THE JURISPRUDENTIAL OPTIONS ON ABORTION

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DURING THE 1970's those who oppose abortion on moral grounds will confront several legal-moral dilemmas which are just now beginning to emerge. It seems clear that either by legislation or by court decision abortion by the end of this decade will be almost as readily available to women who desire to terminate a pregnancy as voluntary sterilization has been in the past.

When legislation to legalize abortion became a viable option some five years ago, Catholics were at first startled, then horrified, and, with the enactment of such legislation in a dozen states, are now depressed at the new downward thrust of the scope of American law in protecting the sanctity of life. It is clear that the struggle which has now emerged is no longer about any modified abortion law for the presumably extraordinary case, but about a law which would give abortion on request to any person who desires it for any medical or social reason. The New York Council of Churches, which represents most Protestant bodies in that state, has endorsed a bill which would permit abortion on demand. Similiarly, the Kansas Medical Society—undoubtedly a forerunner of similiar organizations—has taken the position that there should be no criminal sanctions of any nature against an abortion done by any licensed physician for whatever reason he deems appropriate.

The Catholic stance in America with regard to liberalizing abortion is still one of almost unanimous opposition to any change in the law, accompanied by a solid front against even a dialogue on the subject with the proponents of some form of legalized abortion. Moreover, few if any signs have appeared that Catholic leaders or spokesmen feel that the time has come when the inevitability of legalized abortion must be faced and that Catholics must seek to mitigate or diminish the evil which will come from this new development in the law of America.

An exploration of the following questions may be helpful as theologians, jurists, and law-enforcement officials seek to defend the inviolability of all life, while simultaneously seeking to act as responsible citizens of a pluralistic society where many if not most non-Catholic leaders and organizations are on record in favor of some form of easing in the abortion laws of the nation. Questions worthy of analysis include the following: (1) an analysis of the common points of agreement be-

tween those who desire no change in the law of abortion and those who favor either abortion by request or abortion on a limited basis; (2) an exploration of ways by which traditional Catholic moral principles might be modified or expanded to permit abortion in certain instances; (3) an inquiry into the possible positions which Catholics and other opponents of legalized abortion might assume with respect to limiting or restricting the evil which these opponents of abortion see as the inevitable result of allowing licensed physicians to terminate pregnancies.

POINTS OF AGREEMENT BETWEEN THE OPPONENTS AND PROPONENTS OF LEGALIZED ABORTION

It would seem particularly important at this moment for the opponents of abortion to explore and exploit every possible point on which those who favor the withdrawal of the civil law from this area may nonetheless agree with those who are opposed on moral grounds to abortion. If the opponents of abortion, having lost the fight in the legislatures or courts of the country, retreat into silence, the new legal arrangement on abortion will be stretched by its advocates and users to include excesses and abuses of the law never intended and perhaps never even foreseen by the proponents of the law. Among the areas of agreement five may fruitfully be mentioned here.

1) In every proposal for a liberalized abortion law it has always been assumed that a licensed physician must be the only person authorized to take the necessary medical steps. Within the immediate future, however, it will in all probability be quite possible for a woman to accomplish an abortion by the "morning-after" or the "month-after" pill. In fact, it is reliably reported that the "perfect" pill is now being devised; this pill would include chemicals which constitute an anovulant and additional chemicals which are abortifacient and which, if the anovulant elements fail, accomplish an abortion by chemical means.

It seems clear that the next major moral decision which the United States Food and Drug Administration will have to resolve is the question whether abortifacient pills will be made available by prescription to at least married women. At least at this time there appears to be a consensus that an abortion is much too serious a matter for a woman, unaided by a physician-counselor, to perform on herself.

Inseparable from the question of the moral or legal liceity of any pill which produces an abortion is a fundamental question: What type of entity is actually being destroyed by the chemical and biological effects produced by the abortifacient agent? The medical or genetic

definition of an embryo or fetus will undoubtedly become more and more precise within the immediate future. At the same time there is no absolute necessity for moral theologians to hold that *human* life comes simultaneously with the formation of that genetic unit which contains the blueprint and the machinery to produce a human being. The Church has never pronounced on the precise moment when human life comes to the embryo. On this issue Richard McCormick, S.J., has written: "The theory of retarded or delayed animation is unquestionably a tenable and respectable theory. It is still preferred by a notable number of philosophers and theologians. The Church has very wisely never decided the matter definitively; indeed, it is perhaps questionable if this is within her competence."[1]

In view of the foregoing it would seem that whatever consensus exists at this particular time that a woman should not be allowed unilaterally by medical means to perform an abortion upon herself may in the very near future dissolve into myriad confusions about the actual effects of a pill which will produce chemical results in the uterus which will so interfere with the constituent elements of the embryo that it will be impossible for that entity to develop in a normal way.

It would seem clear that those who are morally opposed to abortion should not concentrate all their activities and energies to prevent legislation or court decisions in favor of legalizing abortion, but should acquire as much information as is possible about the complex biological and chemical warfare against the embryo which is now being prepared.

