CHAPTER V
THE STATE OF THE LEGAL QUESTION

Historical Background

In the previous chapter we have seen the development of religious attitudes toward abortion. The discussion was not completely detached from references to law, because ancient religion and law were closely related, and canon law reflected the moral teaching of the Christian church.

This chapter will not attempt a history of anti-abortion legislation nor even a complete survey of presently existing laws on this matter. Rather, it will review legal data to show what is the issue that is formulated confusedly in the question: "Is a relaxation of the laws against abortion desirable or not?" This question will not be *answered* in the present chapter, but the state of the question will be *clarified* for further consideration in chapter seven.

Roman law is not a simple code, but a development of a thousand years and more. In its early stages, there were few crimes recognized except those, such as treason, directly against the community. Even homicide was punished only in virtue of suit by the murdered persons's family.

Family life was regulated by the patriarch. Free women maintained their independence by a special type of marriage which left them subject only to the authority of their own *paterfamilias.* As late as the second century before Christ, only her own *paterfamilias* could punish a free woman even for the crime of murdering her husband. It is not surprising that abortion became common among women of this class.[1]

Yet the interests of the unborn were not wholly unrecognized by Roman law. The *Lex regia* of Numa Pompilius (715–673 B.C.) required that a cesarean section be performed at the death of a pregnant woman. The *Leges duodecim tabularum* (The "Twelve Tablets"—449 B.C.) provided that the unborn child could inherit on the same basis as one already born. By 443 B.C. the law provided that a husband who ordered or permitted his wife's abortion without good reason was subject to social and political censure. Those outside the family do not seem to have been subject to any penalty.[2] The *Lex Cornelia* (about 85 B.C.) provided penalties for dealing in all sorts of poison, including

abortifacients as such. Cicero (about 65 B.C.) reports the capital punishment for abortion of a Milesian woman, but apparently the offense consisted in the fact that she was not a free woman and did not have her husband's consent.[3]

Laws first proposed by Julius Caesar but passed only under Augustus (4 A.D.) sought to stabilize family life and to encourage the rearing of children. Still abortion was not as such forbidden.[4] One reason may have been the persistent influence of Stoic thought which did not consider the unborn as human beings. In fact, even Seneca defended infanticide as a reasonable method to sort out sound from weak babies; he compared the practice to killing mad dogs or diseased sheep.[5]

There were some advances made under the emperors before Christianity made its impact. Under Hadrian (117–138 A.D.) a stipulation was introduced to protect a pregnant woman from punishment by torture.[6] Septimus Severus (193–211 A.D.), a reform emperor, finally treated abortion itself as an "extraordinary crime" with no definite penalty, but decreed exile for the wife practicing abortion.[7]

We could trace the influence of Christian thought upon the laws of converted barbarians after the fall of Rome. As early as the sixth century, the law of the Visigoths provided a death penalty for anyone who gave a potion to cause abortion. The woman herself was beaten if she was a slave or degraded if she was a gentlewoman. In the seventh century, the *Chindasvinto* Visigoth law provided death or at least blinding both for the abortionist and for the woman's husband, if he ordered or permitted the crime. Anti-abortion legislation developed refinements following those in canon law as the Visigoths became Spaniards.[8]

The same pattern could be traced in France. Civil law followed canon law; abortion (at least of the animated fetus) was regarded as homicide until the French Revolution and was punished as such. French parliaments during the Bourbon period still condemned physicians, surgeons, and midwives to be hanged for this crime. However, under the impact of rationalism in the revolutionary period, the punishment under a French law of 1791 was reduced to twenty years in prison. The Napoleonic code of 1810 did not distinguish between the abortion of the animated and that of the non-animated fetus, but the term of punishment was an indefinite "limited time." Austria in 1787, under Joseph II, also ended the death penalty for abortion. Similar developments occurred in other continental European countries.[9]

Anglo-Saxon law before the Norman conquest (1066) provided for abortion both civil penalties, in the form of heavy fines, and ecclesiastical penalties, in the form of penances.[10] The earliest compilations of English law reflect the fact that abortion was regarded as homicide. Bracton, who actually administered the king's law in mid-thirteenth century, includes in his list of provisions concerning homicide: "If there be some one, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus

be already formed or animated, and particularly if it be animated, he commits homicide."[11]

Here we see the influence of the penitentials and of canon law. Abortion is homicide, but a dividing line is fixed at the formation or animation of the fetus. "Formed" probably means a recognizably human embryo; "animated" could mean one that shows signs of life after delivery. Bracton's formulation shows that the law in his time was no more consistent than were the penitentials about what criterion to use. For Bracton however, homicide was not viewed as a sin but as an offense against the crown. Homicide was the chief breach of the king's peace.

Fleta, an anonymous fourteenth-century commentator, also classifies abortion as homicide and at the same time shows the influence of the canon *Si aliquis,* by considering that those also are properly ("recte") guilty of homicide who deal in contraceptive potions. In the next sentence *Fleta* adds: "Again, a woman does homicide who by potion or something of the sort destroys an animated child in the womb."[12]

Sir Edward Coke (1552–1634), both a judicial defender and scholar of the common law, stated its provision regarding abortion as he understood and, perhaps, applied it. A new distinction is introduced, which hinges upon whether or not the child is born alive. If any method of inducing abortion leads to delivery of "a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive."[13]

Here we see Bracton's unclear rule clarified and developed in a practical way. The law needs evidence of homicide, and so it comes to require clear evidence that a living human being has been killed—namely, the evidence that it is born alive and subsequently dies. Of course, with the drugs and external physical methods of abortion then in use, the aborted fetus probably often was born alive. Lacking conclusive evidence, the law treated abortion not as homicide, a capital crime, but as a "great misprision." Coke adds: "And so horrible an offense should not go unpunished." For authority he cites Bracton, *Fleta,* and Genesis 6.6: "Whoever sheds man's blood . . ."

What was a "misprision?" Coke explains the word etymologically as "unlawful concealment," primarily connected with treason or another felony. From this he extends the term to include a number of serious offenses that are characterized by their close relationship to capital crimes. The concept of "misprision" did not refer to breaches of an insignificant character; punishments extended to life in prison. Drawing a weapon upon a judge or justice, even though no blow was struck, was also classed by Coke as a "great misprision" and the penalty was amputation of the hand used, confiscation of property, and life in prison.[14]

One of the most respected commentators on English law, and one who reflected common law practice just prior to the beginning of modern legislation

on abortion, was the eighteenth-century author William Blackstone. In treating the rights of persons, Blackstone distinguishes between absolute and relative rights. Absolute rights pertain to each single person prior to any established social relationship. Some believe the American Declaration of Independence, written the decade after Blackstone's work appeared, was influenced by his treatment of rights.

The absolute rights are those to personal security, to liberty, and to property. Primary under personal security is "a person's legal and uninterrupted enjoyment of his life." Blackstone explains:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in the contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter. But at present it is not looked upon in quite so atrocius a light, though it remains a very heinous misdemeanor. An infant *en ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes . . ..

And Blackstone goes on to mention matters of inheritance, guardianship, and the like.[15]

Here we see a clear distinction made between the law's view that life begins "as soon as an infant is able to stir in the mother's womb" and its fiction that the unborn is already born. The first underlies the prohibition of abortion, according to Blackstone, while the second is the basis of various provisions of civil law.

Treating the crime of homicide, Blackstone follows Coke very closely in regard to abortion. Murder requires as one of its conditions that the one killed be "*a reasonable creature in being, and under the king's peace.*" It follows: "To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Blackstone adds that a statute has provided that if a woman is delivered of a child that would have been a bastard and if she conceal its death, the presumption is she is guilty of murder.[16]

It is noteworthy that Blackstone classifies abortion in one place as a *misdemeanor* and in the other as a misprision. For him, "misdemeanor" is not contrasted with "crime"; both have the same technical meaning although popular use applied the former to less serious crimes. "Misprision" is defined as in Coke: "all such high offences as are under the degree of capital, but nearly bordering thereon."[17]

In 1803 the first British statute law against abortion condemned as felony attempts to procure abortion. The act had to be willful, malicious and unlawful, but not necessarily effective or harmful to the mother. If the attempt were made after quickening, the punishment could be death; if before, the punish-

ment could be whipping, pillory, imprisonment, or exile to a penal colony for up to fourteen years.

In 1828, a consolidated Offenses Against the Person Act set as penalties for aborting before quickening imprisonment for no more than three years and exile for seven. An 1837 amendment eliminated all reference to quickening (or even actual pregnancy), and increased the term of punishment to not less than fifteen years up to life, while eliminating the death penalty. In none of these early statutes was self-abortion expressly prohibited, but since no distinction was made in the general prohibition, self-abortion seemed to be implicitly condemned.[18]

These statutes were more and more inclusive in their prohibition, but even the first of them revealed a determination to end the laxity that had been introduced into the common law over the centuries. All abortion was held a felony. The earlier laws maintained as significant the old distinction between the fetus that had not quickened and the one that had. But by 1837 this distinction was eliminated. The purpose of all these laws clearly was to protect the life of the unborn. The earlier statutes were following the common law doctrine of Blackstone that life begins at quickening and that from then on there is an absolute, personal right to its "uninterrupted enjoyment." The statute of 1837 embodied a practical compromise between those who wished to get rid of the death penalty for as many crimes as possible and those who wished to strengthen the abortion law so far as it pertained to early pregnancy—when most abortions probably were done.[19]

In 1861 British statute law against abortion reached the form in which it remained until the abortion law of 1967. The 1861 act again was a consolidation of English and Irish criminal law concerning Offences Against the Person. Any act intended to cause abortion, whether induced by the woman herself or by others, by whatever method, and whether successful or not, was treated as a felony. The law did make the distinction that attempted self-abortion would not be a crime unless the woman was "with child"—that is, actually pregnant. The same law made traffic in abortifacients a misdemeanor, punishable by up to three years of penal servitude. The punishment for abortion itself was penal servitude up to life or prison for two years. A series of changes in this penalty occurred over the years; after 1948 the maximum penalty was simply life in prison.

The statute of 1861 was interpreted in such a way that non-pregnant women who believed themselves pregnant and sought abortion could be—and were—convicted of conspiring with others, though they were not guilty of self-abortion. When the defense was offered that such women could not be guilty of conspiracy against themselves, the court rejected the argument, thus showing that the person protected by British law was the unborn child, not the mother.

This point also was brought out by the fact that the 1929 Infant Life (Preservation) Act, which supplemented the abortion act, specifically prohib-

ited "child destruction." This act concerned the unborn who could have been born alive, and the law was written in such a way that, if it were decided by the jury that the child would not have been born alive, persons indicted for violating it could be convicted of abortion instead, and vice versa.

This 1929 law included a specific provision permitting the killing of the unborn if necessary to save the mother's life. The laws against abortion contained no such exception, though it was thought by some to be implicit in the word "unlawfully"—only an attempt "unlawfully" to procure miscarriage was considered a crime.[20]

We know that Thomas Percival, whose influential medical ethics appeared in 1803, and who could even have influenced the anti-abortion legislation, allowed for therapeutic abortion while sharply condemning abortion in general and insisting on the inviolability of even "the first spark of life."[21] The prosecutor of the 1938 Bourne case, which we shall consider later in relation to the abortion law relaxation movement, expressed his understanding that British law permitted abortion to save either the mother's or the child's life.[22] This may sound odd to us, but the words "abortion" and (the word actually used in the 1861 statute) "miscarriage" often were taken to include induced labor. A mother who might not be able to deliver safely at term may be stimulated to a premature delivery, precisely for the child's own safety.

It has been important to follow with some care the development of British law against abortion because American law developed in close relationship to it. In the United States, abortion is a matter for legislation at the state level, not at the national or local levels. Generally, even after independence, the old provisions of common law applied in the United States until the situation was clarified by the passing of statutes in each state.

The common law position on abortion was held in Massachusetts cases in 1812 and 1845 to require that the woman be "quick with child"—that is, that the child, as Blackstone had it, "is able to stir in the mother's womb."[23] On the other hand, a Pennsylvania judge in 1850 held that despite rulings in other states to the contrary abortion as a common law offense was possible "the moment the womb is instinct with embryo life." Citing Coke, the judge argued that "the civil rights of an infant *en ventre sa mere* are fully protected at all periods after conception."[24] But a Kentucky court in 1879 denied that abortion before quickening was a common law offense.[25] The following year a North Carolina court accepted the Pennsylvania precedent.[26]

Since common law was so unclear, and in many respects rather lax, the various states enacted statutes on abortion. The first of these was Connecticut's in 1821; it was similar to the British statute of 1803 in treating abortion by drug after quickening as a felony. But Connecticut did not deal in 1821 with abortion before quickening, nor with all methods of abortion, and the penalty was life in prison rather than death. The statute was several times amended; in 1860 it included all attempts at abortion by whatever means and by whom-

ever undertaken, unless necessary to preserve the life of mother or child.[27]

As the years passed, various states and territories legislated against abortion. There were certain general trends in this legislation. The earlier statutes were usually severe with abortion after quickening, but lenient or silent concerning abortion before that event. Amendments gradually eliminated the silence and even removed the distinction from the law of all but ten states, where in 1965 it still was used as a criterion for differentiation of punishment.[28]

The reason for this development of the statutes is not to be found in any religious doctrine but in the progress of scientific knowledge. As early as 1823, the standard American work on medical jurisprudence, the treatise of Theodoric and John Beck, presented a cogent argument against accepting animation as a significant dividing line. First the discordant opinions about animation were summarized; then the "no less absurd" error concerning quickening was treated.

The fetus surely is not dead before quickening; hence it must be alive. Its distinctness from the maternal organism is demonstrated by the fact that the fetus can die while she continues to live. The mother may not feel movement as soon as it is present, because of the amniotic fluid and the relatively small size of the fetus.

In any case, neither movement, nor completeness of anatomic development, nor full organic function is a necessary condition of genuine life. The conclusion:

> However objectionable such an opinion may be, yet the fact is certain, that *the foetus enjoys life long before the sensation of quickening is felt by the mother.* Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception.
>
> If physiology and reason justify the position just laid down, we must consider those laws which treat with less severity the crime of producing abortion at an early period of gestation, as immoral and unjust.[29]

Most earlier statutes, including all the British and the early Connecticut laws, omitted mention of therapeutic abortion. By 1965 only four states omitted it—Louisiana, Pennsylvania, New Jersey, and Massachusetts—although in New Jersey judicial decisions provided for therapeutic abortion to save the mother's life and similar decisions in Massachusetts allowed physicians to follow medical consensus in regard to the matter. New Hampshire, South Carolina, and North Carolina made no exception in cases of attempted abortion but did make one for effected therapeutic abortion to save the mother's life. Forty-six states and also the District of Columbia thus explicitly permitted abortion to save the mother's life in 1965, before the passage of the first relaxed laws. Seven explicitly permitted abortion to save the child's life. Colorado—even before its recent revision—and New Mexico allowed abortion

to prevent serious and permanent bodily injury to the mother. Alabama and the District of Columbia permitted it for the health of the mother, and Oregon's criminal law had been relaxed along the same lines by its licensing statute. Maryland's old law permitted abortion if the physician were satisfied "that no other method will secure the safety of the mother."[30]

Of course, the statutes were in practice interpreted all over the United States very much along the lines of the Massachusetts judicial interpretation. Abortions were done openly, in hospitals, by physicians for whatever reasons they and their colleagues considered sufficient. Probably in every state abortions were done not only for therapeutic reasons, but as our review of the medical literature suggested, if it was believed the child might be deformed, or if for any plausible reason it was thought possible the mother's "mental health" might be damaged by bearing and raising the child. As we saw, this elastic concept might include any such case as the pregnant victim of rape.

Another important trend in the development of American statute law must be noted. Most states began by allowing therapeutic abortion on the basis that the physician or he and a colleague *thought* it necessary. However, after some experience the laws were tightened so that by 1965 thirty statutes required an *objective necessity,* not merely the physician's declared *belief* of necessity, as justification. Yet five of these strict laws were judicially interpreted to allow good-faith belief in necessity as a defense. Ten states and the District of Columbia explicitly stated that a physician was exempted by good-faith belief in the need for abortion; New York demanded a "reasonable belief." Thirteen states in their abortion laws explicitly required consultation to support a claim of therapeutic abortion; the licensing statutes of three other states set the same requirement.[31]

In the state laws as in British law the tendency increasingly was to punish attempted crime whether or not it was successful. Even the question whether the woman was actually pregnant was excluded from consideration.[32] In this extension of the law may be seen two factors at play: one, a concern for the non-pregnant woman victimized by abortionists; the other, a practical concern to make the problem of prosecution more manageable. Generally the products of conception can be so easily disposed of that the requirement to prove actual effectiveness is a serious obstacle to successful prosecution.

Some have suggested that the abortion statutes were never intended to preserve the life of the unborn child. Their argument is that not the child's right to life but the mother's safety—in an era when abortion was often very dangerous—was the good in view. But this position is inconsistent with the common law out of which abortion statutes grew. Moreover, the statutes themselves frequently reflect in the clearest fashion a concept of human life at stake in the unborn. For example, in addition to the abortion statutes, eight states made it a separate crime of *manslaughter* to kill an unborn, quick child by an attack on the mother, provided that attack would have been murder had the mother died of it.[33]

Of course, most of the early abortion statutes distinguished between the quick child and that not yet quick, and this distinction implied an attempt to defend life from the moment it was certainly present. As the distinction of quickening was eliminated, the same basic concept was still present. The New York statute of 1869, for example, held that anyone who used any means to procure abortion, unless necessary to preserve the mother's life, "shall, in case the death of such child, or of such woman be thereby produced, be deemed guilty of manslaughter in the second degree."[34]

Here the life of the mother and that of the child—with no reference to quickening—are put on a par, except in regard to therapeutic abortion. To kill either in the process of attempting abortion is the very same crime: *manslaughter.* Later revisions of the New York law continued to treat attempted abortion at every stage of pregnancy as a crime, but limited the application of the category of manslaughter to cases in which a quick child or its mother is killed.[35] Florida, North Dakota and Oklahoma also have laws that equate the life of the quick child with that of the mother; to kill either in an attempt at abortion is *manslaughter.*[36]

A British government report on abortion published in 1939 included some information on the statutes of a number of countries.

In Belgium and France the statutes made no exceptions to permit therapeutic abortions but such acts simply were not prosecuted, very much as had been the case in England. In the Scandinavian countries—Denmark, Norway, Sweden and Iceland—the laws in effect up to the changes of the 1930s likewise made no exceptions explicitly, but administratively the official policy permitted abortion for the mother's life and health. Germany's situation was similar, except that judicial interpretation permitted therapeutic abortion. One nation having explicit exceptions in the statute was Argentina. Its law of 1921 permitted abortion if necessary for the protection of the mother's life or health, and also if the pregnancy resulted from rape, or if the mother was feeble-minded or insane.[37]

This Argentine law of 1921 was passed while the Radical party was in power. It may have represented an early attempt to find a compromise between the traditional prohibition and the unrestricted Soviet permission. The statute laws of Europe and America had rejected abortion without exception, or had explicitly included only the otherwise presumed exception in favor of therapeutic abortion. These laws certainly reflected the Judeo-Christian tradition of respect for the right of life, a right considered to belong to each person absolutely and unalienably. Since this right was thought to come from God, not from society, the beginning of the right to life was coincident with the beginning of life itself. Law had wavered in regard to the question when life began; it had hesitated before the conflict between the life of the mother and that of the child. But the intent of law had been clear: to safeguard life as soon as it was surely present and to permit the destruction of the child's life only when that was necessary to safeguard its mother.

Then the Russian revolution came, and everything changed.

Abortion Law in the U.S.S.R.

> No book on abortion written today can be complete without special consideration of the movement in Soviet Russia to legalize abortion. The true significance of this unique experiment must be left for future generations to decide. Certainly the present opinion of the majority in other countries is that this movement is in many ways detrimental to the human race. In all fairness, however, a brief review of the measures originally adopted and their modification in subsequent years should be given, with an analysis of the results thus far obtained. In any problem into which social doctrines and religious and anti-religious bias enter so largely, it will be difficult to separate truth from exaggeration.[38]

Thus Dr. Frederick Taussig opened his chapter on legalized abortion in the Soviet Union in his 1936 treatise on abortion. Writing under sponsorship of the National Committee on Maternal Health, which represented the more venturesome wing of the American birth control movement, Taussig was fascinated by the Soviet Union's "unique experiment." Guarding against the influence of "religious and anti-religious bias," Taussig had gone to Russia in 1930 "to see things at first hand."[39] Now Taussig was making sure that the benefit of Russia's example would not be lost to his readers.

Prior to the Communist revolution, abortion was legally forbidden, with no explicit exception even for therapeutic abortion. In the first years after 1917, social turmoil was general. Probably abortion became more widespread in this period. On November 18, 1920 a decree was issued by the Commissariats of Health and Justice legalizing abortion.[40]

The decree begins with a prologue that makes the following points:

—Abortion has been increasing for ten years in western Europe as well as in the Soviet Union. (The Commissars did not want to put their own people in an unfavorable light, and were seeking support in the argument: "Everyone has the problem.")

—Legislation punishes the woman and the physician, but this is ineffective, for it drives abortion into the basement and puts women at the mercy of greedy and unskilled abortionists. (This is the public health argument for abortion, with an appeal to sympathy for the woman's plight.)

—Nearly 50 percent of aborted women suffer infection, and about 4 percent die. (These figures obviously could not be proved.)

—By propaganda and welfare measures the government fights this evil. "But, since the moral survivals of the past and the difficult economic conditions of the present still compel many women to resort to this operation," the government decided to legalize it. (The "moral survivals" must refer to the reluctance of some women to bear illegitimate children. "Difficult economic conditions" is a very brief way of expressing an official, restrictive population policy. The government could not provide the required welfare programs. Industrializa-

tion was more urgent, and a limited increase of population would assist economic transformation.)

The decree itself was simple. Abortions were permitted without charge in Soviet hospitals. Only physicians might induce abortion. Others, and physicians inducing abortion in private practice, were subject to trial by a People's Court.

To understand fully the sense of this decree concerning abortion, it is important to know that the Soviet revolution also "emancipated women." Sex differences were so far as possible disregarded for social and economic purposes. The rule was equal pay for equal work, and women worked in occupations such as mining and seafaring hitherto reserved to men.

