

Note: The Current Trend to Liberalize Abortion Laws - An Analysis and Criticism

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**NOTE: THE CURRENT TREND TO
LIBERALIZE ABORTION LAWS —
AN ANALYSIS AND CRITICISM**

Introduction

During the last several years there has been an increasing number of commentaries on the problem of abortion. Most of these articles have called for radical changes in the existing laws dealing with the crime of abortion. For example, in a recent issue of the *American Bar Association Journal* a lawyer and a doctor collaborated in urging that the laws of abortion be modified to bring them into conformity with what they consider modern medical practice.¹

Similarly, the American Law Institute's Model Penal Code presents a clear and concise statement of the changes proposed by many of those who favor a liberalization of the present abortion laws. Under this Code abortions would be legal if performed to preserve the life or health of a mother, to prevent the birth of a deformed child, or to terminate pregnancies resulting from rape or incest.²

¹ Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964).

² MODEL PENAL CODE § 207.11 (Tent. Draft No. 9, 1959):

"(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if:

(a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape . . . or from incest . . .

This note will analyze these recommendations and the reasons advanced in support of them from a legal, medical, psychological, and moral viewpoint. This analysis will then be applied to several fact situations and finally, using the abortion problem as a focal point, the proper relationship of criminal law and morality in a pluralistic society will be discussed.

Abortion may be defined as the "expulsion of the fetus prematurely, particularly at any time before it is capable of sustaining life."³ Depending on the cause of the expulsion, an abortion is either spontaneous or induced. Spontaneous abortion results from accident or disease, while induced abortion results "from man's intentional interference with the normal course of pregnancy."⁴ This note is limited to a discussion of induced abortions.⁵

(b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the licensed hospital where it is to be performed, or in such other place as may be designated by law.

Justification of abortion is an affirmative defense." This section is now § 230.3 of the Proposed Official Draft.

³ MALOY, MEDICAL DICTIONARY FOR LAWYERS 4 (2d ed. 1951).

⁴ *Ibid.*

⁵ The reader is cautioned that the statistics presented in this note have analytic limitations. The size of the samples used to gather these figures ranges from 65 New York City mothers to over 22,000 women from all segments and sections of American society. Since there is a direct correlation between the representativeness and size of a sample, and the correctness of the result, the varying validity of the samples is obvious. Furthermore, most of the conclusions have been contradicted by other statistical evidence. For these reasons the conclusions drawn from the largest sample have been employed wherever possible.

Sociological Aspects

Although approximately ninety per cent of all pre-marital pregnancies end in abortion,⁶ most illegal abortions in this country are performed on married women who already have had children.⁷ One study shows that the rate of illegal abortions increases with the number of children in a family, the highest rate occurring among women having three children.⁸ The overwhelming majority of abortions takes place during the first eight weeks of pregnancy⁹ and most are performed by licensed physicians.¹⁰

Religious affiliation has a substantial effect on the abortion rate.¹¹ The percentage of pregnancies ending in criminal abortion is highest among those of the Jewish faith and lowest among Catholics, with Protestants and those of other religious beliefs somewhere in the middle.¹² Education seems to be an important factor, while economic class is less influential. Of the total number of abortions performed, most occur among women with at least some college education.¹³ If all of society is economically categorized, the difference in abortion rates between the class with the highest rate (the poor) and the class with the lowest rate (the rich) is only one half of

one per cent.¹⁴ Finally, race seems to be of significance, there being evidence that the abortion rate among whites is almost three times that among Negroes.¹⁵

Each day there are over 3000 illegal abortions performed in the United States,¹⁶ with over one per cent of the women operated on dying as a result.¹⁷ Therefore, as many as ten thousand women die each year at the hands of criminal abortionists.

The Position of the Reformers

It is this alarming number of illegal abortions and the resulting mortality rate that have motivated the suggestions for change by various authors. Those who favor liberalizing the present abortion laws feel that the high mortality rate could be reduced substantially if fewer legal sanctions stood in the path of the mother and the doctor. It is argued that legalization will allow physicians to treat women seeking an abortion, thus limiting the resort to "quack" doctors.¹⁸

Furthermore, many writers in this country do not consider abortion a moral problem. It is their opinion that "the principle of freedom of conscience" is at issue,¹⁹ and

⁶ MODEL PENAL CODE § 207.11, comment at 147 (Tent. Draft No. 9, 1959). *But see* GEBHARD, POMEROY, MARTIN & CHRISTENSON, PREGNANCY, BIRTH AND ABORTION 17 (1958), where in a study of 5,293 females it was found that 230 of 327 pre-marital pregnancies ended in illegal abortion.

⁷ MODEL PENAL CODE, *supra* note 6.

⁸ WHELPTON, THE ABORTION PROBLEM 18 (1944).

⁹ CALDERONE, ABORTION IN THE UNITED STATES 77 (1958).

¹⁰ GEBHARD, *op. cit. supra* note 6, at 198.

¹¹ *Id.* at 52.

¹² WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 148 (1957). *But see* CALDERONE, *op. cit. supra* note 9, at 43.

¹³ GEBHARD, *op. cit. supra* note 6, at 19.

¹⁴ WILLIAMS, *op. cit. supra* note 12, at 207.