2) There remains a consensus in American law and American society that a viable and a nonviable fetus have the right to inherit and also to receive compensation for prenatal injuries. At this time in American law it is virtually always necessary for the fetus to be born alive for the right of inheritance or of compensation to be realizable. Some Catholic opponents of abortion have sought to exaggerate the importance of these two rights of the fetus in American law. The right to inherit or the right to compensation against a tort-feasor does nonetheless suggest that American law considers the embryo or fetus to be *sui juris* capable of possessing at least inchoate rights. Should the proponents of a legal arrangement where abortion on request would be available for all nonviable fetuses also logically state that the law should not recognize any juridical capacity of a nonviable fetus to inherit or recover compensation? To date, the proponents of legalized

[1] Richard A. McCormick. S.J., "Abortion," *America* 112, no. 25 (June 19, 1965) 879.

abortion have not felt obliged to answer that question, but have simply assumed *arguendo* that the fetus has some type of a right to be born unless its elimination can be justified by a presumably more important right of a person already born.

As the science of fetology continues to develop, there will undoubtedly be court decisions with respect to the duty of parents to utilize the findings of fetology with respect to the medical necessities of an unborn child. American law more and more gives its protection to children who are abandoned, neglected, or mistreated. Should the law extend this care and protection to the unborn child in the event that its parent or its mother is unable or unwilling to take appropriate medical means to protect its life or health?

It is clear, therefore, that the civil law does not treat the fetus merely as a nonbeing or as protoplasm. At the same time, the civil law does not face up to the ambiguities or even contradictions in a legal system which protects a fetus in its right to inherit and its right to compensation for injuries, but extends no guaranteed protection to the same fetus against total destruction because its parents prefer its nonexistence to its existence.

3) All parties to the abortion controversy in America are in agreement that easy abortion should not be allowed to become a substitute for birth control or for planned parenthood. Underlying this consensus is the assumption that an abortion, even in the best of circumstances, is undesirable and even traumatic for a woman and consequently should not be the ordinary means of limiting her family. It may be that hidden in this assumption is an element of respect for the fetus as a potential human being, along with the concept that a woman is likely to feel guilt or remorse because of her acquiescence in the destruction of an unwanted potential child.

It is assumed, consequently, in the ongoing debate about the legalization of abortion that the Japanese experience, where abortion on request was permitted as a birth-control and antipopulation device, was undesirable for a number of reasons. The proponents of easy access to abortion for all women, when pressed to articulate their opposition to abortion as a mass birth-control device, generally restrict their answers to a description of the medical risks involved in any abortion. If, however, one absolutizes to some extent the necessity of planned, responsible parenthood, then the easy availability of abortion becomes a necessity at least as a second line of defense against the unwanted child.

Despite the overwhelming sentiment of white middle-class Americans that it is wrong and irresponsible for all but the affluent to have

more than four or five children, there nonetheless still appears to be a moral consensus that social agencies may recommend and counsel birth control to their clients, but that presumably they should not counsel or even mention abortion if it were easily obtainable to a pregnant woman who, in the value judgment of the majority of Americans and of the social-welfare agency, cannot responsibly have the fifth or sixth child whose unborn, nonviable body is within her.

Despite the fact that there is now a consensus that counseling about birth-control programs and techniques is distinguishable from abortion, one can wonder whether abortion, once it became generally available, would not, at least for the poor and less educated, become in effect the "birth control of the poor."

On the fringes of the arguments about the legalization of abortion in America there appears from time to time the contention that, even in the United States, we need a ready access to abortion in order to control a rising population. Although this contention is not in the mainstream of the current controversies about abortion and the law in America, it seems rather certain that the international agencies which distribute aid from the richer nations in the underdeveloped countries of the world may sooner rather than later be obliged to confront the question whether these agencies will recommend easy abortion when it appears clear that programs of governmentally-assisted birth control in these nations are insufficient to control an escalating population.

The legalization of abortion in America, therefore, might well have an impact upon American foreign policy and upon the public policy followed by those international agencies which understandably will seek to prevent by all available means the destruction of the progress which they introduce into the developing nations by a population spiral which will nullify any gains which the international agencies have initiated.

4) In the area of rape and perhaps of incest there is also some consensus among the proponents and opponents of the legalization of abortion. Catholic moral theology allows a physician to take appropriate measures after rape to prevent pregnancy. This is justified on the familiar thesis that a woman may protect herself against an unjust aggressor and the consequences of such an assault. Competent Catholic obstetricians differ somewhat as to the duration of time following a rape in which the physician may morally seek to prevent a pregnancy without performing an abortion.

Although moral theologians hardly ever mention the analogy between incest and rape, it would seem to follow that a woman who has

been the victim of incest should have rights comparable to the woman who has been raped.

In view of the fact that Catholic physicians, and presumably others who are morally opposed to abortion, can attempt to prevent pregnancy for a period after an instance of rape and in some cases of incest, it would seem that Catholics should have no objection to a carefully worded law which would allow competent physicians to prevent a pregnancy when an instance of rape has been reported in good faith shortly after its occurrence. Despite the potential agreement of Catholics and others in at least this one area in the controversy over abortion and the law, this writer knows of no instance where Catholic spokesmen have stated publicly that they would see no objection to a law which would permit physicians to do what presumably all physicians now do after a case of rape has been reported shortly after it has taken place.