Women also received equal education and equality of status in marriage itself. Divorce and marriage were made into easy formalities, and either partner had equal rights to determine place of residence and to hold and dispose of property. Sexual inhibitions were eliminated and sex lost much of its romance. One observer noted: "Chastity is admirable; but a girl who 'slips,' and still more a boy, is regarded as merely foolish."[41]

Abortion legalization thus filled three functions. First, as a public health measure, it aimed at eliminating illegal abortion. Second, as a matter of economic policy, it was aimed at population control. Third, as a legal matter, removal of criminal penalties contributed to the "emancipation" of women.[42]

The legalization of abortion naturally led to a very rapid increase in the numbers of such operations in hospitals. In 1922 in Moscow there were 35,520 births and 7,769 abortions; by 1929 there were about eleven times as many abortions, 82,017, while births increased only to 51,059. Thus there were far more abortions than births, though the number of births actually increased.[43]

The rapid increase in abortions caused problems with hospital administration. Some efforts to curb abortion administratively were made as early as 1924; later, charges were levied on those who could afford to pay. Special units—abortoria—were set up to perform the operations on a mass production basis; Taussig reported fifty-seven abortions performed by four abortionists in two and one-half hours.[44] Government sources claimed that the experiment was very successful, that the death-rate was very near to zero and the morbidity-rate quite low. In Moscow in 1925 it was claimed there were no fatalities in 11,000 abortions; only about 4 percent of over 50,000 cases showed bad effects. Twelve years after legalization the government statistician claimed that the lives of 300,000 women had been saved by the legalizing of abortion.[45]

One of the authors of the legalization decree, Commissar of Health N. A. Semashenko, argued in a 1934 book that the Soviet way was far preferable to the German. In Germany post-partum deaths were far higher and, he claimed, the rate of abortions was twice as high. Thus the Soviet way meant *fewer* abortions and these done upstairs, not in the "basement" of illegality. The

abortions he said were mainly done because of housing shortage, poverty, illness, and large families.[46]

The Soviet statistician Genss pointed out to Dr. Taussig that the birth-rate had been maintained, and argued from this that the rapid increase in hospital abortion only indicated that hitherto criminal operations were now entering hospitals. As Taussig observes, Genss' own figures do not bear out the claim that the birth-rate had been maintained, although it had not fallen sharply and the population continued to grow during the first decade of legalized abortion.[47]

Taussig, who was not unsympathetic to the Soviet experiment, observed:

> In fact, the bulk of the evidence points to an actual as well as an apparent increase in the abortion rate, for in the past five years, during which the number of secret abortions has apparently been stationary, the total number has shown a steady increase.

Though illegal abortions were fewer under legalization than before, Taussig also noted:

> Even so, the evidence from various sources leads to the conclusion that there are still a considerable number of abortions being done outside the law. It would seem that the very legalization of abortion has led some women to regard more lightly the moral and religious scruples that in the past had restrained them from undertaking such measures.[48]

Beginning in the late twenties, Stalin's austerity program dislocated many segments of the population and made living conditions in general harder. One authority has speculated that in the early thirties the abortion-rate must have shot up even beyond that of the twenties, to the point where the population curve became alarming.[49]

Some restrictive efforts were made. In 1927 one Soviet authority called attention to the spread of abortion among the country people and to the danger of depopulation on the farms. He wanted the government to stimulate motherhood. Efforts were made to discourage women from having their first pregnancy aborted. Physicians and social workers tried to dissuade women who could afford a baby from having it aborted. Almost none of the women being aborted was allowed any anesthesia.[50] On the walls of *abortoria* signs were put up with slogans such as: "Let this abortion be the last one." And specimens of early embryos were displayed in glass jars so that women obtaining abortions would see how quickly development progresses in the early months of pregnancy.[51]

Already in 1927 a meeting of Ukranian gynecologists reflected hostility toward abortion among the medical profession; one observer regarded this meeting as a demonstration against legal abortion.[52] In the early 1930s Russian medical sources began to report a multitude of serious side-effects—for example, sterility, loss of sexual desire, "pelvic disturbances," ectopic pregnancies, and "hormone imbalance."[53]

In 1936 a draft decree was formulated forbidding abortion and "combating light-hearted attitudes toward the family and family obligations." In an extraordinary procedure, this decree was submitted to the people for discussion before it was officially promulgated; some changes were made on the basis of the discussion and the decree appeared June 27, 1936, as a "Decision of the Central Executive Committee of the U.S.S.R. and of the Council of People's Commissars of the U.S.S.R." over the signatures of Kalinin, Molotov, and Unschlicht.

The decree began with a prologue which neatly balanced references to Soviet woman's "emancipation" with references to her "great and responsible duty of giving birth to and bringing up citizens." A significant paragraph stated:

> Back in 1913, Lenin wrote that class-conscious workers are "unquestionable enemies of neo-Malthusianism, this tendency for the philistine couple, pigeon-brained and selfish, who murmur fearfully: 'May God help us to keep our own bodies and souls together; as for children, it is best to be without them.'"

Yet pragmatically abortion had to be legalized to avoid worse evils while the last vestiges of exploitation and its consequences were being overcome. Now, the prologue continues, socialism has succeeded so well that welfare measures and provisions for

> combating a light-minded attitude toward family and family obligations—such are the roads which must be followed in order to solve this important problem affecting the entire population. In this respect, the Soviet Government responds to numerous statements made by toiling women.

Thus by popular consent and feminine demand, the law went on to lay out its program. Abortion was forbidden unless the pregnancy threatened the life or seriously threatened the health of the pregnant woman, or when a serious disease of the parents could be inherited. The permitted abortions had to be performed in hospitals or maternity homes by physicians. In other circumstances, both the abortionist and the woman herself were subject to criminal penalty; also anyone compelling a woman to undergo an abortion was to be penalized.

The decree increased state aid to mothers and provided special allowances for large families. Pregnant working women were given special job and income security (an exception to the equal-pay-for-equal-work rule). The network of maternity homes, nurseries, and kindergartens was extended. Authority over kindergartens was somewhat decentralized; they became adjuncts to factories or other places where the mothers would be employed.

Stricter administrative provisions were set down concerning divorce; how restrictive they would be in practice clearly would depend on administrative policy. The father of the children was held to contribute for their support from one-fourth (for one child) up to one-half (for three or more children) of his wages.

An official directive also was published listing medical indications and contra-indications for therapeutic abortion.[54]

The decree prohibiting abortion introduced the prohibition proper with the phrase: "In view of the proven harm of abortions . . ." This suggests that the medical arguments had been a decisive factor. However, the Ukranian gynecologists in 1927 had urged the substitution of contraception for abortion, and such a step would have solved many of the medical objections.[55] However, when Margaret Sanger visited Russia in 1934, though she was pleased to see the emancipation of women, she was disappointed to discover that the paper plans for contraception were not resulting in practical programs. Mrs. Sanger asked the Secretary of the Comissariat of Public Health, "Has Russia a population policy, Dr. Kaminsky?" She felt that a country with five-year plans for agriculture and manufacturing should certainly have a birth control program. But the official rejected the idea: "There is no policy as to the question of biological restriction. For six years, we have had a great shortage, not only of skilled workers but of labor in general. Now the only question is the increase of population."[56]

Thus we see the explanation of the 1936 decree's reference to Lenin's remark about neo-Malthusianism. The Soviet policy was not aimed at feminine emancipation nearly so much as at the national interest. The birth control movement took an essentially individualistic and libertarian approach. The Soviet policy was more in the nature of controlling the production of an important economic factor—workers. Legalized abortion in 1920 turned off the population stream to aid industrialization. The prohibition of abortion in 1936, together with the other measures in that decree, turned the stream of population on again.

There are several confirmations that this, in fact, is what happened. As the Kinsey study observes, several sympathetic non-Russian observers suggested "that economic and political motives demanded a cut in abortions so that a higher birth rate could produce a larger labor force and more manpower for a future possible war."[57] A Russian refugee physician explained that "the government's intention to increase the birth rate backfired." Provisions had been made for handling more maternity cases, but many women had illegal abortions instead.[58]

Most important, in 1939 the Soviet ambassador to the United Kingdom answered inquiries from the British medical profession with an official memorandum explaining the Soviet Union's 1936 decree prohibiting abortions. Most of the memorandum summarizes the explanation given in the decree itself. But two added points concern population. The first notes that the birth-rate has increased since July 27, 1936, but asserts this was mainly due to prosperity and improved health. The final point in the memorandum is this sentence:

> Subsidiary reasons for the abolition of the law of 1920 on abortion were to inculcate in the young a greater sense of responsibility both in regard to marriage, the bearing of children, etc., and to raise the birth-rate.[59]

It is difficult to say how effective the 1936 decree was. We have noticed already the refugee testimony that it "backfired" and the ambassador's observation that the birth-rate had increased—not, of course, mainly because of the prohibition of abortion. Certainly at the time the draft decree was under public discussion, many who wrote letters published in *Izvestia* showed that they had adopted the view that abortion was one of an emancipated woman's rights.

A girl who was a medical student complained of the housing situation and added: "In five years' time when I am a doctor and have a job and a room I shall have children. But at present I do not want and cannot undertake such a responsibility." A group of women on a collective farm wrote that conditions under which abortion was permitted should be stated so that physicians could not refuse a patient.

An engineer wrote:

> The prohibition of abortion means the compulsory birth of a child to a woman who does not want children .... Where the parents produce a child of their own free will, all is well. But where a child comes into the family against the will of the parents, a grim personal drama will be enacted which will undoubtedly lower the social value of the parents and leave its mark on the child .... To my mind any prohibition of abortion is bound to mutilate many a young life.

A research worker wrote: "[W]e all want to be 'working women.' The tribe of 'housewives' is dying out and should, I think, become extinct."[60]

Despite these attitudes, the 1936 degree was passed and criminal prosecutions of abortionists were carried on under its terms. The continuance of abortion was explained as a residue among the unenlightened of bourgeois consciousness. The Soviet Encyclopedia held that in other countries the poor had abortions through misery, the rich through selfishness. Governments outside the Soviet Union could not fight abortion by improving social conditions, and greedy physicians practicing non-socialized medicine performed abortions as a lucrative part of their practices.[61]

However successful the 1936 decree may have been, a new decree was required. It was issued July 8, 1944, and began as follows:

> The Praesidium of the Supreme Soviet of the U.S.S.R. has issued an edict on increasing state aid to expectant mothers, mothers of large families and unmarried mothers; the protection of motherhood and childhood; and institution of the honorary title of Mother Heroine, the Order of Glory of Motherhood and the Motherhood Medal. The welfare of children and mothers and the consolidation of the family has always been one of the major tasks of the Soviet State.

The decree explains that war conditions require the extension of state aid. A "Mother Heroine" title goes to women who have had and *raised* ten or more children; the other honors can be earned in various grades by mothers of

somewhat fewer children. The decree also ends the parity between legitimate marriage and *de facto* unions, makes divorce more difficult, taxes single persons and couples with small families, and orders that certain existing laws—including that prohibiting abortions—be enforced.[62]

In effect, this decree was a measure to step-up population growth in order to make up for war losses and to provide the population input needed for postwar expansion.

But another decisive shift was made November 23, 1955, when the Praesidium of the Supreme Soviet passed another decree: "The Repeal of the Prohibition of Abortions." The prologue to the decree argues that social and economic progress is so great that a law prohibiting abortion is no longer necessary; the encouragement of motherhood and educational measures are sufficient. Also, the repeal of the law will limit the harm done to women by abortions done outside hospitals. The final reason given was "in order to give women the possibility of deciding by themselves the question of motherhood."[63]

Thus, as the population input was to be slowed, the old appeal to individual freedom was used as a reason for a shift in public policy. Very little publicity was permitted for the new order, but reports indicated that in many cities abortions outnumbered live births. Some experts estimated that by 1959 the total annual rate of abortions in the U.S.S.R. ran over 5,000,000. In addition, one survey showed 21 percent of all abortions taking place outside hospitals. Many of these were illegal.[64] A report indicated that 40 percent of women students at Moscow University had undergone abortions; a coed told an American visitor the true figure was nearer 80 percent. Promiscuity was officially frowned upon—but economically desirable for female students, who supplemented small stipends. Abortions at the University clinic cost five rubles—one dollar at the U. S. rate of exchange.[65]

In the population at large, lack of housing, inadequate care facilities, and too many or too close births were the chief reasons given by a sample of 26,000 women having abortions; about one-third of this group, however, simply did not want to have a baby.[66]

We have considered the history of the Soviet Union's legal provisions concerning abortion at some length. This history is significant because the 1920 law was unique in its time and as we shall see the Soviet experience was a model and inspiration for other efforts to relax the old laws against abortion. The old laws had been based on the inviolability of the life of the unborn child. The Soviet decrees were based on the requirements of society, although individual liberty and medical considerations also were given as reasons, and the latter undoubtedly played some role.[67] The Soviet government's style of policy-making in disregard of the right of the unborn to life has been perfectly consistent with its style of policy making in disregard of other human rights, including the right to life of persons already born.

Compromise Legislation

Between 1920 and 1936 the Soviet experiment was followed with interest by observers in other countries. The legalization of abortion in many places became a political issue; radical legislators now saw this measure as an integral part of socialization. In some places new laws were passed, but none of them were as radical as the Soviet decree of 1920. All embodied a compromise: abortion became legal in certain kinds of cases and in accord with other definite requirements.

Latvia, then an independent republic bordering on the U.S.S.R., apparently was the first nation to pass such a compromise abortion law. The act, passed December 30, 1932, provided that any attempt to procure abortion against the pregnant woman's wish remained illegal. But a physician inducing abortion to prevent loss of life or serious damage to health of the prospective mother was not regarded as criminal. These two provisions incorporated the principle of the woman's wish—in a negative way, by requiring her consent—and the principle of therapeutic abortion, which in almost every country was accepted in practice.

But then the law went on to provide that abortion would not be illegal if:

1)–It were performed during the first three months of pregnancy;

2)–With the woman's consent;

3)–By a physician;

4)–To prevent one of the following:

a) The birth of a child having a physical or mental defect (the "eugenic" indication);

b) The birth of a child conceived in virtue of certain proscribed acts–seduction, rape, incest, and criminal assault (the "humanitarian" indication);

c) The birth of a child that would cause privation to the pregnant woman or her family (the "social" indication).[68]

In these provisions the Latvian law accepted the principle of abortion as a method of birth prevention where there were serious indications of a "eugenic," "humanitarian," or "social" kind.

We shall see much discussion of these indications in subsequent debates. The essential point is to notice that they represent a principle distinct from therapeutic abortion. In therapeutic abortion the objective is not to prevent the birth of the child, although in fact the child is aborted for the mother's benefit. In the compromise legislation of which we see a model in the Latvian act of 1932, the purpose of the indicated and permitted non-therapeutic abortion precisely is to prevent the birth of children falling into certain classes. Insofar as abortion is admitted as a method of birth prevention the principle of the Soviet law is accepted. However, insofar as specific indications are required,

a new principle, derived neither from the traditional view nor from Soviet theory, is operative.

Information about the success of the Latvian compromise is not easily had. The original law was amended by an act of March 22, 1935, which eliminated the "social" indication and tightened up conditions under which most physicians could induce abortion. Under the 1935 amendment only gynecologists and physicians especially appointed by the state were allowed to perform the operation outside a hospital or clinic.[69]

One of the bitterest battles concerning abortion law relaxation was fought in Germany between 1920–1933. Proponents of a relaxed law did not succeed in winning official acceptance for their position until the Nazis came to power. Then the Law for the Prevention of Hereditary Diseases in Posterity, 1933, was passed (amended 1935).

Under this law, a pregnant woman selected for sterilization might also be aborted provided she consented, if there were no medical contraindications and if the fetus were not already *viable.*

Also under this law, a physician might induce abortion (as well as sterilize a woman) to avert serious danger to a woman's life or health. In this case also the woman's consent was required. Except in emergency cases, each operation had to be reviewed in advance by a court of referees, which consisted of medical practitioners. The abortionist and the review court of referees were supposed to be independent of one another both in judgment and in action. All induced and spontaneous abortions were to be reported to the Medical Officer of Health.[70]

At first glance it might seem that the Nazi legalization of abortion was minimal. To begin with, the law required the woman's consent—abortion was voluntary, not imposed. However, William Russell, a member of the American diplomatic corps in Berlin prior to World War II, wrote:

> The Nazis laid great stress on the fact that everything the nation did at their command was "voluntary." Even the compulsory two-year period of service in the army is "voluntary." Every boy is required by law to serve, so the Nazis call it volunteering. I have no doubt but that even those unfortunates who were slaughtered in the 1934 purge died "voluntarily."[71]

The essence of the Nazi law was not, then, that it required the woman's consent. One distinctive feature of this law was the fact that it used the viability of the fetus as a significant dividing line. So far as I know, this was the first law to use this criterion, and thus many current proponents of abortion law relaxation follow in the Nazis' footsteps at least to this extent.

The Nazi law fit into the National Socialist outlook just as the Soviet law fit into the Communist outlook. The Soviets liberated woman from traditional morality in order to use her in the work of the triumphant social-economic revolution. But the Nazis aimed at quality—the reign of the supermen—the purified master race. Thus their program depended upon get-

ting rid of weak and inferior specimens, while keeping the stronger and purer ones. Of course, the Soviet decree of 1936 adopted a position on abortion not far different from that which the Nazis had put into effect in 1933.

So far as we know, however, the Soviet program never led to the consequences that developed in Germany. There the program of selective sterilization and abortion was developed by the medical men themselves into a large-scale program of "euthanasia"—that is, murder of mental patients and others, even German soldiers mutilated in the war. The euthanasia program blazed the trail for the even more extensive mass murders of Jews, gypsies, and other so-called "contaminants of Aryan purity."[72]

Thousands of German, non-Jewish children were disposed of in the euthanasia program, many for a social reason rather than because of any inherent defect. This murderous project was not initiated by Nazi officials but by the medical profession itself; in fact, no law ever gave it formal sanction. Killings were done under the supervision and by the direct acts of psychiatrists and pediatricians. Euthanasia murders were passed upon by independent medical consulting boards, similar to those required in the 1933 act to approve abortion. The murders of the children were accomplished mainly by starvation or by overdoses of drugs. In the early stages only infants suffering serious defects were murdered. But this project did not end until the allied troops overran the institutions concerned, and as time passed the infants became older and the indications slimmer—for example, "badly modeled ears," bed wetters, and children "difficult to educate."[73]

Certainly one cannot say that the Nazi sterilization and abortion law would have led to these consequences if the Nazi regime had not been what it was as a whole. On the other hand, one cannot dismiss the whole affair as mere Nazi insanity. The vast majority of participants in the affair were no less sane and no less upright than the members of any modern nation's medical profession.

The roots of the euthanasia program actually antedate the rise of Hitler. In 1920, a physician and a lawyer—Alfred Hoche and Karl Binding, both prominent men in their fields—published a very influential little book: *The Release of the Destruction of Life Without Value.* The principle of their position was that some human beings are worthless and must be killed for the sake of quality of life.[74]

Thus leading members of the medical profession were quite prepared by 1933 to put into effect the Nazi program of selective sterilization and abortion, and this same medical profession itself organized and pushed ahead the euthanasia program of the late 1930s which merged into the genocide program of 1941-1945. Some physicians did refuse to cooperate in the "euthanasia" murders and they were not punished for their refusal.[75]

Iceland was the first of the Scandinavian countries to relax its former strict prohibition of abortion. On January 28, 1935, an act was passed which permitted a physician to induce abortion for the protection of the pregnant

woman's life or health. The law also made provision for birth control; the abortion provisions were explicitly and accurately characterized as "feticide."

Under Iceland's 1935 law, abortion might be induced only during the first eight weeks of pregnancy except in cases of grave danger, that could not be prevented otherwise. The operation had to be carried out in an approved hospital and two physicians—one the senior surgeon of the hospital and the other normally the referring physician—had to submit to the country's Chief Medical Officer a signed statement setting out the reasons for abortion.

The law of 1935 was a compromise between those who wanted abortion permitted only on strict "medical" indications and those who wished a "social" indication included. The form of the compromise was to require that *some* medical indication be present, but that in judging probable danger to the woman's health there should also be considered

> whether the woman has already borne many children at short intervals and a short time has passed since her last confinement, also whether her domestic conditions are difficult, either on account of a large flock of children, poverty or serious ill-health of other members of the family.

On January 13, 1938, the Icelandic law was broadened to permit abortion to prevent the birth of a child to whom hereditary disease might be transmitted and to terminate pregnancies initiated by rape. On these "eugenic" and "humanitarian" indications, abortion required the approval of the Chief Medical Officer and a special public advisory committee.[76]

The peculiar contribution of the Icelandic law was its merging of social factors—large family, poverty, and health of *other* family members—into the "medical" indication: the permission of abortion to protect the mother's own life and health. Where the Latvian law had clearly distinguished between therapeutic abortion on the strict "medical" indication and permitted abortion to prevent births in certain difficult cases, the Icelandic law, being a compromise, blurred the two categories. In this way a "socio-medical" indication was created.

The importance of this indication is that it reacts upon the concept of health, tending to broaden it to include not only the internal conditions of good individual physiological and psychological function, but also the environmental and cultural conditions of good social and economic function and adjustment. *Health*, in short, comes to embrace all the aspects of human welfare that are valued by those holding a strictly humanistic outlook.

In Denmark there were movements toward legalization of abortion in the 1920s. In the early 1930s a government commission to investigate the matter was established. Meanwhile, a Copenhagen physician, J. H. Leunbach, began performing abortions in defiance of the law. His 1935 trial was a rallying-point for promoters of abortion, as political and economic class distinctions were injected into the argument by Leunbach who argued he was merely supplying to working-class women what wealthier women could already obtain. Criti-

cism of Leunbach's criminal acts was then brushed aside on the ground that the real resentment against him arose from the fact that he had violated the privileged status of the upper classes.[77]

In this situation, the Danish legislature passed a law on May 18, 1937. The aim of this law was to provide aid for women with unwanted pregnancies. One of the unique provisions of the law was the establishment of Mothers' Aid Centers. Since it took time to establish these, the law was not put into effect until October 1, 1939.

The Danish law included the familiar "medical," "humanitarian," and "eugenic" indications. The last of these explicitly included obvious danger that the child might inherit insanity, mental deficiency, other serious mental disturbances, epilepsy, or serious and incurable physical disease.[78]

The Danish "medical" indication, like the Icelandic one, was a compromise. It permitted abortion to avert danger to a woman's life and health; the draft added "on account of disease." But these words were removed at the insistence of those who favored a "social" indication. The Mothers' Aid Centers were projected, and the law included a provision that when the danger was *not* due to disease the woman was required to produce a certificate that the dangers of abortion had been explained and the available economic and medical help had been made known to her. Reasons officially suggested as justifications under the expanded "medical" indication included chronic malnutrition, exhaustion due to many confinements, suicide attempts, and depression—the last not necessarily psychopathological in kind or degree.

The Danish law of 1937 provided that the operation should be performed in a hospital receiving public funds, only after agreement of two physicians, and not normally after three months of pregnancy, except in cases of a strict "medical" indication.[79]

Denmark had been the first country in Europe to pass a law permitting eugenic sterilization. The law, passed in 1929, was not widely invoked in the early years; there were only 108 sterilizations under the law 1929–1934. In 1934, following the German example, the Danish law was broadened to include feeble-minded persons when there were social reasons against their having offspring. Under the new law there were 1,380 sterilizations, 1935–1939, and 2,120 during the Nazi years, 1940–1945. The Danish sterilization and abortion laws were not closely related as was the case in Germany. In Denmark the two laws mainly reflect different concerns, though they share the "eugenic" intent.[80]

As a result of the political and cultural factors underlying the Danish abortion law, its provisions were administered rather strictly. Still, by 1956 legal abortions ended about five percent of known Danish pregnancies—that would be the equivalent of an annual rate of about 200,000 in the United States. Yet writing with Magna Nørgaard, Vera Skalts (director of Mothers' Aid and a defender of the legal procedure) admitted that illegal abortions actually increased in the first decade of the relaxed law.[81]

Practically, the Mothers' Aid was administering the abortion law in the post-war period. Pressure was felt both from applicants, half of whom were refused, and from hospitals and surgeons, some of whom felt too many applicants were approved. After much struggle the 1937 law was relaxed somewhat by administrative interpretation in 1950 and still more by a completely new law in 1956.

