

P U B L I C H E A R I N G

before

COMMISSION TO STUDY THE NEW JERSEY STATUTES
RELATING TO ABORTION, CREATED UNDER ACR 24 [1968]

Held:
October 28, 1968
Assembly Chamber
State House
Trenton, New Jersey

Members of Commission present:

Assemblyman William M. Crane [Chairman]

Senator James H. Wallwork

Assemblyman Christopher J. Jackman

Rev. Thomas F. Dentici

Rev. Alexander Shaw

Rabbi Barry Dov Schwartz

Also:

Samuel A. Alito [Secretary]

Robert M. Poley, Esq. [Counsel]

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Brendan T. Byrne Former Prosecutor of Essex County	1
Dr. Watson E. Neiman Assistant Commissioner, Personal Health Services New Jersey State Department of Health	7
Dr. John Scully Obstetrician-Gynecologist	11
Dr. Benjamin K. Silverman Pediatrician	18
Dr. Dominick Introcasso Obstetrician-Gynecologist	24
Dr. Lewis Cooper Director, Rubella Birth Defect Evaluation Project New York University Medical Center	32
Dr. John D. Preece The Medical Society of New Jersey	44
Dr. Grace Tarrant Board Radiologist St. Peter's Hospital, New Brunswick	46
Dr. Martin Goldfield Director, Division of Laboratories State Department of Health	54
Dr. Richard J. Cross Professor of Medicine, Rutgers Medical School	60
Sheldon Hackney President, Mercer County Chapter American Civil Liberties Union of New Jersey	66
Mrs. Joan Goodman	68
Mrs. Betty Stone Secretary, New Jersey Friends Council	71
Donald H. Goff General Secretary, The Correctional Association of New York	1 A
Detective Sergeant Paul A. Geczy Criminal Investigation Section New Jersey State Police	8 A
Rev. Edwin H. Palmer New York Bible Society	15 A

	Index Page
Dr. F. Leland Rose Vice President, New Jersey Obstetrical and Gynecological Society	23 A
Dr. David Atkin Pediatrician, Princeton	26 A
Cyril C. Means, Jr. Member, Governor Rockefeller's Commission to Review New York State's Abortion Laws	31 A
Rev. David Mellon Executive Director, Council of Churches of Greater Trenton	44 A
Ruth P. Cusack National Organization for Women New York Center	49 A
Thomas Gorman representing The Voice Out of Rana Society	54 A
Mrs. Eugene L. Krasnoff Chairman, Abortion Law Reform Committee of New Jersey	69 A
Joseph Hoffman First Assistant Attorney General (reading letter from Attorney General Arthur J. Sills)	71 A
Stephen J. Foley Attorney-at-Law	77 A
Mrs. Walter McGowan	98 A

ASSEMBLYMAN WILLIAM M. CRANE [Chairman]: The meeting will come to order, please.

This is a public hearing regarding Assembly Concurrent Resolution Number 24, which is a resolution creating a Commission to study the New Jersey Statutes relating to abortion. The Commission is charged with hearing testimony and with submitting legislation, if it desires, to the Legislature for revision of the abortion laws and also with finding ways and means of reducing the already high incidence of illegal abortions in the State.

We have a list here of people who have submitted their names wishing to testify and they will be called as nearly as possible in order. We are asking the witnesses to limit their testimony to five minutes because we do have a substantial list of at least 50 people who wish to testify.

The procedure will be that the Chair will be in charge - I am the Chairman, Assemblyman Crane - and the members of the Commission at the end of the verbal testimony will ask questions of the witness. The meeting is not open to the floor. This is a legislative hearing.

Anyone who wishes to testify who has not submitted their name will please see Mr. Sam Alito, the Secretary to the Commission. This is Mr. Sam Alito over here (indicating).

The first witness is Mr. Brendan Byrne.

B R E N D A N T. B Y R N E: Gentlemen, thank you for the opportunity to come here this morning and I would like to indicate at the beginning that I am here, not speaking for the

administration, but merely offering one or two observations which I accumulated in my experience of some nine years as Prosecutor of Essex County.

Now with the Commission's permission, I would like to submit a written statement to the Commission which I will then summarize very briefly and make one or two additional observations.

[Mr. Byrne submitted a written statement which can be found on page 101 A of this transcript.]

I point out in my prepared statement that it is my view that there is room in interpreting the present statute in New Jersey, even in light of the Gleitman Case and in light of a position that the Prosecutors have taken in the State, to follow the views of Justice Jacobs who indicated that the words "maliciously" and "without lawful justification" in our abortion statute leave room for medical judgments as to the appropriateness of an abortion in a given case.

I point out that the attitude taken by the Prosecutors in June of 1967 - at least 20 of the 21 Prosecutors - was based in part, I believe, on a reading of the statute and the Gleitman Case and in part on the experience that I had in Essex County. Following a conference some years before the Gleitman Case, we in Essex required of the hospital administrators a report of every therapeutic abortion performed in the county. Therapeutic abortions have been performed in Essex County in reputable hospitals for a number of years. We do have categorized the therapeutic abortions which were performed. We do have the areas in which medical judgment has authorized therapeutic

abortions. They include not only the life of the mother, but the physical and mental health of the mother, the health of the baby and in certain cases to abort in case of a rape.

I do think and I do point out to the Committee that under that approach to the New Jersey law, the approach that the Prosecutors have taken, New Jersey winds up with indeed the most liberal abortion law in the United States and probably best working abortion law in the United States because it leaves to an area of medical judgment the indications for an abortion. I also suggest that before we attempt to codify law in this State, we first recognize that we do have a practical operating procedure now and that codification at this point would only serve one purpose and that is to modify and restrict medical judgments and I do think we exist in a State where these medical judgments are made most conscientiously and most carefully by committees and that they result in a very reasonable medical approach to abortions.

I think you ought to also study the experience in other states. I was a Vice President of the National District Attorneys' Association. I have had occasion to speak, for instance, to the District Attorney in Denver where he must participate in the judgments as to therapeutic abortions. I think that is an unfortunate codification of law and I think he would indicate that to you if the Commission were interested in sending someone out to talk to him or in bringing him here.

So we did not become under what I consider a liberal policy of allowing abortions in New Jersey or at least in Essex County a mecca for abortions. We did not become a haven for

abortions. And we wound up, I think, with an abortion policy which recognized medical standards by doctors who are in the best position to judge those medical standards.

With those brief observations, I will rely on my submitted statement.

ASSEMBLYMAN CRANE: Thank you, Mr. Byrne. Mr. Byrne, I don't believe you identified yourself. You are a former Prosecutor of Essex County?

MR. BYRNE: Yes, I am.

ASSEMBLYMAN CRANE: And presently President of the Public Utilities Commission?

MR. BYRNE: Yes. I was Prosecutor from 1959 to 1968.

ASSEMBLYMAN CRANE: And, of course, a licensed attorney in the State of New Jersey.

Do the members of the Commission have any questions of Mr. Byrne? [No response.]

Mr. Byrne, you seemed to indicate - of course, I haven't read your prepared statement - that the Legislature, if it were to come up with some revisions of the current abortion law, should be most careful that they don't make the revision more restrictive than the present practice throughout most of the counties in New Jersey. Is that what you said briefly?

MR. BYRNE: Well, I don't see from our experience - and again I suggested in my prepared statement that you might be interested in sending for our file of abortion reports. They are so filed that the names are anonymous and could not be identified from the reports. Having found no abuse in the way the doctors and hospitals are proceeding on a policy of making

abortion judgments, I would see no need to modify or further restrict that policy.

ASSEMBLYMAN CRANE: Don't you feel that perhaps we have in this case legislation by interpretation rather than legislation in my opinion the way it should be set out as to what the laws are and the courts will, of course, uphold these laws?

MR. BYRNE: Well, I think we have a lot of legislation by interpretation.

ASSEMBLYMAN CRANE: I am sure we have.

MR. BYRNE: I think there are a lot of areas where it is undesirable. But I think you are now in a field where there exists a great deal of controversy and there exists a great conflict. There exists varying opinions as to whether or not there are abuses and with the wide latitude as we have in New Jersey, I think that the Legislature ought to wait until they find abuses. Either that - and I do not comment on this - or make a moral judgment which is to be imposed upon the citizens of New Jersey.

ASSEMBLYMAN CRANE: Are these interpretations followed, Mr. Byrne, through all the counties of the State?

MR. BYRNE: I understand that the Prosecutor of Middlesex County at the time we formulated this policy took exception to it, but I don't know how he has executed that exception.

ASSEMBLYMAN CRANE: I see. Is it possible that from your vast experience as a Prosecutor you could inform us somewhat as to the problem of illegal abortions in the State?

MR. BYRNE: Yes. I point out in my prepared remarks that you cannot stop abortions through enforcement. You can stop

abortionists, but you cannot stop abortions. You can't even stop doctors. I am sure in the course of your day's testimony you will hear either from doctors or others, that doctors who want to perform abortions either in the guise of D and C's or in some other guise can and do do it. So I think from the standpoint of law enforcement the public respects the law enforcement officer who is charged with not enforcing a moral code, but enforcing a criminal code which punishes, and there certainly is an abortion area where there is virtually total agreement that ought to be criminal.

ASSEMBLYMAN CRANE: Would you have any idea, Mr. Byrne, of the number of illegal abortions in Essex County, for example, when you were prosecutor that occurred - any estimate? How many, for example, did you catch and prosecute in an average year in Essex County?

MR. BYRNE: Abortionists?

ASSEMBLYMAN CRANE: Yes - illegal abortions.

MR. BYRNE: Not a whole lot.

ASSEMBLYMAN CRANE: Ten?

MR. BYRNE: If there were ten, that would be about it. We found those abortionists were very active. I actually participated in the arrest of an abortionist who would conduct five, six or eight abortions a day.

ASSEMBLYMAN CRANE: One of the problems, Mr. Byrne, that the Commission is facing is trying to get some sort of reliable estimate of the number of illegal abortions in the State. This is a very difficult figure to get. The figures you hear bandied about are 30,000 a year in the State. But, of course,

there is no way of knowing. Would you say that would be an estimate that you would think might be accurate?

MR. BYRNE: I couldn't give an estimate. I couldn't even define what you mean by an illegal abortion.

ASSEMBLYMAN CRANE: How about abortions performed other than by licensed physicians? Let's put it that way.

MR. BYRNE: Again, I have no guide which would really be of assistance in that.

ASSEMBLYMAN CRANE: I see. I have no further questions. Does anyone else? [No response.] Thank you, Mr. Byrne. We appreciate your testimony.

MR. BYRNE: Thank you.

ASSEMBLYMAN CRANE: Is Dr. Watson Neiman here?

D R. W A T S O N E. N E I M A N: I am Dr. Watson Neiman, Assistant Commissioner for Personal Health Services, in the New Jersey State Department of Health.

I have submitted a written statement to the Commission. I will be glad to read it into the record if you so desire.

ASSEMBLYMAN CRANE: Would you, please.

DR. NEIMAN: While the New Jersey State Department of Health is concerned with the causes of deaths of all of the citizens of the State, it does not appear that illegal abortions are a major public health problem with respect to deaths. This conclusion is based on the following facts:

1. There are approximately 29,000 female deaths each year.

2. About 10 per cent of the female deaths or 2900 are in women in the child-bearing age.

3. All death certificates received in this Department are carefully reviewed. Any death certificate which indicates that the woman was pregnant at the time of death or had been pregnant within the year immediately preceding her death, is referred to a field physician, employed by the Department, for investigation. The results of these investigations are turned over to the Maternal Welfare Committee of the Medical Society of New Jersey for discussion and appropriate action. In the twelve month period ending June 30, 1968, there were 36 such deaths investigated. Of these 36, two were definitely criminal abortions, for an indicated death rate of one case per 1,450 deaths of women in the child-bearing age. There were three other cases among the 36 in which the cause of death may possibly have been due to an illegal abortion, but a definite diagnosis of illegal abortion cannot be supported by the records.

There are no official data available to us regarding morbidity or sterility following such abortions.

Of concern to the Department are the large numbers of children born to women who have had Rubella or German measles during the first three months of pregnancy and who exhibit one or more severe congenital defects, such as heart disease, deafness and cataracts. There are also children born to mothers who have been taking some type of drug during their pregnancy, and the children have had marked congenital defects, such as occurred in the Thalidomide tragedy a few years ago. The present abortion law in New Jersey indicates that no physician can perform an abortion "without lawful justification." This phrase is one which has not been clarified by the courts and in

order to afford the women an opportunity to have an abortion performed in a sterile atmosphere by a competent physician without fear of prosecution of the physician, it is the opinion of the Department of Health that the present abortion law should be changed to protect both the patient and the physician.

It is recognized that there are many physicians who on moral or religious grounds oppose therapeutic abortions under any circumstances. On the other hand, there are many physicians who feel that there are definite indications for therapeutic abortion and whose moral and religious background will permit these physicians to perform such abortions. The State Department of Health recognizes the rights of both groups as well as the rights of the patient and child involved. It is, therefore, the opinion of the Department that therapeutic abortion should be permitted when:

1. The physician and patient have no moral or religious basis which would prohibit abortion;

2. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother, or

3. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or

4. There is documented medical evidence that continuance of a pregnancy, resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient;

5. Two other physicians chosen because of their recognized

professional competence have examined the patient and have concurred in writing; and

6. The procedure is performed in a hospital licensed by the State of New Jersey.

The foregoing policy is, with some minor modification, consistent with the American Medical Association policy on therapeutic abortion, adopted by the AMA House of Delegates in June 1967. It is also consistent with the policy adopted by the House of Delegates of The Medical Society of New Jersey in May 1968.

The Department of Health, therefore, recommends that the abortion laws of the State of New Jersey be amended to be consistent with the above policies.

Now I have been asked by one person who read this where the difference was between the AMA policy and our policy. The American Medical Association policy recommended that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. This is a very admirable place in which to do it and certainly we have no objection. However, in New Jersey there are hospitals which are duly licensed, which are not accredited by the Joint Commission and are fully competent, such as our osteopathic hospitals. They are accredited by their own organization and thus this is the modification to the AMA policy.

ASSEMBLYMAN CRANE: Thank you, Doctor. Are there any questions of the Doctor? [No response.]

Doctor, in your capacity in the Department of Health, have you some connections with the institutions of the State?

DR. NEIMAN: With the institutions of the State?

ASSEMBLYMAN CRANE: Yes.

DR. NEIMAN: No, sir.

ASSEMBLYMAN CRANE: That is the Institutions and Agencies Department, I suppose.

DR. NEIMAN: Yes, sir, that is correct.

ASSEMBLYMAN CRANE: I see. Thank you. Questions anyone?
[No response.] Thank you, Doctor.

Dr. John Scully.

D R. J O H N S C U L L Y: I am Dr. John Scully, an obstetrician-gynecologist in the State of New Jersey.

I come to speak against the liberalization of the abortion law.

Having just read resolution number 24, it seems to me that this Committee has been asked to investigate the existing abortion law with an idea towards liberalization. The supposition is given that there are many illegal abortions performed which are a public health and safety problem and that the restrictiveness of these laws force people to seek such operations from the unscrupulous and frequently the unskilled abortionist. It also states that our statutes in this area must operate effectively to prevent resort to illegal abortionists.

I would think that our statutes in this area should not only be a reflection of what our society considers acceptable, but also what is good medicine. If we change our laws because they are either unenforceable or unpopular, with no eye to what is truly remedial, we certainly are not adequately protecting the public health or welfare. Drug addiction is certainly

widespread, but making it legal would simply be giving the State's stamp of approval to an undesirable condition.

I agree wholeheartedly that illegal abortions are frequent and that most of the time the abortionist is an unskilled operator. If legalizing abortions would then channel these people to a skilled operator, which is very questionable, the only function that this liberalization would be serving would be to make the action safer - period. It would serve no other function. It would not discourage rape or incest, two of the areas in which the critics of the abortion law concentrate upon.

Therefore, it seems to me that the question here is not whether or not we can make abortions safer, as the resolution suggests, but whether or not there is a place for abortions inside the law.

I would like to address myself to three areas, namely:

What is being aborted?

The dangers of abortions

And a few closing comments.

Now, what is being aborted? It is suggested that abortions be performed within the first 12 weeks of pregnancy. I would like to briefly take you through the first 12 weeks of pregnancy so that you may be able to see just what it is that is being sacrificed. For the purpose of dating a pregnancy, a pregnancy begins two weeks before conception in that the egg which will be fertilized begins its formation at this time or at the last menstrual period. It takes two weeks for the egg to develop, at which time it escapes from the ovary and fertilization by the sperm is accomplished at the outer end

of the tube. During the third week, the fertilized egg multiplies from a one-cell stage to a multiple-cell stage and this time is spent in its travel through the tube on its way to the womb. The fourth week of pregnancy is spent with the passage of the fertilized egg into the womb and then implantation occurs. At this stage it is a two-layer disc with the beginning stages in the development of the body, head and trunk. If the lady were not pregnant, she would now menstruate. During the fifth week, we have the formation of the head, trunk and heart. The sixth week, we have the development of the mouth, umbilical cord, nervous system, face, throat, circulatory system and the heart begins to beat. It is at this stage that the woman suspects that she is pregnant. Prior to this time, no examination or test can determine the presence or absence of a pregnancy. The seventh week, the arm and leg buds develop. She is now only three weeks late with her period. The eighth week, there is further development of the legs, body and face. The ninth and tenth weeks the fetus is over one inch long and no further primordia will be formed. Everything is present that will be found in a full term baby. Now the fetus need only grow in all details. The muscles begin their first exercises and the heart has been beating for a month. As you can see, by the time a woman realizes that she is pregnant and by the time a physician can diagnose the fact that she is truly pregnant, the baby's heart has been beating and this happens to be very early in pregnancy. So we are not aborting a "glob" of cells. How shocking it must be to do an abortion and observe the movements of the little fetus.

The dangers. Most people are under the impression that an abortion is only dangerous when it is performed illegally and such is not the case. Any interference with a pregnancy is dangerous and the further along the pregnancy, the greater the danger. Nature has given the unborn child the safest environment he will ever have. Any attempt to remove him from this environment, prior to birth, is filled with many dangers. To quote Nicholson J. Eastman, Professor of Obstetrics at Johns Hopkins University and Obstetrician-in-Chief at Johns Hopkins Hospital, concerning perforation of the uterus, he states: "In the hands of a well-trained operator, in good clinics, the frequency has been estimated from 1 in 150 to 1 in 1000 cases. It is also estimated that every second or third perforation ends fatally." This is an outstanding clinic. No abortion law takes into account a physician's qualifications. It is quite possible that the inferiorly-trained physicians would flock to this area rather than the trained physician who has taken the time and effort to better qualify himself to protect the life and health of his patients.

I would like to mention something concerning rape. When a girl is raped her immediate problem is that she was assaulted. A pregnancy would not become apparent until she had missed a menstrual period, approximately two weeks later, and a diagnosis of said pregnancy could not be made until four weeks after the assault. I doubt that a girl who has been raped would wait until she was sure she was pregnant to seek medical advice. If she had sought medical advice prior to this time, there is much that can be done to see to it that the assault does not lead to a

pregnancy, such as the washing out of the vagina and an injection of an oily substance into the womb and tubes in order to destroy the sperm.

A word concerning defective babies - this is sheer speculation. It is impossible to foretell which baby will be born with defects and which baby will not. It is impossible to tell which defects will be incompatible with life and which will not. A mother might prefer that her child be dead rather than blind, but I doubt that any adult would prefer to give up his life rather than his eyesight. If we abort all women with potentially defective babies, we certainly will be destroying a great percentage of normal babies.

Some closing comments. I hope that the medical profession as well as the officials of our government will not be lulled into the impression that by liberalizing the abortion laws we will be doing something for humanity. In the name of humanity or the Master Race, the Nazis performed such experimentation, mass torture and murder while believing that they were performing great deeds for the German people. It all began in Nazi Germany with the taking of the first innocent life. As Reverend Charles Carroll, Protestant Episcopal Chaplain at the University of California Medical Center while testifying before a similar committee as this one said, "I sat day after day at Nurenberg and heard medical men, supposedly dedicated to the protection and prolongation of human life, who destroyed their fellows and convinced themselves that they were advancing the cause of humanity."

Can life be any more innocent than that which is found within the womb of a pregnant woman? When we begin to lose respect for that life, I fear that this will be only the beginning of a disrespect for life in general. Who knows what will follow? This may be the first step to government control of reproduction, experimentation on defective infants and children and then putting the miserable out of their misery. The danger in all this is that then man will decide who is fit to live and who is fit to die. This is a grave responsibility which I for one would not want to assume. I certainly hope that no one on this Commission would wish to assume it either.

As advisors to the New Jersey State Legislature, I implore you to consider in your deliberations that someone has to speak for the fetus who cannot speak for himself and that you would be doing yourselves and society no harm in considering the rights of the unborn child. Thank you.

ASSEMBLYMAN CRANE: Thank you, Doctor. Any questions of the Doctor? [No response.]

Doctor, where do you practice?

DR. SCULLY: New Brunswick.

ASSEMBLYMAN CRANE: And you are, as you said, I believe, an obstetrician and gynecologist?

DR. SCULLY: Yes, sir.

ASSEMBLYMAN CRANE: Have you had occasion to perform an abortion on a woman for any reason?

DR. SCULLY: No, sir.

ASSEMBLYMAN CRANE: Never?

DR. SCULLY: No, sir.

ASSEMBLYMAN CRANE: To your knowledge is there a problem in your county or your town of illegal abortions being performed by unscrupulous and unlicensed practitioners?

DR. SCULLY: I would say I hear of it twice a year as an average and usually not physicians - midwives and nurses, but not physicians.

ASSEMBLYMAN CRANE: I don't know much about medical practice, but in the event a woman was aborted by an unscrupulous or unlicensed practitioner and she had some difficulty, would she come to a doctor such as you for assistance?

DR. SCULLY: Yes, usually she would. They usually end up quite sick in an emergency room somewhere and they are taken care of.

ASSEMBLYMAN CRANE: And you may be called in for your specialty?

DR. SCULLY: Yes, sir.

ASSEMBLYMAN CRANE: Have you had such occasion?

DR. SCULLY: Not in New Jersey, but in New York I had one occasion during a residency of a girl who had an illegal abortion done by a nurse.

ASSEMBLYMAN CRANE: And did the woman survive?

DR. SCULLY: Oh, yes, she did. She was fine. She was not that sick.

ASSEMBLYMAN CRANE: I see. I have no further questions. Does anyone else have a question? [No response.] Thank you, Doctor.

Next will be Dr. Ben Silverman, please.

D R. B E N J A M I N K. S I L V E R M A N: Mr.

Chairman and members of the Commission: I come before the Commission today to speak for what I have come to believe are the very minimal necessities for the legalization of abortion in the State of New Jersey. I speak out of the experience of fourteen years of pediatric practice in Princeton and only of those conclusions which I have reached from that long and busy practice.

The pediatric practitioner, like the good general practitioner, does more than practice medicine. He becomes involved in the joy and the turmoil and the tragedy of his patients' families. He becomes an overseer of the interplay of relationships between members of the family. He becomes part of the foundation which helps support the family when misfortune befalls it. For example, he not only must provide the medical care for the child born with severe congenital deformities, he must also help provide the emotional and psychological support which is necessary for the normal members of the family. So it is, first of all, the problem of congenital defects in the newborn babies to which I would like to address myself.

We do not know the causes of most defects with which newborn babies are afflicted, nor do we have, at this time, medical means to prevent or to predict the occurrence of most congenital defects. We are well aware, however, of at least a few factors which can alter the course of a mother's pregnancy in such a way as to make it very likely that that pregnancy will

produce a child with deformities severe enough to hinder the child throughout its life and consequently to bring psychological and economic disaster to the normal members of the family.

There are two types of events which can occur to a mother during her pregnancy which have a significant chance of inducing severe and debilitating deformities in the child. One of these events is the ingestion of certain medications; the other is the acquisition of certain infections. Everyone in this room has heard about and read about and been affected by the tragedies wrought on newborn babies by the European tranquilizer known as Thalidomide. Certainly Thalidomide is the best known and best publicized medication which can cause severe deformities when ingested by the mother during pregnancy. Other medications, however, have been equally well established as causative agents in such problems as congenital deafness, uncertain sex characteristics, and absence of limbs. Obstetricians today make every effort to keep their maternity patients away from medications when it is at all possible that such medications can affect a fetus. Nevertheless, mothers do ingest such medications and new causative agents are sometimes discovered after they have been prescribed during a pregnancy. When such drugs have been ingested, and the resulting likelihood of a defective child is significantly increased, abortion would seem to be medically indicated and should be made legally feasible in the State of New Jersey.

Also, everyone in this room is familiar with the effects of maternal German measles, or Rubella, on the development of the fetus. I am mindful of the baby born without an arm to a mother

who had been refused the desired abortion when her German measles was diagnosed early in her pregnancy. Through the intercession of our Governor, the State of New Jersey bought a full-arm prosthesis for this baby through its Crippled Children's program. I am mindful of the blind and mentally defective child living with his three near-genius siblings and their parents who are mathematicians of professorial stature, under conditions which were deleterious to all members of the family. This child has now been institutionalized in a government home. German measles is not the only maternal infectious agent which can cause serious birth defects. So development of maternal infection with one of these agents during a pregnancy should also be among the minimal legal grounds for voluntary abortion in the State.

At the other end of the chronological spectrum of my practice, there is a second major problem which needs the compassionate attention of members of the Abortion Law Review Commission. I am referring now to the unmarried teen-age adolescent who has become pregnant. This pregnancy may have been started with the adolescent girl's permission or without it. That really does not matter. By the time this girl comes into my office, and frequently it is a girl I have known from early childhood, the pregnancy is a tragedy in her life. She may come alone, or she may come with her mother or her father or both. In any case, this girl and this family stand alone at this time of their lives before the vast legal machinery of the State of New Jersey, unable to legally avert the destruction of this girl's future, even though medically a simple and safe ten-minute procedure would be available to them were it not for the legal barriers.

The family that is well-off can transport the girl to other countries for an expensive legal abortion, or they can take their chances with illegal abortionists nearby, or they can let the pregnancy proceed unabated, with all that that horrible event means to the child and to the baby so born. The family that is not well-off has no choice. They must stay here in New Jersey, separated by the law from a chance for medical salvation. So, to my mind and from my long experience, unmarried teen-age adolescents should be allowed voluntary abortions, legally under the best medical conditions here in our State.

Others will come before you to speak of many different facets of the desirability of legalizing abortion in the State. I am in emotional concurrence with much of what you will hear. But within the range of my practical experience, I have outlined what I hope this Commission will recommend at the very, very least; namely, it shall be legal in the State of New Jersey for voluntary abortions to be performed on mothers who have ingested medication during their pregnancy which is known to be harmful to the fetus or mothers who have acquired an infection known to be harmful, and also on any unmarried teen-age adolescent who requests abortion. Thank you.

ASSEMBLYMAN CRANE: Thank you, Doctor. Any questions of the Doctor from the Commission members? Yes, Father.

REV. DENTICI: Doctor, with the discovery of the vaccine for German measles, would you still hold to what you suggested?

DR. SILVERMAN: Yes. Of course, the German measles would be less of a problem, but, as I stated, there are many other infectious agents that can cause defective fetuses.

Hepatitis can result in a defective fetus, chicken pox can, toxoplasmosis, syphilis, polio. So the German measles problem will lessen it. I mean, the German measles vaccine will lessen the problem. The other factor on that is that for the most part the people who are going to get the vaccine are the people who can afford to get the abortions anyhow. I mean, our programs aren't that all diffused that every indigent female in the State is going to get the vaccine or that every female in the State is going to get the vaccine. The disease will still exist despite the vaccine.

REV. DENTICI: Wouldn't it behoove us, as members of the Commission, to suggest that because of what you say about the German measles, that we should see to it that everyone is enabled to get the vaccine?

DR. SILVERMAN: I think this should be true of all the various disease vaccines, yes. I think the program should be expanded. But, nevertheless, there will be people who will not have the vaccine and I feel that these people, if they contact German measles or any of these other diseases which I have listed during the early part of their pregnancy, should be entitled to abortion if they desire one.

REV. DENTICI: Do you know, Doctor, what is the predictability of the defect? In other words, how many --

DR. SILVERMAN: Well, as I stated, there is no way of predicting unfortunately. There have been various methods of trying to test the amniotic fluid and taking biopsies of what lay people would call the after birth in trying to find out some means of determining which pregnancy will have the defective

child and which will not. There isn't any way of doing it. There is a significant chance, depending upon the epidemic, in the range of somewhere between 10 and 50 per cent.

REV. DENTICI: This would mean then between 90 and 50 per cent good babies might be aborted?

DR. SILVERMAN: Might be good babies, yes. This, I think, should be the mother's choice, whether she wants to take that chance or not. It shouldn't be the choice of the law of the State of New Jersey. I think it should be the mother's choice, not as the previous doctor has said. I don't believe that you are imposing the government's will; I think you are removing the government's imposition of will by legalizing these abortions for the mothers who want them.

RABBI SCHWARTZ: From your experience as a doctor, is there any evidence that legalized abortion for unmarried teenagers would encourage sexual promiscuity?

DR. SILVERMAN: The sexual promiscuity exists. I don't know what sociological answers there are for that. It happens. I don't believe that there would be any more likelihood. I think the child involved in this kind of a situation - at the time she does it, it is a relatively unthinking thing. I don't think the outlook for an abortion is any less of a deterrent to her at that stage, at the time she is doing it, than the outlook of the pregnancy itself. I can't see that it would make any difference.

ASSEMBLYMAN CRANE: Doctor, have you any suggestions to this Commission to reduce the allegedly high number of illegal abortions being performed in the State by unscrupulous and

unlicensed practitioners?

DR. SILVERMAN: I think to a great extent the things I have suggested would put the illegal abortionist out of business.

ASSEMBLYMAN CRANE: Would you say the experience of the states that have liberalized their abortion laws shows this to be so?

DR. SILVERMAN: I think it has and quite frankly we are sending patients at this point to some of the other states. I don't know if I am doing that legally or not. I may be putting my foot in it. I ask for a waiver.

ASSEMBLYMAN CRANE: You have legislative immunity at this point, Doctor.

Does anyone else have a question for the Doctor?

[No response.] Thank you very much, Doctor.

Doctor, I don't know whether you stated where you practice.

DR. SILVERMAN: Princeton.

ASSEMBLYMAN CRANE: Thank you.

Dr. Dominick Introcaso.

D R. D O M I N I C K I N T R O C A S O: Mr. Chairman and members of the Commission: My name is Dominick Introcaso. I am an obstetrician and gynecologist. I practice in Colonia, New Jersey.

