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ABORTION, THE LAW AND HUMAN LIFE

THOMAS L. SHAFFER*

Abortion statutes, modeled more or less after the Model Penal Code,¹ have been adopted in Colorado,² North Carolina³ and California,⁴ and proposals are pending in Delaware, Georgia, Maryland, New York, New Jersey and Pennsylvania.⁵ The publication of a comprehensive, readable and representative set of essays⁶ on the subject coincides with heightened professional and public concern over legal restrictions on abortion. The book will probably excite more interest than its editor, Professor David T. Smith, had expected.

This sampling of essays concerning the abortion controversy includes an essay by Professor James George in which the existing legal climate is described in well-documented detail.⁷ Two American physicians and a psychiatrist present essays more or less supporting abortion reform.⁸ A priest-lawyer⁹ and a prominent rabbi¹⁰ oppose reform, and a physician¹¹ answers them. Two social workers and three physicians¹² survey the existing statutes and practices in Denmark and the German-speaking European nations. Most of the substance of the new book is

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1. MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962) [hereinafter cited as MODEL PENAL CODE].

2. Star, "We'll Be the Abortion Mecca for the Nation," LOOK, July 11, 1967, at 67.

3. TRIAL, April-May, 1967, at 7.

4. South Bend Tribune, June 14, 1967, at 15, col. 6.

5. TRIAL, April-May, 1967, at 7.

6. ABORTION AND THE LAW (D. Smith ed. 1967). Professor Smith is Associate Professor of Law, Western Reserve University.

7. George, *Current Abortion Laws: Proposals and Movements for Reform*, in ABORTION AND THE LAW 1 (D. Smith ed. 1967).

8. Niswander, *Medical Abortion Practices in the United States*, in ABORTION AND THE LAW 37 (D. Smith ed. 1967) [hereinafter cited as *Niswander*]; Ryan, *Humane Abortion Laws and the Health Needs of Society*, in ABORTION AND THE LAW 60 (D. Smith ed. 1967) [hereinafter cited as *Ryan*]; Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, in ABORTION AND THE LAW 72 (D. Smith ed. 1967) [hereinafter cited as *Rosen*].

9. Drinan, *The Inviolability of the Right to Be Born*, in ABORTION AND THE LAW 107 (D. Smith ed. 1967) [hereinafter cited as *Drinan*].

10. Jakobovits, *Jewish Views on Abortion*, in ABORTION AND THE LAW 124 (D. Smith ed. 1967) [hereinafter cited as *Jakobovits*].

11. Hall, *Commentary*, in ABORTION AND THE LAW 224 (D. Smith ed. 1967) [hereinafter cited as *Hall*].

12. Skalts & Norgaard, *Abortion Legislation in Denmark*, in ABORTION AND THE LAW 144 (D. Smith ed. 1967) [hereinafter cited as *Skalts & Norgaard*]; Hoffmeyer, *Medical Aspects of the Danish Legislation on Abortion*, in ABORTION AND THE LAW 179 (D. Smith ed. 1967) [hereinafter cited as *Hoffmeyer*]; L. Breiteneker & R. Breiteneker, *Abortion in the German-Speaking Countries of Europe*, in ABORTION AND THE LAW 206 (D. Smith ed. 1967) [hereinafter cited as *Breiteneker*].

data—particularly valuable data in a discussion that sometimes appears obsolete by default.¹³ But Professor Smith also presents thorough excursions into Jewish and Catholic morality (inexplicably omitting Protestants and secular humanists).

The issue in abortion "reform" is whether existing criminal sanctions against doctors and pregnant women should be abolished or liberalized. From one point of view this is the question presented in any discussion of the criminal law—whether people should be put in jail for doing something. From another viewpoint, it is the question presented in any discussion of existing law—whether the reformers, who presumably have the burden of proof, have made a case. The controversy will be especially interesting to Indiana lawyers, who last winter saw an abortion-reform proposal pass both houses of the General Assembly and then die (abort?) at the hands of the Governor.¹⁴

This biased commentator believes that the proponents of reform *fail* to make a case.¹⁵ It is a reasonable impression, though not one intended by either Professor Smith or those of his essayists who are not clergy, that the decisions in three states to leave the life or death of unborn children in the hands of physicians and pregnant women have come too hastily, too emotionally, and with too little consideration of the possibility that the statutes involve millions of human lives. "The loss of 10,000 mothers from badly-performed clandestine abortions in this country is mentioned repeatedly, without any suggestion that the loss of a million babies is worth considering."¹⁶

The statutory "indication" justifying abortion in most states is and has been for a long time that the pregnancy posed a grave threat to the *life* of the mother.¹⁷ The indications which were added by the American Law Institute in the Model Penal Code, by 1937 legislation in Denmark,

13. MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959), by Professor Louis B. Schwartz [hereinafter cited as MODEL PENAL CODE, COMMENT] turns heavily on data presented in TAUSSAG, ABORTION, SPONTANEOUS AND INDUCED (1936), the age of which is noticeable and the accuracy of which is open to some attack; see notes 21, 35, 39 and 47 *infra*.

