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# ISOLATING THE MALE BIAS AGAINST REFORM OF ABORTION LEGISLATION

## PROLOGUE

The time: 1984; the place: California State Assembly; and Miss Onrush, Majority Party Speaker, addresses the assembled legislators in respect to an impending bill, the enactment of which is a foregone conclusion.

And thus the revised version of California Penal Code section 275<sup>1</sup> passed easily, albeit not exactly unanimously, into California law. The lone dissenter from Orange County tried to draw personal attention to his charming person by registering a protest to an eager newswoman, but he quickly regained his gentlemanly composure after a sharp reminder that his presence was not so much one of necessity as it was an expression of the Majority Party's democratic intentions toward those of his sex. As the only male serving in elected capacity he was quick to see the point.

The revised bill reads as follows:\*

“Any man who solicits of any person any antibiotic or anti-biotic substance, and takes the same, or submits to the administra-

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<sup>1</sup> Prior to its partial amendment in 1967, CAL. PEN. CODE § 275 (West 1955) read as follows: “Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than one nor more than five years.”

The statute rested essentially without change since its inception in 1872. In 1967 the statute was amended: “unless the same is necessary to preserve her life” is deleted and “except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.” is added. CAL. PEN. CODE § 275 (West Supp. 1968). The Therapeutic Abortion Act extends the lawful grounds for obtaining an abortion, the major thrust of which is to deem an abortion justifiable if necessary to preserve the mother's health. CAL. HEALTH & SAFETY CODE § 25950-54 (West Supp. 1968).

See generally CAL. PEN. CODE § 274 (West Supp. 1968), which is essentially the same in its terminology but directed at the person performing the abortion. This was likewise revised in 1967 by the Therapeutic Abortion Act; and CAL. PEN. CODE § 276 (West Supp. 1968) directed at a party who solicits a woman to submit to an abortion; this section was revised in the same fashion by the Therapeutic Abortion Act.

\* *Legislative History*: The legislature, after reviewing Dr. Feminina's brilliant research revealing that antibiotics affect spermatozoa, decided it was in the best interests of the public health, morals and welfare to enact the revised statute. Men have not had the right to vote since 1980; that this fact has a bearing upon the enactment of this statute is merely conjectural, even though the relinquishment of this right was not without some skirmish.

tion of an antibiotic during his procreative years regardless of his intent thereby to preserve his health (unless he has been, prior to the administration of the drug, rendered infertile by an event beyond his control) is punishable by imprisonment in the state prison not less than one nor more than five years."

#### THE SUBJECT: REFORM OF ABORTION LEGISLATION

The horrors of overpopulation have at last invaded the consciousness of the average American. He is now willing to cast his embarrassed eye upon a topic, the discussion of which invites a spectrum of comment ranging from "Abortion! A murder in the womb . . ." <sup>2</sup> to "I refuse to permit anyone's interference with the disposition of my own body in its most intimate and basic functions. . . ." <sup>3</sup>

Emotionalism, rather than intellectualism, is more closely related to the act of terminating an unwanted pregnancy. This is not the case when the average person evaluates the other kinds of unnatural termination of human life. Defense of family and self from imminent physical harm, defense of country, and punishment for a capital offense sometimes lead to the deliberate extinction of human life; the unemotional eyes of the criminal law regard these killings as justifiable homicide. <sup>4</sup>

Because of this emotional response to the subject matter of abortion, it is more proper that the former (the response) rather than the latter (the subject matter evoking it) should be investigated. Hopefully this investigation will silhouette those factors militating against a woman's exercise of free will respecting the regulation of her own procreative processes.

The benefits to be derived from abortion legislation reform are two-fold, and both are equal in their importance. The generalized benefit to society in eliminating a legal barrier to a voluntary means of population control <sup>5</sup> is no more important than that specific benefit conferred upon the individual woman whose privacy in her sexual life is sorely in need of protection.

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<sup>2</sup> Address by Father Donald Duggan to the Conference on Population Explosion, The Institute for the Study of Health and Society, November 20, 1969, Airlie House, Warrenton, Virginia. Author of this Comment attended as invitee.

<sup>3</sup> As a woman and a mother, the author does not hesitate to so state; the significance of this statement will not be diminished by permitting it to issue from the lips of an itinerant fruit picker, nor will its meaning be enhanced by attributing it to Simone de Beauvoire.

<sup>4</sup> R. PERKINS, *CRIMINAL LAW* 33 (2d ed. 1969).

<sup>5</sup> Muskogee County Health Department Family Planning Clinic, *The People Problem*, Georgia (1968).

