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NOTE

Abortion Reform: History, Status, and Prognosis

In the world today there are an estimated 30 million induced abortions and 115 million live births, a ratio of one to four. Countries with legalized abortion have sanctioned unchangeable social custom. Countries with liberal abortion laws have legitimized current medical practice. Countries with stringent abortion laws have buried their heads in the sands of time.¹

I. INTRODUCTION

The United States is currently experiencing a surge of significant endeavors by its individual jurisdictions to dig America out of the sand.² Recent judicial decisions, pending litigation, and mass media

¹ Hall, *Commentary*, in ABORTION AND THE LAW 224, 234 (D. Smith ed. 1967).

Abortion is defined generally as the "expulsion or detachment of a pre-viable ovum." F. TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED MEDICAL AND SOCIAL ASPECTS 21 (1936), cited in Note, *Constitutional Aspects of Present Criminal Abortion Law*, 3 VALPARAISO U.L. REV. 102, 103 n.5 (1968). Early common law seemed to equate viability with quickening and ruled that abortion was not a crime unless performed after the fetus quickened, presumably between the 14th and 20th week of pregnancy when the mother notices movement of the fetus within her. Modern sources, however, define the viable fetus as one capable of living outside the womb, generally between the 24th and 28th week. The viability criterion is considered superior to that of quickening since the latter often depends upon subjective sensations of the mother. See, e.g., Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3 (H. Rosen ed. 1967); E. SCHUR, CRIMES WITHOUT VICTIMS 11 (1965).

Most abortions are performed during the first trimester of pregnancy, i.e., within the first 3 months, when, if properly done, they may be safer than childbirth. See, e.g., *People v. Belous*, 80 Cal. Rptr. 354, 360-62, 458 P.2d 194, 200-01 (1969), cert. denied, 38 U.S.L.W. 3320 (U.S. Feb. 24, 1970); L. LADER, ABORTION 4 (1966). During this period, dilation and curettage, a 20-minute procedure, is a safe, routine medical technique utilized to perform abortions by dilating the cervix and scraping out the contents of the uterine lining. See, e.g., R. COOKE, A. HELLEGERS, R. HOYT & H. RICHARDSON, THE TERRIBLE CHOICE: THE ABORTION DILEMMA 1 (1968) [hereinafter cited as TERRIBLE CHOICE]; L. LADER, *supra* at 18. After the first trimester, the growth of the fetus requires more radical surgery. Fisher, *supra* at 8.

Abortions may be spontaneous or induced. A spontaneous abortion, usually called a miscarriage, is the involuntary expulsion of a fetus before it is capable of living, often because it dies *in utero* from abnormal development or maternal disease. See, e.g., Fisher, *supra* at 3-4. Until recently, miscarriages referred only to births of babies weighing less than 2 pounds, 3 ounces, or born within the first 27 weeks. But today because about 10 percent of those babies survive, this distinction is no longer valid. See TERRIBLE CHOICE, *supra* at 38. The legal definition of viability at 28 weeks still controls, however, even though it clashes with modern medical facts and increases the confusion. See L. LADER, *supra* at 178-79 n.3.

Induced abortions are either therapeutic or criminal. Therapeutic abortions are legally sanctioned by statute and performed by licensed physicians to protect the mother's life or health. Fisher, *supra* at 4-5. Criminal abortions are all those not considered spontaneous or therapeutic, performed either by the mother herself or by some third person, including physicians operating outside the law. *Id.* at 5. For a description of such criminal abortion techniques, see E. SCHUR, *supra* at 28-29.

² Some states have enacted liberalized abortion laws. E.g., ARK. STAT. ANN. § 41-

publicity have given new impetus to the adversaries of outmoded antiabortion legislation. To many, the ultimate goal is the demise of all abortion regulation. Such legislation originated at a time when social and economic conditions demanded rapid population growth to replenish losses sustained through war and to provide manpower for a swiftly growing America.³ Medical advancement was dwarfed by infections that made almost any surgery a reliable harbinger of death.⁴ Moreover, the security of an incubating country composed of myriad and unique nationalities demanded strict adherence to the highest traditional religious and ethical ideals.

Modern conditions, however, have occasioned a serious reexamination of the problems generated by abortion and its statutory regulation. Today one of the most pressing socio-economic issues is overpopulation.⁵ The advancement of medical technology since the 1800's insures that a properly performed abortion is safer than childbirth.⁶ The increasing secularization of American society renders it much less susceptible to the majority's attempts to impose laws pred-

304 (Supp. 1969); CAL. HEALTH & SAFETY CODE § 25951 (West Supp. 1969); COLO. REV. STAT. ANN. § 40-2-50 (Perm. Supp. 1967); GA. CODE ANN. § 26-9925(a) (1969 Rev.); N.M. STAT. ANN. §§ 40A-5-1, -3 (Supp. 1969); N.C. GEN. STAT. § 14-45.1 (1969); ch. 684, § 17, [1969] Ore. Sess. Laws. For a general summary of state abortion laws, see Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A.L. REV. 285, 310-12 (1966).

³ L. LADER, *supra* note 1, at 89. In the United States, abortion was widely accepted, in practice at least, until the Civil War. *Id.* at 85.

⁴ New York hospital records of the 1820's revealed that a woman had a 15 percent greater chance of surviving childbirth than of surviving an abortion. Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. Times, Jan. 25, 1970, § 6 (Magazine), at 88. It was not until 1867 that Lister's first contributions to antiseptic surgery were made public, and not until much later that their use was understood and widely accepted. It was even later, in the 1940's, before antibiotics were developed. Understandably, therefore, consideration for the woman's health was often used to justify curtailment of her right to an abortion, especially when even a necessary abortion created a greater risk of death than childbirth. *People v. Belous*, 80 Cal. Rptr. 354, 360, 458 P.2d 194, 200 (1969), *cert. denied*, 38 U.S.L.W. 3320 (U.S. Feb. 24, 1970).

⁵ In Eastern Europe and Russia it was recognized as early as the 1920's that population control was essential for national prosperity. Today, abortion is the prevailing birth control device employed in these countries. This may, in part, be the result of ambivalent attitudes toward contraception which prevailed during the early half of this century. That picture, however, is changing as more use is being made of modern contraceptive devices. L. LADER, *supra* note 1, at 120-31. In Japan, where abortion at the woman's request is permitted, the birth rate had declined from 34.3 per 1,000 in 1947, to 16.9 by 1961, where it generally remains. Although primary reliance was placed upon abortions in the 1950's, in recent years contraceptive methods have become more popular in Japan. *Id.* at 132-36. Abortions performed in Russia by competent physicians under sanitary conditions have a mortality rate of .01 percent. MODEL PENAL CODE § 207.11, Comment 1(3) (Tent. Draft No. 9, 1959). For one view on abortion as a control device for population overgrowth, see L. LADER, *supra* note 1, at 125-43.

⁶ See notes 1, 4 *supra*.

icated upon outmoded theological and moral scruples.⁷ Increased public awareness of the dangers of certain diseases contracted in early pregnancy and of the use of certain drugs during pregnancy has led many conscientious physicians and parents to actively rebel against laws compelling them to deliver and provide for a possibly defective or stillborn child.⁸ In addition, those countries that have sanctioned abortion on demand have been rewarded with consequent alleviation of dire overpopulation and its attendant welfare problems.⁹

The stagnation of American abortion laws creates an even more acute situation, evidenced by the incidence with which these regulations are flagrantly violated. Statistics necessarily vary considerably, but estimates reveal three of every 10 conceptions in the United States fail to produce a viable fetus or to reach term. One estimate is that annually there are approximately 1.3 million abortions in America.¹⁰ About two-thirds of these are spontaneous abortions.¹¹ The extent of therapeutic abortions ranges from one calculation of 18,000 per year to another of from 1 to 5 percent of all

⁷ See Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 448 (1959); Sands, *supra* note 2, at 297. That antiabortion laws are deeply imbued with religious dogma is well supported. Yet, little consideration has been given to the fact that these laws may violate the first amendment's requirement of separation of church and state. *But see* TERRIBLE CHOICE, *supra* note 1, at 96.

⁸ Although opponents aver that the degree of medical speculation involved in predicting the outcome of such a pregnancy is far too great to sustain its validity, data indicate that certain occurrences during pregnancy notoriously produce a relatively high percentage of serious fetal defects. Most notable is german measles where there is a 60 percent risk of a defective child if the mother contracts the disease in the first few weeks after conception, and a 20 percent risk for the remainder of the first trimester, with the risk dropping to below 10 percent after 12 weeks. Ryan, *Humane Abortion Laws and the Health Needs of Society*, in ABORTION AND THE LAW 60, 65-67 (D. Smith ed. 1967); Note, *The California Therapeutic Abortion Act: An Analysis*, 19 HASTINGS L.J. 242, 248 (1967). The recent Thalidomide tragedy has left its indelible mark on the minds of women and has caused many to fear even the safety of the common aspirin. Other fetal defects are known to have resulted from irradiation of the pelvic region during early pregnancy; from severe genetic defects in one or both parents, including unchecked *Rb* incompatibility; and possibly even from the use of LSD and similar hallucinogenic drugs. For a comprehensive summary of medical indicia for therapeutic abortion, see Niswander, *Medical Abortion Practices in the United States*, in ABORTION AND THE LAW 37, 41-49 (D. Smith ed. 1967).

