Germain Grisez

Abortion: the Myths, the Realities, and the Arguments

ABORTION

The Myths, The Realities, and the Arguments

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TO

Thomas, James, Joseph and Paul,
Joan, Sarah, and David,
Michael and Johnny,
Marie and Philip,
and others unnamed.

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Contents

Introduction
The Purpose and Content of This Study

In the chapters that follow I have attempted to present the facts about abortion, the historical context for understanding these facts, and a theoretical scheme for making moral and legal judgments about them.

My original intention was to deal only briefly with the matters treated in chapters one to five, so that all five of these chapters together should only have approximated chapter six in length. However, I discovered that so many ethical and legal arguments rest upon mistaken assumptions of fact that it seemed necessary to examine the relevant scientific data and the historical facts more fully. Certain important false assumptions of fact have been so often repeated that it seemed worthwhile to report their original entry into the literature and their subsequent history as they were passed from one "source" to another.

Some of the most plausible arguments for relaxing existing laws collapse once the facts are considered. Research, as presented in the pages to follow, shows for instance that the proposed relaxation will not solve public health problems arising from illegal abortions but will, more likely, aggravate these problems; again, the general public firmly rejects complete legalization of abortion, and it is this complete legalization toward which reform measures are directed and without this the reformers will remain unsatisfied.

But an exposition of the facts does not finally settle the issue, since those who are devoted to the legalization of abortion will seek other arguments if their appeal to "facts" is rebutted. In recent years various reasons have been proposed for rejecting the traditional moral condemnation of abortion. I wished to undertake a critical examination of arguments against the received moral judgment on abortion and the legal policy based on that moral judgment. Naturally, I found it necessary to leave out much theoretical material, but I have tried at least to consider all of the arguments that are more commonly used and many others that seemed interesting and important.

The result will serve, I hope, as a source of materials for all who wish to study the issues seriously, in order to write, speak, testify, vote, judge, and

decide about this subject with somewhat more care than otherwise would have been possible.

There are many other books on abortion, of course, and some of them are indispensable. But some of the books are out-of-date, even if recently published, since they relied on outdated sources for essential facts. Others are extremely specialized, so that it is difficult for anyone not a specialist in the relevant field to understand them without considerable study. In the course of my own research, I have consulted a number of specialists, and have had relevant chapters reviewed by them. Some very useful books lack a unifying perspective, for they consist in symposia or groups of contributed essays. There are also polemical tracts, as well as some useful and interesting but superficial treatments.

Most important, after two years of preliminary study I concluded early in 1967 that my position would be an extremely *liberal* one—"liberal" not in the sense of approving abortion but *liberal* in the sense of favoring the freedom of the unborn to make their own choice about life and defending their right to live long enough to make that choice. Having come to this view, I decided that a rather thorough statement of it is needed. Most of those who oppose abortion seem to feel this position is self evident. But I think that the case against abortion is less simple than has been realized and that the complexity of the case needs a correspondingly complex exposition.

At present there are committees and commissions of legislatures and there also are courts studying the issues dealt with in this book. Even if members of such bodies begin with a personal opinion that abortion should be approved, I hope that in their official capacities those responsible to and for a pluralistic society will wish to give the most careful consideration to a view that articulates the intuitions of many citizens. Although I am not a lawyer, I have attempted to compose a brief in defense of the unborn. If lawyers notice in its details my lack of expertise, I ask them to be kind enough to correct and perfect what I have tried to do.

After the manuscript of this book was completed, the Supreme Court of the State of California decided (September 5, 1969) that the pre-1967 California statute forbidding abortion was unconstitutional. The decision of the court in the case of *The People v. Belous* rests on arguments all of which I believe I have answered sufficiently in chapter seven. At the same time, I do not think the court appreciated how strong a case can be made for the right of the unborn to life—and it is for this right that chapter seven is a brief.

As this book goes to press (November 1969) Judge Gerhard A. Gesell of the U.S. District Court for the District of Columbia has ruled that the anti-abortion statute of the District is unconstitutional insofar as it applies to physicians. This ruling probably will be appealed and the U.S. Supreme Court may rule on the matter in the near future. One can only hope that members of that Court, aware of their responsibility to protect the weakest, will study the issues to the fullest. There could be no excuse for a hasty decision in a

matter which involves such profound issues, for if the case I have developed in chapter seven is correct, a decision on this case could determine what the United States shall in the future mean by individual rights and the equal protection of the law in the entire matter of the right to life.

At the same time, opponents of the legalization of abortion should not accept any court decision, no matter how authoritative, as final. In some ways present anti-abortion laws are no more satisfactory to those who oppose abortion than to those who favor it when these laws are viewed in the light of constitutional guarantees. The vast majority of American citizens, by the evidence of all polls so far, does not accept the principle of abortion on request. Consequently, *some* laws restricting abortion may be expected to remain or to be newly enacted to replace any statutes declared unconstitutional.

Although there is at present a strong movement to remove legal protection from the right to life of the unborn, public experience with relaxed laws may engender a healthy reaction, provided that those who recognize what is at stake do not accept as defeat whatever setbacks they may suffer. The fearful violence which increasingly permeates domestic politics and which constantly threatens in international politics may help to drive home the lesson that excessive legal permissiveness and utilitarian disregard of the *unalienable* character of each individual's right to life will, if unchecked, bring to a tragic end the magnificent experiment initiated by those who created the United States Constitution.

Because I wish this book to serve as a resource book and as a guide to the literature of the subject, I have included a great many references. Much of the material will not be found in smaller libraries, but libraries will help a reader who wishes to obtain an item from a larger library, such as the Library of Congress or the National Library of Medicine.

The organization of the material presented serious difficulties. Often the same concept, document, event, or technical point comes up at several different points in the presentation. A similar difficulty would have arisen had a different outline been used. In a situation of this sort, a system of cross references would be useful. However, the book also requires a rather extensive index. I have therefore chosen to limit internal cross references to a minimum. A reader interested in any particular point will do well to check the index in order to locate other passages at which he will find it mentioned.

In references, factual statements, and the interpretation of positions I have tried to be accurate. But in a work of this scope errors are inevitable. I hope none is serious and regret any that will cause readers difficulty.

The literature on the subject of this book and related topics is so vast that only a selection of it could be dealt with. I have tried to use the clearest and strongest presentations of positions I criticize, and have generally limited references to works available in English.

Abortion is such a fast-moving subject that no treatise will remain up-to-date in all respects for long. This book was written between June 1967 and

September 1969, but work was not completed on all chapters simultaneously. Readers may wish to know at about what date work was substantially completed on the various chapters.

Composition of chapters one, two, and three was completed during the summer of 1967. These chapters are concerned with relevant biological facts and with the present abortion problem as it appears from the sociological and medical points of view. Since I am mainly concerned with the issues currently debated in the English-speaking world, I have included only limited data from non-English-speaking countries. Thus there is no unified survey of abortion problems and practices in foreign countries, but reference is made to them here and there to provide necessary background, to suggest possibilities, and to indicate what the consequences of various arrangements might be.

Chapters four and five were begun in 1968 and completed early in 1969. For this reason, revised statutes adopted after the summer of 1968 are not included in the survey of recent American legislation in chapter five. These two chapters are historical in method.

Chapter four tries to put the received moral evaluation of abortion into the perspective of the integral religious tradition from which it came. Although I do not want to minimize theological differences, I think the continuity of the tradition which is not only Catholic, or Christian, or Judeo-Christian, but Indo-European is impressive. No special idea of the soul, or of the necessity of baptism, or of creation is as central as the common notion of man, sharing in a transcendent dignity by relation to a divine source.

Chapter five tries to throw light on the various public policies that are proposed for meeting the abortion problem by tracing the alternatives to their historical origins and by analyzing the legal implementation of each policy. Also, I attempt to make clear where the present trend is leading. One of the most important considerations in the present situation is that most Americans do *not* believe abortion should be completely legalized. Yet current proposals certainly are heading toward that outcome.

Chapters six and seven were drafted in the spring and summer of 1969. In each of them I try to deal philosophically with an aspect of the decision that must be made on abortion. One aspect is that of moral judgment, dealt with in chapter six. The other is that of sound public policy, dealt with in chapter seven.

Regardless of what the laws say, individuals must form a sound judgment for themselves about the human meaning of abortion. Should one undergo, perform, or participate in such an action? If the law said nothing about abortion, these questions would still require answers. I hope the essay of chapter six will be of help.

The problem of what a proper public policy should be is distinct from the moral problem, but it cannot be separated from it. One of the more useful contributions of my study, even for those who do not agree with my conclusions, may be that the question of whether the law should *regard* the unborn

as legal persons is clearly distinguished from the question whether they *are* persons, and the latter question (treated in chapter six) is clearly distinguished from the biological facts (described in chapter one) about the unborn, living, human individual.

Some Clarifications of Key Words

"Abortion" sometimes refers to the *unsought and spontaneous* untimely ending of a pregnancy. In this book, as in ordinary English, the word is usually used to refer to *intentional interference* with developing life. The latter is called "induced abortion" in opposition to "spontaneous abortion." We will come back to this distinction.

One way to approach an understanding of *induced* abortion is to consider it as a method of birth control. Birth control involves one of three things:

> (1) The avoidance or regulation of conception by not engaging in sexual intercourse when conception is possible or probable. "Rhythm" usually refers to one method—counting days on a calendar—for determining whether conception is probable. This method is less effective than the interpretation of various symptoms that may show conception to be impossible. Of course, the most effective way to avoid conception is to abstain from intercourse altogether.
>
> (2) The prevention or attempted prevention of conception by persons who nevertheless engage in sexual intercourse. "Contraception" properly refers to any procedure that prevents conception. "Birth control" is popularly restricted to serve as a synonym for "contraception." The use of a condom ("rubber") by the man or of a diaphragm and jelly by the woman are examples of contraception. *Coitus interruptus* ("withdrawal") can be viewed either as the avoidance or as the prevention of conception, since intercourse is performed but not fully. The IUD and the "pill" are generally regarded as contraceptives; we shall see in the last section of chapter three that there is reason to qualify this classification, and to regard these as partly (or possibly) belonging with—
>
> (3) The interruption or attempted interruption of pregnancy after conception, in order to prevent the normal development and birth that would otherwise occur. This is referred to as "induced abortion."

In the preceding distinctions we have used the words "conception" and "pregnancy."

"Conception" is used here and throughout this book—unless the context clearly indicates otherwise—as a synonym for "fertilization." Conception or fertilization is not a momentary event (see chapter one) but a process lasting a few hours. When a sperm and ovum are in close proximity and begin to affect one another, this process begins. It clearly ends when the completion of the new cell is indicated by the beginning of its first division. Conception marks the beginning of each human individual. As *Life* magazine stated in an article illustrated with photographs of embryos at each stage of development:

> The birth of a human life really occurs at the moment the mother's egg cell is fertilized by one of the father's sperm cells.[1]

A standard medical text in genetics explains the origin of the individual in more technical language:

> A human being originates in the union of two *gametes*, the ovum and the spermatozoon. These cells contain all that the new individual inherits organically from his or her parents. The hereditary potentialities present in the fertilized ovum are unfolded, as cell divisions succeed each other, in an environment first prenatal and then postnatal, free to vary at all stages within narrow or wide limits. The child, and finally the adult, is what he is at any time during his existence because of the hereditary constitution which he originally received, and the nature of the environment in which he has existed up to that time.[2]

Chapter one will deal with conception and prenatal development in some detail.

"Pregnancy" is the condition of a woman in whom conception has occurred, from conception until delivery. The word "pregnancy" also sometimes refers to the process of development the unborn individual undergoes. For medical purposes, the elapsed length of pregnancy and the age of the unborn are often calculated from the first day of the last menstrual period *preceding* conception. This is merely a convenient device for keeping accurate medical records, since the precise date of conception is usually unknown. The pregnant woman, on the other hand, is likely to calculate the beginning of her pregnancy from the last day on which menstruation was expected to begin if she had not become pregnant. Thus the calculations of the physician and his patient often disagree by about a month.

"Pregnant with child" and "with child" are often found in legal contexts, and usually they should be taken to mean the condition of pregnancy that begins with conception. But this is *not* the meaning of "pregnant with *quick* child." This expression also is encountered in legal contexts. "Quick" is an old English word meaning *living*—the opposite of dead. A woman once was thought to have a *living* child only some months *after* conception, when she first felt the child move within her. The first perceived movement was called "quickening"—i.e., coming alive. A woman pregnant with a *quick* child has perceived quickening; she is at least three or four months along in her pregnancy.

A number of words are used to refer to the unborn individual at various stages of its development.

> (1) "Ovum" strictly speaking should refer only to the unfertilized egg, but is often used to refer to the fertilized ovum and the developing individual as long as it appears superficially similar to an ovum.
>
> (2) "Zygote" is the new individual formed by union of sperm and ovum when it is a single new cell. Division of cells begins and gives rise to the . . .
>
> (3) "Morula" (from Latin "mulberry") a cluster of cells, sometimes mistakenly thought to be altogether similar to one another, because they are grouped in a rather symmetrical ball. As the ball develops and becomes hollow, a few days after conception, it is a . . .

(4) "Blastula" (from Greek "tiny bud") which continues to develop and, between a week and a week-and-one-half after conception implants or embeds itself into the wall of the uterus.

The words "ovum," "zygote," "morula," and "blastula" are from technical bio-medical language; they are never used to refer to the developing individual throughout the whole period of pregnancy. But "embryo" and "fetus" are used less technically.

(1) "Embryo" in this book *usually* refers to the unborn individual from conception to birth. This broad meaning is in conformity with the usage in *embryology*, which studies the development of the unborn at all stages. In a more restricted sense, which will be sufficiently indicated by the context, "embryo" refers to the developing individual from conception (still more narrowly, from implantation) until the end of the sixth or eighth week of development. When "embryo" is used in a restricted sense, the developing individual is said to become a . . .

(2) "Fetus" (also spelled *foetus*) at six or eight weeks of development, and is referred to as such until birth (or, more narrowly, until about seven months of development). But in this book "fetus" *usually* should be taken to refer to the unborn individual from conception until birth. Therefore, "embryo" and "fetus" are usually used as synonyms, unless the context indicates that one or both should be taken in a narrow sense.

(3) "Unborn child" also will be used, unless the context indicates otherwise, to refer to the developing individual from conception until birth. This broad usage is in accord with much legal usage—e.g., in reference to the "infant *en ventre sa mere*," the infant in its mother's womb. Also, many sex education courses and books for pregnant women refer to the developing individual at all stages as the "baby." More narrowly, "unborn child" may be limited to refer to the developing individual only during the last few months of pregnancy after viability. "Viability" is discussed in the last section of chapter one.

Abortion is divided into *spontaneous* and *induced.*

(1) Spontaneous abortion often is popularly referred to as "miscarriage," if it occurs before the child might have been expected to live. In some medical uses, "miscarriage" refers to a spontaneous delivery between 12–14 weeks of pregnancy and 20–26 weeks; earlier, the same event is called "abortion" and later "premature birth" if the child is born alive or "still birth" if it is born dead.

In a legal context, "miscarriage" usually refers to abortion *at any stage* of pregnancy. Physicians use the expressions "missed abortion" and "threatened abortion" to refer to medical problems that are not relevant to induced abortion.

(2) *Induced abortion*, unless the context clearly indicates otherwise, is what is meant by "abortion" in this book. An induced abortion is any procedure (or the resulting event or process) by which the normal course of the development of the child before birth is purposely interfered with; the procedure is done with the intention of preventing the continuation of normal development and subsequent normal birth. This definition is broad enough to include both the causing of untimely birth by drugs or other methods and surgical attacks on the unborn at any stage of their development. However, the use of medicine or surgery which

in fact interferes with the normal course of development for another purpose (e.g., the removal of a cancerous uterus) is not included in the definition of "induced abortion" given here. In Roman Catholic theology, "indirect abortion" refers to certain treatments and procedures excluded by my definition.

A classical definition of induced abortion is *the expulsion of a non-viable fetus.* The definition given here is wider in two respects. First, I include procedures which kill the child within the mother. Second, if the purpose of the procedure is detrimental to the child, I include the killing of *viable* children.

In some medical usage, especially in the nineteenth century, *abortion* referred even to the induction of labor for the child's benefit. This peculiarly broad use of the word "abortion" explains why some state laws specifically permit abortion to "protect the life of the mother or of the child with whom she is pregnant." This language has been erroneously taken by proponents of revised abortion laws as a sign of confusion by the legislators who drafted the old laws. Actually, the terminology is odd only because the medical profession now uses the word "abortion" more narrowly.

Induced abortion is divided according to legality.

(1) "Illegal abortion" refers to induced abortion contrary to the criminal law of the place where the procedure is done. Thus, "illegal abortion" and "criminal abortion" are used as synonyms. In some jurisdictions abortion is technically classified as a felony, in others as a misdemeanor. "Criminal" refers to the illegal abortion however it is classified technically, since this is common usage.

(2) "Legal abortion" refers to all induced abortions that are not illegal, as defined here. Sometimes "legal abortion" and "hospital abortion" are used synonymously, but this usage is confusing. Abortions performed in hospitals can be illegal, but they are seldom or never punished as such. An abortion performed outside a hospital could (by most pre-1967 abortion statutes) be legal, although few are.

All legal abortions are sometimes referred to as "therapeutic." Strictly speaking, "therapeutic" refers to the protection of life and health. Therefore, only abortions done because of medical necessity should be called "therapeutic." Other abortions, if legal, would be referred to in accord with the specific *indication* (reason) for which they are done. For example, "eugenic abortion" refers to attempts to prevent the birth of children who might suffer from some defect, whether a matter of heredity (genetic) or not.

The World Health Organization has defined "health" as *a state of complete physical, mental, and social well-being.* This definition is extremely broad; according to it every legitimate business or profession is engaged in therapeutic activity, since all contribute to social well-being. The breadth of W.H.O.'s definition is important to notice, however, for it may be used to interpret any new abortion legislation.

Because abortion is in a complex situation of relationships, the word "abortion" can refer either to the act, the event (or process), or the result. A person convicted of abortion is convicted of an *act;* the *event* or *process* is what

is sought by a woman who wants an abortion; the aborted individual is sometimes called "an abortion," or "an abortus."

The one who performs an abortion (especially if illegal) is referred to as an "abortionist"; in some contexts in this book I refer without prejudice regarding legality to the agent as an abortionist.

"Abortifacient" refers to a drug or instrument used (or especially suited) to produce abortion. The act which causes the process of abortion may be called "abortifacient" or "abortional."

Either the pregnant woman or the unborn baby may be said to "be aborted." "Pregnancy" refers to both mother and child; abortion interferes with pregnancy from both viewpoints.

According to the definition given here, which I generally adhere to, abortion is done only if the woman is pregnant and the procedure purposely interferes. In many statutes, however, "abortion" refers to a crime that might more accurately be called "attempted abortion," since the definition of the crime does not require that the abortional act be effective. Frequently, in fact, the statutes do not require that the woman be pregnant, providing that an act is done suited to produce abortion if she were pregnant and/or she was believed to be pregnant by the abortionist. Uses of the word "abortion" to mean *attempted abortion* are fairly common in the legal section of the book and the reader will notice which is meant from the context.

CHAPTER I

HOW LIFE BEGINS[1]

Life from Life[2]

With the aid of a microscope, we can see that a human being, like most living things, is made up of cells—billions of tiny units of different shapes that build up every part of the body. These cells are not inert building blocks, however, for each is like a little organism in itself, undergoing constant change, but maintaining its complex inner structure, for the cell can absorb and secrete various substances while keeping its own identity. Most cells can grow and reproduce.

Within each cell is a compartment, the nucleus, that contains a number of threadlike or rodlike bodies called *chromosomes.* The set of chromosomes in almost all the cells of individuals of the same species—for instance, in all human individuals—is quite similar in number, size, and structure. Normally there is a set of forty-six chromosomes in each human cell, one of which differs between men and women in size and shape.[3]

The chromosomes contain the genes, complex chemical structures that to a great extent determine the occurrence of inheritable characteristics, both those common to a species and those in which individuals differ. A gene that determines a certain characteristic is present not only in the portion of the body concerned or at the time when the effect occurs, but is generally thought to be in every cell of the body throughout life. Other factors, such as the proper stage of development and the right environment, are necessary for the gene to make its potential effective.[4]

The presence of a similar set of genes in every cell of the body of an individual throughout his life is explained by the way in which cells ordinarily divide. The set of chromosomes in an existing cell is not simply parceled out to the two new cells that result from division. If that were the case, each division would reduce the number of genes in the daughter cells. Rather, the chromosomes form replicas of themselves, so that they come to consist in two distinct strands. Then the pairs of strands physically separate, moving like the players of opposing teams to opposite sides of the dividing cell. The cell pinches

in two between the opposing sides, and new nuclei form up around the separated sets of chromosomes. Division in this manner is called *mitosis.*

Another method of division, called *meiosis,* occurs in the formation of the sex cells. During the early stages of the development of each individual, certain cells are set aside and eventually cells derived from these by the usual process of mitosis locate in the testicles, if the individual is a boy, or in the ovaries, if a girl.[5] During the fertile years, some of these cells undergo the special process of division, meiosis. The forty-six chromosomes are reduced by this process to twenty-three, so that a sperm cell or an ovum is peculiar in that it carries only half the chromosomes present in the nucleus of most other cells of the individual.

Of the forty-six chromosomes in most of a human being's cells, half derive from his father's sperm cell and the other half from his mother's ovum. Although we know that the genes received from the father and those received from the mother are somewhat different, when the full set of forty-six chromosomes is examined, the chromosomes appear clearly as two sets of twenty-three. When the sex cell is formed through meiosis, however, it does not simply receive one or the other of these sets of twenty-three chromosomes. In an early stage of meiosis the forty-six chromosomes join in their twenty-three pairs and exchange some of their corresponding genes. Thus new chromosomes are formed that are genetically unlike those in any other cell of the individual's body. The chromosomes in any one sex cell are even unlike those in other cells undergoing meiosis at the same time, since there are so many possibilities of gene-exchange that the results are unique in each instance. In subsequent stages of the process of meiosis, the division of the forty-six chromosomes occurs so that a sex cell is developed having only the half-set consisting of twenty-three chromosomes. Each sperm and ovum, even of the same individual, is genetically different, then, for each one contains half of the individual's genetic inheritance, but in each case a diverse half—like so many half-decks of a very large deck of cards, each half-deck containing different cards, depending upon the shuffle.[6]

The sperm cell, when it is fully developed, is clearly alive as is evidenced by the facts that it receives nourishment and that it swims along under its own power, somewhat like a tadpole. But sperms are much smaller than tadpoles. There are millions of them in a drop of semen, which is mostly a liquid carrier, a kind of transportable pond for the sperm to live in. In contrast, a woman normally produces only one mature sex cell each menstrual period. One or the other ovary prepares a single ovum that bursts from the ovary and is pushed along a tube toward the uterus. Since it contains a good deal of nutritive material, the ovum is much larger than the sperm, and can even be seen with the naked eye. The ovum also is comparatively inert, being moved rather than swimming under its own power. Yet sperm and ovum are alike in being alive, in being genetically unique, and in containing half the genetic inheritance of the man or woman in whom they arise.