## THE LAW: ITS ORIGIN IN THE UNITED STATES

Restrictions placed upon a woman's power to govern her unique procreative processes are expressed predominantly through legislation, and additional prominence is conferred upon such legislation by its incorporation into the penal codes of every state. A survey of all the codes is contained within the graduate thesis of Harvey Ziff.<sup>6</sup> His annotative analysis of the codes is complete,<sup>7</sup> and thus no effort is herein made to duplicate his efforts.

A prohibition on abortion of the not yet "quickened" fetus became a part of the criminal law of England as recently as 1803.<sup>8</sup> Prior to that time the common law was silent on this issue, as were the laws of the states. When the law punishing an abortion first arrived in the United States, an abortion prior to quickening was not within its embrace, and not until 1860 was an abortion made a crime regardless of whether or not the fetus had quickened.<sup>9</sup> It must be noted that an abortion was (and still is) legally justifiable in those circumstances where the life of the mother is thereby preserved, and, as Ziff points out, most abortion statutes read similarly today.

## THE LAW AS IT RELATES TO THE HISTORY OF WOMEN'S STATUS

Even though the thrust of this investigation is directed at discovering the psychological underpinnings of the law, it is appropriate to include a recounting of woman's historical role in the development of the social hierarchy. History points up the absurdity of present-day application of abortion laws which reflect a social order of the past.

It has been almost a universal characteristic of western civilizations that religious and secular regulation of the physiological consequences of a woman's sexual life arose without her participation in either their formulation or judicial application. Why is this so? Why has she, the subject of such intrusive regulation, had so little to say or do in shaping her own life and that of her daughters? A biological viewpoint provides a satisfactory platform from which to launch the answers to these questions.

In comparison with contemporary standards, a woman of the

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<sup>6</sup> Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L.C. & P.S. 1, 3 (1969).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> Pilpel & Norwick, *When Should Abortion Be Legal?* (Public Affairs Pamphlet no. 429, 1969). See R. PERKINS, *CRIMINAL LAW*, 140-49 (2d ed. 1969).

<sup>9</sup> Pilpel & Norwick, *supra* note 8, at 3.

not too distant past was an entity almost totally governed by the demands of her own biology, and compared to her brothers she was a creature of physical infirmity; her lifespan was comparatively short, of an approximate duration of thirty-five years, and often-times terminated in childbirth if not the plague.<sup>10</sup> For most of her life a woman was pregnant. Without housekeeping devices she was fully occupied with the task of reproduction and the acts ancillary thereto, such as child care, nursing and cooking. In such a state, unable to fend for herself beyond the confines of her domestic environment, woman was the natural recipient of protection and sympathy, and because she was of such valuable use, she was the natural target of control.

Measuring her life in these terms, it was easy to arrive at a firm conviction that a woman's biology was her destiny. Her role was so firmly crystallized within the Judeo-Christian ethic that she accepted herself as having been designed to fit into the order of existence as a sessile, secondary being, a servant of man as well as God. It is not surprising that the pedestal became the ultimate and most appropriate destination of such a thoroughly immobilized entity.

When the advances in medicine spared woman from the incursions of puerperal fever,<sup>11</sup> extended her lifespan and freed her from her biological chains (and in fact enabled her to outlive her mate by a few years), she then realized that a greater proportion of her life was newly available for pursuits unrelated to the perpetuation of the species.

#### A NEED FOR REFORM

Times change, and they change faster than the rules and laws flowing from them—probably because the former are a product of the interaction of both chance and choice, while the latter are the handiwork of man's intellectual processes and hence are guarded by his conceit from reflecting a change of circumstances. Thus we have the creation of The Establishment which in turn stimulates creation of a counterforce directed toward its own reformation.

We are in the latter stage today; there is an almost overly acute dissection, intellectually and emotionally, of the intricate

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<sup>10</sup> J. NOHL, *THE BLACK DEATH, A CHRONICLE OF THE PLAGUE* (1960).

<sup>11</sup> See generally, J. LUCAS-DUBRETON, *THE BORGIIAS* (1954); H. L. GREDE, *THE GIFT OF LIFE* (1956) (a biography of I. Semmelweiss, the discoverer of the vector in puerperal fever); F. G. SLAUGHTER, *IMMORTAL MAGYAR* (1950) (a biography of Semmelweiss); I. GALDSTON, *PREVENTION OF MATERNAL DEATHS* (1937).

interdependence of law and morality and the environment within which both exist.<sup>12</sup> People are questioning the quality and extent of their relationships with each other as well as with The Establishment, and they do so with the expectation that there must be changes made today rather than tomorrow.

