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by Luke T. Lee

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The Abortion Experience
Where an act declared "criminal" continues to be widely practiced with little effort at enforcement by the authorities, and where the harmful effects of keeping this crime on the books appear to outweigh those objectives which were originally sought by the lawmakers, the question of repeal or revision inevitably arises. Such being the dilemma posed by abortion legislation, it is useful to examine briefly the different forces at work toward abortion legalization, followed by an analysis of the various judicial and legislative responses.

**FORCES WORKING TOWARD ABORTION LEGALIZATION**

**High Rates of Illegal Abortion and Attendant Health Risks**

Despite the difficulty of measuring precisely the rates and risks of illegal abortion, the following estimates nevertheless reflect the magnitude of the problem posed by illegal abortion. In Egypt, for example, it has been estimated that 40% of hospital admissions for deliveries and pregnancy complications were actually for abortions and their complications.\(^1\) Recent records of two university hospitals suggest the existence of one abortion for every two births, notwithstanding the restrictive nature of the Egyptian Penal Code on abortion.\(^2\)

Reports from Turkey indicate that, during the late 1950s and early...
1960s, there were 500,000 abortions and 10,000 deaths each year from abortion operations, few of which took place in hospitals because of their illegality.3

The number of illegal abortions in France has been estimated on the average at between 250,000 and 300,000 per year, with some authorities claiming a much higher figure.4

A conservative estimate of the number of abortions performed annually in Belgium is 30,000, as compared with 50,000 births.5

In Italy, the annual number of interrupted pregnancies during the 1960s reportedly fluctuated around 150,000, a large number of which were illegal abortions.6 Two other estimates have put the annual numbers of illegal abortions at a maximum of 500,0007 and between 800,000 and 3,000,000,8 respectively. High numbers of maternal deaths occur every year as a result of malpractices that run the gamut from the use of herbs to primitive, unsophisticated instruments.9

A 1966 estimate in Switzerland has placed the ratio of illegal abortions to births at 1 to 2.10

Available data between 1961 and 1968 from the United Kingdom have indicated that the death rates for criminal abortion were from three and one half to eight times higher than the death rates for therapeutic abortion.11

When all abortions were illegal in the Soviet Union between 1917 and 1920, it was estimated that up to 50% of women resorting to abortion became infected in the course of operation and that up to 4% died as a result of the procedure. The 1920 decree legalizing abortion had as its aim the combating of the evils of clandestine abortion.12

In Chile, 8% of all hospital admissions have been for patients with postabortal complications; these patients have occupied one-fourth of all maternity beds in Maternal Health Service hospitals.13 The death rate in the late 1960s was estimated at 150–200 per 100,000 abortions, with most of the abortions being illegal.14 Indeed, it is estimated that 50% of pregnancies in Latin America are currently terminated by illegal abortions—resulting in the death of four times as many women as in countries where abortions are legal.15

In the United States, estimates on the number of illegal abortions ranged from 200,000 to 1,200,000 every year prior to the Supreme Court decisions on Roe v. Wade and Doe v. Bolton on January 22, 1973.16 In a recent study in the United States involving more than 600 young people between 13 and 19 years of age, it was estimated that 10% of all American female adolescents had been pregnant at least once. Among the nonvirgin girls, 11% of those between the ages of 13 and 15 and 28% of those between 16 and 19 reported having been pregnant. That many of them resorted to abortions is evidenced by the opinion of the majority of the adolescents interviewed: “If two people are going to
have a baby that neither person really wants, it is all right for the
girl to have an abortion."

The above statistics suffice to show the prevalence of illegal abortion,
even among predominantly Moslem and Catholic states, with the att-
tendant high mortality rates.

**Impact of Abortion Legalization upon Illegal Abortion and
Birth Rates**

Until the enactment of a more liberal abortion law in 1957, the number
of criminal abortions in Czechoslovakia was estimated at approximately
100,000–300,000 per year, as compared to only 2000–7000 legal abortions. Liberalization of abortion law was followed, according to data for
1958–1957, by a sharp rise of the number of legal abortions to between
70,000 and 90,000 a year, and nearly 100,000 in 1968, with a reduction
in the number of illegal abortions by 65–80%.

Elsewhere in Eastern Europe, liberalization of abortion law was fol-
lowed simultaneously by an increase in the number of legal abortions
and a decrease in birth rates. In the six Eastern European countries
with liberal abortion laws, birth rates declined by 40% in one decade
following liberalization; in the two Eastern European countries (East
Germany and Albania) which did not liberalize their laws, there was
no appreciable decline in birth rates. A decline of 50% was experienced
in Japan.

Conversely, where a liberal abortion law is replaced by a restrictive
one, there is a tendency for the birth rate to rise. For example, imme-
diately after Romania tightened its abortion law in October 1966, the
birth rate jumped from an average of 14.3 per 1000 population in 1966
to 27.3 in 1967. However, the rate declined subsequently to 26.8 in
1968 and 23.3 in 1969, as contraceptive use increased and as abortionists
returned to business and regained a clientele. The estimated birth
rate as of January 1972, was 21.1.

That a liberalized abortion law can lead to a large percentage of
abortions performed under proper medical supervision may be seen from
the following statistics compiled by hospitals: In Uruguay, which has
the most liberal abortion laws in Latin America, it appears that 75%
of pregnancies are terminated by abortion in hospitals. The comparable
figures for countries with more restrictive situations are Mexico, 13%;
Peru, 5%; Colombia, ranging from 2.3% in Cartagena to 13.7% in
Manizales; Chile, ranging from 16.6% in Armijo and Monreal to 23.2%
in Raquena; and Argentina, 48.7%.

What legalized abortion can accomplish in reducing the maternal
death rate has been brought out dramatically by the New York experi-
ence. The total number of maternal deaths in New York City in the
The maternal death rate declined to 37.7 per 100,000 live births, a decline of 28% from the preceding 2-year period when the rate was 52.2. The death rate in New York City for legal abortions performed in the first 12 weeks of pregnancy under the new abortion law has been less than 2 per 100,000 operations, which may be contrasted with 17 deaths per 100,000 tonsillectomies and more than 20 per 100,000 full-term deliveries.

