

## CHAPTER VII

# *TOWARD A SOUND PUBLIC POLICY*

### Morality and Law

"You can't legislate morality." "Criminal law should never be used to impose minority moral opinions on the society as a whole." "The Catholic Church is the only organization opposing humane abortion laws." "People may follow their own religious convictions in their private lives, but such beliefs should be excluded from legislation and policy-making in a pluralistic society."

Propositions such as these—often worded more subtly or suggested by innuendo—block the path to reasonable examination of the current proposals regarding abortion laws. The argument should be concerned with sound public policy; instead, proponents of relaxed abortion laws divert attention to the religious convictions of many in the opposition. The assumption seems to be that a public-policy position grounded in religious conviction is automatically ruled out of consideration without any hearing on its merits.

In fact, the prevalence of this rhetorical device is no accident. At the annual forum of the Association for the Study of Abortion, held at the Carnegie Endowment International Center in New York City, March 21, 1967, several speakers adopted the slogan: "Public health in proposition; Roman Catholic in opposition." The meaning of the slogan is that the pro-abortion strategy should be to propose legalized abortion as a necessary measure for solving the public health problem caused by criminal abortions, while brushing aside opposition to legalization as "moral," "religious," "theological," "dogmatic," "authoritarian"—in short, as Roman Catholic.

Many proponents of relaxed abortion laws inject theological issues gratuitously into the discussion. A law professor critical of Glanville Williams' heavily theological discussion of the unborn noted quite rightly:

Indeed, he dismisses the legal status of fetal life as unimportant while basing his proposals for legal reform on the rejection of a theological construct which he creates.<sup>1</sup>

In other words, proponents of legalized abortion prefer attacking straw men to fighting the real obstacles in their way.

This strategy undoubtedly is a clever one. A similar strategy served the birth control movement well. Catholics and other opponents often play into the hands of "liberal" proponents of "humane" (i.e., utilitarian) revisions of abortion statutes by citing religious tradition, Church teachings, and moral convictions regarding the sinfulness of abortion and the status of the unborn as children of God endowed with immortal souls. Such arguments are unacceptable to many "liberals" who regard religious faith as an erroneous subjective conviction.

Arguments in specifically Roman Catholic terms also provoke an automatic, negative reaction among many Americans who regard themselves as "conservative," particularly among those whose white, Anglo-Saxon, Protestant outlook includes a significant element of distortion by anti-Roman-Catholic prejudice. Surely the sincere convictions regarding public policy issues of no other religious group could be vilified so extensively and so continuously as the Catholic position on abortion has been without eliciting a sense of shock and outrage at the appeal to bigotry involved.

Thus, the movement for the abolition of slavery (and its contemporary continuation in the fight against racial discrimination) was largely religious in inspiration; it owed a great deal especially to liberal Protestant leadership. But the convictions of those seeking racial equality were not systematically brushed aside merely because of their religious source. Not even the sincere, though erroneous, current opposition to integration among some fundamentalist Protestants is rejected because of its religious source; it is judged by the common standard of equality before the law, an equality shown by experience to be incompatible with segregation.

The oversimplification involved in the slogan, "Roman Catholic in opposition," is evident from our history of religious views in chapter four. The opposition to abortion on religious grounds was not specifically a Catholic, nor even specifically a Christian position, although it was shared by all Christians until recent times. Even today, as we have seen, Eastern Orthodox Christians and many Protestants continue to regard the unborn as persons having a right to life, a right that may be subordinated only when necessary to preserve the mother's life.

Religious opposition to abortion is common to the entire Indo-European religious heritage, which expressed in many different ways a common conviction that each individual life is sacred, even in the womb, because of man's origin in a transcendent source. Thus Rabbi Immanuel Jakobovits explains that in Jewish doctrine rights are conferred on man by God, but the capital guilt of murder is possible only if the victim is born and viable. But he adds:

This recognition does not imply that the destruction of a fetus is not a very grave offense against the sanctity of human life, but only that it is not technically

murder. Jewish law makes a similar distinction in regard to the killing of inviable adults. While the killing of a person who already suffered from a fatal injury (from other than natural causes) is not actionable as murder, the killer is morally guilty of a mortal offense.

This inequality, then, is weighty enough only to warrant the sacrifice of the unborn child if the pregnancy otherwise poses a threat to the mother's life.<sup>2</sup> [*references omitted*]

The Rabbi indicates the Jewish view by contrast with stricter Catholic and less strict Protestant alternatives:

The traditional Jewish position is somewhere between these two extremes, corresponding roughly to the law as currently in force in all but five American states, namely, recognizing only a grave hazard to the mother as a legitimate indication for therapeutic abortion.<sup>3</sup>

The point I wish to make in quoting Rabbi Jakobovits is not that religious views should determine public policy. Rather, I mean to show that one cannot refute the proposition that "the life of an innocent human being is so sacred that it can never be sacrificed for the health or happiness of someone else" merely by asserting that it is based on theological beliefs. But this is a common practice, as this citation from a professor of law indicates.

In terms of Catholic theology, the position may be sound, but unless we are to allow it to determine public secular policy, how Catholic theology views the matter seems irrelevant.<sup>4</sup>

This attempted refutation is inadequate, because the proposition it seeks to attack, so far as it has a religious origin, is not dependent upon the specific doctrine and conceptual formulation of human dignity found in Catholic theology.

Dr. George Hunston Williams, a Protestant theology professor at Harvard University, put the point succinctly:

The Catholic position on abortion should not be assailed as "sectarian" or deplored by some Protestants as "too harsh" in the present ecumenical climate. Historically, the position is in fact Judeo-Christian.

In the same article he expressed willingness to accept legalization of abortion only in cases in which the life of the mother is at stake or the child has been conceived by rape or incest.<sup>5</sup>

Among Lutherans opposition to relaxed abortion laws is widespread, though not universal. Agencies of the Evangelical Church in West Germany have set up consultation centers and distributed anti-abortion literature.<sup>6</sup> Rev. Christian Bartholdy, a prominent Danish Lutheran leader, charged that widespread abortion made Denmark "a nation of murderers" and asserted: "Hundreds of thousands of women walk in this country as murderers." A Catholic Workers group and another Lutheran clergyman attacked Dr. Bartholdy for rejecting abortion while accepting the balance of terror.<sup>7</sup>

Lutheran Pastor Richard John Neuhaus of the Church of St. John the Evangelist, New York, stated at a Governor's Commission hearing: "Opposition to abortion is not peculiar to those who are responsible to the *magisterium* of the Roman Catholic Church." He pointed out the real issue that proponents evade:

The question is, therefore, raised regarding the legal rights and protections appropriate to the prenatal form of human life. To evade the question as it is posed in this way is both dishonest and socially dangerous.<sup>8</sup>

An editorial in *The Lutheran Standard* similarly declared:

No American Lutheran should be betrayed into forfeiting his judgment on this issue for either of these two reasons. Whether legal abortion is right or not, dare not be answered by automatically enrolling on the side opposite the Roman Catholics. Nor as Christian citizens can we ever renounce the responsibility to work for laws that express the highest moral insights of the community.<sup>9</sup>

In line with this attitude, representatives of the Lutheran Church have testified *against* relaxing abortion laws at a number of legislative hearings.<sup>10</sup>

But Lutherans are not alone in standing up for the right to life of the unborn. Rev. Charles Carroll is a priest of the Episcopal Diocese of California, married and father of four; he was a student of international law at Yale, Harvard, and Berlin during the Nazi era, an officer of the U.S. Military Government in Germany who attended the trial of the Nazi physicians at Nuremberg. Rev. Carroll has testified at a number of hearings in various states. He cites Thielicke, Barth, and Bonhoeffer—Protestant theologians who upheld the sanctity of the unborn life and who opposed Hitler at the risk of their own lives. Rev. Carroll adds:

Catholics are not alone opposed to "liberalized" abortion. Many Christians and Jews; many who respect the common law heritage of Anglo-American jurisprudence; indeed many who believe the law to be based upon those norms of behavior necessary to life, liberty and order within human society (and thus not subject to change by majority vote) believe the present laws to be adequate. They declare abortion illegal "unless (it) is necessary to save (the mother's) life," an ugly choice of life for life at best, but a choice mindful of the right to life and the "due process" owed the legal person *in utero*. It was by this standard of the right to life (the sanctity of life, if you will) that we *judged* at Nuremberg. It is this standard by which we shall *be judged*.<sup>11</sup>

Of course, this position cannot be taken as representative of Episcopalian opinion.<sup>12</sup> However, it does show that not all members of a given religious group are represented by statements of that group favorable to relaxation of the laws against abortion.

In 1962, a General Assembly of the United Presbyterian Church, U.S.A., adopted a statement urging that abortion be procedurally limited to cases in which there are "strict medical indications." The basis of this position was stated as follows:

As Christians we do not condone induced abortion as a means of family planning. (1) The fetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized. (2) The sanctity of the mother's life and that of the child should be respected and preserved. One of the issues often discussed is the question of priority as to saving the mother's or the child's life. This must be decided on the basis of the specific medical problems involved.<sup>13</sup>

Various adherents to the Presbyterian Church can, of course, interpret this resolution in different ways.

State Senator William T. Conklin of Brooklyn, New York, a Presbyterian and father of a mongoloid son, pledged in 1967 to do everything in his power to see that a relaxed abortion bill "never sees the light of day." Opposing all abortion as immoral, Mr. Conklin referred to a statement of New York's Catholic bishops:

I believe we are all familiar with the tone of that pastoral letter which advised Roman Catholics in New York that abortion is an act that "denies the inviolable rights of the unborn child to life." I agree fully.

Mr. Conklin's mongoloid son is twenty-four years old, lives at home, and is employed as a messenger.<sup>14</sup>

I have not cited these sources as evidence that a large proportion of Protestants and Jews would agree with Roman Catholic views as fully as Mr. Conklin does. Rather my purpose has been to illustrate the fact that not only Roman Catholics and Orthodox Christians but also significant numbers of Protestants and Jews still maintain a traditional view of the sanctity of life before birth.

This view in general, explicitly taken by the General Board of the National Council of Churches in 1961, leads to a rejection of abortion as a method of birth control:

Protestant Christians are agreed in condemning abortions or any method which destroys human life except when the health or life of the mother is at stake. The destruction of life already begun cannot be condoned as a method of family limitation. The ethical complexities involved in the practice of abortion related to abnormal circumstances need additional study by Christian scholars.<sup>15</sup>

At the same time, as their statement also indicates, abortion for the mother's health as well as for her life was approved and other possible indications (probably those mentioned in the A.L.I. proposal) were recommended for further study. A 1963 position paper of the Church Council of the American Lutheran Church drew the line at cases "where the mother's health is threatened with severe physical or mental impairment," specifically excluding abortion in cases of possible deformity.<sup>16</sup>

Still it might be objected that even if all Christians and Jews were agreed in a single position on abortion they would have no right to urge their ecumenical consensus as a basis for public policy. After all, the United States separates church and state. Should not public policy be formed on strictly secular

grounds, to the exclusion of all traditional religious influences? It has been seriously suggested that any legislation that enforces a religiously grounded morality, even in purely secular terms, amounts to an unconstitutional "establishment of religion"; only legislation serving "apparent, rational and utilitarian" purposes is acceptable on this view.<sup>17</sup>

This position amounts to asserting that citizens who have moral convictions are entitled to invoke the law to enforce these convictions only if they are grounded in the areligious ideology of secular humanism, but not if they are grounded in a theological view of human goodness. The utilitarian claims the right to establish his ethics, saying, in effect: "You may not legislate your morality, because I'm going to legislate mine. And I have a right to do so, because mine is areligious while yours is religious."

This position clearly is absurd. The U.S. Constitution forbids the establishment of any religion in order to allow for the freedom of all in this most important matter. But the Constitution does not justify areligious ideologies in their claim to a prior right in the formation of public policy. Many advocates of public programs to alleviate poverty are motivated by a religious conviction that God wills that we love our neighbors as ourselves. Is such legislation, sustained by a motive of this kind, necessarily an unconstitutional establishment of religion? Some utilitarians might support the very same legislation on humanistic grounds. Would their support render the program immune from danger of unconstitutionality? Obviously, secular humanists will oppose legislation for which *they* do not see an "apparent, rational and utilitarian" purpose. But can utilitarianism be made the final judge of the constitutionality of legislation without establishing secular humanism as the official religion of the United States?

Perhaps it will seem fanciful to suggest that the exclusion of religiously formed conscience from public policy determination amounts to the establishment of secular humanism as the official religion. For, after all, secular humanism by definition is *not a religion*. But the point is not well taken.

As Paul Ramsey, Methodist Professor of Religion at Princeton, has pointed out, the U.S. Supreme Court has declared "Secular Humanism" a religion despite its areligious character. The Court ruled in *Torcaso v. Watkins* that the State of Maryland had denied secular humanists the free exercise of their religion by demanding a profession of belief in a Supreme Being from a man as a condition of his serving as Notary Public.<sup>18</sup> In a number of recent cases involving persons having conscientious objections to military service, the court has regarded as religious the basic principle of each individual's conscientious convictions, whether that principle involved belief in God or not. Professor Ramsey concludes:

A well-founded conclusion from this is that any of the positions taken on controversial public questions having profound moral and human or value implications have for us the functional sanctity of religious opinions. The question concerning non-religious positions is whether they any longer exist; and whether

proponents of one or another public policy are not, whether they like it or not, to be regarded as religious in the same sense in which traditional religious outlooks continue to affirm their bearing on the resolution of these same questions.<sup>19</sup>

In other words, secular humanists who demand that public policy be judged solely by utilitarian criteria are attempting to impose their particular "religion" (which is as sectarian and dogmatic as any other) on a pluralistic society, many of whose members still believe in a transcendent God.

I do not mean that secular humanists have no right to advocate that society accept a public policy that meets the test of utilitarian judgment. Since they believe that only such a policy can be truly good and humane, they would fail in their civic responsibility if they did not advocate its adoption. Every citizen has a duty to work for the adoption of whatever policy he judges in his own conscience to be in the best interest of the community. Anyone would do wrong who failed to use the means afforded by constitutional political structures both to seek the adoption of what he truly believed to be just public policies and to block the abandonment of such policies, once they have been achieved, to make way for alternatives he considers wrong and injurious to the community.

In making judgments concerning what public policies ought to be adopted, each citizen quite naturally resorts to whatever sources he normally looks to for enlightenment in forming his conscience to guide his own life. The secular humanist no less than the religious believer looks beyond the facts and the merely rational arguments to ideals, values, and purposes that lend human meaning to the facts and human passion to the arguments. Our survey of various positions on abortion laws in chapter five made clear that each position grew out of its own theological or ideological ground. Professor Ramsey states this point well when he says that

... in the debate over abortion and public policy we should hear no more charges that one party or another is trying to legislate for the whole of society a particular religious opinion. That, so to speak, is the name of the game when any serious human, moral and legal question is at issue.

In fact, any fundamental "outlook" productive of an "onlook" on a controversial moral and legal question enters the public forum with the same credentials as one or another of our traditionally "religious" teachings concerning morality and the common life.<sup>20</sup>

Those whose consciences are formed in more traditional religious modes should not be expected to submit their judgments on public policy questions to the "new morality" of utilitarianism—particularly after the United States Supreme Court has seen fit to define as a religion the secular humanism that shapes a utilitarian worldview.

In most cases, the rights of citizens to promote public policies consonant with their religiously formed consciences are unquestioned. Thus, many religious organizations have taken stands on U.S. military policies in recent years. These stands, ranging from total pacifism to advocacy of wars of liberation

against "atheistic communism," certainly have contributed to the formation of public policy. Secular humanists also have contributed to the debate. On the whole, proposals have been considered on their merits, not evaded by calling attention to the theological or ideological sources in the light of which citizens are forming their consciences.

Of course, there are differences between the Vietnam debate and the abortion debate. One difference is that both those who look to traditional religion as a moral guide and those who appeal to a secular ideology are fragmented among themselves in regard to Vietnam. Thus the lines of conflict are not so clear as in the abortion debate. Another difference is that the strongest proponents of the legalization of abortion claim only to wish to permit each woman to follow her own conscience on the matter by withdrawing the sanction of criminal law. By contrast, any policy on Vietnam would involve public action.

Yet neither of these differences shows that there is anything inherently wrong in the efforts of those convinced that abortion is evil to block its legalization. There are matters of religious doctrine and ritual that cannot be introduced into public policy itself. For example, religious observance on Sunday cannot be required of all citizens, and the abstinence from foods or drinks of certain kinds or at certain times observed by one or another group cannot be enforced by making it a crime for any citizen to eat or drink in the forbidden way. On the other hand, there is nothing wrong if those who think that a secular day of rest is needed each week urge that it be Sunday, because that agrees with their own religious practices. And there is nothing wrong if those who think that drinking alcoholic beverages is bad for society try to limit and control their use in a way that also would fulfill a religious ideal. Of course, such legislation might be unwise on grounds other than the religious interests of its advocates.

Moreover, the battle lines in the abortion controversy are not so clearly drawn as many proponents of legalization pretend. The National Opinion Research Council poll, summarized in chapter five, concluded that frequency of church attendance was more important than one's particular denomination in shaping attitudes.<sup>21</sup> A more recent sociological study did not support that conclusion, but indicated that only twenty-five percent of persons who claimed no religion favored abortion on demand; thirty-one percent of such persons approved it only for serious health reasons—corresponding to the legal situation prior to the recent enactment of new laws in a number of states. Thirty-one percent is not a majority, of course, but it is a substantial group of people who regard themselves as non-religious and yet who do not reject the "religious morality" embodied in laws forbidding abortion. By contrast, five percent of Catholics, eight percent of Protestants, and thirty-seven percent of Jews were ready to accept abortion on demand; forty-four percent of Catholics, twenty-five percent of Protestants, and two percent of Jews maintained the most restrictive position. The strictest views on abortion were not found among

Roman Catholics, but among Mormons, none of whom accepted abortion on demand and fifty-three percent of whom approved it only for serious reasons of health.<sup>22</sup>

How about the argument that laws against abortion prevent some persons from doing what they believe they ought whereas repealing such laws would not force anyone to have an abortion? Here it is essential to notice that criminal laws frequently have this effect. There are laws against polygamy, ritual snake handling, and the non-medical use of narcotics, and all of these impose community standards on individuals who would choose to do these acts if they were not dissuaded by the sanction of the laws. More to the point, laws that forbid parents to maim their children or that require parents to send children to school "infringe" on parental liberty.

Many proponents of abortion will deny the analogy to these cases, insisting that the unborn child has no standing over against its mother, so that destruction of it with her consent is a purely private affair. But many opponents of legalization will assert that the unborn do have rights and that the public has an interest in protecting them. This issue is not easily settled, but it certainly cannot be disposed of merely by asserting that laws against abortion invade an area that should be left to personal conscience, for that assertion begs the question of whether the aborted also have rights that the law should protect.

These explanations should be sufficient to dispel the confusion that has been created by claims that anti-abortion laws represent an imposition of religion upon public policy. However, there remains a number of other questions regarding the proper relationship between morality and law. First among these questions is whether the moral views of a minority may rightly be imposed upon the majority, even if these moral views are legitimately brought to bear upon an issue of public policy.

The first point to notice is that our government is not simply a system of majority rule. It is a system of checks and balances, arranged to protect minority rights and interests to some extent even against a contrary majority will. The law can enforce desegregation without regard to antecedent majority opinion; in acting to protect minority rights, the apparatus of the law often shapes a public moral consensus that did not exist beforehand. As Felix Cohen said, after calling attention to the limits of the force of law:

All this is not to argue that law must or should restrict itself to a reflection of the will of the public. The public will can be as foolish and as brutal as any individual will. Regularly it is too formless and irrational a thing to serve as a foundation of law. Indeed the reform of the public will is one of the most essential functions of law.<sup>23</sup>

Even when the majority is so strong that the law fails to protect minority rights effectively—as, for example, it failed to protect the rights of Negroes and Indians—the strength of the majority does not justify its claim to the freedom to deal with the lives, liberty, and property of the minority without public interference.

Indeed, it is interesting that those who wish to legalize abortion entirely also represent a minority, as the polls cited indicate. Dr. Alice Rossi, who reported the National Opinion Research Council poll, stated:

We may one day have contraceptive devices so foolproof that no failure can occur, but until that day comes, women should have the same freedom to terminate an unwanted pregnancy as they have to use contraceptives to avoid pregnancy.

But in the very same paper, she summarized public opinion in the following terms:

Any suggestion that the abortion would represent a last-resort means of birth control is firmly rejected by the majority of this sample of adults. It does not seem to matter very much what the condition is, a poor family for whom an additional child would represent an economic hardship, a single woman who does not wish to marry the man she has had sexual relations with, or a married woman who does not want any more children. The American population approves family planning by means of acceptable contraceptive techniques, but any failure of traditional birth control measures should be followed not by an abortion, but by an acceptance of the pregnancy.<sup>24</sup>

Moreover, as I explained in chapter five, analysis of the results of the poll would not seem to indicate majority support even for a relaxation of the law along the lines of the A.L.I. proposal.<sup>25</sup> Majorities favoring legal permission of abortion when the mother's life and health are in fact seriously endangered and smaller majorities supporting legal permission of abortion in actual cases of rape or when there is a real probability of serious fetal defect are favoring a position more in line with existing restrictive laws than with relaxed laws specifically justifying such exceptions. For existing statutes—not by the letter of the law but by judicial interpretation and actual application—permit abortion when it is performed in accord with the common standards of medical practice. As Mrs. Harriet Pilpel, another advocate of abortion on demand, has explained:

In many hospitals both public and private, in New York and throughout the nation, abortions are being openly performed for such reasons as German measles, incest and rape. Research studies do not disclose a single case where a doctor openly performing such an abortion in a hospital with the support of his professional colleagues has been prosecuted, no less convicted, for violating the law.<sup>26</sup>

Still, Mrs. Pilpel would have the law revised to end "confusion." As we saw in chapter five, revision in accord with the A.L.I. proposal will in actual practice mean the legalization of some measure of abortion on demand, especially under title of "mental health."<sup>27</sup>

Still it is argued that laws against abortion are misdirected since they attempt to "legislate morality." Such attempts cannot succeed; the example of prohibition is often used to illustrate the point.

It must be admitted by everyone that law (especially criminal law) and morality are closely related. If the criminal law does not attempt to enforce all of morality, it nevertheless does not attempt to punish what is generally regarded as morally upright. Indeed, one of the strongest reasons given by those who advocate legalization of abortion is that in their eyes (and in the eyes of many others) there is nothing morally wrong about it. They resent the criminal law's implied moral reproach for an act that they consider blameless and wish to perform or undergo without guilt.

Morality also is a necessary basis for criminal law. Some seldom obey criminal law except out of fear of the sanction attached to it and few would always obey if they could violate the law with impunity. But the vast body of ordinary citizens usually adheres to the standards set by criminal law because those standards are included in and often surpassed by the common moral standards of society.

I am not suggesting that every moral standard should be enforced by criminal law. Cheating at games is immoral, but criminal law need not penalize it. Failing to respond to generosity with gratitude is a moral fault, but one for which the law can supply no remedy. More seriously, to deny one's religious faith or to pretend a faith one does not have is immoral, but the law can neither enforce martyrdom nor condemn hypocrisy. There is no morally significant difference between two persons who decide to perform abortions, if one does so and the other does not for lack of opportunity. Morally, both are abortionists, but no law can touch the person who is an abortionist only in his heart.

In general, both law and morality guide human action toward the realization of human goods, toward the defense of these goods, and toward removal of obstacles to their attainment. But the sphere of law is smaller than the sphere of morality, since law directs action only toward the goods shared in by the whole civil community. Individual citizens and private groups—such as churches, businesses, universities, unions, and families—pursue their own objectives under their own direction, and the law of civil society should not intervene except to the extent that the activities of groups as well as those of individuals bear on the goods common to civil society.

For this reason, immoral acts such as cheating at games, failure of gratitude, and dissimulation or simulation of religious convictions cannot be punished by the law of civil society, since such acts do not in any direct and substantial manner relate to the goods to which civil society directs itself. The immoral act of abortion in one's heart, not executed in deed, lies beyond the reach of criminal law for a different reason—namely, the law cannot punish an act of which there is no overt evidence, and need not attempt to punish acts for which evidence could be gained only by means that would damage the common good. An act committed only in one's heart can become evident only by the testimony of the guilty party, and we accept the principle that no one should be required to testify against himself. Moreover, the thoughts and

intentions of one's heart are not directly of much relevance to those aspects of human goods that the civil society shares in common, while the possibility of secrecy about one's own conscious self is very important for the realization of certain aspects of good that can be achieved only by the individual acting alone and in intimate relationships with others.

Lord Patrick Devlin, a jurist and member of the British House of Lords, has argued that it belongs to criminal law to enforce morality as such, since a society's morality is necessary to its stability.<sup>28</sup> I do not agree with this position. A given society's morality, as it actually exists, may well be immoral by an objective consideration—for example, the morality of a society that regards apartheid as a standard does not deserve to be enforced, at least not in that particular. But even if the morality that exists is sound, it is also important to safeguard individual freedom and to maintain limits on the civic community so that it does not become totalitarian. Therefore, criminal law should not attempt to enforce moral standards as such, but it should enforce moral standards insofar as they bear on the goods common to the civil society, affect these goods in a direct and substantial way, and admit of enforcement without damage to the common good and without the use of methods that involve acts such as torture that are immoral in themselves.

In taking this position, I am much more nearly in agreement with H. L. A. Hart, an Oxford Professor of Jurisprudence who has criticized Lord Devlin's thesis, than I am with Lord Devlin himself. Professor Hart has been cited by some proponents of the legalization of abortion<sup>29</sup> because of his view that social benefits must be great enough to justify the limitation of freedom and the misery caused by the legal enforcement of a community standard. But it is important to realize that Hart's position does not exclude the regulation by criminal law of narcotics, blasphemy, and sexual behavior. The use of narcotics can be regulated in virtue of society's paternal interest in the well being of its members, blasphemy can be regulated to the extent that it might lead to a breach of the peace, and sexual behavior might be regulated to the extent that it offends public decency.<sup>30</sup>

The line between justifiable and unjustifiable efforts to enforce moral standards can be illustrated by the example of illicit sexual relations—e.g., fornication, adultery, and homosexual acts. There is general agreement that such acts may be regulated by the criminal law to the extent that public indecency, solicitation, coercion, corruption of minors, and financial exploitation (as in organized prostitution) are involved. The question is whether two adult persons who by mutual consent privately engage in sexual relations, without any aspect of public solicitation or financial exploitation by a third party, should be regarded as criminals by the law of civil society. Professor Hart's position would apparently exclude legal interference with such acts. But his view is strongly influenced by Mill's utilitarianism and his concept of liberty. Can the same conclusion be sustained if an ethical theory such as I outlined in chapter six is taken as the basis for judgment?

It has been argued that criminal law should forbid such sexual acts on the ground that they undermine the institutions of marriage and the family, and that the protection of these institutions falls within the goods common to civil society.<sup>31</sup> I would not disagree with the premises of this argument. However, the social act of making and enforcing criminal law is a positive undertaking, and no affirmative obligation binds us in the unconditional way that prohibitions of acts directly against basic goods bind us. Therefore, without accepting a utilitarian standard for the justification of law, we can properly ask whether making and enforcing laws against the acts under consideration may not be ruled out by the infringement of personal liberty, the invasion of privacy, and other undesirable consequences that would be involved.

Considering the matter from this point of view, I think it reasonable to hold that law ought not to regard fornication, adultery, and homosexual acts in themselves as criminal. Because a law forbidding such acts is not very effective in protecting marriage and the family, because the bad effects on these institutions are often somewhat indirect, because the stability of these institutions can be promoted in other ways, and because much of the harm done by illicit sexual relations can be prevented if public indecency, solicitation, coercion, corruption of minors and financial exploitation are excluded—for these reasons laws forbidding these sexual relations as such do not seem to be demanded by the common good so urgently that the undesirable effects of such laws must be accepted.<sup>32</sup>

Yet to reach this conclusion does not seem to me to entail that existing laws forbidding, for example, homosexual acts must be repealed. To repeal an existing law is not the same as to omit passing a new law. Repeal of existing laws might be taken as social approval of a practice that most people in fact disapprove, and repeal of existing laws might make it difficult to regulate the behavior in those aspects that have a direct social relevance, such as solicitation, public indecency, and so forth.

Perhaps a solution would be to establish special rules of evidence, either by legislative enactment or by judicial decision, that would prevent prosecution of those who really restrict their illicit sexual behavior to private relations with truly consenting adults. Or perhaps the undesirable aspects of repeal of existing laws can be circumvented by strict enforcement of existing or appropriate new statutes against solicitation, corruption of minors, public indecency, procuring, and so forth.

In any case, I do not think it is possible to say categorically, on general principles, that existing laws forbidding illicit sexual relations either should or should not be repealed. Only a consideration of the facts and the resources of the law to deal with the aspects of such behavior that most directly damage the common good could provide a basis for sound judgment on this complex issue. Certainly, it should be possible to find a public policy more considerate of personal liberty and privacy than that involved in such police practices as spying through the walls of restrooms and entrapment by the use of decoys.

On the other hand, public policy need not be pushed to the point that a homosexual couple's "marriage" would have to be recognized as a legitimate union, sharing the legal rights and protections afforded conventional relationships.

We need not regard existing provisions of the Constitution as beyond criticism and possible improvement; that is why a process permitting amendment is possible. However, neither proponents nor opponents of legalization of abortion have called the United States Constitution into question so far as it bears on this issue. In fact, both sides appeal to the basic rights guaranteed by the Constitution itself. In this situation, therefore, it seems to me reasonable to assume that there is nothing objectionable in each side's attempting to shape the laws in accord with its own moral convictions—whether these have religious, areligious, or simply non-religious sources—to the extent that the resulting laws would not be unconstitutional. In other words, one can legislate morality or license immorality to the extent that the protections afforded by the Constitution are not violated and its purposes are not frustrated.

In sum, my position is that laws forbidding abortion ought not to be relaxed or repealed merely because they "legislate morality," nor because they allegedly impose the standards of a minority on the community at large, nor because these laws originated in religious beliefs, nor because the strongest visible support for strict laws against abortion comes from the leadership of the Catholic Church.

The Declaration of Independence did not violate the principle of separation of church and state when it declared that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights," for although a religious belief in the divine source of human rights was thus affirmed, the rights invoked are relevant to the common good of civil society, whatever their origin is or is believed to be.

Richard Cardinal Cushing, Archbishop of Boston, is often quoted by those who advocate legalization of abortion because of his statements:

There is nothing in Catholic teaching which suggests that Catholics should write into civil law the prescriptions of church law, or in any way force the observance of Catholic doctrine on others.<sup>33</sup>

And:

Catholics do not need the support of civil law to be faithful to their own religious convictions and they do not seek to impose by law their moral views on other members of society.<sup>34</sup>

Apart from the fact that Cardinal Cushing was referring to a Massachusetts statute regarding contraception, not to the laws against abortion, he also indicated that legislators might vote on secular grounds to maintain the statute.<sup>35</sup> Only those who are themselves confused about the relationship between religion, morality, and law could suppose that Cardinal Cushing's statements endorsed the legalization of abortion. His statements, which are perfectly

sound, merely show that Catholic doctrine and church law cannot properly be substituted for the purposes and rights declared in the U.S. Constitution and in the constitutions of the various states as a standard for judging the merits of proposed legislation. Law must protect the goods common to civil society, and it may not be used as an instrument to further the special interests of any segment of the community to the detriment of the whole.

In the controversy over laws forbidding abortion, the central issue is whether or not the unborn should be regarded as persons having rights to be protected by law. The U.S. Constitution guarantees the right to life by providing in the Fifth Amendment (Bill of Rights) that no person shall be "deprived of life, liberty, or property without due process of law" and in the Fourteenth Amendment that state governments may not infringe this guaranteed right. If criminal laws protect the lives of those already born against homicide, can the law justly leave the unborn, or certain classes of them, without similar protection? To this question we must next turn our attention.

#### Legal Status of the Unborn

The question I wish to discuss here is whether the law *should* regard the unborn as persons whose lives shall enjoy protection according to the concept that no person may be denied due process and equal protection of the laws, a right guaranteed by the Fourteenth Amendment of the U.S. Constitution. My conclusion will be affirmative and will be based on a theoretical argument which can stand independent of the present attitude of the law toward the unborn. However, a merely theoretical argument is unlikely to impress lawyers and judges unless it can be seen as a fitting ratification of precedent legal standards and trends of development. Therefore, I shall pave the way for my theoretical argument by examining in some detail the past and present legal status of the unborn before the law.

Prior to the passage of the relaxed California abortion law, Assemblyman Anthony Beilenson, its sponsor, appeared on a nationwide television broadcast, in the course of which he responded to the argument that his proposal might violate constitutional protection of the right of the unborn to life. Mr. Beilenson asserted as his opinion and that of most of his colleagues conducting hearings on the bill that "there are no legal rights of a fetus."<sup>36</sup> Similarly, Assemblyman Blumenthal of New York, promoter of a relaxed law in that state, told his colleagues in an address:

The law does not recognize a child until it is born. Nowhere in American or canon law do we find a death action on the part of a fetus.<sup>37</sup>

Lest it be supposed that my argument is constructed against a straw man constituted of oversimplified assertions made in the heat of debate, it may be worth quoting Mr. Glanville Williams, a legal scholar writing in a university law journal:

A legalistic argument of which some use has recently been made in this connection is that the law recognizes a child as having property rights and protection in the law of tort before it is born. Such arguments are irrelevant. They point out only that when a child is born its rights antedate its birth; but this legal determination has no bearing on the moral question as to the beginning of human existence<sup>38</sup> [note omitted].

Leaving questions of canon law to Mr. Blumenthal and other experts in that field and moral questions to Mr. Williams and other moralists, I propose to show that in many ways the law does recognize legal rights of the fetus, that the trend has been toward ever broader recognition of these rights, and that legalization of abortion is a regressive move toward an already discredited position on the question of the legal rights of the unborn.

