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THE ABORTION QUESTION: A NONSECTARIAN APPROACH

ROBERT M. BYRN*

IN 1959, FOLLOWING THE APPEARANCE of several relevant and noteworthy books,¹ the American Law Institute proposed a radical liberalization of the nation's abortion laws.² As finally adopted, the proposal would legalize an abortion if a licensed physician "believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape [including statutory rape], incest, or other felonious intercourse."³ At the time, the Institute admitted that the prevailing pattern of American abortion laws was absolute prohibition except to save the life of the mother, with only half a dozen states going so far as to recognize the preservation of health as an independent justification.⁴

In 1959, the proponents of liberalization began a multi-front campaign for legislative adoption of the ALI's proposal. The movement, in turn, sparked a continuing debate which has become so emotionally charged, particularly with religious recriminations, that sometimes we tend to lose sight of what is at stake. At such times it is necessary to remind ourselves that, theological considerations aside, an induced abortion is the deliberate destruction of an innocent human life and that the liberalization movement is based upon an ethic both alien to our jurisprudence and at odds with the general trend of the law. The purpose of this article is to serve as such a reminder.

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¹ CALDERONE, *ABORTION IN THE UNITED STATES* (1958); GEBHARD, POMEROY, MARTIN & CHRISTENSON, *PREGNANCY, BIRTH AND ABORTION* (1958); WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957). [Hereinafter cited respectively as CALDERONE, GEBHARD, and WILLIAMS.]

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

³ MODEL PENAL CODE § 230.3 (Official Draft, 1962).

⁴ MODEL PENAL CODE § 230.3, at 146 (Official Draft, 1962).

Fetal Life is Human Life

Abortion destroys fetal life, but is that which is killed a human being? The significance of this question comes into clearest focus when viewed from the perspective of legal history.

For centuries, ethical opinion on the humanity of the fetus was based upon an ancient scientific theory which taught that the male implanted the seed of potential humanity in the fertile field of the female from which the seed drew the power to educe a sensitive soul.⁵ Prior to the reception of the soul, the unborn child was considered a part of the mother "as the fruit is a part of the tree."⁶ Aristotle postulated three stages in the development of the fetus. The purely vegetable life began at the moment of conception and to this were added, successively, animal and rational souls. Augustine and Galen fixed the Aristotelian hypothesis in the ethical and medical sciences,⁷ and Thomas Aquinas added the refinement that life is demonstrated by knowledge and movement.⁸ Bracton, the earliest common law authority on the subject and a contemporary of Aquinas, equated movement with quickening (perceptible movement in the womb), so that from Bracton's time until the enactment of the first English abortion statute in 1803,⁹ deliberate destruction of the fetus

was criminal only if it occurred after quickening, *i.e.*, after human life had begun.¹⁰ The 1803 enactment, however, forbade abortion at any stage of the pregnancy but quickening remained crucial in fixing the extent of the punishment.¹¹ In most of the original American abortion statutes, quickening determined either criminality or punishment.¹²

At the very least, the crime of abortion entered our law as a means of protecting human life against deliberate destruction. The law, however, was not competent to determine for itself when human life began *in utero*. Rather, it took the cooperative effort of law and contemporary science to make quickening the decisive test. Protecting human life is still a function of the law and therefore it still remains necessary to begin any discussion of abortion with the inquiry: what does science teach today about the humanity of the fetus? This question was propounded to Dr. Herbert Ratner, a physician and lecturer, and the Public Health Director of Oak Park, Illinois. Dr. Ratner replied as follows:

Modern science regards the embryo as a human being from the moment that the male spermatozoa fertilizes the female ovum to form a 'zygote.'

Fertilization produces a new life. The ancient theory that the embryo is *pars viscerum matris* has been discredited and it is now accepted that the new embryonic life is an independent, functioning organism. Of course, the embryo depends upon the mother for nutriment and an environment conducive to growth, but so does the suckling babe.

We have also rejected the theory that the embryo passes through a subhuman

⁵ Gutwenger, *An Illustration of the Influence of Medical Science upon Theological Thought*, 17 CATHOLIC MEDICAL GUARDIAN 137-38 (1940).

⁶ Davies, *The Law of Abortion and Necessity*, 2 MODERN L. REV. 126, 131 (1938).

⁷ See Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 426-29 (1961).

⁸ WILLIAMS 151.

⁹ Miscarriage of Women Act, 1803, 43 Geo. 3, c. 58.

¹⁰ WILLIAMS 151-52.

¹¹ *Id.* at 152.