Women, no longer estranged from the mainstream of life, demand a change in the rules and customs governing their relationship to the American scene so that they can make a productive and positive investment of that greater portion of their lives which is no longer devoted to family oriented activity.<sup>13</sup>

This demand for reform extends to the subject of abortion legislation. Since any reform on this subject is in the direction of enlarging a woman's freedom of choice in determining whether or not she will produce a child, it is a bit startling that there exists a vocal minority of women who would resist all reform in this arena—this despite the fact that they well know or ought to know that such reform is permissive and does not in any degree compel affirmative action that might be contrary to the direction of their own consciences. Future research will no doubt pinpoint the underlying nature of this resistance; however, this interesting dilemma is not of present concern. Herein the attention is focussed upon:

### THE MEN

Do men resist reform of abortion legislation? Assuming that they do, why is this so? What reason might they have for resisting the complete elimination of a criminal statute which has the effect of penalizing a small portion of the citizenry for the unwanted

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<sup>12</sup> In respect to the interdependence of law and morality it is interesting to note the opinions of Eugene Quay on this relationship. In voicing his opposition to adoption of section 230 of the Model Penal Code, dealing with reform of abortion legislation, Quay states that adoption of the law on abortion as restated by the American Law Institute would pave the way toward widespread immoral conduct, in that such a code represents a departure from objective truth. He then goes on to say "Legislative adoption of this section would not leave its opponents undisturbed in their own way of life. The mere fact of affirmative approval of therapeutic abortion by a legislature would change the views and practices of millions who earnestly try to shape their lives to a moral code, but who look to their lawmakers to define it for them." Quay, *Justifiable Abortion—Medical and Legal Foundations* (pts. 1, 2), 49 *Geo. L.J.* 173, 395 at 441 (1960-61).

Evidently Quay believes that those responsible for the creation of a law must employ circular reasoning because of the linear effects of the product of such thought. In light of the non-compelling nature of the proposed legislation, his thoughts upon the nature of its effects seem totally inappropriate.

<sup>13</sup> See 8 *RAMPARTS* 57 (Dec., 1969) (Marlene Dixon, the author, is a professor of sociology at McGill University. Her article is an excellent summation of the forces now in motion leading to the popular establishment of the Women's Liberation Movement); Komisar, *The New Feminism*, *SATURDAY REVIEW* (Feb. 21, 1970).

consequences of a sexual act? Such a state of affairs is absurd when viewed in the light shed by recent court decisions determining that the "marital act" is a basic right and thus protected from the prying eyes of the state.<sup>14</sup>

### THE CHURCH

Men *do* harbor a negative response to the suggestion that perhaps only a woman should have the right to determine whether or not she shall remain pregnant.<sup>15</sup>

Oftentimes the expression of this negative attitude is ascribed to a blind adherence to religious dogma (with the consequence that an attack is launched against the religious establishment itself rather than upon the psychological and sociological basis of the resistance to change). The male's failure to permit his sexual equal the same opportunity to exercise freedom of choice in matters sexual as he himself enjoys does not necessarily *originate* in the church. It is easy to think otherwise since the church is one of several institutions which sanctify the greater privileges of the male.

That which is sought to be shown here is the existence of a basic psychological principle underlying the male viewpoint and expressed through several different mediums of social organization. The church, as one of these mediums, is not the sole creator of prejudice so much as it is one of the most intransigent mediums through which it is expressed.

### THE SURVEY

Many authorities believe the written survey to be one of the best means by which to identify and describe a psychological factor at work in a large group of interviewees. The factor sought here is one which would explain male resistance to reform in the area of abortion legislation, and so, of course, the survey was administered only to men.

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<sup>14</sup> In reaffirming the right to privacy in the marital relationship, the Supreme Court of the United States examines the Bill of Rights in reiteration of the specific guarantees set forth therein and declares that each one of them creates a penumbra: an emanation proceeds from these guarantees and serves to make each one of them a real factor in defining our basic rights. Squarely within this zone of protection is the marital relationship, which is ". . . a right of privacy older than the Bill of Rights . . ." *Griswold v. Connecticut*, 381 U.S. 479, 484, 486 (1965). *Accord*, *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942), wherein the Court declared that marriage and procreation involve a basic liberty. *See also* *People v. Belous*, 71 A.C. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

<sup>15</sup> *See Table 1* showing only 15 men out of 72 selecting statute number 1 advocating elimination of all statutory restrictions on obtaining an abortion.

The survey consists of two pages,<sup>16</sup> one of which is a questionnaire requesting the usual information about the interviewee's age, education and background; however the most important information sought reveals the man's preference in respect to his offspring: Their age, sex and number. The second page lists six statutes on the subject of abortion legislation; they represent the gradient from liberality: Number 1, to conservatism: Number 6. The interviewee is directed to choose the one statute he prefers.

