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An Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion

Thomas H. Barnard, Jr.

In this critical analysis, the author first calls attention to the many reasons necessitating an examination of the Model Penal Code's abortion provisions. It is his view that the American Law Institute followed the sociological jurisprudential approach in drafting the Code's abortion section, and he points to the Advisory Committee's comments in support of this proposition. Mr. Barnard also believes that the Swedish and Danish abortion statutes exerted significant influence upon the ALI but that the effects of these laws were not given sufficient consideration, with the result that no attempt was made to eliminate the problems caused by their enactment. Finally, the author raises several probing questions which must be considered by those who would change the law of abortion and concludes that the Code represents a commendable though imperfect attempt to answer them.

THERE ARE several reasons for devoting special attention to the Model Penal Code provisions concerning abortion,¹ perhaps the most important of which are that the proposals emanate from the august body of men who comprise the American Law Institute (ALI) and that the Code generally has been widely acclaimed. Other reasons are that the Model Penal Code approach appears to be representative of the approach of others who would have the law of abortion reformed, that the

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Code is usually referred to whenever the question of reform is raised, and that it has in fact been the solution embraced by political activist groups and medical associations seeking legislative reform.

Another very practical reason for devoting attention to this section is that the Model Penal Code, like preceding ALI model codes, will receive serious consideration, and it may be enacted into law by state legislatures. Naturally, one does not expect this somewhat revolutionary proposal concerning matters of sex and morality to be accepted without a struggle. Thus far, in fact, it has been ill-

¹ MODEL PENAL CODE § 207.11 (Tent. Draft No. 9, 1959) [hereinafter cited as TENT. DRAFT].

received by our lawmakers.² While this reception might rightfully be attributed to sexual mores and the legislators' usual reluctance to tread in controversial areas, it is submitted that the Code supporters carry a heavy burden of proof in the area of abortion law reform, for which they have failed to make adequate preparation.

This section of the Code has been more enthusiastically received by scholars and writers.³ While most indicate their approval of the Code's liberalized approach,⁴ there are some in their number who have been highly critical.⁵ Among the criticisms is the charge that the American Law Institute failed to give adequate consideration to the moral aspects of the abortion issue.⁶ One critic states:

The practice of consulting with experts in fields other than law which was employed in successive drafts of the Uniform Commercial Code has been neglected in the instance of the Model Penal Code. The Criminal Law Advisory Committee includes sociologists, psychiatrists and other medical experts but the area of morality and ethics seems not to be represented at all.⁷

Another criticism is directed toward the characterization by the Code comment of the fetus as an inchoate being.⁸ The authors of an article defending the legal status quo⁹ devote considerable attention to this characterization, saying in part that the embryo or fetus may be "inchoate" but it is indisputably complete and integrated in terms of its essential elements; it requires nothing but food to grow. In terms of ultimate full development to maturity, the infant after birth is comparably an inchoate creature.¹⁰ Parenthetically, it is interesting to note the comparison of the fetus to an infant. This comparison assumes added significance when eugenic indications

² George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 395-96 (1965).

³ See generally Goodman, *Abortion and Sterilization: The Search for Answers*, Redbook, Oct. 1965, p. 148; Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435 (1965); Comment, 27 U. PITT. L. REV. 669 (1966); Note, 12 W. RES. L. REV. 74 (1960).

⁴ E.g., Rosen, *supra* note 3, at 462 n.90.

⁵ See, e.g., Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW. 187 (1959).

⁶ *Ibid.*

⁷ *Id.* at 190. Professor Schwartz reporting at the ALI proceedings, stated that this was not a moral problem because of the enormous difference of views in a community of our size. See 36 ALI PROCEEDINGS 252 (1959).

⁸ Mietus & Mietus, *Criminal Abortion: "A Failure of Law" or a Challenge to Society?* 51 A.B.A.J. 924 (1965). "The embryo or fetus may be 'inchoate' but it is indisputably complete and integrated in terms of its essential elements; it requires nothing but food to grow. In terms of ultimate full development to maturity, the infant after birth is comparably an inchoate creature." *Id.* at 925.

⁹ *Id.* at 924.

¹⁰ *Id.* at 925.

are considered, especially because deformities are problematical at the fetal stage but can be conclusively established after birth. There are other considerations, of course, such as the anxiety of the expectant mother and her family before birth and the probability of a greater attachment to the child, even if deformed, after birth.

Additional critical observations to this section of the Code are found in a recent law review note¹¹ which directed attention toward the legal rights of the unborn child¹² in light of the increased rights being given to the unborn in the law of torts. It was also suggested "that abortion laws are required by the community as a symbol of formal disapproval of behavior that in specific instances is being condoned."¹³ This suggestion raises a basic jurisprudential question: What is the function of the law? This query is particularly relevant when considering abortion laws.

I. MODEL PENAL CODE APPROACH

Before analyzing the Code and the discussion and pronouncements of the American Law Institute, perhaps attention should be directed to the function of that body. Whether intended or not, the ALI fits neatly into the realization of the fondest dreams of the sociological jurist. It approaches the idea of the "ministry of justice" suggested by Bentham and Roscoe Pound,¹⁴ and it is the embodiment of the law revision committee recommended by Mr. Justice Cardozo,¹⁵ who observed that in *private* law there is no lobby for change and, therefore, a group of professors, judges, and other outstanding jurists should meet periodically to review it.¹⁶

Whatever the purpose of the American Law Institute, the practice, at least with regard to the law of abortion, has been to use the sociological jurisprudential approach; this philosophy is readily apparent in the Code comments¹⁷ and in the Advisory Committee

¹¹ Comment, 37 U. COLO. L. REV. 283 (1965).

¹² *Id.* at 283-85.

¹³ *Id.* at 288.

¹⁴ Pound, *Juristic Problems of National Progress*, 22 AM. J. SOCIOLOGY 721, 729, 731 (1917); Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142, 146 (1920).

¹⁵ Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

¹⁶ *Id.* at 114. See also Goodrich, *The Story of the American Law Institute*, 1951 WASH. U.L.Q. 283, 294-99 and Tinnelly, *supra* note 5, which criticize the American Law Institute for entering the realm of criminal law but laud its efforts in other fields. Since Cardozo referred to private law only, he might support the Catholic proposition. However, it is submitted that the reluctance of legislators and other public officials to move into areas involving sex and morality is a good reason for use of the "law revision committee," at least in that limited area of criminal law.

¹⁷ TENT. DRAFT, comments 1-15.