#### Rights of the Unborn in the Law of Property

In Roman law, the unborn were understood as actually existing for many purposes.<sup>39</sup> Similarly, in common law, as early as 1586 it was held in *The Earl of Bedford's Case* that although the unborn child is "pars viscerum matris"—part of the mother's insides—the law regards it with a view to its expected birth.<sup>40</sup>

This provision of the law can be interpreted as a mere device, a legal fiction arranged to provide continuity in property ownership and provision as most fathers would wish for those for whose lives they were responsible. A number of cases fit well with this "legal fiction" theory.

For example, a British court in 1823 held that a provision for the heir's children "born in her lifetime" applied to an *unborn* child,<sup>41</sup> which clearly would not be so apart from some construction of law. A Massachusetts court in 1834 rejected the argument that "living" applied only to unborn children that had quickened, holding that any conceived child was within the *meaning of the language* of the bequest.<sup>42</sup> The following year, a Pennsylvania court held that a child should be considered in being before its birth to its benefit, but not to its detriment or to the detriment of its estate.<sup>43</sup> Clearly, being and non-being at the same time is characteristic of fiction, not of reality.

A 1927 New York decision seems to put the fact that we are dealing with a fiction beyond doubt by making the legal consideration of the unborn as "living" contingent upon their subsequent live birth and a prospect of survival.<sup>44</sup> In 1959, a New York court ruled that in property cases an unborn child "is not regarded as a person until it sees the light of day" with the result that a trust could be revoked without its consent, although it would have been interested beneficially and the terms of the trust required the consent of all such *persons* for revocation.<sup>45</sup>

But legal devices, like ordinary fictions, are not without a basis in fact, and it is worth noticing the sort of basis that implicitly or explicitly has been provided by courts for regarding the unborn child as if it were already born.

Conception normally occurs about forty weeks prior to birth; the operative period of the legal fiction therefore is the forty weeks of pregnancy. In 1722 it was held in Great Britain that a contingent devise to one not yet conceived was invalid because the heir's birth might be more than forty weeks after the testator's death, and the judges "were not for going a day farther than a life in being."<sup>46</sup> The implication is that there is *a life in being* throughout the forty weeks of pregnancy.

In 1740 the Lord Chancellor ordered that a posthumous child should be given an accounting of her father's intestate estate by her mother and step-father. The *ruling* is not exceptional, but the expression chosen by Lord Hardwicke is interesting:

The principal reason I go upon is, that a child *en ventre sa mere* is a person *in rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime.<sup>47</sup>

Here the fiction and its factual foundation are neatly distinguished. The fiction, established by "rules of the civil and common law" is that the unborn child is as much a child of its father as if born in the father's lifetime. The factual foundation is that a child in its mother's womb *is a person* in reality. Notice that the Lord Chancellor does not say "is understood as" a person, but "is a person *in rerum natura*"—the latter expression being the opposite of *in mente*.

Another English case seemed to rest the application of the testator's language, "children living at the time of his decease," to the unborn child upon the fact that the heir had already quickened. The ruling was that "an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description . . ."<sup>48</sup>

The fiction theory is perfectly consistent with allowing the unborn to be a person when that is to its benefit, but otherwise regarding it as a non-entity. On the other hand, the real foundation of the fiction demands consistency. In an English case of 1798, the issue was put whether an unborn child should not be considered a non-entity in a case where it gained nothing by being deemed a person. The judicial response was:

Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons.

This implied, of course, that they are *persons*, not non-entities. On the latter point Justice Buller expanded in a famous passage:

Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. [citation] He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.<sup>49</sup>

The fiction theory suffers an obvious strain, because rights bring with them duties, and one set of rights tends to introduce another.

Some modern American decisions clearly illustrate this last point. In *Industrial Trust Co. v. Wilson* (Rhode Island, 1938) the issue was whether a posthumous child should begin sharing in a trust at the time of her father's death, or only at her own birth. The right of the unborn child to benefit led the court to conclude that she could actually receive income even prior to her birth.<sup>50</sup> A 1938 Alabama decision applied the old rule not to the child's benefit, but to the benefit of a third party.<sup>51</sup> In 1926 a California court, *In re Sankey's Estate*, ruled that a decree entered against *living* heirs applied to an unborn child—thus not to its benefit, but to its detriment.<sup>52</sup>

If an unborn child inherits a portion of land, and this land is sold without the child being suitably represented at a legal process authorizing the disposal of his estate, can the child have the sale set aside? In *Deal v. Sexton* (1907), a North Carolina court ruled that the child could recover from those claiming his title. Why? The court held that the child was to be allowed to recover because it had not been made a party to the case, and "a person must have an opportunity of being heard before a court can deprive him of his rights . . ." The court also held "that the inheritance vested immediately in the plaintiff, while *en ventre sa mere*, upon the death of the father . . ."<sup>53</sup> Both points are important. If the inheritance vests *immediately*, the right of the unborn child is not merely a fiction contingent for its legal effect upon his later birth. If the rights of the unborn must be protected under the general principle that a person must have *an opportunity to be heard* before a court can deprive him of his rights, then however much a fictional person the unborn child may be thought to be, his fictional personality entitles him to the due process guaranteed to every person by the U.S. Constitution.

Very likely the personality accorded the unborn by Roman and early common law in matters of property was simply a device; it need not be taken as having meant more than that a causal relation was recognized between the deceased father and his posthumous offspring. But it is interesting to notice that the unborn heir was regularly referred to in these cases as a child. Even in *The Earl of Bedford's Case*, where it was "*pars viscerum matris*"—part of the mother's insides—it was still "*filius*"—a *child*.

In more recent times, it seems that there is some tendency for fact to catch up with fiction in this field as it has in so many others outside the law in an age of great scientific advance. Probably an increasing knowledge of the facts of embryogenesis had something to do with this trend; after all, it is not easy to continue to pretend that one is dealing with a fiction when one is aware that the supposed fiction is a fact. Another reason for development has been the changing character of estates. It is one thing to maintain that a child in its mother's womb is merely treated as if it were born at the time of its father's death when its inheritance consists in inalienable real property and social status; it is quite another thing to suppose that a fiction entitles the posthumous child to benefits when the inheritance includes interests that of their nature can be transferred (as the land in *Deal v. Sexton*), or that give rise to liabilities

(*In re Sankey's Estate*), or that may be deemed fruitful or not depending upon when the interest vests (as the trust benefits in *Industrial Trust Co. v. Wilson*).

### Rights of the Unborn in the Law of Torts

So far we have considered only cases involving property rights. Now we turn to the law of torts, and a quite different pattern emerges. *Torts* are wrongs—apart from those connected with contractual obligations—done by one person to another, for which the wronged party can seek damages by lawsuit. Under common law, actions for torts did not survive the death of either party; the concept of tort law apparently was to redress the balance of justice which had been upset in the personal relationship between two living persons. Early statutes began permitting heirs to seek recovery for certain types of torts which put them at an obvious disadvantage. Not until 1846 was the first statute passed, about which we shall see more presently, that permitted surviving family members to obtain a remedy at law for the wrongful death of, for example, the breadwinner of the family.<sup>54</sup>

The very nature of the law of torts tends to preclude its extension by legal fiction to embrace non-entities as parties to an action. The wrongdoer (technically called "tortfeasor"), who becomes the defendant in the case, must be in existence in order to do the wrong. The wronged party, who becomes the plaintiff, also must exist in order to suffer injury. Any tendency to broaden the concept of "wronged party" for the advantage of those seeking damages is bound to be strongly resisted by those who would be liable. In property law, which does not inherently involve a conflict of interests (although indirectly it often does), a fictional personality for the unborn was satisfactory enough to all concerned to be easily adopted. In tort law, the status of the unborn could not be legally settled by any such easy and convenient device.

In 1884 a woman four or five months pregnant slipped on a defective street in Northampton, Massachusetts. The child was born prematurely and lived ten or fifteen minutes, but was too young to survive. Action was brought under the wrongful death act against the town. If the woman had broken a limb instead of losing a baby she might well have recovered, but the court ruled against the plaintiff in this case. On appeal, Oliver Wendell Holmes, Jr., then a state judge (later a Justice of the U.S. Supreme Court), upheld the lower court.

The plaintiff argued from analogy with the common law of abortion. We shall see more about this argument later; Holmes brushed it aside, along with an analogy to property law. Holmes also argued that there was no precedent for recovery in such a case, omitting to notice that there was no precedent for refusing recovery either.<sup>55</sup> But the decisive factor in Holmes' opinion was that "the unborn child was a part of the mother at the time of the injury." Even if all other difficulties were surmounted, Holmes denied that

...an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator.<sup>56</sup>

Thus *Dietrich v. Northampton* established the precedent that a *non-viable* unborn child is not a person in tort law.

An 1891 Irish case, *Walker v. Railway Co.*,<sup>57</sup> added to the weight of Holmes' decision. Annie Walker, while "quick with child," was riding on a train; there was an accident and the child, subsequently born, was deformed. The court decided that the railroad was not liable because it had only sold the mother a ticket, and so had no contract with the unborn baby. But the question also was discussed whether the unborn child could maintain an action in tort. The Chief Justice, O'Brien, declined to say yes or no, whereas Justice Johnson asserted:

As a matter of fact, when the act of negligence occurred the plaintiff was not in esse—was not a person, or a passenger, or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action.

The same judge said:

As Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which was not in esse in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of duty.

Thus the unborn child quick in its mother's womb became a fiction ineligible to recover in tort law.

In 1900 the Supreme Court of Illinois decided a case in accord with the *Dietrich* and *Walker* precedents.<sup>58</sup> Thomas Allaire was born deformed shortly after his mother had a nasty accident in an unenclosed elevator in St. Luke's Hospital, where she had come to have the baby. The court rested the whole case on the issue:

Had the plaintiff, at the time of the alleged injury, in contemplation of the common law, such distinct and independent existence that he may maintain the action, or was he, in view of the common law, a part of his mother?

The court was faced not with a non-viable infant, for Thomas was born four days after the accident and he survived. Nor was there doubt about the hospital's duty toward the child, since the mother was there to be delivered. Still the court held:

That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.

Thus *Allaire v. St. Luke's Hospital* apparently settled permanently any idea that unborn children could be regarded as legal persons.

In fact, *Allaire* did become a leading case for the next forty-six years. However, one member of the court, Justice Boggs, dissented with a well reasoned argument, and his dissent was destined to have great subsequent influence. He carefully answered every argument of the majority, pointing out the differences between the *Allaire* case and the two precedent cases. He invoked an analogy with common law regarding abortion. But the heart of his opinion was the argument that it is simply absurd to maintain that a viable fetus is part of its mother

...for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother.<sup>59</sup>

Justice Boggs took the narrowest possible ground; unfortunately the majority of the court refused to stand with him on it.

A crack in the dike appeared in a 1939 California case, *Scott v. McPheeters*.<sup>60</sup> The California Civil Code, section 29, contains a special provision by which a child "is deemed to be an existing person" from conception for all purposes to its benefit providing it is subsequently born. This provision obviously formulates the civil and common law fiction. However, appeal to it was made in a case in which an unborn child was injured in delivery before birth. The defendant denied the relevance of the civil code fiction to this tort case. The court held:

The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding.

In other words, the fiction is a fact, and so the court allowed recovery. But other states did not follow this precedent immediately, because the *Scott* case involved the provision of section 29 of the California Civil Code.

Thus in 1941, the New Jersey Court of Errors and Appeals still adhered to the old precedents in a case in which the facts showed that a radiologist had negligently caused disastrous brain damage to an unborn baby, who nevertheless was subsequently born and continued to live.<sup>61</sup> The case, *Stemmer v. Kline*, would not have been remarkable, except that a minority opinion written by Chief Justice Brogan resisted the reversal of the lower court's award of damages, particularly attacking Holmes' opinion in *Dietrich* that the unborn child is part of the mother:

With that premise stated as a fact, it was easy enough to come to the conclusion arrived at; but the premise is not true as a matter of elementary physiology. While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circula-

tion of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

The "fiction" had become fact. If the majority of the court relied on outdated precedent, the minority appealed to biological facts and concluded that the child developed *distinct personality from conception on*.

The dissents of Boggs and Brogan, forceful and well-argued though they were, might still tell us nothing about the law's view of the matter if majorities had continued to govern their decisions by precedent. The law is what courts rule, not what dissenters say they should have ruled. But in 1946 the dissenting view of Boggs and Brogan became the majority view of the U.S. District Court for the District of Columbia in *Bonbrest v. Kotz*.<sup>62</sup> The suit was for medical malpractice; the baby was injured in the process of delivery.

In his opinion, Justice McGuire notes the strong dissents of Boggs and Brogan and argues vigorously against Holmes. But the decision is based particularly on a Canadian case,<sup>63</sup> which the majority in *Stemmer* refused to regard as precedent because it involved provisions of Canadian statute law. In both the Canadian case and *Bonbrest* the plaintiffs were viable, and this fact made it all the more obvious that they were not merely part of their mothers. Judge McGuire noted in passing, however, that "apart from viability, a non-viable foetus is not a part of its mother." He rejected Holmes' dictum as "a legal fiction, long outmoded," thus balancing the view that the unborn child is a fiction with the view that its identity with its mother was the real fiction.

At this point, it remained doubtful whether courts would limit the unborn child's rights by the criterion of viability, or whether they might declare that children who survived would have a right to recover regardless of whether they were already viable when the damage was done, or whether—as a third possibility—the courts might not declare that even apart from viability, a fetus is a distinct person in being, as *Bonbrest* suggested in passing.

As early as 1916 a Wisconsin court had adopted the *Allaire* dissent and had ruled against a child subsequently born alive merely because it was not viable at the time of the injury.<sup>64</sup> After *Bonbrest*, some courts at first accepted the viability rule as a limit. For example, the Ohio Supreme Court in 1949 asserted the rights of a *viable* unborn infant, because to say that such a child is part of its mother is to rely on "a time-worn fiction not founded on fact and within common knowledge untrue and unjustified."<sup>65</sup>

Some courts have set aside the viability criterion without clearly asserting that the unborn child is an existing person from conception. For example, a New Jersey decision (1960), while declaring that "medical authorities have

long recognized that a child is in existence from the moment of conception," did not rest its holding, favorable to the child, on the ground that the child is a person:

The semantic argument whether an unborn child is "a person in being" seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile these processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.<sup>66</sup>

The same concept was adopted in a Rhode Island case in which it was alleged that a pregnant woman was not cared for as effectively as she should have been, with the result that her unborn child suffered preventable damage from German measles. The court did not reject the humanity of the fetus from conception, but relied for its holding on the causal connection between negligence and injury:

While we could, as has sometimes been done elsewhere, justify our rejection of the viability concept on the medical fact that a fetus becomes a living human being from the moment of conception, we do so not on the authority of the biologist but because we are unable logically to conclude that a claim for an injury inflicted prior to viability is any less meritorious than one sustained after.<sup>67</sup>

However, a number of states have not hesitated to set aside the viability criterion on the straightforward basis that life begins at conception. As one commentator, not too sympathetic to the "biological approach," as he calls it, says, these states "have accorded legal personality to the zygote."<sup>68</sup>

An example is a 1953 New York case, *Kelly v. Gregory*.<sup>69</sup> Mrs. Kelly was only three months pregnant when she was injured by a motorist who ran her down as she was crossing a street in a crosswalk. Her baby was subsequently born handicapped. But it was not yet viable at the time of the accident and the precedent New York case was limited to the area of viability. Justice Bergan, speaking for a unanimous appeals bench, fixed the point of legal separability of the child from its mother at conception, and by analogy with property law held that a right could vest in a child at any time from conception onward. The issue, wrote Justice Bergan, has been the point at which separability occurs:

We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.

The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut

off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, post-natal as well as prenatal. The complaint here, in alleging that plaintiff was in being in the third month of his mother's pregnancy, alleges a conclusion of fact consistent with generally accepted knowledge of the process.

On one ground or another, since *Kelly* most decisions have found a way to permit recovery for prenatal injuries at any stage of development.<sup>70</sup> This trend certainly has been supported by a recognition of the arbitrariness of forbidding recovery for damage done before viability, when the same injury could have been compensated by damages if it had occurred slightly later. Also, the variability and uncertainty of the time of viability may have had some effect.<sup>71</sup>

Despite what courts have said, those who wish to deny that the unborn have rights before the law might argue—at least for the sake of argument—that the courts had granted only a fictive personality, with contingent rights to be actualized only if the individual was subsequently born alive and suffered disadvantage from the tort committed before his birth. But such an argument loses whatever plausibility it would otherwise have in virtue of the fact that since 1949 courts in a number of states have allowed recovery for the *death* of infants caused by prenatal injury. Such actions have been maintained under the wrongful death statutes of these states.

As we mentioned previously, under common law actions involving torts did not survive the death of either party. On this basis, claims by family members for damage arising from the injury and death of its breadwinner were disallowed. To remedy this obvious injustice, special statutes were passed, beginning with the British Fatal Accidents Act of 1846,<sup>72</sup> otherwise known as Lord Campbell's Act. Many American states imitated this model.<sup>73</sup>

Now, it is obvious from the purpose of these laws that there was not much point in allowing claims for the death of infants, much less of unborn children. If one's child is killed by someone's negligence, there is a serious loss, but since children are inherently priceless, it is not the sort of loss upon which a price can be put, beyond, perhaps, the cost of burial. Indeed, it may even be argued that if actions are permitted for parents to recover for the death of unborn children, the unborn are being regarded less as persons in their own right than as parental property.<sup>74</sup>

Thus it is not surprising that a number of states have not allowed actions for the wrongful death of unborn infants. In Florida, a stillborn child was held not to be a "minor" within the sense of the Wrongful Death of Minors Act.<sup>75</sup> In Michigan, a stillborn child was held not to be a "person" within the sense of the Wrongful Death Act.<sup>76</sup>

There are various reasons why the courts in different states have refused to entertain actions for wrongful death arising from injuries to the unborn. In California, for example, the reason is quite technical; an unborn child might

be a *person*, but cannot be held to be a *minor person*.<sup>77</sup> In North Carolina and New Jersey, the problems involved in showing that the tortfeasor in fact caused the death and that the death involved a monetary loss appear to play an important role in disallowing such claims.<sup>78</sup>

New York has steadfastly disallowed wrongful death claims and its policy has been interpreted in a dictum in another kind of case as meaning that the unborn child is no more a person in tort law than he used to be in property law. The tortfeasor is required to compensate the child after birth for damages done beforehand, simply because by *causing* damage the wrongdoer incurs responsibility for it.<sup>79</sup> This dictum seems difficult to reconcile with the reasoning of *Kelly v. Gregory*, and the position certainly is not consistent with that of other states which, as we have seen, regard the right to damages as vesting at the time the wrong to the unborn child is done.

The first case in which an action for the wrongful death of an unborn child succeeded was *Verkennes v. Corniea et al.*, decided by the Supreme Court of Minnesota in 1949.<sup>80</sup> William Verkennes' wife had died in labor, apparently of a ruptured uterus. The basis of the action was that the baby could and should have been saved by prompt surgical intervention, but this was not attempted, and so of course the baby also died. Minnesota law provides:

When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission.

The defendant had argued that the baby "had in fact never existed as a person in being," and that the suit therefore could not be maintained. The trial court accepted that position, and Verkennes appealed to the Minnesota Supreme Court.

The decision reviewed the history of tort law involving the unborn, beginning with *Dietrich* and emphasizing Justice Boggs' dissent in *Allaire* and the *Bonbrest* decision of three years previously. From the latter was adopted the dictum:

From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception—which it is in fact.

Also adopted, however, was the rationale strongly present in Justice Boggs' dissent and visible in *Bonbrest* which rested on the *viability* of the unborn child involved in each of these cases. What *Verkennes* put beyond dispute, therefore, was only that *viable* unborn children could claim standing as persons in tort law. The decision also obviously was facilitated by the wording of the Minnesota statute, quoted above, which demanded the result if *Bonbrest* and other cases following it rather than *Dietrich* were to be accepted as the proper precedent.

By 1968 about half the states had considered wrongful death actions involving unborn plaintiffs, and a slight majority allowed them.<sup>81</sup> Evidence of the underlying rationale in many of these cases is found in *Mitchell v. Couch*, a Kentucky case decided in 1955.<sup>82</sup> The issue again was put as to whether the unborn child is a "person" within the meaning of the statute. The court declared:

The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word "person" is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being.

This declaration is all the more significant in view of the fact that the relevant statute does not give any special definition of "person," but simply directs:

Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it . . .<sup>83</sup>

When Connecticut joined the states allowing such claims in 1966, the old argument that the standing of the unborn is merely a legal fiction once again was turned about in the assertion that their non-entity is the real fiction:

To deny the infant or its representatives relief in this type of case is not only a harsh result but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified.<sup>84</sup>

All of these cases involved viable fetuses, and some of the rulings seem to make viability an essential condition of recovery. In this respect, wrongful death actions have followed the pattern of development laid down by precedent personal injuries cases, which also at first made viability a criterion. A 1967 Massachusetts case, *Torigan v. Watertown News Co., Inc. et al.*,<sup>85</sup> broke this particular barrier.

Mrs. Torigan was in an automobile accident with a Watertown News Company truck. At the time she was three and one-half months pregnant. The baby was born less than two and one-half months later and lived for only two to three hours. A lower court directed a verdict for the defendants, apparently because "there cannot be recovery for prenatal injury to a nonviable fetus even where a living child is born."

The Supreme Judicial Court of Massachusetts reversed, holding that there is not a sound distinction between the present case and a case in which the fetus is viable. The availability of precedents and the advance of medical knowledge were given as reasons in support of this decision, which directly set aside the old Massachusetts precedent set by Holmes in *Dietrich*. The non-viable fetus was declared to be "a 'person' within the meaning of" the Massachusetts Wrongful Death Act.

In *Torigan* the child was born alive, although unable to survive. However, the decision did not indicate that live birth was a necessary element of the judgment. *Torigan* rejected the viability criterion; other decisions reviewed above rejected the live-birth criterion. There seems to be no essential reason

why courts which have allowed such claims should not take the next step and allow recovery for the wrongful death of non-viable fetuses who never live apart from their mothers. There is at least one case in which this step has been taken.

In *Porter v. Lassiter*, decided by the Georgia Court of Appeals in 1955,<sup>86</sup> the mother was pregnant only about a month and one-half when the injury occurred. Apparently the placenta was damaged; the baby was stillborn about three months later—before it would have been viable had it been born alive. The Georgia Code allows the mother or father of a child to recover from the one responsible “full value of the life of such child” in cases of homicide of children.<sup>87</sup> The mother sought recovery under this law and the court ruled that the plaintiff had a case in which the law provided relief.

Considering the purpose for which wrongful death acts were originally passed, I think it would be quite reasonable and not at all unjust if the courts generally ruled that their provisions do not refer to unborn children. Mothers in such cases should of course be compensated for their injuries and for hospital and medical bills that may be connected with a miscarriage. But there is something rather repulsive about parents obtaining a windfall under a law that was designed to save families from the economic disaster so often consequent upon the death, tortiously caused, of one of its contributing members. Probably this sentiment is an underlying factor in the resistance of some of the courts to applying wrongful death acts to the unborn. Where application has been made, the decisions are a tribute to the courts' acceptance of the logical implications of admitting the unborn as plaintiffs in tort law in the personal injuries cases, rather than a reasonable interpretation of the *intent* underlying the statutes applied.<sup>88</sup>

A difference in sentiment perhaps also explains why a number of states admitted as plaintiffs children who were unborn at the time their parents were injured or killed. Thus a child born posthumously was ruled to be entitled to all the benefits of existing children under a New Jersey workmen's compensation act.<sup>89</sup> Under a Michigan dram shop act a posthumous child was held to be a “child” or “other person” entitled to bring suit for his father's death.<sup>90</sup> The unborn child also has been classified as an “existing person”<sup>91</sup> and as a “surviving child”<sup>92</sup> in cases in tort law involving the wrongful death of a parent, and these cases were decided around the turn of the century when the courts, following *Dietrich*, were denying the child standing to sue for injuries before birth to himself. Of course, in these cases the analogy to the position of the unborn in property law is rather strong.<sup>93</sup>

#### Rights of the Unborn to Support and Care

The analogy is less strong in cases that involve claims under child support laws. For example, in *Metzger v. People* the Supreme Court of Colorado in

1936 affirmed an order requiring a man to contribute thirty percent of his salary to the support of his unborn child. The decision asserted:

No violence is done to the orderly process of the rational mind by letting the word "child" include a human being immediately upon conception . . .<sup>94</sup>

Such a right was not simply contingent and prospective, but actually effective before the child's birth, and would have been of benefit to his interest even if he had died before live birth. In *Kyne v. Kyne*, a California case,<sup>95</sup> an unborn child won an appeal that involved his right to have a guardian, to bring suit, to have his father's paternity declared, and to exact support from his father. The court rejected the contention that the suit was premature and that the child should not be allowed to sue until it had been born.

In 1961, a New Jersey court faced a novel type of case.<sup>96</sup> A child not yet born would need a blood transfusion immediately after birth because of Rh-incompatibility. The parents would not consent. The court held that the fetus was "before the court," claimed jurisdiction on the basis of its duty "to protect such persons with disabilities who have no rightful protector," held the fetus to be a "minor child" within the meaning of a statute that authorizes the courts to take custody of children from their parents, and arranged for guardianship for the purpose of having the necessary procedures approved. The court acted on the basis that "it is now settled that an unborn child's right to life and health is entitled to legal protection, even if it is not viable."

The influence of developments in tort law is obvious here. An even more striking case was *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>97</sup> decided in 1964 by a unanimous New Jersey Supreme Court. A pregnant woman having religious objections was compelled to undergo blood transfusions herself on the basis of the unborn child's rights: "We are satisfied that the unborn child is entitled to the law's protection . . ." The court, while expressing doubts about the idea that adults should be forced to undergo medical treatment against their conscientious objections, saw no difficulty in the present case, likening it to cases in which the court takes custody of infants from their parents when necessary for the welfare of the children.

#### Rights of the Unborn and Criminal Law

Thus far we have examined the legal standing of the unborn without taking into account the most significant field in which the law has recognized and protected their rights—namely, the field of criminal law with the condemnation of abortion itself, first under common law and then by various statutes. In chapter five we summarized the relevant common law sources and the statutes.<sup>98</sup> Here we need consider only the implications of the criminal law of abortion for the law's appreciation of the status of the unborn victim. The relevant case law is vast, of course, and only a few cases will be touched upon. Unfortunately, I have found no really extensive study of the field.

As we have seen, common law once considered the crime of abortion after the child was "formed or animated" as homicide or manslaughter. The implication was that such an unborn child was a human being and that abortion was forbidden as an attack upon it. The crime was not clearly separated from murder in Bracton and *Fleta*. Coke made the separation and his view was repeated and accurately formulated by Blackstone. Thus the common law as we know it consisted of the following points:

1) Abortion prior to quickening would not be criminal, unless it were a criminal assault on the woman due to lack of her consent.

2) Abortion after quickening would not as such be a capital crime; it was a misprision or misdemeanor, but "misdemeanor" here meant a crime bordering on capital, not a trivial offense. (We must think of the U.S. Constitution's "high crimes and misdemeanors," which are grounds for impeachment, not a traffic violation or something of that sort.)

3) Abortion after quickening that eventuated in the death of the infant subsequent to a live birth was still held to be murder according to Coke and Blackstone. Murder required that the victim be a "reasonable creature in being, and under the king's peace."

It is important to notice that there are two distinctions here. One depends on whether or not quickening had occurred. The other on whether or not the child lived for some time after expulsion from the mother's body.

It may fairly be conceded that the law at this point regarded the embryo before quickening as a non-person, as one lacking rights. Bracton had drawn the line at the point at which the child is "formed or animated"; what that meant in terms of legal practice is hard to tell. For the later common law, the empirical fact that the child makes itself felt in the mother's womb signified sufficiently that it had come to life, and that it should be treated as a living, human individual.

Why, then, was abortion after quickening not simply classed as murder? The fact is that it *was* murder if the child were live-born and died subsequently as a result of the abortifacient act. What happened as a result obviously changed nothing with regard to the intent and the malice of the act. An abortionist (perhaps using potions or gross trauma as a method) fulfilled the legal conditions for murder merely by bad luck. Why this legal distinction? Surely not because the standing and rights of the fetus differed according to the time at which it died. Rather, I think, for two technical, legal reasons.

First, because for the capital crime of murder one wants evidence both that the victim had been alive and that it died as a result of the homicidal act. Such evidence was available only if there was a live birth and subsequent death following an attempt to induce premature delivery by a means believed efficacious toward that end. We must bear in mind that surgical methods of destroying the fetus within the uterus are relatively modern and hysterotomy would not have been a practical method in Coke's or even in Blackstone's day.

Abortion was the premature *expulsion* of the fetus; it must often have been born alive.

Second, an even more technical reason comes to mind—and I suggest it only as a hypothesis for further study—why killing the child still in the womb was not murder. If the victim of murder had to be “a reasonable creature in being, and under the king’s peace,” the embryo prior to quickening did not fulfill the first clause, and the unborn child after quickening did not fulfill the second. Perhaps live birth was required, not because the common law assumed that birth somehow magically conferred reasonable creaturehood (personality) upon what up to the moment of separation from the mother was a mere blob. No, the problem, I think, may have been that until a child was born it was not accounted a *subject* of the king; lying within the mother’s womb it lay, *as subject*, beyond the king’s reach, outside his jurisdiction. But if the aborted child were born alive, then it was a subject of the king who was killed, and the act by which this result had been intentionally caused became murder. Conceptually, an *abortion that succeeded* in killing the child before birth was an (attempted) *murder that failed* only through lack of a proper subject.

In American case law, there is a division concerning whether one who maliciously injures an unborn infant with the result that it dies subsequent to live birth can be held guilty of homicide. At least one court has held the negative, setting as conditions for homicide that the infant be liveborn and subsequently die of violence inflicted after its independent existence had begun.<sup>99</sup> On the other hand, there are decisions, in line with the common law rule, that hold that homicide is established by injuries inflicted before birth with death occurring subsequent to live birth.<sup>100</sup>

As we saw in chapter five, eight states (as of 1965) included a provision in their statutes along the following lines:

The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

This provision was first enacted, in these very words, in the New York revised statutes of 1829.<sup>101</sup> The formulation is odd, since it obviously relies upon the common law distinction between the quick child and the one not yet quick, but it also attempts to evade the common law limitation which excluded the concepts of manslaughter and homicide in the case of the unborn.

Even if the child is not born alive, the willful killing of it becomes manslaughter by statutory device, since the act upon the child’s mother falls within the law’s reach as one that can be classified as murder. The phrase “which would be murder if it resulted in the death of such mother” refers to the common law principle according to which an abortionist causing a woman’s death was always guilty of murder whether the woman had consented or not. Thus, this phrase does not *limit* the cases in which the killing of the unborn becomes manslaughter,<sup>102</sup> but provides technical grounds for extending “man-

slaughter" to include the unborn. Evidently legislators were sensitive to the rights of the unborn, regarded the child that had quickened as a human being, and were trying to extend the criminal law to protect it more adequately. Professor B. James George, Jr. was correct in stating:

Conceptually these statutes clearly accord independent personality to the fetus, for the killing of the fetus under these circumstances is called manslaughter; and the sections themselves are usually found with the other homicide sections.<sup>103</sup>

The distinction made in common law between the protection afforded the life of the child after quickening and the protection denied embryonic life prior to that stage of development is much illuminated by dicta of American courts in a number of nineteenth-century cases. These dicta interpreted the common law distinction at a time when its erroneous biological basis was being removed from the conceptual apparatus of non-scientists, including legislators and judges, by the popularization of well established facts of scientific knowledge about prenatal life. Of course, old ideas die hard, and so the nineteenth-century courts were still close enough to the mentality of those who had developed the common law's distinction to interpret that mentality for us.

In 1851 a Maine court explained that at common law it was not an offense to procure abortion prior to quickening with the woman's consent. "Quickening" is defined as the mother's sensation of the child's movement in her womb. But after quickening, abortion was criminal. The court explains why in the clearest possible terms:

[T]he acts may be those of the mother herself and they are criminal only as they are intended to affect injuriously, and do so affect the unborn child. If, before the mother had become sensible of its motion in the womb, it was not a crime; if afterwards, when it was considered by the common law, that the child had a separate and independent existence, it was held highly criminal.<sup>104</sup>

In other words, the intent of the common law was solely to protect the unborn child. It recognized the child's *separate and independent existence* at quickening, and so used this event as a dividing line. Because of its preoccupation with the protection of the life of the quickened child, common law held the mother herself as guilty as anyone else who attacked that life. Moreover, according to this interpretation, the common law did not concern itself with unsuccessful attempts at abortion. It punished only if the acts "are intended to affect injuriously, and do so affect the unborn child."

This understanding of common law is by no means peculiar to this case. A New Jersey court explained the common law in 1858 with regard to abortion after quickening: "It was an offense only against the life of the child."<sup>105</sup> And a Maryland court explained in 1887 that abortion prior to quickening was no crime at common law because "the life of the infant was not supposed to begin until it stirred in the mother's womb . . ."<sup>106</sup> Here the court implies that it knows better by using the word "supposed." We may contrast this with the expression of a New Jersey decision of 1849 which emphasized the problem

of evidence, by saying that the law recognized life and protected it only "at the moment of quickening, at that moment when the embryo gives the first physical proof of life."<sup>107</sup>

In different states having laws classifying some or all abortions as manslaughter, twentieth-century cases have divided on the issue whether the child prior to quickening should be regarded as a suitable example of the victim contemplated by these laws.

In a 1923 Wisconsin case, the defendant was convicted of aborting a woman six or eight weeks pregnant under a statute in the section "Offenses Against Lives and Persons" deeming guilty of manslaughter abortifacient attempts on "any woman pregnant with a child" that resulted in the death of either the mother or the child.<sup>108</sup> The Wisconsin Supreme Court reversed on the ground that the statute really meant "pregnant with a *quick* child." The court argued that although there is embryonic life at conception in a strictly scientific sense, the law should follow the popular view that life does not begin until quickening:

Both the quick child and the mother are human beings; hence to unlawfully kill either constitutes manslaughter. A two months' embryo is not a human being in the eye of the law, and therefore its destruction constitutes an offense against morality and not against lives and persons.

