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ABORTION IN JERSEY: DISCUSSION PAPER

**Presented to the States on 22nd June 1993
by the Public Health Committee**



STATES OF JERSEY

STATES GREFFE

CONTENTS

	Page
FOREWORD	3
SYNOPSIS	4
INTRODUCTION	4
THE LAW ON ABORTION IN JERSEY AND BRITAIN:	
Jersey	5 - 6
Britain	6 - 10
The criminal offences in England and Wales and Jersey ...	10
Notes on the Law on abortion in France, Eire and Germany .	10 - 11
Jersey's abortion rate compared with other countries	11 - 13
Education and counselling	13 - 14
OPTIONS	14 - 15
CONCLUSION	15
SUMMARY.....	16 - 17
APPENDICES :	
A. STATISTICS	18
B. TEXT OF A TALK BY LADY OPPENHEIMER	19 - 25
C. SUMMARY OF THE FRENCH STATUTES ON ABORTION	26 - 27



FOREWORD

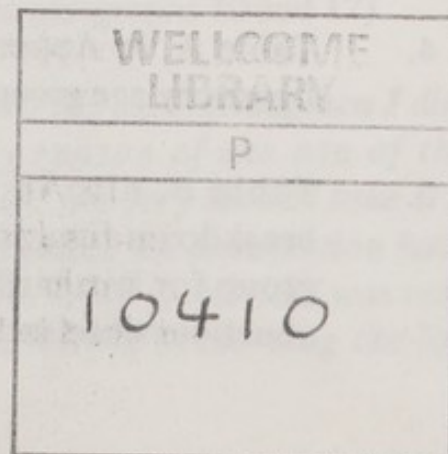
Abortion is something that most of us don't want to have to think about. But the argument is no longer about whether it should happen or not: it is happening and will go on happening. Accordingly it is important to see it in its proper context, to understand what the present law is, what its provisions are and to consider whether any change in the law is desirable. It is equally important to consider whether there is any action which can be taken to reduce the number of unwanted pregnancies which are the principal reason for abortions.

It is recognised that there are serious ethical and moral issues inherent in the consideration of this sensitive subject but this brief discussion paper does not attempt to address them. However, attached as an appendix is a copy of the text of a talk given by Lady Helen Oppenheimer, the eminent theologian, which deals with those issues admirably and in some detail.

The aim of this document is simply to set out the most relevant facts to facilitate informed and constructive debate.

The Public Health Committee now invites all those persons who wish to contribute their views to send them to: The President, Public Health Committee, States of Jersey, 2nd Floor, Kensington Chambers, 46-50 Kensington Place, St. Helier, Jersey, JE2 3PA.

Connétable Jack Roche
President
Public Health Committee
States of Jersey
June 1993



SYNOPSIS

1. **Abortion is not absolutely illegal in Jersey but the grounds are strictly limited. A small number of abortions are carried out each year at the General Hospital and over 300 resident-women a year obtain abortions in England. More than one in five of all conceptions in Jersey is aborted. A number of options for change exist if any action is desired: these include legislation and a programme of education. The Public Health Committee has produced this discussion paper to encourage public comment on the question of whether an Abortion Law should be introduced in the Island.**

INTRODUCTION

2. In his recent annual reports, the Medical Officer of Health has drawn the Public Health Committee's attention to the high number of Jersey-resident women obtaining abortions in England.
3. The numbers for the last five years are -

1987	-	287
1988	-	313
1989	-	322
1990	-	323
1991	-	307
4. Table A, in Appendix A, gives a breakdown of the above figures by age group.
5. Table B, also in Appendix A, compares the age group breakdown figures for 1991 with the related figures by age group for live births and total conceptions. **The number of abortions obtained in England by Jersey-resident women in**

1991 represented 23 per cent of the total number of known conceptions in the Island in that year: the comparative figure for England and Wales for the same year was 21 per cent.

THE LAW ON ABORTION IN JERSEY AND BRITAIN

Jersey

6. To perform an abortion has for centuries been treated as a criminal offence in the law of the Island. The matter is referred to at page 420 of Tome III of the manuscripts of Philippe Le Geyt, Lieutenant-Bailiff, who wrote in 1670, but whose work was not printed and published until 1847. His basic proposition is as follows -

"Selon les lois devines, l'abortissement procure fait un crime capital, si l'enfant a pris vie. Les lois civiles sont conformes a cela."