Report to the 1959 ALI proceedings. The first step in the sociological school of thought is to study the actual effects of doctrines,¹⁸ and, consistent with this, the initial inquiry set forth in the comments is devoted to exposing the "salient features of American experience."¹⁹ The "salient features" listed, six in all, are: (1) the high number of abortions in the United States; (2) the number of women who die annually in the United States as a result of abortion; (3) the contrast of the American abortion mortality rate to that of the U.S.S.R.'s during the latter country's liberal abortion law experiment; (4) a comparison of the illegal abortions performed as a result of premarital pregnancies to those of married pregnant women; (5) a breakdown as to who performs the abortion; and (6) the practice of hospitals in California in "violating" the law.²⁰

Thereafter, the comments state the arguments for a relaxation of the law. It is observed that "economic and social conditions are said to be the primary cause of abortion. Economic distress, or a desire to maintain a higher standard of living, is at the root of the largest number of induced abortions."²¹ Then, continuing in the order followed in the comments, a "cautious expansion of the categories of lawful justification of abortion"²² is recommended following four principles²³ which, it will be observed, closely adhere to the sociological jurisprudential approach.²⁴ First, it is stated that indiscriminate abortion is a secular evil involving some physical and psychic hazards.²⁵ The natural consequences of this observation coincide with Pound's theory on adjusting conflicts of interest. Here the Advisory Committee is weighing the speculative and social consequences likely to be suffered by the pregnant woman.

The second consideration involves the "extremely adverse social consequences [likely to be suffered by] . . . the child."²⁶ Here, too, there is a weighing of speculative consequences, but in this instance the alternatives are death for the unborn child versus a potentially

¹⁸ Eugen Ehrlich, a legal sociologist, called this a study of the "Living Law," which is to see not how men ought to act, but in fact how they do act. See O'Day, *Ehrlich's Living Law Revisited — Vindication for a Prophet Without Honor*, 18 W.L.R.S. L. REV. 210 (1966).

¹⁹ TENT. DRAFT, comment 1. See also 36 ALT PROCEEDINGS 256-57 (1959).

²⁰ *Ibid.*

²¹ TENT. DRAFT, comment 2, at 149.

²² TENT. DRAFT, comment 1, at 150.

²³ TENT. DRAFT, comment 1, at 150-51.

²⁴ *Ibid.*

²⁵ TENT. DRAFT, comment 1, at 150.

²⁶ *Ibid.*

miserable life. Ostensibly, this statement again manifests a regard for the interest of the individual.

The third consideration is that criminal law must not be used "against a substantial body of decent opinion."²⁷ This is an attack on the moral approach which the law is deemed presently to follow. The sociological jurist would explain that today the law is creating friction in civilized society, which is undesirable under Pound's formula for adjusting interests.²⁸ The fourth principle is that "criminal liabilities which experience shows to be unenforceable because of nullification by prosecutors or juries should be eliminated from the law."²⁹ This is clearly the approach of an advocate of the "living law."³⁰

The comments continue with a discussion of the arguments against liberalization. Again, the sociological approach is followed by methodically raising and answering certain sociological arguments of the opposition.³¹ The comments first state: "abortion is opposed by some on the ground of physical or psychic danger to the woman, or as an inhibitor of population growth."³² They then go on to say that

legalizing abortion would be regarded by some as encouraging or condoning illicit intercourse, although this factor can hardly be a significant influence on the rate of illicit sexuality in a society where contraceptives offer reasonable assurance against need for the unpleasant and expensive prospect of abortion.³³

²⁷ TENT. DRAFT, comment 1, at 151.

²⁸ See generally Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142 (1920).

²⁹ TENT. DRAFT, comment 1, at 151.

³⁰ See O'Day, *supra* note 18.

³¹ TENT. DRAFT, comment 1. This section also considers the arguments of those opposed to liberalization which are not sociological, but moral, ethical, or religious. The Committee subsequently answers them by stating:

Moral standards in this area are in a state of flux, with wide disagreement among honest and responsible people. The range of opinion among reasonable men runs from deep religious conviction that any destruction of incipient human life, even to save the life of the mother, is murder, to the equally fervent belief that the failure to limit procreation is itself unconscionable and immoral if offsprings are destined to be idiots, or bastards, or undernourished, mal-educated rebels against society. . . . [See VOGT, PEOPLE (1960)]. Criminal punishment must be reserved for behavior that falls below standards generally agreed to by substantially the entire community. TENT. DRAFT, comment 1, at 151.

Professor Schwartz stated, in reporting at the ALI proceedings, that this is not a moral problem at all but that "it is a problem of the sanctity of life." 36 ALI PROCEEDINGS 252 (1959).

³² TENT. DRAFT, comment 1, at 148. These arguments are answered at pages 150-51.

³³ TENT. DRAFT, comment 1, at 148-49. It will be recalled that most abortions in the United States are performed on married women.

There is one point in particular, however, where the authors of the comments stray from the sociological approach and begin to make their own value judgments without the process of critical thinking.³⁴ The comments state:

There seems to be an *obvious difference* between terminating the development of such an *inchoate* being, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of its mother.³⁵

This will be the subject of later criticism.

Having enumerated the arguments for and against change, the comments next set forth an analysis of the individual Code provisions.³⁶ For present purposes, it is not particularly helpful to restate this analysis except in two specific instances. The first concerns the decision to exclude "individual hardship" cases as a justification for abortion.³⁷ While calling attention to the laws in Sweden and Denmark, which permit abortion for a variety of individual hardship cases as determined by a board of physicians, the comments state: "the draft refrains from taking any position for or against [these] justifications"³⁸ The reason given is that no body of experience with such a law is found in the American society. However, the comments indicate the Advisory Committee's concern in this area and infer that these individual hardship cases, if not handled legally in hospitals or by trained medical personnel, will be driven instead to criminal abortionists and many to needless death.³⁹

The second part of the comments' analysis given attention here is the decision not to impose criminal liability upon the pregnant woman who obtains an abortion except in late-pregnancy situations, that is, after viability.⁴⁰ The reason given in the comments, is that imposing criminal liability upon the woman "has not been useful in suppressing self-abortion, but instead has offered stumbling blocks

³⁴ TENT. DRAFT, comment 1, at 149.

³⁵ *Ibid.* (Emphasis added.) This position is vigorously attacked in Mierus & Mierus, *supra* note 8, at 924-25.

³⁶ TENT. DRAFT, comments 2-15.

³⁷ TENT. DRAFT, comment 6, at 156.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ TENT. DRAFT, comment 9, at 159.

to effective enforcement against the professional abortionists, or has served as an unfair escape from civil liabilities of insurance companies."⁴¹

II. A CRITICAL ANALYSIS

As observed previously,⁴² it is apparent that the ALI has used the sociological jurisprudential approach in developing the section on abortion in the Model Penal Code. The Institute has attempted, by critical thinking, to examine the law in light of the evidence and the conclusions which it supports. The drafters have also attempted to recognize the problems and to find workable solutions to them, to gather and interpret pertinent information, to appraise evidence and evaluate arguments, to reconstruct their patterns of beliefs on the basis of wider experience, and, generally, to apply this critical thinking to the construction of a logical abortion law.⁴³ An examination now follows as to their success with this method of analysis.⁴⁴

⁴¹ *Ibid.* The comment's conclusion as to the insurance companies' "unfair escape" arises from decisions holding that the company is relieved from liability under the woman's life insurance policy by her complicity in procuring an abortion on herself. See *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550 (1876); *Wells v. New England Mut. Life Ins. Co.*, 191 Pa. 207, 43 Atl. 126 (1899). Query, is this "unfair"? If so, how significant is this reason?

