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ABORTION LAW REFORM AT A CROSSROADS?

The clause of the First Amendment against establishment of religion by law was intended to erect "a wall of separation between church and State." The attitude of the Supreme Court and of Americans generally has been that "that wall must be kept high and impregnable." In practice, however, laws have been made to impose the religious views of one group on the entire nation. A prime example of this may be found in the law of abortion. The present abortion laws in the United States, no matter how liberal in form, succeed in imposing a code of moral conduct based largely upon Christian, and especially Roman Catholic Christian, approved religious views by law. If we are to maintain the wall of separation which we have supposedly erected between state and religion, we must abolish all religiously inspired legal prohibitions against abortions by physicians and leave the development and enforcement of morality to the various churches and their respective members. We cannot expect the state to set and enforce a standard of morality and at the same time to remain completely separate from religion.

HISTORICAL DEVELOPMENT

The degree of opposition to abortion has varied historically and largely kept pace with the degree of embryological knowledge, as well as current religious beliefs. By and large, the major issue has centered around the time at which a fetus is considered to make the transition from a living being to a living human being. In religion, this issue is generally conceptualized in terms of when the fetus embodies a soul.

Abortion itself is an ancient practice, so ancient that no one really knows when or where it was first performed. The most primitive tribes were and are familiar with methods and proper magical incantations and rites to effect the death of the fetus. Four and a half millenia before Christ, the Chinese recorded a primitive technique, an herbal using mercury, a strong poison, for inducing abortions. References to abortion procedures are found in the ancient Egyptian papyri.

1 Reynolds v. United States, 98 U.S. 145, 164 (1879).
3 This is not to imply that abortion law is the only area of law based largely on moral judgments. Certainly other areas, e.g., narcotics, prostitution, indeed, much criminal law, have their foundations in moral attitudes. However, while valid arguments can be made for reform in these areas as well, we are here concerned only with abortion law reform.
There are innumerable folk medicine techniques for inducing abortion, such as climbing a smooth tree; jumping from high places; applying hot ashes to the abdomen; rubbing roasted black beetle powder over the abdomen and into the armpits; applying leeches to the abdomen; eating certain herbs, plants, or insects. One record reports a magical procedure whereby:

“A medicine man speaks the girl’s initial into a lemon and utters prayers while the girl is bathed. Whenever he squeezes a drop of lemon juice on her head, he urges the as yet unformed child to emerge before its time.”

Women in Hawaii made stilettos representing Kupo, their god of abortions, and thrust them into the uterus. Ceylonese women today still swallow for seven days an abortificant made by boiling a poison yam in cows’ urine or liquid dung. The anthropologist George Devreux has recorded dozens of ancient procedures for inducing abortions.

While they generally disapproved of abortion, the early Hebrews had effective methods of aborting a fetus. The Babylonians, in the Code of Hammurabi, and the Jews, during their Egyptian exodus, penalized abortion, but the penalties were limited to fines for an assault on a pregnant wife which resulted in a miscarriage. The ancient Greeks encouraged abortion in order to limit the size of the population. Plato (427-347 B.C.) supported obligatory abortion for every woman over forty. Preaching all forms of population control, Aristotle (384-322 B.C.) urged, “When couples have children in excess and there is an aversion to exposure of offspring, let abortion be procured before life and sense have begun.” Hippocrates (ca. 460-370 B.C.) is credited with advising abortions in certain situations, although because of the then frequent danger to the mother, he did not encourage the procedure. While the Hippocratic oath is the only significant Greek reference that contains condemnation of abortion, recent scholarship casts the authorship of this section into doubt. The more accepted theory is that this section was added to the oath by Hippocrates’

