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ABORTION AND THE LAW: A PROPOSAL FOR REFORM

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> The act [of performing a criminal abortion] is being punished because it is dangerous, and it is dangerous largely because it is illegal and therefore performed only by the unskilled.[1]

I EXISTING LAW

The law in force in New Zealand at the present time relating to abortion is contained in ss.182 to 187 of the Crimes Act 1961. These sections may be summarized as follows:

Section 182 (1) Provision is made for up to fourteen years imprisonment for intentionally killing an unborn child.
(2) An exception is provided where the act is in good faith to preserve the life of the mother.

Section 183 (1) There is provision for up to fourteen years imprisonment for unlawfully using a drug or instrument with intent to procure the miscarriage of any woman or girl whether with child or not.
(2) The woman or girl involved is not to be charged as a party to an offence against this section.

Section 184 (1) Up to ten years imprisonment is provided for unlawfully using means other than those in s.183 with intent to procure the miscarriage of any woman or girl.
(2) as in s.183 (2).

Section 185 There is a penalty of up to seven years imprisonment for any female who unlawfully procures or attempts to procure her own miscarriage or permits anyone else to do so.

Section 186 Anyone who supplies any means of procuring abortion is liable to three years imprisonment.

Section 187 The foregoing provisions (ss.183-186) are to apply whether or not the means used are capable of procuring abortion.

Contrary to optimistic expectation in some quarters prior to the passing of the 1961 Crimes Act its provisions relating to abortion are almost identical to those in the 1908 Act. The later enactment differs in two minor respects only. First, it draws a distinction for purposes of punishment between procuring an abortion by drug or instrument and procuring abortion by other means whereas the 1908 Act provided life imprisonment in both cases, and, secondly, s.187 of the 1961 Act is new.

The distinction between killing an unborn child as prohibited by s.182 and procuring a miscarriage as in the other sections is largely historical. In England prior to 1803 abortion was a matter untouched by statute but it was, in some circumstances, a crime at common law. Authority is spare, however, when it is sought to delimit the circumstances in which abortion was criminal but it appears that the prohibition was confined to the period after the foetus had quickened or moved in the womb, this usually occurring about the sixteenth to eighteenth week of pregnancy. It was the idea of taking a human life rather than an abhorrence of abortion itself that was uppermost and so it was only when the foetus became life-like, became animated, that

the law intervened on its behalf. According to Blackstone "Life begins in contemplation of law as soon as the infant is able to stir in the mother's womb."[2] This was a legacy of theology which held that quickening was a sign that the soul had entered the foetus. It was, indeed, only after the rise of Christianity and its ascription of the notion of sanctity of life to the foetus within the womb that abortion became a crime. Sir Francis Adams points out that early writings are vague and even contradictory in defining the common law crime of abortion,[3] but they are at least suggestive that, whether for reasons of religion or practical law enforcement, abortion in the early stages of pregnancy was no crime.

Furthermore, it may reasonably be inferred from the contents of two English statutes that there was no doubt in those early days that abortion (or homicide as it may have been referred to) in the very late stages of pregnancy was prohibited. The first of these Acts,[4] passed incidentally because "divers cruel and barbarous outrages have been of late wickedly and wantonly committed in divers parts of England and Ireland. . ."[5] sought to prevent any person from "wilfully, maliciously, or unlawfully" procuring the miscarriage of any woman then being quick with child. On the face of it this statute would appear to have been exclusive authority under which to bring a charge against a person who had caused the death of a foetus, irrespective of its age, in the womb. Nevertheless the United Kingdom legislature saw fit, in 1929, to pass the Infant Life (Preservation) Act[6] which prohibited the killing of "a child capable of being born alive"[7], this expression being defined for the purposes of that Act as a child carried by a woman who had been pregnant for a period of at least twenty-eight weeks.[8] This suggests that there was an area which the earlier Act of 1803 (and its subsequent enactments of 1839 and 1861) did not cover, presumably because it had always been the domain of the common law and had remained so even after 1803. Hence the New Zealand Crimes Act 1961 deals both with the killing of an unborn child and with the wider prohibition, originating in the 1803 statute, of procuring a miscarriage.

