

ABORTION AND THE POPULATION CRISIS; THERAPEUTIC ABORTION AND THE LAW; SOME NEW APPROACHES

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Induced abortion is one of the most popular, if not the most widely used, single means of personal population control in the United States and throughout the world today. In the United States, however, criminal sanctions against performing abortions have resulted in many pregnancies being terminated under septic conditions by unskilled persons. The authors contend that our abortion laws are badly in need of reform in order to bring them into conformity with accepted medical practice, and to permit termination of pregnancy for medical and humanitarian reasons by qualified physicians. Notwithstanding the religious opposition to efforts of the medical profession and the public toward social progress, the law of therapeutic abortion is on the threshold of change, either by legislative enactment or court decisions.

I. ABORTION AND THE POPULATION CRISIS

Although there is general agreement that abortion will not be a mass method of birth control in this country,¹ for a number of reasons it is appropriate to consider the subject of induced abortion in the context of dialogue over controlling an exploding population. Judging from the universality and high incidence of induced abortion, it becomes obvious that it is one of the most popular, if not the most widely used, single means of "personal population control" in the world today.² This has been the case from at least the beginning of man's recorded history.³

Estimates of induced abortion in the United States indicate that more than one million are performed annually, or one out of every

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¹ Drinan, "The Inviolability of the Right to be Born," 17 W. Res. L. Rev. 465, 467 (1965); George, "Current Abortion Laws: Proposals and Movement for Reform," 17 W. Res. L. Rev. 371, 374 (1965).

² Kummer, "The Problems of Abortion: The Personal Population Explosion," in *The Population Crisis and the Use of World Resources*, Publication 2, World Academy of Art and Science, The Hague, 1964; Population Council, *Family Planning and Population Programs—A Review of World Developments*, noted in *Newsweek*, June 27, 1966, p. 63.

³ Bates, *Criminal Abortion* (1964); Gebhard, *Pregnancy, Birth and Abortion* (1958); St. John-Stevan, *The Right to Life* (1964); Lader, *Abortion* (1966); Schur, *Crimes Without Victims* (1965); Taussig, *Abortion, Spontaneous and Induced* (1936); *Abortion in the United States* (Calderone ed. 1958).

four or five pregnancies.⁴ Undoubtedly, the overwhelming majority of these are in violation of existing law, which allows abortion only to preserve the life of the mother.⁵ Most abortions are undertaken by married women with children.⁶

The abortion rate in other nations with restrictions similar to those in the United States is considerably higher. In France and Germany, for example, it has reached epidemic proportions.⁷ Pregnancies terminated in those nations exceed live births, and the mortality rate varies from one to eight percent.

Only in Japan has abortion been openly acknowledged as a method of mass population control.⁸ It was legalized in 1948 along with requirements for maintaining minimal medical standards, and has since reduced the birth rate by more than one-third. The crash program of abortion, brought on by the serious population crisis following World War II, did not offend the mores and religious beliefs of the Japanese, however, as might be the case in the West. Infanticide, as well as abortion, had been practiced in Japan even in recent generations to control the size of the family. Along with the legalizing of induced abortion, widespread encouragement has been given by the government toward family planning through the use of contraceptive devices, and the abortion rate is steadily dropping.⁹

In Russia and Eastern Europe the restrictions against abortion were considerably relaxed in 1955 and the few years following.¹⁰ None of these governments show official concern with over-population, however, since this is proscribed by Marxist philosophy. Moreover, several of these countries have low birth rates and some of them, for example, Czechoslovakia and Hungary, pursue an active population growth policy; they do not pursue a policy of contraceptive encouragement or family planning in conjunction with legalized abortion. Though

⁴ Kopp, *Birth Control in Practice* 222 (1934); Lader, *Abortion* 2 (1966); Leavy & Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws," 35 *So. Cal. L. Rev.* 123, 124 n.5 (1962); Niswander, "Medical Abortion Practices in the United States," 17 *W. Res. L. Rev.* 403 (1965).

⁵ See the comprehensive "Summary of State Laws on Abortion," in Appendix B, Sands, "The Therapeutic Abortion Act: An Answer to the Opposition," 13 *U.C.L.A.L. Rev.* 285, 310 (1966).

⁶ See authorities cited note 4 *supra*.

⁷ Breitenacker, "Abortion in the German-Speaking Countries of Europe," 17 *W. Res. L. Rev.* 553, 554 (1965).

⁸ Tietze, "Induced Abortion and Sterilization as Methods of Fertility Control," *Nat'l Comm'n on Maternal Health*, Publication 27 (1965).

⁹ Lader, *Abortion* 132 (1966).

¹⁰ Tietze, *supra* note 8. See also Lader, *Abortion* 125-31 (1966).

comprehensive statistics are unavailable from many of these nations, Czechoslovakia and Hungary show substantial reductions of live births with the increase of legal abortion.

It should be noted that physical after-effects of abortion are rare in Japan and in those Eastern European nations which provide statistics, and the mortality rate reported is exceedingly low.¹¹ Post-abortion psychiatric sequellae are mild if not rare, and this has generally been confirmed by recent studies in other areas.¹²

A. *Changing Concepts of Population; The Woman vs. The Fetus*

Abortion is related to population in another way. Throughout history the severity of the restrictions on abortion depended upon the need to increase the population.¹³ Whether the prohibition was designed primarily to protect the mother vis-à-vis the fetus usually turned on whether a particular community was peaceful and affluent on the one hand, or on the other hand, was facing the challenge of war or was aggressively extending its own power, wealth and ideology.

Societies which enacted severe penalties, sometimes even death, for destruction of the embryo or fetus were ancient Sparta, Japan and Russia prior to World War II, Nazi Germany and other cultures bent upon not losing a single potential worker or warrior.¹⁴ On the other hand, the Greek city states, ancient Rome and Egypt made abortion the basis of a well-ordered population policy.¹⁵ The more mature societies placed primary stress on protection of the woman by relaxing the prohibition as she grew older and when her safety might be endangered by continuation of the pregnancy. Increasingly, this has been the case in the modern world, where the stress on soldier-manpower has lessened in favor of controlling an exploding population.

In modern times the secular law of the Western world has provided primary protection to the mother, as is initially indicated by the stated exception in most statutes: "to preserve the life of the mother."¹⁶ Beyond this, the majority view in the United States is that the woman-abortee is not an accomplice to the offense, but a victim of it.¹⁷ She is seldom, if ever, prosecuted and is usually granted im-

¹¹ *Ibid.*

¹² Tietze, *supra* note 8, at 1168. See also Kummer, "Post-Abortion Psychiatric Illness—A Myth?" 119 Am. J. Psychiatry 980 (1963).

¹³ Breiteneker, *supra* note 7, at 553; Leavy & Kummer, "Criminal Abortion: A Failure of Law," 50 A.B.A.J. 52, 53 (1964).

¹⁴ *Ibid.*

¹⁵ Lader, Abortion 76 (1966).

¹⁶ Sands, *supra* note 5, at Appendix B.

¹⁷ Annot., 139 A.L.R. 993 (1942).

munity from prosecution,¹⁸ sometimes by statute,¹⁹ when her testimony is needed to convict the abortionist. Moreover, an attempted abortion is sufficient to fall within most substantive felony statutes, and miscarriage need not result.²⁰ In many states it is not even an element of the prosecution's case that the woman was in fact pregnant. It is enough that the abortionist believed her to be pregnant and performed an act upon her with the *intent* to terminate a pregnancy.²¹

But the moral position is stressed by those with orthodox religious views, overwhelmingly the hierarchy of the Roman Catholic Church.²² Some Orthodox Jewish authorities also take this position,²³ but they have not campaigned as vigorously as the Catholic Church against relaxation of abortion laws. The restrictive views of the ancient Hebrews²⁴ were adopted unmodified by Christianity and early canon law, but Protestantism, in general, has come to accept termination of pregnancy when the woman's health or life is endangered; it is now considered primarily a medical problem for each family to decide after competent medical and clerical consultation, with primary consideration being given the woman.²⁵ Whereas Judaic Law has evolved to accept preservation of the woman's life, if not her health, as an indication for therapeutic abortion,²⁶ Catholicism continues to the present to absolutely prohibit intentionally induced abortion for any reason whatever, even to preserve the woman's life.²⁷

Although the Catholic hierarchy denies neither the high abortion rate, nor that the great majority of medical opinion today would terminate pregnancy for reasons other than to preserve life, it stresses the importance of maintaining the present penal sanctions as a

¹⁸ Williams, *The Sanctity of Life and the Criminal Law* 153 (1957).

