ABORTION LAW REFORM: THE ENGLISH EXPERIENCE[1]

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At the present time there are strong pressures both for and against reform of the existing law relating to abortion in Victoria. In his Southey Lecture, Professor Hart examines the achievements and failings of the recent English legislation. In an analysis of the statistics available since the passing of the Abortion Act 1967, he indicates the various effects which the legislation appears to have produced in such areas of social and legal concern as illegitimacy, maternal mortality and illegal abortion. He also makes mention of the 'political' aspects of abortion law reform, in a discussion of the attitudes of the various branches of the British medical profession. The lecture presents a broad over-view of the problems likely to be encountered by legislatures contemplating the adoption of similar measures.

I INTRODUCTION

In offering to a Melbourne audience these reflections on the recent English experience of abortion law reform, I wish first to make a disclaimer and also to declare my hand. I am not here with the impudent aim of urging upon you the need for similar law reform in Victoria, nor am I here with the equally impudent aim of urging you to keep your law unchanged. Instead, my aim is to describe as clearly as I can some of the many different aspects of this problem which have been forced upon our attention in England and which are, I think, likely to be of importance wherever the legalisation of abortion is debated.

So much then for my disclaimer. I declare my hand simply by saying that, had I been a member of Parliament when the English Abortion Act 1967 was enacted, I would certainly have voted for it. I shall however end my lecture by drawing two morals from our experience in England of the new law. These are not criticisms of its main principles, but attribute certain unsatisfactory features of its operation to two principal failings in our legislation which should certainly be avoided by other countries, if and when they engage in similar reforms.

The study of the changes produced by the Abortion Act 1967 which came into force on 27 April 1968 will I am sure occupy the specialists of many different disciplines for years to come. The change was a very large

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1 A revised version (including statistics subsequently available) of the Southey lecture for 1970 delivered at Melbourne University in May 1971. Two books on the English experience of abortion law reform have since been published in England: Hordern, *Legal Abortion: The English Experience* (1971) and Hindell and Simms, *Abortion Law Reformed* (1971).

scale phenomenon, as can be seen from the figures available for the last four years. Before the Act the largest number of legal abortions performed in National Health Service hospitals was 9,700 in 1967,[2] but in the first eight months of the Act's operation the figure for legal abortions performed in N.H.S. hospitals and licensed private clinics was 23,641; in the next year, 1969, the figure was 54,819, in 1970 it rose to 86,565 and in 1971 to 126,774.[3] This being the magnitude of the phenomenon, it is not surprising that there are problems here, some of them very difficult, for the lawyer, the student of politics, the demographer and sociologist, the moral philosopher and various branches of the medical profession. The study of this subject is indeed an inter-disciplinary study *par excellence*.

II LAW AND STATISTICS

As a lawyer I shall start with the law. Before 1968 the English law in relation to abortion was very similar to what it is now in Victoria. The English Offences Against the Person Act 1861 section 58 made it a felony punishable with imprisonment for life for a woman to abort herself or for another to abort her. The Act contained no explicit exceptions for cases where this was done solely to save the life of a mother, but such an exception was in effect read into section 58 of the Act as an interpretation of the meaning of the word 'unlawfully' used in the formulation of the offence. This step was taken in 1939 in the famous case of *R v. Bourne*[4] in which it was held that an abortion was permitted if it was done in the honest belief on adequate grounds that it was necessary to save the life of the mother; and the construction given to this exception was that if a doctor was of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continued pregnancy would be to make the mother 'a physical or mental wreck', he would not be guilty of the offence. English law also includes a separate provision in the Infant Life (Preservation) Act 1929 (which is still law) making it an offence punishable with imprisonment for life to cause the death of a child capable of being born alive but subject to the proviso that no person shall be guilty of the offence unless it is proved that the act which caused death was not done in good faith for the purpose only of preserving the life of the mother. The interpretation given in *Bourne's* case to the word 'unlawfully' was based on this proviso in the 1929 Act.

[2] The figures for legal abortion in N.H.S. Hospitals for the four years prior to the Act were respectively 3,300, 4,530, 6,380 and 9,700.

[3] The figures cited here for 1968 to 1970 are from the *Registrar-General's Statistical Review of England and Wales*, Supplement on Abortion. Figures for 1971 are from the *Registrar-General's Quarterly Return for England and Wales* which give provisional figures to be corrected in the later published Annual Review. The rate of increase in the number of legal abortions rose very steeply during the period from April 1968 (when the Act came into operation) until June 1970 but the figures for the last three quarters of 1970 and the first quarter of 1971 (21,082, 22,253, 22,774, and 22,808) showed a comparatively stable annual rate. The sharp increase in 1971 began with the second quarter of that year.

[4] [1939] 1 K.B. 687.

Except that the maximum penalties are different, the law in England in relation to abortion, thus interpreted, was before the new Act very similar to the law under section 65 of the Victorian Crimes Act 1958 as interpreted by the decision of Mr Justice Menhennitt in *R. v. Davidson* in 1969.[5] This, like the English decision in *Bourne's* case, in effect made an exception for cases where an abortion was performed if the probable consequence of a continued pregnancy would be to make the woman a physical or mental wreck. Though similar[6] in result, the interpretation in *Davidson's* case of the Victorian statute was reached by a different route from that followed in the English *Bourne* decision since section 10 of the Victorian Crimes Act 1958, which is the counterpart of the English Infant Life (Preservation) Act 1929, did not contain the proviso on which the interpretation in *Bourne's* case of the word 'unlawfully' was based.

The Abortion Act of 1967 made great changes in English law. The core of the Act is the provision in section 1(1) that no offence under the law relating to abortion will be committed by the termination of a pregnancy by a registered medical practitioner if two registered medical practitioners are of opinion, formed in good faith, that either (a) the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the woman or of any of the existing children of the family greater than if the pregnancy were terminated, or (b) that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. The Act also provides in section 1(2) that in determining whether there is the relevant risk of injury to health, account may be taken of the woman's actual or reasonably foreseeable environment, and it stipulates in section 1(3) that operations must take place either in a N.H.S. hospital or in an approved place.

The main provisions of the new legislation are the foregoing. The Act however also provides in section 1(4) that a single medical practitioner may terminate a pregnancy if this is immediately necessary in order to save the life of the mother or to prevent a grave permanent injury to her physical or mental health. To such emergency cases the requirement of the opinion of two registered practitioners and the restriction of the place of operations to N.H.S. hospitals and approved places do not apply.

[5] [1969] V.R. 667.

[6] The result, though similar, is not identical since according to *Davidson's* case a person terminating a pregnancy is liable to conviction under s. 65 of the Crimes Act 1958 if it is proved either (a) that he did not honestly believe on reasonable grounds that the operation was necessary to preserve the woman from serious danger to her life or her physical or mental health, or (b) that he did not believe that the operation was in the circumstances proportionate to the need to preserve the woman from such danger. There was nothing corresponding to (b) in the former English law, though in *Davidson* the conception of proportion was said to underlie the decision in *Bourne*.