The wording of the United Kingdom Acts further explains why our s.182 has an exempting provision expressed in terms of a bona fide intention to preserve the life of the mother whereas the other sections relieve the abortionist of criminal liability if he has not acted "unlawfully". In the case of *R.* v. *Bourne*,[9] in which an eminent English surgeon was charged under the Offences against the Person Act 1861[10] (a statutory modification of the 1803 Act) in that he unlawfully procured an abortion, MacNaghten J. decided that the word "unlawfully" in this context should bear the same meaning as the words "not done in good faith for the purpose only of preserving the life of the mother"[11] as found in the Infant Life (Preservation) Act 1929. In his book *Sanctity of Life and the Criminal Law*[12] Dr Glanville Williams points out that the rules of English statutory interpretation have been reluctant to include a principle whereby the words in one statute may be used to explain those in another. Despite this, MacNaghten J's interpretation of the word "unlawfully" has received the blessing of later courts and is now firmly established. Interestingly enough the All England report of the case of *R.* v. *Bourne*[13] differs quite markedly from the Official Report, the explanation tendered by Dr Williams being

that MacNaghten J. rewrote the latter to justify his interpretation of the word "unlawfully".

The case of *R.* v. *Bourne* is particularly important as authority for an extended interpretation of the words "preservation of the life of the mother". The defence is not confined to being raised only where the life itself of the mother is endangered by the pregnancy but can be maintained where, in the words of MacNaghten J. "the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck".[14] Thus Dr Bourne was acquitted of the charge of performing an abortion where the mother was a fifteen year old rape victim as it was considered that child-birth would impose on her severe physical and psychological burdens.

The same principle has been applied in New Zealand with the qualification that the defence of preserving the life of the mother is open to any abortionist and not merely to a qualified surgeon as MacNaghten J. had suggested.[15]

II THE OCCURRENCE OF ILLEGAL ABORTION

Annual reports compiled by the New Zealand Department of Statistics indicate that between the years 1961 to 1964 eighty-seven persons appeared in the Magistrates' Courts on charges relating to abortion. Of these twenty-two were discharged, six were summarily convicted, and fifty-nine were remanded for trial or sentence. The number involved here is not a large one but as the crime is one difficult to detect, because of the fear of incrimination on the part of all parties concerned, it indicates that very many more illegal abortions must take place in New Zealand. It is probable, too, that abortionists appearing in court are responsible for procuring more abortions than they would actually be charged with. A recent study by Mr J. K. Walton considering abortion in the light of the current problem of illegitimacy is particularly illuminating because out of ten expectant unmarried mothers interviewed by Mr Walton five had attempted either to abort themselves or obtain professional services.[16]

In England in 1939 the Interdepartmental Committee on Abortion accepted that there were between 110,000 and 150,000 abortions each year in England and that two-thirds of these were criminal[17] Simpson states "it is estimated that about one out of every five to six pregnancies terminates prematurely and the Abortion Committee (1939) reported that in some 40 per cent of these there was evidence of criminal interference."[18] However the widely held belief that abortion is commonly associated with extra-marital relationships would appear to be erroneous as an enquiry conducted by A. Davis found that of 2,665 cases of abortion eighty-eight per cent of the women were married.[19]

III INADEQUACIES OF THE EXISTING LAW

First, it is obvious that the law prohibiting abortion is ineffective. In comparison with the estimated large numbers of abortions that must occur each year, even in this small country, convictions are few, probably both because of the difficulties in apprehending abortionists and obtaining incriminating testimony and because we, as a society, have become less intransigent in our stand on this moral issue, or find that the abortionist plays a useful, if unrecognised, role in our society.

Secondly, the law is now less popular. Many countries outside the

Commonwealth and the United States with advanced social structures, like our own, favour varying degrees of permissive abortion. These countries include Russia, where abortions have been legal since 1955 provided they are performed by qualified persons in hospitals or other health institutions, and Sweden, where limited abortions on primarily socio-medical grounds are permitted. It seems only a matter of time before England itself passes an Act authorising abortion in certain limited circumstances.

Thirdly, the law ought to be relaxed at least to permit abortions on accepted compassionate grounds. These could include: (a) where the pregnancy has resulted from rape or incest; (b) where the child will be born with some grievous physical or mental defect; and (c) where the mother is mentally or physically inadequate to undergo childbirth. And, fourthly, there is unjustifiable suffering caused by the existing law. The termination of pregnancy, particularly at an advanced stage, is a difficult operation yet we force expectant mothers, who have found abortion the only answer to their problems, to undergo the operation in conditions where sanitation, methods, and patient after-care must in most cases be inadequate. If women seek, and will continue to seek, abortions in spite of any penal sanctions imposed by the law, and it is submitted there is no other conclusion but that they will, then far better surely, and more humane, that their actions be legalised so that proper medical supervision may be provided.