All states with reformed abortion laws, with the exception of California, have incorporated a eugenic provision permitting abortions where there is substantial risk that the child would be born with severe mental or physical defects. See Note, *supra* at 248.

⁹ See note 5 *supra*.

¹⁰ Fisher, *supra* note 1, at 3. Alternatively, the MODEL PENAL CODE § 207.11, Comment 1(1) (Tent. Draft No. 9, 1959), cites annual estimates of abortion from 330,000 to two million, of which anywhere from 30 to 70 percent are illegal.

¹¹ Fisher, *supra* note 1, at 3.

abortions.¹² The aggregate of criminal abortions is nearly impossible to reliably gauge. The only available figures are derived from puerperal deaths and extend, in California, from between 5,000 and 10,000 annually (or one-third of all maternal deaths) to nearly one-half of all such deaths in New York City.¹³ A 1951 study based on a minimum of one million annual abortions claimed 330,000 criminal abortions.¹⁴ The latter also includes those which are self-induced. Several studies of all abortions among mixed racial and economic backgrounds disclosed that self-induced abortions account for between 25 and 30 percent of the total.¹⁵

The picture of considerable public resistance to and disapprobation of present abortion restrictions seems clear. Although conditions which spawned the original abortion legislation have changed significantly, legislative response has been tormentingly slow. To some degree, a few states have met the need for reform in recent years with progressive therapeutic abortion statutes, yet many state abortion statutes have remained virtually unchanged since the mid-1800's. But while the legislators have stubbornly clung to tradition, modern judicial response to the problem portends further reform, and, in fact, may suggest the imminent demise of all statutory abortion regulation.

This Note will endeavor to trace the historical conditions that precipitated abortion restrictions; to scrutinize the legislative efforts to render the laws more responsive to modern conditions; to examine the judicial response to this legislation; and, finally, to project, in light of the most recent developments, the future course of abortion proscriptions.

II. SOCIAL AND LEGISLATIVE ATTITUDES

A. *Historical Development*

The inception of abortion may be traced to the earliest of civilizations.¹⁶ Recorded history reveals that the practice of abortion,

¹² *Id.* at 4.

¹³ L. LADER, *supra* note 1, at 3.

¹⁴ E. SCHUR, *supra* note 1, at 25.

¹⁵ L. LADER, *supra* note 1, at 73.

¹⁶ See, e.g., Niswander, *supra* note 8, at 38-40; Devereaux, *A Typological Study of Abortion in 350 Primitive, Ancient and Pre-Industrial Societies*, in *ABORTION IN AMERICA* 97-152 (H. Rosen ed. 1967). One source dates the earliest known record of abortion 3,000 years before Christ in the royal archives of China. In 1728 B.C., the Code of the Babylonian King, Hammurabi, proscribed abortion but limited penalties to compensatory damages when assault on a pregnant woman caused a miscarriage. L.

rarely condemned by ancient peoples, was probably universal.¹⁷ The early Greek and Roman civilizations regarded abortion as a sound policy for population control, as did many primitive tribes.¹⁸

About A.D. 65, the first known Christian writings began to conflict with these early Greek and Roman customs by assailing as infanticide the act of abortion.¹⁹ As articulated by early Christianity and the Roman Catholic Church, the reasoning lay within two precepts: (1) The doctrine of "original sin" suggested that an unbaptized human who dies will never attain complete salvation; (2) that the merging of soul and body created a human being.²⁰ Within this latter precept lies the root of modern-day controversy. Aristotelian,²¹ Augustinian,²² and Thomistic²³ views on the development of a soul were a great influence on the doctrines of the Catholic Church, and even today are followed by some theologians.²⁴ How-

LADER, *supra* note 1, at 75. For an excellent study of the history of abortion laws, see B. DICKENS, *ABORTION AND THE LAW* 11-28 (1966).

¹⁷ L. LADER, *supra* note 1, at 75.

¹⁸ *Id.* at 76. A notable exception is the Hippocratic Oath which is thought to be the only early Greek source to condemn abortion. *Id.*

Early Roman law regarded abortion as an offense against the parents, not against the potential child, and, therefore, saw no misdeed if the parents consented. MODEL PENAL CODE § 207.11, Comment 1(6) n.12 (Tent. Draft No. 9, 1959). However, the liberal Roman tolerance of abortion fell to ruin around 200 B.C., when women demanded emancipation from the absolute control exercised by their husbands to condemn or order abortion, and they began to use abortion for "personal vanity and social ambition." L. LADER, *supra* note 1, at 76-77. Between 18 B.C. and A.D. 211, unsuccessful attempts were made to check the incidence of abortion through the granting of tax benefits and political favors for additional children, and later by exiling wives who had undergone abortion. *Id.* at 77.

¹⁹ *Id.*

²⁰ Sands, *supra* note 2, at 293-94. This argument has diminished today in favor of Pope Pius' 1930 encyclical, *Casti Connubi*, condemning any deliberate interference with the unborn child as "an act against nature." L. LADER, *supra* note 1, at 80.

²¹ Aristotle theorized that the soul developed in three stages, beginning with the vegetable soul at conception, followed by the animal soul, and finally, the rational soul. Moreover, in the days when each city-state prescribed the number of children each couple could have, Aristotle preached that if a married woman already had her quota of offspring, any subsequent pregnancy should be aborted before she felt life. Guttmacher, *The Legal Status of Therapeutic Abortions*, in *ABORTION IN AMERICA* 175 (H. Rosen ed. 1967). Plato had recommended compulsory abortion for all women who conceived after the age of 40. *Id.* at 175-76.

²² The influence of the Catholic mentor, Saint Augustine, was felt in Canon Law where a distinction was drawn between the *embryo formatus* which is endowed with a soul, and the *embryo informatus*. Destruction of the former was punishable by death, whereas punishment for destruction of the latter was limited to a fine. B. DICKENS, *supra* note 16, at 15-16.

²³ Saint Thomas Aquinas asserted that the soul does not exist until the 7th week of pregnancy. Kutner, *Due Process of Abortion*, 53 MINN. L. REV. 1, 17 n.82 (1968).

²⁴ Many contemporary theologians follow the view of Saint Thomas Aquinas that the soul exists after the 7th week of pregnancy. *Id.*

ever, it was not until 1869 that the Catholic Church under the proclamation of Pope Pius IX adopted its current position that the soul enters a fetus at conception.²⁵

Other early religious groups varied their opposition to abortion by relying on biblical commands²⁶ or on needs of population control.²⁷ Present attitudes of the Jewish and Protestant faiths are not readily codified because of the lack of a central religious authority such as is found in Rome, but with varying degrees of strictness and liberality there remains a central theme — that a fetal life should not be taken needlessly.²⁸ There is emphasis on the sanctity of human life; however, a priority is placed on the mother's life over that of the unborn child.²⁹ Other religious groups place little or no emphasis on the question of a soul,³⁰ and indeed may not even consider abortion a religious problem, but rather treat it as a social problem.³¹

Dissatisfaction with such a background of diverse philosophies and theological views led to the establishment of an English common law designed to create uniformity of treatment.

B. Legislative Response

1. *Early English Law.*— The early English common law did not prohibit abortion in the early stages of pregnancy. It was only after quickening that control of abortion was attempted and even

²⁵ By abandoning all distinctions in fetal development, the Catholic Church effectively prohibited abortion at any time. L. LADER, *supra* note 1, at 79.

Church proscriptions of abortion were reinforced by two other dominant Catholic attitudes: (1) That sexual intercourse, even in marriage, is intrinsically evil, and should not be accompanied by pleasure; and (2) that the only basis for intercourse is procreation of offspring. Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 662 (1966).

²⁶ Judeo-Christian sects found support in the Biblical mandate "Be fruitful, and multiply." *Genesis* 1:28.

²⁷ Several writers contend that the early Hebrews and Christians evidenced an historical pattern of varying the severity of their abortion restrictions according to the demands for an increased population to engage in war, or to propagandize monotheism. Breiteneker & Breiteneker, *Abortion in the German-Speaking Countries of Europe*, in ABORTION AND THE LAW 206 (D. Smith ed. 1967); B. DICKENS, *supra* note 16, at 20-28.

²⁸ See generally L. LADER, *supra* note 1, at 94-102. For an expanded discussion of Catholic, Protestant, and Jewish attitudes toward abortion, see Curran, *Religious Implications*, in ABORTION IN AMERICA 153-74 (H. Rosen ed. 1967).

²⁹ L. LADER, *supra* note 1, at 94-100.

³⁰ The Japanese Shinto faith considers that a child is a human being only after it has seen daylight. The Islamic theology indicates that a fetus must exist for 150 days before life begins. *Id.* at 94.