"In divine law, the procurement of an abortion constitutes a capital crime, if the child has taken life. Civil laws are the same."

7. He does not define further the words *l'enfant a pris vie*", but it presumably meant the same condition as that described as 'quickening in the womb'.

8. Her Majesty's Attorney General has advised that -

"The existing state of (Jersey) Law is not dissimilar to that set out in Section 58 of the Offences Against the Person Act, 1861, of the United Kingdom. (See paragraphs 10 and 12)

In the case of R. -v- Bourne (1939) ... McNaughten J directed in his summing up that, by reason of the use of the word 'unlawfully' in this Section, the jury should take it that the offence was not committed unless the prosecution had proved that the 'act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the

mother'. The judge went on to suggest that the purpose of preserving the life of the mother should be construed as meaning that an abortion was permissible when the continuance of the pregnancy would make the woman a physical or mental wreck. I have not been able to find any local authority turning upon this point and it appears to me that the case of Bourne is an accurate representation of Jersey Law on this issue.' (See paragraph 14)

Britain (England, Wales and Scotland)

9. It was not always a crime in Britain to induce an abortion and until 1803 common law allowed it before 'quickening' - the moment about halfway through a pregnancy when the child moves, at which point theologians thought the soul entered its body.
10. In 1861, the law in Britain was determined by the Offences Against the Person Act which laid down that abortion, whenever induced, was a felony punishable by life imprisonment. Whether the woman herself performs the act or whether it is done by a second person the crime and its punishment are theoretically the same; and the crime lies in the **attempt** to induce an abortion - whether by 'poison or other noxious thing' or by an instrument - and not in the successful outcome of an attempt. (Section 58)
11. The present law in Britain is based on four Statutes and an important Case -
 - (a) Offences Against the Person Act 1861
 - (b) Infant Life (Preservation) Act 1929;
 - (c) The Case of *R. -v- Bourne* (1939);
 - (d) Abortion Act 1967; and
 - (e) Human Fertilisation and Embryology Act 1990.

12. The Offences Against the Person Act 1861 provides in Section 58, as amended, that -

'whosoever, with intent to procure the miscarriage of any woman ... shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony and liable to be kept in penal servitude for life.'

13. The Infant Life (Preservation) Act 1929 provided the offence of 'child destruction' from the time when an embryo is viable at 28 weeks onwards, this being permissible only to save the mother's life.

Section 1 (1) provides that -

'any person who with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of a felony to wit, of child destruction, provided that no person shall be guilty of an offence under the Section unless it is proved that the act which caused the death of the child was not done in good faith for the purposes only of preserving the life of the mother'.

Section 1 (2) provides that -

'evidence that a woman had at any material time been pregnant for a period of 28 weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive'.

14. The case of *R. -v- Bourne (1939)*¹ involved a girl of 14 who had become pregnant as the result of being raped. The surgeon was prosecuted for carrying out an abortion on her. The defence prevailed to the effect that the doctor had acted to preserve the

health of the girl under such circumstances. The case thereby effectively established when an abortion may be lawfully procured and also outlined the proper rights, practices and duties of the medical profession.

15. McNaughten J directed in his summing up that, by reason of the use of the word 'unlawfully' in Section 58 of the Offences Against the Person Act 1861, the jury should take it that the offence was not committed unless the prosecution had proved that the 'act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother'. The judge went on to suggest that the purpose of preserving the life of the mother should be construed as meaning that an abortion was permissible when the continuance of the pregnancy would make the woman a physical or mental wreck.

16. The Abortion Act 1967 did not repeal the 1929 Act but complemented it and provided that abortion may be lawfully performed under certain conditions in respect of a foetus up to 28 weeks, as previously defined in the 1929 Act. Under the 1967 Act a pregnancy may be terminated by a doctor if two registered medical practitioners are of the opinion that the conditions specified in the Act are met. These conditions, set out under Section 1, include -

- (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
- (b) 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.