I am here to speak against the liberalization of abortion laws. Now the previous speaker alluded to the unwed mother. We would like to take this as an example of why we must stop this idea that the individual is not an individual until the time of

birth. Let us go back to a full-term infant, for example, a baby in a nursery. We call that baby viable. We protect it with all the laws of the State - indeed, it is entitled to the Bill of Rights. We protect it with every law we can protect it which you in the Legislature have devised for this child. Yet, in fact, is it viable? Is it not a term of convenience that we use? This child that is an infant in the crib is not at all viable. About the only thing it can do that an unborn child can't do is cry. It can't walk. It can't talk. It can't really make its needs known. But it does have the potential which we recognize when we look at it in the crib of growing into a full human being. An infant at the point of conception from the medical and scientific viewpoint has exactly that potential. The only difference, gentlemen, is form. It is not an amorphous mass of cells, composed of numerous chromosomes which have no relation at all to a full-grown individual. This is not true.

It is composed instead of an inherent genetic code which is the product of thousands of years of evolution, hundreds of thousands of years really of evolution, and which has come down to the culmination of this one particular individual. Not only that, but it is the product of a human act, the product of human sexual intercourse and its product, that is, the fertilized ovum, is in itself a product of a human action and is in itself human.

Within these chromosomes there are millions and millions of genes formed and within these genes, of course, as you gentlemen well know, are the inherited characteristics which

this individual will carry throughout life. It will not only determine its sex, but its height, its weight, etc., so that it has all the potential at the point of conception that it will have at 21. Again the difference is form.

Now the previous speaker alluded to a few situations in which an abortion might be performed for what is called infant welfare. He alluded to Rubella. Now, of course, it would be rather embarrassing for you gentlemen to liberalize abortion laws for Rubella, a disease which we hope will no longer be in existence within three years. The doctor said we have some difficulty in inoculating those people who would not be inoculated. Well, I think this difficulty could easily be overcome. We overcame it with the polio campaign which we carried on about five or six years ago. You could also pass laws to insist that Rubella be part of a child's pre-school vaccination program, the same as you insisted that Small Pox be a part of such a program. So the disease itself is on the way out.

Another thing I must take issue with the previous physician on, as far as any other viral disease is concerned - and this is rather important - there has never been nor is there today any definitive study that shows that any other viral disease has ever caused a congenital malformation. There is some suspicion in regard to hepatitis, but it is questionable. It is known that Chicken Pox crosses the placenta, but Chicken Pox babies are born without malformation for the most part. It is known, for example, that polio will cross the placenta, but again this is a suspect, such that the National Institute of

Health recommended that pregnant women receive, when we were in that polio campaign, live oral vaccine during their pregnancy. So because of this, I do not feel that this is a valid objection. Our fetal indications are becoming fewer and fewer.

One more word, even about a drug like Thalidomide, again our knowledge is so inexact, as the doctor previously alluded to. We previously thought that Thalidomide was the cause of congenital malformations. It would now appear from some work that is being done in England that in fact what Thalidomide did was to hold onto those babies that were going to be malformed and not in and of itself a malformer.

I do not bring this up to defend Thalidomide, but merely to show you that our knowledge is so inexact in this field, to pass a law either for or against drugs is extremely difficult at this particular time. The present drugs that are known malformers are mostly in the antifolic acid group which are anti-cancer drugs for the most part. It is highly doubtful that the average woman would be exposed to an anti-cancer drug without her realizing she was being exposed to it.

So because of these reasons, we do not feel that you can liberalize the abortion laws simply on fetal indication. Again, we feel very definitely that a human being is a human being from the point of conception. We feel this is true medically and morally. Thank you.

ASSEMBLYMAN CRANE: Thank you, Doctor. Any questions by the Commissioners?

RABBI SCHWARTZ: I just wanted to know who the doctor is representing? Is it a group?

DR. INTROCASO: No.

RABBI SCHWARTZ: Where do you practice?

DR. INTROCASO: Colonia, New Jersey.

REV. DENTICI: Doctor, a thing that is sort of confused in my mind - Dr. Scully said it wasn't just a simple ten-minute operation and Dr. Silverman said it was. In your opinion, is this just a simple operation, an abortion?

DR. INTROCASO: I mean no disrespect to the previous physician, but he is a pediatrician. I submit this is outside his area of competence. He doesn't go near an operation. It is not an easy situation. Now if you want to get some very bold statistics, they are very easy to obtain. We should have some from our western states soon, but they haven't been in operation long enough with the liberalization of abortion laws. However, in the Scandinavian countries they have been - for 20 years. The incidence of morbidity, that is where either perforation or infection has occurred, is approximately 1 in 250 abortions. The incidence of death is about 1 in 500 abortions in the Scandinavian countries. Now when perforation occurs, it usually means in a situation like this that the uterus must be removed. Now, gentlemen, you have lost the whole ball game, the baby and the uterus. Now this is under the best conditions.

If on the other hand we develop a morbidity, what can be the long-term result is that while the uterus might not be removed under a circumstance like that is that the tubes may close down and we get what we call in the profession or in the specialty post-abortal PID or public inflammatory disease, in

which the tubes are locked tight and in which the woman can no longer conceive, at least without difficult surgery. These are the results of abortions even in the best of institutions.

It is interesting that Father Dentici brought that up, if I may allude to it, the same men who say that abortions are easy and who teach this, even in a medical school, would have a medical student's head - because I taught in a medical school at one time - would have a medical student's head if he said that the way to treat a missed abortion was by a dilatation and curettage. They would have his head on a silver platter. Now what is a missed abortion? That is where the pregnancy is already dead. Now we have been desperately trying to find ways to make it easier on the mother to rid this mother of a dead baby and a dead placenta. We have been trying a hundred ways to make it easier on her because now we have to wait until the mother begins herself to spontaneously abort. Why? - because it is too dangerous. This is in any standard textbook on obstetrics that you want to pick out - Eastman, De Lee, etc., and yet they will turn around and say that you can do it with a normal viable fetus. You can't - not without some degree of danger. The incidence of maternal mortality in this country under an ideal setup, I imagine, would be somewhat lower because we do have blood and we would have a good hospital in which to operate. But maternal morbidity would certainly not be low.

ASSEMBLYMAN CRANE: Doctor, I have a question. You use the term "morbidity," with which I am not familiar. Would you explain that?

DR. INTROCASO: Morbidity would mean infection primarily in this case and this would be a woman who read a temperature of 100.4, 24 hours post-abortion, for at least 24 hours. This is what the general definition of morbidity is in obstetrics.

ASSEMBLYMAN CRANE: Doctor, a further question: Do you believe under the current New Jersey abortion statutes that you can practice the best medicine that you are capable of?

DR. INTROCASO: Absolutely.

ASSEMBLYMAN CRANE: You do? Thank you. Anyone else?

RABBI SCHWARTZ: Medically speaking, all operations, I am sure, are considered serious, complex and dangerous. Comparatively and relatively speaking, wouldn't it be a true statement that a D and C in early stages of pregnancy would be a medically simple and safe ten-minute procedure?

DR. INTROCASO: No. It is not a medically safe, simple, ten-minute procedure.

RABBI SCHWARTZ: Would you please clarify that?

DR. INTROCASO: Yes. What would you like me to compare it to, a hysterectomy?

RABBI SCHWARTZ: I would like to know why that statement is not considered true.

DR. INTROCASO: Well, for the very reason that if it is a simple, easy, safe procedure -- it is not considered so by our textbooks, first of all by our authorities, and I quote both Dr. Eastman and Dr. De Lee. One of our previous speakers already quoted Dr. Eastman and the reason he did that is that Dr. Eastman's is one of the standard textbooks in obstetrics

and used by a good proportion of the medical schools throughout the country. But the minute you begin talking about the routine orders, if you were to go to a chart and look at the routine orders that are required for a dilatation and curettage viz-a-viz an abortion, that is where one is to perform an abortion viz-a-viz a diagnostic curettage, you would find quite a difference in those pre-operative orders. For one thing, if the obstetrician and gynecologist were trained at all, he would be cross-matching a thousand c.c.'s of blood against this patient which already brings up the morbidity and mortality after receiving the transfusion. Now why does he do this ahead of time? Because he is afraid he might run into bleeding. The only way to remove a fetus which is already implanted in a womb is to literally dilate the neck of the womb, which has the consistency of a piece of dough, and literally rip it out.

Now you are working in a blind sac. It is as though I was standing here and sticking my hand inside this desk. This is tough enough to do when nature has already loosened the pregnancy through death and the tissue is coming out. There are sometimes inadvertent perforations there.

RABBI SCHWARTZ: Under normal circumstances, approximately how long would such a procedure take?

DR. INTROCASO: Well, if you were starting right from the beginning where there had not been any previous sign of bleeding, I would say a good 25 to 35 minutes. But the seriousness of surgery is not predicated on time.

RABBI SCHWARTZ: I am aware of that, certainly.

DR. INTROCASO: That is not how we predicate the seriousness.

ASSEMBLYMAN CRANE: Any further questions? [No response.]

Thank you, Doctor.

Dr. Lewis Cooper, please.

D R. L E W I S C O O P E R: I am Lewis Cooper. I am a resident of Leonia, New Jersey, but I am not licensed to practice in the State of New Jersey. I am licensed to practice medicine in the State of New York and the State of Massachusetts. I am an Assistant Professor of Pediatrics at New York University Medical Center and am the Director of the Rubella Birth Defect Evaluation Project there.

I have come to meet with you to try to bring you up to date on the current status of our knowledge about congenital infection and its relationship to malformation, and most specifically with regard to Rubella or German measles.

I should say that Rubella was first described in this country at Bellevue Hospital where our program exists and Rubella, the disease, its prevention and treatment have been under study continuously there for 20 years. The members of our own project have been involved in literally seven-day weeks for four years since the 1964 epidemic of Rubella in studies concerned with determining just what is the risk of Rubella to mother and child. How can this be prevented? During the course of these studies we have had the opportunity to provide long-range, multi-disciplinary service to over 500 children whose mothers have had Rubella in pregnancy.

We have on an almost daily basis been concerned with counselling physicians, both in New York State and in New Jersey,

who are concerned by exposure of their pregnant women to rash illnesses. We have been involved since the very beginning in attempts to bring Rubella virus vaccines into the community and have the privilege of bringing the Rubella virus vaccines which you have read about in the papers recently into initial trials, first on the east coast and initial trials for the first time anywhere in families in the community.

So Rubella is a condition that we live with and that causes us great concern. I hope that I can clarify some of the misconceptions related to inadequate information which have existed for many years. One of the major reasons for misinformation and confusion about Rubella has been the difficulty of diagnosing this infection. Until 1962 when the Rubella virus was first isolated and could be grown in the laboratory, it was impossible to distinguish Rubella from a number of other illnesses characterized by rashes which occur in children and in young adults. It also was impossible to detect Rubella without rash and it is important for you to know that Rubella can occur as a full-blown typical picture with rash, swollen glands, a little sore throat and a little fever, but it can occur with no symptoms whatsoever.

The availability of specific laboratory tests beginning in 1962, but with only increasing dissemination to the community, such that now in 1968, it is only in the better endowed medical centers that these tests are available, is at least allowing us to clarify the problem.

Now with this background, how frequent is Rubella? Rubella is an epidemic and endemic illness. That means that it occurs

in large epidemics at irregular and unpredictable intervals, but it also occurs year in and year out every year. The statements in the lay press concerning every seven-year epidemics make interesting reading, but honestly are not passed upon solid scientific fact. We know that the explosive epidemics occur at irregular intervals.

How frequent is Rubella - and what you are greatly concerned with - how frequently is Rubella in pregnancy? It is, I think, quite well documented that during epidemic years as many as one per cent of pregnancies during 1964 along the east coast were interfered with in some way or other by Rubella. Now I will not give you extrapolations nor will I try to give you my opinions until I label them as such, but I am going to try to provide for you numbers that come out of our own case records in New York City and that represent people living in New York City and in the surrounding communities, including the communities across the Hudson River in New Jersey.

I told you that since 1964 we have studied and provided service for more than 500 children with Rubella associated defects. Of this group of children, 60 or roughly 10 per cent are now dead. Roughly 54 per cent of the 260 children living in New York City - and this is the basis of my present series of numbers because I was concerned with educational facilities in New York City - are multi-handicapped.

Now what are the handicaps of Rubella? The most common handicaps are these: hearing loss, which may range from mild hearing loss to total deafness; cataracts, which may affect one or both eyes; congenital heart disease, most commonly a

condition called patent ductus arteriosus, and which incidentally is the easiest of the Rubella problems to manage; and varying degrees of brain damage, which may involve both the intellectual and the motor areas, that is, both the muscles and the thinking processes. This may range from mild problems to what appears to be typical cerebral palsy. It may involve severe or mild degrees of mental retardation.

Now of interest, last spring when we were concerned with our Rubella children because we had to find places for these children to receive education and training, 54 per cent of them were what we call multiply-handicapped; that is to say, they had not only hearing loss, but hearing loss and visual impairment or hearing loss, visual impairment and brain damage as well. New York City is perhaps most richly endowed of all our communities in terms of special facilities for children with handicaps. Yet in our project it was quite easy to document the fact that roughly 50 per cent of our children were receiving rehabilitative and educational services that were totally inadequate and that long-range planning for these children is non-existent.

I know from personal experience that the problems in our own State of New Jersey are much worse than in New York City and in fact when my staff realizes they have a problem of a seriously damaged child in New Jersey, they frequently throw up their hands in total despair.

This is what congenital Rubella is capable of doing in children. The impact on the child, I think, is quite obvious - the multiplicity of handicaps. The difficulty is great in

training children with single handicaps, but the total frustration of the multi-handicapped child is overwhelming.

What about the impact of this child on families? The incidence of divorce, abandonment by fathers and additional problems in terms of school problems, psychiatric problems in the siblings, the children, in households where these multi-handicapped children exist are extremely high. I don't mean to say for a moment that there are not families who because of fantastic personal resources can't take into their bosom the most severely damaged child and provide loving support and end up with a stronger family unit than they started out with beforehand. But on the other hand, there are many people who do not have these personal resources and these resources are more than financial and the added stress of a child who doesn't sleep at night, who has to be tied into a crib, who climbs the walls, goes out the windows, out the doors, down the street, who can't communicate because he can't hear and frequently can't see, is beyond imagination unless you live in such a household. So this is the impact on the family.

Now what about the impact on the community? I can tell you from daily efforts that the community is scurrying in all directions to try to provide facilities for children who are multi-handicapped from congenital Rubella. Roughly 25 of our children are now in long-term, residential, institutional placement, but the waiting list is as long as the list for those who have been admitted. And in the mean time, family dissolution, problems with other siblings, are magnified.

What about existing abortion practices in our community

and the risk of abortion since this is something that apparently is of great concern to all of us? It is well documented that during 1964 more than 200 women in New York City had therapeutic abortions because of Rubella which were reported to the Department of Health. From our own experiences these practices continued both in New York and to a lesser extent in New Jersey because quite frankly, gentlemen, when families and their physicians have adequate resources and the problem exists in New Jersey, the problem gets sent to us in New York. You can understand the obvious discrimination relating to those who can and cannot afford such practices.

Incidentally, Rubella is on the upswing again and during the past spring, not a Rubella epidemic year, but just an ordinary Rubella year, our unit has had the opportunity to study and provide service to approximately 150 women with Rubella in pregnancy. Over 50 of those women have now had therapeutic abortions. One of the advantages of virus isolation and diagnostic techniques is that we are beginning to get some concept of what is the risk of Rubella in pregnancy. Are we aborting normal children? Are we aborting abnormal children or potentially abnormal children? Because we aren't aborting any children; we are aborting fetuses.

I think the story is now quite clear. Early on there was great confusion as to what is the risk of Rubella in pregnancy. From our own studies consisting of some 64 fetal specimens, that is to say, the material obtained at therapeutic abortion from Rubella in pregnancy, we have been able to isolate Rubella virus and this is taken at random so it is a prospective

study - there is no way to bias these figures - from roughly 55 per cent of these tissues. We now know from studies by Dr. William Rawls at Baylor that the techniques we used are relatively insensitive and that when he used our techniques plus another technique, his isolation rate went from roughly 50 per cent to almost 90 per cent when abortion was performed for bona fide Rubella in pregnancy.

Now we know since virus techniques for a number of years have not been available everywhere that there probably are some women whose pregnancies are interrupted for what appears to be Rubella, but really isn't Rubella. This is a technical and medical problem which we now know to be easily overcome. For example, the isolation rate for Rubella virus from fetal tissues when our laboratory was able to confirm the diagnosis of Rubella, even using our insensitive techniques, was 68 per cent compared to only 23 per cent isolation rate when our laboratory did not have proper blood specimens from the pregnant woman to confirm the diagnosis. Even under the least favorable circumstances, with no physician concurring and with no virus blood studies, the isolation rate was 23 per cent.

What is the relationship of defection of a fetus to birth defects? Because that is a key question. I believe our studies over the past four years clearly document that the fetus, infected with Rubella virus, almost invariably has birth defect. I could say "invariably," but out of 500 some children, we have 9 at the moment in whom we can't detect birth defects. This may merely reflect the inadequacy of our clinical techniques. So for practical purposes, fetal infection means birth defect.

Now the kind of birth defect varies with the timing of infection. This is very clear. We don't see cataracts, we don't see heart disease, we don't see glaucoma when Rubella occurs after the first eight weeks of pregnancy. We do, however, see hearing loss and brain damage when Rubella occurs throughout the first sixteen or even seventeen weeks of pregnancy and there is some evidence at the moment that Rubella occurring even later in pregnancy may cause birth defects. The important thing is that the risk of malformation does drop off sharply after the twelfth week of pregnancy. However, the figures in textbooks - and I am the author of a chapter on Rubella in one of the standard pediatric textbooks - suggesting that the risk of malformation was 50 per cent during the first 4 weeks of pregnancy, 25 per cent during the second 4 weeks, and less than 10 per cent during the 9th through 12th weeks of pregnancy, were all based on studies before we could isolate this virus and before we could confirm what we were talking about. These figures are entirely too low and I know of no center in the world whose experience during the past four years is different from the experience in our own center. So Rubella in early pregnancy carried with it, no question about it, a very high risk of serious congenital malformation.

I have heard some discussion about Rubella vaccines. I mentioned that our unit has been involved in the evaluation-testing and dissemination of virus vaccines for a number of years and we have had the privilege of being intimately involved from the earliest stages with the Rubella vaccines. It does appear that we have excellent vaccines for prevention of Rubella soon

coming into the market place. By soon, I cannot give you a date, but we all hope within the next year.

It is quite clear, however, that there are at least 2 million women in the United States of child-bearing age who are susceptible to Rubella and it is well recognized that it is hard to immunize an adult population. As has been alluded to and from experience clearly documented with polio vaccines and measles vaccines, the group which is the hardest to bring into immunization programs is the group who suffers most from the ravages of Rubella in pregnancy. I can tell you that our unit has picked up eight new Rubella babies in the past month, that is to say, children born during the past month, meaning Rubella not during an epidemic year, but this past spring. All eight of those babies come from families of Porto Rican extraction. Most of them are from one-parent families. Most of them were born out of wedlock.

From our experience with many, many women who have had problems of Rubella in pregnancy, despite the existing statutes, women with sufficient resources both intellectual and financial frequently have available to them interruption of pregnancy under the best medical auspices, in the best medical hands, in accredited hospitals. However, many women who do not have these resources are totally at a loss with these problems and this, of course, - and now I am editorializing - to me is one of the tragedies of our existing statutes, the fact that they clearly are discriminatory and capricious.

I would be happy to try to answer any questions that might arise.

ASSEMBLYMAN CRANE: I would like to announce first the arrival of Senator James Wallwork, a member of the Commission, and we are very happy to have you here.

Does anyone have a question for this witness?

REV. DENTICI: Doctor, since you mentioned about the two million women that it would be difficult to immunize - again would you suggest to us social legislation to help these particular groups?

DR. COOPER: I think it is quite obvious that we need legislation to help in a number of areas. We need social legislation for these women. We need educational legislation and rehabilitation legislation for those children who have the misfortune to have congenital Rubella. It is my personal opinion that there should be no legislation which should require anyone to have a therapeutic abortion for any reason and it is quite clear that the consciences of many women even faced with Rubella in early pregnancy would not allow them to interrupt such pregnancies. For those women, we need a variety of supporting services, both medical, social service, education and rehabilitation-al. I am certainly in complete agreement.

RABBI SCHWARTZ: So basically you disagree with the former witness who testified that these diseases do not necessitate birth defects?

DR. COOPER: Yes, I do. I would add one further comment. Rubella is clearly the best defined infectious cause of birth defects. There are other infectious diseases, however, which do clearly cause birth defects. There are a number of infectious diseases in which their relationship to birth defects are not

known. May I clarify? For example, another viral agent, viscidal megalo virus, clearly causes birth defects that are quite similar to birth defects caused by Rubella. Toxoplasmosis, another infectious disease, is clearly a cause of birth defects. Syphilis, of course, is a cause of birth defects. There are a number of other infectious diseases in which this issue is not clear, for example, influenza, mumps, hepatitis. It is my prejudice that if these diseases cause birth defects, they probably are not common causes of birth defects. I must remind you, however, that medical knowledge, though it is expanding, is still quite limited in this area.

I would hope that any legislation concerning interruption of pregnancy because of maternal illness would not specify which diseases constitute a risk to fetus, but would leave this to the best available medical judgment because what may be a cause of birth defects this year may not be next year because of new techniques and what may have been thought to be perfectly benign may be proven to be a serious cause of birth defects in coming days.

ASSEMBLYMAN CRANE: Any further questions? [No response.]

Doctor, you spoke of the serious defects caused by Rubella. What is the probability of the survival of a Rubella baby beyond a certain point?

DR. COOPER: From our experience, it looks as if at least 10 per cent of Rubella babies die during the first year of life. But with approximately 500 such children, deaths have been quite rare after age one year. They occur as occasional accidents of surgery or anesthesia. But because of the new

techniques, the new antibiotics, the new cardiac surgery, we can provide these children with a long and, as far as I am concerned, presumably normal life span. Our problem is that the other permanent deficits of hearing, of vision and brain damage are deficits for which we have no medical therapy and we must rely on the best available rehabilitation.

ASSEMBLYMAN CRANE: How serious is the brain damage problem? Is it likely to cause institutionalization for the child?

DR. COOPER: In our group there are now roughly 25 children who are in institutions. There is a waiting list which is equally long and I think the fact that the list is not longer is a tribute to the hard work of the social service public health nurse, medical and educational teams, who we have been able to bring to bear to try to support these families with these very difficult children. As they get older, bigger, harder to carry and harder to manage in the household, more disruptive to the total family, it is quite clear that the list requiring institutionalization will grow much longer.

I should point out, however, that there are children who despite brain damage, despite hearing loss, despite severe visual impairment, may be able to make remarkable adjustments in the community if given proper education and rehabilitation. The point is there are just so many who despite everything we have never will make it.

ASSEMBLYMAN CRANE: Any further questions? [No response.]
Thank you, Doctor.

Dr. John Preece, please.

D R. J O H N D. P R E E C E: Mr. Chairman and members of the Commission: I wish to express to the Commission appreciation for this opportunity to appear here today and to present a statement in behalf of The Medical Society of New Jersey.

I am John Preece, Doctor of Medicine, Chairman of the Special Committee on Maternal and Infant Welfare of The Medical Society of New Jersey. I have been asked to attend here today by Dr. John Kustrup, President of the Society, who could not himself appear because of previous commitments. I am a diplomate of the American Board of Obstetrics and Gynecology and a fellow of the American College of Surgeons. I am in practice in the City of Trenton and limit my practice to obstetrics and gynecology.

Organized medicine has long been aware of the growing interest in the liberalization of laws governing therapeutic abortion. In June 1967, the House of Delegates of the American Medical Association adopted a formal policy statement in this connection. In May 1968, the House of Delegates of The Medical Society of New Jersey, acting on a recommendation of the Society's Board of Trustees, concurred in by the Committee on Maternal and Infant Welfare, formally approved and adopted the AMA's policy statement for The Medical Society of New Jersey. That statement follows:

. . . Recognizing that there are many physicians who on moral or religious grounds oppose therapeutic abortion under any circumstances, The Medical Society of New Jersey is opposed to induced abortion except when:

(1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother, or

(2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or

(3) There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient,

(4) Two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing, and

(5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

In adopting the foregoing, the House of Delegates of The Medical Society of New Jersey added the following recommendation: "That, in protection of physicians who on moral or religious grounds prefer not to perform abortions, legal immunity be sought and established."

The policy declaration is, it seems to me, self-explanatory. It declares the Society as opposed to induced abortion except in special circumstances that are supported by documented medical evidence. It does not indulge in consideration of legal or philosophical consideration, such as whether or not therapeutic abortion is violative of the basic

right of the individual to life. It restricts itself to consideration of scientific bases and evidential data that it regards as acceptable, when strictly adhered to, as justifying exceptions.

I add only these further notes:

On Wednesday, October 17, 1968, the National Institutes of Health announced the development of a vaccine reported to be ninety per cent effective in preventing German Measles (Rubella), which disease has been regarded as the chief causative factor in producing infants with "incapacitating physical deformity or mental deficiency" as referred to in Section 2 of our policy statement.

Recently, a leading pharmaceutical company has produced an immunizing agent which if given to mothers who are RH negative will protect them from future hazards of maternal and infant blood incompatibility.

It has been a pleasure to appear before the Commission at this public hearing. I thank you for the privilege of appearing for The Medical Society of New Jersey.

ASSEMBLYMAN CRANE: Thank you, Doctor. Any questions of this witness? [No response.] Thank you, Doctor, very much.

Dr. Goldfield, New Jersey Department of Health, please.
[No response.]

Dr. Grace Tarrant, please.

D R. G R A C E T A R R A N T: Assemblyman Crane and gentlemen of the Committee: My professional name is Grace Tarrant. I am a graduate of the New York University Medical School. I interned following my graduation at Bellevue Medical Center

on the medical service for one year. Following that, I joined my husband who was in the Medical Corps of the Air Force in New Mexico and there I practiced for one year in general practice. After his stay in the service, we returned and we both went back in residency training. My residency training was at the Roosevelt Hospital in New York in radiology. I am a Board Radiologist. I am on the staff at St. Peter's Hospital in New Brunswick.

I come here this morning to speak as a physician, as a mother of three children, one of which is adopted, two of which are my natural children, and as a woman.

As a physician, first, I think when we talk about the problem of abortion, there are several vital questions we just have to answer. First of all, is this a safe procedure? Secondly, is it an easy procedure? Third, is it always effective? And fourth, what are the indications?

I think these questions have been touched on by many of the preceding physicians. I would like to give you my thoughts on them.

Is it safe? Well, to begin with, it is not a simple procedure. It is complicated by the fact that general anesthesia is used in the procedure and so you have an additional complicating factor. You have the complications of general anesthesia, including the possibility of death from general anesthesia - certainly something that no surgeon thinks lightly of and certainly when a surgeon does employ general anesthesia, he has a good medical reason for doing it. So it is not necessarily a safe procedure. I think all physicians will agree to this.

Is it an easy procedure? No, it is not an easy procedure. It has been described as an easy procedure. I have heard the description that it is only a ten-minute procedure. This I have not found true in my personal experience in speaking with gynecologists and obstetricians whose experience is much greater than mine certainly. Most of these, who are competent men, don't feel it is an easy procedure.

Is it always effective? At the present time there is a woman living in the New Brunswick area who is being attended by an obstetrician there. She had German measles in the first trimester and was "aborted" at a very competent medical center, at the Cornell Medical Center in New York. So she was not done by any illegal means. She was not done by incompetent men. So even in the hands of competent men, it cannot always be an effective procedure or is not always an effective procedure. This woman now is seven months pregnant. Now what can they do for this woman?

What are the indications, medical indications, which I am primarily interested in and which I feel I can speak most competently on? I think most people will divide these into maternal and fetal indications.

As far as maternal indications, medical maternal indications, today these are almost non-existent. I use the term "almost" because you should never in medicine use the term "never." There are those cases which need to be considered as individual cases. However, this is a very small percentage and today these are being handled under the present legal system that we have and being handled quite well.

Fetal indications - these have been brought up. The first one - drugs. I think here what you really have in essence is a public health problem. This is where you have to put that problem. It is a very serious problem and must be considered with due consideration and can't be minimized certainly. But it doesn't belong here. It belongs in public health. It should be faced as what it is, a public health problem, and these drugs should be prevented from coming on the market. This is where the problem should be attacked in this situation.

Viruses, I think, have been very well handled by physicians before me. I think all I can say really is that we do have the vaccine for the German measles which is the most concerning one. It is not available today for the general public, but it should not be too long in coming out on the market.

Dr. Ramsey who is at Princeton University, and who has done some excellent work in genetics, feels quite strongly that as soon as there is implantation in the wall of the uterus, you have the potential of life similar or exactly the same truly as that of the fetus at birth or in an adult at 21 and therefore should have the same dignity or be treated with the same dignity as any other human being. I don't mean in any way to minimize the tremendous tragedies that do occur and the great hardships that families are under in having a handicapped child born to them and having to live with this child. However, so far this morning, I think it has been of interest that the only concern we have had is for the parents

and for the other living children in the family and not one voice has been raised for the right of that unborn child. No one asks that unborn child: Do you mind being born blind? Do you mind being born deaf? We have no right to decide for someone else in any other field and it just doesn't make sense to me that we are completely ignoring this life.

Dr. Ramsey carries the point a little further and says, since we are more or less playing a guessing game and since we don't know which fetus will be damaged and which fetus will be normal - he says, why not, if we are going to be reasonable about this, wait until they are born. If you don't mind murdering a fetus, why then should you object to waiting until that child is born, separate the defective ones from the normal ones and then murder the defective ones and let the normal ones live. But why should you murder all, both defective and normal.

The point was brought out this morning that we are seeing tremendous anxieties being created in our young teenage girls who are not married who are finding that they are pregnant. Here again, I have tremendous sympathy for these girls and for their parents. I don't mean to minimize the problem that they have. But here again, I think this problem must be handled or should be handled in a way other than murder. Girls that do decide to carry their pregnancy on through and then deliver the child and give them up for adoption, undergo tremendous counselling and help and if we are lacking in this for our teenagers - apparently we have a new problem that is being presented to us - is murdering of the fetus the answer to this

problem? I don't think so. I think we will create a great many more problems in these young girls.

I am engaged in a sex education program at the present time and girls and boys of all ages are longing for help along these lines. They need it desperately. But they need it before the problem and if the problem arises, then they need tremendous counselling and support and help after it. But to compound the error that they have made by making them part of a murder is a rather serious problem that we are going to give these girls and I think we are going to give them a tremendous psychiatric problem. In females that have been aborted, there are many psychiatric problems that arise and it is quite interesting that there is a fairly large percentage that will break down at the time that they should have delivered their child.

I have, of course, a very personal reason for interest in this situation having an adopted child. If my son's natural mother had felt that he was too much of an inconvenience psychiatrically or whatever she wished to call it, and the laws were liberal enough so that she could have killed my son, this is just intolerable to my way of thinking. And this is a very beautiful life I have now that has enriched my life and we just must think of this child as well and must give this life its rights and privileges.