The Act also contains in section 4(1) a conscience clause to relieve those who have conscientious objections from the duty to take any part in treatment authorised by the Act, but this is subject to the proviso of section 4(2) that this is not to relieve a doctor of any duty he may otherwise have to save the life or prevent grave permanent injury to the physical or mental health of the mother.

The main point to bear in mind in considering this legislation is that section 1(1) of the Act permits the termination of a pregnancy on the ground that its continuance would involve risk to life or injury to the health of the woman or of any existing children of her family greater than if the pregnancy were terminated. The risk of injury to health, it is important to notice, need neither be grave nor immediate. It is under the provisions of this wide clause concerning the risk of injury to the mother's health (not life) that the vast majority of legal abortions have in fact been done.[7]

Before discussing the new law I shall consider for a moment the operation of the old. There were two salient features: first, prosecutions were very rarely brought against the pregnant woman who aborted or attempted to abort herself or allowed others to abort her, and secondly, the number of prosecutions and convictions for aborting or attempting to abort a woman were always minute in comparison even with the minimum estimate (10,000 *per annum*) of the amount of illegal abortion which had been mentioned in any serious discussion of the subject.[8] Thus in the years 1949-63 the average number of convictions for England and Wales was 54 and in the years 1964-69 it varied between 65 (for 1965) and 52 (for 1969).[9] The figures for illegal abortions reported as known to the police were similarly small and in the five years before the Act (1962-67) averaged 243 *per annum*.[10]

These minute law enforcement figures of course raise a question as to what the social function of the old law was, or was supposed to be. In considering this question it is necessary to distinguish what may be called the direct function of the law consisting in the suppression of the practice of abortion from the indirect function of the law consisting in the promotion of certain good results through the dissemination of the general knowledge that the law exists and its principles are endorsed by the authority of the State. It is necessary to make this distinction, in discussing the function of the law against abortion, in order to make room for the contention

[7] The percentages of the total numbers of legal abortions for which this was the sole ground in 1968 (8 months), 1969 and 1970 were respectively 71%, 73% and 75%.

[8] See C. B. Goodhart 'The Frequency of Legal Abortion' (1964) 55 *Eugenics Review* 197, 200; but note the discussion of his argument *infra* p. 403.

[9] Figures from *Home Office Supplementary Statistics relating to Crime and Criminal Proceedings* 1963 onwards. Table 6A.

[10] *Ibid.* Table 4 (a).

which was frequently put forward in support of the old law[11] that even if it largely failed in its direct function (since the scale of illegal abortions was so great) it yet may be the case that the law performed indirectly the beneficial function of maintaining a general respect for the sanctity of human life, since this respect may have been strengthened by the knowledge that the State by its law against abortion bears witness to and symbolises society's commitment to the value of human life even in the case of the *foetus in utero*.

Plainly this contention as to the indirect function of the law cannot be simply dismissed, but it is exposed to some serious counter-arguments and in any sober estimate of the social costs and benefits of the law at least two further facts have to be taken into account. The first of these facts is simply that a law so widely disregarded as was the old law was never an effective witness to the sanctity of life, but was an impotent gesture which, because of its impotence, harmfully blurred the line between respectable and criminal behaviour. Thus (to use again the minimum estimate mentioned above), if only 10,000 women *per annum* were illegally aborted then in 25 years a quarter of a million women, drawn from many different segments of society, together with those who operated on them would have involved themselves in the breach of a criminal law the seriousness of which was marked by the fact that the maximum penalty provided for the offence which it defines was imprisonment for life. Secondly, the law against abortion differs from many other criminal laws which are also widely disregarded such as *e.g.* the law against careless driving, in the very important respect that offences against it may be not merely individual criminal acts but may also be part of a high profit criminal industry. This offers targets for the blackmailer and corrupting temptations to law enforcement agencies. It has indeed been asserted that 'there seem to be no general criminal rackets flourishing on the basis of illegal abortion'.[12] But recent experience in Victoria has provided much melancholy evidence that serious corruption of the police is to be found among the consequences of restrictive abortion law.[13]

I turn now to the new law. In considering the 1967 Act it is important to observe that it represents a compromise; it does so because in its

[11] *E.g.* Finnis, 'Three Schemes of Regulation' in Noonan (ed.) *The Morality of Abortion* (1970) 184.

[12] *Ibid.* 203.

[13] See Victoria, *Report of the Board of Enquiry into Allegations of Corruption in the Police Force in connection with illegal abortion practices in the State of Victoria* (1971). Two senior members of the Victoria Police Force of more than thirty years standing, Matthews, a former superintendent and Ford, a former officer in charge of the Homicide Squad, were as a result of this enquiry convicted of conspiring to obstruct the course of justice and sentenced to imprisonment for five years with a minimum of three. Jacobson, a former detective constable of the Homicide Squad of seven years standing was convicted of the same charge and sentenced to three years imprisonment with a maximum of eighteen months.

subordinate provisions it recognises, partly and indirectly, both a more conservative and a more radical opinion as to the permissibility of abortion than the principles on which its main provisions rest. Thus the conservative view that abortion is permissible only to save the life of the mother or to prevent grave injury to her health, is partially reflected in the qualified conscience clause (section 4(1)) which, while exempting a doctor from the duty to participate in operations authorised by the Act, if he has conscientious objections, also provides that this shall not affect the duty to participate in such an operation if it is necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman. On the other hand the Act as finally passed does not, as many reformers hoped it would, directly reflect the radical view that certain social, non-medical indications might be recognised as sufficient grounds for abortion, since it does not include the so-called 'social' clause which formed part of the Bill as originally drafted. This clause provided that a pregnancy might be lawfully terminated if the pregnant woman's capacity as a mother would be severely strained by the care of a child or another child as the case may be. Instead the Act preserves the general principle that the indications for abortion must always be medical in the sense of relating to risks to life or health, but partly recognised the more radical opinion by its provisions that risk of injury to the health of the existing children of the pregnant woman's family and substantial risks of the birth of a seriously handicapped child are grounds for termination[14] and also by its provision that, in determining the risk to health either to the woman or her children, account might be taken of the woman's actual or reasonably foreseeable environment.

Does the law honestly interpreted provide 'abortion on demand'? That it does has been claimed not only by uninformed members of a lay public, but by at least one serious student of the legal and medical aspects of abortion who has argued that, as a matter of law, the new Act, at least in the case of early pregnancies, does permit abortion on demand.[15] His argument is simply that the Act, in providing that an operation is permissible if the risk to the mother's life through continuance of the pregnancy is greater than if the pregnancy were terminated, has thereby specified a condition which is always satisfied if the abortion is performed in the early weeks of the pregnancy in a N.H.S. hospital: for in such cases the statistical risk to the mother's life of an abortion will not be greater and may indeed be less than the normal risks of pregnancy. It is then argued that this being so, any doctor on the basis simply of these general comparative risks would be justified in terminating in hospital any early

[14] In the three years 1968-70 operations on the grounds of the health of the existing children of the woman's family represented 4% of the total for each year. Operations on account of the risk of the birth of a handicapped child represented 4%, 2% and 1% of the total for these years respectively.