17. The Human Fertilisation and Embryology Act 1990

This latest Act amended the 1967 Abortion Act effective from 1st April, 1991, as follows -

- (a) it inserted a 24-week time limit, in place of the previous 28-week limit, for abortions performed on the existing grounds of risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family;
- (b) it introduced a new ground for abortion of grave permanent injury to the physical or mental health of the pregnant woman (the wording already specified in the 1967 Act as a ground for emergency abortions) with time limit;
- (c) it provided for two existing grounds -
 - (i) risk to life of the pregnant woman; and
 - (ii) substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped;

to be without time limit;

- (d) it allowed account to be taken of the pregnant woman's actual or reasonably foreseeable environment in cases of termination on the new ground of grave permanent injury to the woman's physical or mental health (an extension of a current provision of the 1967 Act);
- (e) it permitted the Secretary of State to authorise the use of specified abortifacient drugs, if they were in future licensed and marketed in Britain, in places other than an NHS hospital or an approved nursing home;
- (f) it made clear that selective reduction of a pregnancy (termination of one or more, but not all, foetuses in a multiple pregnancy) might be performed if the requirements of the Abortion Act were fulfilled, but not otherwise; and

- (g) it provided that in England and Wales abortions under the Abortion Act 1967 would no longer be governed by the 28-week presumption of foetal viability in the Infant Life (Preservation) Act 1929. (The 1929 Act never applied in Scotland.)

The criminal offences in England, Wales and Jersey

- 18. The laws in England and Wales, as described in paragraphs 7 to 15, provide for the following offences -

- (a) Abortion : conception to viability (24 weeks);
- (b) Child destruction : viability to birth; and
- (c) Murder or manslaughter (depending on the circumstances) or infanticide : after birth.

('Infanticide' is the killing of a child under the age of 12 months by its mother whilst the balance of her mind is disturbed).

- 19. Under the law of Jersey, the criminal charge for abortion is murder or manslaughter (depending on the circumstances) - irrespective of the number of weeks' gestation.

Notes on the Law on abortion in France, Eire and Germany

France (see also Appendix C)

- 20. Under Law No. 17 of 1975, abortion is available, both in public hospitals and private clinics, **on request** during the first 12 weeks from the last menstrual period (LMP) subject to approved counselling.
- 21. Under Law No. 1204 of 1979, there is no time limit on abortions where the ground is risk to the woman's life or health or foetal handicap.

Eire

- 22. Abortion is illegal except on the grounds of risk to the woman's life or health.

23. The Irish constitution provides for the unborn child to have an equal right to life. Accordingly, it is possible for an application to be made to the courts for an injunction to prevent an Irish citizen from leaving the country when a 'breach of the constitution' is intended; e.g. an abortion.

'West' Germany (The former German Federal Republic)

24. Under Law No. 15 of 1976, the 'West' German penal code prohibited abortion with the following exceptions -

Rape or sexual crime; or for social or psychological reasons - Time limit: 12 weeks from conception;

Genetic reasons - Time limit: 22 weeks; and

Medical reasons - Time limit: None

25. In March, 1991, the British press² reported the case of a German woman, returning from a visit to Holland, being stopped at a border post and gynaecologically examined to ascertain if she had had an abortion. The report stated that border checks revealed 80 or so such illegal acts annually. The woman involved in the report was stated to be facing charges of having had an illegal abortion. The report explained that paragraph 9 of Section 5 of the Criminal Code gave precedence to domestic legislation over that of third countries in cases involving German nationals.

Jersey's abortion rate compared with other countries

26. In order to express the number of abortions in a way which permits comparison with other places, it is usual to convert it to a ratio in relation to the number of women of reproductive age resident in the country where the abortions are carried out. The 'reproductive age' span, for statistical purposes, is taken as being from age 15 to 44.

27. The number of women aged 15 to 44 resident in Jersey in 1989 was -

15-19	=	2,538
20-24	=	4,162
25-29	=	3,977
30-34	=	3,502
35-39	=	3,137
40-44	=	<u>3,086</u>
Total	=	<u>20,402</u>

28. The number of Jersey-resident women known to have obtained abortions in England in 1989 was 322.
29. Thus, Jersey's abortion rate for 1989 - based on the number of Jersey-resident women obtaining abortions in England - was 15.8 per 1,000 resident women aged 15-44.
30. However, as was stated in paragraph 6, there are two grounds on which abortions may lawfully be performed within the Island and each year a number of pregnancy terminations are carried out at the General Hospital. The yearly total fluctuates between 10 and 30: thus, an average of 20 may be assumed. These abortions have not been included in the calculation of Jersey's abortion rate.
31. In Britain, the Abortion Act 1967, as amended, requires that certain particulars of all abortions are notified to the Departments of Health for England, Wales and Scotland. One of these particulars is the residential address of the woman. It cannot be discounted, however, that some Jersey-resident women with former addresses in Britain may not give their Jersey address for several reasons. In view of the absence of any factual evidence to support this conjecture, no account has been taken of this possibility in calculating Jersey's abortion rate.
32. The abortion rates for other European countries where abortion is legal were as shown below for 1984 (the last year for which figures are readily available^{3 4}):