¹⁵ *Ibid.* *But see* CALDERONE, *op. cit. supra* note 9, at 44.

¹⁶ See Leavy & Kummer, *supra* note 1. See also Mills, *A Medicolegal Analysis of Abortion Statistics*, 31 So. CAL. L. REV. 181, 182 (1958) for an estimate of 600,000 abortions per year.

¹⁷ MODEL PENAL CODE, *supra* note 6. See TAUSSIG, ABORTION — SPONTANEOUS AND INDUCED 27-28 (1936). *But see* Fisher, *Criminal Abortion*, 42 J. CRIM. L., C. & P.S. 242, 247 (1951) for an estimate of 0.5%.

¹⁸ See Leavy & Kummer, *supra* note 1, where it is stated that "restrictive laws drive large numbers of desperate women into the hands of the very persons from whom the law seeks to shield them, the unskilled criminal abortionist."

¹⁹ Williams, *Introduction to JENKINS, LAW FOR THE RICH* 19 (1960).

in a free society "to use the criminal law against a substantial body of decent opinion . . . is contrary to our basic traditions."²⁰ It is further reasoned that "the criminal law in this area cannot undertake or pretend to draw the line where religion or morals would draw it."²¹ In addressing those who are opposed to abortion on purely moral grounds, the reformers would state, as did Oliver Cromwell to the Church of Scotland, "I beseech you in the bowels of Christ, think it possible you may be wrong."²²

Today, an abortion is legal only if performed to save the life of the mother.²³ In addition to the grounds for abortion suggested in the Model Penal Code,²⁴ many of those favoring a liberalization have urged that the present prohibitory laws be relaxed so as to include abortions performed when the pregnancy has resulted from a statutory rape,²⁵ when the child would be illegitimate,²⁶ or for other social reasons, such as the pregnancy of a woman demonstrated to be an unfit mother.²⁷ Although some would

favor doing away with all limitations on the practice of abortion,²⁸ most advocates of change recognize the need for some restrictions.²⁹

The problems of sterilization, birth control and abortion are closely related, since the increased use of birth control devices or sterilization would, quite obviously, reduce the abortion problem. Those urging a revision of the present laws, therefore, also favor an increased use of birth control and sterilization.³⁰

The Legal Aspects

Since the problem of abortion has existed throughout history, the difficulty in resolving the present controversy is apparent. The first known abortion law dates from 1728 B.C. Hammurabi, King of Sumer and Akkad, in codifying the law of Babylonia, wrote:

If a seignior struck a(nother) seignior's daughter and has caused her to have a miscarriage, he shall pay ten shekels of silver for her fetus.

If that woman has died, they shall put his daughter to death.³¹

Although most of the laws of primitive and very early societies were based on moral

²⁰ MODEL PENAL CODE, *supra* note 6, at 151.

²¹ *Id.* at 150.

²² Williams, *op. cit. supra* note 19.

²³ See N. Y. PEN. LAW § 80. Forty-two states have only this exception. Alabama, Oregon and the District of Columbia allow abortions to preserve the life or health of the mother. Colorado and New Mexico accept saving the life of the mother or preventing serious or permanent bodily injury to her as a justification. In Maryland abortion is allowed when a physician is convinced that no other method will insure the safety of the mother, or if the fetus is dead. In Massachusetts and Pennsylvania the statute requires, for a violation, that the abortion be done "unlawfully" while in New Jersey it must be done "maliciously or without lawful justification." Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 SO. CAL. L. REV. 123, 127-28 (1962).

²⁴ See MODEL PENAL CODE, *supra* note 2.

²⁵ CALDERONE, *op. cit. supra* note 9, at 15.

²⁶ See MODEL PENAL CODE, *supra* note 6, at 155.

²⁷ *Id.* at 156.

²⁸ Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52, 55 (1964).

²⁹ MODEL PENAL CODE, *supra* note 6, at 150. "[I]f all legal restraint on abortion were removed . . . it is possible that the absolute number of abortions might so increase that . . . a larger number of deaths would have to be anticipated." *Ibid.*

³⁰ See Mills, *supra* note 16, at 196 n.88.

³¹ PRITCHARD, *THE HITTITE LAWS* 175 (2d ed. 1955). The Assyrians had an abortion statute which dates from the twelfth century B.C. There is evidence that the Hittites and the ancient Egyptians had these restrictive laws. The Old Testament warns against abortion, as did the ancient laws of Buddha. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 403 (1961).

considerations, many abortion laws were used as a tool to control the periodic rises and falls of the society's population.³²

Plato approved of abortions as an alternative to the more barbaric practice of infanticide,³³ and Aristotle recommended abortion to the Spartans as a eugenic measure.³⁴ In early Roman law abortion was considered an offense against the parents, and was therefore justified if done with the approval of the parents.³⁵ After the Punic Wars and with the decline of the Roman Republic abortion became more commonplace.³⁶

Following the establishment of the Catholic Church, the reasons for prohibiting abortion became largely moral in nature.³⁷ The laws against abortion were based on a belief in the concept of a "soul." An abortion committed before there was a soul in the embryonic body was punishable as an act preventing a life coming into being. To destroy the fetus after the infusion of a soul was considered murder.³⁸ This theory, based on the writings of St. Augustine, was generally accepted by theologians. St. Thomas added that life is manifested by two actions, knowledge and movement.³⁹ Bracton, a contemporary of Aquinas, understood "movement" to mean "quickening," *i.e.*, the time

at which the mother first feels fetal movement, and incorporated this concept into his writings.⁴⁰ Hence the basis of the common-law rule is that unless it is absolutely necessary to save the life of the mother, abortion of a quickened fetus is prohibited.⁴¹ By the early nineteenth century, England and most jurisdictions in the United States had passed statutes dealing with abortion.⁴² Under the British rule it was a crime to abort a fetus whether or not it had quickened, and most of the states of the United States adopted a similar rule.

