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RECENT ABORTION LAW REFORMS (OR MUCH ADO ABOUT NOTHING)

HARVEY L. ZIFF

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Mr. Ziff received his B.S. degree in Economics from the Wharton School of Finance of the University of Pennsylvania in 1964. His interest turned to medical-legal problems at Stanford University Law School, where he received an LL.B. degree in 1967. While at Stanford, he was a member of the Board of Editors of the *Stanford Law Review*.

After surveying the statutory and case law governing abortions and considering the relevant social and medical issues, Mr. Ziff recommends unregulated medical control during the first sixteen weeks of pregnancy.

The law regulating induced abortion is one of the most widely discussed medical-legal problems of the present time. In recent years literature on the subject has become voluminous, stirring up intense emotional reaction and violent debate. Recently, four states have revised their laws, using the proposal in the Model Penal Code as a guide. This paper will critically evaluate the Model Penal Code proposal. Detailed examination will be made of the social problems which are responsible for recent legal revisions. This examination will be followed by (1) a description of the reasons why the reforms which have been passed are likely to be ineffective in dealing with the conditions which impelled their enactment, (2) an analysis of the legal problems involved in passing an effective reform, and (3) a proposal based on the preceding analysis.

The term "abortion" causes confusion because its meaning varies according to the profession which employs it. In medical usage, abortion generally refers to the premature expulsion from the uterus of the products of conception at a time before viability, *i.e.*, before the fetus has reached such a stage of development that it can live outside the uterus.¹ The twenty-sixth to the twenty-eighth week of pregnancy is regarded as the time of viability.² After that time, "miscarriage"³ or "premature labor"⁴ are the terms used by medical authorities for premature expulsion of the fetus.

¹ DORLAND, ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965).

² TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 21 (1936).

³ MALOY, MEDICAL DICTIONARY FOR LAWYERS 380 (1951).

⁴ DORLAND, *supra* note 1, at 789.

The law makes no distinction based on viability. Criminal abortion generally refers to any untimely delivery voluntarily procured with intent to destroy the fetus before natural birth.⁵ However, few criminal abortions are performed after the third month of pregnancy because abdominal operations are required after that time.⁶ Consequently, most criminal abortions are categorized correctly as abortions in medical terminology.

GENERAL STATE OF THE LAW

Every state in the union has a statute which makes the termination of pregnancy a crime. However, all but Louisiana provide exceptions by statute or case law.⁷ Most states are restrictive and limit legal abortion to the narrow grounds of necessity to "preserve"⁸ or "save"⁹ the life of

⁵ Many abortion statutes punish the attempt to induce an abortion. Thus the crime may be committed with a woman who is not pregnant. See, e.g., ILL. REV. STAT. ch. 38, §23-1 (1965).

⁶ TAUSSIG, *supra* note 2, at 327-40.

⁷ LA. REV. STAT. ANN. §14.87 (1950). There is an inconsistency in the Louisiana statutes, however. Performance of an abortion is not a cause for revocation of a medical license when "done for the relief of a woman whose life appears in peril. . . ." LA. REV. STAT. ANN. §37:1285.

⁸ ALAS. STAT. tit 11, §15.060 (1962).

DEL. CODE ANN. tit 11, §301 (1953).

FLA. STAT. ANN. §782.10 (1965).

GA. CODE ANN. §26-1101 (1953).

HAWAII REV. LAWS §309-3, 4 (1955).

IDAHO CODE ANN. §18-601 (1948).

IND. ANN. STAT. §10-105 (1956).

KAN. GEN. STAT. ANN. §21-437 (1964).

KY. REV. STAT. §436.020 (1962).

ME. REV. STAT. ANN. ch. 134, §9 (1954).

MICH. STAT. ANN. §28.204 (1962).

MISS. CODE ANN. §2223 (1956).

MONT. REV. CODE ANN. §94-401 (1947).

NEB. REV. STAT. §28-405 (1965).

the pregnant woman. Some states permit abortions to "preserve"¹⁰ or "save"¹¹ the life of either the pregnant woman or the child.

A few states do provide wider grounds for justifiably terminating pregnancy. Thus Alabama and the District of Columbia permit abortions to preserve the life or health of the mother,¹² and New Mexico legalizes abortions "to preserve the life of the woman or to prevent serious or permanent bodily injury" to her.¹³

Although most states carefully regulate the grounds on which pregnancy may be justifiably terminated,¹⁴ the majority, apparently, permit anyone to perform the operation.¹⁵ Prior to 1967, only ten states and the District of Columbia required that a physician or surgeon perform the operation.¹⁶

- N.H. REV. STAT. ANN. §583:13 (1955).
 N.Y. REV. PEN. LAW §§125.05; 125.40; 125.45 (1967).
 N.D. CENT. CODE §12-25-01 (1939).
 OHIO REV. CODE ANN. §2901.16 (1964).
 OKLA. STAT. ANN. tit. 21, §861 (Supp. 1967).
 R.I. GEN. LAWS ANN. §11-3-1 (1956).
 S.D. CODE §13-3101 (1960).
 TENN. CODE ANN. §39-301 (1955).
 UTAH CODE ANN. §76-2-1 (1953).
 VT. STAT. ANN. tit. 13, §101 (1958).
 WYO. STAT. ANN. §6-77 (1957).
⁹ ARIZ. REV. STAT. ANN. §13-211 (1956).
 ARK. STAT. ANN. §41-301 (1964).
 ILL. REV. STAT. ch. 38, §23-1 (1965).
 IOWA CODE §701.1 (1950).
 N.J. REV. STAT. §2A:87-1 (1953), as interpreted in *State v. Brandenburg*, 137 N.J.L. 124, 58 A. 2d 709 (1948).
 TEX. PEN. CODE §§1191, 1196 (1961).
 WIS. STAT. §940.04 (1961).
¹⁰ CONN. GEN. STAT. REV. §53-29 (1958).
 MINN. STAT. §617.18 (1963).
 MO. STAT. ANN. §559.100 (1953).
 NEV. REV. STAT. §201.120 (1961).
 S.C. CODE ANN. §§16-82, 16-83 (1962).
 WASH. REV. CODE ANN. §9.02.010 (1961).
¹¹ VA. CODE ANN. §18.1-62 (1960).
 W. VA. CODE ANN. §61-2-8 (1966).
¹² ALA. CODE tit. 14, §9 (1959).
 D.C. CODE ANN. §22-201 (1967).

For states which permit abortions when "necessary to preserve" the life or health of the mother see MASS. GEN. LAWS ANN. ch. 272, §19 (1956), as interpreted in *Commonwealth v. Brunelle*, 341 Mass. 675, 171 N.E. 2d 850 (1961); ORE. REV. STAT. §163.060 (1965).

¹³ N.M. STAT. ANN. §40-A-5-3 (1953).
¹⁴ But see the Pennsylvania statute which prohibits only "unlawful" abortions, and has not been judicially interpreted. PA. STAT. ANN. tit. 18, §4719 (1963). On Pennsylvania law, see Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172, 184-86 (1964).

¹⁵ Ala., Alaska, Ariz., Conn., Del., Fla., Ga., Hawaii, Idaho, Ind., Iowa, Kan., Ky., Me., Mich., Mo., Minn., Mont., Neb., Nev., N. D., Ohio., Okla., R. I., S. C., S. D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wyo. These statutes are cited in notes 8-12 *supra*.

¹⁶ D.C., Ark., Ill., Me., Mass., Miss., Mo., N. M.,

Recent Legislative Revisions

Since 1967, Colorado, North Carolina, California, and Maryland have revised their criminal laws related to abortion. Each of these states has generally followed the reforms drafted by the American Law Institute.¹⁷ The following discussion will focus predominantly on the Model Penal Code provisions since it is likely that other states which are contemplating reforms will also use the A.L.I. proposal as a guideline.

The Model Penal Code provisions maintain the general state of the law in that termination of pregnancy continues to be unlawful, unless justified by particular circumstances. However, only a licensed physician may perform an abortion with justification. His reasons for terminating a pregnancy may be based upon any of four grounds—if he believes that there is a substantial risk that (1) continuance of the pregnancy would gravely impair the physical or mental health of the mother, (2) the child would be born with grave physical or mental defect, (3) the pregnancy resulted from rape, or (4) the pregnancy resulted from incest or other felonious intercourse. In addition, the written concurrence of two physicians on the designated grounds must be filed, either in the hospital where the operation is to be performed or in any other place designated by law.

The new Colorado law provides for termination of pregnancy on the grounds recommended by the Model Penal Code, but requires the unanimous approval of a "special hospital board of three physicians" who are staff members of the hospital where the operation is to take place.¹⁸ North Carolina provides for termination on the Model Penal Code grounds, but limits the operation to women who have been residents for four months, and who have approval of three doctors not engaged in joint private practice.¹⁹ California does not permit potential defectiveness of the child as an independent basis for termination, but does allow termination for the other grounds specified in the Model Penal Code. However, no terminations are permitted after the twentieth week of pregnancy. Prior to that time, approval of a hospital board must be obtained in the following manner. Between the thirteenth and twentieth

N.Y., Ore., Wis. These statutes are cited in notes 8-13 *supra*.

¹⁷ MODEL PENAL CODE §230.3 (Proposed Official Draft 1962).

¹⁸ COLO. REV. STAT. ch. 40, §2-50 (1967).

¹⁹ N.C. GEN. STAT. §14-45.1 (1967).

week, approval of a hospital board of at least three licensed physicians is required. Prior to the thirteenth week of pregnancy, a board of at least two licensed physicians is required. Where the board consists of not more than three physicians, unanimous approval is required.²⁰

These revisions have been hailed as momentous steps in combating the social problems caused by the typical repressive abortion statute. For example, Governor John A. Love, on signing the Colorado bill into law, declared that their new law is "designed to do something about areas of suffering and abuse which have been of concern to a great many people for a great period of time."²¹ The following discussion will demonstrate that these "reforms" fall far short of solving problems with which they reasonably should be expected to deal.

SOCIAL PROBLEMS UNDERLYING THE NEED FOR REFORM

Although the evils resulting from the repressive abortion laws prevalent throughout the United States have been asserted since 1936,²² the thorny political nature of the subject has retarded official recognition. "Laws regulating sexual behavior have no peer at stirring up intense emotional reaction; and when the element of life itself is involved, the reaction is compounded. Abortion is perhaps the only problem in which attitudes toward sexual activity itself and toward life and being are in seething turmoil."²³

Understandably, no legislator wishes to be denounced from the pulpit as a "murderer in the womb."²⁴ To minimize the adverse reaction to their proposals, advocates of reform emphasize the following distressing social conditions which indicate the need for revision of the law:

Extent of Illegal Abortions

The starting point for a discussion of the abortion problem is the extent to which the present

law is being violated. Generally accepted is the estimate that one million illegal abortions are performed in the United States each year.²⁵ Based on this estimate, approximately one out of every five pregnancies in the United States terminates in illegal abortion.²⁶ These figures are discounted by opponents of reform who readily point out the impossibility of obtaining accurate statistics in this area.²⁷ They note that the same authorities who formulated the one million figure also stated that a plausible estimate of the frequency of induced abortion in the United States could be as low as two hundred thousand, and that there is no objective basis for the selection of a particular figure.²⁸

Even if one accepts the lower estimates, the statistics do establish that a serious problem exists.²⁹ One author reports that police consider criminal abortion to be the third largest illegal endeavor in the country, following only gambling and narcotics.³⁰ The potent combination of strong demand and opportunity for exploitation make for potentially high profits. "The terrific frustration of a woman who wants a child and cannot have one . . . does not compare with the intensity of emotion and determination of the woman who does not want a child, is pregnant, and *won't have it*."³¹ At the same time, a woman who goes to an abortionist is really an applicant for a favor;³² consequently, she rarely will leave his office with much more than cab fare.³³

The nature of the business requires that it be well organized, although illicit abortion services apparently are not controlled by any single organization. The professional abortionist needs an office, medical equipment, and some assistants. Customers must be able to locate him, even though

²⁵ BATES & ZAWADSKY, *CRIMINAL ABORTION* 3 (1964) [hereinafter cited as *CRIMINAL ABORTION*].