14. South Bend Tribune, May 12, 1967, at 1, col. 8 and at 13, col. 1.

15. The author is counsel to the South Bend Chapter, and a member of the state advisory board, Indiana Civil Liberties Union, which supported and lobbied for abortion reform in Indiana in 1967. These efforts were opposed by the author in a series of letters to Mr. John de J. Pemberton, Executive Director, American Civil Liberties Union. In this correspondence, the author states his belief that liberalized abortion laws are a violation of the first principle of secular ethics—that human life is an absolute value. Copies of these letters may be obtained by writing to the author in care of the Notre Dame Law School.

16. Pleasants, *A Morality of Consequences*, 86 COMMONWEAL 413, 416 (1967). It is interesting to note, even among the proponents of reform, use of the phrase "unborn child." *Niswander* 63.

17. MODEL PENAL CODE, Comment 163-67 presents several examples in an appendix.

and by legislation recently adopted or now being proposed in many states, are three new ones: (1) a possibility of physical or mental *harm* to the mother, which is a *therapeutic* indication; (2) a possibility of abnormality in the child, which is a *eugenic* indication; and (3) a possibility that the child will be the product of a criminal copulation, which is, I think, a *punitive* indication.¹⁸ The recent essays, however, taken singly or together, support the conclusion that the reason for abortion reform, and the pressure for it, are related to none of these three. The reason is social and economic; it is not therapeutic, not eugenic, and not punitive. It is a matter of birth control.¹⁹

THERAPEUTIC ABORTION

Therapeutic abortions are rarely necessary if health is conceived of as a matter of physical and psychiatric integrity. Dr. Kenneth R. Niswander, a proponent of reform—as most physicians apparently are²⁰—discounts the medical indications for abortion under three heads: those which are minor—examples are neurologic and renal diseases; those which are, under modern methods of treating mothers, capable of control without the necessity of killing the baby—examples are cardiovascular diseases and diabetes mellitus; and those which probably never were vulnerable to aggravation by pregnancy—examples are malignancies and tuberculosis. In other words, his quantitative evidence is that “medical indications” are not medical at all. These are now, under “danger to life” statutes—as they will be under “danger to health” statutes—fictions (or *hypocrisies*, to use the medical term). Doctors use these fictions to bring a woman who demands abortion, and who may very well seek it at the hands of a quack if the doctor refuses to perform it, within the statutory rubric.²¹ Other doctors appear to agree with Dr. Niswander

18. MODEL PENAL CODE § 230.3(2) provides in part for abortion if “the pregnancy resulted from rape, incest, or other felonious intercourse.” The Blumenthal Bill, which failed of passage in New York this year, added abortion for mentally ill or mentally defective women, which seems to expand the *eugenic* category. See Neuhaus, *The Dangerous Assumptions*, 86 COMMONWEAL 408 (1967).

19. *Rosen 72*. Between 20 and 30 percent of all pregnancies in the United States end in abortion. *Id.*

20. Eighty-five percent of obstetricians replying to a poll in New York favored the 1965 proposal to reform New York law—which was similar to Model Penal Code § 230.3; a thousand certified specialists supported the new California statute. *Niswander 55-56*. The American Medical Association supported the sort of bill adopted in Colorado and North Carolina, subject to a requirement of medical documentation and certain additional restrictions in cases of punitive abortion. *TIME*, June 30, 1967, at 44. Dr. Andrew E. Hellegers, Associate Professor of Obstetrics and Gynecology, Johns Hopkins University, however, attacks both medical assumptions and medical statistics. Hellegers, *Law and the Common Good*, 86 COMMONWEAL 418 (1967).

