed. This disregard of the views of the wider public's continued right into the 1990s.

Throughout the operation of the 1975 Abortion and Sterilization Act, public opinion was either ignored or inaccurately reported by the state. At the same time, little was done to assess the damage caused by the Act, which forced women to resort to the backstreets, to the detriment of their health and lives. The procedures required before an abortion could lawfully be performed were exceptionally stringent. The complexity of these procedures, coupled with the lack of privacy they impose and a concomitant disregard of a woman's need for secrecy, confidentiality and immediacy, perpetuates a continued dependency on backstreet abortion.

The statistics testify to the ineffectiveness of the Act, revealing that between 100,000 and 500,000 South African women underwent illegal abortions annually. The statistics also reflect the near impossibility of obtaining a legal abortion, both in terms of the grounds on which an abortion can legally be obtained and the extremely arduous procedures that had to be followed. Another aspect of these figures is what they show about the demographic distribution of those having abortions; the women who sought illegal abortions

in South Africa were mostly very young, poor, black women while the majority of women who obtained legal abortions were white women from more privileged socio-economic backgrounds.

The interim South African Constitution, concluded in 1993 and which entered into force on April 27, 1994, did not deal with questions such as abortion, because of disagreement between the negotiators of that Constitution. However, with such a legacy it is not surprising that the 1996 South African Constitution, while not expressly providing for the right to an abortion on request, provides a regulatory framework which will most likely be interpreted to include a woman's right to choose a safe, early abortion. One clause that will impact on abortion is the equality clause[267] which prevents discrimination on the grounds of pregnancy. The clause recognizes that although men and women have different biological roles in relation to reproduction, women are often disadvantaged by the social consequences of pregnancy and child-bearing.

The most relevant clause to abortion is Section 12(2), which deals with freedom and security of the person, which provides that:

> Everyone has the right to bodily and psychological integrity which includes the right;
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent.[268]

This provision is contained in the Constitution, as it was argued, that if an abortion section was contained in the constitution then, other then changes on the margins, the issue would largely be decided once and for all.[269]

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[267] Act 2 of 1975, § 9.

[268] *See generally* Jeremy Sarkin, *Abortion and the Courts, in* TOWARDS A FINAL CONSTITUTION: A GENDER PERSPECTIVE (S. Liebenberg ed., 1995).

[269] *See* Jeremy Sarkin, *Why There Should Be An Abortion Clause in the Final Constitution*, 4 S. AFR. J. HUM. RTS. 582 (1995).

The enactment of the Choice on Termination of Pregnancy Act[270] in 1996 was a breakthrough for gender equality and signaled the recognition of a woman's right to make decisions about reproduction and to control her own body.

[270] Act 92 of 1996.