⁴² See text accompanying note 17 *supra*.

⁴³ Critical thinking calls for a persistent effort to examine any belief or supposed form of knowledge in the light of the evidence that supports it and the further conclusions to which it tends. It also generally requires ability to recognize problems, to find workable means for meeting those problems, to gather and marshal pertinent information, to recognize unstated assumptions and values, to comprehend and use language with accuracy, clarity, and discrimination, to interpret data, to appraise evidence and evaluate arguments, to recognize the existence (or nonexistence) of logical relationships between propositions, to draw warranted conclusions and generalizations, to put to test the conclusions and generalizations at which one arrives, to reconstruct one's patterns of beliefs on the basis of wider experience, and to render accurate judgments about specific things and qualities in everyday life. GLASER, *AN EXPERIMENT IN THE DEVELOPMENT OF CRITICAL THINKING* 6 (1941). See also Lewis, *Phase Theory and the Judicial Process*, 1 CAL. W.L. REV. 1 (1965).

⁴⁴ The realist, or skeptic if you will, would doubt whether there is a logical answer to the problem of abortion. For example, Holmes stated:

It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. Holmes, *The Path of the Law*, 10 HARV. L. REV. 466 (1896).

A. *The Experiences of Denmark and Sweden*

The Model Penal Code provisions on abortion are in many ways similar to the statutes of Denmark and Sweden,⁴⁵ yet there are some important distinctions. It is clear that the Code's draftsmen had the statutes of these Scandinavian countries in mind as they approached their task. The initial criticism in this analysis of the Code is that the experiences of these two countries were not given sufficient consideration. First, however, a comparative examination of the Code and the foreign statutes is necessary.

The proposed official draft of the Model Penal Code and both the Danish and Swedish statutes permit abortion by a licensed physician under the following conditions: (1) when the pregnant woman's physical or mental health is gravely impaired; (2) when the child is likely to be born with grave physical or mental defects; or (3) when the pregnancy is the result of rape, intercourse with an underage female, or incest.⁴⁶ The first important difference between the Code and the statutes in these countries is that the former does not provide for abortion where there is "anticipated weakness" or what the comments apparently refer to as individual hardship. Another significant difference is the decision not to have an independent board or committee determine whether an abortion should be performed. Instead, the Code provides that an abortion may be performed where "two physicians, one of whom may be the person performing the abortion, . . . have certified in writing the circumstances which they believe to justify the abortion."⁴⁷ While the distinction between certification by individual physicians and by a board might properly be deemed procedural in some respects, it must also be considered to have certain substantive aspects, because decisions by individual physicians offer a greater latitude for variation and, hence, further broaden the law.

Considering the similarity between the Code and the statutes of Denmark and Sweden, it is relevant to inquire whether the ALI has profited by experience. Has it marshaled and interpreted the pertinent information from these countries? It is the author's opinion that it has not.⁴⁸ There was not, of course, a total disregard of the

⁴⁵ See apps. B & C *infra*.

⁴⁶ MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962) [hereinafter cited as CODE], which is set forth in app. A *infra*. See also apps. B & C *infra* for the Swedish and Danish provisions.

⁴⁷ CODE § 230.3(3).

⁴⁸ One school of realist jurisprudence known as "fact skeptics," of which Jerome Frank is a noted example, seriously questions whether it is possible to retrieve all the

experiences with liberalized abortion laws. The Advisory Committee took note of the lowered abortion mortality rate experienced in the Soviet Union⁴⁹ and considered reports of adverse physical and psychic experiences by the women on whom abortions were performed.⁵⁰ The comment also makes an argument which sounds logical enough but does not reflect actual experience.⁵¹ The comments state:

Proponents of liberalization would add that criminal repression of abortions which are widely regarded as permissible can only lead to the illicit performance of the operation by quacks under conditions much more likely to kill the mother. On this hypothesis, abortion law purporting to be based on the morality of saving life actually results in more deaths.⁵²

While this statement obviously refers only to deaths of mothers, even within those limits the experiences in Denmark and Sweden do not support the conclusion reached.⁵³ There is still considerable disagreement as to exactly what is shown by the statistics in the two countries, but it is clear that they do not support the assertion of the Advisory Committee that liberalizing the law saves life. An authority from Denmark reporting on the experience in that country after the relaxation of abortion laws⁵⁴ states — after pointing out that the number of legal abortions has increased from five hundred to five thousand annually — that “it is difficult to establish if the number of illegal abortions during the same period have decreased or increased, but in any case the number is estimated as very high, perhaps twelve thousand yearly.”⁵⁵

pertinent data. This is not necessarily inconsistent with sociological jurisprudence, since the latter school only seeks to gather as much information as is available and considers an important part of its process the testing of conclusions and the reconstruction of beliefs.

⁴⁹ TENT. DRAFT, comment 1, at 147.

⁵⁰ TENT. DRAFT, comment 1. The U.S.S.R. ostensibly discontinued liberalized abortion on this ground for a period of almost twenty years. However, it is arguable that the continuation of a pregnancy might, in certain cases, result in greater physical or psychic danger to a woman than would an abortion.

⁵¹ TENT. DRAFT, comment 1, at 150.

⁵² *Ibid.*

⁵³ At this point the first two “salient features of American experience” stated by the Advisory Committee should be brought to mind: (1) the high number of abortions committed, and (2) the number of women who died annually as a result of abortion.

⁵⁴ CALDERONE, ABORTION LAWS IN THE UNITED STATES 21 (1958), quoting Dr. Carl Clemmesen, consultant in psychiatry, National Health Service, Copenhagen, Denmark.

⁵⁵ *Ibid.* See Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964), stating that “as long as there are any restrictions at all, women with unwanted pregnancies who are determined to abort will seek out and find illegal abortionists.” *Id.* at 55.