³¹ Neither the Buddhist nor Hindu scriptures prohibit abortion, and the practitioners of these faiths view the efficacy of abortion as merely a societal consideration. *Id.*

then abortion was considered merely to be a misdemeanor. Adjudication of these offenses was generally left to the Ecclesiastical courts.³² However, influenced by Thomas Malthus' theory that the population would rapidly increase beyond the supply of food and necessities, England, whose number had increased 25 percent in the preceding 30 years, was quickly becoming aware of the problems of overpopulation and the extreme poverty of the working class.³³ To some extent this concern was overshadowed by the need for manpower for England's booming industrialization and for the Napoleonic campaigns, both of which were impeded by the ravages of uncontrollable disease and infanticide.³⁴ Nevertheless, in 1803, distressed with the number of abortions being performed and left unpunished, Lord Ellenborough gave abortion its initial statutory basis and, for the first time, declared abortion *before* quickening a felony.³⁵ This early statutory prohibition maintained the pre- and post-quickening distinction, however, by providing the death penalty for abortions performed after quickening and for a lesser punishment for abortions in the early stages of pregnancy.³⁶

Lord Landsdowne's Act of 1828 repealed the 1803 Act, but added little more than the proscription of abortion by instruments or any other means.³⁷ This was followed in 1837 by the Offenses Against The Person Act, which abandoned the differentiation between pre- and post-quickening.³⁸ The latter was amended in 1861 to include a provision for indicting the woman as an accessory before the fact to any abortion committed upon her and *to any operation performed on her with the intent to incur an abortion, whether she was pregnant or not.*³⁹

Thus, the early English laws placed emphasis on the life of the child as a potential addition to the population structure.

2. *Early American Law.*— The early American law incorporated the English common law to a great extent, not recognizing abortion as a criminal offense until after quickening, and then only

³² B. DICKENS, *supra* note 16, at 23.

³³ L. LADER, *supra* note 1, at 83.

³⁴ *Id.*

³⁵ B. DICKENS, *supra* note 16, at 23-24.

³⁶ *Id.*; L. LADER, *supra* note 1, at 84.

³⁷ B. DICKENS, *supra* note 16, at 25.

³⁸ Use of the phrase "quick with child" in former acts lent some ambiguity to legislative intent in this area. Aside from its use as a means of distinguishing a lesser offense if the fetus had not quickened, the phrase could have been interpreted merely as necessitating pregnancy as an element of the crime. *Id.* at 27.

³⁹ *Id.* at 29. For a discussion of the judicial interpretation of this Act, see *id.* at 29-38.

as a misdemeanor.⁴⁰ Nevertheless, abortions were overtly advertised and performed at least until the Civil War, and because of lack of enforcement attempts to legislate against abortion met with little success.⁴¹ It was not until the middle of the 19th century that antiabortion laws, many of which still remain unchanged, were passed and enforced.⁴²

Several reasons are posited for the rise of these laws in England and the United States. Some theorize it was part of a general Victorian trend to legislate moral behavior.⁴³ In America especially, the Puritanical preoccupation with sin demanded that the unmarried pregnant girl be punished by displaying her transgression to the world.⁴⁴ Others postulate that the laws followed a legislative discovery that the quickening distinction was at best artificial and arbitrary.⁴⁵ Ignoring the concept of when the soul enters the fetus, most legislatures sought to proscribe abortion on the rationale that it was a "violation of 'the mysteries of nature' which would deny potential human beings to the destined expansion of America."⁴⁶ A third, and primary, reason for these early abortion laws probably was the legislative recognition of abortion as extremely dangerous.⁴⁷

The early American statutes were exceedingly rigid in that they prohibited abortion for any reason. It was not until 1828 that the first law was enacted which legalized some abortions. In that year, New York passed legislation which entrusted to the medical profession the decision of whether to allow an abortion to save the mother's life.⁴⁸ Ohio followed in 1834, Missouri and Indiana in

⁴⁰ See, e.g., *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *State v. Murphy*, 27 N.J.L. 112 (Sup. Ct. 1858). See also Leavy & Kummer, *supra* note 25, at 669.

⁴¹ L. LADER, *supra* note 1, at 85-86. The first American abortion statute was passed in Connecticut in 1821, but it was not until 1860 that abortion *before* quickening was finally outlawed. *Id.* at 86.

⁴² St. John-Stevas, *The Right to Life — The Abortion Dilemma*, 4 GONZAGA L. REV. 1 (1968); TERRIBLE CHOICE, *supra* note 1, at 48-49.

⁴³ TERRIBLE CHOICE, *supra* note 1, at 48.

⁴⁴ L. LADER, *supra* note 1, at 89. In the Puritan mind, antiabortion laws were successfully used to instill a fear of pregnancy among the unmarried as a means of enforcing morality. The Puritan crusade was further buttressed by Anthony Comstock, Secretary of the New York Society for the Suppression of Vice, and the passage of the Comstock Bill, "An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use," giving him, as special agent for the Post Office Department, virtually unlimited authority to rid America of vice. *Id.* at 90-91.

⁴⁵ St. John-Stevas, *supra* note 42, at 1; TERRIBLE CHOICE, *supra* note 1, at 48.

⁴⁶ L. LADER, *supra* note 1, at 88.

⁴⁷ St. John-Stevas, *supra* note 42, at 1; TERRIBLE CHOICE, *supra* note 1, at 49.

⁴⁸ The New York statute was patterned after England's first abortion law with one important qualification: abortions would be legal when it was "necessary to preserve

1835, until now every state provides for some form of legal abortion.⁴⁹ During this formative period, the legislative sentiment seems to have shifted from the early English preoccupation with the life of the child to a concern for the life of the mother. Thus, the rationale for the passage of abortion legislation increasingly emphasized that because of its inherent danger to the life of the mother, abortion should not be condoned unless it could be shown that it would save the mother's life.

3. *A Précis of Modern Legislation.*— The typical pre-1967 "therapeutic" abortion law was, in reality, similarly inflexible:

A person who provides, supplies, or administers to a pregnant woman, or procures such woman to take any medicine, drugs, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.⁵⁰

The predominant weakness in this type of law is that it permits abortion only in one instance — when to deny one would cause the mother to die. By reducing the choice to life or death, these statutes fail to consider that without an abortion serious or permanent injury short of death may be suffered.⁵¹ In addition, by focusing only upon potential damage to the mother's life, such laws increase the possibility that defective children will be born to women carrying adverse genetically inherited factors or who have been exposed to chromosome-damaging drugs or radiation. Moreover, by preventing abortion where conception occurs because of rape or incest, and by failing to consider the plight of a woman medically unable to successfully use contraceptives, the statutes arguably contribute indirectly to the breeding of numerous unwanted children for already badly congested ghettos and overburdened orphanages and welfare agencies. Finally, it can be argued that these laws, ostensibly promulgated on the ethics of protecting the woman's life, in reality promote more deaths because they have the effect of creating a thriving medium of illicit abortions for the desperate woman who can not meet the standard required for a legal abortion.⁵²

a. *The ALI Model Abortion Act.*— In response to such glaring

the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." L. LADER, *supra* note 1, at 87.

⁴⁹ *Id.* at 88.

⁵⁰ ARIZ. REV. STAT. ANN. § 13-211 (1956).

⁵¹ See Ryan, *supra* note 8, at 68-69.

⁵² See MODEL PENAL CODE § 207.11, Comment 1, at 150 (Tent. Draft No. 9, 1959).

weaknesses, two types of progressive legislation have been designed — the American Law Institute's Model Penal Code⁵³ and the state therapeutic abortion acts. In a tentative draft drawn up in 1959⁵⁴ and approved in 1962, the ALI Model Penal Code first dealt with the subject of abortion reform for the purpose of providing a blueprint for revision of abortion legislation in the states. To date, no state has adopted all of the provisions of the Model Act, and only a few states have incorporated some of the recommendations.⁵⁵

The model statute initially provides that one who willfully and without justification aborts a pregnant woman during the first 26 weeks commits a felony of the third degree. Beyond the 26th week, the abortionist has committed a felony of the second degree.⁵⁶ Apparently, the variation in the degree of the crime corresponds to the suggested viability distinction, the 26th week being designated as the time when the fetus is capable of living independently of its mother and, thus, more deserving of the law's protection.⁵⁷

A second provision permits a licensed physician to justifiably terminate a pregnancy if (1) he believes there is a substantial risk that the mother's physical or mental health would severely deteriorate if pregnancy were to continue, or (2) that the child would be born seriously crippled in mind or body, or (3) that the pregnancy was the result of forcible rape or of incest.⁵⁸ The existence of any one or more of these conditions must be certified in writing by two physicians (one of whom may perform the abortion) and be filed, prior to the abortion, in the place where the abortion will be performed — either a licensed hospital or such other place as the law designates.⁵⁹ Such ascribed justification is considered an affirmative defense to any subsequent prosecution.⁶⁰

⁵³ MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962), *formerly* § 207.11 (Tent. Draft No. 9, 1959).

⁵⁴ MODEL PENAL CODE § 207.11 (Tent. Draft No. 9, 1959).

⁵⁵ *E.g.*, ARK. STAT. ANN. § 41-301 (Supp. 1969); CAL. HEALTH & SAFETY CODE § 25951 (West Supp. 1969); COLO. REV. STAT. ANN. § 40-2-50 (Perm. Cum. Supp. 1967); GA. CODE ANN. § 26-9925 (a) (Supp. 1969); N.M. STAT. ANN. §§ 40A-5-1, -3 (Supp. 1969); N.C. GEN. STAT. § 14-45.1 (1969).