Another recent study has found only 6 deaths among 73,000 legal abortions performed in 66 U.S. medical institutions (or 8.2 deaths per 100,000 legal abortions) – three times lower than the U.S. maternal mortality rate of 24.7 per 100,000 births.

Not only the maternal mortality rate but also the infant and neonatal mortality rates declined in New York City. Thus, for 1969, the infant mortality rate was 24.4 per 1000 live births; for 1970, 21.6; and for 1971, 20.7. As for neonatal mortality – deaths occurring in the first 28 days of life – the decline was even more striking: from 18.1 to 16.2 to 14.9 during the same periods.

The rate of out-of-wedlock births has also declined. Out-of-wedlock births, which had been increasing “dramatically” in New York City in recent years, showed a drop from 31,903 in 1970 to 28,126 in 1971, a decline of 11.8% – the first decline since 1954 when such birth records were kept.

That the risk of abortions performed under proper medical conditions is lower than the risk of continued pregnancy and childbirth has been documented by Tietze. His statistics have demonstrated that only 69 women died among 2,500,000 women undergoing legal abortions in Czechoslovakia and Hungary in the period 1957–1967 (a mortality rate of 2.8 per 100,000 abortions). For most countries where abortion is illegal, the mortality rate is expected to average 50–100 per 100,000 illegal abortions. In countries where antisepsis is not practiced, the mortality rate associated with illegal abortion may reach or exceed 1000 per 100,000 such abortions.

Indeed, the U.S. Supreme Court decision on Roe v. Wade, the Texas abortion case, was based in part on the “established medical fact that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth.”

Inadequacy of Contraception Alone as Fertility Regulator

Human nature being what it is, it is unrealistic to expect that precautions to prevent conception will always be taken prior to sexual intercourse,
even though no pregnancy is intended. It suffices to cite a recent study showing that 55% of nonvirgin adolescents interviewed in the United States reported that neither they nor their partners used any birth control method nor did they do anything else to reduce the risk of pregnancy at the time of first sexual intercourse. Of this group of girls 19% indicated as a regular birth control method: "I just trusted to luck that I wouldn't become pregnant;" 8% cited another method: "I didn't think about whether or not I might become pregnant." The resultant pregnancy rates of 11% for nonvirgin girls aged 13-15 and 28% for those aged 16-19 should come as no surprise.55

But even when precautions are used, there is no certainty that pregnancy will not occur. Despite the giant strides made in modern medical sciences, there is yet to be developed a foolproof contraceptive, universally available and acceptable. A recent study in the Philippines, based on a probability sample of 1764 women who accepted family planning during 1970 in 47 clinics, underscores the varying degrees of effectiveness of different contraceptive methods.56 In the first place, the continuation rates vary according to the methods used (allowance must be given to a small number of acceptors who shifted from one method to another), as evident from the following tabulation:

<table>
<thead>
<tr>
<th>Method first accepted</th>
<th>All-method continuation rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pills</td>
<td>66.8</td>
</tr>
<tr>
<td>IUD</td>
<td>85.4</td>
</tr>
<tr>
<td>Rhythm</td>
<td>52.8</td>
</tr>
<tr>
<td>Others</td>
<td>54.6</td>
</tr>
<tr>
<td>All acceptors</td>
<td>70.2</td>
</tr>
</tbody>
</table>

Second, the clinical probability of failure exists in all methods used, as seen from the next tabulation:

<table>
<thead>
<tr>
<th>Method first accepted</th>
<th>Probability of method failure (1)</th>
<th>Rate of pregnancy regardless of status (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pills</td>
<td>3.2</td>
<td>22.3</td>
</tr>
<tr>
<td>IUD</td>
<td>3.3</td>
<td>9.6</td>
</tr>
<tr>
<td>Rhythm</td>
<td>33.2</td>
<td>43.5</td>
</tr>
<tr>
<td>Others</td>
<td>12.1</td>
<td>33.3</td>
</tr>
<tr>
<td>All acceptors</td>
<td>7.2</td>
<td>21.5</td>
</tr>
</tbody>
</table>

Pending the achievement of "each pregnancy a wanted pregnancy," the ethical question may well be posed: If a woman, having determined
to avoid pregnancy, resorted conscientiously to a particular contraceptive method prescribed by her physician or priest, but nevertheless became pregnant, should she, the child, or society be forced to bear the consequences of such contraceptive failure?

Although there is a general preference for contraception over abortion as regulator of fertility, the experience indicates that abortion should be made available in the event of contraceptive failure. In this regard, the Japanese experience is of interest. Given a population size and age distribution, it is possible to arrive at an estimate on the approximate number of natural conceptions per year in the absence of contraception. The difference between such an estimate, on the one hand, and the number of actual births and abortions, on the other, represents the number of conceptions prevented by contraception. This formula is useful in determining the contraceptive effectiveness vis-à-vis abortion.

If we use a Japanese estimate, the following ratios emerge:

<table>
<thead>
<tr>
<th>Year</th>
<th>Induced Abortion</th>
<th>Contraception</th>
</tr>
</thead>
<tbody>
<tr>
<td>1955</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>1960</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>1965</td>
<td>3</td>
<td>7</td>
</tr>
</tbody>
</table>

It should be remembered that the year 1955 was the last of the 8-year population crisis in Japan (1948-1955). The relatively high ratio of abortions to contraception in 1955 as compared to that of 1965 is perhaps instructive. Despite the relatively high economic and educational standard in Japan, it still took many years before contraception could replace abortion as the dominant method of population control. Given a lower economic and educational level, the process might be even longer. This, on the other hand, may be speeded up by discovery and use of more effective and easily administered contraceptive devices and pills.