¹⁹ E.g., Cal. Pen. Code § 1324.

²⁰ Regan, "The Law of Abortion," in *Legal Medicine* 834 (Gradwohl ed. 1954).

²¹ Annot., 46 A.L.R.2d 1393 (1956).

²² Sands, "The Therapeutic Abortion Act: An Answer to the Opposition," 13 U.C.L.A.L. Rev. 285 (1966).

²³ E.g., Jakobovits, "Jewish Views on Abortion," 17 W. Res. L. Rev. 480 (1965).

²⁴ *Exodus* 21:22-23.

²⁵ Therapeutic Abortion 164 (Rosen ed. 1954); Model Penal Code § 207.11, comment (Tent. Draft No. 9, 1959).

²⁶ Cohen, "A Jewish View Toward Therapeutic Abortion," in *Therapeutic Abortion* 166 (Rosen ed. 1954).

²⁷ Canon 2350 § 1; 8 Augustine, *Commentary on Canon Law* 397 (1931); 3 Bouscaren, *Canon Law Digest* 669 (1954); 2 Woywood, *Practical Commentary on the Code of Canon Law* 545 (Smith rev. 1948); Pope Pius XI, *Casti Canubii* (1930), as reprinted in *Ass'n of Am. L. Schools, Selected Essays on Family Law* 132, 149 (Sayre ed. 1950).

deterrent to widespread sexual promiscuity with the resulting "break-down in public morality."²⁸ The poor deterrent effect, however, is indicated by four studies which show Catholics to comprise over twenty percent of all abortion patients. This almost equals the Catholic ratio in the United States, twenty-five percent of the total population.²⁹

This Calvinist concept of enforcing a moral philosophy through fear of punishment in matters of sex is not limited to the Catholic Church or other orthodox religions. It is Anglo-American in nature and relates, in large part, to our strongly ingrained New England Puritanism, with its dismal obsession with sex and immorality.³⁰

Notwithstanding the primary protection given the woman by the law, until recent years a number of courts on the surface have perpetuated the restrictive view, based upon the early Judaeo-Christian tenets, that interference with propagation is a moral question involving a crime against the normal functions "of nature by which the human race is propagated and continued."³¹ But such views are changing rapidly, especially with respect to abortion for medical and humanitarian reasons.

B. *Abortion and Modern Concepts*

Abortion has been a taboo subject, although the taboos seemed to be more concerned with the discussion of abortion rather than the undertaking of the act itself.³² There is a direct derivation of attitudes concerning abortion from our prevailing attitudes toward sex in general; it is apparent that induced abortion is a definite part of our social mores, but society steadfastly refuses to acknowledge the fact.

In recent years, however, abortion increasingly has come into more popular discussion.³³ Medical science in most cases can now save a woman's life, strictly speaking, and still bring the fetus to birth, but current medical practice often prescribes termination of

²⁸ Byrn, "The Abortion Question: A Nonsectarian Approach," 11 Catholic Law. 315, 321 (1965); Drinan, *supra* note 1 at 476. See also Jakobovits, *supra* note 23 at 494, for the similar Orthodox Jewish view.

²⁹ Lader, Abortion 7, 177 n.5 (1966).

³⁰ *Id.* at 81, 89.

³¹ *Mills v. Commonwealth*, 13 Pa. 621 (1850); *Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923); 32 Ind. L.J. 193 (1957).

³² Taussig, Abortion, Spontaneous and Induced 396 (1936).

³³ Recent books cited note 3 *supra*. Several dozen other major contributions have appeared in law reviews and medical journals in the last few years, many of which are cited in this paper.

pregnancy to preserve the woman's health.³⁴ The medical profession is raising a protest to the interposition of the prohibitory law between physician and patient in this manner, and the public is beginning to demand the right to follow the physician's advice when that advice is within current standards and medically sound.³⁵ Medicine and the public are becoming more aware of serious congenital deformities being caused by disease, drugs and other interferences in early pregnancy.³⁶ Also, there is increasing resistance to brushing under the rug the terrible injustice of forcing birth upon the victim of sexual assault.³⁷

It is recently noticeable that the subject of abortion is riding the wave of the grand dialogue over the population explosion and the need for birth control programs.³⁸ In poor and underdeveloped nations, where it is impossible to stem the burgeoning birth rate with contraception and sex education, abortion on a major scale may be the only means of avoiding mass starvation, not to speak of providing the masses of people with a decent life.³⁹ The Indian government now has such a proposal under study.⁴⁰ Abortions could be performed in such a program only on a voluntary basis, of course, and in societies whose mores would not oppose it. Such a program should include a broad companion effort of education and encouragement toward family planning through contraception,⁴¹ as was done in Japan.

In the United States and other western countries, abortion will not be considered as a mass method of population control. Existing mores, religious beliefs and social restrictions will not fully accept legalized abortion. Sex education, family planning and the use of contraceptives may be enough to control the growing birth rate, and, hopefully, will reduce the high incidence of clandestine abortion by unskilled persons. Presently in the testing stage are drugs and devices which will prevent implantation of the fertilized egg on the

³⁴ Niswander, "Medical Abortion Practices in the United States," 17 W. Res. L. Rev. 403, 406 (1965).

³⁵ E.g., the recent experience in California, discussed in notes 78, 79, 80 *infra* and related text.

³⁶ Niswander, *supra* note 34, at 406.

³⁷ Beilenson, "The Therapeutic Abortion Act: A Small Measure of Humanity," 41 Los Angeles B. Bull. 316, 344 (1966).

³⁸ Family Planning and Population Programs—A Review of World Developments, *supra* note 2.

³⁹ Lader, Abortion 94 (1966).

⁴⁰ *Ibid.*

⁴¹ *Id.* at 131.

uterine wall, and this may further reduce the rate of illegal abortions.⁴² But there will always be unwanted pregnancies, and if any restrictions exist at all there will be abortions outside the scope of accepted medical practice and under dangerous conditions. That is, people will continue to use induced abortion as their own method of "personal population control."

There remains one area which cannot be overlooked in societies, such as in the United States, which tolerate only a moderate course of birth control; namely, the problem of therapeutic abortion. The Scandinavian nations also regard therapeutic abortion as a "last resort"⁴³ and have already met the problem by providing broader socio-medical counseling to pregnant women and by relaxing the prohibitory law.⁴⁴ The law allows termination of pregnancy where it endangers the mother's health, where the child may be born with a serious deformity, where pregnancy resulted from rape or incest, and in some limited cases for socio-medical reasons.⁴⁵ Western European nations are likewise tending in this direction.⁴⁶

The dialogue in the United States surrounding abortion for health and humanitarian grounds is rapidly coming to a head, and the law of therapeutic abortion is undergoing a major change.

II. THERAPEUTIC ABORTION AND THE LAW

Existing law in most states is interpreted to prohibit the licensed physician from prescribing or undertaking termination of pregnancy to treat a woman's health. In forty-one states such an act is a criminal offense,⁴⁷ and in most states it is a felony⁴⁸ to procure or attempt to procure an abortion by any means, except when it is necessary to preserve the life of the woman. Louisiana prohibits all abortions

⁴² See Meloy, "Preimplantation Fertility Control and the Abortion Laws," 41 Chi.-Kent L. Rev. 183 (1964), where the question was raised whether these methods terminate pregnancy in violation of existing law.

⁴³ Model Penal Code § 207.11 at 165-66, comment (Tent. Draft No. 9, 1959); Skalts & Norgaard, "Abortion Legislation in Denmark," 17 W. Res. L. Rev. 498, 519 (1965); Gebhard, Pregnancy, Birth and Abortion 221 (1958); Abortion in the United States 14 (Calderone ed. 1958).

⁴⁴ Lader, Abortion 117 (1966).

⁴⁵ Skalts & Norgaard, *supra* note 43, at 509. The 1956 Danish law states that a woman may be deemed unfit to take proper care of her child.

⁴⁶ Breitenacker, *supra* note 7, at 553. For the English Rule see *Rex v. Bourne*, 1 K.B. 687 (1939); Mathew, "The Present State of the Law of Abortion," 4 Med. Sci. & L. 170, 175 (1964); Williams, "Legal and Illegal Abortions," 4 Brit. J. Crim. 557, 562 (1964).

⁴⁷ See Sands, *supra* note 22, at Appendix B.