ASSEMBLYMAN CRANE: Are you finished, Doctor?

DR. TARRANT: Yes.

ASSEMBLYMAN CRANE: Doctor, surely you are not suggesting seriously - I know you are not - that we wait until the children

are born and then murder the ones that have defects and keep the best, in other words, like a litter of cattle or something.

DR. TARRANT: Absolutely not. No, I just say what Dr. Ramsey was pointing out is that ---

ASSEMBLYMAN CRANE: What about the cases we hear about of rape and incest and mentally deficient people and things of this sort. What is your recommendation in cases like that, that the children be born in any event?

DR. TARRANT: Yes, I think they certainly should. Here again, I think this is an area that hasn't been handled properly in the past. Here again, I think it is a rather sad thing when these girls have had this problem. They have to handle it without any real preparation before. But I think here we need more psychiatric help for these girls, more counselling for these girls, more supportive help. I don't think aborting them is going to help. Then, of course, these girls can undergo a D and C in the first five days legally in our State following the actual assault.

ASSEMBLYMAN CRANE: Well, not being a lawyer, I couldn't comment on that provision of the law. But you would then be opposed to abortion under any circumstance?

DR. TARRANT: Yes, medically or otherwise.

ASSEMBLYMAN CRANE: Even to protect the life of the mother?

DR. TARRANT: Well, this is where I qualify my statement. I said "maternal indications" or "maternal complications or difficulties" which are almost nonexistent in our present-day

status of medicine.

ASSEMBLYMAN CRANE: Do you get involved in these matters as a physician?

DR. TARRANT: In my present practice, no.

ASSEMBLYMAN CRANE: You do or you do not?

DR. TARRANT: I do not.

ASSEMBLYMAN CRANE: You are currently a radiologist?

DR. TARRANT: Yes.

ASSEMBLYMAN CRANE: Is that a specialty in the medical profession?

DR. TARRANT: Yes, it is.

ASSEMBLYMAN CRANE: I see. Does anyone else have a question? Rabbi?

RABBI SCHWARTZ: Again referring back to possibilities of a defective child, this is the second time this morning that we heard the comment somewhat to the effect - How can we answer for the fetus? Someone has to speak for the fetus. Or - how can we by murdering the fetus say that we are speaking for the child because if we could speak to him and say, "Do you mind being born blind - do you mind being born deaf," - are you answering also for that child by saying, yes, and allowing the child to be brought into the world blind and deaf? Perhaps if the child could speak he might give another answer.

DR. TARRANT: All I am saying is that we are not even considering this aspect of it at all. We are not giving him the privilege even of saying what he wants at all. We are not considering the anguish that he goes through. We are considering the anguish of the parents.

RABBI SCHWARTZ: Why is that? I thought we would give him the same dignity as you would someone who was born and someone who was 21, the same dignity and respect you mentioned. Why wouldn't we give him the same dignity?

DR. TARRANT: Well, we are taking his life before he has a chance even.

RABBI SCHWARTZ: But we are answering for him.

DR. TARRANT: Yes, you are answering for him. You are not giving him the right to answer for himself.

RABBI SCHWARTZ: One who would take the opposite approach would also be answering by saying that that person would prefer to be born blind and deaf rather than not being born.

DR. TARRANT: No. I am just saying you should give him the right. I don't know what he would want. I cannot think for another human being.

ASSEMBLYMAN CRANE: Unfortunately that is the position we are in here as legislators, trying to think for other human beings throughout the State. That is part of the dilemma we are in.

Are there any further questions of the panel? [No response.] Thank you, Doctor.

DR. TARRANT: You are very welcome.

ASSEMBLYMAN CRANE: I think we will try to hear one more witness and then adjourn for lunch.

Dr. Goldfield, I understand, is here now.

D R. M A R T I N G O L D F I E L D: I am Dr. Martin Goldfield. I am the Director of the Division of Laboratories

of the State Health Department here. I am Associate Clinical Professor of Infectious Disease at the New Jersey College of Medicine and Visiting Professor of Epidemiology at the same medical school.

Although I have no prepared statement, I would like to make some remarks in this regard.

First of all, let us say that there has been a great deal of emotionalism shown here today and this is natural. There are very strong moral convictions that people hold pro and con. I would like to make one point, however. Those who spoke with great emotion about murdering a fetus, I respect greatly. Nevertheless, this is not the issue here. The issue is not whether government is condoning or permitting deaths of fetus or of making a moral judgment. The issue is whether the moral judgments, the ethical feelings that certain people have about the situation of abortion, really should have the force of law. The question then is not whether government is requiring or permitting something, the question is whether government continues to have restrictive laws which require everyone to follow certain moral precepts held by only one group. This is the restrictive and constraining influence and this is the danger.

Actually it would be far better in compliance with our democratic traditions that such moral judgments be made by the individual and that government permit such judgments to be made by the individual.

Now with that off my chest, I would like to say that Dr. Cooper admirably outlined some of the problems regarding

Rubella in pregnancy. I would like to amplify on these because I think he did not completely clear up certain points.

First, there has been the implication that vaccine is on the horizon and will solve the problems. Since I have been offered by one of the major pharmaceutical companies unlimited supplies of the vaccine to do certain large-scale trials of its efficacy in New Jersey, I believe I know the data regarding the vaccine trials that have gone on throughout the world as up to date as one can get.

Let me point out that there is a very serious problem with every one of the present Rubella vaccines that has been under test and that is that it causes overt Rubella, overt disease, in a high percentage of post-pubertal females that are given the vaccine. In other words, it causes disease, mild disease. Now this has been a very important thing because if it causes disease, it may very well cause congenital abnormalities as a consequence of congenital infection if it happens to be given to women who are pregnant. We know very well that in a post-pubertal female the Rubella vaccine could be given. A certain percentage of these could be pregnant at the time without knowledge of that pregnancy. As a consequence of this risk, there isn't a single company that is now attempting to develop a Rubella vaccine that can see on the recent horizon the recommendation to give vaccine to post-pubertal females. That means that at best we will have a Rubella vaccine that will be licensed for use in pre-pubertal children and we have a whole generation of women at risk from Rubella and at risk regarding their children so that this does not

solve the problem. We cannot dismiss Rubella as something that is going to be taken care of in the near future.

Now Dr. Cooper did discuss the hazards of Rubella in pregnancy. He also mentioned something which it seems laymen are not completely familiar with, the very great difficulty in diagnosing German measles. As someone who has been teaching infectious disease for many years let me tell you that the great majority of diagnoses of German measles made in a doctor's office have been in error in prior years. We now know that this is the case.

The question then is: How do we diagnose Rubella in a pregnant female? And my laboratory, of course, is the main laboratory in the State of New Jersey to make such diagnostic tests of Rubella - our virus laboratory. It happens to be unfortunate that if a woman learns she is pregnant more than a week after onset of Rubella, which is not infrequently the case, we are unable by any means that are now known to be able to use laboratory techniques to diagnose that case. She may already have maximal antibody titers so that the tests will show only the fact that she has been infected at some time in the past, which means that laboratory diagnostic procedures alone when a woman is pregnant and has had Rubella are not sufficient to indicate the cases of possible congenital Rubella.

I would like, therefore, to point out that not only must consideration be given to liberalizing abortion laws, but coupled with that must be certain constructive legislation as well, such as the following: It would be very simple to institute mandatory pre-marital Rubella diagnostic testing.

There are 50,000 marriages in New Jersey per year. We could easily test these women for the presence or absence of antibody to Rubella. We would find approximately 10 per cent of these that would show no evidence of prior Rubella infection, about 5,000 per year. These could receive careful wording from the laboratory that they are still susceptible to Rubella, that at the first sign of a missed period, they should report to their physician and physicians could be alerted to these groups and they would be alerted to draw a blood specimen at that early date and then later in the course of pregnancy at the end of the first trimester to draw a second specimen. In that way we could detect in that 10 per cent that are susceptible to Rubella not only those who have an overt recognizable rash, but those who have totally an apparent infection that Dr. Cooper discussed as well. So much for Rubella - and this represents then a constructive addition to our attempts to prevent children born of abnormalities due to Rubella.

But there are other things. For example, we now know of a condition, maternal phenylketonuria, where elevated phenyl-anilin levels in the mother may cause damage to the fetus, even though the fetus may not, itself, when born develop PKU. This could easily be incorporated in such pre-marital testing. We could easily detect at that time in the 50,000 marriages and the blood specimens obtained therefrom - we could easily detect by PKU testing which mothers may be at risk. There is good reason to believe that careful dietary control during pregnancy may mitigate the brain damage done by this metabolic abnormality. But in any case, there would be forewarning.

Lastly, I would like to make a plea that sometimes one of the greatest services that we can do is to define the problem more clearly as we perform a service. There is great need in this program that I have just very briefly outlined to really study the risks where we do not know the magnitude of the risks at present. For example, although we know that there is a risk of developing congenital abnormalities following totally an apparent Rubella infection, we don't know whether that risk is equal to that of a woman who has overt Rubella or not or whether it is less. We know that giving gamma globulin to a woman exposed in pregnancy to Rubella does not prevent congenital abnormalities. We don't know, however, whether it reduces the risk or not.

In the service program I have pointed out if ample opportunity is left for support of studies such as this, then we would learn over the years a great deal more about the risks involved and we would be able to more effectively serve the interest of the public. Thank you.

ASSEMBLYMAN CRANE: Thank you, Doctor. It is very interesting testimony, particularly your recommendation for pre-marital Rubella and PKU tests. That would be a simple legislative amendment to the existing law, I believe.

DR. GOLDFIELD: Yes, it would. But remember that in itself is not too useful unless we also couple it with a careful followup and careful admonitions about the 10 per cent estimated that would be susceptible to Rubella at that time.

ASSEMBLYMAN CRANE: Yes. Doctor, of your knowledge are abortions being performed in New Jersey hospitals now for Rubella

indications?

DR. GOLDFIELD: During this last year - during this last Rubella season, I was getting approximately six to seven calls regarding pregnancy and Rubella daily. A very high proportion of these that proved to be Rubella -- and as a matter of fact, only about half did because it was our misfortune during this past year to have two epidemics coincide, one a disease which is not too familiar to many practicing physicians known as erythema infectiosum or Fifth disease and, two, Rubella. Many of the women had Fifth disease and suffered no significant risk to the fetus while others had Rubella. Of those who had Rubella, a very high proportion had abortions and a good many of them in New Jersey hospitals. What concerns me is that where we could show definite laboratory evidence of Rubella, abortions were done in many New Jersey hospitals. Where because the first blood specimen was obtained too late and current Rubella infection could not be documented, a good many of the hospitals refused to permit abortions and these women sought other means. But a great many were done, sir.

ASSEMBLYMAN CRANE: Thank you. Any further questions of the witness? [No response.]

Thank you, Doctor.

We have a few more witnesses that must testify before we break for lunch.

Dr. Cross.

D R. R I C H A R D J. C R O S S: Mr. Chairman and members of the Commission, I am grateful to you for the opportunity to appear before you.

My name is Dr. Richard J. Cross. I am a Professor of Medicine at Rutgers Medical School, but I would like to make it quite clear at the outset that I speak as an individual and make no attempt to speak for my institution.

As a physician, I take great interest in medical aspects of abortion, but I subscribe to the view that the basic problem is not a medical one. It is a matter of balancing the rights of two individuals, the fetus and the mother, and medical science cannot provide clear-cut solutions to an ethical problem of that sort.

While rights cannot be objectively measured or precisely evaluated, valid comparisons are possible if one considers possible conflicts of interest and seeks to resolve them by the use of reason, logic and common sense. For example, there are those who look on human rights as an all-or-nothing matter and who claim that, at the moment of conception, an ovum is instantaneously invested with rights equal in every respect to those of any other human being. But I submit that this is a legal fiction which is totally unacceptable to most intelligent Americans. If one poses a situation in which the life of either the newly-fertilized ovum or the mother must be sacrificed, most people will unhesitatingly preserve the mother. I suggest further that most Americans subscribe to the belief that the rights of the fetus gradually grow throughout pregnancy. This impression is based not on any legal doctrine but on the fact that people are clearly more concerned with the rights of a fetus at eight months than those of one at eight weeks. The failure of our laws to take into account these shifting values

is perhaps in part responsible for the tragedy of our present situation.

The mother's right to life is generally conceded to have top priority. Her right to health is understandably ranked somewhat lower, while her right to the pursuit of happiness is often disregarded since it is vague and impossible to define clearly. Yet this is one of the rights our forefathers died for, and despite its vagueness there are many circumstances under which this right is interfered with by the bearing of a baby. We all know of pregnant women in this category -- the terrified teen-ager, the discouraged mother of more children than she can care for, the anguished grandmother horrified at the prospect of yet another bout of child-bearing and child-raising. Every year hundreds of thousands of these women make the difficult, individualized decision that their right to the pursuit of happiness is more important than the right to life of the unwanted parasite within their womb. Knowingly risking their lives, fully aware of the agony they will suffer, these women courageously scrape together their savings and seek out an illegal abortionist for the only remedy permitted them by the restrictive laws of most states. Hundreds of thousands more would follow them if the procedure were made more easy and safe.

Motherhood as an institution is widely honored in this country. When embarked upon willingly and enthusiastically, childbearing should be one of the most magnificent and soul-satisfying experiences of a woman's life. But for the woman

who is trapped by an unwanted pregnancy, this magnificent experience becomes transformed into a horrible ordeal. Something is surely wrong when the laws of our land not only permit, but even contribute, to this sort of transformation.

I suggest that abortion laws should take into account the previously-mentioned changes in the rights of the fetus as it develops. No law can precisely match the gradual and continuous growth of rights, but certain broad categories could be easily established. For example, I suggest that in the last three months of pregnancy the guiding principles of our present abortion laws should apply, namely that the life of the fetus should not be taken unless this is necessary in order to preserve the life of the mother. Fortunately, this is a decision which will not often need to be made, since at this stage of pregnancy it is usually possible to save both lives. During the middle trimester, I advocate principles similar to those proposed by the American Law Institute, permitting interruption of the pregnancy if either the life or health of the mother is clearly threatened. I believe that the rights of the fetus during the first three months of its existence are so unimportant as not to require protection by the State. Whether or not to have an abortion at this stage should be a decision made by the mother with the advice and consent of her physician, as is the case with any elective procedure. It goes without saying that no woman should be forced to have an abortion against her will and no doctor should be pressured into performing one against his better judgment.

Such a change in our laws would permit the termination of

many unwanted pregnancies in a safe, clean, inexpensive and relatively painless fashion while at the same time safeguarding the developing rights of the older fetus.

I thank you again for the privilege of presenting my ideas to you.

ASSEMBLYMAN CRANE: Thank you, Doctor. Any questions of this witness?

REV. DENTICI: Doctor, where lies the difference between the rights of the older fetus, say after three months, and prior to that? Why the changeover that the fetus after three months would have these rights and prior to that, you say negligible rights?

DR. CROSS: To me, it seems that this is merely because he is closer to being actually an individual capable of separate existence. And the closer he gets to that point, the more nearly he is entitled to the rights of that new-born baby.

REV. DENTICI: Would it be more just a question of form than of separate existence because when the child is born and has separate existence, he is still very dependent?

DR. CROSS: But he is no longer any way near as dependent as he is while he is within the uterus. At this point, he is completely dependent on another human being for every phase of his existence. Once he is born, he can be taken care of by anybody willing to do so.

REV. DENTICI: But he would be dependent. Wouldn't you say he would be almost completely dependent after birth?

DR. CROSS: To a certain extent we are all dependent on others.

REV. DENTICI: This is why I ask what is the difference between the rights after three months and, say, a couple of days before three months? Where is the basis for it? It is just a matter of form.

DR. CROSS: To me, it is obviously not a jump at the end of three months; it is a continuous change throughout pregnancy until at the time of birth the fetus attains the rights of a new-born baby.

REV. DENTICI: This fetus that is developing you would characterize as human life?

DR. CROSS: It is certainly human life.

REV. DENTICI: A human individual?

DR. CROSS: Certainly an individual.

REV. DENTICI: Human?

DR. CROSS: Yes.

REV. DENTICI: O.K. Thank you.

ASSEMBLYMAN CRANE: Doctor, if I may paraphrase your remarks, I would say then that at the moment of conception, this potential human being has no rights at all according to your analysis and he gradually ascends in his rights until at the time of birth he has full human rights.

DR. CROSS: Correct.

ASSEMBLYMAN CRANE: Thank you. Any other questions?

[No response.] Thank you, Doctor.

Is Dr. Hackney here, please? I introduced you as Dr. Hackney; it is not Dr. Hackney.

MR. HACKNEY: I am not a medical doctor, no.

ASSEMBLYMAN CRANE: Will you introduce yourself

and give your qualifications.

S H E L D O N H A C K N E Y: I am Sheldon Hackney. I am the President of the Mercer County Chapter of the American Civil Liberties Union of New Jersey and I would like to speak in behalf of the local chapter. The position of the State Chapter will be developed before you by Dr. Dorothy Naiman at your hearings later in Newark. I plan to be very brief. The points to which I will speak are points about which I am not an expert any more than any other citizen is an expert.

The American Civil Liberties Union believes that all criminal sanctions should be removed from the area of abortion and that the laws and standards governing this medical procedure be the same as those which govern the performance of all medical procedures. There are at least four bases for thinking that the existing legislation in this area is unconstitutional.

In the first place, it denies to women in lower economic groups the equal protection of the laws guaranteed by the Fourteenth Amendment because abortions are now available to the rich but not to the poor.

Secondly, it infringes upon the privacy of the marital relationship and upon the privacy of the relationship between the doctor and his patient.

In the third place, it places doctors sometimes in the position of being legally prohibited from performing a procedure that professional standards of practice would require them to perform.

In the last place, it deprives women of the right to decide how their bodies are to be used and thus in reality deprives

them of liberty without due process of law.

The civil liberties issues involved in the whole area of abortion should not be thought of solely in terms of these lofty constitutional principles, however. There are also practical considerations which call for the abolition of criminal penalties for medical abortions. The lesson of American democracy, as I read it anyway, is that the best way to insure compliance with laws is to insure that the laws are generally acceptable and approved of and thought to be good and proper by the members of the community who are to live under those laws. Our experience with Prohibition was a dramatic example of the harmful effects of trying to enforce a moral code that did not have the general approbation of society. The same situation exists with regard to abortion laws. That there may be serious moral questions involved in the decision of whether or not to perform an abortion, no thoughtful person would deny. But in the absence of evidence that society in general is harmed by the performance of medical abortions, criminal sanctions should be removed from this area and decisions with regard to abortions should be left to individual conscience and the ethical standards of the medical profession.

ASSEMBLYMAN CRANE: Thank you, Doctor. I would take it from your statement that you would have no objection to having severe penalties for those non-licensed practitioners performing abortions.

MR. HACKNEY: Absolutely none.

ASSEMBLYMAN CRANE: Any questions of this witness [No response.] Thank you.

Mrs. Goodman, please.

J O A N G O O D M A N: I wish to thank the Commission for its indulgence.

My name is Joan Goodman. I am married and the mother of two small children. I am now, and have been, a practicing Roman Catholic since infancy. My bachelor's and master's degrees were both earned at Catholic institutions. I do not come here as an expert either medically or theologically, but I think in all truth I do represent a number of Catholics who hesitate to come here as I am here today to speak in favor of liberalizing the abortion laws of New Jersey.

There are two main points I wish to make. First, in recent years I have come to believe that abortion is justified in certain cases. Second, the laws should be liberalized so that all people in this pluralistic society can be free to exercise their consciences in this regard. To continue making abortion a criminal offense is to remove the little choice that remains, especially for the poor who cannot travel to a legal geographical location or pay for a safe therapeutic or illegal abortion.

Now to elaborate briefly - I think there are several instances when abortions should be permissible, for example, when a pregnancy is the result of rape or incest. No child is willed or desired by either party - the fetus is a biological accident entirely. No woman, especially a very young one, should be forced to use her body for the intimate and demanding task of nurturing and bearing it. Abortion in the case of a mother with, or threatened with, serious mental, emotional

or physical impairment should also be allowed by law. Obviously, this is especially urgent when she has other children to care for. The added stress and strain may well jeopardize the whole family's welfare. A third instance for a legal abortion occurs, in my view, when medical evidence reveals a high probability that a seriously handicapped child will be born, something nature usually takes care of herself.

My church and others say, "Life is sacred." I accept this, but it all depends upon what you mean by human life; to me, more significant than the quantity of life is its quality, especially in view of the current world population problem, which already has consequences in our own country. The facilities in our cities are sadly inadequate to support even present population levels.

Also, charity is supposedly of supreme importance in the Christian ethic. If this is so, alleviating profound human suffering or preventing it may easily outweigh the "right" of a fetus to be left undisturbed to develop into an unwanted born child. I can imagine no greater pain than growing up totally deprived of love and acceptance. The founder and model of Christians, Jesus Christ Himself, often set aside laws to aid fellow human beings in need.

According to Catholic doctrine, as it has been taught me over a number of years, a person is composed of body and soul. Without the soul, there is no human person. But there is no agreement as to when the soul is "infused," as they put it. It has been assumed that it may be at conception, but this is pure speculation. Catholic teaching admits of no justifiable

reasons for abortions at any time in the pregnancy. In all instances it is regarded as killing (though oddly enough, you never hear of Catholics speak of the "death" of a human being when they suffer a spontaneous abortion). I do not regard a fetus before quickening, one incapable of sustaining life on its own, as a human being. There is a vast difference to me between potential and actual development. For those who do look upon abortions as killings, it can be properly asked, "Isn't killing justifiable in certain wars?" The American Catholic bishops in their annual meeting last year were reported as considering the Vietnam War as "morally justifiable." I cannot agree at all, but the killings go on there all the same.

I believe that Catholics, like other citizens, have the right to influence the formation of laws through parliamentary procedure. But Catholic backroom lobbying clearly seems to have crushed the attempt in New York to liberalize that state's abortion laws. This seems wrong to me, and I hope it does not happen in New Jersey. The bill ought to be given a chance for fair and open discussion in the Legislature if these hearings reveal substantial desire for reform.

Notice that I do not advocate abortion on demand, but I do insist that a mother and her family situation ought to be given due consideration. In my view, present human life takes precedence over possible human life when there is a grave conflict. The greater good is the whole family, not the potential and questionable "good" of adding another member to it who cannot, without grave harm, be easily or happily absorbed into the family

group. I do not say that abortion is good, only justified in certain circumstances. Thank you.

ASSEMBLYMAN CRANE: Thank you, Mrs. Goodman. Any questions of this witness? [No response.] Thank you.

Mrs. Betty Stone, please, and then we will adjourn for lunch.

B E T T Y S T O N E: Assemblyman Crane and members of the Commission: My name is Betty Stone. I am secretary of the New Jersey Friends Council, which is made up of representatives from New Jersey Quaker Meetings. While I can't say that I speak for all New Jersey Quakers because no one Quaker can really speak for another - we are very individualistic - I do have here for the record and I have given it to most of you gentlemen a statement that we made about a year ago on abortion, which is part of this Fact Sheet on Family Planning that we did, and it is here for anybody who wants it, in addition to the Commissioners. This thing has been widely distributed. I should say that nothing is adopted by Quakers unless there is unanimous agreement and there was unanimous agreement on this, although some of you may think that we took what might be described as a forward position on abortion. Also, since this has been out for a whole year, we have had no unfavorable comment by a single Quaker and this is quite astonishing.

Our statement calls abortion, as you will see, a "last resort" method of family planning, but we do say that it must be made as available to the poor as it now is to the rich. The rich, obviously everybody knows can go to Japan, they can

go to Poland, they can go to Porto Rico, they can go to Mexico. But we say unless we make this as available to the poor as it now is to the rich, we are favoring as parents and as the ancestors of future generations in this country the people most unlikely to succeed as parents, the people who are unlucky and the people who are improvident.

Up to 1849 in this country, as I am sure you gentlemen know, abortion was absolutely legal under the common law and it was a right that women had had for centuries; up to the time of quickening, any woman could abort a child or have it aborted. In fact, the Roman Catholic Church, which is now making such a great point about the right of the unborn fetus, up until 1869 continued to teach as they had taught for centuries that early months' abortion was not homicide because the fetus did not have a soul until 40 to 80 days after conception. If it was a boy, it took 40 days for the soul to develop; if it was a girl, it took 80, and they always tended to assume it was a girl.

I have here a letter to the Times by a Professor of Jurisprudence, Cyril Means, which I shall add to the collection, which gives the history of the church's position on this which is very interesting. [Mrs. Stone gives Committee copies of the letter she has just referred to.]

Our Quaker statement goes on to describe recent abortion law reforms in California, Colorado, Florida and North Carolina, but we say, more likely to help the ordinary woman seeking help, a healthy married woman with children - none of all of this medical stuff - no Rubella - no incest - no

rape - none of these extraordinary circumstances - just an ordinary woman who wants an abortion - is the 1967 English law which allows any two doctors to approve the operation where there is "risk to the future well-being of the mother, child, or the other children in the family." And I think experience has proved that if you leave it to the doctors the way we have been doing in the State now, if we leave it to abortion committees in the hospitals, every year you will get fewer and fewer and each hospital vies with the other hospitals to see who can say no the most often.

Our statement goes on to say that deaths from criminal abortions have been a motivating force for reform and apparently the testimony shows this morning nobody really knows how many deaths. But how many do you need? It also gives the address of the Parents Aid Society in Hempstead, Long Island, which is a clinic which gives free abortion advice to anybody who wants it for any reason. As you may know, a New Jersey organization has been formed, the New Jersey Clergymen's Consultation Service on Abortion, to give advice also and I am very pleased to be a member of that Committee.

Let me make just a couple more points. I hope that you members of this Commission will go further than the other states of this country have gone and will recommend that the Legislature follow the English law which allows therapeutic abortion for the general well-being of the family where any two licensed physicians approve. If that would turn us into a "therapeutic abortion mecca" as some people have claimed, I would say, great. We would be doing a real service for the country.

I hope that you won't underestimate public opinion on this issue. I think that I am typical of people of my generation in having been brought up to believe that abortion was just the worst thing in the world. But having read and meditated on the subject like other people, I think I have come quite a way. A few years ago I went to my Quaker sewing group, which is made up of Quakers and others, a group of women whose opinions I very much respect, and I said with great trepidation that I hoped I just wasn't going to shock them terribly but I had come to the conclusion after a great deal of thinking that it was so important that unwanted children should not be born that any woman should have an abortion for any reason or for no reason at all. And these women all turned to me and said, "But, of course; that's so obvious."

On the same point, for many years now I have been active in trying to get members of the Roman Catholic Church to do more about rhythm and in the course of that, I have had to do with a number of priests and nuns and more delightful, charming and just nice people I would never hope to meet. But as a mother and as a wife for a long time, it just seemed to me that when I heard their ideas on marriage, they were so - how do I say it? - so out of this world that they were not something that you have to take into the equation because they are so unrepresentative. For example, a Monsignor told me when a family has had all the children they think they can afford, the father can just move down the hall. I said this to my husband and he said, "Who's down the hall?" And a Nun, the head of Sisters, the head of a large, very important hospital,

said to me very sweetly, "You know, Mrs. Stone, there really wouldn't be any problem at all if women would just be more modest - modest in their dress and modest in their ways."

I think it is just very difficult for people who have adopted celibacy as a way of life to understand what happens in a marriage - how there becomes a sort of indissolubility, what the Bible calls "one flesh." I think the ordinary voter understands this and I don't think you have to worry too much about public opinion in this field.

Another point I have that I want to make which someone else, I think the Civil Liberties man, made is this question of prohibition of abortion being like prohibition of alcohol. It seems to me that it helps organized crime. Organized crime loves to step in and provide what people want that is illegal and it seems to me that people who disapprove of therapeutic abortion encourage organized crime when they seek to prohibit for everybody what they should merely give up for themselves.

There has been much made this morning of therapeutic abortion as "killing" - I think one lady said "murder" - as being at all times morally wrong. But the Catholic Church, as I said, before 1869 taught that in the early months it wasn't killing. And I approve very much of what Dr. Richard Cross said here about "Let's make a distinction between the early months and the later months," just the way the old common law did. It seems to me that is very practical.

Also the Bible teaches that we are not to go by the letter of the law, but by the spirit of the law in love. The Bible also teaches that it is better that a millstone should be hung around

your neck and you be cast in the sea rather than that you offend one of these little ones. And who are the little ones that are being offended? These are the unwanted children. We know what happens to unwanted children. Plenty of studies have been made about them. The Children's Bureau head, Catherine Ottinger, said in Newark about a year ago, "There is a consistent picture. . . the abused child is an unwanted child." Now we know that most unwanted children become wanted, but there is just a large enough number of them that never become wanted and the things that happen to them are unspeakable. They get kicked. They get punched. A friend of mine who works in a Brooklyn hospital told me about a child whose mother held his hand over the fire and burnt it off. And these are not little one inch up to 12 weeks - is that what the man said? -- Well, the doctor sitting next to me said the one-inch fetus has feelings, it has a brain, it has consciousness. But surely it doesn't have as much of a brain - it doesn't have as much feeling - it doesn't have as much consciousness as the child who is being abused and having his bones broken and who feels fear and horror.

Some of these children who are so badly abused - and the number of them go up every single year - some of them retreat into insanity. Some of them express their anger in violence and they may grow up to burn down their block or even assassinate somebody. And I say a complex society such as ours which is accepting life-long responsibility for every person born - we simply cannot afford to have people who are so unhappy and so unwanted.

Finally, I would like to see abortion made more cheap. As I understand it, the average cost for an abortion in New Jersey or in Porto Rico is about \$600 on up. In Poland for many years they have been doing early months abortions in a brief office visit with a "simple suction device" without any cutting or breaking of tissues - far safer than the ordinary D and C procedure. I was talking to a doctor in New York the other day who said that they have this equipment - they have this procedure now in Brooklyn and they have it in Manhattan. It seems to me it might be a very good idea if the Legislature should offer some funds for hospitals to buy this kind of equipment for these new techniques and to offer to help train doctors in this new simpler, cheaper, better way.

I will be very happy to answer any questions.

ASSEMBLYMAN CRANE: Thank you, Mrs. Stone. Does anyone have a question of the witness?

RABBIT SCHWARTZ: If I may, I would like to make a statement. Mrs. Stone, as you know, as a Rabbi I do not have to take a vow of celibacy. However, I do not think it is an accurate statement to say that because a priest or a nun does take such a vow that they are unable to cope with the problems of family life. On the contrary, I have read many convincing articles that this is more beneficial in many areas, perhaps comparing it to the following statement: One doesn't need an abortion to speak in its behalf, do they?

MRS. STONE: Well, of course, there are lots of priests who are very understanding and lots of nuns who are very understanding. But I don't think those are the ones that are making

the policy of the Roman Catholic Church on this issue,
if I may say so.

