

## BOOK REVIEW

**Abortion and the Law**, by Bernard M. Dickens, LL.M. (London). MacGibbon and Kee, London. 1966. 219 pp. (including index). N.Z. price \$3.70.

At a time when medical science is placing increasing emphasis on the importance of pre-natal life it is somewhat ironical to find an increasingly voluble body of public opinion advocating the general legalisation of means of destroying that life. *Abortion and The Law*, which was published at the height of the English abortion law reform debate, should be of considerable interest to New Zealand readers.

*Abortion and The Law* resulted from a thesis for the degree of Master of Laws in the University of London where, the publisher's "blurb" informs us, the author specialised in criminology. As such it will reinforce the New Zealand law student's image of English post-graduate legal education as being of an extremely high standard so far as technical aspects of the law are concerned, but considerably less satisfactory when venturing into the related fields of sociology and ethics. The arrangement of the book is excellent, and the book is happily free of emotive terms such as "progressive", "enlightened", and "forward looking" which characterise much writing on the subject.

Chapter I, on the "Development of the Law", provides a useful summary of the better known sources. The weakest section is that on "Classical and Christian Sources", which would have been improved by reference to the Abstract of Villa, *Il Procurato Aborto Nel Modo Romano*, in (1957) 25 *Medico-Legal Journal* 134-135, and Noonan, *Contraception, A History of Its Treatment by Catholic Theologians and Canonists* (1965) (which contains many valuable details concerning historical attitudes to abortion). Like so many studies, Dickens commences his examination of Christian attitudes to abortion with the views of Tertullian (c. 200 A.D.) and fails to note that two first-century documents, the *Didache* (or, to give it its full title, *The Teaching of Our Lord by the Twelve Apostles*) and the *Epistle of Barnabas* contain similar teaching.

Chapter II, on "The Present Law", gives a very full discussion of the English law as it was prior to the enactment of the Abortion Act 1967. This is probably the best chapter in the book. Particularly good is the lengthy discussion of *R. v. Bourne* [1939] 1 K.B. 687. Only two very minor criticisms suggest themselves. Dickens account seeks to perpetuate the widely accepted view that "Mr. Bourne was not prosecuted by the chance of discovery; he wrote to the Attorney-General following the operation and invited action to be taken" (page 38). This is apparently incorrect. Mr. Alec Bourne, it will be remembered, was a Harley Street specialist who was prosecuted for inducing the abortion

of a fourteen year old girl who had been raped by some soldiers at Whitehall. A number of doctors considered the operation desirable, and on being approached Mr. Bourne said he would "be delighted" to *curette* her. It is true that he said "I have done this before and have not the slightest hesitation in doing it again. . . . I have said that the next time I have such an opportunity I will write to the Attorney-General and invite him to take action", but in the present case the parents consented to the operation only on the condition that it was kept secret. That it was not did not result from any breach of trust on Mr. Bourne's part, for the operation only came to the notice of the public as a result of the girl being required to give evidence in the prosecution for rape. See Davies, *The Law of Abortion and Necessity* (1938) 2 Mod. L.R. 126-138; Durand, *Abortion, Medical Aspects of Rex v. Bourne* (1938) 2 Mod. L.R. 236-239. Dickens discussion tends to give the impression that Macnaghten J.'s interpretation of the word "unlawful" in section 58 of the Offences Against the Person Act 1861 was completely original, whereas the position he took had been canvassed by earlier writers on the subject: e.g. Parry, *Abortion Some Medical, Legal and Sociological Points* (1933) 26 Trans. Medico-Legal Society, 111-123.

The major defect of Dickens discussion of abortion lies in his failure to deal with what is rapidly becoming the most important aspect of the subject: from what stage is abortion possible? The increasing use of intra-uterine devices (I.U.D.'s) and the probable event of the "Morning-After" Pill makes this an important issue. Dickens is in good company in failing to deal with the problem as (to this reviewer's knowledge) it has completely escaped the attention of legal writers. The problem arises from the recognition that intra-uterine devices may not in fact prevent conception taking place, but may work to prevent the fertilised egg implanting itself in the wall of the uterus. If this is so—and it should be realised that there is a minority view which considers that the intra-uterine device somehow makes the ovary release the egg before it is ripe enough to be fertilised—the problem of whether this is technically an abortion arises. Even if it should be shown that the intra-uterine device does not have this effect, the question certainly arises with the "Morning-After" Pill. In 1962 a report by a Permanent Advisory Group of the British Council of Churches took the view that abortion can only take place after the fertilised egg is implanted in the wall of the uterus (*Human Reproduction A Study of Some Emergent Problems and Questions in the Light of the Christian Faith* (1962), 44-45), but this appears to be contrary to most medical definitions e.g. Taylor, *II Principles and Practice of Medical Jurisprudence* (11th ed. 1957), 98; Simpson, *Forensic Medicine* (5th ed. 1964), 167; Teare and Bowen, *Criminal Abortion* (1962), 189.