Since new human individuals develop from the union of sperm and ovum, it would be more accurate to speak of "how life is transmitted" rather than of "how life begins." The sex cells are formed from the living matter of man and woman; the sex cells are themselves alive. And so the result of their union does not really come to life, but simply comes to be a unified life—a new individual.[7] If the mature sex cells do not unite to form a new individual, they soon die. Their specialization is for reproduction; they are unable to become blood or nerve or bone or muscle or any other sort of tissue unless they join in the development of a new individual.[8]

Fertilization or Conception[9]

The words "fertilization" and "conception" can be used synonymously to refer to the process of union by which the two parental sex cells fuse to become the first cell of a new individual. The union is not instantaneous; it is a process that takes some time. Thus it is not strictly proper to speak of a "moment" of conception, unless one means to refer to the precise time when a certain stage of the continuous process is completed. Although certain stages can be distinguished, as in the transmission of life as a whole, what is most striking is the continuity of the process as one stage flows smoothly into the next.

The sperm and the ovum meet in the tube that connects the ovary with the uterus. The ovum has been readied, and is pushed along the tube toward the uterus. A sperm that reaches it is one of the few that survive the long trip from the vagina, through the uterus, and into the tube. Millions of sperms must start the trip because there are so many hurdles on the way. Many sperms go right past, seemingly not attracted to the ovum. But there are complex chemical interactions when the two cells come close together.

The ovum is not only far larger than the sperm, but is also enveloped in other cells and in a kind of coating. Passing by chemical means through the cells surrounding the ovum, the sperm reaches its outer membrane like a visitor landing on the crust of a strange planet. However, this very landing reveals that the ovum is not inert. It reacts by surrounding the sperm and helping it come in. This first stage of fertilization also involves other marked and rapid changes in the ovum itself, which makes final preparations for full unification with one of the sperms it has received, while somehow resisting unification with any other sperm that comes along.[10] The ovum is now so obviously alive, after its comparative inertness before the sperm reached it, that this first stage of fertilization is technically called *activation.*[11]

The crucial stage in conception follows. The genetic material brought by the sperm and that present in the ovum are in two packets. These move toward one another and unite, so that the full number of forty-six chromosomes is restored, twenty-three from the mother and twenty-three from the father. The resulting cell is in a full sense called a *fertilized ovum,* but it is no longer merely an ovum—that is, merely a cell derived from the mother containing half her

genetic inheritance. Thus the fertilized ovum also is called the *zygote.*[12] Already it is a new individual, for it has the typical set of chromosomes that belong to each cell of the human body. And having derived half its genetic make-up from each parent, the zygote is unlike any cell that belongs to either of them.

The zygote shows rather quickly that it is alive and that it is distinct from the mother. For it begins the ordinary process of cell division, or mitosis, even while it continues traveling down the tube to the uterus. Each cell of the new individual will include a replica of the genetic material first assembled when the contributions of ovum and sperm were united. If fertilization does not occur, the human ovum will not develop further and will not give rise to additional cells like itself. Rather it will soon die and be washed away in the menstrual flow.

If we must point to a certain moment when the new individual begins, then, it should be when the two halves—the half of the normal human genetic make-up contributed by the father and the half contributed by the mother—have completed the process of uniting with each other to form one whole. Certainly this has occurred before the first cell division, for in that division each of the two new cells receives by the usual process of mitosis a full complement of forty-six chromosomes.

Development before Implantation

The zygote normally will continue along the tube until it reaches the uterus. After a few days it becomes embedded or implanted in the lining of the uterus, which has been prepared to receive it. These early stages of development are critical and interesting. They have been studied and reported on by various authors.

The following is drawn from a report by Arthur T. Hertig, John Rock, Eleanor C. Adams, and William J. Mulligan.[13] The specimens studied were recovered from mothers who required surgery for various reasons. Four specimens regarded as normal were among the eight described.

The first contained only two cells, and was referred to as a *segmenting ovum*—a zygote had undergone a single mitosis. It was recovered from the tube, rather than from the uterus. The two cells remained within the membrane that surrounded the ovum; together they were not larger than the unfertilized ovum. In fact, all four of the specimens studied were about the same size, although the fourth lacked the membrane. In the earliest stages there is considerable development without much change in overall size.

The two-celled specimen was estimated to be about thirty-six hours old, counting from conception. Significantly, these authors chose conception rather than some other point—e.g., ovulation—as the proper time from which to measure the age of these specimens. In this way they tacitly affirmed that the individuals under examination lived a life that began with conception.

The cells of the two-celled individual were not exactly alike. One was smaller and more oval in shape, but had a larger nucleus. Thus already there was the beginning of differentiation, the process that step by step would lead to all the varied sizes and shapes of cells in the many diverse organs and tissues of the mature individual. The reasons for differentiation are not very well understood, and are under intense study by biologists.[14]

The second specimen had twelve cells, and was referred to as a *uterine morula*—because it was found in a uterus and had the characteristic appearance of a little berry. The authors described it as looking, within its membrane, like a small cellophane bag tightly packed with marbles. This individual was estimated to be seventy-two hours old.

The twelve cells of this specimen showed even greater differentiation. One was large and centrally located; the other eleven were smaller. Thus two types of cells were recognized. The larger cell was considered embryonic in potential—it probably was on the way toward forming the body proper of the embryo. The other eleven cells were considered trophoblastic in potential—they were on the way toward forming the membranes and the organ by which the embryo is attached to the mother during its development.

The very fact that there were twelve cells in this individual in itself showed that development and differentiation had begun, for if the cells remained alike during early divisions they would multiply in regular progression: two, four, eight, sixteen, and so forth.

The third specimen consisted of fifty-eight cells, and was referred to as a *uterine blastula*—"blast" means *formative* and "ula" means *little,* a tiny embryo found in the uterus. This individual was estimated to be ninety-six hours, or just four days, old.

The fifty-eight cells had already begun to arrange themselves in a characteristic shape, a sphere with an inner cavity. Of these cells, fifty-three were described as of trophoblastic type; five as of embryonic or formative type.

We might ask why there were so many more of the type of cells that form accessory structures than of those that form the body proper of the developing individual. Apparently, it is a question of first things first. The most essential organ of the individual until birth is that by which it is vitally linked to the mother; therefore, a good part of the resources reserved in the fertilized ovum are devoted to beginning the development of this organ.

The fourth specimen studied consisted of 107 cells. Also referred to as a *uterine blastula,* this individual was judged to be just four and one-half days old. The membrane that surrounded the egg before fertilization had finally been lost, and so the specimen had a pebbly appearance.

Now there were eight cells of the embryonic or formative type, and they were grouped together as a button-like mass, one completely surrounded by the others, two with surfaces on the inside of the blastula, and five partly exposed to the outside. The smaller, trophoblastic cells, were grouped into two types, thirty about the polar region and sixty-nine forming the wall of the

blastula. Four of the polar cells were perhaps already beginning to differentiate toward the formation of one of the three layers of tissue that would have formed the embryo a few days later.

Implantation

The lining of the uterus is prepared during each cycle of a fertile woman to receive and nourish the tiny embryo. Indeed, the mucus secretions of the uterus provide some nourishment and oxygen even before implantation occurs. After its membrane is shed, the blastula sticks to the lining of the uterus. Cells of the lining are broken down to make an opening, and the embryo sinks completely beneath the surface. Maternal blood and tissue now provide nourishment and protection. This process of implantation occurs before the first menstrual period is missed—it has begun by seven and one-half days after ovulation and the embryo is implanted completely within about four more days.[15] Implantation requires a certain co-ordination of the cells lining the uterus and the trophoblast cells of the embryo, which have differentiated in the pre-implantation period.

Why does the menstrual period not come? If it did, the lining of the uterus, including the embryo implanted in it, would be shed. But the process of implantation itself has an immediate effect on the uterine lining, and apparently there is a further indirect effect which keeps the gland (that was formed at the ovary from which the ovum came) secreting its hormone.[16] This hormone prevents the changes in the uterus' lining that would otherwise lead to the menstrual flow. If implantation has not occurred, the gland degenerates, its secretion ceases, and menstruation follows.[17]

Some proponents of abortion have argued in popular discussions that the embryo is a parasite of the maternal organism. The argument is not scientifically sound. A true parasite differs in species from the host upon which it lives. Thus it might be more accurate to say that a parasite may imitate an embryo rather than the reverse, since in nature the relation of an embryo to its mother is a closer one than that of a parasite to its host. In some ways an embryo implanted in the lining of the uterus and a parasite are similar. Though not a parasite in the sense of being a harmful invader of the maternal organism, the embryo does not have a system of organs at the beginning, and so it must make indirect use of its mother's organs. Nevertheless, it is incorrect to call the embryo a parasite, for although the embryo is a distinct individual it is the same in species as its mother.

Another biologically fallacious analogy is contained in the popular argument that the unborn child is no more a person than an acorn is an oak tree. An acorn—like most other seeds—represents an inactive phase in the life-cycle of the plant from which it derives. The human embryo—like most other animals—does not go through such an inactive phase. The word "blastula" refers to the embryo before implantation, and this word comes from a Greek

word meaning "tiny sprout." If one must compare the embryo to a particular stage of plant life, then, the tiny seedling would be a more apt analogue than the acorn. But as soon as an acorn has begun to sprout, it is a *seedling oak.* A seedling oak is not the mighty tree it may one day become, but neither is it a mere dormant seed.

Early Development of the Embryo[18]

It may be of some importance to know what development is shown by the embryo in the time up to thirteen to fifteen days after fertilization. This would mark about the time when the next menstrual period following conception would be expected, and thus it is the earliest date at which a purposeful attempt to induce the abortion of an indicated pregnancy could be made. Some of the drugs now being developed might also be effective in terminating pregnancy at about this time.

The first differentiation of the cells that make up the inner-cell mass occurs when some of the embryonic or formative cells on the inside of the hollow blastula (or blastocyst) segregate and begin to spread over the whole inner surface. As the other embryonic cells multiply they change their shape and spread across one rather flattened surface of the blastocyst. Thus a disk is formed, made up of two layers of embryonic tissue, one of which extends on around the walls of the chamber. From this disk the entire body will develop.

At the same time, the accessory structures are developing even more quickly as the trophoblast differentiates. Very soon the chorionic sac begins to develop—this is the outer membrane of the "bag of waters" in which the baby will be enclosed as development proceeds. The amniotic cavity, which will eventually extend so that its membrane will be the inner surface of the "bag of waters," also begins developing. The body stalk, which will be the umbilical cord, is differentiated. Most important, the trophoblast differentiates and proliferates into a primitive placenta, its outer surface in direct contact with the maternal blood, the surface extended by many *villi* (finger-like projections), which are like roots interlocking with the tissue of the lining of the uterus.

Although the degree of development and differentiation to this stage is not great compared with the whole process from conception until birth, it is nevertheless considerable. The embryo is not merely a mass of undifferentiated cells; it is not simply a cyst in the mother's tissues. An orderly and regular process of development has begun; the stages are so well marked that embryologists can date a specimen within a couple of days by observing its stage of development.[19] Moreover, though not large—less than one-tenth inch including accessory structures at the end of two weeks[20]—the developing embryo has its own structure, unlike anything belonging to maternal tissues.

Indeed, maternal tissues meet and cooperate with the developing embryo, particularly by way of the placenta.[21] The umbilical cord connects the baby to the placenta until the cord is tied and cut. The placenta, which begins developing shortly after implantation, is delivered in the afterbirth. Then it is six to eight inches in diameter, over an inch thick, and weighs about one pound. It consists of tissue developed from the blastula which interlocks with maternal tissue in the lining of the uterus. Normally the bloodstreams of the fetus and of the mother circulate to the point where placenta and uterus meet, but do not come into direct contact. Rather membranes keep the two bloodstreams apart, and nourishment, oxygen, wastes, and other vital factors are exchanged through these membranes that divide the mother and child while they interact, much as a counter divides a clerk and customers while they do business.

Because the afterbirth is no longer of value, we think of it as mere waste to be disposed of, and distinguish sharply between the infant and these accessory structures. Actually this is a prejudice of our point of view. The mother's uterus is an integral part of herself, although as an organ of reproduction it is only useful when she is pregnant. Correspondingly, the infant's placenta—as well as the umbilical cord and the other membranes—is part of himself during the time of his development. The placenta is a true organ of the unborn infant. Until birth it serves more or less completely the functions later assumed by lungs, liver, digestive system, kidneys, and endocrine glands.

While we are quite right in distinguishing between the embryo proper and the accessory structures in view of what we know to be the goal of development—the mature individual—we would be mistaken to distinguish between the life of the developing individual and the accessory structures. A fetus would be as odd without these organs as we would be without lungs, kidneys, and stomach. Hence we should not imagine that in the first weeks little development occurs merely because the development of the tissues forming the accessory structures is much more rapid than that of the embryo proper, which only reaches the stage of being a small, two-layered disk.

The Embryo during the Next Four Weeks

The next four weeks, during which the embryo is in its third to sixth weeks of development, correspond approximately to the time between the expected beginning of the first missed menstruation and the expected beginning of the next one. This is a critical period for the developing embryo.

A great deal of differentiation and development occurs in the embryo proper during this time. What happens is not merely the multiplication and differentiation of cells, but also their movement from one place to another, the folding of surfaces, the forming or opening and closing of various passageways. The entire process occurs in a regular and coordinated manner, like the performance of a ballet by a well-trained troupe.

By the end of the third week of development, the entire structure is perhaps around one-half inch in its largest dimension, while the embryo itself is only about one-twentieth of an inch.[22] However a great deal happens in this week.

The disk, which has been only two cells thick, begins to bulge at one side—the side where the primitive body stalk is attached. Across the underside of the disk, dividing it in half to the center like a radius, a streak appears, and these differentiated cells move between the two existing layers, making almost the whole disk three-layered. At the same time the disk becomes elongated—oval. Thus the embryo becomes definitely right and left sided. At the end of the streak is an opening, beyond which extends a ridge within the layers. The disk becomes rather pear-shaped, the small end at the origin of the streak. The larger end will become the head of the embryo and the small end its tail.

Of course, there is no head in a proper sense at the end of the third week of development. But the tissues that will later form the nervous system are beginning to differentiate. The head end begins to fold over, bowing forward, and along the center of the back a groove opens and begins to make two folds. The area in which the heart will develop is marked off, and vessels are beginning to form in the embryo.

In the fourth week of development the embryo grows to about one-sixth to one-fourth inch.[23] The embryo is now C-shaped, the head and tail folded over, and the back rounded in a slouch. The groove along the back becomes a tube which soon closes at both ends, and the nervous system begins to develop within it. The brain is on its way toward formation by the end of this week, the lower and less specialized layers developing first. However, even at this early stage the tissues that will become the eyes differentiate and begin to develop.

Most remarkable is the development of the circulatory system. The heart takes shape from a simple tube, veins and arteries are formed, and blood cells—the embryo's blood—are manufactured. Before the end of the week the heart takes its first beat and circulation begins. As the blood circulates it begins its function of removing wastes from and bringing nourishment and oxygen to all parts of the embryo proper, which is becoming more and more insulated from the maternal tissues by the developing membranes.

Other rudiments of organs of the digestive system, the respiratory system, the urino-genital system also begin developing, but more slowly. The process of development is always orderly, and the head tends to develop more quickly than the rest of the body. At this stage, of course, the embryo does not look like a mature human being. The segments that have developed along the back, some of which will later become the spinal column, and the arches on the head make the four-week-old individual look to us rather like a fish. In fact, to the unpracticed eye vertebrate embryos of this age would not differ much. Nevertheless, the difference is there, established in the genes.[24]

Sometimes it is said that "ontogeny recapitulates phylogeny"—that is, that the development of each individual follows out the steps by which the species evolved from lower forms. But this is not really true; the actual situation is much more complicated than is suggested by this outdated slogan, which was formulated by a nineteenth-century German biologist, Haeckel. Individuals of diverse species are more similar during the early stages of development than they will be later on, just as babies look more alike than adults do. The arches which become gills in fish become other structures (such as tonsils) in mammals. While at a certain stage of development of fish and mammals these structures appear similar, at that stage they are not yet gills even in the fish. The segmented ridge along the embryo's back is not a fin—in *both* fish *and* mammals it is incipient backbone. Thus it is altogether misleading to talk about the "fish-stage" of the human embryo, since the individual is definitely human from the beginning and its path of development at every stage is peculiar to its species. Moreover, by eight weeks a human embryo is obviously such even to the inexpert eye, and an expert can tell at a glance whether an embryo is human or not much earlier.[25]

The next two weeks, the fifth and sixth of the life of the embryo, show further rapid growth and differentiation. The increase in size is between four and five times; by the end of this period the embryo approaches an inch. Around the beginning of the period, limb buds appear; by the end, hands are present and fingers are beginning to appear. The face is beginning to take shape. Bones are beginning to grow; the long bones and the base of the skull begin hardening by the end of the sixth week.

Within the head the brain rapidly develops as its tissues undergo further growth and differentiation. The hemispheres of the brain take shape, first as a bulge at the upper end of the growing nervous system, but they rapidly grow during these and the following weeks to roof over the rest of the brain. At these early stages, of course, the brain-roof is not fissured, and the functions of the brain are not immediately established.[26] During this period the eyes continue their development, which will take a long time to complete, and the nasal passages open up. The ears begin to develop. Still the nerves that will connect these with the brain are only beginning to grow.

The heart and the circulatory system, already functioning, continue to develop while they work. To keep pace with the changing stages of the development of the organism it serves, the heart undergoes many transformations, the last of which do not occur until birth.

Although breathing is still months in the future, the air passages and lungs form very rapidly. By the end of six weeks the bronchial tubes have branched as many as eight times. Similarly the digestive system shows marked development. The mouth begins taking shape and the tube to the stomach develops. The stomach and duodenum develop rapidly to their permanent shape and relative position. The intestines are also developing although the lower tract

is not yet open. Liver and gallbladder are rapidly developing—in fact, at one point the embryo is ten percent liver.

The urinogenital system also takes shape. The sex of the individual was written into his makeup at conception, and by the end of the sixth week male can be distinguished from female embryos by their sex glands.

Stages in Later Development

At eight weeks, the developing individual is called a *fetus.* The dividing line between embryo and fetus is rather arbitrary—the word "fetus" is simply Latin for *offspring.* But there is some reason for making a distinction, since during the sixth and seventh weeks the embryo takes a more and more obviously human appearance, while all the major parts and organs are laid down and the process until birth is one of refinement and growth. For this reason, treatises on human embryology follow general development rather carefully in the early stages, but summarize the general development after six to eight weeks, following the further development of various parts and organ systems in distinct sections.

Sometimes the completion of the twelfth week of pregnancy—counting from the last menstrual period—has been suggested as an appropriate cutoff point for abortion because after this time the necessary operative procedure may entail increased danger to the mother. At this point the fetus has completed about ten weeks of development. It is more than one and one-half inches from crown to rump; it has an erect head, nicely formed limbs, is well along in the process of bone formation, has the outlines of nails on fingers and toes. The spinal cord is in its definitive form. External sexual organs are becoming definitely male or female and all the internal organs are undergoing further refinement. For example, at this time the kidneys are able to secrete and the anal canal is formed.[27]

The stages of development of the nervous system also may be of special interest. Considering the way in which development occurs, it is extremely difficult to say when anything begins, since everything can be traced back to less and less differentiated primordia. Thus the earliest stages in the differentiated development of the nervous system occur soon after implantation when the folds begin to appear that will later form the tube of brain and spinal column. A few weeks later nerve cells are forming, and the brain has undergone considerable development by the end of six weeks. But the onset of function is another matter, and one extremely difficult to determine.[28]

For example, it has sometimes been argued that there is no effective functioning of the nervous system until late in pregnancy. Even when the nerve cells themselves develop, it is argued, the myelin sheath which surrounds them is not immediately present, and full functioning is thought to be possible only with completion of this process. The fact is, however, that some nerves never are myelinated and the myelination process does not occur simultaneously to

all the nerves that will be myelinated. Myelination begins in the fourth month of development, but is not completed until a child is two or three years old.[29]

One's nerve cells are practically all present at birth, because although nerve cells grow in later life, they usually do not multiply. Yet for most parts of the brain that will be myelinated, the process has not proceeded through its most intense phases even at birth—e.g., in the optic tract it has only begun a month or so before normal birth, goes through the intense phase during the second and third months after birth, and is not completed until the infant is ten months old.[30] Yet any observant parent knows that an infant has some use of his eyes from birth.[31]

Rather than argue theoretically about the onset of functioning of the nervous system, it may be more enlightening to consider the facts that have been discovered by experimentation. These experiments were conducted on live, human embryos received from abdominal surgery on pregnant women. Of course, one cannot say whether the abnormal situation of the embryo may have caused it to respond otherwise than it normally would have done, but certainly its nervous system gained no potential from its condition of ebbing life.

The first responses to tactual stimulation have been observed in embryos of about five and one-half weeks (counting from fertilization, or about seven and one-half weeks of "menstrual age").[32] At first there is merely a tightening of the neck when a fine hair is touched to the skin around the mouth region, but in three weeks this becomes a pulling to the opposite side, then a bending (as if to begin doubling up). In the twelfth week of development the response is more specialized; this already begins as early as seven and one-half weeks when the embryo will begin opening its mouth if its lower lip is tickled. These early responses are not uncoordinated and isolated, as is demonstrated by double stimulation. If a fetus of eight and one-half weeks is tickled around the mouth, it bends away to the opposite side; if it is tickled in the palm of its hand, the fingers partly close. But if both areas are stimulated simultaneously, only the first response occurs, as if avoidance were taking priority over grasping!

Now what does this ability to respond indicate? First of all, it indicates the presence of some sensation, since the skin surface must be sensitive if it responds to stimulation. Second, it suggests that the infant in the uterus may be active (quickening) well before the mother becomes aware of it around the sixteenth or seventeenth week. This date is in any case relative to the mother's experience and sensitivity. Movements can be detected with a stethoscope at about the fourteenth week,[33] and some pregnant women believe they feel the infant move at that time or even a week before.[34]

Still it would be misleading to say that the sensitivity demonstrated even at the embryonic stage shows that the embryo is aware of pain. Awareness is complex and admits of degree. And pain has many psychological dimensions; it is not a simple sensation. If the front of the roof brain is surgically removed,

an individual may not suffer from pain, while still being aware of the sensation, which apparently comes to consciousness in virtue of another part of the brain?[35] Moreover, the sensitivity that admits of stimulation of a reflex-response is considered by many to be distinct from even the purely sensory component of pain.

But one must not too quickly say that the fetus can feel no pain. Certainly the sense seems to be established in some parts of the body of the infant at birth, even if he is quite premature. It is by no means certain that nerve endings are altogether specialized for various modalities such as touch, heat, and pain even after development,[36] and there is all the more reason to think that there would be non-differentiation at early stages of development. So far as the argument about the myelin sheath is concerned, the fact is that not all nerve fibers that do conduct pain are myelinated even in the adult.[37] Perhaps the question whether the response of the embryo to touch is an indication of sensitivity to pain would best be answered by denying the distinction of modalities that will later develop.[38]

Whether such primitive sensations also are "felt" or not is much more a metaphysical question—the answer to which depends on one's theory of the mind-body relation—than a factual one. For if one thinks of body and mind as two quite distinct entities, it might well make sense to speak of sensations that stimulate behavior without in any sense being felt. If one thinks of the individual as more unified, however, the fact of responsiveness may be sufficient to demonstrate that the stimulus is felt, even if only in an initially undifferentiated modality from which the diverse modalities of touch and pain will become differentiated only after some time.