²⁶ *Ibid.*

²⁷ See Ratner, *Abortion: A Public Health Viewpoint*, 131 ILL. MED. J. 687 (1967).

²⁸ *ABORTION IN THE UNITED STATES* 180 (Calderone ed. 1958) [hereinafter cited as *ABORTION IN THE UNITED STATES*].

²⁹ Kleegman, in *ABORTION IN THE UNITED STATES* 104.

³⁰ See SCHUR, *CRIMES WITHOUT VICTIMS* 25 (1965) [hereinafter cited as *CRIMES WITHOUT VICTIMS*].

³¹ Kleegman, in *ABORTION IN THE UNITED STATES* 113. Extremely desperate women have been known to shoot themselves in the abdomen in an effort to terminate their pregnancy. Kloss, *Fatal Gunshot Wound of Foetus Inflicted by the Mother*, 4 AUST.-NEW ZEAL. J. OBSTETRICS & GYNECOLOGY 125 (1964).

³² *CRIMINAL ABORTION* 55.

³³ *Id.* at 58.

²⁰ CAL. PEN. CODE §274, amended by CAL. HEALTH & SAFETY CODE §25950-54 (1967).

²¹ Chicago Sun-Times, Apr. 26, 1967, at 8, col. 1.

²² TAUSSIG, *supra* note 2.

²³ George, *Current Abortion Laws: Proposals and Movements for Reform*, in *ABORTION AND THE LAW* 1 (Smith ed. 1967) [hereinafter cited as *ABORTION AND THE LAW*].

²⁴ Address by Rev. Lester Kinsolving, First Annual Dinner Meeting of the Illinois Citizens for the Medical Control of Abortion, Nov. 16, 1967, Chicago, Illinois [This organization is hereinafter referred to as I.C.M.C.A.] *ABORTION AND THE LAW* 226.

he must maintain a certain amount of anonymity. Intervention by the police must be avoided as well.

The court records in New York reveal the operations of two complex organizations known as abortion "mills" and "rings."³⁴ The mill is comprised of one or several abortionists working regularly in a single locale and aborting a dozen women daily. The less common ring consists of "interacting abortionists or mills working intermittently at several occasionally changing locations and aborting an even more considerable number of women daily."³⁵ The rings are clandestine and swiftly-operating organizations. They may give the woman a code number by telephone and order her to meet the abortion contact in a parking lot. There, the contact may blindfold her and give her sleep-inducing drugs. After the operation he will return her to the parking lot in less than an hour.³⁶

A sizeable portion of the price charged goes to intermediaries because the successful abortionist requires both business and medical assistants. He needs a shrewd secretary who can gauge the financial status of an applicant in order to charge the highest possible fee.³⁷ He requires channels to direct patients to him. Physicians and druggists are the primary source of referral;³⁸ others include women formerly aborted and satisfied with the results, taxi-drivers, and bell-boys.³⁹ Fees are split with all of these "feeders" except the former patients. The abortionist also has a business agent to handle contacts with the landlord, payment of salaries, bills, bribe money and split fees. The agent is usually a relative or a close friend who can be trusted with this confidential position.⁴⁰

Few police officers have any illicit connection with abortionists; however, some do take advantage of the opportunities for extorting a known abortionist who is working in a fixed location. A common practice is to send a decoy, willing to submit to the operation, to the abortionist. The officers stop her as she attempts to leave the office. After "protesting" the legitimate nature of her visit, she "breaks down" and "confesses." The abortionist, who cannot know whether the

raid is "legitimate," has no choice but to agree to bribe the officers.⁴¹

The activities just described should not be tolerated even if one were to assume that illegal abortions are performed in a hygienic manner. The glaring need for adequate revision of the law thus becomes obvious when the suffering inflicted on women as a result of these activities is revealed.

Illegal abortions are a significant contributor to injuries suffered by women. Early commentators estimated five to ten thousand deaths per year are caused by abortions.⁴² As the use of antibiotics and increased care has become more common,⁴³ a lower figure of one thousand deaths per year may now be more accurate.⁴⁴ Nevertheless, recent studies in California⁴⁵ and New York⁴⁶ indicate that criminal abortion remains responsible for more maternal deaths than any other cause. The most common victims are married housewives, with several children, who attempted to abort themselves.⁴⁷

The techniques which cause death are numerous and variable. Several of these are often combined, each contributing to the fatality. Oral medications are commonly followed by direct assaults upon the uterus, apparently after the drugs seemed ineffective.⁴⁸ These medications range from Castor oil to turpentine.⁴⁹ Fluids injected into the uterine canal include pine oil, lysol, soap, and alcohol.⁵⁰ Among the rigid objects forced into the uterus are chopsticks, copper wire, curtain rods, knitting needles, and coat hangers.⁵¹ Air is sometimes forced into the uterus by using a catheter, plastic straw, or football pump.⁵² Sepsis, *i.e.*, infection, is the basic medical cause of death.⁵³ Other medical causes of death, which may be found in combination with each other or with sepsis, include shock, hemorrhage, air or fat embolism, and poisoning.⁵⁴

⁴¹ *Id.* at 69.

⁴² CRIMES WITHOUT VICTIMS 28.

⁴³ *Ibid.*

⁴⁴ BARNO, *Criminal Abortion Deaths*, 98 AM. J. OBSTETRICS & GYNECOLOGY 357 (1967). *But see id.* at 364.

⁴⁵ Montgomery & Hammersly, *Maternal Deaths in California, 1957-62*, 100 CAL. MED. 412, 415 (1964); Fox, *Abortion Deaths in California*, 98 AM. J. OBSTETRICS & GYNECOLOGY 645 (1967).

⁴⁶ Gold, Erhardt, Jacobnizer & Nelson, *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM. J. PUB. HEALTH 964, 965 (1965).

⁴⁷ Fox, *supra* note 45, at 649-51.

⁴⁸ *Id.* at 649.

⁴⁹ *Id.* at 648.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Id.* at 650.

⁵⁴ GRADWOHL, *LEGAL MEDICINE* 814 (1954).

³⁴ *Id.* at 51.

³⁵ *Ibid.*

³⁶ Lader, *The Scandal of Abortion Laws*, N.Y. Times, Apr. 25, 1965, §6 (Magazine), at 32, 59-60.

³⁷ CRIMINAL ABORTION 52. Even if the price had been agreed upon previously, the abortionist's secretary will make every effort to raise the price. *Id.* at 56.

³⁸ *Id.* at 53.

³⁹ *Id.* at 55.

⁴⁰ *Id.* at 52.

Even though the aborted woman usually survives, almost all abortions performed by persons other than qualified physicians cause medical complications which require treatment.⁵⁵ As in fatal cases, the most common after-effect is sepsis because the uterus is a delicate organ which is highly susceptible to infection.⁵⁶ Most women who induce their own abortions fail to take proper hygienic precautions. Mill abortionists, also, often omit elementary aseptic techniques in order to save time in performing operations and increase profits.⁵⁷ To treat the infections which result, forty per cent of women admitted to hospitals after improper abortions require blood transfusions; the average hospital stay is seven days.⁵⁸ In some cases good medical procedure dictates an immediate and total hysterectomy without a delay to assess the effectiveness of antibiotic therapy.⁵⁹ All cases of septic abortion call for early diagnosis, treatment, and meticulous supportive care.⁶⁰

The amount of pain and humiliation inflicted by abortionists is staggering. Although physician-abortionists should be capable of operating in a professional manner without causing serious complications, the physician who has become a professional abortionist is almost invariably a deviate. Some are alcoholics who operate with disastrous results while they are intoxicated,⁶¹ and others are sexual perverts,⁶² as are many non-physician abortionists.⁶³ Many criminal abortionists have little or no medical training, and

come from the ranks of elevator operators, barbers, and unskilled laborers.⁶⁴ Posing as physicians, they may attempt to perform a standard hospital operation known as a dilatation and curettage, or "D & C." The surgeon dilates the cervix, introduces a long, semi-sharp, spoon-shaped instrument called a curette, and scrapes the uterine cavity. Gentleness is the key to a proper operation;⁶⁵ only a physician with obstetrical training is qualified to evacuate the uterus.⁶⁶ Unskilled hands can easily damage the uterus and other nearby organs when they attempt this delicate procedure.⁶⁷

The lack of medical training is compounded because anesthetics are seldom used, another attempt to complete operations quickly, and also a precaution against a medical accident resulting in complications or homicide.⁶⁸ Accordingly, the following account of an abortion is understandable:

Q. What did you feel at that time?

A. Well, there was so much pain—and I just don't—I can't explain it really. I just know it was like my whole stomach was coming out.⁶⁹

When the current laws were originally enacted, all abortions were dangerous procedures.⁷⁰ Improvements have taken place in medical practice since that time. The D & C operation will be quite harmless when performed in a hospital under sanitary conditions today. The renowned physician Alan F. Guttmacher stated:

There is little scientific evidence that in the United States today . . . any marked deterioration in the physical condition of women, aborted for therapeutic reasons in a hospital setting, will take place. . . . If the operation is properly performed so that no infection or laceration of the cervix results, it will have no effect on either the health of the woman or her reproductive future.⁷¹

In addition to the D & C, an even safer, and almost painless, method of performing abortions in the early stages of pregnancy recently has been developed. In this procedure, the vacuum aspi-

⁵⁵ Cases involving criminal intervention "must be presumed infected." Moritz & Thompson, *Septic Abortion* 95 AM. J. OBSTETRICS & GYNECOLOGY 46, 47 (1966).

⁵⁶ The risk of infection is ten times greater in abortion cases than in natural childbirth, since in every case the uterine cavity must be invaded, whereas at childbirth this is rarely the case. TAUSSIG, *supra* note 2, at 186.

⁵⁷ CRIMINAL ABORTION 58.

⁵⁸ Goodno, Cushner, & Molumphy, *Management of Infected Abortion*, 85 AM. J. OBSTETRICS & GYNECOLOGY 16, 17-18 (1963).

⁵⁹ Decker & Hall, *Treatment of Abortion Infected with Clostridium Welchii*, 95 AM. J. OBSTETRICS & GYNECOLOGY 394, 398 (1966).

⁶⁰ Moritz & Thompson, *supra* note 55, at 53.

⁶¹ CRIMINAL ABORTION 95. Occasionally a physician will become a professional abortionist out of a sincere concern for the well-being of women who adamantly wish to terminate an unwanted pregnancy. One such man is Dr. G. Lotrell Timanus, now retired, who performed over 5000 abortions with only two deaths. He had referrals from 353 physicians. Star, *The Growing Tragedy of Illegal Abortion*, LOOK MAGAZINE 149, 153 (Oct. 19, 1965).