IV PROPOSAL FOR REFORM

Reform of the law could be achieved by permitting abortion on limited grounds either with the consent of some authority (as in Sweden) or without (as in Denmark), or by making abortion completely legal provided it is carried out in a hospital or some recognized medical institution (as in Russia). Martin Ekblad's paper entitled "Induced Abortion on Psychiatric Grounds" suggests that a limited liberalisation on the law is largely a failure. He writes[20]

> It has been alleged that the illegal abortions slip through the meshes of the . . . [Swedish Abortion Act 1938] and that it is to a large extent an entirely new *clientèle* that is now granted legal abortion. Women who would formerly never have considered an illegal abortion now apply for and are granted legal abortion . . . Not even extremely generous indications [sic] for legal abortion with a very simple application procedure which have in recent years been applied in Japan seem to be able to eliminate the illegal abortions . . .

Ekblad estimates that from fifteen to twenty-five per cent of the women refused legal abortions by the controlling authority (a Medical Board) resorted to illegal abortions.

This system does not, therefore, eliminate the abortionist operating without medical qualifications, which should be the object of any reform of the law. More effective, it is suggested, would be to introduce a material distinction between the law applicable to abortions carried out in the early stages of pregnancy and those later. This introduces the difficulty of deciding at which stage of pregnancy to draw the distinction and in view of variations in foetal growth rate the decision must, in some part, be arbitrary. In Sweden a legal abortion is permitted up to the twentieth week of pregnancy even though it is accepted that marked foetal movement or quickening occurs from the sixteenth to eighteenth week of pregnancy. It appears, too, that it is normally during early pregnancy that most abortions are sought. Simpson writes[21]

> Nearly all criminal abortions take place at about the second or third month when the woman has become certain of the cessation of her periods and morning sickness has confirmed pregnancy . . . Rarely indeed does any deliberate interference other than an ordinary therapeutic induction procedure take place later than the fifth month.

In Davis' study of illegal abortions it was found that eighty-seven per cent of the women had attained the twelfth to fourteenth week of pregnancy and, in most cases, the abortion was carried out during the twelfth week.[22] From a medical point of view a distinction is necessary as induced termination of pregnancy becomes increasingly more difficult as the foetus matures and, after the twenty-fourth week of pregnancy, is a major abdominal operation. Quite apart, therefore, from any early religious or even legal justification, the case for distinguishing between abortions carried out prior to — say the twentieth week and those after, is not without merit. The proposal made here is that procuring a miscarriage in the earlier period be made lawful perhaps with the qualification that it be carried out under proper medical supervision.

In the later period legal abortion should still be available but on a limited basis. Research indicates that, by this stage, the majority of women would have decided whether or not to allow the pregnancy to continue, so that any abortion sought in these last months would presumably fall within one of the compassionate categories, such as health of the mother or predicted disability of the child. In such instances it would be proper for a doctor to carry out an abortion after making full disclosure to the parent or parents or the risks involved. Reform of the law, as outlined, would not, it is submitted, cause a vast increase in the number of abortions in our society. For the majority of women, induced termination of pregnancy would continue to be abhorrent, irrespective of any change in the law.

Ekblad's study also provides valuable information of the after-effects of an abortion operation. Of 499 women interviewed after having undergone such an operation sixty-five per cent were satisfied and had no self-reproaches, ten per cent were also satisfied but had thought the operation unpleasant, whilst fourteen per cent regretted the operation or experienced serious self-reproaches. Ekblad writes[23]

> It is thus obvious that a legal abortion entails feelings of guilt and self-reproaches in many women. On the other hand, it is seldom that these undesirable psychic sequelae are so severe that they may be described as morbid, or that they impair the woman's working capacity. In the cases in which this has occurred in the present material the woman's psychic state and situation at the time of the unwelcome pregnancy were such that they would probably have entailed equally unfavourable psychic sequelae even if the pregnancy had not been terminated with legal abortion.

It is commonly said that an abortion prevents the woman from being able to conceive or bear children again. This may indeed be so where the abortion is not carried out under medical supervision, but in a survey made by the Swede Svanberg in 1949,[24] of 174 women who had undergone legal abortion only four became involuntarily sterile. Of the remainder, ninety-five claimed to be voluntarily sterile and seventy-five enjoyed normal pregnancy in due course.

An argument against extending permissive abortion is that abortion is no more than murder or infanticide. Without taking issue whether these highly emotive words are properly used in this context it must first be emphasized that proposals for reform are for no more than an extension to the right to abort legally. Abortions may already be