The last phrase refers to another Wisconsin statute forbidding abortion, which referred only to "pregnant woman," not to "woman pregnant with a child," and prescribed much lighter penalties. This latter statute was in the "Offenses Against Chastity, Morality, and Decency" section, and the court was holding that the defendant had been indicted under the wrong statute.

In an Oregon case a conviction for manslaughter was sustained by the Oregon Supreme Court, and a subsequent attempt to appeal to a federal court was unsuccessful.<sup>109</sup> Oregon did not have multiple statutes regarding abortion; its statute referred to acts done on a woman "pregnant with a child" which resulted in the death of either the child or the mother. In this case both died. (In the Wisconsin case, the mother did not die.) The defense objected to the trial court's instruction that a woman is pregnant with a child from the time of conception; in the view of the defense, the instruction should have been based on quickening. The woman had been only three months pregnant. In rejecting this argument, the court explained the process of conception and concluded:

From the moment of conception a new life has begun and is protected by the enactment. The product of conception during its entire course is imbued with life and capable of being destroyed as contemplated by law.

It is ironic that subsequent revision of Wisconsin's statutes, while retaining an increase in penalty based on quickening, expressly defines "unborn child": "In this section 'unborn child' means a human being from the time of conception until it is born alive."<sup>110</sup> Thus the Wisconsin court's reliance on

“popular conceptions” to deny the status of “human being” to the two months’ embryo was disavowed by a more enlightened legislature. On the other hand, Oregon in 1969 adopted a new abortion law including a provision that “substantial risk” to the mother may be estimated by taking into account “the mother’s total environment, actual or reasonably foreseeable.”<sup>111</sup>

What our inquiry has shown thus far is that in criminal law, both at common law and according to many statutes, the killing of the child after quickening was regarded as an offense against a human life in being. Conceptually criminal law has regarded the unborn as persons having a right to life that should be protected. But quickening was taken as the beginning, or the certainly proved beginning, of separate life. And the crime, even against a quick child, was not murder, probably for technical reasons, unless the aborted child were born alive and subsequently died.

Someone thinking in terms of modern abortifacient techniques might argue that the common law covered few abortions, since most abortions are now induced well before quickening occurs, and that almost none could have been regarded as murders, since few abortions now result in live births. Usually the infant is killed *within* the mother. With few reliable statistics and little accurate information about present criminal abortions and the legal disposition of abortion cases, it is difficult to say anything certain about contemporary experience. We know much less about the situation prior to the past century. Yet it may not be idle to speculate that before modern times a large proportion of successful abortions may have been caused by the induction of labor too early, with the birth and subsequent death of the non-viable fetus.<sup>112</sup>

At the same time, we must not omit to notice, in passing, that hysterotomy, by which advanced pregnancies are often aborted today, is a procedure that delivers a live baby. Undoubtedly this method was used in the case at Stobhill Hospital in Glasgow, in which a twenty-year-old girl was delivered of a twenty-six-week fetus, which was later found alive in the bag into which it had been dumped to be thrown into the incinerator.<sup>113</sup> This case occurred under the new British abortion act which, like the A.L.I. proposal, accepts as legal, to the extent that the common law and the new statute overlap, abortions which would have been murder under common law. To this extent it is not false, but is strictly true, that the new abortion laws are legalizing *murder*.

Dr. Ian Donald, Professor of Obstetrics and Gynaecology at the University of Glasgow, warned in advance what was to be expected of the new British act, and what came to pass in Stobhill Hospital. Dr. Donald, an Episcopalian, in a 1966 speech in opposition to the bill then under debate, said:

Make no mistake about it. An unborn baby, even a very small one, can put up a determined fight for life. An abortion can be born alive and can kick and go on kicking for quite a long time. It is not difficult to see this as a sort of slow murder. On the other hand, the baby can be killed while still inside. Is there so much difference? The intention is the same.<sup>114</sup>

As a physician, Dr. Donald does not make the technical distinction established by common law.

However many babies were protected by the common law's prohibition of abortion, the central fact for our present purpose is that criminal law has in fact recognized the right of the unborn, quick child to life. And this right has been protected.

Statute laws extended the protection to the period prior to quickening. We must now examine the reason for this extension. Did it evidence an appreciation of the fact that the physiological presupposition of the quickening criterion is erroneous? Or did legislators have some other motive for creating legal prohibitions of abortion in early pregnancy?

One suggestion, made in a legal article questioning the constitutionality of statutes forbidding abortion, is that those forbidding it prior to quickening were primarily motivated by

...the interests of community elders in compelling uniform adherence to specified moral norms. These precepts generally defined human sexual activity as chiefly procreative in function and nature. Legal bans on both contraception and all abortion followed. A secondary consideration, universally held to be humane in its aim, was to protect pregnant women from the unskilled abortionist.<sup>115</sup>

No evidence is given by this author for his theory as to the primary aim of these laws. I believe that a search of the statutes would show that statutes regarding abortion and contraception were seldom closely related. However, the author saves us from the task of such a detailed search by linking his theory with post-Civil War moralism:

Abortion apparently raised no legal or moral controversy in this country until the post-Civil War period. During this era, however, a repressive ascetic ethic gave rise to the present-day framework of abortion legislation.<sup>116</sup>

In other words, the statutes against abortion are *Victorian*.

This argument simply will not hold, for statute laws forbidding abortion originated long before the period in question. Before the Civil War, the following states (or territories) had statutes forbidding abortion that on their face, at least, dealt with abortion prior to quickening: Alabama (1840-41), Illinois (1827), Indiana (1835), Iowa (1838-39), Kansas (1855), Louisiana (1856), Maine (1840), Massachusetts (1845), Michigan (1846), Missouri (1835), New Hampshire (1848), New Jersey (1849), New York (1830), Ohio (1834), Texas (1859), Vermont (1846), Virginia (1848), Washington (1854), and Wisconsin (1858).<sup>117</sup>

It would be a very large task to try to discover the purposes that motivated legislators in passing all of these statutes. Undoubtedly, as we shall see, concern for women's lives and health was one factor, though not the only one. What is certain beyond doubt is that the "repressive ethic" of the post-Civil War period had not the slightest influence in 1827 when Illinois passed the first of those laws, in 1829 when New York passed the second of them, in the 1830s

when four of them were passed, in the 1840s when eight of them went on the books, or even in the 1850s when five of them were enacted.

An examination of certain of these statutes is sufficient to judge on intrinsic evidence alone that regard for unborn life, prior to quickening, was a precise motive for the enactment.

As we saw in chapter five, in Blackstone's day there were no statutes against abortion, but there was a statute regarding the concealment of birth and the subsequent death of a child who would have been a bastard; the statute established a presumption of murder in such a case.<sup>118</sup> Obviously, the purpose here was not the mother's health, and the statute was at least a century too early to be explained by Victorian moralism.

Maine had a statute to deal with concealment of birth and death of a bastard in 1830. In 1840 the statutes were revised, and *immediately following* sections retained from the 1830 laws were two new sections dealing with the related topic of abortion. The new sections refer to "every person" who employs any method of abortion on "any woman pregnant with child, whether such child be quick or not," unless necessary to preserve the mother's life. The difference between the two new sections is that the first refers to one who acts "with intent to destroy such child, and shall thereby destroy such child before its birth," while the second deals simply with one who acts "with intent thereby to procure the miscarriage of such woman." The maximum penalty in the first case is five years in the state prison; the maximum penalty in the second case was one year in county jail or a one thousand dollar fine.<sup>119</sup> It is obvious from the "quick or not" phrasing of these sections that they were intended to set aside the common law's line of demarcation of criminality. It is evident from the basis used to grade penalties that they were intended to protect the life of the unborn child, for the child's death made the act susceptible to a *prison term* of five years while an unsuccessful attempt received at most a *jail sentence* of one year or a fine.

The Texas statute of 1859 is unique in its clear language and orderly arrangement. It has six sections; the first five create distinct offenses and the sixth a therapeutic exception. The first section sets a maximum penalty of five years in the penitentiary for anyone who effectively uses abortifacient means with the woman's consent, or ten years if consent to the act is lacking. The second section makes the furnisher of means an accomplice. The third section makes an offense of "attempt to procure abortion" if "the means used shall fail to procure an abortion." The only penalty for an unsuccessful attempt is a fine—maximum, one thousand dollars. The fourth section makes the death of the mother murder whether or not the attempt succeeds. The fifth section creates a special offense of destroying "the vitality or the life of a child, in a state of being born, and before actual birth," if the child would otherwise have been born alive. This is, as it were, anticipated infanticide, and the maximum penalty is a life term.<sup>120</sup> Obviously the Texans were intent on protecting both the mother's life and that of the child. The two were not put upon an equal

plane, but there is a clear distinction between attempted and successful abortion. Moreover, the statute makes no mention of quickening, and uses simply "pregnant" and "abortion," not "with child," or "pregnant with a child," or "miscarriage," or any other such language.

Mr. Cyril C. Means, Jr., an attorney and advocate of the legalization of abortion, has proposed in an extensive article in the *New York Law Forum* that present abortion laws are unconstitutional. His argument is that they were enacted to protect the mother's life and that they are no longer helpful to this purpose. Therefore, they become null by the principle that when constitutional ground ceases, the constitutionality of the act also ceases. Here we need consider only the arguments Mr. Means gives for thinking that the laws were enacted to protect the mother's health, rather than the child's life.

The arguments he offers begin from the admission that common law protected the child's life. The issue, therefore, is the one we have been considering: why the statutes made abortion done before quickening a crime. He offers two bits of evidence for his thesis. One is a note to an *unenacted* proposed section of the 1829 revision of the New York statutes; the note was made by the revisers to explain the purpose of that proposed section, which the legislature did not adopt. The other is a sentence from a New Jersey court's opinion, written in 1858, explaining a New Jersey law of 1849. Since Means wants to explain the New York statute that the legislature did adopt and adopted in 1829 (effective 1830), obviously his supporting evidence is weak, but we must examine it.

The revisers of 1828 proposed two statutes pertaining to abortion, and the legislature accepted both. First, they proposed sections concerned with the abortion of a *quick* child, which they treated as a form of manslaughter. Thus they placed the life of mother and quick child on a par, and yet they introduced an explicit medical exception to preserve the mother's life.<sup>121</sup> But the revisers also proposed a second statute worded much like the first, dealing with abortion at any stage of pregnancy:

Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.<sup>122</sup>

The revisers' note referred to the British abortion law of 1803, but noted that a "just and necessary" qualification was added—a reference to the therapeutic exception, which was New York's innovation in abortion statutes.

Now, Means points to a proposed section, which the legislature did not enact, that would also have made *anysurgical* operation a misdemeanor unless it "was necessary for the preservation of life, or was advised by at least two

physicians." The revisers explained the need for this section because young practitioners were engaging in unnecessary surgery with resultant danger to life. Means' argument is that since the revisers proposed the two sections, including the same justifying clause in both sections, the legislature must have had the same purpose in mind for the abortion section, quoted above, when they enacted it, as the revisers had for the unenacted proposed section that would have made unnecessary surgery a misdemeanor.<sup>123</sup>

The argument clearly is not cogent, even with regard to its immediate reference—the intent of the New York legislature of 1828. First, the revisers themselves devoted distinct sections to abortion and to unnecessary surgery, provided different provisions for punishing each (the former being assigned a maximum of one year in jail or five hundred dollars fine, and the latter being designated a misdemeanor with discretionary punishment), and justified each with different notes. Second, the legislature enacted the proposed abortion statute and rejected the other proposal. If their concern were really only danger to the patient's life, the section forbidding unnecessary surgery would have been enacted.

Means suggests that the legislature deemed this unnecessary, because "in respect of every operation except abortion, a combination of patient's caution and professional conscience sufficed to prevent unnecessary surgery."<sup>124</sup> But this explanation does not square with the note of the revisers, on whose wisdom Means depends so heavily:

The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming.<sup>125</sup>

It seems reasonable to suppose that the revisers and their medical advisers knew the contemporary facts of medical life better than Means.

Even if the revisers had given the same reason for the enacted section against abortion and the rejected one against unnecessary surgery and even if the legislature had adopted both sections, that still would not prove that the intention of the legislature of 1828 in forbidding abortion before quickening was solely to safeguard women from the danger of abortion. I do not deny that such concern probably was one factor. But the revisers' notes indicate two positive facts: that the 1803 British statute was a model and that they had been advised by practicing physicians. We know that Percival's *Medical Ethics* appeared in 1803, that it condemned abortion from conception onward as an attack on human life, that it included a therapeutic exception (not found explicitly in British law until 1967), and that this book was extremely influential in forming the ethics of medical practice.<sup>126</sup> We also know that the Beck brothers in 1823 published the first edition of their tremendously successful *Elements of Medical Jurisprudence*, that its publication was at Albany, New York, that it treated abortion as an offense against the right to life of the child,

and that it condemned on the basis of modern biological knowledge laws that discriminated between abortion before and after quickening.<sup>127</sup> These facts do not absolutely demonstrate that the New York legislature of 1828 intended to protect the right of the unborn to life from the time of conception. But these facts do demonstrate that this purpose could have formed at least part of the legislature's intention. We shall see additional reasons for thinking that the legislature's intention was in fact protection of life before quickening.

The other bit of evidence Means adduces is that in 1858 the New Jersey Supreme Court in upholding the conviction of a defendant, tried under the New Jersey statute of 1849, said that the purpose of that 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."<sup>128</sup> But this dictum fails to prove Means' point, and it fails on several distinct counts.

First, what a New Jersey court said in 1858 that a New Jersey legislature was trying to do in 1849 is not very relevant to the purposes of the New York legislature of 1828, or even to the purposes of later New Jersey legislatures.

Second, the New Jersey court in 1858 was interpreting a statute significantly different in its terms from the New York statutes of 1829. New York dealt separately with the quick child and made the death of either mother or quick child manslaughter. The statute extending to abortion prior to quickening included every attempt and made no distinction whether or not the woman died. The New Jersey statute of 1849 did not mention quickening, included every attempt, extended to aiding and assisting, and distinguished cases in which the woman dies (high misdemeanor; maximum penalty, fifteen years or one thousand dollars fine) from cases in which the woman does not die (misdemeanor; maximum penalty, seven years or five hundred dollars fine).<sup>129</sup> On its face this New Jersey statute appears more directly aimed at protection of the mother's life than the New York statutes seem to have been.

Third, the phrase of the New Jersey Supreme Court of 1858 must be read carefully. The court does not say that the *sole* purpose of the statute was to protect the mother, but that it was "not to prevent the procuring of abortions, so much as" to protect the mother. "Not so much as" does not mean the same as "not at all." Rather, "not so much as" means "both this and that, but more the one than the other." The case appears from the opinion to have been one in which New Jersey's peculiarly broad provision forbidding advising and assisting was crucial. Apparently, the woman did not *take* the drug and no abortion was even attempted, for the court says that the crime

. . . as defined by the statute, consists in advising, without lawful justification, a pregnant woman to take some noxious thing, with intent to cause her miscarriage. The actual taking or swallowing of the drug, by the terms of the statute, constitutes no element of the crime.<sup>130</sup>

The court asserts that at common law abortion was an offense "only as it affected the life of the foetus," and then adds immediately the explanation of

the statute which Means cites. The court, of course, is aware that at common law the child had to be quick. It must have appeared to the court that the large extension made by the statute was relevant to the instant case.

Fourth, the New Jersey statute of 1849 was enacted in virtue of a case decided in that year according to common law by the New Jersey Supreme Court. The defendant's indictment was quashed, because the abortion was before quickening; before quickening, the court held, there was no life to be destroyed, and so the defendant could not be convicted. The court adhered to common law and left it to the legislature to act if it believed the evil of abortion prior to quickening should be eliminated.<sup>131</sup> This case does not show that the 1858 court was mistaken in its understanding of the 1849 statute. It does show that "not so much" should not be read as "not at all." Further, it shows that if it had been conceded by the court in 1849 that life is present before quickening, then it would have been maintained that it is an offense to abort it, because the purpose of the common law was to protect life.

And this brings us to a fifth point. The New Jersey legislators of 1849 may not have been certain whether or not there is life in the unborn with a right to protection before quickening. The British apparently became convinced of this point in 1837, when they eliminated the distinction based on quickening from their statute. But New Jersey laws of 1872 and subsequent revisions registered the penetration of the view the Beck brothers had published in 1823, for in 1872 New Jersey extended the application of penalties contingent on the woman's death to make them contingent on the death of the "mother or child."<sup>132</sup> Means is trying to prove that the purpose of the laws against abortion has ceased, but he fails to take into account the manifest intent of the legislature of New Jersey in making the change. Means seems to think that legislatures never expand their intent in proportion to a growing awareness of the values at stake in criminal behavior. The acts of legislatures prove otherwise.

In attempting to construct his argument, Means was confronted by one massive obstacle. In 1869 the New York legislature passed a statute making an abortifacient act at any stage of pregnancy manslaughter in the second degree if either the child or the woman died as a result of the act.<sup>133</sup> Means himself sets out the evidence that this legislation followed a period of considerable public concern about abortion, including an 1867 resolution of the New York State Medical Society labeling abortion "from the first moment of conception" murder, and asking for legislative and other action to curb the practice.<sup>134</sup> He admits that the legislature acted in response to the Medical Society, but he denies that the legislature actually intended to accept the view that the unborn child is a human being, and a potential victim of manslaughter, from conception.<sup>135</sup>

What support has Means for this position? Only this: in a brief filed in *Evans v. People* in 1872 an Assistant District Attorney said that "manslaughter" in the 1869 act was only an arbitrary name for the offense defined by the statute, nothing more. Evans, as Means narrates, was tried under the 1869 act

on a charge of assault with intent to commit manslaughter in the second degree. Since the twin fetuses were not proved to have quickened at the time of the assault, the defense argued on appeal that there was no living child—*man* to slaughter—thus no manslaughter. In this argument, the position and intent of the 1869 act was put to the test. The court ruled *for* the defendant.<sup>136</sup>

The implications are two. First, according to the court, the argument of the Assistant District Attorney was mistaken—the legislature in 1869 meant by “manslaughter” precisely to refer to a crime against the right of a living person to life. Second, the court disagreed with the legislature not about the *meaning* of “manslaughter” but about whether there is a man to slaughter prior to quickening. The court’s position is important in its own right, but so far as legislative intent is concerned it tends to prove precisely what Means denies: that the 1869 legislature did want to protect the child’s life from conception, for the reason why the Medical Society said in 1867 it should be protected.

The opinion of the court is such a remarkable document that it deserves to be quoted at some length:

Although there may be life before quickening, all the authorities agree that a child is not “quick” until the mother has felt the child alive within her. “Quick” is synonymous with “living,” and both are the opposite of “dead.” The woman is not pregnant with a living child until the child has become quick. If the child is a living child from the instant of conception, then all the authorities, medical and legal, are sadly at fault in their attempts to distinguish between mere pregnancy and pregnancy with a quick child, and legislators have been laboring under the same hallucination in legislating upon the subject, for all the acts passed in reference to abortion in this country and in England recognize the fact that the child does “quicken,” that is, become endowed with life, at a certain period, longer or shorter, after conception, and that there is a period during gestation when, although there may be embryo life in the foetus, there is no living child.<sup>137</sup>

The court, of course, is in error in its references to “all authorities” and also to the British laws, which had abandoned the quickening distinction thirty-five years previously. Perhaps the court simply disagreed with the legislature’s policy, but the decision of course does not say so. It does evidence anxiety about all the old medical and legal authorities which would have to be discredited if quickening were abandoned as a significant criterion.

The reaction of the 1872 legislature to this challenge is significant. It adopted a new act, in four sections, designed to avoid the obstacles set by the 1872 court decision. The first section dealt with abortifacient acts on “any woman with child” which resulted in the death of either; the crime was designated an unnamed felony with a maximum punishment of twenty years. Here the legislature manifested its determination to do its will despite the court. The word “manslaughter” is conceded to the court, and attempts are dealt with in a distinct section. The second section parallels the first, except

that the agent is the woman herself who is aborted; her act or submission also is a felony, if the child dies, with a maximum penalty of ten years. The third section deals with all acts intended to effect miscarriage, whatever the result, and carries a maximum jail sentence of three years. The fourth section concerns more remote cooperation—supplying means—and cases where the woman is not pregnant; the offense is a misdemeanor with a maximum penalty of one year in jail and a one thousand dollar fine.<sup>138</sup>

Means thinks that the legislature of 1872 did not intend to include pre-quickenning abortion in section one, because that section refers to “any woman with child”; he thinks that if this did not mean “any woman with quickened child,” the third section would be pointless.<sup>139</sup> However, the third section covers ineffective attempts. Moreover, there would hardly have been any reason for the legislature to omit “manslaughter” or an explicit reference to “quickenning” in section one if that would have expressed its mind.

What all this discussion of New York legislation shows is that the legislature did recognize the right of the unborn to life, and did try to protect it. The acts of 1869 and 1872 surely aimed to put the life of the child from conception on a par with the life of its mother except in cases of a direct conflict, where therapeutic abortion was still permitted. Earlier legislation did not go so far, but it seems clear that even in 1829 one purpose of the legislature was to extend some protection to embryonic life between conception and quickening. The issue in *Evans v. People* was not whether the living child should be protected, but whether there was a living child or only something called “embryo life” prior to quickening. Despite the anxiety of the New York Supreme Court about the fearful consequences of discrediting legal and medical authorities if quickening were abandoned as a significant dividing line, it is worth noting that although a number of statutes still use that event as a condition for increasing punishment, no one in the current debate takes the moment of quickening seriously as a line dividing the non-living from the living.

In 1881, the New York legislature again reworked the statutes on abortion. Quickening was restored, and remained in New York law until 1965 as a significant condition. Abortion causing either the child’s or the mother’s death after quickening became first degree manslaughter. The woman’s own participation was second degree manslaughter if the quickened child died. Attempted abortion at any stage of pregnancy and the woman’s own participation in it were made punishable by a maximum four-year prison term. Those providing abortifacients for unlawful use—a therapeutic excuse continued to be recognized in the 1881 law—were made guilty of a felony.<sup>140</sup> Means thinks that this revision marked the end of the effort of a doctrinaire clique “to innovate a legislative recognition of their metaphysical notion that an hour-old zygote is a ‘living child’ and therefore a ‘man.’”<sup>141</sup>

Certainly, the 1881 revision represents an apparent step backward in the recognition of the right to life of the unborn. But, once more, it is by no means clear what the legislature had in mind. As we saw in chapter four, there was

considerable organized opposition to abortion around 1870, including members of the Protestant clergy of New York State and also including the American Medical Association.<sup>142</sup> Thus the laws passed in 1869 and 1872 were not the product of the efforts of a fanatical minority.

The law of 1881 implies a continuing commitment to the protection of human life before birth in those cases in which there was common agreement that it is surely present. The provisions regarding attempts at any stage of pregnancy are like similar provisions in the law of 1829. Probably the revision of 1881 represented some sort of practical compromise.

One fact important to notice is that New York statutes since 1845 have forbidden the woman at any stage of pregnancy to abort herself or to submit to an abortion. Means notes this fact and observes that the 1881 statutes did not mitigate, but actually intensified, the gravity of the offense.<sup>143</sup> But he claims that these provisions are dead letters, "that no such woman ever has been, or is ever likely to be, prosecuted."<sup>144</sup> How he knows this, he does not say. But even if it is true that the statutes of New York and twelve or fourteen other states applying to the woman herself are not enforced, they do provide some further evidence of concern for the unborn child.

It is worth noting that in the statutes of 1881 New York was not inventing an altogether new pattern of legislation forbidding abortion. The 1881 revision essentially is a reversion to pre-1869 concepts, and has the same basic pattern as the enactments of 1829. This very influential arrangement distinguished between abortion before and after quickening, included all attempts in the section extending to the whole of pregnancy, while it punished equally the death of mother or child consequent upon abortion involving a quickened fetus. Statutes apparently based on the New York 1829 legislation were enacted in at least seven jurisdictions before 1881 when New York itself reverted to this arrangement: Ohio (1834), Michigan (1846), Washington Territory (1854), Wisconsin (1856), Pennsylvania (1860), Florida (1868), and Georgia (1876).<sup>145</sup>

These laws contain an anomaly that Means himself notes and does not satisfactorily explain. In the section dealing with abortion after quickening, the death of either mother or baby is the same crime (usually manslaughter); in the section dealing with abortion before quickening, nothing is said about the death of either. What about the pre-quickening abortion from which the mother died? If the common-law position held, the act would have been murder in such a case, but then the abortionist would be punished more severely for the death of the woman if she were not quick than if she were. If the statute displaced the common law position, then the abortionist who killed a woman would have been subject to no more serious penalty than one who gave an ineffective and harmless drug.<sup>146</sup>

I do not know what to make of the legal position resulting from these provisions,<sup>147</sup> which leave the legal protection of the mother's and child's life equally out of consideration or bring both equally into consideration. I think

it obvious, however, that such a pattern does not testify to a primary concern with the life and health of the mother. The contrast with the New Jersey statute of 1849 is as sharp as it could possibly be, for there quickening was ignored, while any sort of attempt leading to the mother's death was, as we have seen, more severely punished.<sup>148</sup>

Before 1860, Massachusetts (1845), Vermont (1846), and New Hampshire (1848) were the only states that had a law like that of New Jersey (1849),<sup>149</sup> and probably these four states should be considered to have enacted statutes more for the protection of the mother than for extending protection of fetal life to the period prior to quickening. In 1965, twenty states and the District of Columbia indicated in their abortion statutes what the penalty was to be if the woman died, but nearly half of these still more or less followed the New York pattern of 1829, and only six simply provided for increased punishment if the woman should die (the early Massachusetts pattern), while seven merely declared what probably would have been the case anyway—that such a death made the act murder.<sup>150</sup>

Clearly this history is incompatible with Means' thesis. The rule of common law by which an abortionist acting at any stage of pregnancy was guilty of murder if the woman died gave great protection to the woman's life, without evidencing a like regard for the life of the fetus, especially prior to quickening. If the legislators, in passing statutes, were primarily or even on the whole significantly moved by concern to protect the mother's life and health from unsafe abortion, as Means contends, surely those legislators would have maintained an explicit and severe penalty in all cases in which the mother died in consequence of the operation.

Perhaps the penalty would not have been that for murder, because legislators eager to protect women from unsafe abortion would perhaps have been more concerned to secure convictions in a large number of cases than to impose maximum penalties in a smaller number of cases. But the clear provisions of common law which so firmly protected the mother could hardly have been ignored by legislators except for one reason—namely, that they wrote these laws more to protect the unborn child than to protect the mother.

Means brushes aside the anomaly involved in statutes that reduced from murder to manslaughter the crime involved in abortion followed by the mother's death if her child had already quickened, that failed even to mention what crime was involved if the mother died of an abortion induced prior to quickening, that punished the mother herself or another, that punished the physician and the non-physician alike, and yet that—if Means' argument were sound—extended the provisions of common law prohibiting abortion not for the sake of the life of the unborn but only for the sake of the protection of women from the dangers of abortion. This anomaly, more than anything else, demonstrates the falsity of Means' theory.

From the entire preceding consideration of Means' thesis, it is clear that in the nineteenth century, as today, there were conflicting views of the nature

and seriousness of abortion prior to quickening. One view was that it is a violation of a person's right to life, and this view was reflected in laws, such as the New York statutes of 1869 and 1872. The other view was that there is no person with a right to life before quickening. This view was reflected, probably on a basis of compromise with the other position, in all the statutes that used quickening as an important dividing line. Yet it is a mistake to conclude that such statutes, when they forbade pre-quickening abortion, were solely concerned with the protection of the woman's life and health. They also were at least partly intended to protect embryonic life. Even if such life were not a "human being" and a "living child," it deserved some respect and protection insofar as it was a potential human being—one on the way.

Evidence for the existence of this point of view is found, first of all, in our criticism of Means' interpretation of the New York statutes of 1829. That legislation, which was so influential, was intended neither solely nor even primarily to protect women's life and health. Rather, it extended some protection to the pre-quick fetus, but not nearly the protection extended to the quickened fetus.

The ruling of the New York Supreme Court, in the case of *Evans v. People*, throws considerable light upon the mentality of those who regarded life before quickening as a reality of some significance, yet somewhat less important than the life of a "living child" after quickening:

There was no evidence given upon the trial as to the commencement of life in the child or the character or degree of vitality at the different periods of gestation. But it may be assumed that the claim of the physiologist is true; that life exists from the first moment of conception. And it has been well settled, from a very early period, that certain civil rights attach to the child from the first, and that legal consequences result from pregnancy before actual quickening. (1 Bl. Com., 129.) But it is life in embryo, and recognized in the interests of humanity in some cases, and in others in the interest of the child thereafter to be born, and in respect to succession of estates.

But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life. (Dean's Med. Jur., 129.)<sup>151</sup>

The court's observations concerning lack of evidence of life before quickening and well defined evidences of life after quickening touch on a fact that undoubtedly goes far to explain the significance that the law for so long attached to quickening. Statutes following the pattern of New York's 1829 laws included for practical purposes two extensions of the common law in one provision: an extension to cover abortion during the period from conception to quickening and an extension to cover attempts at all stages of pregnancy.

Objectively, an effective abortifacient act in the third month of pregnancy and an ineffective attempt in the sixth month are very different. But from a

legal point of view, the two are very similar, because it is almost as impossible to prove that the abortifacient act caused the death of the not-yet-quick fetus (it might already have been dead) as it is impossible to prove that an ineffective attempt caused death.

If the life and health of the mother had been the prime consideration, a utilitarian approach to the problem would have dictated that the punishment be equal regardless of whether the unborn were killed. But since the laws were intended to protect the unborn, whether a particular abortifacient act certainly caused death or not became an important issue, just as the law makes an important distinction between an attempt to murder and an actual murder. If the problem of evidence is considered, it makes sense to forbid abortion prior to quickening by prohibiting attempts at any stage of pregnancy.

Still, it will be objected that such an arrangement also would make sense if the statutes had a purpose other than the protection of life before birth. We have already argued that protection of the mother was not the primary concern of the many statutes based on the pattern of the New York laws of 1829. Others have suggested that the laws against abortion were "moral legislation" in the narrow sense—legislation to suppress sexual activity—or demographic measures in a period when an expanding population was socially advantageous.<sup>152</sup>

Both of these suggestions are implausible to the extent that abortion statutes were not simply anti-contraceptive, although some of them may have dealt with both matters, for example, in regulating the supplying of poisons and drugs. Moreover, it is anachronistic to read the twentieth-century urge to shape public policy by sociology into the acts of nineteenth-century legislators and judges who had not even caught up with eighteenth-century developments in such sciences as physiology and embryology.

Little evidence is cited for thinking either repression of sexual activity or demographic considerations played a role in shaping nineteenth-century anti-abortion statutes. However, sentences from two state supreme court decisions—one from Pennsylvania, the other from Kentucky—have been cited.

In *Mills v. Commonwealth* (1850), Justice Coulter of Pennsylvania decided that abortion before quickening was a common law crime.<sup>153</sup> Means observes that this opinion was a mistake, and his observation is surely correct. Only one other state followed the Pennsylvania precedent, while the predominant view remained that the common law forbade abortion only after quickening.<sup>154</sup> In this case the court said that abortion is criminal: "[b]ecause it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued." The court also said: "It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature."

Does this show a disposition to enact by judicial fiat a public policy favoring population expansion? No. The two quoted phrases are related to two

problems the court faced in upholding the indictment. One was that it said that Mills had aborted the *woman*, not that he had aborted the *child*. The court solved that, in its rather flowery phrase about "mysteries of nature," by saying that pregnancy is a process, and that abortion interrupts it. This is an offense because pregnancy is a process of human-life-beginning; one can say the woman was aborted without straining language.

The other problem was that the indictment did not say the woman was "quick"; it only said she was "pregnant and big with child." The court handled this objection by asserting (erroneously) that common law did not require that the child be quick. Thus the comment that abortion was not murder was inserted. But then the court added:

The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. The allegation in this indictment was therefore sufficient, to wit, "that she was then and there pregnant and big with child." By the well settled and established doctrine of the common law, the civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception; 3 *Coke's Institutes*.

Justice Coulter and his colleagues may not have been masters of the common law, but it is clear what they meant to do. The reference to Coke, whatever its inadequacy to support the position taken, makes that position clear. Distinguishing between the "living child" after quickening, which they thought could be *murdered*, and "embryo life" before quickening, which they thought could be criminally aborted, the Pennsylvania Supreme Court was trying to extend legal protection to that embryo life, relying on the analogy of the common law's protection of the *civil rights of the infant at all periods after conception*.

It is interesting to note that the Supreme Court of New York, in *Evans v. People* summarized and agreed with the opinion in *Mills v. Commonwealth* so far as the distinction between "embryo life" and the "living child" is concerned.<sup>155</sup> The New York court did not assert nor did it deny that there is, from conception, a life to be protected. All the New York court said was that prior to quickening there was no man to slaughter, and since that was the charge on which Evans had been indicted, his conviction was reversed.

This distinction, stated explicitly in court decisions, throws considerable light on what was surely part of the underlying rationale of statutes in the pattern of New York's 1829 laws. Some protection was extended to "embryo life" prior to quickening, but greater protection was given to the "quick child." The two concepts do not make much sense from an objective viewpoint; there is embryonic life from conception to birth, and it is or is not a "living child" depending upon one's theory of personality. But the law was not working on the plane of objective analysis. "Embryo life" was the legal translation of the scientific facts which had led the Beck brothers to condemn abortion laws that used quickening as a dividing line.<sup>156</sup> The "living child" was the legal entity

common law had always known and that legal conservatism clung to as if it were a Linus-blanket.

In *Mitchell v. Commonwealth* (1879) the Kentucky Supreme Court ruled that abortion prior to quickening is not a common law crime.<sup>157</sup> The court said:

In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation.

Does this dictum reveal an obsession on the court's part with "morals" in the narrow sense? Not at all, for the court proceeded immediately:

That the child shall be considered in existence from the moment of conception for the protection of its rights of property, and yet not in existence, until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government.