[15] See C. B. Goodhart, Letter in [1968] 2 *British Medical Journal* 298.

pregnancy. It is, however, quite clear that even if the comparative risks are as they are assumed to be in this argument,[16] the Act has not been, and will not be, interpreted in the way required by the argument. Doctors are required by law when terminating a pregnancy to certify the particular ground on which they do this and, while an overwhelmingly large number of terminations under the Act are certified as being done to prevent injury to the health of the mother, only a very small proportion are certified as done on account of risks to her life. These amounted in the years 1968, 1969 and 1970 only to 5 *per cent,* 4 *per cent* and 3 *per cent* respectively of the total. In each such case the doctor is required to specify on the certificate the disease, obstetric or otherwise, which is the ground for the termination of the pregnancy.

It is clear therefore that doctors do not regard the risk to the mother's life as an available ground for terminating an early pregnancy simply because of the comparative statistical risks. In 1969 the then president of the Royal College of Obstetricians and Gynaecologists, Sir John Peel, expressly repudiated this 'statistical interpretation' on the footing that the relevant risk to life through continued pregnancy must be some risk to which the individual woman is found to be exposed other than the normal statistical risks of child birth.[17]

In any case, the Act does not compel a doctor to operate; it entitles him to operate if the two opinions required by the Act are forthcoming, unless these were not formed in good faith. A doctor would be criminally liable for a refusal to terminate a pregnancy where the Act permits it, only if he were guilty of criminal negligence in disregarding a risk of death or serious injury to the woman and she died as a result. In such a case the doctor could be convicted of manslaughter. It is less easy to describe with confidence the civil liability of a doctor[18] for damages if a pregnancy which he has refused to terminate results in post-natal injury to the health of the mother or the existing children of her family or in the birth of a seriously handicapped child. It seems clear that he would be liable in such cases if he had failed to consider seriously all the risks indicated by the Act or if, after considering them, he refused to operate and the plaintiff

[16] In 1969 there were no deaths from illegal abortion among the 7,427 women on whom the operation was performed in the ninth week of pregnancy or earlier (*Registrar-General's Statistical Review of England and Wales for the Year 1969,* Supplement on Abortion, Tables 22, 32). In 1968 and 1969, when the numbers of maternal deaths, other than deaths from abortion, were 18 and 15 *per* 100,000 of live births respectively, the number of deaths from legally induced abortions were 5 and 10, yielding a rate approximately of 20 and 19 *per* 100,000 abortions. See *Registrar-General's Statistical Review of England and Wales for the Year 1969,* Pt 1, Table F.1, 463; *Registrar-General's Quarterly Return for England and Wales* (Quarter ended June 1970) Table V, 24; (Quarter ended June 1971) Table V, 26.

[17] See the Proceedings of a Symposium by the Medical Protection Society published under the title *The Abortion Act 1967* (1969) 32.

[18] See the discussion of these legal problems by Howe Q.C. *ibid.* 72.

is able to show that a reasonably careful doctor, after balancing all the factors referred to in the Act, would have concluded as a matter of medical judgment that the operation ought to be performed in the interests of the woman and her family. Some apprehensions were felt by doctors that they might be unduly exposed by the Act to actions for negligence for clinical errors of judgment in cases of refusal to advise a termination or to perform the operation. In fact no such actions have yet been instituted in the English courts.[19]

Though the legal position is as stated here, in practice the Act notwithstanding its careful and much debated wording has, for reasons explained in section VI *infra,* produced a situation where few women, able and willing to pay the very high fees sometimes demanded, will have much difficulty in obtaining an abortion in a private clinic licensed under the Act. But in the N.H.S. hospitals the position is very different and for most women abortion is certainly not yet available on demand.[20]

III POLITICS AND OPINIONS

Let me now turn from law and statistics to politics and moral opinions. The Abortion Act 1967 was the eighth Bill presented to Parliament designed to alter the law on this subject and was passed into law under a Labour government. It was a private member's Bill but drafting assistance and government time were given for its debate, without which no Bill as controversial as this could have succeeded. In this respect the Abortion Act resembled three other measures enacted under the Labour government: the Murder Act 1965 which abolished the death penalty for murder, the Sexual Offences Act 1967 which removed homosexual acts between consenting adults in private from the scope of the criminal law, and the Divorce Law Reform Act 1969 which greatly altered the law of divorce in

[19] A New York jury awarded $46,000 damages to the parents of a girl born physically and mentally handicapped after she had been refused an abortion. See *The Sunday Express* 6 October 1968. This was the first decision of its kind in the U.S.A.

[20] No records of refusal of operations for abortions are required to be kept by law or are generally available at present. It is, however, clear that the great regional variations in numbers of operations performed in N.H.S. hospitals in the first two years since the Act, *e.g.* in Birmingham 2.4% of live births, compared with 7.6% in Newcastle for the first six months of 1970 (see 1971 Abortion Law Reform Association *Newsletter* No. 29, 3), are attributable only to a negligible extent to variations in demand, the major factor being the varying hostility to or sympathy with the policy of the Act among gynaecologists in N.H.S. hospitals. 33% of women wanting an abortion who were seen by the charitable Pregnancy Advisory Service in Birmingham had been recommended for abortion by general practitioners and had either been refused by N.H.S. hospitals or were faced with an excessive waiting period there. (See the accounts of the Pregnancy Advisory Service in Hordern, *op. cit.* 126, 129, 181, and Hindell and Simms, *op. cit.* 216-8.) Refusals of abortions by the N.H.S. to pregnant girls under the age of 16 have been frequently reported (see *The Times,* 21 June 1971, 2). In 1969 the number of under-age girls who had illegitimate babies exceeded at 1,486 the number of those who had legal abortions (1,231).

England. A free vote was allowed in each of these cases and members of both parties were found voting both for and against these measures, but it seems very unlikely that these legislative changes would have been made under a Conservative government.[21] It is perhaps a paradox that the most noteworthy achievements of a Labour government, which might have been expected to make its prime objective the reduction of social and economic inequalities, should have in fact been these considerable changes in the criminal law affecting primarily matters of morals and private life.

In one important respect, however, the Abortion Act differs from the other measures mentioned above, each of which had been preceded by an elaborate governmental inquiry either in the form of a Royal Commission or a Departmental Committee.[22] For the last governmental inquiry in England into abortion law was the Interdepartmental Committee of 1939 under the chairmanship of Lord Birkett. This Committee which recommended the codification of the law as interpreted by the decision in *Bourne's* case but no other changes, was obviously much influenced by the then prevailing fears of a falling population, and had little to say that is relevant to contemporary conditions. Hence nothing was done, before the Act came into force in 1968, to explore the size of the likely demand for operations if the law was relaxed, and to investigate and plan ways and means of providing for it by reorganization and extension of hospital and other medical resources.

The changes in the abortion law brought about by the 1967 Act were in very large measure made possible by the pressure exerted by a voluntary society, the Abortion Law Reform Association.[23] This was founded by a group of women as long ago as 1936, and had made a number of unsuccessful attempts to obtain a change in the law including the organization of support for some of the private members' Bills which were presented unsuccessfully to Parliament since 1952. The A.L.R.A. was predominantly middle class and left of centre in politics. By 1967 two-thirds of its members were women, one-fourth of whom had obtained abortions 'mostly legally'; two-thirds of its members had had some form of higher education and one-fifth were doctors. After a dormant period in its activities new life was given to it in 1961 by the distressing cases of gross deformity found in children born to mothers who had taken the tranquillising drug thalidomide.