Parthenogenesis

To this point we have been concerned with the normal process by which a new human individual comes to be. *Normal,* of course, merely means what happens for the most part, or what proceeds toward the completion of a goal which we, viewing the process, have in mind—i.e., the developed and viable infant. Before concluding this chapter, it would be well to consider briefly a few of the many variations from the normal that may occur. Our interest will be restricted to those that might raise questions of importance for the subsequent discussion.

Parthenogenesis is the development of an embryo from an unfertilized ovum. This occurs as a normal event among certain non-mammals.[39] We may view it as a variant of sexual reproduction, wherein some asexual reproduction also may occur. Experimentally, fatherless turkeys have been bred, and it has been reported that induced parthenogenesis has occurred even in the rabbit. In the rabbit, however, development apparently does not proceed beyond very early stages unless the ovum divides peculiarly so that the normal, full comple-

ment of chromosomes is restored.[40] Of course, all the individual's genetic constitution in this case would derive from the mother.

If parthenogenetic development were to occur in a human, either naturally or artificially, it would raise two interesting questions. First, can we think of individuality as being determined altogether by genetic makeup, when such individuals would have all their genetic makeup from their mother, and yet would be distinct from her? Second, how can we sharply distinguish between the unfertilized ovum—not yet an individual—and the zygote, if the latter may arise from the former alone? Does not parthenogenesis suggest that the ovum and the fertilized ovum are really equivalent, so that the latter is no more a new individual than the former?

The first question requires two answers. If, on the one hand, the parthenogenetic individual arises from its mother making use of only half her genetic makeup, then the cells of the offspring will remain distinct from those of its mother by this fact alone.[41] On the other hand, if this peculiarity of development begins only after the ovum has undergone part of its normal development, as seems likely, the shuffling of genes will have produced peculiarities in the makeup of the offspring that altogether distinguish it from its mother.[42] Thus in any case the individual developing parthenogenetically would be genetically distinct from its mother.

The answer to the second question is that even if parthenogenesis is proved to occur in human beings, this still would not prove that every ovum is a new individual in the sense that the fertilized ovum clearly is. To begin development parthenogenetically, the ovum of a mammal must be treated in some abnormal way—e.g., cooling or heating beyond the normal range of body temperature. The fact that there are definite differences among species in susceptibility to such development also suggests that a genetic factor is involved. Thus it may well be that not every ovum even of the same species would be potentially susceptible to parthenogenetic development. But even if all could be stimulated to such development, this would by no means prove the equivalence of the zygote and the unstimulated, unfertilized ovum. It would rather demonstrate the opposite, for the stimulation leading to such extraordinary development is precisely what the human ovum normally does not undergo.

Twins

What we have to say here about twins will apply also to triplets, quintuplets, and so forth.

There are two types of twins: fraternal and identical. The former are merely multiple, simultaneous pregnancies, while the latter derive from the same sperm and ovum. At some point after conception, the developing product of conception divides so that two individuals are formed having the same genetic constitution.

This phenomenon raises two questions. First, how can the zygote be individual at the moment conception is completed if it is potentially able to develop into two individuals by dividing after that moment? Second, how can individuality be determined genetically if identical twins, admittedly distinct individuals, can share the identical genetic constitution?

To answer the first question it would be interesting to know just when the split occurs that leads to identical twins. The answer seems to be that the division does not always occur at the same stage of development. It is possibly sometimes as late as the primitive-streak stage, which does not occur until after implantation, but in other cases it may occur prior to implantation.[43] These suppositions follow from the evidence of various arrangements of the accessory structures, which are more or less completely distinct. If they are not completely distinct, it may be assumed that splitting did not occur until *after* the structures in question were formed.

But it is one thing to know when splitting occurs, and another to know when two individuals begin to be present, for duality may be established before the two individuals divide. Most identical twins have separate amnions—the inner membrane of the "bag of waters."[44] Since this membrane begins to form at or shortly after implantation, it seems likely that the duality is established before that time in almost all cases. Even if there is but one amnion, duality may be established considerably earlier, for splitting at the primitive-streak stage is most unlikely to be the result of environmental conditions, and so may arise from a peculiarity of blastula formation that brings about two foci on a conjoined embryonic disk.

Apart from this consideration, it also is important to notice that there is a genetic factor involved in identical twinning.[45] This fact strongly suggests that not every zygote is capable of developing spontaneously into identical twins. The question—How can what is potentially two individuals actually be one?—really only can be asked with regard to those zygotes that do, in fact, develop into identical twins.

If we assume that the duality which leads later to formation of twins is not already determined in the zygote, we can answer the question in the following way. Two individuals can develop from one in such a case much as two individual animals of many lower forms can develop by the division of a single, existing individual. Which one of the two new animals is to be identified with the original individual that was divided? In a case of this sort, perhaps neither. It has been suggested that we should think of identical twins as *grandchildren* of their putative parents, the individual that divided being the true offspring, and the identical twins children of that offspring by atypical reproduction.[46] By this theory a certain number of human individuals would cease to be shortly after conception. However, there is a rather substantial wastage in the first two weeks anyway, as we shall see shortly.

The second question about twins was: how can individuality be determined genetically if identical twins share the same genetic constitution?

The answer to this question requires a clarification of the concept of individuality. The notion of *individual* is that of one unified in itself and distinguished from others. But unity and distinction are rather slippery terms. If we consider a tree that both reproduces from seed and grows in clumps we may not know whether two sprouts we see coming up are two trees or only one clump. If the sprouts are from different seeds, they will be genetically different from each other. But if they are from only one seed, we will ask ourselves for some other criterion for distinguishing them—e.g., we will have several trees when the clump is well enough established so that parts of it can be transplanted to different locations. Thus there is relativity in the concept of individuality.

The zygote, whether it will become a single or a double embryo, is genetically distinct from its parents as soon as it is formed. It is unified in its own genetic character and divided from theirs, and this is an adequate criterion of its individuality in this relationship.[47] But identical twins are thought of as individuals because we discern distinct masses, each of which functions in itself as we expect a human being *at that stage of development* to function. The growth pattern is our chief key in the early period.

But we must realize that this criterion of individuality for identical twins can break down more or less seriously. The two may never separate completely, and so we have various forms of conjoined (Siamese) twins. These blend continuously into many types of double monsters, in some of which elements of what might have been one twin become abnormally incorporated in the other.[48]

In some of these cases, the twins though joined and sharing some common parts nevertheless have some quite distinct human functions. For example, conjoined twins with two heads and one stomach could be sleeping with one head while being amused with the other, and simultaneously digesting in a single stomach. Here there are two individuals for some functions and there is one individual for others. We would like to say "two" without qualifying, because we regard the functions of the head as more important than those of the stomach. If there is only one brain, we are likely to think there is one individual with some spare parts.

What these considerations show is that identical twins certainly do not lack individuality when we consider them in comparison with others even though their individuality in relation to one another may be qualified and puzzling. If anyone wishes to argue that identical twins cannot be individuals in any relation until they are distinct from each other, he shall have to hold that conjoined identical twins, especially those sharing some organs, are not human individuals at all. Though he might be happy to think this when looking at some ugly, asymmetrical double monster, he would have difficulty

holding the same view consistently when considering some pair of appealing, symmetrical conjoined twins.

Mosaics

Recent experiments with mice have demonstrated the possibility of producing just the opposite result from identical twins. Two fertilized ova in a morula stage of development have been combined to form a single individual which—placed in a mother mouse of a different strain—has developed through the blastula and later stages to normal birth. Such mice contain tissues of two genetically individuated types. Success has been obtained with paired morulae of at least sixteen cells each—this is in the pre-implantation stage and would correspond to about three days after ovulation in the human being.[49] There have been reports of no such experiments with human beings. Perhaps the same thing could be caused artificially, but it is questionable whether it occurs naturally.[50]

These experiments show that at this stage of development the cells are not differentiated in an irreversible way. However, implantation cannot occur without definition of function and the development of a specific shape—that of the blastula.

The judgment we should make about the individuality of mosaics is parallel to that we have made concerning twins. So long as the two morulae are distinct from each other they are distinct individuals, separated from their parents genetically and from one another by their position and functioning. Once combined the two cease to be as such and form one new individual. The situation is analogous to that in a grafted plant, where fusion between previously existing individuals can be obtained. The fact that this is possible by no means indicates that the two plants were not alive and individuated prior to their fusion, but rather demonstrates just the opposite.

Monsters

The question of monsters is often treated illogically, since abnormalities seem to stimulate deep anxieties and feelings of disgust in many of us. Perhaps much of the mystery would be taken out of the matter at once if we would consider that accidents and disease can strike before birth much as they do afterward. An individual can be rendered hardly human (and still permitted a few minutes to live) by a bullet blowing away half his skull and brain. Surgery for cancer can leave one without many of his normal parts and organs. In such cases we do not doubt one remains a human individual until death intervenes.

Here we do not wish to discuss the entire question of congenital abnormality. Rather we wish to treat a single question: should we consider monsters to be true, human individuals? Is everything coming out of the womb to be considered a human being?

The first thing to be said in answer to this question is that not everything that appears to be an embryonic development really is one. There are certain tumors, called *teratomas,* that include various types of tissue, jumbled together without much order. Such a tumor may, for example, contain some hair, some skin, some teeth, some muscle. The tissue may seem to form a part of a body—e.g., there may be fingers with nails growing. Many biologists and physicians going by appearance have believed these tumors to be embryos whose development had gone astray. But authoritative and recent examination of the question has led to the conclusion that these growths are simply tumors—rather disorganized but somewhat differentiating bundles of material deriving from an individual's own body. Teratomas are not malformed embryos. They do not develop from a zygote, but from stray cells which perhaps were misplaced in the course of the individual's own early development, and hence which retain a capacity for growth and differentiation somewhat similar to that of embryonic formative tissue.[51]

Another type of monster is one that has not developed properly in the head region. In one condition, called *anencephaly,* a fetus is delivered lacking the top of the head and having little brain tissue. What has happened is that for reasons unknown the neural tube failed to close, the brain could not develop properly, and the amniotic fluid destroyed what nerve cells did develop. This type of monstrosity is more or less due to inheritance, and it occurs in a fairly large number of cases, perhaps two to six per thousand live births. Very shortly after birth, the monster dies because it cannot live for long once the umbilical cord is cut.[52]

Are such monsters to be considered human individuals? Genetically they are human and individual, although the degree of abnormality makes us wonder if the specimen is a human being. One possible view, if the abnormality is determined from the beginning, is that such individuals should be considered human only in their origin. Another possible view is that such monsters should be considered in much the same way we do an individual whose head has been blown off by a gun shot. The consequence is similar. This way of viewing the matter is favored by the fact that in the anencephalic embryo there is normal development up to a certain point, but the failure of the neural tube to close leads to degenerative changes.

The double monsters that result from the imperfect separation of identical twins and the anencephalic monsters just described both illustrate an important point. Monsters are merely variations from the normal course of specifically human development. They are not beings of a different species—as if human conception could lead to the genesis of some other sort of animal. Much of the horror of monsters in earlier times probably arose from a suspicion that they resulted from copulation with sub-human animals. This explanation of the monster birth is of course absurd.

Sometimes normal development is interfered with by something coming from outside the embryo. That was the case with the thalidomide babies, in

whom sleeping pills blocked the normal development of the limbs. A drug helpful to the mother could not be handled by the developing embryo, with whose prime function of growth and differentiation it interfered. Something similar happens with the rubella (German measles) virus, which can cause cataracts, heart defects, or deafness in a certain proportion of the babies of women who have the disease in the first twelve weeks of pregnancy. The effect in a given case depends upon the particular system that is beginning to develop at the time the disease strikes, although not every system developing at that time will be damaged. Rubella does not lead to severe mental retardation, for example, except in one or two percent.[53]

Another source of abnormalities is genetic. Here something goes wrong so that there may be one too many or one too few chromosomes. An example is Down's syndrome (mongolism). Or the pattern of chromosomes may appear normal, but some of the genes may be damaged or destroyed—a situation called a "mutation." In cases of this kind, the genetic material that remains is still human, although somewhat altered from the normal complement. When such individuals can develop in a fairly normal way to birth, and can exercise human capabilities within certain limits afterwards—as is true of those with Down's syndrome—there can be no doubt that conception has initiated a human life, although an abnormal one.[54]

Genetic abnormalities may be viewed as experiments that nature is making. In a given environment, an individual could be more or less damaged by such an experiment, but could conceivably be helped. However, most experiments turn out badly. The important thing is that "normal" only means a range of variation that leaves an individual well-equipped to deal with his particular environment. For this reason there are all sorts and degrees of abnormality, and not every abnormality means that an individual is a monster.

We reach the margin of human specificity, however, when we consider genetic anomalies that may arise from accidents in the formation of the sex cells themselves or in fertilization. Sometimes, although fertilization occurs, there are three or more whole sets of chromosomes, instead of the normal two sets. This may result from fertilization of an ovum by two sperm, or by some abnormal development in the forming of either ovum or sperm.[55] In cases of this sort, the individual never survives until birth—the outcome, as in many other genetic abnormalities, is spontaneous abortion.[56]

The efficiency of nature in preventing such anomalies from developing makes discussion of them rather academic. Perhaps even greater and more serious anomalies occur, and they may in part account for non-implantation or failure of development before the third week.[57] In these cases in which the specific pattern of human genetic structure is so transformed that embryonic development cannot occur, we might reasonably hesitate to refer to the life of the abnormal conceptus as an "individual human life." Still we can call such life "human" in the sense that it originates as a deviation from normal human development.

The consideration of monsters therefore can bring us to the conclusion that not everything coming from the womb should be considered a human being. The specimen may not result from conception, and then it would be a tumor, not a deformed embryo. It may be a human being only in the sense that someone dying of a wound that has destroyed most of his brain remains human until he dies. It may be human in its conception, but incapable of developing beyond a few hours, a few days, or a few weeks. In such cases, especially if the specifically human genetic pattern is greatly transformed, we may not consider the conceptus a human individual. Finally, various lesser abnormalities occur, compatible with at least some human development. In these cases we are undoubtedly dealing with damaged human individuals.

This discussion suggests that there is naturally a considerable loss of life before birth. Our final task in this chapter will be to investigate its extent.

Pregnancy Losses

The actual extent of loss of human life, apart from induced abortion, in the whole period between conception and viable birth is extremely difficult to determine, and available studies leave much to be desired. One study investigated losses in New York City in 1960 and arrived at the conclusion that the total loss would be about 295 per thousand, or around 30 percent.[58] However, in this study 185 of the losses were extrapolated to the period 0–7 weeks on the basis of 110 losses for which there was evidence in the remaining period of pregnancy.

Another study, conducted on a large scale and on a fairly careful basis, produced evidence of 142 deaths per thousand conceptions.[59] The authors of this report speculated that the death rate in the early weeks actually is higher, since in some cases women must become pregnant and expel the products of conception without knowing it.[60] Nevertheless, they did not extrapolate to the early period, and if they had done so, the result would be higher than 295 per thousand, though not in the proportion 110:142, since this study included some early losses in the 0–7 weeks period.

A different way to attack the problem is by deducing the probable loss in human beings from what is known of other mammals. This is the basis of the often repeated statement: "One-third to one-half of all fertilized ova perish before birth." It was published in 1944 in a popular treatise on human embryology by George W. Corner; his basis was research published over twenty years previously, in 1923, on pigs and other animals.[61] Whether the rate of pregnancy losses in other species is a sound basis for drawing conclusions about humans is questionable, especially because other species differ considerably among themselves in this respect.

A better approach to the question is to consider the proportion of normal to abnormal individuals discovered in the human specimens that have been studied of very early products of conception. In the study of Hertig, Rock,

Adams, and Mulligan on which we drew near the beginning of this chapter, four normal and four abnormal specimens were found.[62] A few years previously, Dr. Hertig discussed some of this material and some other specimens that attained implantation at a conference concerned with pregnancy wastage—i.e., losses during the whole time between conception and viable birth.[63] His conclusion at that time was that although 40 percent of the specimens were more or less abnormal, only about 12 percent were defective in such a way that they would have caused noticeable abortion—many of these specimens showing defects similar to those found in the peak period of pregnancy loss between nine and fifteen weeks.[64]

Other contributors to this symposium, relying on earlier, published work of Dr. Hertig and Dr. John Rock, estimated the rate of loss variously at 25–35 percent.[65] A 1954 United Nations study noted that the abortion-rate based on the first 28 of Hertig's and Rock's embryos would be "at least 25 percent" but added that much more information would be needed for any valid generalization.[66] In its conclusions, 20 percent was stated to be the "most conservative estimate" of pregnancy losses.[67]

A few years later, in 1956, Drs. Hertig and Rock themselves published a summary of their work on thirty-four specimens from the first seventeen days of development.[68] They concluded that twenty-one were normal and thirteen (just under 40 percent) were abnormal. Of course, this group includes the eight pre-implantation specimens, of which half were abnormal. Of the nine that were implanted, two altogether lacked an embryonic disk. The conclusion was drawn that probably *most* of these abnormal specimens would inevitably have been aborted naturally, some perhaps without a menstrual period being missed.

More recently, Dr. Hertig again analyzed these same data and concluded that in any one month, with optimal conditions for fertilization, about 15 percent of the ova never are fertilized, 10–15 percent do not implant, 28–33 percent implant but do not cause a missed period, and only 42 percent cause a delayed or missed period.[69] This 42 percent represents about half the fertilized ova. The implication is that about half of those conceived die within about two weeks after conception. Dr. Hertig adds, but without giving any evidence, that 27.6 percent of those that survive the first two weeks do not go to term.[70]

If we accepted this figure, we would conclude that only about 36 percent of those that begin life naturally survive until normal birth. However, Dr. Hertig reaches his conclusions on the basis of only six more specimens than the sampling that the U. N. study considered as an inadequate basis for generalization. If the percentage of cases in which fertilization does not occur at all were taken as higher than the 15 percent Dr. Hertig estimated—and he admitted elsewhere it could be as high as 42 percent—the percentage of loss would decline very rapidly.[71]

Moreover, in the actual examination of the results of one thousand spontaneous abortions, Dr. Hertig found 48.9 percent with absent or defective embryos, most with no embryonic mass at all.[72] If these specimens already were causally determined to be so at the time of fertilization, it seems doubtful whether we should say that a human life was lost, or merely that a fertilization occurred from which no individual ever could have developed.

Our conclusion is that the most conservative estimate of loss of life before birth is 20 percent. The upper limit suggested by Dr. Hertig's calculations is unproved and seems excessively high. However, the rate of loss could well be 50 percent—one of every two. If so, about as many individuals die before birth, naturally and spontaneously, as are born alive if they are not purposely aborted. Of these that die naturally before birth, most die after implantation—probably less than 30 percent die before this stage.[73] Including those that survive, less than 20 percent—probably even less than 15 percent—of all blastulas fail to implant.

This conclusion, while not exactly heartwarming, should at least put to rest the image sometimes conjured up in popular writings and discussions that there are three or more times as many conceptions naturally aborted as develop normally, and that 30 percent or more of conceptions never proceed as far as implantation. The large numbers sometimes given indicate that ovulation and conception are being confused. Obviously, in a very high proportion of cases, ovulation does not lead to conception, because conditions are not "optimal"—i.e., there is no intercourse at the appropriate time or contraception is used. The proportions of implantation failure sometimes given at 30 percent or more probably arise from a misreading of Dr. Hertig's conclusions.

A Note On "Viability"

The word "viability" has been avoided in this chapter but it is likely to be used in arguments about abortion—for example, when it is suggested that abortion be permitted as long as the unborn is not "viable." The concept is that prior to viability the fetus could not live apart from the mother; after viability it could live apart. A dividing line at twenty-six or twenty-eight weeks of gestation is sometimes suggested as the appropriate demarcation of viability.

The notion of "viability" defined in any such simple fashion is without biological and medical foundation. The word does not even appear in standard medical indexes.

The reason why is not difficult to discover. Dr. Carl L. Erhardt and his colleagues studied mortality among infants born in New York City, 1958–1961. In general, they discovered that neonatal mortality—that is, deaths within the first twenty-eight days after live birth—mounted steeply as the length of pregnancy shortened below thirty weeks and as the birth weight dropped below fifteen hundred grams (about three pounds, five ounces). But 45 percent of white and 58 percent of non-white babies born during the

twenty-sixth or twenty-seventh weeks of pregnancy survived through the neonatal period. Even under twenty weeks of pregnancy, more than twenty percent of those born alive survived the neonatal period.[74]

From this study alone—we could cite others—it is clear that "viability" is relative and does not provide a clear line of demarcation. Besides length of pregnancy, such factors as the weight and the race of the fetus make a significant difference. Of course, beyond a certain point there are no survivors. However, this point, whatever it happens to be, also is relative to present methods of caring for the premature. With improved techniques and equipment, going beyond the incubator toward the artificial womb, probably the vast majority of fetuses could survive apart from their mothers after twelve or fourteen weeks of pregnancy.[75]

Perhaps even more misleading than the factual oversimplification involved in the idea of "viability" is the assumption that ability to live independently is a suitable criterion of individual identity. Biologically this is certainly not true, for the fetus is genetically and functionally an individual from its beginning, but it is not capable of living independently until long after its birth. The mother's breasts are a biological sign of the infant's continuing dependence for survival, although in human beings dependence is prolonged far beyond weaning.

Indeed, one might question whether even the strongest of us is ever able to live wholly independently. Obviously, many who are retarded, handicapped, ill, and aged are as dependent upon others for survival as is the "non-viable" fetus.

CHAPTER II
A SOCIOLOGICAL VIEW

The Frequency of Illegal Abortion in the United States

The question of the frequency of illegal abortion is interesting not only in its own right, but also because of the light it throws upon the grounds of claims often made by those favoring relaxation of existing abortion laws and upon the extreme difficulty of gaining any accurate knowledge of the sociological facts concerning abortion.

Dr. A. J. Rongy, in a pioneering pro-abortion tract published in 1933, estimated that there were nearly 2,000,000 abortions per year in the United States.[1] He offered no evidence for the estimate, but argued that "no one denies" that abortion is increasing in cities and that women who have over three children have repeated abortions, often many of them in one year.

Dr. Frederick J. Taussig, in a study published in 1936, cut Dr. Rongy's estimate by almost two-thirds when he concluded that there were a total of 681,600 abortions annually in the United States, which then had a population of 120,000,000.[2] How did Dr. Taussig arrive at this figure? He deduced it from the results of four studies. The first was prior to 1910, and included 600 patients whose histories Taussig had obtained; the second was of the same vintage and depended on another physician's series of 250 patients. But Taussig recognized that these were very small groups, so he added a third study, which he treated as definitive. This was an analysis of 10,000 case histories from a New York birth control clinic, reported by M. E. Kopp in *Birth Control in Practice,* published in 1934. Kopp's figures revealed a ratio of one abortion to every 2.5 confinements.

Taussig felt certain that this figure was accurate for the urban population; he explained that women in this clinical situation could be expected to tell the whole truth. But he thought the figure perhaps too high for rural areas. For these he relied on a study made by Dr. E. D. Plass, who had sent a questionnaire to Iowa physicians asking them to give "their estimate" of the ratio. Plass reported the result to Taussig: one abortion to five confinements, just one-half the city ratio.