⁴⁸ A "high misdemeanor" in New Jersey; N.J. Stat. Ann. § 2A:87-1 (1953).

without exception,⁴⁹ but provides a different standard for physicians than for non-physicians. The physician's license can be suspended unless it appeared, with concurring medical opinion, that the woman's life was in peril.⁵⁰

Alabama,⁵¹ Colorado,⁵² New Mexico⁵³ and the District of Columbia⁵⁴ expressly provide that an abortion may be performed to preserve the woman's health or protect her from serious bodily injury. The same result appears to have been reached by the courts of Massachusetts⁵⁵ and New Jersey,⁵⁶ the statutes of which prohibit "unlawful" abortion. Pennsylvania has a similar statute, but no cases have interpreted it.⁵⁷ In Maryland a physician may perform an abortion if, with concurring medical opinion, he is satisfied "that no other method will secure the safety of the mother."⁵⁸ Although no cases interpret this statute, an Attorney General of Maryland has opined in a letter that "safety" means "health."⁵⁹

The laws of Louisiana and Oregon provide an instructive study. Oregon prohibits all abortions unless necessary to save the life of the woman⁶⁰ but, like Louisiana, provides a broader standard when regulating the practice of its licensed physicians. Notwithstanding the criminal law, a doctor's license may be suspended or revoked only for

procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician and surgeon who is not an associate or relative of the physician or surgeon and who agrees that an abortion is necessary.⁶¹

The Oregon Supreme Court ruled that a physician who undertakes

⁴⁹ La. Rev. Stat. § 14:87 (Supp. 1952).

⁵⁰ La. Rev. Stat. § 37:1285(6) (1950).

⁵¹ Ala. Code tit. 14, § 9 (1958).

⁵² Colo. Rev. Stat. Ann. § 40-2-3 (1953).

⁵³ N.M. Stat. Ann. § 40A-5-3 (1964).

⁵⁴ D.C. Code Ann. § 22-201 (1961).

⁵⁵ Mass. Gen. Laws Ann. ch. 272, § 19 (1956); *Commonwealth v. Brunelle*, 341 Mass. 675, 171 N.E.2d 850 (1961); *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944).

⁵⁶ N.J. Stat. Ann. § 2A:87-1 (1953); *State v. Siciliano*, 21 N.J. 249, 121 A.2d 490 (1956); *State v. Murphy*, 27 N.J.L. 112 (Sup. Ct. 1858).

⁵⁷ Pa. Stat. Ann. tit. 18 § 4718 (1963); *Sands*, *supra* note 22, at 288.

⁵⁸ Md. Ann. Code art. 27, § 3 (1957).

⁵⁹ *Therapeutic Abortion* 152 (Rosen ed. 1954).

⁶⁰ Ore. Rev. Stat. § 163.060 (1965).

⁶¹ Ore. Rev. Stat. § 677.190(2) (1965).

to terminate pregnancy and meets the requirements of this regulatory statute is not subject to criminal prosecution.⁶² Thus, the actions of a licensed physician in administering sound and accepted medical treatment are removed from the ambit of the penal law which is designed primarily to protect the woman from unskilled abortionists.

But the statutes and case law of these states have not always been indicative of interpretations and practices in the more populous areas of the nation, and it is said that physicians and hospital therapeutic abortion committees in Louisiana and Oregon, as well as in the other states which allow abortion for health reasons, still interpret the law strictly so as to discriminate against those who cannot obtain, or cannot afford to obtain, the right doctor and the right hospital in order to secure relief.⁶³ We must look to the more populous states, then, for valid indications of current trends.

California courts, in the absence of legislation similar to that of Louisiana and Oregon, have begun to speak in terms of separating the licensed medical practitioner from those who risk the lives of women for a profit. In the case of a physician, the prosecutor is held to a higher standard of proof that the abortion was not necessary to preserve the woman's life,⁶⁴ and/or that the physician's specific intent was to terminate pregnancy for a reason other than to preserve life.⁶⁵ Furthermore, it is suggested in the California decisions that preservation of life might include danger to health as well.⁶⁶ Precedent for such interpretation comes, *inter alia*, from the famous charge to the jury in the 1938 English case of *Rex v. Bourne*,⁶⁷ the standard followed in that country.⁶⁸ The California court also pointed out the inadequacy of existing law in not requiring pregnancy to be terminated by a medical doctor in a licensed hospital.⁶⁹ These trends are not with-

⁶² State v. Buck, 200 Ore. 87, 262 P.2d 495 (1953).

⁶³ Statements by Drs. Alan F. Guttmacher and Robert E. Hall, of New York City, presented at a panel discussion on "How We Can Update Our Abortion Laws" at the annual convention of the American College of Obstetricians and Gynecologists in Chicago, May 4-5, 1966.

⁶⁴ People v. Ballard, 167 Cal. App. 2d 803, 335 P.2d 204 (Dist. Ct. App. 1959). See also a subsequent prosecution, People v. Ballard, 218 Cal. App. 2d 295, 32 Cal. Rptr. 233 (Dist. Ct. App. 1963).

⁶⁵ People v. Abarbanel, 239 Adv. Cal. App. 24, 48 Cal. Rptr. 336 (Dist. Ct. App. 1965).

⁶⁶ People v. Ballard, 167 Cal. App. 2d 803, 814, 335 P.2d 204, 212 (Dist. Ct. App. 1959).

⁶⁷ 1 K.B. 687 (1939).

⁶⁸ Mathew, *supra* note 46, at 175; Williams, *supra* note 46, at 562-63.

⁶⁹ People v. Ballard, 218 Cal. App. 2d 295, 308, 32 Cal. Rptr. 233, 241 (Dist. Ct. App. 1963).

out significance in considering the pressure now building toward an impending change in the law of therapeutic abortion.

A. *Medical Practice and the Changing Law*

The law of therapeutic abortion is on the verge of change, to bring it into conformity with current medical thought and practice. Movements have been underway in several of the more populous states,⁷⁰ but thus far have been unsuccessful because of strong opposition from the leadership of the Roman Catholic Church and Catholic hospitals. The overwhelming majority of the medical profession,⁷¹ and the general public as well,⁷² favor modification of existing law to include health and humanitarian indications for lawful termination of pregnancy.

The California experience offers the most recent and far-advanced example of the impending reform. The Therapeutic Abortion Act, introduced by Assemblyman Anthony C. Beilenson of Los Angeles, after being studied by committees for three regular sessions of the California Legislature (about five years) was reported out of the Assembly Criminal Procedure Committee in 1965 with a "do pass" recommendation.⁷³ Mr. Beilenson informed us that indications showed sufficient votes on the floor of the lower house to pass the measure. The bill, however, was referred to the Assembly Ways and Means Committee for approval of a modest sum of money for supervision of Hospital Therapeutic Abortion Committees by the State Department of Public Health. Tremendous last-minute pressure was exerted by prominent Catholics on the members of that Committee, the majority of which favored the bill, and the chairman saw to it that the measure was killed without a vote.⁷⁴

The Beilenson Bill was patterned after the Model Penal Code provisions drafted by the American Law Institute⁷⁵ and allowed therapeutic abortion if there was substantial risk (1) of the woman's

⁷⁰ Illinois, Kansas, Minnesota, New Hampshire, New York, and most recently in California. See Lader, *Abortion* 111-16, 144 (1966); George, "Current Abortion Laws: Proposals and Movements for Reform," 17 *W. Res. L. Rev.* 371 (1965).

⁷¹ The results of polls of physicians in New York State and at a recent AMA meeting are reported in Lader, *Abortion* 144 (1966). The history of overwhelming medical support for abortion legislation in California is reported in Sands, "The Therapeutic Abortion Act: An Answer to the Opposition," 13 *U.C.L.A.L. Rev.* 285 (1966).

⁷² See text accompanying note 89 *infra*.

⁷³ California Assembly Bill 1305, 1965 Regular (General) Session. See Sands, *supra* note 71, for a detailed history of AB 1305.

⁷⁴ Lader, *Abortion* 147 (1966), quoting a report from the *San Francisco Chronicle*.

⁷⁵ Model Penal Code § 230.3 (Proposed Official Draft 1962).

health being endangered by the pregnancy, or (2) of the child being born with a grave defect, or (3) that the pregnancy resulted from rape or incest. Conservative procedural safeguards required concurring medical opinion and majority approval of a hospital therapeutic abortion committee; the committees were to be supervised by the State Department of Public Health. For rape and incest pregnancies, consultation of the local district attorney was required to determine if he objected to the conclusion that there had been a sexual assault, and if he objected, the matter could be taken to the local court of general jurisdiction for a priority determination of fact.

