THE LAW OF CRIMINAL ABORTION: AN ANALYSIS OF PROPOSED REFORMS

Since the turn of the century, existing abortion laws have been the object of criticism by both legal and social reformers.[1] In all United States jurisdictions it is a crime to induce an abortion, unless the case falls within certain exceptions;[2] yet the number of these illegal operations has assumed monstrous proportions[3] and, in all but an insignificant number of cases, go unprosecuted.[4] A heterogeneous array of solutions to this problem of non-enforcement has been proposed; but the law, with a few exceptions, has not been modified. In attempting to explain this apparent legislative apathy toward a problem of such magnitude, it seems essential to re-examine the underlying rationale of the abortion laws. Any proposal, regardless how superficially attractive, which conflicts with the basic purpose of the law which it purports to reform is clearly undesirable, unless it can be further demonstrated that the purpose is one which society no longer desires to be effectuated. Thus, the value of any particular solution can best be determined by the utilization of a standard evolved from this underlying rationale.

Although the practice of abortion goes back to earliest recorded history,[5] its emergence as a crime is a comparatively recent development. In many societies the laws against abortion reflect a desire to foster population growth.[6] Both Plato and Aristotle, on the other hand, recom-

1. STORER & HEARD, CRIMINAL ABORTION (1868); ROSEN, THERAPEUTIC ABORTION (1954); TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED (1936) (hereinafter cited as TAUSSIG); TAYLOR, THE ABORTION PROBLEM (1944).

2. See note 59 *infra.*

3. The only official statistics found in the United States Census publications are for number of reported fetal deaths after twenty weeks gestation. The figure for 1951 was 70,569 which excludes the first twelve weeks gestation during which the majority of abortions are performed and further excludes illegal abortions; it clearly gives no accurate picture of the scope of the problem. U.S. BUREAU OF THE CENSUS CURRENT POPULATION REPORTS (Series P-25, No. 118) (1953). Taussig in his classic work on abortion, makes the ultra-conservative estimate of 681,000 abortions based on a natural population of 120,000,000. He arrived at this figure on the basis of one abortion for every 2.5 confinements in urban areas and 1 to 5 in rural areas. A projection of these estimates based on present population figures would indicate a total of more than 1,171,000 abortions in 1953 (60% to 65% estimated to be illegal). TAUSSIG 25.

4. It has been estimated that convictions number less than one thousand per year. ROSEN, *op. cit. supra* note 1, at 6. The only recent official tabulations are to be found in the Attorney General and Judicial Council reports of a few states: Connecticut (1938-1954), 135 prosecutions, 118 convictions; Minnesota (1938-1953), 119 prosecutions, 114 convictions; Utah (1938-1954), 7 prosecutions, 7 convictions.

5. The oldest abortifacient recipe still extant in writing is attributed to an ancient medical work written during the reign of Emperor Shen Nung who according to Chinese chronology reigned from 2737 B.C. to 2696 B.C. TAUSSIG 35.

6. This was especially true for the Jews. In Genesis, ch 1, 22, we find the command "Be fruitful and multiply," and later on the promise "that in blessing I will bless thee, and in multiplying I will multiply thy seeds as the stars of the heaven, and as the sand which is upon the sea shore," GENESIS, ch xxii, 17. Hale cites *EXODUS*, ch xxi, 22, for the

mended abortion, especially in the first half of pregnancy, as a method of limiting population.[7] In Rome, during the Pagan Empire, abortion seems to have received only mild social disapproval,[8] but with the advent of the early Christian Emperors came the first unqualified condemnation of the practice in the Western World.[9] The Christian Church established abortion as a crime against the unborn fetus, which was regarded as having a soul, and the penalty was death.[10] Voltaire, Rousseau, and other reformers succeeded in obtaining the abolition of such an extreme penalty, but it must be noted that this was accomplished more through arousing the tide of public opinion against the barbarity of the sanction than through any change in the moral concepts underlying the law.[11]

The exact status of abortion in the English law prior to the passage of the first abortion statute in 1803[12] is confused. There is no doubt that abortion was an ecclesiastical offense as late as 1527,[13] but there is no conclusive evidence that it was ever a crime at common law.[14] Abor-

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proposition that according to the judicial law of Moses, abortion was punishable by death. 1 HALE, PLEAS OF THE CROWN 433 (1736).

7. The Greeks seem to have had a true Malthusian philosophy which is reflected in their views as to both infanticide and fetacide. See 1 WESTERMARCK, ORIGIN AND DEVELOPMENT OF MORAL IDEAS 415 (1906); TAUSSIG 33.

8. 1 WESTERMARCK, *op. cit. supra* note 7, at 415.

9. 6 ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX 604 (1940).

10. *Id.* at 605.

11. 1 ENCYCLOPEDIA OF SOCIAL SCIENCES 370 (1930). The Christian Church apparently adopted the attitude of the Jews toward abortion. 2 LECKY, HISTORY OF EUROPEAN MORALS 23 (1884). St. Augustine is credited with initiating the distinction between an embryo as yet unformed, embryo informatus, and the animate fetus, embryo formatus. A fetus in this latter stage of pregnancy was thought to be endowed with an immortal soul which was in need of baptism for its salvation, and its destruction was therefore considered murder. WESTERMARCK, *op. cit. supra* note 7, at 416-17. This distinction was later incorporated into both English and American law. See note 23 *infra*.