Figure 16.1 shows the pattern relating the use of contraception and induced abortion to the number of live births in a country passing from a high to low birth rate.

Further, one must remember that the use of contraception is not totally free of morbidity. Birth control pills and, to a lesser extent, intrauterine devices are accompanied by occasional complications. As a result, in one review Tietze concluded, “The most rational way of regulating fertility is to use a perfectly safe, although not necessarily 100 percent effective, method of contraception and to terminate pregnancies resulting from contraceptive failure under the best possible circumstances, i.e., in a hospital operating room.”
Consequences of Denied Abortions on Mothers and Children

A number of reports have demonstrated the consequences of denied abortions upon the women, the children, and the society at large. In a Swedish study 120 children born after refusal by the authorities to grant permission for abortion were compared to paired controls of the same sex born either in the same hospital or district to mothers who had not applied for abortion. After a close observation for 21 years, the former group of children were found to have higher incidences of psychiatric disorder, delinquency, criminal behavior, and alcoholism. They were more often recipients of public welfare assistance, were more unfit for military service, and received less schooling than those in the control group. The study concluded that the very fact that a woman applies for legal abortion indicates that the prospective child, if carried to term, will have a greater likelihood of social and mental problems than his peers.

In another study in Sweden of 213 children born to women who had been refused therapeutic abortion, the unwanted children were shown to be physically as well as mentally impaired.

An analysis of the records of 180 cases of disordered mother-child relationships at the Lasker Mental Hygiene Center of Hadassah, Jerusalem, similarly demonstrated a relatively frequent history of unsuccessful attempts by mothers to terminate pregnancies.

In Prague, 254 of 555 women who had been refused legal abortion
resorted to spontaneous and criminal abortions. The "unwanted children" from the remainder, who were observed over a period of 5 years, appeared at a disadvantage when compared with children whose mothers had not sought abortions during pregnancy.  

A British study following the liberalization of abortion law demonstrated that the stress of bearing an unwanted child could lead to psychiatric symptoms, especially in the overburdened multipara and for the single girl without support. In contrast, little psychiatric disturbance could be detected in patients whose pregnancy was terminated.  

Grim though the above picture is, it shows but the tip of an iceberg, portraying the situation only in countries which offer an abortion review procedure or machinery—countries already with, by definition, liberal abortion laws. Many more countries do not even provide for such procedure or machinery, thus making legal abortion much more difficult. While reactions to unwanted pregnancies may range from mere regret at inconvenience to trauma, children born under the latter circumstances may well be analogized to those born as a result of refused legal abortions, with comparable consequences. To cite but one example: the situation of mixed blood children fathered but abandoned by foreign servicemen. Many of the mothers are bar-girls, prostitutes, or maids. In view of the women's need to continue their trades for a living and in view of the expected shame brought upon their families by the begetting of "half-breed" children (particularly if half-Black), the difficulty of identifying the natural fathers, and the near impossibility of compelling the latter to pay for the support of the children because of jurisdictional and distance problems, it may be assumed that, had legal abortions been available, they would have been obtained. Denial of such an opportunity has produced many tragedies.  

In the first place, many mothers have abandoned these children to overcrowded orphanages in which children sometimes sleep two to a cot. They seldom visit the children who hunger for visitors' affection. In some orphanages in Vietnam, half-black children are kept apart from the other children.  

Physically conspicuous, and almost always abandoned by their fathers, the mixed-blood blacks grow up amid the taunts of their schoolmates, whether in Europe or in the Far East. According to a recent study in West Germany, which has a restrictive abortion law, 65% of some 8000 children of half-Black parentage are growing up psychologically retarded, shy, and inhibited. In racially monolithic Japan, only a handful of half-Black children have broken through the high walls of prejudice, winding up mainly in the entertainment field. Even under the Confucian concept of tightly knit families, Korea's "half-castes" are considered "outcastes," and their presence reminds many Koreans of the shame of widespread prostitution.
Again, the question must be asked whether it is in the interest of the woman, of the prospective child, or of the society that unwanted pregnancies be required to come to term.

**Discrimination against the Poor**

Where abortions are illegal, the rich can resort either to high-cost and illegal but safe abortions at home or to a pleasure trip abroad combined with an abortion. The poor can only stay home and face the consequences of either childbirth or high-risk, illegal operations. Thus built into a restrictive abortion law system is the inherent discriminatory treatment against the poor and the favoring of the rich. It raises the serious issues of justice and equal protection under the law.

In Italy, for example, abortions by bona fide doctors operating in private clinics cost about $175–$500 or more; thus they are placed out of reach of low-income women.54

In France, clandestine abortion operations are performed when women do not have $400–$600 to go to a clinic in London or Geneva. Of 100 women brought to a... for abortion, 26 were housewives without employment, 35 were stenographers or typists, 15 were salesgirls, 16 were teachers or lab assistants, 5 were factory workers, and 3 were students.55

The results of a survey of 60 major hospitals throughout the United States prior to legalization of abortion demonstrated an enormously higher incidence of therapeutic abortion among private patients than among ward patients. In one extreme case, a hospital reported a therapeutic abortion rate of 1 per 37 deliveries among its private patients, while another reported no abortions among 24,013 indigent patients delivered. In New York City, a 10-fold higher incidence among private patients than among clinic patients was reported.56 According to another estimate, in a recent 1-year period, there were only 109 legal abortions performed in the municipal hospitals with 18,000 ward beds, as against 1731 abortions performed in private hospitals with only 4500 beds.57

That legalization of abortion will mitigate such discrimination is evidenced from the following statistics: In New York City in 1960–1961, the ratio of therapeutic abortions per 1000 deliveries was 2.6 for white women, 0.5 for black women, and 0.1 for Puerto Rican women. During the first 9 months after liberalization of the abortion law (July 1, 1970–March 31, 1971), the following changes in the ratio were noted: Abortions were performed on New York City residents at the rate of 4 for each 10 live births among whites, 6 for each 10 live births among blacks, and less than 3 for each 10 live births among Puerto Ricans.59

In the words of Joseph Beasley: "The discrimination against the poor in regard to both education and the availability of adequate contracep-
tive services is in my opinion the major cause of the high rate of unwanted pregnancies observed.