Passage of the Beilenson Bill was supported overwhelmingly by the medical profession in California, as initially indicated by the endorsements of the California Medical Association, the Bureau of Maternal and Child Health, the California State Department of Public Health, the California State Board of Health, and all the obstetrical and gynecological societies in the State.⁷⁶ A petition signed by more than one thousand physicians, thirteen hundred clergymen, and one-hundred-fifty prominent attorneys was submitted to the Criminal Procedure Committee urging passage of the measure, and numerous other interested groups and persons testified in favor of the bill.⁷⁷

The California Medical Association has consistently supported modification of the law for the reason that it has long been responsible and competent medical practice to advise termination of pregnancy where the woman's health is at stake, or where it is likely that the child will be born with a serious defect, so long as this procedure does not offend the moral and religious beliefs of the woman and her family.⁷⁸ A recent sample taken and reported through the Stanford School of Law confirmed that abortion on these grounds in most non-Catholic hospitals in California was common practice.⁷⁹ Even the opposition witnesses before the California Assembly Criminal Pro-

⁷⁶ Sands, *supra* note 71, at 287 n.15.

⁷⁷ *Id.* n.16. *E.g.*, California State Junior Chamber of Commerce; contra Costa Council for Responsible Parenthood; American Association of University Women, Cal. Division; 1960, 1962 and 1966 Los Angeles County Grand Juries.

⁷⁸ "MDs Seek Abortion Law Change," Medical World News, April 15, 1966, p. 56, reports "support from the overwhelming majority of delegates at the CMA's (California Medical Association) annual (1966) meeting" for reform abortion legislation, and that "more than 85% of the nation's psychiatrists who responded to a survey favor the easing of abortion laws." Those favoring abortion in the psychiatrists' poll numbered 5,241; the survey was conducted by the nationally known Association for the Study of Abortion, composed of clergymen, doctors, lawyers, and laymen.

⁷⁹ Packer & Campbell, "Therapeutic Abortion—A Problem in Law and Medicine," 11 Stan. L. Rev. 417 (1959).

cedure Committee admitted that the proposed bill would only make legal what is current medical practice.⁸⁰

It must be noted, however, that such medical treatment is far from being universally available; it is considerably limited in nature. Most women do not have the means or the contacts to be channelled to the particular doctor and hospital where existing law might be stretched or violated. The restrictive law particularly results in discrimination against the poor.⁸¹ Hospital therapeutic abortion committees tend to limit approval to compelling cases presented by their own staff members, in which there is no possibility of publicity or trouble coming to the hospital.⁸²

The restrictiveness of non-Catholic hospitals also depends upon the temper of the times.⁸³ At this writing there is considerable dialogue reported in the press concerning violations of the anti-abortion law in California by reputable physicians, much of which is instituted by prominent Catholic obstetricians.⁸⁴ Although there is no record of prosecution of a licensed physician who, with concurring medical opinion and approval of a hospital committee, terminated pregnancy in a licensed hospital, prosecutions were recently threatened for such abortions performed when German measles were contracted in early pregnancy.⁸⁵ Disciplinary proceedings were recently instituted before the State Board of Medical Examiners against a number of doctors who performed such abortions. Some members of the Board are the very persons who contributed to the public dialogue directed at the accused physicians. It is our recent experience that this publicity and disciplinary action have served to severely curtail hospital abortions in California. Patients with sufficient means are being referred out-of-state for medical treatment. Perhaps this was the ultimate goal of those who caused the disciplinary proceedings and dialogue to be instituted.

The attitude of the general public favors a broadening of the law of therapeutic abortion. This is indicated not only by the high incidence

⁸⁰ Transcript of hearings before the California Assembly Interim Committee on Criminal Procedure, held Dec. 17 & 18, 1962, in San Diego, Hon. John A. O'Connell, Chairman, presiding.

⁸¹ Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 Am. J. Obst. & Gyn. 518 (1965), shows twenty times more abortions in private cases than in the wards and clinics; Niswander, "Medical Abortion Practices in the United States," 17 W. Res. L. Rev. 403, 405 (1965).

⁸² Niswander, *supra* note 81, at 418.

⁸³ *Ibid.*

⁸⁴ Reports in Los Angeles Times: March 22, 1966, § 1, p. 4, col. 4; June 16, 1966, § 1, p. 3, col. 3; June 24, 1966, § 1, p. 4, col. 4; June 27, 1966, § 1, p. 3, col. 1.

⁸⁵ *Ibid.*

of illegal abortion, but also by the voluminous professional literature now urging a change, by the increasing dialogue in the public communications media decrying the ills of existing law, and by the recent wide-spread support of the medical and related professions for measures such as the Beilenson Bill. As in California, physicians in New York State recently indicated overwhelming support for a change in the law.⁸⁶ The Association for the Study of Abortion, headquartered in New York City, was formed in 1964 and has a professional membership from all over the country.⁸⁷ Other groups have been formed in California for the specific purpose of changing the law.⁸⁸ For a direct sampling of public opinion, a recent CBS nationwide survey found that a majority of those with opinions favored "relaxation of existing abortion laws."⁸⁹

In July, 1966, the highly respected California Poll, headed by Mervin D. Field, conducted a state-wide survey throughout California and found that fifty-six percent of the general public favored liberalizing the abortion law, as opposed to twenty-five percent favoring the existing laws. Among Roman Catholics, forty-six percent favored liberalization and thirty-six percent favored restrictive laws. The major news media in California have editorialized in favor of broadening the lawful indications for therapeutic abortion, including the reputable Los Angeles Times, the major San Francisco newspapers, and the CBS and ABC television and radio outlets in Los Angeles.

The Conference of Delegates to the California State Bar Convention, in September of 1966, recommended by an overwhelming majority the enactment of Assemblyman Beilenson's Therapeutic Abortion Act. The Conference was comprised of nearly one thousand lawyers from all over the state who were delegates and alternate delegates to the State Bar Convention.

B. *Religious Opposition*

The only organized opposition to reforming the law of therapeutic abortion comes from the leadership of the Catholic Church

⁸⁶ Hall, "New York Abortion Law Survey," 93 Am. J. Obst. & Gyn. 1182 (1965). The New York Academy of Medicine also has recently endorsed legislation similar to the Beilenson Bill. See New York Academy of Medicine, Therapeutic Abortion (1964).

⁸⁷ Lader, Abortion 148 (1966).

⁸⁸ University Women for Humane Abortion Law; California Committee on Therapeutic Abortion; Society for Humane Abortion; California Committee to Legalize Abortion. See also Sands, *supra* note 71, at 287, for others supporting legislation.

⁸⁹ Broadcast throughout the U.S. on the CBS television show "National Health Quiz" on the eve of Jan. 18, 1966; 43% favored relaxation, 39% opposed it, 18% had no opinion.

and its hospitals.⁹⁰ A number of organizations vigorously opposed the Beilenson Bill in California, but they have all manifested the religious philosophy of the Roman Catholic Church.⁹¹ Even the ostensibly medical and legal arguments proffered by these groups bear the same stamp of theological doctrine.⁹²

The Church's opposition to abortion historically is based on the doctrine of original sin, that a child would die without the sacrament of baptism; thus condemning it to eternal punishment.⁹³ This is still recognized, but it is not used as an argument against abortion. Instead, the Church contends that the embryo is a human being from the moment of conception, and its directly induced destruction is an intentional homicide of an innocent person.⁹⁴ Obviously, this view is stricter than existing law.

The legal argument presented by Catholic opponents starts with the basic premise that a human being exists from conception.⁹⁵ Upon this premise rests the remainder of the argument: namely, that the embryo or fetus is a "person" entitled to all the rights and protection of constitutional law normally given to other human beings no longer in their mothers' wombs; more particularly, the so-called "right to be born."

Much precedent is cited to buttress the basic premise. It consists of cases which recognize the right of a child to sue for pre-natal injuries, and which recognize a child in gestation for purposes of inheritance or appointment of a guardian.⁹⁶ But such precedent is inapplicable here, since the so-called "rights" of the child mature only if it is born in a viable state. In every one of these cases, without exception, the interests of mother and child coincide; every party concerned *wants* the child to be born. Even in the recent New Jersey

⁹⁰ George, "Current Abortion Laws: Proposals and Movements for Reform," 17 W. Res. L. Rev. 371 (1966); Kummer & Leavy, "Therapeutic Abortion Law Confusion," 195 J. Am. Med. Assoc. 96, 99 (1966); Lader, Abortion 75, 93, 165 (1966).

⁹¹ Sands, *supra* note 71, at 287 n.18. *E.g.*, Catholic Physician Guild; Guild of Catholic Psychiatrists; St. Thomas More Society; California Council of Catholic Hospitals; Catholic Parent Teacher's Ass'n.