12. See note 15 *infra*.

13. The earliest Anglo-Saxon reference to abortion is found in the *Penitential of Theodore,* Archbishop of Canterbury, 668-90 A.D., which provides that women who commit abortion after the fetus "has life" should do penance as murderesses. MCNEILL & GAMER, MEDIEVAL HANDBOOK OF PENANCE 197 (1938). One of the last ecclesiastical references is the following note dated 1527 found in Archdeacon Hale's *Procedents:* "Margareta Saunders notatur quod potionibus infantulum in utero Johanne Byrde interemit . . ." HALE, PRECEDENTS AND PROCEEDINGS IN CRIMINAL CAUSES, 1475-1640, under date 1527 (1847).

14. Bracton is the first treatise writer to refer to abortion, but his entire discourse on homicide is derived either directly or at second hand from Bernard of Pavia, a cannonist of the late twelfth and early thirteenth century. MAITLAND, SELECTED PASSAGES FROM BRACTON AND AZO 225 (8 Seldon Society 1894). Maitland says that when Bracton dealt with matters which came before English courts he used English cases, and that it was only when there were no cases and when he was dealing with a question which was speculative or academic that he went outside the realm for his authority. *Id.* at xx. Fleta, who quoted and abridged Bracton, is translated by Storer as follows: "Moreover, whoever shall have overlain a pregnant woman, or who shall have given her drugs or blows, in such a sort as to procure abortion, or non-conception after the fetus shall have been already formed and endowed with life, is by law, a homicide." STORER & HEARD, *op. cit. supra* note 1, at 152. Coke, who quoted both Bracton and Fleta, regarded abortion

tion, according to the terms of 43 George III, c.58 (1803) was punishable by death if the woman was "quick with child," and by transportation or imprisonment if performed prior to quickening.[15] This statutory adoption of the ecclesiastical distinction based on quickening is good evidence that Parliament continued to regard abortion as a crime against the unborn child.[16]

Although historical study strongly indicates that abortion was considered a moral question in England, it must not be assumed that our modern legislation is always predicated solely on a desire to protect the fetus. Increased medical knowledge has made both legislatures and court aware of possible deleterious effects on the mother's health resulting from artificially induced abortion.[17] Thus, protection of the mother's health has, on occasion, been a salient factor controlling judicial interpretation of the rationale of an abortion statute.[18] Protection of the mother's

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as "a great misprison and no murder," but he cites no authority or cases for this change. 3 COKE, INSTITUTES *50. Hale, Hawkins, and Blackstone all adopt the view of Coke. I HALE, PLEAS OF THE CROWN 433 (1736); 1 HAWKINS, PLEAS OF THE CROWN 94 (1824 ed.); 1 BLACKSTONE, COMMENTARIES *129. Whether abortion continued to be an offense of ecclesiastical cognizance until 1803 is doubtful in view of the fact that no mention of it is made in Burns, Ecclesiastical Laws (4 vols. 2d ed.) published in 1767. The status of the ecclesiastical law after the English Reformation rested on 25 HENRY 8, c. 19, which affirmed the authority of all canon law not already covered by the "laws, statutes, and customs of the real." See MORTIMER, WESTERN CANON LAW 61 (1953). Thus, it may well be that the ecclesiastical courts had ceased to exercise jurisdiction over abortion at about the same time Coke was writing his *Institutes*. Several writers have said that abortion was exclusively a common law offense, but there appears no basis for this view other than an unsupported generalization from the statements of the treatise writers. See note 20 J. CRIM. L. & CRIMINOLOGY 595 (1938); Note, 35 COLUM. L. REV. 87 n.2 (1935).

15. 1 VICTORIA c. 58 (1837) modified 43 GEORGE 3 c. 58 (1803) by eliminating the "quick with child" distinction and reducing the penalty to transportation or imprisonment. This act as slightly modified by the OFFENSES AGAINST THE PERSON ACT of 1861, 24 & 25 VICTORIA c. 100, 558, and further modified by judicial interpretation is the law of England today.

16. The preamble to this act which stated that "certain . . . heinous offenses, committee with intent to destroy the lives of his Majesty's Subjects by Poison, or with Intent to procure the miscarriage of Women . . . have been of late also frenquently committed; but no adequate Means have been hitherto provided for the Prevention and Punishment of such offenses," lends support to the contention that abortion was primarily an ecclesiastical offense prior to passage of the act. Davies, *The Law of Abortion and Necessity*, 2 MODERN L. REV. 126, 134 (1938).

17. Fatal hemorrhage may follow cutterage by an unskilled abortionist, and an even more frequent complication is that of infection resulting from failure to perform the operation under aseptic conditions. See Fisher, *Criminal Abortion*, 42 J. CRIM. L. & CRIMINOLOGY 242, 247 (1951); GONZALES, LEGAL MEDICINE 567 (2d ed. 1954).