With these constants, Taussig confidently calculated the number of urban and rural abortions by allocating all reported births to urban and rural populations according to the proportion of the Federal Census. Taussig did not state explicitly in the pages where he worked out this calculation that the figure he reached would include *all* abortions—spontaneous, induced according to legal provisions, and induced illegally. Elsewhere in the book,[3] he stated that 25–30 percent are spontaneous, 10–15 percent therapeutic, and 60–65 percent illegally induced. Again, Taussig was indebted to Kopp, who found 69 percent illegally induced, and to Plass, who put 61 percent in that category.[4]

Taussig's conclusion is important, not because it throws any light on the frequency of illegal abortion, but because it continues to be cited directly or indirectly as an authoritative statistic. For example, Bates and Zawadzki base their serious study on the claim that "four major independent studies made in the last quarter century" reach a surprisingly similar result: one million criminal abortions per year in the U.S. The four studies? Taussig, Kopp, Stix, and the Kinsey figures.[5] The last we shall discuss below.

The first three are all more than a quarter century prior to Bates' and Zawadzki's date of copyright. Taussig and Kopp are certainly not independent. Stix also was a birth control clinic study, and the author herself was coauthor of an article three years later in which it was pointed out that the sample was by no means representative of clinic patients in other cities, or of married women generally.[6] What indicates almost unbelievable sloppiness, however, is that Bates and Zawadzki, simply by adjusting for the intervening population increase, apparently projected Taussig's total figure of 681,600 abortions annually, which was intended to include 35–40 percent non-criminal abortions, into "about one million" *criminal* abortions.

More serious than Bates and Zawadzki's carelessness is that of Glanville Williams. In a study that has greatly influenced the effort to modify abortion laws, he makes use of Taussig's conclusion to indicate the possible upper limits of the total of abortions in the United States.[7] Williams first cites Raymond Pearl's study, which he qualifies as "authoritative," and P. K. Whelpton's report of the Indianapolis study, which he qualifies as "careful."[8] But these studies revealed induced abortions at no more than 1.9 percent of pregnancies—about one for each fifty live births, one-tenth or one-twentieth of Taussig's total figure. Estimating 1.5 percent on a 1940 pregnancy rate of 2,750,000, Williams arrives at a figure of only 41,000.

So Williams refers to Taussig's figure, saying that "many accept" it as a "conservative one." Williams somehow confuses the percentage Taussig considers criminal; Williams says "a minimum of 30 percent," while, as we have seen, Taussig actually thought it was at least 60 percent. Then, assuming that abortions kept pace with population and that the rate did not decline "since 1935," Williams decides that illegal abortions "must now" approach 365,000 per year. For confirmation, he cites Russell S. Fisher. But when we refer to this author we find that he has provided no independent basis for his conclu-

sions; he depends mainly on Taussig![9] Fisher does mention "other authorities" that give a more conservative figure, but these authorities do not include the studies of Pearl and Whelpton that Williams cites.

To complete his argument, Williams also mentions that John H. Amen estimated a total of "more than 100,000 criminal abortions performed in New York City alone, during the three-year period 1936-9." When we pursue this reference, we find Amen himself not estimating, but simply assuming "an estimated total of more than 100,000 criminal abortions performed annually in New York City alone."[10] Unfortunately, Amen does not say who made this estimate or on what evidence it was based, but we will offer a possible explanation for it in due course.

At the 1942 conference, the *Abortion Problem,* the Chief Statistician for Vital Statistics of the U.S. Census Bureau spoke on this topic. He simply averaged available studies, including a number from birth control clinics, to arrive at ratios of 1:5.6 for urban confinements and 1:9.4 for rural confinements, which produced a total of 332,329 abortions on a 1940 birth-rate of 2,336,604.[11] But this conclusion included all sorts of abortions, and no attempt was made to distinguish the proportion of spontaneous and of induced abortions.

At the same conference, in the very next paper, P. K. Whelpton presented the results of a sociological study conducted during 1941-1942 among 1,980 women in Indianapolis.[12] Whelpton's report is interesting because it shows some of the difficulties of drawing conclusions from data, even if the data are carefully assembled. If respondents were believed on the question whether an abortion were illegally induced or not, only one percent of pregnancies terminated in this manner; this excluded reported self-induced abortions by drugs, since the researchers, not believing the drugs really effective, assumed that these women were not pregnant. If all reported induced abortions were included, and also those the researchers felt were falsely classified by the respondents as spontaneous were reclassified as induced, the figure of 2.9 percent could be reached.

In making his presentation to the conference, Dunn criticized Taussig's figures, and pointed out in particular that Kopp's 10,000 birth control clinic patients could hardly be typical of the urban population of the U.S.[13] Taussig was present at the conference and was given first opportunity to speak in the discussion following these two papers. He began by apologizing for the "meager information" contained in his book on this question. Explaining that there were at the time "the wildest estimates as to the number of abortions and the number of abortion deaths both in Europe and in this country," he said he had trimmed his estimates. Still Taussig felt that Dunn's figure of "350,000 to 400,000" abortions might be too low, and he argued that P. K. Whelpton's sample was biased.[14] In fact, Dunn's figure was only 332,329, and Whelpton defended the validity of his study.[15] No agreement came in the discussion, and there is no report of a direct comment by Dunn on Whelpton's results. Such

a comment would have been interesting, since Whelpton's statistics, if projected, would have given a figure very much less than the earlier studies on which Dunn had relied.

A brief paper, published four years previously in 1938, must be mentioned because of the endorsement it receives in the next major study to be discussed. This paper, by Dorothy G. Wiehl, merely summarized data from other studies on the frequency of abortion.[16] Here the birth control clinic samples were criticized as non-representative, and the conclusion was reached that all abortions were probably eighteen per hundred births, and that abortions were most probably induced at a rate of 4 percent or 5 percent of the pregnancies of married, white women in the general urban population.

In 1954 a mortality study was published by the United Nations; the section on abortion statistics was written by Christopher Tietze, whose studies are usually received respectfully in planned parenthood and pro-abortion circles.[17] Recognizing the difficulties, Tietze thought it impossible to produce a reasonable estimate of the number of illegal abortions in the U. S. with the available data. He pointed out that each source of information has its difficulties, and although he cited other studies he referred to Wiehl's summary, saying: "Later studies have produced no evidence either to confirm or to modify her estimate." He noted also that in rural areas and among Negroes the abortion-rate probably was lower than in the urban, white group covered by the studies Wiehl summarized. Finally, he considered it a fair assumption that the abortion-rate in the post-World War II era would be lower than in the depression days of the 1930s.[18]

This report also provides the probable explanation of the figure of over 100,000 abortions per year in New York City alone. Tietze warns that the greatest care is necessary in dealing with abortion figures. He mentions Rongy's guess of 2,000,000 as one example. Another is the New York case. In 1893, someone noted that twelve or thirteen cases of induced abortion were reported in a two-month period. Having heard the opinion that only one case in a thousand is detected, an estimate of 80,000 annually was concocted and published in *Medical Record,* June 3, 1893. Tietze observed that this estimate has been quoted for years in both American and foreign literature.[19] Since John H. Amen indicated no basis for his estimate of over 100,000 per year in New York City alone, we cannot be sure he arrived at it by raising the estimate of 80,000 to take account of increasing population, but it is plausible to suppose that this was the case.

At the time the U.N. report was prepared, the Kinsey materials concerning abortion were not yet published. Since we can draw some conclusions from this study, we should give a brief, general description of it.[20] It was not finally prepared by Kinsey himself, since he died while preliminary work was going forward, but it did benefit from the advice of Christopher Tietze.[21] The report consists of a study of 5,293 white non-prison women, supplemented by additional, distinct studies of 572 Negro non-prison women, 309 Negro female

prisoners, and 900 white female prisoners. One chapter draws on all the materials for a general discussion of some aspects of induced abortion, and an appendix draws on extrinsic sources for a consideration of abortion in other countries.

The basic study of white non-prison females is based on a sample admittedly not representative of the population as a whole in several ways: 1) almost all the women were urban, 2) the educational level was relatively high, 3) the proportion of single women was relatively high, 4) the proportion of women who had been separated, divorced, or widowed was relatively high, 5) the proportion of Catholics (11 percent) is relatively low, 6) the proportion of Jews is relatively high, and 7) "the majority of the groups was, almost necessarily, made up of persons who had some interest in, and comprehended the value of, sex research."[22] The last point—the sexual sophistication of the women who would submit to searching personal questions—perhaps has the greatest effect on the validity not only of this study but of all the Kinsey material; however, the effect of this factor obviously is incalculable.

Anyone looking at this study hoping to find a basis for projecting to the entire population will be disappointed. Of 4,248 conceptions in this group, 999 are reported as ending in illegal induced abortion, 68 in legal induced abortion, and 667 in spontaneous abortion. There were 2,434 live births and 80 pregnancies at the time of interview.[23]

Now since there were 4,027,490 live births in the U.S. in 1964—the total in provisional vital statistics for 1965 was below 4,000,000—it would be tempting to use this figure to project a total of around 1,600,000 induced abortions. However, if we consider the proportion of *legally induced abortions* to live births we immediately see a reason to be suspicious of any such projection based on the Kinsey materials. For the ratio of 68 induced abortions to 2,434 live births is about 1:36. In about the same period as that from which the Kinsey material is drawn, we find the following hospital figures:[24]

Bellevue, New York 1935–1949 1:76

University of Virginia 1941–1952 1:120

Iowa University 1926–1950 1:176

Los Angeles County 1931–1950 1:285

Dr. Gebhard and his colleagues in their study based on the Kinsey material cite the first and last of these figures, and admit that their sample is not representative in this respect.[25] If it is equally non-representative in regard to illegal abortions, the projected figure of 1,600,000 would have to be reduced by about 75 percent—to around 400,000—working from the mean of the four hospital ratios.

Yet simply to assert that the Kinsey study shows the annual rate of illegal abortions to be 400,000 would be a serious error, and to see why it is necessary to consider carefully the report of a committee, led by Christopher Tietze, that

is included in the proceedings of the 1955 Planned Parenthood Federation meeting on abortion.[26]

This committee report noted the non-representative character of the Kinsey material, and concluded that these data "do not provide an adequate basis for reliable estimates of the incidence of induced abortion in the urban white population of the United States, much less in the total population." The committee compared the high rates suggested by the Kinsey material with the low rates indicated by the Indianapolis study[27] and a study in New York City,[28] and noted that the three studies refer to approximately the same period, pre-World War II, and are concerned with groups somewhat similar to one another. Why then the difference? The committee suggested that the respondents in Indianapolis and New York may have been lying and/or the Kinsey sample may not have been "representative of urban white women of equal educational and socioeconomic status with respect to the incidence of induced abortions." Note that the committee was not merely observing that the Kinsey material was not representative of the population as a whole; it was entertaining the further hypothesis that it may not have been representative of the group it seems to sample most adequately.

To what conclusion did this consideration lead the distinguished members of the committee? They decided that if the probable trend of abortion since depression days were considered, plausible estimates of induced abortions in the United States might be as low as 200,000 or as high as 1,200,000, depending on how one evaluated the data. Then they concluded: "There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency."

Now this conclusion is astounding. If there is no objective evidence for a figure *between* the two limits, what is the objective basis for these limits rather than for others—e.g., 100,000 and 4,000,000? The answer, so far as the upper limit of 1,200,000 is concerned, is obvious—it is based on the Kinsey material, despite all its admitted limitations and difficulties. In an appendix to the same volume Christopher Tietze explained the ways in which the Kinsey material diverges from the *urban, white* population.[29] Some of these differences have been mentioned above.

Reviewing this volume for the *Milbank Memorial Fund Quarterly*, a journal that has published many studies on abortion, Robert G. Potter, Jr. remarks:

> The appropriateness of the upper limit is placed in doubt by an appendix in which Tietze analyzes the representativeness of the ISR [Kinsey] respondents in relation to estimates of 1945 distributions for urban white women in the United States. Tietze concludes that ISR respondents are usefully representative but his tables contradict this conclusion by showing not only gross differences with respect to age, education, and marital status, but also and more important, tangible differences with respect to age-specific marital fertility.[30]

What this last point means is that age group for age group the married women in the Kinsey material consistently had fewer babies than women in the population as a whole, even after adjustments are made to account for educational level and social status—which we shall see are potent factors. One may reasonably suspect that some of the difference is made up by illegal abortions.

Why did the committee sign a statement incorporating an upper limit that was found questionable even by as sympathetic a reviewer as Potter? Perhaps the reason is to be found in the concluding statement signed by most of the conference participants.[31] Here it is pointed out that abortion laws "do not receive public sanction and observance" and illegal abortion is presented as "a problem in epidemiology" comparable to venereal disease in pre-antibiotic days. The statement barely falls short of being a manifesto; it outlines the ground strategy for the campaign that has been conducted since 1955 to relax the anti-abortion laws. The high estimate of illegal abortions has been a major weapon in this campaign.

Thus Dr. Alan F. Guttmacher, who signed the 1955 report, used the Kinsey figures to suggest at a 1964 conference that there are "a million illegal abortions per year" in the U. S. He qualifies this figure as a mere guess, but suggests it may err on the low side. What evidence does he offer? He says "those of us who have practiced obstetrics and gynecology feel that it may be an underestimation rather than an overestimation, because we are constantly approached for advice on the problem."[32] Dr. Guttmacher might as well conclude that hospitals are unhealthful places because many people die there, as to conclude that abortions are frequent because he is constantly asked about them. With this sort of argument we are back to Dr. Rongy again; a whole generation's work has yielded no progress.

What can we conclude? There is no reasonable basis for asserting that there are 1,200,000 abortions per year in the United States. Apart from the peculiar bias of the Kinsey sample pointed out by Potter in his review, there are the admitted respects in which this material was not a representative sample of the population as a whole. We shall consider some of these factors below, and find that they introduce distortions in the direction of a high rate of abortions in the Kinsey material.

In popular arguments, however, we constantly hear the figure: "around one million per year." For rhetorical purposes it is a good, round number; it is matched only by the rhetoric of "experts estimate as many as 1,200,000 illegal abortions per year in the United States"—phrasing reminiscent of an advertisement for an oil additive that promises "up to ten additional miles per gallon."

One opposed to legalized abortion naturally would like to minimize the dimensions of the problem. The Kinsey material may well have approximated more nearly the clientele of the birth control clinics than the population as a whole. If so, the lower limit is more plausible. It would be interesting to begin with Wiehl's conclusion that 4–5 percent of the pregnancies of married white

women end in abortion. The Kinsey figure is three or four times as high—621 induced abortions (including an unstated number of legal ones) out of 3,720 pregnancies.[33] Cutting the upper limit of 1,200,000 suggested by the statistical committee of the Planned Parenthood conference on the basis of the Kinsey material by one-third would produce a range of 200,000 to 400,000 induced abortions per year in the United States.

But this procedure would be quite arbitrary. We cannot be certain that respondents to the Kinsey interviews were atypical to this extent, and we cannot be certain that the campaign to relax the laws against abortion has not had as its byproduct a substantial increase in the number of illegal abortions. Probably the generation of the "new morality" is better represented by the birth control clinic clientele and the sexual sophisticates interviewed by Kinsey's research team than the preceding generation would have been. And certainly the advocates of relaxed abortion laws are bringing this practice to the attention of people who might not have seriously considered it thirty years ago. What is more important, they are providing abortion with an aura of respectability it never used to enjoy.

One further point, to which we will return in the next chapter, is that if some of the newer methods of birth control that are usually considered contraceptive are counted as in fact abortifacient, there may well be hundreds of thousands or even millions of women undergoing unnoticed, frequent early abortions.

The only acceptable conclusion concerning the incidence of illegal abortions in the United States, therefore, seems to be that which Christopher Tietze stated in the U.N. report of 1954—available data do not give reasonable support to any estimate. The committee chaired by Tietze that subscribed to the estimate of an annual rate of 200,000 to 1,200,000 induced abortions in the United States would have displayed more scientific objectivity and caution if it had refused to endorse this indication of limits that are hardly better grounded than any figure between or outside them. They might simply have rested on their own statement concerning the Kinsey data, that they "do not provide an adequate basis for reliable estimates of the incidence of induced abortion in the urban white population of the United States, much less in the total population."[34]

The Frequency of Illegal Abortion in Other Countries

Glanville Williams states that there are tens of thousands of illegal abortions in England each year, and adds: "For the benefit of English readers, who will be prone to disbelief, I must try to substantiate this figure."[35] First he quotes Professor David Glass, who thought in 1940 it "'not at all improbable that there are each year about 100,000 illegal operations in England and Wales.'" A recent study written by a British barrister, Bernard M. Dickens,

in favor of abortion law relaxation, also quotes Glass, but adds: "Unfortunately Dr. Glass does not provide the basis of his conclusions."[36]

Williams next refers to a British government inter-departmental committee of 1939, which estimated that there were 110,000 to 150,000 abortions each year, "and that two-fifths of these were criminal."[37] Dickens, however, says "this includes lawfully procured abortions,"[38] and he proceeds to consider at length whether the abortions induced legally might be a significant proportion of all those induced.

Williams also refers to Dr. Keith Simpson, who "like Professor Glass," thinks this to be an understatement.[39] Williams correctly cites Simpson,[40] who like Glass gives no evidence whatsoever for his surmise. Williams also cites Dr. Eustace Chesser whose "most conservative estimate is that the figure cannot be less than a quarter of a million every year."[41] Again the citation is correct, even word for word,[42] but what is perhaps more interesting is that Chesser had been recruited the previous year to write a pamphlet for the Abortion Law Reform Association, a pressure group that grew out of the birth control movement in England in the 1920s.[43]

Williams also questions the proportion (60 percent) of abortions considered by the 1939 committee to be spontaneous; for this he cites a hospital study: "A. Davis found that of 2,665 cases of abortion admitted to hospital, only 10 percent were spontaneous; the rest must have been criminal."[44] In this case Williams has gone beyond the evidence. Davis reports on cases admitted to two London hospitals. In his report he summarizes the proportion of induced abortions indicated by various other studies, doubts the veracity of the respondents and the competence of the inquirers, and concludes: "My own impression is that the great majority—perhaps 90 percent—are induced in one way or another."[45] Thus Davis' *impression* and *perhaps* are transmuted by Williams into a *finding.*

Williams caps his argument concerning the high rate of abortion in Britain with the statement that Marie Stopes reported "she had over 10,000 people who wrote to her asking her to perform abortion."[46] Even if the figure is accurate, it can prove nothing, since Marie Stopes, the Margaret Sanger of England, enjoyed a long career preaching the gospel of birth control. Here we are back with Dr. Guttmacher's impression, based on the frequency with which *he* is asked about abortion.

In contrast with these high estimates, C. B. Goodhart, in an article in *The Eugenics Review,* argues persuasively that the total must be much lower. He begins from reported abortion deaths and concludes either the death-rate from criminal abortion is extremely low, "or else, and surely more probably, that their numbers have been much exaggerated." Goodhart suggests that 10,000 per year in Great Britain may be no further from the truth than widely accepted figures five or ten times as high.[47] Using a somewhat similar method, the Council of the Royal College of Obstetricians and Gynaecologists published its estimate in 1966. Their conclusion was that only 14,660 women who

had self-induced or criminally induced abortions were treated in National Health Service hospitals in 1962, and that a large proportion of such cases must have been so treated. They emphatically reject the estimate of 100,000 as much too high, on grounds similar to Goodhart's.[48] Thus, this respected group considered much too high a figure less than two-fifths of Dr. Chesser's "most conservative estimate." Obviously, either the Council of the Royal College or Dr. Chesser was badly mistaken.

Dickens—who wrote before the statement of the Council of the Royal College—presents some considerations against Goodhart's conclusion. And Dickens himself makes a candid statement: "It is clear that any estimate of the extent of breach of the law is uncertain, even if based upon fairly reliable statistics."[49] I can accept this as a statement of my own view. Unfortunately most of those who supported the relaxation of anti-abortion legislation in England and almost all of their counterparts in the United States have neither been as objective nor as candid as Mr. Dickens.

With this basis of study of the frequency of illegal abortion in the United States and Britain, no one should be surprised to see figures given for Germany and France that are as groundless as any suggested for the English-speaking countries. For example, in a symposium article in a respected law review, two Austrian physicians state that in Germany, with a population of 80,000,000, there are 1,000,000 illegal abortions per year, and that in Paris in 1960 there were 150,000 abortions to 95,000 live births.[50] When Abraham Stone suggested at the 1955 Planned Parenthood abortion conference that the rate of abortions in Germany was increasing since 1945 and approaching a ratio of one abortion to every live birth, Christopher Tietze replied by criticizing the estimates:

> I don't think—and I say this in all seriousness—that *any* of the figures that were used in Germany during the interwar period were any good at all, and I think that those which have been put out recently as over-all estimates are even less reliable.[51]

Dr. Tietze did not deny that are many illegal abortions; he simply deplored the unfounded exaggerations put out by some West Germans.

As to Paris, the figure of 150,000 abortions to 95,000 live births is not supported in the source cited by a shred of direct evidence. In fact, we are not even told who concocted the figure, because the French indefinite subject is used: "Pour Paris seulement *on a cité* les chiffres . . ."[52]

Of course illegal abortion is by its very nature difficult to investigate. But this is no excuse for building a case on unsubstantiated guesswork. If a sufficiently serious attitude were taken toward the truth of the question, an organization with adequate money and prestige could pre-select a representative sample of the population, train effective interviewers, and then persuade the pre-selected sample to respond in detail. The results would still be questionable, but they would be better founded than existing estimates.

One survey of this kind, on a rather small scale, was conducted in Santiago, Chile. A team of 35 social workers contributed by the Chilean National Health Service interviewed a representative group of 1,890 women. Responses indicated 762 induced abortions and 3,267 live births in the period 1952–1961; a rate of 23.3 induced abortions per hundred live births. The statistics would not be valid for Chile as a whole, but could be projected to urban Santiago from which the sample was drawn, with the conclusion that there would be around 24,930 induced abortions there in 1962. Multiplying the ratio of abortions to live births by the 1962 total of live births yielded 17,483 induced abortions in 1962. A calculation based on hospital admissions fell between these two.[53]

With methods like this, one could conclude with some confidence—not that the number was actually one of those given, of course, but at least that it was in the range of 12,500 to 30,000. This is still quite a range, but it is better than the range of ill-founded guesses we must contend with when considering illegal abortion in Britain and America.

Although precise numbers of illegal abortions cannot be determined anywhere, trends may appear with greater precision from hospital records in places where accurate reporting by uniform standards and careful compilation of data are the rule. This is the case in some of the Scandinavian countries, for example, and it has led to some of the most surprising and important observations concerning the frequency of illegal abortions.

In Sweden and Denmark, laws against abortion were relaxed in the 1930s to permit it not only for strict medical reasons, but also for a number of other causes similar to those commonly proposed in current attempts to loosen state laws in the United States. One reason why these changes were made was that illegal abortion had been recognized as a problem, and it was hoped to solve it in this manner.

After Denmark's enactment of its relaxation in 1937, legal abortions of course increased, but, according to widely accepted studies, so did illegal ones.[54] A recent study seems to show that illegal abortions still are three to four times as common as legal ones, though perhaps they have declined slightly over the past ten years.[55]

Gebhard and his colleagues noted evidence of the situation in Denmark[56] and also summed up studies that indicated the same trend in Sweden. Concern led to studies, hoping to find that illegal abortions were declining, but: "So far, 'noteworthy' results of these investigations do not show any clear-cut evidence of a 'noteworthy' reduction in illegal abortion, and it has been claimed by some that the number has been actually increasing."[57] One explanation offered is that the legalization of abortion for some reasons led to abortion mindedness; some believe that those now obtaining legalized abortions are new users of this technique, quite distinct from those who normally procure illegal abortion.

