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ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE. Edited by S.J. Frankowski and G.F. Cole. Boston: Martinus Nijhoff. 1987. 334 Pp. \$86.00.

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hard in that, as Professor Stevens's history tends to show, they were trusted too much too long.

One can only hope that health care providers reading Professor Stevens's book will begin to understand this distrust and deal with it, rather than react, as they too often do, with paranoia at the unhappy turn of events overtaking their (overly) happy past.³⁰

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*Reviewed by Jude P. Dougherty, Ph.D. **

ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE is at once a valuable and a depressing survey of abortion practice and law throughout most of the West and Japan. There are specific reports on Austria, England, France, Ireland, the Federal Republic of Germany, the Netherlands, Sweden, and the United States. There is a collective report on abortion policy in *European Socialist Countries*¹ and another on *International Law and the Protection of the Fetus*.² No attempt is made to address the practice of abortion in the Southern Hemisphere. I say "depressing," since anyone who, for biological or metaphysical reasons, is certain that the human being exists from conception is bound to

30. Of course there's more to it than I've stated. Consider the wildly fluctuating attitudes toward technical expertise in our hospitals. For example, during the first half of this century, women insisted on giving birth in a hospital under the care of M.D.'s (as opposed to midwives), who advocated maximum pain-relief. But once hospital delivery became the overwhelming norm, along with anesthesia and fetal monitoring, women began insisting on giving birth in their homes, along with minimal intervention in labor, through the care of sympathetic midwives (as opposed to obstetricians). How can you win? See Cullen, Book Review, *The Times Literary Supp.* (London), May 18-24, 1990, at 525, col. 1 (reviewing *THE POLITICS OF MATERNITY CARE: SERVICES FOR CHILDBEARING WOMEN IN TWENTIETH CENTURY BRITAIN* (J. Garcia, R. Kilpatrick & M. Richards eds. 1990)).

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1. Zielinska, *European Socialist Countries*, in **ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE** 241 (1987) [hereinafter **ABORTION**].

2. Shelton, *International Law on Protection of the Fetus*, in **ABORTION**, *supra* note 1, at 1.

be distraught by the widespread taking of human life, largely in the interest of sexual pleasure.

Remarkable is the change in outlook concerning the morality of abortion which has occurred from the nineteenth to the twentieth centuries. Until recent decades moral opinion in the West was fairly united in condemning abortion. We have only to note the almost universal use in the medical profession of the Hippocratic Oath. Until recent advances in biology, there may have been doubts concerning the exact time a conceptus becomes a human being, given the time-honored Aristotelian doctrine that matter has to be in proximate potentiality to receive the form.³ In the Middle Ages, Aquinas, in addressing this issue, relied upon common opinion in his speculations concerning the moment of hominization and elected for delayed hominization; but on his principles, even if the moment of hominization was unknown, the unborn was not to be aborted because from the moment of conception it was at least potential human life.⁴

Modern biology has shown how complex the microscopic can be. Minimally, we know today that at approximately the end of the second week after fertilization, a developmentally individual embryo is formed and, from that point on, human development is a continuum.⁵ I say "minimally" because geneticists will affirm that, from the instant of conception, a separate human life is present with its own unique genetic pattern with all the chromosomes and genes which will later determine the physical characteristics of the individual from body structure to hair color.⁶ Some recent studies suggest that "polarization" occurs at the moment of conception; the head of the offspring will be formed when the sperm enters the ovum.⁷

One of the most valuable essays in the book is Frankowski's study of the history of abortion legislation and related issues in the United States.⁸ The

3. For a careful and comprehensive history of the ancients and medievals on abortion, see J. CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* (1977); see also ARISTOTLE, *On the Generation of Animals*, in 5 *THE WORKS OF ARISTOTLE* 736 (J. Smith & W. Ross trans. 1912).

4. See T. AQUINAS, 1 *SUMMA THEOLOGICA* 574 (Q. 118, art. 2) (Fathers of the Eng. Dominican Province trans. 1947-48); 2 *SUMMA CONTRA GENTILES* 263 (bk. 2, ch. 89) (Eng. Dominican Fathers trans. 1923); 1 *QUAESTIONES DISPUTATAE DE POTENTIA DEI* 155 (Q. 3, art. 9) (Eng. Dominican Fathers trans. 1952).