The legal problems presented in interpreting and applying the present statutes involve five main areas: (1) the stage of pregnancy at which the act is performed; (2) the elements of the criminal act; (3) the scope of the therapeutic exception; (4) the requisite state of mind of the abortionist; and (5) the burden of proof.

The stage of pregnancy at which the act is performed is determinative of the extent of criminal liability in several states.⁴³ The usual test is "quickening." This is generally a poor criterion, however, because it is purely subjective and depends in large part on the sensitivity of a mother to the activity of the fetus. Furthermore, if the mother has died as a result of the operation, there is no way of proving the fact of "quickening."

In most states the crime is not the abortion itself, but merely the attempt to abort, since the danger to the mother arises from the attempt, be it successful or not.⁴⁴ In fact,

³² WILLIAMS, *op. cit. supra* note 12.

³³ 1 WESTERMARCK, *THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* 415 (2d ed. 1952).

³⁴ ARISTOTLE, *POLITICS*, II, ix.

³⁵ DAVIES, *The Law of Abortion and Necessity*, 2 *MODERN L. REV.* 126, 131 (1938).

³⁶ Quay, *supra* note 31, at 410.

³⁷ 1 *APOSTOLIC FATHERS* 312 (Loeb ed. 1912). *Didache*, the earliest Christian writing now known outside of the canonical books, states that "thou shalt not procure abortion, nor commit infanticide. . . ." *DIDACHE* (anon.), II, 1-2.

³⁸ See WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 150 (1957).

³⁹ *Id.* at 151.

⁴⁰ *Ibid.*

⁴¹ CLARK & MARSHALL, *CRIMES* 394 (5th ed. 1952).

⁴² See 43 George 3 c.58 (1803); Quay, *supra* note 31, at 447-520.

⁴³ See MISS. CODE ANN. § 2222 (1956).

⁴⁴ Mills, *A Medicolegal Analysis of Abortion Statutes*, 31 *So. CAL. L. REV.* 181, 191 (1958).

some states impose criminal liability even though the woman was not pregnant.⁴⁵ Even in cases where a fetus is dead, it has been held to be criminal to attempt to, or, in fact, remove it.⁴⁶ The reason for so holding is to deprive the abortionist of the defense, which is difficult to rebut, that the fetus was already dead.

The scope of the therapeutic exception is the center of the present controversy. Louisiana seems to be the only state which prohibits all abortions.⁴⁷ Maryland, on the other hand, probably has the most liberal abortion law in this country. Its statute allows abortions by a licensed physician when, after consultation with another practitioner, he is satisfied that there is no other method to secure the safety of the mother.⁴⁸

The leading case in interpreting the recognized exception to the rule prohibiting abortions is *The King v. Bourne*.⁴⁹ The facts in this case are particularly significant. The statute under which the defendant was being prosecuted allowed abortions only to save the life of the mother. In this case, a well-known British physician performed an abortion on a fourteen year old girl who had been raped and was pregnant as a result. The doctor, who had brazenly invited prosecution, was tried and acquitted. The acquittal was based on the theory that the girl's mental health would be jeopardized if she were required to bear the rapist's child.

The result in this case raises the question of whether the therapeutic exception fully

encompasses psychological threats to life. In the United States the answer is probably in the negative. It has been argued that the threat of suicide by the woman will be accepted as a justification,⁵⁰ but no cases have been found sustaining this point. *State v. Dunkleberger*⁵¹ lends some support to this argument but may be distinguished on the evidence that the fetus was already dead at the time of the abortion. The case involved a very emotional fifteen year old pregnant girl who had threatened to kill herself and had jumped several times from a height of eight to ten feet. The court held that the evidence was insufficient to convict the doctor.

Other problems in delineating the scope of the therapeutic exception are: (1) whether the exception should extend to other than licensed physicians;⁵² (2) whether consultation with a fixed number of specialists should be required;⁵³ and (3) whether the operation should be limited to licensed hospitals.⁵⁴

It must be remembered that the arguments for liberalizing the scope of the therapeutic exception are basically philosophical. One authority has unequivocally stated that "serious physical injury to the mother . . . is an evil greater both morally and socially than the destruction of the fetus."⁵⁵

Is the surgeon's subjective belief in the

⁴⁵ *Ibid.* See also WILLIAMS, *op. cit. supra* note 38, at 153.

⁴⁶ *Territory v. Young*, 37 Hawaii 150 (1945); *Anderson v. Commonwealth*, 190 Va. 665, 58 S.E.2d 72 (1950); *State v. Cox*, 197 Wash. 67, 84 P.2d 357 (1938).