The Council of the Royal College of Obstetricians and Gynaecologists noted the anomalous situation in which measures designed to limit illegal abortion had the opposite effect:

> Yet there is evidence to show that, except in those countries where abortion on demand and without inquiry is permissible, the legalization of abortion often resulted in no reduction and sometimes in a considerable increase in the number of illegal abortions.[58]

Dr. Guttmacher has also noted that Scandinavian evidence indicates a partially permissive program is questionably effective in reducing the frequency of illegal abortions. He adds: "Unless legal abortion is done whenever demanded, without restriction, it is impossible to eliminate criminal abortion."[59]

Even this estimate of the problem of illegal abortion may be optimistic, however, as appears when we consider what has happened in Eastern Europe, where the situation Dr. Guttmacher describes has nearly come to pass. One of the reasons was the hope to eliminate illegal abortions. An East German physician, Dr. K.-H. Mehlan, reporting enthusiastically on the results, points out that in Czechoslovakia, where abortion was legalized in 1957, the number of deaths due to illegal abortions fell from 53 in 1956 to 11 in 1962. In Poland (legalization 1956) from 76 in 1956 to 26 in 1959. And in Hungary (legalization 1956) from 83 in 1956 to 24 in 1964. He adds that probably other consequences of illegal abortion also have been reduced.[60]

Perhaps we may be excused for not showing enthusiasm over this program which has "succeeded," when we consider the residue of illegal abortion together with the fact that in the same years legal abortions increased in Czechoslovakia from 3,100 to 89,800; in Poland from 18,900 to 79,000; and in Hungary from 82,500 to 184,400.[61] The Hungarian program was such a success that in the last year mentioned (1964), provisional figures indicated 79 legal abortions for each 1,000 women 15–49 years of age, and a total of 140 legal abortions for every 100 live births.[62] Yet deaths from illegal abortion remained more than one-quarter what they had been when abortion was legalized.

Furthermore, it is questionable whether the indicated decline in abortion-deaths actually is due to a decline of illegal abortions or to other factors, such as improved hospital care.

With many pregnancies that would normally abort by themselves being aborted beforehand by induction, the rate of hospitalizations for all abortions other than legal ones should have fallen drastically if legalizing abortion had actually reduced illegal abortion. In fact, the number of hospitalizations for all abortions other than legal ones has not changed greatly. In Czechoslovakia it was 30,200 in 1957 and 26,000 in 1961, when legal abortions already reached 94,300. In Hungary the corresponding figures were 41,100 hospital admissions (1956) and 33,700 (1961) when legal abortions reached 170,000.[63] The Council

of the Royal College of Obstetricians and Gynaecologists cites these figures as evidence to show that when abortion is legalized "the total effect is that women are increasingly ready to have pregnancies terminated and potential criminal abortionists are less reluctant to help."[64] Dr. Mehlan himself informed the 1962 Conference of the International Planned Parenthood Federation in Warsaw about the effects of legalized abortion in Eastern Europe:

> A study of the medical literature of the last years proves that after five years' experience with legalization of abortion all authors hold a very reserved view concerning the reduction of criminal abortions in these countries.

He notes that in East Germany, during the first period of abortion:

> An increase of legal abortions was connected with a simultaneous increase of criminal abortions. The same fact was observed by Harms during the first period of abortion in the Soviet Union. From their investigations and noting the experiences in Sweden and Denmark, both authors come to the conclusion that legal abortion is an inadequate means of fighting criminal abortion.

Dr. Mehlan notes that despite mounting numbers of legal abortions the numbers of "other abortions" have "remained virtually constant" in Hungary, Czechoslovakia, Poland, Bulgaria and Japan. He admits that some studies suggest that the rate of criminal abortion has not been greatly reduced. For example, one Hungarian placed the 1959 illegal abortion-rate at 80 percent of the generally assumed pre-1953 level, and Czechoslovakian studies indicated that illegal abortion had been reduced only by "approximately 50 percent," or even less. Mehlan himself tries to be hopeful. He assumes that the rate of conceptions has not increased, and argues on this assumption that since legal abortions increased more than births decreased there *must have been* a decrease in illegal abortions. With his conclusion established by a priori reasoning, Mehlan proceeds to explain the stationary statistics of "other abortions" as the result of an increase in the rate of illegally aborted patients admitted to hospitals. But apparently realizing that this supposition is questionable, Mehlan hedges:

> The number of cases formerly hidden and treated outside a hospital decreased. The fact that pregnancies or abortions still continue to be hidden must be considered to be the outcome of a wrong attitude in previous times which has not been completely overcome. The non-prosecution of a woman will doubtless contribute to a further limitation of criminal abortion.[65]

Other speakers at the conference were more direct. For example, speaking for Croatia, Dr. J. Herak-Szabo stated:

> Illegal abortion is becoming relatively more frequent, the statistics indicating 15,228 cases in 1960, and 15,186 cases in 1961. In 1960, 73 percent of these cases occurred in workers and employees, while 27 percent concerned other categories; the corresponding percentages in 1961 were 68 and 32 percent. An increased number of artificial abortions reflects the free application of the bill on abortions. Nevertheless, many women still end pregnancies in secret, hence the frequency

> of illegal abortions. It is believed that the number of illegal abortions must be much larger than that indicated by the statistics.[66]

E. Laudanska of Poland both claimed that legalization had "caused a considerable decrease in the number of criminal abortions," and blamed "our opponents' propaganda activities" for

> the fact that the decrease in the number of secret abortions, initiated outside hospital, is relatively low (from 85,374 to 72,185) on the national level, with a distinct difference in favour of big cities or industrial centres, like Lódz, where most of the patients are industrial or white-collar workers.[67]

In other words, hard evidence did not support the view that legalized abortion had greatly decreased criminal abortions in Eastern Europe, but those who were committed to legal abortion continued to hope that legalized abortion would reduce criminal abortions if only economic pressures could overcome social sanctions against abortion as such.

In sum, the reports at Warsaw showed that experience indicated legalization was not going well, but those committed to it continued to try to reassure one another that there would be a change for the better. In a religious believer, such stubbornness in the face of facts would probably be called "dogmatism."

Abortionists

When we wonder who performs illegal abortions, we are likely to imagine poor, desperate women aborting themselves or being aborted by bloody butchers completely without medical skill or training. The image is misleading. Probably most illegal abortions are performed by physicians.

In the report, based on the Kinsey materials, which Dr. Gebhard and his colleagues prepared, white non-prison women reported 8–10 percent self induced, 84–87 percent induced by a "physician," and 5–6 percent by others. The Negro and prison groups of women reported 30 percent of abortions self-induced. Other studies—all referring to the period before World War II—are cited indicating that in every case the majority of illegal abortions was the work of physicians, midwives, or other professional abortionists.[68]

The Kinsey sample also included some abortionists, of whom it was concluded: "In the limited number of professional abortion specialists interviewed we have been impressed with their technical ability and the low number of deaths and ill effects resulting from their operations." One reported performing 30,000 abortions without a single death.[69]

The pre-World War II prices of abortion also can be gauged from the Kinsey materials. The median cost for the white non-prison sample was 83 dollars; the median for the Negro and prison samples was about 45 dollars. The price tended to increase with the woman's age, with her educational level, and with the general level of prosperity. Husbands generally knew about their wives' abortions and paid knowingly for them; unmarried fathers sometimes refused to pay or were not even told about the pregnancy.[70]

In their book on criminal abortion, Jerome Bates and Edward Zawadzki have included extensive information on criminal abortionists. Their sample is not representative, of course, because they studied 111 persons *convicted* of abortion during the period 1925–1950 in New York County. Naturally, the more skillful abortionist is less likely to be convicted, and the professional undoubtedly does a great many more abortions than the part-time worker. Even so, these 111 abortionists included 31 M.D.s, 3 chiropractors, 25 midwives, 5 practical nurses, and 2 registered nurses.[71] The large number of midwives is explained by the fact that this profession was being terminated, and some women turned from it to illegal abortion but without great skill.[72] All the convictions of midwives arose from customers who had become feverish and been forced into hospitals.[73]

The trained medical men often were involved in organizations known as "mills" or "rings." Mills or rings are conspiracies, established on a relatively permanent basis, including one or more physicians, surgical assistants, a secretary, a business manager, transportation service, contact persons, and so on. Other physicians and druggists send most of the customers. One abortionist performed as many as 45 operations on a busy day; estimates for the experts run 4,000 to 5,000 per year. Prices for this service varied greatly, and often were charged on the basis of what-the-traffic-would-bear. However, the skilled professional had high overhead costs for staff and for bribery. Even so, on a modest fee scale the professional can make many times what he could earn in legitimate practice, and can retain much of his income without taxes.[74]

A considerable range of persons committing illegal abortion is thus revealed. Those on the highest rung of the ladder operate under cover of "medical ethics" to obtain semi-legality. An example is the often-reported case of Dr. G. Lotrell Timanus of Baltimore.[75] In about twenty years he performed over 5,000 abortions, always on referral from another physician. He claimed that 353 doctors had referred patients. In the early days he charged 25–100 dollars, then 150–200 dollars, and finally 400–3,000 dollars for each abortion. Timanus was invited to participate in the 1955 Planned Parenthood conference on abortion, although he had been convicted of criminal abortion, and he even signed the closing statement of that conference along with other professional persons such as Dr. Guttmacher, Dr. John Rock, and Dr. Tietze. Timanus' case is described with respect and obvious admiration in a journalistic pro-abortion book by Lawrence Lader, who includes the interesting information that Timanus' punishment was a five-thousand-dollar fine and four and one-half months in jail.[76] *CBS Reports* treated Timanus as a respectable authority on its program "Abortion and the Law," broadcast April 5, 1965.

In Great Britain, a considerable semi-legal business in abortion has been carried on by licensed physicians, working openly, using consultation with compliant colleagues as legal cover, and using small private hospitals or nursing homes to keep this practice quiet. Paul Ferris, in a journalistic account, reports estimates of at least 7,500 such operations per year in London, with

fees ranging upward from 100 pounds (278 dollars). Professionals perform as many as twenty abortions in a busy day, 1,000 or more a year.[77]

There are many journalistic accounts of American women obtaining illegal abortions abroad. In both Puerto Rico and Mexico abortion is illegal, but it is said to be much more easily obtained than in the United States. Reported fees for skilled treatment range from 300–700 dollars, but careless operators also try to lure the unwary.[78]

Other women travel from the United States and Britain to countries where abortion is legal, such as Japan and Poland. Going abroad for an abortion was dramatized for the American public by Sherri Finkbine, a television performer who became pregnant during the thalidomide episode, and secured a legal abortion in Sweden.[79] Her case was ironic on two accounts: first, as we shall see in the next chapter, many cases similar to hers are regularly handled as legal-abortion cases in the United States; second, few American women who desire an abortion can obtain one in Sweden. A leaflet distributed by the Swedish embassy warns that aliens who do not reside in Sweden (and pay taxes there) have little possibility of obtaining a legal abortion under the Swedish system.

In contrast to the medically trained and relatively skilled professional abortionists, there is a small army of untrained amateurs, including "quack" doctors and untrained "midwives." These people perform fewer abortions and have shorter and less happy careers.[80] This is illustrated both by the records of their convictions and by a comparison between hospital experiences. A recent study of abortion deaths over several years in California, for example, shows that more than 20 percent of the deaths from criminal abortion of which the agent was tabulated were due to amateur work, while only 3 percent were due to a physician's work. But the largest category of all were those done by the patient herself—fully two-thirds died as a result of self-abortion.[81]

This last point is an extremely interesting one, because for all practical purposes self-abortion is not treated as a crime; in the United States and Britain women apparently are never prosecuted for their own abortion.[82] Whether the rate of self-abortions could be reduced by changing the laws is doubtful.

In Britain, poorer women perhaps more often resort to the services of other women whose attempts, though dangerous enough, may not be so inept as an effort at self-abortion. A psychiatric social worker at a British prison has described typical convicted abortionists as older married women who did not charge excessive fees, avoided techniques to which their skill was not equal, considered themselves to be "helping" the pregnant woman, and often sharply distinguished between killing (which they disavowed) and "bringing on the period" (which was their preferred description of abortion).[83]

Some abortionists who are medical professionals also claim that their major motive is sympathy, a desire to help "women in trouble." Timanus claims that he was moved by human needs and that he made his fortune in real estate, not abortion.[84] The anonymous abortionist hero of a popular

paperback, *Abortion: Murder or Mercy?* also claims humane motives at times, even though his own story reveals a major factor to have been desire for the money to pay gambling debts.[85]

Even Dr. Gebhard and his colleagues accepted the concept of the abortionist as altruist: "We have also been impressed with their obvious concern, in most cases, over the plight of a woman with an unwanted pregnancy."[86] The study of convicted criminal abortionists by Bates and Zawadzki presented a quite different picture, however. While they noted that "many defendants claimed to be performing socially valuable work,"[87] their study of the records revealed a combination of greed and psychological inadequacy as typical factors in the motivation of medical criminal abortionists.[88] A New York State Grand Jury study in 1941 supported the view that medical men become abortionists because abortion pays well for people who have failed to establish themselves in legitimate practice. Yet the physician-abortionist had usually been an average student at an average medical school.[89]

It is difficult to reconcile this image with that of the Robin Hood of surgery pictured by some authors. "Unfortunately, almost without exception, the physician-abortionist is a deviate in some manner,"[90] Bates and Zawadzki conclude. The criminal abortionists they studied "not infrequently" engaged in "purveying drugs to narcotic addicts," as well as in abortion.[91] Undoubtedly the criminals would have rationalized this activity, as well as abortion, as service to those in need.

We have seen that the loosening of abortion laws in other countries has not eliminated illegal abortions. If there were no laws regarding abortion whatsoever, there would of course be no illegal abortions. But would those who choose abortion as a specialty be a better group than at present? Are abortionists repulsive characters simply because their profession is illegal, or are repulsive characters the only sort who would be content to engage in this activity?

Carl Müller, Professor of Obstetrics and Gynecology at the University of Berne, Switzerland, has made a relevant observation concerning the personality required for work as an abortionist:

> In countries where abortion is entirely legal and a doctor may have to undertake an enormous number of operations on healthy women during a single day, it can happen that he breaks down and needs psychiatric help. It seems that for these mass abortions a special robot-like constitution is needed, which every doctor does not possess.[92]

Of course perhaps Dr. Müller is overly pessimistic. German experience earlier in the present century has shown that many ordinary physicians can even engage in programs of infanticide, euthanasia, and genocide without experiencing any overt difficulties.[93]

What Women Get Abortions?

If someone were asked the following questions on a true-false quiz, how should he answer?

1) Negro women are more likely to get illegal abortions or to abort themselves than are white women.

2) Women who live outside cities are more likely to resort to abortion than their more sophisticated, city-dwelling sisters.

3) Poor, uneducated women are more likely to resort to abortion than are the upper classes.

4) Single women have most of the illegal abortions.

5) A single girl is more likely to get an abortion than is a formerly married woman after separation, divorce, or the death of her husband.

6) Catholics have almost no abortions.

7) Among Jews, the intensity of a woman's religious practice has little effect on the likelihood that she will get an abortion.

The proper advice to give would be: "Answer 'false' to all items." This conclusion follows from all the evidence available—and on these points it tends to converge, so long as we do not try to establish exact proportions.

Despite its defects, the study written by Dr. Gebhard and his colleagues based on the Kinsey materials is the best source for these questions. Conclusions should not be drawn from certain pre-selected groups—e.g., from the patients of certain hospitals. Hospitals will reflect their neighborhoods, and only the worst cases will come to them. Birth control clinics see a segment of the population already dedicated to limitation. A professional abortionist builds up a definite clientele. Only an inquiry that is directed to a group taken specifically for inquiry can be considered to give useful information.

One might imagine that Negro women would be more likely to get abortions or to abort themselves than white women. But the statistics indicate that this is not so. Except for college educated Negro women, a very small group, the rate at which pregnancies are aborted is much less among Negroes than among whites. Of the high-school educated, the Kinsey figures show double the rate of abortion among white women.[94] Kinsey himself commented on this point at the 1955 Planned Parenthood abortion conference:

> The Negro is securing induced abortion less often in comparison to the white female. This is partly a matter of sociology. The birth of a child prior to marriage is not the social disgrace among the socially lower level Negroes that it is among college girls, and this is something that touches upon a reality we must always take into account.[95]

But the rate of abortions *per hundred women* also is lower among Negro *wives,* despite a considerably higher conception-rate.[96]

The Kinsey materials do not provide data on the difference between urban and rural women, and recent studies have not been made, since the distinction no longer has the social significance it once had. However, when Halbert Dunn

summed up available studies at the 1942 conference, he assumed an over-all rate of abortions more than 50 percent higher in urban areas.[97]

The Kinsey materials on urban white women do not provide separate indications of socioeconomic class and education, but treat both together by using educational attainment as the sole index. However, the prison sample of white women introduced a socioeconomic difference. The conclusion of Dr. Gebhard and his colleagues was that in the lowest social class abortion is quite uncommon. Married women feel that child-bearing is their proper vocation, and single women are not stigmatized for having an illegitimate child. The conclusion: "As a rule induced abortion is strongly connected with status-striving."[98]

In the general sample of urban white women, single women were more likely to abort their pregnancies and had a higher ratio of abortions per 100 women as they advanced in education.[99] The same was true of previously married women.[100] Among married women, those of grade school education or less and those educated beyond college differed in that the former had more abortions and the latter fewer than the average.[101] This difference followed a difference in rate of conceptions. However, the grade-school educated section of this general sample was peculiar in representing a socially and economically favored section of that group, a section particularly hard-pressed in the competition for status.[102]

As to the difference between married, single, and formerly married women, the *rate* at which pregnancies are ended by abortion is much higher in the latter groups, but the *number* of abortions is much greater among married women, because married women become pregnant more often.[103] Part of all induced abortions were of pregnancies following *marital* relations cannot be known, but Dr. Gebhard and his colleagues judged it a "vast majority."[104] In support, they were able to point to evidence from hospital studies, which uniformly show the majority of abortion patients to be married women.[105]

Formerly married women have more pregnancies than single girls do, so their rate of abortion is much higher. But the formerly married are only slightly more likely than the single to have a particular pregnancy aborted. Still, the formerly married women in the Kinsey material with more than a high school education used abortion to end over 85 percent of their pregnancies.[106]

As to religious differences, the Kinsey materials revealed that Catholics have abortions—if they are not devout Catholics. In all religious groups, the degree of devoutness made a great difference.[107] For example, among Protestants—the only group fully represented in the Kinsey materials—induced abortion was a much more common outcome for pregnancy among the less devout, not only because they had more premarital pregnancies, but because they aborted a larger proportion of their premarital and marital pregnancies as well.[108]

The Kinsey materials supply little evidence concerning religious differences among Jews. However, a recent study in Israel revealed that the percentage of women reporting induced abortion was more than twice as high among the non-observant than among the religious, and this was true of women who had been born in other parts of the world as well as of those born in Israel.[109]

There are a couple of other facts of interest revealed by the Kinsey report. One is that the trend among married women born until 1909 was toward an increasing use of induced abortion; this trend was reversed for women born in later years, especially after 1920, apparently as a result of the post-depression "baby-boom."[110] Though no recent study exists to substantiate the hypothesis, we might suppose that the downward movement of the birth-rate since the mid-1950s has again reversed the trend, so that abortion very likely has increased to some extent. This possibly explains, at least in part, current interest in abortion law relaxation.

Another trend noticed by Dr. Gebhard and his colleagues is in the use of abortion to end marital pregnancies after the first one. Among white women, married once and still married, about one in eight with only one pregnancy had purposely aborted it. Women who had two pregnancies were much less likely to use abortion; only three and one-half percent of their pregnancies had been purposely aborted. But the proportion then increases so that about one in eight of all the pregnancies were purposely aborted among women who became pregnant three to five times. Almost one-third of the pregnancies among women who became pregnant more than five times were ended in induced abortion.[111]

In sum, all sorts of women get abortions. The popular idea that Negroes and very poor people are especially likely to get an abortion is false—the reverse is the case. Single white women, especially formerly married ones, end a large part of their pregnancies with abortion, but the greatest part of all pregnancies occur in marriage, and the majority of the abortionists' clients undoubtedly are married women. These clients include women who are nominal members of all religious bodies, but devoutly religious wives—whether they be Jews, Protestants, or Catholics—tend to avoid the abortionist.

Why Women Have Induced Abortions

No serious study of motivations has ever been done, but a reasonable inference can be made from a consideration of the incidence of abortion. The inference is that women have induced abortions mainly for the same reasons they practice contraception. Sometimes abortion is an alternate method of birth control chosen by those not using contraception; very often abortion is the remedy for contraceptive failure.

Abortion is a primary method of birth control in Japan and in the Communist countries where it is legal for this purpose. Perhaps it also has been the

method-of-choice in some of the underdeveloped, less fully industrialized countries. This is suggested by the study in Santiago, Chile where both the birth-rate and the abortion-rate are high in the lowest socioeconomic classes.[112]

Abortion in the developed countries—that is, those such as the United States and Great Britain that are industrialized and urbanized to a high degree—seems to be a secondary method of birth control. Contraception is preferred, and abortion is used most often when contraception fails. So true is this that the spread of birth control, at least up to the very last few years, seems to have been accompanied by the increase of abortion. Birth control, rather than counteracting abortion, actually has seemed to aggravate the problem.

In earlier decades this thesis would have been rejected by proponents of birth control. Referring to her opponents, Margaret Sanger wrote:

> Try as they will they cannot escape the truth, nor hide it under the cloak of stupid hypocrisy. If the laws against imparting knowledge of scientific birth control were repealed, nearly all of the 1,000,000 or 2,000,000 women who undergo abortions in the United States each year would escape the agony of the surgeon's instruments and the long trail of disease, suffering and death which so often follows.[113]

Unfortunately, however, Mrs. Sanger was wrong about the effects of contraceptive practice, as little publicized findings of well-known studies reveal.

The 1934 birth control clinic study of Marie Kopp, on which Taussig mistakenly drew for evidence about the incidence of abortion in the whole population, showed that in 587 cases of contraceptive failure, twice as many were aborted (393) as were brought to term (194).[114] Even if we allow that one-sixth of these were spontaneous or legal, the number of illegal abortions would still be more than half again as many as the number of live births.

The 1935 study of Regine Stix included a table which showed that 3.5 percent (50) of 1,438 pregnancies that occurred without contraception were illegally aborted, while 38.9 percent (635) of 1,633 pregnancies with contraceptives were illegally aborted. The author comments:

> The use of induced abortion as a secondary rather than a primary method of birth control is shown more clearly in Table 5. Nearly 40 percent of the accidental pregnancies (pregnancies experienced while contraceptives were being used) were terminated by illegal abortion, while less than 4 percent of those pregnancies experienced when no contraceptives were used were so terminated.[115]

Raymond Pearl was a Johns Hopkins professor who was a member of the eugenics movement before the 1930s.[116] The eugenics movement was an attempt to promote better breeding in man, to bring to birth a "new race." Pearl became an enthusiast for birth control in connection with this interest, and, when the older form of eugenics fell into disrepute during the Hitler era, he

led the transformation of the eugenics movement into a more respectable effort to control "the population explosion." His 1939 book, *The Natural History of Population,* has had a tremendous influence on the subsequent development of national and international programs aimed at limiting births to improve living standards—restricting the "quantity of life" for greater "quality of life," a kind of democratized eugenics[117] Pearl states in his book that

> in this large sample of respectable white married women already shown to be fairly representative of the general population from which it came, those who practise contraception as part of their sex life, by their own admission resort to criminally induced abortions about *three times* as often proportionately as do their comparable non-contraceptor contemporaries.