18. State v. Cooper, 22 N.J.L. 52 (Sup. Ct. 1849) decided that at common law abortion was not a crime prior to quickening. As a result of this decision the New Jersey legislature inacted a statute which purported to eliminate any distinction based on quickening. This statute was construed in State v. Murphy, 27 N.J.L. 112 (Sup. Ct. 1858) where the court, after commenting that at common law abortion was only an offense against the life of the child, went on to say: "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." *Id.* at 114. But at least one section

health has most frequently been urged in conjunction with the more fundamental concept of abortion as a crime against the unborn child. The courts have felt particularly obliged to articulate a rationale in cases where the death of the fetus prior to the acts of the defendant has been raised as a defense.[19] In jurisdictions where the defendant has been held guilty under these circumstances the courts have characterized the statute as having a dual function.[20] Unfortunately, abortion statutes have failed to live up to expectations and, in fact, have had an adverse effect on the mother's health. Although the statute may on occasion act as a deterrent to the would-be abortionist, the more usual effect is merely to drive him underground. The operation is often performed incompetently and under unsanitary conditions. Even more serious is the fact that patients rarely receive the proper post operative care following one of these clandestine operations.[21] The Russian experiment in legalized abortion has demonstrated that an abortion performed under optimum conditions presents very little risk to the patient.[22]

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of the New Jersey law is still aimed at protection of the fetus, since by the terms of the 1881 revision the maximum penalty is doubled if the child dies. N.J. REV. STAT. § 2A:87-1 (1951). For an example of a statute rationalized as exclusively for the protection of the fetus, see Miller v. Bennet, 190 Va. 162, 168, 56 S.E.2d 217, 221 (1949).

19. In the several states which have held the death of the fetus prior to the abortion as a good defense, the statute seems chiefly intended for the protection of the life of the fetus. Tonnahill v. State, 84 Tex. Crim. 517, 208 S.W. 516 (1919); Taylor v. State, 105 Ga. 846, 33 S.E. 190 (1899); State v. Atwood, 54 Or. 526, 102 Pac. 295 (1909), aff'd, 54 Or. 542, 104 Pac. 195 (1909); State v. Howard 32 Vt. *380, *398 (1859) (dictum).

20. Thus, in State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913) where it was held that the statute had abrogated the common law, the court said, "This statute regards not only the life of the child, but also the life of the woman, though she be not with child in fact." *Id.* at 37, 105 N.E. at 77. Other courts have observed, "The life and health of the mother, and the probability of future off-springs are all so seriously put at hazard by such a transaction, when produced by mechanical means, that it is not easy to determine precisely which is the more important purpose of the statute, to prevent the injury to the child or to the mother." State v. Howard, *supra* note 19, at *399. "The intention of the lawmakers was to protect the health and lives of pregnant women . . . and their unborn children from those who intentionally and not in good faith would thwart nature by performing or causing abortion and miscarriage." Anderson v. Commonwealth, 190 Va. 665, 668, 58 S.E.2d 72, 75 (1950). "It is entirely immaterial that the fetus previous to the acts of the appellant had lost its vitality so that it could not mature into a living child. The statute defining abortion is designed to protect the life of the mother as well as that of her child." State v. Cox, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938).

21. Lack of space and the everpresent risk of detection forces the criminal abortionist to require patients to leave his office as soon as possible after the operation, often within thirty minutes. Contrasted to this is the five to ten days rest period deemed absolutely essential by the legitimate practitioner. See Bates, *The Abortion Mill: An Institutional Study,* 45 J. CRIM. L. & CRIMINOLOGY 157, 161; TAUSSIG 171.

22. The Soviet law which was passed in 1922 and repealed in 1936 provided:

1) Primigravidal are not aborted except for medical complications unless, after careful explanation of the dangers, they insist upon its being done.

2) No abortion is done in the first three months of pregnancy (twelve weeks after last menstruation).

3) No abortion is done earlier than six months following a preceding abortion.

The modern statutory abrogation of the quick-with-child distinction appears to have resulted from medical acceptance of the view always maintained by the early Christian Church that the child from the moment of conception has a separate existence.[23] A more fundamental modification raising problems of rationale is the holding in several jurisdictions that proof of pregnancy is not essential to a conviction for abortion,[24] but even in most of these states the object of protecting the fetus is still evidenced by the existence of a separate statute providing for a more severe penalty if the fetus dies.[25] In other jurisdictions this modification was apparently made as a means of obtaining stricter enforcement,[26] and in only two states does the exclusion of pregnancy as an essential element indicate a possible rejection of protection of the fetus as a rationale.[27]

Another type of rationale which has received limited judicial acceptance is the view that abortion statutes are designed primarily to prevent interference with racial reproduction, but the argument here is not founded on the population policies typically underlying suppression of

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4) Women required to stay in the hospital for three days after the operation and must not go to work for two weeks after. TAUSSIG 414. According to Taussig's figures, the death rate was .01% as compared to 1.2% in the United States. *Id.* at 26.