7 Guttmacher, supra note 5, at 1.
8 Id.; “The Desperate Dilemma of Abortion,” supra note 6.
9 Niswander, supra note 4, at 39.
10 Lader, Abortion 76 (1966).
12 Lader, supra note 10.
14 The applicable section of the Hippocratic Oath reads: “I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrongdoing. ... I will not give to a woman a pessary to cause abortion. But I will keep pure and holy both my life and my art.” Mietus and Mietus, Criminal Abortion: “A Failure of Law” or a Challenge to Society?, 51 A.B.A.J. 924, 925 (1965).
disciples, a Pythagorean sect which believed that the soul became infused with the body at conception.\textsuperscript{15}

Soranus of Ephesus, a Greek who became the leading physician in Rome around the first century A.D., wrote a famous text on gynecology in which he describes in detail several medical indications for abortion, such as a contracted pelvis, a too small uterus, and swelling and fissures of the cervix interfering with delivery. He aligned himself with those who restricted abortion to medical indications, refusing to "prescribe them when a person wishes to destroy the embryo because of adultery or out of consideration for youthful beauty."\textsuperscript{16}

The early Romans, on the other hand, while not encouraging the practice, for all practical purposes left the matter in the hands of the father as \textit{pater familias}. As an absolute head of the family, he could order his wife to have an abortion, just as he could divorce or punish her, even with death, if she had one without his consent. Since the Romans held to the Stoic belief that the soul entered the body at birth, the fetus was not considered a human being but \textit{pars viscerum matris}. Thus, neither law nor morality opposed abortion.

The Emperor Augustus (4 A.D.) sought to curbe the high incidence through tax benefits and more rapid political advancement for additional children rather than through legal prohibitions. While the Christian beliefs conflicted with the Roman attitudes toward abortion, it was not until the fourth century that laws reflecting the Christian position were adopted.\textsuperscript{17}

The most powerful opposition to abortion was ultimately to come from the Christian church and took shape at a very early date. Abortion was denounced, for example, in the first known Christian writings, \textit{The Diache} (65-80 A.D.). It was labeled "murder by way of advance" by Tertullian (155-222 A.D.), who pronounced, "To prohibit birth is to accelerate homicide. . . ."\textsuperscript{18} While there was universal agreement among church leaders that abortion was murder, "the exact moment at which a fetus was infused with a rational soul (and 'murder' was applicable) remained through modern times one of the thorniest dilemmas of Christian dogma."\textsuperscript{19} A few theologians held the position that all abortion was murder, but most adopted Aristotle's view of the development of the soul. He saw the development of the soul in three stages, the vegetable soul, the human soul, and finally the rational soul. It was during the last stage that the fetus became

\textsuperscript{15} Lader, \textit{supra} note 10.
\textsuperscript{16} Guttmacher, \textit{supra} note 11.
\textsuperscript{17} Lader, \textit{Abortion} 76-7 (1966); Guttmacher M.D., \textit{Abortion—Yesterday, Today and Tomorrow}, in \textit{The Case for Legalized Abortion Now} 2-3 (Guttmcher, M.D. ed. 1967).
\textsuperscript{18} Lader, \textit{id.} at 77.
\textsuperscript{19} \textit{id.} at 78.
human. He placed the time of rationalization or animation at forty days after conception for the male and eighty or ninety for the female, although no one has yet explained how fetal sex was determined.20

In line with Aristotle's theory of the development of the soul, abortion was generally punished by the church as murder only if performed after the soul reached the rational or animated stage. This theory of treating abortion as murder only after animation was followed for several centuries. Thomas Aquinas (1225?-1274) later incorporated his ideas of fetal movement with the theories of Aristotle.21 Because of Aquinas' ideas, the time at which abortion became murder was changed from the forty or eighty day demarcation line to the time of quickening, the point during pregnancy at which the mother first feels the fetus move. This attitude was incorporated into the English common law by a contemporary of Aquinas, the great thirteenth century English jurist Henry Bracton, who opined that since life actually begins at the moment of quickening rather than a given number of days after conception, killing the fetus after the occurrence of the quickening was murder, whereas before that time it was no crime.22