Status of Women

Like family planning, equality of the sexes is recognized as a basic human right, although it has often been honored in its breach rather than its observance. Even today, polygamy runs rampant in many parts of the world, and women's suffrage is by no means universal.

During the last half-century, tremendous strides have been made in advancing women's position in the legal, educational, political, social, and economic fields—with a resultant decline in birth rates. In the Scandinavian and Socialist countries, and increasingly among several states of the United States, there also has been a growing tendency to broaden the definition of equality of women to include in the meaning that each woman should have the right to decide whether or not to bear children and that this right should include the right to have an abortion. It even has been pointed out that the opposition to the liberalization of abortion has been most marked in religious organizations which, by tradition, have given a predominant role to men and which in one case has a celibate clergy; in contrast, countries which have adopted the most liberal abortion laws are those which, with the exception of Japan, have most fully recognized and implemented an equal status for women. Further, some have claimed that the procedure under which abortion petitions are reviewed by hospital committees is but a thinly disguised attempt to perpetuate men's control over women in view of the all-male or nearly all-male composition of such committees.

It is noteworthy that in a conflict between the right of Soviet women to abortion and the basically pronatalist policy of the Soviet Union in light of its huge underpopulated territories and losses of manpower resulting from the World Wars, the women's right has tended to prevail. It is not surprising that complete freedom to obtain an abortion exists in the People's Republic of China, now that its women are accorded complete equality with men.

Separation of Church from State

Despite guarantees in most countries' constitutions of the separation of church from state, it is a self-evident truth that religion continues to have a strong influence on the law. This becomes most apparent when issues surrounding human reproduction are considered. The Islamic religion forbids abortion after the "quickening" of the fetus, and no Moslem country permits such abortion. Similarly, the debates
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on divorce, contraception, and abortion in Roman Catholic countries indicate the strength of religious influence.

The successful attempts in Italy to liberalize its divorce and contraceptive laws in 1970 and 1971, respectively, against Church opposition may signal a growing acceptance of the separation of church from state and may foreshadow some change in the abortion law. Elsewhere, there are also signs suggesting impending change. Even within the Church itself, there is increasing sentiment, epitomized by the Venezuelan bishops, for a separation that would confine the Church's teaching to its own faithful and avoid imposing its views on the State and on non-Catholics.

Rediscovery of Traditional Laws Allowing Abortion

Where present laws create general dissatisfaction, it is inevitable that peoples look back to see what were the traditional laws, why they gave way to the present laws, and whether the reasons for change remain valid. Such reexamination and revival of the past—a kind of legal Renaissance—has led to some interesting discoveries. For example, it was found that at common law and for several decades after the ratification of the U.S. Constitution, there was no legal prohibition against abortion before quickening. Surgical abortions before quickening were first prohibited in 1803 in the United Kingdom by Lord Ellenborough's Act, and in 1829 by the New York Revised Statutes of 1829, the latter being motivated, according to some authorities, by the risks connected with surgery in general. Since it is safer now to have abortion under proper medical supervision than continued pregnancy or child delivery, the question is understandably raised as to the need for retaining such existing laws.

In the non-Western world, dissatisfaction with existing abortion laws led to the discovery that such laws had not been part of the indigenous cultural, religious, philosophic and legal traditions but were products of imperialism or the wave of westernization attendant upon the Industrial Revolution. The upsurge of nationalism and the decolonization process following World War II accelerated the reawakening of the past—giving new impetus for legal change. A few examples may suffice:

In the case of China, one of the main tenets of Confucianism is that of filial piety stressing reverence to parents as life-givers. The logical sequel is that what the parents have given, they can take away. Abortion is regarded more as parents' self-inflicted punishment than a "sin" against God or a "crime" against society. This explains the absence of any provision dealing with abortion in traditional Chinese penal codes. It was only during the late Manchu dynasty in the latter part of the nineteenth century that abortion was prohibited—as a result of an attempt to
westernize the Chinese legal system. It should be noted, however, that the Manchu attempt was motivated, not by conviction, but by the desire to remove the extraterritorial regime imposed on the Western Powers—removal of which was made contingent upon China’s judicial modernization.

The establishment of the People’s Republic of China in 1949 set the stage for a reexamination of the Western-originated legal system, along with its antiabortion provisions, which had been adopted by the Nationalist government. Though a new penal code has not yet been promulgated, abortion has been made not only legal, but even rendered free, for the purpose of meeting China’s need. It may be interesting to note that abortion has remained a “crime” under Article 288 of the penal code in Taiwan.

Similarly, abortion had not been considered a “crime” in Japan until the Meiji Reform. In its effort to modernize the judiciary, the Meiji government adopted a penal code along with its antiabortion provisions after the French model. Despite the similarity of the texts, the basic Japanese and French approaches to life (including its embryonic stage) and to crime remained different. French laws against abortion were originally based on the religious concept of God as the creator of life. Thus, it would be violative of God’s will to take away that which was given by Him—a concept alien to the Confucianist philosophy which permeated Japan. In view of this difference in concepts it was not surprising that the post–World War II liberalization of abortion law in Japan struck a responsive chord.

Until World War II, much of the Moslem world was dominated by Great Britain, France, and Holland, along with their strict antiabortion laws. Independence resulted in the opportunity to review the usefulness of these laws and their compatibility with the traditional Islamic jurisprudence. Such review brought to light the doctrine that although abortion after the fetus had acquired a life or soul of its own was absolutely forbidden—“haram”—there was disagreement on when the soul entered into the fetus. Most scholars agreed, however, that the soul was not created until the embryo took on human shape; this occurred at 40 to 120 days, depending on the school of thought to which one adhered. There also was disagreement as to the necessity for a valid cause for abortion.