5. See generally R. RUGH & L. SHETTLES, *FROM CONCEPTION TO BIRTH* (1972); S. GILBERT, *DEVELOPMENTAL BIOLOGY* (1988); Ashley, *A Critique of the Theory of Delayed Hominization*, in *AN ETHICAL EVALUATION OF FETAL EXPERIMENTATION* 113 (D. McCarthy & A. Moraczewski eds. 1976).

6. See GILBERT, *supra* note 5, at 30-58.

7. See *id.* at 92. Compare Lehtonen, *Cytokeratins in Oocytes and Preimplantation Embryos of the Mouse*, 22 *CURRENT TOPICS IN DEVELOPMENTAL BIOLOGY* 155-56 (1987) (discussing alternative polarization theories).

8. Frankowski, *United States of America*, in *ABORTION*, *supra* note 1, at 17.

story has been told before, notably by John Noonan,⁹ but it bears reviewing. In 1900, every state in the Union had statutes prohibiting abortion except within narrowly defined limits. The pro-abortion movement started in the early 1960's with strong support from the American Civil Liberties Union and the Planned Parenthood Federation of America.¹⁰ Between the mid-1960's and 1972, nineteen states were persuaded to relax their abortion laws, largely by adopting legislation that followed the American Law Institute's Model Penal Code, published in 1962.¹¹ "Under the Code, abortion remained criminal unless the doctor considered that the mother's physical or mental health was in danger, or that the baby was likely to be formed with serious mental or physical problems, or that the pregnancy was the result of felonious intercourse."¹² The other thirty-one states did not change their laws despite the activity of pro-abortion pressure groups.¹³ It is worth noting that the movement toward the relaxation of anti-abortion laws was not a movement initiated by legislative assemblies. If legislation occurred, it was as a result of recommendations by commissions or other study groups which frequently became policy advocates. In the United States it was a judicial decision by the Supreme Court which invalidated most state laws regulating abortion.¹⁴

Reports from Europe vary. In Sweden, within the span of a half-century, abortion has expanded from a few hundred emergency cases to a socially acceptable way of ending early pregnancy, such that by 1983 one-third of all pregnancies were terminated by abortion. One-half of all women of child-bearing age have had one abortion, and one-third have had two or more. Not only that, but forty-four percent of all children are born out of wedlock. Alvar Nelson reports that moral resistance against abortion has all but ceased, religion having lost its grip on the citizenry.¹⁵

In the Federal Republic of Germany, the *Strafgesetzbuch*, or Penal Code, until 1976 treated abortion as a criminal act except when performed under certain narrowly defined conditions. German law governing abortion dates to the Penal Code of 1871, which in spite of many alterations remained fundamentally the same until 1976, when many of the traditional restrictions were relaxed.¹⁶ With the unity of the two Germanies the issue may again be

9. J. NOONAN, *A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES* (1979).

10. Frankowski, *supra* note 8, at 21.

11. *Id.*

12. *Id.* at 22.

13. *Id.*

14. *Roe v. Wade*, 410 U.S. 113 (1973).

15. See generally Nelson, *Sweden*, in *ABORTION*, *supra* note 1, at 189-212.

16. See generally Gössel, *Federal Republic of Germany*, in *ABORTION*, *supra* note 1, at 129-50.

addressed as some seek a law that will reflect the even more permissive East German abortion law. At this writing the outcome is uncertain.