Sweden apparently experiences a similar high illegal abortion rate and, while some persons claim that there has been a lower rate of criminal abortion because of the increased frequency of legal abortion, there are others of the opinion that the number of criminal abortions has remained the same.⁵⁶ One authority has suggested that the total number of criminal abortions in these countries has increased because the legislature has helped to remove the feeling that abortion is wrong and that an "abortion mentality" has extended to all women who have unintentionally become pregnant.⁵⁷

Two observations may be made about the high number of illegal abortions still being performed in Sweden and Denmark,⁵⁸ with, presumably, the same high proportion of deaths. First, the statistics are possibly wrong or will reverse themselves in the future. While this is doubtful, even if true the significance of the mothers' mortality rate is so great that it should be conclusively established in a thorough and disinterested study.⁵⁹ Second, accepting as true the

⁵⁶ CALDERONE, *op. cit. supra* note 54, at 30, referring to Dr. Af Geijerstam, Department of Women's Diseases, Karolinska Sjukhuset, Stockholm, Sweden. See ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 34 (1963): "Such evidence as there is, however, suggests that legalized abortion does not reduce the illegal rate."

⁵⁷ In WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957), the author states:

Another factual ground of criticism of the legislation both in Sweden and in Denmark is that it has not substantially reduced the number of illegal abortions; according to one opinion, these have actually become more numerous because the legislation has helped to remove the feeling that abortion is wrong, and indeed promotes an abortion mentality which extends to all women who have become unintentionally pregnant. Whether it is true to say that illegal abortions have increased or somewhat diminished is controversial, but investigation has shown that a proportion (ranging from 15 to 33 per cent) of the women refused legal abortion have afterwards had their pregnancy ended by abortion, whether natural or illegal. *Id.* at 241-42.

⁵⁸ Perhaps the mortality rate for illegal abortions might even increase under these circumstances because doctors, having gained liberalization of the law, would more closely adhere to it and, therefore, a greater proportion of induced abortions would be of the "back-alley" variety. This follows from one argument made in favor of liberalization, namely, that we should liberalize the law so that doctors may follow it. In this connection, one must also consider the reaction of the woman who has been refused a legal abortion. Having first obtained the courage to seek an abortion legally, how is she likely to accept rejection? This is a question to be left for the psychiatrists. Furthermore, since the request for a legal abortion, the examination, and determination all require time, the woman is placed in even greater danger when she goes to the "back-alley surgeon," because it is recognized that abortion in the later months of pregnancy poses a greater danger to the woman.

Consider also how the liberalization of abortion laws will affect the unscrupulous practitioner. Will he be discouraged? At best, it might be argued that with liberalization the prosecutors could vigorously enforce the law. But do they not already attempt to prosecute the non-medical man? And what about the jury? What effect will a more liberal statute have on its attitudes?

⁵⁹ While further development of sex education, intensified propaganda for planning parenthood, and more numerous consulting centers have been recommended,

proposition that there has been little or no effect on the number of illegal abortions performed, a sociological problem is created for the mother which is no less significant than it was before revision and which is worse with respect to the fetus, since legality has raised the total number of abortions.⁶⁰ This would mean that the safe, equivocal position taken by the American Law Institute — which offers no remedies to the problem created in Sweden and Denmark and which does not extend as far as the Russian or Japanese positions⁶¹ which have in fact reduced the number of illegal abortions by enabling virtually any pregnant woman to secure one⁶² — fails to improve upon three of the six "salient features of American experience" enumerated in the Code's comments.⁶³

The above indicates the shortcomings of that part of the Swedish and Danish approach which the Code accepts. Now follows an examination of what can be expected in proposing legislation which falls short of the law in those two countries, primarily the exclusion of "anticipated weakness" as a ground for abortion and the failure to use the board or committee system of determination. Because of the ALI's rejection of these two provisions, the law would be changed very little from what it is today in the more "liberal" jurisdictions and, further, the remaining ills which might be cured by enacting the substance of the Scandinavian laws are left unremedied. One of these ills, referring again to the "salient features" set forth in the Code comments, is that a substantial number of medical practitioners and a large number of hospitals fail to abide by the present law.⁶⁴

It has been said that proposals which extend therapeutic exceptions and yet remain consistent with the underlying rationale of our law only slightly ameliorate the situation we have today⁶⁵ and that the basic turning point in liberalizing the law appears to be the exception for "anticipated weakness," otherwise described as "eco-

CALDERONE, *op. cit. supra* note 54, at 31, it appears that Sweden has already advanced in these areas, and it is questionable whether such measures will afford a solution to the problems in that country. *Id.* at 31-32.

⁶⁰ To say that an abortion is "worse" for the fetus concededly presumes some value in the life of the unwanted child.

⁶¹ TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 410 (1936) (commenting on the experience of the U.S.S.R.).

⁶² *Ibid.*

⁶³ See text accompanying notes 19-20 *supra*. The author has in mind the high mortality rate, the comparison to the lower mortality rate in the U.S.S.R., and the question of who performs the abortion.

⁶⁴ See Leavy & Kummer, *supra* note 55, at 52.

⁶⁵ Note, 32 IND. L.J. 193, 205 (1957).

conomic distress.”⁶⁶ Even the Advisory Committee recognized the problem of economic distress⁶⁷ and appeared disturbed by its own recommendation.⁶⁸ The Committee stated:

The final area of controversy is whether social or economic factors should be considered in abortion legislation. Such situations are created when the pregnant woman is, for example, carrying an illegitimate child and has several other children, or she has been abandoned by her husband and is burdened with sickness or delinquency problems among her other children. One authority has estimated that ninety per-cent of illegal abortions are suffered by women in such situations and who are willing to risk their lives and health in back street surgery.⁶⁹

It is important to note that the Model Penal Code recommendation states that the physical or mental health of the mother must be “gravely” impaired,⁷⁰ a term which cannot be expected to receive a construction broad enough to include, for example, social and economic considerations. Referring to the earlier section of this article setting forth the present practice of much of the medical profession and many hospitals,⁷¹ the provision can be said only to enact what is already practiced.⁷² Furthermore, in considering this catchall indication, however it is labeled, there is the problem of psychiatric justifications. The Advisory Committee recognized this problem and stated that psychiatric justifications are difficult to classify and verify and that “psychiatrists themselves have expressed concern at the shadowy line between mental and social justification.”⁷³ Does the Code offer any guidelines?

The statistics in Sweden bear out the significance of this added justification. After the initial law revision, there was little change

⁶⁶ *Id.* at 201 n.49, where it is stated: “If economic distress is the principal cause of abortion, then an exception for economic necessity would render abortion laws largely nugatory even in the absence of deliberate evasion.” See note 64 *supra* and accompanying text.

⁶⁷ TENT. DRAFT, comment 1, at 149: “Economic and social conditions are said to be the primary cause of abortion. Economic distress, or a desire to maintain a higher living standard, is at the root of the largest number of induced abortions.”

⁶⁸ TENT. DRAFT, comment 6.

⁶⁹ Kenney, *Thalidomide—Catalyst to Abortion Reform*, 5 ARIZ. L. REV. 105, 108-09 (1963). See also Note, 12 W. RES. L. REV. 74 (1960), which states that “social and/or economic considerations are never considered as grounds for justifiable abortion. However, these socioeconomic factors deserve consideration due to the fact that the majority (estimated at 90%) of all criminal abortions are performed on married women who seek to avoid the economic burden of another child.” *Id.* at 83-84.