"If there be someone, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."23 According to the noted Chief Justice Sir Edward Coke, however, induced abortion after quickening was only a misdemeanor. Moreover, an abortion performed to save the mother's life at any stage of fetal development was considered an exception to the criminal rule.24

Abortion was made an excommunicatory sin at any time during pregnancy by Pope Sixtus V (1585-90) in his bull Effraenatum,25 but a year after his death, the order, which had been generally ignored, was reversed by Pope Gregory XIV, who returned to the forty-day dividing line. The Roman Catholic view ultimately returned to the Sixtus position of ensoul-

20 Id.; Aristotle, De Anim. Hist. viii 3; Rabbi Dr. I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 128 (Smith ed. 1967).

21 "St. Thomas Aquinas applied this concept [Aristotle's ideas of animation] to his own belief that the soul is the first principle of life in things that live and that life is shown by two actions, knowledge and movement. The life or soul, he theorized, entered the body of the fetus at the time of its first movements." The Legal Status of Therapeutic Abortion, 27 U. Pitt. L. Rev. 669, 672 (1966).

22 Guttmacher, supra note 17, at 4.


24 The Legal Status of Therapeutic Abortion, supra note 21.

25 Lader attributes this sudden change in the Roman Catholic position to Sixtus V's attempt to cleanse the Renaissance Church by such measures, among others, as adopting this position on abortion and making adultery a hanging offense. "'An extremist in the pursuit of virtue, . . . he displayed towards sins connected with sexual intercourse a severity which would have done credit to a New England Puritan.'" Lader, Abortion 79 (1966). See also Noonan, Contraception 362-3 (1965).
ment at conception in 1869 with Pope Pius IX. Thus, excluding the period controlled by Sixtus V’s *Effraenatum*, the Roman Catholic position on abortion is barely a hundred years old.

The Roman Catholic position originated in the beliefs of Origen, a third century physician who developed the theory that Adam's original sin was transmitted at birth. One who died *in utero*, without baptism and in original sin, would be denied the right to enter heaven.

For all practical purposes, until 1803, abortion was primarily a religious offense, punishable by such sanctions as the Church was able to impose. The first English Abortion Statute made abortion after quickening a crime punishable by death and punishable by up to fourteen years' deportation, whipping, the pillory, imprisonment, or a combination of these if the abortion occurred before quickening. During the reign of Victoria, in 1861, the present English Abortion Statute, the ”Offense Against the Person Act,” was enacted, calling for a maximum punishment of life imprisonment for abortion performed at any time after conception. The statute applies to anyone who attempts to induce an abortion, including the woman herself, whether or not the woman is pregnant.

**CURRENT RELIGIOUS POSITIONS**

The opposition by organized religious groups to legalized abortion is in no sense universal in the United States. While the Roman Catholic Church has taken an unequivocal stand against abortion for any reason whatsoever, other religious groups support abortion in varying degrees and under varying circumstances. The basic Jewish position, for example,

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27 According to Lader, the position of the Catholic Church adopted in 1869 must be viewed in light of the atmosphere of the times, against two recent movements: the development of birth control and the advances in biological knowledge of conception. The 1869 position was preceded by the emergence of birth control practices with a resulting decrease in the population of France, the largest Catholic country in Europe. Moreover, the contraception movement was beginning to sweep throughout the rest of Europe and the United States, thereby threatening the population of the Catholic world. Undoubtedly, the Pope’s position was related to this growing danger.

The Pope’s position should also be considered against the biological research of the time, including the 1677 discovery of the spermatozoon and the 1853 discovery by Ferdinand Keber that the sperm enters the ovum to produce insemination. A year after this discovery, Pius IX defined the dogma of the Immaculate Conception, and sixteen years later he rejected the theories based on animation and quickening and decreed that abortion at any time after conception was murder. Lader, *supra* note 25, at 80-81.