ASSEMBLYMAN CRANE: Any further questions?

REV. DENTICI: Just a statement - I don't think it is a question of understanding priests or nuns. I think what we are interested in here are some of the things you have already mentioned. You mentioned the fact that under the present law many doctors are not performing abortions and many hospitals are denying them. It could be that they are denying them and not performing them because it is bad medicine.

MRS. STONE: Well, I think you have to look at it this way - if you are an obstetrician and a gynecologist, you have sort of a vested interest in babies. You're bringing them into the world and this is your job and you are doing a wonderful, wonderful thing. I would tend to think that you would get to think, the more the merrier and this is not necessarily the case. Listening to all this medical testimony this morning, I kept thinking, "Boy, you would think it is only a medical problem." It's a social problem. As somebody said, "It's a human rights problem."

I would say also I am really a little shocked there isn't one woman sitting up there with you. It is a woman's problem.

ASSEMBLYMAN CRANE: Mrs. Stone, we have a woman doctor on the Commission. Unfortunately she is recovering from surgery at the moment so she couldn't be here.

MRS. STONE: I am very glad to hear it.

ASSEMBLYMAN CRANE: Any further questions of the witness? [No response.] Thank you, Mrs. Stone.

MRS. STONE: Thank you.

ASSEMBLYMAN CRANE: We will adjourn now for lunch and reconvene at about 1:30.

[Recess for Lunch]

AFTERNOON SESSION

ASSEMBLYMAN CRANE: The hearing will come to order, please.

I will call Donald Goff. Is he here?

D O N A L D H. G O F F: Gentlemen, speaking on behalf of The Correctional Association of New York and as a long-time New Jersey resident, I am most pleased to have this opportunity to present the Association's views and my own personal views on abortion law reform.

For some time now, The Correctional Association has been urging that a more realistic and humane approach be taken toward abortion.

ASSEMBLYMAN CRANE: Will you identify yourself, please, and your profession.

MR. GOFF: I'm sorry. I am Donald Goff, General Secretary of The Correctional Association of New York, and a Sociologist at Rutgers University; I am not, however, speaking on behalf of Rutgers University. I am speaking on behalf of The Correctional Association.

For some time now, The Correctional Association has been urging that a more realistic and humane approach be taken toward abortion. Our position favoring such a more realistic approach is not predicated upon the rights of an individual to terminate any unwanted pregnancy, despite the fact that social agencies are advertising in the subways for foster home placement of many such unwanted children. "Dial-A-Child," "Foster Parents Are Desperately Needed" are signs one constantly sees while riding in the buses or subways in New York City.

Nor is the Association's position predicated solely upon the fact that a pregnant woman stricken with German measles during early pregnancy has a much higher probability of giving birth to a deformed or retarded child. Decisions on these matters should be left to the medical profession and the individual involved.

The Association likewise has not predicated its position solely on the fact that the continuation of a pregnancy might gravely impair the physical or mental health of the mother. We do believe that the State is being overly harsh, and on this matter we would again refer to the medical profession and be guided by professional medical opinion.

Of great concern, both to the Association and to me, is the fact that a pregnancy resulting from rape or incest cannot be terminated legally under the existing law unless it is necessary to preserve the life of the woman. I believe it is cruel and inhuman to require a woman who has been a victim of a rape or a child who has been forced to submit to incestuous intercourse to be further penalized by a statute which prevents an abortion under these circumstances.

Speaking from personal knowledge gained when I was Chief of the Bureau of Correction in this State, I know of instances where 13 and 14 year old girls were impregnated by their father or uncle and conceived. The adult male was sentenced to the prison and the community had its vengeance. But what about the girls? They were bitter and disillusioned, yet were forced to be constantly reminded of the traumatic experience throughout the period of their pregnancy. The

offspring in most instances became charges of the State, and the girls, if they were not already delinquents, moved into a life of promiscuity. Had the State been able to abort them rather than drag them through a nine-month pregnancy and the trauma of giving birth to their father's or uncle's child, there is strong reason to believe that they would less likely have become a liability to the community.

One might postulate that women who become pregnant as a result of being raped and who have the financial means are so distraught that many are forced to seek illegal ways of terminating their pregnancy which cannot be terminated legally unless the life of the mother is in danger.

One has only to examine some of the studies on the "dark number" of criminal abortions, homosexuality, incest, and other offenses that escape being reported to public authorities - the hidden criminality - for support of this postulation. As indicated by Thorsten Sellin and Marvin Wolfgang in their book, The Measurement of Delinquency,* Kirk Meyer concluded after an intensive analysis of available data that for each offense within a given category known to the courts, a percentage exists indicating the ratio of known offenses to the actual number of offenses committed in the community. Mr. Meyer's data indicates that less than 1 per cent of the criminal abortions come to the attention of public authorities.

In 1957, the director of the criminal police of Dusseldorf, Dr. Bernd Wehner, after an analysis of various types of crimes, based on police experience as well as from

*The Measurement of Delinquency by Thorsten Sellin and Marvin E. Wolfgang. Publisher, John Rile & Son, New York, London, Sydney, 1964.

other sources, concluded that the relationship of the number of offenses known to the police to the speculative number of hidden crimes of that same category, would likewise place criminal abortion at the rate of only 1 per cent being known.

In 1958, Dr. C. N. Peijster, a Dutch police official, in a work entitled, The Unknown Crime, ventured the estimate that the ratio was one known abortion to 250 unknown criminal abortions.

Based upon these academic, objective studies, the rate of about 100 unknown criminal abortions for every single known criminal abortion appears realistic.

Further, we are supported in postulating that only about one in every ten forceful rapes becomes public knowledge by being reported to the police. A talk with anyone knowledgeable in the field of crime and law enforcement will quickly reveal the reticence of women who have been forcefully raped to report the offense. Studies of the aforementioned scholars substantiate this and buttress our proposition that only one out of every ten forceful rapes are reported. In New York City which has approximately 1,500 forceful rapes known to the police annually, this would mean about 15,000 actually committed. Based upon the calculation of approximately one out of every fifty forceful rapes resulting in conception, this means that approximately 300 women conceive each year in New York City as a result of being raped.

In the State of New Jersey in 1967, there were 677 rapes reported to the FBI. This would mean that there were approximately 6,770 actual forceful rapes committed, on the same basis of 1 out of every 50 forceful rapes resulting in conception. It is estimated that about 135 women conceived last year from being raped.

I personally know of the case of a single woman who was abducted and forcibly raped by two men. This occurred in another State which has a statute similar to New Jersey. Some two hours after the assault, she wandered onto a road and was picked up by the police who in turn took her immediately to a hospital. Being an intelligent woman she realized that the assault had occurred at the time of ovulation and for a period of some four weeks after the assault went through unbelievable mental turmoil. Coupled with unconscious guilt - she was constantly thinking that somehow she might have prevented the attack - was the apprehension of being pregnant. An extremely reputable Gyn-Ob man, her own gynecologist in fact, who had examined and treated her at the time of the assault, finally determined that she was pregnant. But the law makes no exceptions - she was legally expected to proceed to full term. It is obvious that the doctor, a reputable specialist, recognizing that the second trauma of pregnancy had been added to the trauma of the assault, and realizing that it would be cruel and inhuman to allow this pregnancy to continue, must have performed an abortion at the pleading of this woman, not in the hospital but in his own office. But this is only a partial solution since,

added to the humiliation, guilt and anguish of the original assault and how it might have been prevented, was the guilt over an "illegal operation." This woman was not a criminal but the law made her so. The doctor was not a criminal but the law made him so.

It is extremely distressing to see this woman, who until about a year ago was a successful well-adjusted person, gradually deteriorate psychologically. A combination of the assault, followed by the pregnancy, followed by the "illegal operation," one added to the other, has had a tremendous impact. One can only speculate as to which mental institution she would be in today had she gone full term. One need not speculate, however, about the future life of the mother and of an unwanted child resulting from a rape or incestuous intercourse.

I do not propose the lifting of all bans from abortion. The existing statute is too narrow and should be broadened to allow factors in addition to saving the life of the mother. With proper safeguards we would support lawful abortions when there is danger of a serious impairment of the mother's physical or mental health. We would propose that lawful abortions be permitted when there is grave danger of producing a physically or mentally defective child. We would emphatically propose that lawful abortions be permitted when a pregnancy is the result of rape or incest.

The Association completely supports the proposal of the American Law Institute in its Model Penal Code, Section 230.3, which defines justifiable abortion as:

"A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purpose of this sub-section. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable."

It is highly possible that the enactment of a law similar to that proposed by the American Law Institute would bring about greater willingness on the part of women who are assaulted to report this assault to the police.

May I thank you personally and on behalf of The Correctional Association of New York for this opportunity to present our views on the needs to modify the State abortion statute.

ASSEMBLYMAN CRANE: Thank you, Mr. Goff.

Do any of the Commissioners have any questions of this witness?

REV. DENTICI: Doctor, in this question of rape and incest, do you feel that your institution believes that abortion only will solve the problem of the individual girl raped or involved in incest?

MR. GOFF: In what sense do you mean that?

REV. DENTICI: What else could you do for this girl besides abortion. Could you suggest anything else?

MR. GOFF: Counselling and anything that may be required in view of the actual assault. We do feel very strongly, however, that it is cruel and inhuman to expect a woman to go through full-term when she has been forcibly raped, or when a girl has conceived as a result of relationships

with her father or uncle.

ASSEMBLYMAN CRANE: Any further questions? [No questions.)

Thank you, Mr. Goff, for taking the time out of your busy schedule.

I will call Detective Sergeant Paul Geczy, please.

Will you identify yourself, please.

P A U L G E C Z Y: Yes, sir. I am Detective Sergeant Paul A. Geczy of the Criminal Investigation Section of the New Jersey State Police.

On December 22, 1965, the Criminal Investigation Section of the New Jersey State Police conducted a raid on an apartment building in West New York, N. J. After lengthy and painstaking investigation and surveillances, in which I played a large part, a search warrant was obtained to conduct this raid. The raid was conducted and a search of the apartment did in fact reveal that it was being used to perform abortions.

Arrested as a result of this raid was a then licensed New Jersey physician and four other persons who worked with him. They included a female who dressed and acted the part of a nurse, a driver who made pick-ups and drop-offs of women who had arranged to be aborted, and two males who assisted the doctor in the operations. Arrested as material witnesses were three young women who had just been aborted, one woman who was ready to be aborted, and a young man and woman who were waiting on a street corner for the driver to pick up the woman to take her to the apartment for an abortion. All of five principals had previous arrest records. The doctor had

been arrested in 1963 for an alleged abortion on a 19-year old girl. When she failed to appear in court to testify against him, the complaint was dismissed. This indicates that as early as 1963, this particular doctor was in the abortion business. He was widely known as a doctor who would perform abortions and his clients came from the New York City area, Long Island, and as far away as Massachusetts, Connecticut, Florida, and Ohio. His name and phone number were common knowledge at many colleges.

The above apartment consisted of five rooms and two bathrooms. It was equipped with an operating table, sterilizer, a large supply of syringes, medications, penicillin, anti-biotics, surgical instruments, face masks, caps, gowns, etc. One of the rooms in the apartment was furnished as the "operating room." Another room contained five cots and was used as a "recovery room" for the women after their operations. Another room was used as a waiting room.

In questioning the women apprehended in this raid and those interviewed prior to the raid, it was determined that this group operated in the following fashion: Most of the clients were younger women, single, college students, school teachers, secretaries, librarians, housewives, etc. The name of the doctor had been obtained from other doctors or from friends who had had abortions previously. The pregnant woman would telephone one of the doctor's two offices and make an appointment for an office visit. When she visited the office she was examined and questioned regarding

her pregnancy. For this, she paid five dollars. At the time of the office visit, the doctor would tell the woman that she would receive a phone call the same evening. When she received the phone call, the price of the abortion was discussed and she would receive instructions as to where to go and at what time she would be approached and picked up. These locations would be street corners, parks, bowling alleys, bus stops, etc. Here the woman would be picked up by a man in the car. This man carried a list of the women to be picked up, the time of the pick-up and the location of the pick-up. Sometimes he would have one or two other women in the car. Upon arriving at the apartment, the "nurse" would immediately take the money from the woman in amounts ranging from a minimum of \$600 to \$1500, depending on the length of the pregnancy. She would receive instructions to undress down to her slip and bra and wait in the room with the cots in it. Here she would find other women in various stages of recovery after their operations. She would also see one of the doctor's assistants carry an unconscious woman into the room and place her on one of the cots. When it was her turn for the operation, she would be directed into the "operating room" where there were two men dressed in white jackets, wearing surgeon's face masks and caps. She was given injections of penicillin and anesthesia while on the operating table and when she was rendered unconscious, a D and C (dilation and curettage) was done on her. This usually took approximately 15 to 20 minutes. When she regained consciousness she found herself in the "recovery room." After an hour or two, depending on her condition, she was told to get dressed, was given a

packet of anti-biotics with instructions on their use, was escorted from the building by the driver and returned to the location where she had been picked up.

This group usually performed abortions on Wednesdays, Fridays, and Saturdays, depending on the number of customers they had. From 12 to 15 operations could be scheduled for one day. Using an average of 12 per day at a cost of \$600 each, this would gross \$7200 per day. Operating three days a week would amount to \$21,600. Working 52 weeks a year at this pace would involve a total of \$1,125,200.

Subsequent to the above arrest, this doctor and others were arrested again in North Bergen, New Jersey, on February 2, 1966, in Elizabeth, New Jersey, on May 12, 1966, again in Elizabeth, New Jersey, in September of 1966, and in New York City some months later. On all of these arrests the doctor and his accomplices were freed on bail immediately pending court or grand jury action.

During the later part of 1967 the doctor and one of his accomplices were convicted in Union County Court of abortion and conspiracy and were sentenced to terms of 5-8 years in State Prison. In June of 1968, after 8 days of trial, the defendants entered pleas of guilty and received concurrent terms in State Prison. This was on the State Police raid. The other defendants received suspended State Prison terms and paid fines of \$1,000 and were placed on probation. The remainder of the arrests are still pending against these individuals.

Each time this group was arrested thousands of dollars were confiscated by the police. In the State Police raid a

total of \$4,739 in cash was seized. This operation was well organized, well equipped, staffed, and was efficiently and smoothly run. To investigate and surveil it was extremely difficult because the locations were frequently shifted from apartment buildings to motels, etc, the persons involved were rotated from time to time, the cars used bore fictitious owner's names and addresses. After raids were conducted and arrests made, the defendants made use of every legal maneuver, such as postponements, suppression hearings, appeals, etc. to delay the case from going to trial. In the State Police case the motion to suppress the evidence was granted. This necessitated a representative of the Attorney General's office to appeal this ruling to the New Jersey Supreme Court to have the evidence reinstated.

I have listed several problems of enforcement in these types of cases:

Women involved are extremely reluctant to discuss their experiences and are especially reluctant to testify in court hearings, grand jury or at a criminal trial. (They have had the job done and they want to forget about it as soon as possible.)

Often the women involved are from out of State making it difficult if not impossible to bring them back to testify. In our case it was necessary to obtain court orders in the women's home county and State to legally compel them to come to New Jersey to testify.

Due to long lapses of time from the date of the arrest to the date of trial, the women do not wish to re-live something that occurred three or four years previously. Some of

them are now married, have families, etc.

Women who have had abortions do not freely discuss their experiences and even when discovered by law enforcement people refuse or are reluctant to talk. Often, even with their full cooperation if it can be gained, the woman cannot honestly say where the place was where she had her abortion or who the person was who performed it.

A woman is willing to pay almost any price to get rid of an unwanted pregnancy and, when she is successful, feels satisfied. Therefore, she has no complaints to make to the police or anyone else. She keeps her secret to herself.

Usually the only time an abortion comes to light to the police is when a woman finds herself in a hospital with an infection or with serious hemorrhaging. Then the hospital notifies the police and an investigation ensues. The woman is usually reluctant to talk about it and does not cooperate fully with the investigator. Oftentimes she could not be much help for she cannot identify persons or locations involved.

The crime of abortion is a unique one. It is not like an assault, rape, robbery or other offense. Here you do not have a woman complaining to the police that she has been victimized. The woman who seeks and obtains an abortion goes home a satisfied customer. She wants to forget about it as soon as possible and will not discuss it with the police or anyone else.

ASSEMBLYMAN CRANE: Thank you, Sergeant.

SGT. GECZY: I will be glad to answer any questions you may have.

ASSEMBLYMAN CRANE: The question that immediately

comes to mind is: Is there anything that you feel that the Legislature could do in the way of legislation that would be helpful in stopping this illegal abortion practice?

SGT. GECZY: Well, as I say, it's extremely difficult to detect and apprehend these people and to convict them.

ASSEMBLYMAN CRANE: Well, do you find that the law hampers you, or is it just the difficulty of surveillance and the nature of the crime?

SGT. GECZY: It's the nature of the crime. As I say, a woman who has an abortion doesn't want to talk about it. And the person performing the abortion, certainly is not going to tell you about it.

ASSEMBLYMAN CRANE: Would you have any estimate of the number of illegal abortions performed in the State?

SGT. GECZY: No, I have not.

ASSEMBLYMAN CRANE: Some say 30,000. Have you any idea?

SGT. CECZY: I don't know where they get these figures from.

ASSEMBLYMAN CRANE: It's a difficult figure to estimate, I'm sure.

ASSEMBLYMAN CRANE: Are there any questions of the Detective Sergeant?

REV. SHAW: Would you feel that if abortion were legal in the State of New Jersey with the consent of the mother and the doctor, this would do away with illegal abortions?

SGT. GECZY: I think it would. If there was another means of obtaining these same results, these people would follow that means. I think a woman or a young girl who is pregnant and wants an abortion will go to any extent or do anything to realize what she wants, and would even have an abortion down a back alley or on the kitchen table or anywhere. The main thing is that they are pregnant and they don't want to be pregnant.

ASSEMBLYMAN CRANE: Are there any further questions?
[No questions]. Thank you, Sergeant.

I will call Edwin Palmer, please.

REV. EDWIN H. PALMER: I have other copies of my statement in case any of the Commissioners do not have one.

ASSEMBLYMAN CRANE: I believe we have your statement. Will you identify yourself, please.

DR. PALMER: Mr. Chairman and Members of the Commission: I am Edwin H. Palmer, the Executive Secretary of the Committee on Bible Translation for the New York Bible Society, a pastor in the Christian Reformed Church and a member of the Christian Action Foundation. It is in behalf of this latter organization that I speak concerning the government's role in regulation abortion. The Christian Action Foundation is a national organization with chapters in many states. With me today are the Chairman and Treasurer of the New Jersey Chapter, The Rev. Harry Down and Mr. Richard Brandes. Both of them are available for further information concerning CAF's position on abortion.

The problem of the government's role in abortion is a complex one. I will attempt to approach it from only one aspect, the moral one. And I will do so from my religious convictions, which are, I trust, Biblical and Christian.

The hinge upon which the whole moral reasoning turns is this: Is the fetus a non-human bit of tissue or is it a person, even though in embryonic form? Is it just a fleshy appendage of the mother like an appendix or a finger, or is the fetus a human being?

The answer to that fundamental question will be a major determinant in your seeking a right solution to this relevant problem.

If the fetus is not human but is just so much tissue, then, of course, the problem dissolves. Abortion would be no more a moral issue than is a mastoidectomy, a tonsillectomy, or a trimming of the fingernails and a cutting of the hair.

But if a fetus is a complete, though not fully developed, human, then it is obvious that a deep moral problem is involved in terminating the life. The Christian position is that human life is sacred and that it may be forcibly terminated only in certain circumstances, such as by soldiers in war or police on duty (Romans 13 develops this extensively) or in capital punishment (as Genesis 9 indicates.) Otherwise, wilfully to terminate the image of God, as the Bible calls man, is directly contrary to the revealed will of God.

Thus, for a Christian and I trust for others, too, the problem will turn largely on the question: Is the fetus a person or a non-person?

As to the latter question, it is not in the province of this statement to give a theological grounding of the thesis that human life begins at conception. This is what I certainly believe. We do not want to go into that here at this time, and I am just simply trying to point out that this is the responsibility of anybody who is deciding these issues to decide whether it is a non-person, a bit of tissue, or whether it is really a human being. To do so would require entry into the complex question of the nature and unity of man. It should be noted, however, that a large percentage of Christian theologians - and I not only speaking of Catholic theologians but Protestant theologians - have taught and currently do teach that human life begins at conception. And medical science indicates that many fundamental personal characteristics, such as a person's sex, are determined from the moment of conception.

What we have attempted to do so far is to set forth the moral issue.

One other matter. The government should be extremely cautious when dealing with the possible termination of human life. In cases where life and death are not involved, such as the purchase of a voting machine or the designing of a policeman's uniform, an erroneous judgment is not so significant. But in a question that involves the life and death of a human, great caution must be exercised.

In capital punishment, for example, every precaution is taken to safeguard the life of the accused. He is rightly given every benefit of doubt.- all because Americans are convinced that life is sacred and once taken away can never be restored.

Should not the same caution be exercised in the matter of abortion? Millions of Americans, especially mothers-to-be, are firmly convinced that the life in a mother at the time of pregnancy is not just so much tissue, but is a real person. With such a large percentage of theologians and laymen convinced that a human person is involved in abortion, it would seem that, as in the case of capital punishment, great care should be taken lest the government should be found guilty of authorizing an immoral termination of human life. After all, we are not dealing here with such prosaic questions as the placement of a mailbox or the architectural style of a municipal building. We are dealing with life or death. When there is such overwhelming doubt on this matter, it would seem the better part of wisdom for the government to err on the side of safety. Maybe the fetus is a person. I for one, along with millions of other Americans, believe it is.

For a further explanation of the principles set forth in this statement, I refer you to the testimony of the National Board of the Christian Action Foundation which I have given to you. [See Page 105 A]

I would like to conclude by saying that this is not a testimony against therapeutic abortion that would save a mother's life. And I want to thank you very much for your graciousness in giving me this time.

ASSEMBLYMAN CRANE: Thank you, Reverend Palmer.

Do any of the members have any questions?

REV. DENTICI: The last statement you made, leaving out the idea of therapeutic abortion, would you then say that the right of that fetus to life is more important, supersedes the right relative to the difficult cases of rape and incest and the prospect of a defective child? Is that what you say?

REV. PALMER: Yes. I think that this morning, for example, we have concentrated a great deal upon the right of the mother-to-be, and this is good, and we should and must be concerned about the one who has been raped or is a victim of incest, and we must try to alleviate her condition as much as is possible. But I've heard very little about the right of the fetus. And, again, if the fetus is only a bit of tissue that is not human, then the problem is not there. But if it is, as millions of Americans, theologians and laymen, do believe, a human being, made in the image of God in the sight of Christians, then I think that we should consider the rights of the fetus as well as the rights of the mother.

REV. DENTICI: Should this Committee, in its considerations, then consider the unenforcibility of Prohibition and perhaps the unenforcibility of this abortion law on equal terms?

REV. PALMER: I do not think so. In Prohibition we are dealing with going into a store or into a bar and taking a drink of alcoholic beverages. I do not think that this could be put upon the same level as taking the life of a human being made in the image of God. That's why I say we have to go to the prior question: Is this just a hunk of flesh or is it an immortal human being?

ASSEMBLYMAN JACKMAN: Reverend Palmer, then would you, in your analysis, say that at the moment of conception this is a human being?

REV. PALMER: Yes, I do believe so. Earlier today somebody made a statement that he believes the present day abortion laws ought to be applicable for a fetus three months before birth. Then someone asked, I thought, a rather perceptive question, why do you make an arbitrary dividing line between three months and perhaps a day before or three days before or maybe a month before? And I think that this is the real heart of the issue-that a person has life or doesn't have life, is a human or is not a human, It is not a question of gradation; it's either/or, and I find that if we do not begin at the time of conception then we fall into the problem that I think he fell into of trying to defend the position why I believe at the period of three months before birth it is a human and then immediately prior to that it is not. So I do believe, in answer to your question, that at the time of conception a person is an entity, he is a whole, and it's not something that is suddenly added on later on, but I think at the moment of conception we have a full person even though it is in embryonic stage.

ASSEMBLYMAN CRANE: Reverend Palmer, you said in your testimony that you would perhaps favor abortion to protect the life of the mother. Now here, of course, you are having to choose which human life do you preserve. Why do you choose the mother instead of the fetus?

REV. PALMER: I think that we must remember that in other cases where another life is not concerned we are choosing between the life of one and another person is not involved. It's life or death.

Here, in the case of a mother or a child, we are choosing between the life of one or the other, and whether I act by inaction or take definite steps, such as in abortion, I am going to in any case take the life of one or the other, the mother or the child.

I, for myself, in such a case believe that it is obvious that a mother is more necessary to the welfare of a family unit than a fetus which is only two weeks old, or so, and for that reason, because she is more valuable, obviously, in a home situation, I would spare her life.

ASSEMBLYMAN JACKMAN: I would like to ask you one question, Reverend. You make no difference between rape, you feel that a woman is obligated even though she was forcefully induced to have a child, that she should have no say as to whether she should bear it or not?

REV. PALMER: I believe that in the case of incest or rape, we must be exceptionally kind and considerate of the victim involved. And, therefore, I think we must be concerned, as has been evidenced so much here today, and rightly so, with the rights of the mother. And I think this is the import of your question and I appreciate it.

But I think that on the other hand we must go back and ask, is this a human being, this fetus, or not? If it's not, then there is no problem, but if it is a human being

then I think we must also be concerned about the right of the child or the fetus and I think it has certain inviolable rights, and I would think, frankly, that I would see no difference between a child one day before it's born or one day after it's born and, if we practice abortion, we could, upon the same basis, then go into infanticide because we think that the child is the product of rape or incest.

ASSEMBLYMAN CRANE: Any further questions?

RABBI SCHWARTZ: May I ask, does the group that you represent - are they in favor at all of capital punishment under any circumstance?

REV. PALMER: Yes, they are in favor of capital punishment, believing that the Scriptures such as in Genesis 9 or in Romans 13 specifically say that the powers that be are ordained by God and that God has given them the sword not in vain but to execute judgment against evildoers.

Now this is what the revealed will of God has said, I believe, so that the government may have policemen and soldiers and capital punishment.

RABBI SCHWARTZ: How does that interpret the statement here that life is sacred? Here we are taking a life that has --

REV. PALMER: Yes. Immediately in the Old Testament when it says, "Thou shalt not kill," in the very next chapter, in Exodus, there are prescriptions given by Moses for capital punishment. In other words, the scriptures themselves make a distinction between somebody hatefully, murderously terminating somebody else's life, on the one hand,

and, on the other hand, a government which is exercising judgment and justice.

RABBI SCHWARTZ: In other words, the Bible does present certain conditions and situations whereby taking a life is possible.

REV. PALMER: As I have indicated in my testimony, I think that the Bible is not pacifistic. I think the Bible thoroughly allows the taking of life. And, again, I cite Romans 13, a clear-cut example.

RABBI SCHWARTZ: Reverend Palmer, is there any mention of abortion in the Bible?

REV. PALMER: I do not think so. There is the problem, of course, in the Old Testament of Pharaoh trying to kill the children but not of abortion.

RABBI SCHWARTZ: That's infanticide, of course

ASSEMBLYMAN CRANE: Any further questions?

Thank you.

REV. PALMER: Thank you very much, Mr. Chairman.

Dr. F. Leland Rose, please.

D R. F. L E L A N D R O S E: Honorable Chairman, Mr. William Crane and members of the Legislative Commission, I am Dr. F. Leland Rose and I appear before you as Vice President of the New Jersey Obstetrical and Gynecological Society and Chairman of its Committee to study the New Jersey Statutes on Abortion. I am also the Chief Attending Gynecologist to the Cooper Hospital, Camden, New Jersey.

As obstetricians and gynecologists we are very closely associated with the problems of abortion, which are many. Clarification of the law is one of the most important problems. Our present law is archaic, going back approximately 125 years, and it is very restrictive, if interpreted literally. Attorney General Arthus J. Sills believes that the law is capable of being interpreted quite liberally, and he bases this opinion on the findings of a committee of the Prosecutors' Association. The physician should not be forced to guess what is legal each time he is called upon to make a decision and he should not be placed in the position of a king, able to grant or deny the request of an unfortunate patient. Recently in New Jersey a physician was sued for not performing an abortion on a mother who had rubella, which is German measles, while in California physicians were threatened with the loss of their medical licenses for doing an abortion for the same reason.

When our present law was written, the medical problems were much different than they are today. At that time, the risk in doing an abortion was tremendous, even under the best of medical care available. Now an abortion, if properly done, carries little risk. Formerly therapeutic abortions were performed only because of advanced heart, lung and kidney disease; now these cases no longer need be aborted. Instead, our indications are primarily psychiatric and the prevention of mentally or physically defective children. The latter can often be predicted in advance, and as our knowledge progresses we will become much more accurate.

The Obstetrical and Gynecological Society of New Jersey mailed to each of its members a copy of my Committee's resolutions which recommended that we, as a group, approve the policy adopted by the American Medical Association. This policy, briefly stated, recommended that an abortion be done if the pregnancy threatened the health or life of the mother, if the child might be born with incapacitating physical deformity or mental deficiency, or if the pregnancy was due to proven rape or incest. The policy further stated that two additional well-qualified physicians must examine the patient and agree in writing that the abortion is indicated, and, finally, that the procedure must be done in an accredited hospital. A total of 313 ballots were sent out and the returns showed that 222 voted in favor of the resolution, 35 voted unfavorably, 1 abstained, and only 55 did not respond.

I think the response there to such a questionnaire is tremendous. In view of this response, the resolution was formally presented to the Society at its meeting on April 14, 1968 and was overwhelmingly adopted as the goal of the organization.

The Society believes that this policy should provide a good basis for a new law on abortion in New Jersey. Colorado and North Carolina have passed such laws. However, this will not stop the many criminal abortions, for most of these are not medically indicated. It would, nevertheless, prevent a woman with a good medical reason from being forced to go to an abortionist.

The American College of Obstetricians and Gynecologists,

a national organization having approximately 12,000 members, endorses the same policy but goes one step further and recommends that a therapeutic abortion may be done if the pregnancy threatens the life of the mother or seriously impairs her health. And, "In determining whether or not there is such a risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable."

I fear that no law will stop criminal abortions with their resulting death and invalidism. Passage of a law based on the above policy would be helpful. The only way to prevent criminal abortions is to completely legalize abortions, as Japan and a few other countries have done.

Respectfully submitted.

ASSEMBLYMAN CRANE: Thank you, Doctor.

Do you know whether the states that have passed liberalized abortions laws have had a reduced incidence of criminal abortions?

DR. ROSE: I do not know that. I know they have had a slight increase in legal abortions but I do not know if they have had a decrease in criminal abortions.

ASSEMBLYMAN CRANE: Any questions of the Doctor?

Thank you, Doctor, for coming.

DR. ROSE: Thank you.

ASSEMBLYMAN CRANE: Dr. David Atkin, please.