[21] See the analysis of voting showing a preponderant Labour support for the Abortion Act in Hindell and Simms, *op. cit.* 165, 201-2.

[22] United Kingdom, *Report of the Royal Commission on Capital Punishment 1949-53* (1953) Cmnd 8932; United Kingdom, *Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd 247; United Kingdom, *Report of the Royal Commission on Marriage and Divorce 1951-55* (1956) Cmnd 9678; United Kingdom, *Report of the Law Commission: The Field of Choice* (1966).

[23] See the detailed accounts of this Association in Hindell and Simms, *op. cit.* See also their earlier article, 'How the Abortion Lobby Worked' (1968) 39 *Political Quarterly* 269.

A further impact was made by the subsequent trial and acquittal in Belgium in 1962 of a mother who had killed her baby born deformed by the drug. From 1963 onwards the A.L.R.A. conducted opinion surveys with great energy and skill especially among doctors, and marshalled considerable support from them by the time the 1967 Bill was debated in Parliament.

I do not propose to make a critical assessment here of the arguments about the morality of abortion which were advanced during the passage of the Act through Parliament. I shall attempt only a description of the opinions which I think were most widely shared by its supporters. In the description of opinions held on this matter it is useful to distinguish three principal conceptions of the moral status and claims to life of the non-viable foetus. The first is that a foetus is a full human person with the same right to life as an adult; the second conception is that it is a person with a moral right to life but a lesser right than that of an independent person and may be destroyed to avoid what may be considered greater evils than the termination of its life. The third conception is that the foetus is not to be regarded as a person at all, but as part of the mother. On this footing if abortions are not to be performed simply on her demand, the restrictions can be justified only on paternalistic grounds and in cases where the operation would be gravely injurious to her life or health and so should be refused by a doctor, just as he should refuse to perform any other dangerous and unnecessary operation on any person.

The attitude not only of many of those who voted for the recent legislation but of a considerable number of the public who supported it was, I think, accurately expressed in simple terms by a Conservative Member of Parliament, Mr Angus Maude, in the first debate on the Abortion Bill as follows: 'I . . . cannot find it in me and I do not believe I shall ever find it in me to regard the non-viable *foetus in utero* as a human personality. I cannot say I am right to believe this but nobody can say I am wrong. I am therefore left unmoved by the talk of killing unborn babies.'[24] Of course those who share Mr Maude's attitude were invited by their opponents to consider two sets of facts, one medical and the other legal, tending to show how little difference there may be between the foetus and the independent human being where the attribution of human personality is in question. The medical facts are simply those that show that after the first few weeks the physical structure and indeed appearance to the naked eye of a foetus is remarkably similar to that of a new born baby and that its heart beats are easily detectable. The legal facts are those which show that the law recognises the unborn foetus as having rights to compensation for injuries done to it by third parties which may be enforced by legal proceedings after birth.

[24] (1966) 732 H.C. Deb. 1118.

I do not think that emphasis on these physical and legal similarities, even when dramatically presented, as they have been by opponents of the relaxation of the law, have converted many to a different view of the moral status of the foetus. This is so I think because underlying the perhaps crude dismissal of the idea that a non-viable foetus is at any stage a person, there is the conviction that the difference between termination of a pregnancy resulting in the death of a foetus and other forms of destruction of human life are so great that the legalisation of the former does not constitute any threat to the general respect for the sanctity of human life in other forms. This differentiation between the destruction of a foetus and other forms of destruction of human life seems to many to be anchored in much human experience, and to account for the facts that only rarely has English law equated any form of abortion with murder, that penalties even for the professional abortionist have rarely exceeded 5 years imprisonment, and that the woman aborting herself or procuring others to abort her is virtually never prosecuted.[25]

It is also a noticeable fact both of human individual psychology and of national character that advocates of liberalisation of the law of abortion are to be found among those most concerned to protect human life in general. Many of those who have campaigned for the relaxation of this law have also been opponents of capital punishment and pacificists, and though this syndrome of attitudes has been denounced as contradictory, it seems to many both consistent and natural and to reflect the radical difference between abortion and the killing of an independent person. Similarly, at the national level, the Scandinavian countries who have been the foremost and most consistent supporters of liberalisation of the law were also among the earliest to abandon capital punishment and are generally pacific in outlook.

However, other supporters of reform have been prepared to distinguish between different stages of the growth of the foetus. While arguing that very early abortions need no justification since the foetus is then a cluster of cells which is no more a person or the possessor of rights than an acorn is an oak tree, they have conceded that after this earlier period it is a person with certain rights to life. Their argument has been that though it is important to draw this distinction, nonetheless the bare fact that the foetus is a person in this later period, with rights not to be destroyed or injured by third parties, does not entail that it has a right against the

[25] According to Coke's *Institutes* III, 50 (repeated in Blackstone's *Commentaries* IV, 198) the abortion of a woman even after 'quickening' is a great 'misprision and no murder'. This is wrongly cited as 'misprision and *so* murder' (my italics) in Louisell and Noonan, 'Constitutional Balance', in Noonan (ed.), *op. cit.* 223. Abortion after quickening was a capital offence in England only between Lord Ellenborough's Act 1803 and the Offences Against the Persons Act 1837.

mother to be maintained in existence by the use of her body which outweighs or limits her right to determine what shall happen to or be done to her body. That it does not follow from the fact that the foetus is a person, that it has a right to obtain by use of the mother's body everything which may be required to keep it in existence is something plainly conceded by those who accept (as the old law accepted) that an abortion is permissible if it is necessary in order to save the life of the mother: the foetus' 'right to life' is not a right to be kept alive at the cost of the mother's life. The argument of some supporters of reform has pushed this principle further, on the footing that, at least in cases where pregnancy was unwanted and reasonable steps were taken to avoid it, the foetus whatever rights it may have against strangers has no right to be kept in existence through the use of the body of a woman who does not wish her body to be used for this purpose.[26]

IV INTENTIONS AND RESULTS

In two principal respects Parliament gave the reformers less than they asked. The Bill, as originally presented to Parliament, included, as I have already mentioned, a purely 'social' clause providing that a pregnancy might be terminated if the pregnant woman's capacity as a mother would be severely overstrained by the care of a child or of another child, and it also included a provision that a pregnancy might be terminated if the mother was a defective or became pregnant while under the age of 16 or as a result of rape. These two clauses were deleted from the Bill. On the other hand the main clause of the original Bill was immensely widened and it is under this much widened clause that nearly three-quarters of the legal abortions have been done. As originally presented this clause seemed merely to codify, so far as risks to the mother's life or health was concerned, the previously existing law, since it provided that there must be a 'serious' risk to life or a risk of 'grave' injury to physical or mental health if risk to her life or health was to be a condition for the operation. However, the Bill in fact emerged from the committee stage without the words 'serious' or 'grave'. I was astonished, when I investigated the Parliamentary history, to find that these words were taken out of the Bill as a result of representations made by the two medical associations, the British Medical Association and the Royal College of Obstetricians and Gynaecologists who expressed the view that if these words were included they would bring into question current medical practices which were regarded by these bodies as acceptable.[27] Both these bodies, however, while assenting to this widened

[26] See Judith Thompson, 'A Defence of Abortion' (1971) 1 *Journal of Philosophy and Public Affairs* 47.