5) It is remarkable to note the persistence of the consensus that the fetus after the time of viability should be inviolate. The reasons for the distinction between the easy abortion sought for the nonviable fetus and the untouchability of the viable fetus do not appear very cogent to the person who is persuaded on moral grounds that feticide is just as immoral as infanticide. But for several reasons even the most ardent advocates of abortion on request for any reason are not, at least at this time, extending their case to include the viable fetus. The proponents of abortion say that any fetus which can live outside the body of the mother has to some extent the appearance of a human being and should therefore be treated with the respect which American law gives to any person, however slim his chances are of surviving. It may be, however, that those who claim that every woman should have an indefeasible right to abort her own fetus may seek in the near future to blur the distinction between the viable and nonviable fetus, particularly as the moment of viability decreases from about twenty weeks to possibly as low as twelve weeks. The motivation to erase the line between viability and nonviability will increase as additional tests are discovered which will permit a highly accurate prediction of retardation or abnormality in a fetus.

These developments are perhaps one of the reasons why more and more persons and organizations are advocating that there should be no criminal sanctions against abortion done by licensed physicians in a competent way. If such a law were enacted, the distinction between viability and nonviability would be in the hands of physicians. For medical reasons, if not for moral reasons, it appears to this writer that there is a consensus among physicians at this time that a clearly viable

fetus should not be aborted if neither the fetus nor its mother has medical problems.

Despite these somewhat promising areas of consensus, the stark fact is that in America today virtually the only persons who are protesting the liberalization of abortion laws are Catholics. This, of course, does not mean that most non-Catholics look upon abortion as moral, but rather that most non-Catholics do not necessarily feel that their moral judgments about abortion should be written into the criminal law. The rather monolithic stand of Catholic spokesmen in America with regard to the abortion issue should prompt us to undertake a thorough analysis and reconsideration of positions with which other Christians disagree rather fundamentally.

TOWARDS A REASSESSMENT OF CATHOLIC TEACHING

It is not for a lawyer or a jurist such as this writer to assume the role of moral theologian with respect to the tradition and full meaning of the Church's position on abortion in the past. But any person who seeks to understand what the role of the modern state should be with regard to the regulation of abortion must consider possible or potential shifts in the thinking of the Christian groups whose theology or philosophy constituted one of the major, though not exclusive, forces which led to the antiabortion legislation which was in the statute books of every state in America up to the year 1967.

It is difficult to generalize about shifts that have taken place in Protestant thought with regard to the morality of abortion. One of the severe complications in undertaking such a task is the impossibility on many occasions of distinguishing between what the Protestant authors of a particular document are saying with regard to the morality of abortion and what they are recommending as a suitable legal arrangement for the regulation of abortion. On February 23, 1961, for example, the National Council of Churches of Christ issued a policy statement from its General Board which declares:

> Protestant Christians are agreed in condemning abortions or any method which destroys human life except when the health or life of the mother is at stake. The destruction of life already begun cannot be condoned as a method of family limitation. The ethical complexities involved in the practice of abortion related to abnormal circumstances need additional study by Christian scholars.

One can argue that the inclusion of "the health" of the mother is a basic compromise with the Protestant tradition of morality. The validity of such an accusation depends undoubtedly on the definition of

the term "health." If this term is to be taken in a broad sense to mean the general social well-being of a woman, then the NCC statement is subject to the interpretation that any substantial temporal end desired by the mother and obtainable by her permits her to terminate the pregnancy. If this is so, it is difficult to deny a basic contradiction in the NCC statement, which categorically condemns the "destruction of life already begun."[2]

Other statements by non-Catholic groups demonstrate the same ambivalence. This ambivalence seems more and more to derive from an emphasis on the "quality of life" which the unborn child may expect if his existence is not aborted. Many non-Catholics, both individuals and groups, who are by no means situationists in a pejorative sense, increasingly seem to mention the solidarity of a family life already in existence as a moral justification for terminating an unwanted and unplanned pregnancy.

During the past three years this writer has dialogued at length with most of the Protestant theologians and ethicians who have written or spoken about the morality of abortion. It sometimes seems possible or even probable that Protestant theology and possibly most Protestant churches would return to or revive the strictly antiabortion opinions of such Protestant theologians as Paul Ramsey of Princeton Theological Seminary, George H. Williams of Harvard Divinity School, and James M. Gustafson of Yale Divinity School—all of whom have recognized the sanctity and inviolability of nascent life.[3] These theologians acknowledge their debt to the firm Catholic tradition which resolves any possible doubts about the humanity of a fetus in favor of the right-to-live of the embryo in question.

These Protestant theologians nonetheless recognize that their witness to the sacredness of fetal life may be acceptable to many, if not most, Protestant theologians, but at the same time is at war with the principles of expediency and pragmatism which can justify the termination of a pregnancy to preserve or to secure values and goods which are necessary or helpful to maintain a certain quality of life among those for whom the birth of another child would involve adverse circumstances.