In the 1956 law the "medical" indication is spelled out so that all circumstances, including the woman's and prospective child's living conditions, are weighed in the balance. Also a new indication is added: "When, in very special cases, it is presumed that the woman will be unfit to take proper care of her child due to serious mental or physical defects or other medically indicated conditions."[82] This is clearly a "social" indication, but one that concerns the welfare of society rather more than that of the mother or the child. It might be called the "tax-burden" indication.

Even with these provisions, a study published in 1964, and cited by Skalts and Nørgaard with approval, indicates a rate of illegal abortions three to four times greater than the legal rate.[83] At the same time, the Danish have originated some novel and rather vaguely defined "medical" conditions—such as "convention conflicts" (a woman depressed by her pregnancy because of unconventional circumstances), "insufficiency" (chronic, sometimes minor disease with psychic or psychosomatic symptoms such as fatigue and irritability), and "the stress syndrome of housewives" (socioeconomic problems or fear of a lowered living standard). There is argument whether it might not be better to allow unrestricted legal abortion; some feel increased mothers' aid, more contraception, and sex education might help.[84]

Sweden's law concerning abortion has followed a course only slightly different from Denmark's. The new Swedish law was passed June 17, 1938, and it went into effect January 1, 1939. The "medical" indication allowed for "weakness" in the woman, but did not clearly allow for environmental conditions. Abortions done on the "eugenic" indication were normally to be accompanied by sterilization. The procedure for this indication demanded an inquiry in each case by the Royal Medical Board, and reference to the Board became the ordinary procedure except when abortions were performed by advice of two physicians on a strict medical indication. The Swedish law was peculiar in permitting abortion up to twenty weeks—or even twenty-four weeks—of pregnancy.[85]

In 1946 the Swedish law was amended by the addition of a new "socio-medical" indication:

> Abortion is also permitted when, in view of the woman's living conditions and other circumstances, it can be assumed that the birth and care of the expected child will seriously undermine her mental or physical health.[86]

Here purely social grounds are not admitted and the revised Swedish law perhaps remains a bit more restrictive than that of Denmark. In 1963 the law

was further amended to specifically allow abortion in cases where the fetus is damaged before birth—for example, by German measles or by drugs.

One of the main purposes of the Swedish law of 1938 was to try to limit the number of illegal abortions—to bring abortion under social control. However, facilities comparable to the Danish Mothers' Aid Centers were not provided for in Sweden's 1938 law, and ten advice centers provided for after the 1946 broadening of the law did not come into immediate operation.[87] The official Swedish position is that the reduction by half of deaths due to illegal abortion between the early 1930s and 1946 showed the law's success.[88]

However, this argument takes no account of the introduction of antibiotics and other drugs which reduced death rates due to all infection in this period. A number of Swedish investigators in the early 1950s argued that illegal abortions had increased along with legal abortions, and that the women having legal abortions constituted a "new clientèle"—a group who would otherwise have borne their children.[89]

It is certain that Scandinavian legislation concerning abortion was influenced by the Soviet example. The first discussion of amending the law to permit broadened indications occurred in the Swedish Riksdag in 1921.[90] More important, the Scandinavian countries were embarked on an effort of liberal or democratic socialism which shared many ends—while avoiding many of the objectionable means—of the Soviet experiment. Thus, although the Swedish committee considering abortion in 1935 recommended that it be allowed on a purely "social" indication, the Population Commission rejected the proposal:

> To allow abortion on social grounds will signify that the community expressly introduces into our laws a declaration that we do not know how to deal with certain obvious and commonly admitted grave social evils.[91]

Similarly, the Danish Pregnancy Commission that prepared the 1937 law suggested a "social" or "welfare" indication, but this provision was not adopted by Parliament, where it was held the community should supply for the social needs that would prompt such abortions.[92]

Another factor that undoubtedly influenced the Scandinavian legislation, making it more moderate than that of the Soviet Union, was the residue of Christian culture in Scandinavia. It is an interesting fact that Latvia, Iceland, Sweden, and Denmark were all countries in which Lutheran Christianity was the predominant (nominally majority) religion during the 1930s when all four passed similar compromise abortion laws.

There was an interesting address at a 1929 meeting of the World League for Sexual Reform—an organization that included eugenicists, promotors of birth control and abortion, sex educators, and others urging a new sexual morality and legislation. Svend Ranulf of Denmark explained the relationship between democracy and morals in his country. Many sociologists believed that severity in sex and democracy were linked to one another. Explaining why this

was not so in Denmark, Ranulf referred to Luther's view that sexual desire is a natural urge and that enforced abstinence for the ordinary person is an unnatural restraint. He also related the Lutheran Church to monarchical government and the Calvinistic churches to democracy of the American type. In this way he hoped to explain why Denmark was more receptive to sexual reform than America.[93]

Perhaps more significant of a Lutheran influence than the relation of Church to state were some other features of the compromise abortion bills. All attempted to provide a method for making decisions subject to a duly constituted government authority. All of the laws implied a recognition of the right of the unborn to life, but at the same time tried in difficult cases to balance that right against other factors.

The committee which proposed the first Swedish law, for example, argued that the accepted therapeutic indication for abortion already went beyond balancing life against life. This was because it was already agreed that genuine medical indications would permit abortion to safeguard the mother's health. From this, the committee argued that other serious threats to the mother's welfare deserved equal consideration. Thus the committee's proposal was an effort to balance the right to life of the unborn against the welfare of the mother. In an effort at resolving some difficult situations, the Swedish law tried to establish public authority for choosing the lesser evil and also, it was hoped, for reducing the bad effects of criminal abortion.[94]

In effect, therefore, while the Soviet Union legislated its morality, which was Marxist Communism; Germany under the Nazis legislated its morality, which was Fascism; and the predominantly Lutheran countries of northern Europe legislated their morality, which was a form of situation ethics influenced by the Lutheran tradition.

The Origins of the British Abortion Movement

The origin of the current efforts to relax anti-abortion legislation is to be found mainly in a British movement in the 1920s and 1930s. This movement derived from the birth control movement and was closely related to it.

The earliest proponents of birth control did not in general favor abortion or infanticide. William Godwin, a British writer and social reformer, did suggest as early as 1801 that personally he would consider infanticide preferable to permitting a child to live a miserable life, but he thought Englishmen would find the practice too repulsive. An anonymous writer using the name "Marcus" also suggested in an 1838 pamphlet that three-quarters of all third-born children of poor families and all children after the third should be gassed.[95] This proposal did not find supporters.

However, serious advocacy of free abortion received inspiration from the treatment given the subject by Havelock Ellis in the sixth volume of his *Studies in the Psychology of Sex* (1910). Ellis, a pioneer sexologist, was a strong

supporter of eugenics and birth control. Of the latter he said: "It is no longer permissible to discuss the validity of this control, for it is an accomplished fact and has become a part of our modern morality."[96] Abortion, Ellis noted, was not yet accepted in this way, though he believed it to be accepted without a "twinge of conscience" by the majority of women who find themselves unwillingly pregnant.[97]

Ellis begins by presenting purported evidence that illegal abortion was widespread and increasing in America, Britain, France, and Germany. He then mistakenly asserts: "Its unqualified condemnation is only found in Christendom, and is due to theoretical notions," ignoring the Vedic, Hindu, and Jewish attitudes.[98]

Ellis is disappointed that the medical profession is not ready to accept eugenic abortion, but he is pleased that the profession accepts the killing of the fetus "whenever the interests of the mother demand such a sacrifice." In support he cites an 1899 article which mistakenly asserted that the fetus is a mere "parasite performing no function whatever." From this the author and Ellis conclude that the fetus has only potential, not actual life. The fetus has only possible value because of what it may become.[99]

It is important to notice that this biology is not only out of date today, when it is still cited by advocates of abortion law relaxation, but it already was out of date as early as 1803, when Thomas Percival published his work in medical ethics that was the forerunner of modern British and American codes. Percival noted that the "false opinion" that the fetus is part of the mother influenced attitudes toward abortion. He rejected the argument:

> This false opinion may have its influence in modern, as well as in ancient, times, and false it must be deemed, since no female can be privileged to injure her own bowels, much less the foetus, which is now well known to constitute no part of them.[100]

Ellis ridicules a French writer who has referred to the unborn's right to life as "an imprescriptible and sacred right, which no power can take from him." With capital punishment and war, society terminates the lives of adults, "amid general applause and enthusiasm." The unborn are not yet part of human society, and therefore we have a right to kill them, Ellis argues, and the contrary position is "a vestige of ancient theological dogma." Doubtless, "the 'imprescriptible right' of the embryo will go the same way as the 'imprescriptible right' of the spermatozöon."[101] With this argument Ellis shows that in principle he regards abortion as a logical extension of birth control.

Ellis next considers the views of the German feminists. "At the Women's Congress held in the autumn of 1905, a resolution was passed demanding that abortion should only be punishable when effected by another person against the wish of the pregnant woman herself." The German feminists Ellis quotes were indeed proponents of abortion on demand. One argues that a woman has as much right "to destroy the results of her action" as she has to decide to

whom whe will yield her virginity. A woman practicing eugenic abortion, the same writer urges, is entitled to public reward. Another feminist argued that by the fact that a woman wanted abortion it was clear nature should have made her sterile. "These, when they abort, are simply correcting a failure of Nature." This author also advocated a "new morality" on eugenic grounds.[102]

Ellis notes some suggestions of compromise legislation that would permit abortion in the early months of pregnancy. The medical profession in general is unwilling to go even to eugenic abortion because physicians are dedicated to preserving "worthless and worse than worthless lives." A German professor is cited who advocates legalization of abortion when the pregnancy is due to rape, the girl has been abandoned, or eugenic indications are present. And a French physician is referred to for the view that a woman has a right to abortion.[103]

Ellis' own conclusion is paradoxical:

> The blind and aimless anxiety to cherish the most hopeless and degraded forms of life, even of unborn life, may well be a weakness, and since it often leads to incalculable suffering, even a crime. But as yet there is an impenetrable barrier against progress in this direction. Before we are entitled to take life deliberately for the sake of purifying life, we must learn how to preserve it by abolishing such destructive influences—war, disease, bad industrial conditions—as are easily within our social power as civilized nations.[104]

For Ellis, then, abortion, and especially eugenic abortion, appeared to be a matter open to great progress. He had no respect for unborn life, and in principle he thought of abortion as a woman's right. Still he hesitated because he saw a link between the disrespect for life implied by abortion and the destructive influences, such as war, which society could deal with, but had not yet mastered. Ellis wrote in 1910, before two world wars, before Nazism, and before the "balance of terror." One wonders what he would say today.

We have cited Havelock Ellis' treatment of abortion at some length because even today it serves as a kind of bible for pro-abortionists. Ellis' remarks are often repeated as grounds for the argument that nineteenth-century laws against abortion should be relaxed in view of modern (1910) psychological and medical insights. But whatever Ellis' status as a prophet of "reform," he did not himself initiate an effective movement. That honor went to the ladies, especially to Miss F. W. Stella Browne.

Miss Browne was an advocate of birth control on several grounds, as she explained at the 1922 International Neo-Malthusian and Birth Control Conference in London: "In my opinion, as a Feminist and a Communist, the fundamental importance and value of birth control lies in its widening of the scope of human freedom and choice, its *self-determining* significance for women." She proceeded to commend the Soviet Union's "unique experiment in constructive civilisation" including the legalization of abortion. On the continent, agitation "led by Feminists of the Left Wing and by several prominent Socialists" was working toward legalization on the Soviet model. Yet

Miss Browne insisted she was "*not* concerned here to vindicate the moral right to abortion, though I am profoundly convinced that it is a woman's primary right." Some objected to abortion on medical grounds; Miss Browne doubted that the bad effects were due to abortion as such, but argued that even if they were, this was all the more reason to make effective contraception available to exploited women of the working classes. She concluded her paper with a triumphant epitaph for the "ancient codes, the decaying superstitions and prejudices of an old theoretical morality" which were rapidly losing "all the sanctity they ever had."[105]

In 1923 Miss Browne broke with the Communist Party because of its officially negative attitude toward birth control—tied to Lenin's rejection of neo-Malthusianism.[106] But in later years, as we shall see, Miss Browne remained an admirer of the Soviet Union's legalization of abortion.

An important milestone in the abortion movement was the 1929 International Congress in London of the World League for Sexual Reform. This organization began in Germany and met for the first time in Berlin in 1921. Its objectives were not merely inquiry but a "reform" of sexual morality and of relevant legislation. It aimed at "establishing sexual ethics and sociology on a scientific biological and psychological basis, instead of (as at present) on a theological basis." The League aimed not to supplant but to embrace movements such as those devoted to birth control, eugenics, sex education, marriage reform, and homosexuality.[107] Among its members the League claimed pioneers such as Sigmund Freud, Havelock Ellis, and Edward Westermarck; leaders of the birth control movement such as Margaret Sanger, Marie Stopes, C. V. Drysdale, Norman Haire, and Abraham and Hannah Stone; and several later founding members of Britain's Abortion Law Reform Association—namely, Miss Stella Browne, Mrs. Janet Chance, Dr. Joan Malleson, and Dora Russell.[108]

The Soviet experience dominated discussion of abortion. Dr. Norman Haire showed that the British birth control movement was not so shy of abortion as it had been when Stella Browne spoke out seven years before. Haire stated:

> In Soviet Russia, whose whole sexual code is a fascinating experiment which we sexologists in other countries are watching with great interest, every woman is permitted to have her pregnancy interrupted if she wishes it.

And after mentioning other countries' moves to imitate the Soviet example, he added: "Many of us in England are in agreement with this point of view."[109]

Miss Browne argued an absolute right to abortion. Fundamental to "sexual reform on a scientific and humanist basis is the power to separate the fulfillment of the sexual impulse from the procreation of children." Since contraceptives do not always work, and some find them an obstable to otherwise highly enjoyable sexual experiences, abortion is necessary. To forbid

abortion is to enforce the illegal performance of the operation, with consequent bad effects, or the birth of unwanted children, who are sure to be damaged psychically. The effort to set conditions as in compromise legislation is mistaken; boundaries will be unworkable and will lead to abuses. Miss Browne concluded: "Not abortion, but forced motherhood, is the crime."[110]

The keynote address at this Congress was a lecture by British philosopher C. E. M. Joad. Professor Joad explained the religious basis of existing sexual morality and argued that science was replacing religion as a basis for life. Yet there is a lag in the change of morals and laws. The object of sexual reformers must be to abolish the lag. "To achieve this end they must seek to diminish by any means in their power the influence of the religion which is largely responsible for the maintenance of the present moral code." In the future, Joad predicted, religion and sex life would be dissociated and both would be purely private, "as private and personal as the toothache.[111]

Thus Professor Joad thought it necessary to subvert religion as a means to the end of sexual reform. Miles Malleson presented a similar argument under the title: "The Need for a New Positive Morality." Malleson stressed the inevitability of moral change and made the keystone "the responsible individual."[112]

Others at the Congress, for example Dr. Johannes Werthauer, thought that not only religion but capitalism must be destroyed to make way for sexual reform. The great war lords and captains of industry fight contraception and abortion. But sex is

> . . .an impulse which does not permit of regulation. The complete abolition of all Church and State interference in sexual relations can alone give freedom to this natural impulse and release it from its unnatural servitude. But the removal of these restrictions is merely part of the general task of the abolition of capitalism altogether.[113]

Dr. J. Leunbach of Copenhagen, whose 1935 abortion trial we mentioned in relation to the Danish legislation, also blamed "the existing capitalistic social order" for maintaining laws against abortion. Working women, the exploited classes, should have the benefit of abortion, which was already available to the wealthy. "This is the line that has been taken in Soviet Russia," and though lack of facilities has prevented complete success "they can point to undeniably excellent results." Even in a capitalist society it might be possible to get a majority to repeal anti-abortion laws. In this the good results of the Soviet Union can be used as an argument. Dr. Leunbach explained how the Danish chapter of the League had acted in 1929 to promote a petition by several women's unions requesting Parliament to grant abortion on request.[114]

Most who spoke at the Congress on the subject of abortion clearly considered only completely free abortion satisfactory. Dr. Helene Stöcker, for example, considered anything short of the Soviet legalization as only partial pro-

gress.[115] A Frenchwoman, Dr. Pelletier, considered that women were treated unjustly with regard to abortion everywhere but in the Soviet Union. The punishment of abortion, she argued, results from man-made laws, laws aimed at reducing women to the status of "machines for producing children."

Dr. Pelletier encountered some difficulty in her argument, however. First she asserted: "Abortion is not a crime. One cannot be said to be taking life since life does not yet exist. Far from being bad, abortion is often a commendable step. Abortion is moral." But then she asked "up to what date should it be allowed?"

> The difference between the fertilized ovum and the foetus at nine months is only a matter of development. But while it may be a light matter to destroy an embryo at the age of six weeks, an abortion at seven months amounts almost to infanticide. Abortion at such a time is only justified if the mother's life is in danger. The law might fix a definite limit: say three months.[116]

No reason is given why three months is to divide the "light matter" of abortion from infanticide on a continuum of unbroken development.

A German physician, Dr. Hertha Riese, argued that physicians could not consistently refuse abortion on social grounds if they allowed it on medical indications, since the life of the child would be the same in either case. Why is the life of the mother ever given preference?

> The fundamental reason for this general attitude is probably that we recognize that a human being who is conscious and capable of feeling, represents a form of life which is to be preferred to one which merely exists unconsciously.[117]

From this argument follows the sub-humanity and violability of the non-conscious fetus. Dr. Riese does not explain how her argument affects the valuation of other "forms of life"—e.g., the mentally ill or the retarded.

Dr. A. Genss journeyed from Moscow to this 1929 London conference to give a detailed account of the Soviet abortion program in which everyone was so interested. He explained the great success of the Soviet law and commended the principles behind it:

> In Soviet Russia abortions are due to the same causes as in Western Europe, with the one difference that we are trying to master our social diseases not by means of formal measures of soulless legislation but solely by means of a radical and sure remedy—by reconstructing the whole country on socialist lines, by building the whole economic structure of the U.S.S.R. on a communist foundation.[118]

The arrangers of the Congress also included the showing of a Russian film about abortion. It was one of the special features of the program.[119]

The League had not previously endorsed a change in abortion laws. However, among the resolutions voted at this London conference was the following:

> This Congress of the World League for Sexual Reform declares that since contraceptive methods are at present not sufficiently perfect nor widespread, many women are compelled to resort to artificial termination of pregnancy.

> In all countries except Soviet Russia this act involves severe legal penalties. These, in fact, fall mainly upon women of the poorest classes, and do not prevent the practice of abortion, but ensure that it is done secretly, incompetently, and with danger to life and health.
>
> We therefore call for the abolition of penalties for the mother and a revision of laws relating to abortion, so as to make it possible for a woman to obtain a termination of pregnancy by a qualified medical practitioner on economic, social, and eugenic grounds as well as the medical indications permitted at present.[120]

This resolution marked a milestone in the international abortion law relaxation movement. It undoubtedly influenced some of the Scandinavian and other developments we already have reviewed, although there the scope of the revision was limited by excluding purely "social" and "economic" grounds. Less than the Soviet ideal, the resolution represented an objective for practical efforts in most countries. The euphemism "termination of pregnancy" which has reappeared in many proposals for legislative revision as a substitute for "abortion" also showed a practical desire to effect attainable results.

The 1930 Congress of the World League for Sexual Reform met at Vienna. Many of the themes of the previous year reappeared. Wilhelm Reich, later famous for his philosophy of orgasm, said: "The Soviet system in Russia solved the problem of abortion and of marriage without much difficulty." He urged the League to fight abortion laws and he attacked the practice of sexual abstinence on religious grounds.[121]

Dr. P. Vachet of Paris affirmed: "Soviet Russia is the only country in all times, where sexual ethics and institutions have been rationally rebuilt." Christianity, by contrast, degrades sex and makes it shameful.[122] Havelock Ellis pictured Soviet Russia as an inspiring "social laboratory," though he conceded its political and economic system might not be exemplary.[123]

Dr. Batkis of Moscow was present to extol his country's system: "Perfect freedom of abortion and the establishment of clinics and hospitals for birth-control and abortion."[124] Prof. J. Wolf of Berlin appealed to the Soviet example in his medical-legal argument for abortion. He referred to the "epidemic" of abortion, the ineffectiveness of punitive legislation, and the harm caused by illegal abortions.[125] Bertie Albrecht of London spoke of the imprescriptible feminine right to abortion, so far recognized only in Soviet Russia.[126]

Dr. Victor Margueritte of Paris was not satisfied with the resolution the League had passed the previous year in London. He began his paper by requesting the Congress to pass this resolution: "We demand that the new legislation concerning abortion, as adopted by the Soviet States of Russia, should be introduced into the penal codes of all countries."[127] The Congress apparently did not agree; this resolution is not recorded in the volume of its proceedings.

Dr. Leunbach of Copenhagen was at the Vienna Congress, repeating his argument of the previous year.[128] Others also spoke for the first time or

repeated previous arguments in favor of abortion.[129] Adelheid Popp of Vienna outlined compromise legislation allowing abortion on "medical," "eugenic," and "social" indications.

Two papers at Vienna were especially revealing. Dr. Herbert Steiner of Vienna, in an unusually frank survey, stated that illegal abortions had actually increased in Russia, but he believed a more intensive program of birth control clinics would help. He also asserted that all intrauterine methods of "prevention," such as the paste used by Leunbach and the ring-type IUD used by Gräfenberg, were actually abortifacients. But Steiner commended such methods for use in birth control clinics.[130]

The other interesting paper was a report of the American Birth Control League by F. Robertson-Jones. She indicted Christian belief in providence as a special obstacle to the movement, but pointed out that Protestant sects were not so well organized for political action as the Catholic Church. She bemoaned the lack of limitation among the "lowest economic classes," "the incompetent—the physically, mentally or morally subnormal," for these people are a burden: "The burden of dependence bears heavily upon the taxpayers." Racial deterioration would be the inevitable consequence of the "differential birth rate." For this reason: "It is all-important for the future of the country that the incompetent classes—those of the worst stock—should limit their children." The report ended with an acknowledgment of the inspiration received by America from "Europe and the East; and the other officers of the American Birth Control League join me in sending hearty greetings and congratulations to our fellow workers gathered together in this great Congress."[131]

The significance of the Sexual Reform Congresses can hardly be overestimated. Of course, the various movements which united in these meetings maintained their independence. One does not find the entire program of the World League adopted by limited movements such as the American Birth Control League. But the World League's Congresses, and especially the London meeting of 1929, certainly proposed the Soviet abortion law as an ideal, indicated the outline of possible attainable compromise legislation, integrated the abortion question into the new sexual morality, and drew the lines of opposition between "theology" and "science"—that is, between a traditional outlook and the new, non-religious ideology. If this new ideology was not in every case "scientific socialism" (Marxism) it was always humanistic, unfriendly to all traditional religion, and particularly hostile to the Catholic Church.