30 There are, of course, those who oppose abortion reform who are not religiously oriented. It is submitted, however, that these attitudes as well are based at least indirectly on the Christian concepts of morality which so thoroughly permeate our social attitudes largely because of the strong influence of religion in our past.

There is only one exception to the adamant Roman Catholic stand against
is that the health and life of the mother should be of greater concern than that of the fetus. While their position does not necessarily support the abolition of all abortion laws, it does support the destruction of the fetus for medical reasons, a much more liberal stand than that taken by the Roman Catholic Church.

The positions of the various protestant sects vary from group to group. In 1961, the only combined policy statement on abortion by the Protestant churches was made through their National Council of Churches of Christ. While the position does not appear to support abortion simply as a means of birth control, it does express approval of hospital abortion "when the health or life of the mother is at stake." At the same time, many Protestant clergymen broadly defined health to include social as well as physical well-being. Their stand is far in advance of and much more liberal than that taken in most state laws.

An even more liberal viewpoint was expressed by a Protestant group in 1963 when the General Assembly of the Unitarian-Universalists condemned our "laws which narrowly circumscribe or completely prohibit termination of pregnancy by qualified medical practitioners as 'an affront to human dignity.'" The group demanded legalized abortion if "there would be grave impairment of the physical or mental health of the mother; the child would be born with a serious physical or mental defect; pregnancy resulted from rape or incest; there exists some compelling reason, physical, psychological, mental, spiritual, or economic." Other major Protestant groups have simply remained silent, neither supporting nor condemning the present state laws on abortion.

ABORTION TODAY

Whatever the reasons behind the present prohibitions against abortion, the impact of religion upon abortion laws is major, as evidenced in the criminal codes of the several states. The statutory attempts to limit or completely abolish abortions have not been satisfactorily met by the present laws. The situation with abortion today is similar to that of alcohol during the Prohibition, when the anti-liquor laws simply decreased the quality and ready availability of alcohol but did not abolish it. Abortion is available almost on demand to the wealthy, frequently legally, and under excel-

abortion, called the principle of double effect. This exception covers those rare instances in which the abortion is simply the by-product of another necessary operation. If, for example, a physician performs a hysterectomy in order to remove a malignant uterus, an innocent act with a good effect, the death of the fetus is permitted as an indirect result of the surgery.

Lader, Abortion 96 (1966).

32 Guttmacher, supra note 29, at 8; Lader, id., at 99.
33 Lader, supra note 31, at 99.
34 Id., at 100.
35 Id.
lent medical conditions. They are able to fit themselves into the limited categories where abortion is permitted in the United States or can afford to travel to countries where abortions are more easily obtained than in the United States. It is available to the poor also, but by no means on demand, rarely legally, and too frequently in a fatally inferior form.

**THE HOSPITAL ABORTION**

Abortion is always relatively safe surgery if performed by a competent physician, preferably in a hospital. Depending on the time during pregnancy at which an abortion is performed, it can range from a relatively simple to a slightly more complicated surgical procedure. If an abortion is performed during the first three months of pregnancy, which is the safest and preferred period, doctors generally perform a simple dilation and curettage, commonly referred to as a “D and C,” a procedure which consists of dilating the cervix, the mouth of the womb, and scraping the products of conception from the uterus with a tiny metal rake-shaped instrument called a curette. The doctor then gives the woman drugs to contract the uterus to its normal size and sanitary packings to prevent infection. She is generally given antibiotics to protect against infection and released after an overnight stay in the hospital.