3 Source: 'Human IVF, Embryo Research, Fetal Tissue for Research Treatment, and Abortion'; H.M.S.O; Feb. 1990.

Italy	19.0
Denmark	18.4
Sweden	17.7
Norway	15.9
France	14.9
United Kingdom	12.8
Germany (West)	7.3
Netherlands	5.6

(* The 1984 abortion rate for Jersey is not ascertainable as the UK Department of Health did not then separate the figures for Jersey from those of the other Channel Islands.)

33. The 1989 Jersey abortion rate per 1,000 resident women aged 15-44 of 15.8 was higher than the 1984 rate for Britain (12.8) and in the middle of the European abortion-rate table; although the local statistics have to be considered with some caution in view of the comparatively small numbers involved.
34. It is interesting to note that the Netherlands, well known for its 'liberal' attitudes to some controversial aspects of social behaviour, was at the bottom of the table with only 5.6 abortions per 1,000 resident women aged 15-44.

Education and counselling

35. During the 1960s, the Dutch government commenced an educational programme which has clearly proved very successful. Prior to 1960, the abortion rate in Holland was much higher than the 1984 figure of 5.6 per 1,000 resident women aged 15-44 (in contrast to Jersey's 15.8 and Britain's 12.8). It should be noted that the abortion law in Holland could be viewed as most liberal and yet that country's abortion rate is the lowest in Europe.

36. The Public Health Committee, with the support of the Education and Social Security Committees, has established a Working Party on Unplanned Pregnancy. Its report has recently been completed and the recommendations include improved family planning services, education and counselling. Indeed a sum of £40,000 has been inscribed in the Public Health Committee's Estimates of Revenue Expenditure for 1994 to fund the provision of a counselling service.
37. Attention has previously been focused on the need for protected sexual intercourse to minimise the risk of transmitting HIV and AIDS: such practice would also contribute to the reduction of unwanted pregnancies.
38. The Public Health Committee, however, does not believe that the problem will be wholly resolved through these efforts and, sadly, some women will inevitably find themselves faced with an unwelcome pregnancy and will travel to the United Kingdom for an abortion.

OPTIONS

39. Subject to consideration of paragraphs 35 to 38 above, a number of options may be considered - although others may be proposed -
 - (a) Do nothing - maintain the legal *status quo* ; or
 - (b) Codify Jersey's **existing** customary law into a statute, making the law more accessible and certain; or
 - (c) Introduce an Abortion Law with more grounds than the existing customary law in Jersey but less than those available in Britain; or
 - (d) Introduce an Abortion Law with the same grounds and other provisions as the law in Britain; or
 - (e) Introduce an Abortion Law approximating to the law in France with a provision for statutory counselling; or

- (f) Maintain the existing customary law on abortion but criminalise the act of obtaining abortions outside of the Island (as in Eire and Germany).

CONCLUSION

40. The Public Health Committee is aware that whatever the content of its final report and proposition there will be some who will support the proposals and some who will not. That is to be expected in a society such as ours which lays no civil duty in holding any, or any particular, religious belief. There is no doubt that each and every abortion, carried out for whatever reason, is a tragedy which is exacerbated when Jersey-resident women have to travel to England, often alone. Having said that, the Committee is inclined to advocate some reform of the law on abortion in Jersey. At present it is minded to propose a statute similar to the French law which includes statutory counselling. In the first instance, however, it seeks comments from any person who might wish to express a view on this most sensitive of matters.