Given these divergent views, it was not surprising that in 1965 Tunisia liberalized its law to permit abortion, not only in the event that the mother’s health would be seriously compromised by the continuance of pregnancy, but also if the duration of pregnancy was less than 3 months and if both parents requested abortion in writing and already had five living children. Elsewhere in the Moslem world, the sentiment for changing the existing laws also appears to be on the rise.
Although the Roman Catholic church is now taking an unequivocal position equating abortion with murder, whatever the stage of fetal development, its doctrine has not been a consistent one. The Didache, the first recorded condemnation in ecclesiastical writings, enjoined: "You shall not slay the child by abortion. You shall not kill what is generated." However, a distinction between a "formed" and "unformed" fetus made its mark between the fifth and twelfth centuries. With the publication of Gratian's Decretum in 1140—the first systematic attempt at compiling ecclesiastic legislation—the distinction became firmly established: "He is not a murderer who brings about abortion before the soul is in the body." From 1591 to 1869, the Church taught that the unborn infant acquired a soul only with the quickening—the first movement—of its body (generally between the 12th and 15th week of pregnancy). An abortion which took place prior to this period fell into a less serious category of sin. Also, between the fifteenth and eighteenth centuries, the doctrine was developed justifying abortion if necessary to save the life of the mother.

In view of the change in the Church's doctrine on abortion, its "one dimensional approach" condemning all abortions as murders, and certain theoretic weakness, an increasing number of Roman Catholics have been calling for abortion reform. Some would even remove abortion from penal legislation altogether—regarding it as a private matter between a woman and her physician. The intransigence of the Church's stand against contraception in any form except the rhythm method has not helped its position on abortion.

That abortion legalization is not incompatible with a predominantly Catholic country is evidenced by the liberal abortion legislation adopted in East European countries such as Czechoslovakia, Hungary, and Poland as well as in Uruguay. Also in France, Belgium, and Italy there are signs of a more liberal trend in regard to abortion legislation.

It may be quite possible, however, that reemphasis of traditional laws in some cases may work against, instead of for, abortion liberalization. For example, Hinduism regards abortion as tantamount to the murder of a brahman—the crime of crimes—for blocking reincarnation or interfering with the wheels of the transmigration of souls. The restrictive abortion law imposed by erstwhile British colonialists thus found a receptive soil in India. Even so, stark socioeconomic necessity resulted in an estimated 6.5 million abortions a year (2.6 million natural and 3.9 million induced) prior to the liberalization of abortion law which took effect in January 1972. However, notwithstanding liberalization, abortion may not be as widely utilized as intended by the legislature because of the Hindu attitude toward it. Vasectomy, on the other hand, bestirs little of the adverse reactions directed against abortion. In fact, Hinduism has held sexual abstinence (with which sterilization is more
associated than is abortion) in high esteem, ascribing to it a certain quality of aestheticism. This may explain, at least in part, the popularity of vasectomy camps in India to which a festive spirit usually is endowed.

**JUDICIAL AND LEGISLATIVE RESPONSES**

The judicial and legislative responses to the forces working toward abortion legalization described above have taken the following forms, each of which will be briefly described:

**Nonprosecution or Nominal Penalty upon Conviction**

It is no secret that, even in countries forbidding abortion under any circumstances, abortion operations continue to exist, with very few or no prosecutions. In the Philippines, for example, the draconian and restrictive nature of the abortion law (allowing for no abortion under any circumstances) has been accompanied by nonprosecution in recent years—either of the woman or of the abortionist.100

In Thailand, which has a restrictive abortion law, municipal hospitals receive large numbers of women requiring treatment for postabortion complications, and at least one hospital reports all such cases to the police department. Actual prosecutions, however, are rare.101

In most of the countries of the Middle East, which have continued the repressive legislation against abortion, the laws are rarely enforced, and many illegal abortions are even performed by physicians in hospitals or private clinics.102

In the Netherlands, despite the severity of punishment for abortions under the criminal code, the latter is not enforced.103 In fact, several abortion clinics run by a specially created foundation for medically indicated abortions (Stimezo) are operating without interference by the department of justice.104

In Italy, only 150-200 people have been prosecuted annually in recent years in spite of estimates of as many as 800,000-3,000,000 criminal abortions a year.105

In Belgium, an average of 60 people, including only one doctor, have drawn jail terms annually under its strict abortion law over a 5-year period. As mentioned earlier, a conservative estimate of the number of abortions is 30,000 per year as compared with 50,000 births.106

Despite the rigidity of abortion law in the French penal code, the number of actual convictions has been estimated at 500-600 a year, or scarcely higher than 2 per 1000.107 Even in case of conviction, the court is likely to impose only a mild sentence. Thus, a court in suburban Bobigny imposed a suspended $500 fine on November 22, 1972, on Mme. Michele Chevalier for finding an abortionist for her 16-year-old daughter,
Marie Claire: This despite Art. 317 of the penal code which provides that "any person who . . . has procured or attempted to procure the abortion of a pregnant woman" is liable to 1-5 years' imprisonment and a fine of 1800-36,000 F. The daughter herself had been set free earlier notwithstanding the liability under the code to imprisonment for 6 months to 2 years and a fine of 360-7200 F. Even the abortionist drew only a suspended sentence notwithstanding penalties of up to 30 years in prison and fines as high as 14,000.

Liberal Interpretation of Existing Law

Since the law revision process is usually cumbersome as well as time consuming, some judiciaries have preferred to give a liberal interpretation to existing laws rather than to adhere strictly to the letter of the law. A case in point is the Japanese interpretation of Art. 14 (1) (iv) of the Eugenic Protection Law which authorizes a designated physician to perform an abortion operation on a "mother whose health may be affected seriously by the continuation of pregnancy or by delivery, from the physical or economic viewpoint" (italics supplied).