⁹² Sands, *supra* note 71.

⁹³ *Supra* note 27; Williams, The Ideas of the Fall and of Original Sin 221 (1957).

⁹⁴ *Ibid.*

⁹⁵ *E.g.*, Byrne, "A Critical Look at Legalized Abortion," 41 Los Angeles B. Bull. 320 (1966). It is instructive to note that a number of Catholic opponents of reform legislation insist upon referring to the measure involved as "legalized abortion" no matter how conservative the bill may be, in an apparent attempt to lead people to believe the legislation in reality means abortion merely for the asking.

⁹⁶ Drinan, "The Inviolability of the Right to be Born," 17 W. Res. L. Rev. 465, 468 (1965).

case,⁹⁷ where the court appointed a guardian and ordered transfusions for the pregnant mother who had refused on religious grounds, everyone (including the mother) wanted the child to live; the court stressed the importance of physicians being able to administer necessary, competent and accepted medical treatment. On the other hand, where therapeutic abortion is requested, the interests of the pregnant woman and the fetus are antagonistic.

We have found no precedent anywhere in the United States which challenges the constitutionality of the present exception to the prohibitory law, whether it involves preservation of life or health. Counsel to the California Legislature explored the matter fully and found no constitutional flaw, such as impinging the "rights" of the fetus, in the Beilenson Bill or in its predecessors.⁹⁸ Similarly, the American Law Institute, in its comprehensive studies spanning many years and leading to the reformed abortion sections of the Model Penal Code, did not even mention the issue of constitutionality.⁹⁹

All this leads one author, who was counsel to the committee which conducted hearings on the Beilenson Bill, to question the sincerity of the opposition in raising this issue; to question "whether the opposition truly believes there is a constitutional issue involved, or is only making a desperate attempt to justify its opposition to the Therapeutic Abortion Act for other than religious reasons."¹⁰⁰

Indeed, the basic premise of the opposition is the subject of widespread and responsible difference of opinion; even theologians differ. Nearly every opposition argument begins with an attempt to center the discussion around "what one thinks of a human embryo or fetus,"¹⁰¹ or what is described as an absolute and scientific fact that "human life begins at conception."¹⁰² Yet, it is far from absolute fact; it falls in the realm of opinion, has been debated for centuries and is still being debated without resolution.¹⁰³

Testimony taken in 1965 before the California Assembly Criminal Procedure Committee, as reported in a recent paper, indicates that

⁹⁷ *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964).

⁹⁸ Unpublished opinions: Ops. Leg. Counsel No. 18587 of May 19, 1963; Ops. Leg. Counsel No. 1673 of July 16, 1964.

⁹⁹ Model Penal Code § 207.11, comment (Tent. Draft No. 9, 1959).

¹⁰⁰ Sands, *supra* note 71, at 306.

¹⁰¹ Drinan, *supra* note 96, at 465.

¹⁰² Byrne, "The Legal Rights of the Unborn Child," 41 Los Angeles B. Bull. 24 (1965).

¹⁰³ Lader, *Abortion* 75 (1966); Sands, *supra* note 71, at 294.

the assumption that the embryo is a distinct life from conception is actually a presumption.

[S]ince no one can say positively when life begins, the Church maintains that it must presume that life begins at conception until proven otherwise. Only in this way can the Church be sure that the child is protected from the time life begins, whenever that occurs. Thus the Canon Law is explicit though there is no dogma on the point.¹⁰⁴

C. *Ultimately a Balancing of Interests*

We believe that the argument finally resolves itself to a balancing of the interests of those who favor the birth of the fetus, on the one hand, against the interests of the pregnant woman, her family and society, on the other. The basis of the opposition's argument, firmly and historically grounded in religious doctrine and dogma, confirms this position.

Dating from the original biblical command to "be fruitful and multiply,"¹⁰⁵ the ancient Hebrews and then the early Christians, a persecuted sect, counted on increasing their numbers to gain strength and extend their influence and monotheistic beliefs. The prophets and theologians spoke about morality, but increasing the population definitely was a factor in outlawing abortion.¹⁰⁶

In the development of Judaic and Christian dogma an aura of sin surrounded the sexual relationship, dating from the story of Adam and Eve, when entered into for any reason other than procreation. The Immaculate Conception was Godly in nature, and instructed that although man participated in the reproductive process he did so upon the command of his Maker. Conception, therefore, though the result of the lustful act of man, is of divine purpose and not to be interfered with in any manner.

In vast areas of the world, outside the orbit of Judaism and Christianity, by way of contrast, there is no such dogma or debate to trouble the public or private conscience. Shintoism recognizes a child as a human being when it has "seen the light of day."¹⁰⁷ Islam holds that life begins in the fetus only after 150 days.¹⁰⁸ Lader reports, "Neither Buddhist nor Hindu theology contains any scriptural

¹⁰⁴ Sands, *supra* note 71, at 294.

¹⁰⁵ Genesis 1:28.

¹⁰⁶ Breitenacker, "Abortion in the German-Speaking Countries of Europe," 17 W. Res. L. Rev. 553 (1965).

¹⁰⁷ Lader, *Abortion* 94 (1966).

¹⁰⁸ *Ibid.*

prohibitions against early abortion, treating it as a social rather than religious issue. In fact, the Indian government in 1965 began to investigate the legalization of all abortion, modeled on the Japanese system, as part of its policy on population control."¹⁰⁹

Over the centuries, not even the Catholic position has remained constant, for the Church constantly has adapted to changing forces. Continual debate took place over when the soul entered the fetus, to establish the point at which the death of the fetus without baptism occurred.¹¹⁰ Canon Law at different stages did not punish abortion during the forty-day period after conception for males, and during the eighty-day period for females, although it is not known how sex of the fetus was determined in advance.¹¹¹ As late as 1869 abortion was punished only if undertaken after the fetus animated, in conformity with the common law of that day. In that year, however, Pope Pius IX eliminated all distinction between the animated and non-animated fetus, and the forty and eighty-day rules; he held all abortion to be murder.¹¹² Subsequently, Pope Pius XI, in his *Casti Connubii* of 1930, condemned all attempts to limit offspring as acts against nature.

Lader believes that the latter Pope's stringent position on abortion was "undoubtedly linked to the growing threat of contraception" and the birth control movements sweeping European countries with large Catholic populations.¹¹³ But the prior 1869 decision, he maintains, was based in part on a radical shift in Catholic theology on the ensoulment of the fetus, probably impelled by new biological research. It marked the beginning of the moral offensive, however, which in a few decades developed into open warfare by the Church against birth control on a broad political and social level.

Thus, Catholicism is deeply committed to its present position in attempting to preserve the interests of the fetus and its ultimate birth, to the exclusion of all other interests. By the same token, the Church, at this writing, still refuses officially to acknowledge the existence of a population problem which will require broad-scale solutions. This is changing, however, as the Church has always adapted itself to world pressures, though reluctantly perhaps; increasingly we are made aware of voices within the hierarchy which give recognition to the grave problems posed by our rapidly expanding

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* note 27; Lader, Abortion 79, 185 n.9 (1966).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Lader, Abortion 80 (1966).

population. The Church is beginning to recognize at least the right of non-Catholics to limit their numbers, *and* to promulgate this as social policy if large numbers of responsible people desire it.

On the other hand, many responsible people in our society—though they have increasing sympathy for the fetus as it grows more human in form, and consider it immoral to terminate pregnancy at one stage or another—under certain compelling circumstances sincerely believe the interests of the woman and her family, and even the interests of a seriously deformed or deprived newborn, outweigh their feelings for the fetus. When the fetus endangers the health of the woman, such people will have less tendency to believe that it is a human being to be protected in the constitutional sense. In such circumstances, a piece of tissue will not be sanctified as human life by many persons. The woman's life has far more value for what she is than fetal tissue for what it might become.¹¹⁴

D. *Humanitarian Indications*

Where pregnancy results from sexual assault, aside from any danger to the woman's health or likelihood that the child will be born deformed, it seems hardly necessary to point out the manifest injustice in existing law, which compels the birth of the product of a monstrous act.

The arguments of the Catholic opposition border on the ridiculous, and attempt to sweep aside this aspect of the abortion problem as an emotional approach of the proponents of modification.¹¹⁵ For example, it is maintained that all forcible rape involves some element of consent on the part of the woman, however little it be.¹¹⁶ This, of course, disregards the traditional accepted element of forcible rape which vitiates consent, *i.e.*, the threat of great and immediate bodily harm accompanied by the apparent ability to carry out the threat.