It may be that any person who would reject the notion of an intrinsically immoral act and would judge the morality of a deed by the motivation of the actor and the circumstances surrounding the deed could justify an abortion for a variety of reasons. This judgment, to be

[2] Cf. Robert F. Drinan, S.J., "Contemporary Protestant Thinking [on Abortion]," *America* 117, no. 24 (Dec. 9, 1967) 713.

[3] Cf. *ibid.*, p. 715.

sure, is the utilization and the application of traditional concepts in Catholic moral thinking to the thought processes of Protestant moralists. The language does nonetheless reach to the heart of the ever-growing literature by Protestants about the morality of abortion.

This writer has speculated on several occasions whether it might be possible to establish between Catholic and Protestant theologians a rather strong similarity of opinion regarding the immorality of terminating the life of a healthy fetus in the womb of a healthy mother. An agreement of this nature might also include a large number of Jewish theologians, as well as a significant number of nonbelieving humanists who place a high value on fetal life.

Most, but not all, of the justifications offered tend to center on the defective fetus or the health of the mother or the emotionally charged instance of the raped woman. Very few moral theologians will confront the real question involved, namely, the fact that, as far as we can ascertain, more than 80% of all the legal and illegal abortions performed in America are done on healthy children and healthy mothers.

Paul Ramsey has called abortion "fetal euthanasia."[4] Other Protestant theologians, such as Karl Barth and Dietrich Bonhoeffer, have categorically condemned the taking of a germinating life as a "monstrous thing" and as "murder."[5] Richard John Neuhaus, a Lutheran theologian, echoed these sentiments when, in testimony before the New York Governor's Commission on abortion, he stated: "The discussion of abortion must come to terms with the pre-eminent question of the presence of human life . . . [and] the legal rights and protections appropriate to the prenatal form of human life. To evade the question as it is posed in this way is both dishonest and socially dangerous."[6] The same Governor's Commission heard a statement of the Greek Orthodox Archdiocese of North and South America: "When the unborn child places the life of its mother in jeopardy, *then and only then* can this life be sacrificed for the welfare of its mother. To move beyond this exception would be transgressing man's duty in the protection of human life as understood and interpreted by the Orthodox Church."[7]

Catholics who participate in the ongoing public debate about abortion and the law hear on the one hand these Protestant and Orthodox condemnations of abortion and are encouraged to feel that possibly a

[4] "The Sanctity of Life," *Dublin Review*, Spring, 1967, pp. 3–23.

[5] Karl Barth, *Church Dogmatics* 3/4 (Edinburgh, 1961) 415–16; Dietrich Bonhoeffer, *Ethics* (New York, 1965) pp. 175–76.

[6] Report of the Governor's Commission to Review New York State's Abortion Law, 1968, p. 23.

[7] *Ibid.*

common front against the legalization of feticide might be possible. On the other hand, Catholics hear from almost every source challenges to the proposition that the nonviable fetus has any right to be born which transcends the desires and plans of those responsible for the coming-into-existence of the fetus.

As a result of the conflciting voices which Catholics hear with regard to the issue of abortion, Catholic theologians tend to be silent, while Catholic spokesmen seek to bring together any and all forces which will reverse the tide which is running so strongly to turn abortion over to the private sector and to disestablish it as a part of public morality. Those Catholic scholars who seek to re-examine traditional teaching with a hope that there might be an "opening to the left" are sometimes treated as if they were giving comfort to the "enemy." On the other hand, Catholic intellectuals who have sought to justify Vatican II's condemnation of abortion as "an unspeakable crime" have not been able to develop a line of argumentation which is persuasive to the countless non-Catholics who are confused or ambivalent about the morality of abortion.

Without necessarily suggesting that any valid way of modifying the traditional Catholic position on abortion has evolved or could evolve, the following points are nonetheless worthy of the most serious consideration by Catholic thinkers. These issues include (1) a consideration of the incidence of involuntary miscarriage and (2) the ever-greater predictability of the malformed or defective unborn child.

The Fetus and Involuntary Miscarriage

To a certain extent the right of the fetus to be born is qualified by the process of nature itself. An astonishing number of pregnancies involuntarily miscarry. A nonmedical observer of this phenomenon such as this writer can only be amazed that perhaps one third of all fetuses "die" before they are born.

The complex processes that bring about this very high rate of miscarriages are still too obscure to form the basis for any moral judgment on what fetal rights, if any, may have been violated by the relative ease with which this phenomenon has been allowed to continue. No one, in other words, appears to be suggesting that the moral law requires that the best possible scientific and obstetrical care and medicine *must* be available to *all* mothers who, because of the likelihood of their involuntarily having a miscarriage, should have the right that their fetuses be born protected in every possible way. If, however, society were truly convinced that a fetus has just as much a right to live as any child or any adult, then the medical equipment necessary

to prevent involuntary miscarriages should be made available in order to save the lives of endangered unborn children.