⁶² CRIMINAL ABORTION 95, 177.

⁶³ See DUFFY & HIRSHBERG, SEX AND CRIME 136-44 (1965).

⁶⁴ CRIMINAL ABORTION 35.

⁶⁵ TAUSSIG, *supra* note 2, at 193.

⁶⁶ *Id.* at 238.

⁶⁷ Shenoi, *Massive Removal of Small Bowel During Criminal Abortion*, 2 BRIT. MED. J. 929 (1966).

⁶⁸ CRIMINAL ABORTION 58.

⁶⁹ *Id.* at 4.

⁷⁰ Editorial, 199 J.A.M.A. 211 (1967). See STORER, WHY NOT? A BOOK FOR EVERY WOMAN 36 (1866).

⁷¹ Guttmacher, *The Shrinking Nonpsychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12 (Rosen ed. 1954).

ration method, a tube connected to a suction pump is inserted into the uterus. The uterine contents are then evacuated by negative pressure from the pump.⁷² Dilatation is often unnecessary, thereby eliminating the need for an anesthetic in many cases.⁷³ In contrast to the incidence of perforation of the uterus in normal curettage which ranges from 0.09 per cent to 6 per cent,⁷⁴ the chance of perforation with vacuum aspiration is virtually 0 per cent; one study reported no cases of perforation in 4,000 pregnancy terminations.⁷⁵ Furthermore, the entire procedure requires only one to three minutes.⁷⁶

Obviously, all the suffering women endure because of the restrictive laws which compel them to perform crude and lethal operations on themselves, or submit to the butchery and lechery of criminal abortionists, is unnecessary. If sanitary facilities were made available to these women, this misery would be eliminated.

Lack of Enforcement of Present Laws—the Problem of Crime Without Victims

The abortion statutes have been as unsuccessful in prohibiting abortions as the eighteenth amendment was in eradicating drinking.⁷⁷ Contributing to this situation is the historical lack of vigorous enforcement of these laws. Alabama had 40 prosecutions and 5 convictions in the period between 1892 and 1935.⁷⁸ In a similar period Michigan recorded 40 convictions.⁷⁹ Commenting on the California law, which at that time restricted abortions to those necessary to save the life of the pregnant woman, Alfred Kinsey stated:

The chief thing that the abortion laws do is to provide a basis for yellow journals to put on a campaign once in a while. Then you may see twenty abortionists convicted in a single week, and there may be at a given time thirty or forty abortionists in prison in the state, as a result of

⁷² Peretz, Grunstein, Brandes, & Paldi, *Evacuation of the Gravid Uterus by Negative Pressure*, 98 AM. J. OBSTETRICS & GYNECOLOGY 18 (1967); Vlawow, *The Vacuum Aspiration Method for Interruption of Early Pregnancy*, 99 AM. J. OBSTETRICS & GYNECOLOGY 202 (1967).

⁷³ Kerslake & Casey, *Abortion Induced by Means of the Uterine Aspirator*, 30 OBSTETRICS & GYNECOLOGY 35, 36 (1967).

⁷⁴ *Id.* at 38.

⁷⁵ Vojta, *A Critical View of Vacuum Aspiration*, 30 OBSTETRICS & GYNECOLOGY 28, 31 (1967).

⁷⁶ Peretz, *et al.*, *supra* note 72, at 21.

⁷⁷ Moore, *Antiquated Abortion Laws*, 20 WASH. & LEE L. REV. 250, 251 (1963).

⁷⁸ 29 J. CRIM. L. & C. 595, 596 (1937).

⁷⁹ Note, 35 COLUM. L. REV. 87, 91 (1935).

the sudden application of a law that is ordinarily a dead letter.⁸⁰

The most crucial problem involved in enforcing laws prohibiting abortion, assuming officials are interested in enforcing these laws, is the lack of a complainant. Even after an extremely frightening or distasteful experience, a woman is unlikely to file a complaint which would surely require her testimony in open court, exposing her willing participation in an illicit activity.⁸¹ Therefore, methods other than direct reporting by the aborted woman must be utilized to develop a case. The most effective device for obtaining the necessary evidence against a professional abortionist is the well-timed, well-organized raid.⁸² Prior to the raid, lengthy surveillance must be undertaken in order to apprehend the abortionist in the course of the operation. Often, medical advisors and female assistants accompany the police to direct the collection of evidence and to calm the woman. Even these expensive and time consuming efforts may be thwarted. An elaborate organization may equip its office with an alarm which, in combination with a secret escape door, permits the aborted woman and soiled instruments to be removed from the scene, even as the police enter all known entrances to the building.⁸³

Furthermore, the collection of convincing evidence does not assure convictions. The courts distinguish between lay abortionists and physicians. Sympathetic juries are reluctant to convict doctors,⁸⁴ and judges often impose suspended sentences rather than prison terms.⁸⁵ Also, successful prosecutions are commonly reversed on

⁸⁰ ABORTION IN THE UNITED STATES 39.

⁸¹ CRIMINAL ABORTION 92.

⁸² CRIMES WITHOUT VICTIMS 37.

⁸³ CRIMINAL ABORTION 65.

⁸⁴ Leavy, *Criminal Abortion: Facing the Facts*, 34 L.A. BAR BULL. 355 (1959). The experience in Chicago between 1950 and 1965 does not support this contention very strongly. Although the conviction rate for non-physicians was 54% while the conviction rate for physicians was 29%, the difference was in large part due to the much greater proportion of guilty pleas entered by nonphysicians. For those who went to trial, the conviction rate for nonphysicians was 39% while the rate for physicians was 31%. Nevertheless, convictions are difficult to obtain even when guilty pleas are included. Only 49% of all defendants arrested for abortion offenses were found guilty. (Information obtained from the files of the Chicago Crime Commission.)

⁸⁵ ABORTION IN THE UNITED STATES 37. The experience in Chicago does not support this assertion at all. Of 8 physicians who were found guilty after trial, 5, or 62%, were sentenced to prison. Of 19 nonphysicians who were found guilty after trial, 11, or 57%, were given prison terms. However, for all defendants, in-

appeal. One scandal ridden Illinois case involved a "million dollar ring" which operated in downtown Chicago around 1940. For some time prior to their arrest, the abortionists had been bribing several members of the State Attorney's office. The Illinois Supreme Court was forced to reverse the convictions obtained against the illegal abortionists because a search and seizure of records had been made without a warrant. According to the Court, the violation appeared to be deliberate because there had been enough evidence to secure a warrant at least a week before the raid.⁸⁵ Understandably, critics feel the effort involved in developing a successful case against an abortionist is "out of proportion to the results achieved."⁸⁷

Disregard of Legal Restrictions by Reputable Physicians

Possibly the most significant impetus to legal reform has been the classic study, conducted by Stanford Professors Packer and Gampell, which demonstrated that reputable hospitals and physicians knowingly perform illegal abortions.⁸⁸ Packer and Gampell asked twenty-nine representative California hospitals to indicate whether they would perform abortions in eleven hypothetical situations. These situations included cases clearly illegal and cases of dubious legality under the California law which, at that time, allowed abortions only if necessary to save the life of the pregnant woman. No case, not even the one based upon purely socio-economic reasons, was uniformly rejected. There was a significant diversity of opinion among the hospitals as to the appropriate medical standard for the performance of therapeutic abortions.⁸⁹ The most commonly approved justifications are embodied in the Model Penal Code proposal.

Physicians have also indicated their desire for relaxation of the law in surveys conducted among members of the profession. In a survey of New York obstetricians, an overwhelming majority favored legalization of abortions when performed for the reasons set out in the Model Penal Code.⁹⁰

cluding those who plead guilty and those whose cases were dismissed, only 14% were sentenced to prison terms.

⁸⁵ *People v. Martin*, 382 Ill. 192, 46 N.E.2d 997 (1942).

⁸⁷ CRIMINAL ABORTION 6.

⁸⁸ Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959).

⁸⁹ *Id.* at 447.

⁹⁰ Hall, *New York Abortion Law Survey*, 93 AM. J. OBSTETRICS & GYNECOLOGY 1182 (1965).

A poll of California obstetricians and gynecologists revealed similar sentiments. Additionally, thirty-four per cent of the California physicians replied that the question of abortion is a purely personal matter which should be totally outside the scope of the law.⁹¹ Moreover, half admitted having performed abortions which violated the criminal code which, at that time, limited abortions to those necessary to save the life of the mother.⁹² A nationwide poll recently revealed that 86.9 per cent of physicians throughout the United States favor some liberalization of the law, 26.6 per cent approving of abortion for socio-economic reasons, and 14.3 per cent approving of abortion at the request of the woman, for any reason.⁹³

Physicians, feeling strongly that the law is unfair, and knowing that it is rarely enforced, often disregard the law on the assumption that they are best qualified to make decisions in this area. For using their best medical judgment, many physicians may lose their license to practice medicine. This could occur because the vast majority of states authorize revocation of a physician's license when he has committed, or participated in, a criminal abortion.⁹⁴ The astounding magnitude of the problem is clear when one considers that physicians perform between fifty⁹⁵ and eighty per cent⁹⁶ of all abortions.

Threats of license revocation are real.⁹⁷ Recently, proceedings were instituted against several prominent San Francisco physicians for performing abortions on women who had contracted German measles during the early stages of their pregnancy.⁹⁸ The physicians had assumed that the law was a "dead letter," but they were wrong.⁹⁹

⁹¹ *Obstetricians Back Liberalized Abortion Law in California*, 34 MOD. MED. 24 (Dec. 1966).

⁹² *Ibid.*

⁹³ *Abortion: The Doctor's Dilemma*, 35 MOD. MED. No. 9, at 12 (1967).

⁹⁴ See statutes compiled in George, *Current Abortion Laws: Proposals and Movements for Reform*, in ABORTION AND THE LAW 1, 17.

⁹⁵ TAUSSIG, *supra* note 2, at 388.

⁹⁶ GEBHARD, POMEROY, MARTIN & CHRISTENSON, *PREGNANCY, BIRTH & ABORTION* 198 (1958) [hereinafter cited as *PREGNANCY, BIRTH & ABORTION*]. But see *ABORTION IN THE UNITED STATES* 65, where it is claimed that the majority are self-induced.

⁹⁷ Russell & Chayet, *Abortion Laws and the Physician* 276 NEW ENG. J. MED. 1027, 1028 (1967). Medical journals often advise physicians to be careful in obeying the law. *E.g.*, *Abortion, Protect Yourself*, 65 WIS. MED. J. 28 (Jan. 1966).

⁹⁸ When German measles is contracted before the twelfth week of pregnancy, there is a 30% to 50% chance that the offspring will suffer from severe congenital abnormalities if the pregnancy is carried to

Singling out a few physicians for violating a widely disregarded, rarely enforced, and unpopular law seems inherently unfair. The lack of notice may raise due process questions of constitutional dimension. Even when local authorities do not intend to enforce restrictive statutes, "physicians may well find it galling that their freedom from criminal and civil liability turns merely on the nonenforcement of law."¹⁰⁰ Undoubtedly, these unenforced laws inhibit physicians from using their best medical judgment. Such statutes provide inadequate criteria by which physicians can govern their actions.

"Dead letter" laws, far from promoting a sense of security in the community, which is the main function of penal law, actually impair that security by holding the threat of prosecution over the heads of people whom we have no intention to punish."¹⁰¹ From this perspective, a revision of the law which would bring it into conformity with accepted medical judgment and practice is both desirable and necessary.