23. See STORER & HEARD, *op. cit. supra* note 1, c. 1. In State v. Alcorn, 7 Idaho 599, 64 Pac. 1019 (1900), the court in holding that the crime may be committed prior to quickening of the fetus made it clear that the law still regarded the protection of the fetus: "The crime for which appellant has been convicted is one of the worst known to the law. An unnatural abortion, brought about by means of drugs or instruments, violates decency, the best interests of society, the divine law, the law of nature, the criminal statutes of this state, and is not only destructive of life unborn, but places in jeopardy the life of a human being—the pregnant woman." *Id.* at 599, 64 Pac. at 1019.

24. In some jurisdictions pregnancy has been expressly excluded as an element of the offense, *e.g.*, DEL. CODE ANN. tit. 11 § 301 (1953); VT. STAT. § 8477 (1947). In other jurisdictions where the statute does not specifically include pregnancy, it has been excluded by judicial interpretation, *e.g.*, Commonwealth v. Willard, 179 Pa. Super. 368, 116 A.2d 751 (1955). State v. Gallardo, 41 Cal.2d 57, 257 P.2d 292 (1953).

25. The Missouri statute is in two parts; one aimed at situations where the woman is pregnant, but not quick with child, or not in fact pregnant, and the second part retaining the "quick with child" distinction, making death of the fetus manslaughter. MO. ANN. STAT. § 559.100 (1949). See also N.Y. PEN. CODE § 294 and § 189; PA. STAT. ANN. tit. 18 § 4718 and § 4719 (1930); FLA. STAT. § 797.02 and § 782.10 (1955).

26. In State v. Magnell, 19 De. 307, 51 Atl. 606 (1901), the court, in construing a statute which used the language "woman pregnant or supposed by the accused to be pregnant," remarked that the general assembly had passed the statute in the belief that the prevelence of the practice called for "stringent provisions for its rigid suppression enforced by severe punishment. . . ." *Id.* at 309, 51 Atl. at 607.

27. In Vermont, the statute has been rationalized as having a dual function. State v. Howard, 32 Vt. 380 (1859). In Indiana, the provision that the woman need not be pregnant only applies where the woman dies. IND. ANN. STAT. § 10-105 (1955). In Iowa and Massachusetts, the courts have followed the English rule that pregnancy is not an element without any attempt to rationalize. State v. Snyder, 188 Iowa 1150, 177 N.W. 77 (1920); Commonwealth v. Taylor, 132 Mass. 261 (1882); Reg. v. Goodchild, 2 Car. & K. 293, 175 Eng. Rep. 121 (K.B. 1858).

abortion on the continent in recent years.[28] The American courts appear to regard interference with propagation not objectionable on nationalistic grounds, but, rather, as a moral question involving a crime against nature.[29] A few courts have noted with approval that abortion laws not only protect the fetus, but act as a bulwark against loose morals among the unmarried.[30] This argument, however, loses much of its force in consideration of the fact that the majority of abortions are performed on married women.[31]

The foregoing analysis would seem to indicate that the ecclesiastical view of abortion as a crime against the fetus continues to be the underlying rationale of contemporary abortion statutes. Although the law now seeks to protect other interests, such as the health of the mother, the basic theme of protection of the fetus is not only retained through specific statutory provisions, but is frequently reiterated by the courts which enforce the statutes. Therefore, it is erroneous to attack abortion laws on the grounds that they fail to accomplish some purpose such as the protection of population growth or the mother's health, since even if these contentions are true the moral rationale will continue to exist regardless of ethical validity until such time as the mores of the community undergo a change.[32]

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28. In both France and Belgium the penalties for abortion were reduced in the hope that ineffectiveness of the law resulted from excessive severity of the penalty. The desire for stricter enforcement arose out of widespread concern for the falling birth rate. Implementation of population policies was also deemed to require increased supression of contraceptives. It is of note that the ban on dissemination of birth control devices appears to be responsible for even greater disregard of abortion laws. Glass, *The Effectiveness of Abortion Legislation in Six Countries,* 2 MODERN L. REV. 97, 108 (1938).

29. "It is a flagrant crime . . . because it interfers with and violates the mysteries of nature, in that process by which the human race is propagated and continued. It is a crime against nature which abstructs the fountain of life, and is therefore punishable." Mills v. Commonwealth, 13 Pa. *631, *633 (1850). *Accord,* Dykes v. State, 30 Ala. App. 129, 1 So.2d 754 (1941); People v. Gallardo, 41 Cal.2d 57, 243 P.2d 532 (1952).

30. "The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice, and to discourage secret immortality between the sexes . . ." State v. Tippie, 89 Ohio St. 35, 40, 105 N.E. 75, 77 (1913). *Accord,* State v. Atwood, 54 Or. 526, 102 Pac. 295 (1909); State v. Howard, 32 Vt. *380 (1859).

31. It is a popular misconception that abortion is intrinsically linked with illegitimacy. In most statistical studies of abortion married women have outnumbered the unmarried, widowed, and divorced combined, and Taussig estimates that 90% of all illegal abortions are performed on married women. TAUSSIG 376. See also HAMILTON, *Some* SOCIOLOGIC AND PSYCHOLOGIC OBSERVATIONS ON ABORTION (1940); SIMONS, STATISTICAL ANALYSIS OF ONE THOUSAND ABORTIONS (1939).