21. *Niswander 41-44*. Rev. Neuhaus questions the honesty of the stated goals of abortion reform. Neuhaus, *supra* note 18, at 410. Dr. Hellegers suggests physician-

that "danger to health" is as unrelated to the realities of abortion as is "danger to life."²²

There is no convincing evidence that psychiatric indications are any more compelling. Where mental conditions are at issue, however, there is a clear difference between the dominant "danger to life" statutory rubric (which in psychiatric terms, requires that the pregnant patient be in danger of suicide)²³ and the new rubric (which would require only that she be in danger of "increased morbidity of mental illness").²⁴ Those physicians who are generally vocal on the subject tend to favor abortion reform. But the physicians are not joined by psychiatrists, only twenty-five percent of whom, in Dr. Niswander's figure, support abortion on psychiatric grounds.²⁵ He quotes a British psychiatrist who denies any connection between pregnancy and mental disease at all: "If society wants abortion to be easier, it should have the courage to campaign for it honestly and not exploit the psychiatrist."²⁶ Nonetheless, Dr. Niswander says, legal abortions for "psychogenic" reasons have increased in the United States, while therapeutic abortions generally have declined.²⁷ This means the psychiatric indication is as hypocritical as the medical indication is.

The evidence to support abortion as therapy is certainly, therefore, less than a preponderance. This is ironic since professional medical support for the statutes has probably been the most potent factor in putting them through the three legislatures which have effectively passed them.²⁸

comfort is behind much of the medical support for reform and adds: "[T]he destruction of a fetus should never be a comfortable matter." Hellegers, *supra* note 20, at 418.

22. Dr. Ryan believes society will condone abortion only if "it does not have to collectively assume the moral responsibility." *Ryan* 62. Dr. Rosen finds that the "actual indications" for abortion are "for the most part, socioeconomic." *Rosen* 87.

23. *Niswander* 49-50. Dr. Rosen notes that eight percent of all female suicides in Sweden between 1925 and 1944 were by pregnant women. *Rosen* 83. However, the suicide rate among pregnant women in the United States (and, for all that Dr. Rosen says, in Sweden) is lower than the rate among the population generally. *Niswander* 53.

24. Dr. Niswander notes however: "It is evident that social factors have become the prime consideration in the decisions to terminate pregnancy for psychiatric indications or for fetal reasons," and he apparently does not regard either of those as genuinely psychiatric. *Niswander* 53. Rev. Neuhaus suggests that Swedish experience indicates grave psychiatric disorder caused by abortion. Neuhaus, *supra* note 18, at 411.

25. *Niswander* 49-50.

26. *Id.* (quoting Dr. Myre Sim).

27. *Niswander* 51-52 (citing a study in Buffalo showing that the number of abortions predicated, under the existing statute, on "psychogenic" indications increased from 10 to 80 percent of the total between 1943 and 1963). Dr. Hellegers disputes the conclusion and demonstrates that psychiatric indications have steadily declined at the Johns Hopkins Hospital. Hellegers, *supra* note 20, at 420.

28. Star, *supra* note 2, at 67.

EUGENIC ABORTION

Eugenic indications²⁹ are, on the one hand, a bitter irony, and, on the other, somewhat more persuasive than therapeutic indications are. The health of the fetus may be threatened by the fact that his mother has had or been exposed to rubella, but both Dr. Niswander³⁰ and Dr. Ryan³¹ indicate that efforts to prevent or cure effects on the baby with gamma globulin are largely improved, and other doctors indicate that the risk of *permanent* harm to the child is much less than is commonly believed.³² This is not to suggest that rubella is less than serious; it is to suggest that destruction of the baby who may or may not be harmed by it is not the only solution. The evidence on rubella is obviously not all in,³³ but the evidence on common and serious fetal harm from other eugenic factors—drugs,³⁴ radiation exposure,³⁵ congenital factors³⁶ and Rh sensitization³⁷ is both in and unimpressive. Of those four factors, only congenital defects commonly present serious harm to children, and none of the doctors gives any indication that medical science can reliably detect the danger necessary to indicate abortion except in cases of incest,

29. MODEL PENAL CODE § 230.3(2) provides in part for abortion where "the child would be born with grave physical or mental defect." The Danish statute is somewhat broader, including grounds for abortion, added in 1956, where the mother is deemed unfit to take proper care of her child. *Skalts & Norgaard* 149. These authors describe also a current debate to extend grounds still further, to cover all mentally retarded mothers. *Id.* at 156-57. Star quotes a Dr. Stewart, who opposed the Colorado statute: "I'm just sick and tired of them trying to grind us down to acceptance that the state is more important than the individual." Star, *supra* note 2, at 67. The data from Denmark suggests that there may be some validity to the common "one-foot-in-the-door" argument against abortion reform.

30. *Niswander* 47.