Other Considerations Indicating Need for Revision

Those who seek to relax restrictions on the performance of abortions by physicians often emphasize the problems just described. However, other consequences of the present laws quite possibly constitute more compelling justifications for revising the abortion statutes.

1. *Inhibition of Vital Medical Research.* An extremely important problem facing this nation and the world is the population explosion. Two-thirds of the world's people are underfed or undernourished. Among low-income, poorly educated parents, 54 per cent of their children were unplanned and unwanted. Usually they wanted two or three children, and had four to six. Even in the United States approximately 50 million people are living at the poverty or near poverty level. Of these, 22 million are children, nearly one-third of the nation's youth.¹⁰² Unless inexpensive and effective methods of birth control are developed

and made available, millions of people will be forced into a low standard of living and, perhaps, starvation.

One of the more promising areas of birth control research has been in the development of the intrauterine contraceptive device, or IUD. These devices include a ring made of stainless steel spring, a polyethylene spiral, a double-S loop of plastic, and a double triangle of plastic.¹⁰³ Insertion by a physician takes only a minute, and it will remain effective until removed. In Japan, women have been known to have them in place for twenty years or more. They have never been known to cause a malignant cervical disease, and fertility is unimpaired after the device is removed. The IUD's fulfill the requirements for widespread use among the groups who need them most because they are inexpensive and require no daily attention.¹⁰⁴

There is good reason to believe that the IUD does not actually *prevent* pregnancy, but causes an early termination after conception by preventing,¹⁰⁵ or disrupting,¹⁰⁶ implantation. After conception, the fertilized ovum travels down the fallopian tubes, enters the uterus and nidates, or affixes, itself in the uterine tissue. The time between fertilization and implantation is estimated to be seven or eight days.¹⁰⁷ When implantation is prevented or disrupted, the fertilized ovum will be discharged, and the pregnancy terminated.

Assuming these devices work as theorized, insertion alone would clearly violate abortion laws of the many states which define the crime in terms of attempt because such statutes do not require a showing that the woman is pregnant. Proof problems are probably insurmountable when the statute requires a showing that the woman is pregnant; all practical methods used to

term. Rosen, *Psychiatric Implications of Abortion, A Case Study in Social Hypocrisy*, in *ABORTION AND THE LAW* 72, 81.

⁹⁹ The National Observer, May 30, 1966, at 3, col. 1.

¹⁰⁰ Gampell, *Legal Status of Therapeutic Abortion and Sterilization in the United States*, 7 *CLIN. OBSTETRICS & GYNECOLOGY* 22, 27 (1964).

¹⁰¹ MODEL PENAL CODE §207.11, Comment at 151 (Tent. Draft No. 9, 1959).

¹⁰² NATIONAL HEALTH EDUCATION COMMITTEE, *WHAT ARE THE FACTS ABOUT THE POPULATION CRISIS?* (1966).

¹⁰³ Meloy, *Pre-Implantation Fertility Control and The Abortion Laws*, 41 *CHI.-KENT L. REV.* 183, 185 (1964). See generally SEGAL, SOUTHAM & SHAFER (eds.), *INTRAUTERINE CONTRACEPTION, PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE (Excerpta Medica, International Congress Series No. 86, 1965)*.

¹⁰⁴ *Clinical Research Calms Fears, Raises Hopes About Intrauterine Contraceptive Devices*, 188 *J.A.M.A. MED. NEWS* No. 10, at 40 (1964).

¹⁰⁵ Bengtson & Mouvad, *The Effect of the Lippes Loop on Human Myometrial Activity*, 98 *AM. J. OBSTETRICS & GYNECOLOGY* 957, 964 (1967).

¹⁰⁶ Panchalingham, *Is the Contraceptive Intrauterine Device an Abortifacient?*, 1 *LANCET* 1391 (June 1965). But see Sammour, *Combined Histologic and Cytologic Study of Intrauterine Contraception*, 98 *AM. J. OBSTETRICS & GYNECOLOGY* 946 (1967).

¹⁰⁷ BENSON, *HANDBOOK OF OBSTETRICS & GYNECOLOGY* 53 (1964).

determine early pregnancy require the physiological state present *after* implantation.¹⁰⁸ However, prosecution is still possible under abortion-related statutes which prohibit the advertisement, manufacture, transportation, distribution, and sale of abortifacients.¹⁰⁹

Swedish scientists have recently developed a "morning after" pill which would cause a woman to menstruate even if conception had taken place.¹¹⁰ Use of this pill also would be illegal. One should seriously question the wisdom of laws which permit the manufacture and use of a pink contraceptive pill, but penalize the manufacture and use of a green contranidation pill, when both are ingested by women in identical fashion. A simple distinction between abortion during early pregnancy and contraception is no longer possible, but present laws fail to recognize this.¹¹¹

2. *Economic Discrimination.* The difference between an illegal and a therapeutic abortion is \$300 and knowing the right person.¹¹² Any woman with sufficient funds can have her pregnancy safely terminated. A round trip flight from Chicago to Japan, where abortions have been legal since 1948, costs \$953.00. In Japan, more than eight thousand physicians are licensed to perform the operation, which costs between \$3 and \$10. The woman can have the operation performed by a recognized gynecologist, and stay in the hospital for one to three days for \$100 to \$150.¹¹³ An estimated ten thousand women also fly to San Juan, Puerto Rico, where abortions are illegal, but readily available.¹¹⁴ American abortion applicants in Sweden uniformly come from upper economic and educated classes.¹¹⁵ In the United States, the private, rather than the ward, patient is far more likely to obtain a hospital-approved abortion.

Ninety-three per cent of all New York City [therapeutic abortions] . . . in the last few years were performed on white patients, almost all in private rooms at voluntary hospitals, who could enlist the aid of prominent doctors to support their applications. Only 7 per cent went to Negroes, Puerto Ricans, and others.¹¹⁶

Most legal abortions are justified on psychiatric grounds.¹¹⁷ While wealthier women can afford the services of a psychiatrist who will report that the pregnancy poses a serious threat to the woman's life, the cost of such opinions are beyond the means of most women.¹¹⁸ Surely, however, the wealthy do not *need* abortions more than the poor.

The results of this economic discrimination are reflected in the grim statistics on abortion mortality. In New York, twice as many deaths caused by abortion occur among nonwhites as among whites.¹¹⁹ In California, women from low income backgrounds are the most frequent fatalities from improper abortions.¹²⁰ This double standard, nurtured by present statutes, is incompatible with any notion of justice.¹²¹ It reflects poorly on the law's concern with the welfare of disadvantaged citizens at a time when millions of dollars are being spent to equalize the medical care available to all people in this country.

3. *Miscellaneous Problems.* Unwanted pregnancies cause certain problems which are difficult to categorize. Almost 300,000 illegitimate births occur in the United States each year, and the number continues to increase. Undoubtedly, many of the women did not want their pregnancies. The babies frequently become partial wards of the state, supported by welfare.¹²² Adoption is no solution. The majority of these infants are nonwhite, and prospects for adoption of Negro children are dim.¹²³ Also, many women,

¹⁰⁸ Lader, *supra* note 36, at 59.

¹⁰⁹ See Guttmacher, *supra* note 71.

¹¹⁰ ABORTION IN THE UNITED STATES 101; Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 187 (1966).

¹¹¹ Gold, *et al.*, *supra* note 46, at 965.

¹¹² Fox, *supra* note 45, at 645.

¹¹³ To argue that the "illegality" of abortions acquired by rich people renders the statement inappropriate ignores the facts. Each year, thousands of abortions which are performed because the pregnant woman had contracted German measles are openly recorded in hospital records throughout the United States. (Personal communication from Christopher Tietze). Although these operations may be technically illegal, there is no threat of prosecution.

¹¹⁴ *Illegitimacy in the U.S.—It's on the Rise*, U.S. News & World Report 87 (July 18, 1966).

¹¹⁵ See Grove, *Children Without Homes: the Adoption*

¹⁰⁸ The commonly used Ascheim-Zondek, Friedman, American male frog and other endocrine pregnancy tests are ineffective until development of chorionic tissue. The chorionic tissue is not developed until implantation, and the tests often are not positive until about three weeks after implantation. WILLIAMS, *OBSTETRICS* 273 (12th ed. 1961).

¹⁰⁹ Meloy, *supra* note 103, at 187-92. Note, 46 ORE. L. REV. 211 (1967).

¹¹⁰ San Francisco Examiner, Dec. 20, 1967, at 21, col. 1.

¹¹¹ *Illinois Abortion Law Should Be Repealed*, pamphlet distributed by the I.C.M.C.A., 5638 S. Woodlawn Ave., Chicago, Illinois 60637.

¹¹² ABORTION IN THE UNITED STATES 121.

¹¹³ Star, *The Growing Tragedy of Illegal Abortion*, LOOK MAGAZINE 149, 153 (Oct. 19, 1965).

¹¹⁴ *Id.* at 154.

¹¹⁵ Rapoport, *American Abortion Applicants in Sweden*, 13 ARCHIVES OF GEN. PSYCHIATRY 24 (1965).

even though they may be willing to procure an abortion at an early stage of pregnancy, find parting with the child too painful after it is born.¹²⁴ When the girl is more than seventeen or eighteen, adoption of her child will be psychologically traumatizing in most cases.¹²⁵ In contrast, few ill psychological effects result from abortions, and few patients show regret.¹²⁶

Marriages entered under duress of pregnancy often prove unsatisfactory. One-third to one-half of all high-school or teenage marriages in the United States are implicated by, or accompanied by, premarital pregnancy.¹²⁷ More than half of these marriages end in divorce within eighteen months.¹²⁸ While it would be speculative to estimate exactly how many of the girls who entered ill-fated marriages would have sought an abortion, if one had been legally available, one may fairly presume that the number is significant.

Unwanted children invariably bear the brunt of much intentional cruelty.¹²⁹ Lack of affection in child rearing often leads to delinquency in boys and prostitution in girls.¹³⁰ While one hundred per cent effective contraception is the most desirable solution for preventing the birth of unwanted babies, it is inevitable that this goal can never be completely achieved. Many physicians are hesitant to provide contraceptives to unwed teenage girls, 90 thousand of whom bear children out of wedlock each year.¹³¹ And, even assuming that all married women of child-bearing age who do not want to become pregnant use

"the pill," the most effective contraceptive available, one biologist estimates that this group would still have 220,000 unwanted pregnancies each year.¹³² A responsible society must face these facts and attempt to deal effectively with the problem of unwanted pregnancies.

THE FAILURE OF RECENT LEGISLATION

The proposals recommended by the Model Penal Code, and recently enacted legislation in Colorado, North Carolina, California, and Maryland, seem plausible and reasonable on their face. Women no longer will be forced to bear children conceived by rapists or incestuous relatives. They can avoid the heartbreak of giving birth to a deformed child (California excepted). They can terminate pregnancies which involve a substantial risk of impairing their life or their health.¹³³ However, this legislation is only superficially meritorious and, in fact, is wholly indefensible from the standpoint of combating recognized problems inherent under present law.