Although "economic" reasons alone would not, under a strict interpretation of the Japanese law, constitute sufficient grounds for abortion, the obvious difficulty or impossibility of proving the serious adverse effects of economic conditions on health has resulted in such a liberal interpretation of the law that, in practice, the requirement to prove them has been dropped, and every wealthy and healthy woman can obtain an abortion. Indeed most of the operations for induced abortion have been performed on economic grounds.

Liberal interpretation of existing laws may extend to the area of burden of proof with similar results. Thus, in the case of United States v. Vuitich involving the constitutionality of the District of Columbia's abortion statute which forbids abortion "unless the same were done as necessary for the preservation of the mother's life or health," the United States Supreme Court, while dismissing the vagueness charge, decided that the burden of pleading and proving "beyond a reasonable doubt" that the abortion was not "necessary for the preservation of the mother's life or health" rests with the prosecution. Such a holding, according to Harriet Pilpei, had the effect of reducing "considerably any risk physicians may incur in connection with any abortion statute."

Establishment or Extension of Grounds for Legal Abortion

The usual device in liberalizing abortion law has been to establish or extend the grounds for legal abortion ranging from medical (life, health) to any or all of the following: eugenic, ethical (humanitarian),
medicosocial, social, and age. Among these, the first three are the most common and are perhaps best expressed in the Model Penal Code provisions on abortion as recommended by the American Law Institute:

1. if there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother"
2. if "the child would be born with grave physical or mental defect"
3. if "the pregnancy resulted from rape, incest or other felonious intercourse."

The laws of some countries also provide for "medicosocial indications" (e.g., previous deliveries in close succession, interval since the last delivery, difficult financial situation, or ill health of other members of the household), "social indications" (e.g., number of living children, hardship, and environmental consideration), or "age" as an indication (e.g., above or below certain age).

Where abortion is permitted on one or more of the grounds discussed above, there are usually qualifications (contraindications) explicitly forbidding abortion under certain circumstances, e.g., progress of pregnancy beyond a certain stage (quickening, viability) or time (10-28 weeks), nonfulfillment of residency requirement, presence of certain diseases, and withholding of consent by the spouse.

Some of the grounds may produce the same effect as abortion on request because of difficulty of proving nonfulfillment. Thus, although the new Indian abortion law, which was passed in August 1971, and went into effect in January 1972, does not stipulate contraceptive failures explicitly as a ground for abortion, Explanation II to Art. 3(2), which authorizes abortion if continued pregnancy would involve a risk of grave injury to the mental health of the woman, provides:

Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

**Abortion on Request**

The term "abortion on request" or "abortion on demand" is actually a misnomer, for there are invariably certain conditions, formalities, or procedures to be observed or fees to be paid. It is generally taken to mean the elimination of the need to specify any ground for abortion within a specified period of gestation. Under the November 23, 1955 decree of the Soviet Union, for example, abortions may be performed...
by qualified personnel in medical facilities. However, a Ministry of Health instruction on December 28, 1955, provided a list of contraindications, under which no abortion may be performed. These contraindications are:

1. acute or chronic gonorrhea
2. acute or chronic inflammatory conditions of the sexual organs
3. purulent foci, irrespective of localization
4. acute infectious diseases
5. abortion within the preceding 6 months

Special permission is required in pregnancies more than 12 weeks old.

A gynecologist usually discusses with each woman the reason for her application for abortion and warns her of possible adverse effects. However, if the woman persists, her application must be granted. The cost for an induced abortion is 5 rubles (U.S. $6.10); therapeutic abortions are performed free of charge.

In a landmark decision on January 22, 1973, the United States Supreme Court, in *Roe v. Wade*, the Texas abortion case, ruled that:

a. For the first 3 months of pregnancy, the decision to have an abortion lies with the woman and her doctor.

b. For the next 6 months of pregnancy, state laws may regulate the abortion procedure reasonably related to maternal health.

c. For the last 10 weeks of pregnancy, when the fetus is judged capable of surviving if born, any state may prohibit abortion except where necessary to preserve the life or health of the mother.

In a separate decision on a challenge to the Georgia abortion law, *Doe v. Bolton*, the Supreme Court declared unconstitutional any residency requirement as well as the Georgia requirements that abortion operations be performed in private hospitals, applicants be screened by hospital committees, and certification be made by two independent doctors to the effect that continued pregnancy would cause potential danger to the woman’s health.

The Texas decision will invalidate strict antiabortion laws in 31 states, while the Georgia decision will require amendments of abortion statutes in 16 others plus those which have in effect allowed abortion on request but have imposed a residency requirement (Alaska, Hawaii, and Washington).

Underlying these decisions is the majority’s rejection of the argument that a fetus becomes a “person” upon conception and thus is entitled to full due process and equal protection guarantees under the Constitution. The Court explicitly held that the fetus is not a person within the meaning of the Fourteenth Amendment.
The Court observed that the restrictive criminal abortion laws in effect in the majority of the states were of comparatively recent origin—dating, for the most part, to the latter half of the nineteenth century when abortion operations were hazardous for the woman. It took note of improved medical knowledge in the established fact that mortality in abortion until the end of the first trimester is less than mortality in childbirth. Also noted are the detrimental effects of denied abortions upon the woman, the unwanted child, and all concerned, psychologically and otherwise. Expounding on the right of privacy which it first invoked in 1965 to invalidate a Connecticut law prohibiting the use of contraceptives (Griswold v. Connecticut), the Court held that this right is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

The sum effect of these decisions is that the Court recognized that there must be a compelling state interest to warrant interference with the woman’s basic right to privacy. No such interest exists in the first trimester. However, the interest appears to a limited extent in the second trimester, and becomes strong during the third. Although, as the Chief Justice stated, this is not abortion on demand, the decisions nevertheless allow the woman and her doctor to make whatever decisions on abortion that may be appropriate during the first trimester without governmental interference.

Integration of Abortion into Free Family Planning Services

Finally, a country may not only permit abortion on request but also make abortion a free public service—thus implementing in effect the 1969 United Nations Declaration on Social Progress and Development calling on U.N. members to provide families with not only the knowledge but also the “means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children.”