Whether or not this opinion was an influence, it is interesting to note that Kentucky did subsequently enact statutes dealing in distinct sections with abortion attempts (maximum penalty, ten years in prison and one thousand dollar fine), the killing of an unborn child "whether before or after quickening time" (maximum penalty, twenty-one years in the penitentiary), and the killing of the woman in an attempted abortion, successful or not and at any stage (maximum penalty, that for murder or manslaughter, as the facts indicate).<sup>158</sup>

A possible source of the Kentucky legislation was the Illinois statute of 1867. Illinois enacted one of the earliest American statutes against abortion, in 1827, but it was limited to attempts involving poisons and drugs. The 1867 law dealt with other methods, successful or not, set ten years in the penitentiary as the maximum penalty, in a distinct section classed the offender as guilty of murder if the woman died, and—like all Illinois statutes—made no mention of quickening.<sup>159</sup> Obviously, this statute aimed to protect fetal life from conception on, and set a high value on it.

Kentucky may also have been influenced by the Tennessee statute of 1883, which expressly excluded quickening and increased penalties only on the basis of whether or not the child was actually destroyed before birth.<sup>160</sup>

Two states obviously learned something from the 1872 New York collision between court and legislature. Minnesota enacted a four-section statute in 1873 closely following the New York 1872 statute.<sup>161</sup> Nebraska in 1873 adopted two statutes, one of which penalized abortifacient attempts that led to no death, and the other punished equally ones that led to the death of the mother or to that of the unborn child, which is nevertheless cautiously referred to as "a vitalized embryo, or foetus, at any stage of utero gestation."<sup>162</sup> As far as I know this is the only occurrence of this language in any statute. It clearly excludes quickening, extends protection to the unborn at all stages of preg-

nancy, and carefully avoids using language that would open the statute to treatment by the courts as the New York law of 1869 was dealt with in the *Evans* opinion.

Modern courts have explained the purpose behind various abortion statutes in a manner compatible with my thesis that they were intended to protect developing human life from conception until birth.<sup>163</sup> Justice Francis, in a concurring opinion of the New Jersey Supreme Court, said that if the 1858 decision in *State v. Murphy* meant that

. . . the only purpose of the 1849 act was to protect the life and health of the mother, I disagree. There is nothing in the legislative language to support that idea. It seems to me there were two objectives, of at least equal importance. One was to provide greater protection for the child *in utero* than was given under the common law. To accomplish this, the safeguard against abortion was moved backward from the time when the child became quick, to the moment of conception.<sup>164</sup>

In his opinion this and subsequent changes in New Jersey abortion laws implied the legal recognition of a separate entity:

In my judgment, the most important consequence of the statute is the legislative recognition and sequential incorporation in the law of the principle that the child as a legal entity begins at conception; as of that time it has a legal existence as a separate entity, as distinguished from a mere part of its mother's body.<sup>165</sup>

In view of our previous discussion, this opinion is essentially correct, though somewhat oversimplified. The statute laws on abortion extended the protection of unborn *life* to conception, and clearly considered that life as something more than any other mere bit of maternal tissue. Still, many of the statutes presupposed a distinction between the "quick child," which was treated as a separate legal entity—as a special class of legal person—and "embryo life," which was not a legal entity or unborn *person*. "Embryo life" was regarded as something *becoming a person*, and deserving of protection in view of the inviolability of the life which it would come to be; *rights* were not assigned to "embryo life," but care was to be given it in view of the "quick child" it would become.

Many other statutes, such as the New Jersey statute of 1872, which provided the same penalty if either the woman *or the child* died as a result of an attempt at abortion at any stage of pregnancy, do seem to have recognized the developing individual as an unborn person with a right to life from conception onward. It is worth noting that (as of 1965) only ten states still used quickening as a basis for determining the penalty for abortion or attempted abortion, and no state lacked a law prohibiting abortion at every stage of pregnancy.<sup>166</sup>

In the famous case of *Rex v. Bourne*, which we discussed in chapter five, Justice Macnaghten summed up the rationale of the British statute, which was the model of American statutes:

The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.<sup>167</sup>

The report of the British Inter-Departmental Committee on Abortion (1939) stated:

Undoubtedly, the law upon the subject has been most markedly influenced by the teaching of the Church. The sanctity of human life from its very beginning has been strongly emphasised in all Christian teaching; even the unborn life must not be deliberately taken.<sup>168</sup>

The Committee also believed that concern to maintain the continuity of the state may have been another factor.

Glanville Williams, a proponent of legalization of abortion, correctly states the intention of the laws forbidding it:

At present both English law and the law of the great majority of the United States regard any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The fetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized.<sup>169</sup>

The American Law Institute's commentary on its proposed statute also conflicts with Means:

Abortion is opposed by some on the ground of physical or psychic danger to the woman, or as an inhibitor of population growth. But it is clear that the main factor accounting for laws against abortion is ethical or religious objection. As the fetus develops to the point where it is recognizably human in form (4–6 weeks), or manifests life by movement perceptible to the mother ("quickening": 14–20 weeks), or becomes "viable," i.e., capable of surviving though born prematurely (24–28 weeks), it increasingly evokes in the greater portion of mankind a feeling of sympathy as with a fellow human being, so that its destruction comes to be regarded by many as morally equivalent to murder.<sup>170</sup>

Unfortunately, this normal sympathy seems to be decreasing in advocates of abortion on demand.

The general trend in abortion legislation, until the last few years, was increasingly to recognize and insist upon respect for the life of the unborn child. This trend paralleled the trend in property law to recognize the factual ground of the old civil-law fiction and the trend in tort law to recognize rights vested in the unborn prior to birth, rights that could be vindicated at law in many states even if the child were never born alive.

In reviewing tort law, we saw that the first cases that recognized rights in the unborn—*Bonbrest* for personal injuries and *Verkennes* for wrongful death—limited themselves to pushing the line from viable birth back to viability; subsequent decisions went further. In criminal law of homicide, one decision took the step of setting aside old criteria of birth—for example, whether

the infant breathed or whether the umbilical cord was cut—and took the position that *homicide* can be committed before the child is born, provided it is viable. This case was *People v. Chevez*, decided in California in 1947.<sup>171</sup> The court held:

There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed. While the question of whether death by criminal means has resulted while the process of birth was being carried out, or shortly thereafter, may present difficult questions of fact, those questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed.

This case is significant because it was an application not of abortion statutes, but of the same homicide statutes that protect adult lives. If there were not at present so strong a movement to legalize the killing of the unborn, one could predict that the *Chevez* decision would be the first step in a development in the field of criminal law of recognition of the rights of the unborn parallel to the development initiated by *Bonbrest* and *Verkennes* in the law of torts.

Today it is difficult to foresee what direction courts will take. One attempt has been made to challenge the new California law by means of a civil suit brought by a husband against a hospital to prevent the abortion of his wife. The suit, *O'Beirne v. Kaiser Memorial Hospital*, could have marked a significant advance in the legal right of the unborn to life, because plaintiff argued that the abortion would violate his paternal rights and the right of the child to be born. However, the case was decided for the defendant, and this decision was affirmed by peremptory decision of the California Supreme Court.<sup>172</sup>

Still, this decision does not set a precedent against the position that the unborn child has a constitutional right to life. Although there was no written opinion published, there is evidence in the form of a letter written by the trial judge indicating that the decision against the plaintiff was made on the basis that the abortion was necessary to safeguard the woman's life.<sup>173</sup>

One final argument that criminal law recognizes no right to life prior to quickening is offered by Means. He points out that New York legislatures in 1828, 1881, 1910 and 1967 maintained the common law rule according to which reprieve was granted to a woman to be executed only if she were "quick with child." Thus it seems that these legislatures recognized a separate life to

be legally respected only after quickening.<sup>174</sup> Conceptually, the argument is sound, but in reality it lacks force. Executions of women who have conceived but are not yet quick are highly unlikely in recent years, for there have been few executions, fewer still of females, and these only after months or years of delays. The continuation of the old rule in 1967 would therefore seem to be a matter of legislative inertia rather than of policy, and the same may be true of the revisions of 1881 and 1910. The minority report of the 1969 New York Governor's Commission on abortion asserted:

We are aware of no case of the execution of a pregnant woman in this state. We cannot conceive of such a case occurring today.<sup>175</sup>

There is some reason to doubt whether pregnant women were executed even under common law, for a jury of twelve women decided whether to honor a claim to reprieve on this ground, and the reported practice was to grant reprieve if there were "any colour to support a sparing verdict."<sup>176</sup> Some modern state codes of criminal procedure have abolished the quickening distinction from the provision for reprieve of a pregnant woman.<sup>177</sup>

#### "Wrongful Life?"

A small number of recent tort cases deserve separate consideration because they raise a wholly new question: whether the child who is born under disadvantageous conditions has a legal right to compensation for "wrongful life"—for having been procreated and permitted to be born.

The first of these cases, *Zepeda v. Zepeda*, involved illegitimacy.<sup>178</sup> The suit was brought on behalf of the child against his father, who had fraudulently promised marriage to the baby's mother though he already was married to someone else. The child asked for damages to compensate for the fact and effects of his illegitimate birth.

The opinion of the Illinois Appellate Court, written by Presiding Justice Dempsey, was that the child had been tortiously wronged. Reviewing the history of tort law, the court observed:

The law of torts has been hesitant in recognizing what medical science has long known, that life begins at the moment of conception, and what theology has longer taught, that from the moment of conception every human being has the rights of a human person.

However, the court did not rest its opinion that the child had been wronged so much on the idea that it was a person with rights at conception as on the concept that even prior to its conception there was a "conditional prospective liability" toward it. Thus the court maintained:

If the plaintiff was conceived before the completion of the act, he became a living, human organism concurrently with the wrongful act. If his conception took place after the act, he was a potential being with essential reality at the time of the act. The seed was planted, the life process was started, life ensued and birth followed.

The defendant's wrongful act simultaneously procreated the being whom it injured.

In neither event was the plaintiff a "person" as that word has been historically understood in the law of torts. We do not think this is too material for we are not concerned with some abstract ontological proposition as to the instant a human entity becomes a person. The plaintiff is a person now and he was a potential person with full capacity for independent existence at the time of the original wrong. As he developed biologically from potentiality to reality the wrong developed too. It progressed as did he, from essence to existence. When he became a person the nature of the wrong became fixed. From a moral wrong and a criminal act against the public, it became a legal wrong and a tortious act against the individual.

Although the court recognized that the "living, human organism" begins at conception, and although it held that a child is able to recover for injuries done before birth, it refused to regard the plaintiff as a "person" in tort law and suggested that during pregnancy there is development from a potential to an actual person. This view is not unlike that of those who accorded "embryo life" to the unborn while denying that they are persons.

The court, despite its finding that the child had been wronged, refused to allow his claim. The difficulty in granting recovery was located in the nature of the complaint "that he was born and that he is." To admit this complaint "means the creation of a new tort: a cause of action for wrongful life." If admitted in this case, the way would be open for suits not only by illegitimates against their fathers, but also by every individual whose birth was in some regard less fortunate than normal. The court therefore decided that the legislature, not the court, was the proper body to admit and limit such causes of action, if they were to be allowed at all.

*Zepeda* does not prove a great deal with regard to the issue as to whether the unborn should be considered persons having rights. There is some recognition of the facts of prenatal life, a refusal to classify the unborn as persons, an admission that one can be legally wronged from conception onward, and a refusal to give legal approval for a claimed right not to exist.

*Williams v. State*, a subsequent New York case, raised the issue again in a slightly different form. A mental patient in a state institution was raped, became pregnant, and gave birth to a baby girl. The child's maternal grandfather sued on her behalf, because the negligence of the State Hospital resulted in her "being conceived, being born and being born out of wedlock to a mentally deficient mother." The Court of Claims decided that the case should not be dismissed, that recovery for damages inflicted "at conception" should be allowed. In this opinion the court undertook the step Illinois had refused to take in *Zepeda*. But, significantly, Judge Squire declined "to approve the appellation: 'a cause of action for wrongful life.'"<sup>179</sup>

Despite this caution and the fact that Judge Squire's opinion made no mention of abortion, it immediately led to speculation that the decision would

establish a duty to abort on eugenic grounds, in rape cases, and possibly in many other cases. The plaintiff's attorney said that an abortion had been sought and refused and added: "It was this failure to abort and therefore to mitigate damages that lies at the heart of the case."<sup>180</sup>

The State appealed the Court of Claims ruling. The Appellate Division reversed the original decision, as lacking reasonable grounds. The State does not have a duty to one not yet conceived, and so was not negligent prior to conception. Moreover, the damages asked for cannot be ascertained:

In essence, and regardless of the verbiage of the claim above quoted, the damages asserted rest upon the very fact of conception and would have to comprehend the infirmities inherent in claimant's situation as against the alternative of a void, if nonbirth and nonexistence may thus be expressed; and could not, without incursion into the metaphysical, be measured against the hypothesis of a child or imagined entity in some way identifiable with claimant but of normal and lawful parentage and possessed of normal or average advantages.<sup>181</sup>

This decision makes an extremely important point: that an individual cannot legally claim to have been wrongfully given life, since the alternative for him is *not being at all* rather than being in an imaginary better condition. One takes his life as he finds it—a counsel of realism!

A final appeal to the New York Court of Appeals resulted in affirmation of the Appellate Division's judgment. The Court of Appeals held:

Being born under one set of circumstance rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court.<sup>182</sup>

Shortly after *Williams* finally failed (December 1966), *Gleitman v. Cosgrove* was decided by the Supreme Court of New Jersey.<sup>183</sup> In 1959 Mrs. Gleitman had a baby, Jeffrey, after suffering an attack of German measles in early pregnancy. She asserted and the defendant physician denied that no warning was given of the possible effect on the child. Jeffrey was born substantially injured in sight, hearing, and capacity for speech. The Gleitmans sued, not on the basis that better treatment would have ameliorated the damage, but rather on the assumption that a legal abortion could have been obtained somewhere, eliminating Jeffrey and his problems. The trial judge dismissed the suit as far as Jeffrey was concerned because the defendants were not responsible for his condition, and as far as the parents were concerned because New Jersey law did not seem to him to admit abortion in such cases.

The New Jersey Supreme Court divided four to three against allowing the parents' action and five to two against allowing Jeffrey's action. There was a separate concurring opinion and two distinct dissenting opinions, one by the Chief Justice who would have allowed the parents' suit while affirming the dismissal of the child's.

The opinion of the court, written by Justice Proctor, dismissed the complaint on behalf of Jeffrey on the same ground that the New York Appellate Division used in *Williams*:

The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the non-existence of life itself.

It is important to note that Chief Justice Weintraub, in his partial dissent from the majority opinion, agreed with the majority on this point:

Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.

This argument is extremely important, because it applies equally against proposals to legalize eugenic abortion in the interests of the fetus. In effect, the New Jersey decision clarifies the precedent opinions in *Zepeda* and *Williams* by pointing up the logical difficulty in the view that possibly defective infants should be aborted in their own interest.

In regard to the parents' claim, the court held it not actionable for two reasons. First, the human values of parenthood, even in this situation, cannot be measured against its disadvantages. Second, even if the damages could be measured, "the right of their child to live is greater than and precludes their right not to endure emotional and financial injury." To reach this conclusion, which directly asserts the right of the unborn child to life, the court formulated the following argument, which proceeds from the value of human life to the right to life, a right held to be superior to the claim of the parents:

It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. "For the living there is hope, but for the dead there is none." Theocritus. See Ryan (M.D.), "Humane Abortion Laws and the Health Needs of Society," 17 *West. Res. L. Rev.* 424, 428-430 (1965); and for a recent statement on "the rights of the fetus" see Conniff, "The World of the Unborn," *New York Times*, January 8, 1967, Section 6 (Magazine), pp. 97-98.

The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action. Examples of famous persons who have had great achievement despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life.

We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less

expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort. Cf. Jonathan Swift, "A Modest Proposal" in *Gulliver's Travels and Other Writings*, 488-496 (*Modern Library ed.* 1958).<sup>184</sup>

This opinion, while it strongly argued against the rationale of eugenic abortion, did not hold that eugenic abortion is criminal under New Jersey law. In effect, the majority of the court agreed that even if it is not criminal, it is not the sort of behavior the state should make a policy of, by enforcing damages when it is not performed.

Justices Jacobs and Schettino, in their dissent, embraced the theory of the plaintiff's suit completely. They believed that an abortion should have been performed, that New Jersey law would have permitted it, and that the state should make a policy of eugenic abortion.

Justice Francis, in a concurring opinion, argued that abortion would have been illegal in New Jersey. The law forbids abortion "without lawful justification" and does not say what that might be. Justice Francis argued that in view of the history of abortion laws and their purpose as a protection of the right of the unborn to life, this phrase could reasonably be taken to refer only to the cases in which abortion was necessary to save the mother's life.

Chief Justice Weintraub, in his partial dissent, argued that "lawful justification" in the New Jersey statute did or should include eugenic indication. He also attacked the phrase as vague and suggested that it might be unconstitutionally vague, since it does not clearly tell people just what the law forbids them to do. On this basis, he held that the Gleitmans may have been tortiously injured in not being given the chance to have Jeffrey aborted. But Justice Weintraub joined the majority in rejecting a claim for "wrongful life": "To recognize a right not to be born is to enter an area in which no one could find his way."

A case similar to *Gleitman* has been tried in New York. On trial, the infant and parents in *Stewart v. Long Island College Hospital* were awarded damages totaling 110,001 dollars by the jury. However, the trial judge set aside the 100,000 dollars awarded for the child on the same grounds accepted by the New Jersey court, including Chief Justice Weintraub, in the *Gleitman* case. In *Stewart*, Judge Beckinella held that "a plaintiff has no remedy against a defendant whose offense is that he failed to consign the plaintiff to oblivion." Damages were allowed to the parents on the theory that they had proved a case of medical malpractice, in that they were not informed of a division among members of the hospital abortion board, and that this information might have led them to seek medical advice elsewhere. Apparently, however, the "elsewhere" would have had to be outside New York State, since Judge Beckinella did not accept the view that New York law permitted abortion except to preserve life.<sup>185</sup> As of August 1969, appeals by plaintiff for damages

denied and by defendant against damages awarded are pending final disposition on appeal.

These four "wrongful life" cases merit attention for two reasons. First, the position seems to be established that tort law is not able to recognize a person's right *not to be*. Second, there may be other aspects of a complex situation that merit and will receive a legal remedy. These should not be confused with a right not to be. I see no reason why in *Zepeda*, for example, the child's claim against his father could not have been admitted. The issue was not properly whether the child's life was wrongful, but whether the reprehensible behavior of the man did not fall short of enforceable standards of responsibility toward those whom he is willing to procreate. The possible child is not a mere non-entity, but a potential reality toward which there are at least moral responsibilities.

#### "Person"—Consistency in the Law

Should the law in all its branches be consistent in what it regards as a *person*? Or may it reasonably regard as a person in property law what is not a person in tort law or in criminal law?

The issue will be sharpened by reference to two recent articles in legal journals. In one, "The Law of Prenatal Injuries," Mr. John L. Hay observes that Holmes' dictum in *Dietrich* that the unborn child is part of its mother was reversed partly because it denied what was known shortly after as a palpable fact. However, it took nearly half a century for this fact to be generally recognized. He then adds: "Most courts since 1946 have classified viable, unborn infants as legally persons by judicial statement of the fact."<sup>186</sup>

One reason for this is that courts have argued from the legal status of the unborn in property law and criminal law to the conclusion that they should be considered "in being" for tort law as well. Mr. Hay points out that not all states using this analogy have been consistent in it, for in property law it was essential that the child be liveborn, while the analogy has been used in tort law in cases involving wrongful death. At this point Hay states his own view, with admirable clarity:

Whether or not this analogy between property and criminal law and the torts field should be drawn is, of course, up to each individual court. Many of the recent cases have implied that a person should be characterized as "in being" from the same particular time each time a definition of "being" is needed. This is not so. [As Cook observes:]

"The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."

Each court should be free to define the point in time at which a person is "in being" differently for tort law than for property law or criminal law, if public

policy, statutory enactment or well-reasoned precedent requires it. [notes omitted]<sup>187</sup>

A position contrary to Hay's is implied by the very title of an article by Mr. William Diller: "The Unborn Child: Consistency in the Law?"<sup>188</sup> Diller does not discuss the theoretical issue; he simply assumes that the law ought to be consistent. He points out that common law was not consistent, in that it regarded the unborn as persons from conception for purposes of property law, from quickening in the criminal law regarding abortion, and from birth (until *Bonbrest*) in tort law. Diller reviews the tendency toward consistency in recent years and refers to dicta in many decisions that show a concern of the courts to be consistent in this matter.

It is, in general, a sign of simplemindedness to expect that the same word will have the same meaning in all its uses, regardless of context. Only a dolt would take a dull saw to a dentist for sharpening because dentists fix teeth; only an imbecile would try to cash a check coat at a bank because banks pay out money for checks.

The law, therefore, is no different from life in general in using words with many meanings. The law tries to be more explicit about equivocation, for the benefit of simpletons and for the frustration of those seeking loopholes. Thus a statute establishing fire safety regulations for schools may state (or be held by the courts to mean) that it applies to summer camps and day-care centers, while these same institutions may not be required to meet the standards required of all schools so far as the training of teachers is concerned. There is nothing inconsistent in such equivocation in the use of the word "school." Fire safety regulations can serve much the same purpose in day-care centers and summer camps as in institutions whose object is the children's education, while teacher-training standards are not relevant where teaching is not undertaken.

Often legal distinctions seem arbitrary, but usually they are not, as appears on closer inspection. The tax laws may hold that a professional architect or engineer who gives a great deal of time in invaluable free service to a church or charitable organization has not donated "anything of value." But if he donates a physical object, such as a blueprint, that may be held to be a donation deductible "at fair market value," even though there is no *market* for the item, because of its very specialized character. Such distinctions seem arbitrary until one reflects how easy it would be for anyone to make—and even obtain written verification of—vastly inflated claims of the amount and value of service given to churches and charitable organizations.

Therefore, we must agree with Mr. Hay that, in general, it is erroneous to assume that a word must have the same scope in different legal rules or in diverse fields of law.

Having conceded this point, we ought next to consider what courts have said about inconsistency in regarding the unborn as persons for some purposes

and not for others. Of course, many court decisions can be cited in defense of making the distinction, including many dicta in tort cases between *Dietrich* and *Bonbrest*. I wish mainly to point out that many competent judges find equivocation on this matter anomalous and unsatisfactory. Thus we will see that despite the truth in general of Hay's observation, Diller is not simple-minded in assuming that there should be consistency on this point.

In decisions regarding common law on abortion, we saw that both the Pennsylvania justice who extended the crime to the period before quickening in *Mills v. Commonwealth* and the Kentucky justice in *Mitchell v. Commonwealth* who refused to undertake such legislative responsibility referred to the status of the pre-viable fetus in property law. In *Mills* there is a reference to Coke for the civil-law status of the "infant" from conception; in *Mitchell* there is a reference to a "child in existence" from conception for its rights of property but not until four or five months later to the extent that it is a crime to destroy it.<sup>189</sup>

In denying recovery in *Dietrich v. Northampton*, Holmes rejected the argument that the protection afforded the quick child by common law forbidding abortion should be extended to the field of torts. He argued against the analogy both in general and on several specific grounds: that there were authorities denying Coke's rule that the live birth and subsequent death of an aborted quick child made the act murder, that extension to tort law on proper principles would not be able to limit recovery to the *quick* child, and that the Massachusetts statute on abortion did not increase the penalty if the child dies, even after birth, though it did increase the penalty if the mother dies.<sup>190</sup> The New York Law Revision Commission points out that there was a fallacy in this argument:

The argument of the court based on the last mentioned statute failed to take into consideration the fact that the first statute amply provides for punishment for the death of the child, and it would be unnecessary repetition to include the provisions of the first statute in the second. It is submitted that the court has neglected to perform the simple act of reading the two statutes together and has thereby drawn unfounded conclusions from the language of the last statute alone.<sup>191</sup>

Justice Boggs in his famous dissent in *Allaire*, often cited and quoted in the cases that overturned the *Dietrich* precedent, argued at length not only that a viable child is not part of its mother, but also that common law recognized the child as "in esse" from conception for purposes of property and from quickening in the criminal law of abortion. Boggs summed up his argument with a rhetorical question, asking

... why should it be supposed the common law would have denied to an infant born alive the right to recover damages for the injury inflicted upon it while in the womb of the mother?<sup>192</sup>

Among the decisions that followed *Dietrich* was that of *Magnolia Coca Cola Bottling Co. v. Jordan*, a Texas case decided in 1935.<sup>193</sup> The court ruled against allowing action for prenatal injuries precisely on the ground that it is not murder under Texas law to kill an unborn child. This example of argument from one field to another logically implies that if prenatal injury suits are allowed, abortion should be murder. The Texas Supreme Court overturned the *Magnolia* precedent in 1967.<sup>194</sup>

Chief Justice Brogan of New Jersey, in his dissent in *Stemmer v. Kline*, again a dissent often cited after *Dietrich* was overturned, summed up the argument for consistency:

A reading of all these authorities discloses that the courts recognized the beneficence of the common law for the protection of unborn infants against the criminal conduct of others and as to inheritance and property rights without saying that such protection and rights exist as exceptions or statutory declarations. But when they follow the principle of the *Dietrich* case and deny a cause of action to infants on the ground that the unborn child is not a separate and legal entity, they do nothing to reconcile the contradiction or at least the anomaly between the common law rights in favor of the infant, which they recognize, and the natural right of the infant to have compensation for pre-natal injuries negligently inflicted, which they do not recognize.<sup>195</sup>

When the dissenting position of Boggs in *Allaire* and Brogan in *Stemmer* was accepted as the law in *Bonbrest*, the court appealed to the analogy with civil law:

From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception—which it is in fact. [Footnote omitted]

Why a "part" of the mother under the law of negligence and a separate entity and person in that of property and crime?

The court attached to the last quoted sentence a footnote providing a dictionary definition of "person," criticizing statutes permitting *therapeutic* abortion, citing a standard text of physiology and anatomy for the point that "the fertilized human ovum is a one-celled individual," and arguing that Siamese twins are two persons although they are physically joined even less separably than the unborn child and its mother.<sup>196</sup> Of course, these remarks do not have authority as precedent; they are merely dicta. But so was most of Holmes' opinion in *Dietrich*, which is still cited by proponents of legalized abortion. More important, the dicta of *Bonbrest* clearly reveal the outlook of those who overturned *Dietrich* and began the current recognition of the rights of the unborn in tort law.

*Verkennes*, the first case allowing recovery for the wrongful death of an unborn child, quoted extensively from Boggs' dissent in *Allaire* and from *Bonbrest*, including portions of their arguments from the standing of the unborn in the law of property and crime to what their standing should be in the law of torts.<sup>197</sup>

*Kelly v. Gregory*, the first case allowing recovery for injuries incurred in early pregnancy, noted that while in certain types of cases the judges at common law accepted that “the separate legal entity of life” began at conception, in others they made “some highly artificial distinctions.” The court in *Kelly* also made the extremely important point that property rights recognized by common law in the unborn could vest *before birth*:

It is to be noticed that no distinction between viability or non-viability was attempted to be drawn in determining the point of vestiture of a legal right. Conception and vestiture became coincidental in the full sense of that word.<sup>198</sup>

Obviously, a right which vests in the child at any time after conception implies that infants in the womb are capable of actually having rights—of being *subjects* of rights—at any time after conception.

Finally, in *Porter v. Lassiter*, the only case thus far in which a wrongful death action succeeded involving a child that was neither viable nor live-born, the Georgia court ruled on the basis of the provision of the Georgia abortion law (at that time) by which an abortifacient that caused the death of either mother or child was treated as assault with intent to murder.<sup>199</sup>

Many more cases could be cited to show that there is a strong inclination among judges to seek consistency in what the law will regard as a person. But the cases cited ought to be sufficient to indicate the judicial sense that inconsistency *in this matter* is an anomaly which leads to injustices. Moreover, the general (though not invariant) direct relationship between denial of a need for consistency and refusal of standing in tort law, on the one hand, and, on the other, a demand for consistency and the vindication of the rights of the unborn in tort law points to the conclusion that the trend since *Bonbrest*, which has revolutionized the position of the unborn in tort law, also has been a trend toward the establishment of the soundness of the judicial view that inconsistency *in this matter* is intolerable.

Now, the question is: why is it generally an error to assume that the same word should maintain a single scope in diverse fields of law, but an intolerable anomaly when the law is found to regard the unborn as “in esse,” as “legal entities” with life, as subjects of rights—in short, as *persons*—in one field of law, but not in another?

The answer to this question is essentially very simple. A person is not related to the law merely as one of the things with which the law deals. In other words, a person is not merely part of the subject matter of the law. No, a person is a member of the community from which law originates; a person is an agent of the community in exercising legal authority, and a person is a constituent of the community for which law is ordained. We, the *people*, are the first source of the law; government should be of the *people*, by the *people* and for the *people*; *people* have rights and duties. “People” does not designate some abstract entity or some Leviathan; “people” simply designates persons.

The world of law is like a stage. It is a world of our own contriving. We build it for ourselves and we enact the drama of life within it. Since it is our own world, we are entitled to give the things within it natures according to our own fancy. But the freedom of the theater to indulge in fiction does not mean it can get along with imaginary producers, imaginary stage crews, or an imaginary audience. Particularly not the last, because the play is for the audience, not the audience for the play.

The law with all its fictions and devices exists to serve persons, to protect them, to guide them in fulfilling their duties, to assist them in vindicating their rights. People are not for the law; the law is for people. Thus the person in a sense stands outside the legal system and above it. Hence the law cannot dispose of persons by its own fiat, any more than action upon a stage can make non-entities of the producer, the stage crew, and the audience.

In short, the law needs to be consistent in what it regards as a person while it need not be consistent in other classifications, because persons are *subjects* of rights and duties while everything else can only be an *object* of a right or a duty. Persons are not objects. The trouble with slavery is that it does not respect this distinction. Slavery regards the slave as an object of someone else's (the owner's) rights instead of regarding him as a subject of his own rights, particularly as a subject of his own right to freedom.

There are two reasons why this difference, so vital to law, between persons and other entities may be overlooked. First, there are legal persons, which at first glance look rather like other legal fictions. Second, statutes can use the word "person" in a special sense for a particular purpose, with no less propriety than when the law restricts the scope of other expressions. We must look more closely at these two points.

As to the first, the law recognizes as "persons" entities such as corporations to which one would not attribute personality in any psychological, metaphysical, or theological sense. Even if one were to agree that personality is an achievement, not an endowment, it would be odd to talk of a corporation achieving its personality. All seem to be agreed that corporations are soulless, whether or not natural persons are thought to have souls. And if personality is thought to depend upon the reflexivity of consciousness, it is hard to see how it is meaningful to speak of self-consciousness in connection with a corporation.

But if corporations are clearly not persons in all sorts of extra-legal senses, their legal status as persons is not a mere pragmatic device on a par with other legal fictions. A corporation, after all, among other things is a unified body of natural persons joined in action for some common purpose. According to its constitution, each corporation has its authorized spokesmen and agents. These individuals, in their official capacity, act as only natural persons can act—only a human being is capable of being an official of a corporation. If we consider such an official, it is obvious that his personality does not exclude, but rather includes, his status as an official of the corporation.

In his official role, however, the agent of a corporation functions not on behalf of all the other aspects of himself, but rather on behalf of a certain limited aspect of the persons who are other members of the corporation. The limited aspect of all the persons who are members of the corporation is their involvement in the common purpose and action which they share. The corporation is not a mere abstraction and it is not a construction of impersonal entities. It is a unity made up of the stuff of which persons are made.

What does the law supply? Not the fact that the reality of the corporation is of the order of *person* rather than of the order of *object*. Rather, that limited aspects of many persons may be allowed to count as *one*. In other words, what the law supplies to the corporate person is not its personality but its corporeity.

Once this point is understood, it will be clear that the existence of merely legal persons does not count against the preceding explanation of the reason why the law is not free to dispose of persons as it is to categorize objects. Corporations are simply another way of recognizing persons with their interests, their purposes, their rights, their duties—in short, with their status above the world of law which they themselves create.

But there remains the fact that the law may use the word “person” in statutes with a restricted sense with no impropriety whatever. For example, the law of contracts may speak of “persons,” while excluding anyone under twenty-one years of age or anyone not of sound mind. Thus the scope of the word “person” is limited, and attempted acts by those beyond this limited scope will be regarded as invalid.

To understand what is involved in such a case, we must distinguish between the fundamental rights and duties common to all persons and the special rights and duties which are peculiar to individuals who have certain definite roles in relation to others. The former rights, common to all, are the ones that used to be called natural and unalienable; the duties correspondent to these rights will be of the same sort. The latter rights, special to those in particular relationships, are at least partly a matter of human invention; the duties corresponding to them will be like them.

We think of persons as the subjects of rights. Thus when the law refers to the one who will have rights and duties, it naturally uses the word “person.” If the rights and duties in question are special ones, arising from a particular relationship, only those capable of assuming that relationship and carrying out their role in it will be included within the scope of the word “person” in that context. So far as the relationship is the creature of law, the scope of the word “person” in such special contexts will be determined by the law. But if we consider the fundamental rights that are common to all persons, the rights that are unalienable, the law may not rightly determine that for any reason or purpose the scope of the word “person” may be restricted.

The point may be illustrated by the analogy of the theater. Within the world created upon the stage, the only individuals who count as “persons” are the characters in the play—the *dramatis personae*. The fact that the producer,

the stage hands, and the audience are not listed as "*dramatis personae*" does not mean that the playwright has the power to detract from their reality. The actors themselves, as actors—rather than as the characters they play—are not part of the world created upon the stage; they are among its creators. Even so, the law can create special groups of persons, but it cannot detract from the personhood of those who create it, whom it serves.

For this reason, when we are considering the provisions of the Fourteenth Amendment of the U.S. Constitution, according to which no State may

... deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws

—we are in a context where the word "person" cannot be limited for any special purpose. Here we deal with persons as those whom the law serves. We at once see why judges sensed an intolerable inconsistency in the position created by following Holmes' precedent in *Dietrich* in the field of tort law while adhering to the common law fiction-that-had-become-fact in the field of property law, and while applying a criminal law that (until the 1960s) never detracted from the common law's regard for the right to life of the quick child and often extended that same protection back to the beginning of pregnancy.

This conclusion, that law should be consistent in what it accepts as a person, may be made more vivid if we consider two imaginary situations.