⁷⁰ TENT. DRAFT, comment 3, at 152.

⁷¹ See text accompanying note 20 *supra*.

⁷² See Leavy & Kummer, *supra* note 55, at 52 for a study of the California hospitals.

⁷³ TENT. DRAFT, comment 3, at 153.

in the rate of abortions until 1946 when the requirement of "weakness" was broadened to include "foreseen weakness";⁷⁴ thereafter, the number of abortions performed in that country sharply increased, with approximately sixty percent performed on the combined grounds of weakness and anticipated weakness. Compared to this percentage, the indications for medical reasons amounted only to 30.2 percent; the percentage for eugenic indications, that is, the expectation that the child would inherit some mental disease, deficiency, or other serious illness or defect, amounted to 9.2 percent; and the percentage for humanitarian indications, such as a pregnancy caused by rape, incest, or the impregnation of a girl under age, amounted to only .3 percent.⁷⁵ These statistics might also indicate that the real effect of the Code, at best, is a clarification of the medical indications justifying abortion and an extension of the law only where there are eugenic and humanitarian indications, which amount to but a small percentage of the abortions performed.

The other major distinction between the Code and the Scandinavian approach is the procedure for determining a valid justification. The Code permits a physician to perform an abortion with the written concurrence of another physician if they both state that there are justifying circumstances. Denmark and Sweden use permanent committees or boards to varying degrees. The Code procedure, it is submitted, does not give the guidelines needed by physicians and only serves to assist the more unscrupulous practitioner.

The reason given against the use of such boards was that there was no "body of experience" in the United States to handle these matters.⁷⁶ This appears to be a weak argument. First, is there really no such body? Many hospitals in the United States already utilize the board approach, for this purpose as well as for other crucial decisions such as medical experimentation.⁷⁷ Second, although hospital boards might be distinguished because they are private in nature, is the mere fact that presently there are no public boards truly significant? Other administrative tribunals have also had to make unprecedented determinations at one time, and perhaps

⁷⁴ WILLIAMS, *op. cit. supra* note 57, at 240.

⁷⁵ CALDERONE, *op. cit. supra* note 54, at 28.

⁷⁶ TENT. DRAFT, comment 6, at 156.

⁷⁷ See paper delivered by Lewis, *Restrictions on the Use of Drugs, Animals and Persons in Research*, Rockefeller Institute Conference on Law and the Social Role of Science, April 8, 1965.

there is even an advantage to a fresh start at this point in medical history.

There seem to be excellent reasons for using a board approach. Perhaps the best reason given is that the board takes the decision out of the hands of the individual,⁷⁸ thereby supporting the conservative physician who believes that an abortion is desirable but is hesitant to perform it because he fears possible censure. This approach also protects the obstetrician or surgeon who is inclined to specialize in this field but who is concerned at being labeled an "abortionist,"⁷⁹ and it also protects society from the unscrupulous physician who is concerned only with a fee or with the desire to build a practice in defiance of the law.⁸⁰ In addition, the board is likely to have a broader perspective and an objectivity not attained by the physician personally involved in the individual case.⁸¹ Another advantage of the use of boards is that a body of law would be developed from their decisions which would further define the guidelines in a manner similar to our federal administrative rulings.⁸²

The composition of the boards is important and should be given careful consideration. It would seem that medical experts such as obstetricians, gynecologists, or psychiatrists would be preferable persons to serve on the boards because of their expertise. Others who might be considered are sociologists (if sociological factors are to be given weight), members of the legal profession (to interpret statutes and previous decisions), or laymen (to serve in the capacity of a jury).⁸³

⁷⁸ CALDERONE, *op. cit. supra* note 54, at 123; Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172, 183 (1964).

⁷⁹ The experience in the Soviet Union clearly establishes the value of specializing in this practice. See TAUSSIG, *op. cit. supra* note 61, at 417.

⁸⁰ WILLIAMS, *op. cit. supra* note 57, at 236: "For the protection of the surgeon who operates, it would obviously be desirable to have the case passed upon by some official board, as is done in Denmark and Sweden."

⁸¹ Cf. Lewis, *supra* note 77, wherein he discusses the use of the board as a regulator of human experimentation and states that "this will lend both a broader perspective and an objectivity not attained by the investigator who is personally involved in the experiment."

⁸² CALDERONE, *op. cit. supra* note 54, at 123 cites Dr. Lidz as stating: "A board would still have to make decisions, but this would put it in a position occupied by the courts, in which interpretations of the law are made from year to year as the practical applications of it arise, and over a period of time a general basis for the interpretation of the law is established." See also Trout, *supra* note 78, at 184: "It endows a continuing body with a basis for developing cumulative expert judgment."

⁸³ When dealing with cases of mental incapacity, the board composition in Sweden consists of one physician, usually an obstetrician, one layman, preferably a woman, and

B. Concerning the Sanctity of Life

Perhaps the most important shortcoming of the American Law Institute approach is the failure to consider and evaluate fully the arguments regarding the "sanctity of life."⁸⁴ At the 1959 ALI proceedings, where this section of the Code was discussed, Professor Schwartz appropriately began by characterizing abortion as a problem of the sanctity of life,⁸⁵ but thereafter this basic issue was not thoroughly explored. Instead, the ALI followed the Advisory Committee's evaluation which was not really a result of critical thinking, but was what Bertrand Russell would call "special pleading," or the finding of arguments for a conclusion given in advance.

The Advisory Committee's consideration of the sanctity of life was almost entirely limited to the life of the woman, with very little, if any, consideration given to that of the fetus. While the Committee recognized the argument that destruction of the fetus approaches murder, it minimized the human characteristics of the fetus prior to the fourth month of pregnancy when it is most likely to be aborted and then stated:

the Chief of the Bureau for Social Psychiatry of the Medical Board. When an abortion is sought on eugenic grounds, a specialist in genetics joins the board. For any other indications, two physicians may decide the matter, one being a properly appointed medical officer and the other the surgeon who will perform the operation. CALDERONE, *op. cit. supra* note 54, at 27.