As a proponent of birth control, Pearl was dismayed by this fact, but he adds

> that for something like three-quarters of that part of the professional abortionist's business that derives from urban American married women he can thank the birth controllers and the current imperfections in the technique of their art.[118]

Similarly, Kinsey made this point more than once at the 1955 Planned Parenthood conference on abortion:

> At the risk of being repetitious, I would remind the group that we have found the highest frequency of induced abortion in the group which, in general, most frequently uses contraceptives.[119]

The same situation obtained in England. Dr. G. R. Venning, writing in 1964 in a British birth control periodical, *Family Planning,* summarized as follows a 1949 report prepared for a Royal Commission on population:

> This found that the incidence of induced abortion as percentage of all pregnancies was one per cent for women not using birth control and nine per cent for women using birth control unsuccessfully.

He adds further detailed statistics and concludes that

> the data illustrate clearly that the likelihood of induced abortion is much greater in women who have contraceptive failures than in women who have not used birth control at all. The data from this survey also showed more induced abortion with rising socio-economic status, the incidence in all pregnancies in the highest social class being more than double that in the lowest group.[120]

Perhaps sometime a woman has resorted to an illegal abortion because she was genuinely concerned that her baby would be defective, or because she had been a victim of sex crime. But such cases must surely be rare, and, as we shall see in the next chapter, an abortion is legally obtainable anywhere in the United States or Britain if the mother's life is at stake or her health gravely endangered. The vast bulk of abortions, however, have nothing to do with these considerations—none of which is related to a failure of birth control. The vast bulk of abortions are sought as a preferred method of birth control or—perhaps even more likely—as a remedy for birth control failures.

If we proceed from this fact, it becomes possible to tell what are the past and future trends of illegal abortion in Western countries such as the United States and Great Britain. Until the industrial revolution, both the death-rate and the birth-rate were high. About 1770 the death-rate fell and from that time population expanded. But a century later the birth-rate also began to fall, though less sharply, as family limitation began to be practiced.[121] At this point, the rate of induced abortion must have increased—as the Kinsey statistics indicate was still happening for women born between 1890 and 1909. During the "baby-boom" following World War II the rate of abortion fell. However, the trend in births in the decade 1957-1967 has been downward. The "baby-boom" is over,[122] and with greater efforts to limit births, abortions probably also have increased.

Dr. Venning suggests another possibility. He believes that the high abortion rate rate associated with birth control may have been due to the inadequate methods many women were using:

> The illegal abortion problem has grown in Western societies, along with industrial development and education. The main factor has been a combination of high motivation for family planning together with the use of contraceptive techniques which fail frequently enough (largely as a result of human fallibility) to result in a high incidence of unplanned and unwanted pregnancies. When motivation is strong, induced abortion can only be prevented by the use of more effective contraceptive methods than those used in the past. Such methods are now becoming available.[123]

But if we can believe advocates of abortion law relaxation, these methods either are not as effective as they are thought to be or they are not used for one or another reason. It may happen that the present rate of induced abortions in the Western countries will decline greatly as the new methods of birth control and surgical sterilization come to be more widely adopted.

However, experience in Japan, where abortion is legalized, indicates that unless completely effective contraception is used at all times, birth control by abortion cannot easily be replaced by other methods. Dr. Yoshio Koya explains in a paper, "Why Induced Abortions in Japan Remain High," that a five-year guidance program in contraception that began with 2,230 couples actually resulted in a significant increase in induced abortions per 100 wives—from 6.3 the year before the program to 9.2 in its first year of operation. Then the rate declined, but did not fall below the pre-guidance level until the fourth year of the program.[124] Even then the fall may not have been as genuine as appears, since almost one-fourth of the original group of couples was no longer guided in the fourth year, and experience shows that in any program the participants most successful in reaching its objectives are the ones who remain in it. In any case, even in the fourth year of the program, the tendency of couples to have an induced abortion once they did become pregnant remained high—more than 50 percent above the pre-guidance level. Dr. Koya explains this fact:

> It would appear that women preferred the consequences of an induced abortion to the alternative of bringing an unwanted child into the world. Can we blame them for that? Absolutely not, because this line of reasoning reflects the results of our educational activity.[125]

The Movement to Loosen Anti-abortion Laws

As soon as one realizes that the vast majority of illegal abortions is performed for birth control purposes, a question naturally arises as to why there has developed such a great campaign to loosen anti-abortion laws in the United States and Britain. In general, limited relaxation of existing laws against abortion would have very little effect on ordinary illegal abortions—except, probably, to increase their frequency.

To this question there is no simple answer, particularly as concerns those working to loosen the abortion laws in the United States. In Great Britain, the Abortion Law Reform Association grew out of the birth control movement, and the associations, though formally distinct, have maintained close, open, and mostly friendly relations. In April 1966, the Family Planning Association as such held a meeting to support the efforts of those seeking changes in British abortion laws.[126] Both movements were offspring, or, at least, godchildren, of the eugenics movement in Britain.[127]

The situation in the United States is more important for our present purpose, and less clear to the naked eye.

The birth control movement, under Margaret Sanger's direction, always claimed the replacement of abortion by contraception as one of its chief benefits. Many members of the planned parenthood movement apparently have maintained some diffidence toward abortion. As recently as 1964, Dr. Alan Guttmacher said of the Executive Committee of Planned Parenthood Federation of America: "I think I would have a tough time in getting them to take a stand on a liberalization of abortion laws."[128]

Yet there had long been some ambivalence in this attitude. The 1955 conference on abortion was directly sponsored by Planned Parenthood. Earlier, the book of Dr. Taussig and the 1942 conference were sponsored by the National Committee on Maternal Health. In its early days, this self-constituted body, led by Dr. Robert L. Dickinson, had been more radical in some respects than the Birth Control League led by Margaret Sanger.[129] However, in later years relations were good, and Dr. Carl G. Hartman said retrospectively that Margaret Sanger had instigated the research: "In 1926, Dr. Robert Latou Dickinson took over this work most efficiently through his National Committee on Maternal Health. Monies were collected for meetings and for basic research."[130] In other words, Dickinson's committee became what, in another context, might be called a "front organization."

Moreover, in recent years the birth control movement has undergone a notable shift in attitude toward abortion. Such leaders as Dr. Guttmacher have become proponents of a loosening of the abortion laws[131]

Abortion has become a topic of discussion at conferences of the International Planned Parenthood Federation.[132] Nor is this discussion merely to assess the abortion problem and to consider how best to replace abortion with other methods of birth control. The example of Japan and of Eastern Europe is considered both objectively and according to the possibilities it suggests for application elsewhere in the world. For example, in his closing summary at the International Planned Parenthood Federation conference at Singapore in February 1963, Colonel B. L. Raina stated:

> Greater light has been shed in the conference on sterilization and abortion. If the people, because of their particular situation chose to adopt a particular form of behaviour, the ignoring of that behaviour will not change its importance or role. The experience of India in the field of sterilization and some countries of Europe and Japan on abortions has been especially well presented at the conference. It is apparent that all over the world, in rich or poor countries, people frequently turn by themselves to such methods of solving the problem of unwanted births. More studies of this phenomenon are greatly needed, to identify and clarify the situation rather than to ignore it. In countries where the population crisis is acute, official recognition of such a reality can catalyse the total, complex process of movement toward a stable population.[133]

Colonel Raina was then Director of Family Planning in the Ministry of Health of India; by mid-1967, its present Director, Dr. Chandrasekhar was urging the adoption of abortion together with *compulsory* sterilization as official birth control methods.

The other point that must be considered is that the birth control movement in the United States was closely related to the eugenics movement of the pre-Nazi era. The eugenics movement was an effort to improve the race by selective breeding. Its basis was pseudo-scientific and it did not always avoid racial bias. For example, a fairly typical popular treatment of eugenics contains the "information" that:

> The mind of the negro gets its maturity at the end of the second or third or fourth grade, as the case may be. No system of teaching can correct it. It is due to the inherent fiber of the brain that only can be changed by a process of evolution which may take some thousands of years to accomplish.[134]

Elsewhere, this book advocates sterilization for defectives and adds:

> When the defectives have been cut off from the power of reproduction, the next step is to teach the class above them how to practice "birth control" to which no exception could be taken. The unskilled man plays an important role in the industrial world. He lacks the intelligence, the self-control, and the power to limit the number of his children.[135]

At the end of this treatise the author imagines that unborn babes are stretching their tiny hands toward him from the mystic future and pleading: "Refuse to give me birth, or else let me be well-born."[136] Thus the title of the book: *The Right to Be Well-Born*—a phrase used today still, by those who advocate the loosening of anti-abortion laws.

The first American Birth Control Conference passed a eugenics resolution stating that "we advocate a larger racial contribution from those who are of unusual racial value."[137] This was not inspired only by a fringe of the movement. Margaret Sanger herself joined the eugenics cause. In a 1921 address she said of the diseased, the feeble-minded and the poor:

> There is no doubt in the minds of all thinking people that the procreation of this group should be stopped. For if they are not able to support and care for themselves, they should certainly not be allowed to bring offspring into this world for others to look after.[138]

In a book, *The Pivot of Civilization,* published in 1922, Mrs. Sanger said:

> The lack of balance between the birth rate of the "unfit" and the "fit," admittedly the greatest present menace to civilization, can never be rectified by the inauguration of a cradle competition between these two classes. The example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken, should not be held up for emulation to the mentally and physically fit, and therefore less fertile, parents of the educated and well-to-do classes. On the contrary, the most urgent problem to-day is how to limit and discourage the over-fertility of the mentally and physically defective. Possibly drastic and Spartan methods may be forced upon American society if it continues complacently to encourage the chance and chaotic breeding that has resulted from our stupid, cruel sentimentalism.[139]

In a 1926 speech at Vassar college, Mrs. Sanger commended the immigration restrictions that had been strongly supported by the eugenicists:

> The question of race betterment is one of immediate concern, and I am glad to say that the United States Government has already taken certain steps to control the quality of our population through the drastic immigration laws.

Mrs. Sanger remained unsatisfied.

> But while we close our gates to the so-called "undesirables" from other countries, we make no attempt to discourage or cut down the rapid multiplication of the unfit and undesirable at home.[140]

The remedy proposed was another favorite of the eugenicists—sterilization. However, Mrs. Sanger's considered position was that sterilization should be a secondary method, not the method of choice:

> The first great need of modern society is the encouragement of Birth Control education among potential parents of those poorer strata of society where poverty is correlated with disease, poor health, and physical or mental defect.[141]

Sterilization should be used immediately on obvious defectives, she thought, but others should be allowed the opportunity to practice birth control and should be sterilized only if they failed:

> Birth Control is of inestimable value not only to the individual parents; but its popularization would enable us to draw a definite line between the worthy, intelligent and self-respecting types of parenthood among the poorer classes and the delinquent and irresponsible.[142]

Progress in the birth control movement seemed to be accompanied, until the mid-1930s, by an increasingly eugenicist coloring. The fourteenth annual meeting of the American Birth Control League, held in January 1935, observed the cost of relief and the fact that families on relief have more children than those not on relief. A resolution was passed unanimously:

> Be it resolved that the American Birth Control League unite with the American Eugenics Society in formulating and securing the adoption of the most effective plans for providing that as a matter of routine, all families on relief shall be informed where they may best obtain medical advice . . .[143]

The April 1935 issue of the *Birth Control Review* was a special eugenics number, for which the American Eugenics Society's president was guest editor.

One matter that greatly worried the eugenicists was expressed by the technical term "fertility differential." The fertility differential is the difference between two groups in the proportion of women in each group who gave birth during a certain period of time.

The concern is exemplified by a discussion in Norman Himes' book, *Medical History of Contraception,* which was originally published in 1936. Dr. Himes first considers whether Catholics have a higher fertility-rate than others, and shows evidence that they do. Then he goes on:

> Are Catholic stocks in the United States, taken as a whole, genetically inferior to such non-Catholic libertarian stocks as Unitarians and Universalists, Ethical Culturists, Freethinkers? Inferior to non-Catholic stocks in general? No one really knows. One is entitled to his hunches, however, and my guess is that the answer will someday be made in the affirmative. If there are no material group differences there is no eugenical problem raised by a supposed differential in net reproductive rates. On the other hand, if the differences in genetic endowment should prove to be real, and if the supposed differentials in net productivity are also genuine, the situation is anti-social, perhaps gravely so.[144]

This book also was sponsored by the National Committee on Maternal Health, Inc., and when reprinted in 1963 it was graced by a twenty-two page foreword by Dr. Alan F. Guttmacher.

It would be unfair to suggest, however, that the American birth control movement has been racist in the current sense. Certainly the vast majority of those involved have been without overt racial prejudices. As early as June 1932, a special issue of the *Birth Control Review* was subtitled, "A Negro Number"; it included articles without racial antagonism, with several by Negroes. Featured were: "Black Folks and Birth Control," "A Question of Negro Health," and "Quantity versus Quality." In the minds of liberal proponents of birth control, the race to be improved was not only the white race, but the Negro race as well.

By the late 1930s, the German experience had registered on everyone, and eugenics went out of fashion. The birth control movement always had been supported by those concerned with other aspects of population problems, and

so a transition to a non-eugenicist concern with the population question was easily made. Frank W. Notestein—then a professor at Princeton and later President of the Population Council, a channel for American funds into world population control[145] —wrote in the *Birth Control Review* in 1938:

> We must credit contraception with permitting us to avoid a population so dense that low death rates would be impossible. But we must charge it with a large part of the existing differences in fertility which are resulting in a population drawn heavily from sections and classes with the least economic opportunity. If that process continues indefinitely, serious damage may be done. There is no proof that the damage will be genetic, for substantial innate differences between large sections and classes have not been shown to exist. The damage may be none the less real, for we are recruiting our population from families whose incomes provide inadequately for the healthy development of children, and from areas whose slender economic resources afford wholly inadequate educational opportunities and restrict the entire cultural life of the community.[146]

In this way eugenics became democratic.

What is the relevance of this discussion to abortion? Just this, that the movement toward loosening the abortion laws actually is aiming beyond the very limited proposals now being placed before legislatures toward a broad use of abortion as a method of birth control. We shall see further evidence for this in chapter five. Of course, some desire this relaxation of the laws simply because they consider it a liberal cause. But the practical importance of legalizing abortion for birth control would be to limit the births of those who are not now effectively limiting them, either by abortion or otherwise.

Here it should suffice to see what Dr. Guttmacher, President of the Planned Parenthood Federation, and Dr. Robert E. Hall, President of the Association for the Study of Abortion, have written.

Dr. Guttmacher feels that it would be ideal to have unrestricted legal abortion. However, he proposes that this goal should be reached by evolution, because most people in America currently would oppose it. He proposes a loosening of existing statutes along the lines usually urged. But to the provision that abortion should be permitted if the child is deformed he adds:

> Then too, if either parent has proved through previous poor performance that because of alcoholism, drug addiction, psychopathy, emotional makeup, etc., he is incapable to care or provide for children, it is senseless to penalize either him or the child unborn.[147]

A great many people—anyone on public welfare, in fact—would meet the qualification proposed here, because the operative clause follows "etc." and "etc." refers to any condition in virtue of which *either parent* has previously turned in a poor performance.

Of course, Dr. Guttmacher is a gentle, kindly man; he is talking about permitting a legal abortion, not about forcing anyone to submit to one. The great effect of legalization would be that groups who now have few abortions, legal or illegal, would be provided through public facilities with legalized

abortions. Thus, Dr. Hall, in an article pointing out that ward patients are provided fewer birth-prevention services, including legal abortions, than private patients, urges greater uniformity:

> The institution and implementation of birth control measures are primarily medical matters. The obstetrician's obligation to provide abortion, sterilization, and contraception is inadequately and inequitably met at the moment. The obstetricians of America must individually and collectively review these vital issues in an effort to establish a more uniformly humane birth control ethic.[148]

In 1959, the American Public Health Association made a statement of policy concerning the inclusion of birth control in regular public health services. At that time, only seven states—Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia—had such programs.[149] If more Negro births than white births were prevented by these programs, this does not demonstrate racist motivation, but merely the coincidental fact that most Negroes happened to be poor. Similarly, when an article appeared in the *Milbank Memorial Fund Quarterly*[150] pointing out certain advantages of abortion and even infanticide as methods of population control, it would have been grossly unfair to charge that genocide was contemplated. Certainly the author was not urging that a racial basis of selection be used; undoubtedly he, like Dr. Guttmacher, would be content to use as criterion the ability of parents to care and provide for children.

It is true that one occasionally runs across a disquieting statement, such as the following by Dr. Harold Rosen:

> In Baltimore, for instance, white children between the ages of twelve and sixteen, even though repeatedly pregnant, are more apt to have abortions than their colored sisters who therefore bear a greater number of illegitimate children.[151]

However, Dr. Rosen seems to view abortion more as a service inadequately distributed than as a mere means of cutting the rate of illegitimate Negro births.

The same outlook emerges from a paper by Dr. Irene B. Taeuber, a respected demographer at Princeton. Writing on Japan, where abortion is the primary method of birth control, she states:

> Among American Negroes, birth rates are substantially higher than they were in prewar Japan. The associated problems of limited education, low incomes, high fertility, disorganization, and delinquency are as real for us as for the Japanese. And however we may estimate our international obligations, we cannot deny our responsibilities for the Navajo on the reservations. A positive approach to the world's population problem, then, requires that we view the many related problems within our own society with the same frankness with which we approach those of other countries. We have the responsibility for whatever actions are needed in our own country, just as others bear it in theirs.[152]

Her evident concern is that the sectors of society that are more advantaged should fulfill their responsibilities to less advantaged sectors by helping them to reduce the fertility differential.

Dr. Taeuber does not suggest that abortion be used in the United States, merely that "whatever actions are needed" be done. It does happen by coincidence that her article appears in a 1964 anthology sponsored by a self-constituted society of world notables, the World Academy of Art and Science, and that two other contributors to that anthology offered interesting observations.

Dr. Lincoln Day of Columbia University included abortion among methods of birth control: "But all means, so long as they are effective and do not endanger the well-being of the persons involved, must be considered." Unless done by the free decision of parents, there would be a serious loss of individual liberty, he observed, and concluded: "Let us hope that the current misuse of this most personal liberty by an unwittingly irresponsible portion of our citizenry can be halted before it jeopardizes any further the liberties of all of us."[153]

Frederick Osborn, a proponent of a respectable type of eugenics, and a past-President (1952–1960) of the Population Council, suggested that couples might be encouraged or discouraged to have larger families depending upon their achievement. "The influences which could be brought to bear range all the way from the climate of public opinion to the use of economic measures such as larger income tax deductions for children through the whole period of their education."[154]

Osborn published on this topic thirty years previously. In a book co-authored with Frank Lorimer, he advocated sterilization as the method of choice to prevent less fit individuals from reproducing disproportionately: "It seems reasonable that social agencies should recommend cessation of child-bearing after the birth of the second living child in the case of families that are personally handicapped or partially dependent on public or institutional aid for their maintenance."[155]

Abortion was considered as an alternative to sterilization:

> All available data clearly indicate that induced abortion is an important factor in the rural-urban differential in fertility in the United States and in most European countries. It is more difficult to define accurately the relation of abortion to the differential among urban social classes. It is possible that the relative availability of abortion in Germany and Sweden may be a factor in the disappearance or reversal of the usual social class differential in some German and Swedish cities; but this has not been demonstrated.[156]

But in 1934 abortion had to be rejected because though it "demands no persistent self-discipline," which would make it an ideal method of birth control for the less desirable elements of society, it was "repudiated by most medical authorities."[157]

Lorimer and Osborn were not racists. They hoped that suitable measures would reverse the trend by which the more desirable Negroes were relatively infertile and the less desirable ones excessively fertile:

> In the case of colored families that respond well to opportunities for intellectual advance, the eugenic principles already outlined suggest attention to greater provision for the economic security of young couples, especially among intellectual workers. In the case of colored families that fail to respond to such opportunities, the sort of efforts already described as generally applicable to families of low intellectual development may be evoked—and similar difficulties must be faced.[158]

Loosening the abortion laws is a step in an evolution toward legalized abortion, available to all without discrimination. In this way fertility differentials that have caused concern for at least a generation would perhaps finally be eliminated. However, the motivation cannot fairly be represented as racist; no respectable person has yet said that abortion be applied to Negroes—or to any other minority—as a way of limiting its growth. Rather we must understand the movement to loosen abortion laws as a further step in the continuing effort of the better (or "more fortunate") parts of society to fulfill their responsibilities to those who have shown themselves, in Dr. Guttmacher's words, "incapable to care or provide for children."

This effort follows on efforts only partly successful to meet the problem in other ways. Faced with the demands that would be made on the United States' program of foreign aid and the domestic war on poverty, President Johnson, speaking at the twentieth anniversary of the United Nations, San Francisco, June 25, 1965, stated the fundamental principle of his policy:

> Let us in all our lands—including this land—face forthrightly the multiplying problems of our multiplying populations and seek the answers to this most profound challenge to the future of all the world. Let us act on the fact that less than five dollars invested in population control is worth a hundred dollars invested in economic growth.[159]

Clearly, nothing aimed at any particular foreign or domestic group is intended. It is a mere question of dollars and cents. Every dollar spent abroad or at home to control population is worth twenty dollars in capital investment. It is only a coincidence that capital already is invested for *us.* and the saving will be achieved by not investing it for *them.* Actually, the ratio of twenty to one, suggested by former President Johnson, probably is much too low, if we consider the new techniques of abortion, now becoming available, that we will consider in the next chapter.

CHAPTER III
A MEDICAL VIEW

Abortion Deaths

"Five thousand American women die every year from illegal abortions!" This assertion is repeated over and over again by proponents of abortion law relaxation. It is demonstrably false. Informed proponents of relaxation of the laws know it is false, but they usually keep silent, and popular media continue to perpetuate the false figure.

Kenneth R. Niswander, for example, writing in the *Western Reserve Law Review* states: "Of women electing illegal abortion, an estimated five to ten thousand die each year."[1] Bates and Zawadzki state that the number of criminal abortions each year in the United States is large, and add: "Out of this number at least five thousand women die as a direct result."[2] *CBS Reports,* "Abortion and the Law," put the "fact" strategically near the beginning of the program: "Five thousand of these women die," Walter Cronkite said with a tone of horrified conviction.[3] The "fact" was driven home again toward the end of the program, the last scene of which showed an alleged hospital death following illegal abortion.

Glanville Williams cites the 1939 British Government Interdepartmental Committee for a figure of between 411 and 605 deaths due to abortions of all types in England each year, and adds that "the committee admitted that this probably understated the position."[4] For the United States, he refers to a 1935 estimate of 8,000 deaths per year, but concedes that this may have been reduced by antibiotics.[5]

What evidence is provided for these figures? Niswander cites Taussig and Russell S. Fisher. Bates and Zawadzki cite Fisher. Williams cites Taussig and Fisher. *CBS Reports* cites no one at all.