There are now states in which a woman may be legally aborted if her child is likely to be seriously defective. Some abortions will be performed under this provision in cases in which an Rh-factor incompatibility is likely to create difficulties. But we have also seen that a court has considered itself compelled to take custody of an unborn child and to order blood transfusions over the parents' religious objections in order to protect the child from the consequences of this very incompatibility.

Now, we can easily imagine a judge faced with two cases, precisely alike in their medical facts, in which Rh-factor incompatibility is involved. In one, the mother decides to have an abortion. But her husband objects and seeks a court order to prevent it, on the ground that the unborn child has a right to live. The court rules according to the statute legalizing the operation (which, we assume, does not require the father's consent). Yet in the next case a woman's husband, who does not share her religious objection to blood transfusions, asks that the court order medical care in the interest of the infant despite the woman's refusal to agree to it. The court now takes the position that the unborn child is a person with an independent right to life. In effect, the court would have to regard an unborn child as a non-person if its mother wished to get rid of it, but as a person if she did not wish to take adequate care of it.

Let us imagine another situation in which a woman has become pregnant out of wedlock. She files suit on behalf of the child, and the court orders the father to support it. Feeling depressed, she goes to a psychiatrist, who suggests an abortion. The abortion is performed by hysterotomy late in pregnancy

Although the surgeon cuts the infant's foot off by a slip of the knife, the baby is born alive, breathes, and cries. A nurse disobeys orders to dispose of the infant, and instead cares for him and he survives. The mother sees the baby and decides to keep him. She now files suit on the child's behalf for the negligent surgery by the result of which he will have to go through life without one foot. The legislature, with unusual foresight, has provided that no action may be brought under the wrongful death statute for the death of an infant resulting from legal abortion. But what is to be done about the child's right to recover for prenatal injuries? It was a person with a right to paternal support and a non-person with no right to life; shall it be deemed to have been a person or not when it was maimed?

Such anomalies would be intolerable. Clearly, the law must be consistent. Either the unborn are persons or they are not. Personality cannot be conferred on them and withdrawn from them by legal fiat.

#### The Unborn Person and Equal Protection of the Law

If the law ought to be consistent about what it regards as a person, there remains the question how the law ought to regard the unborn. There are three possibilities. The unborn might be consistently regarded as non-persons; they might be consistently regarded as persons from the biological beginning—that is, from conception; or they might be consistently regarded as non-persons up to a certain stage in pregnancy and consistently regarded as persons thereafter.

If the unborn were consistently regarded as non-persons, they might most plausibly be treated as part of their mothers' bodies. As such, the criminal law should not forbid or regulate abortion except in the interest of pregnant women. Thus abortion without the woman's consent would be forbidden, not by any special statute, but by the general prohibition of assault. The induction of abortion by non-physicians would be forbidden by statutes banning unlicensed medical practice. In tort law, wrongful death actions would not be permitted in the case of the unborn. The mother could be permitted to sue for damage to the unborn child as injury to herself, but would not be permitted to recover much, since the infant in the womb, after all, is a "part" of the mother easily replaced—in fact, the only large part that regenerates. The child that is born suffering the consequences of someone's tortious act might be permitted to recover on the principle that he—the liveborn child—had been damaged by the act through a sufficiently established and foreseeable causal chain of events. In property law, rights would never be regarded as vesting in the unborn. For purposes of inheritance, there would have to be maintained a strictly consistent policy that the unborn were fictions, regarded only "as if" they were offspring after their survival following birth. In equity, guardians would not be appointed for the unborn. A woman would not be ordered to care for her unborn child by undergoing transfusions; a man would not be required

to support the unborn child, but could be required to care for the pregnant woman.

This recitation shows two things. First, there is no logical impossibility in consistently regarding the unborn as non-persons. Second, to do so would conflict to a considerable extent with the traditional attitude of Anglo-American common law—which, however, was not itself consistent—and would conflict to an even greater extent with the predominant (but not invariant) recent trends in the development of the law, especially in tort law since *Bonbrest*.

That revolutionary development came about not because of any metaphysical or theological dogma, but because of a sense that it is an injustice not to admit the rights of the unborn, an injustice more and more glaring in the light of the better and better appreciated fact that biologically the infant in the womb is not a part of its mother. We have set forth the biological facts sufficiently in chapter one and reviewed them in chapter six. We have reviewed the trends of legal development in earlier sections of this chapter. It remains here to notice the constitutional implications of certain significant cases.

In *Tucker v. Carmichael*,<sup>200</sup> the court argued:

It would therefore be illogical, unrealistic, and unjust—both to the child and to society—for the law to withhold its processes necessary for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property.

The case was in tort law; the reference to protecting the “person” to personal injuries, in contrast with property damage. Glanced at superficially therefore, the argument seems to be just another instance of the inference from property law to tort law that has been made so often since *Bonbrest*. However, the Georgia court was saying something more, when it referred to the anomaly in terms of *the law* withholding its *processes* in one field and making such *processes* available in another. This language is a clear allusion to the constitutional guarantee to every person of due process and equal protection of the laws.

Two state supreme courts have held that unborn children are persons within the meaning of provisions of their state constitutions guaranteeing a legal remedy for torts. Both cases involved prenatal injuries. In *Williams v. Marion Rapid Transit* the infant was viable and the injuries resulted from the defendant’s negligent operation of a bus. The Ohio Constitution in a specification of the due process guarantee to tort law, requires that

. . . all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have a remedy by due course of law, and shall have justice administered without denial or delay.<sup>201</sup>

The court applied this provision to the unborn plaintiff:

To hold that the plaintiff in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part

of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified.<sup>202</sup>

The second occurrence of the word "person" in the passage cited from the Ohio Constitution corresponds to the first occurrence of it in the court's statement. "Person" in that use merely means *body*. But the Constitution, in providing that "every person . . . shall have a remedy," and the court, in refusing to deny the infant a "right conferred . . . on all persons," use the word "person" in the same sense in which it is used in the Fourteenth Amendment of the U.S. Constitution.

The Oregon case is similar, except that the unborn child was only about six months along at the time the injuries were inflicted. In other words, viability was doubtful. The Oregon Supreme Court nevertheless upheld the right of the unborn plaintiff to recover damages, using a provision of the Oregon Constitution similar to the passage cited from the Ohio Constitution. The court also invoked the consistency argument, observing that the state had recognized "the separate entity of the unborn child by protecting him in his property rights and against criminal conduct . . ." <sup>203</sup>

In 1963, the U.S. Supreme Court stated in *Sherbert v. Verner* that interference with the religious liberty guaranteed by the First Amendment can be justified only by "the gravest abuses, endangering paramount interests."<sup>204</sup> The case of *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* was decided by the New Jersey Supreme Court shortly afterwards.<sup>205</sup> This was the case in which a woman was compelled to undergo blood transfusions despite her objections on religious grounds. The New Jersey Supreme Court required the woman to submit, not for her benefit, but for the welfare of her unborn child. Mrs. Anderson attempted an appeal in federal court; *certiorari* was *denied*. Implicit in this case is the proposition that the welfare of the unborn child is not merely a value that the law may or may not take into account, but is rather a *paramount interest* which prevails even over fundamental liberties guaranteed by the First Amendment.

These cases help to point up the fact that if the law is now consistently to regard the unborn as non-persons, it will not only disregard the *implications* of recent trends, it will actually have to overturn *precedents* which have acknowledged the rights of the unborn on constitutional grounds. Proponents of the legalization of abortion on demand often think, or pretend to think, that there is no existing legal barrier in the U.S. Constitution's guarantee of due process and equal protection. But the Constitution does not limit its guarantee to persons already born, and the rights of the unborn already have been recognized by state courts and even treated as paramount in comparison with the liberties guaranteed by the First Amendment.

The difficulty of holding consistently that the unborn are non-persons becomes particularly acute when we consider in the concrete what arbitrary

distinctions this position would imply. Some very definite criterion of birth is required—e.g., the cutting of the umbilical cord. Such a criterion of course has been used in the past, to distinguish abortion from murder. We saw how in the *Chevez* case this sort of criterion was held to be unrealistic, and a homicide statute was held to apply to a live child in the state of being born.<sup>206</sup> But if the unborn are to be held consistently to be non-persons, we should have to hold, for example, that a woman in childbirth might arrange with her obstetrician to examine the baby before the cord was cut (if that were the criterion selected for birth) and to kill it if it did not fulfill her requirements as to sex, eye color, lack of defects, and so forth. The law could take no notice of such killings, unless someone made a mistake and cut the cord *before* killing the baby. Then all involved would be accomplices in a first degree murder.

To evade such *obvious* arbitrariness, many suggest that some stage of pregnancy prior to birth should be used as the point of demarcation. Prior to that point the law might consistently regard the unborn as non-persons, as previously outlined, while after that point unborn children would be regarded consistently as persons. We shall consider shortly what would be involved in a consistent legal policy of regarding the unborn as persons. First, we must consider the merit of drawing a line at some point between conception and birth.

There are only two possibilities suggested by our legal tradition: quickening and viability. Quickening always was quite variable and subjective, depending on the relative size of the infant and the mother, the sensitivity and experience of the mother, and other such factors. However, the event was *thought* to be significant of the child "coming to life." Since this idea is obviously without scientific foundation, no one seriously proposes quickening as a dividing line any more.

Viability, as we saw in the last section of chapter one, also is variable and relative to the care the child is given and to such puzzling factors as the child's race. Therefore, in the case of each particular prospect for abortion, one could not be certain in advance that it would not be one that could not survive if carefully delivered and cared for, even within existing techniques, unless it were surely very early in development.

Moreover, the arbitrariness involved in using birth as the dividing line is not eliminated, but only concealed, by using some dividing line—for example, twelve weeks of uterine development—prior to which we are quite certain no baby would survive even with the best application of available methods of care. What will be done when the artificial placenta becomes available? Will the legal status of the unborn as persons benefit by the advance in technique? Or will we decide that such an important distinction must not be allowed to rest on the state of technology?

It is also important to notice that the admission of viability as a legally significant dividing line does not have a very strong basis in our legal tradition. It has played a role in the development of tort law since *Bonbrest* because

Holmes in *Dietrich* said that the unborn child is part of its mother. Boggs in *Allaire* pointed up the absurdity of this by the fact that the baby in that case was in fact viable—it was almost being born. Others emphasized viability in overturning *Dietrich*, and the *argument* from viability then was used by some courts as a *criterion*. But this criterion has not held firm since *Kelly v. Gregory*, except in cases involving wrongful death actions where the infant is not born alive.

Some who favor viability (or some line such as the end of the twelfth week of uterine development), as the criterion for distinguishing between embryonic non-persons and uterine persons, admit that such a criterion is arbitrary, but assert that the arbitrariness of the criterion should not be an objection to it, since the law constantly uses such dividing lines. The day before his twenty-first birthday, John Doe (who may be more capable of managing his affairs than ninety percent of the adult population) is legally an "infant." He cannot make a valid contract; he cannot vote; he can sue only if a guardian or "next friend" files the suit on his behalf. Joe Roe, who is one day past his twenty-first birthday, can do all these things, although he is nearly moronic.

The dividing line is arbitrary, but we must consider the purpose behind it. Children must be protected from exploitation; they cannot carry out the responsibilities of adults. But to avoid uncertainty about status, an arbitrary dividing line must be maintained. Yet this is mainly to *protect* the rights of children; it is not to benefit others. Of course, at times his legal status inhibits a minor from having certain benefits. But the interests at stake are not of the order of fundamental, common, unalienable rights. An arbitrary dividing line, to be acceptable, must not be a line that divides non-persons from persons.

But what about the right to vote? Important as the civil right to vote is, it is not as important as the human right not to be killed. Since action by the individual himself is necessary to exercise the right to vote and since small children are simply incapable of that action, some dividing line is unavoidable, and an arbitrary one that is clear is less open to abuse than one better grounded in objective principles. The right to life, by contrast, requires that others forebear rather than that the person whose right is protected actually exercise it. Therefore, every person is competent to have his right to life protected.

This argument is important because it helps to reveal more clearly how objectionable it would be, in the face of recent legal development, to begin now consistently to regard those unborn or those not yet arrived at a certain stage of fetal development as non-persons. The only reason that could motivate such a legal policy would be to permit the "non-persons" to be killed without legally attending to a violation of their right to life. In law there must be a certain amount of arbitrariness. But there is tolerable arbitrariness and there is intolerable arbitrariness. Arbitrariness exercised for the precise purpose of denying a fundamental right is intolerable.

There remains, then, only the possibility that the law might consistently regard the unborn as persons from conception. To this possibility there are a

number of objections, which we shall have to consider in due course. It should be clear at the outset, however, that if the law were *consistently* to regard the unborn as persons from conception on, this policy would be a new one. It would be *in line with* the trend evident in the law of torts since *Bonbrest* and to a less extent present in other areas of law, with the sole exception of the movement to relax or repeal abortion laws. But the law has never *consistently* regarded the unborn as persons from conception. We shall have to consider what such a policy would mean.

The implications in the area of property law would not be drastic. The only difference would be that if a child acquired property rights before birth and died before birth it would leave an estate. In tort law, so far as personal injury cases are concerned, no significant changes would be necessary, thanks to the revolution initiated by *Bonbrest*. Wrongful death statutes should be held to apply, yet there are good reasons for severely limiting the scope of these statutes, and all on whom no one is economically dependent might well be excluded. Equity already has taken a sound approach.

What about the criminal law regarding abortion? Must all abortion be regarded as murder? Since abortion is usually performed with premeditation, with direct intent, and without provocation, must it be first degree murder? Must those who have abortions and those who perform them be hung, sent to the gas chamber, or to the electric chair?

As to the last question, I argued in chapter six that capital punishment is not morally justifiable in any case.<sup>207</sup> Moreover, parents who kill children already born are seldom treated with the full severity of the law of homicide. There are distinctions made that take into account the fact that in dealing with the murder of an adult we are dealing with a crime that has many aspects of wrong and injury, only one of which is the attack on another individual's life.

No social order whatever is possible if healthy adults begin killing one another; history amply testifies to the possibility of a sort of social order in which abortion, infanticide, and euthanasia of the aged and weak are practiced. It seems to me that without detracting from anyone's right to life, we could distinguish between crimes the whole malice of which arises from their trespass upon this right and even worse crimes—ones that join the malice of destroying life to the malice of undermining the very possibility of social order.

In effect, the common law made this distinction, for it treated the abortion of a quick child as a crime nearly capital, yet did not treat it as murder, since to be the victim of murder one not only had to be a reasonable creature *in being* (which the quick child was) but also *under the king's peace*. Murder not only attacked human life, it attacked the king's peace—the principle of social order.

If abortion were treated as simple homicide (whereas "murder" were reserved for the more socially destructive forms of attacking individuals' lives), the crime still would in fact not be able to be proven in most cases of abortion performed in early pregnancy. The law could forbid the crime, but the ele-

ments of the crime surely would be given only if there were a living individual and if it died as a consequence of the abortifacient act. Since the state must prove each element of a crime beyond a reasonable doubt, homicide of the unborn would be fairly difficult to prove. This situation dictates that there should be statutes forbidding abortion attempts, whether or not there is a living individual to be killed.

The practical result, then, would be quite close to the situation which developed in the statute laws regarding abortion. The important distinction needed in criminal law is between murder and simple homicide. There remain other problems, such as the issue of therapeutic or other excuses, and we shall deal with these questions presently. At this point, enough has been said to provide a tolerably adequate idea of what it would mean for the law consistently to acknowledge the unborn as persons from conception.

The next step is to prove that the law ought consistently to follow this principle. There is only one reason: the basic principles of social justice cannot otherwise be maintained in a pluralistic society. By a "pluralistic society" I mean one in which no particular metaphysical or theological thesis can be established as the official principle of public policy. The basic principles of social justice that I have in mind are the content of the concepts of due process and equal protection set down in the Fourteenth Amendment to the U.S. Constitution. Next I must explain the argument.

I showed in chapter one that from the viewpoint of biology a human individual begins at conception. Life does not begin at conception; life is continuously transmitted. A sperm or an ovum is alive, but it is not a living, human individual; it is an individual, human gamete. In the present chapter we have seen a good deal of evidence that the biological facts played a central role in the history of the law of torts involving the unborn, and some evidence that the biological facts played a part in the tendency of other areas of law to expand recognition of the unborn.

But I also argued at length in chapter six that the question of what the person is, is not a factual question that can be settled by biology.<sup>208</sup> The definition of "person" is essentially a matter of metaphysics or theology. Whether one says that a person is nothing more than a living, human individual (which is my own view), or that a person is an individual that is "animated" by a rational soul (which is what the medievals believed), or that a person is a human being with consciousness (which is what Joseph Fletcher says), or that a person is one who has reached certain standards of achievement (which is Ashley Montagu's position)—every view of the person is equally metaphysical or theological, equally non-demonstrable in terms of analytic reason and empirical evidence.

In rejecting the view that the unborn are persons with a right to life, Mr. Glanville Williams briefly summarizes the biological process of conception, and points out the continuity in that process. He then attempts to argue on

the basis of the biological facts that personality begins and ends where we choose to set the boundaries:

The truth surely is that human beings are part of the continuum of nature. A man's commencement is no more a perfectly fixed and definite point of time than his death. Philosophically speaking, our conception of human personality, like our conception of every other kind of unity, is something that we impress upon nature rather than something that is found in nature. All unity is subjective; it exists only to the extent that we choose to perceive it. There is, indeed, an underlying reality, but our conceptual unities have sharp edges nonexistent in nature. These sharp edges are the products of our imagining and are always in a sense arbitrary.<sup>209</sup>

Williams is in error if he believes that his theory is implied by the facts of biology. Of course, fertilization (conception) is a process, not an instantaneous event. The process is over, however, at least when the first cell division of the new individual begins, and that division is the empirical proof that there is (in the biological sense) a new *individual*, distinct from the parent gametes.

Williams is asserting, in part, what I am saying myself—namely, that the question of what a person is, is a philosophical question, not a question of fact. But Williams is going beyond this general position to assert a particular metaphysics, a metaphysics that will easily be recognized by all students of philosophy as an idealistic process theory dominated by operational (pragmatic) principles. I do not wish to argue here whether this metaphysics is tenable. The point is that when Williams holds that there are no distinctions in nature and that all unity is subjective he is announcing a view that is hardly obvious. The ordinary man supposes that the distinction between himself and Glanville Williams is as objective as can be, but according to Williams the ordinary man is mistaken. Williams may be right, but empirical evidence cannot prove that he is.

Thus, Williams also holds a certain metaphysical view of what a person is. His view is that the person begins and ends wherever we choose; other metaphysical positions would say a person begins at conception, or sometime thereafter. I am not interested in settling which of these views is correct. I only wish to point out that if public policy is not to be based on some particular metaphysical assumption, then it may not be based on Glanville Williams' metaphysics, Joseph Fletcher's metaphysics, or Ashley Montagu's metaphysics any more than on my metaphysics or on the metaphysics of the medieval school.

Those who favor the relaxation or repeal of abortion laws often point out that the law cannot rightly work on the assumption that there is a soul or some other metaphysical or theological entity in the unborn child in virtue of which it is a person. This argument is certainly correct to the extent that it refers to the public policy of a pluralistic society—a nation such as the United States. No ultimate worldview may be officially established without undermining the very foundations of the pluralistic society. But it must be recognized that by

the same token the secular humanist worldview with its utilitarian ethics cannot rightly be taken for granted in the public policy of our pluralistic society.

Yet law must have a concept of person, for it must know whom to regard as the subjects of the rights it guarantees. How can law arrive at a judgment as to what will count as a person without committing itself to a particular worldview?

Common sense is not an adequate criterion. By that standard, the corporation would not qualify as a person, but it is a person with full constitutional rights so far as the guarantees of the Constitution can in the nature of the case apply to the corporation. An individual during the first few weeks after conception does not "look like a human being," and we have difficulty imagining ourselves at that stage of development. But surely such subjective impressions of common sense cannot be decisive for the law.

Similarly, the problem should not be left to the decision of majority opinion. If majority opinion is to be decisive, then the rights of the minority—of every minority—are in principle undermined, for what is at issue is the criterion according to which one will be able to remain a *person*—a subject of rights—though in the minority.

At the same time, it will not do to allow just *anything* that *anyone* believes is a person to count as a person. Some people are so attached to their pet animals that they would claim them to be legal persons. Others would say that their right and left hands were distinct persons, each entitled to a vote in elections. Yet I think there are very few sane people who would wish to maintain seriously that anything neither a living, human individual nor a unity composed of aspects of such individuals (such as a corporation) ought to be counted by law as a person.

To reduce the circle of those who are to count as persons so as to exclude some living, human individuals might be approved by a majority and might be sanctioned by common sense. After all, who would imagine a sixteen-cell individual a few days after conception to be a *person* in any common sense meaning of the word?

Still, if an effort is made to determine what is to be included under the most basic meaning of the word "person," as it is used in ordinary English, I submit that it is difficult to exclude the unborn. Webster's *Third New International Unabridged Dictionary* arranges definitions in the order of the time at which the word began to be used with each meaning. If we look under "person" we find: "1a: an individual human being." The biological facts amply show that the unborn fulfill this requirement. Of course, Webster's offers other definitions. A much more recent use is: "8a: a being characterized by conscious apprehension, rationality and a moral sense." This is one meaning of the word, but it is more restrictive than the earlier and more general meaning.

Since this is the case, I submit that the correct public policy for a pluralistic society is to accept the more comprehensive view rather than an exclusive

one. Regardless of the ultimate validity of a worldview that regards the sixteen-cell individual as a person, if the pluralistic society is really going to be pluralistic, then that individual ought to be treated as a legal person.

Why? Doesn't this conclusion mean that a minority will rule, that a woman who wants an abortion will be legally required to go through with her pregnancy and have a baby despite her own conviction that the aborted embryo is not a person? The woman will indeed be restricted by the law from doing as she wishes, and a majority might approve her wish. Yet it is not the minority, but the constitutional principles we all approve that demand this result. There is no injustice in this, because the law—not able to adopt any metaphysical concept of person as the official one—must take the standpoint of the one to be aborted and from that point of view assume that it, if it were given the ability and opportunity, would accept an opinion that would make it be a person, a position that would endow it with rights rather than a position that would deny rights to it.

The issue, if our society is to remain pluralistic, is not what one or another faction, whose own right to life is not at stake, thinks about the legal status of the unborn. The real issue is what the law should suppose the unborn would claim for themselves, if they were able to make the claim. No one can say, of course, what they *would* claim; that question is meaningless. But the law should *suppose* that the unborn themselves would claim a right to live, that they would accept the view according to which they would be legal persons. To take a different assumption is in fact to impose upon the unborn a theory of personality we, in a free society, have no right to assume they would share.

The solution to the problem of how public policy can have a notion of person adequate for legal purposes, without committing the whole society to any single ultimate notion of what a person is, thus is simple. The law must not simply look upon the unborn as objects; it must see whether there is not some coherent perspective from which they may be supposed to be subjects.

If so, then the law must avoid imposing any one else's metaphysics on the unborn, and must assume for them—tentatively as it were—an interim position according to which in legal matters they claim the status of persons and all the rights that go with that status. If, later on, the individual does not wish to maintain that position, he can take a different one. If a perspective of a sort that would have excluded the unborn individual's personhood had been adopted, he could not subsequently have corrected the assumption as to his view.

The issue is not squarely faced as long as it is supposed that the conflict concerning the rights of the unborn is between people who want abortions and other already-born people who believe abortion to be wrong. That is the conflict in the field of politics, of public opinion, of clashes between proponents of different ultimate visions of man and the universe.

But the conflict before the law is whether to accept the view of one who wishes to kill it that the unborn human individual is not a person, or whether

to accept the view, which may plausibly be attributed to the potential victim, that it is a claimant of the right to life, and that it seeks the equal protection of the laws. It does not demand that the law be intolerant of views according to which it is a non-person; it asks only that the law regard it on that basis which gives it a legal status and guarantees its right to life.

Glanville Williams says: "When considering the moral rule that human beings must not be killed, it becomes necessary to define 'human beings' for the purpose of the rule."<sup>210</sup> Of course. But here we deal not with a moral rule—law is not morality. We deal with the legal standard of due process and equal protection of the laws. And the question is whether it is consistent with the standards of a pluralistic society to impose on a certain group of human individuals a definition of "person" favored by those who would approve killing individuals of that sort, when the definition imposed will make these individuals non-persons and when there is in the society another definition that would make it possible to grant those individuals the protection of *legal* personality—regardless of what their metaphysical status might be thought to be.

In this situation, no liberal should stand in favor of the narrower definition of "person." Rights should be extended, not restricted. That is why throughout this book I do not speak of the "liberalization" of abortion laws when I mean their relaxation, their broadening, their loosening. There is nothing liberal about labeling the unborn non-persons to facilitate their conignment to oblivion.

In the preface to *The Sanctity of Life and the Criminal Law*, Glanville Williams wrote:

The main theme of the book may be simply stated. Much of the law of murder rests upon pragmatic considerations of the most obvious kind. Law has been called the cement of society, and certainly society would fall to pieces if men could murder with impunity. Yet there are forms of murder, or near-murder, the prohibition of which is rather the expression of a philosophical attitude than the outcome of social necessity. These are infanticide, abortion, and suicide. Each extends the disapprobation of murder to particular situations which raise special legal, moral, religious, and social problems. The prohibition of killing imposed by these three crimes does not rest upon considerations of public security. If it can be justified at all, this must be either on ethico-religious or on racial grounds.<sup>211</sup>

Williams sees the pragmatic grounds that make the murder of healthy adult human beings an attack on any possible social order as well as a violation of an individual's right to life. He also sees the ethico-religious grounds which make all killing of the innocent immoral. He does not see any basis for an indispensable legal principle protecting the right of life of those who cannot protect themselves—of those not useful to society. Yet the U.S. Constitution guarantees due process and equal protection of the laws to all *persons*. This guarantee seems neither merely pragmatic nor (necessarily) ethico-religious. I

think that Williams has failed to notice something that is indispensable to law in a pluralistic society.

Perhaps it will help to bring what I believe Williams has ignored into sharp focus if I point out one respect in which I do not think it necessary that the law coincide with the "ethico-religious" standard Williams wishes to set aside. Traditionally, suicide has been regarded as a moral violation of the sanctity of life; more recently, the special form of suicide called "voluntary euthanasia" has been condemned on the same basis. Within my own ethics, I would hold suicide wrong. However, it does not seem to me that the law *must* forbid suicide, suicide pacts, and voluntary euthanasia.

This is not to say that there may not be good grounds for forbidding or regulating such practices. Obviously, if any form of euthanasia is legally approved, many other forms may be difficult or impossible to control. That may be a good enough reason for maintaining the legal prohibition. All I am saying is that I do not see any fundamental incompatibility between our basic law, with its concepts of due process and equal protection, and a legal policy permissive with regard to self-destruction. For immoral though such an act may be, it violates no one's fundamental rights, since a person does not have rights against himself, and the deadly deeds in question are, by hypothesis, in accord with the individual's own will.

But infanticide and abortion present a quite different problem. The law need not prevent such forms of simple homicide on pragmatic grounds; some sort of society could survive if they were freely permitted. But what sort of arrangement would the legal system of such a society be? It would protect those strong enough to make a nuisance of themselves if they were not protected. It would abandon those from whom no one had anything to fear. Those whose lives the law protected would not be granted protection because of an antecedent right to life. Rather, they would be protected because of the danger involved in excluding them. The right to life would be conferred by the strong upon themselves, and they would have this right as long as they remained strong. Law would simply be the set of rules by which the strong avoided costly conflicts with one another, the better to exploit the weak.

Societies have existed that fulfilled these specifications. But that is not the sort of society projected by the Constitution of the United States, and especially by the Fourteenth Amendment. In our fundamental law we see the outcome of an effort by reasonable and honest men to find better grounds for expecting of law what they wanted of it.

They wanted personal security as everyone who is able to want anything does. But why expect the law to provide it? Not—since they wished to be reasonable—merely because they were strong enough to make life difficult for others if personal security were not mutually guaranteed. Rather because the law expressed the necessary conditions for sharing together in the pursuit and enjoyment of certain values, values on the importance of which everyone is agreed. These values—domestic peace, justice, liberty, defense against com-

mon enemies—can be shared only if the lives, liberty, and property of all, the weak as well as the strong, are guaranteed. In fact, the whole point of law is to make the naturally unequal sufficiently equal that they can cooperate as persons in a common life, not become exploiter and victim, master and slave. He who is too weak to defend himself is given the armor of the law; he who is too easily seduced to keep his freedom is liberated by legal keys from the captivity into which he has been led; he who is too stupid to keep his possessions is protected from the fraud of the wily by the accounting the law demands.

Thus reasonable and honest men established a system of law guaranteeing the rights of "every person" and defining what is permitted to be done to "no person." This is what we mean by justice. It is not an ethico-religious postulate. But it is not merely an expression of the minimum pragmatic conditions without which there can be no society at all. What Glanville Williams overlooks is simply this—justice. An unjust society is possible; radically unjust societies have existed. But the law is not a device for creating a society with as little justice as possible.

As I explained in chapter six, utilitarianism is completely useless as a moral system because it can reach any conclusion at all once one knows what conclusion is to be reached. But sometimes the conclusions will have to be quite implausible. That is how it often is if one attempts a utilitarian account of fundamental rights guaranteed by the U.S. Constitution. It is sheer commitment to principle, not any obvious utility, that requires such elaborate care to protect the rights of persons accused of crimes. Surely there could be a good deal more order if there were considerably less law—law of the sort that forbids an individual being required to testify against himself.

Thus the due process and equal protection provisions are necessary not for utility but for a just society. It is no accident that the first was reiterated and the second fully articulated in the context of the Fourteenth Amendment, one of the amendments which put an end to slavery, an institution quite conformable to Williams' pragmatic conception of the law, but irreconcilable with justice.

My conclusion, therefore, is that the law should be consistent in what it recognizes as a person. It should recognize the unborn as legal persons. And given this recognition it may not restrict its protection of fundamental rights in such a way as to make an exception of the unborn, of infants, and of others too weak to protect themselves.

This conclusion is adequately supported by the arguments given, but it is confirmed by the trends of legal development we surveyed earlier in the chapter. The courts in *Zepeda*, *Williams*, and *Gleitman*, for example, did assume for the infant plaintiffs a point of view according to which at conception they would have claimed the status of persons and preferred life to the utter void of non-existence. Of course, the decisions were *against* a claimed right not to be born, not *in favor of* a right to be born. But in reaching their

decisions, the courts viewed the unborn infant at the beginning of its existence as a subject, not as a mere object. The parents in the latter two cases certainly held a different view, but the courts refused in *Williams* and *Gleitman* to regard the interest of the infants from the parents' viewpoint.

The view that the legal notion of person should include every living, human individual receives some confirmation from a recent attempt by the U.S. Supreme Court to lay down the criteria of "person":

We start from the premise that illegitimate children are not "nonpersons." They are humans, live and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.<sup>212</sup>

The criteria mentioned—human, alive and actually existing—hold of the unborn. Thus they also should be held to be legal persons.

#### Answers to Further Objections

It may be argued that in insisting that the law must consistently hold the unborn to be persons from conception, or non-persons up to birth (or some earlier time) and persons thereafter, I have omitted another possibility, in many ways more attractive than the alternatives considered. This possibility would be that at conception the living, human individual begins and begins to become a person, that his personhood is actual (if incomplete) at birth, and that between conception and birth the unborn individual is acquiring by a continuous process what he will fully be only at birth.

This view is somewhat like the notion that in the time before quickening there is "embryo life" but not a live child. The idea also is similar to that of the Anglican commission, which we examined in chapter six, according to which the unborn child is a potential person with some rights, but with rights inferior to those of actual persons.<sup>213</sup>

There are several factors that make such an idea attractive—almost "natural." It conforms to the continuity of development that we experience; we easily imagine the personality growing as the person grows, for we identify a person with the living body that he is. Also, the notion of potential personality and diminished rights is attractive as a possible basis of compromise between sharply conflicting alternatives. Most important, I think, is that a view of this sort conforms to the naive empiricism of the human mind, according to which what cannot be directly perceived by the senses may somehow be "real" but is not as real as the thing right there now—"before my very eyes," "heard with my own ears," "held in my own hands." When a woman is pregnant, she and all who share her expectation look forward to this experience, which is the final confirmation of the reality of the child. Quickening used to be so important because the child *moved*—an evidence of life—and because the mother *felt* the child move (and others might too by placing their hands upon her belly). What is felt is real, although not quite as real as what

is also seen, heard, smelled, and held in one's hands. Thus works the human imagination.

There was a time when some protection would have been given—was given—to the unborn by the imagination of them as in the process of development between non-person and person. That was the time when the generative process was regarded as inviolable in view of the *possible* child that might be conceived and born. In our contraceptive age, however, there is little respect for that which might be; the entire movement to legalize abortion is nothing more than an extension of the contraceptive mentality to post-conceptive birth control, regardless of the question of the rights of the unborn, even after they have become actual, living embryonic humans. When a person begins became crucial as soon as people lost the sense of reverence for the process preceding the beginning.

Whatever the metaphysical merits of regarding personality as an entity that can grow by degrees, so that one can be more or less a person, the idea is not legally viable. The legal concept of person is an all-or-none idea. Either one is within the scope of the Fourteenth Amendment or not. If the unborn as supposedly potential persons belong outside that scope in virtue of the potentiality that qualifies their personality, then legally they are not persons at all. They might just as well be the sperm and ova into the disposition of which the law cannot meddle. If the unborn as "potential" persons belong inside the scope of the Fourteenth Amendment, then "potentiality" is no more significant a qualification than "black" or, for that matter, than "criminal," "insane," or "imbecilic." There are *no* second-class persons when it comes to fundamental rights. Thus, the law must have a simple "yes" or "no" to the question whether the unborn are persons or not. In the present situation, if the answer is "no" the unborn child might as well be viewed simply as a part of its mother's body.