#### METHOD OF SAMPLING

The interviewer was stationed in a heavily travelled shopping mall<sup>17</sup> so that the men stepping within a designated target area were within her view. All men who stepped within this area did so by chance and thus became the subjects who were asked to spend a few minutes filling out a questionnaire. Most men so requested evidenced pleasure at being stopped and appeared to enjoy filling out the survey. In this fashion eighty-five interviews<sup>18</sup> were obtained, and the data gathered as a result of their cooperation is tabulated below.

A test run of the survey on several male law students convincingly indicated that they could not see, from the face of the questionnaire, that the major information sought was the correlation of liberality in selection of abortion legislation with fulfillment of male heirship demands of each male interviewee.<sup>19</sup>

#### THESIS UNDERLYING THE SURVEY

The theory underlying the construction of the questionnaire is more readily understandable in light of the following: A survey of abortion legislation enacted (and having as its purpose the regulation of the means by which a woman can control her fecundity) reveals the same to be the product of legislatures composed almost

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<sup>16</sup> See APPENDIX *infra* at 316.

<sup>17</sup> The shopping center selected is centrally located, and is patronized by a broad cross-section of economic classes; the selection of this particular shopping center was thought to be the best for purposes of obtaining a random sample of the male population, especially so, since it was the Christmas shopping season when men are most apt to be patronizing a center of this kind.

<sup>18</sup> Although this sample is not of the magnitude associated with statistical conclusiveness, the relative uniformity of the results indicates a disposition toward conclusiveness. Because of this, the study serves as a pilot program for a more exhaustive study to be undertaken at a later date and made possible by a grant.

<sup>19</sup> Questions 7-1 through 7-4 were added to the survey so that a different complexion would be imparted to the questionnaire and to obscure the purpose of correlating offspring with preferred legislation.

entirely of men.<sup>20</sup> Whatever form it took, this type of legislation had its origination and was enacted many years prior to the establishment of women's suffrage.<sup>21</sup>

Because of the nature and circumstances surrounding the establishment of abortion legislation (*e.g.*, the exclusion of women from public life and hence from governmental and judicial bodies and the non-existence of channels through which women could express a political opinion) the enacted legislation uniformly precludes the incorporation of a woman's judgment on the subject of early termination of pregnancy. These same circumstances also give substance to the proposition that abortion statutes are more expressive of the male attitude towards procreation than has heretofore been recognized. Thus the underlying premise structuring the questionnaire is one which points out that legislation restricting the freedom to terminate an unwanted pregnancy reflects a bias in favor of the male's conceptualization of his own procreative impulses. The historical circumstances within which the law was formulated permitted an unobstructed and unmitigated expression of this bias in the law as well as in other institutions. It is this author's thesis that the bias is composed of the following constellation of psychological factors:

A man desires the perpetuation of his own self, and not merely in abstract terms; he desires a male heir above a female because he does not regard the female as being a totally satisfactory expression of his own self. This "replication of self" is one of the most basic goals of the male parent, and he does not wish to permit his mate the power to infringe upon its fulfillment; hence he will do what he can to ensure her cooperation.

One of the ways he secures this cooperation, now that application of brute force has passed the way of trial by combat, is by legally restricting her right to terminate a pregnancy at will. Legislation provides the means to serve this end.<sup>22</sup>

The survey was composed so as to reveal the existence of this premise as a psychological operative. If it existed and was operating, the response on the part of the male participant would reveal a direct relationship between the presence and number of male offspring born to each interviewee and the degree of liberality

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<sup>20</sup> A. HIBBARD, *WOMEN IN GOVERNMENT* 141 (1961).

<sup>21</sup> U.S. CONST. amend. XIX (giving women the right to vote, enacted in 1920). This amendment was enacted 50 years after the first version of CAL. PEN. CODE § 274 (West 1955), as amended CAL. PEN. CODE § 274 (West Supp. 1968) (making abortion a felony).

<sup>22</sup> *Supra*, note 1.

in his choice of abortion legislation. In other words, the more male children a man had, the more "self" he would thus realize, with the result that he should be more willing to grant his spouse (and other females) a greater freedom from an unwanted pregnancy than would a male whose demand for male heirs is unfulfilled. Consequently, this willingness would be expressed by his preference for more enlightened rather than punitive abortion legislation.