D R. D A V I D A T K I N: Mr. Chairman and members of the Committee, I must apologize that I have not prepared a written statement. I wasn't informed that this was a

requirement.

ASSEMBLYMAN CRANE: It's not a requirement, Doctor.

DR. ATKIN:

I'm a practicing Pediatrician in Princeton, New Jersey. My background is that I have taken my pediatric residency, internship, chief residency in Boston, Massachusetts; I'm a Fellow of the American Academy of Pediatrics, having had approximately four years of practice and experience.

What should a good abortion law be? I feel it is one that should reflect the doctor's point of view, society's point of view, the welfare of the fetus, the welfare of the mother; and, from the doctor's point of view it should be defined as to what the conditions for abortion should be; it should not reflect generalizations. The doctor should be protected, such as in the case that was stressed by the last person who was testifying here.

There are many conditions, hereditary in nature, such as PKU, which you may or may not know is phenylketonuria, diabetes, hemophilia and mongolism, which are all transmitted hereditarily. For instance, if you have a diabetic child your chances of having a second or third diabetic child are extremely good, in the range of fifty percent.

Phenylketonuria, which is a disease of retardation which may or may not be treated after birth, is in the order of fifty percent.

Hemophilia, for which there is no known cure, is a sex length disease transmitted by the female to her affected male offspring which, if fifty percent of her offspring

are affected, the females will in turn be carriers. There is no known treatment for this disease. The children, although the advances in medicine are progressing all the time, at this point still are limited in their capacities and their life expectancy is still quite short.

Mongolism and other diseases related to chromosomal aberrations are other conditions. There is a rare form of mongolism which one can detect if the mother is a carrier. And if this mother produces a mongoloid child, her chances of producing another one again range in the odds of two to one. And mongolism, as you all know, is a condition which will produce, at best, a very retarded child and at the very least will require institutionalization.

Environmental factors which are very prevalent, which will affect the fetus, include, as has been brought up before in this Committee, thalidomide, as you well know.

X-rays to the mother which will affect chromosomal division can also be very injurious to the growing tissue.

Trauma is another problem that must be gone into. The emotional problems of the girl who gets forcibly raped or, for that matter, the girl who becomes pregnant must be taken into consideration.

The implications of all these problems are for society. What are we to do with the mongol or the horribly retarded child with PKU or the child with hemophilia or other diseases? Are we to just say that they are life and, therefore, this is sacred and then proceed to place them

into institutions for the rest of their life where they can produce nothing but a drain on society, as well as an emotional reaction in the people who are producing these children.

There is the problem of population. The population, as we know, is increasing at the rate of two per cent per year. This is a statistic I read yesterday in the New York Times, and if this goes on and on and on, apparently it is going to reach a point where the capacity of the earth to sustain this amount of life will just not be there, and to inflict on society the unwanted, the battered, the cases of mongolism, PKU, and other forms of diseases that are transmissible is a point that this Commission has to take into consideration when they are deliberating about the revision of the abortion law.

In my experience, the problem comes up very often of the girl who has pregnancy that is caused either by a rape or by some other situation where she is not married. These children oftentimes, if they are unwanted, will have emotional deprivation at the very least. There are laws on the State books for the reporting of battered children. I have no statistical correlation as to the number of battered children that were unwanted, but I am convinced that this is a factor in here. To reiterate what was said in the last discussion before you, it is the poor and the underprivileged that are the ones who suffer in these cases, because they are not able to afford to go out of the State or out of the country for their abortions and are forced to seek care where they can get it, and it is these people who need the most under-

standing and the most help who get the poorest medical care and in many cases suffer the most severe complications, in fact death, while attempting to undergo illegal abortions.

So, in summary, I feel that there are many conditions that need to be explored by this Committee, both organic as well as the emotional problems that call for a re-evaluation of the abortion law in the State.

Thank you.

ASSEMBLYMAN CRANE: Thank you, Doctor. The question arises - is it possible with any accuracy to predict a mongolian child before birth?

DR. ATKIN: As I said, in most of the cases it is not. This is just an aberration where the chromosomal division has gone awry. But there are certain cases where the woman is a carrier of this abnormal chromosome and she produces a mongoloid child at a young age. It is this woman who should have her chromosomes tested and, if she does have this chromosome attached to one of her chromosomes, it is very much like hemophilia and you can predict with great certainty that 50 per cent of her offspring will be mongoloid. There is no way at this point to determine whether the unborn fetus will be mongoloid until it is formed. I am sure these tests will come along, but at the present point - and this represents about five per cent of the cases - you can detect this carrier condition in the mother.

ASSEMBLYMAN CRANE: This could be done before the woman conceives, supposedly?

DR. ATKIN: Yes. However, in the usual cases of these problems, these are young girls who have one pregnancy and they

rapidly go on to have other pregnancies.

ASSEMBLYMAN CRANE: You spoke about abortion in relation to population control. Would you amplify that a bit, please?

DR. ATKIN: My feeling about this is that population in relation to the ability or capacity to sustain it is rapidly reaching a crisis state. This isn't just my opinion. If you read any of the data coming out of China, India, etc., there are thousands of healthy people starving on the streets. If you have conditions that will produce nothing but a child or infant or adult - if you are sure that these people will be non-productive, such as the mongol - and I'll use this as the example - and you know that this person is going to be at the very least a case that will require institutionalization, I feel that the resources of the country or State here should not be obligated to take care of a child that one in some way should not have conceived, or if in the case of the translocation mongol that I was talking about, it was predicted that there was a good chance that this child would be born defective, I feel that this is a waste of the capacity of the State.

ASSEMBLYMAN CRANE: Any questions of this witness? Thank you, Doctor.

I will call Cyril Means, please.

C Y R I L C. M E A N S, J R.: Mr. Chairman,
I have prepared a paper which I have left with the stenographer
and rather than read it, I perhaps could digest it.

ASSEMBLYMAN CRANE: Excuse me, but will you identify
yourself?

MR. MEANS: My name is Cyril C. Means, Jr. I live at
1199 Park Avenue, New York City. I am a member of the bar
and a member of Governor Rockefeller's Commission to Review
New York State's Abortion Laws.

Now I understand that your Commission has a copy of
our printed report to the Governor -

ASSEMBLYMAN CRANE: That is correct.

MR. MEANS: - and if you have any questions concerning
the contents of that report or our recommendations therein,
I shall be glad to answer them, but I have not devoted this
paper to that subject.

Do you wish to ask me any questions at this time?

ASSEMBLYMAN CRANE: Well, will you sort of digest
your statement that you prepared for today and then we will
go into the other.

MR. MEANS: The statement I have prepared for today
relates to a narrow question. You asked me to come as an
expert, and my only field of expertise, I'm afraid, is that
of constitutional law, a subject which I have taught, in
which I have graduate degrees, and in the course of preparing
a major law review article for the Governor's Commission in
New York, I have done a good deal of research and composed an
article on The Law of New York Concerning Abortion and the

Status of the Foetus, between 1664 and 1968. Now this led me also into the laws of certain neighboring States including New Jersey. So what I propose to do in this paper is to handle the history of the New Jersey legislation and cases, and particularly the question which has now arisen as to whether the continued application of such a statute is constitutional.

I should like to treat three separate cases - Eugenic Abortion first, since your case of Gleitman v. Cosgrove raises that; secondly, Abortion of Pregnancy Caused by Rape; and, thirdly, the general cases which is much more typical of simply a woman who, for one reason or another, desires to be aborted.

Now in regard to eugenic abortions, we are dealing principally with the rubella cases. Now there is a recent decision handed down by the Superior Court of San Francisco County only last month, and I shall be glad to see that you get a copy of it, if you wish it, in the case of Dr. Shively, a respected gynecologist in San Francisco, who had performed numerous abortions on women who had suffered from rubella in the first trimester of pregnancy. He had done this under the old California abortion statute which had but one express exception, and that was to preserve the life of the mother. But it would have made no difference if the new California statute had been in effect, because it does not contain any specific exception for eugenic abortion.

Now the Board of State Medical Examiners of California cited Dr. Shively for professional misconduct and imposed

upon him a reprimand for performing these abortions. He then appealed the decision to the Superior Court of the County of San Francisco which, in an opinion rendered on September 24, 1968, held that the Board had acted erroneously and reversed the reprimand, and it went on to specifically state that the women whom Dr. Shively had aborted were entitled to protection under the VIII and XIV Amendments to the Constitution of the United States, because, in the VIII Amendment to which the Judge was referring, is that clause which forbids the imposition of cruel and unusual punishment.

Now the apparent basis for the Judge's decision was a passage in an opinion of the Supreme Court of the United States rendered in 1962 in the case of Robinson v. California, in which our Federal Supreme Court had said that "a law which made a criminal offense of a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Now the disease, of course, which Dr. Shively's patients had contracted was rubella early in pregnancy and, like the common cold, it was contracted involuntarily.

Now another statute of the State of California specifically defines contracting rubella early in pregnancy as a disease, but nevertheless the operation of the California abortion statute, as interpreted by the Board of State Medical Examiners, was, in the view of the court, the equivalent of that, because it confronted the woman in question with three equally cruel and unusual alternatives. I shall state these alternatives in the way that they would occur or confront a woman in

New Jersey, since you are more concerned with her predicament than a California woman, but one could do this in any State with only slight modification.

A woman in New Jersey who has been informed or who knows that she has suffered from rubella in early pregnancy and has been informed of the dangers inherent from this fact could do one of three things. Either she could perform an abortion upon herself without the aid of others. Now this procedure, curiously enough, is completely legal in New Jersey because the common law still applies to the woman herself in this State. This was decided In re Vince in 1949 by the new Supreme Court. However, how legally unpunishable she would be, a self-abortion is a very dangerous proceeding and can cause severe damage to a woman's health. Even a woman who herself was a gynecologist would, without the aid of others, be unable to perform such an abortion upon herself safely.

Secondly, she could submit to an abortion at the hands of others. Now again, under In re Vince and the cases which preceded it, she would not be, herself, guilty of any crime in doing this, assuming, of course, this was done before quickening. But the abortionist would be subject to criminal liability under the New Jersey statute if the New Jersey statute indeed does forbid eugenic abortions in such a case. This is a point that was left open by the plurality opinion of the Supreme Court of New Jersey in Gleitman v. Cosgrove. Only one Justice - Justice Francis - held that such an operation would have been a violation of the penal code. That, as I recall, was a civil case.

Now, in such a case, of course, if Justice Francis' opinion were to be adopted as the law of New Jersey, all the hospitals in New Jersey would be closed to our women seeking eugenic abortions and she would therefore have to resort to an illegal, clandestine abortion, with all the danger of damage to her health and even life which that normally entails.

The third alternative she would have would be to carry the fetus to term, which would involve her in living in the awful uncertainty for over half a year as to whether or not the rubella virus had invaded not only her own person but had reached the fetus and thereby deformed it. After the birth, of course, that uncertainty would disappear but it might well be replaced with the awful fact of a deformed child, which she would have then to rear and care for for the rest of their joint lives.

Now it seems perfectly clear that each of these three alternatives which the woman faces in this case is a cruel and unusual punishment and a far crueler and more unusual punishment than the one day of imprisonment for having a common cold, which the United States Supreme Court referred to in Robinson v. California. And I would, therefore, respectfully submit that there is a virtually overwhelming case to be made for the unconstitutionality of applying the New Jersey or any other general abortion statute to the case of eugenic abortion.

Passing from eugenic abortion to abortions of pregnancies

caused by rape, of course the same reasoning, so far as the eighth amendment and the fourteenth amendment, applies. There is in a rape case, and in a rape case only, an additional amendment of the Constitution which applies and that is the thirteenth amendment, the one which, when adopted in 1865, prohibited throughout the United States slavery or involuntary servitude. Every system of human slavery that has been known to man, including our own, from 1619 to 1865, was characterized by the right of a master to have intercourse, with or without their consent, with his female slaves and to impregnate them at will. When a man today commits rape upon a free woman and impregnates her, he has in effect reduced her to the status of slavery or involuntary servitude which the thirteenth amendment condemns. That this is no flight of fancy is borne out by the fact that there are numerous acts of Congress forbidding the involuntary sexual exploitation of women under the terminology of "white slavery," which, of course, means sexual enslavement irrespective of the woman's color.

Passing now to the third class of women and by far the largest class - these must constitute around 95 per cent of all abortion-seeking women - we then come to the real abortion problem which the arguments made concerning constitutionality in regard to the eugenic abortion case and the rape caused pregnancy case would not cover. It is here, I think, pertinent to inquire what the legislative purpose was of the statutes passed by the State Legislatures in the nineteenth century, when

for the first time they prohibited abortion before quickening. It has to be remembered that prior to 1803 abortion before quickening with the woman's consent was legal throughout the entire common law world. These statutes are innovations; they are not in the scheme of our legal history that stretches over many centuries or any part of our common law tradition. In fact, the common law remained the rule of New Jersey in regard to everybody until 1849 and only then, for the first time, was abortion before quickening made a crime and, as we have seen, only on the part of the abortionist. Even to this day so far as the woman herself is concerned, she is still subject to the common law and, therefore, is guilty of common law abortion only if she either aborts herself or submits to an abortion at the hands of another after quickening.

Now, fortunately, we are not left in the dark as to what the legislative purpose of the Legislature of 1849 was in first enacting the statute, and the changes that have been made in the statute since then have all been quite minor. The old Supreme Court of New Jersey in the case of State v. Murphy, in an opinion written by Chief Justice Green in 1858, only nine years after the statute had been passed, said this:

"The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."

Now it happens that among the Associate Justices who joined in Chief Justice Green's opinion in that case was Daniel Haines who, as Governor of New Jersey, had signed the bill which was the Act of 1849, and, therefore, the court

was exceptionally well-equipped by one who had partaken in the legislative process of passing the law to know what the law meant.

Now this phraseology of the court of 110 years ago might strike us as somewhat odd because today abortion is one of the safest of all operations and it is hard for us to translate ourselves back into the conditions of 110 years ago. But we must do this in order to understand what the Legislatures and the courts meant. At that time, not only abortion but every form of surgery was exceedingly dangerous to human life. Joseph Lister was not to inaugurate antiseptic surgery until 1865, and before that time, any sort of operation was apt to result in infection and in the patient's death. Notwithstanding how infections arose, physicians were incapable of controlling it. In the case of any kind of surgery, therefore, not just abortion, a cautious and conscientious practitioner and a reasonable patient would not resort to it normally unless the alternative was the loss of the patient's life or whatever the condition was that he was being operated on for.

Now the Legislatures did not find it necessary to forbid other kinds of operation except to save the patient's life, because the patient's own caution and the practitioner's conscience were sufficient to deter them. In the case of abortion, special factors came into play which did not influence patients in any other kind of operation. If the fetus had been extra maritally begotten, shame and the fear of social ostracism were potent factors in this heyday of Victorian moralism.

But then, as now, by far the majority of the abortion-seeking women were married women who had been impregnated by their own husbands and simply did not wish additional children.

Now, as we know, the surgical facts of life about abortion and indeed about all other operations have changed vastly since the time of which we speak. In the nineteenth century the rate of maternal death due to abortion, even when conducted in hospitals, was, prior to Lister's time, very high. It was higher than the rate of maternal mortality due to child birth. So it is quite reasonable for a Legislature to say to women, "You shall not run the greater risks, no matter what your motives." But both curves have descended since then and the one which was higher has become lower. Now the rate of maternal mortality due to abortions conducted in hospitals is only about a tenth of the rate of maternal mortality for child birth when delivery has occurred in hospitals. In other words, there came a point in time when the rapidly descending abortion maternal mortality curve intersected and went below the more slowly descending curve of maternal mortality due to child birth, and when that point in time occurred the command of the statutes which previously had been directed to preserving the woman's life and preserving her from the rash decision of undertaking a more dangerous alternative of two alternatives became exactly the reverse. Now the legislatures are commanding women to undertake the more dangerous of the two alternatives. Now it seems to me that a very strong argument could be made here that under the Fourteenth Amendment, in its basic due process clause as

applied to the protection of human life itself, that the statutes as applied to the generality of women have become unconstitutional.

Now I will pass on to two other items and then close. One is the pre-natal injuries cases. Opponents of abortion law liberalization frequently cite these cases for the proposition that they show the law regards the fetus before birth as a human person. However, the Supreme Court of New Jersey has characterized such contentions as a "semantic argument" and "beside the point." In Smith v. Brennan, 31 N.J. 353, 364, it is pointed out that the only difficult question involved is the question of causation. If that can be established, then, of course, the fetus once born has the right to sue for the injuries. A still born fetus has no such right and no such suit can be brought against the tortfeasor even though he was equally injured pre-natally.

I think perhaps the best way to consider these cases is to consider what would happen if a man's or a woman's reproductive organs were irradiated by a ray which did not kill the spermatozoa or the ova but merely mutated the chromosomes in them and that later on the person so irradiated became a parent of an abnormal child, and it would be possible to trace scientifically the abnormality of the child back to the pre-conceptional irradiation of the parent. Now no one would argue that justice did not require the child to be given, because of action in such a case - and I am confident that the Supreme Court of New Jersey would allow recovery - but, as it is, no one could argue that such a decision established that a spermatozoon or an unfertilized ovum was a human person. And

if that is so, then neither do the presently decided pre-natal injuries cases.

Now a great deal of point - and this is my last point - is often made about the question of the sanctity of life. The question regarded as central both by advocates and by opponents of abortion law liberalization is usually couched in the following terms: When does human life begin? There is only one correct answer to this question, and that is, it does not begin. The spermatozoon and the ovum, prior to fertilization, are each of them alive, and each of them is human, because each such spermatozoon and each such ovum can be distinguished, although with a good deal of difficulty - but they can be distinguished from the spermatozoon and ovum of every other species. Each spermatozoon and each ovum prior to fertilization contains 23 chromosomes and each of those chromosomes is alive and is human, in the sense that that chromosome can be distinguished from the chromosomes of every other species. When fertilization occurs, all that happens is that two squads, each consisting of 23 chromosomes, rearrange themselves into a single platoon of 46 chromosomes. They are now in a new pattern on the genetic drill field, but there is no more life present and no more ingredients present after fertilization than there was before.

Now in the case of Griswold v. Connecticut, decided by the U.S. Supreme Court in 1965, it held that married couples have the constitutional right to commit spermatozoicide and ovidicide prior to conception. In In re Vince, the Supreme Court of New Jersey in 1949 held that a woman before quickening

has the right to destroy a conceived embryo. Consequently, it is completely erroneous to say that Anglo-American common law in the statutory tradition required that we regard either the gametes or the early embryo as in possession of a human life which is sacred. The earliest point at which the common law protects the life of the fetus from destruction by everyone is the moment of quickening. And even between quickening and birth, the fetus is not regarded as on a full parity with the mother, although it comes to something close to that. It is only with birth that our legal tradition regards the child as fully entitled to metaphysical and every other kind of equality with persons already born.

I would like to end on one slight and possibly humorous note. Certain opponents of abortion law liberalization are about to publish a book under the title "Abortion is Coming." The ominous terror effected by this touching caption is quite superfluous. Abortion is not coming. It is here. It always has been here. It will finally be superseded only by a virtually free, extremely simple, and foolproof contraceptive.

These are the nondebatable facts of life that will not be budged by punitive legislation however severe. What legislation can do is to convert clandestine, dirty, and dangerous abortions into open, sanitary, and safe abortions by re-legalizing abortion when it is done before quickening.

Mr. Chairman and gentlemen, thank you very much.

ASSEMBLYMAN CRANE: Thank you. Are there any questions of this witness? [No questions].

Thank you for coming.

Dr. Boonim. Is Dr. Boonim here? I understand he has left.

Has Dr. Combs left also? (No response).

The gentleman here, do you care to speak? You have been waiting patiently all day. Will you identify yourself please, sir.

R E V. D A V I D M E L L O N: I am Rev. David D. Mellon, Executive Director of the Council of Churches of Greater Trenton - which goes to prove that there is no graft on this Committee. I know three of the members and I have been sitting here all day waiting.

ASSEMBLYMAN CRANE: Sorry about that.

REV. MELLON: The Council of Churches of Greater Trenton has approximately 60 member churches and perhaps thirty thousand or more constituents within these churches. It is essentially a Protestant organization. All of this, however, is to say that I don't pretend to speak for any one of these people, let alone any sub-group within the organization, because one of the perhaps unfortunate tenets of Protestantism is that everybody speaks for themselves. So that is exactly what I am doing. However, I think there will be elements in my testimony which would reflect the thinking of perhaps other groups of Protestants.

For centuries, state laws in the United States have generally made abortion a crime except where necessary to save a woman's life. The ban is enforced by religious beliefs, medical ethics, fear of social scandal. Yet it is flouted throughout the country in the same pattern, though not in the same numbers, as Prohibition was decades ago.

Written by men, anti-abortion laws cannot quell the desperation of women for whom a particular pregnancy is a hateful, foreign object. At their time of despair, women agree with Author Marya Mannes, who reviles such laws as the work of "the inseminators, not the bearers."

How women react to unwanted pregnancy is the most crucial and least acknowledged issue in the current debate over U. S. abortion laws. Each year an estimated 25 million legal abortions occur throughout the world, versus 120 million live births. The fact is that women have always practiced abortion, defying all laws or taboos against it, including the death penalty which still exists in Pakistan. In my opinion it is a male theory or unconscious demand that women feel deep guilt after abortion. In fact, I believe that most women react with a feeling of great relief. And I want to point out that, in my opinion, there are not enough women on this Commission reflecting what to me is important, the women's point of view, although I am sure that the gentlemen on the Commission are quite competent and adequate in these areas.

How many women have illegal abortions rather than suffer the far-reaching effects of unwanted pregnancy? Our estimates range from 200,000 to a million and a half a year in the United States. Of course, no one records illegal abortions and all statistics are extrapolated from shaky sample studies, going as far back as Germany in the 1920's.

As for deaths resulting from abortions, which are better recorded, the annual toll is probably about 1,000. Of course, no one can accurately add up the number of the United States

women who go to Puerto Rico, Japan, and other places where abortions are more easily , if expensively, obtained.

All the polls - or perhaps that's too broad a statement - some polls show that Americans heavily favor reform. Of 40,089 U. S. physicians who answered a survey by Modern Medicine in the spring of 1966, 87 per cent favored liberalizing abortion laws, including 49 per cent of the Catholics.

According to the National Opinion Research Center, 71 per cent of Americans favor legal abortion if the woman's health is in danger, 56 per cent in rape cases, and 55 per cent if there is a strong chance the baby may have a serious defect.

No legal system has ever regarded abortion as murder. In medical eyes, the fetus is usually incapable of independent life before 20 weeks, thus presenting no murder issue in abortion. Social laws are necessary for the very reason that abortion is not homicide.

A political system cannot make moral judgments, and I question the morality of putting legal restraints on abortions. The system itself can only maintain external conditions of justice within which the individual is free to function.

Now today we have heard a lot or have had a lot of information from medical persons, some points of view of law, and these persons can speak with scientific authority, refer to specific structures and tests, and what have you. I think perhaps the real question here has to do with religion and, unfortunately, when we get into a religious area we move very quickly into feelings and emotions and

one's tradition and one's heritage and the teachings of one's church, all of which are very difficult to put on some kind of scale or to define scientifically.

I have a sneaking feeling that if the churches could ever concur on a procedure in this area, many of the others who testified would fall into line. What I am saying is that behind much of the positions that we take is our religious conscience, regardless of how it is developed.

I would like to quote Rev. Dr. Charles West who is Professor of Christian Ethics at Princeton Theological Seminary. He says, "The present abortion laws are too far removed from reality. The law is clumsy and cannot be enforced. So many abortions are performed in defiance of the law that it makes it a mockery. In a situation where abortion becomes a question, a serious moral dilemma has already arisen." He goes on to say, "There may be no sinless answer. Bringing a child into the world is not something that just happens. It happens by human choice. There may be situations where it is a woman's responsibility not to have a child." Some of the examples which he states and which I add to are these:

A woman threatened with disability so that she may not be able to care for a child. Now this is kind of beyond the big three reasons that we hear from the AMA and other groups. Or a second possibility is the child who is likely to be seriously deformed so that it will never be able to carry on an independent existence. This concurs with those positions.

A woman who is demonstrably unable to care for a

child. And I have been in the juvenile court locally and part of our responsibility has to do with juvenile work, and I know that there are women who come in there almost every day who just cannot function as mother but yet may have three and four and five children, and the Judge throws up his hands and everybody else throws up their hands really not knowing what to do.

Another example would be a home where poverty is so acute that the child must literally fight with its own brothers and sisters for food and for life.

A situation where the mother is so psychologically oriented against the child that she will always reject it.

This kind of list could be magnified, I'm sure if we wanted to sit around and talk about it for a while.

Now I could say a lot about theology and morality and ethics and, as others have said, there are millions of Christians who say one thing and support a retaining status quo. Of course, there are millions in the other direction who feel that there needs to be a change. I think the key point here that we who practice religion and who are professionals in this area need to always remember is that we are living in a pluralistic society. Those who oppose abortion for any reason should not have one or perform one. However, these reasons and views should not be forced on society. I think ultimately those of us who speak in the name of religious institutions or in the name of Christ or whatever our own orientation is realize that we cannot ultimately make decisions for the whole country, where many people do not accept our views or support our thesis - in fact, reject

us as individuals and religionists. So the only teachings that I can give with any effect are to those who would listen to me, and I happen to be a Presbyterian minister, and I don't think that whatever beliefs I have in this area should be foisted upon society as a whole, most of whom are not Presbyterians, and a large percentage of those couldn't care less about any religion at all.

Along with poverty, ignorance and moral strictures against birth control, the unpredictability of human sexual practices makes unwanted pregnancy inevitable. The way to deal with the problems forthrightly is on terms that permit the individual, guided by conscience and intelligence, to make a choice, unhampered by archaic and hypocritical concepts and statutes.

I definitely support the liberalization of New Jersey's, what is in my opinion, archaic abortion law. Thank you for this opportunity to express my views.

ASSEMBLYMAN CRANE: Thank you. Are there any questions of this witness. (No questions.) Thank you very much, Rev. Mellon.

Next we will hear Joseph Hoffman, please. If he hasn't arrived yet, we will hear him later.

Mrs. Ruth Cusack, please.

R U T H P. C U S A C K: Thank you, Assemblyman Crane and other members of the Commission. My name is Ruth Cusack.

This statement is presented on behalf of the National Organization for Women, New York Center, with membership in

New York and New Jersey. NOW is a civil rights organization for women. Its purpose is to take action to bring women into full participation in the mainstream of American society, exercising all the privileges and responsibilities thereof. I am chairman of the Committee on Sex Education, Contraception and Abortion.

With regard to abortion laws, it is our conviction that all methods of birth control should be available to all women who want them. Abortion is one method of birth control which is legally denied to all women but which is in fact available to those women who have the right information, who have enough money, who are willing to risk their life and health, and who are willing to undergo the dehumanizing process of seeking an underground abortion. We find this situation deplorable. The remedy is quite simple: Repeal of criminal abortion laws.

Repeal of criminal abortion laws will permit all women who want abortions to get them from a qualified physician in proper medical surroundings. As a medical procedure, abortion would continue under the surveillance of laws governing general medical practice. As with other methods of birth control, decision regarding abortion would be a private matter between the patient and her physician.

The opinions of those persons whose religious, moral or ethical precepts forbid abortion should not prevent repeal of abortion laws. Repeal of abortion laws is permissive legislation; it requires no one to act against his or her principles. It merely establishes that legal jurisdiction

over a woman's uterus belongs to the woman herself.

As a women's rights organization, NOW is primarily concerned with the effect of abortion laws on women. May I point out, however, that in addition to giving a woman control over her own reproductive system, repeal of abortion laws would have these additional benefits to society: it would permit children to be born to parents who are willing and able to care for them properly; it would strengthen families by insuring voluntary parenthood; it would permit physicians to give high quality medical care to all their patients without fear of criminal penalty, and it would eliminate the criminal abortion racket.

Absolutely no detrimental effects to individuals or to society would result from repeal of abortion laws.

As legislators, you are demonstrating your concern for the welfare of women and children by holding these hearings. You can illustrate that concern most effectively by declaring loudly and clearly that abortion is not your problem. It is not the function of government to decide who will and who will not bear a child. I doubt if any one of you really wants to have the power to force a woman to bear a child against her will. The freedom and the responsibility to decide whether or not to continue a given pregnancy belongs to the pregnant woman herself, in consultation with her own physician.

I ask you then, gentlemen, to act for human dignity, to act for individual freedom, to act in respect for human

life. I ask you to recommend repeal of criminal abortion laws and thereby acknowledge that women are human beings and are entitled to the rights and responsibilities thereof.

Thank you.

ASSEMBLYMAN CRANE: Thank you, Mrs. Cusack. Are there any questions of this witness?

ASSEMBLYMAN JACKMAN: I would just like to ask you one question. I don't want to seem facetious, but, of course, we realize that the uterus belongs to the woman. One thing that is very important to me is, if she is married do you think she should consult her husband before she has this abortion?

MRS. CUSACK: The husband should not have the legal right to prevent the woman from having an abortion. There is a very easy thing that a woman can say to her husband if he does think she should not have an abortion when she wants it because he has some interest in the embryo. She can say to him, "Well, I wasn't planning to tell you this, but it isn't your child."

ASSEMBLYMAN CRANE: That would do it, I think.

MRS. CUSACK: It is a clear question and I should give it an answer. In practice, I think husbands and wives agree on this, but if you do have a situation where a woman does want an abortion and the husband does not, I think that the State should not take the side of the husband and allow him to force the woman to have the child.

ASSEMBLYMAN CRANE: You are then in favor of repealing all abortion statutes and leaving it as a medical problem

between the -

MRS. CUSACK: I would like to point out one thing that I think hasn't been made clear enough here. Other speakers have spoken about conditions for abortion during the trimesters of pregnancy. When abortion laws are repealed, women will in practice get abortions during the second month, so you simply don't get into the situation of women wanting abortions later on. If a woman would want an abortion about the fourth or fifth month, it would be because some unusual medical situation arose or because it might be a young girl who didn't tell her parents she was pregnant and they didn't know it until it began to show, and I think in that case the physician should be free to exercise his medical judgment. As far as abortion in the third trimester is concerned, I think the use of the word "abortion" is not medically correct really at that time. Abortion refers to removal of the fetus before viability and, since the fetus is viable in the last three months, you really should not term it abortion - you should speak in terms of a still birth, I believe.

ASSEMBLYMAN CRANE: Anything further? [No questions]

Thank you, Mrs. Cusack.

Is Dr. Samuel Breslow here? [Not present]

I will call Thomas Gorman, please.

T H O M A S G O R M A N: Mr. Chairman, I don't have a prepared statement.

ASSEMBLYMAN CRANE: Would you identify yourself, please, and the society you represent.

MR. GORMAN: My name is Tom Gorman and I represent The Voice Out of Rana Society.