There does not appear to have been the same confusion in England as there has been in New Zealand concerning the distinction between the offence of killing an unborn child "in such a manner that he would have been guilty of murder if the child had become a human being" (Crimes Act 1961, s. 182) and the offences concerned with attempts to procure a miscarriage (Crimes Act 1961, ss. 183-185). Both appear under the heading (*fasciculus*) "Abortion" in the Crimes Act 1961. At a public forum on abortion law reform an Auckland barrister recently maintained that section 182 is the main provision in the Crimes

Act dealing with abortion, but it is doubtful whether this is so. Although to cause the death of an unborn child by crushing the foetal skull (craniotomy) would be a procedure "in such a manner" that it would have amounted to murder if it took place after birth, the usual methods of inducing an abortion cannot be said to come into that category. The scraping of the uterus, the injection of fluid into the uterus to induce the expulsion of the foetus, or even the act of incision into the uterus and the removal of the foetus (hysterotomy) may cause the death of an unborn child, but they do not come within the "in such manner" requirement.

Chapter III, on "Breach and Enforcement of the Law", is probably the best treatment of this difficult subject. Estimates of the number of criminally induced abortions vary greatly, and Dickens gives a useful summary. However he does not take the point that if any of the higher estimates (including his own) are correct, criminally induced abortions must have a lower mortality rate than those induced by specialists in the best hospital conditions. There is a full discussion of enforcement by the police, by the courts, and by the medical profession. There has been no comparative study in New Zealand. The *Report of the Committee of Inquiry into the Various Aspects of the Problem of Abortion in New Zealand 1937* A.J.H.R. H.-31 A. is the only official survey of the matter, although it was dealt with briefly in an Appendix to the *Report of the Dominion Population Committee 1946* A.J.H.R. I.-17. However the current situation in New Zealand is probably very similar to that described in *Abortion and The Law*. The New Zealand police are said to regard abortion as a major crime, and to treat it as such (Detective Chief Superintendent R. J. Walton C.I.B., *New Zealand Herald*, 31 May 1967). However the police concentrate on the abortionists and "except under exceptional circumstances" do not prosecute the girls who go to abortionists (Senior Detective Cromwell C.I.B., lecture on abortion given at C.I.B. Wellington, 9 October 1956 (cyclostyled)). The legality of therapeutic abortion is recognised, and the present Attorney-General has said that he cannot imagine any prosecution being taken where competent medical opinion considered the abortion advisable in the interest of the mother's health (Hon. J. R. Hanan, *Auckland Star*, 16 November 1962).

Chapter IV, on "Reform of the Law" is uneven in quality. The best parts are those dealing with the history of attempts to reform the law, and outlining some of the specific proposals for reform. Disappointing in contrast is the discussion of the case for and against reform, where the underlying assumption seems to be that any change will necessarily be for the better. Two general criticisms can be made of Dickens' treatment of these difficult questions. The first is that he attempts to deal with all the possible grounds for abortion in the one discussion, whereas (for example) abortion on the grounds of rape involves very different considerations from abortion on the ground of general inconvenience. The second criticism is that Dickens does not make his own position clear. He attacks the views of those who would uphold the present law (or something similar to it) on grounds which would seem to require an "abortion for all" approach. However he does not clearly state whether he advocates such an approach. He is thus able to point out the difficulties in the current approach without facing up to the difficulties any alternative approach would involve.

Dickens marshalls seven arguments in favour of reform: (1) the ineffectiveness of the present law, (2) the harmful consequences, (3) the uncertainty the present law gives rise to, (4) the social consequences of unwanted children, (5) the interference with personal liberty the present law involves, (6) the way in which the present law discriminates against the poor, and (7) the interference with the doctors' discretion which it involves. All of these arguments merit careful examination.

It is tautologous to claim that the "law is ineffective to prevent illegal abortion" (page 107), as it is only because of the law that certain abortions can be categorised as illegal. That the present law is often flouted is certain, but this is not of itself a reason for abolishing it—any more than the laws concerning speeding and dangerous driving should be abolished because they are constantly broken.