#### INTERPRETATION OF DATA

The principle sought to be illustrated by the data is one of a direct relationship between the degree of liberality expressed toward abortion legislation reform and the fulfillment of a desire for male heirs. The results, as gathered in *Table 1*,<sup>23</sup> do show a strong trend toward support of the thesis that a man will relax his grip upon his mate's freedom from unwanted pregnancy as his needs for male heirship are met.<sup>24</sup> There are several reasons why the results were not more exaggerated:

1. The parameter of selection as between the statutes was reduced as a function of the participants' own behavior; no one selected either one of the two most stringent statutes—number 5 and number 6. Thus the degree of liberality, or lack of it, had to be distributed between four rather than six statutes. It is important to note that the most conservative selection made was thus number 4, which is a close paraphrase of section 274 of California Penal Code, and that 83.5 percent of the participants prefer legislation more liberal than is presently controlling.
2. Of the eighty-five men interviewed, thirteen had no children, and hence their preference for ideal family composition and the relationship of such to abortion statutes may

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<sup>23</sup> See text at page 311, *infra*.

<sup>24</sup> D. Chappell and P.R. Wilson conducted a survey of public attitudes toward the reform of the law relating to abortion. After categorizing the response in terms of age and sex, they found that in the younger age groups more women than men favored abortion, and that in the older age groups, the situation was reversed. The authors suggested that the greater liberality in attitude of the younger women reflected their enjoyment of a greater degree of emancipation than their elders. They offered no explanation for their finding that 55 percent of the younger men as compared to 65 percent of the older men favored abortion. Chappell & Wilson, *Public Attitudes to the Reform of The Law Relating to Abortion and Homosexuality*, 42 *AUSRL. L.J.* 120, 125 (1968).

Perhaps the psychological factors herein described as operating in relation to a man's preference for abortion legislation were also evidenced and reflected in the statistics gathered by Chappell and Wilson. As the men grew older their procreative drives toward providing themselves with a male heir would be more apt to be fulfilled than those of the younger men.

not properly be included in the data compilation along with the information given by male parents. Perhaps a restriction to male parents as survey subjects would throw the principle into greater relief as larger sampling groups are gathered.

3. Another factor seems to be operating, and it might be obscuring the clarity of expression of the aforementioned thesis. The compilation of data suggests that as the family size exceeds a certain limit (generally four children) the relationship of male heirship fulfillment and liberalized legislation seems to disappear as an identifiable factor; in its place appears a direct relationship between family size and liberalized legislation. Perhaps abortion is associated with family planning to a greater degree by men with large families than by men with only one or two children.

#### ECCE SIGNUM!

The survey results are interesting in themselves apart from the possibilities of correlation with legislation. For instance, the optimum family size departs from that standard sought to be established by such organizations as Planned Parenthood and Zero Population Growth. The former would be disturbed while the latter would be horrified to see that out of seventy-two male parents, forty-seven of them (65 per cent) have three or more children. If family size is to remain a matter of individual conscience, as almost all social institutions tenuously agree that it now is, then organizations like Planned Parenthood have their work cut out for them to reduce the demands of the conscience to a size that can be accommodated by the planet's finite resources.<sup>25</sup>

As mentioned previously, the results support the thesis that a male has a preference for male offspring and that his regard as to what the law ought to be in respect to the regulation of abortion varies directly and according to the degree to which he realizes his urge for male heirs. Reference to *Table 1* shows that statutory preference is uniformly more conservative for men who have offspring entirely or predominantly female; this is seen, for instance, by reading the table in the case of preference for statute number 1. Men with families composed of "all girls" failed to select this

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<sup>25</sup> See *Table 2* illustrating the unmarried males' preference for a family of at least three. Planned Parenthood hopes to educate the public to accept two children as the upper limit on family size.

## SURVEY RESULTS: TABULATION OF DATA

TABLE 1

NUMBER IN EACH COLUMN REPRESENTS FREQUENCY OF SELECTION OF A STATUTE; EACH STATUTE HAS THE SAME DESIGNATING NUMERAL AS IN THE SURVEY

Gender characteristic of each male <i>parent's</i> offspring.	Statute selected						*number of informants
	#1	#2	#3	#4	#5	#6	
All girls	0	3	4	4	0	0	11
More girls than boys	2	2	9	6	0	0	19
Equal number of each sex	5	7	2	1	0	0	15
All boys	4	10	0	0	0	0	14
More boys than girls	4	7	2	0	0	0	13
Total	15	29	17	11	0	0	72
Percent	21%	40%	24%	15%	0	0	100%

\* This category does not include the informants who have no offspring.