If the abortion is performed after the third month of pregnancy, a hysterotomy, or miniature caesarean operation, is performed. This process requires an incision in the lower abdomen, through which the fetus is removed. Still another procedure used frequently when the pregnancy has passed the three months' mark is a newly developed, simple technique called “salting out.” After the patient has been given a local anesthetic, the doctor inserts a syringe needle through the womb into the amniotic sac, which contains the fetus. The amniotic fluid is then withdrawn and replaced with a sterile concentrated salt solution. The pregnant woman

36 In discussing the lengths to which hospitals will go to “legalize” abortions for their wealthy patients, one physician commented: “To be sure, most hospital abortions are, strictly speaking, illegal, but an elaborate system of professional subterfuge and self-delusion is invoked to make these crimes seem innocent. To rationalize an abortion on medical grounds the facts are distorted.” Abortions are done for hypertension, for example, “because pregnancy in such cases may lead to heart attack or a stroke,” whereas the actual risk of these complications in pregnant hypertensives is not significantly higher than the risk in nonpregnant hypertensives.

“To obtain an abortion on psychiatric grounds, the risk of suicide is exaggerated. We accept with full credence the psychiatrist's opinion that ‘this woman is so depressed by her pregnancy that she may unintentionally drive her car into a light pole and kill herself,’ whereas we would deride such a statement in another setting.”

Similar distortions are made in other situations as well in order to bring abortions that are actually illegal at this time within the framework of the existing statutes. Unfortunately, the measures are generally available only to those select few who are fortunate enough to be able to enjoy the medical facilities of the private hospitals and clinics. Torrey, “Ethical Issues in Medicine,” 51 Sat. Rev., Dec. 7, 1968, at 78.
usually begins labor within forty-eight hours, during which the fetus and placenta are expelled as they are during a spontaneous miscarriage.\textsuperscript{37} 

The cost of these procedures ranges from $100 to $500, depending on the area of the country and the individual hospital and physician. They are safe and rarely affect the physical health, fertility, or related factors of the woman.\textsuperscript{38} The circumstances surrounding the hospital abortion contrast sharply with those of the "back-alley" abortion.

Unfortunately, under the presently imposed conditions prescribed for legalized abortion, such safe measures of hospital abortion are generally not available to the poor, who are unable to satisfy the often arbitrary criteria for meriting a hospital abortion in a private hospital or who are unable to obtain an abortion under welfare hospitalization programs because of the political involvement of such programs. Hospitals which rely on politically controlled funds for operation are reluctant to perform abortions for their patients because of the current questionable status of abortion law. The noninfluential poor are too frequently unable to merit the medical care of those who are more wealthy. Consequently, these women must either bear the unwanted child or abort it, either through self-induced means or at the hands of the back-alley abortionist, in either case often with tragic, if not fatal, results.

Of course, the same medical procedures are available to the poor, if they can find a competent physician to perform the abortion illegally, but the conditions under which they are performed are very often fatally inferior. The doctor, if the woman is even able to find a doctor willing to perform the abortion, is usually not licensed. Even if he is, he is not unaffected by the surreptitious conditions surrounding the entire affair. Constantly expecting the police to arrive and expose him, he must act quickly and be ready to leave at a moment's notice. As a result of this atmosphere, the woman is rarely given any anesthetic so that she too can be ready to leave quickly should the need arise. Moreover, the doctor frequently has lost his license because of incompetence, alcoholism, or immoral practices. It is not uncommon for the physician-abortionist to be so drunk that he is incapable of performing the abortion properly or for part of his fee to require the woman to submit to his perverted desires.\textsuperscript{39}

\textbf{The Back-Alley Abortion}

Back-alley abortion is not limited to unlicensed physicians. Criminal abortions have been performed by beauticians, mechanics, druggists, bar-
bers, indeed, by anyone who feels that the money is worth the risk involved. Frequently the woman herself knows more about the procedure than the so-called “doctor,” limited though her knowledge may be. The office of the practitioner is generally a motel room, so that the location can be changed freely and frequently, or an old office, or simply the abortionist’s home. In any case, it rarely comes close to approaching the desired sterile conditions of a hospital or clinic. While the dangers from incompetent surgical procedures are nearly always great, the dangers from infection are probably even greater. Those few persons who attempt to sterilize the instruments often do so crudely; most do not even bother.