Another objection that is likely to be made is that for many purposes we do not now and never have regarded the unborn as persons. Glanville Williams argues:

A pregnant woman who travels by public transport has to take only one ticket. She travels on only one passport. No child is given a baptismal or other official name before birth, though it may be given a name at any time thereafter.<sup>214</sup>

In many cases an adult occupying only one seat with an infant pays only one fare. Williams no doubt overlooked this point because he does not make much distinction between abortion and infanticide. A passport is a form of identification. Unborn infants stay close to their mothers, they are hard to identify except as "the unborn infant of so-and-so," and they are not likely on their own to enter a country illegally, smuggle, or do any of the other things immigration and customs officials worry about.

As to names, the situation is more complex. Parents sometimes do name their unborn children, but generally do not, partly because they do not know

whether a boy's or a girl's name will be appropriate. But Williams says "official name." Names become official when they are used in records, and records are partly like passports—they serve as identification. Another aspect of names is that they serve in conversation to mark the subjects of social relationships. The unborn child is not a member of society in the natural and immediate sense, because no one, except the mother, can be in *touch* with him, can deal with him, can react to him. That is why the unborn child is so much more real for its mother than for anyone else. In part the idea that women should be allowed to dispose of their unborn children as they please derives from the feeling that they are persons *for her* but not for society at large.

A great many arguments similar to those just criticized are offered by various authors. Spontaneous abortions and stillbirths do not have to be registered, it is said. That depends on the jurisdiction. Mortality records serve many purposes today, but keeping them for the unborn may be regarded as irrelevant, impossible, or ineffective. Unborn children need not be buried in a cemetery. But they sometimes are. Regulations depend to a considerable extent on sanitation problems. We can think of many situations in which adult persons (especially of "inferior" race) were not given burial. An aborted infant is not given a funeral. But often there is no funeral service for infants either. And sometimes, if there is, it is not the usual service used for a grown person.

All such arguments may be answered in the following manner. First, consider whether the alleged fact is true. Very often it is entirely false or only partly true. Second, consider whether any discrimination that is made between the unborn and other persons is really based upon the supposition that the unborn are not persons, or whether it is not simply because they are *unborn*. If law and custom work on the assumption that the unborn are in many significant ways different from the rest of us, that is only realism. But the relevant differences do not necessarily imply that the unborn are not persons. There is no racial discrimination involved if one takes realistic account of genuine differences between the races—for example, if a physician examining a Negro patient checks for the presence of a blood disease to which only Negroes happen to be susceptible. But there is invidious discrimination if one supposes that those who are different from us are therefore not persons legally equal to us.

Finally, if the law or custom that involves discrimination between those already born and the unborn really does imply that the latter are not assumed to be persons, one must consider whether the assumption is merely a product of the imagination, which regards the unborn child as in process from non-being to being, from non-personhood to personhood, or whether the law or custom in question is a product of a settled conviction that the unborn are legal non-persons. The only completely clear example of the latter conviction is a law or custom freely admitting abortion in a society that forbids the killing of infants and children. Since the justifiability of such a law is the issue, advocates

of abortion cannot appeal to this example without assuming what they wish to prove.

A more technical line of argument may be advanced on the basis of the precise wording of the Fourteenth Amendment itself:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The occasion of this section was, of course, to establish and guarantee the civil and human rights of former slaves; subsequent sections deal with other problems consequent upon the Civil War.

According to the Fourteenth Amendment, unborn children are not citizens. But that is like not needing a passport. The point of the wording is to establish a simple condition which, when it is met, makes citizenship (and its privileges) automatic and undeniable. Conception would not serve as well, because it is often hard to prove where it took place.

Someone might suppose that the due process and equal protection clauses use the word "person" to mean citizen, so that these guarantees do not apply to the unborn. The fact that two distinct words are used and general principles of construction (rights should be extended) argue against the notion that "person" here ever was limited to citizens. In any case, such a view cannot be maintained today, for these clauses have been applied to aliens and corporations as well as to citizens.<sup>215</sup>

It might be thought that even if the unborn are persons, they are not persons *within the jurisdiction* of the United States, as at common law the unborn child was not *under the king's peace*. But the history of legal trends in recent times falsifies this notion. A court could hardly appoint a guardian for someone not within its jurisdiction, to mention only one example.

Someone might suppose that if a State passes a law permitting abortion, the requirement of due process is fulfilled provided the law is properly enacted by the legislature and governor. But "due process" means more than this. It means an open hearing, with suitable warning beforehand, before a properly constituted tribunal. The one whose life, liberty, or property is to be taken must have legal representation, who must be allowed to hear the opposing case, examine the evidence, cross-examine witnesses, and present the case against the projected deprivation. Finally, there must be an opportunity for appeal.<sup>216</sup>

Someone might deny that the due process clause of itself demands that the state attempt to regulate every incursion by private persons or agencies on the protected goods. The clause only says that the state itself may not deprive anyone of these goods. Abortion law relaxation or repeal does not make

abortion an act of the state, but only an act not prohibited by the state. But if it is granted that the unborn are persons within the meaning of the clause, it is relevant to ask how far such an objection would prevail if any other class of persons were deprived of the protection of their very lives? Such an exception, if not a technical violation of the due process clause, is a violation of the equal protection clause. Even on the technical plane, it may be argued that in virtue of the Civil Rights Act of 1964 the due process clause has been extended to protect individuals from infringements by other individuals upon at least important aspects of "life, liberty, or property."<sup>217</sup>

Again, it may be argued that if "equal protection of the laws" is to be fully applied to the unborn, no special law of homicide can be adopted in regard to them. Thus, an abortion would have to be treated as murder. I would not personally consider the consequence utterly repugnant, if it necessarily follows. Certainly it is in the spirit of equality before the law. Yet I think that a distinction, such as I suggested earlier, between simple homicide and homicide of healthy adults can be made without violating the requirement of equal protection. The law would defend all persons' lives equally so far as the malice of killing them consisted in its violation of their right to life. The criminal law can discriminate, particularly as to the seriousness of offenses, in its handling of different crimes, provided that there is a reasonable basis for the distinction. But to allow some persons to be killed with total impunity is to deprive them of equal protection of the laws.

Another type of objection that might be raised against the position I have taken is less technical. Someone might argue that the status of the unborn as *persons*, though not an impossibility, is clearly not a certain fact. If the law insists on the right to life of the unborn, then, even against other conflicting claims, such as the woman's liberty to refuse to bear the child, it seems that an uncertain possibility is being allowed to prevail over a certainty.

An argument such as this, while plausible on its surface, is fallacious. The legal status of the unborn as persons is a matter for legal determination. This legal determination is based on relevant empirical facts that are certain: namely, that the unborn are living, human individuals. Whether the unborn are persons in some metaphysical or theological sense is beyond the competence of the law to decide. This question is not a factual uncertainty; it is simply not a matter of fact at all. I have not argued that the law should protect the rights of the unborn on the gamble that they might be persons, as if the issue were a doubt about fact that would eventually be resolved one way or the other. Rather, I have argued that the law must regard the unborn as persons because there is reasonable ground for regarding them as such, and to regard them otherwise would be to impose upon them a particular metaphysical theory to facilitate allowing them to be killed with the approbation of the law.

A different problem is presented for the law when there is a doubt of fact. If it is doubtful whether or not human beings will be killed by a certain action, the law may regulate that action but need not wholly prohibit it if the loss of

life is merely an unlikely possibility. Thus the law need not prohibit prize-fighting, although now and then a boxer lands a deadly blow. Whether such a practice which the law permits is morally acceptable or not is another question. Again, if there is a mine accident with the entrapment of workers and a fire which threatens to spread, the law need not forbid flooding the mine after there is no *reasonable possibility* that any of the men survives.

Absolute certainty that the act will not destroy a human life is too much to demand. When human life is not intentionally destroyed, the law can permit some acts that may possibly kill someone, so long as that consequence is not likely. But even in such cases, the permitted act should be conditionally forbidden; it should be allowed only if there are reasons weighty enough in the common estimation of reasonable people to justify the risk to life that is permitted to be run.

These considerations are relevant to problems involving the use of certain methods of birth control, such as the ordinary "pills" and IUDs. I discussed medical evidence concerning the possibly abortifacient action of such methods in chapter three and applied my ethical conclusions regarding abortion to these methods in chapter six.<sup>218</sup> How should the law regard such techniques?

On the basis of present knowledge, no one could be convicted under a homicide statute that required proof of the actual killing of a living individual if any of the present (1969) methods of birth control were used. Nor could anyone be convicted under such a statute for using a "morning-after pill," since it would be impossible to prove that a life had been taken.

At the same time, statutes forbidding attempts at abortion (and abortifacient-type acts whether the mother is pregnant or not) clearly forbid the use of methods designed to act after conception. This means that a "morning-after pill" would be forbidden by most existing abortion statutes.<sup>219</sup> I believe this prohibition is as it should be, and that no license should be given to manufacture and distribute such abortifacients. Their use should not be allowed merely because they superficially resemble contraceptives more than they do other methods of abortion. If conception is the line that marks the beginning of the legal person, then no "small incursions" can be tolerated.

The existing "pills" present a different problem. I do not think their use is morally acceptable because of their possibly abortifacient effect. But since the law may not forbid contraception, a certain risk of possible abortifacient effect must be legitimate. On the basis of the present evidence, I do not think that present hormonal birth control drugs can be legally forbidden.

The IUD presents a third problem. I think the existing evidence indicates a large possibility, even a probability, that this technique is abortifacient. I do not see legal justification for permitting the use of the IUD, because the risk that human beings are killed by it is high and there is no overwhelming need to accept that risk. To offer this judgment at the present time is perhaps hopeless, because those promoting the IUD have artfully concealed its real significance, as we saw in chapter three, and it is now generally accepted as

a "contraceptive"—"conception," "pregnancy" and other words having been redefined to this end.

### Therapeutic Abortion?

May the law permit abortion to save the life of the mother? If the one to be aborted has a right to life equal to that of its mother, can a therapeutic exception be accepted? I think that a strictly limited therapeutic exception is not unjust. The law cannot stand upon any theological or ethical theory justifying this exception, without illicitly establishing that theory as a common faith. But almost all citizens, whatever their beliefs, agree that therapeutic abortion is justified at times. Very few, whatever they believe with regard to the morality of the act, would wish to have the law forbid abortion when without it both mother and child would die. The question is how the therapeutic exception can be legally justified. If we are not clear about its justification, the exception is open to endless abuse and extension—which has, in fact, occurred in recent years.

It has been suggested that the therapeutic exception can be based upon the principle of "legal necessity." According to at least one view of this principle, expressed in the Report of the Governor's Commission in New York State, the violation of a law is permissible and excusable if necessary to preserve life, and even an act that would otherwise be homicide is excusable if it is a necessary means for saving as many lives as possible.<sup>220</sup> Yet it is by no means clear that "duress of circumstances" (another name for "necessity") extends to taking life. Most acts that would otherwise be criminal have been excused if necessary to *preserve* life, but homicide itself does not seem to have been held excusable on this ground. There are few cases and these yield a negative result.<sup>221</sup>

Where the law permits the excuse of necessity, there need be no exception or "justifying" condition stated in the statute. In including such an exception, American statutes on abortion seem to imply that "legal necessity" was not operative. In the British statutes prior to 1967, no therapeutic exception was explicitly stated. One might develop an argument on this basis that if therapeutic abortion was legal in Britain, prior to the Bourne case, it was so on the basis of necessity. But the concept of legal necessity was not invoked in that case so far as the report of the judge's instruction reveals. Instead, the appeal was to the use of the word "unlawfully" in the abortion statute itself, and to the inclusion of an explicit exception in another statute.<sup>222</sup>

I think that what is needed in this matter is a more careful reconsideration of the entire question of excusable homicide, not merely the problem involving the unborn. When life is at stake, is it just to excuse an act which destroys another innocent life? Bearing in mind the fact that law cannot require all that is morally demanded and cannot enforce any single moral theory, I think we must admit that the law could justly excuse homicide in certain conditions.

One of these situations, the most obvious, is killing one or some when otherwise it is reasonably certain that all or more will die. I would not accept such a general principle as morally sound, since its ethical rationale would be utilitarian. But I think that since life is at stake in any case, the common judgment may be accepted as the appropriate criterion of what life is to be saved and what sacrificed.

I do not think most people would approve a general principle excusing the destruction of innocent life for purposes less than the immediate preservation of life itself. If it were possible to save many lives by medical experimentation on a few unwilling victims, I think few would hold that law should regard such homicide excusable, however useful it might be, because there would be no immediate preservation of life. If it were possible immediately greatly to benefit the health of one person by sacrificing the life of another—for example, curing one man's heart disease by giving him another *living* person's heart—I think few would wish to excuse the homicide; unless, perhaps, the victim were able to consent and did freely consent.

If this general discussion is applied to the unborn, it seems to me few abortions could be legally excused. Assuming that the unborn are legal persons with all the rights of other persons, the extension of the therapeutic exception to the protection of the mother's health, to defective children, and to situations involving socioeconomic factors, illegitimacy, and the like are clearly excluded.

The victim who conceives a child as a result of rape presents a special difficulty, because it is hard to find any parallel case not involving an unborn child. I should hope that standards of respect for the rights of unborn persons would lead society to a consensus against abortion in such cases, but the present sentiment seems to be the contrary. If the child were clearly perceived as a person having his own right to life, I think that despite great compassion for its mother's misfortune, we would sense the injustice of killing the offspring of a violation, when the violation occurred before the one to be killed began to be.

But in the present situation, I would hesitate to condemn as unjust a legal provision which permitted victims of *forcible rape who subsequently conceived as a consequence of that rape* to obtain an abortion. Many people believe that there is in this situation a conflict of rights more severe than that between the life of the unborn and the health of the mother. Granted that such fundamental rights are in conflict here, as people seem to believe, a legal system such as ours must establish a rule of resolution not on the basis of any single moral or religious theory but on the general consensus of reasonable people. However, such consensus should establish rules for resolving conflicts which will apply equally to all persons, not rules which discriminate against any group on grounds such as race, age, state of health, or the condition of living within the uterus or outside it.

The prompt medical treatment of all victims of forcible rape might render conception very unlikely. If such treatment involved procedures which might possibly be abortifacient but were not certainly so, this possibility might justly be admitted by the law, whatever its moral justifiability.

If a strictly limited therapeutic exception and an exception in cases of pregnancy through forcible rape are to be allowed, however, the abortion should not be performed without a suitable legal process. No review by a group of physicians acting as a hospital abortion committee would meet the essential requirements of due process. I have already outlined the elements of due process, and some sort of court hearing seems indispensable. The problems involved because of the time-factor are not beyond the possibility of legal ingenuity to resolve, if we bear in mind that a person's life is at stake.<sup>223</sup>

One thing is certain. If the unborn individual is accepted as a legal person, then abortion could never be justified or justifiably excused in those cases (which constitute almost all) in which the very purpose of the operation is to get rid of the child. Any abortion that could be justifiably excused would have to be one in which what is unbearable is the state of pregnancy itself, not the child to be borne. This condition is fulfilled only in those cases in which the child in the womb would be cared for and raised if an artificial uterus were available. Some cases in which the mother's health is affected by pregnancy, as well as cases involving her life, and conceptions resulting from forcible rape might meet this condition.

But I would not say that all cases that meet this condition should be excused. The law should not only forbid homicide committed for its own sake, but should also forbid it to be done for any (or almost any) other reason, however good. There is a grave danger, as history amply attests, that a narrowly conceived and formulated therapeutic exception will be stretched to permit abortion for all sorts of relatively trivial reasons. The concept of health is particularly dangerous, because it is attached to the plausible excuse of life at stake on the one hand and, on the other, to the general well-being of the woman and her family.

Probably the most important point to notice in regard to the word "health" in discussions of indications for abortion is that although there is an indistinct boundary between saving life and protecting health, not everything on the side of health is proximate to life. Morning sickness is an illness of a sort; it is no part of what we mean by "health." But no one dies of it either. "Pernicious vomiting" used to be an indication for abortion, but it ceased to be so when physicians found a way of treating it without inducing abortion.

#### Are Existing Abortion Statutes Constitutional?

This question has been raised more and more insistently in recent years by those who regard abortion as "the final freedom"—the right of every pregnant woman. When the suggestion was first made, few took it seriously.

Since the American Civil Liberties Union adopted this view in 1968, however, it has gained a great deal of support, as we saw in chapter five.<sup>224</sup> For this reason, the main arguments proposed for the position, which have been drawn together by Professor Roy Lucas, deserve some consideration.

The underlying principle of the position is that abortion is merely a form of birth control, no more homicidal in its effect than contraception. Lucas sums up this position, which is typical of those who share the view he expounds, as follows:

It is an anomaly that a woman has absolute control over her personal reproductive capacities so long as she can successfully utilize contraceptives but that she forfeits this right when contraception fails. Clearly no government is permitted to compel the coming together of the egg and spermatozoon. Why then should the state sanctify the two cells after they have come together and accord them, over the woman's objection, all the rights of a human being *in esse*? If the logic behind present abortion laws were rigorously followed, abortion would be treated as murder punishable by death or life imprisonment, and perhaps a clearer focus would emerge. If an aborted woman and her physician were tried for "homicidal abortion," convicted, and sentenced to death, few would consider the result justifiable. It is a result, however, that follows from defining the fetus as a human being. No one holds full funeral services for the products of miscarriage. Certainly no one would suggest that a woman who miscarries regularly four weeks after each conception could be required by law to seek medical treatment to prevent future miscarriages, or otherwise be sentenced to death. The definition of a fetus as a "human being," is at odds with the view that conception is only one point in the transmission of life, not the beginning of it. It disregards the physical and developmental similarities between the embryo and the constituents which come together at conception.<sup>225</sup>

Elsewhere in his article Lucas quotes with approval the comments from the A.L.I. proposal which attempt to answer the charge that abortion is homicidal.<sup>226</sup> I have quoted and criticized that same passage in chapter six.<sup>227</sup>

Several points should be noticed in regard to the argument Lucas presents here.

First, in emphasizing the continuity of the process by which life is handed on, Lucas is pointing to a fact which we took fully into account in chapter one. But as we saw in chapters three and five, proponents of contraception until recently sharply emphasized the difference between contraception and abortion.<sup>228</sup> An additional illustration deserves mention: through 1963, the Planned Parenthood Federation of America issued a pamphlet, *Plan Your Children for Health and Happiness*, containing the statement: "An abortion requires an operation. It kills the life of a baby after it has begun." The 1964 revision omitted this statement.

Second, in emphasizing continuity, Lucas erroneously ignores the differences between the sperm and ovum prior to conception and the developing individual afterwards. We presented the facts in chapter one. It also is worth

noting that although the legal history and trends reviewed earlier in this chapter do not show the law *consistently* regarding conception as the beginning of the legal person, they do show that conception has regularly been accepted as an important line of demarcation. Lucas' position conflicts with all the laws and decisions which for any purpose have supposed conception significant, for he makes it completely insignificant.

Third, Lucas is not only ignoring the significance which conception has for biomedical science and for law, but also the importance of this event in common knowledge. A good sign of that importance is the manner in which sex education courses typically explain this matter. For instance, in the fifth grade, children in New York City are taught: "Human life begins when the sperm cells of the father and the egg cells of the mother unite."<sup>229</sup> If Lucas is right, most children are being taught theories little better than the old story about the stork.

Fourth, Lucas focuses on the embryo immediately after conception. Obviously, at this stage it is most difficult to accept, on a merely common sense impression, that the unborn ought to be regarded as legal persons. I have accepted fully the burden of proving my case on behalf of the unborn at all stages of their development. But Lucas also should accept the burden of proving his case against the humanity of the unborn at all stages, or up to some line after which he will admit the prohibition of abortion to be legally sound. But he never considers this question.

The declaration of the A.C.L.U. on abortion laws accepted viability as the proper line of demarcation. We have already given reasons for considering viability unacceptable, and will not repeat them. But it must be noted here that if Lucas is trying to defend the A.C.L.U. position, as he seems to be, he really should try to prove that there are no important *dissimilarities* between "the constituents which come together at conception" and the fetus at the last moment before it is viable. I think that even the crudest common sense observation could make this distinction and would find it significant.

Fifth, Lucas is wrong in his attempt to draw from the logic of present laws the position that abortion should be punished as murder. If homicide statutes were applied, they would lead to conviction only if the death of the fetus as a consequence of the abortifacient act could be proved. But the present abortion laws are not homicide laws; many of them rest, as we have seen, on some sort of unclear compromise about the status of fetal life, especially prior to quickening. On the other hand, full legal recognition of the unborn as persons would not necessarily demand that murder and homicidal abortion be treated the same.

Sixth, Lucas compounds confusion by suggesting that the logic of anti-abortion legislation would demand that a woman who refused treatment for a condition that causes her to miscarry repeatedly four weeks after conception should be sentenced to death. Logically, she should be dealt with in the same way that she would be if her living children needed medical care and her

negligence was a possible factor in their deaths. In practice, if no act of hers caused the miscarriage, I doubt that even the most stringent law could touch her, for the offense would be impossible to prove. Many conceptions that have caused one missed period abort spontaneously in any case. How could it be proved in a given case that the miscarriage would not have occurred?

Lucas is fond of such groundless extremism. At one point, for example, he refers to constitutional difficulties in "any attempt to prosecute a woman who had used the loop twelve months on that number of counts of murder."<sup>230</sup> Apart from the legal nonsense this false conclusion involves, Lucas seems ignorant of the fact that women do not conceive that easily even if they use no contraceptive. Of course, a woman using an IUD could never be prosecuted for anything but an attempt, because there would be no evidence of pregnancy if it occurred.

One might suppose that when Lucas holds that "contraception and abortion differ only in degree,"<sup>231</sup> he is expressing a peculiar idea of his own, which is not essential to the view that any law against abortion is unconstitutional. But Lucas' position really is unavoidable, for he must hold the unborn to be non-persons and draw out the radical implications of that view if he is to eliminate every basis on which protection could be afforded them. Lucas and those who share his view cannot admit any significant distinction between contraception and abortion, for such a distinction could provide some basis for prohibiting abortion.

Having established his foundation, though on no substantial ground, Lucas builds his case. One suggestion he makes is that when the U.S. Constitution was adopted, women enjoyed a common law "right" to abortion before quickening. The states, in passing statutes forbidding abortion at any stage of pregnancy, have infringed this "right." Therefore, Lucas concludes, the statutes are unconstitutional under the Fourteenth Amendment which forbids state encroachment on "fundamental rights."<sup>232</sup>

Lucas here erroneously assumes that whatever the common law did not forbid as a crime it guaranteed as a right. In fact, there is a large area which common law, like any other legal system, dealt with as non-criminal but undesirable. Cyril Means points out that at common law abortion even prior to quickening was viewed in this way, and points to the fact that if the woman died the abortionist was held guilty of murder.<sup>233</sup> But Means erroneously takes this rule as evidence that common law was concerned solely to protect the mother's life; he fails to note that surgeons who performed surgery not essential to protecting life were not regularly hanged when their patients died. And he himself gives evidence that there was unnecessary surgery performed.<sup>234</sup>

Lucas also fails to consider the implications of the common law *prohibition* of abortion *after* quickening. By his own argument, it should follow that state laws permitting it (which he obviously believes they should) would violate a guaranteed right of the unborn child. Moreover, Lucas' argument makes no allowance for the fact that after the Constitution was ratified knowl-

edge of the early stages of pregnancy increased, so that if the common law principle of protecting the child as soon as it "comes alive" was to be continued, the time to begin such protection had to be moved back from quickening to conception.

Another point that Lucas ignores, and a very important one, is that even if there had been a right to abort recognized at common law, that right might not still exist. Common law enforced the rights of slave-owners and the Constitution, when it was adopted, did not abrogate those rights, although slaves were admitted to be persons (e.g. in article one, section nine). The Fourteenth Amendment, on which I have based my argument against the legal justifiability of abortion, eliminated the "rights" of slave owners.

Another of Lucas' arguments is that statutes forbidding abortion may be unconstitutionally vague, because they do not clearly define the forbidden act and so lack that definiteness needed in a criminal law if it is to make due process possible.<sup>235</sup> His argument seems to me questionable for two reasons. First, to the extent that uncertainty exists, most of it has been generated by purposeful efforts to stretch the strict requirement of the law. If laws can be nullified simply because those who are violating them are not certain how far they can go without getting caught, many laws are null—e.g., speeding laws and statutes forbidding perjury. Second, the abortion statutes have existed, been applied, and been interpreted by the courts for decades; Lucas himself admits that courts have held them to be sufficiently clear.

Of course, if a judge is determined to legalize abortion, he might use the notion of vagueness as a pretext upon which to declare an abortion statute void. The notion of vagueness itself is none too clear.

However, when consistent procedures of enforcement have been followed, criminal statutes long in force can hardly lack clarity. For people know what the criminal law is more by observing how police, prosecutors, and the courts apply it than they do by any process of subtle legal exegesis.

Everyone knew perfectly well what the pre-1967 abortion statutes meant in practice. Whatever the differences among these statutes in their wording, all the pre-1967 statutes in practice made abortion a crime unless it was performed openly, by a licensed physician, acting with the tacit or expressed approval of his medical colleagues. Under these conditions, the law has not intervened in the medical practice of abortion. However, the non-medical abortionist has been prosecuted, and the medical abortionist has sometimes been prosecuted when he operated covertly, without the support of a medical consensus.

Some physicians have complained that the requirement of the law is vague. Either they mean that medical practice has modified the law from the meaning it once had or they mean that the consensus of the medical profession is more restrictive than they wish—or both. Surely, when custom modifies law the result is not necessarily unacceptably vague, even if the law in practice is not compatible with all the strictness of the intent of the legislature that

enacted the statute. And if medical consensus has been restrained by the law from going as far in permitting abortion as some would like, surely this fact does not argue the invalidity of the law.

No physician, whatever his opinion about abortion and the law, has doubted in the least regarding the conditions under which he or anyone else would or would not be susceptible to prosecution for performing an abortion. In examining the mere words of a statute, a judge can find (or invent) difficulties of interpretation. But a criminal law that gives clear guidance to those whose conduct it was intended to shape should not be held void for vagueness. After all, crimes were sufficiently defined under common law without any statutes. If judges today must judge by the statutes, still they should be realistic enough to take into account the clarity the statutes receive in practice from consistent application.

Lucas also suggests that laws against abortion, as actually applied and enforced, may be unconstitutional because they discriminate against the poor, ward patient. He also mentions the "quota-system" by which some hospital boards are said to limit abortions in a given month.<sup>236</sup> But as we saw in chapter two, there is some evidence that abortion is related to status striving and thus is less sought by the poorest women.<sup>237</sup> And as we saw in chapter three, the so-called "disadvantage" suffered by the poor patient in abortion service is related to a whole pattern of real disadvantage.<sup>238</sup> As for the quota system, a practice not implicit in the law but rather in its systematic but cautious violation cannot make the law itself inequitable.

One point that is never made in discussions of discrimination in the permission of "therapeutic" or "legal" abortions is that, from a medical point of view, these operations are almost all in the category of "elective surgery." In other words, abortions are done because the patient wants them done, not because the physician regards them as essential for good health. If the unborn child is thought of as a mere part of the mother, abortion is like a hysterectomy a woman wants rather than like one she needs. Undoubtedly, the economics of medicine being what it is, one probably would find few unnecessary operations of any sort being done on ward patients. The poor get the medical care they need—or less; those who can pay get the medical care they want—or more.

Lucas deserves credit for setting aside as irrelevant one of the arguments about alleged discrimination that one often sees: namely, that the rich woman can go abroad for a legal abortion, while the poor woman must do without because she cannot afford the trip. The trouble with this argument is that a wealthy person also can go places where he can legally marry half-a-dozen teenage girls simultaneously, or smoke hashish, or practice racial segregation, but none of these facts shows that our laws against such acts discriminate against the poor.

Lucas in several places suggests that because there is opposition from religious groups to the position he takes, the abortion laws may be an unconsti-

tutional establishment of religion, an imposition of a single religious outlook on those who do not believe it.<sup>239</sup> I have directly faced such an objection in the first section of this chapter. But two observations may be added here.

First, the real issue is what outlook will be imposed upon or assumed for the unborn. While it would be wrong to impose on anyone a religious view contrary to his or her conscience, it does not seem to me to be wrong to assume for the unborn a view that admits their personhood rather than imposing a view that excludes it.

Second, it is a red herring to argue that laws forbidding abortion necessarily assume that there is a soul or some such theological entity given at conception. The assumption is not necessary at all, as any attentive reader of my arguments in chapter six and the present chapter will have observed. I do not object to killing infants, the insane, or the senile—or any other minority—*because* I believe them to have souls, but because I think killing human beings is immoral and must be held to be legally unjust. The same holds for the unborn, regardless of whether there is any such thing as a soul, or when and from what cause it may be supposed to be derived.

The issue is confused because religious people naturally express their sense of morality and justice in terms of their faith. But such expressions should not be allowed to divert attention from the real issues. The civil rights acts are not an unconstitutional establishment of religion despite the fact that many who worked for them—black and white—were clerics and religious people who quite naturally expressed their moral indignation and sense of injustice about racism by saying that all men are children of the same heavenly Father, saved by the blood of the same Christ Jesus, and inspired to righteousness by the same Spirit sent by Christ and His Father. Yet people who talk thus not only invoke religious motives, but even the creed of orthodox Christianity.

Another red herring that Lucas mentions is that a state might defend its law against abortion on the ground that it serves as a deterrent to illicit intercourse, by making those who become pregnant by such intercourse pay the price. He then points out that such a ground must be rejected, since abortion laws prevent the abortion of women pregnant by their husbands.<sup>240</sup> This response is unquestionably cogent, and Lucas must be given credit for not making much of the argument. Often other authors deal with this red herring elaborately and evade almost completely the question of the rights of the unborn. All my research has revealed no evidence that fear of illicit sexual intercourse and vindictive reactions to it was of any importance in the development of legal prohibitions against abortion. Moreover, almost no one opposing legalization invokes the “moral” argument that is so regularly answered by proponents.<sup>241</sup>

At the heart of Lucas’ case, and central to the position of all who contend that laws against abortion are unconstitutional, is the decision of the U.S. Supreme Court in *Griswold v. Connecticut*.<sup>242</sup> In this 1965 decision, the court

ruled unconstitutional a Connecticut statute that made *use* of contraceptives a criminal offense. Lucas holds that this decision “appears reasonably applicable to the invalidation of abortion legislation.” But he hedges by suggesting particular applicability in case of the use of a “morning after pill,” which appears most like—and would present problems of evidence most like—the contraceptive pill. He also asserts that the general interest of a woman in family planning protected by *Griswold* would be even more applicable if the woman asserted her interest in protecting her life and health, “avoiding the product of rape or incest, or where she asserts some other interest important to her.”<sup>243</sup>

*Griswold v. Connecticut* was the outcome of the conviction of the executive and medical directors of Connecticut Planned Parenthood for violating the statute *as accessories* by giving birth control advice to married persons. The conviction, being sustained through state courts, was appealed to the U.S. Supreme Court. The statute was struck down as unconstitutional by a seven-to-two majority. In addition to the opinion of the court, which expressed the views of five members, there were three separate concurring opinions and two dissents.

Justices Black and Stewart, in their dissents, in each of which the other joined, emphasized that the Connecticut statute violated no specific provision of the U.S. Constitution. The court, as we shall see, claimed that there is a constitutionally guaranteed right of privacy. Black especially denied any such general right and argued that specific rights to privacy in particular circumstances do not imply more than what the Constitution actually says. He insisted that the court ought not to rule on the basis of its own conception of what a reasonable law would be, but rather should leave that judgment to the states where people could decide through their own legislatures. Black and Stewart were both careful to express personal disagreement with Connecticut’s policy.

Whether or not the dissenting position or that of the majority expresses the sounder constitutional theory I am not able to judge. My personal inclination is to think that the dissenting position is too restrictive, for I think that the Connecticut statute was, in fact, unjust and that there should be some way for the Supreme Court to protect rights, even if the Constitution does not specifically mention them. My view that the Connecticut statute was unjust is based not on a morally favorable judgment of contraception, but on the view that the use of contraceptives does not violate any person’s rights nor in any clear and proximate way injure the common purposes of civil society.

Justice Douglas delivered the opinion of the court. He held that specific guarantees of the Bill of Rights have “penumbras” formed by “emanations” from them, that the various implications about privacy of diverse constitutional provisions create a “zone of privacy,” and that the *use* of contraceptives *within marriage* (as opposed to their manufacture and sale) is within that zone because of the intimacy of the marital relationship. This decision suggested

that a narrowly constructed statute regulating the manufacture and distribution of contraceptives for use in extramarital relations might not have been regarded as unconstitutional.

A concurring opinion written by Justice Goldberg, and joined in by Chief Justice Warren and Justice Brennan, argued that the Constitution must be understood as guaranteeing "fundamental" rights, that the courts could be guided in discerning these by the common conscience of the people, and that the right to marry and raise a family was included. Into this process the state may intervene neither by forbidding birth control practices nor by compulsory birth control. But such rights may be limited by a "compelling subordinating state interest." Connecticut had argued that its statute helped limit extramarital sexual activity. Goldberg affirmed the constitutionality of that purpose and of statutes against such activity. He distinguished the protected privacy sharply as "privacy in the marital relation."

Justice Harlan concurred in the judgment but rejected the opinion of the court. He held the Connecticut statute unconstitutional not for violating any provision of the Bill of Rights, but for infringing the due process clause of the Fourteenth Amendment, by violating basic values implicit in the idea of ordered liberty.

Justice White also referred to the due process clause's guarantee of liberty, but added a detailed argument designed to show that in the concrete the Connecticut statute was not justifiable as a control of extramarital sexual activity, since it could not limit that sort of behavior by interfering with the acts of married persons.

What conclusions can we draw from these opinions?

First, the focus in *Griswold* is on a right to privacy in the intimate relationship between husband and wife. Abortion is much less closely connected with this relation than is contraception. The relationship of mother and child enters into abortion, creating a different situation. The right that abortion advocates usually invoke—that no woman should have to carry a child she wants to be rid of—is never mentioned in *Griswold*. *Griswold* does *not* protect a "general interest in planning a family without state interference," as Lucas claims.<sup>244</sup>

Second, the majority of the court clearly accepts the constitutionality of statutes against extramarital sexual *acts*; implicitly there is a suggestion that control of the manufacture and distribution of all contraceptives might have been approved. In both respects I personally doubt that such laws would be justifiable. But the two points are important, because they reveal how narrow the holding of *Griswold* is. Neither private sexual behavior in general nor contraception as such is protected by the decision.