SUMMARY

41. Over 300 Jersey-resident women obtain abortions in England every year (paragraph 3).
42. The number for 1991 represented 23 per cent of the total number of known conceptions in the Island in that year: the comparative figure for England and Wales for the same year was 21 per cent (paragraph 5).
43. The existing customary law in Jersey permits abortion to save the mother's life or to preserve her physical or mental health (paragraph 8).
44. The statutory law in Britain (England, Wales and Scotland but not Northern Ireland) provides several grounds for abortion (paragraphs 10 - 17).
45. The criminal offences in England and Wales are: 'abortion' (up to viability - now taken as 24 weeks); 'child destruction' (viability to birth); and 'murder' or 'infanticide' (after birth) but, in Jersey, the crime at all stages is 'murder' (paragraphs 18 and 19).
46. In France, the law permits abortion 'on request' during the first 12 weeks subject to statutory counselling (paragraph 20).
47. In Eire, abortion is illegal and it can become a criminal offence to obtain an abortion outside of the country (paragraphs 22 and 23).
48. In Germany, it is a criminal offence to obtain an illegal abortion outside of the country (paragraph 25).
49. In 1989, there were 20,402 women of reproductive age (taken as being 15 to 44) resident in Jersey (paragraph 27).
50. In the same year, 322 Jersey-resident women obtained abortions in England (paragraph 28).

51. Jersey's abortion rate for 1989 was 15.8 per 1,000 resident women aged 15-44 (paragraph 29).
52. A small number of legal abortions are performed each year at the Jersey General Hospital (paragraph 30).
53. Some Jersey-resident women obtaining abortions in England may not give their Jersey address and consequently not be included in the figures for Jersey (paragraph 31).
54. The 1984 abortion rates for France, United Kingdom, (West) Germany and Holland were all lower than the 1989 rate for Jersey (paragraphs 32 and 33).
55. The 1984 abortion rate for Holland was the lowest at 5.6 per 1,000 resident women aged 15-44 (paragraph 34).
56. Holland's abortion rate was much higher in the 1960s but the government initiated a programme of education and other measures which reduced it to the lowest in Europe by the mid-80s (paragraph 35).
57. The Public Health Committee's Working Party on Unplanned Pregnancies has recommended improved family planning services, education and counselling and has budgeted £40,000 for the introduction of a counselling service in 1994 (paragraph 36).
58. A number of options for action are identified (paragraph 39).
59. The Committee provisionally favours the statutory arrangements in France (paragraph 40).

APPENDIX A

STATISTICS

Table A

JERSEY RESIDENTS - ABORTIONS IN ENGLAND AND WALES

1987 to 1990

<u>Age group</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>
Under 19	43	65	63	55	51
20 - 24	118	118	125	116	116
25 - 29	67	80	79	84	80
30 - 34	25	27	33	29	28
Over 35	<u>34</u>	<u>23</u>	<u>22</u>	<u>39</u>	<u>32</u>
TOTALS	<u>287</u>	<u>313</u>	<u>322</u>	<u>323</u>	<u>307</u>

Table B

JERSEY RESIDENTS - CONCEPTIONS, BIRTHS AND ABORTIONS

1991

Age group	Total concep- tions	Live births	Number of abortions	Abortions as percentage age of conceptions
15 - 19	87	36	51	57
20 - 24	274	158	116	42
25 - 29	433	353	80	18
30 - 34	364	336	28	8
Over 35	<u>206</u>	<u>174</u>	<u>32</u>	<u>16</u>
TOTALS	<u>1,364</u>	<u>1,057</u>	<u>307</u>	<u>23*</u>

* Guernsey = 19 per cent : England and Wales = 21 per cent

APPENDIX B

TEXT OF A TALK BY LADY HELEN OPPENHEIMER,
B.Phil, M.A.

"We are thinking about abortion and the law in Jersey. I have not come to say that the present law is bad or good. What I should like to do is try, as a moral theologian, to say something about the underlying moral questions.

I do not altogether go along with either 'pro-life' or 'pro-choice'. Both of them are apt to beg the question and not listen to each other's arguments. Certainly their chosen names are question-begging. When I use these terms 'pro-life' and 'pro-choice' it will be for convenience not in acceptance of either. The truth is surely more complicated.

Of course Christians are pro-life. Many people think that settles the question about abortion. Perhaps they can approve of better contraception so that the question of abortion will arise much more seldom. Humane anti-abortionists go on to argue warmly for a more determined attempt to give better backing to the women who, for various reasons good and bad, feel that they cannot cope with their babies.

In this sort of way the people who are firmly against abortion feel justified in taking over the name of 'pro-life'. I believe this is a misuse of language: who, honestly, is 'anti-life'? This high moral tone naturally infuriates those of us who are not prepared to take such a *rigid* stance. Our principles are just as strong, though different. What we have here is a clash of principles.