On one side of the debate are the German Bishops and the Federal Chamber of German Physicians. On the other are arrayed the representatives of the women's liberation movement and other groups, including the trade unions and the Evangelical Church, which favor some form of compromise. The German Catholic Bishops have consistently taught: "The day of conception makes life untouchable. Unborn life is not at the mother's disposal, because the child within his mother's body is not part of that body, but is an autonomous life of its own."¹⁷ The Federal Chamber of Physicians has taken the following position: "Physicians must realize that their duty is not to solve social problems by abortion, but to preserve unborn life."¹⁸ But the 1976 law, giving priority to the pregnant woman's right to personal freedom over the protection of unborn human life, was passed by a majority coalition of the Social Democrats (SPD) and the Free Democrats (FDP).¹⁹ Under the new law, a woman has a right to terminate a pregnancy in four situations: medical-social, eugenic, ethical, and "general state of distress."²⁰ Destruction of the fetus is permitted for medical-social reasons throughout the pregnancy up until the beginning of the birth process, for eugenic reasons within the first twenty-two weeks of conception, and for "ethical" (felonious intercourse) and "state of distress" reasons within the first twelve weeks.²¹ To justify abortion when its purpose is to avoid a "state of distress," two conditions must be met: 1) the "state of distress" must be too grave to require the pregnant woman to give birth, and 2) the destruction of the unborn must be the only way of averting the danger in a way that is tolerable to her. The "state of distress" defined by the 1976 law may result from familial, economic, or other burdens of extraordinary harshness. Familial reasons may include the judgment that the birth of the child would mean the neglect of other children or relatives in the household requiring special care. Examples of "extraordinary harshness" include the possibility that continued pregnancy would prevent the woman's further education and thus severely endanger "her whole path of life."²²

While the law clearly has been enfeebled by the numerous conditions that are recognized to justify abortion, the thrust of the German law remains the protection of unborn life. Unborn life is meant to be penally protected not

17. *Id.* at 131.

18. *Id.*

19. *Id.* at 146.

20. *Id.* at 142.

21. *Id.*

22. *Id.* at 143.

only by declaring abortion punishable, but also by imposing duties on the mother and on the attendant physician that are in the interest of the unborn's right to life. Before an abortion is performed the woman must request social and medical counseling. Social counseling is intended to encourage the mother to decide freely to continue pregnancy. Physicians may serve as counsellors only if they agree not to perform the abortion if the woman so elects in spite of counseling. Practice varies from state to state with some parts of the country far more lenient in their compliance with an already weak law. The law is so weak that many regard the present Code to be unconstitutional because in practice it fails to guarantee the constitutionally demanded protection of unborn life. This fear is reinforced by the evidence; since 1976, the number of abortions has risen dramatically from forty-three per thousand live-births to one hundred and forty-six in 1982.²³

As in the United States, in nearly every European country the division between pro-life and pro-choice advocates is deep. Any explanation is bound to be complex. Throughout the West the liberalization of abortion laws occurred in the 1970's largely as a result of the adoption by the judiciary and by political parties of an intellectual outlook at war with the traditional morality and its customary institutional defenders. One philosophical or religious outlook replaced another, and with the new outlook came a new way of structuring society. Abortion was but one facet of the larger restructuring. At one level, the permissive attitude toward abortion is the logical outcome of the sexual revolution. If sexual fulfillment is given priority over life's other goals, and this is commonly accepted, restraint is difficult to promote through moral persuasion: individuals tend to do no more than is demanded of them under sanction of law or public opinion. It should be obvious to anyone who considers the evidence that the unborn are human beings and today few rarely argue the opposite. Rather, the sloganeering is on "bodily freedom," with the human life issue completely ignored.

The secular mind-set of intellectuals trained in the spirit of the Enlightenment governs the media and the academy. It is at once in opposition to Biblical morality and to the religion which it fosters. Though many social observers have pointed to the destructive effect of Enlightenment morality, its negative effects for the individual and for society are yet to be acknowledged (or even noticed) by its advocates. That morality was designed by an elite for an elite; the masses were to be controlled by insisting on their adherence to traditional norms and by holding them liable to customary sanctions. It will be remembered that Voltaire urged the eradication of Christianity from the world of higher culture. But he was willing to have it remain in the

23. *Id.* at 148.

stables and in the scullery, mainly as a moral force, lest a servant class emancipated from the traditional sources of morality might pilfer.²⁴

It is a truism that, given enough time, intellectual conflict will manifest itself in political confrontation. It is no accident that Christian democratic parties, whatever their name, are usually defenders of a Biblical or traditional morality. They emphasize self-restraint, obligation, the common good, and spiritual goals. Socialist parties, again, whatever their name, are usually secular in outlook, embracing a naturalistic humanism that places the emphasis on temporal achievement. If the grave is the end of life, human goals are to be achieved here and now or not at all. Strangely, an outlook that starts with the declared goal of "making this a better place for future generations" has time and again, as we can see from numerous examples in Asia and Eastern Europe, resorted to coercion in the practical order, exclusiveness in the academic, and a self-destructive permissiveness in the moral.