31. *Ryan* 65-66.

32. Dr. Hoffmeyer sees the gross risk as between 20 and 30 percent where exposure is in the first three months. *Hoffmeyer* 192. *But cf. Ryan* 65-66 (indicating that most defects—as much as 92 percent of them—are curable). *See also Jakobovits* 137 (estimating that the liberalized statutes will result in three million abortions a year in the United States, of which no more than 30,000 would have involved deformed children—so that 95 to 98 percent of all abortions will be performed on healthy mothers, bearing healthy children).

33. *Ryan* 65-66. Dr. Hoffmeyer warns of surgical complications producing sterility as a result of abortion, citing three cases in 1957 in Copenhagen; it is not clear from his account whether rubella abortions carry a greater risk of sterility than other abortions. *Hoffmeyer* 192.

34. *Niswander* 46 (does not mention public control of drugs which endanger the fetus).

35. *Niswander* 48 (indicates that the sources cited at MODEL PENAL CODE, Comment 154 on this point are outdated).

36. Dr. Niswander indicates abortions on this ground in the United States are rare. *Niswander* 48. They are somewhat commoner, apparently, in Denmark. In 1963-64, in cases handled by the Mothers Aid Centers, 419 of 3,936 abortions were eugenic, and 181 of these—more than a third—were because of a fear of congenital defects. *Skalts & Norgaard* 162.

37. *Niswander* 48-49 (indicates that transfusions *in utero* are effective in dealing with this condition).

where statistical probabilities of abnormality are thought reliable.³⁸ Even on the subject of incest, some proponents of reform seem to admit that they are guessing.³⁹

The ironic side of the eugenic indication is the irony Colonel Purdy gave Okinawa in "Teahouse of the August Moon":⁴⁰ "[M]y job is to teach these natives democracy; and they're going to learn democracy if I have to shoot every one of them." Dr. Ryan, the only one of this recent and impressive array of physicians who really faces the problem of human life in the womb, makes the same point with laconic precision:

If an abortion is performed, it in fact is done for the family and society, not for the unborn child. Although some parents and physicians have indicated a desire to abort out of compassion for the child who would bear these defects, this is a difficult moral line to follow. People ask, "How would you like to be deformed?" The child might reply, "If it is a choice of that or no life at all, I might choose life." One prominent gynecologist made a plea for "someone to speak for the fetus." If someone is speaking for the fetus, he must realize that it might say "Let me live." Lest one become too concerned with the cult of perfection, remember—

They say, best men are moulded out of faults,
And for the most, become much more the better
for being a little bad.⁴¹

PUNITIVE ABORTION

The modern statutes also permit abortion where pregnancy results from rape—including statutory rape⁴²—and incest.⁴³ I am calling that

38. *Skalts & Norgaard* 156 (indicates administrative channels through which these prognostications are apparently obtained in Denmark).

39. Professor Schwartz announces a "basis" for this judgment, but cites no authority, MODEL PENAL CODE, Comment 155.

40. PATRICK, THE TEAHOUSE OF THE AUGUST MOON 23 (1964).

41. *Ryan* 66 (quoting Dr. Allen G. Barnes and Shakespeare, MEASURE FOR MEASURE). See also Hellegers, *supra* note 20, at 420. Professor Schwartz reports a case in Philadelphia, in 1956, in which a married woman bore a child fathered by rape; he says the press sympathetically reported her inability to obtain an abortion, but notes the child was turned over for adoption. It appears to be a case supporting Dr. Ryan's point. MODEL PENAL CODE, Comment 155.

42. MODEL PENAL CODE § 230.3(2) (The Code states after "other felonious intercourse" that: "All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.") It is not clear that this kind of abortion requires the mother's consent, which was a stated reason for the veto of the Indiana bill in 1967. See note 14, *supra*.

43. *Id.* Many of these cases would probably be aborted under the old statute. There is apparently a good deal of uneven application of the existing rubrics. Dr. Niswander cites a California study showing that 83 percent of hospitals there

category *punitive*; the Danish call it "ethical." Certainly the "punitiv" situations are the most compelling, since they often present young girls, bearing children as the result of inhuman impositions on them, without any possibility of caring for the child when it is born. Nine months of pregnancy, followed by childbirth, followed by the trauma involved in surrendering the child for adoption, is a bitter price; nothing short of the preservation of innocent life would justify it.