32. Professor Hall points out that the criminologist must concern himself "with empirical study of moral ideas. If moral ideas are viewed as facts which operate in reactions against persons and conduct deemed anti-social, then the ethical validity of such ideas is of no consequence so far as criminologic research is concerned. They must be accepted without bias as elements in the factual setup with which the scientist must deal, however superficial or distasteful they may be." Thus program or reform which ignore these moral ideas are "largely irrelevant. The briefest study of history—

Determination of this underlying rationale is of more than academic interest. To the contrary, it has great utility in that it provides a standard by which we may evaluate tentative solutions to the abortion problem. Thus, every hypothetical solution must be reconciled with the basic purpose of protecting the life of the unborn child.[33] No solution which ignores this premise, however effectively it may deal with the immediate problem of non-enforcement, is acceptable.

One of the most formidable obstacles to effective enforcement of abortion laws lies in the very nature of the crime. Everyone connected with the operation is naturally interested in suppressing knowledge from the police, and there is no injured party in the usual sense of the word to file a complaint. For this reason abortions are rarely detected unless the woman dies.[34] In cases where a woman seeks treatment of injuries received as the result of an illegal abortion, the physician's legal and ethical position is uncertain. A New York City ordinance requires the doctor to report all cases of abortion regardless of their nature,[35] but the physicians in most jurisdictions are under no such legal obligation.[36] Whether or not medical etiquette requires a physician who knows his patient has had an illegal abortion to keep the confidence of his patient is still a hotly debated point.[37]

The enormous discrepancy between the incidence of illegal abortion and number of prosecutions indicates the existence of a more fundamen-

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certainly that of law—shows an amazing inertia, an astounding persistence of patterns of thought that cannot be ignored by scientists. To say that a proposed code must be practicable, that its chances for adoption must be good, is to put the matter superficially. It is the business of the social scientist to ground his discovery in fact. Correct norms cannot be spun from air. . . ." Hall, *Criminology and A Modern Penal Code,* 27 J. CRIM. L. & CRIMINOLOGY 1, 11-13 (1936).

33. Note that in the case of the therapeutic exception this reconciliation has historically taken the form of subordination of the interest in protecting the fetus to the interest in saving the mother's life. See note 59 *infra.*

34. In non-fatal abortion cases it is generally impossible to obtain a conviction without the testimony of an eye witness. Fisher, *Criminal Abortion,* 42 J. CRIM. L. & CRIMINOLOGY 242, 248. Gonzales notes that prosecutors frequently experience difficulty even in establishing that the woman was pregnant in fatal cases. GONZALES, *op. cit. supra* note 17, at 570.

35. *Id.* at 566.

36. At common law any person who knew of the commission of a felony and took no steps to bring the felon to justice was guilty of "misprison felony," but this offense is probably obsolete. COKE, INSTITUTES *139; 1 WHARTON, CRIMINAL LAWS § 289 (12th ed. 1932).

37. The duty of the physician to contact police officials in situations where the woman is dying so that she may have an opportunity to make a dying declaration admissible as evidence in a court of law, is generally conceded. 138 L.T. 194; Fisher, *Criminal Abortion,* 42 J. CRIM. L. & CRIMINOLOGY 242, 249 (1951). The difficult question arises where the woman will recover, and in these situations the doctor is probably governed more by expediency and conscience than by fiat. GONZALES, *op. cit. supra* note 17, at 566.

tal reason for non-enforcement than mere difficulties of detection and evidence. One possible explanation is that the severity of the sanction renders the law ineffective.[38] Professor Jerome Hall has pointed out that the discretion exercised by 18th century English juries in mitigation of the capital sanction has been taken over largely by the prosecutor, the typical method being waiver of the felony.[39] This device does not appear to be utilized extensively in the abortion situation for two reasons: 1) the prosecutor is usually reluctant to reduce the charge in crimes to which any considerable moral stigma attaches,[40] and 2) the general apathy of public and police officials toward the crime precludes the vast majority of illegal abortions from ever coming to the attention of the prosecutor.[41] One writer in commenting on this latter aspect of the non-enforcement problem argues that the only valid estimate of public opinion is the record of public behavior. Hence, widespread violation of a law indicates that the illegal conduct is "secretly" approved by the community.[42] It seems dangerous so completely to equate behavior with mores, for the legal reformer who does so may suddenly find himself unable to convert the so-called real convictions of the people into legislative conviction. Perhaps abortion laws are part of that body of law, the continued existence of which is required by the community as a symbol of formal public disapproval of behavior that in specific instances may be condoned.

Three basic avenues of attack on the problem of non-enforcement have been proposed: statutory reform, stricter enforcement of existing statutes, and the elimination of reasons for procuring an abortion. The latter solution embraces proposals for legalizing distribution of contraceptive devices, dissemination of information regarding their use, and the more fundamental solution of alleviating the indigent economic condition of those classes in which the practice of abortion is most prevalent. Statistics indicate that the majority of abortions are performed on married women[43] who seek to avoid the economic burden of another

38. See note 28 *supra.*

39. ". . . the police magistrate and the prosecuting attorney loom up as by far the most powerful officials in our system of criminal justice. Examination of their work reveals a practice so frequent, typical, and significant, that it has become vastly important, namely, waiver of the major felony charge and acceptance of a plea of guilty to a lesser offense." HALL, THEFT, LAW AND SOCIETY 144 (2d ed. 1952).