Does the attitude of almost heedlessness with regard to the countless number of involuntary miscarriages which continue to take place say anything about the common estimation which mankind has of the right of the fetus to be born? If a Catholic mother with a medical history of a number of involuntary miscarriages became pregnant with an unwanted child, would there be a moral obligation on her part to seek all possible medical ways to prevent a miscarriage in this particular instance? Would the ordinary-extraordinary test applying to the means which must be used to preserve the life of a person with an incurable disease be similarly applicable to the mother with an unwanted pregnancy? Does the failure of Catholic teaching to require of such a pregnant mother that she take every possible precaution to save the life of her unwanted fetus state something by implication about an ambiguity in Catholic tradition with regard to the right of *every fetus to be born*?

Assuming that *some* ambiguity does exist with regard to this question, then must mothers and physicians simply allow the unknown processes of nature to expel fetuses in some instances but not in others?

As the knowledge about fetology develops, the question will arise whether a Catholic mother with an unwanted pregnancy may allow the natural processes known to her to have aborted in the past, to operate in this particular instance to expel the child which was unplanned and unwanted. Persons outside the Catholic moral tradition would affirm a positive right on the part of the mother to control the biological forces of her own body to bring about a situation which for her and for her family would be desirable. As knowledge about the process of conception, implantation, and the growth of the embryo increases, Catholic theologians will no doubt have to confront the situation where a mother may, by negative means or the omission of certain medical agents, allow a situation to develop in which she would acquiesce in the withering away of the fetus within her. Could a rationale be developed for such a situation in which it could be said that the mother has not (utilizing the traditional terminology) taken "direct" action against an "innocent" embryo?

It is not contended here that the suggested nonaction of a mother, when scientific knowledge is a good deal more precise, is consistent with existing moral principles. But it is suggested that the profligate number of involuntary miscarriages may suggest that Catholic thinking might be modified so that women and Catholic physicians need not

necessarily be controlled by the anomalies and abnormalities of the process of reproduction.

Once again, it is not contended that this approach to allowing or even controlling an involuntary miscarriage has a basis in Catholic moral thought at this time. But clearly such an approach to the reproductive process is almost at the heart of the thinking of those highly moral individuals who feel that mankind, and particularly women who are pregnant with an unwanted fetus, should not be the victims of the unknown or mysterious forces of nature, but should be in a position to control these forces in order to produce a higher quality of human existence.

The Predictably Malformed or Defective Fetus

Another factor which qualifies or limits the right of a fetus to be born is the apparent tendency of nature to expel some malformed or defective fetuses. A nonmedical observer such as this writer cannot pretend that he possesses adequate information on this subject. If, however, it becomes clear that nature does intend to expel the seriously malformed or substantially defective fetus, would it seem to follow that the natural moral law might permit qualified medical persons to assist nature in carrying out its intended expulsion of severely damaged embryos?

Within the immediate future it will be more and more possible for a pregnant mother to obtain early in the first trimester of her pregnancy an accurate prediction of any serious abnormality in the child in her uterus. Defects due to chromosomal anomalies will be increasingly detectable early in pregnancy, as will other, nongenetic defects.

Are there any principles in the Catholic tradition which could be utilized or modified to permit parents to terminate a pregnancy where the nonviable fetus is clearly severely damaged and where the predictable mental ability will place the child in the trainable and not the educable class? Rather extensive discussions by this writer about this problem with Catholics of all educational levels seem to suggest that among the best informed and most devout Catholics there is a feeling that in such an instance there is not necessarily any moral duty on the part of the parents to insist that a severely defective fetus be brought into the world where his entire existence would be abnormal and almost apart from humanity. There are, to be sure, many Christians who would shrink from such a conclusion and who would feel instinctively that no one should tamper with fetal life, even though the potentialities of this gravely damaged fetal life are so minimal.

One can wonder whether in a matter of this complexity the "sense of the faithful" might be taken as a norm in a moral problem which is very new to mankind and which has dimensions and implications no one has yet been able to explore.

Some couples with inherited chromosomal patterns will have up to 75% of all their children born with severe retardation. For an ever-increasing number of these cases scientific tests are being developed which will allow the mother to know at an early moment in her pregnancy whether the fetus she has conceived is defective or normal. Is there any moral way by which such a mother may have four normal children rather than the four severely abnormal children which might well be born to her?

This writer does not pretend that any of the questions raised above can be resolved in a satisfactory manner by the application of the traditional principles employed in this area. At the same time, it is suggested that the explosion of knowledge about the reproductive process should bring a good deal of caution to the spokesmen for the Church when they are confronted with a new situation in which the application of customary principles would bring about a result that appears to many to flout the findings of science and to insist that, once "life" is present in the uterus, that "life," however disabled or defective, must be treated as if it were an entirely normal fetus.

The unavoidable moral dilemmas which will occur by reason of new scientific discoveries are one of the reasons that complicate the Catholic's choice of a legal arrangement which effectively protects as many interests as any law can in the area of abortion. We come then to the question of jurisprudence, or the role of criminal and civil sanctions against abortion in the temporal order.