This morning we heard a spokesman from The Friends, and now you will hear a spokesman from the Romans and my countrymen.

I would like to introduce myself. I am the product of incest. My mother and father were brother and sister and my father's wife is my aunt; my mother's husband is my uncle, and I'm my own counsin. I am human, alive, and I dare anyone to deprive me of that right to life. So step outside later.

Of course, I'm being facetious right now. I have a good mother and father and I'm very proud of them.

This morning and this afternoon I have heard a total disregard for the rights of the embryo and the fetus, a complete disregard of one of our basic rights. The right to life is endowed by God to all men. It is not bestowed by legislators nor is it bestowed by an Abortion Study Commission. This right cannot be earned; it's a right we come with, no matter how deserving or undeserving. All individuals are endowed with this unalienable right to life and, following upon life, comes liberty and the pursuit of happiness.

A rock does not have the right of the pursuit of happiness, because it's not alive.

I have come before you today to speak in behalf of the unborn children who have been murdered in the abortion practice and in behalf of future unborn children, to present and to defend their unalienable rights which this antiquated Constitution and the Declaration of Independence define for us. Somehow, because the unborn are unseen, they are

helpless and completely at the mercy of various factors and human beings; they become sort of an unknown quantity to some people. Any rights they may have are summarily bypassed. What you don't see doesn't bother you. Once their rights are done away with, these children can in no way rise up to assert their rights.

Some of the confusion in this matter stems from the fact that some people question exactly when does the embryo become a human being. This is a prime question, although we have heard Cyril Means pooh-pooh the idea. I'll have some quotes from the New York Commission in a minute.

In early September of 1967, a three-day Commission, an international Commission or Conference on Abortion, was held in Washington, D.C. In some of the findings of that Commission, it pooled much of the advance study concerning this matter of the moment when the human soul takes over, or humanity takes over this glob of tissue.

Professor Richardson of the Harvard Divinity School spoke to the consensus at that meeting of the theologians and philosophers, and I quote: He states that from the first days of its existence, the fetus is a human being and, therefore, has a certain dignity as well as human rights.

Doctor Heliger of the Georgetown University Medical School gave a matching consensus of the medical profession there assembled. He states that human life is present from conception in such a manner - I'm sorry; here's the quote: "The fertilized human ovum has the genetic material required to produce an adult individual." In other words, it contains

from the beginning the code and the machinery for what the adult is going to be. If some doubt still remains in your mind as to the nature of the embryo or fetus, let me quote to you the opinion of the eleven-member Commission - the New York Abortion Study Commission. We had Cyril Means here who is of that Commission. I asked him just previous to his leaving this room whether or not he was on that show that I am going to quote from - the Martha Dean Show on April 2nd, this year - WOR. Dr. Allen Gutmacher, who is Chairman of the Commission, - well, I don't know whether he is chairman or not but he is one of the leading spokesmen of that Commission and chief abortionist at Mt. Sinai - New York City, that is, not Palestine. He appeared with several members of that Commission on The Martha Dean Show on April 2nd, this year. He stated that the other ten Commissioners - and that's why Cyril has been misrepresented by his very good friend - he stated that the other ten Commissioners and he never entertained a doubt that the human embryo is a living human being from the first moment of conception. This is not in the Commission report but it was stated over the air-waves when put bluntly to them. However, he further goes on to arbitrarily say that the embryo or fetus does not have human rights, legal rights, until it sees daylight. It is very arbitrary on his part.

This morning, in listening to some of the array of speakers and witnesses, it sounded very much like a chapter out of "Mien Kampf." There are difficulties here we see. There is the mother with an unwanted pregnancy or some very

inconvenience. We have to resolve this problem. But the right to life is prime, gentlemen; it is not something that comes second or third. Without this right to life, you cannot have the other guarantees. We must consider that.

Once his opinion was clarified by Dr. Gutmacher, outside of the Commission report, it became evidence to the New York State Legislature that they had to defeat this resolution, which they did. Some say it was the Romans again who pushed it. If so, I am very proud of them. But the fact of the matter is this, that these are living human beings and we have the top minds in the country agreeing that they are. Unless people speak with forked tongues and out of both sides of their mouth at the same time, they are misleading you. Can they go before one Commission and say one thing and come before another and say something different?

We heard doctors here today. I know plenty of doctors. I know a doctor who sewed up a woman's vagina in a delivery. It caused her so much trouble she couldn't even pass her urine and they told the mother that he saved her life and that of the baby. This man was barred from the hospital. If he were to appear here today with his credentials, I am sure we would all listen to him. He was barred from the operating room there.

Now there are men who are speaking out of their field in many of these areas, out of their field completely. There are others who are speaking in their field and they tell you. We heard Dr. Introcaso this morning tell us that the child that is in the cradle, in the crib, several days

old, is not yet subject to stimuli, just as the baby in the womb. The baby in the womb is subject to stimuli. Just recently in New York City, a pregnant woman was shot in the abdomen. The bullet penetrated the uterus. That baby, like any child running around the household, picked up the bullet, put it in its mouth and fully ingested it. It's an oddity, huh? That child was in the uterus - right? Are we going to draw a line between two weeks, ten weeks, fifteen weeks? The idea of quickening has been done away with in our legal system as a determinant for determining the viability and the rights of the child in its fetal stage.

Doctor Gutmacher then holds with me on this question of the human nature of this child. We have to ask ourselves what are we doing? What are we doing when we ask for an abortion? The rights of the mother - it's unfortunate that she's been raped. You can't undo the fact of a rape. It's unfortunate if there was incest, but you can't undo the fact of incest. Put that child out of its misery, why? Because you don't like it? Who are you? The elite? You have no right. Suppose that child is born and you didn't get to it yet. What do you do? Shoot it? How about our people who are maimed and deformed? We hear of eugenic abortions, the poor child, going through life deprived. Deprived like what? Those children who are deprived right now, let's not put them in homes; let's kill them in their sleep. They won't know it.

We are drawing the wrong conclusion. We are going to the wrong place for our answers. Our answers are so obvious. They are as plain as the nose on your face. We have answers for

every one of these problems that come up, except for the problem of the mother going through the full term of her carrying that child. You cannot do away with the fact that the child was there that you aborted, or that she was raped and violated against her will, or that there was incest perpetrated. You cannot undo this fact by the mere fact of killing the baby. If you had a headache, you would have several recourses for removing that headache. You could have the recourse of an aspirin tablet or the guillotine. They both work effectively. One is a little drastic, gentlemen, and I'm sure I know what answer you would give and where you would go for your remedy, and not to the guillotine. That's too drastic.

Since the embryo's destiny is entirely human, it already has certain rights to develop and grow as a human being. It would be immoral to directly kill this being. The point of human rights before birth cannot be bypassed. There is nothing liberal about abortion.

I have heard this word misused. It's like the whole game of semantics that everybody's playing here today. It's abortion, spelled a-b-o-r-t-i-o-n, not m-u-r-d-e-r. Oh, yeh?

Medical men testify to these rights when they spend their lives working for a healthier child in utero. They are constantly working for it. We have in our own State of New Jersey men like Dr. Hillman working in the Merck Institute developing this rubella vaccine which he got from one of his own children, by the way, some fifteen years ago. He developed a live virus which he feels will be effective.

We have Dr. Parkman over in New York at the Columbia Presbyterian Hospital doing the same thing, and another doctor. I can't think of his name right now.

We have men like Dr. Gorman and Doctor - his name escapes me right now. These two gentlemen have developed this Rogan, as its trade name is known, and it's highly effective in the reducing of the Rh problems, highly effective.

We have the PKU test. I hear a lot of people talking about the PKU test, these doctors up here, and so on. It is compulsory in New Jersey hospitals that in all nurseries the PKU test be administered to children to determine the mental deficiency if it exists. A simple ferric chloride solution, which costs about five cents, is placed on a diaper or on a urine sample and if it turns purple, that child has PKU. They used to think one in twenty thousand, now it's estimated as one in ten thousand. This causes mental deformity in the child. But it can be corrected by a simple dietary change in that child's intake. It's simple - not medication; it's dietary change. I have read this in the medical magazines. I have gleaned over the past five years - I have been studying abortion carefully; I've read everything there is to read on it, and this is the conclusion I've come to: Abortion is not the answer. It's drastic.

Medical men testify to the right of the embryo and the fetus to life by the mere fact that they are working constantly for the health of this child in utero.

The Ohio Supreme Court just recently declared that the embryo is human from the first moment of conception and is entitled to all human rights.

In 1964 the New Jersey courts held that the unborn child is a distinct person whose right to live has to be protected in spite of its mother's religious belief. This is in a case of a woman who refused a blood transfusion at the time of delivery because of her religious persuasion, and the court held that the distinctness of this person, this child, a living human being, had to be protected and maintained. Our whole tradition in history is for this.

I heard a quote from the 14th amendment. It can mean anything you want it to mean. It can mean protect corporations, or free slaves; it can mean individuals with white skin or different colorations. It has throughout our whole history meant different things to different Supreme Court Justices. And it was quoted directly this morning as preventing involuntary slavery and servitude, hardship punishment, and so on. I consider the unfortunate part is that we have rapes taking place. What is the Legislature doing to make sure that "rapos," as they are known in prison circles, are kept behind bars. We hear about them getting out on their own recognizance ten minutes later.

This reminds me of Dr. Raymond, the well-known abortionist who works in Union City and the West New York area. This guy is always being nabbed, thrown in jail, and released on his own recognizance. This guy can't trust himself and they let him out about ten minutes later to do the same thing all over again - illegal abortions.

I'm sorry but I can't seem to see this whole approach. You people are missing the boat when you even consider these questions. We have answers to all of our problems. We have answers. The way we treat society today in regard to people who commit rape and crime; we let them go to do it again; abort the child.

The Supreme Court just recently declared that the embryo is a living human being. In our New Jersey court decisions last year - a friend of mine, a doctor, was sued for not aborting a child who turned out to be deaf and dumb from German measles, rubella. This suit was brought by his parents, the parents of the child. He won the suit. The New Jersey Supreme Court declared that they had to vote in favor of life, the prime importance of life, the life of the individual. In addition to the medical fact that a separate human life comes into being at conception, the unborn child has enjoyed many legal rights since the time of the Romans. It is recognized in the United States and England that the unborn child may inherit an estate by will, may acquire property by descent - while in utero now - may be the beneficiary of a trust, may be a party to a litigation, may enjoy every other property right extended to other individuals. Except for a few states which have not had an opportunity to consider their position, every State which has considered the question since 1946 now permits recovery for prenatal injuries and the modern enlightened view, in the light of scientific findings, is to grant this right from the time of conception, from the moment that child is conceived - any injury that is sustained at the hands of the

doctor, -in almost every State where cases of this sort have been heard.

Also absent in Assembly Resolution No. 24, are the rights of the embryo. This whole resolution smacks of a direction toward more liberal abortion in New Jersey, so that our doctors don't have to look over their shoulders when they perform the customary D and C's. How can the children of any human being, whether unborn, in good health, infirm, or senile not become a legal question? Once we deny the rights of the unborn child for any reason, the field of abortion is wide open under all considerations; such considerations as social standing, unwed mother's embarrassment, parental selfishness, any degree of threat to physical or mental health on the part of the mother, even ranging from dandruff to falling arches in some States, anything, so long as you get a couple of medical men together - they usually work over the telephone, by the way. All three are supposed to examine her but one calls up and says, "Hey, will you sign this document?" And then all three concur that she should have an abortion.

If we allow it in any one instance, we have got to allow it for all. We cannot say, well, it's wrong to abort a child in this instance. Why? because you think it's murder? What is your reasoning? We must permit blanket abortions if we are going to allow it at all. I tell you if abortion is permitted for any reason - now we have "possible tragic consequences;" we have definite tragic consequences - since the warning beginning at line 7 in Assembly Concurrent Resolution 24.

Definite tragic consequences will result to the child. We modern enlightened men ignore the findings of the present medical, theological and legal researchers and still believe that human beings only have rights after birth? This much is certain: We all exist in body and soul up to nine months before we come to the light of day. When the newly-created being takes up its existence, it is a hundred per cent separate person with unalienable rights and I hope that equal rights continue sitting at the banquet of life. And I use that expression without prejudice.

At a time when we consider human life so precious that we question capital punishment, we question the activities of wartime killings, we regard life as one of the greatest things we have, and yet we would like to sit in judgment and issue final and decisive judgment as to the annihilation of the right of an unborn child.

Gentlemen, the nations of the world are to this day holding men accountable for the horrendous deeds committed under the dictum of Joseph Stahlin and Adolph Hitler. The world has answered their claim, the claim that they made when they said they were merely following orders from their law-makers. The trial at Nuremburg charged that they should have known better than to adhere to the dictum which saw the slaughter of six million under Adolph Hitler and nine million under Joseph Stahlin - although that did not come from Nuremburg about Stahlin. But it's still the consensus of the world. They should have known better. Each had his pragmatic considerations for what he did. There are always pragmatic

considerations for anything we do. What are New Jersey's chief considerations ? Rape, incest, fornication, too many children, mental health of the mother, physical health, deformities. Now if you go down the hall here, you will see two blind people working at the counter. You tell them that they shouldn't have existed, that they should have been killed, at birth, or before birth.

I worked at a hospital one summer and it's a wonderful experience. I worked as an orderly. I was called in the maternity wing one night to take two dead children down to the morgue, a very unhappy task. I had one in each hand - "premies" - they came a little bit early and they couldn't sustain themselves in life. Have any of you here held a premature baby in your hands? It's alive when it's born - just like some of those that are extinguished before they are born.

We heard Doctor Introcaso this morning speak of the unpleasant sight of seeing a child that is aborted move around on the table after it has been extracted from its mother's womb forcibly before time. What do you do then? Step on it? Put it out of its misery?

If we allow this murder of a single child in any instance, we've got to allow it in the law. We cannot say it is against our laws, our arbitrary dictum, which says that it's all right in one instance but not all right in another.

How do we treat these people who are convicted of rape? Do we let them go early for good behavior or do we keep them confined and incarcerated to protect society? Or are our public health facilities ready to dispense new German measles vaccine when it's made available? Is our legislature

considering this question? This is important. If you want to prevent deformities, start at the answer. Don't go to drastic guillotines for your answer.

ASSEMBLYMAN CRANE: Mr. Gorman, you have been on fifteen minutes. Could you conclude your remarks, please?

MR. GORMAN: Oh, I'm sorry. All right.

We have other areas that the New Jersey Legislature must consider - questions such as: Are the public health facilities taking care of the handicapped and the retarded? Drs. Cooper in Lancaster, Pennsylvania, have the greatest treatment clinic for cleft palate and harelip. Do we have a like facility in New Jersey? You should see the work these men do in the clearing up of these defects, and there is a high percentage. One in ten thousand is the rate of cleft palate and harelip. These men do a remarkable job.

I would just like to conclude then by saying that it is destructive of family life, cohesiveness of children and parents, and it's a great detriment to our society at large. We had better start thinking of the young ladies who are impregnated out of wedlock and do something about it, such as educational facilities during the time of pregnancy, pre-natal and post-partum care. These are all essential. We cannot overlook these things.

ASSEMBLYMAN CRANE: Thank you, Mr. Gorman. One question: What is "The Voice Out of Rana Society"?

MR. GORMAN: The title I used for the Society is made up of just a few individual people. It is not a large group. We have obtained many signatures, however, urging that there be

no liberalization of abortion. The name comes from the scriptures of St. Matthew with reference to King Herod's murder of the innocents. It refers to Rachael and goes back to Jeremiah at the cross, when he said "A voice is heard out of Rana, a voice lamenting and weeping." It was that of Rachael because her children were no more.

ASSEMBLYMAN CRANE: Thank you. Are there any questions? Rabbi?

RABBI SCHWARTZ: Yes. I just was interested in knowing: Is your Society equally opposed to hunting and fishing?

MR. GORMAN: My wife is a member of that society. She is but I'm not. We are talking about human life, human individuals, because the dignity of man is more than the animal that goes to the slaughter house. I had a grilled cheese today but that doesn't mean I'm opposed to eating meat.

ASSEMBLYMAN JACKMAN: Mr. Gorman, I'd like to ask you one question. I notice you have a tendency to use a lot of names in your statement. You mention a Dr. Raymond, I believe.

MR. GORMAN: Yes.

ASSEMBLYMAN JACKMAN: He is now serving five to eight years in the State Prison.

MR. GORMAN: It's about time, because he went free time after time.

ASSEMBLYMAN JACKMAN: I would like to ask you another question: You'll agree that the average abortionist does not go out soliciting customers. Usually the customer comes to him. Is that true?

MR. GORMAN: Yes.

ASSEMBLYMAN JACKMAN: And your position is, I assume, that even if a woman was raped, she is morally obligated to bear that child.

MR. GORMAN: Yes, because I feel this way: The right to life has priority. It's a priority of rights. Now the right -

ASSEMBLYMAN JACKMAN: Even without wanting?

MR. GORMAN: Even without wanting, yes, because the child is there. You cannot erase the fact of a child being alive and there. It's a hard fact to face, but you have to face it. It's regrettable. It's as regrettable as rape, incest, out-of-wedlock children.

ASSEMBLYMAN CRANE: Any further questions? Rabbi?

RABBI SCHWARTZ: Yes, I did want to ask another question. It was mentioned by another speaker also in reference to the Nazi program, and you mentioned Mein Kampf. I was just wondering how could you compare this Nazi policy of systematic genocide based on race and religion, the Nazi policy of human experimentation with human lives, to the consideration of humane legislation now in order here on behalf of the human life that you are so concerned of, both in aspects of the mother and the child, the unwanted child? Now where is the comparison?

MR. GORMAN: Well, Rabbi, in the town of Asbury Park, about a year ago, an article appeared written by someone whose name I don't have, so you will have to accept on faith that I am quoting correctly - it appeared in the Asbury Park Press, which I'm dying to get ahold of - and his statement was an admonishment as to inherence of genocide which they are now carrying out, and he figures that in 10 more years it won't be around at the rate they are going. That was his conclusion.

ASSEMBLYMAN CRANE: Thank you, Mr. Gorman.

Mrs. Eugene L. Krasnoff, please.

M R S. E U G E N E L. K R A S N O F F: Assemblyman Crane and members of the Commission, I have a very, very brief statement, which I'm sure will delight you since it's short.

I am Mrs. Eugene L. Krasnoff and I am Chairman of the Abortion Law Reform Committee of New Jersey, based at the Princeton YWCA. I will be presenting views supported by the YWCA.

Abortion is an important health problem of vital concern to women and, at the New Jersey Women's Organization, we are very concerned about the abortion laws of this State. We feel that we must share the responsibility to do all that we can to eliminate a law that leaves New Jersey women with very few choices other than to seek out an illegal abortionist to help them with their unwanted pregnancy, a law that compels women to face the needless risk of death under disgraceful humiliating conditions and prevents doctors from exercising their vast medical judgment.

Therefore, after having studied this problem, the Princeton YWCA has resolved to support the principles set forth in the British law, and these principles are:

An abortion will be permitted if two licensed doctors are of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman or injuries to the physical or mental health of the pregnant woman or any existing children of her family greater

than if the pregnancy were terminated, or that there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

These principles are also supported by the Camden YWCA and the Summit YWCA, and we expect many more letters of support from other Y's in the near future.

There are also many other groups in New Jersey supporting reform and representing thousands of women. The three Y's mentioned represent 12,000 women.

While women as a whole are victimized by the present law, poor women are definitely discriminated against. A middle or upper-income woman may be able to go abroad for a legal abortion or obtain an abortion in the United States at a high price. The poor woman cannot.

We feel the current British law recognizes that the lower-income woman should have as much right as anyone else to terminate an unwanted pregnancy and that all women wanting abortion under the stated provision have the right to an abortion under safe hygienic conditions. We believe that the time is long overdue for New Jersey to guarantee these rights to woman.

Thank you.

ASSEMBLYMAN CRANE: Thank you, Mrs. Krasnoff. Are there any questions of this witness? [No questions]

Mr. Joseph Hoffman, please.

J O S E P H H O F F M A N: Gentlemen,
I am Joseph Hoffman, First Assistant Attorney General.

The Attorney General could not be here today.
I have a letter from him which at your pleasure I shall
read into the record or hand up to you, whichever you
prefer.

ASSEMBLYMAN CRANE: Will you read it, please.

MR. HOFFMAN: [Reads letter as follows]



STATE OF NEW JERSEY
ARTHUR J. SILLS
ATTORNEY GENERAL

October 25, 1968

Honorable William M. Crane, Chairman
Commission to Study the New Jersey
Statutes Relating to Abortion
State House
Trenton, New Jersey

Dear Assemblyman Crane:

As I indicated to you in my letter of October 11, 1968, I was committed, at that time, to be in the northern part of the State on Monday morning, October 28, 1968. I had hoped to be able to testify before your Commission to Study the New Jersey Statutes Relating to Abortion late in the afternoon that day. Unfortunately, I find now that my schedule will render this impossible. In lieu of oral testimony, therefore, I am indicating in this letter for the purpose of the record what I consider to be the salient features of the abortion law issue.

I.

The particular statute in question, as you know, is N.J.S.A. 2A:87-1 which states:

"Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor. . . . If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 15 years, or both."

II.

The stimulant for the present interest in abortion law reform was the New Jersey Supreme Court case of Gleitman v. Cosgrove, 49 N.J. 22, decided last year. In this particular case, a complaint had been brought against two physicians specializing in obstetrics and gynecology and engaged together in the practice of medicine. The first count of the complaint was on behalf of an infant for his birth defects (substantial defects in sight, hearing, and speech), the second by the mother for effects on her emotional state caused by her son's condition, and the third by the father for costs incurred in caring for his son.

The theory of the plaintiff's suit was that the defendants negligently failed to inform the mother of the effects which german measles might have had upon the infant in gestation. Had she been so informed, plaintiffs asserted, she might have obtained other medical advice with a view to the obtaining of an abortion. Plaintiffs did not assert the mother's life or health was in jeopardy during the term of the pregnancy.

The trial judge and, subsequently, the State Supreme Court dismissed all three counts. Of great interest was the following observation of Justice Proctor, speaking for the court:

"In the view we have taken of the case we need not consider whether the abortion would have been illegal. Our statute provides criminal sanctions for abortions which are performed 'without lawful justification....' It may well be that when a physician performs an abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime." (emphasis supplied)

The Justice pointed out that the words "lawful justification" had been adjudicated so far in two previous court cases, State v. Shapiro, (1910) and State v. Brandenburg, (1948). In these cases the Court held that the term "lawful justification" included within its meaning the preservation of the mother's life.

III.

As a result of the Gleitman case, two salient legal issues were presented: (1) is the phrase "without lawful justification" capable of judicial definition; (2) if so, what does it mean?

IV.

Since 2A:87-1 is a criminal statute, it became necessary for the County Prosecutors to discuss the impact of Gleitman upon their enforcement of that statute. Following the decision, the Prosecutors met in my office and a Committee of the Prosecutors' Association was established for the aforementioned purpose. Soon thereafter, the Committee issued a report premised as follows:

"It is not the purpose of this Committee to make a judgment as to the morality of abortions or the termination of a pregnancy. It is the function of the Prosecutor to enforce the criminal laws of the State of New Jersey as enacted by the Legislature. And in serving this function it becomes necessary for the Prosecutor to interpret the criminal laws in accordance with the language used by the Legislature and the applications made with respect thereto by decisional law. In the first instance we deem it to be the obligation of the Prosecutor to uphold the law enacted by the Legislature unless that law has previously been declared invalid by a court of competent jurisdiction."

The Prosecutors' Committee assumed the constitutionality of the statute and noted that it has in fact been interpreted by the courts of the State in the three cases previously cited herein, Shapiro, Brandenberg, and Gleitman.

The Committee recommended that N.J.S.A. 2A:87-1 be interpreted to mean that "a person is subject to criminal prosecution for causing or procuring an abortion except in those instances where such a technique is necessary for the preservation of the mother's life, or where a physician performs an abortion on the basis of a good faith determination which is made in accordance with accepted medical standards that such an operation is medically indicated."

In all other cases a person would be subject to criminal prosecution. It was forcefully emphasized that the Committee's interpretation of N.J.S.A. 2A:87-1 did not remove from its reach the so-called "abortion mills" or the "backroom abortions."

One of the functions of the Attorney General with respect to the County Prosecutors is to attempt to achieve uniformity of interpretation of the criminal laws in order that there might be certainty with respect to the implementation thereof. In this particular situation, there was great uncertainty because of various opinions delivered by members of the Supreme Court in the aforementioned Gleitman case. My office and the various Prosecutors' offices had been receiving many inquiries from hospitals and medical practitioners concerning the problem. This was the background to the Committee's formation and ultimate Report. Twenty of the State's twenty-one County Prosecutors subscribed to the Committee Report and presently interpret the law in this manner.

V.

This interpretation by the Prosecutors represents the interim status of the abortion statute, pending further guidance by the Legislature. It is a less than satisfactory solution since it lacks the certitude of judicial sanction or the clarity of keener legislative definition.

Therefore, I respectfully submit that the Legislature must meet its responsibilities by enacting a clearly drawn, definitive statute on the subject of abortion which reflects the mores and the will of the people. Chief Justice Weintraub articulated like sentiments in his dissenting opinion in the


Gleitman case wherein, after citing the Model Penal Code as an example of such a statute, he opined as follows:

"Thus, there is no reason why a Legislature could not itself say what shall constitute justification."

As Attorney General, I have presented to you the present status of the law. I do not feel that I should insert my personal convictions on this subject at this stage of the Legislative process. In my official capacity, my office and I are involved in the prosecution of the criminal laws. I deem it improper to expound a view before the Legislature which might prejudice the conduct of any pending litigation.

I, therefore, make no suggestions of my own with respect to the matter before your Commission. I believe a broad and representative array of religious, social, and community interests should be aired as a prerequisite to an ultimate Legislative determination. Only with the full weight of all such opinions can the abortion issue be resolved in a manner consistent with the desires of the people of our State.

Respectfully submitted,


Arthur J. Sills
Attorney General

ASSEMBLYMAN CRANE: Thank you, Mr. Hoffman.

Are there any questions of this witness? [No questions].

We will have a five minute recess and will reconvene and at that time will call Mr. Bill Baird.

[R E C E S S]

[After Recess]

ASSEMBLYMAN CRANE: We are ready to proceed. Mr. Foley, please.

S T E P H E N J. F O L E Y: My name is Stephen Foley. I am an attorney. I don't represent any organized group or society other than as an individual as a citizen of the State and an attorney-at-law of the State. My views are perhaps shared in by my wife. I say that not facetiously, but simply because on three occasions in our marriage we had to face the problem of possible abortion. On those occasions, we did exactly nothing about it on the advice of our obstetrician who said that good medicine is good morals, and on each of those occasions a natural abortion, that is, a miscarriage, took place.

I thank the Committee for the opportunity to participate in this important study and I accept your invitation to file a memorandum with the Committee at a subsequent date. I think you deserve some commendation, some compliment, on your membership in that in organizing you recognized that there is a moral, ethical, theological nature to your subject and that is consistent with our Judeo-Christian heritage and our culture.

It is reflected in the Gallop Poll recently which suggested that 97 per cent of our people believe in the existence of God. It is reiterated by our Supreme Court who said that we are a religious people whose institutions presuppose the existence of a Supreme Being.

Most unfortunately, the American Law Institute Study and also their recommendations on this subject completely ignored

the presence of a moral, ethical consideration. There was no ethical representation, no moral representation, in their studies. Although it is consistent with one of the passages of the Restatement of Torts, Volume 4 of the Restatement, Section 869, promulgated by the American Law Institute, which says that a person is not liable for the tortious harm to an unborn child. That is not the majority rule in the United States, it is not the law of New Jersey and it has been abrogated by every jurisdiction that has considered it in the last 20 years.

In your preamble, I think the Committee wisely avoided any reference to statistics and simply stated that the high rate of abortions constituted a problem. The American Law Institute, itself, acknowledged that there are no legitimate statistics upon which intelligent judgment could be made. Many people quote the ALI, but very few quote that portion of the resolution which says that the statistics available are completely unreliable. But let there be no misunderstanding; it is my contention that any single wrongful abortion is a cause for concern.

In referring to the resolution, Number 24, it was adopted as the goal of the Committee to protect the public health and welfare. Stated otherwise that would be termed in the phrase of "the common good," and I respectfully suggest to you that the goal of all law, all legitimate law, of necessity must deal with the common good.

As a lawyer, I suggest to you that our common law inheritance has always reflected principles of basic, fundamental, underlying natural law. Three hundred years ago Judge Coke,

one of the brightest lights of the English Common Law, said that the law of nature is a part of the law of England. In this country shortly after the Revolution, Justice Green said in a Supreme Court opinion, "There are principles of justice, eternal principles, which no government may deny." And Chief Justice Chase a hundred years later was to write in an opinion, "There are undoubtedly fundamental principles of morality and natural justice which transcend the governmental sphere."

It is with some awe really that I appear before you, recognizing the responsibility that you have accepted, that is, a legislative consideration of the basic fundamental question of life and death. In that context, our Judeo-Christian heritage suggests to us that society, legislative or otherwise, is not itself the author of life and therefore there are limitations on society's exercise of control of life.

A prior speaker, Mrs. Stone, suggested that the viewpoint of one discipline, one ethical discipline, is "out of this world." I would agree with her that the temporal happiness of man is not man's final end and goal.

Recently stated by Pope Paul VI in his "Encyclical on 'Human Life'" was that human life is a reality not bound up with this world alone and hence cannot be measured or perceived solely in terms of it.

I would respectfully suggest to this Committee that their motto might be in the language of the late President Kennedy, "Let us go forth asking His blessing, but knowing that here on earth God's work must surely be our own."

I think the inquiry of this Committee, therefore, is directed to: What is the common good? What law of New Jersey will most closely harmonize with natural law? The closer your inquiry gets to fundamental principles, the more basic natural law principles become. I suggest to you that the basic question of life or death is about as fundamental a question as any man can decide. Very wisely, as I said before, your Committee has chosen to examine the legal, medical and moral viewpoints. I respectfully suggest to you that the more harmonious your inquiry and your judgment comes to natural law, the more harmonious will be the medical and moral support for your judgment because in perfect harmony there should be no conflict between these three disciplines.

Now historically under our law when there is a conflict, then the law resorts to principles of natural justice in order to resolve those. For example, in the blood transfusion case where the religious principles of the parent precluded the transfusing of blood, our State, I think correctly, adopted a higher value than her religious beliefs and compelled her to submit to a blood transfusion.

In the English case in the execution of a pregnant woman, there was no law covering the subject and they resorted to principles of natural law and stayed the execution until after the birth of the child.

In the famous "Sailor on the Raft" case, it was established as a principle of our law that where two sailors are on a raft which will hold only one, either one has the right to contest the other for the survivorship on that raft,

but when a passenger arrives on the scene, then the right of the passenger is superior to the right of the sailors.