The harmful consequences of backstreet abortions, with their "toll upon life and health" (page 107) will not necessarily be avoided by making abortions freely available. In *Legalised Abortion—Report by the Council of Royal College of Obstetricians and Gynaecologists 1966* British Medical Journal 850–854 (hereinafter referred to as the R.C.O. & G. Report) it was recently pointed out that those "without specialised knowledge . . . are influenced in adopting what they regard as a humanitarian attitude to the induction of abortion by a failure to appreciate what is involved. They tend to regard induction of abortion as a trival operation free from risk. In fact, even to the expert working in the best conditions, the removal of an early pregnancy after dilating the cervix can be difficult, and is not infrequently accompanied by serious complications. . . . Even for the relatively healthy woman . . . the dangers are considerable" (page 851). This expert report goes on to outline the physical and psychological complications involved, and takes a very different attitude from that of Dickens. High rates of recidivism ensure that the general legalisation of abortion would cause more health problems than it would solve. A study of almost 1400 women who had been aborted in Japan revealed that over twenty per cent. were pregnant again within six months, and almost fifty per cent. within eighteen months: Koya, *A Study of Induced Abortion in Japan and its Significance* (1954) 32 *Milbank Quarterly* 282–293. A similar study of Swedish cases led to the conclusion that "it is not uncommon that legal abortion . . . provides only an extremely short-lived and to some extent meaningless help." Thirty-eight per cent. of a group of women who had been therapeutically aborted were pregnant again within two to four years, the large majority of them unintentionally, despite renewed instruction in contraception: Ekbal, *Induced Abortion on Psychiatric Grounds* (1955), page 10. With the rate of recidivism so high, the harmful medical consequences are further multiplied to the stage where the "toll upon life and health" argument boomerangs on the would-be reformer.

The argument that as a result of the present legal position "a very large number of qualified medical practioners will abstain from performing abortions which they consider necessary and desirable" (page 112) is unconvincing in the light of the R.C.O. & G. Report, where the Council unanimously stated "We are unaware of any case in which a gynaecologist has refused to terminate pregnancy, when he considered it to be indicated on medical grounds, for fear of legal consequences" (page 850).

It is unfortunately true that "The product of an unwanted pregnancy is often an unwanted child, which may be the victim of cruelty and may itself represent a danger to society" (page 114), but this is no more convincing an argument for exterminating the life of the child *en ventre sa mere* than it is for exterminating the life of the child once born. Rather, it calls for higher standards of sexual morality (or, failing that, the use of contraceptives) outside marriage, and an installation of a different attitude towards children and the availability of Family Planning advice within marriage. Increases in the woefully inadequate Family Benefit Allowances and more Family Planning centres would be more positive ways of meeting the problem.

Not even the most erstwhile opponent of reform would dispute that "a woman is more than an organism for producing children" (pages 114-115) and that "a woman should have a free choice in whether or not she bears a child" (page 115). However the obvious time for her to exercise that choice is before, not after, the child is conceived.

Even if the richer classes find it easier to evade the present abortion laws than the lower classes (pages 115-116)—and, although often exaggerated, this is probably the case here as in many other parts of the law—this is not a very convincing argument for doing away with the law altogether. Nevertheless the emotional force of this argument must be recognised.

Dicken's concern "that doctors should have full freedom to treat their patients as they consider best in all the circumstances" (page 116) will not be furthered by the general legalisation of abortion. As has been seen, the present law does not prevent doctors doing what they consider best for their patients. Indeed, the R.C.O. & G. Report was concerned that doctors would lose their freedom of action under any wider law. It noted that "Gynaecologists from most countries where abortion for non-medical indications is legalised now find themselves having to adopt an apologetic attitude when talking to their colleagues from other countries and to explain that they are often under government pressure to induce abortion against their better judgment" (page 852). Despite his alleged concern for the freedom of the medical profession Dickens is remarkably blind to its interests. He considers "legal abortion is a right of the patient" (page 143) and fails to allow for views such as those one theatre sister expressed in asking whether a certain advocate of reform, Miss Marghanita Laski, had ever witnessed an abortion. "If she has not," the sister wrote, "I suggest she does, and then perhaps she will appreciate what it feels like to be handed a dish containing the remainder of one small life. . . . People, not robots, staff the operating theatres and each termination involves a crude, bloody procedure to enable the wilful destruction of a human life. If Miss Laski's vision of "abortion for all" is to be, it will certainly precipitate the departure of myself and many colleagues to other fields of nursing. . . ." (Elaine Singer, *New Statesman*, 1 April 1966). One gathers that New Zealand obstetricians and gynaecologists are no more keen than their English counterparts to become "Public Foetal Exterminators" (as Dr. A. W. Liley, Senior Research Fellow at the University of Auckland Postgraduate School of Obstetrics and Gynaecology, puts it). They are trained to save life, not to destroy it.