40. *Id.* at 144 n. 80.

41. Amen, *Some Obstacles to Effective Legal Control of Criminal Abortion,* in THE ABORTION PROBLEM 133, 135 (Tayor ed. 1944).

42. 1 ENCYCLOPEDIA OF SOCIAL SCIENCES 376 (1930).

43. See note 31 *supra.*

child,[44] and several European countries have attempted to meet this problem by paying a subsidy to the parents for each birth.[45] The logic of those who advocate birth control as a solution to the abortion problem is unimpeachable, but again there are certain practical objections. It must be noted that although many states have statutes prohibiting the sale or use of contraceptives,[46] in only two states is there any attempt at enforcement,[47] and the inconvenience of most contraceptives is probably a greater deterrent to their use than is any legal impediment.[48] Regardless of the practical disadvantages, the economic aid and birth control proposals are acceptable on the basis of the standard which has been proposed. It is often assumed that identical obstacles impede the reform of birth control and abortion laws, but this is true only to the extent that both involve a violation of moral taboos. The specific harm involved is quite different, for it cannot be said that birth control conflicts with the abortion law rationale of protection of an unborn child.

One avenue of statutory reform would involve either unconditional repeal or, what would be tantamount to repeal, an enlargement of legal exception to include economic necessity.[49] The advocates of this course are armed with a diversified collection of arguments. One writer, after

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44. This has been born out by two studies which correlated the proportion of illegal abortoins according to pregnancy order. In each study the data for the series were limited to pregnancies within marriage. In New York City there were 5.2 abortions per 100 first pregnancies and 43.3 per 100 fifth pregnancies. In an Indianapolis study the corresponding figures were .4 per 100 first pregnancies and 17.9 per 100 fifth pregnancies. FOETAL, INFANT AND EARLY CHILDHOOD MORALITY, 13 United Nations Population Studies Vol. 1, pp. 25, 26 (Dept. Social Affairs, Population Division, U.N. 1954). The inference from these figures is that economic distress caused by large families is a controlling factor in the incidence of illegal abortions.

45. Tax exemptions are another method of achieving this same result. See TAUSSIG 395. Such proposals, although perhaps theoretically sound, involve political and social considerations outside the scope of this note.

46. See Note, 45 HARV. L. REV. 723 (1923) for a comprehensive collection of these statutes and cases.

47. Only Mass. and Conn. still attempt to make any effort at enforcement. PILPEL & ZAVIN, YOUR MARRIAGE AND THE LAW 173 (1952). However, in the former a conviction cannot be sustained unless the article was sold or used for the sole purpose of contraception. *Ibid.* Some states attempt to channel the distribution of devices and information for contraception through legitimate drug stores and physicians. They also require state testing procedures intended to insure at least a minimum quality of the product. See e.g., IDAHO CODE ANN. § 39-801-10 (1955).

48. GAIL, SEX AND THE LAW 202 (1935). Seven southern states go so far as to promulgate birth control information through their public health departments to anyone who desires it. (Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Virginia) PILPEL & ZAVIN, *op. cit. supra* note 47, at 167. Information is also distributed on a national basis by such agencies as the Human Betterment Association of America.

49. The argument here is that any legislative exception invites evasion by the unscrupulous. See Note, 35 COLUM. L. REV. 85, n. 46 (1935). But if economic distress is the principle cause of abortion, then an exception for economic necessity would render abortion laws largely nugatory even in the absence of deliberate evasion.

comparing the value of the fetus and the adult on the basis of life expectancy, concluded that the fetus is merely "a parasite performing no function whatever."[50] Another argues that the right of society to provide for the termination of fetal life is ethically in line with the right to terminate the lives of those individuals whose anti-social conduct makes them dangerous.[51] Legalized abortion was urged strongly by those involved in the feminist movement in Germany at the turn of the century. It was their contention that the right to terminate fetal life existed by virtue of the woman's right of control over her own body. Exercise of this right without good cause was supposedly precluded by the natural force of mother love.[52] The most persuasive practical argument for legalized abortion is the deleterious effect which illegally induced abortions frequently have on the mother's health.[53]

The practical arguments against repeal or exception for economic necessity are not without merit. The argument that repeal would greatly reduce mortality and morbidity rates is chiefly supported by the Russian experience,[54] but opponents of legalized abortion point out that the Soviet experiment was far from being a complete success. Shortly before virtually unrestricted legal abortion was repealed in 1936, medical centers began to report a large incidence of delayed medical complications or "late effects." This was especially prevalent among women who had aborted in their first pregnancy.[55] Unfortunately, the Soviet experiment did not last long enough to determine whether these "late effects" might be prevented by utilization of more advanced techniques, but certainly grave doubts are raised as to the wisdom of proposing legalized abortion as the panacea for the United States abortion problem. The considerations weighing against a legal exception for economic necessity include the inherent administrative difficulties, and the probability that such an exception would offer an easy avenue of escape for all offenders.[56] For our purposes, however, these practical and ethical polemics are irrelevant. Legalized abortion clearly fails to fulfill the minimum requirements for a feasible solution as defined by the standard previously discussed; in