While the surroundings usually bear little resemblance to a surgery room, the instruments and methods generally bear even less. Knowing little of medical procedure or female anatomy, many abortionists simply operate under the delusion that all that is necessary to induce an abortion is to insert a foreign object into the uterus or to scrape the embryo or fetus out. Not allowing for any variation in the shape or position of the uterus in their various “patients,” they frequently insert such objects as the notorious straightened coat hanger into the uterus, puncture it, and pass through into the intestine. The result of this gross malpractice is generally peritonitis, very often followed by death.

In other instances, the abortion itself is successful, that is, the unwanted fetus is removed, but the after effects are often tragic, if not fatal. Most illegal abortions are not accompanied by the use of antibiotics so that infection frequently follows. Moreover, if the woman survives the infection, she is often left sterile. Sterility is also often a result of the abortionist’s butchery in performing the abortion itself. There are other methods attempted to induce an abortion besides the common coat hanger method. However, these too are often ineffective and followed by infection, sterility, and frequently death.40

The death rate of illegal abortions contrasts sharply with that of legal abortions. Those performed by physicians, approximately 8,000 annually, 40 The common non-medical means of inducing an abortion include such measures as inserting a catheter or “Bougie,” an umbrella rib, a knitting needle, or a goose quill dipped in turpentine into the uterus in an attempt to remove the fetus. Another well-known device is the slippery elm stick, which swells with moisture after insertion into the cervix. All of these devices are usually ineffective and nearly always lead to a dangerous infection.

An even more dangerous method is the injection of a soap solution, using a soap or detergent either alone or with such things as bleach or glycerine. Other dangerous chemicals include Lysol, vinegar, silver salts, and lye, injected under pressure by means of a douche nozzle or a syringe. The danger of these techniques is that the soap frequently enters the uterine veins directly, causing collapse and death in minutes or hours thereafter. Other times, an air bubble blocks a blood vessel, causing an air embolism. Frequently, gas gangrene, a dangerous infection, quickly results in a massive destruction of the blood. Lader, supra note 38, at 68-69.
rarely result in death or indeed in any ill after effects. Unfortunately, the statistics for illegal abortions are not so favorable. An estimated 1.5 million illegal abortions vis-à-vis 3.7 million live births occur in the United States each year. Of these, approximately 5,000 to 10,000 result in death, with the odds overwhelmingly against the poor.

Apart from deaths, it is estimated that 350,000 women a year suffer post-operative complications. Once more, it is not necessary to accept the full figure for even if the actual number is only a tenth of this, it is evident there is an immense amount of avoidable human suffering.

**The Rights of the Fetus**

The position taken by nearly every opponent of legalized abortion is that the fetus is also a human being and, as such, has a right to life. They point out that no matter how high the rate of maternal death or how great the risk of harm is with illegal abortions, the mortality rate to the unborn children is substantially higher: one hundred percent. As this viewpoint demonstrates, one of the key issues in relation to abortion law is the determination of the legal status of the fetus; is it simply a mass of tissue, basically only a part of the mother, merely a potential person? Or is it a person, subject to the constitutional guarantees of due process?

There is no case law directly on point declaring whether or not a fetus is entitled to the protections afforded to legal persons. There is, however, support for the position that the fetus does not enjoy these rights.

The most relevant area of the law is that concerning the destruction of the fetus. In no state is this act treated as murder, at least before viability, whereas a similar act toward an individual after birth would be. It is, rather, treated as a lesser crime than the intentional killing of a living person.

While unborn persons, in many states, are protected from losing a prospective interest in property, such laws require a live birth before enabling the interest to pass to the child. Moreover, such laws are generally based on policy decisions designed to protect the wishes of the deceased rather than a recognition of a fetus' status as a legal person.