WHICH LEGAL ARRANGEMENT IS BEST WAY TO REGULATE ABORTION?

There are only three ways by which the law can operate with regard to abortion. The first way, followed in Anglo-American and in European law until the very recent past, prohibits all abortions with the one exception that permits physicians to terminate a pregnancy when the mother's life is at stake. The second way, now the law in at least ten states in America, would prohibit all abortions except in instances where the pregnancy threatens the physical or mental health of the mother, or where pregnancy results from rape or incest, or where the fetus is predictably deformed. The third way is to withdraw all criminal sanctions and to allow licensed physicians to terminate pregnancies for any reason deemed satisfactory by them. An analysis of

these three options will demonstrate that those seeking a just abortion law have at best a Hobson's choice.

Should the Law Forbid All Abortions?

A persuasive case can be made for the proposition that the law which existed in England from 1803 and in all of the American states until 1967 was the best way to regulate abortion. The law stated a moral ideal to the effect that society would protect all life from the womb to the tomb. To the objection that such a Draconian law is not enforced or even enforceable a sound reply can be given: the law must treat the protection of life as a nonnegotiable item. A law forbidding all abortions would place society and the government in the role of teaching the integrity, the untouchableness, and the inviolability of every human or potentially human life.

It can also be argued that society needs and regularly demands dubiously enforceable laws in other complex and difficult areas of human existence, such as the regulation of prostitution, the sale of narcotics, or the control of gambling. In these fields of human activity society has found that law must protect men from their own weaknesses and that it is for the common good that statutes inhibit commercialized vice, the widespread availability of narcotics, and the permeation of gambling into every avenue of society. A case can be made that the suppression of abortion is even more important than the social objectives sought by the laws which curb the concupiscence and the avarice of mankind.

It is interesting and perhaps significant that virtually all American laws prohibiting abortion included within them at the time of their enactment in the late nineteenth or early twentieth century an exception permitting abortion in the event that the life of the mother was at stake. It is by no means certain that these laws were a reflection of Protestant morality at the time the laws were enacted. But it does seem significant that America has always desired to have some mercy for the living in its law on abortion, even though such a provision undercuts the absoluteness of the guarantee given by the law to protect all forms of human life.

In the escalation of literature about abortion and the law in the recent past there are very few apologists for the legal system which does not allow abortion at least in the most agonizing cases. Many persons who oppose abortion on moral grounds reject the idea of a firm law against abortion on the assumption that such a law is unenforceable and consequently produces contempt for the law and indeed lawlessness. These same individuals seldom if ever analogize the ban on

abortion to similar prohibitions in difficult areas of life where presumably a restrictive law does in fact inhibit and to some extent deter the passions of men from harming other innocent individuals.

Catholic endorsement of the existing legal arrangement on abortion has brought charges and angry accusations that the Catholic Church is seeking once again to impose its own moral views upon non-Catholics. Almost every attempt to broaden the bases of Catholic opposition to change in the abortion laws by including non-Catholics and nonbelievers is still deemed to be in essence a "Catholic front." Seldom if ever do non-Catholics give credit to Catholic spokesmen for making the preservation of fetal life a nonnegotiable issue.

There exists very little sentiment among even the most "liberal" lay Catholic groups or individuals to advocate or even acquiesce in a substantial change in the abortion laws of America. At the same time, these articulate Catholic lay people do not defend the present system, where there are criminal sanctions against all abortions except in the presumably rare instances of a medical situation which would justify a "therapeutic" abortion.

Catholics and others who oppose any easing in the abortion law have an instinctive feeling that any liberalization in the law will in fact lead to a widespread abuse and a *de facto* legalization of abortion on request. This feeling brings us to a discussion of the second possible legal arrangement by which abortion can be regulated.

Does the Approach to Abortion in the Model Penal Code Offer a Solution to the Problem of Abortion?

The central problem regarding abortion and the law is that no one has really defined the problem. The problem presumably is the presence of illegal abortions in America, the estimate of which ranges from 200,000 per year to 1,200,000 per year. It seems clear that some 80% of these abortions are done on married women who already have a family and desire to terminate an unplanned and unwanted pregnancy. These women are by no means in the lower socioeconomic classes; rather the opposite. As far as can be discovered, more than one fourth of all the illegal abortions are done by licensed physicians. This does not include the eight or ten thousand legal abortions done each year in the forty states which forbid abortion except when there is a serious threat to the life of the mother or, in some five states, to the health or safety of the mother. These figures, furthermore, do not include the somewhat higher number of abortions done in the ten states which have adopted a modified form of abortion in the past three years.

On the assumption that the existence of widespread illegal abortion

is a serious social problem, is there any solution to the problem within the nation's legal institutions? It is widely assumed that strict enforcement of the abortion laws is not possible because of the clandestine nature of the events which surround an abortion. On the other hand, it is feared even by the most militant advocates of abortion-on-request that the withdrawal of all criminal sanctions might well lead to an escalation in the number of abortions, many of which would be hasty and ill-advised.