On the other hand, proponents seem to assume that abortion is a universal cure for human misery—a dubious symptom in any reform movement. A recent magazine article sets forth this case:

A 14-year-old mentally retarded girl . . . was impregnated by her father. A public hospital in Denver was unable to perform an abortion, and she had to have the baby. What happened? The father is in prison. The family is on relief. The girl is under a psychiatrist's care. God knows where the baby is.⁴⁴

A hard case, surely. But suppose there had been an abortion. The father would still be in prison and the family still on welfare. Abortion won't prevent sex crimes or produce wealth. The girl—who was mentally retarded—might well be under psychiatric care in any event (and abortion might have made her worse). It is possible that the *only* difference an abortion would have produced in this case is that everybody would know where the baby is, because he would be dead.

It is statistically significant—and perhaps no more than that—that very few abortion cases in this country or Denmark involve that sort of pregnancy.⁴⁵ The statistics may suggest that proponents of reform are utilizing emotional reaction to this dismal social situation for all it is worth.⁴⁶

ABORTION AS BIRTH CONTROL

The real steam behind abortion reform is none of these things. It is nothing more complex than the fact that millions of women want abortions,⁴⁷ and are given abortions.⁴⁸ Most of these abortions, apparent-

stretched the old legal requirements and 59 percent violated them. Dr. Niswander also notes that the rate of abortions in a study at Sloane Hospital, under existing New York law, shows four times as many therapeutic abortions in the private rooms as in the ward. *Niswander* 53, 56.

44. *Star*, *supra* note 2.

45. I infer that conclusion from the doctors' essays as to the United States; in Denmark, in the 1963-64 study cited in note 36, *supra*, only 45 of 3,936 abortions were for "ethical" reasons, which include rape and incest.

46. *Star*, *supra* note 2.

47. *Rosen* 72 (10 to 20 percent of all pregnancies). Dr. Niswander cites the Kinsey estimate that 22 percent of all married women have had abortions. *Niswander* 37-38. But he passes over the highly improbable 95 percent abortion rate in pre-

ly, are performed by reputable physicians,⁴⁹ and some by quacks who put the women's lives in danger.⁵⁰ The typical abortion-seeker does not want her child.⁵¹ Her reasons are not danger to her life or health;⁵² they are not because, without abortion, she will do something rash;⁵³ they are not because the child within her is the product of crime or likely to be abnormal.⁵⁴ She wants abortion because her home has too few bedrooms, or because her life is too crowded, or because she already has too many children, or because the father of the baby doesn't make enough money.⁵⁵ These are reasons for family limitation, and, when put into the debate on abortion, they ought to be fairly labeled for what they are—birth control arguments.⁵⁶ Physicians have declaimed at great

marital pregnancy, which is accepted and expanded from a secondary source at MODEL PENAL CODE, Comment 147.

48. Hungary legalized abortions in 1956; between 1956 and 1966, two million abortions were performed, in a population that totalled ten million. About one pregnancy in four results in abortion there. *Jakobovits* 137. Dr. Niswander estimates present American abortions at between 300,000 and one million annually. *Niswander* 37. Dr. Hellegers thinks his statistical grounds unreliable. Hellegers, *supra* note 20, at 421-23.

49. Dr. Rosen estimates that 80 to 90 percent are performed by reputable physicians, citing 1954, 1958 and 1963 studies. *Rosen* 73. This, of course, raises an independent argument for reform:

To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions. . . .

"[D]ead letter" laws, far from promoting a sense of security in the community, which is the main function of penal law, actually impair that security by holding the threat of prosecution over the heads of people whom we have no intention to punish. MODEL PENAL CODE, Comment 155.

But see Hellegers, *supra* note 20, at 421, who says: "[W]hether the physician should feel comfortable or not is entirely irrelevant if the law is written for the protection of some common good. In fact, the destruction of a fetus should never be a comfortable matter."

50. Dr. Niswander cites studies showing that a third of the maternal deaths in California are due to illegal abortions. He estimates that 5,000 to 10,000 women die annually in this country at the hands of amateur abortionists. *Niswander* 38. Dr. Hellegers disagrees with statistics on maternal deaths. Hellegers, *supra* note 20, at 421.

51. Dr. Rosen says that medical and psychiatric indications are "in most cases. . . mere rationalizations." *Rosen* 87.

52. Although typical polemic cites the fact that most abortion-seekers are married women with other children, that statistic is weakening. Dr. Niswander has it declining from 93.3 percent in the 1940's to 58.9 percent in the 1960's; two out of five are now unmarried. *Niswander* 54. In Denmark 66 percent are married. *Skalts & Norgaard* 161.