Proponents of affording a fetus the status of a legal person also fre-

41 Lader, supra note 38, at 18.
45 Id., at 19.
quent reliance on tort actions where recovery has been allowed for injury to the fetus or the wrongful death of the fetus. Again, the success of the cause of action frequently depends on a subsequent live birth. Moreover, these cases are not actually on point, for the recovery, when permitted, is based largely either on the fact that the individual must bear the injury throughout life, rather than any pain and suffering actually endured as a fetus, or on the fact that the death of the fetus causes a loss to the parents who are deprived of the live child which would otherwise have been born to them. The constitutional question of any rights as a person has not been the decided issue in these cases.

In sum, no court to date has directly decided whether a fetus is entitled to due process under the fourteenth amendment. Some cases deciding tort issues, inheritance rights, and liability under support laws superficially appear to recognize the fetus as a human being, entitled to due process. In reality, decisions in these cases are based on a variety of social policies, many of which clearly favor withholding constitutional rights from the fetus.  

A New Approach

A study of the history of abortion laws reveals clearly that the criminal prohibitions against the practice have come about because of religiously inspired pressures. While our enlightened society has made great strides in making meaningful the "inalienable rights" of human beings and in recognizing that personal freedom is one of the most precious gifts natural law has bestowed upon man, the same religiously inspired pressures continue to dominate legislatures by their powerful lobbies. They effectively thwart efforts to effect sensible reform in recognizing that abortion, this crime without a victim, should not be a criminal offense at all, when performed by licensed medical practitioners in an appropriate medical facility.

The fairly recent success in obtaining passage of therapeutic abortion laws in some states shows an increasing awareness of the inherent wrong of the historical position of the law in this area. These newer laws recognize that it is just as necessary to end a pregnancy when the physical and mental health of the mother is endangered as it is when her life is in peril.

48 . . . [W]hen human abortion bills seemed close to passage in California, England, and New York, the Catholic Church reacted violently. Pastoral letters were written by the bishops, sermons were preached in every pulpit, and letters from dutiful parishioners flooded their legislators' mail. Despite the fact that Catholics comprise a minority of the voters in these areas, despite the fact that ninety percent of all the letters on abortion reform originate from this one minority group, and despite the fact that polls show that even the majority of Catholics favor reform, the Catholic hierarchy succeeded in killing these abortion bills.

49 Those states which have recently passed therapeutic abortion laws are Colorado, North Carolina, California, and Maryland. Ziff, supra note 44, at 4.
because of the pregnancy. Moreover, these new laws permit an abortion when the pregnancy resulted from rape or incest, as well as when there is substantial probability that the child born will suffer from grave physical or mental defects.\textsuperscript{50} These bills have been designed, as Governor John Lowe of Colorado stated, "to do something about areas of suffering and abuse which have been of concern to a great many people for a great period of time."\textsuperscript{51}

These recently reformed statutes are largely based on proposals by the American Law Institute, contained in the Model Penal Code, § 207.11.\textsuperscript{52} In June 1967, the American Medical Association adopted a resolution that a physician, after consultation with two other competent physicians, be permitted to perform an abortion in an accredited hospital in certain instances.\textsuperscript{53} Like the American Law Institute, the American Medical Association proposed that abortion be allowed when the life or health of the mother is endangered by continuation of the pregnancy, when the pregnancy resulted from rape or incest, or when there is medical evidence that the baby might be born with incapacitating physical or mental defects.

It is important to note that in all of these provisions neither the physician nor the woman is obligated to undergo or perform an abortion in any of the permitted circumstances. The procedure is simply made available to willing parties. Moreover, the proposals and statutes limit legalized abortion to being a medical procedure; \textit{i.e.}, one who is not a licensed physician is not included in the category of those who may legally perform therapeutic abortions.