TABLE 2

NUMBER IN EACH COLUMN REPRESENTS FREQUENCY OF SELECTION OF A STATUTE; EACH STATUTE HAS THE SAME DESIGNATING NUMERAL AS IN THE SURVEY

Family composition: Gender characteristic preferred by each male <i>non-parent.</i>	Statute selected						number of informants
	#1	#2	#3	#4	#5	#6	
All girls	0	0	0	0	0	0	0
More girls than boys	0	0	0	0	0	0	0
Equal number of each sex	**1	0	0	0	0	0	1
All boys	0	1	0	0	0	0	1
More boys than girls	0	4	4	3	0	0	11
Total	1	5	4	3	0	0	13
Percent	8%	38%	31%	23%	0%	0%	100%

\*\* One interviewee, married, but without children, reported that he really didn't care what he had as long as there were no more than two, and all he hoped was that they were healthy. His inclusion into the category of "equal number of each sex" is the best compromise.

statute, while men with families composed of "all boys" selected statute number 1 in four out of fourteen cases.

The same information in respect to the other three statutes can be derived by reading the tables in a similar fashion.

*Table 2* tabulates the results from males without children. The childless males exhibit a slightly more conservative preference than did the male parents. Perhaps this is a sign of lack of experience with child rearing, as well as an indication that they are less apt to regard abortion as a method of family planning than would a man with seven children to support. The preference for male heirs is clearly demonstrated, since twelve out of thirteen men express a desire for all male or mostly male offspring.

## STATUTORY REFORM

Not only is there a need, there is a demand for statutory reform which has not been adequately and equitably met in California.

Ziff points out the danger of partial reform, which is what we now have with the incorporation of the Therapeutic Abortion Act into the Penal Code. He finds inculcated within the minds of medical practitioners an "abortion mentality which develops concomitant with partial legalization [of abortions] and which is likely to strengthen the resolve of individual physicians to follow their own best judgment."<sup>26</sup> He adds that this partially corrected law does not achieve the end of decreasing illegal abortions and that, instead, illegal abortions are increased both in and out of the hospital. There is a continued lack of enforcement of the new law, or worse yet, a sporadic enforcement that keeps doctors and their patients trembling on the brink of what is for them a terrible legal abyss.

The recent California decision, reciting the existence of a woman's constitutional rights to life and to choose whether to bear children, is no substitute for legislative reform. In this decision, *People v. Belous*,<sup>27</sup> the court declared that:

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family and sex.

That such a right [of choice] is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right.<sup>28</sup>

Beautiful as these words might be to a doctor prosecuted for acting in accord with the way he sees his duty to his patient, these words lack the power to stay the hand of a district attorney determined to prosecute. In fact, he might be forced to prosecute;<sup>29</sup> and if he *chooses* to prosecute, the district attorney need obey only the dictates of the legislature as long as the criminal law is on the

<sup>26</sup> Ziff, *supra* note 6 at 14.

<sup>27</sup> 71 A.C. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). Dr. Belous recommended a skilled abortionist to a patient who threatened to commit suicide or go to Mexico and gamble with her life. For this act he was convicted of abortion under the pre-1967 version of CAL. PEN. CODE § 274 (West 1955), *as amended*, CAL. PEN. CODE § 274 (West Supp. 1968) and conspiracy to commit the felony under CAL. PEN. CODE § 182 (West 1955), *as amended*, CAL. PEN. CODE (West Supp. 1968). The defendant regarded his act as necessary in light of his understanding of the meaning of the phrase "[N]ecessary to preserve the life of the mother . . ." The district attorney disagreed with his understanding and prosecuted.

<sup>28</sup> 71 A.C. 996 at 1005-06, 458 P.2d 194 at 200, 80 Cal. Rptr. 354 at 359-60 (citing *Carrington v. Rash*, 380 U.S. 89 (1965)).

<sup>29</sup> *State v. Langley*, 214 Ore. 445, 323 P.2d 301 (1958).

books. It is only partial relief to the accused parties that they shall eventually receive relief in the higher courts of the state.

The concept of a society ordered by the law is irremediably damaged when the law itself becomes a source of harassment and confusion as a result of its inconsistent application. For these reasons, the criminal statutes restricting a woman's freedom to determine whether she shall bear a child must be either revised or taken completely out of the area of criminal law.

### THREE STEPS FORWARD AND TWO BACK: WHY?

The conclusions derived from this author's survey might explain the motives for the adoption by the California legislature of the halfway measures incorporated by the American Law Institute into section 230.3 of the Model Penal Code.<sup>30</sup> California modeled its therapeutic abortion revision after the Model Code and attached it to section 274 of the Penal Code.<sup>31</sup>

The existence of a bias favoring males and the procreation of male heirs can probably be demonstrated in any all-male group. Why, then, would not the same bias be controlling in our almost all-male legislature, now challenged to serve up a better law? It probably is operating either consciously or unconsciously in the minds of the congressional representatives who, even though they are sworn to serve all of their constituents, nevertheless favor their own sex.