Frankowski and Cole in this collection of reports have studiously refrained from imposing moral judgment; yet, in spite of what must have been their charge to the contributors, nearly all find it difficult to avoid moral judgment as they point to profoundly divisive outlooks and call for more careful considerations. One cannot avoid the impression that so much taking of life has resulted in a certain callousness in those societies or groups where it has become prevalent.

With the collapse of Marxism in the economic order, perhaps the time is ripe for a study of its consequences and that of other secular humanisms in the social order. In 1929, Lenin wrote: "To engage women in productive work for the society, to liberate them from 'home slavery,' to free them from stupefying and humiliating dependence, so that they do not have to look constantly and exclusively after the home and children—this is the primary task."²⁵ As Eleonora Zielinska has pointed out, "Mass scale 'liberation' of women from the traditional social roles would not have been possible without accepting the idea of family planning, including the availability of abortions."²⁶ In the Soviet Union permissive legislation with respect to abortion was followed by such a downturn in the birth rate that Stalin in 1936 reversed the policy and introduced a general ban on abortion. The prohibition against abortion continued until 1955 when a new liberalization occurred. Zielinska in her chapter, *European Socialist Countries*, finds that a permissive attitude is common to all socialist countries whether in Europe or elsewhere.²⁷

24. P. GRAY, *VOLTAIRE'S POLITICS: THE POET AS REALIST* 259 (1959).

25. Zielinska, *supra* note 1, at 254 (quoting LENIN, 30 LENIN 418 (1929)).

26. *Id.*

27. *Id.* at 242.

While ABORTION AND PROTECTION OF THE HUMAN FETUS settles neither the moral question nor the more basic metaphysical issues at stake, as a result of the data presented, it clearly suggests the need for principled inquiry. The basic question remains: Is there any freedom which justifies such a large scale taking of human life?

MEDICAL LAW: TEXT AND MATERIALS. By Ian Kennedy and Andrew Grubb. London: Butterworths. 1989. 1210 Pp. \$50.00 approx.

*Reviewed by George P. Smith, II**

I.

Although human anatomy and physiology are taken as the same world wide, individual cultures differ in the basic organization and the delivery of health care services. Thus, while Americans are regarded as probably more health conscious than any other culture, it remains the only industrialized country (with the exception of South Africa) that has failed to create a system of national health insurance. The underlying rationale for this policy is said to be cost—this in spite of the fact that the Nation spends more than twelve percent of its Gross National Product on health care.¹

While the traditional means for affording access to goods and services in a capitalistic economy is the free market system, Americans have been unwilling in the past for the most part—to either condone or accept financial ability as the central means for distributing health care. Responding to this attitude, or consensus, the United States Congress established both Medicare and Medicaid programs to deal with the commitment to provide health care services regardless of ability to pay.² Recent surveys show, however, that while the American public is concerned about the idea or principle of providing health care for all who are in need, and catastrophic health care cov-

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1. B. FURROW, S. JOHNSON, T. JOST & R. SCHWARTZ, *HEALTH LAW CASES, MATERIALS AND PROBLEMS* xxxi (1987) [hereinafter *HEALTH LAW CASES*]; see Hall, *The Malpractice Standard under Health Care Cost Containment*, 17 *LAW MED. & HEALTH CARE* 347 (1989).

2. Silver, *From Baby Doe to Grandpa Doe: The Impact of the Federal Age Discrimination Act on the "Hidden" Rationing of Medical Care*, 37 *CATH. U.L. REV.* 993, 1000 (1988); see also K. DAVIS & D. ROWLAND, *MEDICARE POLICY: NEW DIRECTIONS FOR HEALTH AND LONG-TERM CARE* (1986).