⁵⁶ MODEL PENAL CODE § 207.11(1) (Tent. Draft No. 9, 1959). The Model Code provides that a third-degree felony is also committed if the abortionist attempts an abortion on a woman he knows is not pregnant or on a woman for whom the existence of such pregnancy he recklessly neglects to determine. *Id.* § 207.11(4). It should be noted that the language of the first subsection is not applicable to instances when early delivery must be induced to save the fetus' life. *Id.* § 207.11, Comment 2, at 151 n.16.

⁵⁷ *Id.* § 207.11, Comment 15, at 162.

⁵⁸ *Id.* § 207.11(2)(a).

⁵⁹ *Id.* § 207.11(2)(b).

⁶⁰ *Id.* § 207.11(2). The prosecution has the burden of disproving, beyond a rea-

By expanding the standard which must be met to obtain a legal abortion from *necessary for the preservation of the mother's life* to also include *substantial risk to both physical and mental health*, the model statute implicitly recognizes that continuing a pregnancy may cause physical injury short of death.⁶¹ Furthermore, this new standard recognizes that the potential effect of an unwanted pregnancy on the mental condition of the mother is an equally valid consideration when deciding whether to abort a pregnancy. It is quite possible for pregnancies to generate suicidal proclivities.⁶² The social stigma of giving birth to a child which may be the result of incest or rape is likely to increase the threat of suicide. In jurisdictions which do not recognize such factors as justifications for an abortion, psychiatrists frequently fabricate a psychiatric basis predicated upon the adverse psychological effects of such situations, particularly on the already unstable personality.⁶³

A third area of advancement is that the Act sanctions the abortion of a fetus that results from forcible rape or incestuous relationships. While many state statutes have allowed abortions in such instances, they often condition the abortion upon a finding, usually by the Attorney General, that there is just cause to believe that the rape had been forcible, or that the female had not consented to the incestuous affair. By eliminating such preconditions, the Model Code emphasizes that justification for permitting abortions in the case of rape or incest rests on a desire to prevent the corrosive effects that the birth of a child would have on the mother's mental posture, rather than being founded upon the old theory that no den-

sonable doubt, the physician's certified honest belief that abortion is justified. *Id.*, Comment 7, at 156-57.

⁶¹ See, e.g., Comment, *An Analysis of the Proposed Changes to the Ohio Abortion Statute*, 37 U. CIN. L. REV. 340, 347-48 (1968). The additional word "health" acknowledges that most physicians equate life with health, and that life, meaning more than immediate survival, depends upon both physical and mental health. Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, in ABORTION AND THE LAW 72, 75 (D. Smith ed. 1967). See also Kutner, *supra* note 23, at 26, wherein he states that the concept of health involves the individual as an integral part of his total environment. By stressing the individual's interaction within his social cosmos, Kutner suggests that abortions should also be approved when justification is founded upon factors other than mere physical or mental indicia.

⁶² The actual suicide rate among pregnant women is less than the statistical expectation for the population as a whole. Rosen, *A Case Study in Social Hypocrisy*, in ABORTION IN AMERICA 299, 303-04 (H. Rosen ed. 1967).

⁶³ See, e.g., Lidz, *Reflections of a Psychiatrist*, in ABORTION IN AMERICA 276-83 (H. Rosen ed. 1967). Suicide is probably the most popular psychiatric claim, particularly since it could be utilized to satisfy the standard of "necessary to preserve the mother's life." See *People v. Abarbanel*, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965).

igrating consequence should be visited upon the innocent victim of an antisocial act.⁶⁴ Additionally, the Act stresses the undesirable medical and social effects of an incestuous relationship. Not only may close in-breeding result in a genetically defective child,⁶⁵ but also incestuous issue may not be legitimized through the marriage of their parents,⁶⁶ nor are they often welcome for adoption.⁶⁷

Today almost all state reform abortion acts permit abortion to prevent the birth of a possibly defective child.⁶⁸ The principal justification for abortion in such cases is that the birth of such a child would cause grave economic and emotional tragedy for its family,⁶⁹ and that, in all probability, the child would eventually become a ward of the state. Nevertheless, most statutes still require that the potential defect be incurable. The Model Penal Code, recognizing the need for abortion in this instance, requires only that the anticipated disability must be grave, yet not irremediable.⁷⁰

A final advancement proposed by the Model Penal Code, but not yet adopted by any state, would leave each state free to specify places other than a hospital where the abortion may be performed.⁷¹ Most states, endeavoring to oversee and to protect the procedures and frequency of abortions, condition the legality of the operation upon its performance in an accredited hospital, except in emergencies. Because of the religious inhibitions of some hospitals, probable

⁶⁴ MODEL PENAL CODE § 207.11, Comment 5, at 154-55 (Tent. Draft No. 9, 1959).

⁶⁵ One study based upon norms derived from classical genetic theory claims that the normal incidence of mental retardation doubles in the offspring of incestuous in-breeding. George, *Current Abortion Laws: Proposals and Movements for Reform*, in ABORTION AND THE LAW 1, 27 n.136 (D. Smith ed. 1967).

⁶⁶ In traditional Jewish law, incest is a capital crime and the children born of an incestuous union are permitted to marry only children from similar origins. The justification for a law that saddled the innocent with the sins of their parents was the belief that it acted as a strong deterrent for like behavior. This also reflected the natural law that the parents alone are responsible for their children's fate, both prior and subsequent to their births. Jakobovits, *Jewish Views on Abortion*, in ABORTION AND THE LAW 124, 140-41 (D. Smith ed. 1967). See also MODEL PENAL CODE § 207.11, Comment 5, at 155 (Tent. Draft No. 9, 1959).

⁶⁷ L. LADER, *supra* note 1, at 5.

⁶⁸ See note 8 *supra*.

⁶⁹ The prospect of the birth of a mentally or physically crippled child can pose a serious threat to the mental health of the mother. MODEL PENAL CODE § 207.11, Comment 4, at 154 (Tent. Draft No. 9, 1959).

⁷⁰ *Id.* When eugenic indications may be an issue for recommending abortion, considerations of whether and to what extent the defect is remediable, the risks of survival, and the chances for success must be honestly met by both the parents and their physician. For an extended discussion of eugenic factors and whether their presence should prompt an abortion, see Quay, *Justifiable Abortion — Medical and Legal Foundations*, 49 GEO. L.J. 173, 236-41 (1960).

⁷¹ MODEL PENAL CODE § 207.11(2)(b) (Tent. Draft No. 9, 1959).

overcrowding, and possible inaccessibility, the drafters of the Model Code recommended that states may authorize additional facilities,⁷² for hospital equipment is not necessary for most abortions.⁷³

A review of the Model Code reveals that while it eliminates the choice between childbirth or maternal death, and reduces the number of children born as a result of forcible rape or incest, or born with serious defects from eugenic factors, it does not offer a complete solution to the growing population crisis nor does it deter many women from consulting unskilled, incompetent, and unlicensed abortionists. In addition, it discloses two general defects. One is that it fails to establish adequate guidelines by which a physician may counsel a patient regarding an abortion. Vague descriptive criteria such as "reputable," "competent," "skilled," etc., as referring to a doctor who may legally perform a therapeutic abortion, are of little aid in designating an appropriate physician to handle another's case.⁷⁴ The second flaw underlies the whole approach to abortion regulation and raises the question of whether such procedural norms belong among the criminal laws in the first place. Many current reform laws no longer reside in penal codes but are instead nestled within health, safety, and sanitation codes. There are at least two advantages to this: (1) It avoids jamming the penal statutes with endless details, and (2) it expedites necessary changes to the regulations through modern, informed medical channels.⁷⁵ Since probably the largest faction advocating abortion reform is the medical profession, it would seem more appropriate to formulate the legal justifications for abortions within the statutes that currently regulate physicians and hospitals. Interpretation of ambiguous terms can then be made within the context of civil provisions affecting only the practice of medicine rather than within the context of the penal system.⁷⁶

b. The California Therapeutic Abortion Act.— There was a lull of about 8 years between the drafting of the Model Penal Code

⁷² *Id.*, Comment 8, at 157.

⁷³ It has been suggested that complex hospital equipment is needless since a skilled physician can perform a safe abortion in his office in less than 30 minutes. Comment, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 771-72 n.167 (1968). A new drug currently under experimentation, which can induce abortions in women as much as 5 months pregnant, with no side effects if used in early pregnancy, can be administered in less than a minute in a doctor's office or clinic. Fort Myers (Fla.) News-Press, Jan. 28, 1970, at 10, col. 1.

⁷⁴ George, *supra* note 65, at 30.