Russell S. Fisher published his article originally in 1951 in a criminology journal and revised it for the symposium edited by Rosen. Fisher simply reworked Taussig's figures, assuming a larger number of abortions and a lower rate of deaths (because of the increase of population and the introduction of antibiotics, respectively).[6]

There is no need to examine in detail the extrapolations and deductions by which Taussig arrived at a figure of 8,000 to 10,000 deaths from all types of abortion. He assumed that the maternal death-rate following abortion would be 1.2 percent. He worked from one careful U.S. Children's Bureau study that examined maternal deaths in fifteen states in 1927–1928. He mixed in some questionable German data from the same period, and assumed that there would be as many deaths concealed as detected.[7]

But at the 1942 conference, *The Abortion Problem,* Taussig admitted that he had to reconsider his estimates: "They were trimmed down considerably, particularly as to the number of abortion deaths, in which I attempted to find concealed abortion deaths under other causes of death." He concluded: "I think we can positively say there do not occur over 5,000 abortion deaths annually in this country, no matter how we try to cull the various brackets in the mortality statistics."[8]

Taussig reduced his estimates with reluctance. He had postulated a death-rate of 1.2 percent following abortion; Fisher trimmed this to .5 percent, on the basis of his guess concerning the effect of antibiotics. But Gebhard and his colleagues refer to hospital studies of the period before World War II—before antibiotics—that revealed a range of .35 percent to 1.9 percent deaths among abortion cases *admitted to hospitals.*[9] Obviously only the serious cases that led to complications found their way into hospital records.

A sane approach should begin with an examination of the official statistics. In 1964 in the United States there were 1,343 maternal deaths from all causes related to pregnancy and childbirth. Abortion of all kinds accounted for 247 reported deaths. A British gynaecologist who participated in the 1966 conference, *Abortion in Britain,* summarized British statistics, which reveal about 50 deaths per year due to abortion of all kinds; only 61 percent of these cases were definitely a result of illegal interference.[10] It was on the basis of such figures that Dr. Goodhart concluded that the death-rate from illegal abortion either approximates that from normal childbirth, or the number of illegal abortions must be greatly exaggerated.[11]

Of course, the officially reported statistics will be disputed; the claims will be made that many abortion deaths are concealed and remain uncounted in official statistics. There are three routes by which we can examine the merits of this claim. First, a closer examination of the vital statistics themselves. Second, special studies in certain states. Third, expert opinion from persons known to be sympathetic to abortion law relaxation.

The *Vital Statistics of the United States* uses the years 15–44 as a basis for calculating the fertility rate, because almost all pregnancies occur during these ages. In 1964, when 247 deaths were reported due to abortion of all kinds, only 50,241 American women aged 15–44 died *from all* causes. To conceal any substantial number of deaths in this small total mortality would be impossible. In these age groups, far more men than women died—the total of American male deaths, aged 15–44 in 1964, was 89,759. If abortion deaths were con-

cealed in large numbers, then, they would have to be in categories where female deaths outnumber male deaths. One such category is cancer. All forms of cancer accounted for nearly a quarter of female deaths—11,943. There were fewer male deaths due to cancer in the corresponding age groups—only 9,687. But the difference is explained by the simple fact that 3,044 women died of breast cancer, while only 8 men died from cancer of the breast.

As to special studies, one of particular interest is a report by Dr. Milton Helpern, Chief Medical Examiner of New York City. This was presented at the 1955 Planned Parenthood abortion conference, and it is hard to believe that most advocates of abortion law relaxation are unaware of it. Dr. Helpern described the investigations that were conducted to determine whether a death was due to criminal abortion. Although reporting had improved, the number of deaths had nevertheless fallen—from 140 in 1931 (around the time the material for Taussig's book was gathered) to 15 in 1951.[12] New York has about 4 percent of the nation's population, and probably more than its share of abortions. But if Helpern's figure were projected, only about 375 abortion deaths per year in the U.S. would be revealed.

A more recent report on New York indicates a ratio of 3.1 abortion deaths per 10,000 live births in 1960–62.[13] Apparently this figure applies to deaths due to abortion of all types, not only to criminal abortions. If this rate were projected, with a present birth-rate under 4,000,000, the number of deaths from abortion of all types would be about 1,200. This study was reprinted and distributed by the Association for the Study of Abortion, Inc.; other parts of it are often cited by advocates of the relaxation of abortion laws.

A very careful Minnesota study, 1950–1965, was reported by Dr. Alex Barno (who happens to be a Unitarian) at a 1966 meeting of the Central Association of Obstetricians and Gynecologists. Minnesota has one-fiftieth of the country's population; Dr. Barno points out that if there are 5,000 to 10,000 abortion deaths, the Minnesota share would be 100 to 200 per year. Actually, the average number of deaths due to criminal abortion was 1.3 per year. If this figure were projected to the nation as a whole, the result would be 65 deaths per year.[14] In the discussion following Dr. Barno's paper, Dr. Lee Stevenson of Michigan presented material from the Michigan Maternal Mortality Survey. These figures reveal an average of 15 deaths per year from all sorts of abortions between 1955 and 1959, and a higher average of 24 deaths per year between 1960 and 1964. In 1964 there were 25 deaths; if this were projected to the whole nation the result would be 628 deaths due to abortion of all kinds.[15]

A study of Maternal Mortality Committees of California reveals that "the number of deaths per year from all abortions has averaged about 30 without much variation during the period" (1957–1965) under study.[16] The abortions causing deaths studied were definitely induced in 54.7 percent of the cases and definitely spontaneous in 13.1 percent. The remainder were uncertain.[17] Since California has about one-twelth of the population of the U.S., a projection to

the entire country would indicate less than 350 deaths due to criminal abortion in the nation as a whole. If, as seems likely, the California proportions of types of abortions leading to deaths apply in Michigan and New York City, the projections for criminal abortions must be 13.1 percent to 45.3 percent less than the projections derived from their rates of maternal deaths due to abortion of all kinds.

From these studies, it seems clear that even if the official figures are seriously understated, the total number of deaths due to criminal abortion is less than 400 per year. This figure is in line with the results from Michigan and California studies, though very high in comparison with the Minnesota results and somewhat low in comparison with recent New York City figures.

Finally, there are the experts. Dr. Tietze examined the question of the validity of the official statistics in a 1948 article. After considering all the possibilities for understatement, he concluded that the vast majority of abortion deaths in the U. S. are correctly reported, though perhaps not as large a proportion as in Britain, where the Registrar General for England and Wales asserted there was no reason to suppose understatement by more than 10 percent.[18]

Mary S. Calderone, who edited the report of the 1955 Planned Parenthood abortion conference, wrote in 1960:

> Abortion is no longer a dangerous procedure. This applies not just to therapeutic abortions as performed in hospitals but also to so-called illegal abortions as done by physicians. In 1957 there were only 260 deaths in the whole country attributed to abortions of any kind.

She went on to note the decline in deaths between 1921 and 1951, and she explained it by drugs and by the large proportion of abortions performed by physicians.[19] This explanation is confirmed by the California study, which revealed that the death-rate from abortions performed by physicians must be very low; less than 3 percent of the deaths certainly due to criminal abortion followed the intervention of a physician, while two-thirds of them followed an attempt by the woman herself.[20]

Not 5,000 to 10,000 deaths due to criminal abortion, but 200 to 400 per year in the United States—that is the truth of the matter, and no advocate of abortion law relaxation should distort the facts. By "criminal abortion" here we refer to *all* illegally induced abortion, whether self-induced or induced by amateurs, or by trained physicians.

To his credit, Dr. Robert E. Hall, President of the Association for the Study of Abortion, Inc., and leading advocate of abortion law relaxation, recently criticized the excessive claims, referring to the article by Niswander mentioned above:

> I would quarrel with Niswander on only one point, namely, his perpetuation of Taussig's thirty-year-old claim that five thousand to ten thousand American women die every year as the result of criminal abortions. Whether this statistic

> was valid in 1936 I do not know, but it certainly is not now. There are in fact fewer than fifteen hundred total pregnancy deaths in this country per annum; very few others could go undetected and of these fifteen hundred probably no more than a third are the result of abortion. Even the "unskilled" abortionist is evidently more skillful and/or more careful these days. Although criminal abortion is of course to be decried, the demand for its abolition cannot reasonably be based upon thirty-year-old mortality statistics.[21]

Dr. Hall would have done better to have mentioned the census figure—247 deaths from abortion of all kinds. As we have seen, even if the figure is understated, *criminal* abortion deaths are surely less than 400 per year in the United States. Apparently Hall is maintaining Taussig's tradition, at least to the extent that Hall still doubles the reported death-rate, and uses the result in a way likely to lead the unwary reader to suppose there are as many as 500 deaths due to criminal abortion. However, for a man who is retreating, "probably no more than a third" of 1,500 deaths is a considerable improvement upon the much higher figures that usually have been given by advocates of abortion law relaxation.

Unfortunately, Dr. Hall in the same essay perpetuates the unfounded claim that there are one million illegal abortions per year in the United States.[22] Abortionists would have to be extremely skillful indeed if the actual maternal death-rate following abortion has to be reduced from Taussig's unbelievably high guess of 1.2 percent to .05 percent, or one death for each 2,000 criminal procedures.

Even more disturbing, however, is that Dr. Hall continues to talk as if legalizing abortion would eliminate criminal abortions and their consequences: "Although criminal abortion is of course to be decried," Dr. Hall says, "the demand for its abolition cannot reasonably be based upon thirty-year-old mortality statistics.[23] Even 400 deaths would be a very grave matter if they could be prevented. But, as we saw in chapter two, in our examination of "The Frequency of Illegal Abortions in Other Countries," a limited relaxation of anti-abortion laws is likely to lead to an increase of all abortions, of illegal abortions, and so of abortion deaths; even abortion on demand does not lead to the abolition of criminal abortion.

Often it is pointed out that the abortion death-rate is higher for non-whites than for whites. This is true; the 1964 census shows a death-rate, due to abortion of all kinds, six times higher among non-whites. In actual numbers, there were 130 non-white deaths due to abortion, and only 117 white deaths from this cause. *But these figures include spontaneous and therapeutic abortions as well as illegal ones.* And the non-white maternal death-rate from all causes other than abortion also is disproportionate; in 1964 it was five times as high for non-whites as for whites.

The latter difference can hardly be explained by criminal abortion; the laws against abortion could be loosened without altering this disproportion. The death-rate from all causes among non-whites is higher, usually more than

twice as high in all age groups up to fifty years of age. A non-white newborn baby girl is five times as likely to die of infection as a white baby girl; a non-white woman is nearly six times as likely to be a victim of murder as a white woman. These facts are due to a whole complex of social conditions which will not be improved in the least by a loosening of the laws against abortion.

Colored women simply do not get adequate medical care. Adverse conditions undoubtedly lead non-white women—who are less prone to abortion, as we have seen—to try to abort themselves, while white women get professional help, legally or illegally. Thus the Kinsey materials showed that 8–10 percent of abortions among the basic sample of white women were self induced, but 30 percent among the Negro and prison samples were self induced.[24]

Many women who are now dying as a consequence of self-induced abortion would not go to a physician for the operation if it were legal, unless it were free of charge. Advocates of abortion law relaxation have not yet proposed that the operation be done without charge. What would the American Medical Association have to say about such a program of aborticare?

Indications for Therapeutic Abortion

If a physician openly and with legal justification interrupts a pregnancy with the expectation that the child will thereby die, he is said to perform a "therapeutic abortion." *Therapy* is treatment by a physician; in therapeutic abortion the pregnant woman's disease is treated, in part, by interrupting her pregnancy.

When Taussig wrote his book, he devoted a long chapter to "Indications for Therapeutic Abortion."[25] In medicine the word *indications* refers to those conditions which seem to warrant a certain procedure. Taussig stated:

> If therapeutic abortion were limited to those cases where the life of the mother was certainly and immediately imperiled, the number of such abortions would be exceedingly small, and unfortunately they would in many instances be done too late to save her life.

But, he adds, "serious danger to the health of the mother" also must be considered.[26] A long list of indications follows; the leading one is active tuberculosis. Psychiatric reasons are mentioned, but they play a rather small role.

By 1951, Dr. Guttmacher was able to state:

> Even before the advent of the "miracle" drugs, the practice of allowing pregnancy to continue in women with pulmonary tuberculosis had become general. It had been determined that if the tuberculous pregnant woman was treated like the non-pregnant, with pneumothorax or even surgery if indicated, she did well.[27]

In other words, the leading indication in Taussig's time became insignificant in less than two decades, mainly because a prejudice against pregnancy was overcome by the facts. Guttmacher expresses this reason for change with admirable clarity:

> Two decades ago the accepted attitude of the physician was that, if a pregnant woman were ill, the thing to do would be to rid her of her pregnancy. Today, it is felt that unless the pregnancy itself intensifies the illness, nothing is accomplished by abortion.[28]

Dr. Guttmacher's effort to set out possible indications for therapeutic abortion also is introduced and concluded by a frank statement that there is little consensus among physicians concerning legitimate indications:

> I should like to re-emphasize the fact that, if two well-qualified obstetricians were each to write upon this subject, there would be no likelihood of absolute agreement: the views expressed, therefore, are not necessarily the only correct ones.[29]

An interesting survey of medical literature was included in Eugene Quay's legal study published in 1960. This survey reveals a trend toward reduced recognition of medical indications for abortion. But as the indications lessened in number, they also became less definite, so that hardly any condition is generally admitted to require abortion for the protection of the mother's life and health.[30]

There appear to be only the following types of cases concerning which there is general agreement:[31]

1) Some cases, including hydatidiform mole, in which the fetus is dead or has been reabsorbed. Such cases, though technically involving an interruption of pregnancy, present no ethical question.

2) Some types of cancer and other tumors require removal of the uterus during pregnancy. We shall see in considering the ethical questions that these cases present no problem; there is general agreement that removal of the uterus is allowable.

3) Ectopic pregnancies—i.e., those which involve implantation outside the uterus, usually in the tubes, but occasionally in the abdominal cavity—require removal. In most cases ectopic pregnancy presents no ethical problem. We shall consider the question in detail.

4) Heart and kidney diseases which are complicated by progressively diminishing or failing heart and/or kidney functions, especially during the first three months of pregnancy. These cases present an important ethical question, because there does exist a very broad medical consensus that there are legitimate grounds for therapeutic abortion in such cases, while an absolute prohibition of abortion seems to exclude the procedure.

Incidence of Therapeutic Abortion

Dr. Robert E. Hall has accepted a somewhat extended list, including a few less common conditions and special cases of some fairly common conditions. He observes that if his list were strictly observed, the rate of therapeutic abortions would be about 1 per 10,000 deliveries. The actual rate has declined in recent years, but hospital studies indicate it still is 1:400–500; the total

number of therapeutic abortions per year in the United States is 8,000 to 10,000.[32]

There are two facts that must be considered with regard to the therapeutic abortions that are now performed. The first is that incidence varies greatly in different hospitals, and between different groups of patients treated in the same hospital. The second is that most of these abortions are performed for reasons that are not, in a strict sense, therapeutic.

These points are revealed by several studies. Dr. Gold and his colleagues in their study in New York City show a 1960–1962 rate of 1 abortion per 10,000 births among Puerto Ricans—the ratio Dr. Hall said would prevail if strict medical indications were adhered to. The rate among non-whites was 5 times as high, and that among other whites 25 times as high, as that among Puerto Ricans.[33] Again, the rate in municipal hospitals was 1 per 10,000 births; the rate in general services of voluntary hospitals was 7 times as high, in private service of voluntary hospitals 24 times as high, and in proprietary hospitals 39 times as high, as in the municipal hospitals.[34]

Dr. Hall tabulated data from sixty large hospitals concerning recent periods, mainly in the early 1960s. These revealed variations between ward and private services of such an order that on the average therapeutic abortions were performed more than three times as often in private as in ward services. In 1951–1962, George Washington University Hospital, Washington, D.C., (private, not Catholic) had only 1 abortion to 4,324 deliveries in its ward service, but had 1 to every 218 deliveries in its private service. In 1960–1962, Woman's Hospital, New York City, had two and one-half times as many ward deliveries as private deliveries (4,501 to 2,023). But there were only 5 abortions on its ward service, while there were 101 on its private service, where a ratio of 1 abortion per 20 births was reached. Chicago Lying-In 1957–1962, performed 1 abortion for every 227 deliveries in its service, exclusively ward; Cincinnati General Hospital in the same years had no abortions but 24,417 deliveries in its service—also strictly ward. Similarly, in hospitals with strictly private services there were vast discrepancies. The California Hospital, Los Angeles, reported (1953–1962) 1 abortion per 488 deliveries; St. Luke's Episcopal Hospital, Houston, reported (1961) no abortions and 2,969 deliveries.[35]

Why this great variation? Dr. Hall suggests three reasons. First, ward patients generally register later for care and are "less aware of their need to be aborted." (This suggests either that the need is nonmedical, or that the patients in private service are better judges of medical need than their physicians.) Second, there is a higher incidence of abortion for psychiatric reasons among private patients. At Sloane Hospital, New York (1951–1960), psychotherapy was given to 86 percent of the ward patients and to only 57 percent of the private patients aborted on psychiatric grounds. (This suggests that pregnancy as such has a much less damaging effect on the mental health of women in lower socioeconomic brackets.) Third, "abortions were more common among the private patients at Sloane Hospital for virtually all of the more

debatable indications, such as arthritis, inactive tuberculosis, and rubella."[36]

This explanation tends to be confirmed by a recent study of therapeutic abortion at Mount Sinai Hospital, New York, 1953–1964. Abortions in the private service have risen very rapidly; between 1956–1958 and 1962–1964 the rate more than doubled, from 49 to 121 per 10,000 deliveries. At the same time there was only a slight increase on the ward service, from 48 to 62 per 10,000 deliveries. In both services, abortions for psychiatric indications increased, but more than two and one-half times as much in the private service. The rate for genetic reasons (mainly German measles) fell 75 percent in ward service while it increased more than 50 percent in private service. Very strikingly, the rate for the indication of cancer was consistently higher in private service; the mean rate (1953–1964) for this indication was 7 times as high on the private service as on the ward service.[37]

The authors of this report comment:

> On the basis of a twelve-year experience with therapeutic termination of pregnancy, we concur with the growing opinion that for most clinical conditions the natural history of a disease is not influenced deleteriously by an intercurrent pregnancy. Neither is the course of pregnancy often seriously affected by a complicating medical condition.[38]

The discrepancies thus seem to arise mainly from differences in the extent to which psychiatric and fetal indications are accepted as justifications for abortion. Psychiatric and fetal indications are such complex topics that we shall devote the next two sections to them. Fetal indications are not a basis for therapeutic abortion, if the word "therapeutic" is taken in its proper sense, because the health of the mother is not involved, and the health of the child is not improved. We shall see that psychiatric indications also have little to do with therapy. It follows that most abortions, performed openly in hospitals, are not, in a strict sense, therapeutic. Dr. Alan F. Guttmacher has written that over 85 percent of the abortion operations performed at Mount Sinai Hospital (1952–1956) "at least bent the law, if they did not fracture it."[39] He has also said that "the abortion laws make hypocrites of all of us."[40]

From data such as we have been reviewing it has been argued by Dr. Hall, Dr. Guttmacher, and others, that the differences in treatment are an inequity to those who have fewer abortions, and that changes in the laws are necessary to permit abortion for the indications in accord with which it is being performed.[41]

One point to be observed is that the evidence reveals that no change in the laws is needed to permit physicians who want to perform abortions for psychiatric, fetal, and other reasons to do so. If a physician in good standing wishes to perform an abortion in a hospital for any reason that would be approved by a substantial number of his colleagues, he can act following consultation; physicians are not convicted for violating anti-abortion laws in

such cases.[42] Laws that do not reflect current practice need not be altered to permit that practice; however, if the laws are loosened, practice may well vary even more widely.

A second point is that the argument for loosened anti-abortion laws based on the "inequitable" differences in treatment is strictly parallel to—in fact, is merely an extension of—the argument that always has been used by advocates of birth control when faced with the evidence that contraception increases the fertility differential between upper and lower social classes. In recent years the argument has been that contraception must be included in public health and welfare programs, so that lower class women might share the freedom to be as infertile as they wished. In the 1920s and early 1930s the argument was frankly eugenic—that contraception had to be extended to the lower classes lest their uncontrolled breeding debase society and culture. The extraordinary argument for a loosening of anti-abortion laws to eliminate inequities in treatment begins to make sense when it is put into its proper historical context.

A third point is that the matter may well be more complex than the argument suggests.

To begin with, Drs. Keith P. Russell (who has been a member of the Board of Directors of Dr. Hall's Association) and J. George Moore have concluded that differences in the patients, rather than a double standard, account for differential abortion rates in various types of hospital services.[43] Perhaps they are not correct, but if there is a double standard in practice among the same doctors in the same hospital, changing the laws would not eliminate it. Undoubtedly the well-to-do enjoy—if that is the correct word–a great deal more surgery generally, and the laws do not create whatever double standard is involved. Rather, it is a simple matter of economics.

Moreover, the differential between public and private services need not exist. A review at Toronto General Hospital (1954–1965), where 262 abortions were performed in a recent twelve-year period, shows a statistically insignificant difference between the "therapeutic" abortion-rate in public (1:181) and private (1:172) services. The law at Toronto is as restrictive as in the United States; the author of this report also favors loosening it.[44] But apparently in Toronto physicians are as willing to bend the law for poor patients as for rich.

We have seen in chapter two that the very lowest socioeconomic classes are not very likely to have criminal abortions. They may be even less likely to seek comparatively costly "therapeutic" abortions. Moreover, Dr. Alice Rossi, a sociologist who favors legalizing abortion for any woman who wants it, has speculated that middle class women and working class women react differently to illegal and legal abortion. A middle class woman who obtains an illegal abortion is distressed in part by the experience of going across the "social tracks," Mrs. Rossi explains:

> A working class woman under similar circumstances may feel very differently. Her discomfort may actually be greater about going uptown to a big, alien hospital

to obtain an abortion at the hands of a middle class doctor than resorting to an abortionist or physician in her own community.[45]

Mrs. Rossi assumes that the "working class woman" is likely to want an abortion. But in the poorest groups, we have seen that the *desire* may not be present. The Kinsey materials seem to show that those in the lowest socioeconomic class have a more affirmative attitude toward procreation and that abortion increases with status-striving.[46] Thus a major factor in the differential incidence of "therapeutic" abortions may be difference in demand.

This supposition concerning difference in demand receives some confirmation from an interesting study of therapeutic abortion in Salt Lake City, 1954–1964. The incidence in four large hospitals was one therapeutic abortion per 2,482 births. The author of the report points out that about 50 percent of the residents of Salt Lake City are members of the Mormon Church, which "places great value on having children. Such a philosophy is antithetical to the extensive use of abortion."[47] He explains further that the "Church makes no dogmatic statement concerning therapeutic abortion, but one finds strong sentiment against it, and criminal abortion is condemned as a sin."[48] In this situation 73 percent of the abortions were for medical indications (two-thirds of these serious heart and kidney problems), 18 percent were for psychiatric reasons, and 9 percent for fetal indications.[49]

The same report included an interesting survey of the attitudes of Salt Lake City's obstetricians and gynecologists. They considered (40 to 3) that indications for therapeutic abortion *sometimes* exist. But *asked to assume that each condition was serious,* a majority said they would consider therapeutic abortion only in case of rheumatic heart disease (22–19), certain kidney problems (26–14 and 28–10), and cancer of the cervix (25–19). The majority rejected all non-medical indications; for example, rape (13–30), suicide threat (17–20), German measles (7–36).[50]

Psychiatric Aspects of Therapeutic Abortion

Fourteen psychiatrists polled in the same survey all accepted possible indications for therapeutic abortion, and the majority of those answering was willing to consider almost every indication suggested. Interestingly, the majority of psychiatrists accepting many of the medical indications was almost unanimous, while it was significantly reduced where psychiatric indications were in question. The majority of the psychiatrists (9–4) rejected psychoneuroses as a possible indication. They also rejected (7–4) suicide threat, and in this were more reserved than the obstetricians and gynecologists. Apparently, the more a physician knows about an excuse for therapeutic abortion, the less likely he is to consider it valid. At the same time a majority of the psychiatrists polled did accept schizophrenia (8–5) and manic-depressive reaction (7–6) as possible indications for therapeutic abortion.[51] Clearly, in Salt

Lake City there was no general agreement in favor of therapeutic abortion for any of the proposed psychiatric indications.