⁴⁷ LA. REV. STAT. § 14:87 (1951).

⁴⁸ MD. ANN. CODE art. 27, § 3 (1957).

⁴⁹ [1939] 1 K.B. 687.

⁵⁰ See McGraw, *Legal Aspects of Termination of Pregnancy on Psychiatric Grounds*, 56 N.Y.S.J. MEDICINE 1605, 1607 (1956). *But see* *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891).

⁵¹ 206 Iowa 971, 221 N.W. 592 (1928).

⁵² Only four states require the operation to be performed by physicians. Mills, *supra* note 44, at 190.

⁵³ See MODEL PENAL CODE § 207.11 (Tent. Draft No. 9, 1959).

⁵⁴ *Ibid.*

⁵⁵ WILLIAMS, *op. cit. supra* note 38, at 163-64.

necessity of the operation, if it conforms with medical knowledge, a sufficient defense, or is the necessity of an abortion an objective question of fact for the jury? The authorities are diametrically opposed in their answers to this question.⁵⁶

A somewhat different problem arises when the physician does not know or even care if the operation is necessary; but after he has performed the abortion he discovers it was necessary to save the mother's life. In other words, he had the *mens rea*, but he has not committed the *actus rea*. The tenor of the cases indicates that there is a conflict of authority as to the criminal nature of such an operation.⁵⁷ One authority has stated that "there is no reason why such a surgeon should not be convicted of attempting a criminal abortion."⁵⁸

In most of the United States and in England the lack of necessity for the abortion must be proven by the prosecution.⁵⁹ But in a minority of the states, including New York, there is a presumption that the abortion was unnecessary.⁶⁰ Even in those states which place the burden on the prosecution, proof that the woman was previously in good health is sufficient to shift the burden of coming forward with the evidence to the physician.⁶¹

⁵⁶ Compare *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944), with *Adams v. State*, 88 A.2d 556 (Md. 1952).

⁵⁷ Compare *Commonwealth v. Wheeler*, *supra* note 56, with *Hatchard v. State*, *supra* note 50.

⁵⁸ WILLIAMS, *op. cit. supra* note 38, at 179.

⁵⁹ See, e.g., *State v. Fitzgerald*, 174 S.W.2d 211 (Mo. 1943); *State v. St. Angelo*, 72 R.I. 412, 52 A.2d 513 (1947).

⁶⁰ WILLIAMS, *op. cit. supra* note 38, at 181. Except for the Michigan statute which expressly removes the burden from the prosecution, there is no "relevant difference" of wording of the statutes. *Id.* at n.3.

⁶¹ *Id.* at 182.

Placing the evidentiary burden on the defense would be no embarrassment to the *bona fide* practitioner, because all he has to do to satisfy the burden of raising the issue is to give evidence of the reason why he thought the operation necessary. Once he has done this, the jury will be directed that the persuasive burden of proof rests upon the prosecution.⁶²

Other legal problems related to abortion have received widespread comment. The first is the liability of the mother in her own right or as an accomplice.⁶³ Although there is a division of opinion as to the guilt of the mother who attempts to, or does actually, abort herself, the "majority view in the United States is that the woman-abortee is not an accomplice to the offense, but a victim of it."⁶⁴ Secondly, the enforceability of the abortion laws has been questioned. The assenting mother is seldom, if ever, prosecuted, the theory being that prosecution will not have a deterrent effect on her,⁶⁵ and that the testimony of the mother is necessary to build a case against the abortionist.⁶⁶ The frequent occurrence of adverse physical effects after an abortion necessitates that she should not be so frightened by the law so as to fear competent hospital care.⁶⁷ As one

⁶² *Id.* at 183. *Contra*, *Mills*, *supra* note 44, at 198. "Regardless of the scope of the exception, the burden of proof on the issue of necessity for therapeutic abortion should be on the prosecution. . . ." *Ibid.*

⁶³ WILLIAMS, *op. cit. supra* note 38, at 156. See MODEL PENAL CODE § 207.11, comment at 157-59 (Tent. Draft No. 9, 1959).

⁶⁴ Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52, 53 (1964). See *People v. McGonegal*, 136 N.Y. 62, 75-76, 32 N.E. 616, 620-21 (1892).

⁶⁵ WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 154 (1957).

⁶⁶ Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 SO. CAL. L. REV. 123, 126 (1962).

⁶⁷ WILLIAMS, *op. cit. supra* note 65, at 154.

authority has said:

perhaps the most decisive reason for the indulgence is an unavowed change of attitude towards the crime of abortion. The chief evil of an abortion is no longer thought to be the loss of the unborn child, but the injury done to the mother by the unskilled abortionist.⁶⁸

Prosecutions of licensed physicians are as rare as prosecutions of mothers. In fact, there are no known prosecutions of licensed medical practitioners who, prior to terminating pregnancy, obtained concurring medical opinions as to the necessity of therapeutic abortion and/or permission from hospital boards.⁶⁹

While very recent statistics on the actual number of annual convictions for abortion in the United States are unavailable, the older statistics indicate that there are less than 2500.⁷⁰ Based on these facts it may not be incorrect to say that there is "no other instance in history in which there has been such frank and universal disregard for a criminal law."⁷¹

The Medical Aspects

It is the opinion of those who favor a liberalization of the current laws on abortion that both law and morality are at odds with current medical practice.⁷² In order to test the validity of this assertion, it is necessary to examine modern medicine's attitude towards abortion.