Sexual intercourse with an unmarried female under the age of consent, more commonly known as "statutory rape", is a criminal offense throughout the United States, with the age of consent usually being set by statute at sixteen or eighteen years.¹¹⁷ Intercourse is

¹¹⁴ *Id.* at 102.

¹¹⁵ Drinan, *supra* note 96, at 468.

¹¹⁶ Quay, "Justifiable Abortion—Medical and Legal Foundations," 49 Geo. L.J. 395, 399 (1961).

¹¹⁷ Model Penal Code § 207.4(10), comment (Tent. Draft No. 4, 1955): Seven years, one state; twelve years, two states; fourteen years, one state; sixteen years, twenty-three states; seventeen years, one state; eighteen years, twenty-one states; twenty-one years, one state.

entered into with the actual consent of the girl, otherwise the more serious charge of forcible rape would be involved. The final draft of the Model Penal Code, after much discussion and questioning, includes statutory rape as an indication for termination of pregnancy.¹¹⁸ Not only the Catholic Church opposes this, but some non-Catholic authorities raise the possibility of any girl under eighteen obtaining an abortion for the asking.¹¹⁹

We disagree with the opposition and urge adoption of the Model Penal Code concept. Whenever consent to the sex act is involved, the Puritan obsession with sex and immorality rears its head. The argument is that when a young female becomes pregnant as the result of engaging in the sinful act of sex for pleasure, she shall carry her sin with her as a firm reminder of the wrong committed; this shall be a deterrent to widespread promiscuity. In other words, in a society where the sex symbol is uppermost, strict sexual morality shall be enforced through fear of punishment.

We do not believe that the present law of abortion effectively acts as such a deterrent.¹²⁰ Moreover, the harm done to the young girl, to the father, to society, and mostly to a child brought into the world under these circumstances, in most cases far outweighs any impropriety in terminating such a pregnancy. Again, it is a matter of balancing the interests, and we believe this is a decision to be made by the pregnant girl, perhaps the man who impregnated her, and their families, not by the legislature.

It is our experience that incest is almost always committed upon young girls, at least in those cases which come to light. It seems hardly cogent that existing abortion laws will deter the male member of a family who has easy access to a young female relative whose morals and conscience have not already deterred him. Not infrequently, the young girl is mentally retarded, and being more sheltered within the home makes her an easy target for a frustrated male in the same household. Such circumstances compound the injustice and harm to all concerned by forcing the pregnancy to term.

In the case of minors, we believe the law has a special duty, not only to the young girl but to society as well. Until the state legislatures in this country act to alleviate these hardships, we have offered a new and different approach through the courts, as set forth in the last section of this paper.

¹¹⁸ Model Penal Code § 230.3(2) (Proposed Official Draft 1962).

¹¹⁹ Sands, *supra* note 71, at 300.

¹²⁰ Lader, Abortion 163 (1966).

E. *True Function of Law*

Criminal law should not undertake to draw the line where religion or morals would draw it. There appears to be widespread disagreement among honest and responsible people as to moral standards with respect to abortion, ranging from deep religious conviction on one hand to purely scientific and utilitarian views on the other, with a majority middle group of medical judgment and public opinion favoring relaxation of the present laws. Use of the criminal law contrary to a substantial body of public opinion is definitely alien to our basic principles, as criminal punishment traditionally has been reserved for behavior falling below the universally accepted standards of conduct. Moral demands on human behavior, over which there is wide difference of opinion, can be stricter than those of the generally accepted criminal law, because violations of those higher standards do not carry the grave consequences of penal offenses. We therefore submit that strict moral and religious standards should not be imposed upon the people in the form of felony statutes.

Even Catholics differ among themselves as to whether legislation should be urged to enact religious doctrine.¹²¹ Cardinal Cushing and others have counseled that Catholics should not attempt to impose their moral position on non-Catholics.¹²² Others, however, from our experience with opposition to the Beilenson Bill, strongly urge the adoption of the Catholic viewpoint.¹²³

We submit that the legislature cannot and should not attempt to legislate a moral philosophy grounded in religious dogma and offensive to substantial numbers of responsible persons in our community; witness the experience with Prohibition. The legislature is on equally shaky ground when it attempts to force the public to believe that terminating pregnancy at an early stage is morally wrong, no matter what may be the reason.

Furthermore, the legislature should not undertake to make a medical decision based upon the objection of the Catholic hospitals that the proposed modifications of the law are medically unsound. It should be enough that a majority of the medical profession considers certain indications for therapeutic abortion within the scope of competent, acceptable and sound medical practice. Unless the legislature is prepared to fix standards in all areas of medicine where some

¹²¹ Sands, *supra* note 71, at 296.

¹²² Lader, *Abortion* 93 (1966).

¹²³ Drinan, *supra* note 96, at 478, candidly admits the basic issue is "what or whose moral values should the law endorse or enforce?"

medical opposition exists, then why should the law interpose itself between doctor and patient in this area?¹²⁴

Qualified physicians, particularly obstetricians and gynecologists, cannot operate honestly within the framework of current abortion laws. The threat of prosecution under these laws hangs over their heads when in reality the community has no intention of punishing medical practitioners acting in good faith. The present statutory standard does not adequately meet the needs of the physician who decides that induced abortion is necessary for his patient. Hence, medical men are often uncertain about the consequences of terminating pregnancy. The law should be brought into closer conformity with public need and the practices of reputable members of the medical profession. The statutes should clearly set out what constitutes lawful therapeutic abortion in order that physicians and surgeons have clear guideposts on which to base sound medical judgment.

Unfortunately, the nature of the Catholic opposition to modification of the law of therapeutic abortion is increasingly incurring widespread resentment. No one would deny the right of religionists to preach their beliefs from the pulpit, the press, or any other public medium. But there is an enormous difference between persuasion and promulgation of ideas and the blockbuster tactics used by the Catholic hierarchy in a number of states to frustrate reform.¹²⁵ Would the same methods be employed by others to force their views upon Catholics through penal law? Certainly there would be a hue and cry from the Church over such restriction of religious freedom.

Recently in New Hampshire, as reported by Lader, "Every type of political in-fighting was directed at legislators and governors to block reform legislation," and lamentably, the New Hampshire lawmakers voted strictly down religious lines.¹²⁶ In this state, and previously in New York, tremendous political pressure was brought to bear on the respective governors by the Catholic hierarchy to veto the reform bills already passed by the legislatures, thus frustrating much-needed modification of the law.

The people of the State of California have also been subjected to these tactics for the last three regular sessions of the legislature. More recently, the emotional and religious fervor of some prominent Catholic obstetricians, who have been outspoken against changing the law, has spilled over into bitter charges within the medical profession. At this writing, administrative disciplinary proceedings are

¹²⁴ Sands, *supra* note 71, at 297-99.

¹²⁵ Lader, *Abortion* 165 (1966).

¹²⁶ *Id.* at 112, 165.

pending against nine licensed physicians in the San Francisco area for terminating pregnancies in women who contracted German measles in the first trimester, in order to avoid the birth of deformed children.¹²⁷ Though perhaps violations of the penal law, strictly speaking, the abortion procedures undertaken by these doctors were within the currently accepted standards of sound medical practice. It appears from the defense funds established and the number of physicians stepping forward to help, that the medical profession is rallying to assist those accused.

We must conclude that if the tactics of the opposition are successful in resisting modification of the law of therapeutic abortion, we must look to the courts for clarification.

III. SOME NEW APPROACHES TO THE LAW OF THERAPEUTIC ABORTION

The inability of existing laws to meet the needs of society and modern medical concepts and the pressure tactics of opponents to legal reform have had two prominent effects: (1) therapeutic abortion is quietly undertaken by reputable physicians in many licensed hospitals, though not in strict conformity with the penal laws; but not on a scale great enough to include most women who, except for their socio-economic status, would otherwise receive relief; (2) a search is underway for new approaches, in addition to legislation, by which the law may be brought into conformity with current medical practice and the mores of the community.

When a woman and her husband consult their family doctor or obstetrician, and he believes that the woman's pregnancy and birth of the child will endanger her health and perhaps that of the family, and other responsible physicians concur in this opinion, and the parents desire to follow their physician's advice, which does not offend their moral or religious beliefs, then why should the law step in to frustrate their decision? Similarly, when, through modern medical knowledge, a man and wife learn at an early stage of pregnancy that a seriously deformed child may be brought into the world, and they choose not to take this risk of hardship to all the family as well as to the child itself, then again, why must the law intrude to prevent them from making this most crucial decision affecting the entire family?