[27] See speech of Lord Stoneham in (1967) 285 H.L. Deb. 988-90. As a result of these representations by the medical bodies the clause emerged from the committee stage without any words qualifying the relevant risks to life and health. The qualification that the risk must be greater than if the pregnancy were terminated was added at the suggestion of Lord Parker, *ibid.* 1431.

clause, were strongly opposed to the original social clause which was deleted, and were, and are still, opposed to the provision which the Act makes that a pregnancy may be terminated out of consideration for the health of the existing children of the woman's family. Since the Act, both bodies have repeatedly affirmed that though such an operation is now lawful it is not ethical.[28]

The upshot is a curious one. It seems plain to many lawyers that had the main clause been kept as originally drafted with the insertion of the words 'serious' and 'grave', this would have fairly represented, or at least would have been no more restrictive than, the previous law as interpreted in *Bourne's* case according to which an abortion was permitted only if believed necessary to prevent the mother becoming 'a physical or mental wreck'. The medical associations in asking for the deletion of these words did so on the footing that they would bring into question acceptable medical practices current before the Act, yet only three months previously the R.C.O.G. had insisted that in any reform of the law[29] the qualifying words 'serious' and 'grave' should be retained. This seems a clear indication that a practice might be regarded by these professional bodies as ethical even if legal opinion as to its lawfulness was divided. On the other hand, the opposition of these bodies to the clause permitting an operation out of consideration for the health of the woman's existing children has taken the form of a refusal to countenance as ethical what Parliament has declared to be lawful. Some confusion in the relationship between law and professional ethics has thus been generated. However, no disciplinary steps have been taken or are likely to be taken by the professional body against doctors who perform operations permitted by the law.

Among the aims of the reformers three have at all times been paramount. These are the reduction in numbers of unwanted children, particularly illegitimate children, the reduction of maternal mortality through illegal abortion, and the reduction of illegal abortion. Till recently there was little clear or convincing evidence that the Act had significantly advanced these aims, but the three years statistics now available seem to me to justify the conclusion that it has done so and is likely to continue to do so. I consider here the statistics under the heads of the reformers' three main aims.

(a) *Decrease in numbers of illegitimate births*

From 1961 when the number of illegitimate births was 48,490, representing 6 *per cent* of live births, the number of illegitimate births rose steadily until 1967 when the number was 69,928, representing 8.4 *per cent* of live births. In 1968, however, during which the Act was in force for

[28] [1968] 3 *British Medical Journal* Supplements 25-7.
[29] R.C.O.G., 'Memorandum on Legalised Abortion' [1966] 1 *British Medical Journal* 850.

eight months, this rise was virtually halted: the numbers of illegitimate births fell to 69,806 and the percentage of live births increased only by .1 *per cent* to 8.5 *per cent* which was by far the smallest annual increase yet recorded. In 1969 the number fell to 67,041 and the percentage of live births to 8.4 *per cent* and in 1970 they fell again to 64,744 and 8.3 *per cent.*[30]

These figures alone afford convincing evidence that the Act has succeeded in reversing the trend and has secured a substantial reduction in the number of illegitimate births. But to appreciate its full effect, it is necessary to extrapolate the previous trend and to compare the actual numbers of illegitimate births for the years since the Act with the estimated numbers of such births which would have occurred had the established trend continued. On the footing that in 1968-70 illegitimate births would have continued to increase at a rate equivalent to the average annual rate of increase for the years 1960-67, the figures (in whole thousands) for 1968-70 would have been 74,000, 78,000 and 82,000 and thus would have exceeded the *actual* figures for these three years by 4,000, 11,000 and 17,000 respectively.

This reduction in numbers of illegitimate births for 1968-70 is, however, considerably less than the numbers of single women known to have obtained legal abortions in these years (*viz* 11,120, 24,499 and 40,734). Part of the difference is accounted for by the success which the Act has had in reversing another established trend, namely, the increasing number of so-called shot-gun marriages where the parents have married after the child has been conceived. From 1961-67 the number of such cases rose from 59,000 to 74,000 and the average annual increase during these years was 2,500. In 1968, though the Act was only in force for eight months of the year, the annual increase fell to 900 and in 1969 there was an actual decrease of 2,000.[31] Had the trend continued, the number of such cases would have exceeded the *actual* number in 1968 by 2,000 and in 1969 by 6,500. Nonetheless, there still remains a difference between the total number of single women legally aborted in 1968-70 and the reductions in illegitimate and shot-gun marriage births. For 1968 and 1969 the difference was between 5,000 and 6,000 but cannot yet be calculated for 1970. The most obvious explanation of the difference between these figures is that some part of it represents single women legally aborted who would have obtained a legal abortion even if the Act had not been passed, and the remainder represents single women legally aborted under the Act who but for the Act would have sought and obtained an illegal abortion. If this is so their transfer from illegal to legal abortion is one way in which the Act has secured yet another of its main objectives, namely the reduction of the amount of illegal abortion.

[30] For these figures see *Registrar-General's Quarterly Return for England and Wales* (Quarter ended June 1971), Tables Ia and Ib.

[31] See *Registrar-General's Statistical Review of England and Wales for the Year 1969,* Pt II, Table UU, 195. The figures for 1970 and 1971 are not yet available.

However, an alternative and more pessimistic interpretation of this remainder of the difference (between the total number of single women legally aborted in 1968-70 and the reductions in illegitimate and shot-gun marriage births) is logically possible, namely, that it represents an increase in the total number of conceptions by single women. Those who hold this view attribute the increase to the Act on the footing that the belief that the Act has made abortions easier to obtain has either led single women who would otherwise not have had intercourse to have it without adequate contraceptives or has led single women who previously used adequate contraceptives to abandon them or become careless in their use.

Most people, myself included, find the hypothesis that many women were caused by the change in the law to change their sexual habits or their use of contraceptives much less credible that the hypothesis that the total number of single women legally aborted comprises many who but for the Act would have sought and obtained an illegal abortion. But fortunately we are not left to our intuitions to choose between these alternatives for, as I shall argue in paragraph (c) below, the hypothesis that there has been a considerable transfer of illegal to legal abortion is well supported by reasonable inferences from the figures now available for deaths from illegal abortion which I shall now consider.