In 1930, Dr. R. Forgan, a British physician and former Member of Parliament, spoke on maternal mortality at an Independent Labour Party Congress:

> What if birth control utterly failed? Are we to insist on the birth of an unwanted child? The logical conclusion is that abortion, carried out by skilled

> persons, should be legalized. That is the conclusion to which our point of view is tending.[132]

In 1931, Mr. Justice McCardie tried a case in which a woman had died at an amateur abortionist's hands. Instead of limiting himself to the impartial performance of his legal office, the Judge attacked the law against abortion, characterized the charge of "wilful murder" against the abortionist as "brutal," and proclaimed the one absolute norm of birth control and pro-abortion groups: "I cannot think it is right that a woman should be forced to bear a child against her will."[133]

Mrs. Janet Chance, who was listed on the roster of the 1929 Sexual Reform Congress, published two books, one in 1931 and the second in 1933. The first embodied the program of sexual reform. Mrs. Chance argued in favor of abortion law relaxation: "And all medically-endorsed abortion should be legalised if only, as it has done in Russia, to compel Ministries of Health, doctors and legislators to face the true condition of the working-class mother." The agreement of the woman and her doctor should be sufficient. Mrs. Chance claimed that politicians failed to act "for fear of the Catholic and Church of England vote."[134]

Mrs. Chance's second book attacked "intellectual crime" and especially all forms of religious faith: "Religious creeds do not merely contain, here and there, some intellectual error. No. *Religious creeds are intellectual crimes,*" she asserted emphatically in her chapter entitled: "Religious Belief: An Intellectual Crime."[135] Mrs. Chance excoriates those who teach religion to small children with "romantic views of life such as the existence of a Divine Father."[136] Mrs. Chance tells with approval how Lord Buckmaster, lecturing on divorce law reform, refused even to answer the objections of Roman Catholics in his audience. She agreed with and wished to surpass his attitude of scorn for Catholic thought which she condemns bitterly, concluding: "Tinsel ideas for their tinsel shrines."[137]

By 1932 the cause of abortion law relaxation was being advocated in meetings of the British Medical Association. At a 1933 meeting, it was unsuccessfully proposed to establish a committee:

> First, because the legalization of abortion in some countries, notably Russia, had created a demand for abortion in this country; secondly, because, owing to the economic crisis, and possibly as an offshoot of birth control teaching, women were having more recourse to abortionists than they had done in the past; and thirdly, because the law was uncertain on this point and juries hesitated to commit themselves upon it.[138]

In 1934 the Association did establish a committee to consider the medical aspects of abortion.[139]

Meanwhile, the ladies went to work. Madame Bertha Lorsignol, an Englishwoman whose husband was a French banker, worked energetically to

persuade the Women's Co-operative Guilds to pass a resolution (by 1,320 votes to 20) asking the government to allow abortion "under the same conditions as any other operation." Dr. Joan Malleson, who was on the roster of the 1929 Sexual Reform Congress, wrote a popular article in the *New Statesman.*[140]

In 1935 Miss F. W. Stella Browne organized a symposium on abortion in the form of a small book. She called for legalization of abortion so that it could be performed like any other operation. Despite her departure from the Communist Party, she lauded the "sexual statesmanship" of Soviet Russia in its handling of the abortion issue.[141] Miss Browne asserted: "The woman's right to abortion is an absolute right, as I see it, up to the viability of her child."[142] She rejected any proposed indications, "for our bodies are our own."[143] In this argument, by using viability as a dividing line she assumed, as did the Nazis, that the incapacity of an individual to survive by itself left it without any right to life.

Miss Browne urged that people using contraceptives were plagued with anxiety lest an unwanted conception occur. The availability of abortion "would save the racked nerves of thousands of sensitive women and men, and prevent the shipwreck of much mutual joy and affection."[144] Abortion is not only good and necessary "but also erotically preferable to any current and available form of contraception, because any available contraceptive disturbs the essential rhythm, the crescendo, climax, and diminuendo of the communion of sex."[145] Miss Browne assured religious believers that they "must regard human parental responsibility as an important factor in the sifting of souls, and for really effective responsibility, abortion is as necessary an instrument as contraception."[146]

The Abortion Law Reform Association was founded February 17, 1936. Mrs. Janet Chance was elected Chairman; Miss Browne, Vice-Chairman; Dr. Joan Malleson was a medical advisor; Madame Lorsignol and Dora Russell also were involved. Lord Horder, who was very active in sponsoring the birth control movement, was also an advisor. Mrs. Alice Jenkins became Secretary.[147]

By the time the new organization held its first public meeting in May 1936, Mrs. Chance was able to report that the British Medical Association's committee favored revision of the law to explicitly permit therapeutic abortion, because "in the law as it stands no specific authority is given for terminating pregnancy." The Association did not advise legalization on non-medical grounds, because that issue was considered beyond its competence, although the committee did observe "that the legalization of abortion for social and economic reasons would go far to solve the problem of the secret operation."[148]

The public meeting, encouraged by this report, after lively discussion, agreed unanimously to a very strong resolution:

> This Meeting advocates the amendment of the abortion laws so that it shall be legal for abortion to be performed by a medical practitioner subject only to restrictions imposed by medical and humanitarian considerations.[149]

Lord Horder proposed a somewhat less blunt statement of objectives, stressing the dangers of illegal abortion and urging amendment of the abortion laws to permit "help from the patient's doctor." A version of this more veiled statement was adopted, with an added clause urging better contraception.[150]

That the leadership of the Abortion Law Reform Association dissimulated its actual objectives is proved by the testimony of Alice Jenkins herself. Noting that Stella Browne always insisted on the absolute right to abortion, Mrs. Jenkins explains her own attitude and that of Mrs. Chance: "Janet and I shared her opinion, but, mistakenly or not, believed that we could further our views better by a less forthright declaration."[151]

The movement to relax the abortion laws gathered support among the public and in Parliament. In June 1937, an Inter-Departmental Committee was appointed jointly by the Ministry of Health and the Home Office

> to enquire into the prevalence of abortion, and the law relating thereto, and to consider what steps can be taken by more effective enforcement of the law or otherwise to secure the reduction of maternal mortality and morbidity arising from this cause.[152]

The terms of reference were narrow; moreover, material and testimony presented to the Committee would not be published as such—as would have been the case if a Royal Commission had been set up. Nevertheless, the hearings of this Committee provided a focus for effort and an opportunity for the promoters of a relaxation of the law to make their case. Among the witnesses were Miss Browne, Mrs. Chance, Dr. Joan Malleson, and Mr. Thesiger for the Abortion Law Reform Association; Dr. C. P. Blacker, Lord Horder, and two others for the Eugenics Society; two spokesmen for the National Birth Control Association; and many individuals favorable to the cause who spoke on their own behalf. Considering the proportion of the Roman Catholic population in Great Britain, the size of the Catholic contingent was large—many Catholic individuals and associations appeared, presumably against relaxation of the law.

This forming of the lines of opposition was altogether beneficial to the movement for change. At the 1922 International Neo-Malthusian and Birth Control Conference at which Stella Browne first spoke up for abortion, Mrs. Annie Porritt, who managed the *Birth Control Review* for Margaret Sanger, explained in some detail the proper strategy of "publicity in the birth control movement." She explained that reformers err if they "devote their whole strength to appeals to the intelligence of the people." Persecution is much better, she pointed out, referring to the 1879 British birth control trial of Charles Bradlaugh and Annie Besant, the "martyr publicity" gained in 1917

by Margaret Sanger, and the great advantage gained in 1921 by the new American Birth Control League when New York police closed one of its sessions. "The Churches, especially the Roman Catholic Church, came to the aid of the movement by vigorous attacks on it," Mrs. Porritt explained. Her conclusion was that good publicity should arouse intense emotion, force the indifferent to take a stand, and also be capable of withstanding criticism.[153]

Mrs. Porritt may have inspired a brilliant publicity campaign the following year. Marie Stopes, unable to get herself arrested for promoting birth control in a London clinic, sued for slander Dr. Halliday Sutherland, a Catholic, who had criticized her in passing in his popular anti-birth-control book. The trial began February 21, 1923, and dragged on through two appeals, the verdict finally going to Dr. Sutherland on the ground that the original jury found his comments "true in substance and in fact."[154] A decade later, in a book devoted to an attack upon Roman Catholic resistance to the birth control movement, Miss Stopes characterized Dr. Sutherland's opposition as "Roman Catholic interference in this Protestant country."[155] When this particular book failed to sell well, Miss Stopes chained a copy of it to the font in London's Catholic cathedral, carefully arranging that a newspaperman should be present![156]

In February 1938, a well attended debate on abortion was arranged by the Fellowship of Medicine.[157] The chairman was Mr. Justice Humphreys and the main speakers were moderate physicians. The proponent argued only for legalization of therapeutic abortion, maintaining that a procedure requiring an abortion committee and reporting to the government would actually limit the number of "therapeutic" abortions then performed. The opponent accepted therapeutic abortion but considered the law adequate. He mentioned the Soviet experiment, but believed unrestricted abortion would never be permitted. He also held that new restrictions would be impractical.

Mr. Justice Humphreys stated the current law and explained that it certainly permitted abortion when necessary to save the mother's life. He would not say it also was legal to protect her health, but he hesitated only because of the unlimited meaning that statement could be given. He left no doubt that if the medical profession accepted a case as one in which abortion was indicated, the law would not treat its performance as criminal.[158]

Two more extreme advocates of abortion law relaxation were present. Dr. Binnie Dunlop argued

> this law has really no right to exist at all. If you say, "Oh, yes, it is a law against murder," then you have no right to interfere even on therapeutic grounds with a pregnancy. You are in that dilemma. Either it is a religious law and should be left alone, or it is not a religious law and should be got rid of.

As a compromise, the speaker urged that abortion be permitted any woman who had undergone one or two pregnancies.[159]

Dr. Joan Malleson also spoke out against requiring physicians to report "therapeutic" abortions performed. She argued that the "generous" practitioner spared many women self-inflicted criminal abortion. Her conclusion was: "It seems to be shortsighted to knock the 'generous' practitioner out by notification in favour of increasing criminal abortion."[160]

On April 27, 1938, a fourteen-year-old girl was raped by some soldiers in London. The case was a sensation, and the attackers were promptly convicted. The child missed a period and was referred to Dr. Joan Malleson, a member of the medico-legal council of the Abortion Law Reform Association. She wrote Dr. Alec Bourne, also a member of the council and he answered:

> I shall be delighted to take her in at St. Mary's and curette her. I have done that before and shall have not the slightest hesitation in doing it again. I have said that the next time I have the opportunity I will write to the Attorney-General and invite him to take action.[161]

The girl's father wished the matter kept secret. Dr. Bourne agreed, and the operation was performed on June 14. The same day at the hospital Bourne related the facts to a police inspector and said: "I want you to arrest me." When he was charged at the police court on July 1, the prosecutor explained the facts and pointed out that Bourne had openly defied the law to ventilate the opinion that the abortion law ought to be relaxed: "He had been exceptionally fortunate in being able to find what from his point of view was an absolutely perfect case.[162]

Mr. G. A. Thesiger's defense at the preliminary hearing stressed the youth and innocence of the girl, the brutality of the rape, the expertise of Dr. Bourne, and the excellent conditions under which the abortion was performed. As to the charge, Thesiger argued that Bourne was not guilty, because the law stated that the abortion-causing deed must be done "unlawfully" for the crime to be committed.[163]

The magistrate presiding at the preliminary hearing did not accept the submission of the defense, but observed that the accused and his advisers wanted a trial, and decided that the case should be presented to a judge and jury in High Court.[164]

It is interesting to note in passing that Mr. Justice Humphreys at the February debate had explained that the case for the legality of therapeutic abortion depended on a reasonable understanding of legislative intent, not on the presence of the word "unlawfuly." That word, the learned Justice explained, appeared in many other sections to which there was no conceivable exception. The word "unlawfully" was included only for technical legal reasons, not to suggest an alternative.[165]

Thus the argument based on the word "unlawfully" was perhaps bad law, but it was excellent publicity. Meanwhile, the Inter-Departmental government committee finished hearing evidence by July 7 and began considering what its report should be.[166]

July 18 and 19 Dr. Bourne stood trial. The word "unlawfully" did not appear in the original indictment; it was inserted on a motion by the defense. Also, any member of the jury who might believe on religious grounds that abortion is always wrong was asked to withdraw.

Dr. Malleson's letter to Bourne was entered in evidence. Besides outlining the case, Malleson had urged the value of a "cause célèbre" and had suggested the view

> that the best way of correcting the present abortion laws is to let the medical profession gradually extend the grounds for therapeutic abortion in suitable cases, until the laws become obsolete, so far as practice goes.

Malleson also deduced that the first physician who attended the girl "must be Catholic. He took the conventional standpoint that he would not interfere with life . . ."[167]

The child who already had suffered rape and abortion now was made to give evidence in court. She, and most of the other witnesses, simply recounted the facts of the case. However, Dr. Joan Malleson also discussed divergent medical views of therapeutic abortion. She claimed that health as well as life was a legitimate ground, especially if conception occurred in such circumstances as in the present case. Many physicians favored the "humanitarian" indication, though it was not considered adequate *by itself* for legal termination. The "eugenic" indication was accepted by some according to Malleson.[168]

After presentation of the case against Bourne, the defense asked the judge, Mr. Justice Macnaghten, to rule on the meaning of "unlawfully" in the statute. The defense argued that this implied that abortion should be considered lawful not only to save the mother's life, but also to protect her health; a physician should be free to perform the operation for the mother's health on the same basis that he could remove an appendix to preserve health without being guilty of mayhem. Macnaghten ruled that the prosecution had to prove that the physician had *not acted in good faith* to preserve the life of the mother. This formula was introduced from the 1929 Infant Life (Preservation) Act, which probably had envisaged difficulties at the time of delivery. However, the defense elicited from the Justice agreement that one "cannot altogether separate the questions of what is necessary to preserve life and what is necessary to preserve health." The jury must decide in each case.[169]

The defense argued that Bourne took a moderate view among physicians on indications for abortion. He thought the operation should be done when the risk of the operation was overbalanced by risk to health in the widest sense. The eminent surgeon was prepared to be a martyr in order to get the law clarified. His act was gallant and "he had acted from a motive of purest charity."[170]

Dr. Bourne himself refused to distinguish sharply between safeguarding life and safeguarding health. He recalled an earlier case in which a colleague

had refused, on religious grounds, to assist in abortion, and said this incident had led him to consider the question carefully. In this present case, the circumstances of the impregnation, the child's age (her pelvic bones not fully united), and the probable emotional consequences were factors. The decisive moment came when the child cried while being examined. No consultant had been called in to confirm the diagnosis, because Bourne himself often acted in that capacity and considered himself his own consultant.[171]

Expert testimony for the defense confirmed Dr. Bourne's opinion that the abortion was necessary for the girl's health. One physician said that the rape had caused the child "shell-shock" and that abortion spared her from being "buried." Lord Horder agreed with Bourne's diagnosis, so far as he could judge without seeing the patient.[172]

The defense argued in summation that given the exception permitting abortion "to save the patient's life," a wide and liberal view of that phrase should be taken. To say the physician "must not operate even if he were faced with a practical certainty that she would have a complete nervous and mental breakdown revolted one's sense of justice and every other sense." The prosecution argued that there is a fundamental difference between preserving life and preserving health. "The destruction of an unborn child was the destruction of a potential human life," the Attorney-General maintained. The law was based on the sacredness of life, and it was quite a different matter to kill for something less than life and to kill to preserve life itself.[173]

Mr. Justice Macnaghten's instruction to the jury is a remarkable document. He rejected any definite distinction between danger to life and danger to health, arguing that the former was only proved by death: "Life depends on health, and it may be that health is so gravely impaired that death results." He endorsed the defense's medical testimony regarding danger to the girl's health. He dwelt upon the difference between the respectable Dr. Bourne and the disrespectable "criminal abortionist." The Justice also asserted that anyone who objected to abortion on religious grounds should not be a doctor, or not practice obstetrics, because if he failed to perform abortion and the mother's death resulted he would be guilty of manslaughter. Macnaghten charged the jury that if the doctor believed continuance of the pregnancy would "make the woman a physical wreck or a mental wreck," then he operated "for the purpose only of preserving the life of the mother." The jury must decide whether the prosecution had proved beyond a reasonable doubt that Bourne *did not believe* the operation necessary to preserve the life of the mother—defined in this way.[174]

The *British Medical Journal* joined in general rejoicing at Bourne's acquittal, which was seen as an endorsement of existing practice. At the same time, the editor observed with remarkable frankness: "It was less a criminal trial than a co-operative effort by judge, jury, counsel, and witnesses to create law out of strong but ill-defined feeling."[175]

In March 1939, the British government's Inter-Departmental Committee on Abortion delivered its report. The recommendations of the majority of the Committee were generally on the conservative side. The major relaxation proposed was that the law

> be amended to make it unmistakably clear that a medical practitioner is acting legally, when in good faith he procures the abortion of a pregnant woman in circumstances which satisfy him that continuance of the pregnancy is likely to endanger her life or seriously to impair her health.

This would have reduced the law of the Bourne case to the form of a statute; the Committee added proposals for compulsory consultation and compulsory reporting of all therapeutic abortions.[176] These provisions, had they been enacted, probably would have restricted the borderline of "therapeutic" abortion, which enlarged into a vast domain in subsequent decades.

The Committee also explicitly referred to the proposal of the Abortion Law Reform Association that abortion be legalized generally. This, and more modest proposals for legalization on non-medical grounds, were not accepted. The main reason for rejecting such proposals was stated in these terms:

> The teaching of Christian religion and ethics that the individual life is sacred is one of the main principles upon which social life rests. As we understand it, this principle means that life must not be deliberately taken, save in very exceptional circumstances, and any measure which would tend to detract seriously from the sanctity of life must, in our view, be regarded as fundamentally unacceptable. The argument of some witnesses that, since the foetus is part of, and depends for its continued existence upon, the mother, she should be entitled to dispose of it as she thinks fit, appears to us to be a complete negation of the principle.[177]

The Committee in effect endorsed the principle of inviolability of innocent human life and accepted the fact that the developing embryo is a living human individual. However, the Committee was willing to admit exceptions in some cases and to allow some difference between the inviolability of the unborn and of those already born. On this basis therapeutic abortion was endorsed. Also the arguments against "eugenic" and "humanitarian" indications were mainly pragmatic—difficulty of diagnosis in the one case and procedural difficulty in establishing the crime in the other. Even with regard to the wider "social" and "economic" indications the Committee felt it necessary to point to the dangers of declining population, of sexual looseness, and of bad consequences of the operation itself.[178]

Several members of the Committee had relatively minor reservations to its report. One, Mrs. Dorothy Thurtle, disagreed sharply both in a minority report, published with the Committee document, and in an expanded treatment of the question published in 1940. Mrs. Thurtle rested her case in part on mistaken biology—the claim that the fertilized ovum develops by simple division without differentiation for some time. Using this misconception as one

premise, she pointed to the life of the sperm which is frustrated by birth control and concluded that contraception and abortion do not essentially differ.[179]

Mrs. Thurtle also referred to the Soviet experience, but now to explain that its apparent failure was due to Communist bungling and economic deficiency. As Russia had become Britain's enemy in 1939, the Soviet's 1936 reversal of abortion policy now appeared as a prelude to imperialism.[180]

Perhaps the most significant contribution of Mrs. Thurtle's work, however, was her suggestion of a strategy for "liberalization" of the law. Realistically accepting the general unwillingness to permit abortion on demand, she urged the plight of women in all sorts of difficult circumstances. Her list of indications included rape or pregnancy initiated by incest, pregnancy in a girl under sixteen, "eugenic" reasons, and an excess of pregnancies beyond four. The underlying idea was that abortion should be available to back up contraception whenever birth *prevention* rather than mere *spacing* was desired. But the public might accept the objective more easily if each reason for *prevention* were argued separately than if all were joined under the general claim of an absolute right to abortion.[181]

With the beginning of World War II, the movement to relax abortion laws lost momentum. Probably the general disruption caused by the war and the press of war business played a large role in this hiatus. However, the horror felt in the face of atrocious violations of innocent life probably played an important role. As awareness of Nazi violence spread, the claim by anyone of a right to dispose of the lives of others—weak, dependent, and "without value" as they might be—seemed empty and decadent.

The British movement in the prewar years had laid a foundation for later efforts. The objectives, the program, the strategy, the arguments to be used—all were developed fully. We must glance at the modest effort begun in America before World War II, and then consider the vigorous development of the postwar period.

Abortion in the United States before World War II

From its inception, the American Birth Control League distinguished sharply between contraception and abortion. A striking instance of this position is to be found in the very first paper delivered before the first American Birth Control Conference, which was held in New York in 1921. Dr. John C. Vaughan declared:

> Any means used to keep the male and female elements from uniting is a preventative or contraceptive. But when once fertilization has taken place, then all the possibilities of a new soul, a new individual, are opened up, and an individual life is started that should be covered by the same protective laws that cover all human beings. The same laws that protect adults protect children. It is no less a crime to kill a baby than it is to kill an adult. Why should it be any less a crime, why should it be more moral or legal to destroy a life in its intra-uterine stages than it is after these stages are over and the baby has been born? And I

say again that from the time the ovum is fertilized until the infant passes out of the uterus any destructive interference with it must be considered abortion, and that abortion should never be necessary, can never be moral, and must rarely be legal.

It can readily be seen that the definition we have adopted brings within the classification of abortion the many cases of so-called delayed menstruation that are brought about by manipulation, medication or some one of the common devices so well known to those in the medical profession.[182]

Yet there was a certain ambiguity in the birth control movement's attitude toward abortion. In 1928, Margaret Sanger, writing in favor of birth control, discussed abortion as a "desperate remedy" that greater knowledge of birth control could forestall. The argument was often used, but in this case Mrs. Sanger expands upon it for a few pages. She asserts there is no evidence that legal penalties are effective. She contrasts "scientific abortion" available to the few with the desperate "remedy of utter hopelessness." Referring to the aborted fetus as an "immature fruit," Mrs. Sanger mentions with obvious disbelief the position that abortion is sinful. From her viewpoint, "the revolting aspect of the practice is exposed in the vast number of midwives and abortionists who fatten upon the never-ending misery of mothers in bondage . . .." Women who practice self-abortion are referred to respectfully, even with a certain admiration, though contraception is seen as a better way.[183]

The 1930 International Birth Control Conference had a panel on abortion. One discussant pointed out that the only strategy for legalization that was likely to be successful had to begin by broadening medical indications: "One must start with the attainable, if one is to reach the unattainable."[184]

The Chairman, Dr. T. H. Van de Velde, remarked at the end of the discussion that the intention had been "to discuss primarily the means of *avoiding* abortion, but the discussion has apparently tended to deal only or mainly with the question of technique." He felt the two questions should not be mixed, since the birth control movement would be reproached for really favoring abortion.[185] The official policy was against regarding abortion as a method of birth control, but the movement had a dynamism of its own as this panel showed.