Dr. Geijerstam, the reporter for Sweden, does not discuss the rationale underlying the criteria for membership on the special committee. It seems obvious, however, that a social psychiatrist should be on the committee where there is a claim of mental incapacity, and that the genetics specialist should be on the committee when eugenic grounds are alleged. But the selection of the other two members of the committee raises some questions. Why the layman? Is she to serve as a juror, finding facts and representing a cross-section of Swedish women? Would Americans entrust court decisions on the facts to one layman? Perhaps a non-jury trial before a judge is analogous, but his special training and experience might also make the example distinguishable. Possibly she (or he) is to serve as the "humanizing" factor in what might be otherwise a cold, scientific decision. But should emotional or "humanizing" factors be involved? Is not the sole question whether the woman is mentally fit to carry the baby until delivery or whether it is likely that the baby will be born deformed? And what of the third panel member, the physician who is "usually an obstetrician"? If the question is strictly a scientific one regarding mental fitness, why not another psychiatrist or a committee of three psychiatrists? If it is a fact-finding role, another layman would serve the purpose. If an obstetrician is desirable, is he not equally desirable when the other indications are claimed (but when the decision is now left to a medical officer and a surgeon)? See also, Jakobovits, *Jewish Views on Abortion*, 17 W. RES. L. REV. 480, 481-82 (1965), contending that the judgment called for is not medical at all but moral and should be taken from the physicians and given to "moral experts."

⁸⁴ "[F]acts albeit scientifically ascertained are of themselves of no avail; for they do not evaluate themselves. And if the evaluation is not given either by substantial unanimity or by an authoritative form of words, the task has only begun when the facts have been gathered, organized and interpreted." STONE, *THE PROVINCE AND FUNCTION OF LAW* 387 (1950).

⁸⁵ 36 ALI PROCEEDINGS 252 (1959).

There seems to be an obvious difference between terminating the development of such an inchoate being, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of its mother.⁸⁶

The true significance of this basic point — what value has the life of the fetus and how does it compare with the life of the pregnant woman? — is apparent when one observes that it is at this point that the line is most clearly drawn between those favoring a liberal abortion policy and those espousing a more conservative policy. While no attempt is made here to provide the resolution of this value conflict between the fetus and the pregnant woman, it is incumbent upon us to note this basic issue and understand the varying approaches.

Doctors also disagree on this point; one writer refers to the fetus as no more than a uterine tumor⁸⁷ while another compares abortion to the use of the "gas chambers of Buchenwald."⁸⁸ Religious opinions range from the rabbi who contends that the "fetus is a part of the mother prior to birth and as such can be sacrificed for the sake of the mother, just as an arm or leg could be amputated,"⁸⁹ to the Catholic view that any abortion is the killing of an innocent human being.⁹⁰ One analyst of American statutes asserts that they have been designed to protect the pregnant woman,⁹¹ while another states that the underlying rationale of contemporary abortion statutes is that abortion is a crime against the fetus.⁹² As to what the law should be, some say that the purpose should be the protection of the fetus life,⁹³ and others say that lawmakers should not be concerned with the fetus but with injury to the pregnant woman.⁹⁴

⁸⁶ TENT. DRAFT, comment 1, at 149. See also Mietus & Mietus, *Criminal Abortion: "A Failure of Law" or A Challenge to Society?*, 51 A.B.A.J. 924, 925 (1965), wherein the authors attack this position.

⁸⁷ WILLIAMS, *op. cit. supra* note 57, at 230.

⁸⁸ Comment, 37 U. COLO. L. REV. 283, 291 (1965).

⁸⁹ Mietus & Mietus, *supra* note 86, at 924-25. In this article, and particularly this discussion, the authors call attention to the use of the word "mother" as opposed to "pregnant woman," and so forth. The authors believe that "mother" is perhaps inaccurate and should only be used after birth, but they are also concerned with the advantageous psychological effect of the word "mother" vis-à-vis "fetus."

⁹⁰ Tinnelly, *Abortion and the Law*, 5 CATHOLIC LAW. 187, 190 (1959).

⁹¹ Leavy & Kummer, *supra* note 55, at 53.

⁹² Comment, *supra* note 88, at 292.

⁹³ *Ibid.* See note 97 *infra* regarding semantics.

⁹⁴ WILLIAMS, *op. cit. supra* note 57, at 154.

Still others are concerned with both the fetus and the pregnant woman.⁹⁵

On the issue of the quality of life, one position emphasizes the *innocence* of the human life of the fetus,⁹⁶ another position maintains that the quality of the woman's life is the more significant,⁹⁷ and, again, there is a middle road position, that there is no quality difference but that "the mother is able to speak for herself, whereas the child is obliged to be silent."⁹⁸ A proponent of liberalization has pointed out that the death of the fetus passes without public notice (for example, no obituary),⁹⁹ but Catholics apparently will make a great effort to baptize the unborn.¹⁰⁰ Moreover, when the proponent of liberalization contends that if the fetus has the right to life, so has the pregnant woman,¹⁰¹ it is certain that the conservatist would reply that if the pregnant woman has a right to life, so has the fetus.

While the above only serves to illustrate the differences of opinion and to show the significance of the value issue, it does not assist in any way to formulate a means to resolve the conflicting interests. And while the conflicting interests concern the fetus vis-à-vis the pregnant woman, other interests to be considered are the family to which the pregnant woman belongs, or into which the fetus will some day be born, and the community.

First — for convenience only and with no intention to make a value judgment — what should be considered with regard to the fetus? It is life, no one questions that. But where does it fit into the scheme of human life? Does it have an independent existence? And, if it does, to what extent? When does life begin? While one answer is that life commences with the union between the sperm and the ovum, this raises a question regarding the life of sperm and the unfertilized ovum, perhaps answerable by making a value determination based on probabilities.¹⁰²

⁹⁵ Note, *supra* note 65, at 194-95.

⁹⁶ 36 ALI PROCEEDINGS 261-62 (1959) (remarks of Mr. Quay); 5 CATHOLIC LAW. 190 (1959); Mietus & Mietus, *supra* note 86, at 927.

⁹⁷ WILLIAMS, *op. cit. supra* note 57, at 163-64, wherein it is especially noted that the mother suffers pain and that there is a greater loss both morally and socially than when the fetus is destroyed.

⁹⁸ ST. JOHN-STEVAS, *op. cit. supra* note 56, at 35.

⁹⁹ See WILLIAMS, *op. cit. supra* note 57, at 227.

¹⁰⁰ *Id.* at 195-96.

¹⁰¹ WILLIAMS, *op. cit. supra* note 57, at 196.

¹⁰² Cf. Mietus & Mietus, *supra* note 86, at 925. While eighty-five percent of all pregnancies develop to the stage of viability, "the mathematical odds of fertilization of

Should any distinction be made between different stages of development of the fetus, infant, or young child? On what would such a distinction be based? On pain? On consciousness? Theologians have suggested the "soul" as a basis, but does the fetus have a "soul," and, if so, when is it acquired? Is it a question that can be answered? Of what importance is the quality of life the child will eventually lead if born deformed¹⁰³ or without one or both parents, or into poverty or other unfavorable conditions? Should man make this judgment? If so, how should it be made? On the basis of probabilities? Where does one draw the line?