The People’s Republic of China, having reportedly “the best family planning programme in the world,” belongs to this category. A recent report by Faundes and Luukkainen confirmed that “in China induced abortion is performed free on request.” They described the procedure as follows:

As soon as a woman realizes that she is missing a period, she attends the clinic . . . If a positive diagnosis is made on the first visit and the patient declares that she does not want to have the baby, she is immediately taken to the appropriate ward where she waits for her turn to have an abortion . . . [She] will have 15 days of paid vacation and 18 days if an IUD was inserted postabortion.
Early abortions are usually performed by nurses and, in the communes, by trained barefoot doctors or midwives. . . . The complication rate seems to be very low because of the good aseptic procedures used. . . .

Mortality resulting from abortion seems to be nonexistent or extremely low.

It may be noted that the procedure outlined above was not based on any judicial decision or published legislation. In light of the dichotomy between \( li \) (Confucian ethics) and \( fa \) (written code) in the traditional Chinese legal system, in which \( li \) invariably prevailed over \( fa \) in the event of a conflict, it would not be surprising that integration of abortion into free family planning services was a decision made by the Communist Party, aided by mass organization and support, pursuant to the ideals of a new \( li \) in a new society.

CONCLUSIONS

Despite continued strong opposition to abortion on various grounds, the general trend points unmistakably toward abortion legalization, so long as the forces working toward it remain unabated. In fact, five of the world's most populous countries comprising a majority of the world's total population—United States, Japan, Soviet Union, India, and China—now have laws which virtually allow abortion on request. It is interesting to note that each of these countries has approached abortion legalization via a different route: the United States, judicial decisions; Japan, liberal interpretation of existing law; Soviet Union, new legislation; India, official explanation forming part of new legislation; and China, party decision and mass support.

REFERENCES


7. Id. at 19.


14. IPPF, op. cit., p. 27.


32. New York Times, Oct. 8, 1972, p. 20, col. 6. Since many young people marry to legitimize conceptions, the decline in "illegitimacy" could lead to a reduction in teenage marriages, which are twice as likely to result in divorce as those of older couples. See Brody, Jane E., "Landmark Ruling on Abortion," New York Times, Jan. 28, 1973, section 4, p. 3.


35. Sorenson and Hendin, op. cit., pp. 6-10.


37. There is evidence showing that even where abortion is legally available on social and medical grounds, the abortion rate can decline with the passage of time. IPPF, Induced Abortions, p. 20.


41. Hall, op. cit. vol. 2, p. 121.


44. Hook, Kerstin, "Refused Abortion: A Follow-up Study of Two Hundred and Forty-nine Women Whose Applications Were Refused by the National Board of Health in Sweden," id., Supplement 168, vol. 39, 1963; Nadelson, Carol,


46. Potts, op. cit., p. 247.


49. The laws of virtually all civilized countries require natural fathers to pay for the support of their children, whether born in or out of wedlock. In view of the inability of foreign nationals to reach the natural fathers who may be placed under the exclusive jurisdiction of the sending state by virtue of their membership in the armed forces, an attempt may be made to alleviate human suffering through appropriate unilateral, bilateral, or multilateral actions.


52. The estimates on the number of mixed bloods sired during the postwar American occupation of Japan range from the low Japanese official figure of 4000 to 50,000. Ibid.


60. See Dr. Joseph D. Beasley’s statement, Hall, op. cit., vol. 2, p. 22.

61. Universal Declaration of Human Rights, Art. 2; International Covenant on Civil and Political Rights, Art. 3; International Covenant on Economic, Social and Cultural Rights, Art. 3; and Declaration on the Elimination of Discrimination against Women, Arts. 1, 4, 6, 9, and 10.


65. Id. at 102.
69. In a dramatic demonstration against existing restrictive abortion law, 343 of France's most prominent women declared in Nouvel Observateur that they had broken the law by undergoing abortion. The women included the writers Simone de Beauvoir, Françoise Sagan, Violette Leduc, and Marguerite Duras; the actresses Jeanne Moreau, Catherine Deneuve, Marina Vlady, and Micheline Presle, the television director Françoise Fabian, and many others of outstanding career or family. See New York Times, Apr. 5, 1971, p. 28, col. 1.
   The feminine act of defiance was followed in less than 2 years by a manifesto for "Freedom of Abortion" also published by Nouvel Observateur, and signed by 345 French doctors—some highly respected in their specialties—who risked penalties of up to 10 years in prison, fines as high as $14,000, and debarment from practice, by admitting publicly that they had performed abortions. Another group of 250 professional people announced that they consider themselves jointly responsible for abortions that physicians among them have performed "in circumstances where interruption of pregnancy appears an absolute moral obligation." Abortion thus became an important issue in the next elections for the National Assembly. New York Times, Feb. 6, 1973, p. 3, col. 1.
   "See Le Monde, June 16, 1973, for text of Le Project de Loi relatif à l'Interuption de la Grossesse, approved by the Council of Ministers."
72. Indeed, the U.S. Supreme Court in Roe ___ Wade pointedly observed that the restrictive criminal abortions laws in 17 of the majority of the states were of comparatively recent origin—dating, for the most part, to the latter half of the nineteenth century when abortion operations were hazardous to the woman. It stressed the established fact that until the end of the first trimester mortality in abortion is less than mortality in childbirth.
73. An examination of Ta Tsing Leu Lee (The Laws and Statutes of the Dynasty of Tsing), (1799, translation by Sir George Thomas Staunton, published in London, 1810), as well as earlier codes has failed to unearth any provision
against abortion. Among the works consulted are: Huang Ming Chih Shu, Ku T'ang Lii Shu 1, T'ang Lii Shu 1, T'ang Lii T'ung Lun, Han Lii Chi Ch'eng, and Chiu Ch'ao Lii K'ao. See also Yu Cheng Hsin, *Hsin-fa Fen-tse Shih-I* (Interpretation of Articles in Criminal Law, Taipei, 1956), vol. 3, p. 850.