¹² Quay, *supra* note 7, at 437. See generally *id.* at 435-37.

stage in the womb. From the moment of zygote formation, the characteristics of a highly individuated human organism are established by the intermixture and combination of the genes, chromosomes and cytoplasm contributed by the parental human egg and sperm. This includes not only sex but a whole spectrum of human traits, both external and internal, organic and functional. . . . For the geneticist the individuality of the adult is the unfolding of the unknown, as well as the yet to be identified genetic determinants within the fertilized egg which give it the essential individuality that subsequently marks the adult. The lay person should readily be able to see that as we project the adult from the given newborn, so the infant (and subsequently the adult) is primarily a projection of the individualized human being, the fertilized egg.

This new, individualized, human life starts to grow immediately, and after several days, begins to implant itself in the womb. The implantation process is not significant *vis-a-vis* the embryo's humanity. A bird, in or out of the nest, is still a bird.

The ancients thought that fetal growth occurred in stages, but actually the development of the fetus is gradual and directive, much like the post-natal growth of the child. In this growth process, birth is a transitional event which adds nothing more to the essential humanity of the child than does puberty.

The implication that abortion is a "crime without a victim"¹³ is obviously unscientific. The victim, as Dr. Ratner's reply makes clear, is a human being whatever the stage of the pregnancy may be. The child in the earliest stages of pregnancy may not look like a human being but, biologically and ethically, the only logical and satisfactory view is to regard

¹³ See SCHUR, *CRIMES WITHOUT VICTIMS* (paperback ed. 1965).

the embryo as a human being from the outset.¹⁴ Is it not established in our law that *all* human beings are entitled to equal protection of the law?

Liberalization Is Not Medically Necessary

Why then are we urged to deny this protection to unborn children? Despite references to the physical and mental health of the mother, there is no medical need for a change in the law. Indeed, since the liberalization movement began, the annual rate of therapeutic abortions has dropped from an estimated 18,000 in 1958¹⁵ to a current estimate of 8,000.¹⁶ Even before 1958 we were being told of a ". . . gradual realization, based on extensive clinical experience, that pregnancy, if properly managed, seldom aggravates organic disease."¹⁷ In addition, there is substantial evidence that abortion will exacerbate mental disease.¹⁸ It is one psychiatrist's impression "that pregnant women are more apt to make a satisfactory recovery from their psychosis, and to do so more promptly than comparable patients who are not pregnant."¹⁹

¹⁴ MARSHALL, *MEDICINE AND MORALS* 66 (paperback ed. 1964).

¹⁵ Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 *GEO. L.J.* 173, 232 (1960).

¹⁶ Lader, *The Scandal of Abortion Laws*, N.Y. Times, April 25, 1965, § 6 (Magazine), p. 32. However, a recent study points to a rise in abortions based upon "psychiatric indications." *Id.*, June 22, 1965, p. 42, col. 4.

¹⁷ Eastman, *Obstetrical Foreword to ROSEN, THERAPEUTIC ABORTION* at xix (1954).

¹⁸ See Comment, 37 *U. COLO. L. REV.* 283, 289-90 (1965); Note, 10 *CATHOLIC LAW.* 161, 168 (1964).

¹⁹ Murdock, *Experiences in a Psychiatric Hospital*, in *ROSEN, THERAPEUTIC ABORTION* 203 (1954).

When one examines the literature of those who would liberalize the law, one realizes that "physical health" does not refer to medical health during pregnancy but to socioeconomic circumstances following birth. If, for instance, an additional child in the home would put an undue strain upon the physical resources of the mother, who is economically unable to afford help, abortion would be justified on so-called physical health grounds. Presumably, if such a mother were able to afford a nurse to care for the child, an abortion would not be justified on "physical health" grounds. In short, we are asked to ration the law's protection to unborn children on the basis of the economic status of their parents.

Mental illness, too, has become a pseudonym for the socioeconomic problems of living.²⁰ As mental disease was discarded as a justification for abortion, "neurotics were quickly substituted for psychotics; and in one writing after another we begin to find suggestions that the medical man should recognize unmedical indications—economic, social, the wish of the patient—to determine his course as a medical man."²¹ So we find "social well-being,"²² and "economic need severe enough to affect the health of the family unit,"²³ being classified as health factors. As early as 1955, the Planned Parenthood Conference was informed that fifty-nine per cent of the legal abortions performed in Sweden between 1950 and 1953 were

based to a large extent on post-natal sociological factors.²⁴ Dr. Alfred Kinsey revealed to the Conference that some psychiatrists were recommending abortions on grounds similar to those written into the Scandinavian laws.²⁵

It has been observed that the major portion of the induced abortions in the United States are socioeconomically motivated.²⁶ Apparently reformers intend to bring the socioeconomic abortion under the mantle of the law via the euphemism "health." To support their position they argue the immorality of a law which prohibits the termination of an unwanted pregnancy. "For a state to force a woman to bear a child against her will is outrageous."²⁷ "The real sin, reformers declare, is the law that demands an unwanted child."²⁸ Of course, any moral code which sanctions the destruction of an innocent human life because it is burdensome and unwanted, is totally alien to our jurisprudence. "[R]espect for human life is not based . . . on any attempt to balance the pleasure and pain that may come to a human being during his life span, but on the plain fact that the life to be protected is human life and therefore sacred."²⁹

²⁴ CALDERONE 25-28 (interview with Dr. Gunnar Geijerstam).