In the late 1950's the American Law Institute, a prestigious group of 750 law professors, jurists, and judges from all over the United States, sought to produce a "compromise" between the Draconian prohibition of all abortions and the complete abandonment of any regulation of this area. The resulting sections of the Model Penal Code, finalized in 1961 by the American Law Institute, recommend that an abortion be permitted in three circumstances: (1) where the physical or mental health of the mother is threatened by the pregnancy, (2) where the pregnancy is the result of rape or incest, and (3) where the fetus is a predictably defective or deformed child.

The Model Penal Code was deliberately designed to harmonize and accommodate all competing theories regarding the functions and limitations of criminal law. On first inspection, the Code would seem to be an admirable harmonization of those conflicting interests. Further analysis, however, reveals the several anomalies and contradictions within the Penal Code regarding the right of a fetus to be born. It may be, to be sure, that these contradictions can be resolved if one accepts the utilitarianism underlying the approach of the Code's authors. "Utilitarianism" is used here to mean an approach to law and ethics which teaches as its ultimate norm the principle that the end of society and of the law should be the greatest happiness of the greatest number. John Stuart Mill put it this way in his essay *On Liberty*, when expounding "one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control":

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[8]

[8] Chap. 1; text from *On Liberty, Representative Government, The Subjection of Women* (*The World's Classics* 170; London, 1948) pp. 14–15.

Although Catholics should perhaps give more consideration to this viewpoint when they develop a jurisprudence for a pluralistic society, the fact remains that the Model Penal Code, in applying utilitarianism to the right of a nonviable fetus to be born, tries to slide over the crucial question whether the fetus is or is not a human being. In other areas of the law it may be permissible and wise for a statute to muffle or mute its answer to hard questions and thereby pragmatically attain an acceptable accommodation or compromise. But when the law grants the right to extinguish fetal life to certain specific persons for specific reasons, the result would be the institutionalization of a new legal right—the right to dispose of fetal life for reasons which hitherto have been thought insufficient to justify such an action.

The Model Penal Code establishes priorities which are entirely new in American jurisprudence. The Penal Code says in effect that society and its law may prefer to prevent any harm coming to the health of a pregnant woman even to the point of destroying fetal life itself in order to preserve the objective of the mother's health. The term "mental health" in the Penal Code is even more susceptible of an interpretation predicated on utilitarian moral principles. The concept of "mental health" cannot be defined or interpreted in any way known to the civil law, where the concept of "mental health" is used only as a norm for the commitment to an institution of a person whose "mental health" has so deteriorated that the person is a danger to society.

The eugenic provisions of the Penal Code are even more compatible with the moral outlook of John Stuart Mill than the provisions concerning the mental and physical health of the mother. The Penal Code states by undeniable implication that parents have a right to prefer bright and healthy offspring to retarded and defective offspring. Utilizing this principle, the Penal Code gives to parents the right to extinguish the life of any potential human being conceived by themselves who will in all probability be retarded, deformed, or defective. The Penal Code assumes that such a child will be "unwanted" and that consequently nonexistence for such a child is better than existence. To suggest that the law is not selecting those who must die or those who may live, but is simply handing this decision to the parents of a nonviable fetus, does not really answer the objection that society by enacting the Model Penal Code is withdrawing the protection of the law from the first twenty weeks of fetal life, not for the healthy and the normal fetuses, but only for the retarded and abnormal fetuses. Such a law clearly teaches the principle that healthy and productive human beings are much more desirable for society than retarded and unproductive individuals would be.

Many other moral and practical difficulties can be enunciated with

regard to the major premises behind the Model Penal Code. This writer finds himself more and more opposed to, and indeed appalled, at the concept of having a law which would permit the termination of a pregnancy for the pragmatic objective of preserving the health of the mother or the eugenic objective of diminishing the number of retarded or substandard human beings.

If one is opposed to the Model Penal Code but sees nonetheless that *some* alteration of the abortion laws is inevitable, is it better to prefer the withdrawal of all criminal sanctions in the area of abortion rather than allow the statute books of America to rule for the first time that the state may choose the reasons for which it can give permission to terminate the life of a fetus thought to be undesirable for society? What, then, are the attractions and the difficulties with the third option, namely, the withdrawal of criminal sanctions from all conduct by licensed physicians which is designed to terminate pregnancy for any reason deemed adequate by the mother seeking the termination of her pregnancy?

Should Abortion Be a Crime?

For Catholics and others who believe that feticide is almost always the equivalent of infanticide, the objective of any civil or criminal law should be to minimize the number of fetal deaths. In the order of sheer logic, without reference to the existential order, the absolute ban on all abortions would be the best way to minimize the number of fetal deaths. Since this total ban in the United States has apparently not been effectively enforced and is apparently unenforceable, does it automatically follow that the repeal of these laws will increase the number of abortions sought and finalized? There is no empirically verifiable answer to that question. Almost everyone would probably conclude, however, that abolition of all criminal sanctions against abortion would in fact teach society that abortion is a neutral event with which society has no moral difficulties.