53. Of 3,700 women who were refused abortions in the 1958-59 Danish study, 2,988 (81 percent) had their babies, 598 (16 percent) were aborted illegally, and 29 (1 percent) were later given legal abortions. 86 (2 percent) were not accounted for. *Skalts & Norgaard* 165.

54. *Skalts & Norgaard* 162 (indicates that 1.25 percent of Danish abortions are because of rape or incest).

55. Dr. Jakobovits quotes a rabbinical article published during the thalidomide reaction:

The sole legitimate grounds for killing a fetus are the urgent needs of the mother and her healing, whereas in these circumstances the mother's efforts to have the child aborted are based on self-love and egotism, wrapped in a cloak of compassion for this unfortunate creature, and this cannot be called a necessity for the mother at all.

Jakobovits 134.

56. MODEL PENAL CODE, Comment 149, concludes: "The restrictions which

length that existing statutory standards on abortion produce hypocrisy,⁵⁷ but they seem able without blanching to contemplate the hypocrisy of the future, when they will say that a woman who wants an abortion because her baby will limit her social life is in grave danger of illness.⁵⁸ They are willing to replace one hypocrisy with another and are unwilling to say candidly, as the A.C.L.U. has,⁵⁹ that abortion reform is a matter of birth control, and not a medical matter at all.⁶⁰

The question then becomes one of balancing values, and this balancing process inevitably raises the question of the nature of the fetus. This is the hardest and most ignored question of the whole debate—and it is a philosophical question, not necessarily a religious question and certainly not a medical one.⁶¹

A Lutheran clergyman, Pastor Richard John Neuhaus, emphasized this point in an eloquent (and recent) analysis which Professor Smith could well have included in his book:

Discussion of the right to life, enters upon the most sacred and sensitive ground known to the sensibilities of Western man. The question is as sobering as is the discussion of it eternal. What Is Man? The full resources of biology, law, philosophy and theology must be marshalled for this consideration. To say this is not an alarmist escalation of the abortion problem. Self-

society places on the distribution of contraceptives and birth control information are themselves contributors to the abortion problem."

57. *Niswander* 56; *Ryan* 62; *Rosen* 87; *Hall* 226. The A.M.A. endorsement contained this paragraph which I quote from an Associated Press survey, South Bend Tribune, July 5, 1967, at 39, col. 6:

American medicine is therefore confronted with a situation whereby conscientious practitioners performing therapeutic abortions for reasons other than those posing a threat to the life of the mother are acting contrary to existing laws. The A.M.A. statement noted that some 10,000 abortions are performed annually in hospitals in the United States and that few of these were necessary to save the mother's life.

58. It is difficult to see how these "socioeconomic" grounds for abortion, which all of these doctors admit to be the principal grounds, can be honestly assimilated under the three categories of MODEL PENAL CODE § 203.3.

59. Minutes, Due Process Committee, March 8, 1967, and minutes, Board of Directors, June 12, 1967, American Civil Liberties Union, exhibit substantial agreement among members of the committee and members of the Union's board of directors that abortions should be given on demand in cases where pregnancy has been for twenty weeks or less. The Union has not yet taken an official stand on the issue.

60. *Ryan* 62; *Rosen* 87; *Hall* 226. "Physicians, by demanding that as the practitioners in this field they should have the right to determine or adjudicate the laws governing their practice, are making an altogether unprecedented claim not advanced by any other profession." *Jakovovits* 125.

61. Professor Schwartz seems to me to gullibly surrender this point, by saying of psychiatric justification for abortion, "we have no alternative but to rely upon professional opinion on mental health questions," and of predictions of deformity in the fetus, "it seems preferable to rest the matter directly on scientific prognostication of the child's state of health. . . ." MODEL PENAL CODE, Comment 153.

evidently, abortion raises the question about the nature of human life, and those who refuse to discuss the issue on this level are in danger of jeopardizing man's highest values for the sake of a short-range resolution of an immediate problem. Our century has witnessed the demonic consequences of man's distorted definitions of himself along racist, nationalistic and utilitarian lines. Nothing can be taken for granted in terms of society's understanding of human rights. In our valuation of human life, to be civilized is to be conservative.⁶²

Father Robert Drinan believes the fetus is a human life.⁶³ Rabbi Dr. Immanuel Jakobovits disagrees on the premise, but agrees with the result—Judaism, he says, will not countenance abortion on any grounds except to save the mother's life.⁶⁴ Both of these moralists oppose the reform statute.