Medically speaking, a young girl, whether the victim of rape, incest or misguided morals, may be seriously affected by the trauma of an unwanted pregnancy and childbirth when she is not mature enough to cope with it, let alone be an adequate mother to a child

¹²⁷ Los Angeles Times, *supra* note 84.

which society rejects. Nor is it any solution to force her to give away her own flesh after she has carried it to term; this may only compound her problem and that of her family.

Society has no real interest in the product of these situations, so long as the parents concur. The demographers tell us we are far removed from any need to increase our numbers, but we must slow the pace of procreation in order to perpetuate a reasonable human existence on this planet. Society should be, and in fact is, more concerned with the health and welfare of those already in existence than those who might be born into one of these three situations. These circumstances call for the most personal, private and soul-searching decision a family can make. They may need medical and perhaps religious guidance, but the decision ultimately must be made by the family members involved who may be affected for the remainder of their lives. The state should not intrude with such an impersonal and inflexible decision for them, without regard to the circumstances. Every rule has its limit, dependent upon the nature of extenuating facts.

A. *Historical Purpose of Anti-Abortion Laws*

The purpose of the anti-abortion laws is to protect the woman from unskilled abortionists operating outside the ambit of accepted medical practice. Their purpose is not to frustrate the family in seeking and following competent and accepted medical advice. Their purpose is not to prevent responsible and honest physicians from prescribing and undertaking such treatment when medically sound. The abortion statutes of most jurisdictions do not mention medical standards or the role of the licensed physician.¹²⁸ The codes and case law formulate rules obviously designed to protect the woman from those who would harm her for a profit.¹²⁹ This is as it should be.

Abortion was openly advertised and performed in this country as an "established custom" until at least the Civil War period.¹³⁰ The common law did not make abortion, with consent of the woman, a criminal offense until after the fetus had quickened or turned in the womb, and then only a misdemeanor.¹³¹ It was common knowledge that at the stage of pregnancy when the fetus quickened, it became

¹²⁸ See Sands, *supra* note 71, at Appendix B.

¹²⁹ See notes 16-21 *supra* and related text.

¹³⁰ Lader, *Abortion* 85 (1966).

¹³¹ *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *State v. Murphy*, 27 N.J.L. 112 (Sup. Ct. 1858); 3 Stephen, *History of the Criminal Law of England* 32 (1883); *Model Penal Code* § 207.11, at 148, comment (Tent. Draft No. 9, 1959).

considerably more dangerous to terminate pregnancy. The law thus was designed, in part, to protect the woman when the danger to her was great.

But the scope of medical knowledge and experience began to broaden rapidly, and abortion could be performed by doctors under conditions which presented less danger to women. Shortly before the Civil War, as states began departing from the common law with anti-abortion statutes, the concept of the legal, medical abortion came into being. The new laws, it is contended, were part of the increasingly greater role governments were taking in the protection of the health and safety of their citizens; the new abortion acts were intended primarily to provide protection against swarms of hack abortionists who were endangering the lives of women.¹³²

The New Jersey Supreme Court, in 1858, held, in *State v. Murphy*,¹³³ that at common law abortion with consent of the woman was not an indictable offense before the fetus quickened. But examination of the new law,¹³⁴ the court said, "will show clearly that the mischief designed to be remedied by the statute was the supposed defect in the common law. . . ."¹³⁵

The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts The offense of third persons, under the statute, is mainly against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment.¹³⁶

The desire to enforce stricter moral standards also may have played a part in the enactment of some of the new anti-abortion laws, since many of them were adopted in the same era as the Comstock Act, enacted by Congress in 1873 for the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use". The Comstock Act was "part of a continuous scheme to suppress immoral articles and obscene literature,"¹³⁷ including any item the

¹³² Lader, *Abortion* 87, 88 (1966).

¹³³ 27 N.J.L. 112.

¹³⁴ *Id.* at 113: "(I)f any person or persons maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing"

¹³⁵ *Id.* at 114.

¹³⁶ *Ibid.*

¹³⁷ *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), interpreting the Comstock Act of 1873, ch. 258, 17 Stat. 598 (1873).

purpose of which is "prevention of conception or for causing abortion."¹³⁸

The Comstock Act has been interpreted by a Federal Circuit Court of Appeals as not applicable to the licensed physician acting within the accepted medical practices of the day: In *United States v. One Package*,¹³⁹ pessaries had been imported from Japan by a doctor for experimentation in her practice. In the opinion written by Augustus N. Hand, and concurred in by Justices Swan and Learned Hand, it was held that medical knowledge available to Congress in this field was considerably limited in 1873. The court accepted the medical soundness of prescribing the prevention of pregnancy by contraception for health reasons. Judge Hand, in writing for the court said that the Comstock Act embraced

only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used. Its design, in our opinion, was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients. . . . [I]t is going far . . . to hold that abortions, which destroy incipient life, may be allowed in proper cases, and yet that no measures may be taken to prevent conception even though a likely result should be to require termination of pregnancy by means of an operation. It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world.¹⁴⁰

B. *California Decisions*

The appellate courts in California, as have the statutes of Oregon and Louisiana,¹⁴¹ have tended recently to place the licensed medical doctor in a different and more favorable category than the abortionist who is not acting within accepted medical practice. When a physician testified that he terminated a woman's pregnancy because it was "necessary to preserve her life,"¹⁴² the prosecutor had a greater burden of proof as to an element of the offense, that the abortion was not necessary to save the woman's life, than he would have had if the

¹³⁸ 19 U.S.C. § 1305.

¹³⁹ 86 F.2d 737 (2d Cir. 1936).

¹⁴⁰ *Id.* at 739-40.

¹⁴¹ *Supra* notes 49, 50, 60-62 and related text.

¹⁴² It is a felony in California to procure, or attempt to procure, an abortion by any means whatsoever "unless the same is necessary to preserve her life." Cal. Pen. Code § 274.

defendant had been without medical credentials.¹⁴³ In the face of the doctor's testimony as to the necessity of abortion, buttressed with concurring opinions of other examining physicians, it is difficult, if not a practical impossibility, for the prosecution to prove the specific criminal intent necessary for conviction, *i.e.*, the specific intent to terminate a pregnancy for a reason other than to preserve the woman's life.¹⁴⁴

People v. Ballard held that in the case of a medical doctor, the exception "to preserve her life" does not require that peril to life be imminent.¹⁴⁵

It ought to be enough that the dangerous condition 'be potentially present even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.¹⁴⁶

If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community, then it cannot be said that the operation was not necessary to preserve the life of the patient.¹⁴⁷

C. *Griswold v. Connecticut: The Beginning of an Answer*

The United States Supreme Court, in *Griswold v. Connecticut*,¹⁴⁸ held the Connecticut birth control law¹⁴⁹ unconstitutional as it applied to the acts of the Director of the Planned Parenthood Center in New Haven and of a licensed physician in providing information, instruction and medical advice to married persons as to the means of preventing conception. The striking similarity of the anti-abortion laws and the Connecticut anti-contraceptive statute is too patent to be overlooked,¹⁵⁰

¹⁴³ *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (Dist. Ct. App. 1959). See also a subsequent prosecution, *People v. Ballard*, 218 Cal. App. 2d, 295, 32 Cal. Rptr. 233 (Dist. Ct. App. 1963).

¹⁴⁴ *People v. Abarbanel*, 239 Adv. Cal. App. 24, 48 Cal. Rptr. 336 (Dist. Ct. App. 1965).

¹⁴⁵ 167 Cal. App. 2d 803, 814, 335 P.2d 204, 212 (1959).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Id.* at 815, 335 P.2d at 812.

¹⁴⁸ 381 U.S. 479 (1965).

¹⁴⁹ Conn. Gen. Stat. Ann. § 53-32 (1960): "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Conn. Gen. Stat. Ann. § 54-196 (1960): "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

¹⁵⁰ Emerson, "Nine Justices in Search of a Doctrine," 64 Mich. L. Rev. 219 (1965).

and this landmark decision may offer some guidance as to what the courts will do when the constitutionality of the abortion laws is challenged in the proper case.