Is abortion wrong, and if so ought there to be a law against it? These two questions are not identical. It is often useful to make a distinction between actions to be forbidden with penalties - e.g. driving when drunk - and other actions which we can still believe to be wrong, but which we think are not really the law's proper concern but are matters of 'private morality' - e.g. getting drunk at home.

People who like to think of themselves as moral but not intolerant often find this distinction between private and public spheres a help. For

instance, it has been much brought into play over the question of homosexuality. We might hope that this distinction would be a help with the question of abortion. Someone might say: I should never think it right to have an abortion myself, but I should not think it right to stop other people?

Unfortunately that won't do. Maybe homosexuality is a matter of 'consenting adults in private'; but abortion can't be. Abortion is more like murder: some people say it simply is murder: the offence of all offences which we agree that the law ought to forbid.

Take the 'back street abortionist' argument. 'Of course abortion is horrible, but unless we allow it to be done properly women will simply go to dreadful quacks and perhaps be damaged for life'. This is one of the strongest arguments for a more liberal law: *but* it is not going to convince a strong anti-abortionist: that is what I mean by saying that the two sides are not listening to each other. To use the 'back street abortionist' argument, we must first show how it is different from saying: 'Unless we allow people to kill their relatives they will simply do it on the quiet in worse ways'. *Why isn't abortion just doing away with one's inconvenient relatives?*

The strength of the anti-abortion case does need to be acknowledged, especially by those of us who cannot altogether accept it. It is no wonder that Christians are attracted by the formula 'Human life is sacred from the moment of conception'.

Many people are surprised to hear that there is no such clear Christian tradition. The whole history of theories, assumptions, confusions, misunderstandings, discoveries is complicated and fascinating.

Christians will find it natural to base their views on the Bible; but the New Testament does not pronounce directly on this subject. What was the Old Testament Law? There is a passage in Exodus (21:22-5), dealing with damages for causing miscarriage, which in its Septuagint translation distinguishes the formed and the unformed embryo.

The belief that the human being develops gradually was elaborated as a Christian theory by St. Thomas Aquinas who learnt it from Aristotle. The theory was that the foetus went through stages of being first a plant

and then an animal, and was eventually, not immediately, 'animated' with a God-given 'rational soul': which incidentally was supposed to take longer for a girl (80 days) than for a boy (40 days). The biology is out-of-date: we know more embryology than Aristotle did; but the idea of gradual development makes good sense in the light of what we know now and has as good a claim as the 'moment of conception' doctrine to be called *the* Christian tradition. For instance, we now know that the 'moment of conception' itself is *not* a moment after all but a process.

There is an interesting bit of history here, recounted by Angus McLaren in his chapter called 'Policing pregnancies' in *The Human Embryo* (ed. G. R. Dunstan, Exeter University Press, 1990). Traditionally, the moment when 'the soul' arrived was supposed to be, not conception but 'animation': so early abortions could be tolerated. Abortion was not made a crime in England until 1803. It was Pius IX in 1869 who decided to move the great dividing line of the start of human life back from animation to conception, so forbidding *all* abortions, even therapeutic abortion, to Roman Catholics. As long as 'animation' - 'ensoulment' - was identified with 'quickening', it was the mother who could best tell whether it had happened or not; so women themselves could be the real authorities on the status of their unborn babies.

Professor McLaren sums it up nicely: (*The Human Embryo* p.203): '... doctors sought to put an end to the concept of quickening so that in future any grading of pregnancy could only be legitimately carried out by the medical profession. The Church rejected the concept of the inanimate or unformed foetus for just the opposite reasons; to put an end to medical intervention in childbirth ... Priests and medical practitioners agreed that women had no right to control their own fertility; the question was, who had?'

Whether it was to be doctors or priests, either way it was to be men deciding for women. No wonder we now have a backlash claiming that abortion is a matter for *women* to decide. We may well think now that the 'pro-choice' backlash has gone too far.

Be that as it may, what emerges from all this is that the old idea of graded *increasing* protection for the developing human being, according to its stage of development, is as traditional as the all-or-nothing 'moment of conception' doctrine. So when legislators decide to

forbid abortion only after a certain number of weeks and permit early abortions, they are not doing something intrinsically anti-Christian. To get this clear is important for those of us who mind about our tradition.