There probably can never be a satisfactory consensus on the point at which human life begins. Dr. Kenneth Ryan advances an administrative test and a cultural test, both of which would regard the fetus destroyed under the modern statutes as non-human.⁶⁵ Father Drinan's test is absolute and pervasive—human life begins at conception.⁶⁶ Rabbi Jakobovits's test is birth itself, with a reverent respect for incipient humanity before birth.⁶⁷ Drs. Niswander, Rosen and Hall largely ignore the problem, as, one gathers, the eager legislators in Colorado did.⁶⁸ But issues of human life cannot simply be ignored; too many people did that between 1933 and 1945. Too many people have done that with respect

62. Neuhaus, *supra* note 18, at 410.

63. *Drinan* 115, 123.

64. Talmudic argument has often been that liberal abortion would encourage promiscuity. On deformed children, a 12th century rabbi took up the question of a child born with tail and teeth and suggested that the teeth be removed and the tail amputated, but the child kept alive. *Jakobovits* 126-32.

65. Dr. Ryan notes that uninduced abortions before the 20th week are not considered either births (on the mother's parity record) or deaths (for purposes of certification and interment). He further suggests a cultural test keyed to when the baby "quicken" at about the 13th week. *Ryan* 63-64. Professor Schwartz puts a number of similar tests. MODEL PENAL CODE, Comment 148.

66. *Drinan* 123. Dr. Hall shouts Father Drinan down, but offers no real alternative opinion except his view that a fetus is a "potential" human being. *Hall* 230. The resurrection of the Thomistic "mediate animation" theory has been suggested, under which fetal life is life but not human life. Wassner, *Questions About Questions*, 86 COMMONWEAL 416 (1967). Father Drinan says Catholic law has always permitted medical measures to prevent conception after a rape. *Drinan* 110. But Dr. Hall says there are no such measures. *Hall* 230. Hellegers, *supra* note 20, and Pleasants, *supra* note 16, seem to agree with Dr. Hall. See also DALY, MORALS LAW AND LIFE (1966).

67. *Jakobovits* 126-28.

68. Star, *supra* note 2. Mr. Star quotes a Dr. Stewart, who attempted to present to a legislative committee human fetuses, to demonstrate, I take it, that they looked like people. He complained to Mr. Star that he was gavelled out of the hearing. *Id.* at 67.

to the inhumanity of capital punishment; too many do it today when they ignore charges of the unnecessary slaughter of civilians in Viet Nam. The final argument against ignoring discussion on this problem is that it is *cowardly*, a specific refusal to accept moral responsibility.⁶⁹

To debate the question of human life and abortion is not to determine in advance what the debate will decide. Dr. Hall condemns those Catholics who oppose abortion on moral grounds, but his condemnation is ambiguous.⁷⁰ If he criticizes the use of episcopal power to prevent legislation—the sort of thing that probably occurred in Connecticut until the Supreme Court interred that state's birth control statute, and the sort of thing that has clearly held up divorce reform in New York—the criticism is deserved. Catholic bishops in the United States show a remarkable capacity for disqualifying themselves from this sort of debate when they insist upon maintaining in legislation what are clearly sectarian moral positions. They also show a capacity for indiscreet silence on certain issues.

There are insurmountable obstacles to dialogue on the level of public statements from the Roman Hierarchy, not so much because of what the bishops say about abortion as because of what they do not say about Vietnam and the myriad other injustices by which human life is mutilated.⁷¹

But if Dr. Hall condemns those whose political (and moral) judgment is more or less associated with a religious point of view, who merely want to argue their moral insights and then abide the decision of the majority, the criticism is unfair. As Pastor Neuhaus puts it:

The argument against abortion is not derived from church law, but from a conviction regarding the prudent and just course for the whole of society.⁷²

Every man's position on abortion relates to his moral opinions, and no participant is entitled to call another foul when morals are

69. "I am responsible for myself and for everyone else. I am creating a certain image of man of my own choosing." SARTRE, *EXISTENTIALISM* 21 (Frechtman Tr. 1947). That moral choice is made whether or not one chooses to make it. "The casual claim that 'of course' and 'obviously'; there is a difference between the fetus and the baby are supported by the wish for a simple resolution of a troubling problem." Neuhaus, *supra* note 18, at 410.

70. *Hall* 231.