²⁵ CALDERONE 52 (interview with Dr. Alfred Kinsey).

²⁶ MODEL PENAL CODE § 230.3, at 149 (Official Draft, 1962).

²⁷ Lader, *supra* note 16, at 32 (quoting Dorothy Kenyon).

²⁸ *Id.* at 62.

²⁹ ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 114 (1963). "Insistence on the absolute inviolability of innocent human life will certainly occasion suffering. But in the past this suffering was a challenge to medical science and to our charity; acceptance of this challenge proved, in the long run, to be a life-saving principle. Only by facing

²⁰ See SZASZ, *LAW, LIBERTY AND PSYCHIATRY* 11-17 (1963).

²¹ Quay, *supra* note 15, at 223.

²² *Abortion and the Law*, CBS REPORTS (transcript p. 21), April 5, 1965.

²³ Kleegman, *Planned Parenthood: Its Influence on Public Health and Family Welfare*, in ROSEN, *THERAPEUTIC ABORTION* 258 (1954).

The writer, in several debates with reformers, has encountered a variation of the socioeconomic argument which goes something like this: the well-to-do, private patient is able to retain a qualified physician to perform an abortion under anti-septic conditions, while the impecunious woman must either entrust her life to a quack in a back room or bear the child; therefore, the law discriminates against the poor. However, the law should not be changed merely because of an advantage the rich might have over the poor in pursuit of a criminal endeavor. It would be rather ridiculous, for instance, to repeal the criminal sanctions presently imposed upon the tax evader merely because the rich can afford expert assistance in committing tax frauds. The argument begs the question entirely.

From another viewpoint, it seems incongruous to find a declaration against capital punishment of the guilty³⁰ accompanied by a movement to permit prenatal destruction of the innocent. It would seem that the murderer is no less "unwanted" than the unborn child. As a matter of fact, the reformers' basic premise that "there are no legal rights of a fetus"³¹ is completely at odds with the trend in other areas of the law to accord the unborn child its appropriate status as a human being.³² We should not take a reactionary step backward in order to accommodate

suffering in a human way can we expect to make progress—and to stay human ourselves." McCormick, *Abortion*, 112 *AMERICA* 877, 880 (June 19, 1965).

³⁰ See MODEL PENAL CODE § 201.6, comment 1, at 65 (Tent. Draft No. 9, 1959).

³¹ *Abortion and the Law*, CBS REPORTS (transcript p. 25).

³² See PROSSER, *TORTS* § 56 (3d ed. 1964); See generally Gordon, *The Unborn Plaintiff*, 63 *MICH. L. REV.* 579 (1965).

the special brand of sectarianism that proclaims the "sin of the law that demands an unwanted child."

The *Supermensch* Philosophy of Eugenic Abortion

In addition to socioeconomic abortion, reformers also urge us to legalize eugenic abortion—to exclude a human life from the protection of the law solely because it may be defective. The *supermensch* philosophy, which places defectives beyond the pale, is utterly repugnant to our jurisprudence. Reformers point to the recent decision in *Williams v. State*,³³ wherein the court refused to dismiss the claim of an infant who alleged that she had been conceived and born as a result of a rape in a state mental institution, and that the rape would not have occurred but for negligent supervision by the institution's staff. It is argued by reformers that the decision establishes a cause of action for wrongful birth and that it justifies, and perhaps mandates an abortion whenever the child would enter the world under adverse circumstances, e.g., as a mental or physical defective.³⁴ But the reformers fail to note that the court specifically expressed its "disinclination to approve the appellation: 'a cause of action for wrongful life.'"³⁵ The weak and the unfortunate have traditionally been the wards of the law, not its outcasts.

The Emotional Appeal of "Humanitarian" Abortion

The reformers' final proposal, to legalize

³³ 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).

³⁴ *N.Y. Times*, June 26, 1965, p. 1, col. 2.

³⁵ *Williams v. State*, 46 Misc. 2d. 824, 830, 260 N.Y.S.2d 953, 959 (1965).

the termination of a pregnancy which has resulted from rape or incest, has a first-blush appeal.³⁶ The pregnant girl stirs us to compassion while we find it difficult to identify emotionally with the minute, out-of-sight fetus. The law, however, does not mete out its protection on the basis of emotion. It is no less a crime in law to murder a despised assassin than it is to assassinate a beloved president. Both are equally entitled to the protection of the law. Moreover, before the *rapist* may be punished, he must be proved *guilty of the crime* beyond a reasonable doubt. Yet, beyond a reasonable doubt, *the unborn child* of the rape is *innocent of any crime*.