When questioning the independent existence of the fetus, the corollary questions are whether the fetus is to be considered a part of the pregnant woman and, if so, to what extent. Is it to the extent that the woman may treat the fetus as part of her own body, and may a woman abuse her own body? How is the woman's life to be compared to that of the fetus? Is "innocence" relevant, and, as previously suggested, what is innocence? Is one life more important and, if so, by what standard? Should the standard be life expectancy or the present love of others for the woman? How important is the woman's present role as a wage-earner, a mother of other children, or a mother of future children? Considering the quality of the woman's life, will it make her happier or more miserable, and will childbirth or an abortion shorten her life?

While weighing these considerations, alternatives should not be overlooked, especially the possibility that the unwanted child might be placed with an adoption agency after birth, thereby increasing the happiness of some couple not able to have their own children. Consider also the mentally disturbed woman; if a real threat of suicide exists, not only will the woman's life be taken but also that of the fetus — except possibly very late in pregnancy. Then, too, compare the value of the mentally disturbed mother's life with that of her presumably normal child.

Perhaps there should be different considerations for the married woman as compared with the single woman. The single woman usually faces social disgrace¹⁰⁴ and serious economic prob-

the ovum by the one particular spermatozoon out of an ejaculate of 200,000,000 to 600,000,000 spermatozoa available in a normal insemination, are obviously astronomical."

¹⁰³ Mrs. Sherri Finkbine, an Arizona housewife who received considerable publicity in 1962 when she sought an abortion after taking thalidomide while pregnant, stated that her greatest and most surprising support came from deformed persons or their families who almost unanimously urged her to go ahead with her abortion.

¹⁰⁴ CALDERONE, *op. cit. supra* note 54, at 55: "The birth of a child prior to mar-

lems if she is self-supporting. The married woman, however, usually has similar economic or social problems, and this fact raises several questions which concern the family unit. A large, poor family faced with an extra mouth to feed and a mother not able to work at full capacity will surely suffer. Should not the other young children be considered? But there are other alternatives and considerations such as adoption and an increased welfare check.

This leads to a consideration of the effect on the community, and whether the public should be required to carry the financial burden. It has also been demonstrated that the unwanted child is very likely to be a juvenile delinquent.¹⁰⁵ Perhaps the greatest concern of the community is population control. But it seems that there are better means of achieving this goal — assuming it to be desirable. What alternatives exist? Pope Paul VI, in his address before to the United Nations in 1965, stated: "Your task is to ensure that there is enough bread on the tables of mankind and not to encourage artificial birth control, which would be irrational, in order to diminish the number of guests at the banquet of life."¹⁰⁶ But are birth control and food production mutually exclusive, or do they complement each other?

The mother, the community, and the family are also adversely affected by the burden of a mentally or physically defective child in their midst. But what standard should be applied in determining what is "defective"?¹⁰⁷ Should it be merely mental and extreme physical defects? What difference is there between the destruction of a defective fetus and a defective, helpless human? Perhaps the community also has an interest in improving the quality of human life in a manner similar to that which has been used to improve strains of corn or cattle. What if one society practices eugenic control while another does not? Will such practices reduce man's respect for human dignity?

The foregoing are just some of the questions which must be answered in evaluating the sanctity of life concept and its impact upon the lives of the fetus and its mother as well as upon the family and

riage is not the social disgrace among the socially lower-level Negroes that it is among college girls, and this is something that touches upon a reality we must always take into account."

¹⁰⁵ WILLIAMS, *op. cit. supra* note 57, at 218-19.

¹⁰⁶ N.Y. Times, Oct. 6, 1965, p. 6, col. 6.

¹⁰⁷ Mietus & Mietus, *supra* note 86, at 926: "Has the world gained or lost from the services of the epileptic Michelangelo, of the deaf Edison, of the hunchbacked Steinmetz, of the Roosevelts—both the asthmatic Theodore and the polio-paralyzed Franklin?"

the community. Perhaps this section should be related to the previous discussion regarding review boards.¹⁰⁸ The seemingly infinite number of questions underlines the need for a continuing body to answer them as they arise. In addition, perhaps the close relation between abortion and contraception should be observed so as to minimize, if possible, this conflict in the first instance.

C. The Pregnant Woman: Victim or Protagonist?

According to the Model Penal Code, it is only after the twenty-sixth week of pregnancy that self-abortion is to be considered a criminal act on the part of the woman,¹⁰⁹ and even in this case the Advisory Committee states as its first reason the fact that there is greater danger to the woman at the end of pregnancy, and only as a second reason, does it consider the fetus.¹¹⁰ However, in reaching its decision on how to deal with the pregnant woman, it is clear that the committee considered another factor to be significant in determining the criminal responsibility of the aborting woman, namely, that it was not efficacious to denounce the pregnant woman as a criminal.

Using the sociological technique as previously illustrated, the Advisory Committee noted that "the prosecution of the mother is so rare that no reported decisions have been found,"¹¹¹ that her cooperation is needed in convicting "abortionists,"¹¹² that it is unlikely that there is any deterrent effect,¹¹³ and that a greater evil would be perpetrated by sending the woman to prison.¹¹⁴ In setting forth these facts, the committee followed the argument of other proponents of liberalization.¹¹⁵

One criticism of this liberal attitude toward the aborting mother is that there has been virtually no consideration of the "ought."¹¹⁶

¹⁰⁸ See notes 77-84 *supra* and accompanying text.

¹⁰⁹ CODE §§ 280.3 (3). See app. A. *infra*.

¹¹⁰ TENT. DRAFT, comment 9, at 158.

¹¹¹ *Ibid.*

¹¹² TENT. DRAFT, comment 9, at 159.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* Sociological jurisprudence is not the only jurisprudential school concerned with efficacy. Most schools of jurisprudential thought take this into serious consideration. The realist evaluates the law as to its effects, as does the analytic jurist. The positivist qualifies the rule by stating that a law should be "substantially" efficacious, and the natural law adherent is more concerned with what ought to be done than what is done, although he, too, takes cognizance of legal efficacy.

¹¹⁵ WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 153-54 (1957).

¹¹⁶ Some have suggested that abortion laws be left on the books "as a symbol of formal disapproval of behavior," even though in specific instances the acts are con-

Some consider this attitude as indicative of a weakness of the sociological technique, but here it demonstrates the incomplete use of this approach. As indicated previously,¹¹⁷ in applying Pound's original theory of maximizing man's total number of interests in life in civilized society for the least amount of friction and waste,¹¹⁸ the draftsmen include only the pregnant woman when they consider "man" and consider "life" only as life after it is separated from the mother.¹¹⁹

Also evident in this section is the failure to obtain all relevant information. In reaching their decision to condone the woman's acts, the draftsmen have apparently ignored behaviorism, particularly that of the pregnant woman.¹²⁰ Consider the opinion of one authority quoted earlier who asserted¹²¹ that the liberalization of abortion laws has created an "abortion mentality" in the Scandinavian countries, leading to an increased number of legal and illegal abortions. An important corollary to this proposition might be that a more strict abortion law, perhaps aimed directly toward the woman, would actually lessen the number of abortions. This is at least a genuine possibility meriting detailed study.