(b) *Decrease in deaths through illegal abortion*

For the eight years before the Act came into force (1960-67) the numbers of deaths certified as due to illegal abortion were 30, 23, 29, 21, 24, 21, 30 and 17 respectively. For the three years since the Act (1968-70) they were 22, 15 and 11 and both in 1969 and 1970 the numbers were lower than in any previous year.[32] This is a striking and of course welcome decline in the figures for mortality but, before it can be attributed to the Act, it is necessary to exclude the alternative explanation that it merely reflects, very imperfectly, a general fall in maternal mortality rates due to general medical improvements. In fact this alternative explanation is not available. A comparison[33] of the annual percentage changes in hospital maternal mortality rates *per* live births for the period 1950-67 with the annual percentage change in deaths from illegal abortion *per* live births show there was so little relationship between the two during this long

[32] *Ibid.* Pt 1, Appendix F1, 463; *Registrar-General's Quarterly Return for England and Wales* (Quarter ended June 1970), Table V, 24; (Quarter ended June 1971) Table V, 26; Ministry of Health, *Report on Confidential Inquiries into Maternal Deaths in England and Wales for 1964-66* which suggests that the official figures may understate the number of deaths.

[33] A regression of the annual percentage change in deaths from illegal abortions *per* live birth run on the annual percentage change in hospital maternity mortality rates *per* live birth in the period 1950-67 shows the R^2 of the regression to be .12. This can be rejected as insignificant at a 1% significance level. I am indebted to Mr David Soskice, Fellow of University College, Oxford for this regression analysis. I am also much indebted to him for drawing my attention to the significance of the figures for the shot-gun marriage cases and for much help with the statistics in general.

period that any fall in the former since 1967 could not explain the fall in the latter. In fact, in 1969 the percentage fall in deaths from illegal abortion was 32 *per cent* while ordinary maternal deaths fell by 20 *per cent*, and in 1970 deaths from illegal abortion fell again by 27 *per cent* while ordinary maternal deaths fell only by 5 *per cent*.[34]

(c) *Decrease in illegal abortion*

At all times the difficulty of estimating the amount of illegal abortion is formidable. During the debates in Parliament the figure of 100,000 *per annum* for the years before the Act was frequently mentioned but without supporting evidence and much higher figures have also been suggested.[35] A sample poll conducted in 1966 on behalf of the Abortion Law Reform Association among 3,500 women aged between 21 and 35 yielded an estimate of 31,000 *per annum*, but far too few of those polled gave complete answers to permit reliance on this sample estimate.[36]

Scepticism of the common opinion that the numbers of illegal abortions before the Act were very large has been usually based on the small numbers of deaths officially reported as due to illegal abortions. As can be seen from the figures already cited, these ran for many years before the Act at an average of less than 30 *per annum*, and even if these figures are increased by 30 *per cent* to allow for the result of the Registrar-General's confidential inquiries into cases of maternal deaths, the average figure was under 40 *per annum*. The sceptical argument[37] was that if a figure as large as say 100,000 illegal abortions was a correct estimate, then the illegal abortionist was successful in operating with a level of mortality considerably less than double that attending normal childbirth; so it was suggested that a figure of 10,000-15,000 illegal abortions *per annum*, yielding a much higher mortality rate might be more realistic.

To this argument (quite apart from the possibility that the number of such deaths might still be under-stated even after allowance for confidential inquiries), the chief and, in my view, convincing objection is that since the earliest form of antibiotics became generally available, the illegal abortionists (many of whom were doctors operating under safe conditions) might well possess enough skill to avoid a rate of mortality very much greater than that attending normal childbirth or legal abortion in a hospital, especially since many of their victims might be rescued from death

[34] Percentages calculated from *Registrar-General's Statistical Review of England and Wales for the Year 1969*, Appendix F.1, 463; *Registrar-General's Quarterly Return for England and Wales* (Quarter ended June 1971), Table V, 26.

[35] Cf. D. V. Glass, *Population Policies and Movements in Europe* (1940) (100,000 'not at all improbable'); Mr Roy Jenkins, then Home Secretary, in (1966) 732 H.C. Deb. 1141 ('perhaps 100,000'); Dr Eustace Chester, 'The Law of Abortion' (1950) 72 *Medical World* 495 ('not less than a quarter of a million').

[36] See Hindell and Simms, *op. cit.* 32.

[37] See C. B. Goodhart, 'The Frequency of Illegal Abortion' (1964) 55 *Eugenics Review* 197. In 1964 when Dr Goodhart wrote this article the rate of maternal mortality otherwise than from abortion was 20 *per* 100,000.

by transfer to hospital. The greatest risks attending illegal abortion before the Act were not death but serious damage to health or sterility. Hence the low mortality figures are not good evidence that the figure of 100,000 *per annum* illegal abortions was an over-estimate. The most useful statement that can be made by way of a gauge of the amount of illegal abortion is I think, the following. In the three years since the Act (1968-70) the average rate of death for legal abortions carried out in N.H.S. hospitals or authorised clinics was approximately 15 *per* 100,000. If we suppose that illegal abortion was twice as risky as this, then a figure of 30 deaths *per annum* from illegal abortion implies a total of 100,000 illegal abortions, and a figure of 40 deaths *per annum* implies 133,000 illegal abortions. If, as might well be reasonable, we suppose that the risks of death from illegal abortion was less than twice the risk in the case of legal abortion, then the total amount of illegal abortion would have been correspondingly greater.

Although the estimate of the absolute amount of illegal abortion at any time is beset with these difficulties, the striking decrease in the numbers of deaths from illegal abortion since the Act constitutes good evidence that the total amount of illegal abortion has decreased and perhaps by a roughly similar proportion. This would not be so if there were good reasons for thinking that the death *rate per* illegal abortion was considerably less after the Act than it had been before it. We have, however, already excluded in paragraph (b) above the suggestion that the death rate *per* illegal abortion has declined since the Act as the result of medical improvements which have reduced general maternal mortality rates. There remains the abstract possibility that since the Act the proportionate reduction in numbers of illegal abortions has been greater among cases where the operation carried unusually high risks of death than among other cases, so that the reduction in deaths from illegal abortion could not be taken to reflect any similar reduction in illegal abortion generally. But this seems very implausible since any illegal abortionist willing to undertake such cases before the Act would have just as much or as little reason for undertaking them since the Act. In fact, the only plausible argument suggesting a variation since the Act in the death rate *per* illegal abortion points in the other direction to the conclusion that the proportionate reduction in the total amount of illegal abortion may have been greater than the reduction in deaths. For it is most likely that the reduction in the relatively safe and expensive forms of illegal abortion carried out, not in the back streets but by doctors in hygienic conditions, has been greater than the reduction in the relatively risky back street abortions. This is so because the doctor, unlike the back street abortionist, could transfer to the new legal private sector created by the Act and probably could do this with very little alteration in the type of case and clientele with which he dealt. If this is so, the rate of deaths *per* illegal abortion is likely to have increased, since illegal abortions would

since the Act includes proportionately more of the risky cases and proportionately less of the relatively safe cases. Hence the decline in the numbers of such deaths may reflect at least a roughly similar proportionate decline in the total numbers of illegal abortions, but in view of the small numbers of deaths, before and after the Act, I would assert only that the amount of illegal abortion must have considerably declined.

This reduction in the total amount of illegal abortion is not only welcome in itself because of the risks of death and the greater risks of ill health and sterility attached to it, but it also strongly supports the conclusion that the difference between the numbers of single women aborted since the Act and the numbers representing the reduction in illegitimate births and shot-gun marriage cases is to a large extent accounted for by a transfer from illegal to legal abortion.