Increase in Abortions

Two factors will combine to cause an increase in the number of illegal abortions wherever a version of the Model Penal Code proposal is enacted. First, such legislation will legalize only between two¹³⁴ and four¹³⁵ per cent of the total abortions now being performed. Pregnancies involving rape, incest, or a defective fetus are exceptional. Advances in medical science are rapidly eliminating "purely medical" justifications for terminating pregnancies.¹³⁶ Intensive care prevents threats to the pregnant woman's life, and, unless "health" is given so broad a definition as to emasculate the statute entirely, cases involving serious impairment to health are similarly infrequent.¹³⁷

Problem, Chicago Sun-Times, Tuesday Magazine 4 (Dec. 1967).

¹²⁴ Williams, *Legal & Illegal Abortion*, 4 BRIT. J. CRIM. 557, 564 (1964).

¹²⁵ Hoffmeyer, *The Mother and the Family*, 28 W.H.O. PUB. HEALTH PAPER 9, 32 (1965).

¹²⁶ Niswander & Patterson, *Psychologic Reaction to Therapeutic Abortion*, 29 OBSTETRICS & GYNECOLOGY 702 (1967); Kummer, *Post-Abortion Psychiatric Illness—a Myth?*, 119 AM. J. PSYCH. 980 (1963); but see Bolter, *The Psychiatric Role in Therapeutic Abortion: The Unwilling Accomplice*, 119 AM. J. PSYCH. 312 (1962). See generally White, *Induced Abortions, A Survey of their Psychiatric Implications, Complications, and Indications*, 24 TEX. REP. ON BIOLOGY & MED. 529 (1966). In any case, possible trauma from abortion must be weighed against the likely ill effects to result from giving birth to, and raising, an unwanted child.

¹²⁷ Semmens, *Implications of Teenage Pregnancy*, 26 OBSTETRICS & GYNECOLOGY 77 (1965).

¹²⁸ Williams, *supra* note 118, at 188.

¹²⁹ *Id.* at 194.

¹³⁰ See 2 LANCET 398 (1964). Cf. Hoffmeyer, *Medical Aspects of the Danish Legislation on Abortion*, in ABORTION AND THE LAW 179, 200.

¹³¹ Ayd, *Contraceptives for Teenagers?*, 18 MED. SCI. 20 (Sept. 1967).

¹³² Hardin, *Blueprints, DNA, and Abortion: A Scientific and Ethical Analysis*, 3 MED. OPINION & REV. 74 (Feb. 1967).

¹³³ See text accompanying notes 17–20, *supra*.

¹³⁴ I.C.M.C.A. estimate, Chicago's American, Oct. 22, 1967, Sec. 4, at 2, col. 3. See Overstreet, *Comment*, 98 AM. J. OBSTETRICS & GYNECOLOGY 652 (1967).

¹³⁵ Based on reports of figures on the increase in legal abortions performed in Colorado and California since liberalization, measured against estimated illegal abortions. A. Guttmacher, *Current Data on Facts Concerning Abortion*, paper presented at the University of Chicago Conference on Abortion, April 28, 1968.

¹³⁶ See Guttmacher, *supra* note 71; Tietze, *Some Facts About Legal Abortion*, in HUMAN FERTILITY AND POPULATION PROBLEMS 222, 223 (Greep ed. 1963).

¹³⁷ Some physicians have advocated adoption of the World Health Organization's definition of health, "a

The Model Penal Code proposal refuses to recognize that most women seek abortions as a method of birth control. This phenomenon is universal.¹³⁸ In the United States, more than eighty per cent of all abortions are performed on married women.¹³⁹ Most of these women have several children, are pregnant by their own husbands, and simply do not want another child.¹⁴⁰ Death and substantial injury from improperly performed abortions usually strike women in this category, leaving large families without mothers.¹⁴¹

Another major category of illegal abortions, ignored by the Model Penal Code proposal, occur among unmarried girls. Ninety-five per cent of all premarital pregnancies are terminated by abortion.¹⁴² If illegal abortions are to be eliminated, reforms must deal with this great discrepancy between law and practice.

The second factor which will cause an increase in illegal abortions is demonstrated by the experience of Scandinavian countries. In these countries, liberalization of the law created an increased demand for abortions. Denmark enacted abortion legislation in 1936 and 1956, so that the operations would be performed in a hospital, under safe conditions, and with the aid of expert medical advice and supervision.¹⁴³ The Danish Pregnancy Act provides for legal termination in four situations. Three are similar to the justifications found in the Model Penal Code—(1) where necessary to avert serious danger to life or health of the woman; (2) where the woman has become impregnated as a result of specified criminal acts (rape, incest, or intercourse when under the age of fifteen); (3) where the child is likely to be born with any serious physical abnormality or disease. The fourth justification has no counterpart in current United States

state of complete physical, mental, and social well being and not merely the absence of disease or infirmity." Rovinsky & Gusberg, *Current Trends in Termination of Pregnancy*, 98 AM. J. OBSTETRICS & GYNECOLOGY 11, 16 (1967).

¹³⁸ See Darby, *Legal Abortion?*, 34 MEDICO-LEGAL J. 96 (1966) (England); Rice-Wray, *The Provoked Abortion—A Major Health Problem*, 54 AM. J. PUB. HEALTH 313 (1964) (South America); Hoffmeyer, *supra* note 130, at 186-87.

¹³⁹ TAUSSIG, *supra* note 2, at 387.

¹⁴⁰ *Ibid.*; Rosen, *supra* note 98, at 73.

¹⁴¹ The typical abortion fatality in California has had five previous pregnancies, none of which had been aborted. Fox, *supra* note 45, at 651.

¹⁴² Kinsey, in ABORTION IN THE UNITED STATES 54.

¹⁴³ Skalts & Norgaard, *Abortion Legislation in Denmark*, in ABORTION AND THE LAW 144, 146.

proposals—where, because of serious physical or psychic defects, or other medical reasons, the woman is deemed unfit to take proper care of her child.¹⁴⁴ In spite of this liberal legislation, there has probably been an increase in the incidence of illegal abortions. There has been only a slight decline of illegal abortions in Denmark,¹⁴⁵ and many Danish women travel to Poland where abortion is available "on request."¹⁴⁶ Presumably, the abortions in Poland fail to meet legal requirements in Denmark, and, therefore, these abortions must be considered to be illegal. Moreover, the incidence of legal abortion, which also increased,¹⁴⁷ has been based primarily on the fourth justification. The usual cause for legal abortion in Denmark has been the "stress syndrome," found predominantly among housewives who are exhausted from maternal duties, or who do not wish to lower their standard of living.¹⁴⁸ Where the fourth justification is absent from legislation as in the Model Penal Code proposal, one may expect a significant increase, rather than a decrease, of illegal abortions.¹⁴⁹

Some experts express the belief that partial liberalization makes abortion more culturally acceptable.¹⁵⁰ A greater demand is created because many women who would not seek an abortion when almost all were illegal, will do so now, if they feel that their reasons are as compelling as those provided for by the new reform. The Model Penal Code reform legalizes less than five per cent of abortions now performed. Undoubtedly, it will increase the demand for illegal abortions by more than that. Consequently, legislation based on the Model Penal Code proposal can be expected to increase, rather than reduce, unnecessary deaths, serious injuries, and humiliation inflicted upon women as a result of illegal abortions.

Continued Disregard by Physicians

The prospect that physicians will be willing to adhere to the limits proposed by the Model Penal

¹⁴⁴ *Id.* at 155.

¹⁴⁵ *Id.* at 167.

¹⁴⁶ In Poland, a single physician can authorize an abortion on the oral declaration by the pregnant woman that she has a "difficult social situation." Tietze, *supra* note 136, at 230.

¹⁴⁷ Skalts & Norgaard, *supra* note 143, at 161.

¹⁴⁸ Hoffmeyer, *supra* note 130, at 186.

¹⁴⁹ The Soviet experience with partial liberalization supports this hypothesis. See Muller-Dietz, *Abortion in the Soviet*, 1 REV. SOVIET MED. SCI. 28, 34 (1964).

¹⁵⁰ WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 242 (1957); SHAW, *ABORTION AND PUBLIC POLICY* 39-40 (1966).

Code is remote. The "abortion mentality" which develops concomitant with partial legalization is likely to strengthen the resolve of individual physicians to follow their own best judgment.

Reputable hospitals, acting under approval of "abortion committees," likewise may persist in performing abortions which are not strictly legal. Institutional responsibility obligates hospital directors to stay within legal limits. Simultaneously, their personal beliefs impel them to go beyond these bounds. In practice the committee compromises, generally staying within the law, but occasionally ignoring it in the most compelling cases.¹⁵¹ Unless the reform coincides with the personal belief of the members of the committee, one can expect them to continue to compromise and occasionally violate the law when their consciences so dictate. The Model Penal Code does not take this into account. It merely legalizes abortions already performed by a substantial number of hospitals in jurisdictions with laws which restrict legal abortions to those necessary to save the life of the mother.¹⁵² Partial legalization simply may result in the performance of abortions in hospitals for a new variety of illegal reasons. Moreover, it is probably easier for a committee to construe facts to show significant impairment to the pregnant woman's health, than to demonstrate necessity to save her life. Consequently, hospitals may violate the law with even greater frequency than before the passage of the reform.

Even if legislators expect hospitals to go beyond legal limits, but they purposely use this approach to avoid responsibility for passage of more extensive reforms, undesirable effects will follow. This approach discriminates against women who are not sophisticated enough to manufacture stories which create an appealing case. And those who are clever enough to fabricate an effective case are probably women wealthy enough to have their pregnancies safely, although illegally, terminated under present laws. Moreover, many women will be discouraged from seeking, and physicians from performing, safe abortions which the legislators are willing to permit.

Continued Lack of Enforcement

There is not the slightest indication that local authorities will attempt to enforce the new laws

¹⁵¹ Guttman. *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. M.T. SINAI HOSP. 111, 118 (1954).

¹⁵² See Packer & Gampell, *supra* note 88.

more strictly than they enforced the old statutes. Rather, juries and judges can be expected to be more lenient as abortions become more acceptable. The reforms simply substitute one "dead letter" law for another, a situation decried in the official comments to the Model Penal Code recommendation.¹⁵³

Discerning the motives of the American Law Institute in recommending such ineffective legislation is beyond the scope of this paper. Expediency, and fear of public opinion unprepared for broader proposals, are among the suggestions which have been made.¹⁵⁴ The proper approach to reform would have been to recognize the legitimate legal obstacles, confront these objections directly, and base a proposal on a fair resolution of the issues. This is the direction which this paper will attempt to follow.

OBSTACLE TO REFORM—ALLEGED RIGHTS OF THE FETUS

The legal position taken by virtually every opponent to liberalization of the abortion statutes is that conception is a dramatic moment in the evolution of a human being, after which the fetus becomes a "person" within the terms of the due process clause of the fourteenth amendment. In other words, the fetus is entitled to the constitutional protections which any citizen is accorded.¹⁵⁵ If one grants the initial premise of this argument—that the fetus is entitled to constitutional protection from its earliest stages—it is difficult, if not impossible, to contend that the Model Penal Code proposal, or any other permissive legislation, meets appropriate standards. To examine the consequences of this approach, it is initially assumed that, at all times after conception, the fetus is a "person" under the fourteenth amendment. On this assumption, the Model

¹⁵³ See text accompanying note 101 *supra*.

¹⁵⁴ Tinnelly, *Abortion and Penal Law*, 5 CATH. LAW. 187, 188-90 (1959).