50. BALLANTYNE, MANUAL OF ANTENATAL PATHOLOGY: THE FETUS 459 (1921).
51. 6 ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX 606 (1940).
52. *Id.* at 607-8.
53. See note 17 *supra.* A variation on this theme is the argument that the social stigma attached to illegitimacy makes it desirable to legalize abortion for unwed mothers. 1 ENCYCLOPEDIA OF SOCIAL SCIENCES 372 (1930).
54. See note 22 *supra.*
55. Confinements following a legalized abortion had a higher incidence of such complications as long labours, postpartum bleeding, and adherent placenta. Menstrual disturbances, pelvic disturbances, sterility, and functional neuroses such as hysteria, depression, and loss of libido were also traced to a prior abortion. TAUSSIG 415.
56. See note 47 *supra.*

fact, no proposal is more palpably the antithesis of protection of the fetus! As long as abortion laws reflect a basic moral attitude of the community, repeal or reform tantamount to repeal is both impractical and undesirable.[57]

One aspect of statutory reform which remains to be discussed is the therapeutic exception.[58] Induced abortion to "save" or "preserve" the life of the mother is expressly allowed in the abortion laws of 31 states,[59] and seven additional states allow the exception to save life only if the operation is medically advised.[60] The desirability of such an exception has been almost universally conceded,[61] the usual criticism being that it is too narrow.[62] The famous English case of *Rex v. Bourne* emphasized the inadequacy of the narrow "save life" exception found in most United States jurisdictions. Although the English statute has no express exception to "save life," the word "unlawfully" as used in the statute had prior to the *Bourne* case been interpreted to mean that an abortion induced to save or preserve the life of the mother was not illegal.[63] The defendant physician in the *Bourne Case* successfully contended that the

57. See note 32 *supra.*

58. Taussig defines the therapeutic abortion as "Interruption of pregnancy before viability in order to conserve the life or health of the mother." TAUSSIG 480.

59. ARIZ. CODE ANN. § 43-301 (1939); CAL. PEN. CODE § 274 (Deering 1949); CONN. GEN. STAT. § 8363 (1949); DEL. CODE ANN. tit. 11, § 301 (1953); IDAHO CODE ANN. § 18-601 (1948); ILL. REV. STAT. c. 38, § 3 (1955); IND. ANN. STAT. § 10-105 (1955); IOWA CODE ANN. § 701, 1 (1950); KY. REV. STAT. § 436.020 (Supp. 1956); ME. REV. STAT. ANN. c. 134, § 9 (1954); MICH. COMP. LAWS § 750.14 (1948); MINN. STAT. § 617.18 (1953); MISS. CODE ANN. § 2223 (Supp. 1954); MONT. REV. CODES ANN. § 94-401 (1947); NED. REV. STAT. § 28-405 (1956); NEV. COMP. LAWS § 10129 (1929); N.H. REV. STAT. ANN. § 585:13 (1955); N.Y. PEN. CODE § 294; N.C. GEN. STAT. § 14-44 (1953); N.D. REV. CODE § 12-2501 (1943); OKLA. STAT. tit. 21, § 861 (1951); R.I. GEN. LAWS ANN. c. 606, § 22 (1938); S.C. CODE § 16-82 (1952); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. § 39-301 (1935); UTAH CODE ANN. § 76-2 (1953); VT. STAT. § 8477 (1947); VA. CODE ANN. § 18-64 (1950); WASH. REV. CODE § 4.02.010 (Supp. 1950); W. VA. CODE ANN. § 5923 (1955); WYO. COMP. STAT. ANN. § 4-223 (1955).

60. ARK. STAT. ANN. § 41-2224 (1947); GA. CODE ANN. § 26-1101 (1953); KAN. GEN. STAT. ANN. § 21-410 (1949); MO. ANN. STAT. § 559.000 (1949); OHIO REV. CODE ANN. § 2910.16 (Page 1954); TEX. PEN. CODE ANN. art. 1183 (1948); WIS. STAT. § 340.095 (1955).

61. The Catholic Church takes the position that an abortion should not be performed under any circumstances. Huser, *The Meaning of "Fetus" In Relation to the Crime of Abortion,* 8 JURIST 306 (1948). Given a choice of the death of the mother or the death of the fetus, the Catholic Church defers the choice to nature. Despite this absolute prohibition, studies indicate that there is little difference in the incidence of criminal abortion among Catholics, Protestants, and Jews. TAYLOR, THE ABORTION PROBLEM 117 (1944); TAUSSIG 399; KOPP, BIRTH CONTROL IN PRACTICE 78 (1934); ROBINSON, SEVENTY BIRTH CONTROL CLINICS 34 (1930).

62. 186 L.T. 87 (1938); Davis, *The Law of Abortion and Necessity,* 2 MODERN L. REV. 126 (1838).