Third, the right protected by *Griswold* is partly dependent on the fact that the statute did not protect any overriding state interest, otherwise unattainable, sanctioned by the community conscience. The fact is that laws forbidding abortion (perhaps with certain exceptions) do protect the unborn and the

community approves them for this reason. It cannot be pointed out too often that no available evidence shows that abortion on request is approved by more than a small minority of people.

At this point, we can see why Lucas felt he had to hedge his appeal to *Griswold*. If an abortion could be shown to be necessary for some very important interest of the woman or if it were by means similar to contraception in close connection with marital intercourse, the extension of *Griswold* to apply to it would have some appearance of validity. Otherwise, the thesis that laws forbidding abortion are unconstitutional finds no plausible precedent in *Griswold*. But Lucas has tried throughout his article to defend the broader position, which is also that of the A.C.L.U., that every woman has a right to abortion.

Justice Tom C. Clark, who retired subsequent to the *Griswold* decision, has recently stated a strictly personal opinion about an attempt such as we have been considering to extend *Griswold* to abortion. Warning that the court never considered the abortion question and also refusing to predict what the court might do, Clark reviewed some of the limitations invoked in *Griswold* that we have noted. Then he said:

The question, therefore, narrows to whether the decision to bear or not is a fundamental individual right which is not subject to legislative abridgement. *Griswold's* action was to prevent the formation of the foetus, while abortion is to destroy it. Both deal with procreation in which the state has a vital interest. However, the difference lies in the fact that after the foetus is formed, life is present, and barring unusual circumstances, it will grow and in due course become a human being. At what stage does the state interest become substantial and its restriction reasonably necessary to its legitimate purpose to protect life and the propagation of the human race? If, as I am told, some medical men say life is present at conception, would it be reasonable to protect it from that time forward? If not, at what time would the foetus be subject to state protection—at quickening? It seems that the crux of the problem of control is where does the foetus assume the status of a living human being?

This question is largely controlled by the medical evidence, despite the fact that some states permit recovery of damages for injury to the foetus even when born dead. It is submitted, however, that such a rule would not control the question raised here. Still, it is argued, even the mass of cells must have some life—otherwise there would be no necessity for the abortion. Perhaps it is biologically alive? If so, is it expendable?

*These are difficult questions and in my view a court is not the place to get an answer. Control could be the better solved in the legislative arena.* [italics his]

Justice Clark explains why he thinks the problem belongs in the legislature largely in terms of the advantages of legislative procedure for dealing with the sort of problems involved. He expresses a personal inclination to accept the A.L.I. proposal as “a first step” with which he doubts the courts will interfere.<sup>245</sup>

Two important conclusions can be drawn from these remarks. First, Justice Clark does not regard contraception and abortion as the same, does not

think *Griswold* extends to abortion, does not regard restrictive laws regarding abortion as unconstitutional, and does not think courts will hold them to be so. This position is in direct conflict with Lucas and with the A.C.L.U., and I think it is more likely Clark would be right.

Second, Clark seems not to be certain about the biological facts and he clearly does not see the issue in terms of the logical alternatives—either a legal *person* or a *part* of the mother. But he is openminded and disposed to rest the issue on biomedical evidence. If other justices will approach the problem in the same spirit, I think there would be an excellent chance that if the issue is ever squarely faced, the unborn may well be accepted as legal persons from conception.

It is also interesting to notice that Cyril Means, whose attempt to show the abortion laws unconstitutional on other grounds we considered earlier in this chapter, observes with particular reference to Lucas' article, that every one of the arguments offered against constitutionality would have been as valid during the entire period of statutory legislation on the subject as today if they were valid at all. Means recognizes a considerable obstacle to the acceptance of such arguments:

Judges may understandably feel uneasy if urged to declare, or even to imply, that these statutes have been patently unconstitutional on a dozen or more grounds for 140 years under the State Constitution and for a full century under the Federal, and that five generations of American Constitutional lawyers have been too dim of eye to descry these grounds, which had to wait until 1968 to be perceived by a new "Daniel come to judgement, yea a Daniel."<sup>246</sup>

Means' criticism is not necessarily effective, since segregation laws existed for many years and were then struck down on constitutional grounds. But it probably is true that judges would want some change or some advance in knowledge of the relevant facts on which to base a new judgment. That is why Means tries to argue that the laws have become unconstitutional through losing their purpose of protecting the mother's life. Of course, that is to evade the real issue, and it is encouraging to note that Justice Clark, in his analysis, shows no disposition to evade it.

For my own part, I consider that the existing statutes are not adequate from a constitutional point of view to protect the right to life of the unborn legal *person*. Even if the unborn were regarded as legal persons only after a certain stage of pregnancy, present laws would not protect them sufficiently.

Some of these statutes, especially the newer ones, permit abortion on grounds which certainly would not be used to justify the killing of those already born. Such statutes are discriminatory. But what is more important is that none of the statutes, as interpreted and actually applied, is definite enough to protect the unborn as they deserve. Saving the "life" of the mother in almost any state means finding a group of physicians who are selling "legal" abortions to those who can pay well for the service.

As I have explained, a just abortion law need not eliminate a therapeutic exception and might also allow abortion of those conceived in consequence of forcible rape. But a hearing before a court should be a precondition, if due process is to be fulfilled. Some of the Scandinavian procedures, when they were carried out more strictly than they have been in recent years, provided a semblance of due process. But only a semblance, because the laws permitted abortion on unjustifiable grounds (e.g., the eugenic indication) and because the rights of the child were not really defended adequately by a closed discussion, conducted by interested parties, with no representative of the one to be aborted, no complete record, and no right of appeal.<sup>247</sup>

It is a problem to be examined very carefully by the most competent counsel how existing statutes might be challenged in the courts on behalf of the unborn child's right to live. One suggestion that has been made, and that might be considered, is that an injunction might be sought in federal court against parents and a physician planning an abortion. The request might be based either directly on the child's right to live or under the 1964 Civil Rights Act.<sup>248</sup> Another possibility is offered by the provision in the Georgia statute of 1968 that allows a solicitor general to seek a declaratory judgment that a proposed abortion would violate "any constitutional or other legal rights of the fetus."<sup>249</sup> Although such an action would have to originate in a county Superior Court, it might be appealed into the federal courts.

Of course, no such effort will make progress if the courts are unwilling to face the issue. But if there is a reasonable prospect that they would face it, I think that opponents of abortion should make the effort. The courts might hold that the unborn are non-persons, of course, but that would only slightly hasten a trend toward legalization that cannot, I fear, be reversed in legislatures. On the other hand, the courts might courageously defend the rights of the unborn, as they have so often in recent years defended the rights of the weak, the poor, the outcast, and the oppressed.

The case to be presented to the courts is a good one—I am confident of that. If an effort is to be made, it would of course be essential that the details of the particular case be as favorable as possible. The more advanced the pregnancy, the slimmer the excuse for abortion, the fewer the complicating factors, the more solid the facts, the more favorable the witnesses, and the more sympathetic the court in which the case is initiated the better the test would be. Only one issue should be advanced—that the unborn to be aborted ought to be regarded as a person with a protected right to life. If *some* appellate court were to accept this position, it might be very difficult for the U.S. Supreme Court to refuse to face the challenge presented by an appeal, and the record to be transmitted might be as fair to the rights of the unborn as possible.

## The American Law Institute Proposal

In chapter five we described the proposal made by the American Law Institute in its Model Penal Code and we reviewed the support that has developed behind this proposal. We also saw the extent to which the revised statutes of California, Colorado, North Carolina, Georgia, and Maryland were influenced by the A.L.I. model. In chapter six we briefly considered the response offered in the commentary presented with the Model Penal Code to the basic challenge that abortion kills a human being.<sup>250</sup> Here it remains to consider a number of arguments that have been or may be offered for and against the A.L.I. proposal.

The strongest argument that can be offered for the A.L.I. proposal is that it has widespread support. Yet while it cannot be doubted that a powerful group of physicians, lawyers, and other professionals support some relaxation of abortion laws and while the mass media—especially television and the magazines—have campaigned for the cause, one may fairly doubt how deep popular support is for the change that would actually be effected if the A.L.I. proposal as it stands were enacted. We saw in chapter five and earlier in this chapter that even if opinion polls are assumed to be accurate, the questions they ask do not correspond to the legal significance of the A.L.I. proposal.<sup>251</sup>

Before the public could express its opinion, the difference would have to be explained between the law permitting a woman who has been forcibly raped to get an abortion and the law permitting abortion for a woman whose physician cannot be proved beyond a reasonable doubt not to have believed in good faith her story that she had been forcibly raped. The same would be true of other words and technicalities which may well mean that the A.L.I. proposal is a long step toward complete legalization—which all evidence shows does *not* have popular support. This obstacle of public incomprehension might be overcome by education through the mass media.

However, abortion has unfortunately become a “liberal” cause. This means that publishers and broadcasters who normally try to be fair and honest are systematically giving biased treatment to news and opinion on this topic. They mean well, for they are only trying to back what they suppose to be enlightenment, progress, and the public welfare. Doubting the wisdom of their audiences and the force of truth, publishers and broadcasters confronted with a “liberal” cause are easily tempted to try to insure its success by giving it unequal space and time, and by mixing editorial opinion with “factual” presentation.

The other difficulty about the support that has been generated for the A.L.I. proposal is that not even a genuine majority, if it existed, would necessarily be in the right. In World War II, the Nisei were removed from the west coast and placed in concentration camps. Hardly anyone opposed this violation of the Fourteenth Amendment at the time and hardly anyone of liberal

inclination would approve it now. The American Indians have been treated disgracefully throughout our history, but the majority apparently favored the policies that have been carried out. "Separate but equal" was a solution to the "Negro problem" that most people accepted—perhaps a majority still would accept it.

After Hiroshima, when the "little yellow monkies" became our "Asian allies," remorse for the treatment of the Nisei set in. And when there was little or nothing left to steal from the Indians, they became "noble savages." The position of black Americans has changed largely because their power changed as many of them escaped from rural-agricultural peasant-status to urban-industrial worker-status. The tragedy of the unborn is that the reasons we have for preferring them dead will not pass, the good of life we steal from them is as inexhaustible as the sex drive, and no social or economic developments will alter their absolute powerlessness. If we are to recognize their rights, therefore, we must do it solely on the basis of an accurate understanding of what abortion does and a sense of justice toward those with whom we have little community.

An important argument against the A.L.I. proposal is that any constitutional arguments that can be offered by advocates of legalization against the stricter laws previously existing apply much more forcefully against statutes based on the A.L.I. model. If a law that forbids abortion "except when necessary to save the life of the mother" is too vague to be certain what it forbids, one that refers to *health, mental health, substantial risk, serious defect*, and (in the context) *rape* is certain to be an even less clear guide.

Also, if there are constitutional questions raised by the discrimination implied by the various degrees to which physicians and hospitals are willing to stretch strict laws, there is more obvious and direct discrimination (from the viewpoint of one favoring abortion) in a law that would allow rich people to get an abortion on grounds of "mental health" but would forbid poor people to get one on grounds of starvation. One might also think of the implication of a statutory rape provision. A wanton a few weeks under the age of consent could be aborted while an overly sheltered innocent seduced a few weeks after that magical date could not.

From my own viewpoint, of course, neither the laws previously in force nor those following the A.L.I. model afford equal protection of the laws to persons who are unborn. But the revised laws are worse, not only since they permit more killing, but also because their substantive criteria and their lack of procedural due process render them unjust.

One argument sometimes offered in favor of enacting the A.L.I. proposal is that existing laws are a hodge-podge, varying from state to state. This is a curious argument, inasmuch as a principal reason for the existence of separate state governments in our federal system is to permit such variation in the laws as the customs, needs, and opinions of the people of each state require. If uniformity were so great a virtue, our Constitution was totally misconceived. But it also is pertinent to observe that the revised statutes which more or less

follow the A.L.I. model diverge from it in many different ways, so that the revised statutes probably will form more of a hodge-podge than the earlier strict ones.

The commentary to the A.L.I. proposal begins by listing "salient features" of the American experience—such as estimates of as many as 2,000,000 abortions per year with seventy percent illegal abortions and estimates of 8,000 abortion deaths per year.<sup>252</sup> We saw in chapters two and three that such estimates are at best unreliable (e.g., as to the number of illegal abortions) and at worst certainly false (e.g., as to the number of abortion deaths).

We also have seen that there is no reason to believe that the adoption of a relaxation along the lines of the A.L.I. model will in the least alleviate the legal, social, and public health problems posed by criminal abortions. If the experience of other countries teaches anything, it is that partial legalization is likely to increase the total numbers of abortions, legal and illegal, and that not even complete legalization eliminates "backstreet" operations.<sup>253</sup>

The A.L.I. commentary is not noteworthy for consistency with the proposal it is supposed to support. Arguments advanced in favor of a "much more restricted application of criminal sanctions" include economic distress, the interference of pregnancy with women's careers, illegitimacy, unsatisfactory family situations (e.g., an irresponsible father), family size disproportionate to income, and public welfare costs.<sup>254</sup> Yet the proposal does not purport to satisfy these demands.

Another and even more serious inconsistency is that the commentary offers a justification for abortion in *early pregnancy* while the proposal admits abortion under specified conditions without any time limit.<sup>255</sup> Twenty-six weeks is used as the point after which self-abortion is made an offense, partly

. . . because the respect for human life which underlies the social effort to control abortion assumes increasing relevance as the fetus passes into the stage of recognizable, viable humanity.<sup>256</sup>

No effort is made to justify the twenty-six-week line as an adequate reflection of the criteria expressed by this description. Six or eight weeks would be a better estimate of the time of recognizability and less than twenty weeks of possible viability, as we saw in chapter one. But the A.L.I. proposes, in any case, to allow the killing of the unborn on the stated indications even after they are in a "stage of recognizable, viable humanity."

An argument offered in favor of the A.L.I. proposal that deserves careful consideration is the following:

To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions. Accordingly, here as elsewhere, criminal punishment must be reserved for behavior that falls below standards generally agreed to by substantially the entire community.<sup>257</sup>

In other words, the criminal law should not go beyond the shared moral standards of the public at large. In forbidding abortion without exception, it

does so. Therefore, criminal law has gone too far, and the price it pays is unenforceability.

The principle underlying this argument is sound but its application here is fallacious. The underlying principle is that law is justified by reference to the good for which the community is organized. If a substantial segment of the community rejects some law, this usually indicates that the common ground on which the community has to be built does not extend quite so far as had been assumed. Therefore, that particular law represents a failure in attempt at community; it simply marks a limit beyond which general cooperation is not to be expected. Usually, the proper course is to recognize that the good to which this law was directed must be served by individual or voluntary group efforts. For the majority to continue to insist on a law in such circumstances would mean that the minority were being compelled to a pseudo-cooperation toward an objective they did not see as an aspect of the common good.

But the existence of substantial dissent does not always show that enforcement of a law would be unjust. The Civil War marked the enforcement of federal primacy and the principle that slavery should be outlawed against a very "substantial body of decent opinion." The rights of slaves to liberty and the survival of the federal union were at stake, and these factors justified the war in the eyes of Lincoln and those who followed him.

The abortion issue is somewhat similar. The question of the right to life of the unborn cannot be brushed aside. Community does extend so far as to protect the right to life of the rest of us; to make an exception of the unborn is not simply to accept a somewhat diminished community, it is to admit a radical discrimination against a weak minority.

In a society that was not pluralistic most people shared the same appreciation of the ultimate meaning of man and the same vision of his final good. Under those conditions there existed a "public philosophy," a "common faith," a "secular consensus." In our present radically pluralistic society there is no such underlying unity. When there was unity about ultimates, the common sense of the community was a reliable guide to what was essential to community survival, and criminal law could limit itself to enforcing only what nearly all agreed *had* to be enforced. But with disunity about ultimates has come a new need to reflect upon what is necessary for a pluralistic society if it is to survive as a functioning community.

To limit the protection given the right to life so that some lives are left unprotected is unjust in any society. However, normally such limitations are based on some principles of discrimination generally accepted in the society, and so the injustice is not destructive of the very foundation of the society itself. But in our society the protection of the fundamental rights of all persons regardless of differing ultimate values is the very basis of community. If a "substantial body of decent opinion," even if it were a majority, wishes to label a certain group non-persons in order to expedite withdrawing protection of

their most fundamental right, that opinion ought to be resisted so far as possible, since it threatens the inner structure of the community itself.

The law itself teaches. One reason why those who favor complete legalization often support a proposal along the lines of the A.L.I. model is that the revised law will teach a new lesson. Instead of the unborn having a right to life, the A.L.I. proposal says: "Indiscriminate abortion must be judged a secular evil since the procedure involves some physical and psychic hazards."<sup>258</sup> In other words, abort discriminately. The lesson of the old laws might arouse a sense of guilt in those who violated them, but who is likely to be conscience stricken about having taken a few risks?

It is a serious fallacy to point to the cases in which the law forbidding abortion is disobeyed, the relatively few prosecutions under it, and to conclude that the law is wholly ineffective. No one knows how often the law is violated; still less does anyone know how often the law is obeyed by those who would otherwise seek abortion. The crime of abortion obviously is difficult to detect and to prosecute successfully, but that is no more reason to permit abortion than it would be to permit infanticide or involuntary euthanasia, which probably occur undetected quite often.

Nor should anyone be impressed by arguments that abortion laws alone are so often violated by "decent" people. Laws against perjury are often violated. Such violations strike at the heart of our system of justice. Prosecutions seldom occur. Many "decent" people cheat on their income tax. There are potential criminal penalties. But most cases that are detected are settled by the payment of the tax plus a penalty, while large-scale cheaters often are allowed to settle by paying *less* than the delinquent tax owed. Laws protecting property have been often and seriously violated in many recent demonstrations on college and university campuses. Apparently, a substantial body of "decent" opinion sympathizes with the objectives and is tolerant of the methods of confrontation politics. Public officials, therefore, have appeared to be rather helpless. Does this breakdown of law enforcement mean that such activities should no longer be forbidden by law?

The answer, of course, must be negative. What we are experiencing is simply the difficulty of reconciling community with pluralism about ultimates. This problem must be solved, or we shall end either in anarchy or in some sort of totalitarian "order." The abortion issue is a testing ground for justice in a pluralistic society. If the test is not passed here, we must face the grim possibility that it may be failed altogether.

One frequent elaboration of the argument for restricting application of the criminal law to cases in which there is general consensus stresses the dark side of the entire process of criminal law enforcement. First, there are the sometimes distasteful activities of police. Then, the taxing process of the courts. Finally, the useless suffering of prison. The horrible engine of the criminal law, it is suggested, should not be set into operation against someone whose only crime was to help a desperate woman out of a tight spot.

In part the picture thus painted is ludicrous; it makes the unappealing figure of the abortionist into a veritable folk-hero, a modern Robin Hood. But in part the picture is accurate, for it points up real inadequacies in the way we deal with crime and criminals. Yet these inadequacies are general, and unless we are to repeal the entire criminal code, they are no argument for legalizing abortion. But we might well seek some reforms. It is often pointed out that juries are reluctant to convict licensed physicians. Perhaps they would be less reluctant if the prison term could be translated into a certain number of years in which the convicted physician would be compelled to work one day each week in a clinic giving free medical care to the poor.

Often the abortion laws have been compared with prohibition as an example of an unsuccessful effort to legislate morality over the objections of a substantial body of "decent opinion." The essential point that the right to life is at issue in abortion and was not at issue in prohibition is never mentioned. Nor are other important points of contrast noted. The sources of our moral and legal tradition have always regarded abortion as a moral evil and treated it as a crime. Generally, the Judeo-Christian tradition and common law have viewed drinking benignly, unless carried to excess. The prohibition experiment was an effort to treat the social *consequences* of drunkenness by legislation; abortion laws aim at the act itself. Prohibition required an unprecedented effort by the federal government at what amounted to local law enforcement. The abortion laws are enforced by local police.

In many ways, the campaign to legalize abortion has more in common with the prohibition movement than the laws against abortion have in common with prohibition itself. Like the prohibitionists, proponents of legalized abortion are manipulating public opinion with the promise that a simple change in the laws will solve vast social problems. We must remember that two-thirds of both houses of Congress and representatives of the majority of the people in three-quarters of the states voted for prohibition as well as for repeal. In neither case were the people victims of religious fanaticism. But they were convinced in the first case that prohibition would practically solve the problems of poverty, dependency, crime, and family disintegration. Of course, it did not solve them. Neither will abortion, but those who favor it still often seem to be seeking a way to eliminate the consequences of social injustice and of human weakness without seriously attacking the former or even so much as acknowledging the intractable reality of the latter.

The fact of the matter is that the general reasons given in support of the A.L.I. proposal really are reasons for supporting complete legalization. If those reasons were cogent, the weak reasons given for resisting abortion on demand could hardly be compelling against the respect for medical judgment and for the individual woman's freedom proclaimed throughout the commentary. The A.L.I. proposal must be regarded as a compromise designed to attract support for a wider legalization by limiting its stated grounds to cases known to have the broadest appeal. The commentary itself offers evidence for

this conclusion in its discussion of possible additional grounds, wherein it sympathetically projects abortion at will, suggests the protection of women from illegal abortion as the basis of argument, implies that support of strict laws is chiefly religious, and offers no reason for stopping short of wider justifications except a lack of experience with such a law in the context of American society.<sup>259</sup>

Proponents of revisions along the lines of the A.L.I. proposal offer other arguments that we may briefly consider.

Some argue that the laws to be replaced are antiquated—"our nineteenth-century abortion law"—while the proposed revision is in the modern trend. But the Bill of Rights is eighteenth century and the Fourteenth Amendment is as old as many current abortion statutes. They are not out of date. There have been legal trends before—e.g., the enactment of sterilization laws—which gained public support for awhile and then were seen to involve injustice.

Abortion is described as a huge racket on which the underworld thrives. This description does not fit well with the alternative picture of the kindly physician helping a woman in distress. I have seen no evidence that abortion is an organized racket, like the numbers game. Not that the physicians and paramedical personnel who perform illegal abortions are any less greedy or more scrupulous than the Mafia. Legalization along the lines of the A.L.I. proposal might easily intensify exploitation of women by unscrupulous operators.

The laws are said to make hypocrites of respectable physicians. But the laws never compelled a physician to perform an abortion that was not strictly medically necessary and never forbade him to perform one that was. Those who have taken the law into their own hands and performed abortions not medically necessary are hardly likely to stop doing so if some further indications are admitted. The hypocrisy will remain, but it will be in performing abortions beyond the vaguer boundary of a newly enlarged zone of legality. The difficulty would not even necessarily be taken care of if abortion were altogether legalized, for then the homicide laws might make hypocrites of physicians who felt it necessary and found it profitable to dispose of unwanted defective babies and senile relatives.

Some argue that relaxing laws to permit abortion in cases in which many physicians now practice or would like to practice it is required by respect for the medical judgment of the expert physician. But this argument misses the point that the judgments to be made often are not really medical. A physician does have special training to tell whether a woman is likely to be physically healthier if she has an abortion, but "mental health" seems to be a standard as easily applied by the average layman. The physician, if he is specially trained, may gauge the likelihood of birth defects, but he is no prophet about the quality of life possible with them. Whether a pregnancy resulted from rape or incest is altogether outside the field of medical judgment. Other indications,

such as economic factors and illegitimacy, are not susceptible to medical judgment. The fact is that physicians have some expertise on how to preserve and restore health but no expertise on whom to kill and whom to let live. Opposition to relaxed abortion laws can be based, among other reasons, on a desire to see medicine survive as a humane profession rather than become a pliable tool that is wielded now for life, now for death as may be demanded by ulterior considerations.

Many arguments in favor of abortion law relaxation fail to observe the fact that any change in the laws will alter the existing situation and thus create new problems. This defect is particularly marked in arguments that assume that a certain number of abortions done legally can be subtracted from the total criminal abortion-rate. The same defect is present in arguments that suggest that if some unwanted children are aborted, a larger proportion of children will be wanted.

The trouble with this argument is that the availability of abortion is likely to change prevalent attitudes toward parental responsibilities. If some people can get abortions legally, others may resent having children they would otherwise have accepted. Even if everyone could get an abortion legally, many a parent disappointed and irritated by a child may say—let us hope silently: “I should have had you aborted.” And such feelings may easily lead to mental and even to physical cruelty. I believe that contraception has enlarged the problem of the unwanted child; abortion may not solve this problem, but might also extend it.

A common objection is that abortion laws enacted by men deprive women of their freedom. But the only poll which can be taken seriously on this matter is that of the National Opinion Research Council, reported by Mrs. Alice Rossi, who is a strong proponent of complete legalization. Her report indicates that women are *less* favorable to legalization than are men. If church attendance and sex are both taken into account, women with a given intensity of religious practice are only slightly less favorable to abortion than men whose religious practice is equally intense, but more women than men are devout. On three proposed indications—poverty, illegitimacy, and simply not wanting the baby—total approval for legalization ranged from 15 percent to 21 percent. But men were significantly more favorable to abortion on these grounds while women were markedly less favorable to it.<sup>260</sup>

Dr. Joyce Brothers, a psychologist who writes a syndicated column, has argued that abortion is much more a psychological threat to women than to men. She asserts:

Basically most women feel abortion is wrong. Casually taken straw polls which sometimes indicate growing numbers of them favor liberalization of current laws are contradicted by scientific studies made under controlled conditions.<sup>261</sup>

The fact seems to be that men facing financial problems, or finding pregnant the women with whom they are having an affair, or simply not wanting another baby are more likely to want abortion than the women who would have to undergo it, *even if it were legal*. Abortion laws thus protect many women from male pressures. Thus Dr. Brothers concludes that men may legislate to permit easier abortion, but the question has a deeper significance for women.

Lurking under the surface of all the arguments for abortion is the desire for a solution to the social and economic problems of poverty and illegitimacy. Harriet F. Pilpel, testifying on behalf of the New York Civil Liberties Union before a New York State Assembly committee, gave first place in her attack on existing statutes to the tremendous social cost. While admitting that it would be simplistic and callous to view unwanted children merely in monetary terms, she first presented the claim that the nationwide cost of supporting the "unwanted children" born during a single year could run to a public expense of seventeen-and-one-half billion dollars over a seventeen year period.<sup>262</sup>

Since Mrs. Pilpel left it to the legislators to figure out which children those referred to might be, and who it is that does not want them, I cannot tell whose children she was proposing to abort to save the taxpayers this annual welfare bill. She discussed the right of the unborn to life only briefly at the end of her presentation. After claiming that the idea has its roots in Catholic theology (a hardly adequate account of the history we described in chapter four), she returned to the question of social cost, saying:

But the enormous social cost that the present abortion law creates is clearly an evil that far outweighs any right to life that a foetus may be thought to possess.<sup>263</sup>

In other words, *their* right to life simply is not worth *our* seventeen-and-one-half billion dollars and other disadvantages their lives might entail.

Such an argument, as we saw in the last section of chapter two, is not racist even if many of the prospects for abortion happen to be black. The New York Civil Liberties Union undoubtedly would reject abortion if it were presented in terms of genocide. No, what we see here is the same desire to solve social problems that motivated the prohibitionists, only this campaign is an infringement upon the right to live, instead of upon the much less vital right to imbibe.

#### Should the Law Withdraw?

In 1967, Rev. Robert F. Drinan, S.J., Dean of Boston College Law School, presented a paper entitled, "The Right of the Fetus to Be Born," at the Harvard-Kennedy Conference on Abortion which met at Washington, D.C.<sup>264</sup> In this paper Drinan argued against the A.L.I. proposal; he suggested that it might be better if the law would altogether withdraw from the area of regulating abortion. In June 1968 he reiterated this position at a meeting of

the Catholic Theological Society of America and made unmistakably clear that his preference for legalizing abortion at will does not depend on opposition to the A.L.I. model so much as upon his estimate of the intrinsic merits of the proposal.<sup>265</sup>

Drinan begins his second treatment of the subject with a discussion of the relationship between law and morality. He offers the theological opinion that there is nothing binding upon Catholics to prevent them from accepting Mill's opinion on this relationship. I leave the question of what is binding upon Catholics to the Church. But I question Drinan's argument in support of his position. I question it as argument, rather than as theology.

Drinan thinks that Catholics would in general be more sympathetic to the view of Lord Devlin than to that of H. L. A. Hart regarding the relation of law to morality. I set forth my own position on this problem in the first section of this chapter and find myself more nearly in agreement with Hart than with Devlin. Drinan explains why he expects Catholics to take Lord Devlin's view as follows:

It should be noted, however, that Catholics have not yet really explored the impact of the "Declaration on Religious Freedom" of Vatican II on what is thought to be the traditional view of the state's role in fostering public morality. That Declaration stated that:

"The usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary." [note omitted]

As a perceptive footnote about this sentence explains, Vatican II here adds the concept of freedom to the traditional ideas of truth, justice and charity which had hitherto dominated Catholic thinking about the role of the state.

And Drinan goes on to summarize the note.<sup>266</sup>

If one looks at the "Declaration on Religious Freedom," the first point he will notice is that the passage cited by Drinan referring to the "usages of freedom" is at the end of a paragraph concerning the regulatory norms that must be observed in the exercise of religious freedom. These norms are derived from the moral law; they include the rights of others, one's duties toward others, and the common welfare. Society also has a right to control abuses of religious freedom, but such control must be exercised justly. The Declaration then explains the source of the norms it has set forth:

These norms arise out of the need for effective safeguard of the rights of all citizens and for peaceful settlement of conflicts of rights. They flow from the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice. They come, finally, out of the need for a proper guardianship of public morality. These matters constitute the basic component of the common welfare: they are what is meant by public order.

For the rest, the usages of society . . .<sup>267</sup>

And then follows the passage quoted by Drinan, from the beginning of which he omitted the words: "For the rest . . ."

What Vatican II said, therefore, is that even the right of religious freedom must be exercised in accord with morality and that government may and should regulate the exercise of this right by the standards of just law. *For the rest*, liberty ought to prevail. I hardly think that this passage, read in its context, supports the idea that abortion at will is to be allowed by just laws in a pluralistic society.

It also should be noted that the "perceptive footnote" which Drinan summarizes is not a note of the conciliar document (which has some footnotes, printed in *italics* in the edition Drinan cites) but is rather an editorial addition. This note therefore does not show that the Council itself believed it was adding something new in the theology of the role of the state.

A few pages later Drinan cites passages of the Declaration that he says would be operative "[i]f one assumes that a fetus is a person deserving of the protection of the government." But he then adds:

On the other hand, if one begins with the assumption that a significant minority or even a majority of persons in America think that women should have a legal right to dispose of an unwanted pregnancy one must look for guidance in other assertions in the Declaration.

He then cites a passage that excludes even a hint of coercion in *spreading religious faith and introducing religious practices*.<sup>268</sup>

Now, I personally hold both that a fetus is a person deserving government protection and that a significant minority—but certainly not a majority—of Americans think women should be legally permitted to have abortions or "dispose of an unwanted pregnancy" at will. I presumably must look for guidance to both sets of passages in the Declaration.

Following Drinan's directions, I have done so; in fact, I looked at the whole document to see whether there might be any relevant passage he omitted. I find nothing in it to support the idea that Catholics or anyone else should check their consciences at the door when they enter the forum of debate about public policy. The standards of just law are derived from the goods shared by the community. There is coercion in any criminal law, but the Council excluded coercion not in general but only as an instrument of spreading religious faith and introducing religious practice.

Throughout his 1968 essay, Drinan seems to assume that the unborn are without rights. His paper at the Harvard-Kennedy Conference was entitled: "The Right of the Fetus to Be Born." A right to be born is a rather odd right; I never heard of it before Drinan formulated it. Abortion legislation has protected the *right to live*, which everyone shares with the unborn, not a special right peculiar to those unborn, which no one else could lose.

Drinan wrote earlier on the right to be born in an article published in 1965. At that time, however, he was clear and emphatic that the unborn are

human beings with a right to life, a right over which no one else's health or happiness may take precedence. He regarded the inviolability of innocent human life as the cardinal principle of Anglo-American law and he asserted forcefully that to permit legal abortion would be to cut the very heart out of this principle.<sup>269</sup>

Drinan has never denied that the unborn are *human beings*, but he has departed from the position that it is essential to protect the right of the unborn to life. We must consider what made him alter his view.

In his 1967 paper, Drinan's chief argument was that it would be better for the law to withdraw protection from non-viable fetuses than to accept a system such as the A.L.I. proposal by which abortion would be permitted on stated indications. The A.L.I. proposal, Drinan contended, would introduce a new principle into Anglo-American jurisprudence

...for the first time in its history, a principle justifying the elimination of a life,—not in order to save the *life* of another person but rather to preserve or enhance the health or the greater happiness of another person.<sup>270</sup>

Drinan rejected such a principle, particularly for the lesson it would teach about the priority of the rights of "the living to happiness" over "the rights of the unborn to existence." He felt that withdrawal of the law would not have the same impact.

A law which is silent about the abortion of non-viable fetuses says no such thing. It neither concedes nor denies to individuals the right to abort their unborn children. It leaves the area unregulated in the same way that the law abstains from regulating many areas of conduct where moral issues are involved.<sup>271</sup>

There are several arguments against this position.

In the first place, the principle introduced by the A.L.I. proposal is not as novel as Drinan says. The present Massachusetts statute does not define its therapeutic exception, but merely says the act may not be done "unlawfully"; the Massachusetts courts have interpreted this language to mean that abortion is justified when there is danger to the woman's physical or mental *health*.<sup>272</sup> Drinan, being the Dean of a law school located in Massachusetts, might have been expected to know this, even if he were not aware that the statute of the District of Columbia, where this paper was delivered, makes an explicit therapeutic exception when abortion is "necessary for the preservation of the mother's life and health."<sup>273</sup>

But even if the principle introduced by the A.L.I. proposal were as novel as Drinan believed, he overlooked the fact that his alternative introduced an equally novel and much less defensible principle into Anglo-American jurisprudence. At common law, life was protected from the time of quickening, since life was surely present and proved itself to be so at that time. All modern knowledge pushes back the stage at which life is surely present toward conception. Drinan, however, implicitly introduces the principle that the legal right of people to do as they please is superior to the legal right to life of the unborn

prior to viability, which he set at twenty-six weeks. In other words, if one is completely dependent upon another, the law is justified in leaving the dependent one at the mercy of the one on whom he is dependent.