¹⁵⁵ This is the legal position taken by Catholic authors who are opposed to changes in the law. Elaboration of this position may be found in the following articles: Byrn, *A Critical Look At Legalized Abortion*, 41 L.A. BAR BULL. 320 (1966); Byrn, *Abortion in Perspective*, 5 DUQUESNE L. REV. 125 (1966); Byrn, *Abortion Question: A Nonsectarian Approach*, 11 CATH. LAW. 315 (1965); Drinan, *The Inviolability of the Right to Be Born*, in *ABORTION AND THE LAW* 107; Mietus & Mietus, *Criminal Abortion: "A Failure of Law" or a Challenge to Society*, 51 A.B.A.J. 924 (1965); Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L. J. 173, 395 (1960-61).

Penal Code proposal is unconstitutional for the following reasons:

Violation of Substantive Due Process

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." The limitation which this clause imposes on the legislature from enacting arbitrary and unreasonable legislation is called substantive due process. One can reasonably charge that the Model Penal Code violates substantive due process because it permits destruction of a fetus for a less compelling reason than saving the life of another. By analogy, the law of homicide generally restricts the self-defense justification for a killing to situations where there are threats to life or threats of serious bodily injury.¹⁵⁶ In these cases, moreover, the person killed had been a wilful aggressor. The fetus, however, has committed no crime or wilful aggression. A minimum of due process, therefore, must prohibit a woman from terminating a pregnancy, unless continuation of the pregnancy seriously threatens her life or physical health; legislation with provisions for legal abortion in cases involving less significant threats to the mother are unconstitutional. Thus, the Model Penal Code provisions permitting abortion for the sole reason that the girl is under the age of consent,¹⁵⁷ or on the basis that the child is likely to be born with a serious defect,¹⁵⁸ are clearly unconstitutional because these situations do not necessarily involve any threat to the mother's life or health. Similarly, permitting abortion of a fetus because continuation of the pregnancy would impair the pregnant woman's mental health, or because the fetus had been conceived by a rapist, is of dubious legal validity.¹⁵⁹

Violation of Procedural Due Process

The fourteenth amendment also protects against judicial or administrative procedures which deprive a person of property or personal rights by denying notice and opportunity for a hearing. This is the right to procedural due process. One can assert that the Model Penal Code violates procedural due process because it authorizes a

procedure whereby a fetus may be condemned to death in a summary proceeding in which no one defends its right to live.

The due process requirements for court procedure are summarized in *Twining v. New Jersey*:

The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with.¹⁶⁰

Clearly, the mere certification by two physicians of their belief in the justifying circumstances, or a like opinion of a hospital committee, is inadequate to meet these requirements. And even though a medical committee may be treated as an administrative tribunal, which is often subject to less rigorous standards than a court, the same elements of due process should be present in any proceeding which authorizes the taking of a life.

Furthermore, no provision is made for the appointment of counsel, even though the fetus undoubtedly qualifies as an indigent.¹⁶¹ The notorious "Scottsboro trial" involved the conviction of seven ignorant and illiterate youthful Negroes who had been accused of raping two white girls.¹⁶² In that case the United States Supreme Court held that the right to aid of counsel is embraced within the due process clause of the fourteenth amendment. *A fortiori*, a procedure which provides no one to defend the rights of an "unborn child,"¹⁶³ and which is really no trial at all, must violate due process. In the above case, the Court stated:

Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his

¹⁶⁰ 211 U.S. 78, 111 (1908).

¹⁶¹ *Gideon v. Wainwright*, 372 U.S. 355 (1963).

¹⁶² *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁶³ The phrase "unborn child" is commonly used by opponents of reform. It is submitted that this term is as inappropriate a designation for a nonviable fetus as is the term "unconceived fetus" for a sperm and ovum not yet united, or the term "mature embryo" for an infant.

¹⁵⁶ See, e.g., CAL. PEN. CODE §197.1.

¹⁵⁷ MODEL PENAL CODE §230.3(2) (Proposed Official Draft 1962) (pregnancy resulting from "felonious intercourse").

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide.¹⁶⁴

The Model Penal Code proposal is also too vague to adequately safeguard the rights of the fetus. A law which is too vague and uncertain in its definition of an offense, or its violation, is repugnant to the due process clause.¹⁶⁵ Under the Model Penal Code proposal, two physicians can approve an abortion if "there is a *substantial* risk that continuance of the pregnancy would *gravely* impair the physical or *mental health* of the mother or that the child would be born with *grave* physical or mental defect. . . ." Dictionaries differ on the definition of these terms, and physicians have already demonstrated their lack of uniform agreement.¹⁶⁶ For example, the World Health Organization defines health as "a state of complete physical, mental and social well being and not merely the absence of disease or infirmity."¹⁶⁷ If physicians are permitted to use this definition of health, they can legally terminate pregnancies at whim.

Regardless of the definition intended, in the absence of adequate supervision there can be no assurance that the determination to terminate a pregnancy will be made in anything but subjective fashion. Yet, the records of the hearing, if any exist, are private records. The fetus, even if it had a defender, has no appeal because there is no public record to review.

Violation of Equal Protection of the Laws

The Model Penal Code authorizes the destruction of the fetus with none of the safeguards for justice which are accorded to even the most hardened criminals. Therefore, the above violations of due process likewise violate the equal protection clause, inasmuch as the due process safeguards denied to the fetus are singularly denied to fetuses, as compared with other beings threatened with deprivation of life.

¹⁶⁴ *Supra* note 162, at 72.

¹⁶⁵ *Lanzetta v. New Jersey*, 306 U.S. 451 (1938).

¹⁶⁶ See text accompanying note 89 *supra*.

¹⁶⁷ Quoted in *Rovinsky & Gusberg, supra* note 137.

THE ISSUE CONFRONTED—SHOULD A FETUS BE RECOGNIZED AS A PERSON WITH CONSTITUTIONAL RIGHTS?

The Model Penal Code proposal and similar legislation infringe upon constitutional rights of a fetus only if it is a "person" within the meaning of the fourteenth amendment. Thus, the crucial legal issue is the standing of the fetus to claim constitutional protection. In other words, the issue becomes whether it is necessary to treat a fetus as an infant and an adult, or whether a fetus may reasonably be classified as something significantly different. If a fetus may reasonably be classified as significantly different from an infant and an adult, a court is free to decide that the fetus does not have standing to claim the constitutional protections described above.

The Model Penal Code is ambivalent on this issue. It is difficult to believe that the prestigious and knowledgeable members of the American Law Institute would draft substantive and procedural provisions, the constitutionality of which is so questionable. This necessarily implies that the Institute assumed that the fetus is not entitled to constitutional protection. On the other hand, abortions performed in a medically-approved manner by licensed physicians remain criminal unless justified. What rationale can there be for declaring the some abortions serve a necessary purpose, and then surrounding these legal abortions with hedges and safeguards not required for other serious operations, unless we are dealing with issues of constitutional significance? This problem is summarily mentioned without serious analysis in the official A.L.I. *Comments*. With no citation of authority, the *Comments* state:

There seems to be an obvious difference between terminating the development of such an inchoate being [as] a fetus in the first four months of pregnancy, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of its mother.¹⁶⁸

The recommended statute, however, makes no distinction as to the stage of pregnancy at which a physician must justify termination in

¹⁶⁸ MODEL PENAL CODE §207.11, Comment at 149 (Tent. Draft No. 9, 1959).

order to avoid criminal liability. Therefore, it is only one's personal preference which determines whether the *Comment* means that a fetus is never entitled to constitutional protection, or whether it is an implied admission that the statute is unconstitutional, at least in part.

This issue cannot be resolved on the basis of dogmatic statements. Both the law and current scientific knowledge should be examined.

Legal Status of the Fetus

There is no case law directly on point which declares that a fetus is, or is not, entitled to the protections described above. Nevertheless, analysis of relevant areas of the law adequately demonstrates that a fetus, at least in the early stages of development, should not be treated as a person entitled to constitutional guarantees.

The approach of using the criminal law to protect a fetus from the time of conception is relatively novel. Prior to 1803, legal prohibitions against induced abortion were confined to the stage known as "quickening," *i.e.*, when the fetus noticeably moved in the womb.¹⁶⁹ Thus, propositions seeking recognition of the "inherent inviolability" of early fetal life cannot base their claims on any notion of a natural law which has been immutable through the ages.¹⁷⁰ It is significant that there is no reported record of the conviction of a woman for submitting to an abortion although she is, unquestionably, a principal.¹⁷¹ In contrast, there is considerable support for passing laws to protect infants from abuse by their parents.¹⁷² One distinction between the treatment of abortion and infanticide is that the infant child is considered to be a human being, worthy of protection, but the embryo is not.¹⁷³

The dearth of case law on the constitutionality of present abortion statutes itself implies that a fetus has no constitutional rights. Statutes allowing abortions necessary to save the life of the

pregnant woman were enacted during the last century. None requires appointment of counsel or opportunity for a representative of the fetus to be heard, as procedural due process allegedly requires. The failure to question the constitutionality of present abortion laws, in spite of ample opportunity to do so, implicitly supports the proposition that the fetus does not have a right to be born.¹⁷⁴

Opponents of reform often rely on language in cases deciding questions of inheritance, tort, and support law where various courts accord different "rights" to the fetus. These opinions, however, are based on policy considerations which either are wholly inapposite to a determination of the constitutional rights of the fetus, or which favor withholding constitutional protection. Cases resolving questions of inheritance law and interpreting wrongful death statutes fall in the former category; cases determining support rights and cases upholding a cause of action for prenatal injuries come within the latter.

Opponents of reform often point to rules of property law which give a fetus, *if* subsequently born alive, the same standing as a live child in taking under a will which refers, for example, to "all grandchildren alive at my death,"¹⁷⁵ or in taking under rules of intestate succession.¹⁷⁶

It is argued that, because a fetus is treated in somewhat the same manner as a live child in the context of dividing an inheritance, a fetus should be given the same constitutional protections as an infant. The policy being fostered by the property law, however, is totally unrelated to considerations involved in granting, or withholding, constitutional protections of due process to the fetus. The two situations are not analogous. The purpose of the property rule is simply to follow the presumed intent of the deceased in choosing among those who are to share his bounty. It is presumed that he would prefer to treat a fetus, *who is later born a child*, in the same manner as children already alive. These cases require a subsequent live birth because it is unreasonable to presume that the deceased valued the fetus, by itself, in any way. Using decisions based on this policy as a justification for granting the constitutional right of due process to the fetus is clearly inappropriate. Within the limits set by the rele-

¹⁶⁹ WILLIAMS, *supra* note 150, at 149.

¹⁷⁰ Abortion has been accepted by a number of early societies. See DEVEREUX, *A STUDY OF ABORTION IN PRIMITIVE SOCIETIES* (1955).

¹⁷¹ Several states treat her participation as solicitation. See George, *supra* note 23, at 13. The author notes that the importance of her testimony often means that she must be granted immunity. However, in cases where there had been a successful raid, her testimony should not be necessary. See text accompanying notes 77-83 *supra*.

¹⁷² See Paulson & Blake, *The Abused, Battered, and Maltreated Child: A Review*, 9 TRAUMA No. 4 (1967).

¹⁷³ WILLIAMS, *supra* note 150, at 215.

¹⁷⁴ See Sands, *Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285, 305 (1966).

¹⁷⁵ *In re Wells' Will*, 221 N.Y. Supp. 714 (1927).