Some who were involved in the discussion were in Vienna a few days later for the 1930 Sexual Reform Congress. We have already discussed this meeting, but it may be interesting here to note that a sympathetic report on it was published in the *Birth Control Review* (American). The report states:

Birth control and illegal abortion were the subjects most stressed. Practically every speaker referred to them, and the demand for repeal of the law against abortion was general. Physicians, sociologists, poets were unanimous on this point. The physicians spoke of the danger to women of abortions performed by unskilled quacks, who are encouraged under the present law.

The sociologists defended the right of parents to determine the number of their children according to their desire. They pointed out that the desire of

> employers for cheap laborer leads to a disregard of individual and eugenic right. Victor Margueritte entered a plea for voluntary parenthood. Russia was frequently mentioned as having attained high ideals in regard to sexual rights.

The report of Mrs. F. Robertson-Jones, summarized above, is only mentioned.[186] The interesting news was not what the League's own representative had reported, but the drift of the Congress as a whole.

In the following year the *Birth Control Review* published an article by a Russian on the Soviet experience. Of course, it was only 1931, and the argument was how successfully "Soviet Russia fights abortion."[187]

In the 1930s the National Committee on Maternal Health, a private group which organized the more venturesome wing of the American birth control movement, began to take an interest in abortion. Dr. Robert L. Dickinson was the dedicated full-time volunteer secretary of this organization for eleven years.[188]

This Committee sponsored the 1936 volume on abortion by Dr. Frederick J. Taussig. This work, despite its defects and its age, is still something of a bible for the American abortion movement. As early as 1934 Dr. Taussig had advocated broader indications—including "social-economic" ones—for "therapeutic" abortion as a way of reducing abortion deaths. His plea was presented at a Washington conference on "Birth Control and National Recovery," sponsored by a committee of which Mrs. Sanger was President.[189]

Dr. Dickinson was the one who persuaded Dr. Taussig to elaborate on abortion in his 1936 book.[190] Later but still in the pre-World War II period both men were Vice-Presidents of the British Abortion Law Reform Association.[191] In this way contact was established between the more advanced British movement and its fledgling cousin in America.

In his book, Dr. Taussig sets out the requirements for a proposed relaxed abortion law. The law must agree with "mass opinion" as of 1935, he notes. The primary requirement is "consideration for the health of the mother, and secondarily, respect for the unborn fetus as a living organism, capable, if protected, of developing into an individual of value to the community." Other requirements are the good of the family as a whole, "freedom from religious bias," and punishment of professional non-medical abortionists. Dr. Taussig was anxious to put the physician and the hospital administration into positions of great discretion and responsibility. To achieve this he proposed that any condition that might produce a predisposition to disease as well as any condition of irresponsibility on the part of the mother (rape, under sixteen, etc.) be made indications for abortion. The check on wholesale abortion was to be simply that two physicians would be required to agree and to make the matter one of hospital record. Then, Dr. Taussig thought, "unnecessary" abortion could be curbed administratively just as other unnecessary surgery had been.[192]

Like the German law of 1933, Dr. Taussig's proposal accepted "viability" as a significant dividing line. After that line he would allow the physician to "produce premature birth and thus procure the death of the child" only to preserve the mother's life or health, or in case of "serious deformity of the child." He proposed that abortion should be subsidized for the needy. He also noted: "Some may criticize the proposed statute as a halfway measure, claiming that any attempt to limit by law the indications for abortion is futile, and will lead to a persistence of the practice of secret interruptions of pregnancy. I do not deny this difficulty." But he felt the proposal would satisfy immediate needs and that it could be modified in the light of experience.[193]

Dr. Taussig's proposal indicated that his respect for fetal life was contingent upon the potential value of the individual to the community. So far did he subordinate the individual to society that he was willing to allow the killing of deformed individuals even *after* viability. Dr. Taussig also showed blindness to the peculiarity of abortion in comparison with other forms of surgery. In suggesting that administrative controls would limit "unnecessary" abortion as they had limited other unnecessary surgery, he ignored the fact that appendectomy is necessary for health and is not normally an elective operation while most abortions are sought and performed without medical necessity, simply to prevent unwanted births.

To be fair to Dr. Taussig, we must also notice that he supported measures such as better maternity care, education, and welfare programs to decrease both spontaneous and induced abortion. He did not favor abortion on request, and he seems honestly to have believed that a relaxed abortion law could and would be enforced.[194]

Dr. Taussig's book has had an immense influence on the subsequent pro-abortion movement, though it did not immediately lead to the formation of an American abortion league. The book is still widely cited and its misinformation (examples of which we analyzed in previous chapters) and misinterpretation keep turning up in pro-abortion literature. An example of misinterpretation is Dr. Taussig's theory that the Christian attitude toward abortion heavily depended upon fear for the fate of the unbaptized child.[195] In fact, as we saw in the previous chapter, that factor had almost no role in the traditional Christian view. Abortion was never viewed as justifiable, even if the fetus could thereby be baptized.

In 1942 the National Committee on Maternal Health sponsored a two-day conference on abortion at the New York Academy of Medicine. Drs. Taussig and Dickinson took prominent part in this meeting.

For Dr. Taussig, "the purpose of this meeting should be primarily directed to drafting a model abortion law which could be accepted by all the states of this country." He cited the diversity of existing laws and their "illogical" wording as reasons against them, failing to note that the American system reserves criminal matters to the states precisely to allow diversity and that the

apparently illogical legal wording generally is perfectly sensible if it is once understood.[196]

Dr. Dickinson made a remarkable impromptu pro-abortion speech. He admitted friendly acquaintance with professional abortionists and urged that their superior technique should be available to the whole medical profession. He attacked restrictions on abortion as "formulated largely by theological dogma." He urged the law to catch up with public opinion, mentioning "multi-motherhood" and illegitimacy in this connection. He urged that the medical profession see to it that abortions should be done in good conditions, not in present "deplorable conditions, and halt the forcing of many pregnancy interruptions by unskilled hands . . ." (The competitors of Dr. Dickinson's friends?) He urged that doctors, who do not undergo the "serious condition" of pregnancy should only advise the woman, "but the ultimate decision should be hers finally." He noted that professional abortionists had supplied "specimens" to an embryologist, and observed: "With all that research material available we talk statistics, speculate on theology and morals, and do not get down to brass tacks." Dr. Dickinson's speech was applauded by the assembly.[197]

Others expressed more or less similar sentiments. Mr. Algernon Black of the Ethical Culture Society, who was the only person to present a paper on the religious or moral aspects of the subject, claimed great respect for "the Church," but added: "I cannot, however, accept the teaching that abortion is the destruction of a human being, in the same sense that murder is, and hence a crime." He said *all* life should be respected, but he compared the unborn human individual to a syphilis bug.

> So we promote the mother's life in preference to the unborn child because she is a human being in fact. The embryo, however, especially in the early months, has not the selfhood, the relationships, or the consciousness of human personality—save potentially. In our laws and our education we have to deal with the problem of abortion with that sense of values.

His conclusion was that the indications for abortion should be broadened as had been done with birth control.[198]

Mr. Black did not seem to realize that in expressing his peculiar "sense of values" he was taking as partisan a position as that of any other form of belief (or unbelief). For the biological facts do not support the view that the unborn are any less living human individuals than are those already born. His criteria of "personality" are not based on fact, but on a preference for those more like ourselves, with whom we can have social relationships.

Dr. Sophia Kleegman, still active in the pro-abortion movement a quarter-century later, argued at the 1942 Conference that indications for abortion should be broadened. Adopting without change, despite its irrelevance to the problem of abortion, a slogan of the birth control movement, Dr. Kleegman asked: "Is it right for one particular Church to enforce its tenets on members of other churches?"[199]

Dr. Anna Kross, a judge, argued for competent, legal abortion in contrast to incompetent or secret operations.[200] Mr. Raymond Squier took the same view and cited the fact that the majority of physicians "who are really deeply interested in this problem, want liberalization of sanctions for the performance of abortion by skilled and accredited surgeons.[201] He did not note that naturally more abortionists than other physicians are deeply interested in abortion.

Three physicians at the 1942 Conference expressed a higher valuation of unborn human individuals. Dr. Fred L. Adair, a leading obstetrician, noted: "As far as the fetus is concerned, of course, it is a total loss in abortion."[202] Dr. Herman N. Bundesen, a leader in public health, stated that officials in his area had done little, and added: "Yet abortions do account for needless destruction of fetal lives and for unnecessary maternal deaths."[203] Dr. Howard C. Taylor, Jr., the Conference Chairman, rejected the idea that physicians could

> . . .arrogantly claim for ourselves the right to deny the existence of such [religious and philosophical] factors in the problem. Nor am I convinced that it would be either right or wise not to recognize something peculiar, something in some measure sacred, in human life even in the two weeks old embryo. Belief in the destiny of the human race, as well as revealed religion, requires that even fetal life has a special significance that neither individual materialism nor biologic detachment should ever be allowed to obscure.[204]

Faced with such resistance, Dr. Dickinson proposed and the Conference passed two mild resolutions. The first called for "free and open public discussion of human reproduction and the problems of abortion." The other called for another meeting in the future.[205]

Thus, before the end of World War II there was no significant American pro-abortion movement. The American Birth Control League remained diffident about abortion. Perhaps this diffidence was only for the sake of public relations; perhaps it was a stand on principle, at least the public health principle that even under good conditions abortion is undesirable and that promoting any easier access to abortion would lessen the force behind the contraception movement. Unlike Britain, America during the 1930s was not exposed to the strong and dedicated ideological views of social reformers like Stella Browne and Janet Chance. Thus in America the direct influence of the Soviet experiment was slight, and even the theology underlying the Scandinavian compromise legislation made little impact in America until after Hiroshima.

Major Developments before 1959

The Abortion Law Reform Association again met October 10, 1945. Mrs. Jenkins relates that Janet Chance "once more explained our principles and advised a realistic attitude to the present state of public opinion, necessitating a slow approach to full legalization, accompanied by education and gradual

formation of a wise attitude to all that is involved."[206] This policy seems to have governed the post-war abortion movement at least until 1967.

By 1952 the British movement gained considerable respectability and strength. Conferences involving physicians and lawyers were organized. Additional cases went to court—and were ended in acquittals. The communications media began to give the movement their powerful support. As early as 1949 a physician stated at an A.L.R.A. Conference that he had certified an abortion "which in his opinion had saved a marriage"—and the police merely questioned him.[207]

The 1939 British Government report had been too conservative for the pro-abortion movement; the Bourne case had been its great victory. In 1952 an opportunity arose for a sympathetic member of parliament to introduce a bill. Professor Glanville Williams, had been enlisted into the A.L.R.A.; he drafted an apparently modest restatement of the Bourne decision which was then proposed as an amendment to the existing law. Though this bill did not make headway in Parliament, it may be of interest to look at it closely:

> For the removal of doubt there shall be added the following proviso to section 58 of the Offences Against the Person Act, 1861—
>
> Provided that (a) no person shall be found guilty of an offence under this section unless it is proved that the act charged was not done in good faith for the purpose of preserving the life of the mother; (b) no registered medical practitioner who acts with the concurring opinion of a second registered medical practitioner shall be found guilty of an offence under this section unless it is proved that the act charged was not done in good faith for the purpose of preventing injury to the mother in body or health.[208]

A number of questions come to mind as one studies this bill. First, the proponent of the bill in debate suggested that "person" in the first clause could be restricted to "medical practitioner." Was the word "person" used by design to allow for self abortion and amateur abortionists, or was this simply careless drafting? Again, why two clauses, when the Bourne case and many others already made clear the elasticity of "preserving the life of the mother"? Was this to introduce new terms with additional possibilities of elasticity? Again, was the word "sole" omitted from "for the *sole* purpose of preserving" in order to relax the law by allowing any least element of the mentioned purposes to justify abortion, regardless of the major motive of the abortionist? Again, was the expression "body and health" selected as one that would be interpreted much more broadly than appeared at first glance. Clearly it means more than *physical* health, and the courts would have been forced to give the greatest leeway to other meanings of "health" since "body" appears explicitly.

If the suspicions suggested in these questions are at all justified, Mr. Williams showed himself to be an ingenious draftsman. His greatest skill might be to drastically relax a law while apparently only formulating current practice.

In debate, a promoter of the Bill stated:

> I must make it clear from the outset that it is not the object of the promoters of this Bill to extend the practice of abortion. On the contrary, it is to confine it to cases where, in the view of competent medical practitioners, it is in the interests of the mother's health and for the prevention of injury to her body.[209]

If so, the promoters seem to have overshot their purpose, in the several ways suggested by the above questions.

Two general observations. The bill and its promoter in the debate both referred—quite naturally—to the pregnant woman as "mother." This habit of speech is hard to break, for it rests on a deep conviction that the unborn individual is in fact a *child,* a human person already really related to those who generated him not merely as to a biological source, but as to *mother* and *father.*

In many subsequent proposals for relaxation the argument was made that the proposal merely codified an existing and universally accepted state of affairs. But if the proposal extends abortion, the argument is fallacious; if the proposal really is as limited as claimed, it is unnecessary.

The uncertainty of existing law and the indignity to physicians of not having an explicit license in the statutes to induce abortion on given indications are the reasons offered for needing "a codification of existing practice." But the new proposals do not eliminate uncertainty, they merely displace it to the perimeter of an ever-widening circle within which abortion is called justifiable. As to the physicians' dignity—one wonders whether the concern to have legal justification does not betray a sense of guilt. Oftentimes we seek to assuage our merited guilt-feelings by enlisting collaborators or seeking approval for our guilty deeds.

By the early 1950s a definite movement began to take shape in America. A 1951 Maryland meeting of psychiatrists included among its participants Dr. Alan Guttmacher, a leading figure in the Planned Parenthood Association. In 1952 the American Psychiatric Association's annual meeting included a panel on abortion. One of the physicians on this panel was Dr. Harold Rosen, a psychiatrist at Maryland's Johns Hopkins Hospital. Derivative from these discussions was an ambitious symposium volume edited by Dr. Rosen and published in 1954.[210]

This was the first major American publication on abortion since 1944 when the report of the 1942 National Committee on Maternal Health Conference appeared. The book contains valuable material. However, as a whole the volume must surely be seen as an exploration toward the promotion of freer abortion. The first paper of the book opens by citing as if they were facts projections based on Dr. Taussig's unsubstantial statistics of criminal abortion.[211]

The section on "Mores, Laws, Ethics, and Religion" includes an excellent fifty-six page paper on abortion in primitive, ancient, and pre-industrial societies. Only twenty-two pages are devoted to the whole Judeo-Christian tradition, and the essays are not outstanding.[212] By presenting statements of reli-

gious positions without any analysis of their reasons, it is made to appear that all religious positions are mere taboos. Nowhere in the book is there any ethical or philosophic inquiry into key issues—e.g., "Is the fetus a person?" and: "Under what conditions would it be justifiable to kill *any person*?"

Even at the 1942 Conference the key issues had been mentioned. But the tendency of developments during the 1950s became more and more clear, as a movement took shape and thrust more and more intensely at the goal of relaxing anti-abortion laws.

Part of this movement was a simple ignoring or easy begging of fundamental issues. In 1954, Rev. Joseph Fletcher published his book, *Morals and Medicine.* Fletcher later became famous for his book: *Situation Ethics, the New Morality* (1966). An Episcopalian minister and professor of Christian Ethics at the Episcopal Theological School in Cambridge, Massachusetts, Fletcher has been active in the Planned Parenthood Federation, the Association for the Study of Abortion, and the Euthanasia Society of America.

Fletcher holds that there is no personality in the absence of freedom and knowledge. No argument is given for this position, but it is laid down as an unquestionable assumption from which he draws justification both for euthanasia and for abortion.[213] Responding to those who reject abortion, Fletcher says: "The basic difficulty in the position arises, of course, from the soul-and-life idea which attributes personal status to a pre-personal organism and assigns it human rights, including the right to rites of salvation."[214]

The last reference, to "rites of salvation," alludes to the Catholic practice of baptizing any living fetus that may be delivered. Fletcher considers the practice ridiculous, and traces it to a sixth-century author, Fulgentius, who taught that infants dying without baptism are condemned to hell in virtue of original sin.[215]

In fact, Fulgentius was not concerned with abortion.[216] Conversely, we have failed to find any argument against abortion in the whole Christian tradition that rests on the view that the aborted individual's soul would suffer eternally.

In 1956, Glanville Williams, the British professor of law who had long been active in promoting the relaxation of anti-abortion legislation, was invited to give a series of lectures at Columbia University School of Law. The following year these lectures were published as a book: *The Sanctity of Life and the Criminal Law.* The general premise of this study is that the laws against murder are justified by pragmatic and utilitarian considerations, because society would be impossible if adults could murder one another with impunity. But Williams sees no clear social necessity for laws regarding contraception, sterilization, artificial insemination, abortion, infanticide, euthanasia, and suicide.[217]

In dealing with infanticide, Williams argues that the former horror in which this crime was held was not so much that the child was deprived of life as that it was deprived of an opportunity for baptism. On utilitarian grounds,

he suggests that one may take a dim view of the killing of infants that have a prospect of a happy life, but proposes a tolerant and permissive view of the killing of defective infants.[218]

Williams devotes over one hundred pages, well over one-quarter of his entire book, to two long chapters on abortion. In explaining the historical basis of the anti-abortion laws, Williams correctly observes that "the historical intention underlying the abortion legislation, which was passed for the protection of the unborn child and not as a form of control of unregistered medical practitioners," is perverted if the legislation is used for the latter purpose rather than the former.[219]

But Williams, like Fletcher (whom he cites), accepts an altogether unfounded historical explanation of the Christian defense of the life of the unborn: "The historical reason for the Catholic objection to abortion is the same as for the Christian Church's historical opposition to infanticide: the horror of bringing about the death of an unbaptized child." To sustain this theory, Williams refers to the doctrine of original sin and cites Fulgentius, but fails to note the actual lines of argument used by Christians throughout the ages.[220]

At the same time, Williams realizes that present Catholic theological arguments against abortion do not involve any reference to baptism. In order to make the position appear to be a matter of religious dogma, Williams therefore discusses at length the question of the time of ensoulment.[221] In the course of this discussion, Williams confuses Christian moral teaching regarding abortion, which clearly did not rest on any supposition regarding the time of ensoulment, with the provisions of canon law, which took into account such suppositions and varied accordingly.

With this foundation, Williams observes that if soul is present from conception, the naturally aborted embryo also has a soul—a point no believer in soul would find difficulty in accepting. Then Williams concludes:

> There are other difficulties in the orthodox doctrine of the soul which need not detain us. For the legislator, it seems sufficient to say that theological speculations and controversies should have no place in the formation of rules of law, least of all rules of the criminal law which are imposed upon believers and non-believers alike. If we protect the fetus by law, it should be for reasons relating to the well-being of existing human beings. Can it be said, with any degree of reality, that the week-or-month-old embryo is an existing human being?[222]

Thus Williams neatly begs the issue by means of a rhetorical question. Clearly, many legislators have considered the embryo an existing human being, in the sense that it is a living individual organism of the human species—a view we have seen in chapter one is amply supported by biology. At the same time, this view requires no support by any religious concept of the soul, as Williams mistakenly believes. Many who do not believe in the soul regard the killing of infants or senile persons as murder, and one can equally regard the killing of

an infant in the uterus as a form of homicide without assuming anything regarding the soul.

Having set aside conception as an appropriate point to draw the line, Williams seeks some other time after which the law may begin to protect the individual's life. In this consideration he gives no thought to the possibility of drawing it at one week or one month—the ages he mentioned in the rhetorical question which rejected conception. Instead he suggests quickening, which is set aside as too vague. Then he suggests "viability," which he arbitrarily sets at twenty-eight weeks. This possibility is supported by the "feeling of the plain man" and by the fact that illegal abortions do not occur after this time anyway. Finally he suggests the time when the brain begins to function, which he erroneously sets at a few weeks before viability. Linking soul with mind and mind with brain, Williams concludes: "If one were to compromise by taking, say, the beginning of the seventh month as the beginning of legal protection of the fetus, it would practically eliminate the present social problem of abortion."[223]

Williams' own conclusion is that abortion prior to some such arbitrarily determined date should not be regarded as a crime.[224] It ought to be permitted on the same basis as any other operation. Yet he realizes that this is a "radical solution" and proposes limited legalization as a partial solution. The clearest case he considers to be for eugenic causes, for he does not believe that it should be permissible to breed defectives. He also believes there is a clear case for abortion resulting from rape. Other cases suggested concern incest, women having more than four children, and women deserted during pregnancy.[225]

Williams reviews the experience of limited legalization, especially in Sweden and Denmark, and notes that this approach does not solve the social problem of abortion, that illegal abortion may actually be increased, and that considerable administrative complexity is involved. Why, then, does Williams propose limited legalization as a partial solution? Perhaps because he considers that by aggravating the problem and increasing popular sympathy for abortion, the radical solution will become politically feasible. Williams does not state this, but seems to imply it when near the end of his treatment of abortion he quotes a Danish physician who credits the limited legalization with increasing desire for abortions as a method of eliminating unwanted pregnancies.[226]

Williams' book has become a chief source of ammunition for those arguing in favor of the legalization of abortion. Thus he argues that existing laws cause doubts among physicians, that they work special hardship on the poor, that they are widely violated with a huge toll of maternal deaths, that their enforcement is impossible, that their repeal would not have serious medical consequences, that repeal of these laws made by males is favored by women, that a half-conscious reason for maintaining these laws is a desire to punish incontinence, that anti-abortion laws try to "legislate morality," and that the laws themselves lead to great social evils.[227] All these arguments are set in a

context of argument which falsely treats Roman Catholicism as the sole serious obstacle to humane reform and which criticizes Catholic moral theology without ever understanding its principles. For example, in attacking Catholic casuistry, Williams takes for granted his own utilitarian ethics, according to which moral goodness depends on consequences, and utterly ignores the fact that traditional Catholic moral teaching locates moral goodness in the orientation of the person toward the good rather than in the consequences of his act as such.[228]

Spanning the period when Williams' book was written and published was the production of the volume, *Abortion in the United States,* edited by Mary Steichen Calderone. The Planned Parenthood Federation of America sponsored the conference in the spring of 1955 from which this volume developed; considerable post-conference work and editing led to its publication in 1958.[229] An introduction was written for this volume by M. F. Ashley Montagu, an anthropologist who was not a participant in the original conference. Montagu sets the tone for the volume by making a straightforward plea for relaxation of the laws against abortion: "The laws need to be brought up to date," he argues, and then points out:

> No matter how efficient the contraceptive devices we develop become, a certain number of unwanted pregnancies will always occur, and the well-ordered society will then be called upon to determine whether such pregnancies should be permitted to continue.