63. The paucity of legal authority was one of the unique aspects of the Bourne case. Although the legality of an abortion performed to save the life of the mother was admitted by the prosecution, there was no case authority for this proposition offered by either side. Davies, *supra* note 62, at 130.

abortion, which he had performed to preserve the physical and mental health of a 15 year old girl whose pregnancy had resulted from rape, should be no less justified than an abortion induced where the mother's life is in imminent danger.[64]

Five jurisdictions in the United States have statutes which fail to expressly recognize an exception to save life.[65] In three of these, no case on point has been reported, but in one, New Jersey, it has been held that the statutory expression "without lawful justification" implies an exception to save life.[66] In Massachusetts it has been held that the use of the word "unlawfully" in the statute implies an exception to save life or preserve health of the mother.[67] Iowa is the only other jurisdiction to expand the therapeutic exception by judicial interpretation to include preserving health,[68] but there the statute provided an express exception to save life.[69] In the statutes of four states and the District of Columbia there is an express exception to save life or preserve health if medically advised.[70]

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64. Judge Macnaughten gave the following charge to the jury: "You have heard a great deal of discussion of the difference between danger to life and danger to health. I confess I have had great difficulty in understanding what the discussion really meant. Life depends on health and it may be that if health is gravely impaired death results. . . . If pregnancy is likely to make the woman a physical or mental wreck you are quite entitled to take the view that a doctor who, in these circumstances and led by his belief, operates, is operating for the purpose of preserving the life of the woman. . . . If the doctor in good faith thinks it necessary for the purpose of preserving the life of the mother, in the sense that I have explained, not only is he intitled to perform the operation, but it is his duty to do so." *Id.* at 128.

65. FLA. STAT. § 297.02 (1955); LA. REV. STAT. ANN. § 14:87 (1950); PA. STAT. ANN. tit. 18 § 4718 (1930); N.J. REV. STAT. § 2A:87-1 (1951); MASS. ANN. LAWS c. 272 § 19 (1956).

66. State v. Brandenburg, 137 N.J.L. 124, 58 A.2d 709 (1948).

67. "A physician may lawfully procure the abortion of a patient if in good faith he believes it to be necessary to save her life or to prevent serious impairment of her health, mental or physical, and if his judgment corresponds with the general opinion of competent practitioners in the community in which he practices. Commonwealth v. Wheeler, 315 Mass. 394, 396, 53 N.E.2d 4, 5 (1944).

68. State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592 (1928).

69. IOWA CODE ANN. § 701.1 (1950).

70. COLO. REV. STAT. ANN. § 40-2-23 (1953); MD. ANN CODE art. 27 § 3 (1951); N.M. STAT. ANN. § 40-3-2 (1953); D.C. CODE ANN. § 22.201 (1951). In Oregon, the last state to expand the therapeutic exception to include preserving health, the modification was achieved by construing the provisions of the 1895 Criminal Act, ORE. REV. STAT. § 23.408 (1951), in conjunction with the 1951 Medical Practice Act, ORE. REV. STAT. § 54.901 et seq. 54.931, which provided that the board of medical examiners could revoke a physician's license for "(b) The 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 consideration with another duly licensed medical physician and surgeon." The court held that this provision of the Medical Practice Act repealed the criminal abortion act as to physicians and surgeons, allowing them to perform an abortion to preserve the health of the mother. State v. Buck, 200 Ore. 87, 262 P.2d 495 (1953).

ALA CODE ANN. tit. 14 § 9 (Supp. 1955) inlarges the "save life exception" to include preserving health, but requires no medical consultation.

An exception to preserve health, whether achieved by statutory reform or judicial interpretation, is clearly desirable. It is not only sound from an ethical and medical viewpoint, but it is at the same time in keeping with existing mores. The distinction between saving the mother's life and preserving her health seems both tenuous and artificial. Not only is it frequently difficult to ascertain what constitutes a peril to life as opposed to impairment of health, but it is equally difficult to rationalize why one should be morally acceptable while the other is not. Therapeutic abortion as defined by the *Bourne Case* provides a flexible exception which can meet a variety of contingencies. With increasing knowledge in the field of mental health, it is apparent that an exception to preserve health would allow induced abortion for psychiatric indications as well as for preservation of physical health. The much discussed rape and insantity cases would thereby be provided for.

The high incidence of illegal abortion has had tragic consequences, but, unfortunately, resort to the legislative process is not an automatic panacea. Legal reforms which will immediately correct the evils of non-enforcement are so antagonistic to the basic purpose of the law as to be undesirable, while proposals such as expanded therapeutic exception, which are consistent with the underlying rationale of the law, will ameliorate the situation only slightly. Prosecutors should avail themselves of every opportunity to enforce existing laws, but success depends on the co-operation of the public, a factor over which the prosecutor has no control. The ability of the legislature to deal with the problem is similarly dependent on public opinion. The result of this anomalous situation is that the status quo will remain undisturbed until either public opinion becomes aroused sufficiently to enforce abortion laws, or existing mores change enough to make legalized abortion a legislative feasibility.

PROCEDURAL TECHNIQUES FOR BELATED ATTACKS ON JUDGMENTS IN INDIANA

It is one objective of our legal system to bring litigation to a timely and final conclusion. However, correction of unjust decisions cannot be completely subverted to the interest in finality. Some method must be devised which permits the courts to balance the interest in finality and that of correcting erroneous judgments. How great must be the hardship before the law will sacrifice finality to prevent injustice? Several factors must be weighed in making such a decision; the length of time