⁷⁵ *Id.*

⁷⁶ *Id.* at 31.

and its partial adoption by several state legislatures through the enactment of therapeutic abortion laws. Of all the modern therapeutic acts, the California Act of 1967⁷⁷ appears the most progressive. It offers improvements upon the Model Penal Code and at the same time it presents some unique defects. Substantively, the Act requires that abortions be performed in accredited hospitals, following approval by a panel of at least two physicians, and three if the proposed abortion will occur after the 13th week of pregnancy.⁷⁸ The panel must determine that each application involves either a substantial risk of grave impairment of the mother's physical or mental health if the pregnancy is continued or that the pregnancy resulted from rape or incest. The Act also provides that no abortions will be approved after the 20th week of pregnancy under any circumstances.⁷⁹ The procedural aspects of the Act outline the course to follow with pregnancies caused by rape or incest, which requires, in essence, that no approval for abortion will be granted before the district attorney determines that there is sufficient cause to believe the alleged crime occurred.⁸⁰

In spite of its apparent progressive approach to the problems of abortion, the California Act has several inherent shortcomings. Following the example of the Model Penal Code, the California Act also expands the "necessary to preserve life" phrase to encompass substantial risk to physical or mental health. However, by requiring mental illness to be severe enough that the woman qualifies for judicial commitment to a mental institution,⁸¹ the Act fails to recognize that there are other very real forms of mental illness which can severely incapacitate the mother, and which may affect the child as well, but which do not warrant institutionalization.⁸² While

⁷⁷ CAL. HEALTH & SAFETY CODE §§ 25951-54 (West Supp. 1969).

⁷⁸ *Id.* §§ 25951(a)-(b), 25953. When there are no more than three physicians on the panel, approval requires unanimous consent. *Id.*

⁷⁹ *Id.* §§ 25951(c), 25953.

⁸⁰ Upon receipt of an application for an abortion because of rape or incest, the committee must immediately notify the district attorney of the county where the alleged incident occurred and send him the applicant's affidavit of the facts. Only if the district attorney finds probable cause that the pregnancy resulted from the incident, or if no reply is received within 5 days, may the committee approve the application. *Id.* § 25952(a). If the district attorney concludes that there is no probable cause, the applicant may petition the superior court of the county where the alleged violation occurred for a finding of probable cause, to be held within 1 week after filing. *Id.* § 25952(b).

⁸¹ The Act defines impaired mental health as "mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint." *Id.* § 2594.

⁸² For a discussion of other mental indices used as grounds for abortion in other

legislative proponents have suggested that qualifying mental health is necessary to discourage fraudulent claims, to require the woman to be sufficiently psychotic to necessitate institutionalization as a prerequisite to abortion does little to enhance the statute's alleged leniency and flexibility.⁸³ Fortunately, no such limitation was placed upon the Act's allowance for impairment to physical health short of pending death.

Although California expands the legal indications for abortion to include rape and incest, a limitation of this reason for abortion to girls under 15⁸⁴ totally nullifies its avowed functions. If the rationale for authorizing abortion in such cases is to alleviate the incidence of illegitimate and unwanted children, to prevent the genetic consequences of close in-breeding, and to avert a permanent reminder of an emotionally traumatic offense against an innocent victim, then logic demands the same consideration be given to older females as well.⁸⁵

While California's strict limitation of abortions to the first 20 weeks of pregnancy may reflect the fact that abortions become increasingly hazardous after 20 weeks, it fails to acknowledge that a woman's health may later be threatened so as to justify an abortion at *any* time during the course of the pregnancy.⁸⁶ Several other states, however, permit emergency abortion at any time during a pregnancy provided a physician concludes that the threat of complications from continuing the pregnancy outweigh the potential dangers of abortions.⁸⁷ These statutes seem to adopt the conclusion of recent studies that medical progress has diminished the danger of late pregnancy abortion.⁸⁸

states, see Rosen, *supra* note 61, at 82-87. For a discussion of the mental and emotional impact of pregnancy on women, see E. SCHUR, *supra* note 1, at 15-17.

⁸³ Note, *supra* note 8, at 246.

⁸⁴ CAL. HEALTH & SAFETY CODE § 25952(c) (West Supp. 1969).

⁸⁵ Although the emotional repercussions from such an act might be less, the social problems raised would certainly not be reduced. Moreover, if the woman were married, her husband would be legally committed to provide support for the child until 21, since it is legally presumed that a child born in wedlock is the legitimate child of the husband. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 309, at 646 (1954). If the woman is single, divorced, or widowed, the child cannot be legitimized nor easily adopted. L. LADER, *supra* note 1, at 155-60.

⁸⁶ Comment, *supra* note 61, at 358-59.

⁸⁷ See, e.g., COLO. REV. STAT. ANN. § 40-2-50(4) (a) (iii) (West Supp. 1967) (requires abortion in rape cases to occur within the first 16 weeks but mentions nothing about time restrictions on other indications); N.C. GEN. STAT. § 14-45.1 (West Supp. 1967) (permits abortions after the 12th week only in emergencies).

⁸⁸ Rosen, *supra* note 61, at 96.

III. JUDICIAL RESPONSE TO LEGISLATION

Traditionally, judicial response to changing mores and community standards has been slow. Laboring against such a brake, the proabortion movement was unsuccessful in its early attacks on the statutes. But as the trend toward liberal interpretation of the Constitution has gathered momentum, protagonists of abortion reform, riding on a wave of public sentiment, have met with increasing success in the courts.

A. *The Traditional Judicial Approach*

The first judicially-monitored attacks on the abortion laws were not centered around the religious arguments or the practicalities of enforcement, but rather focused on the constitutional issue of vagueness.⁸⁹ When legislation impinges upon personal freedom and provides for punitive sanctions, then "precision of regulation must be the touchstone."⁹⁰ However, these early attacks met with little success. Historically, the courts used two basic methods to uphold state abortion statutes against charges of vagueness. One approach was through reliance on the dictionary and the second was to find support for the challenged law in its legislative history.

Typical of the first approach was *People v. Rankin*,⁹¹ a 1937 California case wherein the defendant alleged that the statutory phrase, "procure the miscarriage of such woman"⁹² failed to inform him "with reasonable certainty" of the act it prohibited. In rejecting defendant's contentions, the court cited two law dictionaries' definitions of the procurement of miscarriage as "the criminal act of destroying the foetus at any time before birth is termed,"⁹³ and

⁸⁹ It is well established that:

No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁹⁰ *NAACP v. Button*, 371 U.S. 415, 438 (1963).

⁹¹ 10 Cal. 2d 198, 74 P.2d 71 (1937).

⁹² CAL. PENAL CODE § 274 (West 1967) provides:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment . . . not less than two nor more than five years.

⁹³ 10 Cal. 2d at 202, 74 P.2d at 73, quoting *Bowyer's Law Dictionary* and the *Cyclopedic Law Dictionary*.

concluded that the statute's phrase "was sufficiently explicit to inform persons of common intelligence and understanding of the acts which were prohibited."⁹⁴ In the 1946 Nebraska case of *Hans v. State*,⁹⁵ the defendant alleged that since the statute's title, "Homicide and Foeticide,"⁹⁶ did not refer to the killing of a *vitalized embryo*, convicting him under that statute violated the state's constitutional mandate that no bill could contain more than one subject as clearly expressed in the title.⁹⁷ Although conceding that the medical definitions of embryo and fetus differed, the court recognized only the legal definitions of a fetus as "an unborn child"⁹⁸ and of foeticide as "destruction of the fetus, the act by which criminal abortion is produced."⁹⁹ Thus, the court found that the defendant clearly fell within the proscriptions of the statute.

Most courts, however, met the vagueness argument by reference to the legislative intent and history of the statute in question. One Florida court rejected the argument that the word "unlawfully," in referring to unlawfully using any instrument with intent to procure a miscarriage, could not be adequately defined to avoid ambiguity.¹⁰⁰ In consulting the statute's legislative history, the court noted that it was originally part of another act wherein the legisla-

The court added that each of the modern dictionaries of the English language gave essentially the same definition. *Id.*

⁹⁴ *Id.*

⁹⁵ 147 Neb. 67, 22 N.W.2d 385, *vacated on other grounds*, 147 Neb. 730, 25 N.W.2d 35 (1946).

⁹⁶ The statute provided:

"Chapter II. — Homicide and Foeticide

. . . .

Sec. 6 Any physician, or other person, who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or foetus, at any state of utero gestation, any . . . substance whatever, or who shall use . . . or devise to be used . . . any instrument or other means with intent thereby to destroy such vitalized embryo, or foetus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such vitalized embryo, or foetus, or mother, in consequence thereof, be imprisoned . . . not less than one nor more than ten years." *Quoted in Hans v. State*, 147 Neb. 67, 70, 22 N.W.2d 385, 388 (1946).

⁹⁷ Article II, section 19, of the constitution provided: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." *Quoted in Hans v. State*, 147 Neb. 67, 70, 22 N.W.2d 385, 388 (1946).

⁹⁸ "An infant *in ventre sa mere*." BLACK'S LAW DICTIONARY 794 (3d ed. 1933).

⁹⁹ *Id.* at 769.