Griswold held that to punish the use of a contraceptive or anyone who assisted in its use, would be an unconstitutional invasion of the right of privacy guaranteed to husband and wife by the due process clause of the fourteenth amendment. Preliminarily, the court held that the defendants had standing to raise the question of the constitutional rights of the married people with whom they had a professional relationship.¹⁵¹

The opinion, written by Mr. Justice Douglas, and concurred in by Chief Justice Warren and Justices Goldberg, Brennan, Harlan and White, with Justices Black and Stewart dissenting, disclaimed any intent on the part of the Court to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."¹⁵²

Justice Douglas went on to develop the concept of the constitutional right of privacy, by pointing out that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.¹⁵³ Various guarantees create zones of privacy from governmental intrusion. The first amendment allows freedom of association to the extent that disclosure of membership lists cannot be compelled. The third amendment prohibition of quartering soldiers in private homes is another facet of that privacy. The fourth amendment protects privacy from unreasonable searches and seizures by government. The fifth amendment provision against self-incrimination enables a citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The fourth and fifth amendments were held to protect against all governmental invasion "of the sanctity of a man's home and the privacies of life." Finally, the ninth amendment reserves to the people any rights which have not been specifically enumerated in the Constitution.

The Court stressed the fact that the defendants prescribed contraception solely to married persons,¹⁵⁴ and concluded with the

¹⁵¹ 381 U.S. 479, 481.

¹⁵² *Id.* at 482.

¹⁵³ *Id.* at 484.

¹⁵⁴ *Id.* at 480.

following comments on the importance of the zone of privacy surrounding the marital relationship:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. 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.

* * *

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁵⁵

A comparison of the Connecticut law and a typical anti-abortion statute leads to the conclusions that: (1) both statutes are at war with currently accepted standards of medical practice; (2) both statutes invade the sacred realm of marital privacy by denying married couples the right to plan the future of their family; (3) both statutes force the birth of deformed children, or leave abstinence as the alternative; (4) both statutes are largely unenforced, nevertheless prosecution hangs like a cloud over the medical profession; (5) both statutes result in discrimination against people in lower economic brackets; (6) both statutes are in conflict with one of the world's most critical problems today, the population explosion; (7) both statutes involve the imposition of a religious principle on the entire community by government sanction.¹⁵⁶

This newly enunciated right of privacy evolved out of the need for protecting the individual from the ultimate and absolute control of the state. Its purpose is to reserve to married individuals the right to plan a family themselves, to have or not to have children, without the intrusion of the state in this decision. It emanates from substantive due process and is one of the fundamental personal rights essential in maintaining the independence, integrity and private development of the citizen in a highly organized yet democratic society.¹⁵⁷

¹⁵⁵ *Id.* at 485-86.

¹⁵⁶ Emerson, *supra* note 150.

¹⁵⁷ *Ibid.*

In summary, it appears that in the absence of legislation to bring the law of therapeutic abortion into conformity with current medical practice, the courts are beginning to recognize the need for removing reputable physicians from the scope of the criminal abortion statutes when those physicians are acting within the standards of accepted medical practice and when they are involved with a personal, private decision of the pregnant woman and her husband to follow the recommendation of their doctor when it is accepted as medically sound. The courts are beginning to recognize that the laws against criminal abortion do not have as their purpose the frustration of those decisions that are based on sound medical advice.

D. *Relief for Minors under Existing Laws*

Pregnancy in young girls often calls for special and sympathetic treatment to alleviate the hardship to the girl and her family and perhaps to the child who might be brought into the world under these aggravated circumstances. The need for relief is especially great when the pregnancy is the result of sexual assault. Most people are in agreement, but it is rare for public officials and those involved in the administration of justice to exercise the courage necessary to provide such relief in the face of existing anti-abortion statutes.

The law has a special duty to protect minors, however, and to that end the courts in this country assert jurisdiction over them to provide necessities of life when otherwise unavailable, and this includes necessary medical care to juvenile wards of the court.¹⁵⁸ Thus, although the exception to existing prohibitory abortion laws appears to be narrow, strictly speaking, there remains sufficient breadth to include therapeutic abortion for juveniles within the jurisdiction of the court. A recent California case offers an example.

The California Juvenile Court Act gives the California Superior Court, sitting as a juvenile court, jurisdiction over any person under the age of twenty-one years "who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control."¹⁵⁹ Other grounds for jurisdiction include lack of necessities, an unfit home, or where the minor is dangerous to the public because of some mental or physical deficiency. The Juvenile Court Act also provides the juvenile court with specific authority to authorize and consent

¹⁵⁸ E.g., 2 A.L.R.2d Dig. 297 (1956); Annot., 89 A.L.R.2d 506 (1963); Annot., 85 A.L.R. 1099 (1933); Annot., 76 A.L.R. 657 (1932).

¹⁵⁹ Cal. Welfare & Inst'ns Code § 600.

to necessary medical care when there is no parent or other person "standing in loco parentis capable or willing to authorize" such remedial care or treatment for the minor.¹⁶⁰

These provisions were invoked by the Superior Court of the State of California, exercising its jurisdiction over a fourteen-year-old mentally retarded girl who had been forcibly raped by her brother and was between four and five months pregnant at the time the pregnancy was discovered.

A written opinion was submitted to the court by a psychiatrist that the young girl could not understand the nature of her predicament; that over the years she had developed an extremely close and sheltered relationship with her mother which constituted the basis for an orderly life in society outside an institution; that if this relationship were destroyed or impaired, the girl would need to be institutionalized, would suffer virtually an emotional death, and her physical life may be somewhat shortened thereby; that the mother of the young girl was not only distraught and on the borderline of psychosis as a result of the impact of this event upon her, but also that her relationship with her daughter was so strained that she indicated both homicidal and suicidal tendencies; and that the life of the family was at stake. The psychiatrist recommended therapeutic abortion, notwithstanding the late stage of pregnancy.

The written opinion of a reputable obstetrician also recommended therapeutic abortion, but he indicated that he would not undertake the procedure unless it was in some way approved by a court of law. The obstetrician also informed the court that the therapeutic abortion committee of his hospital would not approve the abortion unless sterilization was performed at the same time.

The parents testified in the judge's chambers that they had attempted for more than a month, through a number of doctors and hospitals in the area, to secure a therapeutic abortion for their daughter, but were refused in every case because of an impending "crackdown" on abortions by the State Board of Medical Examiners. Local newspapers had recently reported statements by prominent Catholic obstetricians to the effect that physicians were going to be held to the strict letter of the law. The parents further indicated that they were of insufficient means to transport their daughter to another location where abortion might be obtained.

After a full and complete consideration of these facts and existing case law, including *People v. Ballard*,¹⁶¹ the court found the allegations

¹⁶⁰ Cal. Welfare & Inst'ns Code §§ 739, 740.

¹⁶¹ *Supra* note 143.

of the petition to be true, and "that [the] minor is in need of effective parental care and control, that [the] parents are not capable of providing medical care and control needed by the minor in as much as it has been necessary to obtain consent by the Court as well as by the parents before medical and surgical processes indicated by Dr. . . . can be performed." The court noted that recommendations had been made in writing by qualified physicians "that the minor is in need of such medical and surgical care in order to preserve her life and well-being and that of her parents." The court further found:

[T]hat both parents of [the] minor consent and agree to the declaration of dependency and the necessity of surgical and medical care as recommended in the written reports of the two doctors; that both parents agree that to secure such necessary medical and surgical care the consent of the Juvenile Court is required.

Therefore, it is the order of this Court that the minor be declared a dependent child of the Court . . . and . . . consent is hereby given to the performance . . . of a therapeutic termination of pregnancy, as recommended, as necessary for the preservation of the emotional and physical life of the minor and for such other medical and surgical procedures as in his [the surgeon's] judgment may be indicated.

Upon receipt of a certified copy of the court's order, the therapeutic abortion committee of the proposed hospital approved the procedure, and the hospital's attorney withdrew his objections. The young girl was admitted, her pregnancy terminated, and a sterilization performed.

CONCLUSION

If the opponents to legislative reform of the law of therapeutic abortion are successful in perpetuating their religious and moral views through penal law, in the face of currently accepted standards of medical practice and the mores of the public, as well as changing conditions throughout the world, there is still sufficient room within existing law to allow therapeutic abortion on grounds accepted by the overwhelming majority of the medical profession. This change will come, however, only when the present trend of case law comes further to fruition, to remove the licensed physician and hospital from the scope of the penal anti-abortion statutes, which have as their purpose the protection of women from clandestine, unskilled abortionists. Society has no desire to punish physicians for responsibly practicing medicine, nor to have its government intrude upon the right of a family to make its own decision when the health of the mother is involved, or when there is likelihood of the birth of a seriously deformed child.

Abortion will not be a mass birth control device in this country, as a social policy, at any time in the foreseeable future. And although great numbers of people in this country will continue to use criminal abortions under septic conditions, performed by persons with dubious training, as their own method of "personal population control," the incidence of these abortions ultimately will be reduced with the increases in sex and contraceptive education, adequate family planning programs, and in the use of birth control devices.