This bias, composed of the psychological factors already described, serves as a brake upon the collective action of this particular group of men, just as it would on any other group of men. The legislators disguise their reticence with declarations that the public is not ready to accept such advanced legislation. That this is a too conservative estimation of their constituents' temper is evidenced by the data which clearly shows that 83.5 per cent of the men polled would enact, if they could, legislation "liberalized" to a greater degree than that which is presently in effect.

In failing to recognize and thus compensate for this gender-related bias the legislators are breaching a duty of impartiality owed to their female constituents, in addition to discriminating against them by creating legislation infringing upon a woman's most fundamental rights. This latter point raises a constitutional issue to be dealt with next.

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<sup>30</sup> MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

<sup>31</sup> See *supra*, note 1.

## CONSTITUTIONAL ISSUES

One of the impediments to the revision or elimination of abortion legislation is the difficulty attendant upon resolving whether or not the fetus has any rights<sup>32</sup> and if so, whether they are within the embrace of the Bill of Rights of both the state and the nation.<sup>33</sup>

Why there is so much attention devoted to the rights of the fetus rather than to those of its living and unwilling mother is a fascinating discussion but beyond the scope of this paper; nevertheless, the product of this exclusive focus has crystallized into the usual scientific and philosophical analyses of the origin of life, its meaning, its inviolability and whether life is concurrent with conception or only when the embryo is recognizably human. This author believes that discussion of fetal rights in relation to present abortion legislation is futile because present legislation is in itself unconstitutional on a different basis.

To illustrate the unconstitutionality of the criminal law as applied to the unwilling pregnant woman, a comparison is made of her position to that of the Negro defendant in *Strauder v. West Virginia*.<sup>34</sup> The woman who prefers an escape from the rigors of childbirth for reasons other than those pertaining to her life and health and who thereby subjects herself to the penalties of the criminal law, stands in a legal position similar to that of the Negro, Strauder, indicted for murder and tried before an all-white jury.

The Court held that the defendant's rights guaranteed to him by the equal protection clause of the fourteenth amendment had been denied because he was precluded, solely because of his race, from receiving a fair trial before a jury of his peers, since the law of his state excluded all Negroes from the right of serving on a jury.<sup>35</sup>

The language used in striking down the West Virginia statute can be paraphrased without distorting the essence of its meaning, thus providing a tool with which to strike down section 274 of the California Penal Code. In doing so, it must be held in mind that the California anti-abortion statute was enacted in 1870, prior to the establishment of woman's legal capacity to act and participate politically. The court said:

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<sup>32</sup> Ziff, *supra*, note 6 at 16.

<sup>33</sup> Ziff, *supra*, note 6 at 14; See generally *People v. Belous*, 71 A.C. 996, 1020, 458 P.2d 194, 209, 80 Cal. Rptr. 354, 369 (1969) (dissenting opinion).

<sup>34</sup> 100 U.S. 303 (1880).

<sup>35</sup> *Id.* at 304.

The very fact that colored people [women] are singled out and expressly denied by a statute all right to participate in the administration [enactment] of the law . . . because of their color [sex] though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race [sexual] prejudice which is an impediment to securing to individuals of the race [sex] that equal justice which the law aims to secure to all others.<sup>36</sup>

The condition of the Negro who has been denied the equal protection of the law as a matter of his race is directly analogous to the condition of the woman who has been barred, by virtue of her sex, from directly participating in the formulation and application of a law which has its most severe effects only upon the members of her sex. The double irony: To be punished for being a woman under a law created in the absence of women's assent.

The results of this survey show a bias in favor of male interests at the cost of those that are uniquely female. This bias is gender-related and thus is presumed to have existed at that time when only men had political rights and legislative capacities; therefore the statute enacted by male legislators at a time prior to the establishment of women's political rights is unconstitutional not only because the law denies a woman her human rights,<sup>37</sup> but also because the statute as it now stands denies to the woman the equal protection of the law.

Solely as a matter of her sex, a woman has been denied, and continues to be denied, the equal protection of the law as a function (1) of being denied the right to participate in the statute's formulation,<sup>38</sup> (2) of being effectively denied the opportunity of administering the law because of the preponderance of males in high (if not almost *all*) administrative positions,<sup>39</sup> and (3) of being educated to accept the role of victim in the furtherance of male interests<sup>40</sup> which are often in opposition to those of women.