¹⁰⁰ In *Carter v. State*, 155 So. 2d 787 (Fla.), *appeal dismissed*, 376 U.S. 648 (1963), the court found that the challenged part of the statute, "Whoever with intent to procure miscarriage of any woman . . . unlawfully uses any instrument or other means whatever with the like intent . . ." [FLA. STAT. ANN. § 797.01 (1965)], was not on its face vague.

ture defined abortion as unlawful unless necessary to preserve the mother's life, and advised as such by two physicians.¹⁰¹ In *Kudish v. Board of Registration in Medicine*,¹⁰² a Massachusetts court held that any uncertainty in the statutory phrase "unlawfully procuring miscarriage" was clarified by prior judicial decisions permitting physicians to perform abortions in good faith and with an honest belief that the mother's life or health was in danger.¹⁰³

It is arguable that by resorting to extra-judicial matter, *i.e.*, lexicons and legislative history, to prove the statutes' clarity, these courts confirmed instead its antithesis. Such decisions myopically ignored the judicial principle that, at least where criminal laws are involved, reasonable men should be expected to understand the laws by reliance upon the plain meaning rule alone. Moreover, by such an approach the courts avoided the more cogent argument that present societal conditions no longer reflect the same needs that inspired the original enactment of these laws.¹⁰⁴ A review of the traditional judicial attitude, then, evinces a judicial reluctance to do little more than follow a strict, narrow approach to the problem.

B. *The Belous Approach*

In 1969, the California Supreme Court presaged the destiny of such narrow interpretations of abortion regulations. *People v. Belous*¹⁰⁵ reversed a doctor's conviction for abortion in violation of section 274 of the California Penal Code — the predecessor of the California Therapeutic Abortion Act — which permitted abortions only when necessary to preserve the life of the pregnant woman,¹⁰⁶ and held that the statute offended constitutional safeguards against unreasonably vague and overbroad legislation.¹⁰⁷

¹⁰¹ 155 So. 2d at 788-89.

¹⁰² 248 N.E.2d 264 (Mass. 1969).

¹⁰³ *Id.* at 266.

¹⁰⁴ One of the oldest principles of the common law is that once the reason for a law is no longer valid, the law itself is no longer valid. *People v. Belous*, 80 Cal. Rptr. 354, 362, 458 P.2d 194, 202 (1969), *cert. denied*, 38 U.S.L.W. 3320 (U.S. Feb. 24, 1970); *Galyon v. Municipal Court*, 229 Cal. App. 2d 667, 671-72, 40 Cal. Rptr. 446, 449 (1964).

¹⁰⁵ 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied*, 38 U.S.L.W. 3320 (U.S. Feb. 24, 1970).

¹⁰⁶ For the text of section 274, see note 92 *supra*.

¹⁰⁷ A criminal statute may be void if it "either on its face or as authoritatively construed, while reaching conduct that may lawfully be punished, is nevertheless so broad in its sweep that it may be used to punish constitutionally protected conduct." P. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 856, at explanatory note 4 (3d ed. 1966). See, *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing a

The defendant, Dr. Leon Belous, a licensed physician and surgeon specializing in obstetrics and gynecology, was approached in 1966 by an unmarried couple who beseeched him to perform an abortion, insisting that they would seek the operation in Tijuana if he refused. Although Dr. Belous was intimately familiar with the hazards of Tijuana abortions, he had personally witnessed competent abortions performed by a Dr. Lairtus. Lairtus was licensed to practice medicine only in Mexico but was, at this time, living in California where he was seeking a license and actively performing abortions. Convinced that the girl's life would actually be in danger if she went to Tijuana, Dr. Belous gave the couple Lairtus' phone number. Subsequent to a police search of Lairtus' records, Dr. Belous was convicted and fined \$5,000 with 2 years probation.

In reversing Dr. Belous' conviction, the California Supreme Court ruled that section 274, specifically the phrase "necessary to preserve," was vague and overbroad and thus unconstitutionally interfered with personal liberties. The court reasoned that the statutory language was so pervaded with uncertainty that those subject to criminal sanctions were forced to speculate as to its meaning. Moreover, the court held that the broad scope of the statute could not be narrowly construed so as to protect the physician's fundamental liberties guaranteed by the 14th amendment and, simultaneously, preserve the original legislative intent. Therefore, the statute was invalidated entirely.

The California court's approach was really threefold. After rejecting the *Rankin* and *Hans* dictionary approach, the *Belous* court sought to apply four suggested interpretations of the "necessary to preserve" standard which had been derived from past judicial holdings, in hopes of illuminating the propriety of abortion in any particular situation. After examining the alternatives, the court rejected all four interpretive standards requiring (1) certainty of death, (2) reasonable certainty of death, (3) possibility of death, and (4) relative danger of death. Next, the court weighed the detrimental effects of the statute upon both the physician compelled to make the abortion decision and the woman requesting such an operation. Third, the court intimated that although revision of the statutory language might avoid the vagueness problem, there remained the

conviction for breach of the peace, the offense being so generalized as to be "not susceptible of exact definition"); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (applying the clear and present danger test to a picketing statute, the Court found that picketing would cause no such serious and imminent danger to life, property, or privacy as to justify the broad sweep of the statute).

additional issue lurking behind all abortion legislation — whether such legislation contravenes both the marital right to privacy and the woman's right to decide whether to bear children.¹⁰⁸

The *Belous* court, in rejecting all four suggested standards, reasoned that the interpretations were vague, no longer appropriate in light of changing surgical techniques, tended to foster criminal abortions,¹⁰⁹ and effectively destroyed or were not in line with original legislative intent.¹¹⁰ Furthermore, when balanced against a woman's fundamental rights to live and to choose whether to bear children, the states could show no overriding interest¹¹¹ — especially in light of the priority that has been accorded in all 51 jurisdictions to the mother's life over that of the unborn child.¹¹² The *Belous* court, in

¹⁰⁸ Although vague statutes might be made clear, a second question was left unanswered: "[W]here, if at all, the legislature may draw its line [in clearly contravening asserted fundamental liberties]." Comment, *supra* note 73, at 769.

¹⁰⁹ The *Belous* court stated that criminal abortion was "the most common single cause of maternal death in California." 80 Cal. Rptr. at 363, 458 P.2d at 201, quoting Fox, *Abortion Deaths in California*, 98 AM. J. OBST. & GYNEC. 645, 650 (1967).

In 1961, New York City recorded that 47 percent of its maternal deaths were caused by illegal abortions. Niswander, *supra* note 8, at 37. Even conceding that contraception is preferable to abortion, no matter how effective and easily obtainable contraception may be, unwanted pregnancies will inevitably occur and abortions will be sought. Hall, *supra* note 1, at 234. If abortion were legalized for a broad spectrum of reasons, women could rely on it to complement normal contraceptive measures, and the criminal abortionist would, in all probability, be driven out of business.

¹¹⁰ Although the legislative intent in 1850 might have been that every fetus should be carried to term in order to protect the mother against the extreme dangers of surgical treatment, the *Belous* court indicated that such a purpose is not valid today when hospital abortions within the first trimester of pregnancy are less dangerous than carrying the child to term. 80 Cal. Rptr. at 360-61, 458 P.2d at 200-01.

Additionally, the court concluded that if the "necessary to preserve" standard were interpreted to include psychological factors the legislative intent would be destroyed, since by the mere threat of suicide any woman could obtain a legal abortion. See, e.g., *People v. Abarbanel*, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965) (reversing the conviction of a physician who had performed an abortion in reliance on letters from two psychiatrists attesting that the abortion was necessary to save the patient from the "possibility" of suicide).

¹¹¹ Appellant (*Belous*) conceded that the State had an interest in insuring that only licensed physicians perform abortions, only under aseptic conditions, and not when the fetus has already developed to the stage of viability. But, the statute's defect lay in its overbreadth which, instead of specifically legislating its direct interests, forbade all abortions regardless of the physician's judgment of the possibility of harmful results from such inaction. Brief for Appellant at 7-8, *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969) (which also argues that the state medical licensing and procedure laws already satisfy the state's interests in these matters. *Id.* at 8 n.13). "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). The *Belous* court determined that the woman's constitutional right to life is at stake because childbirth does carry some risk of death. It also assumed that she has a fundamental right to choose whether to bear children, as analogous to rights such as marital and sexual privacy that have been acknowledged both by that court and the Supreme Court. 80 Cal. Rptr. at 359, 458 P.2d at 199.

¹¹² 80 Cal. Rptr., at 363, 458 P.2d at 203. See E. SCHUR, *supra* note 1, at 53; Leavy

effect, considered and dismissed all of the justifications relied upon by past courts to uphold abortion laws challenged as vague. Moreover, the court found that this incurable inherent vagueness had two invidious consequences — both the patient and the physician were denied due process of law. The court concluded that the imprecise statute forced the physician, be he intrepid or not, to guess at the statute's meaning, with the attendant criminal punishment for making an incorrect guess. There can be little doubt that a physician who faces revocation of his license, a fine, and felony conviction cannot impartially weigh circumstances that might favor an abortion.¹¹³ Such pressure, the court felt, may understandably induce the physician to decide against abortion for he would not run the risk of prosecution if the woman should die because a necessary abortion was not performed. Placing the doctor in this unenviable position, not only denied his right to due process, but it also affected the patient's constitutional rights.

Skewing the penalties only in the direction of the physician effectively denied the woman her fundamental right to live, since it undermined the physician's right to act in good faith, to the best of his ability and judgment for the benefit of his patient.¹¹⁴ Moreover, the court found a more tangible intrusion of the patient's rights — a statute which delegates decisionmaking power to a

& Kummer, *supra* note 25, at 662. For a discussion of the Jewish and Protestant views on the priority of the mother's life, see L. LADER, *supra* note 1, at 97-102.