As criteria for decisions concerning abortion as a method of birth control, Montagu proposes that economic and emotional factors be given great weight.[230]

The organization of conference material in the volume proceeded from a consideration of abortion in the Scandinavian countries, through legal aspects of abortion in the U.S., to the medical and social aspects of illegal and of therapeutic abortion, and concluded with material on other (especially psychiatric) aspects and the relation between abortion and contraception. At a number of points in the recorded proceedings there are direct appeals for relaxation of existing laws, and a large part of the concluding discussion was devoted to the question of how far to go in urging such changes.[231] Participants in that conference apparently generally favored legalization of abortion on socioeconomic and other narrower grounds, and those taking this view are not seriously criticized. In fact, the most negative reactions recorded were to one physician who took a dim view even of therapeutic abortion.[232]

The post-conference statement, included in this volume, was supported by thirty-one of the thirty-four participants who considered it appropriate to take a position; the Scandinavians and the Planned Parenthood officials who organized the conference abstained from signing the statement. The document is a strong recommendation for relaxed laws. Illegal abortion is treated as a problem that cannot be solved with existing laws. Several suggestions are made, but

the key one is that legal commissions, including the American Law Institute "should study the abortion laws in the various states and frame a model law that could, perhaps jointly, be presented to the states for their consideration to replace existing statutes." It is suggested that the model law might include provisions permitting physicians to legally induce abortion on psychiatric, humanitarian, and eugenic indications.[233]

In effect, a somewhat inconsistent compromise had been reached, quite similar to that of Glanville Williams. The goal was the solution of the illegal abortion problem, which would be impossible unless abortion were allowed to any woman who wanted one, as Dr. Howard Taylor, Jr., a leading obstetrician and gynecologist, pointed out in the course of the discussion.[234] But the practicable immediate objective was some relaxation of existing laws, as a step in the direction of the acceptance and legalization of abortion as a means of birth control. The vast majority of conference participants accepted the inconsistency of urging limited relaxation to help solve the much larger problem. Significantly, Dr. Taylor, though a member of the post-conference statement committee, did not sign the statement.

Dr. Alfred Kinsey, who participated in the conference, subsequently undertook the editing, from his already gathered research materials, of a volume that would provide data on the outcome of pregnancies. Though Kinsey died in the interim, his associates published the volume, *Pregnancy, Birth and Abortion* in 1958. This volume supplemented that edited by Calderone, both by presenting a detailed analysis of the Kinsey materials, and by highlighting the possibility of diverse legal approaches through an appendix surveying abortion problems and legal developments in some foreign countries.[235]

The Kinsey materials cannot be projected to the population as a whole, as the post-conference committee of the Planned Parenthood conference on abortion noted. But this same committee considered that these materials had some validity as indicators of the facts concerning abortion in the parts of the population similar to those interviewed by Kinsey in education and socioeconomic status. Still, the committee concluded with regard to the Kinsey materials:

> We are, therefore, forced to conclude that the data collected by the Institute for Sex Research do not provide an adequate basis for reliable estimates of the incidence of induced abortion in the urban white population of the United States, much less in the total population.[236]

Two Proposals for Limited Legalization

The year 1959 marks a turning point in the movement toward relaxation of anti-abortion legislation in the United States. In that year the American Law Institute published a tentative draft of a revised statute on abortion to be included in this organization's "Model Penal Code." The American Law

Institute is not an official organization, but is a private voluntary society of certain jurists, lawyers, and legal scholars. The "Model Penal Code" has the force only of a considered suggestion to state legislators by a body of persons having legal competence.

The provision on abortion was drafted with explanations and supporting arguments, and presented to Institute members for discussion at their May 1959 meeting. Argument at that meeting and subsequently led to a few relatively minor changes, and the provision was finally approved in May 1962.

The proposal of the American Law Institute removes abortion from the area of homicide and includes it among "offenses against the family." The final version of the proposal begins as follows:

> Section 230.3. Abortion.
>
> (1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
>
> (2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.

Other provisions of the A.L.I. proposal require that abortion be performed in a licensed hospital, but permit exceptions to this requirement; require certificates by two physicians, one of whom may be the abortionist, but enforce this requirement only by making the absence of certification cause a presumption of unjustifiability; make a third-degree felony of self-abortion, but only if the pregnancy has proceeded beyond the twenty-sixth week; make inducing or assisting self-abortion a third-degree felony, but do not increase the penalty for abortion after the twenty-sixth week; make a third-degree felony of performing an abortive-type act upon a woman not pregnant or not believed to be so; make the merchandising of abortifacients a misdemeanor, but exempt physicians, druggists, and their suppliers; and exclude from the category of abortion those methods which "avoid pregnancy" by preventing implantation or otherwise interfering with the reproductive process before, at or immediately after implantation.[237]

We shall consider arguments for and against this proposal in chapter seven, but here it is appropriate to notice some points which clarify the magnitude of the change in previous abortion laws suggested by the A.L.I. proposal.

In the first place, the proposal would introduce into the law a positive declaration of justifiability of abortion in specified categories of cases. These categories are defined with very vague or elastic terms: e.g., "*gravely* impair the physical or *mental health*," "*grave* physical or mental *defect*," and, in the

context, "*rape.*" Unlike the existing legal situation in about half the states, the A.L.I. proposal does not require that the ground for exception be in fact present, but only that the physician believe it to be so. It would be incumbent upon the prosecution to prove beyond reasonable doubt that the physician *did not believe* any of the justifying conditions to be fulfilled. As the conditions are stated, such proof would be almost impossible, for a physician could always be supposed to have believed—even if erroneously—that there was a risk to the mental health of the mother or defect in the child that in his judgment would have been "grave." If the patient merely asserted rape, the physician could be sincere in believing her.

The requirements of performance in hospital and for certification would tend to support the justification clause in making abortion a monopoly of licensed physicians, and the provisions regarding self-abortion, the assistance of self-abortion, and the merchandising of abortifacients would have the same effect. None of these provisions would inhibit the activities of licensed physicians who practiced openly and performed abortions in accord with standards acceptable to their colleagues in any particular hospital. In other words, a law which might appear rather restrictive at first glance, in effect allows a very broad area for arbitrary judgment by licensed physicians.

Moreover, the proposal's positive declaration of justifiability would tend to make the practice of abortion in many cases an integral element of medical practice, with the results that abortion would tend to be included in programs of public health care and that physicians conscientiously opposed to abortion would become subject to legal sanctions, such as civil liability, for not performing an abortion which other physicians considered justifiable.

The provision regarding girls under sixteen years of age is obviously intended to end the social problem of illegitimate births among younger girls. The sub-section exempting methods which operate before, at or immediately after fertilization is clearly an invitation to develop pharmacological abortifacients, such as the "morning-after pill," as well as an explicit exemption of probably abortifacient techniques of birth control such as the IUD.

Many arguments have been offered for and against the A.L.I. proposal, but few alternatives have developed short of complete legalization of abortion. One interesting alternative was offered by two Stanford University law professors, Herbert L. Packer and Ralph J. Gampell, at the same time the A.L.I. proposal was published.

Packer and Gampell criticized the attempt in the A.L.I. proposal to specify conditions for justifiable abortion. Instead, they proposed to amend the law in order to eliminate criminal sanctions against physicians performing abortions in accord with certain procedural safeguards. These safeguards would be approval by the majority of a registered, five-member, hospital abortion committee; recommendation with explanation of cause by two physicians not on the board itself; signed approval by the patient and by her husband or (if a minor) by her parent or guardian; and the keeping of records by the

hospital and reporting to the State Department of Public Health. Hospitals would be eligible to register an abortion committee only if they maintained a regular obstetrical service. The five members of the committee would have to be in specified, appropriate fields of medical practice, and the same would be true of the two recommending physicians. The committee would be required to consider the *medical* advisability of the abortion, but there would be no control upon its definition of that term.[238]

This proposal would not require any hospital or physician to cooperate in abortion. It would accomplish in a more straightforward and orderly fashion the same result that the A.L.I. proposal would bring about—namely, the establishment and protection of a medical monopoly in the lucrative field of abortion. The procedural controls would inhibit the activities of physicians who are less ethical (or more greedy) than the average member of the profession. While apparently less restrictive than the A.L.I. proposal, Packer and Gampell's procedure would in fact limit legalization to hospitals having sufficient staff to organize a committee, would safeguard the rights of husband and parents of the patient, and would subject the practice in each hospital to professional scrutiny. In the short run, a proposal such as this might lead to rather slight relaxation of present practice, but as public and professional opinion came to support a more aggressive pro-abortion policy the unaltered legal regulations could support a public policy involving strong inducements to mothers—e.g., those on public welfare—to undergo "voluntary" abortion.

It is neither possible nor necessary to review in detail the movement which grew in support of limited abortion law relaxation between 1959 and 1967. In general, the existence of specific, limited objectives enabled pro-abortion forces to organize and campaign on the issues which could generate the greatest sympathy, horror, and anxiety. At the same time, support for abortion in limited cases breached the principle of the fetus' right to life, which alone is a serious obstacle to the acceptance of abortion as an individual right and as an instrument of public health and welfare policy.

The pro-abortion movement both in Britain and in America was greatly aided by the thalidomide tragedy of the early 1960s. One of the most dramatic events of that affair was the 1962 trial in Liège, Belgium, of Suzanne van de Put and others for the killing of Corinne, an infant born to the van de Puts afflicted with limb deformities due to thalidomide. The issue was squarely put by Madame van de Put who admitted killing Corrine but claimed to have acted in order to save the baby from a miserable life. The jury acquitted all defendants, thus accepting the justification offered. The general public reaction was one of satisfaction. However, a few days later another Belgian mother was taken in custody for the killing of her mentally retarded child, aged three. And the society which was moved to accept the violation of the right to life of a child already born, was even more strongly moved to doubt the right to life of children unborn.[239]

In Britain, the quiescent Abortion Law Reform Association was given new life in 1963 and 1964 in the wake of the thalidomide tragedy. In March 1964, Mrs. Vera Houghton, wife of a member of parliament who soon became Labour Minister responsible for coordinating social policy, was elected Chairman. She had been Executive Director of the International Planned Parenthood Federation for ten years, and under her competent direction the A.L.R.A. pressed toward enactment of new legislation in Great Britain. A particular element of technique became the use of carefully worded, pre-tested public opinion polls, which showed popular support for abortion in certain specific cases. The members of the Association also bombarded the public media of communication with articles and letters in support of their program.

The Association's membership was hardly a representative cross-section of the British people, since among members of the A.L.R.A. two-thirds had higher education, two-thirds were women (of whom one-quarter had undergone at least one abortion), 74 percent were atheists or agnostics, 39 percent belonged to the Family Planning Association and 57 percent were unsatisfied with the limited legalization of abortion in Britain's 1967 Abortion Act. Yet this efficient pressure group managed to create the appearance of a nearly universal public demand for limited legalization.[240]

In the United States, 1964 marked the founding of the Association for the Study of Abortion. By republishing materials favorable to abortion, supplying speakers, holding an annual forum, aiding state groups organizing to work for abortion law relaxation, and by many techniques of cooperation this organization has done much to encourage and coordinate the American pro-abortion movement. It provided a means for Dr. Alan F. Guttmacher and other leaders of the Planned Parenthood Federation to promote legalization of abortion without committing the birth control movement as a whole to abortion until there was little danger in taking this step.

During the middle 1960s, the work of the pro-abortion movement was largely one of popularization of the positions reached in the conferences and studies of the previous decade. Thus, *CBS Reports* broadcast an hour-long program, "Abortion and the Law," on April 5, 1965. Presenting some opinions against abortion, this program nevertheless was so effective in promoting the pro-abortion cause that it was subsequently widely used on film by groups favoring relaxation of the laws.

Similarly, the book *Abortion* (1966), by Lawrence Lader, a biographer of Margaret Sanger, showed in its notes and acknowledgements the help and cooperation of many of the leaders in the pro-abortion movement. Lader reduced to a smooth journalistic argument much of the mass of material favorable to abortion that had been generated by physicians and lawyers in the previous fifteen years. At the same time, Lader went beyond the generally declared position at the time he published his book by declaring that the right of every woman to legalized abortion was the final freedom implied by feminism and the birth control movement.[241]

Support developed for relaxation of the abortion laws along the lines of the limited proposal of the A.L.I. This support was evidenced both by public opinion polls and by the resolutions of important professional groups. Samples of each of these types of support may usefully be examined here, before we proceed to a review of some of the new legislation that has been passed in Britain and the United States.

One interesting public opinion survey, never published in its entirety, was conducted by the National Opinion Research Center in December 1965. A representative sample of 1484 adult Americans was asked six questions, each of which began: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion . . . " followed by one of six conditions. The conditions and resultant percentages of various responses were:

1. If the woman's own health is seriously endangered by the pregnancy. Yes, 71 percent; no, 26 percent; don't know, 3 percent.

2. If she became pregnant as a result of rape. Yes, 56 percent; no, 38 percent; don't know, 6 percent.

3. If there is a strong chance of serious defect in the baby. Yes, 55 percent; no, 41 percent; don't know, 4 percent.

4. If the family has a very low income and cannot afford any more children. Yes, 21 percent; no, 77 percent; don't know, 2 percent.

5. If she is not married and does not want to marry the man. Yes, 18 percent; no, 80 percent; don't know, 2 percent.

6. If she is married and does not want any more children. Yes, 15 percent; no, 83 percent; don't know, 2 percent.[242]

These results, if accurate, show several interesting facts. In the first place, at the time of the survey the overwhelming majority of Americans rejected legalization of the use of abortion simply as a method of birth control. In the second place, despite the emotional appeal of the rape case and the impact of the thalidomide disaster, a substantial minority rejected legalization of abortion on so-called humanitarian and fetal indications. In the third place, only the first condition received an overwhelming affirmative response, and even here there was a significant minority (26 percent) who rejected abortion.

It is also important to realize that there is a difference between the questions asked and the legal implications of the A.L.I. proposal. Expressions in the questions such as "seriously endangered," "as a result of rape," and "strong chance of serious defect" would be understood by respondents in their ordinary meaning. But the A.L.I. proposal's references to *mental* health, to statutory rape, and to substantial risk of defect in the baby open considerably wider grounds for abortion. Moreover, as we have seen, the A.L.I. proposal would legalize abortion in any case in which it cannot be proved that the abortionist does not think the specified condition is fulfilled, while the respondent is considering an imaginary or remembered case in which the condition is certainly fulfilled.

This same poll also revealed certain other interesting facts. It is often argued that abortion laws are made by men and would not exist if women legislated. Also that the issue on abortion is one that sharply divides Catholics and Protestants, the latter overwhelmingly favoring law relaxation obstructed by the former. And again, that the law favors women who are well-to-do—that poorer women want legal abortion as often as their better-off sisters, but cannot obtain it.

Now, none of these arguments turns out to be supported by the N.O.R.C. survey. A smaller percentage of women than of men approved abortion in each of the circumstances about which questions were asked. Fewer persons who attended church regularly approved abortion, whether they were Catholics or Protestants. More Catholics attend regularly, however. Poorer women are less favorable to a relaxation of abortion laws; this is shown by a correspondence between approval and increasing education, which goes with higher economic status.[243]

In the analysis accompanying her original presentation of the N.O.R.C. survey, Dr. Alice Rossi stressed that the A.L.I. proposal would not go far enough to legalize the vast majority of abortions, which are simply post-conception birth control. Though the survey showed the opposition of public opinion to legalization of abortion as a method of birth control, Dr. Rossi herself strongly defended this concept and urged those seeking abortion law relaxation to campaign for it: "The only criterion should be whether such an induced abortion is consistent with the individual woman's personal set of moral and religious values, and that is something only she can judge."[244]

In 1967 another public opinion survey was taken by the Gallup organization on behalf of the Population Council, a private organization oriented toward the promotion of birth control as an aspect of public policy. This more recent survey confirmed the general structure of information in the N.O.R.C. survey. The majority accepted abortion in difficult cases, but not as a backstop to contraception. The views of Catholics and Protestants are close, but Jews and other religious groupings are more favorable to abortion. The overall percentage approving abortion in various circumstances (the actual question was not reported) was as follows: endangered woman's health, 86 percent; rape, 72 percent; incest, 69 percent; child deformed, 62 percent; not married, 28 percent; can't afford child, 25 percent; don't want child, 21 percent.[245] The interest of the Population Council in public opinion regarding abortion was one more sign that the birth control movement was proceeding rapidly toward acceptance of abortion as a method of birth regulation. The increased percentages of those approving abortion is noted in the Population Council report as a gratifying sign of progress although the majority still rejected abortion as an elective method of birth regulation.

Perhaps the greatest impetus given to the relaxation of abortion laws along the lines of the A.L.I. proposals was the marshalling of support by the

American Medical Association and the American College of Obstetricians and Gynecologists.

The American Medical Association acted first, in June 1967, when the Association's House of Delegates passed a resolution containing a policy statement on therapeutic abortion. While acknowledging a lack of consensus in the profession and recognizing the dangers to bodily and mental health which may arise from the procedure, the A.M.A. policy accepts the desirability of broadened medical and eugenic indications. The core of the resolution is contained in the statement that the A.M.A. opposes induced abortion except when:

> (l) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother, or
>
> (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or
>
> (3) There is documented medical evidence that continuance of a pregnancy, resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient;
>
> (4) Two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing; and
>
> (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.[246]

This resolution suggests a policy stricter in several respects than that implied by the A.L.I. proposal. The A.M.A. resolution asks for "documented medical evidence" rather than mere belief. The A.M.A. supports eugenic abortion only if an "incapacitating" rather than merely a "grave" defect may occur. The A.M.A. does not accept the "humanitarian" indication as such; abortion is accepted in cases of rape and incest only if the physical or mental health of the patient is threatened. The A.M.A. suggests two consultations instead of the one accepted by the A.L.I. proposal. Finally, the A.M.A. would permit abortion only in *accredited* hospitals rather than allowing it in any *licensed* hospital, as does the A.L.I. proposal.

The statement of the American College of Obstetricians and Gynecologists was approved in May 1968. This statement requires performance in an accredited hospital, requires consent of the patient's husband or the parent or guardian of an unmarried minor, recognizes the physician's right of conscience not to perform abortions, and requires two consultations by qualified specialists. The conditions under which abortion is approved are stated as follows:

> 1. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable.
>
> 2. When pregnancy has resulted from rape or incest: in this case the same medical criteria should be employed in the evaluation of the patient.

3. When continuation of the pregnancy is likely to result in the birth of a child with grave physical deformities or mental retardation.[247]

Obviously, these conditions are less restrictive than those outlined in the A.M.A. policy; these approximate the practical force of the A.L.I. proposal. Of particular importance is the College's statement that the determination of risk to health may take into account the patient's *total environment in the present and the future.* In effect, this phrase opens the way to abortion on social and economic grounds when future hardship may effect a mother's health.

Perhaps because this phrasing approaches an approval of abortion for any good reason whatsoever, the College's Executive Board approved a separate statement issued at the same time rejecting the idea that abortion should be approved in all cases of unwanted pregnancy or as a method of population control. Special agencies are suggested that would encourage women to complete an unwanted pregnancy already in progress and provide counseling to prevent another. The medical dangers of unlimited abortion are stressed. Thus the American College of Obstetricians and Gynecologists gave strong support to the A.L.I. proposal.

The First New Laws in America

By the end of the 1968 legislative sessions, five states had passed new, relaxed laws regarding abortion. Many other states were moving toward the approval of such laws, and some of the first relaxed laws were already being criticized as too restrictive. In this fluid situation, it is impossible to give a full account here of legal developments. However, examination and comparison of the laws passed in 1967 by Colorado, California, and North Carolina, and those passed in 1968 by Maryland and Georgia, reveal a number of interesting points about the state of the legal question.

The Colorado act of 1967 is a considerably modified version of the A.L.I. proposals.[248] The most important differences are the following:

1) The Colorado act defines "accredited hospital" more strictly (following the lines of the A.M.A.) and does not admit exceptions to the requirement of performance in hospital. This restriction makes it more difficult for medical practitioners working at the borderline of legal requirements to set up an abortion mill.

2) The Colorado act requires the consent of the parent or guardian of a girl under eighteen and of the husband of a married woman. The A.L.I. does not recognize the rights of other members of the family in this way.

3) The Colorado act uses the device of a three-member board of physicians on the staff of the hospital where the abortion will be performed. An abortion is "justified" only if such a board unanimously certifies in writing that one of the conditions similar to those mentioned in the A.L.I. proposal is fulfilled. Thus the prosecution is relieved of the impossible task of trying to

demonstrate that the one performing abortion did not *believe* what he and a colleague certify.

4) The Colorado act defines the justifying conditions more strictly than the A.L.I. proposal. Colorado requires not only a substantial risk of grave impairment to the mother's health or of grave defect in the child, but a likelihood of grave and *permanent* impairment or defect. Colorado also requires the certification of a psychiatric specialist in cases of abortion on the ground of mental health and a district attorney's certificate of probable cause to believe rape or incest in cases of abortion on those grounds.

5) The Colorado act contains a conscience clause, whereas the A.L.I. proposal makes no provision for conscientious objection to abortion. Colorado hospitals are not required to establish an abortion board, and if they do not, then no abortions may be performed in them. Moreover, individual physicians associated with a hospital and hospital employees are protected from any disciplinary or recriminatory action for refusing to participate in abortions provided they state in writing their conscientious objection to abortion on moral or religious grounds.

Colorado does not require reporting of legal abortions, and so various conflicting figures were published about the effect of the new law. A survey of *reported* abortions conducted one year after the law went into effect showed a 798 percent increase over the previous year—from 51 to 407. Only 24 of Colorado's 52 eligible hospitals had set up abortion boards, and 3 of these received no applications. The women were residents of Colorado in 68 percent of the cases. In 291 cases the reason given was mental health, in 47 cases fetal indications, in 32 cases statutory rape, in 23 cases the mother's physical health, and in 14 cases "forcible" rape. More than half the women, 226, had never been married; 43 had been divorced; only 138 were married at the time they were aborted.[249]

If these figures were typical of all the legal abortions performed in Colorado under the new law, the conclusion would be that "mental health" was the chief excuse but pregnancy among unmarried women the chief reason for the legal abortions encouraged under the new law. Although the state had not become an abortion center, as some opposed to the new law had feared, nearly a third of the operations were performed on non-residents. More non-residents would have been aborted if some hospitals had not turned them away. Also, because of complications in late abortion, one of the physicians who conducted the survey after one year's experience strongly urged that legal abortion should be limited to the first twenty weeks of pregnancy.[250]

The new abortion act passed by California in 1967 culminated more than six years of efforts. In 1961, the Assembly's Committee on Criminal Procedure held hearings on, but did not report, a proposal to relax the law which consisted in a merger of Packer and Gampell's proposal and that of the A.L.I. The Committee's staff then held hearings in San Diego in December 1962, and subsequently published a lengthy report highly favorable to the proposed

relaxation.[251] In fact, the report was an *ex parte* brief for abortion, using uncritically materials as old as Taussig's 1936 study and criticizing anti-abortion arguments. Similar bills were promoted in subsequent years, the chief proponent being State Senator Anthony C. Beilenson, who is from the Beverly Hills area.

The California act of 1967 is similar to the Colorado act in basing authority to abort on the findings of a hospital staff committee in a fully accredited hospital.[252] The California act, however, does not require consent by a parent or husband, does not permit abortion on the ground of defect in the child, and has no conscience clause. Moreover, the provisions of the California act in cases based on rape or incest are quite detailed; while certification by a district attorney is generally required, a board may approve abortion without such a certificate if the district attorney does not respond within five days or if the superior court, on appeal, overrules the district attorney's judgment. Another peculiar provision of the California act is that the abortion committee must have at least two members if the abortion will occur in the first thirteen weeks of pregnancy, at least three members if it will occur between the thirteenth and twentieth weeks, and that boards with only two or three members cannot approve abortions without unanimous consent. No abortion is to be approved after the twentieth week of pregnancy, which is approximately the half-way point.