Some of the predictable good effects of the withdrawal of criminal sanctions from this area would be the following:

1) If any licensed physician or duly qualified obstetrician could perform an abortion for any reason deemed sufficient to himself and to the mother of the unborn child, it would appear that, at least in the order of logic, all underground and illicit activities of unlicensed abortionists could be sharply curtailed and even eliminated. If the elimination of the illegal traffic in abortions were terminated, at least one part of the social problem of abortion would be resolved.

2) A second good result would be the possibility, for the first time, of

providing in-depth counseling to women who come to medical officials seeking an abortion. If one thing is clear about the pregnant woman seeking the termination of her pregnancy, it is that she needs and deserves extensive counseling rather than the threat of criminal prosecution. To treat a woman seeking an abortion as a criminal rather than a person confronting what is probably the worst predicament of human existence flies in the face of all contemporary jurisprudential theories which seek to assist rather than convict and punish the alcoholic, the user of narcotic drugs, and the person charged with deviant behavior. To be sure, the case of the woman seeking an abortion cannot be adequately described as a "crime without a victim"; nonetheless it is nearer to that concept than other forms of criminal conduct.

If criminal sanctions were not applicable to abortion, it would be possible for the law to require mandatory counseling and a "cooling off" period. During such a period the pregnant woman would be advised with respect to all the options open to her, including the possibility of bearing the child and allowing it to be placed for adoption in a very attractive home. Such counseling would also, hopefully, prevent a woman who does in fact elect an abortion from repeating the events which led up to the unwanted pregnancy.

3) A withdrawal of criminal sanctions against abortion would clearly keep the state out of the business of establishing standards or reasons with regard to what kinds of fetuses may have their life extinguished and what type must be given the right to be born. It seems undeniable that the granting of such a right to the state might have long-range consequences of incalculable significance.

Some of the foreseeable bad effects of the withdrawal of criminal sanctions from abortion would be the following:

1) Every withdrawal of a law which protects the sanctity of life weakens to some extent the teaching power of the law regarding the inviolability and untouchableness of every human life. Laws, for example, which lift restrictions on the possession of firearms, or laws which are not stringent with regard to the possibility of a fire in a nursing home for the aged, teach at least by implication that the right to personal security and to property take precedence over the right of every individual not to have his life terminated by the action or negligence of another. These analogies, however, probably fail to illustrate the much more direct teaching impact which the law would have if it abdicated the protection of the life of every potential human being during the first twenty weeks of the fetal nonviable existence of this person.

2) The diminution of the protection of the law which would result from the repeal of any regulation of what physicians may do to fetal

life could possibly be the forerunner of many other laws which would be predicated on the concept that the law should elevate the quality of human existence rather than merely protect every human being, however lowly and unneeded his existence might be. Such a result is undoubtedly now thought highly desirable by not a few jurists in America. These jurists can justify the extinction of fetal life only on the supposition that the first trimester of fetal life is not worthy of the protection which the law gives to human existence in every other form. The advocates of abortion-on-request insist that they are not downgrading human life in any way. At the same time, it is very significant that the proponents of abortion-on-demand can justify their position in moral terms only if they assume that fetal life is subhuman or at best parahuman.

The foregoing makes it abundantly clear that the tangled web of abortion and the law yields very few clear questions about the problem and virtually no answers. The dilemmas surrounding the issue of abortion and the law involve aspects of genetics, medicine, sexuality, morality, jurisprudence, and in the ultimate analysis one's view of the nature and purpose of any human existence. For Catholics there exists the further problem of potential abrasions to intercredal dialogue and harmony which might result if Catholics assume a "hard line" on the question of abortion.

This author has no easy solutions or ready options for the Catholic legislator, jurist, or spokesman on the question of abortion and the law. Perhaps the central issue was described in the reasoning of John Courtney Murray, S.J., who, while not addressing himself to the question of abortion, wrote as follows about the criminal law: "The moral aspirations of law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order.... It enforces only what is minimally acceptable, and in this sense socially necessary.... Therefore the law, mindful of its nature, is required to be tolerant of many evils that morality condemns."[9] Pursuant to these principles, Father Murray goes on to ask: "Is it prudent to undertake the enforcement of this or that stand, in view of the possibility of harmful effects in other areas of social life? Is the instrumentality of coercive law a good means for the eradication of this or that social vice? And, since a means is not a good means if it fails to work in most cases, what are the lessons of experience in the matter?"[10]

[9] *We Hold These Truths: Catholic Reflections on the American Proposition* (New York, 1960) p. 166.

[10] *Ibid.*, pp. 166–67.

Even if, however, the power and processes of law seem almost impotent with respect to the control of abortion, those who fight on for the sanctity of fetal life are struggling for what George H. Williams of Harvard Divinity School has called "the very frontier of what constitutes the mystery of our being." Unless these frontiers are defended, Prof. Williams states, "the future is grim with all the prospects of man's cunning and contrived manipulation of himself and others."[11]

That somber warning constitutes an appropriate conclusion to a discussion of the contemporary assault on the right of the human fetus to be born.

[11] George H. Williams, "The No. 2 Moral Issue of Today," *America* 116, no. 12 (Mar. 25, 1967) 452.