It is noted that emphasis normally is not placed on the legal rights of the fetus until the later stages of pregnancy. As one example, for the purpose of California's manslaughter/murder statutes, a fetus is considered a human being only when "it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care." *People v. Chavez*, 77 Cal. App. 2d 621, 626, 176 P.2d 92, 94 (1947). See *Keeler v. Superior Court*, 80 Cal. Rptr. 865 (Ct. App. 1969), where killing a 31- to 36-week old fetus was considered manslaughter since the fetus was viable and weighed 5 pounds. Some states do not have such a law, and instead require that the child be born alive first and then die before an attacker can be charged with manslaughter. See, e.g., *Clarke v. State*, 117 Ala. 1, 23 So. 671 (1898).

¹¹³ See E. SCHUR, *supra* note 1, at 27-28. For many physicians, the desire to exercise the best care possible for their patients, which may include performing abortions when indicated, is matched by their fear of detection and prosecution. The inevitable confusion emerging from this dilemma surely must have some detrimental effect on the physicians' professional or private lives. For other physicians, perhaps, tempted by financial benefits that overshadow their more conservative brothers' fears of discovery, revocation of a license may be an empty gesture. An abortionist's reputation rests upon his skill, not his collection of framed diplomas. *Id.* at 38.

¹¹⁴ The court noted that because section 274 requires the physician to determine at his peril the necessity for an abortion, the "woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions." 80 Cal. Rptr. at 336, 458 P.2d at 206.

financially interested party may well be contrary to the due process clause of the 14th amendment.¹¹⁵

In light of the breadth of the *Belous* court's analysis, one may conclude that it would invalidate all existing state legislation on abortion, including the Model Code and the progressive therapeutic acts. Because of the vagueness of existing standards, any judicial effort to provide physicians with sufficiently definitive criteria to enable them to formulate proper decisions would effectively defeat the legislative intent of these statutes. Furthermore, the court's position on fundamental rights and lack of sufficient state interest may well portend the deracination of all such legislation.

IV. POST *Belous* PROJECTION

Examination of the current and proposed legislation suggests that vagueness may not be the only flaw uncovered by *Belous*. The court's finding that section 274 of the California Code was unconstitutionally vague is only one of three possible routes that may be taken by future courts. The vagueness approach has merit in that it is not necessary for a court to assume the entire burden of resolving an important and complex religious, moral, and politically sensitive constitutional question. By finding section 274 vague and by limiting analysis to presently used interpretations, the court has laid the problem squarely in the lap of the state legislature — and perhaps with the legislature's greater capacity to determine facts and public sentiment this is proper. With the only judicial guidance available that certain phrases are improper, the legislature will be hard pressed to find suitable language and may be forced to consider seriously whether the whole approach to abortion is appropriate.

Of more far-reaching consequence are the other two approaches suggested by *Belous*. The first is the relative safety test which appears to have been recognized by some modern therapeutic acts, and is premised upon the belief that the state does have a limited interest in controlling abortions. A second approach would recognize that the state has no compelling interest in abortion — at least until the fetus is viable. In view of the *Belous* court's assumption (not holding) that a woman has a fundamental right to decide whether to bear children,¹¹⁶ adopting this approach would seem

¹¹⁵ *Cf. Tumey v. Ohio*, 273 U.S. 510 (1927), where the Court found that the defendant was denied due process since the magistrate's salary was dependent upon a percentage of the fine assessed against Tumey.

¹¹⁶ 80 Cal. Rptr. at 359-60, 458 P.2d at 199-200.

to require an analysis of whether, under principles of due process, such a right exists in fact and, if so, whether it may be limited by a compelling state interest.¹¹⁷

Presently the first of these two approaches suggests that the state interest rests on the well-being of the mother,¹¹⁸ and would make abortion legal when it is safer than childbirth, or unlawful where abortion is more dangerous. One problem, however, with this test is that although the approach may be on a relative danger continuum, the decision is still not placed in the hands of the woman, but rather rests with a panel of physicians.¹¹⁹ Moreover,

¹¹⁷ It is interesting to note that the issue of constitutional due process is not mentioned in the Model Code [see MODEL PENAL CODE § 207.11, Comments (Tent. Draft No. 9, 1959)] in relation to any supposed rights the unborn child would have in prohibiting an abortion. See Sands, *supra* note 2, at 304-06, wherein the author examines this question and concludes that the weight of authority agree that the therapeutic abortion acts do not raise a constitutional question regarding the unborn child. But, query, whether such a question could be so easily dismissed for the mother?

The *Belous* court expressed doubt as to whether the state's interest could ever justify requiring a woman to risk death, 80 Cal. Rptr. at 363, 458 P.2d at 203, and certainly "childbirth involves risks of death." *Id.* at 359, 458 P.2d at 199 (footnote omitted). This risk of death, in any degree, may actually be the basis for finding a fundamental right to choose whether to bear children, although the court appeared to rely on the source of such right as stemming from the right to privacy in matters related to marriage, family, and sex. See *id.*

¹¹⁸ Cf. 80 Cal. Rptr. at 365, 458 P.2d at 205, wherein the court stated: "There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo."

¹¹⁹ There is never any guarantee that the panel will be free from personal bias, even where records of meetings and deliberations are maintained. Religious opposition to abortion may well manifest itself in the decisionmaking process of individual panel members and would be nearly impossible to prevent. The chief of obstetrics at one large east coast county hospital openly boasted that no abortion had been performed there in 20 years! L. LADER, *supra* note 1, at 25.

Even without the problem of bias, panel decisions could vary with the hospital, depending on such factors as unavailability of hospital space at the time of application, varying standards, and variable professional judgment as to the necessity for the requested abortion — leaving the woman at the mercy of chance.

Increasing pressure from political and religious groups and pressing financial considerations may cause public hospitals to institute quota systems within which the panel must work. That such systems would gravely impair the opportunities for abortion among the lower socio-economic strata is evident; those of means would simply go to the private hospital when the public hospital quota was filled, whereas the indigent and poor would undoubtedly be foreclosed from such a choice. Such an arbitrary system would be the foundation for a strong equal protection argument. For a discussion and criticism of quota systems, see L. LADER, *supra* note 1, at 27-31. On hospital committee reviews of applications for abortion as constituting state action, and their discriminatory effect on the poor, see Comment, *supra* note 73, at 769-72. On economic discrimination, see *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969); L. LADER, *supra* note 1, at 29, 65-66; Greenhouse, *supra* note 4, at 88; Comment, *supra* note 73, at 772-73 & n.175; Note, *supra* note 8, at 246-47.

One author suggests that the ideal abortion panel should include a physician, obstetrician, psychiatrist, social worker, housewife, lawyer, and a representative of the general public, and that provision should be made for judicial review of the panel's decisions. Kutner, *supra* note 23, at 25.

given present medical and surgical advances, danger to the mother during early term abortions is minimal in relation to possible danger to her mental and physical health from an unwanted pregnancy, and, thus, such a state interest would not appear to be sufficiently compelling to limit her fundamental right to control childbearing.

Recently the federal district court in Washington, D.C., in *United States v. Vuitch*,¹²⁰ expanded this relative danger approach by implying that a woman's right to an abortion should exist even when her life and health are not in danger. Rejecting the District of Columbia's abortion statute as vague, the federal court left to the legislature the revision of the statute in light of current conditions of medicine, sociology, and constitutional interpretation.¹²¹

In response to the suggested approach that the state has no compelling interest in regulating abortion, one state legislature has implicitly adopted this view by enacting an abortion statute which, for the most part, gives the woman full discretion to determine whether to abort the pregnancy. In March, 1970, the Hawaiian legislature passed a measure which allows any woman over 20 years of age to have an abortion "for the asking," if performed by a licensed physician in a government licensed hospital, provided the fetus is not yet viable. The state is the first to treat abortion as an exclusive decision of the pregnant woman in consultation with her physician.¹²²

Notwithstanding Hawaii's acceptance of this approach, whether women have a *constitutional* right to plan their families in any chosen manner and whether the fruits of their sexual relations are no concern of the state are questions which remain unanswered by the courts.¹²³ It is arguable that such a right is found in the right to privacy and the position espoused in *Griswold v. Connecticut*,¹²⁴ which vacated Connecticut's anti-birth-control statute. In that case the marital right to privacy was grounded on the Supreme Court's interpretation of penumbral rights inherent within the fourth, fifth, and ninth amendments as applied to the states through the 14th

¹²⁰ 305 F. Supp. 1032 (D.D.C. 1969).

¹²¹ *Id.* at 1035-36.

¹²² TIME, Mar. 9, 1970, at 34.

¹²³ It has been forcefully argued: "It is a man and woman who must decide whether or not they wish their union to lead to the birth of a child, not the church . . . and certainly not the state." L. LADER, *supra* note 1, at 99, *quoting* Rabbi Israel Margolies.