Of course the idea of gradual 'ensoulment', though it does fit with common sense, makes things more difficult for moralists and legislators. Instead of every case being clear - 'There is a human being here', or 'There is not' - we shall have many borderline cases where difficult judgements have to be made. Sometimes we have to draw neat lines where the reality has fuzzy edges. 'You can have an abortion up to 20 weeks' is like saying 'You can drive a car from your 17th birthday'.

It is important that this is quite different from saying 'Truth is only relative', or 'Right and wrong are a matter of taste'. For instance: 'Is this red or yellow? - let's call it orange' is a borderline case judgement; 'What is your favourite colour? I like yellow' is a judgement of taste. Likewise, 'Is this a human being?' can be a borderline case judgement, not a matter of taste. We can't say, 'I like to think of it as just a cluster of cells'.

Let us call it what it is, a human foetus; then we can ask the real questions, both about what individuals ought to do and about what sort of law we can support. Is that 'playing God'? If we are made in God's image one of our main duties is to 'play God'. It is a most characteristic human responsibility to make laws, to draw boundaries where often there are no marked lines already. Legislating is an exercise of responsibility before God.

So what line do we draw? The argument is far from settled, either way. On the one hand, when people who have taken the name 'pro-life' ride roughshod over the actual human lives which are at risk of being wrecked; when they talk insensitively about 'mere convenience' when real misery is at stake; when people are not sufficiently aware of what serious mental handicap can do to a family; when men and often celibate men think that the rights and wrongs of abortion are for them to decide; and especially when doubt is cast on the rightness of *therapeutic* abortion: then I know that there is much more to be said.

But on the other hand, when I am talking to someone who believes in 'a woman's right over her own body' I keep remembering that this is a

human life at stake, not just a sort of appendix. When people forget the tragedy and indeed violence of abortions, I realise that a foetus before birth, with its human shape, its beating heart and its nervous system, is not so different from a newborn baby. Especially when people who have been adopted or people with handicaps, who might have been considered as candidates for abortion, tell us that they are glad to be alive, I respect that and think their voices deserve to be heard.

Whatever we say or don't say about 'souls', abortion does take a human life. We have to ask, seriously not in a debating spirit, is this killing murder? Let us consider our instinctive judgement, which says: not always. Few of us really put the life of the foetus absolutely on all fours with the lives of people already born and living their lives: most of us are prepared to say yes, many of us without hesitation, to therapeutic abortion. Truly therapeutic termination, where the mother's life is at stake, is hardly 'abortion' at all. Far from intending to kill the foetus, the doctor will save both if he can. If he can't, he will surely give priority to the mother, whatever some rigid moralists may say. I don't think there is any question for us here of trying to reverse that priority, legally or morally.

But of course we know perfectly well that there are many abortions where there is no risk to the *life* of the mother, where the object is indeed to kill the foetus: to kill a developing human being. *Is this murder?* If it were, then all the common sense and humane arguments for easing the law could never get started.

This is where it is fair to point out: not *all* killing is murder. I find the taking of life thoroughly repugnant but I am not myself a pacifist. I think there can be a just, or inescapable war. If there can be 'justifiable homicide', surely there can be 'justifiable feticide'. This is Professor G. R. Dunstan's phrase from *The Artifice of Ethics* (SCM Press 1974).

What is legitimate, for non-pacifists, is killing in self-defence. People say abortion is different because the foetus is 'innocent': but the notion of an 'innocent' life is not as relevant as it sounds. 'Innocent' here does not mean 'guiltless', which of course the foetus is, but 'harmless', which, when abortion is in question, it is not. The foetus is a sort of aggressor: no more *guilty* than the young enemy soldier who is only trying to do his duty. Abortions are like wars in making victims of

human beings who have not deserved to be punished: and many of us think that there can be dire circumstances in which such killing can be justified. 'Pro-life' then amounts to a kind of pacifism.

Have I dodged the question whether abortion is *wrong*? I think more often it is a lost opportunity. I believe that the making of a human being is the blessing of matter into spiritual life. (I have argued this more fully in an essay on 'Blessing' in *The Weight of Glory*, T & T Clark 1991 pp.228-9). God our Creator delegates this task of nourishing and cherishing to human parents, so that ideally the conception of a child is an acceptance, a kind of mini-annunciation. We can call it a vocation; and the point is that we cannot compel someone by law to accept a vocation. Does acceptance mean anything unless refusal is a possibility?