Finally, it is important to understand that abortion is proposed here as a "humanitarian" measure and not necessarily as a psychiatric one.³⁷ It is difficult to comprehend how, in our jurisprudence, the destruction of an innocent human life can ever be considered genuinely humanitarian.

The Problem of Illegal Abortions

Illegal abortion, an extremely difficult crime to bring to light, constitutes a major law enforcement problem in the United

States. It is said that an authoritative consensus tallies 1,000,000 criminal abortions, and more than 5,000 abortion-deaths annually.³⁸ While this may be true, we must be careful in the choice of solutions. "Where fundamental human values are at stake, law must be judged by other criteria than its mere effectiveness in preventing crime. Here, above all, law is the voice of society's conscience."³⁹ Thus, as one writer has said, "every hypothetical solution must be reconciled with the basic purpose of protecting the life of child,"⁴⁰—and legalized abortion cannot be so reconciled. Moreover, experiences in Scandinavia indicate that the American Law Institute's proposal may actually produce an increase in illegal abortions.

In Sweden parallel liberalizations were enacted in an "attempt to stem the evidently increasing rate of criminal abortions."⁴¹ Yet there has been no "noteworthy reduction" and some claim that the populace has become "abortion minded" and that illegal abortions have increased.⁴² Denmark has had a similar experience,⁴³ and apparently some Scandinavians are seeking abortions in Poland where the law is even more permissive.⁴⁴

The failure of the Scandinavian experiment is understandable. When a radical "liberalization" occurs in the legal order,

³⁶ Reformers find support for this proposal in the case of *R. v. Bourne* [1938] 3 A11 E.R. 615 (CCC) wherein it was held that an abortion is justified to preserve the life of the woman, which includes saving her from physical and mental injury. The aborted female in the case was a fourteen year old girl who had become pregnant as a result of being raped. The case has been criticized for its interpretation of the English abortion statute, see Quay, *supra* note 7, at 433-35, and the effect of the decision is doubtful even today. Lederman, *The Doctor, Abortion, and the Law—A Medicolegal Dilemma*, 6 CAN. B.J. 136, 145 (1963); see generally *id.* at 145-47.

³⁷ Rosen, *The Emotionally Sick Pregnant Patient: Psychiatric Indications and Contraindications to the Interruption of Pregnancy*, in ROSEN, THERAPEUTIC ABORTION 243 (1954).

³⁸ Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964).

³⁹ Editorial, *Morality and Policy: IV*, 112 AMERICA 520, 521 (April 17, 1965).

⁴⁰ Comment, 37 U. COLO. L. REV. 283, 292 (1965).

⁴¹ CALDERONE 25 (interview with Dr. Gunnar Geijerstam).

⁴² GEBHARD 224.

⁴³ CALDERONE 173-74 (interview with Dr. Joseph P. Donnelly).

⁴⁴ N.Y. Times, February 14, 1965, p. 20, col. 3.

the moral force of the law is weakened and the liberalization is quite frequently followed by a more far-reaching breakdown in public morality. Specifically, if the law were to devalue fetal life for one purpose, a significant segment of public opinion would devalue it for many other (extra-legal) purposes. When one judges the morality of abortion on *motives*, therapeutic or otherwise, and not by its *object*, abortion can have no limits.⁴⁵

On the other hand, the law has an educational function. When reformers argue that, "To use the criminal law against a substantial body of decent opinion . . . is contrary to our basic traditions,"⁴⁶ they forget that the law may appropriately be used to teach the specific application of a principle which even that "substantial body of decent opinion" is willing to accept. For instance, the law is being used

today against otherwise decent citizens to orient them to a particular application of the principle that all men are created equal.

The task, then, is to bring the public to a realization of the fact that pre-natal life is innocent human life and, like all such life, is inherently sacred. There are many who can contribute in different ways: state legislatures, by supplementing their abortion laws with a statement of public policy opposing permissive abortion and reasserting the humanity of the unborn child; the medical profession, by restating its role as the guardian of both the mother *and* the unborn child; and the mass media, by giving suitable coverage to advanced embryological findings and opinions.⁴⁷ Most important of all, to those who weigh the value of a life on the scales of social utility and convenience, the legal profession must reply with an unequivocal reaffirmation of the sanctity and inalienability of *all* innocent human life.

⁴⁵ Tiberghien, *Principles and Moral Conscience*, in FLOOD, *NEW PROBLEMS IN MEDICAL ETHICS* 32 (paperback ed. 1963). See also Editorial, *supra* note 39.

⁴⁶ MODEL PENAL CODE § 230.3, at 151 (Official Draft, 1962).

⁴⁷ *E.g.*, Life Magazine, April 30, 1965, p. 54; Time Magazine, April 30, 1965, p. 58, col. 3.