A brief history will aid in understanding

the significance of the current practice of physicians. Although it is stated in the Hippocratic Oath, "I will not give to a woman a pessary to produce abortion," Hippocrates is said to have suggested to an entertainer, who was burdened with an unwanted pregnancy, that she should jump into the air seven times so that her heels touch her buttocks.⁷³ The Hippocratic Oath is taken by all licensed practitioners, and yet many doctors, as did Hippocrates, accept abortion as a proper medical practice.

Today, doctors are in sharp disagreement as to whether abortion is medically justified. One representative opinion would list rheumatic heart disease with a history of previous decompensation, advanced hypertensive vascular disease and carcinoma of the cervix as justifications for abortion.⁷⁴ It has been argued, on the other hand, that "anyone who performs a therapeutic abortion is either ignorant of modern medical methods of treating the complications of pregnancy or is unwilling to take the time to use them."⁷⁵

It is the opinion of many experts that if abortion had not been prohibited, medical progress in treating the innumerable complications of pregnancy would have been at a snail's pace.⁷⁶ Without as yet commenting on the morality of the abortion operation, it is not unreasonable to suggest that the

⁶⁸ *Ibid.*

⁶⁹ Leavy & Kummer, *supra* note 66, at 128.

⁷⁰ Fisher, *Criminal Abortion*, 42 J. CRIM. L., C. & P.S. 242, 244 (1951).

⁷¹ TAUSSIG, ABORTION—SPONTANEOUS AND INDUCED 422 (1936). *But see* WILLIAMS, *op. cit. supra* note 65, at 168. "There can be little doubt that fear of the law is a determining factor in the policy adopted by hospitals and surgeons, both in the United States and Great Britain." *Ibid.*

⁷² See Leavy & Kummer, *supra* note 64, at 52-53.

⁷³ This incident is recorded in Leavy & Kummer, *supra* note 66, at 125.

⁷⁴ WILLIAMS, OBSTETRICS 1077 (11th ed. Eastman 1956).

⁷⁵ Heffernan & Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 LINACRE Q. 24 (1952).

⁷⁶ See, e.g., Mills, *A Medicolegal Analysis of Abortion Statutes*, 31 SO. CAL. L. REV. 181, 195-96 (1958); Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 233 (1960).

exemptions to liability under the heading of therapeutic necessity should be reappraised by both the medical and legal professions; but no substantive changes should be made until the medical profession can and does present a unity of opinion by a significant number of its members.⁷⁷

Psychological Aspects

As the medical reasons for abortion have diminished, there has been a marked increase in the number of abortions performed for psychological reasons. Figures derived from New York City's requirement that fetal deaths be registered show that during the early 1940's the percentage of abortions for psychological reasons increased from 8.2 per cent to 40 per cent.⁷⁸

The psychological justifications are more difficult to support scientifically than the medical. This is due largely to the recent emergence of psychology as a separate discipline. Also, there is no clear line between "illness" and concern about social pressures. For instance, is it fear of disgrace or a mental aberration which prompts the unwed mother to threaten suicide if her pregnancy is not terminated?

A further complication in this area is the conflicting evidence as to the possible adverse after-effects of an abortion. It has been estimated that 9 per cent of the women who undergo abortions suffer unfavorable psy-

chological consequences.⁷⁹ In addition, abortion may "exert a deleterious effect that is more harmful than the continuation of pregnancy" to a mentally ill woman.⁸⁰ Although there is recent evidence tending to cast doubt on the frequent occurrence of adverse psychological effects,⁸¹ the unfavorable physical consequences which do occur in over 14 per cent of the cases⁸² must raise a question as to the therapeutic value of abortion.

Liberalization Experiments Outside The United States

Most countries have laws which regulate abortion in some manner.⁸³ The main purpose in studying foreign solutions to the abortion problem is to learn what can be expected if the American laws are liberalized so as to allow abortion on eugenic and what are called humanitarian grounds. For present purposes, the discussion will be limited to the experiences of Japan, Sweden and Denmark. In Japan, where the population is close to 90 million, there was a 30 per cent drop in the national birth rate in the first 6 years after full legalization of abortion.⁸⁴ In 1949, one year after this legalization, there were 101,601 abortions; by 1955, this number had risen to 1,170,143 and it is estimated that there are almost as many unreported abortions.⁸⁵ Since that

⁷⁷ Mills, *supra* note 76, at 198. *But see* Leavy & Kummer, *supra* note 64, at 52, where it is argued: "airing these problems is a prerequisite to any attempt at solution. But we consider changing the law...to bring it into conformity with responsible medical attitudes...to be the significant primary step...."

⁷⁸ Tietze, *Therapeutic Abortions in New York City, 1943-47*, 60 AM. J. OBS. & GYN. 146 (1950). See CALDERONE, *ABORTION IN THE UNITED STATES* 79 (1958), where the percentage of abortions for psychological reasons is set at 37.8%.