¹⁷⁶ ATKINSON, *WILLS* 75 (2d ed. 1953).

vant statute against perpetuities, a testator can also provide for people who are not yet conceived at his death, as well as those who are conceived but not yet born.¹⁷⁷ The logic of opponents of reform would require courts to declare a constitutional right to be conceived. This would directly conflict with the decision of the United States Supreme Court in *Griswold v. Connecticut* which allowed a husband and wife to practice birth control.¹⁷⁸ Read narrowly, the Court held only that a husband and wife have a constitutional right to privacy which cannot be abridged by a criminal statute prohibiting the use of contraceptives. However, the interest protected must necessarily include an affirmative right of access to birth control information so that the couple could reasonably regulate the intimacies of their marital relationship.¹⁷⁹

One very recent case has permitted recovery under a wrongful death statute for injury to a nonviable fetus which caused its premature live birth and subsequent death.¹⁸⁰ One could superficially distinguish this case on the narrow ground that it involved a subsequent live birth, whereas abortion involves no live birth in most cases. However, the court, in dicta, indicated that the live birth was not an essential factor for recovery. Even so, the case is still inapplicable. The policy fostered by permitting recovery simply is that a husband and wife should be recompensed for injuries which cause the loss of *potential* society and companionship.¹⁸¹ The same policy would favor a tort cause of action against a wrongdoer who caused a man or woman to become sterile.¹⁸² As demonstrated above, allowing such a cause of action cannot compel declaration of a constitutional right to be conceived. Therefore, the cases also fail to support the declaration of a constitutional right to be born. The two situations are not analogous.

Opponents of reform occasionally point to cases holding that a fetus is a dependent child under

support laws,¹⁸³ and cases permitting suit, via a guardian, for a determination of paternity and compulsory support.¹⁸⁴ They contend that these cases indicate that a fetus should be treated as a child for purposes of receiving constitutional protections. The obvious policy of support cases, however, is to prevent children from becoming wards of the state.¹⁸⁵ Since a fetus which is aborted cannot become a ward of the state, the cases do not support the position advanced. Indeed, continuation of restrictive abortion laws, which are responsible for the deaths of mothers of large, low-income families, is directly contrary to the policy being fostered by the support cases.¹⁸⁶ Therefore, these cases should be considered as support for withholding constitutional rights from the fetus, in order to avoid retarding the passage of reforms which establish safe procedures for terminating pregnancies.

In recent years there has been a trend toward permitting greater recovery for prenatal injuries to children born live.¹⁸⁷ Early cases often had asserted that the fetus was merely part of the mother, and they denied recovery on the ground that no duty was owed separately to the fetus.¹⁸⁸ On this basis, courts easily made exceptions for a viable fetus, since, by definition, it was capable of an independent existence.¹⁸⁹ Courts are now overruling old cases, and they are allowing recovery for injuries sustained by a nonviable fetus.¹⁹⁰ Opponents of reform allege that this is a recognition that a fetus should be treated as an independent person under the fourteenth amendment from the time of conception.

Examination of the cases reveals, however,

¹⁸³ E.g., *Metzger v. People*, 98 Colo. 133, 53 P.2d 1189 (1936).

¹⁸⁴ *Kyne v. Kyne*, 38 Cal. App. 2d 122, 100 P.2d 806 (1940).

¹⁸⁵ See CAL. CIV. CODE §29: "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." (Emphasis added.)

¹⁸⁶ See note 120 *supra* and accompanying text.

¹⁸⁷ E.g., *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Scott v. Mcpheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (3d Dist. 1939); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (Ct. App. 1951); *Williams v. Marion Rapid Transit Inc.*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

¹⁸⁸ *Dietrich v. Northampton*, 138 Mass. 14 (1884).

¹⁸⁹ E.g., *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

¹⁹⁰ *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93, overruling *Berlin v. J. C. Penney Co.*, 339 Pa. 547, 16 A.2d 28 (1940); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960), overruling *Stemmer v. Kline*, 128 N.J.L. 455, 26 A. 2d 489 (Ct. App. 1942).

¹⁷⁷ See SIMES, *FUTURE INTERESTS* 263-69 (2d ed. 1966).

¹⁷⁸ 381 U.S. 479 (1965).

¹⁷⁹ Dixon, *The Griswold Penumbra: Constitutional Charter For an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 212 (1965).

¹⁸⁰ *Torgian v. Watertown News*, 225 N.E.2d 926 (1967).

¹⁸¹ PROSSER, *TORTS* 930 (3d ed. 1964).

¹⁸² *Valence v. La. Power & Light Co.*, 52 La. 2d 847, 50 So. 2d 847, 849 (Ct. App. 1951).

that the courts used the viability test as a facade to conceal their fear that the lack of reliable medical knowledge about causation would permit a flood of fictitious claims. Scientific advancements in causal analysis, not a revaluation of the status of the fetus, have changed the attitude of courts.¹⁹¹

Regardless of the reason for the change, the policy justifications for allowing the tort cause of action are either inapplicable or favor denial of constitutional rights to the fetus. Recovery is partially based on sympathy for a person who is forced to bear an injury *through life*. A fetus which never develops into a child bears no injuries. This consideration is inapplicable in evaluating the merits of imposing criminal liability for *prevention of birth* or in evaluating the propriety of granting the fetus constitutional rights of due process.

Recovery is also permitted for "the very practical reason that a child starting with a handicap due to a prenatal injury may very possibly wind up receiving social welfare assistance unless he can be compensated for his injuries at a time when the recovery will aid his adjustment."¹⁹² This is the identical policy which underlies support cases and, likewise, favors withholding constitutional rights from the fetus.

Some recent developments in the law of murder may indicate that viability is the point beyond which the law cannot deprive a fetus of the same protection accorded to infants. At common law the full protection conferred by the law of murder was restricted to human beings born alive. Birth, in English law, meant complete extrusion from the mother, although the umbilical cord need not have been severed.¹⁹³ Consequently, if a person strangled an infant while only its head protruded from the mother, that person would not be guilty of murder. An English author has severely criticized this anomaly, suggesting that a viable fetus, capable of independent life, should be entitled to the full protection of the law.¹⁹⁴ Appellate courts in California and Alabama have judicially adopted

his opinion.¹⁹⁵ Other states are likely to follow this approach when the situation arises.

The social policy underlying the prohibition of murder is the protection of *existing* human beings. This policy significantly distinguishes the law of murder from tort and property law. The latter may accord the fetus "rights" to further policies which are not based upon the present human status of the fetus. Tort law has an interest in protecting a *potential* human being which may subsequently become a ward of the state. The laws of testate and intestate succession have an interest in giving rights to a *potential* human being which may develop into someone for whom a deceased would have felt affection at that time. But if the law of murder, which has an interest solely in protecting existing human beings, protects a viable fetus, it must be because a viable fetus is considered to be an existing human being. When the fetus is no longer a *potential* human being, but has developed into an *existing* human being, it may reasonably be entitled to due process. One could argue, therefore, that viability is the stage at which a fetus should be granted constitutional protection.

In sum, no court to date has directly decided whether a fetus is entitled to due process under the fourteenth amendment. Some cases deciding tort issues, inheritance rights, and liability under support laws superficially appear to recognize the fetus as a human being, entitled to due process. In reality, decisions in these cases are based on a variety of social policies, many of which clearly favor withholding constitutional rights from the fetus. However, relevant developments in homicide law indicate that fetal life in the last stages of development should be accorded the protection of due process. Determination of the rights of early fetal life is, apparently, open to a decision made apart from precedent and based wholly on the social implications of the decision.

The Fetus and Science

In determining the stage of prenatal development for applying constitutional protection, the law should choose a point which the community at large reasonably can be expected to respect. The public uniformly accepts the proposition that infants deserve the same constitutional protections as adults. Therefore, when the fetus

¹⁹¹ Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 563, 600 (1962). See also PROSSER, *TORTS* 357 (3d ed. 1964). See, e.g., Eaton & Danziger, *Traumatic Disruption of Pregnancy: Report of a Case and Its Legal Implications*, 30 OBSTETRICS & GYNECOLOGY 16 (1967).

¹⁹² Sands, *supra* note 174, at 302.

¹⁹³ WILLIAMS, *supra* note 150, at 6.

¹⁹⁴ Atkinson, *Life, Birth and Live-Birth*, 20 L.Q. REV. 134 (1904).

¹⁹⁵ *People v. Chavez*, 77 Cal. App. 2d 621, 176 P. 2d 92 (4th Dist. 1947); *Singleton v. State*, 33 Ala. App. 536, 35 So. 2d 375 (1948).

significantly resembles the infant, it is fair to constitutionally protect the fetus and require the public to treat the fetus and the infant identically. However, when the fetus does not significantly resemble the infant, it would be unfair to grant the fetus the same constitutional rights and legally require that the public regard the fetus and the infant in the same manner. One should note that withholding constitutional protection from the fetus does not mean that a fetus cannot be considered a human being from some aesthetic viewpoint. Nor does withholding constitutional protection prevent a person from making an independent moral determination on this issue. Each individual remains free to decide whether or not he will treat the fetus with the reverence he feels for an infant. But individual determinations of morality simply are not imposed on those who reasonably disagree.

In making legal determinations regarding prenatal life, one also must distinguish between scientific facts and inferences drawn from scientific facts. Medical-legal problems require analysis of relevant scientific knowledge. However, scientists usually make inferences for scientific, rather than legal, purposes. An inference drawn for a particular scientific inquiry is not necessarily relevant to a legal inquiry, or even a different scientific inquiry. Thus, scientists can reasonably disagree in choosing the most significant point of human development. Geneticists emphasize the union of sperm and ovum because it limits hereditary potentialities.¹⁹⁶ Some psychologists believe that the most important point of human development occurs between ages five and seven, because children then respond more like adults than animals.¹⁹⁷ Each scientist arrives at a different conclusion because the purpose of his inquiry differs.

As legal purposes differ from scientific purposes, inferences for legal determinations of the prenatal stage at which protection of the fourteenth amendment should apply reasonably can differ from inferences for scientific determinations. Although the fourteenth amendment guarantees rights to "persons," determinations of the origin of individual life made for biological or other scientific purposes clearly are not controlling. For legal

purposes, a corporation, as well as a human being, is considered a "person" under the fourteenth amendment.¹⁹⁸

Prenatal development of the infant will now be examined. A general overview will be followed by examination of particular stages. The term "fetus," which heretofore has been used to refer to all biological stages of prenatal development after fertilization, technically refers only to prenatal development after the second lunar month.

In medical terminology, intrauterine life is divided into three phases—the periods of the ovum, the embryo, and the fetus.¹⁹⁹ The period of the ovum is the initial phase. It extends through the first week of human development. It encompasses the zygote, or fertilized ovum, its subdivisions into smaller cells called blastomeres, and the arrangement of these cells into a hollow blastocyst. The period of the embryo includes the second through the eighth week of prenatal life. This period is characterized by rapid growth, establishment of a placental relationship with the pregnant woman, acquisition of a general body plan, and development of basic external features. The period of the fetus includes the third through the tenth lunar month. In it differentiation, or progressive diversification of cells and tissues, continues, and organs become competent to assume their specialized functions.

This development is continuous, and it progresses for many years after infancy. Not until age twenty-five are the last stages of adult development complete.²⁰⁰ No stage of development seems inherently more significant than another. Therefore, any particular stage is significant only because of the legal consequences one chooses to attach at that point.