¹²⁴ 381 U.S. 479 (1965); *cf.* *Loving v. Virginia*, 388 U.S. 1 (1967) (statute proscribing interracial marriage held violative of due process); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (involuntary sterilization law infringed upon basic liberties of marriage and procreation).

amendment.¹²⁵ The *Griswold* consensus, in essence, would retain through the ninth amendment those fundamental rights not enumerated in the Bill of Rights.¹²⁶ It would seem reasonable to infer that abortion may belong in this category. Prior to the enactment of the Bill of Rights, and before 1827, American common law permitted abortions before quickening. It is arguable that the right to an abortion, although not expressly enumerated in the Constitution, was a part of the American tradition, and, therefore, falls within the purview of the Constitution in the same manner as marital privacy. Moreover, as has been frequently argued, the issues raised in *Griswold* concerning contraception are so similar to those reflected by abortion that abortion must likewise be safeguarded from transgression by the state.¹²⁷ A comparison of the Connecticut anti-contraception statute with current abortion laws demonstrates that: (1) Both countervail presently acknowledged medical standards; (2) both trespass upon the marital bedroom by subverting the discretion of married couples to unerringly plan the timing and size of their families; (3) both oblige the option of bearing possibly imperfect children or practicing abstinence; and (4) although both are generally unenforced, impending prosecution persistently threatens.¹²⁸ Admittedly, a limited expansion of *Griswold* would be required to fit it into the abortion reform mold. Conceptually, however, an early abortion is but a degree removed from contraception, the only substantial difference being that abortion occurs *after* the egg and the sperm have already united. What is more, even this distinction is minimized in view of the fact that no known attempt has been made to challenge the legality of the use of some contraceptives which are, in effect, abortifacients.¹²⁹

¹²⁵ 381 U.S. 479 (1965). For a thorough analysis of *Griswold*, see Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

¹²⁶ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

¹²⁷ Comment, *supra* note 73, at 776.

¹²⁸ Additionally, both laws exacerbate the world's most exigent crisis — overpopulation — and both sanction government imposition of one religious and ethical ideal upon peoples of disparate and essentially incompatible persuasions. Leavy & Kummer, *supra* note 25, at 674. Chief Judge Weintraub, dissenting in *Gleitman v. Cosgrove*, 49 N.J. 22, 55, 227 A.2d 689, 707 (1967), pointed out that whereas the evil prohibited by most penal codes is easily perceptible, in abortion and contraception even the existence of evil depends entirely upon individual religious convictions. Acknowledging the diverse views regarding the point at which the unborn entity has established a claim to human life sufficient to supplant its mother's autonomy over her own welfare, he found it not surprising that the legislators could agree only upon amorphous legal phraseology. *Id.* at 59-63, 227 A.2d at 709-11.

¹²⁹ These devices prevent attachment of the fertilized egg to the uterine wall,

When attempting, then, to balance the substantial interest the mother may have in bearing children only when she wants them and the interests the state may claim in tagging the developing germ cells as "human" the moment they meet, *Griswold* promises to be a plausible vehicle for rescinding abortion ordinances.¹³⁰ The most serious drawback to this approach, however, is that *Griswold* would affect only married couples, while abortions are being sought increasingly by unwed mothers, for whom the consequences of a pregnancy may be far more severe.¹³¹ Opponents of this approach to abortion would agree: "We are no longer in the sacred precincts of the marital bedroom. The act is complete, the doors are open, and the zone of privacy is no more."¹³²

Although *Griswold* may suggest that the decision whether to bear a child is an elementary, personal freedom derived from implicit constitutional values, not to be abbreviated by local legislation, caution must be advised to insure that, with abortion, the court will endeavor to expand the ninth amendment and the concept of penumbral rights in a manner not limited solely to activities transpiring within a marital relationship.

which normally occurs within 6-7 days following conception. Kutner, *supra* note 23, at 4; Comment, *supra* note 73, at 760-61; 46 ORE. L. REV. 211-12 (1967). Early surgical abortions similarly would sever the potential fetus from its source of nutrition, at nearly the same stage of development as with the oral abortifacients. See Comment, *supra* note 73, at 763.

The Model Code, however, maintains such a distinction by indicating that the provisions applicable to abortion do not include "the prescription, administration, or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at, or immediately after fertilization." MODEL PENAL CODE § 207.11(7) (Tent. Draft No. 9, 1959). It is interesting to note that this clause was drafted several years before oral contraception was in wide use and well before discovery of and experimentation with the abortifacient-type contraceptives.

The critical problem is determining at what point does one cease characterizing the use of these devices as contraception and commence identifying it as abortion. Although beyond the scope of this Note, many problems are raised by use of abortifacients. Statutes vary in their application, depending on the stage of pregnancy: whether application begins at the time of conception or after implantation could be critical. Additionally, where pregnancy is made an element of the crime, an attempted prosecution for use of abortifacients would face a formidable obstacle — lack of evidence. However, where pregnancy is not an element, a successful prosecution might be mounted. For an expanded discussion of the legal implications of the use of abortifacients, see Kutner, *supra* note 23, at 4-6; 46 ORE. L. REV. 211 (1967).

¹³⁰ Comment, *supra* note 73, at 764.

¹³¹ One survey tallied a 24 percent increase in the number of children born out of wedlock between 1960 and 1964. Interestingly, the greatest rise in illegitimacy did not occur among teenagers and young adults, as one might assume, but in those between the ages of 25 and 34. L. LADER, *supra* note 1, at 59-60.

¹³² Greenhouse, *supra* note 4, at 90, quoting New York Assistant Attorney General, Joel Lewittes, who will handle the state's defense when four presently pending New York cases are heard.

V. CONCLUSION

Today, as never before, the population explosion is an omnipresent threat to our national prosperity.¹³³ The social and fiscal consequences of too many people, especially too many in the ghetto or in other impoverished areas of the country, staggers the imagination.¹³⁴ Antiquated laws prohibiting abortion, purportedly concerned with morality and the rights of embryos, are fostering an immoral congestion of humanity — often unwanted, frequently neglected, and always in need of aid that invariably is inadequate or late in arrival.¹³⁵ The prehensile tail of early abortion law is wrapped around the moral issues of the scarlet woman and religious dogma, and cannot, at the same time, lay hold of the obvious immorality involved in antiabortion byproducts such as growth of ghettos, burgeoning crime rates, and overflowing homes for unwanted children.¹³⁶

The courts alone will not be able to resolve the problems. Although the *Belous* court commendably recognized constitutional issues of vagueness and the fundamental rights of women, other vital social and economic aspects of the question of abortion were not directly called to the attention of those who were in a position to do something about it — namely, the state legislature. It took the *Vuitch* court, in leaving the District of Columbia without any abortion law, to directly call upon its legislature to examine and restruc-

¹³³ For a recent commentary on this problem, see P. ERLICH, *THE POPULATION BOMB* (1969).

¹³⁴ It took India (whose land area is about two-fifths the size of continental United States) from the beginning of its existence until 1966 to reach a population of about 480 million, and yet it is estimated that at its present rate of growth that figure will double in 35 years! L. LADER, *supra* note 1, at 136. Although the United States is not in as precarious a position, we too are facing many social problems never before experienced in the same magnitude — housing shortages, urban expansion, and transportation inadequacies are just a few examples which are related to a rapidly growing population.

¹³⁵ For too long our only concern has been with the rights of the embryo and the endless creation of rivers of humanity. Now, in our revolt against servitude to uncontrolled fertility, and a reckless flood of children born as accidents and out of ignorance, we at last have recognized that survival of the embryo is not enough. Our laws must not demand that conceptions be brought to term without being equally concerned about the child who is born. As crucial as his right to be born is his welfare as a human being. L. LADER, *supra* note 1, at 155.

¹³⁶ "Our welfare agencies, our foster homes, the whole vast machinery of public and private institutions dedicated to child care have been involved almost wholly with picking up the pieces. Instead, we should attack the root of the problem—the needs and rights of the child to be born with a fair chance for social as well as physical development. Our responsibility is to guarantee that no child comes into this world unwanted, unloved and uncared for." *Id.*, quoting Sophia M. Robison, Professor-Emeritus of Columbia University's School of Social Work.

ture the relevant abortion laws after first reviewing all medical, social, and constitutional problems presented. This court, in essence, returned the congressional buck which heretofore had meant providing a statute that was "just an incomplete act of legislation whereby the Legislature passed to the judiciary for gestation the touchy subject of contraception."¹³⁷

These constitutional and social problems must be taken into account in formulating meaningful new abortion controls, and the controls may well vary for the period of pregnancy. It is probable that a state could muster sufficient interest in the unborn child during its period of viability, *i.e.*, for such purposes as murder/manslaughter laws, or for testate and intestate succession. On the other hand, in light of medical advances and the holdings of *Belous* and *Vuitch*, there may no longer be sufficient state interest in controlling abortions during the first trimester of pregnancy (aside from insuring abortion is conducted by competent physicians). It would appear, then, that the legislative focus should center on that period before viability and after the first trimester — a period of 7 to 10 weeks when abortion presents a medical risk greater than childbirth and a legal risk less than that of manslaughter or murder.

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¹³⁷ *Gleitman v. Cosgrove*, 49 N.J. 22, 59, 227 A.2d 689, 709 (1967) (Weintraub, C.J., dissenting in part).