⁷⁹ GEBHARD, POMEROY, MARTIN & CHRISTENSON, *PREGNANCY, BIRTH AND ABORTION* 205 (1958).

⁸⁰ Arbuse & Schedtman, *Neuropsychiatric Indications for Therapeutic Abortion*, 1 AM. PRACT. 1069 (1950).

⁸¹ See Kummer, *Post-Abortion Psychiatric Illness—A Myth?*, 119 AM. J. PSYCHIATRY 980 (1963).

⁸² GEBHARD, *op. cit. supra* note 79.

⁸³ See generally *id.* at 215-47 for information on more than twenty countries.

⁸⁴ Leavy & Kummer, *supra* note 66, at 137 n.99.

⁸⁵ GEBHARD, *op. cit. supra* note 79, at 219.

time the number has decreased slightly but this leveling off is the result of a sharp rise in sterilization and an increased use of contraceptives.⁸⁶

The situation in Sweden is best understood if it is remembered that Sweden is probably the least repressive of all Western countries in its attitudes towards sexual behavior. Over 80 per cent of the females and 90 per cent of the males have had premarital intercourse, and approximately 10 per cent of the total births occur out of wedlock.⁸⁷ In 1940 for every 200 live births there was one abortion, but in 1955 this number had increased to over 9.⁸⁸ It is estimated that 38 per cent of the women apply for and are allowed even a second abortion. Generally, during or immediately after this second operation the women are sterilized. Although the abortion mortality rate has decreased substantially, when both sterilization and abortion take place at the same time the death rate is approximately one per cent, or the same as in the United States for illegal abortions.⁸⁹ A study of the psychological after-effects of the operation showed that approximately 50 per cent of those who had abortions were satisfied and grateful, while about 11 per cent suffered impaired mental health.⁹⁰ The result in Sweden seems

⁸⁶ In 1959, over 40,000 people were sterilized, and it is estimated that over 40% of the population regularly uses contraceptives. The Japanese government has played a major part in this area in an attempt to control the population. This effort has included clinics, demonstrations and dissemination of literature on these subjects. For further information on the Japanese experience, see generally ASIA FAMILY PLANNING ASS'N, FAMILY PLANNING IN JAPAN (1961).

⁸⁷ GEBHARD, *op. cit. supra* note 79, at 223.

⁸⁸ CALDERONE, *op. cit. supra* note 78, at 28.

⁸⁹ GEBHARD, *op. cit. supra* note 79, at 223.

⁹⁰ CALDERONE, *op. cit. supra* note 78, at 133-34.

to have been an increase in the total number of abortions, rather than a decrease in the number of illegal abortions.⁹¹

In Denmark abortions have been legal since 1939. Since that date the number of legal abortions has increased tenfold and "the number of criminal abortions, instead of approaching zero has increased to 9,000 a year."⁹² Today, approximately 17 per cent of all pregnancies end in abortion whether legal or illegal.⁹³ In each of these countries, although there has been a sharp decrease in the mortality rate, the total number of legal abortions, and more significantly the number of illegal abortions, has increased since abortion was legalized. It appears that a more liberal statute may increase the business of the "quack" doctors who perform illegal abortions, instead of reducing it, as has been argued by those who would reform the law in this country.⁹⁴

The Catholic Attitude Toward Abortion

The Catholic Church has always considered voluntarily induced abortion a crime

⁹¹ WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 242 (1957). An analysis of 200 requests for legal abortions is illuminating. Sixty women were persuaded to continue the pregnancy. Permission to have an abortion was given to 97 women. Of these, 13 women did not have an abortion: 10 changed their minds; 2 had spontaneous abortions; and one woman came for the abortion after the legal term. Thirty-one were refused permission: 27 continued the pregnancy; 2 had illegal abortions performed; one went to another agency and received permission; and one had a spontaneous abortion. Before a decision was made on their requests, 7 women had spontaneous abortions and 5 women had illegal abortions. CALDERONE, *op. cit. supra* note 78, at 133-34.

⁹² Quay, *supra* note 76, at 439.

⁹³ CALDERONE, *op. cit. supra* note 78, at 21.

⁹⁴ See Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964).

and a serious sin. Her earliest laws reinforced this condemnation with severe canonical penalties.⁹⁵ These laws and the present laws are based on a belief that man has an inalienable God-given right to life.⁹⁶

Aristotle believed that every living being had a soul. He theorized that a human soul was not infused into the embryo until it was sufficiently developed to receive it. Since the embryo had to pass through a vegetable and an animal stage before it received a human soul, he designated this pre-human being a *foetus inanimatus*. Upon the infusion of a human soul, the embryo was considered a *foetus animatus*, i.e., a human being.⁹⁷ In 1211 Pope Innocent III introduced this distinction into the Canon law.⁹⁸ In 1917 the Code of Canon Law was promulgated by Pope Benedict XV. The Canons provide that "all who effectively procure abortion, the mother included, incur excommunication. . . ."⁹⁹ The Canons further elaborate that "all who . . . effectively procure abortion of a human foetus, and all who cooperate thereto incur criminal irregularity."¹⁰⁰ Although it is sinful even to attempt an abortion, unless it is successful no canonical penalties are incurred.¹⁰¹