As will be gathered, the present reviewer does not find Dickens' case for reform particularly convincing. He considers it a pity that Dickens

has not scrutinised his own case for reform in the same way as he has scrutinised the case against reform.

Dickens lists, and attempts to rebut, six objections to reform. He gives these as being: (1) "religious teaching", (2) the harmful physical and psychiatric consequences of the operation, (3) the ineffectiveness of legislation in reducing backstreet abortions, (4) the encouragement of promiscuity and immorality, (5) the effect on population growth, and (6) the expense to the National Health Scheme.

A number of these arguments may be quickly dismissed, for they are straw men which are set up for the purpose of being knocked down. Who is it who in recent years has opposed abortion on the grounds of "fears of population decline" (page 163)? Who is it who opposes abortion for the sake of giving "punishment by childbirth" (page 163) and thus discouraging promiscuity? (It may be noted in passing that it is often those groups in the community who most oppose pre-marital intercourse and abortion who do most to care for unmarried mothers—a fact difficult to square with Dickens' assertion.) The objection that greater expense to the National Health Scheme would result from the general legislation of abortion (page 164) is such a minor objection that it too may be a straw man. Nevertheless Dickens fails to show why operations which from a medical point of view are unnecessary should take precedence in already overcrowded hospitals, frequently with a shortage of staff and long waiting lists.

More important are the first three objections, which will be examined in the reverse order to that in which Dickens lists them. The ineffectiveness of piecemeal reform to reduce the number of backstreet abortions (page 160) is well-established, and Dickens fails to produce any contrary evidence. However the opponents of reform do not use this as a primary objection, but merely in reply to those who consider such reform will solve the problem of backstreet abortions. It is therefore easy to agree with Dickens that this is not of itself an argument against wider abortion laws if such laws can be justified on other grounds.

Dickens discusses the objection "that the operation is dangerous, and can have harmful after-effects of both a physical and psychiatric nature" (page 155), and fails to show that this is not so. It is unnecessary to recount the wealth of evidence on which the R.C.O. & G. Report based its claim that "Even for the relatively healthy woman . . . the dangers are considerable" (page 851), for this is readily available for those willing to face up to it.

It is in dealing with the major objection to the general legalisation of abortion—the sanctity of human life—that Dickens is least convincing. He says "The major objection to an extension of the categories of legal abortion follows from religious teaching. Objection is expressed either in overtly doctrinal terms, or in some cases in the culturally induced resistance of the idea of interfering with the process of human life, except to prolong its span . . ." (page 151). But, as Dickens' ally Glanville Williams has stated, "Even the modern infidel tends to give his full support to the belief that it is our duty to regard all human life as sacred" (*The Sanctity of Life and Criminal Law* (1958), 30). This being so, this objection cannot be relegated to the category of "religious teaching" and (as Dickens would evidently hope) ignored. In advocating abortion Dickens should have stated clearly (1) whether he dissents from the general principle of the sanctity of human life, or (2) whether

he considers that the induced termination of a pregnancy is not covered by that general principle. The problem is an exceedingly difficult one, but Dickens gives us little help in dealing with it. He is plainly out of his depth in discussing the philosophical and theological issues involved—the views of “the Protestant Church” are dealt with in a one paragraph quote from the Anglican Bishop of Exeter on the subject of therapeutic abortion—and he fails to mention the medical grounds on which many regard the foetus as a human life. There was a time when those who upheld the existence of foetal life did so on the basis of some very doubtful Aristotelian philosophy, but those who do so today claim the support of medical evidence. This should have been discussed.

It seems regrettable that Dickens did not hang more on his recognition that “it does not follow that the solution to illegal abortion is legal abortion; unwanted pregnancies are better prevented than terminated” (page 166). In Yugoslavia, where abortion is legalised on very wide grounds and where there is no official objection to it on ethical grounds, it is significant that the Social Workers Health Manual states that “A health worker should regard abortion as biologically, medically, psychologically and sociologically harmful . . . [the health worker’s] profession charges him to strive for such conditions in society that abortion, because of planned parenthood, becomes unnecessary.” (Quoted in Draper, *Birth Control in the Modern World* (1965), 81.) If a reading of Dickens’ book does anything it should convince the reader that such a goal is infinitely more desirable than the general legalisation of abortion. But whether our social planners will have sufficient foresight is rather doubtful.

P. D. G. S.

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