71. Neuhaus, *supra* note 18, at 409.

72. *Id.*, at 410. See MODEL PENAL CODE, Comment 148 for a catalogue of moral opinions. Professor Schwartz unfairly emphasizes the theory of infant damnation as having force in modern Catholic moral theology on the subject. His sources indicate that he did not consult anyone who could be expected to know anything about Catholic theology. *Id.*

brought into the discussion. Dr. Hall and other proponents of reform are fair men who ought honestly to recognize that the debate over abortion involves a grave question of human life. It should be discussed on those terms. If the majority decides to allow the destruction of human life,⁷³ or if the majority decides that no human life is involved, most of us who oppose abortion reform will go on voting, paying taxes and writing to editors. We don't contemplate rebellion. We do want to be heard—heard, not listened to—and to see our elected representatives make an advertent and informed finding on the status of unborn children. "If the fetus is aborted at all, it should be with the same grim sense of necessity with which the pacifist might go to war."⁷⁴

If the legislature finds no human life involved, the restrictions on abortion contained in the modern statutes seem unnecessary. Father Drinan makes that point :

There has been little, if any, speculation by the proponents of liberalized abortion laws on the question of what the law should be when medical science discovers a drug which may be safely and effectively self-administered by a woman desiring to procure an abortion. All discussion on the advisability of more liberal abortion laws has, up to the present, assumed that a woman is not able, or should not be permitted, to be the exclusive decision-maker in the process of securing an abortion; an outside agency has been recommended, presumably because the state owes some duty to protect a pregnant woman against the consequences of her own unilateral decision If any of the advocates of eased abortion laws would categorically recommend the free availability of abortifacient drugs . . . the underlying position of these proponents of easier abortion laws will become much clearer. If they see no problem in permitting a woman to abort herself without the advice or consent of any other human being, then the fetus is, in this view of things, simply a quantum of protoplasm with no rights or interests, which the mother may destroy for any reason deemed

73. This position has also been suggested from a Catholic point of view. Pleasants, *A Morality of Consequences*, 86 COMMONWEAL 413 (1967). See also MODEL PENAL CODE, Comment 150.

74. Neuhaus, *supra* note 18, at 413. The committee minutes, *supra* note 59, represent Judge Kenyon as favoring the mother's right to abort at any time, even when the child is viable, with a stipulation that it is the duty of society and of the attending physician to try to save the life of the fetus. It presumably is not a human life unless it is saved. Pleasants describes recent research data indicating a possibility of saving a baby who aborts very early in pregnancy. Pleasants, *A Morality of Consequences*, 86 COMMONWEAL 413 (1967).

valid by herself alone. Absent such a position, however, those who would defend existing legal penalties against abortion must argue against adversaries who presumably think that an unborn fetus has *some* rights which the state should protect and preserve.⁷⁵

Certainly, if only an inconvenient piece of the mother's tissue is involved, the price paid by women who resort to quacks is far too high. Abortion should be permitted at the unsupported petition of any woman who wants it, and if science devises a safe⁷⁶ way for her to destroy the fetus herself, no one should interfere with her.⁷⁷

If human life is involved, though, its destruction is a relatively grave matter. Abortion should at least, in that case, be surrounded with procedural protections as great as those given men convicted of crime and sentenced to death. Substantive grounds for either imposing or permitting abortion should be grave grounds, gravely stated. If the child is a human life he should be entitled to be heard, through a guardian, and to be heard on questions of due process. If legislatures do not resolve those questions—and possibly even if they do—the courts will have to resolve them. The result will be at least a certain social price paid for undue haste in the legislature. The question is far too grave to be left up to doctors—and I am amazed at those doctors who seem ready to assume it.

75. *Drinan* 112-13.

76. *See* note 50, *supra*. Professor Schwartz claims, citing 1936 authority, that Russian doctors lose no more than one-hundredth of one percent of their abortion patients, in contrast to an American mortality rate, in 1936, of one percent. MODEL PENAL CODE, Comment, 147.

77. Professor Schwartz cites grounds that he apparently feels might justify enlargement of the present proposals. "[P]regnancy of a deserted wife, pregnancy of a woman who is the working member of family . . . pregnancy of a woman inmate of a penal or other institution, pregnancy where the child will be one of multiple illegitimate offspring of a woman who has already demonstrated her incapacity to rear children decently." MODEL PENAL CODE, Comment 156. Rev. Neuhaus reviews some of these "reasons" and concludes that "as an inner-city pastor in Brooklyn, it occurred to me that by these criteria almost all the children in my parish should not have been born." That suggests, of course, the elimination of poverty through the elimination of people. Pastor Neuhaus quotes Stokeley Carmichael's fear that some proponents of abortion plan to eliminate "the colored problem" by eliminating Negroes. Neuhaus, *supra* note 18, at 411.

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