Some authorities are of the opinion that the "insertion of the phrase 'human fetus'. . . [is] a definite indication of the legislator's

will to eliminate the distinction between animated and non-animated fetus."¹⁰² Today it is contended that *human* life comes into being at the moment of conception, regardless of the form of the embryo. It is usually agreed that this occurs within a short time after intercourse.¹⁰³

In judging the morality of abortions the Catholic Church bases its position on an analysis of human activity. A human act is any act based on knowledge and will.¹⁰⁴ Three elements are involved in judging the morality of a human activity: the purpose motivating it, its object, and the surrounding circumstances.¹⁰⁵ A person is not responsible for the evil effects of his actions unless: (1) he realizes that the evil effect might take place; (2) he is able to avoid the action that might produce the evil effect, and (3) he is aware of an obligation to refrain from so acting. If any one of these elements is not present, the actor suffers no guilt before God notwithstanding that the evil effect results.¹⁰⁶

Since it is obvious that we are not obliged to abstain from all actions that produce harmful results, it is the second condition that needs to be interpreted so as to develop a practical rule. The application of the "principle of double effect" provides a means of determining permissible activity. Since most significant human acts have both good and evil effects it is often necessary to

⁹⁵ BONNAR, *THE CATHOLIC DOCTOR* 82 (5th ed. 1950). At the Council of Ancyra in 314 A.D. these penalties were mitigated. *Ibid.*

⁹⁶ Tiberghien, *Principles And Moral Conscience*, in FLOOD, *NEW PROBLEMS IN MEDICAL ETHICS* 147 (1952).

⁹⁷ BONNAR, *op. cit. supra* note 95.

⁹⁸ COPPENS, *MORAL PRINCIPLES AND MEDICAL PRACTICE* 59 (Spalding ed. 1921).

⁹⁹ Can. 2350.

¹⁰⁰ Can. 985,4^o

¹⁰¹ BONNAR, *op. cit. supra* note 95, at 83.

¹⁰² Huser, *The Meaning of "Fetus" in Relation To The Crime of Abortion*, 8 *JURIST* 306, 319 (1948).

¹⁰³ See CATHOLIC LAWYERS SOCIETY OF THE ARCHDIOCESE OF DETROIT, *CATHOLIC LAWYERS GUIDE* 38 (1963) [hereinafter cited as *CATHOLIC LAWYERS GUIDE*].

¹⁰⁴ *Id.* at 16.

¹⁰⁵ *Ibid.*

¹⁰⁶ KELLY, *MEDICO-MORAL PROBLEMS* pt. 1, at 11 (1951).

permit evil to occur. Action is permissible provided four conditions are met: (1) that the act itself is not morally wrong; (2) that the evil is sincerely not desired and every reasonable effort is made to avoid it; (3) that the evil is not used as a means of obtaining a good end, and (4) that the good effect is at least as important as the evil that is tolerated.¹⁰⁷

In order to apply these principles, to the problem of abortion, it is necessary to distinguish direct abortion from indirect abortion. An abortion is direct "when the sole immediate result of a procedure is the termination of pregnancy before viability;" it is indirect when it is the "by-product of a procedure which is immediately directed to the cure of a pathological condition of the mother."¹⁰⁸

In order to be able to see clearly the areas of conflict between current medical methods and the teachings of the Church, several hypothetical fact situations should be analyzed:¹⁰⁹

(1) A woman with a heart disease has faced increasing strain with each pregnancy. This pregnancy, her third, has increased her danger of dying during or immediately after the pregnancy at least thirty times. Under these facts, the abortion is legal, and most doctors would abort the child; yet it is immoral because the conditions of the "principle of double effect" have not been met.

(2) A pregnant woman has an existing

neurosis which may be intensified by the birth of another child. This added emotional instability probably occurs in a substantial number of all pregnancies. The abortion is illegal, and most doctors would not abort the child. It also is clearly immoral.

(3) A pregnancy results from rape. The abortion is illegal, although most doctors would approve it; it is also immoral. The woman may attempt to eject the semen or have it extracted provided this is done before conception has taken place (within about ten hours after the intercourse). This is morally permissible because the semen is present by unjust aggression and may therefore be expelled.¹¹⁰

(4) A husband is ill and unable to work. The wife supports him and their five children, but has become pregnant again. To operate would be illegal and most doctors would not abort the child. An abortion on this ground is also immoral, since the act itself is morally wrong.

(5) A woman has cancer of the uterus. In this case the abortion is legal, and all doctors would abort the child. It may also be moral, since the doctor, in order to remove the malignancy, must run the risk of an abortion. This case is clearly governed by the "principle of double effect," since the act has both a good and evil effect. The four necessary conditions for the application of the principle would be satisfied: the act of operating to remove the cancer is obviously morally permissible; the doctor would not presumably intend the evil effect (abortion) and would make every effort to avoid it; the evil effect does not directly cause the good (the preservation of life), and the preser-

¹⁰⁷ See *id.* at 12; COPPENS, *op. cit. supra* note 98, at 67-68.

¹⁰⁸ KELLY, *op. cit. supra* note 106, pt. 3, at 9.

¹⁰⁹ These fact situations and the statements on the opinions of doctors are based in part on a study of medical practice in California. See Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959).