### CONCLUSION

Assuming that the desire for a male heir is, in the male, an impulse towards replication or enlargement of "self," then the data

<sup>36</sup> *Id.* at 308.

<sup>37</sup> *Cf.* *People v. Belous*, 71 A.C. 996 at 1005, 458 P.2d 194 at 200, 80 Cal. Rptr. 354 at 359 (1969).

<sup>38</sup> See note 21, *supra*.

<sup>39</sup> See *Woman's Place*, 225 THE ATLANTIC 81-126 (Mar., 1970). ATLANTIC devotes a special issue to a report of women's views of their status. Diane Schulder, a New York attorney, reviews the relationship of women to the law and points to the disadvantageous position of women in relation to it. In this same issue, Catherine Drinker Bowen (an eminent biographer of men in the law) notes that out of one hundred members of the United States Senate, only one is a woman.

<sup>40</sup> The most basic of which is sought to be shown by this study.



5-6 Are you satisfied with the present composition of your family in terms of: (Answer yes or no.)

	YES	NO
The number of children you have.....	_____	_____
The number of boys.....	_____	_____
The number of girls.....	_____	_____
The order of appearance of each child in respect to its sex.....	_____	_____

6. If you have no children OR if you answered NO to any part of 5-6, then answer what would be for you, the ideal *number* of children: \_\_\_\_\_  
 the ideal number of children of *each sex*: \_\_\_\_\_BOY(S) \_\_\_\_\_GIRL(S)  
 the ideal *order* of appearance of each child in respect to sex:  
 (e.g., boy, boy, girl, boy.) \_\_\_\_\_

7. PLEASE ANSWER THE FOLLOWING:

- 7-1. As a child, I sometimes wished I was a member of the opposite sex:  
 YES: \_\_\_\_\_, NO: \_\_\_\_\_.
- 7-2. If women are given too much authority they lose their femininity:  
 (check one) AGREE \_\_\_\_\_ UNDECIDED \_\_\_\_\_ DISAGREE \_\_\_\_\_
- 7-3. There are few famous or important women artists or scientists because a woman's creativity is intended for motherhood:  
 AGREE \_\_\_\_\_ UNDECIDED \_\_\_\_\_ DISAGREE \_\_\_\_\_
- 7-4. Generally speaking, a college education is more of a privilege for a woman than the same education is for a man:  
 AGREE \_\_\_\_\_ UNDECIDED \_\_\_\_\_ DISAGREE \_\_\_\_\_

QUESTIONNAIRE: ABORTION STATUTES

The purpose of this questionnaire is to give people an opportunity to express a preference in respect to the creation of legislation having as its subject the early termination of an unwanted pregnancy.

Which one of the following proposed statutes would you like to see enacted? Circle the proposed legislation which is the closest expression of your views.

- #1. All statutory restrictions placed upon seeking and obtaining an abortion shall be declared null and void; the elimination of statutory restrictions is intended to have the consequence of conferring upon the pregnant woman the sole responsibility of determining whether or not she shall terminate her pregnancy.
- #2. All statutory restrictions placed upon a *single, unmarried* woman who seeks or obtains an abortion shall be declared null and void; a *married* woman who seeks an abortion as a matter of convenience and not as a matter of preserving her mental or physical health, shall be entitled to a lawful abortion if and only if her lawful *husband consents* thereto.
- #3. Every woman who seeks to obtain and submits to the use of any means whatever, with intent thereby to procure her miscarriage; unless the miscarriage is necessary to preserve her *mental or physical health*, or unless there is a strong likelihood that the child might be *born deformed*, is punishable by no more than five years imprisonment in the state prison.
- #4. Every woman who seeks to obtain and submits to the use of any means whatever, with intent thereby to procure her miscarriage, unless the same

is necessary to preserve her *physical or mental health*, is punishable by imprisonment in the state prison for no more than five years.

- #5. Every woman who seeks to obtain and submits to the use of any means whatever, with intent thereby to procure her miscarriage, unless the same is necessary to preserve *her life*, is punishable by imprisonment etc.
- #6. Every woman who seeks to obtain and submits to the use of any means whatever, with intent thereby to procure her miscarriage, and who in fact thus terminates an actual pregnancy, has committed a crime punishable by the penalty of death.

WOULD YOUR PUBLICLY ESPOUSED VIEWS DIFFER FROM  
THOSE YOU HOLD IN PRIVATE? YES\_\_\_\_\_ NO\_\_\_\_\_

IF YOU ANSWERED YES, WOULD YOUR PRIVATE VIEWS  
TEND TOWARD #1 OR TO #6 AS COMPARED WITH YOUR  
PUBLIC VIEWS?