Drinan does not suggest extending this principle to the sick, the retarded, the insane, or the senile. I do not believe he would want to extend it. Perhaps the law could allow abortion at will of the pre-viable without going on to these other cases of completely dependent individuals. Perhaps. But the unprecedented principle would be introduced by the legalization of abortion, and it would be in the body of the law like a dormant cancer, ready to spread when and if conditions become favorable.

Moreover, even if Drinan were correct in supposing that legalized abortion at will would introduce no new principle into the law, he is in error in suggesting that the law's withdrawal would mean that it would be merely *silent* on the abortions it permitted, that it would remain *neutral*, and that it would simply leave a certain area *unregulated*. The law would contain a repeal of what it had prohibited and such a repeal would not be the same as never having tried to protect life before viability. It would, under actual circumstances, amount to approval of the position of those who deny that the fetus has any rights. The law cannot be neutral in the question whether it regards a certain class of human beings as legal persons or not. By permitting them to be killed *legally*, the law would hold that before viability the unborn are not legal persons. The law would still regulate abortion, as it regulates *all* medical practice in the interest of those whom it recognizes as *persons*. But in regulating the abortion of the pre-viable, the law would simply disregard those to be aborted.

Finally, even if Drinan were correct in thinking that the law can withdraw protection from some lives without in fact saying they are non-persons, the actual situation shows that legalization such as Drinan proposes would only be one element in a shift of public policy. The law is not merely a mediator of interests, as Mill and other nineteenth-century liberals sometimes seemed to believe it should be. The law is a positive engine of progress through planning and public programs—or at least, so twentieth-century liberals have thought. If abortion prior to twenty-six weeks of pregnancy is not criminal, it will inevitably take its place among other legal methods of birth prevention in public health and welfare programs. The state will then be doing what Anglo-American law really never envisaged—killing the innocent as a matter of public policy.

In his 1968 presentation of the same thesis, Drinan did not expand on his argument, which sought to maintain a technical purity for the law at the price of sacrificing the fundamental principle of equal protection. He merely mentioned that the legalization of abortion at will

. . .to be sure keeps the State out of the business of decreeing what type of pre-natal beings may be eliminated but it also withholds the state's firmest

protections,—its criminal sanctions,—from human beings during the first twenty weeks of their fetal life.<sup>274</sup>

He then goes on to say that the central issue is whether the withdrawal of criminal sanctions “from this very tiny area of human life will, may or could” diminish the respect for life that Drinan still holds to be a cardinal principle of Anglo-American law. He says the question is hard to answer, and then adds an irrelevant assumption that there would be no more abortions altogether if abortion were legalized and that procedures could be instituted that would at least mitigate the harm to the mothers.

This argument is remarkable and it deserves to be criticized in several respects.

First, Drinan admits that the “pre-natal beings” to be killed are “human beings.” But he still does not face the issue whether they must be regarded as legal *persons*. His failure to face this issue is pointed up by the casual manner in which he introduces the dividing line—now set at twenty weeks. Why twenty-six weeks in September 1967 and twenty weeks in June 1968? Drinan gives no hint why he changed his mind, nor does he in either paper try to show that the dividing line he accepts is the right one—that is, the one demanded by justice.

Second, Drinan does not say that the unborn are to be deprived of all legal protection, but only of the sanctions of criminal law. We shall presently see the procedure he proposes. I do not see that either this procedure or any other existing legal provision would protect the unborn if abortion were legalized.

Third, I do not see what it means to suggest that there is doubt about the meaning of legal abortion for respect for life. A law that allows some human beings to be killed with impunity seems to me evidently to lessen *respect* for life. Whether more individuals will in fact be killed is a wholly different question. On this question I think the relationship between the abortion-rate and the birth-rate in countries that have legalized abortion (such as Japan) is some reason to think there would be more abortions if they were legal. Drinan himself admitted in the 1967 version of his argument the substantial evidence that *partial* legalization leads to an increase of criminal abortions and therefore of the total of abortions.<sup>275</sup> Why he thought in 1968 it a reasonable assumption that complete legalization would not lead to an increase in the total I cannot explain.

In any case, in 1968 Drinan’s emphasis shifted to a four-point statement of the opportunities and advantages of the withdrawal of the criminal law and the imposition of a civil law regulating the granting of an abortion.<sup>276</sup>

His first point is that the repeal of criminal laws forbidding abortion would “allow the government for the first time to prosecute vigorously all non-physicians who perform abortions.” Maybe this somehow makes sense, but I cannot understand it. The government is free to prosecute non-physicians performing abortions now. Presumably there would be few of them if abortion

were legalized. But to the extent that non-medical abortionists were able to beat the professional competition, I think they would be as difficult to catch and convict for unlicensed medical practice as they now are for abortion.

Drinan's second point is that before an abortion were approved there could be mandatory "competent counselling for the woman seeking an abortion" and also for the child's father. This counselling "might well convert an unwanted pregnancy into a wanted one" or at least prevent the woman from becoming a repeater. Drinan does not say who would do the counselling or how long it would go on. Since the counselling would be imposed by the law (which Drinan assumes may not insist on the point that the unborn are persons with rights), it could not amount to much more than an opportunity for the couple to talk and to be instructed about using contraceptives in the future. If the counselling were organized with a supporting battery of social services, as was the case with the Danish program, at least in its early form, something might be accomplished. But since abortion could not be refused under Drinan's system, it is hardly likely that social support for the alternative would be offered; in fact, I think it more likely that present welfare measures might be suspended and support withdrawn from those who did not accept abortion.

Drinan's third point is that legalization would allow abortion to come out from "underground" and thus permit a survey of the scope of the problem and facilitate attempts to solve it. The trouble with this is that if abortion were legalized it would no longer exist as a public problem; there simply would be no impetus to do anything to "solve" what would legally be no more of a problem than is the use of any less desirable form of birth control when more desirable methods are available. *The problem* inherent in abortion (as distinct from the many complex problems of women who seek abortions) is that sometimes people wish to consign unborn children to oblivion and until the present we have not been willing to condone this practice.

Drinan's fourth point is that repeal of laws against abortion would lessen the "disregard and contempt for law which the widespread defiance of any law always breeds." He also adds that repeal may be inevitable because of the coming "morning-after pill." Neither of these points appears to me to be cogent. If the manufacture and distribution of the "morning-after pill" is not licensed, as it should not be, some illicit traffic might develop. But the drug will not be so easily manufactured as to be able to be produced in everyone's basement, and it will not be so valuable or essential as to stimulate very great efforts at smuggling. In any case, pharmacological abortifacients will not necessarily imply the *repeal* of laws against abortion.

As to the argument based on disrespect for law, one can only wonder what values Drinan does not regard as expendable for the technical purity and validity of the law. Undoubtedly people lose respect for an inadequately enforced law that is supposed to protect human life itself. But when the truth dawns that law will not even attempt to defend the most essential rights of the weakest, respect for law will fall even farther. If the law is to be merely a

utilitarian expedient for regulating the activities and protecting the interests of those strong enough to make themselves troublesome to others, then the reverence for the law—which even many criminals share—will vanish. For it will then be clear that the law neither is nor even seeks to be an embodiment of the ideal of justice.

In a despotic state, law can be made to work as long as most people fear the power and brutality with which it is imposed. In a free society, the effectiveness of law depends on the general belief that one *ought* to obey it—that it is fair and that it is something more than a convenient arrangement. I submit that the legalization of abortion may make the law seem less worthy of respect even to those who want abortions, for they will perceive that the law is no majestic lady. If *she* must tilt *her* scale in order to keep possession of it—why then!—*she* is no better than the rest of us.

#### A Strategy in Defense of Life

The strategy that should be followed by those who are convinced that the law ought to regard the unborn as legal persons is seldom seriously discussed. I do not think I can deal adequately with the problem; it must be studied by experts from many fields, especially by lawyers and politicians. The proper strategy certainly is not merely resistance to legalization of abortion or to relaxation of present laws. But such resistance is necessary. I wish to offer here a few ideas that may initiate reflection and lead to action both in the fight to maintain legal restrictions and in efforts to promote conditions favorable to respect for the lives of those unborn.

One proposal that is certain to be made is to promote the use of contraceptives. If no woman ever becomes pregnant except by a calm, cool decision, then few would seek abortion. It seems to follow that universal use of effective contraceptives would eliminate abortion.

The argument is plausible, but fallacious. No foolproof contraceptive exists and none may ever exist that can be used by all women (or men). Even a very small failure-rate (e.g., one per every thousand couple years) would cause tens of thousands of babies to be conceived every year to the tens of millions of couples using contraceptives, and all of those babies would have been absolutely rejected in advance. Their chances not to be aborted—to become wanted after the fact—could never be good.

Moreover, if no woman ever became pregnant except by a calm, cool decision, it would still remain a woman's prerogative to change her mind. In a society that has fully committed itself to the principle that no one has any responsibility toward children he does not want, children who become unwanted after conception (and even after birth) cannot be safe.

I do not propose that contraception should be legally regulated; I simply reject the idea that it has anything to contribute to a strategy that is favorable to life and its protection.

I have suggested previously in this chapter that it would be desirable to try to obtain from the U.S. Supreme Court a decision squarely facing the issue whether the unborn are to be regarded as persons within the meaning of the Fourteenth Amendment. Also, I believe that every effort should be made to prevent the licensing for manufacture and distribution of abortifacient drugs. Whatever abortions in early pregnancy are deemed legal can be performed easily enough by mechanical methods—the curette or a vacuum apparatus.

Much more organization is needed among those who oppose legalization. The proponents are active pressure groups; they need a well organized opposition. The issue is not essentially a religious one, and so opposition need not be organized on religious lines. The results of polls that show substantial groups of people who regard themselves as non-religious and who oppose abortion on any but the narrowest indications point to the possibilities and the inadequacy of what has been done thus far.

In cases where the passage of a relaxed abortion bill seems inevitable, should opponents accept a “realistic” compromise in order to obtain amendments that may mitigate the ill effects? Compromise can seem reasonable when there is nothing to be gained by further resistance. However, I think a closer look will reveal that “compromise” is merely another name for complete surrender.

Of course, according to the previous argument, there are cases in which a law can justly permit abortion. Where there is a conflict of interests between the life of the unborn child and that of its mother, some rule of resolution must be set down by society, and the rule can only be derived from consensus of opinion. If the interest of the mother is less than life itself, then I think it is clear that only an irrational discrimination against the unborn can rationalize allowing them to be killed, for other legal persons would never be left without the protection of criminal law when life is not at stake. The only plausible exception is the case of the woman pregnant as a consequence of forcible rape—here there is certainly a conflict of interests and one unique in its origin and structure. I do not think abortion is justifiable in such cases but can understand how unprejudiced reflection may consider it so. Still, as I have argued, if a just law is to permit abortion at all, due process should be granted to the unborn.

There are, of course, cases in which there is literally no choice but that between two evils. For example, if a legislative body has directed a committee to consider various proposals for relaxing existing abortion laws and to report one of them, a member of that committee may be forced to vote on which of the proposals should be considered. In such a situation, there is obviously no compromise in preferring the less unjust alternative.

But legislators and judges as well as medical personnel and others ought not to cooperate—if they believe abortion wrong—for the sake of avoiding greater evils. The issue is not an ordinary one in which merely conflicting interests are involved and many different solutions are possible within the

limits of justice. The issue is the most profound possible one, involving as it does the most fundamental right. Anyone who is tempted to compromise should ask himself before he begins where he will stop and where, in his judgment, those who cooperated with the Nazis should have stopped.

There are practical reasons for rejecting compromise. Complete legalization and limited relaxation seem very different superficially. But relaxation means an abandonment of the only principle on which complete legalization can be resisted—that the unborn are legal persons. Once this principle is abandoned, the limits in any restrictive law will be stretched, breached, and abandoned. A relaxed law will be obviously vague and discriminatory, and thus subject to challenge in the courts. A relaxed law will make everyone familiar with legal abortion, will make it “normal,” but will not solve any of the problems presented by illegal abortion. In fact, illegal abortion may increase and present worse problems.

Then, is there any point in opposing complete legalization when relaxation already has occurred? The most important reason for keeping some restrictive conditions is that some lives may be saved by them. But another important factor is that everything possible should be done to prevent legalized abortion from becoming an integral part of public poverty and welfare programs. As long as some restrictive conditions remain in the law, the agencies of government itself can perhaps be restrained. The A.L.I. proposal is extremely weak in its restrictions—both because of the vague concept of “mental health” and because of the near impossibility of proving a case against a physician who says he believed something. But by political action and possibly also in the courts citizens can perhaps use the presence of such weak restrictions to fight the application of abortion as a final solution of the welfare problem.

If a relaxed bill is being passed or has been passed, opponents should seek useful restrictive amendments so long as they can do so without lending any support to the law itself. What are some restrictions that could save unborn lives and that are worth seeking?

First, of course, is limitation of grounds. If “mental health” were defined in such a way that only women undergoing therapy in an institution were considered mentally ill within the meaning of the statute, many abortions would be excluded and some precision given the expression. The category of rape and incest can be limited to forcible rape, and legal procedures can be established for certifying it, as some states have done.<sup>277</sup> If the possibility of defect in the child cannot be excluded altogether, as in California, it might perhaps be limited to a list of specific conditions, perhaps a list to be drawn up by a state board of health.

Next, is the limitation of the group who may perform legal abortions. “A licensed physician” is less restrictive than one could wish, but probably there is little chance to exclude general practitioners. In view of newly developing methods, a provision that would require the physician to perform the abortion

personally, not merely to supervise the procedure, could provide some limitation.

The requirement of consultation or review by a board is some limitation. If possible, both procedures can be joined, so that the recommendation of two or three physicians *who have examined the woman*, including the one who will perform the abortion, will be passed upon by a distinct review board of hospital staff members. Psychiatrists' certificates are usually easily obtained and therefore it is important to specify that the recommending physicians and the members of the review board should be from diverse medical specialties.

If abortions are permitted only in *accredited* hospitals, a significant limitation is achieved. Colorado's provision required that legal abortions may be performed only in hospitals accredited by the Joint Commission on the Accreditation of Hospitals which have *voluntarily* established the required abortion board is about as restrictive as possible in this matter. Physicians' offices and small private hospitals may be medically adequate places to perform abortions, but permitting any legal abortion in such places invites unlimited abortion.

A restriction often is suggested limiting legal abortion to women who are residents of the state. Since a number of states have relaxed laws, such provisions are not very effective. Also, if abortion can be constitutionally legal, I think it is questionable whether a provision limiting the procedure to state residents is a constitutionally sound form of restriction.

The requirement of consent in writing by the mother is necessary, but can hardly be expected to be an effective limit. If the woman were required to appear at a public office, read a description of the procedure and what it does (or have it read to her), sign an application, and wait for a few days before receiving a certificate of compliance with this required procedure (an abortion "license"), there would be some certainty that the consent was really free and informed. There is a real danger that uninformed women will be subjected to "voluntary" abortion after giving merely *pro forma* consent, if the operation is provided to ward patients at public expense.

The requirement of consent by a husband is reasonable, provided the couple are not separated. This might not significantly restrict the number of abortions, but it would signify that the unborn are not merely parts of the mother's body, to be disposed of as she chooses. The requirement of consent by a parent or guardian in the case of minors is essential on a different basis; the law does not admit their will as effective in many less important matters, and should not in this, since a girl may suffer serious effects.

A clause protecting hospitals and individuals unwilling to participate is surely desirable, since the partial legalization of abortion may otherwise expose those who refuse to cooperate to various legal disadvantages. Better than the conventional "conscience clause" is one that requires no reason for non-cooperation, along the lines of that included in the Maryland law.<sup>278</sup> One

should not need a justification for refusing to participate in legalized killing of the unborn. Mere distaste ought to be enough to exempt one from penalties.

A most important restriction is a definite time limit after which abortion will not be legal, either at all or unless specified conditions are met.

There is no reasonable point at which to set a time limit, but there are always good reasons for demanding a limit *earlier* than any proposed. For example, if "viability" or a definite limit of twenty or more weeks is proposed, it may be pointed out that some babies are viable before twenty weeks, that development is far advanced at that stage, that after twelve weeks a major operation may be required, and that any definite limit is certain to be stretched. Thus, if the abortion of viable infants is really to be excluded, twelve weeks would be a more realistic time limit. If any limit beyond fourteen weeks is suggested, the common-law tradition regarding quickening, together with some of the points already noted, would argue for a twelve-week limit. If a twelve-week limit is proposed, it may be argued that twelve weeks is near the boundary of medical safety for most methods, that some stretching is sure to occur, and that at this stage the unborn are much more fully developed than at six weeks. The arguments for abortion always assume that something very small and not human-looking will be killed. Certainly this is not true after six or eight weeks of development.<sup>279</sup>

Some effort might be made to use the time limit, whatever it is, to introduce a legal procedure that is not provided for otherwise. As I have argued, no abortion should be legally permitted, even on possibly just grounds, without a procedure protecting the rights of the unborn child. It is hardly likely that any state permitting abortion on grounds that would relax pre-1967 statutes will establish a procedure implying that those to be aborted are legal persons. However, whatever time limit is accepted is likely to include an exception even after that limit if the mother's life is at stake. Here an effort might be made to introduce due process—the appointment by a court of a guardian ad litem, an open hearing, cross-examination of witnesses, and a right of appeal.

Such a procedural requirement would introduce this idea, and subsequent attempts could be made to extend its application. The precedent might be helpful in limiting future incursions on the right to life of people already born.

Whenever conditions are established permitting physicians to perform some abortions legally, it is important that something more than the physician's *belief* that the condition is fulfilled be required for legality. If this is the only requirement, conviction would be impossible if procedural requirements were met, since the prosecution can hardly demonstrate that the physician did not mistakenly believe what he says he did. If the physician performs an abortifacient act that the prosecution can prove objectively falls beyond the legal conditions, the fact that the physician is supposed to be an expert in the matter makes it reasonable to assume he acted with a knowledge of the facts unless he can show the contrary.

I do not say that the law may justly—much less that it should—regard the physician as guilty unless he prove himself innocent. The prosecution should have the burden of proving each element of a crime. If a law permits abortion under certain circumstances, it is reasonable to demand proof not only that abortion was induced, but also that in fact the justifying circumstances were not given.

A statute might well be declared unconstitutional if it admitted justifying conditions for some acts of a species of act otherwise criminal, and then proceeded to require defendants to prove that the justifying conditions were *not* fulfilled. If courts have in the past interpreted some abortion statutes in this impermissible manner, however, such judicial errors cannot reasonably be held to void the statutes themselves.

Rather, past judicial errors should be purged by appropriate judicial rulings. The faults of judges in applying statutes do not invalidate the legislation. If that were the case, probably no valid legislation would exist. It would be absurd for the judicial branch to ask the legislature to set to work anew to replace a statute not defective in itself, but only applied defectively by the courts.

A requirement that hospitals keep records, report to a state official, and that such reports (which would exclude the names of persons aborted) be available for public inspection can provide some limitation. Reports should include among other information a statement of the justifying reason, the number of weeks the pregnancy had proceeded, the method used, the place of residence, marital status, age, and parity (number of previous pregnancies) of the aborted woman. The hospital should also report the proportion of abortions performed of those requested, and the reason for non-performance if an approved abortion is not performed. Hospitals also should report the proportion of abortions performed to normal deliveries in the hospital as a whole and for each physician performing abortions in the hospital. If possible fetal deformity is admitted as an indication, a pathological report of the condition of the fetus should be made.

A relaxation of existing law can be accomplished either by repeal and enactment of a wholly new statute or by amendment. The latter course may have some advantages. The provisions of existing laws have been interpreted by the courts. They apply to physicians and non-physicians alike, and the amendment need only exempt physicians *acting under the specified conditions*. An amendment might also contain a provision that if it is found to be unconstitutionally vague or discriminatory, the pre-existing law without the offending amendment should be held to express the intention of the legislature.

On the other hand, in some states, an altogether new statute may open up more possibilities for restriction than an amendment would. If the existing statute treats abortion as a misdemeanor, a new statute might open the way for dealing with abortions not exempted by law in a more severe manner, particularly if performed after the established time limit. However, it is unfor-

tunate if hospital abortions are removed altogether from the criminal law, as has been done in Maryland.<sup>280</sup>

Special provisions that might lead to judicial decisions on the right of the unborn to life are, in my judgment, worth considering. The Georgia law has such a provision, but some study ought to be made to see if a better opportunity could be created in some state, where the high court and public officials might cooperate with litigation that could lead to a decision on a fair basis by the U.S. Supreme Court regarding the question whether the unborn are persons within the meaning of the Fourteenth Amendment.

Apart from the laws against abortion, there are many areas in which the law can and should be used constructively to alter conditions so that the chances of the unborn will be more favorable.

To a great extent, what is needed is a truly humane approach to the broad social problems of poverty, failure of education, inadequate medical care, and discrimination that have created the "welfare problem." Abortion is not a real solution. It is a cowardly expedient, which discharges social responsibilities by dispatching part of those for whom we are responsible rather than by intelligence, work, and sacrifice.

Since abortion can be accepted only in virtue of the prejudice by which we can discriminate between "us" (those already born) and "them" (the unborn), any sort of educational programs that will help bring home to people the fact that the unborn also are human will help. Emotionally, we sympathize with babies; we would not so easily accept abortion if we considered the unborn as simply babies—only more so—which is really the case.

The various conditions that lead to some of the more plausible indications deserve special attention in a sound public policy toward the unborn.

For example, every victim of forcible rape ought to be given prompt medical treatment to lessen the chance of conception as much as possible. Those who deal with a woman who has undergone this experience in a way that puts the needs of police routine before the woman's care are partly responsible for the small but important number of preventable pregnancies. There should be a recognition of public liability toward victims of rape (and, in my opinion, of all crimes of violence) so that the resources of the community could be used to assist those who have suffered from the lack of adequate community protection of personal security.

Much can be done in cases that involve birth defects. Institutions providing care in this area are inadequate (as are insane asylums and facilities for the aged). As the causes of many defects become known, ways of treating or preventing them can be found. The important lesson of thalidomide is that there are no *new* thalidomide babies; there will soon be no more German measles or babies suffering from its consequences. The public commitment to the care and training of the handicapped could be increased. Social security should be extended to give more help to parents of severely defective children,

for such parents make a contribution of great value to society if they foster those persons who are equal to us in everything essential.

Illegitimacy also needs special attention. Legal discriminations against the illegitimate are not as serious as they once were, but the remaining artificial disadvantages of the status could be eliminated. Emphasis should be upon the child in any program of sex education. If the possibility of paternity (by the fully proven fact of intercourse) is established and this possibility cannot be excluded by appropriate evidence, the father of an illegitimate child should be held as fully responsible for supporting it as if he were its legitimate father. Mothers should be given medical and legal aid, and assisted whether they wish to keep the child or to give it up.

One of the most urgent needs in our society is for public facilities for the best possible care of infants and small children—either on a day-care basis or on a full-time basis. Since the enlarged family—including grandparents, aunts, and cousins—has given way as a functioning unit to the nuclear family of parents and children, women who must work or who for other reasons cannot take care of their children are put in a very difficult position. Children need love and care; huge wards with babies in cribs confined by wire mesh are an atrocity almost as horrible as abortion itself. The cost of developing and conducting the necessary facilities will be huge, but it is a necessary expense, no less our responsibility than the school system. If the wealthiest societies history has ever known cannot fulfill the essential duties to infants and children as well as many primitive tribes have done, then the failure is not of adequate means but of humanity.

Still we must realize that even if everything possible were done, no public effort can eliminate the factors which probably underlie the majority of abortions. These factors are simple. Babies are conceived through irresponsibility, including the irresponsibility of intercourse “protected” by a contraceptive and enjoyed with an attitude of complete rejection toward the new life which might arise. Having been irresponsibly conceived, the babies are unwanted and rejected. Being weak, invisible, and unknown to society at large such babies are easily killed and disposed of without detection. The act is imagined to be as insignificant as the victim is small. Those immediately concerned—especially the abortionists—have selfish motives for acting. Society tends to accept the practice because it is a fact, to compromise with it because it is intractable, and even to legitimize it because it seems harmless to the rest of us.

Dr. Joseph B. DeLee was one of the leading figures in modern obstetrical practice. Under his guidance Chicago Lying-In Hospital became a model for many similar units in the United States and through the world. For many years DeLee was a co-editor of the *Yearbook of Obstetrics and Gynecology*. In the 1940 volume he included a summary of an article by a Catholic priest-physician, who argued that on both medical and moral grounds therapeutic abortion is not justifiable. DeLee, who held abortion to be necessary in some few cases,

did not agree with the author of the article. Yet such was DeLee's appreciation of the dignity of life of the unborn child, that he wrote in his editorial note a paragraph we may still ponder with profit. For as DeLee wrote during the fury of World War II, we must now live under the endless threat of nuclear catastrophe. DeLee said:

All doctors (except abortionists) feel that the principles of the sanctity of human life held since the time of the ancient Jews and Hippocrates and stubbornly defended by the Catholic Church are correct, and we are pained when placed before the necessity of sacrificing it. At the present time, when rivers of blood and tears of innocent men, women and children are flowing in most parts of the world, it seems almost silly to be contending over the right to live of an unknowable atom of human flesh in the uterus of a woman. No, it is not silly. On the contrary, it is of transcendent importance that there be in this chaotic world one high spot, however small, which is safe against the deluge of immorality and savagery that is sweeping over us. That we, the medical profession, hold to the principle of the sacredness of human life and of the rights of the individual, even though unborn, is proof that humanity is not yet lost and that we may ultimately attain salvation.<sup>281</sup>

## EPILOGUE

### *Abortion and Prejudice against the Unborn*

I use the word “prejudice” here as we use it in speaking of *racial* prejudice. There are several aspects to such prejudice that are worthy of our attention.

First, the subjects of prejudice—those who are prejudiced—and its objects—those against whom there is prejudice—must be distinguished from each other by some fairly obvious characteristic. In racial prejudice this is racial difference. The characteristic also must be difficult or impossible to alter, so that the subjects of prejudice have no fear of becoming its objects and the objects cannot escape from it. Obviously, this holds for racial prejudice.

Second, prejudice takes advantage of a difference, but it requires an intelligible motive to explain its development and persistence. Racial prejudice was motivated by the perfectly intelligible—although unjustifiable—motive of the economic advantage of slavery to white society. The economic factor is still an important motive for such prejudice, although subtler psychological factors, including unconscious ones, probably also play a part.

Third, the attitude of prejudice is not conscious; if it were conscious, it could not be maintained. Prejudiced people are not dishonest; they are in error. The subject and the object of prejudice are both victims of the subject’s false outlook. This outlook must therefore be sustained by what seems to be evidence. For example, the racially prejudiced person can be confident he is not prejudiced because he “knows” *from his own experience* that his attitude is well-founded. This experience, as anyone who is not racially prejudiced can see, is an amalgam of misinterpreted facts, half-truths, myths, unwarranted generalizations, and perhaps a few bits of genuine experience with the imperfect human nature of some people who happen *also* to be black.

Fourth, while prejudiced people are not simply dishonest, they act as if they suspected the truth and were trying to avoid facing it. People who are racially prejudiced do not like to be shown facts and have a hard time following arguments that might dislodge their prejudice. This resistance is always surprising, especially when it is encountered (as often happens) in persons who are extremely perceptive and logical in other matters. When intelligent people

perform a discriminatory act, they always seem to have a perfectly plausible excuse that conceals the attitude of prejudice. However, the shifting of excuses tends to reveal to an unprejudiced observer that there is an attitude of prejudice underlying a consistently discriminatory pattern of behavior.

Fifth, a system built on prejudice is never consistent. It is full of arbitrary boundaries. For instance, a person who entered a society in which racial prejudice is institutionalized would have a hard time figuring out how he was supposed to act in different situations. Learning that both fornication and interracial marriage are forbidden, he might suppose that interracial fornication would be considered doubly wicked—both as fornication and as interracial. But he would discover that under certain conditions this is not so at all.

Sixth, and last, a prejudiced person must find some way to defend his opinion against the conflicting opinion of unprejudiced people. In the case of racial discrimination, one often hears prejudiced people saying that those who do not share their prejudice have led unusually sheltered lives, so that they did not undergo the experiences that would have shown the prejudice to be correct. But sometimes almost paranoid explanations are offered—e.g., that those who are not prejudiced have been misled by a communist plot to subvert “the social order,” meaning segregation.

Now, I have noticed that all these aspects of prejudice are to be found in the words and deeds of those who approve abortion.

First, those who are already born are distinguished from the unborn by obvious characteristics. Moreover, unless he believes in reincarnation, one who is already born need not fear that he might actually have to trade places with one unborn. On the other hand, the unborn cannot do anything about their condition.

Second, there is an intelligible motive for prejudice against the unborn. They are going to be a burden for a long time. In many respects, especially if they are defective, they will take much more from those immediately responsible for them than they will ever give back in return. If their mothers are poor, the unborn may also turn into a burden on the public for many years. In many cases their parents unsuccessfully attempted to prevent their conception, and in other cases public and private agencies promoting birth control must record every additional conception as a frustrating failure for their programs.

Third, those who approve abortion and promote its legalization rely heavily upon what they claim to be facts of experience in support of their view. I first began to suspect that there might be prejudice against the unborn when I began to examine some of the “facts.” Chapter one summarized scientific evidence about the development of life before birth, with references to the source material, that contradicts much that is alleged in serious pro-abortion arguments—such as the commentary to the American Law Institute’s model abortion law. Chapters two and three began with a treatment of the statistical questions of, respectively, the number of abortions and the number of abortion-related maternal deaths in the United States each year. The best that can be

said for estimates of the number of abortions is that they are groundless; most published statements about the number of deaths are definitely false. These are only a few of the dozens of "facts" I found to be errors, myths, half-truths, and misinterpretations.

Fourth, those who approve abortion and promote its legalization offer some rather shifty excuses. Sometimes they emphasize some especially moving cases—for instance, a case in which a woman is dying because of the strain her pregnancy is putting on her heart and kidneys or a case in which a decent girl has been violently raped. But then they argue that the real problem is an "epidemic" of illegal abortions sought by married women whose contraceptive practice is deficient. Better contraception is urged as a remedy. Yet next it is argued that contraception alone cannot prevent the tragedy of unloved babies, and the terrible psychological disadvantages such babies will live under. After considering such excuses for some time, one begins to perceive that the essential point is a deep-seated prejudice against unborn babies.

Fifth, the system built on this prejudice is not consistent. Physicians publish articles about methods of treating the "unborn patient" in the very medical journals in which other physicians describe the latest techniques for removing "fetal material" from the uterus. One judge declares an unborn individual a child and orders his illegitimate father to provide support while another denies a legitimate father a court order to prevent an abortion. In a state with a newly relaxed abortion law and a new sex education program, children are taught in school:

Human life begins when the head of the sperm cell, which carries the nucleus, unites with the nucleus of the ovum or egg cell. This is called *fertilization*. . . Fertilization of the egg cell is also referred to as *conception*. In other words, it is at this time that a new life is conceived.<sup>1</sup>

If a child in such a class puts together the idea that *his* life began at conception with the information that his mother is obtaining an abortion, he could easily conclude that *he* might have been aborted. But that is not supposed to be true, because those who approve abortion tell us there is a great difference between what is aborted and any "you" or "me."

Finally, proponents of the legalization of abortion often accuse their opponents of lack of compassion, lack of experience, and—especially—lack of critical capacity. The last charge is especially pointed in the accusation that resistance to abortion is only a matter of Roman Catholic dogma. The first section of chapter seven directly confronted this challenge. Of course, there is *some* ground for locating opposition to abortion in Catholic teaching, but the ground often is misunderstood.

Bertrand Russell, who is not noted as a lover of Christian tradition, wrote some perceptive words about the influence of Christianity and the obstacle it presents to the "scientific organization" of the world. After mentioning other obstacles to this project, Russell added:

In addition to these forces, there are also hostile idealisms. Christian ethics is in certain fundamental respects opposed to the scientific ethic which is gradually growing up. Christianity emphasizes the importance of the individual soul, and is not prepared to sanction the sacrifice of an innocent man for the sake of some ulterior good to the majority. Christianity, in a word, is unpolitical, as is natural since it grew up among men devoid of political power. The new ethic which is gradually growing in connection with scientific technique will have its eye upon society rather than upon the individual. It will have little use for the superstition of guilt and punishment, but will be prepared to make individuals suffer for the public good without inventing reasons purporting to show that they deserve to suffer. In this sense it will be ruthless, and according to traditional ideas immoral, but the change will have come about naturally through the habit of viewing society as a whole rather than as a collection of individuals. We view a human body as a whole, and if, for example, it is necessary to amputate a limb we do not consider it necessary to prove first that the limb is wicked. We consider the good of the whole body a quite sufficient argument. Similarly the man who thinks of society as a whole will sacrifice a member of society for the good of the whole, without much consideration for that individual's welfare.<sup>2</sup>

It should be noted that Russell goes on to express reservations about such complete subordination of the individual to the community. Hence I do not quote Russell as a horrible example, but rather to suggest a non-dogmatic reason why traditional Christian moral teaching and some newer moralities differ so sharply about abortion.

The fact that those who approve abortion and who advocate its legalization show characteristic signs of prejudice has misled some into wondering if the prejudice might be racial in its basis. However, many of the strongest advocates of abortion are also opponents of racism. I therefore believe that the prejudice against the unborn is an independent factor. It is merely coincidental if one person is the subject of both prejudices. A new name is needed for prejudice against the unborn; I suggest it be called "prenatalism" since it is based on the fact *we* are already born while *they* are unborn (prenatal).

I realize that many who approve abortion will reject the suggestion that they are prejudiced, that the virus of prenatalism has infected their thinking about abortion. Particularly if one feels secure that he is *not* prejudiced in some other way, he may feel he is immune and may be shocked by the suggestion that he is not. I would only ask any such person that he try to examine the evidence and arguments presented in this book in the spirit he has wished that those infected with racism would bring to a consideration of the case against their prejudice.