We have reflected "higher values" in the duties of soldiers to obey a conscience in contradiction to a lawful command. As a result of the law promulgated at the Nuremberg trials, we have recognized that there is a higher value, that there is a conscience that is imposed in the natural order of things superior to any man-made law.

In this hierarchy of values, our law has recognized the right of property and above that right of property the right of life, itself. But even higher than "right of life," itself, are other values, transcendental values, such as justice, itself. Historically our culture has accepted - and I think this is the majority law in our western civilization - only three exceptions to the biblical prescription of taking of life. The first is capital punishment. The second is a just war. And the third is self-defense. Those are the three limitations that our culture has inherited and each of them are justified and characterized by the fact that they involve the concept higher than life itself, justice - a defense against aggression.

The Jewish Rabbi Maimonides in 1168 in promulgating the Rabbinical Code suggested abortion only to save the life of the mother as constituting self-defense of the mother. Today we are being asked to reevaluate these exceptions in light of our reverence for life itself.

The question of capital punishment is being reevaluated all over the United States today because even in the case of

a convicted felon, our respect for life is so great that in many jurisdictions we are continuing to abolish capital punishment.

I am sure the Committee is all aware of the tremendous difference of opinion in this country today over the morality of the Vietnam involvement. I suggest that the inquiry into the enlargement of the justification for the taking of life runs contrary to the historical precedence. This inquiry into abortion, this self-defense exception, is being reevaluated in the light of proposed higher values, higher than the traditional evaluation of life itself.

It has been suggested and continues to be that there are social-economic factors that may be persuasive. I think the question is: In light of our background of the common good, as interpreted in natural law, has this common good changed? Has our increased scientific discovery enabled us to more accurately redefine what is the common good?

I point out to you that the science of fetalogy and embryology are brand new sciences. The first ovum was only retrieved in 1930 and the first fertilization was only witnessed in 1944 so that we are on the threshold of increased scientific medical knowledge.

As an attorney, since we are considering the question of life and death, it seems to me that a minimal requirement would be to impose the burden of proof on those who would enlarge these time-honored exceptions to life, itself.

We know from genetics that the sperm which has a limited life expectancy after ejaculation of some 72 hours meets the

egg, which is passing to the womb which if not fertilized has a life expectancy of some 36 hours. So these two cells of limited expectancy unite and from that union a new existence is created, a link between the past, the present and the future. At that moment of conception 9,000 years of heredity exist. Your question, gentlemen, is: What value shall our society place on this link between the past, the present and the future? Obviously you are inquiring: What would be the effect if we increase the respect for this life? And the alternative: What would be the effect if we decrease our evaluation of life's link?

I think your answer can only come from the conclusion as to which course lies in the common good.

Mention has been made earlier that there was no common law crime of abortion before quickening. The obvious answer to that was simply because that was based on inadequate medical knowledge. The minute medical science demonstrated that life exists before quickening, the law in harmony with this increased knowledge removed the bar of quickening and now in most of our common law jurisdictions abortion takes place any time following the moment of conception.

Despite some of the pessimistic views expressed earlier, actually the law of New Jersey is the majority view of the western civilizations today; that is, abortion is considered by most states and most of our society as a defense against the public interest and it is treated and published as a crime. This is the law in 42 of our 50 states in this country. The sole exception in those states is the life of the mother - only

to save the life of the mother. I suggest to you that that posture of the law to this extent is in harmony with principles of natural justice, it is in harmony with principles of medical science and it is in harmony with the majority law. In other words, I don't think any speaker in this or subsequent hearings will suggest to you that the existing exception is contrary to law, medicine or morality. So if there is a legal consensus, it is in favor of the existing law. Now if there is a moral consensus, it would be based on a survey of the public documents and statements. I don't profess to represent that moral consensus, but I would point to your attention the policy statement of the General Board of the National Council of Churches of Christ on February 26, 1961, which condemned abortion.

I direct you to the statement of the Anglican Bishops at the Lambeth Conference in 1958 which condemned abortion.

I would direct you to the Study Pamphlet issued by the Church Assembly Board of Social Responsibility of the Church of England which says, "To grant to the whole the power to kill the deformed and unconsulted on the ground that it was in their own interest that they be killed is as unethical as it is socially dangerous."

I refer you to the Protestant theologian Karl Barth in his "Church Dogmatics." I refer you to theologian Dietrich Bonhoeffer in his book on "Ethics." This was the man executed by the Nazis. He said, "Destruction of the embryo in the mother's womb is a violation of the right to live which God has bestowed on this nascent life."

Professor Paul Ramsey has been referred to, also Professor Jaroslav Pelikan, Professor James Gustafson of the Yale Divinity School, and Professor George Williams. I might mention in my supplemental statement I will file with the Committee documentary authority in reference to all of these quotations.

Turning to the medical consensus, I think there is a medical consensus that the question, the issue of choice between the mother and the fetus, is practically eliminated through medical achievement. I think there is a medical consensus that increased medical knowledge has improved and benefitted the prenatal existence. We are now on the threshold of fetal transfusions, fetal diagnosis, fetal surgery, where they remove the fetus from the womb, perform corrective surgery and return the fetus to the womb. Of course, you are all familiar with the postnatal correction and development of the human potential.

I think the conclusion to be drawn is as of now, law, medicine and morality agree and have operated to protect, preserve and defend fetal life. Harmonious with the medical advance, the law has also advanced to protect fetal life. Under New Jersey law an unborn child can inherit an estate by will, he can acquire property by descent, he can be the beneficiary of a trust, he can be a party to litigation, he can be a beneficiary under the wrongful debt statute, he can qualify for workmen's compensation. He constitutes a life in being for the purpose of fixing the rule against perpetuities. He can sue for prenatal tort. He can obtain

compulsory medical aid before his birth. He can obtain financial support before his birth.

I suggest to you that a liberalized abortion statute would effectively eradicate each and every one of these civil rights of the unborn child.

Thus where the parents refuse to protect the child, the law will step in and based on natural law principles superimpose its will on behalf of the unborn child.

Hundreds of years ago in England, Blackstone in his Commentaries on the Common Law said, "The duty of the parents to provide for the maintenance of their children is the principle of natural law."

In this country in 1853, the Supreme Court of Connecticut said, "There is a law of our universal humanity as extensive as our race which impels parents, whether fathers or mothers, to protect and support the helpless children."

In this State, this Legislature under Title 2A:4-2 says as follows: "It is hereby declared to be a principle governing the law of this State that children are the wards of this State entitled to the protection of the State which may intervene to safeguard them from neglect or injury."

Up to this point, law, medicine and morality appear to have been pretty much of a one-way street directed backward in time to the moment of conception, designed to preserve, protect and defend fetal life.

Reference has been made to the Constitution and to the amendments thereto. The Constitution says among other things that there are certain truths that are self evident. That is an

expression of natural law principle. It says that all men are created equal, not born equal, but created equal, and that they are endowed by their creator, referring to the Supreme Being, not to the parents and not to society, with certain unalienable rights, another natural law principle, and that the primary one of those is the right to life itself, and to secure those rights governments are instituted by men. So it would seem to me that our basic document on which our society stems, the Constitution, speaks in terms of natural law.

If this is in effect the direction that our law, our medical and moral ethics have brought us to this point, it is rather clear and direct in favor of fetal life. The question you men now will search your consciences and your souls and your intellect is: Shall we change this direction? Has this direction been wrong? Can this common good we seek be reached by some other route? Can common good be reached by opposite paths? I repeat, the proponents of change should have at least the minimal burden of proving their case. As Justice Proctor in the majority opinion in Gleitman versus Cosgrove pointed out: "Can we weigh the unweighable, that is, life versus non-life? Can we measure the unmeasurable, parenthood versus non-parenthood? Can we evaluate the invaluable, life, itself, versus anything less than life itself?"

Law and medicine to date have answered those questions in favor of life. Moral principles suggest to date that that question is answered in favor of life unless there is a higher value - duty, honor, justice, love. By love, I mean the instance

where the soldier in Vietnam sacrifices his life to save his fellowman. He is not indicted for suicide. He is presented with the highest award for bravery that our government can bestow. So in our hierarchy of values we do recognize certain transcendental principles exceeding life itself.

Now opposed to those transcendental principles, you are considering or society is considering certain suggested values which are equal to or superior to nascent life. One would be the physical or mental health of the mother. Another is the proposed physical or mental defect of the child. A third is rape, incest, illegitimacy or premature pregnancy, that is, under certain ages. A fourth suggested alternative is economic or socialized hardships. Gentlemen, in none of those proposed exceptions, is there a choice of life; that is, all the values proposed as superior to nascent life cannot be weighed against life itself, but other values. This is rather a novel ideology to our society. As I point out, up to this point the majority view is in favor of life subject only to transcendental views.

Now it is suggested that these proposals are permissive and not mandatory. As an attorney, I question for how long a period of time with logic a Legislature which recognizes a common good can continue to leave that common good up to the individual choice as, for example, in the vaccine case, as, for example, in the blood transfusion case. If the Legislature is to declare that a certain act, that is, abortion, is in the common good, then isn't it logical in support of that common good to compel that abortion? Take, for example, the eugenic

considerations - a minor, a ward of the State and pregnant. If it is the espoused or declared policy of our jurisdiction that abortion of that fetus is in the common good, I question whether or not any court would refuse to order an abortion against the right of the mother. What if the doctors refuse to abort? There is a complaint today that they don't know whether or not it is legal. If we permit the abortion, the other complaint would be, they don't know whether or not it is legal not to abort.

Reference has been made to the prohibition question, suggesting that perhaps it is a matter of popular acceptance or rejection. Whether before the Volstead Act or subsequent to repeal,gluttony, that is excessive ingestion of alcohol, has always been against the natural law and against the common good. So whether the Legislature is vocal or silent on the question of intoxicants, the natural law continues to exist.

Dr. Cross suggested that there should be a scale of values, that is, up to three months, it has no rights, and then after three months it has some minimal rights, and the following three months some additional rights. I doubt that the matter of the common good can be measured on such a sliding scale. If an act is wrong in the first three months, it is wrong the next 24 hours. If it is correct in the first three months, I don't see how the passage of one day can render something that was in the common good yesterday against the common good today. I don't think that the common good is that variable a factor.

Now addressing myself directly to the suggested change, the health of the mother - there is no medical consensus in favor of abortion based on the health of the mother. In the hierarchies of values, health is, of course, an important factor, but life itself would appear to be primary. Medical science is reducing the alleged health reasons. I don't think any doctor would presume to guarantee an abortion would benefit or that an abortion on the other hand would prejudice a mother.

Concerned with the physical or mental defect of a child, as a lawyer, I question the use of the term in this instance as therapeutic. "Therapeutic" I think means to cure or to heal. If you are concerned about the therapeutic value to the child, anything less than abortion is a lesser danger to the child. Life with all its defects is immeasurably greater than absolute death. The eugenic considerations completely ignore the subject itself. It basically denies any right to live, which is a dangerous concept.

The question was asked earlier: Well, don't we answer for the unborn when we say, "Yes, you must live"? It is true, we do. And so we answer for the living when we say, "No, you can't commit suicide," or "No, we don't permit euthanasia." So we have answered that question and we have consistently answered it in favor of life. I suggest since we are on record as against suicide, as against euthanasia, can we do to the individual unborn without his consent what we deny to him as a society when he voluntarily seeks it.

Addressing myself to rape, incest and illegitimacy, abortion will not prevent rape, incest or illegitimacy. It

will not punish the transgressor. It will not eliminate the happening or correct the evil. It will destroy an innocent life. And the life conceived as the result of rape, incest or illegitimacy is a life separate and apart, distinctly unique from either the mother or the father. It seems to me that if we trade the temporary inconvenience of nine months and decide in favor of eliminating that inconvenience against a lifetime of existence, human existence, as we know it, we are trading an apple tree for an orchard.

Economic and sociological hardships have been suggested. Well, as President Kennedy said, life itself is unfair, is unequal. Life itself contains hardships. We become sick. We must work. We pay taxes. We are subjected to compulsory military service. Parenthood is simply another one of life's burdens. It is but one of many. I don't think we can anymore justify the default of that obligation than we can that of any of the others.

As to the first two, that is, the physical and mental health of the mother and/or defective child, medicine is making giant strides to eliminate or reduce the physical and mental factors. As to rape, incest or illegitimacy or the economic or sociological hardships, I think there, as prior speakers have indicated, the guilt lies with society not with the individual and the relief is to correct the social conditions which give rise to those violations rather than to punish the innocent life.

On the question of adoption of any one of those children, perhaps our society has a different attitude toward adoption.

I was surprised to read yesterday in the Sunday Times that in England there are 18,000 adoptions a year, in Canada there are 13,000, in Germany 8,000, in France 4,000, and in the United States there are 130,000 adoptions per year. So it seems to me that perhaps our attitude toward the product, the parentless child, may be different from some other countries and therefore we should not be persuaded by the laws enacted in other societies under other social-economic values.

The final proposal - and it has been mentioned here this morning - is abortion on demand. I submit to you that no sister state, no society, no public authority, has proposed or adopted such a precedent, but, in fact, ultimately that is the goal.

California doesn't permit abortion on demand and yet in the first annual report to the Legislature, of 254 adoptions granted, 214 were for "psychiatric reasons." Now California's Legislature considered rape and incest and all of these other bases and the opponents suggested that in practice there would not be many abortions for this reason. I think in California there were seven for rape last year. But if 80 per cent are for non-maternal or non-fetal indications, then I think under any guise that you call it, we are going to have abortion on demand.

Another demonstration of that is the fact in the Western Reserve Law Journal in a survey of midwestern hospitals, in one hospital of every 37 births, one resulted in abortion. In another hospital of 24,000 births, one resulted in abortion. Now this cannot be an honest difference of medical opinion. It

has to be a basic fundamental difference of philosophy.

So I suggest to you if you enlarge the existing statute, all you are doing is permitting the application of varying individual philosophies.

As I said earlier, life is the product of more than man alone and man does not have the right to destroy life.

Getting back to the abortion on demand, we are now in the society of the no-return bottle, the throw-away container, the non-deposit can. Abortion on demand is nothing more than disposable life. I suggest that we are not reaching a common good if we accept that principle.

What can be done, however, to meet the problem of abortion? Certainly increased medical knowledge can reduce the occasions for abortion. Increased law enforcement can crack down on illegal abortions. Expanded moral education in the area of sex education, pornography and so forth can enrich our climate in achieving a total sexuality. We can improve our information about birth control. We can improve the standard of living and those conditions which give rise to these tragic situations. We can adopt public support for illegitimate children. If the impetus for abortion is the social rejection of these children, we can educate the public to accept them. We should have enlarged research on the problems of marriage and divorce and family programming. We can increased programs of assistance to the handicapped. We can facilitate adoptive procedures. We can enlarge our public support for defective children. We can have more effective criminal law studies and surveys.

Abortion is an irrevocable choice. Against that irrevocable choice, there are hundreds if not thousands of alternative.

In summary then, in conclusion, thanking you for your patience, I would say, your question is what is the common good? What is that quality of life that we desire? What physical, intellectual, artistic, social and spiritual values do we choose as a society to confer on future generations? We know where the law has brought us to this date. We know where medicine and morality have brought us to this date. They are in favor of life. What would be the effect - what would be the consequences of change? Japan has abortion on demand and they are having second thoughts about it. It is not unusual in Japan for a woman to appear for the second and third time in a year seeking abortion. I think the only answer to a change would be that life would be less valuable than it was before.

Three hundred and fifty-eight years ago, Judge Coke in Calvin's Case in England, the Court of King's Bench, in 1610, said this, "The law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction and this is the law eternal, the moral law, called also the law of nature, and by this law, written with the finger of God in the heart of man with the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world."

When I was preparing to come before you gentlemen, we

were discussing the subject of abortion at the dinner table. My nine-year-old daughter said, "Daddy, what is abortion?" And I said very simply, "Well, it is killing babies before they are born." Without benefit of ethical or moral or sociological studies, she said to me instantly, "But that's wrong." I suggest to you gentlemen, stripped of its sophistry and its syllogisms, that it is wrong and, in the heart of that nine-year-old girl, as Judge Coke said, written by the finger of God, the voice of God speaks and says it is wrong to kill babies before they are born. Thank you very much.

ASSEMBLYMAN CRANE: Thank you, Mr. Foley. Any questions of this witness?

REV. DENTICI: I would like to ask a question, Mr. Foley. You treated with this abortion on demand. Now we have heard this afternoon the idea that we are faced with pluralism in moral standing relative to this. We have heard conflicting medical advice as well as social advice. Do you feel it would serve the common good if we were to repeal all laws on abortion?

MR. FOLEY: No, I don't think that the common good is a matter of consensus or popular poll. As I said, in the law with respect to intoxicants, excessive indulgence - that is, gluttony - was against the moral law. There are 4 million car thefts a year. I don't think anyone would suggest we repeal the law with respect to that. There is some suggestion that gambling doesn't meet with a popular consensus. There is a didactic value to the law wherein we serve an educative purpose. Our society says, gambling is against the public interest. Notwithstanding

the fact that millions perhaps of our society gamble, we recognize that it is against the public interest - the same thing with intoxicants, the same thing with laws of abortion or pornography. Although there may be a multimillion dollar market for pornography, the law serves a didactic purpose in recognizing that the common good is best served by promulgating laws to reduce and eliminate that.

If we were to withdraw entirely from the law of abortion, we would then be permitting the individual conscience to dictate what the common good is. We don't do that in the question of the blood transfusion. We don't permit that in the question of vaccines. And I suggest that we should not do that in the basic question of the value that our society will put upon the fundamental question: Who shall live and who shall die? Life is not the product of any mother or father alone but there is a third force and that life, once conceived, has a final end that transcends this reality called human existence.

REV. DENTICI: Then if we spoke about the private right of a mother over what is in her uterus - to supersede what is in her uterus - would this go against our legal tradition?

MR. FOLEY: Yes. The problem with making the woman sole arbiter of who shall live or who shall die as if it were a wort on an arm or something like that is this: Under our law we compel the father, of course, to support his children and if he doesn't, the law will compel him to. But in those jurisdictions permitting abortion, when there is a contest between the mother and the father as to whether or not the child shall be aborted, we defer to the mother. The mother is not the

end arbiter. The separate existence that lives and breathes and exists inside her is separate and apart from her. It is unlike any other life that ever existed. I think we must measure the value we place on that life as compared with that of the mother. When it is the choice of lives, morality, law and medicine concur that the mother's life is superior. But when it is the choice of something less than life itself, I think our law has a duty to enunciate and declare what our hierarchy of values are.

ASSEMBLYMAN CRANE: Mr. Foley, supposing you knew of a case where a woman was pregnant in the early stages and there was absolutely no question but that that child would die immediately upon birth - it was some sort of a defect discovered and there was no question but that this would happen - would you then not recommend an abortion for that woman?

MR. FOLEY: If the mother's life is not in danger, no doctor is going to guarantee that the baby will die.

ASSEMBLYMAN CRANE: This is an academic question. Supposing you knew this for a fact, an incontrovertible fact --

MR. FOLEY: Accepting it as an academic question, good medicine, I suggest, is in favor of permitting that fetus to come to full term. A delivery is a far less traumatic medical experience than an abortion. I don't know that anyone has described a physical abortion to you, but when one of the doctors appears before you, you might ask him exactly - how is an abortion accomplished?

Another problem with that question, Mr. Chairman, assuming that it is a guaranteed medical fact that the child

will die shortly after birth, under this simple technique that has been referred to, this suction pump that they have in Sweden, it is possible to abort that child alive. What do you do with him until he dies? Is he a non-person? In Sweden they have had aborted fetus live for as long as three days and subject to experimentation. That is the result, that is the effect, that is the consequence of denying the right of the unborn. So I suggest that good medicine, good morality and good law would permit that fetus to come to term and then perhaps a greater authority than you or I will decide whether or not he lives or dies.

ASSEMBLYMAN CRANE: Any further questions? [No response.]
Thank you, Mr. Foley.

Mrs. Walter McGowan, please. Would you identify yourself, please.

M R S. W A L T E R M C G O W A N: Senator Crane and gentlemen, I am Mrs. McGowan and my husband and I have eight children.

I don't know why the word "Catholic" is used here so much. Other religions love children. I was brought up in a Jewish neighborhood, and, believe me, I have never seen such love and dedication on the part of parents. The Galbraith's were white, Anglo-Saxon protestants and they had 12 children - "Cheaper by the Dozen." And was not Onan in the Old Testament slain by the Lord for having done a detestable thing, strewed his seed upon the ground. And how about the father in all this discussion, after all, the baby is half his?

I do not say having children is easy, but I see a lot of

my friends after two children are raised, spending their idle afternoons in card games or cocktail lunches while I still have the joy of six more to attend to.

Our Lord said, "Suffer little children to come onto me for such is the Kingdom of Heaven."

Our legal man from New York said that an ovum and a sperm still remain an ovum and a sperm, but two atoms of hydrogen and one of oxygen make water, so those two must make something too.

Dr. Cooper cites 200 patients out of a city of 10 million people. Are we to deny the most precious gift of life to thousands of unborn children to prevent a very few handicapped children? And if we can spend millions of dollars on a moon shot, can't we spend a little for these handicapped children?

So many ladies I know have been so upset about pregnancy but after the baby was born, they loved her or him very dearly. Who in this room can safely say that he or she was wanted? A first child can be just as unwanted as the tenth. Who of us can really believe that in our ancestor's tree some time some place rape or incest has not occurred and yet we are all here?

If I asked for a show of hands, most people here would be against capital punishment. Capital punishment is reserved for men who have been duly tried and convicted. Are little babies or fetuses, if you must, to be slain without any trial? Will we have slain a deaf Beethoven or a dwarfed Toulouse-Lautrec unawares? Thank you.

ASSEMBLYMAN CRANE: Thank you, Mrs. McGowan. Any questions of this witness? [No response.] Thank you.

Is there anyone else in the room who wishes to testify at this point? [No response.]

I will state that the record will be open, of course, until the conclusion of the hearings on November 26th.

This hearing will now adjourn until our next session in Newark City Hall, November 13th, at 7:00 p.m. Thank you all.

[Hearing Adjourned]

I appreciate your invitation to appear today as a former Prosecutor of Essex County for the purpose of offering observations on the New Jersey law pertaining to abortion. Our statute, N.J.S. 2A:87-1, makes it a crime to perform an abortion "without lawful justification." The act with its critical phrase, "without lawful justification" has been in existence and has remained substantially unchanged for almost 120 years. Many persons consider that fact together with the ambiguous word "maliciously" to be reason enough for a legislative revision and modernization. Additionally, and more specifically, it is asserted by some legal commentators that the words "without lawful justification" are so vague and undefinable as to render New Jersey's criminal statute constitutionally defective.

Chief Justice Weintraub, in the case of Gleitman v. Cosgrove, 49 N.J. 22, 56-57 (1967) expressed difficulty with the constitutionality of the act and suggested that a new statute, articulating the lawful justifications for an abortion, could cure the problems of ambiguity that the present act perpetuates.

Justice Francis takes a distinctly different position. He concludes, from his examination of the statutory history, that the phrase "without lawful justification" is neither vague nor uncertain and that it represents the intention

of the Legislature to adopt the common law rule that any abortion is criminal "except those performed solely to save or to preserve the life of the mother." Comments of Justice John J. Francis, Symposium, "Law Morality, and Abortion," 22 Rutgers L. Rev 415, 417 (1968). And see also concurring opinion in Gleitman v. Cosgrove, supra, at pp. 32-49.

A third member of the New Jersey Supreme Court, Justice Jacobs, took the position in his dissenting opinion in Gleitman that when the Legislature chose the words "without lawful justification," it envisioned that the judiciary would interpret the deliberately broad and flexible words "...from time to time in the light of prevailing conditions." 49 N.J., supra, at p. 53. Having analyzed the historical basis of the statute, Justice Jacobs concluded that "...therapeutic termination of pregnancy to preserve the life or health of the mother⁷ may be considered as falling within the contemplation of the statutory exception...." Id., at pp. 54-55.

I am in agreement with the latter interpretation. We implemented a system in Essex County some years ago whereby every abortion performed by a doctor in any hospital in the County was required to be reported to us. In this way the decision is to whether an abortion is necessary to protect the life or health of the mother was made by medical

personnel. Our office in turn maintained statistics on the number of abortions taking place. We found that the hospitals cooperated fully in making full and completed disclosures. Prosecutor Lordi can make available those statistics if they are of interest to the Committee.

In Essex then, we have the experience of a number of years during which "lawful justification" was left to medical judgment. That medical judgment could and can be broadly exercised within the bounds of professional ethics. Essex did not during this period become an abortion mill or mecca. On the other hand women with a medical problem were not exposed to the danger of submitting at risk of life to an illegal abortion.

Before this Legislature adopts a law which would be more restrictive or which would take from the medical profession the basic judgments as to cause for an abortion, I would urge that the present law be left alone because I believe our courts will trend toward leaving the judgment to doctors. Colorado has by statute forced the District Attorney to become part of the abortion judgment process. My conversations with Mr. McKevitt, the District Attorney in Denver would indicate that he does not regard this as a happy situation. From my own experience, it seems inappropriate to have a District Attorney make

judgments on medical questions. At best he could deal with medical catagories, not cases, with legislated principles, not applications.

Criminal sanctions have never stopped abortions. At best they have stopped abortionists. Many abortionists represent a danger to victims and a danger to society and should be stopped and punished. They can best be stopped by a program which will not interfere with legitimate medical judgments. I urge legislation or an interpretation of existing legislation which would leave the broadest judgment to our colleagues the doctors.

Thank you.

ABORTION



A CHRISTIAN TESTIMONY

Christian Action Foundation

Box 185, Sioux Center, Iowa

ABORTION

A CHRISTIAN TESTIMONY

Agitation is growing for liberalized abortion laws. California, Colorado and Maryland are some of the States that have relaxed abortion laws. Several other States are considering proposals in the same direction.

The problems surrounding abortion are not easy. Medical authorities estimate that last year some one million illegal abortions were performed compared to some eight thousand legal (therapeutic) abortions. Though some feel that the former figure is too high an estimate, the fact remains that the cost in human life, sorrow, and degeneracy is incalculable.

Classifications

Illegal abortions are those performed for reasons other than the termination of a pregnancy in order to save the life of the prospective mother.

Presently, advocates of liberal abortion legislation say that, besides saving the life of a prospective mother, the law should allow abortion

1. when pregnancy results from rape or incest;
2. when pregnancy causes mental and physical health problems;
3. when physicians determine that the child will be born physically deformed or mentally defective.

Besides the above there are those who defend a mother's right to end any pregnancy at her own will.

Advocates of a New Trend

Many legislators are of the opinion that the law should be changed. They point out that the present law dates from the middle of the nineteenth century, that it has been conditioned by Victorian ethics which are no longer ours, and that social circumstances today are completely different from those of one hundred years ago. Dorothy Kenyon, a former municipal court judge in New York, summarizes this trend as follows: "For a state to force a woman to bear a child against her will is outrageous."

A leading spokesman for practising obstetricians in California, Dr. Edmund W. Overstreet, declares, "We do not believe that violation of an archaic statute [the 1872 abortion law in California] is unprofessional conduct."

And Dr. Carl Goldmark, an obstetrician, gynecologist, and member of the Board of Directors of the Association for the Study of Abortion in New York, asserts, "There should be no abortion laws at all. No law tells me if I can amputate a leg or perform a Caesarean, and no law should govern whether I can perform an abortion."

Both the American Medical Association and the American Law Institute have gone on record, recently, as favoring the liberalization of existing abortion laws.

The Philosophy of Hedonism

Underlying much of the argumentation of the advocates of a new trend in abortion practices is the philosophy of Hedonism. Hedonism champions the pleasurable as the highest good. As long as something is convenient and comfortable, hedonism says, it is also the best. Thus abortion is praised as good, because it helps mothers avoid pain and discomfort. The pro-abortionist, from his hedonistic philosophy, reasons that a deformed child should not be allowed birth, because such a child will suffer and cause suffering and, therefore, life cannot be worthwhile for him.

It is our conviction that the present drive of liberalized abortion legislation - though perhaps unintended - springs from these hedonistic ideologies which are at variance with Biblical injunctions.

A Christian View of Life

Biblical Christianity presents an entirely different evaluation of life. It confesses, from the Bible, that life is worthwhile when spent in service and godliness. Life is a gift of God. The purpose and fulfillment of human life must be sought in joyful acknowledgment of God as Creator and Father. The Bible tells us in Romans 11:36, "For of Him, and through Him, and unto Him, are all things, to whom be the glory forever. Amen."

The source of all man's misery, also those signalled in the debate around abortion legislation, lies in man's fall from God. God, in His great mercy, gave His Son, the Lord Jesus Christ, to redeem fallen man. Christ paid for the sins and guilt of those who accept Him as Savior. By faith in Christ a redeemed man may dedicate his life to God in its entirety. Thus serving God and his fellow man is his ultimate end. He may go through trials and suffering, but he knows the secret of God's care and grace. A Christian approaches distress and brokenness with compassion and helpfulness.

Pregnancies, in many cases, entail hardships and suffering. These should not be construed, however, as grounds for abortion, nor occasions for the governing authorities to neglect their divine duty, but, rather as an occasion to serve, sustain and help. We are well aware of the exceptionally painful situations caused by rape and incest. Here due weight must be lent to the

considered judgment of medical authorities. We feel, nevertheless, that abortion must not be simplistically proclaimed the best and only solution. Here too, divine norms must speak clearly: the unborn child, in spite of tragic circumstances is entitled to life, protection and care.

Sanctity of Life

The crucial argument in matters of abortion, we feel, should center around the application of God's command to protect human life. The unborn child lives! To take away that life is a violation of God's commandment, "Thou shalt not kill " (Exodus 20:13).

The Bible indicates that God counts life in the mother's womb as personal. Concerning the prophet Jeremiah God said, "Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, and I ordained thee a prophet unto the nations " (Jeremiah 1:5). God regards the unborn child. The psalmist says to God, "Thou hast covered me in my mother's womb " (Psalm 139:13). Jacob and Esau struggled in their mother's womb. John the Baptist, before he was born, responded to the presence of the Lord Jesus (Luke 1:41,44).

We submit that it is the task of the government, as the representative of God's authority, to protect that life. It is not a mark of progress when a civilization rids itself of the unwanted unborn. Progress should march toward moral excellence. The sanctity of life dictates that we create better circumstances surrounding the birth of unwanted children and that we give better care to those born with handicaps.

The Mother's Suffering

Much has been made by pro-abortionists of the mother's mental agony resulting from child-birth. To prevent such suffering, they said, abortion is the ideal answer.

We submit that this is an unwarranted argument and dangerous advice as well.

Present day mental distress, to a large extent, is part of a deeper ill in society, such as the absence of goals in life, the disappearance of norms of good and bad, the hankering for pleasure, and the rush of modern living.