V ATTITUDES OF THE MEDICAL PROFESSION: N.H.S. AND PRIVATE SECTOR

Both before and since the Act there has been a well-marked contrast between the attitudes of the general practitioners on the one hand and that expressed by the spokesmen of the official bodies, the British Medical Association and the Royal College of Obstetricians and Gynaecologists. In the years before the Act both these bodies expressed themselves as opposed to far-reaching changes in the law and, in 1966, the Royal College published a memorandum on legalised abortion[38] in which it urged that the grounds for abortion should be confined to those cases where there were serious risks to the life or grave injury to the physical and mental health of the mother, or where there was a substantial risk of a child being born with physical or mental abnormalities so as to deprive it of any prospect of a reasonable enjoyment of life. During the passage of the Act through Parliament these official bodies generally supported its central clauses and confined their opposition to two points. They denounced as 'unethical' the provision that a pregnancy might be terminated because of the risk to health of the existing children of the woman's family and also maintained a firm opposition to the clause which permitted operations to be performed by and on the certificate of medical practitioners who were neither consultants nor operating under their direction. Since the Act these bodies have maintained their opposition to both these provisions. Efforts to reverse the ruling that the termination of pregnancies out of consideration for the health of the existing children of the mother is unethical notwithstanding its legality were unsuccessfully made at the Annual Representative Meeting of the British Medical Association.[39] Two unsuccessful attempts, both supported by both the professional medical bodies, have been made in Parliament to amend the Act so as to permit operations for abortion only

[38] [1966] 1 *British Medical Journal* 850.
[39] [1968] 3 *British Medical Journal* Supplements 25-9.

if they are performed by or under the supervision of a consultant gynaecologist in the N.H.S. or by an approved medical practitioner of equivalent status.[40]

By contrast, the general practitioners whose views have been sought by a detailed National Opinion Poll,[41] have given answers which permit the statement that two-thirds of general practitioners are satisfied with the new law or would welcome some further relaxation of the Act so that legal abortion would be easier to obtain, while 28 *per cent* would welcome some restrictions. These percentages were almost exactly reversed in the case of consultant gynaecologists in the N.H.S., 30 *per cent* of whom in reply to an elaborate questionnaire sent out by the Royal College in 1970 expressed themselves against any restrictions of the Act while the remainder were in favour of its restriction.[42]

It seems, however, that since the Act there has been some modification of opinion on the part of the consultants who, owing to the vastly increased number of referrals, have had to confront and have come to understand more of the problems of women seeking abortion. A considerable number (88 *per cent*) of the consultants who answered the 1970 questionnaire stated that where they had performed an increased number of operations this was in great part due simply to the fact that the number of cases referred to them by doctors had increased, and many found on referral that an operation was justified under the old criteria which they were still using, notwithstanding the passing of the Act. This attitude was expressed by Mr S. Bender,[43] a distinguished consultant gynaecologist, who said that the consultant gynaecologist 'applying the same principles and standards [as before], is now terminating more pregnancies simply because he is seeing more women with, to him, justifiable indications for intervention—women who previously would never have sought medical help because they thought it hopeless to try.' But he added '[f]or every such case . . . there are also several where there is no indication under the Act, as he interprets it but where the patient or her doctor or both understand the law as allowing abortion on demand.' It should be added that among senior consultant gynaecologists there are some ardent defenders of the new law as well as severe critics.

It is important, in assessing the range of attitudes to the Act within the medical profession, to consider the development alongside the N.H.S., where treatment is free, of a private sector where fees are charged for abortion operations in a private clinic licensed under the Act. The number

[40] See (1969) 787 H.C. Deb. 411; (1970) 795 H.C. Deb. 1653.
[41] National Opinion Polls, *Survey of General Practitioners* (1970) 4. 55% of the electorate supported the Act's retention or relaxation.
[42] [1970] 2 *British Medical Journal* 529.
[43] *Ibid.* 478.

of private clinics now approved and licensed is 52 and the proportion of all legal abortions performed in these clinics rose from 38 *per cent* in 1968 to 45 *per cent* in 1970.[44] The growth of a vast private sector where often very high fees are charged and large profits may be made by doctors and clinics is due in part to the great regional variation among N.H.S. hospitals in the interpretation of the Act and willingness to apply it. This development is a great disappointment to those many reformers whose concern was not only to liberalise the law but to secure that there should no longer be in effect one abortion law for the rich and another for the poor.

These and other very unsatisfactory features of the operation of the new law led the Government in February 1971 to set up a Committee of Enquiry into the operation of the Act under the chairmanship of a High Court Judge, Mrs Justice Lane. This Committee's terms of reference do not extend to the principles of the Act or the conditions for legal abortion which it lays down, but only to the manner of its operation.[45] The Committee has not yet reported but the main problems to which it will have to address itself are already plainly identifiable and fall to be considered under the two heads of the N.H.S. hospitals and the private clinics.

(a) *N.H.S. hospitals*

The regional variations in the amount of abortion operations performed in N.H.S. hospitals are still very considerable and still tend to reflect the varying attitudes of the local senior gynaecological staff to the liberalisation of the law. Many hospitals where a liberal policy of applying the law prevails have sought to protect themselves from overcrowding by refusing to take cases from outside their normal catchment area; but there has been some overcrowding in some hospitals with regrettable consequences. These include the deferment of many abortion operations until after the thirteenth week of pregnancy when the relatively simple operation is no longer available[46] and also the deferment of other gynaecological cases considered less urgent than abortion. Moreover, in many such hospitals a great distaste has been felt and expressed by a number of staff, especially nurses, who while not refusing to take part in the treatment, nonetheless dislike being involved continuously in this form of work. Owing to the unequal distribution throughout the country, the burden of operations has at times fallen on a small proportion of gynaecologists and in 1970 it was estimated than

[44] Percentages calculated from figures given in the *Registrar-General's Statistical Review of England and Wales for the Year 1968,* Supplement on Abortion, Table 1; *Registrar-General's Statistical Review of England and Wales for the Year 1970,* Supplement on Abortion, Table 1A.

[45] (1971) 812 H.C. Deb. 318. The terms of reference are '[t]o review the operation of the Abortion Act 1967, and, on the basis that the conditions for legal abortion contained in paragraphs (a) and (b) of subsection (1) and in subsections (2), (3) and (4) of section 1 of the Act, remain unaltered, to make recommendations.'