This kind of 'pro-choice' argument takes motherhood seriously. To allow a woman to refuse to bear this child, to cut off this potential life at its source, is to have the courage of the conviction that parenthood is a vocation. It is not *wicked* to refuse a vocation: we can *allow* abortion, even sometimes approve it, but still look on it as a tragedy.

In this sense I have come down on the side of 'pro-choice', but with two essential qualifications. First, 'pro-choice' must include the live choice *not* to have an abortion, not to be so pressurized by social conditions and lack of support that to get rid of this invader seems the only option.

The pregnant girl or woman needs to have her choices put before her in simple words, with the dangers and disadvantages on both sides fairly set out. Secondly, 'pro-choice' cannot ride roughshod over the doctor's conscientious choice, the doctor's responsibility to make clinical decisions for this patient.

When both sides of the case are properly presented, 'pro-choice' ought not to rule out 'pro-life'. We ought to be able to accept a woman's choice in the last resort without trivializing abortion into a sort of elective minor operation. We can keep alive the awareness that there are two lives at stake here, but also the awareness that they are not two separate lives. One depends on the other for everything including life

itself, and it is not wrong, though it may be sad, for the law to reflect this.

There is an analogy here to the law of divorce. Marriage like parenthood is a vocation, and because it is no good trying to enforce vocation, law has to make provision for what is to happen when vocation fails. The nurture and care a baby needs, before and after birth, the 'mutual help, society and comfort that the one ought to have of the other' in marriage, are absolutely needful and yet go beyond what it is *fair* to demand, so we have abortions and divorces, but we cannot get rid of the feeling that something sacred is being overthrown. The more fully developed the baby or the marriage, the more we are horrified by the killing. The 'morning after' pill, the dissolution of the unconsummated marriage, seem intuitively less wrong. If marriage or a pregnancy was truly a false start, we feel that the law ought to allow redress; and if so, then the earlier the less traumatic.

An abortion, like a divorce, is a tragedy. If we believe that human beings are children of God, abortions and divorces look like God's children rejecting one another; but we still need to acknowledge that abortions and divorces may sometimes be matters of necessity, that the law must make provision for them, but that, however therapeutic they may sometimes be, we still have to say 'The pity of it!'. '

Helen Oppenheimer

APPENDIX C**SUMMARY OF THE FRENCH STATUTES ON ABORTION****Notes**

- A. Prior to 1975 there was a general prohibition of abortion, doubtless with the same exceptions, such as serious danger to the health of the mother, as now apply in Jersey.
- B. In 1975 a law was passed operating for a trial period of five years; it was renewed in 1979 and is now the settled law of France.
- C. It provides different rules for two different periods of pregnancy - within 10 weeks of gestation, and after that period.

Before expiration of 10 weeks gestation

- 1. A pregnant woman whose condition causes her distress may ask a doctor to terminate her pregnancy.
- 2. Only a doctor may terminate the pregnancy and the operation must be carried out in a public hospital or approved establishment.
- 3. The doctor will inform the woman of the medical risks to herself and to future pregnancies, and will give her a dossier of the help and benefits provided by the state to families, of adoption possibilities, and a list of counselling organisations.
- 4. The woman will consult an approved counselling service.
- 5. If the woman, after not less than a week's delay, renews her request to the doctor, the doctor will ask for written confirmation of the counselling.
- 6. The doctor will carry out the operation or refer the woman to someone who will; the chosen hospital will also confirm the counselling.

7. If the woman is a minor, someone in parental authority must agree.
8. No doctor is bound to comply with the woman's request but, if he refuses, he must do so during the woman's first visit. Nurses, auxiliaries, etc., may likewise decline. A hospital may also refuse to carry out abortions, but only if there is another hospital in the area which provides the service.
9. The hospitals must inform the woman of the registration requirements.
10. A central register of abortion details is maintained, omitting identities.
11. There are rules of residence for foreigners.

After 10 weeks pregnancy

12. A pregnancy may be terminated at any time if two doctors certify, after examination and discussion, that the continuation of the pregnancy would gravely imperil the health of the woman, or that there is a strong probability that the child will suffer from a malady of particular gravity recognised as incurable at the time of diagnosis.
13. One of the doctors must be employed in a public hospital or in an approved private hospital.
14. Three copies of the medical opinion must be made, one being given to the woman and the others retained by the two doctors.