¹¹⁰ BONNAR, *op. cit. supra* note 95, at 88-89.

vation of the mother's life would be at least as important as the evil effect which may result.

One of the suggested reasons for liberalizing the present abortion laws is to bring them into conformity with current medical practice. These hypothetical fact situations show that there is a high degree of correlation between legal and medical attitudes. Therefore, the validity of reforming the law for this purpose would seem to be questionable.

Abortion Legislation And The Catholic

Many commentators on the problem of abortion manifest a lack of knowledge of the nature of the position of the Catholic Church. The Church's teachings on abortion are based on a reasonable definition of law and a logical, workable understanding of the proper relationship of church and state. Unless the non-Catholic, or for that matter the Catholic, understands these beliefs a solution to the problem of abortion legislation and the Catholic is impossible.

It is the position of the Catholic Church that abortion contravenes both divine and natural law. Furthermore, a statute legalizing abortion, even if only for the limited purpose of saving the life of the mother, is an abuse by the civil authorities of their proper functions. The Catholic Church teaches that God is the authority behind any legitimate form of government and the author of both civil and religious authority. The Church alone has authority over the spiritual aspects of man's life and therefore it is necessary for there to be civil freedom for her to fulfill her mission. The state has exclusive authority over purely secular matters. Therefore, the proper relationship between church and state should be one of mutual respect and cooperation for the

benefit of the people.¹¹¹

The Catholic legislator may be brought face to face with the abortion problem very soon. It is reasonable to assume that bills liberalizing the present abortion laws will be presented to many legislatures in the near future.¹¹² He will be asked for his opinion on abortion, and be told that even if he opposes it, he has no right to impose his will on the majority and he should therefore vote in favor of the bill. How should the Catholic legislator respond? Certainly he is to be guided by his conscience, but are his critics correct? Is there a conflict between his political duty and his religious beliefs? Archbishop John Ireland, when asked this question, responded:

My religious faith is that of the Catholic Church – Catholicism, integral and unalloyed – Catholicism, unswerving and soul swaying – the Catholicism, if I am to put it into more positive and concrete form, taught by the supreme chieftain of the Catholic Church, the Bishop, the Pope of Rome.

My civil and political faith is that of the Republic of the United States of America – Americanism, purest and brightest; yielding in strength and loyalty to the Americanism of none other American; surpassed in spirit of obedience and sacrifice by that of none other citizen, none other soldier; sworn to uphold in peace and in war America's Star Spangled Banner.

Between my religious faith and my civil and political faith . . . it has been said, there is discord and contradiction. . . . Those who so speak misunderstand either my creed or my country. . . .¹¹³

¹¹¹ See CATHOLIC LAWYERS GUIDE 11-12 (1963).

¹¹² See Leavy & Kummer, *supra* note 94, at 55.

¹¹³ Address by Most Rev. John Ireland, Aug. 11, 1913, in RYAN & BOLAND, CATHOLIC PRINCIPLES OF POLITICS 343 (1950).

Today, many Catholic writers, in discussing the relationship between church and state, suggest that the Church's "minimum requirement, which may possibly be enough, should be that on issues where agreement is impossible, her members should not be bound by the State to act in violation of their consciences."¹¹⁴

This position is premised on the belief that the law has limited competency in creating a moral order. At most, the best the law can do is attempt to preserve the existing moral views.¹¹⁵ Whether one considers this a depreciation of the force of law is almost insignificant as society's diminishing acceptance of any absolutes has made it difficult to communicate the efficiency of any law which restricts private desires. Today, it may well be true that "public enforcement of religious standards cannot extend beyond the area of community agreement."¹¹⁶

This approach is not an abandonment of principle to secularism; rather it is an acceptance of the moral pluralism which is

¹¹⁴ ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 48 (1961). See generally MURRAY, *WE HOLD THESE TRUTHS* (1960) for the application of this principle to several contemporary conflicts between church and state.

¹¹⁵ *Id.* at 40.

¹¹⁶ *Id.* at 45.

inherent in the religious pluralism of a free society. It is a recognition of civil peace as a moral value which may demand that the conscientious objections of a minority not be ignored.¹¹⁷ But to allow the state to permit the killing of innocent human beings through abortion "strikes at the common good so gravely that it endangers the fabric of society and so should be suppressed by law."¹¹⁸

In theological terminology, to vote for the liberalization of the present abortion laws would be material cooperation,¹¹⁹ and anyone who cooperates in an abortion incurs a canonical penalty.¹²⁰ Material cooperation in a sin is licit when the action of the one who cooperates is not evil and there is proportionately a grave reason.¹²¹ But as long as the canonical limitation on cooperation remains, it would seem that even if there was a grave reason for so doing, a Catholic legislator would be prohibited from voting for a more liberal abortion law.

¹¹⁷ *Id.* at 47-48.

¹¹⁸ *Id.* at 39.

¹¹⁹ CATHOLIC LAWYERS GUIDE 25 (1963). "Material cooperation means that one, without giving approval, aids another by an action which is not in itself sinful." *Id.* at 24.

¹²⁰ See Can. 985,4^o

¹²¹ CATHOLIC LAWYERS GUIDE 25 (1963).