It is obvious that the pregnant woman is the one who seeks out the abortionist and not vice versa and that the decision to proceed with the operation is usually made by her.¹²² If this is true, what motivates her decision, and how does that relate to the law? One bio-psychological study indicates that the normal pregnant woman wishes to stay pregnant until the child is born¹²³ and that any woman who aborts even with excellent social reasons has been at least partially motivated by unconscious and neurotic wishes.¹²⁴

done. Comment, *supra* note 88, at 288. See Note, 32 IND. L.J. 193, 200 (1956). While this is perhaps primarily an "ought" consideration, it may well be the position of the positivist regarding efficacy, that is, substantial efficacy.

¹¹⁷ See note 28 *supra* and accompanying text.

¹¹⁸ See Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142 (1920).

¹¹⁹ Cf. GLASER, AN EXPERIMENT IN THE DEVELOPMENT OF CRITICAL THINKING 6 (1941), wherein the author states that one of the objectives of critical thinking is "to comprehend and use language with accuracy, clarity, and discrimination."

¹²⁰ *Ibid.* (regarding the importance of obtaining all relevant information.)

¹²¹ See note 57 *supra* and accompanying text.

¹²² DEVEREAUX, A STUDY OF ABORTION IN PRIMITIVE SOCIETIES 90 (1955):

Our data shows that the decision to abort, or not to abort, is made either by the pregnant woman herself, or by a person capable of imposing his will upon her, or by society as a whole. This decision results from a choice between two kinds of stress, one of which is—rightly or wrongly—deemed to be less painful than the other.

¹²³ *Id.* at 94.

¹²⁴ *Id.* at 97. This would find favor with those adhering to natural law concepts. The conclusion stated, however, is disputed.

While basic organismal processes influence the decision against abortion, it is the worlds of the ego, the super ego, and external reality which favor abortion.¹²⁵ Will the law influence the latter three? Admittedly, certain socio-economic considerations are important parts of the external reality which contribute to the decision, but so, too, are the legal considerations. And how does the law function today? A few states already provide no penalty for the woman¹²⁶ and several others in various ways provide lower penalties than were imposed at common law.¹²⁷ While not exactly creating an "abortion mentality," as is said to be found in Scandinavia, perhaps this has already had a significant effect upon the woman who may be considering whether or not to abort the fetus by convincing her of what she wants to believe: that it is not her wrongdoing¹²⁸ but that of the abortionist.

Perhaps this is what the members of the Advisory Committee have also done. They collected an incomplete set of sociological data, followed a "hunch," and reached a decision which the realists would say they wanted all along.

III. CONCLUSION

While the tone of this article is obviously critical, the author nevertheless believes that the American Law Institute has taken a giant step in an area of the law which has long been neglected in this country. It has served a valuable function in bringing the serious imperfections of present laws to light. However, in an explosive area touching on sex and morals where legislators fear to tread, the author also believes that proponents of modernization must come better prepared with convincing evidence that their solution will improve the status quo.

¹²⁵ *Ibid.*

¹²⁶ See, e.g., R.I. GEN. LAWS ANN. § 11-3-1 (1956); VT. STAT. ANN. tit. 13, § 101 (1959).

¹²⁷ See, e.g., ARIZ. REV. STAT. ANN. § 13-212 (1956); CAL. PEN. CODE § 275; CONN. GEN. STAT. ANN. § 53-30 (1960); IDAHO CODE ANN. § 18-602 (1948); IND. ANN. STAT. § 10-106 (1956); MINN. STAT. ANN. § 617.19 (1964); MONT. REV. CODES ANN. § 94-402 (1949); N.Y. PEN. LAW § 81; N.D. CENT. CODE § 12-25-04 (1960); OKLA. STAT. ANN. tit. 21, § 862 (1958); S.C. CODE ANN. § 16-84 (1962); S.D. CODE § 13-3102 (1939); UTAH CODE ANN. § 76-2-2 (1953); WIS. STAT. ANN. § 940-04 (1958); WYO. STAT. ANN. § 6-78 (1957).

¹²⁸ The use of the word "wrongdoing" in connection with the woman is admittedly presumptuous, but so is this section.

APPENDIX A

MODEL PENAL CODE

Section 230.3. Abortion.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with the intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

- (a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or
- (b) the sale is made upon prescription or order of a physician; or
- (c) the possession is with the intent to sell as authorized in paragraphs (a) and (b); or
- (d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

APPENDIX B

DANISH PROVISIONS ON JUSTIFIED ABORTION*

The pregnancy of a woman may be terminated under the following circumstances:

(1) If termination of pregnancy is necessary to avoid serious danger to the life or health of the woman. In appraising this danger account shall be taken not only of physical or mental disease, but also of present or imminent states of physical or mental weakness. All circumstances shall be considered, including the conditions under which the woman has to live.

* From § 1, Statute of June 23, 1956 (transl. Professor Knud Waaben, University of Copenhagen), as reproduced in MODEL PENAL CODE § 207.11, app. at 165 (Tent. Draft No. 9, 1959).

(2) If the pregnancy of the woman resulted from violation of [specified Sections of the criminal code referring to rape by force or with a mental incompetent, incest, intercourse with young girls, and intercourse with dependent or institutionalized females under circumstances involving serious infringement of the woman's freedom of action].

(3) If there is manifest danger that, because of hereditary predisposition or defect or disease originating at the fetal stage, the child will suffer from insanity, mental deficiency, or other serious mental disturbance, epilepsy, or serious and incurable abnormality or physical disease.

(4) If, under exceptional circumstances, serious physical or mental defects or other medical considerations indicate that the woman may be considered unfit to take care of her child.

APPENDIX C

SWEDISH PROVISIONS ON JUSTIFIED ABORTION**

The termination of pregnancy shall, under this Act, be justified:

(1) If, as a consequence of disease, physical defect or weakness, the birth of the child would involve serious danger to the life or health of the mother.

(2) If, taking into account the living conditions of the woman and other factors, there is reason to believe that her physical or mental strength would be seriously impaired by the birth and care of the child.

(3) If the pregnancy of the woman resulted from violation of [specified Sections of the criminal code referring to rape by force or with a mental incompetent, incest, intercourse with young girls, and intercourse with dependent or institutionalized females under circumstances involving serious infringement of the woman's freedom of action].

(4) If there is reason to believe that the woman or the father of the expected child will, as a result of hereditary predisposition transmit to their offspring insanity, mental deficiency, serious disease or other serious defect.

** From Statute of June 17, 1938, as amended, May 17, 1946 (transl. Professor Knud Waaben, University of Copenhagen), as reproduced in MODEL PENAL CODE § 207.11, app. at 166 (Tent. Draft No. 9, 1959).