While these reform measures would appear to offer a solution to the illegal abortion problem, in actuality they fall far short. For example, as a result of recent medical advances, purely medical reasons affecting the

\textsuperscript{50} California does not permit termination of pregnancy solely on the grounds that the child is potentially mentally or physically defective. However, it does permit abortion on the other grounds permitted in the Model Penal Code. Ziff, \textit{Recent Law Reforms (Or Much Ado About Nothing)}, 60 J. Crim. L.C. & P.S. 4 (March 1969).
\textsuperscript{51} Id., at 5.
\textsuperscript{52} In the proposal of the American Law Institute (§ 207.11 of the Model Penal Code), the following abortion provision appears:

\textbf{(2) Justifiable Abortion:} A licensed physician is justified in terminating a pregnancy if:

(a) he believes that there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape by force or its equivalent as defined in Section 207A(1) or from incest as defined in Section 207.3; and

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

Justification of abortion is an affirmative defense.

\textsuperscript{53} The entire proposal of the American Medical Association can be found in Inbau, Thompson & Sowle, \textit{Cases and Comments on Criminal Justice}, Vol. 1, 559 (3d ed. 1968).
health of the mother are rapidly being eliminated and only a small percentage of abortions now being performed will be affected; i.e., those resulting from rape or incest and those likely to result in a defective child.\textsuperscript{54} While the Model Penal Code, like some statutes in the United States, does not authorize abortions purely because the child is unwanted, as a means of birth control, most illegal abortions are performed for this reason.\textsuperscript{55} Another large percentage of illegal abortions are performed on unmarried girls. However, these persons, too, generally do not fall within those categories set out in these therapeutic abortion statutes. One source suggests that the Model Penal Code reform legalizes less than five percent of the abortions now being performed.\textsuperscript{56}

Considering that the partial liberalization of abortion laws will undoubtedly make abortions more acceptable generally, the effect of these current reforms could, and probably will, very well be to increase the number of illegal abortions with all their accompanying deaths and injuries. Modification of abortion laws will at least to a degree remove the stigma attached to abortion. If, at the same time, little is done to increase the availability, as a practical matter, to women who wish abortions, they will turn to the criminal abortionist in greater numbers than before with the inevitable result that the problems will be worsened.

Moreover, imposing such requirements as having a hospital panel determine who will be permitted a legal abortion inevitably has the effect of continuing the favorable position of the wealthy patient, who presently has safe abortions available to her, both here and abroad. The poorer, less educated woman is frequently not sophisticated enough to manufacture the stories necessary to bring her within the provisions of the statutes. Yet frequently overburdened with too many children, unable either economically or physically, if not both, to care for those she already has, she is frequently the most in need of an abortion and hence likely to seek one illegally.

While the viewpoints expressed in the newly reformed statutes constitute a considerable improvement over what has been the traditional position for so long, they do not go nearly far enough. All of these recent developments still require a medical judgment that continuation of the pregnancy will result in harm, albeit psychological, to the expectant mother, thereby continuing the hypocritical situation presently existing which so overwhelmingly favors the wealthy patient.

It is submitted that the decision of the woman whether or not she

\textsuperscript{54} Ziff, supra note 50, at 12.
\textsuperscript{55} Over eighty percent of the abortions in the United States are performed on married women, most of whom have several children, are pregnant by their own husbands, and simply do not want another child. Id. at 13.
\textsuperscript{56} Ibid.
wishes to give birth to a child should be the true deciding factor. Abortion is and should be a matter to be decided by the individual woman herself after considering the advice of her doctor, the wishes of her husband, and the dictates of her own conscience. To forbid her the availability of a legal abortion when other extra-legal considerations support her having one is to force the religious and moral precepts of a minority of society upon her. To permit a legal abortion to those who determine to have one for whatever personal reasons they choose is to again separate religious beliefs from the law, to mend the wall, as it were.

The aim of any law on abortion, like that of other moral-legal problems, should be two-fold: "to refrain from imposing as law the views of any group upon another; and second, the construction of a law which would permit freedom to one group of adherents without, at the same time, violating the consciences of those who hold the opposite."\textsuperscript{57} The abolition of all legal prohibitions against voluntary abortions performed by licensed physicians satisfies such an aim.

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