[46] *Registrar-General's Statistical Review of England and Wales for the year 1968,* Supplement on Abortion, Table 1; *Registrar-General's Statistical Review of England and Wales for the Year 1969,* Supplement on Abortion, Table 1.

one-third of all such operations were performed by only one-tenth of N.H.S. gynaecologists.[47]

(b) *Private clinics*

Both overcrowding in some hospitals where the Act is liberally applied and the refusal to perform operations where it is conservatively applied have fostered the growth of the private sector. Much has been written to the discredit of some private clinics licensed under the Act and of those who operate in them and though unfortunately there is room for such criticisms certain discriminations should be made. There are for example some clinics which have been set up by essentially charitable organizations to aid women to find at a moderate fee a private treatment which they could not obtain from the N.H.S.[48] It is also the case that, though a few of these licensed clinics have failed to obtain a renewal of their licence, there has been little substantial evidence of medical ill-treatment: certainly the amount of mortality from operations in the clinics is no greater than those from operations in the N.H.S. hospitals. There is, however, not the slightest doubt that a large scale racket[49] has developed in this sector and it is a racket which has three tiers. First, very high fees are charged by some of the doctors who operate in some of these clinics; secondly, very high fees may be charged by the clinics themselves, and thirdly, an ancillary network of bureaux and touts has grown up enabling a woman sometimes to obtain a fixed date and place for the operation before she has been examined by any doctors. Foreign women coming from abroad for an operation in a clinic and able to pay fees which are often much higher than those charged to residents accounted in the first quarter of 1971 to some 11 *per cent* of the total of operations.[50]

VI LESSONS OF THE ENGLISH EXPERIENCE

The first moral to be drawn from the English experience is that if abortion law reform is to be undertaken it must not be regarded merely as yet another piece of permissive legislation comparable to the relaxation of the law against homesexuality which can be introduced without previous organization and ancillary supports. Liberalization of abortion law in any modern industrial state is a large scale medical and social change which demands careful planning of available resources. It was in England unfortunately the case that there was no such anticipatory planning and,

[47] Report on R.C.O.G.'s questionnaire in [1970] 2 *British Medical Journal* 529.

[48] See the account of the charitable Pregnancy Advisory Service in Birmingham and London and of the Calthorp Nursing Home in Hordern, *op. cit.* 107-12, 181-2 and Hindell and Simms, *op. cit.* 216-8.

[49] For a vivid and detailed account of this racket see *Daily Telegraph Magazine,* 28 November 1971.

[50] (1971) 817 H.C. Deb. 1177.

although in 1970 the amount of legal abortion in N.H.S. hospitals was approximately six times that done in 1967 no extra beds, nurses or doctors had been supplied for this work. The Government appeared to think that no expansion in medical services was needed and, indeed, the attitude both of the general public and the great willingness demonstrated since the Act of the general practitioner to refer cases to the hospitals seems to have taken both the Government and consultants by surprise.[51]

The Lane Committee may have much to say on ways of securing a more equitable distribution of the burden on hospitals and will consider suggestions already made for special units and part-time rotas to alleviate its work and for the improved use that could be made of hospital capacity by rearrangement of the division between obstetric and gynaecological beds. It may, however, soon be the case that both the costs and difficulty of providing for large numbers in the N.H.S. will be eased by the further simplification in the new rapidly developing techniques for the operation in the early weeks of pregnancy, and there has already been a noticeable increase in the proportion of operations performed by vacuum aspiration instead of the older dilatation technique.[52]

It is however unlikely even with these latest developments that the N.H.S. hospitals will be able in the next few years to cater without strain for the full demand so that a private sector will no longer be necessary. No doubt the racket will diminish, but it will still present a problem of control and the efficacy of any such controls as stipulation of maximum fees must in the end depend upon the ability of the professional associations to define and enforce standards which, though easy to prescribe on paper, may be empty unless some investigatory machinery is available.

The second and in the long term more important moral to be drawn from the English experience is that no country contemplating the liberalisation of abortion law should legislate for abortion alone. It is of crucial importance that such legislation should be part of a coherent and comprehensive scheme for dealing with the whole problem of unwanted pregnancies and should be accompanied, and if possible preceded by a really effective provision of free contraceptive services and education in their use. Among the mass of information which has come to light since the Act there is plain and depressing evidence that a high proportion of women who became pregnant and later sought abortion, used no contraceptive precautions on the relevant

[51] See Lewis, 'The Abortion Act' [1969] 1 *British Medical Journal* 241.

[52] See Lewis, Lal, Branch and Beard, 'Outpatient Termination of Pregnancies' [1971] 4 *British Medical Journal* 606. According to this account 127 women between 6 and 10 weeks pregnant were aborted by a form of vacuum aspiration operation lasting only 5 to 10 minutes, and were allowed to go home after a period of 2 to 3 hours. Only one patient was required to stay in hospital after the operation and though 16 were readmitted for short periods, no complications were found after careful follow-ups at 3 months.

occasion and a smaller, though still large, proportion habitually used none.[53]

Since the National Health Service (Family Planning) Act 1967 local authorities in England have been authorised to set up birth control clinics to give free advice and, when need is demonstrated, to give free equipment; but they are not required to do this, and a large number of local authorities do not provide these services at all, or only do so for married women. Much important work has been done by volunteers in the Family Planning Association, but their scope is limited by their need to charge fees. The work of local authority and Family Planning Association clinics has in some areas been reinforced by hospital-based clinics and services and the Government[54] has supported both voluntary associations and local authorities with increased financial grants. Yet in spite of these efforts it seems clear that a system in which free contraceptive services will be provided only if hospitals or local authorities decide to provide them, cannot cope with the problem. It is not I think an exaggeration to say, as an indication of the change that is required, that any unwanted pregnancy should be regarded as an illness, and the provision of adequate contraceptive education and services should be regarded as a duty of preventive gynaecology. After a slow start the medical associations in England have come to take something like this view of the problem and in April 1966 (when legislation on abortion was impending) the Royal College of Obstetricians and Gynaecologists[55] announced its full support for the provision of free contraceptive advice and materials for all, and also for voluntary sterilisation of both men and women. But much active effort is needed to counter widespread ignorance, irresponsibility and even fear of contraception; a passive system in which free advice and facilities are merely provided for women if they elect to come forward and ask for them will not succeed in penetrating to those areas of society where contraception is most needed. Until this deficiency is remedied abortion, which should be used only in the last resort to prevent the misery of unwanted pregnancies and unwanted children, will too often be used as the first.

I said at the beginning of this lecture that had I been a member of Parliament in 1967 I would have voted for the Act. I would still do so in spite of the unsatisfactory features in its operation which I have discussed in this section. For the overcrowding in the hospitals and the racket

[53] Among 300 women seeking abortion in Birmingham in 1968, 45.8% habitually used no contraception and 73.5% used none on the relevant occasion (see Diggory, 'Some Experiences of Therapeutic Abortion' [1969] 1 *The Lancet* 873, 875). In London of 500 patients examined in 1968, 42% habitually used no contraception and 70% none on the relevant occasion (see Abels, Letter in [1969] 1 *The Lancet* 1051).

[54] The Government has announced a trebled grant for these purposes for 1972-73 see (1971) 812 H.C. Deb. 313.

[55] [1966] 1 *British Medical Journal* 850-3.

in the private sector are things that can be remedied and controlled without an impossible strain on our resources; in any case they are likely to diminish with the development of new techniques. Regrettable though they are, they seem to me to be outweighed by the substantial success which the Act has had in reducing the numbers of illegitimate children, the numbers of shot-gun marriage cases, the number of deaths from illegal abortion and the total amount of illegal abortion. But important as these benefits are, I consider no less important the fact that since the Act it has become possible for large numbers of pregnant women who do not wish to continue their pregnancy to lay their case frankly before doctors and to discuss it without shame and without fear.