We contend that abortion, instead of relieving mental pain, will itself become a source of more mental suffering. Easy abortion, it must be noted, is not a once-in-a-lifetime thing. Once abortion is being granted freely in every hospital the same woman will seek abortions more than once. And repeated abortions are disastrous to the mother's mental health. Japan introduced liberalized abortion legislation in 1943. Abortions sky-rocketed from

101,601 in 1949 to 1,170,000 in 1955. But already in 1951 a Cabinet decision noted that "abortion exerts undesirable effects on maternal health." Japan's director of the National Institute of Public Health, Dr. Yoshia Koya, prevailed upon the government to promote the use of contraceptives to combat the population explosion, and expressed his hope that abortion laws be made restrictive as they were before. Russia, which for some years (1929-1937) had open abortion laws, was forced to repeal them and return to older stricter laws which permit abortion only when the life of the mother is at stake.

Sweden, where abortion laws are very liberal, reports a serious increase in neurotic tendencies in women who have aborted ("Commonweal", June 30, 1967, page 411).

The Unwed Mother

The advocates for free abortion claim that they have the answer to the unwed mother problem. We demur. We believe that moral problems are not resolved by removing results but by doing something about the causes. Parents, leaders, teachers, and preachers better join hands in attaining higher moral standards for the younger generation among us. Admittedly, this will not prevent all illegitimate births. It remains society's duty also to protect the unborn child, conceived out of wedlock, and to lend assistance to mother and child. This is a far more difficult road to walk, but it is the only way in which a nation can hope to be blessed. Many of our societal problems stem from a national indifference to God's norms.

Conclusion

We would urge our elected representatives to weigh the preceding consideration carefully in evaluating proposed amendments to existing abortion laws. It is our conviction that the tenets of the Christian faith are of great benefit for the nation as a whole. We submit that the Government should ever realize that it is the bearer of divine authority which it must express in protecting human life and in creating such conditions that those who suffer hardships from childbirth, as well as those born malformed, are given proper assistance and care.

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State House, Trenton, New Jersey, Monday, October 28, 1968.

TESTIMONY OF CYRIL C. MEANS, JR., J.D., LL.M.
BEFORE THE LEGISLATIVE COMMISSION TO REVIEW THE
NEW JERSEY STATUTES RELATING TO ABORTION.

My name is Cyril C. Means, Jr. I live at 1199 Park Avenue, New York, New York 10028. I was first admitted to the Bar, in Michigan, in 1941. In 1948 I received the degree of Master of Laws at Harvard, my two areas of specialization being Constitutional Law and Conflict of Laws. I have taught at Detroit College of Law and the Stanford Law School. I am the author of a law review article, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968, 14 New York Law Forum 235 (1968), and of a forthcoming book, The Morality of Abortion: The Case for Legal Reform (Seabury Press 1969). I am a member of Governor Rockefeller's Commission Appointed to Review New York State's Abortion Law (1968). I understand that your Commission has received our Report to Governor Rockefeller of March 25, 1968. I shall endeavor to answer any questions you may have about its contents and the recommendations we made.

In my testimony, however, I shall confine myself to the legislative and judicial history of New Jersey's statute on abortion, and to the intriguing question concerning its validity under the Federal Constitution.

My views on this subject are personal, and are in no way represented as those of Governor Rockefeller's Commission. The Commission's views are stated in its printed Report, which speaks for itself.

Eugenic Abortion

In 1962, the Supreme Court of the United States declared that if a State "would attempt to make it a criminal offense for a person" to be afflicted with a disease, such a statute would be unconstitutional: "a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . . Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Robinson v. California, 370 U.S. 660, 666-667 (1962).

If the Supreme Court of New Jersey were ever to make its own the separate concurring opinion of Mr. Justice Francis in Gleitman v. Cosgrove, 49 N.J. 22, 32, at 48 (1967), and hold that it is "a crime" for a physician in New Jersey to abort a woman "because she had had rubella in the first trimester of her pregnancy", such a decision would impose on the woman in question cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

It is true that in New Jersey a woman who aborts her-

self, or submits to abortion by another, before quickening, is guilty of no offense at all, because the common law applies to her. The New Jersey statute does not apply to the woman aborted at all; it applies only to the abortionists. In re Vince, 2 N.J. 443, 449-450 (1949). It is also true, of course, that no New Jersey statute formally declares that a pregnant woman who is infected by rubella in early pregnancy has thereby committed a crime. But a citizen's Federal Constitutional right to be free of cruel and unusual punishment cannot be got rid of by the State by the simple expedient of refraining from using the label "crime" to identify the conduct on account of which it punishes her. If a woman in New Jersey is infected with rubella during the first trimester of pregnancy, and if Justice Francis' opinion were to become the law of New Jersey, what would be the alternatives open to her in this State?

1. She could perform an abortion upon herself, without the aid of others. This is a highly dangerous procedure, apt to result in severe damage to her health. Even if the pregnant woman were herself a gynaecologist, she could not, alone, safely perform such an operation upon herself. Legally speaking, however, such a self-aborter would incur no criminal liability, provided she acted before quickening.

2. She could submit to an abortion at the hands of another. Again, if she did this before quickening, she would herself incur no criminal liability. The abortionist, however, would be in violation of the statute, assuming that Justice

Francis' interpretation of it had become the law of this State. Thus every hospital in New Jersey would be closed to her, and she would have to have recourse to a criminal abortionist, operating clandestinely, with all the risk of damage to her health that that entails.

3. She could carry the foetus to term. For more than half a year she would have to live in awful uncertainty as to whether the foetus had itself been infected by the rubella virus and therefore was deformed. At birth this uncertainty would disappear, only in many cases to be replaced with the ghastly fact of a deformed child, which she would then be condemned to rear and care for for the balance of their joint lives.

Whichever of the three alternatives this woman were to choose, she would suffer punishment. The punishment inflicted varies according to the alternative chosen, but in every case it is excessive and inhuman, Constitutionally "cruel and unusual" because the only conduct of hers for which it would be imposed was her misfortune in being infected with rubella early in gestation. That is not an act; it is a mere passive reaction, wholly involuntary on her part (just as being infected by a common cold would be). If the Legislature of New Jersey could not send her to prison for even one day for the "crime" of having a common cold, how could the Supreme Court of New Jersey force her to choose among the three far worse alternatives just set forth, for the equally nonsensical "crime" of having rubella early in pregnancy?

The Superior Court for San Francisco County appears to have adopted this reasoning in Joseph Paul Shively, M.D., v. Board of Medical Examiners of the State of California, Superior Ct., San Francisco County, No. 590333, opinion filed September 24, 1968. In ¶¶ 13 and 14 of his conclusions of law, the Honorable Andrew J. Eyman held that a respected gynaecologist who had performed hospital abortions on women who had suffered rubella in the first trimester of pregnancy "was not guilty of performing a criminal abortion in that all of the women allegedly aborted were entitled to protection under the provisions of Amendment VIII . . . [and] Amendment XIV of the Constitution of the United States," -- the very Amendments invoked by the Supreme Court of the United States in its observation about making a common cold a "crime" in Robinson v. California. The San Francisco court therefore set aside the reprimand which the State's Board of Medical Examiners had imposed upon Dr. Shively for performing these eugenic abortions.

Neither the former California abortion statute (the one in force when Dr. Shively had operated on the women in question), nor the new statute enacted in 1967, makes any specific exception for eugenic abortion; nor does the New Jersey statute. Judge Eyman held, however, that the Eighth and Fourteenth Amendments of the Federal Constitution carved out an exception to cover the eugenic abortions Dr. Shively had performed. Furthermore, neither the California Legislature, nor any other, has ever said in so many words that a pregnant woman's contraction of rubella in the first trimester was a crime. Nevertheless, the San Francisco court

squarely held that the board's application of the California abortion statute to inhibit doctors from performing eugenic abortions would, unless reversed, inflict upon the women concerned "cruel and unusual punishment".

Rape

The same reasoning applies to termination of a pregnancy caused by rape. No legislature has ever declared, or ever would declare, that being raped is a crime. Yet a construction of a general statutory prohibition of abortion as prohibiting termination of a pregnancy caused by rape has precisely the same effect as if the legislature had solemnly enacted that any woman who shall commit the "crime" of conceiving in consequence of being raped shall be punished by being denied the right which was hers (and, indeed, that of every woman) at common law to obtain a professionally performed hospital abortion before quickening. Clearly the courts cannot accomplish by an inhumanly extensive interpretation of a general statute what the legislature itself could not have constitutionally enacted as a narrowly drawn specific statute.

Yet Mr. Justice Francis stated, in answer to a question put to him by a nurse at a symposium held by the Rutgers Law Review on March 27, 1968, that "it would be criminal to perform . . . an abortion" to remove "any products of conception" caused by rape.

Here again, as in the matter of eugenic abortions, the Constitutional instincts of the medical profession of New Jersey appear commendably sound; for the nurse stated that terminations of rape-caused pregnancies are being "done in reputable hospitals in our state." (For the colloquy between Mr. Justice Francis and the nurse, see Law, Morality and Abortion, 22 Rutgers Law Review 415, 438 (1968).)

Thus the Eighth and Fourteenth Amendments carve out exceptions in favor of eugenic abortion and of abortion where pregnancy results from rape. A third Amendment supports this result in the case of rape, but only in that case. This is the Thirteenth Amendment (1865), prohibiting throughout the United States "slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted".

In every historic system of human slavery, including our own from 1619 to 1865, a prominent and well-understood feature was the right a master had to have sexual intercourse with, and to impregnate, his female slaves, with or without their consent. The judicial annals of the Southern States before 1865 will be searched in vain for a single instance of prosecution of a slaveowner for the rape of one of his own female slaves. The reason is that such an act, though forcible, was not, committed by a master on a slave, a legal crime.

When, therefore, today, a man commits rape upon a free woman, he subjects her to the same condition of involuntary

servitude to which every female slave was subject at the will of her master before 1865. Where pregnancy does not ensue, the involuntary servitude ends with the completion of the rape; where pregnancy does result, the servitude lasts as long as the pregnancy lasts. So far as the rape itself is concerned, it is private action, performed by the felon not only not under color of State law, but in direct violation of State law. Nevertheless, if pregnancy ensues, and if the State construes its abortion statute to forbid its termination, the State itself becomes an accessory after the fact, not of course to the rape itself, but to the perpetuation of the involuntary servitude which the rape in this case initiated.

That the sexual use of a woman against her will constitutes "slavery" not merely in the sense of common usage but in a legal and Constitutional sense as well is borne out by the Acts of Congress against the "white slave trade", by which expression is meant the sexual enslavement of free women of any color.

If the Constitutional arguments against the validity of applying State abortion statutes to prohibit eugenic abortions and terminations of rape-caused pregnancies are overwhelming, the reason is simple. In both cases the involuntary suffering imposed upon the woman and her family for an act for which she was not responsible cries out for remedy. Legislatures do have the power to hold citizens to the natural consequences of their own voluntary acts, but neither being infected with rubella nor being raped is a woman's own voluntary act.

Abortions Before Quickening in Other Cases

So much for predictably deformed foetus and women impregnated by rape. What is the Constitutional position in regard to all other women among the total who desire abortions? In regard to them, it is true that the Legislature has the power to hold them to the natural consequences of their own voluntary acts, in pursuit of some governmental objective within the State's general police powers. It therefore becomes pertinent to inquire what the legislative purpose of the New Jersey abortion statute, as applied to the generality of cases, is. As the statute has been changed only in minor particulars over the years (L. 1849, p. 266; L. 1872, p. 45, c. 337; Rev. Stat. 1874, pp. 121, 146-147, §75; L. 1881, p. 240, c. 191; L. 1898, pp. 794, 827, c. 235, § 119; Rev. Stat. 1937, § 2:105-1; L. 1951, 1st Sp. Sess., c. 344, § 2A: 87-1 [N.J.S.A.]), it is the intent of the Seventy-third Legislature, which passed the original abortion statute, signed by Governor Daniel Haines on March 1, 1849, which is relevant.

In State v. Murphy, 27 N.J.L. 112, 114-115 (Sup. Ct. 1858), in an Opinion written by Chief Justice Green for a unanimous Court, which included among the Associate Justices the very Daniel Haines who, nine years earlier, had signed the Act of 1849, the former Supreme Court thus construed that statute:

"The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."

Chief Justice (afterwards Chancellor) Green was one of the greatest lawyers and one of the greatest judges that New Jersey ever produced. When Roger Brooke Taney died in 1864, President Lincoln offered Chancellor Green the Chief Justiceship of the United States, but ill health (which was soon to force his retirement from the bench) compelled him to decline the nomination.

In his separate concurring opinion in Gleitman v. Cosgrove, 49 N.J. 22, 32, at 41 (1967), Mr. Justice Francis, after quoting the foregoing passage from Chief Justice Green's Opinion, wrote:

"If the [1858] court meant to suggest that the only purpose of the 1849 act was to protect the life and health of the mother,"---

and that such was indeed the meaning of Chief Justice Green's Opinion is abundantly evident from a careful reading of the whole of it, ---

" . . . I disagree."

If only the Witch of Endor were still around, she could summon up for us the Supreme Court of New Jersey of 1858, as she did the ghost of Samuel for Saul (I Sam. xxviii.7-20). It does not require much imagination to picture the reaction of those judges of 110 years ago to this latter-day impugning of their construction of a statute passed in their own professional lifetimes. One can see Chief Justice Green deferring to former Governor Haines, and the latter using the same words that, almost 700 years ago Chief Justice Hengham spoke to Serjeant Malmesthorpe:

"Do not gloss the statute; we understand it better than you, for we made it; . . . "

Aumeye v. Anon., Y.B. 33 & 35 Edw. I, 78-82 (C.P. 1304-05 & 1306-07), translated and quoted, T.F.T. Plucknett, Statutes and Their Interpretation in the Fourteenth Century 183, 184 (Cambridge University Press 1922).

In 1849, when the Legislature passed New Jersey's earliest abortion statute, and in 1858, when Chief Justice Green and his colleagues construed it, Joseph Lister had not yet inaugurated antiseptic surgery; he would not do so until 1865. Until then, in the best of hospitals, patients died in great numbers on operating tables in all kinds of surgical operations, including legal abortions. Not understanding how infection took place, surgeons were powerless to control it. Under such consitions of surgical art, a conscientious practitioner would refrain from any kind of surgical operation, not just from abortion, unless it was really necessary to save the patient's life. Only in that real extremity was the risk worth taking. Legislatures did not have to pass statutes prohibiting other kinds of surgery, except where necessary to save the patient's life: the patient's own caution, and the surgeon's own conscience, were deterrents enough. In the unique case of abortion, however, the woman was often under enormous pressure to undergo surgery, even though she knew how dangerous it was, because of factors that would never prompt any other kind of operation.

If the foetus had been extramaritally begotten, shame and fear of social ostracism in that heyday of Victorian moralism were particularly potent influences. But then, as now, the vast majority of abortion-seeking women were wives impregnated by their own husbands. It was no accident that when, in 1878, Anthony Comstock tricked Madame Restell, the millionairess and uncrowned queen of Manhattan abortionists, into selling him an abortifacient, he pretended to be a married man whose poverty forbade another child! This ugly ruse led to her arrest and suicide.

When Nineteenth Century legislatures enacted statutes for the first time prohibiting generally abortion even before quickening, were they acting Constitutionally? I think they were. They were guarding the health and lives of their pregnant citizens from the contemporary consequences of unnecessary surgery. On the other hand, if a woman was really going to die as a result of continuing the pregnancy, the new statutes allowed, either expressly or by construction, her to decide whether to run the risk of an operation, as she had had a right to do at common law, either before or after quickening. After all, not every woman aborted in a hospital before 1865 died; only a minority (though a large one by today's standards) did. If the surgeon estimated that her chances of survival of the operation exceeded her chances of surviving the pregnancy, he would so advise her, and she remained free, under the statutes as she had been at common law, to choose either alternative.

The question may be asked whether eugenic abortion and abortion where pregnancy resulted from rape could, under pre-Lister conditions of surgery, be Constitutionally forbidden by State legislatures. In the first place, eugenic abortion is an anachronism when one is speaking of the Nineteenth Century; for it was only in 1941 that Sir Norman Gregg, in Sydney, discovered the first scientifically predictable teratogenic agent: rubella in early pregnancy. Rape, of course, has always been with us.

Legislatures could rationally decide that a woman should submit to the lesser evil of the pain and humiliation of bearing her ravisher's spawn rather than run the risk of losing her life on the operating table. Once hospital abortions ceased to be dangerous, however, this justification for legislative prohibition of abortion in the rape-caused pregnancy case ceased. Curiously, the Thirteenth Amendment (1865), prohibiting involuntary servitude, and the Fourteenth (1868), now held to incorporate the Eighth (1791), which prohibits cruel and unusual punishment, were contemporary with Lord Lister's inauguration of antiseptic surgery (1865).

Still, it was not only in respect of pregnant rape-victims that the increasing safety of hospital abortions in the decades after Lister undermined the Constitutional basis of the general statutes against abortion. This changing state of surgical fact had Constitutional implications for the great mass of abortion-seeking women as well.

Cessante ratione legis cessat et ipsa lex (When the reason for a law ceases, the law itself also ceases) is a maxim that has come down to us from the age of Justinian by way of Coke's treatise on Littleton. It has been applied to countless rules of law, mostly common-law rules made obsolete because of new statutes that changed the context from which the common-law rules sprang. There are many such decisions in New Jersey. Much rarer is the case where the maxim is applied to declare obsolete a formally enacted statute, especially a penal statute, because of some nonstatutory development in the world of fact. Yet there is such a decision in New Jersey, in the very same volume of reports as the one which contains State v. Murphy; again, the Opinion was written by Chief Justice Green! This case is State v. Passaic Turnpike Co., 27 N.J.L. 217, 220 (Sup. Ct. 1858).

The charter of the turnpike company (which at that time was granted by special act of the legislature, there being as yet no general corporation law) contained in its § 7 a statutory prohibition against the company's building a gate across a certain highway existing at the grant of the charter. Afterwards, this highway was abandoned, and ceased to exist in 1851. In its terms, the statutory prohibition was absolute, and the State argued that it was perpetual. A prosecution for maintaining a nuisance in violation of its charter was brought against the company, for maintaining the gate in 1856. The Court held that despite the categorical terminology of the statute, it was not really intended to be perpetual, but to guard a highway. When the highway, which was the reason for the prohibition, ceased, so did the prohibition.

Conviction was reversed. Justinian's maxim was quoted. The parallel to the case at hand is obvious. Here, too, we have a statutory prohibition, categorical in its terms, apparently perpetual. Yet we know, from State v. Murphy, that in fact the statute was addressed to contemporary conditions of surgery which happily have long since passed away. Is it asking the courts too much to be as humane to all the pregnant women of New Jersey who want abortions as the former Supreme Court, 110 years ago, was to the Passaic Turnpike Company?

Such a ruling would not be a Constitutional decision, but the application of Justinian's maxim as a straightforward rule of statutory construction. In the event that the courts were not so to rule, however, I believe that the maxim has a valid role to play in pointing to the Constitutional infirmity of the statutes as of the present time.

In terms of maternal mortality, hospital abortions are now safer than hospital deliveries at term. The entire Constitutional basis of the original general statutory prohibitions of abortion before quickening, which State v. Murphy identified as protection of pregnant women from the temptation to endanger their lives and health on abortionists' operating tables, has thus disappeared. Not only has that happened, but, if one today were to use the State v. Murphy criterion, the legislatures should prohibit childbirth! That is nonsense, of course, because the State has an interest in seeing that population is replaced, though no longer has it any rational interest in seeing it unduly increased. Furthermore, maternal mortality due to hospital abortions and maternal

mortality due to hospital delivery at term are now both so miniscule that one is tempted to invoke the maxim, de minimis non curat lex, until one remembers that, small as they are, both figures do represent deaths of living women.

In the Nineteenth Century, maternal mortality due to hospital abortions (curve A) was undoubtedly higher than maternal mortality due to hospital deliveries at term (curve B), but both were high. Today, A is lower than B, and both are very low. This means that, at some discrete point of time in the not too distant past, a more rapidly descending curve A intersected and plunged below a less rapidly descending curve B. That point in time is of critical significance for the Constitutional question as regards ordinary abortion-seeking women. Up until then, the legislatures, by forcing women to bear rather than abort (or rather by trying to accomplish this objective), were protecting them from the more dangerous alternative. After that point in time, however, continued enforcement of the statutory prohibitions of abortion before quickening has had quite the opposite effect: women from that time onward have been forced (or rather an effort has been made to force them) to choose the more dangerous alternative. Absent an explicit objective such as promotion of population growth, which could be subsumed under the State's police powers, the continued enforcement of the abortion statutes after the critical point in time above identified is surely unconstitutional. It is the Fourteenth Amendment (1868) itself, acting directly through its clause prohibiting deprivation of "life" or "liberty" without due process of law (and not as incorporating some clause from one of the first eight

Amendments) that accomplishes this result. A State may not force, or attempt to force, a woman, against her will, to run a higher medical risk of death by carrying a foetus to term and bearing it rather than accept the lower medical risk of death through hospital abortion, unless it explicitly bases such compulsion on a legislative determination that such a measure is necessary to cause the State's population to increase more rapidly than it is increasing. The widespread repeal of laws against contraceptives proves that no such evaluation of the demographic problem is presently in the minds of America's State legislators, who are, of course, well aware that overpopulation, not underpopulation, is the danger that we now face, for the first time in the history of our species on this planet.

The Pre-Natal Injuries Cases

Opponents of abortion law liberalization cite the decisions since 1946 allowing infants, after birth, to sue for injuries inflicted upon them intrauterinely, as "proof" that the law regards the unborn foetus as at all stages a human person. The Supreme Court of New Jersey has correctly characterized such contentions as a "semantic argument" and "beside the point"; causation is the only real question. Smith v. Brennan, 31 N.J. 353, 364 (1960), in which the Court declared that "[j]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body." The beginning of life to which the Court here alludes is, as the context makes clear, not conception but birth. Only a live-born

plaintiff may bring such a suit; none can be brought on behalf of a similarly injured still-born foetus.

Causation, not conception, is the key to the pre-natal injuries cases and what they teach. Suppose a man's testicles, or a woman's ovaries, were to be irradiated by a ray that did not kill, but mutated, his spermatozoa or her ova, and that afterward either became the parent of offspring deformed because of such mutation. If causation could be proved, recovery ought to be allowed. No one would argue from such a decision (at least I hope no one would) that it proved that the law now regards a spermatozoon or an unfertilized ovum as a "man", or rational animal. Yet, if that be agreed, how do the pre-natal injuries cases already decided prove that the law regards the early embryo as a human person?

The Sanctity of Life

The question regarded as central by most debaters on both sides of the abortion law liberalization controversy is: When does human life begin? There is only one correct answer. It does not begin. The spermatozoon in the man is both alive and human, in the sense that it is distinguishable from the spermatozoon of every other animal. The ovum in the woman is both alive and human in the same sense. Each of these gametes, before the moment of fertilization, contains 23 chromosomes. Each chromosome is alive and human, in the sense that it can be distinguished from the chromosomes of all other animals. At the time of fertilization, all that occurs is that the two squads of 23 chromosomes

rearrange themselves into a single platoon of 46 chromosomes. There is a new pattern on the genetic drill field, but there is no new life, and no different life, than there was just before fertilization. There is just the same old life, rearranged.

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Federal Supreme Court held that married couples have the Constitutional right to commit spermatozoicide and ovidicide, otherwise known as contraception. In In re Vince, 2 N.J. 443, 449-450 (1949), the New Jersey Supreme Court held that a pregnant woman still has her common-law right to commit foeticide (i.e., abortion) up to the moment of quickening. These authorities alone make it clear that neither the Constitution nor the common law regard either gametes or early embryos as possessing life that is sacred or inviolable. The common law does protect the fetus after quickening, as a being worthy of protection in its own right, but even then not as on a full parity with born persons.

The liberalized abortion statutes recently enacted in six English-speaking jurisdictions (Mississippi [1966], Colorado [1967], North Carolina [1967], the United Kingdom [1967], Maryland [1968], and Georgia [1968]) have led certain critics to lament that these enactments for the first time have breached the high wall that Anglo-American law has, until now, built around something called "human life". This is nonsense. The Anglo-American common law has never regarded the human life of gametes or early embryos as sacred. What it has regarded as generally inviolable is the right to life of a human person; it has recognized, and still recognizes,

no human personhood prior to quickening, only a limited human personhood between quickening and birth, and personhood itself only after birth.

Certain opponents of abortion law liberalization are about to publish a book under the title, Abortion Is Coming. The ominous terror affected by this touching caption is quite superfluous. Abortion is not coming; it is here. It always has been here. It will be finally superseded only by a virtually free, extremely simple, and foolproof contraceptive.

These are the nondebatable facts of life that will not be budged by punitive legislation, though never so draconian. What legislation can do is to convert clandestine, dirty, and dangerous abortions into open, sanitary, and safe abortions, by re-legalizing abortion, if done before quickening. Such abortions were legal at common law everywhere until 1803, and in New Jersey until 1849. Until then such abortions were completely legal but dreadfully dangerous. If they were re-legalized today, we should be returning to the legal wisdom of our forebears, without having to run the risks they did.

Mr. Chairman, Dr. Ginsburg, Reverend Clergy, Gentlemen:
I thank you most sincerely for the opportunity to share with you these personal views.

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October 24, 1968

Hon. William M. Crane, Chairman
Joint Legislative Abortion Law Study Commission
c/o Samuel A. Alito, Secretary
Law Revision and Legislative Services
Division of Legislative Information and Research
State House
Trenton, N.J. 08625

Dear Mr. Crane:

Thank you for your invitation to appear before your Commission
Wednesday, November 13, 1968.

I regret that I will be out of the State on that date for a commitment
that I cannot change.

For what they are worth I would like to bring to your attention my
thoughts on the matter of your Committee's Study.

As you know, one of the reasons for the re-evaluation of New Jersey
laws on abortion was Gleitman vs. Cosgrove et al 49 N.J. 22 (1967) wherein I was
a defendant.

I suppose since time immemorial obstetricians and their predecessor
midwives have been constantly importuned by women who think they may be pregnant
and are unhappy to be, to have the pregnancy (if present) terminated.

Obstetricians therefor probably know more of the law in this very
limited area than the average lawyer. Since being licensed in New Jersey in 1937
I have been aware that the law in New Jersey (N.J.S.A. 2A:87-1) states that it is
a high misdemeanor to "maliciously or without lawful justification" cause or procure
a miscarriage. Subsequent judicial interpretations of the foregoing law prior to the
suit involving me and my associate, Doctor Jerome A. Dolan, held that the only
justification was preservation of the mother's life. (State vs. Shapiro, et al,
87 N.J. L. 319 (E&A 1916) and others.

It was therefor shocking to me to be sued for not having broken the
current law in New Jersey by not recommending or performing an abortion on
Mrs. Gleitman. The initial charge obviously wasn't so crude, since we were accused
of not having advised the plaintiff of the possible harm caused by rubella in early

pregnancy. We did so advise of the possible adverse effects but did no more than describe the possibilities. This of course was a matter of credibility for jury decision, but there was no question that the object of the suit was to gain damages because the child was defective and no abortion had been performed. In this connection see the written opinion of Supreme Court Justice Francis. None of the Justices held that Mrs. Gleitman's health (the only possible reason for an abortion at that time) was ever in question.

It is my firm conviction that laws should be made by pertinent legislative bodies and should be sufficiently explicit that it is not necessary that the interpretation of them be constantly shouldered by the courts, who have troubles enough of their own.

The present law in New Jersey as cited (NJSA 2A:87-1) is defective because of the lack of definition of the word "lawful". This is particularly pertinent when it is realized that the Supreme Court paid little attention to prior judicial interpretation of the word. (Gleitman vs. Cosgrove et al, previously cited).

I therefor strongly urge the legislature to examine carefully the present law and change it to define explicitly its terms.

Other than to know what the law of our State really means, and never to be under any legal obligation to perform an abortion, I have no strong interest in the matter discussed.

There are some views however which may be pertinent.

The first sentence of the Resolution creating your Commission states: "The high rate of illegal abortions constitutes a serious law enforcement and public health and safety problem;" There is no argument about the truth of the statement. However, it is a matter of concern to objective observers to know whether a broadening of the indications in the laws concerned really decreases the incidence of criminal abortions. The experience in Sweden seems to indicate that the incidence of criminal abortions, as far as can be determined, remains constant, whether the permissiveness of legal abortion is strict or lenient. (It has been both). Japanese experience is comparable.

The experience in Colorado for the first year of operation of the new law there as reported by E. Stewart Taylor, Professor and Chairman of the Department of Obstetrics and Gynecology at the University of Colorado Medical Center (in press) indicates an eight fold (8x) increase in the number of abortions (total 400), one third from out of State, 71% for psychiatric indications and only about 5% for medical indications. Two thirds were unmarried (many "Statutory rape").

In a discussion of the foregoing presentation before The American Association of Obstetricians and Gynecologists at Hot Springs, Virginia, September 6, 1968 Doctor Roy Parker, Chairman of the Department of Obstetrics and Gynecology at Duke University, Durham, North Carolina, remarked that the new North Carolina law, which requires four months residency to be eligible for legal abortion, had resulted in a 230% increase in legal abortions but no change in the ratio of indications. One of the problems encountered was that of repeated requests from the same individual. In Colorado about 10% of the legal abortions were subjected to tubal ligation or hysterectomy (sterilization). In this connection, it may be pertinent to note that the law in New Jersey is silent concerning sterilization. I have not heard any statistical data from California, the other State with a new abortion law.

Any further comments would involve the matter of morals versus science. There is much obfuscation about when life begins. Biologically it seems obvious that when a sperm and ovum unite, a new individual of the species will result if nothing interferes. Abortion destroys such a new individual however this may be defined as to whether or not it has attained human status. And whether such life is human or not, it is destroyed without possibility of self defense, legal or physical. Otherwise the discussion becomes a determination of ease and convenience, and neither moral nor scientific.

Writing legislation to determine whether any woman who is unhappily pregnant may be aborted, or prohibiting anyone pregnant to be ever legally aborted is the function of your Committee. The question is less, in my view, of expanding or restricting indications for abortion as it is of defining what the legislature really desires.

I wish you luck.

Sincerely,



Robert A. Cosgrove, M.D., F.A.C.S.

Professor, Clinical Obstetrics and Gynecology, N.J. College of Medicine & Dentistry
American College of Surgeons, President elect, N.J. Chapter
American College of Obstetricians and Gynecologists, Past Chairman, N.J. Section
N.J. Obstetrical & Gynecological Society (Past President)
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Jersey City Medical Center
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Holy Name Hospital, Teaneck, N.J.
John F. Kennedy Memorial Hospital, Edison, N.J.
Monmouth Medical Center, Long Branch, N.J.
Shore Medical Center (Fitkin), Neptune, N.J.

Committee on Maternal and Child Welfare, Medical Society of New Jersey, etc.

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