1. *Fertilization.* Opponents of abortion law reform allege that human life should be inviolable from the "moment of conception." They claim that biologists recognize that life begins with a fertilized ovum and, consequently, the law must do likewise. During fertilization, the male and female gametes pool their nuclei and chromosomes.²⁰¹ Opponents of reform contend that these events mark the emergence of a human being entitled to due process.

¹⁹⁶ See ROBERTS, AN INTRODUCTION TO MEDICAL GENETICS 1 (3d ed. 1965).

¹⁹⁷ See White, *Evidence for a Hierarchical Arrangement of Learning Processes*, in 2 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 187, 195 (Lipsett & Spiker eds. 1965).

¹⁹⁸ Connecticut Gen. Co. v. Johnson, 308 U.S. 77 (1938).

¹⁹⁹ AREY, DEVELOPMENTAL ANATOMY 85 (7th ed. 1965).

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.* at 55.

Such an approach is subject to several criticisms. As discussed above, reliance on determinations made by biologists disregards the distinction between scientific facts and inferences drawn from scientific facts. An inference drawn by biologists, for biological purposes, is not entitled to weight in a legal determination.

One should also note that the phrase, "moment of conception," misleadingly connotes an instantaneous transformation. Fertilization, however, is a time-consuming process. The sperm first penetrates the egg. Then the sperm head rotates and advances toward the center of the egg. As it approaches the center, the head swells and converts into the male pronucleus. The male and female pronuclei then approach and unite. Even fusion is a process. As the male and female pronuclei approach each other, they resolve their chromosomes. Finally, a cleavage spindle organizes with the double set of male and female chromosomes arranged midway as an equatorial plate. If a human being emerges after a "moment of conception," it is not at all clear which "moment" is most significant.

The chromosomes which organize at fertilization do determine numerous traits which the infant and adult eventually exhibit.²⁰² It is fallacious, however, to argue that the fertilized ovum bears a significant resemblance to the infant merely because the infant develops from the fertilized ovum. The origin of the infant can be traced back even further. Embryology texts begin with a discussion of gametogenesis, the production of spermatozoa in the male and maturation of ova in the female, as the first phase in sexual reproduction.²⁰³ Yet, no one believes that *presently existing* human beings are destroyed by menstruation or nocturnal emissions. Sperm and ova do not significantly resemble existing human beings. Only *potential* human beings are lost even though a human being originates in a sperm and an ovum.

Similarly, abortion of a fertilized ovum destroys only a potential, not a presently existing, human being. The fertilized ovum is a microscopic, single-celled organism. In appearance it differs little from an unfertilized ovum. It has neither brain, nervous system, nor bodily organs. The term "human being" generally connotes bodily structure and intelligence. The fertilized ovum

exhibits neither of these characteristics.²⁰⁴ Prior to the seventh week of development, the human embryo is incapable of even reflex activity.²⁰⁵ It is difficult to maintain that a fertilized ovum bears a significant resemblance to an infant. Therefore, it is unreasonable to grant due process rights at fertilization; it would be unfair to require that the public regard the fertilized ovum with the same respect they may prefer to reserve for an infant.

2. *Viability.* Advocates of abortion reform generally contend that viability is the stage at which to grant the fetus rights. Viability, the capacity to survive outside the womb, occurs between the twenty-sixth and the twenty-eighth week of pregnancy.²⁰⁶ At this stage the single-cell zygote has transformed into a fully-formed infant.

The propriety of delaying constitutional protection until actual birth is questionable. No one denies premature babies the right to be treated as human beings entitled to due process. The growth careers of full-term, pre-term, and post-term infants are basically similar.²⁰⁷ Thus, a fetus which attains viability develops in the same manner whether or not it remains in the womb, and a viable fetus resembles many infants. One can reasonably require that the public regard a viable fetus as an existing human being entitled to constitutional protection.

3. *Intermediary periods.* Because opponents of reform emphasize fertilization, while advocates of reform emphasize viability, little attention is given to intermediary stages of development. However, one need not withhold constitutional rights until viability merely because one rejects fertilization as an unreasonable stage for granting constitutional protections. Although a fetus cannot survive outside the womb before the end of the sixth lunar month, human resemblance in some respects begins earlier. For example, the face of the fetus has a human appearance in the fourth lunar month, and individual differences are recognizable at that time.²⁰⁸ In the fifth lunar

²⁰⁴ Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 197 (1966).

²⁰⁵ Hooker, *The Sequence in Human Fetal Activity*, in READINGS IN CHILD BEHAVIOR AND DEVELOPMENT 11 (Stendler ed. 1964).

²⁰⁶ TAUSSIG, *supra* note 2, at 21.

²⁰⁷ Behavior patterns are not affected by premature or postmature birth. Gesell, *Maturation and Infant Behavior Pattern* in READINGS IN CHILD BEHAVIOR AND DEVELOPMENT, *supra* note 205, at 25.

²⁰⁸ AREY, *supra* note 199, at 100.

²⁰² ROBERTS, *supra* note 196, at 1.

²⁰³ See, e.g., HAMILTON, BOYD & MOSSMAN, HUMAN EMBRYOLOGY 12 (3d ed. 1962).

month the pregnant woman can feel fetal movements.²⁰⁹

There is a particular logical advantage in granting the fetus constitutional rights after the fourth or fifth lunar month of development, even if one assumes that viability is the single point of development most significant for legal purposes. The scientific fact is that human development is a process, not an instantaneous transformation. By granting constitutional protection at the beginning of a period of evolving viability, the law can recognize that humanization, like growth, is a developmental process.

Relevant legal and scientific facts indicate that viability is the most rational single point at which to recognize the emergence of a human being with constitutional rights. However, choosing a single point of time is inconsistent with the scientific fact that human development is a process. Therefore, it may be wiser to recognize a crucial span of time during which the fetus attains viability, and grant the fetus constitutional rights throughout this period and thereafter.

PROPOSAL—UNREGULATED MEDICAL CONTROL
DURING THE FIRST SIXTEEN WEEKS OF
PREGNANCY

Once one concludes that there is no constitutional necessity to accord the fetus due process rights throughout the early pregnancy period, it is difficult to find any valid reason for regulating abortions which are performed by physicians during that time. It is reasonable to prohibit nonphysicians from ever terminating pregnancies in order to safeguard the health of the pregnant woman. But the problems underlying the need for law revision clearly indicate that physicians should be free to act according to their best medical judgment during the early pregnancy period.

The approach most likely to reduce the incidence of injuries and deaths from abortions is to encourage women to terminate unwanted pregnancies in hospitals under hygienic conditions. Approval by not more than two physicians should be required. The greater the number of physicians whose approval is needed, the more likely a woman will resort to an illegal abortion. Some women may feel humiliated and inconvenienced when forced to undergo complicated administrative

procedures which are not required for other operations. Others cannot afford to pay several physicians for their services. Wealthy women still may prefer an illegal abortion, fearful that they may lack the time necessary to repeat formal proceedings at a different hospital if the first hospital eventually denies their application.

In order to eliminate illegal abortions, a reform should not regulate the criteria for terminating pregnancy. Most women seek abortions for general social, rather than medical, reasons. Any regulatory law which permits physicians to terminate pregnancies for purely social reasons necessarily will be so loosely phrased that it will provide no regulation at all. Nevertheless, some physicians may be inhibited from following their best medical judgment when even a remote possibility of being subjected to criminal sanctions exists.

Many opponents of abortion reform may find that outright repeal is more philosophically acceptable to them than the Model Penal Code proposal. To those who believe that abortion is a form of homicide, the state *authorizes* the killing of innocent human beings when it enacts a version of the Model Penal Code proposal. In contrast, repeal does not mean that the state approves of abortion, but only that it *declines to regulate* it. Father Robert F. Drinan, a Jesuit priest and Dean of the Boston College Law School, is one of the leading opponents of abortion reform. In a paper prepared for the 1967 International Conference on Abortion, he wrote:

If one assumes that the law teaches minds as well as regulates conduct the potential teaching impact of a law which exalts the superiority of a mother's health over her child's right to be born and of a legal system which specifically permits the annihilation of predictably deformed or retarded children can hardly be exaggerated. Such a system creates a new and revolutionary hierarchy of rights in which the rights of the living to happiness transcend the rights of the unborn to existence. A law which is silent about the abortion of non-viable fetuses says no such thing. It neither concedes nor denies to individuals the right to abort their unborn children. It leaves the area unregulated in the same way that the law abstains from regulating many areas of conduct where moral issues are involved.²¹⁰

Previously, this paper demonstrated that the

²⁰⁹ *Ibid.* "Bursts of activity" are characteristic of the fetus at this time. Hooker, *supra* note 205, at 16.

²¹⁰ Drinan, *The Right of the Fetus to be Born*, Unpublished paper presented to the International Conference on Abortion, Sept. 6-8, 1967, Washington, D.C.

Model Penal Code proposal is probably unconstitutional if one assumes that a nonviable fetus is a person entitled to due process under the fourteenth amendment. Likewise, this proposal is also of questionable constitutional validity when one rejects that assumption. The Model Penal Code provides no accurate guide for physicians who wish to obey the law, because such key words as "grave" and "substantial" are nowhere defined. Physicians who terminate pregnancies in good faith may find themselves criminally liable if a jury later disagrees with their opinion as to whether a particular pregnancy involved a substantial risk of gravely impairing the health of the mother. Because the recommended statute is too vague, the procedural due process rights of physicians are violated.

The statute also violates substantive due process rights of married couples. In the 1965 case of *Griswold v. Connecticut*, the United States Supreme Court recognized the existence of a constitutional right to marital privacy.²¹¹ "The concept of liberty . . . embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution . . ." ²¹² In *Griswold*, the Court held unconstitutional a criminal statute which prohibited the use of contraceptive devices by married couples, stating:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.²¹³

If the bedroom is a sanctuary of marital privacy, the law cannot regard a married woman's reproductive organs differently.

²¹¹ 381 U.S. 479 (1965).

²¹² *Id.* at 486 (Goldberg J., concurring).

²¹³ *Id.* at 485 (Douglas J., majority).

The entire fabric of the Constitution and the purposes that underlie its specific guarantees demonstrate that the rights to marital privacy and to marry *and raise a family* are of similar order and magnitude as the fundamental rights specifically protected.²¹⁴

Since the Court declared unconstitutional a statute which prohibited the limitation of family size through the use of contraceptives, the constitutional right to "raise a family" must also be a constitutional right to limit family size. Most abortions are sought by women to limit family size. Prior to the commencement of a period of evolving viability, there is no distinction, significant for legal purposes, between the fetus and individual sperm and ovum. Therefore, any statute which prohibits abortion during the early stages of pregnancy is as unconstitutional an invasion of marital privacy as is a statute which prohibits the use of contraceptives.

The Model Penal Code recommendation was officially proposed in 1962. The American Law Institute cannot be criticized for ignorance of a marital right to privacy which was first judicially recognized in 1965. The states which recently have enacted modified versions of the Model Penal Code proposal have no similar excuse. They have enacted legislation which ineffectively and unconstitutionally deals with the problem of unwanted pregnancy. The only reasonable approach is to equate termination of early pregnancy with every other medical operation. No physician should be subject to penal sanctions for performing an abortion on a woman who is not more than sixteen weeks pregnant. Criminal statutes which regulate abortions performed by physicians during that time should be repealed.

²¹⁴ *Id.* at 495 (Goldberg J., concurring) (emphasis added).