The California act is not a model of clarity. A memorandum of the California Hospital Association, issued for the guidance of its members, noted:

> Terms such as 'substantial risk' and 'gravely impair the physical or mental health' are not adequately defined, and the decision as to the proper interpretation to be placed upon such is left to the sound judgment of the medical staff and the hospital administration.[253]

The California act itself does not require reporting, but a separate resolution of the legislature requires quarterly reports of abortion data (not including identification of the mother) to the State Department of Public Health. In the first six months of 1968 there were 2,117 applications for abortion approved and 207 rejected. Of those approved 92 were not performed; of those performed 1,777 (83 percent) were on the grounds of mental health.[254] Unofficial reports suggest that the mental health excuse is being abused. A year after the new law went into effect, medical and hospital costs for an abortion averaged between six hundred and seven hundred dollsrs. Some physicians were charging five hundred dollars for the operation, with a guarantee of getting abortion committee approval; some psychiatrists were reportedly charging one hundred dollars for a single visit and a letter certifying "mental health" grounds under the law. The attempt to define "mental health" in the law would seem to indicate that candidates for abortion would also be candidates for commitment to a mental hospital, but few aborted women were in mental hospitals. Reports indicated that "mental health" was being used as an excuse for abortions really

desired because of a prospective defect in the child—a ground the new law purposely did not include.[255]

The act passed by North Carolina in 1967 accepts the grounds stated in the A.L.I. proposal as reasons why abortion "shall not be unlawful.[256] In cases involving rape, a report must have been made to police within a week after the alleged rape. However, like Colorado and California, North Carolina does not accept the physician's *belief* as a sufficient defense; rather, the excusing conditions are effective only if the physician "can reasonably establish" them. North Carolina also requires the consent of a parent or guardian of a minor or incompetent woman, or the husband of a married woman. Three physicians, not necessarily an abortion committee, must certify the fulfillment of the conditions they believe to justify abortion. North Carolina's law is peculiar in forbidding abortion to non-residents except in emergencies endangering life. On the whole, the North Carolina enactment probably is the closest of the laws passed in 1967 and 1968 to the spirit and the letter of the A.L.I. proposals.

The Maryland act of 1968 is peculiar in several important respects.[257] After efforts to change the law had failed in 1967, the Maryland legislative council, which meets between regular sessions, took up the question and proposed to repeal the criminal law against abortion, so far as physicians would be concerned, which would have left the medical practice of abortion subject to regulation only under the medical practice act. In other words, abortion would have been regarded as any other operation. A bill to this effect was introduced. However, amendments in the House of Delegates restored to the medical practice act a reference to termination of pregnancy in violation of a special, new section—based on the A.L.I. proposals—as one of the grounds on which the Board of Medical Examiners might suspend or revoke a medical license. As drafted in the House of Delegates, the special section was entirely permissive; it presented the conditions as ones under which a physician might perform abortion, but did not exclude abortion under any conditions. Thus the section could not have been violated. The State Senate amended the bill, however, so that in its final form a licensed physician, while immune from criminal penalties so long as he performs abortions only in fully accredited hospitals, is subject to possible suspension or revocation of his license unless he complies with the law's terms.

In its application to physicians, the Maryland act provides for maternal and fetal indications in language close to the A.L.I. proposal, except that the condition is supposed to exist, rather than merely being believed by the physician to exist. The clause relating to pregnancy resulting from rape and incest has been modified to exclude incest and statutory rape, and the State's Attorney's certificate of probable cause to believe that the alleged rape did occur is required. In its application to licensed physicians, the Maryland act also limits abortion to the first twenty-six weeks of pregnancy unless the mother's life is at stake or the fetus is dead. Authorization by a hospital abortion review authority is required and no provision is made for extra-hospital abortion in

emergency cases, but the structure of the hospital review authority is completely unspecified. Annual reports of relevant data are required both to the State Board of Health and to the Joint Commission on the Accreditation of Hospitals. These reports, which do not include the patients' names, are public information.

The performance of abortion otherwise than by a physician in a fully accredited hospital as well as all forms of cooperation in such an act are still forbidden under Maryland law. The offense is a misdemeanor, rather than a felony, carrying a maximum penalty of three years in prison and a five-thousand-dollar fine.

The most remarkable feature of the Maryland law is its conscience clause—or, rather, section containing three clauses:

> No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.
>
> No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the state or any person.
>
> The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits.

The purpose of this rather complex clause is to try to insure that no one will feel compelled to perform or approve any abortion. No moral or religious ground is needed, and in this sense it is not a matter of "conscientious exception," but rather a question of "insurance of full voluntariness." The exclusion of civil liability was included especially because medical abortion was legitimatized—so far as criminal law is concerned—and placed under professional regulation alone. If abortion is acceptable medical practice, physicians are in danger of being held in default of their duty if they refuse to perform it, hospitals are in danger of being compelled to allow it, and clients of public welfare as well as inmates of state institutions are in danger of being pressured into consenting to it.

The Georgia act of 1968 permits an exception to the criminal law forbidding abortion in cases where a licensed physician performs it "based upon his best clinical judgment that an abortion is necessary" for reasons somewhat narrower than those stated in the A.L.I. proposal.[258] The ground of maternal health is limited by the phrase "would seriously and permanently injure." The ground of fetal defect is limited by the phrase "grave, permanent, and irremediable." Incest as a cause of the pregnancy is omitted from the list of grounds.

The procedural safeguards in the Georgia act also are somewhat stricter than in the A.L.I. proposal. The woman and physician must certify she is a resident of the state. The physician's judgment of grounds must be supported by that of two consultants, and all three must examine the woman separately. The majority of a hospital abortion board of at least three members, not including the physician who performs the abortion, must approve in advance, and the operation must be performed in a fully accredited hospital. Abortion on the ground of rape requires certification by a legal officer that there is probable cause to believe it occurred. The Georgia law requires full disclosure to the Director of the State Department of Public Health, who is to keep all records confidential.

The "conscience clause" in the Georgia act is similar to Colorado's: hospitals need not set up abortion boards and physicians or employees in hospitals allowing abortions can refuse to participate with protection from civil liability as well as from recriminatory and disciplinary action.

A peculiar provision of Georgia's act permits a solicitor general or anyone who would be related to the unborn child within the second degree of consanguinity to petition the Superior Court of the county where the abortion would be performed for a judgment declaring that the abortion would violate a consitutional or other legal right of the fetus. In a case of this sort, the pregnant woman and the physician who would perform the abortion will be respondents, and a judgment in the fetus' favor would include a court order forbidding abortion. This clause appears to be an interesting effort to meet the argument that abortion law relaxation violates the rights of the unborn.

Compared with the five new abortion acts of 1967 and 1968, Mississippi's revision of its law in 1966 was a minor amendment.[259] Abortion is permitted if the pregnancy is caused by rape as well as by necessity to preserve the mother's life. Maternal health and fetal defects were not added as distinct grounds for excusing abortion.

Comparing the new abortion laws, we may note that they are hardly uniform and that they are considerably less clear than the laws they replaced. Generally the A.L.I. proposal that legality be based on the physician's *belief* that there is a justifying condition has not been accepted; state legislators have sought a more objective criterion. Most of the laws also incorporate some form of abortion board and provide a procedure for certifying by a law officer in cases involving rape. None of the laws can be expected to make any significant inroad into criminal abortion; rather, the medical profession's monopoly on legal abortion is confirmed, and the size of this lucrative part of medical practice somewhat enlarged.

Maryland's law, which removes the medical abortionist who works in hospital from the scope of criminal law, probably is the most radical. It is hard to believe that the State Board of Medical Examiners will suspend or revoke a license for the performance of an act in itself not criminal unless the medical abortionist ignores procedural requirements or makes a regular practice of

abortion without any apparent reference to the conditions specified in the law. In other words, in practice the Maryland law will be as lax as the consensus of medical opinion permits.

The New Law in the United Kingdom

The 1967 abortion act, passed by Parliament for England, Wales, and Scotland, culminated concerted efforts extending over many years. Mr. Kenneth Robinson had made the first serious effort in 1961, when he promoted a bill rather similar to the A.L.I. proposal. The effort to relax the law was not repeated for several years. However, in the fall of 1964 a Labour Government came to power, and at that time Mr. Robinson became Minister of Health while Mr. Douglas Houghton, whose wife was to be active in the Abortion Law Reform Association, became coordinator of social services.

In November 1965, a bill was promoted in the House of Lords by Lord Silkin, which contained a social clause permitting abortion if the physician believed a patient's health or social environment made her unsuitable to take on the responsibilities of caring for the child. This clause was deleted before the bill was passed by the Lords in March 1966. The bill did not come under consideration in Commons because Parliament was dissolved. Meanwhile, a bill had been promoted in Commons that was rather similar to the American A.L.I. proposal, but it did not make significant headway.[260]

About the same time, in October 1965, the Board for Social Responsibility of the Church of England published its booklet: *Abortion: an Ethical Discussion.* The conclusions of this discussion were based on the concept that the unborn is neither wholly excluded nor wholly included in the area of human life. It is "potential life," to be protected in general but not in exceptional cases where the life or well-being of the mother is seriously threatened. On this principle, a law permitting abortion to protect the mother's life, and present and future health in view of all actual and probable future circumstances was considered acceptable. Abortion precisely for eugenic or humanitarian (rape) reasons was excluded, and the practice of abortion for socioeconomic reasons or on demand was also ruled out.[261] In the House of Lords sit Bishops of the Church of England who tried to defend this compromise position in later debates. It is interesting to compare the abortion act passed in 1967 with it, and to note how little influence the Church of England's position had on the outcome.

In July 1966, Mr. David Steel, a liberal (third party) member of Commons promoted a bill somewhat similar to that which Lord Silkin had previously piloted through Lords. Mr. Steel could not have proceeded far except that his effort was unofficially supported by the Labour Party Government, which provided the time needed to overcome a filibuster and which apparently provided the political pressure on the Lords that prevented moderating amend-

ments from being incorporated in the bill after it finally passed Commons in July 1967.

From the first, Mr. Steel's bill contained a social clause justifying abortion if a woman's capacity as a mother would be severely overstrained if she had a child (or another child). The provisional debate on the bill in 1966 lasted nearly five hours and ended with a vote of 223 to 29 in favor of sending the bill to committee for reworking with a view to approval.

Encouraged by the extent of support, promoters of the bill made few compromises in the committee stage. One of the few was the addition of an extremely weak "conscience clause." When the bill was taken up again in June and July 1967, the opponents' effort to obstruct it by filibuster was defeated by the scheduling of night sessions, the last of which was open-ended and lasted more than thirteen hours.

After passage by Commons, consideration in Lords at first led to some significant and moderating amendments, the most significant of which was omission of the social clause as it then stood. However, under threat of retaliatory action by Commons, the Lords backed off. When the bill was taken up again in October, after their summer recess, the Lords restored the social clause. What was more significant, perhaps, is that with almost no discussion the Lords inserted a formula making explicit the degree of risk required to justify abortion: risk in continuing the pregnancy "greater than if the pregnancy were terminated." The proponents of the bill in Commons had no difficulty accepting this terminology, which makes the justification of abortion depend on the same sort of medical evaluation that controls any other surgical procedure, since no surgical operation is justified unless the risk of performing it is less than the risk of omitting it.[262]

The final text of the abortion act of 1967 became law with the Royal assent on October 27, 1967.[263] It went into effect six months later. Formulated as an amendment to the existing anti-abortion law, the main provisions are expressed as follows:

> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or,
>
> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> (2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Other provisions require that the abortion be performed in a government approved hospital, except in medical emergencies, when the requirement of a second opinion also is waived. Reporting to a government agency is required. The law also applies to U.S. military hospitals, to physicians with the American forces, and to pregnant women who would normally be eligible for treatment by such physicians or in such hospitals. By keeping in force the Infant Life (Preservation) Act of 1929, the 1967 Abortion Act limits abortion to the first twenty-eight weeks of pregnancy.

The "conscience clause" frees anyone who conscientiously objects from legal duty to participate in abortion, but under two conditions. First, in any legal proceedings the burden of proving conscientious objection rests on the person claiming it. Second, the exemption does not apply if the abortion is "necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman."

The central provisions, quoted above, do not include the origin of pregnancy in rape as a separate ground. That is because the proponents of the bill agreed this ground was covered by the broad provision referring to the woman's health. This provision is so broad that one might argue that every pregnancy meets the test provided abortion is expertly performed in the early weeks, since such abortion has been claimed to have less inherent risk than natural childbirth.[264] In any case, two physicians should always be available to give the opinion that the medical risks favor abortion, and that is all the law requires.

The additional ground allowing the health of existing children to be taken into account is the final form of the "social clause." Actually this clause and the separate "eugenic clause" need hardly be invoked, for they would only come into play when the danger of abortion to the mother was significant—e.g., if probable defect in the child were learned of late in the pregnancy. The "social clause" does, however, provide an impetus to the use of abortion to restrict the size of families living in poverty or in marginal economic circumstances. The social problems unsolved by the welfare state's economic planners will be nipped in the bud by its national health service. The added provision indicating that the woman's "actual and reasonably foreseeable environment" may be considered in determining risk also lends impetus to abortion on social grounds.

The "conscience clause" obviously rests on the assumption that abortion is to be considered equivalent to any other operation as part of regular, medical practice—which, as we have seen, is nearly the practical effect of the act. For although consultation and reporting are required in cases of abortion, and not for all operations, the criterion of weighed risk is made the same for abortion as it would be for any surgery. In this situation, participation in abortion becomes the normal duty of medical personnel. Although conscientious objection is allowed for, it is treated as a merely tolerable exception to duty, and the burden of proof is therefore placed on the one claiming a conscientious

objection. Instead of physicians facing a threat of criminal law for performing abortions, the new act places them in jeopardy of civil suit for refusing to perform them. And while the erstwhile criminal abortionist was at least given the benefit of the law's presumption that he was innocent until proven guilty, the present conscientious objector to abortion, who may well regard it as the moral equivalent of murder, is assumed to be guilty of dereliction of duty unless he can prove his excuse. And no excuse is permitted in the type of abortion that the consensus of the medical profession regards as truly warranted on strict medical grounds.

The Abortion Act of 1967 went into effect April 27, 1968. Early reports indicated that abortions might be expected to total 30,000 to 35,000 in the new law's first year, and that about 40 percent were being carried out in private nursing homes rather than in National Health Service Hospitals. Public facilities were over-crowded; private physicians were receiving many foreign candidates for abortion as well as some of the overflow from the Health Service in addition to their normal practice.[265]

The *New York Times* reported the consequences after the law was in effect for only four months. The Abortion Law Reform Association was promoting the establishment of abortion clinics to handle the mounting demand. At the same time, one London specialist was taking forty cases per week and charging a standard fee equivalent to 360 dollars per case. Allowing two weeks each year for vacation, that would amount to 720,000 dollars annual income, although the physician in question said he did some abortions for nothing and charged a minimum fee in other cases. As in California and Colorado, the commonest excuse in London was the mother's mental health, and the controversial social clause was, as expected, little used.[266]

Abortion on Demand—Japan's Experience

Faced with the problems of criminal abortion and population control, Japan's Diet in 1948 passed the Eugenic Protection Law. Setting aside the previous criminal law on abortion, this new law as amended in 1952 permits designated physicians to perform abortion at discretion without consultation when they believe the mother's health might be affected seriously by pregnancy or delivery from either the physical or the economic viewpoint. The operation need not take place in hospital, but the consent of the woman and spouse is required. Operations are supposed to be reported to the government.[267]

More than 19,000 physicians were designated by local medical associations to perform abortions.[268] The number of live births declined from 2,696,638 in 1949 to 1,730,692 in 1955—a decrease of 965,946. At the same time reported abortions increased from 246,104 in 1949 to 1,170,143 in 1955—an increase of 924,039. By 1965 live births had rebounded slightly to 1,818,429 while reported abortions had dropped off from the 1955 peak to 843,248.[269]

The correspondence between the reported decline in births and increase in reported abortions is a matter of objective statistics. But this correspondence in reported figures suggests—without demonstrating—that the rate of illegal, and hence unreported, abortions may not have been altered by the extreme relaxation of the law. For since the birth-rate is not affected whether an abortion is performed *legally* or not, the rapid drop in the birth-rate suggests that the increase in legal abortions was really an increase in abortions as such—that the rate of illegal abortions may have remained about what it had been.

Thus Gebhard and his colleagues, who were hardly unsympathetic to legalized abortion, report with apparent acceptance the estimate that there remain 1,000,000 illegal abortions per year in Japan.[270] Dr. Wesley T. Pommerenke, who had recently visited Japan, reported to the 1955 Planned Parenthood Conference on abortion that the man who licenses abortionists in Yokohama told him between one-half and two-thirds of the abortions performed there were unreported.[271] A statistical study of reported figures from various prefectures also supported the view that there remained as many illegal as legal abortions under the relaxed law.[272]

A 1965 survey conducted by the Japanese association for maternal welfare revealed something about the grounds on which legal abortions were performed. According to the reports of physicians, 632 per thousand were for socioeconomic reasons, 265 per thousand were for medical reasons, 95 per thousand were because the pregnancy resulted from illicit relations, only 5 per thousand were because of "eugenic" reasons (fear of fetal abnormality); and only 3 per thousand because of rape.[273] The stated rate of "medically" induced abortions probably should not be taken seriously. Dr. Pommerenke reported that if a medical indication were asked for, it was sufficient that the woman say she had been vomiting, and this was regarded as a toxemia.[274] These statistics on the grounds for which abortions are performed therefore actually reveal the extent to which abortion is simply an alternate method of birth control, a point further borne out by the studies of those who have tried, with only limited success, to introduce contraception to Japanese families as a substitute for abortion.[275]

It is very difficult to tell how great are the unfavorable medical consequences of abortion in Japan. Gebhard and his colleagues report a variety of studies showing rates of "slight or severe complications" ranging from 8 percent to 47 percent.[276] Dr. G. Nozue, speaking at the 1967 Conference of the International Planned Parenthood Federation, cited four studies to show that the physical effects of legal abortion were declining. However, the two most recent of the studies he cited were from 1954. One of them showed a mortality rate of 87 per 100,000; the other, only 7 per 100,000. However, the latter study also showed a rate for direct injuries—e.g., perforation of the uterus, laceration of the cervix—of 3,800 per 100,000; the former study showed the much lower rate of 120 per 100,000.[277]

Given such variations, one wonders if any of the figures are of real value. One thing is certain, however, and that is that Japan's 1965 maternal mortality rate of 3.2 per 100,000 females of all ages compares unfavorably with the U.S. mortality rate of 1 per 100,000. At the same time, while the Japanese male suicide rate was only slightly higher than that in the U.S. (17.3 compared to 16.1), the female suicide rate was more than twice as high in Japan (12.2 in Japan; 5.9 in the U.S.). Of course, there are many factors involved in the suicide rate, but it may be significant that the peak years for American women to commit suicide are 40–49 years old while for Japanese women the highest numbers of suicides are in the 20–29 age group.[278]

Perhaps the largest segment of bad effects are accounted for by illegal abortion, which—we we have seen—still flourishes despite the introduction of abortion practically on demand. But that only raises the question why the Eugenic Protection Law has not succeeded in wiping out illegal abortion. That was, after all, the primary excuse for passing it. The answer seems to lie in the economics of the medical profession. On the one hand, physicians themselves may find it more profitable to engage in illegal abortion, because of income taxes. On the other hand, non-designated physicians, midwives, and simple amateurs still find it profitable to try to undercut the qualified practitioner.[279]

It has often been said that abortion succeeded in cutting population in Japan because the Shinto and Buddhist religions do not reject it; indeed, in the past infanticide (*mabiki,* literally "thinning") was an old accepted means of limiting family size.[280] Nevertheless, a 1965 survey, reported at the 1967 Conference of the International Planned Parenthood Federation, indicated that 35.2 percent of those who had an abortion were sorry for the aborted baby; 28.1 percent said they felt guilty; only 18 percent were completely indifferent. A small survey among college girls, reported at the same meeting, showed that 25 percent expressed no view on the law permitting abortion and 25 percent expressed a view in line with the existing law, but 50 percent felt the law should be changed to forbid abortion except for medical reasons.[281]

By the mid-1960s, an organized effort to tighten the abortion laws had developed. Led by Mr. Shinozaki, Chief of the Section on Quality of Population of the Japanese Welfare Ministry, the Movement to Treat Life Respectfully was uniting the efforts of Buddhists, Shintoists, Christians, and others who were dissatisfied with the lax abortion law. The members of one religious group, the Seicho no Ie, were especially active; in 1964 they collected 1,800,000 signatures on a petition condemning abortion and seeking a change in the law, and members of this group prodded the relatively insignificant Catholic Church in Japan to join the fight against abortion.[282]

While the law has not been tightened, reported statements by government officials indicate that the attitude toward abortion has shifted toward the negative. For example, the Minister of Welfare has been reported as calling abortion an "evil practice" that is "eroding the physical and moral health of

our nation." The Chief of the Children's Bureau of the same ministry has alleged that in an "abortion age" children who do manage to get born experience a lack of parental love, with bad psychological and social effects.[283]

Perhaps behind the concern of government officials has been long-term implications of the drop in birth-rate following legalization of abortion on demand. The net reproduction rate is a gauge of the extent to which a woman is providing her own replacement in the next generation. In the pre-war years, Japanese women were more than replacing themselves, and the population was growing. The same was true immediately after the war. But with the legalization of abortion the net reproduction rate began to fall, and in 1956 it fell below unity—that is, below the level of replacement in the next generation. And the rate continued to fall during the late 1950s and into the 1960s. Although the population was still increasing, this was a result of a higher birth-rate in the previous generation together with a declining death-rate. As a result, the entire population was growing older and projection of the effect of the depressed reproduction rate indicated the population would dwindle away in three to four centuries.[284]

Of course, such a projection is no more valid than the oversimplifications that try to lend substance to the "population explosion" by projecting upward trends for several generations. However, the Japanese themselves were sufficiently disillusioned that Dr. Yoshio Koya, Chairman of the Western Pacific Division of the International Planned Parenthood Federation, presented a paper before the 1965 World Population Congress as a warning to those who "would legalize abortion, or enlarge the conditions under which the operation may be permissible." He pointed to the persistence of the abortion habit. The report of the Church of England's committee, while it did not reject abortion absolutely, remarked in the light of Japan's experience:

> To build up a habit of mind which regards abortion lightly as an easy remedy for an adverse situation, personal or social, might be, in fact, to do people and society a grave disservice by addicting them to another social disease.[285]

Considering the great differences between Japanese and English-speaking societies, we cannot judge the extent to which the Japanese experience can provide a forecast of what we might expect if abortion on demand were legalized here. However, the possibility that a very large number of legal abortions might be added to the present quantity of illegal abortions should not be simply brushed aside. The English-speaking countries have no tradition of infanticide or socially accepted abortion as methods of population limitation, as Japan did. Moreover, contraceptive methods of birth control, especially the newer methods, are much more established in the English-speaking countries. However, our present illegal abortions arise most heavily from the same social groups that practice contraception most enthusiastically. And in arguing that abortion should be socially acceptable, the new morality is undermining the western traditions that previously rendered both abortion and infanticide unacceptable as means of family limitation.