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74. This is a system under which Western Powers exercised full civil and criminal jurisdiction over their nationals in China through their consuls. For a historical development and analysis of the system, see Lee, Luke T.: *Consular Law and Practice*, London, Stevens and Sons, and New York, Frederick A. Praeger, 1961, pp. 205-12; reproduced in Lee, *China and International Agreements*, Leiden, A. W. Sijthoff, and Durham, N.C., Rule of Law Press, 1969, Appendix 2.


76. See Section III-5, infra.


The discussion on China and Japan above would apply to all countries with the Confucianist influence, e.g., Korea, Vietnam, and Singapore.


80. Loi No. 65-21 du ler Juillet 1965 (2 rabiz I 1385), relative à l'avortement; Lee, "Tunisia," id. at 347.

81. For Turkish law authorizing abortion on medical grounds, see Turkey's Official Gazette, Apr. 15, 1965, Arts. 3–5. Therapeutic abortion on medical grounds is allowed in most countries in the Middle East, except Jordan, Syria, Lebanon, and Saudi Arabia. But even in Jordan and Lebanon, the law takes into account the demand for abortion to protect the woman's reputation and her family's honor. The Grand Mufti of Jordan stated in Dec. 1964: "[I]t is permissible to take medicine to procure abortion so long as the embryo is unformed in human shape" (the period of the unformed human state being given as 120 days). See Isam B. Nazer's statement in Hall, op. cit., vol. 1, pp. 267, 268; IPPF, *Proceedings of the 8th International Conference of the International Planned Parenthood Federation* (1967), p. 140. See also IPPF, *Abortion: A World Survey* (Supplement to International Planned Parenthood News, Mar. 1972).


85. Id. at 413.

86. Id. at 412.

87. Id. at 409.
88. Catholic moralists have long held that life is present from the moment of conception. However, new biologic knowledge concerning the process of twinning may require a rethinking of the question. Since twinning—the splitting of the formative cells into two lots to form twins—may occur 2 or 3 weeks after conception, the old theory of life beginning at conception has come under dispute. See New York Times, Feb. 18, 1973, section 4, p. 10, col. 1.

89. See the view of the Rev. Robert F. Drinan, former Dean of Boston College School of Law and currently a Democratic Representative from Massachusetts, and an open letter by the Roman Catholic bishops of Texas, in New York Times, Jan. 2, 1973, p. 24, col. 3.


A Gallup poll conducted in Aug. 1972, showed that 56% of Roman Catholics believed that abortion was a matter to be decided solely between a woman and her doctor. Cited in New York Times, Feb. 18, 1973, section 4, p. 10, col. 1.


91. Potts, op. cit., p. 248.

92. See Section 328 of the Penal Code (as amended by Law No. 9763 of 24 Jan. 1938) concerning the extenuating circumstances and exemptions from punishment in cases of abortion. Thus:

(1) if the offence was performed to safeguard the honour of the woman or that of her spouse or a close relative, the penalty is reduced by one-third to one-half; the judge may totally exempt the parties concerned from punishment in the case of abortion performed with consent, after an examination of the circumstances of the case; (2) if the abortion is performed without the consent of the woman in order to terminate a pregnancy resulting from rape, the penalty is reduced by one-third to one-half, no penalty being imposed if the operation is carried out with the woman's consent; (3) if the abortion is performed without the consent of the woman, on account of a serious danger to health, the penalty is reduced by one-third to one-half while if it is carried out with her consent or in order to save her life, the penalty may even be totally waived; (4) in cases where an abortion is performed without the woman's consent, for reasons of serious economic difficulty [angustia economica], the judge may reduce the penalty by one-third to one-half, while where an abortion is performed on such grounds with the woman's consent, the penalty may even be totally waived; (5) the reduction of the penalty and the total exemption therefrom referred to above apply only if the abortion is performed by a physician during the first three months of pregnancy (this time limit does not apply in cases covered by item 3 above). (WHO, op. cit., p. 26.)

93 See note 69 supra.

94. See note 69 supra.

95. See note 68 supra.

Also, Bhrumahan was defined as (XX, 24 Penances, p. 105): "[one] who kills a Brahmana or destroys an embryo the sex of which is unknown."


van de Kaa, op. cit., p. 6.

Ibid.


The most stringent abortion laws allow abortion only where it is necessary to save the life of the woman, as still exist in France and most of the francophone African states, Pakistan, and a few Latin American states. The term "health" is sometimes defined to cover mental as well as physical health. It is obvious that where "health" is an indication for abortion, it is invariably accompanied by that of "life," and that where the legislative texts allow abortion on nonmedical grounds, they invariably allow it on medical (life and health) as well.


See American Law Institute, Model Penal Code, Sec. 230.3 [Proposed Official Draft 1962], which had been substantially followed by 13 of the states of the U.S. prior to the Jan. 22, 1973, Supreme Court decisions on Roe v. Wade.


118. Id. at 13; David, op. cit., pp. 46, 62; Grzybowski, op. cit., p. 279.


122. 381 U.S. 479 (1965).

123. Art. 22(b). The Declaration was adopted by the U.N. General Assembly by a vote of 119 in favor, none opposed, with 2 abstentions.


126. The last known decree was made in May, 1957, by the Ministry of Public Health permitting induced abortions under three conditions: (1) that the pregnancy is clinically ascertained to be of less than three months' duration; (2) that the pregnant woman is declared by a medical doctor not to be affected by a disease which would rule out such an operation; (3) that no induced abortion has been performed within the last past 12 months. See Huang, op. cit., p. 135.


128. Id. at 445.

129. The population of the five nations totals 1,974 million, as against the world's total population of 3,782 million, according to the 1972 World Population Data Sheet, based on population information for 160 countries, compiled by the Population Reference Bureau, Washington, D.C.
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