Abortion on Demand as the Legal Goal

Undoubtedly there are proponents of relaxation of the abortion laws who aim at nothing more than legalization of abortion in a few difficult cases that have gained widespread sympathy. In general, however, the goal of the campaign to relax abortion laws is the elimination of these laws. Limited relaxation is a step toward the final goal.

Even if unlimited abortion were not the objective reformers had consciously in view, the partial relaxation of the laws would strongly tend toward the ending of all restrictions. On the subjective side, once abortion is accepted psychologically as a common, if unpleasant, medical practice and accepted socially as a decent and conventional solution to certain problems, there is little difficulty in extending the grounds on which abortion is permitted legally. On the objective side, once the principle by which limited abortion is justified is accepted, there is no barrier to unlimited abortions that a libertarian society will accept. For the justification of relaxed laws permitting limited abortion is based on the negation of the right of the unborn to life, and if there is no such right, then there is no substantial public interest in limiting abortion, unless that interest be in medical safety or population maintenance. But a libertarian society will provide for these factors by regulating medical practice and by incentives to have sufficient children rather than by prohibiting abortion.

The fact is, however, that most who advocate relaxation of abortion laws are actually aiming at unlimited abortion—that is, they wish abortion to be regarded as any other elective surgery, to be performed at the woman's request by any competent physician with no requirements about grounds, consultation, reporting, nor any other restrictive requirement.

This position has been promoted most vigorously for the longest time by the Society for Humane Abortion, Inc., a San Francisco based organization founded in 1965 by Patricia M. Maginnis. Newsletters of this organization tell of its activities in support of elective abortion. The new California law was bitterly attacked under the headline: "Bielenson Bill passes—Public Is Deceived." Since only a small percentage of all abortions would meet the law's standards, the Society for Humane Abortion regarded it as highly unsatisfactory. Fearing that this limited relaxation of the law would lessen pressure for total permissiveness in the abortion field, the Society condemned the new law as deceitful and dangerous.

Miss Maginnis herself has gone even further than her first organization, for she has distributed lists of abortionists (mostly in Mexico) and has taught groups of women how to perform self-abortion. She and a co-worker set up a second organization, Association to Repeal the Abortion Laws, which opposed the Bielenson bill and which raised funds to pay legal expenses arising from the trial of Miss Maginnis on criminal charges.

Another California organization, Legalize Abortion, is based in Los Angeles. This group also opposes any limited relaxation. Elaborate directions for setting up a local committee to legalize abortion have been distributed; a voter initiative is the proposed method for repealing the abortion laws. This organization makes a very blunt request for contributions, and asks contributors to designate which of several dozen alternative projects is to be supported. In this way contributors are said to make the organization's policy decisions.

Such organizations may seem far removed from the American Law Institute, but the differences are more with regard to strategy than with regard to ultimate aim. In the commentary to the A.L.I. proposal, the arguments given in favor of abortion extend far enough to justify all illegal abortions if any are justified. The only argument given against indiscriminate abortion is physical and psychic health hazards, but this argument is negated in a footnote by a quotation from Glanville Williams.[286] Prof. Louis B. Schwartz, a co-reporter of the A.L.I. proposal, stated: "In recommending a moderate liberalization, the American Law Institute simply took realistic account of the intensity of feeling on this issue. The results of experience with the new law can shape later legislative action."[287]

Mrs. Alice Rossi, in reporting the 1965 survey of the National Opinion Research Center, took a dim view of the A.L.I. proposal as a goal, but a more favorable view of it as a step toward full permissiveness. She pointed out that while abortion is generally simply a birth control measure, neither the A.L.I. proposal nor public opinion was ready to approve abortion except for limited conditions that involve something more in the way of an excuse than mere birth control. Yet restrictive legislation, as Scandinavian experience proves, does not solve the problem of illegal abortion. Mrs. Rossi's position is that abortion should be done at the woman's request, regulated only to the extent that other surgery is regulated by medical practice laws. She also believes that taking this position, even though it is contrary to public opinion, is the best way to win first-step legislation as a compromise, while holding to the goal of abortion as a feminine right necessary to backstop contraceptive failures.[288]

Mrs. Harriet Pilpel, an attorney who has served as legal counsel for the Association for the Study of Abortion and as a director of the American Civil Liberties Union, takes a very tolerant attitude toward all proposals to relax abortion laws. She has testified on behalf of limited relaxation before hearings of the New York State Assembly. She favors regarding abortion as any other surgery. Her peculiar contribution has been to urge that an effort be made to relax the laws without legislative action by medical practice and judicial interpretation. Arguing by analogy with Britain's Bourne case and with various American cases that ended barriers to contraception, Mrs. Pilpel points out that physicians who operate openly with the support of medical colleagues have not been prosecuted, though they often violate the letter of the law. If this practice were pressed far enough, prosecutions might result, but the laws

might then be greatly relaxed by interpretation or even nullified by a judicial declaration that they are not constitutional.[289]

The year 1968 marked a turning point in the pro-abortion movement, for during this year a number of powerful, nationwide organizations spoke out in favor of completely free abortion. The American Civil Liberties Union, obviously partly influenced by Mrs. Pilpel's advocacy of the position, argued that existing laws violate constitutional rights. The A.C.L.U. statement (March 25, 1968) asserts that the woman and any licensed physician have a right to make the abortion decision up to the time the fetus becomes viable. On this basis the A.C.L.U. asks that all laws forbidding a licensed physician to perform an abortion be abolished.[290]

Before the year's end, such varied organizations as the Unitarian Universalist Association, Planned Parenthood–World Population, and the American Public Health Association had fallen into line with the A.C.L.U. position.

For Planned Parenthood–World Population, the endorsement of abortion "as a back-up medical technique to omitted or failed contraception" marked a reversal of the traditional declared attitude of the organized birth control movement. Basing itself on the premise that "it is the right and responsibility of every woman to decide whether and when to have a child," the Planned Parenthood–World Population statement concludes by recommending "the abolition of existing statutes and criminal laws regarding abortion, and the recognition that advice, counseling, and referral with regard to abortion is an integral part of medical care."[291]

The American Public Health Association statement is similar in arguing from the acceptance of birth control to the need for abortion. However, the A.P.H.A. statement also alludes to "adverse health effects of illegal abortion." Moreover, the assertion is made with regard to birth control: "This personal right has been supported and enhanced through governmental action at all levels."[292] Though not explicitly applied to abortion, the reference to governmental action in this context is a portent of what to expect if abortion is completely legalized.

Also during 1967 and 1968 there were several large conferences on abortion and at each of them there were proponents of abortion on demand.

The conference in Washington, D. C., in the fall of 1967 sponsored by the Harvard Divinity School and the Joseph P. Kennedy, Jr. Foundation was not on the whole oriented toward elimination of abortion laws. If anything, this conference tended toward some sort of compromise, for it brought together a good deal of factual information and diverse viewpoints in an irenic atmosphere.

However, the Rev. Robert F. Drinan, S.J., Dean of the Law School at the Jesuit operated Boston College, presented a paper at the Harvard-Kennedy Conference in which he espoused the position that legalization of abortion on request during the first twenty-six weeks of pregnancy would be preferable to legalization along the lines of the A.L.I.'s proposals. In taking this position

Drinan reversed his views of less than a year before when he had urged a strategic compromise permitting limited legalization as preferable to general legalization.[293]

The reason given for the reversal was that Drinan had come to believe that the law's purity in respect for life would be more seriously tainted by conniving with the decisions of parents and physicians in a procedure of "justified" abortion than by withdrawing all protection from the unborn (until the end of twenty-six weeks of pregnancy).[294]

At an April 1968 conference at University of Chicago, a number of speakers favored repeal of all abortion laws. One presentation along these lines was made by Rev. Don C. Shaw, an Episcopal Canon and director of Episcopal Charities in Chicago. Canon Shaw admitted that the A.L.I. proposal served a purpose in opening public discussion and debate, but he pointed out the fallacy of the position: "Those espousing the legalizing of 'therapeutic' abortions apparently *assume* that abortion is *bad,* but they fail to explain the nature of the evil." He explained that this position is really a matter of strategy and that most of its proponents "privately espouse the repeal position." Canon Shaw also argued that the medical profession is inconsistent in approving abortifacient devices such as the IUD while advocating legalization of abortion only on limited grounds.[295]

At the Colloquium on Abortion held at Louvain University, Belgium, in May 1968, few who declared a position on the legal issues favored abortion on request. However, a lawyer, André Perreault of Montreal did argue in favor of laws that would permit women to defend their bodily integrity and exercise responsible parenthood even to the extent of allowing abortion of non-viable fetuses, which M. Perreault considered only potentially human. Though not favoring abortion as such, he considered it necessary that the law adapt to the conditions of the time.[296]

Another international conference was held at Hot Springs, Virginia under the sponsorship of the Association for the Study of Abortion in November 1968. A number of participants, perhaps the majority, favored complete legalization. John D. Rockefeller, 3rd, long a supporter of a public policy of contraception, was keynote speaker at this conference. Mr. Rockefeller urged the morality of abortion as a lesser evil—particularly as a lesser evil than the unwanted child.

With regard to the law, he outlined two approaches. One, modification, he deemed acceptable only if the mental health provision is broad enough to allow abortion whenever the pregnancy causes serious mental distress. Among factors that cause such distress he listed "the prospect of illegitimacy, the size of the family, the health of existing children, the economic condition of the family." The other approach, outright elimination of abortion laws, is the one Mr. Rockefeller favored, because "it would give us a true basis for eliminating the social evils I have discussed."[297]

In February 1969 another conference was held in Chicago to organize a new National Association for Repeal of Abortion Laws, to be headquartered in New York. Planned Parenthood–World Population, American Civil Liberties Union, American Public Health Association, American Baptist Convention, and the Unitarian Universalist Association were among the approximately forty organizations that sent over three hundred representatives to this meeting. The conference resolution argued from the premise "that to compel a woman to bear a child against her will violates her basic human rights" to the conclusion that abortion should be regarded by the law as any other medical procedure.[298]

Abortion and Public Policy

A number of signs have appeared which indicate that repeal of abortion laws would be quickly followed by the use of voluntary—and perhaps even compulsory—abortion to fulfill the goals of public policies of population control and selection.

For example, an entire issue of a periodical published by the Population Council, of whose Board of Trustees John D. Rockefeller, 3rd is Chairman, was devoted in February 1969 to the topic, "Beyond Family Planning." The question treated was what is to be done to limit population "beyond present programs of voluntary family planning." Among proposals considered are liberalization of induced abortion and non-voluntary abortion of all illegitimate pregnancies. In the evaluation of the proposals, it is concluded: "Legalization of abortion would almost certainly have a measurable effect, but acceptability is problematic." However, it is also pointed out that moral tolerance of proposals is relative to the view people take of the seriousness of the situation. Moreover, there is a special value in proposing extreme measures, since less extreme ones then seem moderate: "Finally, it is also worth noting that more extreme or controversial proposals tend to legitimate more moderate advances, by shifting the boundaries of discourse."[299]

A political-action-oriented propaganda organization, Campaign to Check the Population Explosion, has made extensive use of newspaper advertisements with the slogan: "Famine stalks the earth." In a pamphlet sent to those who write for further information, this organization includes abortion as a method of population limitation. Its effectiveness in Japan and the Communist countries is pointed out, and Dr. Tietze's opinion that legalized medical abortion is safer than childbirth is balanced against the dangers of secret abortions.

Interest in the possibilities of abortion as a birth control technique is not limited to private organizations. A 1966 advisory report prepared for the Children's Bureau of the U.S. Department of Health, Education and Welfare by researchers of the Hudson Institute called attention to abortion: "It should also be mentioned that abortion and sterilization are also means of birth control. Therefore, any liberalization of abortion or sterilization laws or prac-

tice might have an appreciable effect on the unwanted birth rate."[300] The report is optimistic that with expanded government birth control programs "a large segment of the ineffective planning group among the poor may soon be reached."[301] Although no definition of "unwanted birth" is given, the report estimates that in 1960 seventeen percent of white births and thirty percent of non-white births were "unwanted." But with more effective birth control, by 1975 "a further reduction in the proportion of children of uneducated mothers, and in the proportion of nonwhites in the population, can be expected."[302] The report points out that an anti-implantation (abortifacient) pill probably will be the most significant new birth control method of use in the reduction of illegitimacy.[303]

The Hudson Institute report did not *advocate* abortion as a method of government sponsored birth control; the report merely pointed to this possibility. By the fall of 1966 the Department of Health, Education and Welfare was ready to begin sponsoring a series of regional meetings on planning. The first such meeting was a Conference of Appalachian States at Roanoke, Virginia. Dr. Robert W. Jessee, Director of the Division of Local Health Services of Virginia's State Department of Public Health, spoke at this meeting. He advocated legalization of abortion as "a logical and necessary expansion of the thriving program of population control."[304]

By 1968 there were increasing signs of government interest in abortion as a method of birth control. A striking example was a paper on abortion written by Dr. Alice Rossi for the U.S. Department of Labor's Citizens' Advisory Council on the Status of Women. This paper reached a conclusion, publicized as the recommendation of the Council's task force on family law and policy, which predictably coincided with Dr. Rossi's private view—that laws making abortion a crime should be repealed. The basis of this conclusion is that abortion is an alternative method of contraception or at least a necessary backstop to other contraceptive devices. Legalized abortion is promoted as a desirable public policy on the grounds that it will help limit population, that legalization will prevent the bad medical consequences of illegal abortion, and that uninhibited abortion is needed to fulfill a woman's right to control her own reproductive behavior. The political strategy urged by Mrs. Rossi would depend entirely on the claim that abortion is a "fundamental human and constitutional right" and that there should therefore be "no pressure or control from government to either have or not to have an abortion."[305]

There is some reason to doubt that if abortion were legalized there would be no pressure to use it. Mrs. Rossi herself cites the opinion of demographers who hold that it is *wanted* children, not only unwanted ones, who constitute "excess" population. When government sponsored contraception programs were going into effect, many assurances were given that the service would be strictly voluntary on the recipient's part. Yet during a few months in 1967 one newspaper, *The Washington Post*, which is very sympathetic to such programs, reported abuses on three distinct occasions. A feature story on District of

Columbia birth control programs warned that "some well-meaning poverty program and welfare workers are most guilty of" pressuring people "to get birth control devices rather than let them make their own decision."[306] A few months later, a talk by Mrs. Ruby Evans, a local U.P.O. official, was reported under the headline: "UPO Official Raps Forced Use of Pill by Teen-Age Girls."[307] Within a week there was another story about Mrs. Evans: "UPO Official Is Fired for Birth Control Talk."[308] A few months later, Judge Perry G. Bowen of Prince George's County, Maryland, a Washington suburb, was reported as ruling that mothers of two or more illegitimate children are guilty of neglect solely because the children were illegitimate. The Judge threatened that women who do not learn and practice methods of birth control would risk losing their children.[309]

The interest of the United States government in abortion as a method of birth control is not limited to the domestic scene. A spokesman of the Agency for International Development explained this governmental agency's strategy in a brief statement published early in 1969. Repeal or liberalization of abortion laws is an integral part of a comprehensive family planning program, for population has been effectively limited in countries where women have access to abortion as well as to contraception. Hopefully, with freely available abortion coercive measures will not be needed, although the possibility of compulsion in the future is not ruled out.[310]

Of course, many would argue that A.I.D.'s strategy for reducing births will not work, because legalization of abortion does not—so they say—increase the numbers of abortions. Mrs. Rossi, for example, argues that "it has been found that the number of abortions remains relatively constant no matter what the law provides."[311] However, Mrs. Rossi's view seems at odds with the Japanese experience; the evidence we reviewed above surely indicated that the total number of abortions increased with legalization, for although illegal abortion may not have been decreased, the large increase of legal abortions corresponded to a reduced birth-rate. The effect of laws against abortion is also shown by the result of Rumania's switch from a very free abortion policy (which brought with it a dangerously low birth-rate) to a restrictive policy. The Communist government's change of policy, paralleling that by the Soviet Union in 1936, was certainly effective, for the Rumanian birth-rate rose from fourteen per thousand in the third quarter of 1966 to thirty-eight per thousand in the third quarter of 1967.[312] Legal abortion can be an effective method of birth control and anti-abortion laws are an effective restraint upon the practice of abortion.

Conclusion

In this chapter we have examined the history of anti-abortion laws and the movement for change to the extent that these data illuminate the state of the present legal question. Each of the various alternatives has its own context,

and we have seen enough of the context to see more clearly what is meant by any proposal for change.

The statutory laws forbidding abortion except to save the life of the mother originated in the nineteenth century. They represented the consensus of opinion at the time; this consensus had roots in the religious tradition but it was secular public opinion rather than theology that shaped these laws.

We can see the roots in religious tradition in the fact that the anti-abortion laws, along with laws against infanticide, were based on a concept of the inviolability of innocent human life that is part of a western liberal conception of human dignity. This conception is the secular residue of the Judeo-Christian religious tradition. If the U.S. Constitution and Declaration of Independence are not religious documents—and they surely are not—they are nevertheless rooted in the same religious tradition.

The immediate origin of the anti-abortion laws in secular public opinion rather than in theology is shown by the fact that these laws were a reflection of ethical medical practice at the time. Christian moral teaching was not clear on whether fetal life in the early months should be regarded as "ensouled"; abortion was seriously immoral, as was contraception, even if no person were killed. But secular public opinion, basing itself on increasing biological knowledge, embraced the view that each individual life develops continuously from conception onward. At the same time, in cases where physicians believed abortion necessary to save the mother's life they resorted to it, and the laws sanctioned this practice without regard to theological opinions about it.

The chief alternative to the restrictive laws is the radical possibility of permitting abortion on the same basis as any other method of birth control. The only restrictions are those imposed by medical safety—that the operation be done competently and not done if it would be too dangerous. This alternative was first adopted in the U.S.S.R. under Lenin. The rationale for this policy was that it furthered socialist equality and feminine emancipation. Atheistic humanism brought its own ideology of human dignity and freedom to bear upon marriage and the family, sex, and innocent life. The result was to subordinate all of these to the needs of the larger society. Thus restrictive divorce and anti-abortion laws were reinstated, then reversed again, as conditions changed and the planners set different quotas for the production of human beings.

The new socialist morality was propagated between 1921 and 1936 through such organizations as the Sexual Reform League. The anti-religious basis of the Communist ideology carried over into bitter attacks upon traditional humanistic morality. Because western secular morality had roots in a religious tradition, those who sought to destroy the liberal humanism of the west took every opportunity to ridicule the "theological morality" of sex and innocent life.

To point this out is by no means to make some paranoid, McCarthy-like allegation that the movement to permit abortion on demand is a Communist plot to subvert the morals of the "free world." Countries such as Great Britain

and the United States seem to be quite self-sufficient in carrying out the "liberalization" of popular attitudes and public policies in these areas. However, it is true to say that the historical roots of the new morality's attitude toward abortion are to be found in the anti-religious humanism which first gained political domination in Soviet Russia. Just as true as to say that the roots of the older morality's attitude toward abortion are to be found in the religious humanism which was still politically effective, though in a secularized form, in the pre-new-morality world of Europe and America. Moreover, it is just as false to say that those who reject abortion on request are trying to impose a theological ethics on our pluralistic society as it is to say that those who promote abortion on request are trying to impose a socialist ethics on our pluralistic society.

The only countries that have so far fully and openly followed the Soviet example have been Communist nations of Eastern Europe and Japan. Japan, of course, did not have the western ideal of respect for individual human life; abortion and infanticide were traditional methods of birth regulation. In all of these countries, complete permissiveness concerning abortion was much more a matter of economic expediency than of libertarian principle.

Where the most extreme policy has been followed, there always has been as excuse that legalization would eliminate illegal abortion and its bad public health consequences. But even the most unrestricted policies have not eliminated illegal abortion, and many reports suggest that the conditions of legalized abortion have seldom been as perfect as proponents said they were. Thus there was some opposition to abortion among responsible medical men in the Soviet Union in the early 1930s and there has been a similar movement in recent years in Japan.

The various reversals of policy have demonstrated that drastic changes in the law do alter the total number of abortions and so affect the birth-rate. The fact that a reimposition of restrictive laws after a period of very free abortion has led to a drastic change in birth-rate certainly shows that laws against abortion are not without effect.

Underlying the abortion policies of the Communist countries and Japan is the assumption that the state need protect and foster individual lives only insofar as those lives are valuable to the purpose of the community. This premise certainly can be formulated in more or less absolute fashion. In its widest formulation, it would lead to the compulsory extermination of all useless individuals. In a narrower formulation, it may lead to withholding the care and protection of the society from those who cannot be dealt with by society as separate individuals. Since the fetus, prior to viability, is beyond the reach of bureaucratic management (except by dealing with its mother), public policy can permit abortion at the mother's request unless population must be increased.

It is surely not unrealistic to notice that current promotion of a radical policy in favor of abortion in the United States manifests the classic ambiva-

lence. On the one hand, the policy is promoted as a libertarian measure. A woman must be free of "compulsory pregnancy." But on the other hand there is some evidence that if abortion were legalized it would become an important element of population control. Its greatest impact would not be on the upper classes, which already use contraception effectively and obtain abortion when desired, but on the lower classes, where illegitimacy could be limited, the differential birth-rate lessened, and welfare rolls shortened.

Between the very restrictive policy and the very permissive policy is the possibility of a compromise plan. Abortion is declared illegal in general but exceptions are made for "justifying reasons" or "indications."

The earliest compromise legislation was in Latvia, Iceland, Denmark, and Sweden. All of these countries had accepted a limited version of socialism. All had experienced the influence of Lutheran moral thought, which made it easier to accept the idea that one might be obliged to do an evil, providing the evil is necessary, without subverting the principle by which the evil is condemned. The importance of *authorization* derived from the Christian requirements for justifiable killing—e.g., capital punishment. Thus these policies assumed that abortion did kill a nascent human life, but sanctioned that killing for good and sufficient reasons accepted under public authority.

The evident dependence of this sort of compromise on a particular outlook renders it notably unstable where that outlook is not present. The compromise does not eliminate illegal abortion and may even increase the problem. The libertarian demand is not satisfied and abortion cannot be used for controlling births among the lower social and economic classes.

Thus the proposal in the English debate of a compromise did not win wide support. Instead, the compromise was forced in the parliamentary debates far in the direction of complete permissiveness. Partly the outcome may have been determined by the Church of England's less compelling rationale for the compromise position; partly by the widespread acceptance of a form of utilitarianism which has practical implications very like those of the atheistic humanism which led to the Soviet experiment of 1921.

In America, the compromise position appears to have little basis in principle. It is simply a matter of practical politics, reflecting the responses to available public opinion polls. Many of those supporting legislation actually hope to achieve abortion on request. The medical supporters of compromise legislation apparently wish to maintain the law as a reflection of developing medical consensus. Certainly, Americans are more likely to concede abortion in the emotionally appealing cases—such as the young girl impregnated by a lecherous relative or the loving mother happily pregnant who finds that her baby may be deformed. However, unless some special theory is developed to justify abortion in such cases, the relaxation of the law implicitly means an abandonment of the principle that the right to life of the unborn should be protected. Thus relaxation implicitly points toward complete legalization, a position not accepted by a majority of Americans.