Other reports strongly suggest that psychiatric indications for therapeutic abortion are mostly subjective. One study in California revealed attitudes that varied so much that some psychiatrists never recommend therapeutic abortion, while some "seem always to do so."[52] Dr. David C. Wilson, reporting on abortion at the University of Virginia Hospital, explained why abortions on psychiatric grounds dropped from an average of 3.8 per year (1941–1950) to none (1951–1952):

> The fact that no abortions have been done for neuropsychiatric reasons during the last two years at the University of Virginia Hospital means that a change of attitude has been successful in helping many people solve their problems in living, problems which seemed to be without solution at the time the case was presented.

The attitude that changed was not only that of the patients, but also that of the physicians.[53]

We shall see more about hospital committees in a subsequent section. It is perhaps due to their work that although the proportion of therapeutic abortions performed on psychiatric indications seems to be rising almost everywhere, the absolute number of such abortions seems to be declining, at least in some places. The study of trends in New York City (1943–1962) by Dr. Gold and his associates reveals that therapeutic abortion for mental disorders declined 19.1 percent between the 1951–53 period and the 1960–62 period.[54]

A variant of the committee system is a review board; staff members do not pass on proposed therapeutic abortions in advance, but simply formally review and discuss all such cases afterwards. This simple procedure reduced the incidence of therapeutic abortion on psychiatric grounds at Tampa General Hospital from 1 per 149 births (April 1963 to March 1964) to 1 per 410 births (April–December 1964). The authors of this report cite the even more dramatic declines achieved elsewhere by this simple device. They also point to the pre-existing situation. Between 1960 and 1964 various psychiatrists had recommended from one or two to as many as 23 and 33 abortions. One might suppose that differences in their practices were a factor, but this is discounted, and the difference is explained by "varying opinions of the subject."[55]

The strongest psychiatric indication for therapeutic abortion would seem to be the case in which a woman would otherwise commit suicide. However, Dr. Myre Sim, of Birmingham, England, cites evidence from earlier studies that women refused abortion do not commit suicide, and cites a study (1950–1956) by the coroner of Birmingham who concluded:

> In no case has pregnancy been established as a factor in bringing about the suicide. In two cases the woman thought she might be pregnant, but it was certainly not confirmed by medical examination or post-mortem examination. We have no record of any woman known to be pregnant having committed suicide.[56]

Swedish material continues to show that suicide threats are not carried out. A 1962 report of a study during 1954–1956 shows that women threatening to commit suicide did not do so prior to determination on their requests for abortion. A 1963 report of a study of 273 women refused abortion, including 32 who had threatened suicide, revealed no suicides. There were only three suicides following rejection of an application for abortion in the entire period between 1938–1958, so far as the Swedish National Board of Health could determine.[57]

A California study of suicides revealed only three involving pregnant women. Statistically 17.6, at a minimum, could have been expected in the population studied. All three of the suicides involved stress between the man and woman, rather than rejection of pregnancy. The authors, Drs. Allan J. Rosenberg and Emmanuel Silver, conclude that perhaps pregnancy has a psychically protective role.[58]

These studies all tend to confirm facts revealed in a discussion at the 1955 Planned Parenthood abortion conference. It was pointed out: "Suicide is one of the most difficult things to forecast in any patient . . ." Suicides among pregnant women in New York City (1953) were reported to be at a rate 90 percent less than among non-pregnant women in the same age groups. A Danish physician confirmed this by the observation that although the general suicide rate in Denmark is high, it is so low among pregnant women that not even an attempt at suicide is considered sufficient evidence to warrant therapeutic abortion. A Swedish physician reported a somewhat higher rate of pregnancy among female suicides in Sweden, 3.7 percent or 5 percent according to different studies, but did not compare these figures with what might have been predicted for *all* women.[59] An American psychiatrist said that not suicide risk but socioeconomic factors were the actual grounds in many instances in which psychiatric recommendations for termination were made.[60]

At the same conference, Dr. Iago Galdston, who opened the discussion of psychiatric factors, stated clearly that abortion as such is no remedy for the psychologically sick person. He added the blunt comment: "Bad as the situation was initially, it not infrequently becomes worse after the abortion has taken place."[61]

Theodor Reik has proposed a theory that might explain the worsening of the psychological situation after abortion. For the man, Reik theorizes, abortion is an expedient solution to the problem, but for the woman the operation has an unconscious meaning comparable to that of castration for a man. The experience embitters the woman against her partner.[62]

Severe depression has been suggested as a psychiatric indication for abortion. But Dr. George S. Fultz, Jr. has argued that abortion is seldom justified on any psychiatric ground; the treatment of existing illness is much more desirable. In regard to depression, he says:

> Depressions are due to guilt. Depressed patients, who are made more depressed by their pregnancies, are already guilt laden, and an abortion, even though it might serve as a temporary solution to the depression, seems to add much more guilt with increased depression later on.[63]

At a 1962 meeting of the American Psychiatric Association, Dr. Sidney Bolter offered a devastating critique of the role many psychiatrists were performing in the "therapeutic" abortion mill. He pointed out that there was a rush for judgment on cases not previously seen, and that important psychiatric factors against abortion were being casually ignored. He pointed to a prospect of severe psychic damage to the patient coming to the surface at menopause, perhaps years after the "therapeutic abortion."[64]

Dr. T. N. A. Jeffcoate, an eminent British obstetrician and gynaecologist, surveyed the conflicting attitudes among psychiatrists concerning abortion in cases of serious psychosis. He concluded that few mentally ill women are ever helped by abortion, and it is hard to tell beforehand who those few will be. Even in cases where severe mental illness returns after successive childbirths, abortion is not a solution, because it has its own problems and the "disorder is just as likely to follow abortion as delivery at term"[65]

Dr. Harry M. Murdock, a psychiatrist and professor of psychiatry, divides into three groups the pregnant patients seen in a private psychiatric hospital. First are patients discovered to be pregnant at admission. Here the family's first reaction often is to demand an abortion, but "the fact of pregnancy does not affect treatment or management, and the question of abortion does not require much consideration." Pregnancy is a reality stress, explains Dr. Murdock, and it sometimes seems to help recovery. Second are patients known to be in the early stages of pregnancy at admission. These have been ill for some time, but the pregnancy elicits a sharp reaction from the family. Among such psychotic patients, Dr. Murdock considers that the depressed stage of manic-depressive psychosis may be hastened and intensified by pregnancy. Third are patients whose mental illness first appears during pregnancy. Dr. Murdock's impression is that "pregnant women are more apt to make a satisfactory recovery from their psychosis, and to do so more promptly than comparable patients who are not pregnant."[66]

The fact of the matter is that the whole concept of psychiatric indications for therapeutic abortion is questionable. Dr. Quinten Scherman told the American College of Obstetricians and Gynecologists at a 1956 meeting:

> Medical men have devised better treatment of severe diseases associated with pregnancy and have been able to markedly reduce the therapeutic abortion rate throughout the country only to find that this least justifiable of all indications, psychiatric reasons, has been allowed to run rampant.

Of manic-depressive psychosis and schizophrenia he added: "The problem here is one of institutional care and certainly therapeutic abortion will not

solve it."[67] Dr. Myre Sim concluded flatly: "There are no psychiatric grounds for termination of pregnancy."[68]

Of course, many psychiatrists would not agree. But it is extremely important to understand why they would not.

Drs. Ebaugh and Heuser, of the University of Colorado School of Medicine, observed in a 1947 article that psychopathy and psychoneurotic reaction do not warrant therapeutic abortion. But in selected cases of schizophrenia, a therapeutic abortion may help to "soften the environmental stress." In selected cases of manic-depressive psychosis, abortion "may be advisable owing to the inability of the patient to care for the child and the problems inherent in management, confinement, and labor."[69] Here abortion is more a convenience for the hospital than a therapeutic measure for the patient.

In Rosen's 1954 symposium, Dr. May E. Romm stated:

> Women with major psychoses of the schizophrenic or manic-depressive types which are not amenable even to protracted therapy, if pregnant, should be relieved from continuing the gestation, both as a humane measure for themselves and for the sake of human beings who otherwise would be brought into an untenable environment.[70]

Here there is no question of therapy; the disease is assumed in advance to be "not amenable even to protracted therapy." Abortion is simply chosen in preference to other possibilities (which are not even mentioned) as a solution to a social problem.

At the 1955 Planned Parenthood abortion conference, Dr. Rosen, himself a psychiatrist, stated:

> So frequently when the psychiatrist sees a patient, he has been asked to do so not really because psychiatric indications or contraindications may be involved, but because socioeconomic factors are pronounced.[71]

By 1964, Dr. Alexander Simon of University of California School of Medicine inserted an extremely significant sentence in a summary of his view of the proper psychiatric evaluation of indications for therapeutic abortion:

> Essential to this evaluation is the assessment of other factors which always influence it: the patient's age, number of children, her wishes regarding therapeutic abortion, the family situation and interpersonal relations, the socioeconomic situation, fetal indications.[72]

This seems to mean that there is a psychiatric indication whenever the psychiatrist decides that, all things considered, it would be good if a woman's demand for abortion were approved. The psychiatrist becomes a kind of judge to whom patients must submit, but who himself decides each case without any definite rules.

Dr. Jack Weinberg, a prominent Illinois psychiatrist, has proposed explicitly that psychiatrists assume this role:

> It is in the more subtle situations with less defined and self evident indications for abortion where no expertise may be needed, that our hearts must grow strong, and

> our readiness to use our painfully acquired skills could be rewarded for the benefit of all. As an example, it is generally accepted that poverty, marital strife, poor housing, financial difficulties, adverse work situations and emotional conflicts can produce mental and physical disorders.

He wishes to consider "not only the direct but also the remote effects on the health and well being of the mother" in deciding whether abortion is indicated, but he wants to "resist the notion to terminate a pregnancy lawfully merely on the grounds that it is inconvenient to either or both parents."[73]

With an outlook of this sort, a very broad concept of "health and well being" allows anything the psychiatrist considers a sufficiently good reason for abortion to become a legitimate indication for "therapeutic" abortion. This development has occurred more straightforwardly in the Scandinavian countries. In Denmark, for instance, the chief excuse for legal abortion is called "stress syndrome." There is no definite illness, and this "stress syndrome" appears to be of two types:

> One type is dominated by social, financial, and housing problems. In these cases physical symptoms in addition to the stress are often predominant. The other type more often appears in middle-class women who are not directly threatened by social destitution due to the pregnancy, but who are motivated to seek an abortion through the fear of a reduction in their standard of living.[74]

In sum, many psychiatrists consider that there are psychiatric indications for abortion, but these reasons are mainly socioeconomic ones. They are converted into indications for "therapeutic" abortion only by the argument that what is not good for the patient—in the psychiatrist's judgment and by his system of values—is bound to make her sick sooner or later. A British psychiatrist, who himself favors broad indications for abortion, states frankly that non-medical factors are determinative:

> If these other factors are disregarded, we might as well abandon the task of advising on this matter, since the number of cases where a purely *medical* indication is concerned is very, very small, in my experience, none.[75]

And the word "medical" is not used here in opposition to "psychiatric."

If psychiatric *indications* for therapeutic abortion only become intelligible when mental health is extended to include socioeconomic welfare, the psychiatric evaluation of untoward consequences of abortion does not require any such stretching of concepts. The literature is filled with testimony from psychiatrists, including many who favor relaxation of anti-abortion laws, indicating the possible dangers of this practice, even when the abortion is done under the best conditions.

Dr. Sim puts the point bluntly: "Abortion, even if therapeutic, may in itself produce a psychosis."[76] An American psychiatrist concluded his presentation before a 1966 meeting of the American Society of Psychoanalytic Physicians by saying:

> Finally, any abortion is an emotionally traumatic experience, and is sometimes a precipitating and unsuspected cause of atypical psychotic reactions. These "pseudo-schizophrenic" episodes compare to those found in the postpartum psychoses, and should be generally treated in the same manner.[77]

The symposium edited in 1954 by Dr. Harold Rosen, who is a psychiatrist sympathetic to abortion law relaxation, contains abundant material pointing to the psychiatric dangers of therapeutic abortion. In a foreword, Dr. Nicholson J. Eastman, noting repeated use in various contributions of expressions indicating psychic dangers, commented:

> The feeling is growing apparently among the leaders in psychiatry that therapeutic abortion on psychiatric grounds is often a double edged sword and frequently carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of pregnancy.[78]

In Rosen's symposium, Dr. Flanders Dunbar writes graphically of the "post-abortion syndrome," in which a woman begins to feel inadequate or guilty, blames her husband or society, becomes "an unpleasant person to live with," and loses "conviction in playing a feminine role."[79] Dr. May E. Romm emphasizes that a woman who undergoes therapeutic abortion is aware of her responsibility for the decision, and so may feel intense guilt and hostility toward the physician, even though she had pleaded with him for the abortion. "She may later equate the abortion with murder and react to the guilt entailed in it with a reactive depression or, in extreme cases, with a psychosis."[80] Dr. Rosen himself emphasizes the possible dangers of therapeutic abortion, pointing out that suicidal depression may appear as a result of abortion even if the pregnancy is not desired.[81] Dr. Theodore Lidz, a Professor of Psychiatry at Yale Medical School, states that abortion can be felt "as a serious assault upon the integrity of the body and a tremendous threat to the integrity of the ego structure." The mother feels this loss to herself as something for which she is responsible: "Much of what goes wrong in life can be blamed upon others, but the ultimate decision concerning abortion and the refusal to give that new life a chance remains with the mother." The guilt may reawaken past guilts, and in turn may be reactivated by future guilts, for example, at menopause.[82]

At the 1955 Planned Parenthood abortion conference, Dr. Iago Galdston stated: "Drawing upon my experience I would summate the major psychological effects in three terms: frustration, hostility, and guilt."[83] Dr. Lidz unfolded his views at some length according to the outline indicated by these three terms, and questioned whether these reactions were culturally or religiously based, or whether for the mother abortion does not violate "something that is properly her goal in life."[84] Dr. Rosen pointed out that adverse reactions do not always occur, and suggested that they are less common in psychologically healthy women than in the patients psychiatrists see.[85]

This last observation is supported by Martin Ekblad's follow-up study of 479 women granted abortions under Swedish procedures. He summarizes:

> The psychically abnormal find it more difficult than the psychically normal to stand the stress implied in a legal abortion. This means that the greater the psychiatric indications for a legal abortion are, the greater will be the risk of unfavorable psychic sequelae after the operation.[86]

Dr. Nathan M. Simon and Audrey G. Senturia have surveyed publications (1935–1964) on psychiatric consequences of abortion. Their survey is accompanied by a critique of the scientific method of the authors reported. They reach the conclusion: "There appears to be a lack of conclusive data about the effects of therapeutic abortion."[87] Yet, despite the faults of methodology Simon and Senturia point out, such as failure to take into account the significance of non-response to the surveys, the studies cited do point to the conclusion that therapeutic abortion has serious psychiatric consequences. Perhaps it is pedantic to insist on a perfect demonstration before admitting a point of this kind which is so generally agreed upon by psychiatrists working from clinical experience.

One of the studies Dr. Simon criticizes least (and cites only from a summary in a secondary source) is the Swedish work of Per Aren. At least 40 percent of the women studied became pregnant again within three years. Of 100 who gave birth after a previous legal abortion, "14 stated that they had desired to have a substitute for the child they had earlier not borne, and 20 stated that although the pregnancy was unwelcome, they could not bear the idea of going through a new abortion."[88] Aren holds that these cases show the importance of guilt feelings after legal abortion. He found also that in 142 cases in which legal approval for abortion was granted, but for various reasons the operation was not performed, 79 percent enjoyed mental health as good as or better than before—although the approval of abortion was on psychiatric or social-psychiatric grounds. In the remaining cases "the deterioration was usually insignificant, and in approximately half of the cases it was apparently due mainly to factors other than the arrival of the child."[89]

Another Swedish study published in 1965, too late for inclusion in the Simon-Senturia survey of publications, again revealed the dangers of legal abortion. Bengt Jansson points out that women granted legal abortion are likely to be psychically vulnerable. Still it is startling to find that 34 women out of 1,773 (1:52) granted legal abortion in Göteborg required psychiatric hospital treatment within a year. Abortion by itself was considered the causal factor in eight cases, and a contributing factor in seven others. There were five suicide attempts shortly after legal abortion, and Jansson concludes by agreeing with earlier Swedish studies:

> It may be said, perhaps, that legal abortion stands out as a fairly ineffective psychiatric therapeutic means. Women who are psychically vulnerable risk a deterioration in their condition through an unwelcome pregnancy and the extra load this involves, whatever course is adopted; while those who are mentally stable get over an abortion, or a rejection of their application for an abortion, considerably better.[90]

Drs. Arthur Peck and Harold Marcus, of Mount Sinai Hospital, reported (1966) a study of fifty patients interviewed by a psychiatrist before abortion and again within three to six months afterwards. They claimed the effect was really therapeutic, though ten women experienced some reaction and one an acute adverse reaction clearly related to the abortion. The validity of the result is questionable, however, because sixteen other women who were interviewed before abortion refused to return for the post-abortion interview and would not respond to repeated efforts to obtain information.[91]

Drs. Kenneth Niswander and Robert Patterson, of State University of Buffalo reported (1967) a questionaire sent to 163 patients who were aborted (1963–1965); 116 replies were received; 29 were returned undeliverable, and 16 were not returned. Six respondents were definitely negative or doubtful about their abortions, but the authors reach a confident conclusion "that the treatment is usually therapeutic in the best sense of the word—the patient feels better and, therefore, functions more effectively."[92]

The situation seems to be this. Until recently the psychiatric consensus and Scandinavian studies indicated that legal abortion is psychologically dangerous and that it is a rather ineffective means of psychotherapy. Recently some American studies have begun appearing that seem to suggest the opposite. The Scandinavian studies certainly are more extensive and more careful than the recent American ones, which involve very few patients and serious methodological defects.

The Report by the Council of the Royal College of Obstetricians and Gynaecologists thus seems to have been correct in concluding:

> Whilst the continuance of pregnancy can have a psychological rather than physical ill-effect, so can induced abortion. There are few women, no matter how desperate they may be to find themselves with an unwanted pregnancy, who do not have regrets at losing it.

The physicians conclude that if the indication for abortion seemed to the woman herself not essential to life and health "she may suffer from a sense of guilt for the rest of her life."[93]

It seems quite doubtful that a change in the criminal laws against abortion will eliminate this guilt; guilt has not been avoided in Sweden. On the other hand, it is fair to speculate that a great deal of the pressure to alter the laws may arise from a gnawing sense of guilt experienced by even reputable physicians who, having bent existing laws to the limit, project the guilt of performing abortions onto the laws, which are thereupon accused of making reputable physicians into hypocrites.

One point about relaxation of the laws should not be overlooked: it will not make the conscientious psychiatrist's work any easier. Dr. Lidz pointed out clearly that difficulty arises from lack of laws, and that laws protect physicians "from the need to make impossible decisions—decisions that often go beyond their knowledge." He adds: "Unrestricted by regulation, the deci-

sion to recommend therapeutic abortion for psychiatric reasons would remain just about as difficult as at present."[94]

Dr. R. F. Tredgold, a British psychiatrist sympathetic to abortion law relaxation, raised some additional important questions concerning psychiatric aspects of abortion in a lecture he gave at the Royal Society of Medicine in 1964. He found acute depression after therapeutic abortion exceedingly rare, but thought that his careful screening of patients might have helped to produce this result, and that "psychiatric support given before and after the operation" may have helped to prevent serious reactions.[95] Obviously such help would be available to few patients if therapeutic abortion were much more common than it now is. Moreover, Dr. Tredgold points out: "One may replace the foetus by a load of guilt, which is more difficult to treat."[96]

He also speaks very frankly about the attitude of the medical staff involved. Gynaecologists and nurses suffer a severe emotional strain because they "are asked to destroy life rather than to save it, as they have been trained to do." Dr. Tredgold expressed sympathy with the opinion—which on other grounds he opposed—of a "gynaecologist who said that if psychiatrists recommend abortion they should learn to do it themselves." He expressed even greater sympathy for nurses who must obey the "gynaecologists and often cannot voice their reluctance."[97] Dr. Tredgold says that he himself "could well do without" the burden of the decision to recommend "what some feel, and call, murder."[98] Medical reforms are urged that would force each general practitioner, gynaecologist, and psychiatrist to see and take responsibility for his own cases. Among these reforms is one that would shock many members of the American medical profession: "In no circumstances should fees be charged for advice or operation."[99]

Professor Jeffcoate also believes that "the destruction of a living embryo offends something fundamental in human nature." He cites another author for the opinion that "as the pregnancy sac is removed, the surgeon 'can feel the shudder of the theatre staff.'"[100] He suggests that both those performing an abortion and those consulting never accept a fee; thus necessary abortions could be performed without a suspicion of criminal intent.[101]

Apparently there is a good reason why the obstetricians and gynecologists in Salt Lake City were so much less willing to consider abortion than were their colleagues in psychiatry. The "refusal to give that new life a chance" may not only cause strain on the medical personnel involved, but may even generate a load of guilt—guilt that physicians would like to see divided evenly with colleagues, guilt that they may even feel obliged to compensate by performing this unpleasant operation without accepting any fee.

After Dr. Tredgold's article was published, other physicians, in letters to the *Lancet,* suggested that the difficulties of decisions concerning therapeutic abortion might be mitigated by the use of a committee system. One correspondent suggested that "collective decision" by general practitioner, psychiatrist, social worker, and gynaecologist would help the latter "to feel that the

distasteful operation he is to perform has been recommended on grounds which he can accept as valid."[102] A member of the Department of Psychiatry at the London Hospital argued that boards should be established. Some psychiatrists might want to keep independence in decision:

> But since the decision is so harrowing and the individual psychiatrist is so influenced by prejudice, conscious or unconscious, surely it would be wise to share this grave responsibility with colleagues and with, perhaps, a non-professional woman of commonsense and child-bearing age.[103]

Dr. Tredgold, replying to correspondence, showed little enthusiasm for the committee idea, partly because "it would be a great strain on the members of the panel to see so many such cases."[104]

"Fetal Indications"

In the next section we shall see how the idea of the abortion board has been put into practice in the United States. Before proceeding to this topic, however, we must consider another major category of excuses for "therapeutic" abortions—so-called "fetal indications." This expression refers to a probability or possibility that if a child is permitted to be born he may have some serious defect. If abortion is performed in such a case, it cannot be regarded as "therapeutic," unless it is argued that the continuation of pregnangy would damage the parents' mental health. This argument is sometimes offered, and undoubtedly prospective defects in the child have contributed somewhat to the proportion of abortions performed on psychiatric grounds. Nevertheless, there appear to be no studies devoted to discovering what happens to the mental health of parents expecting a possibly defective child if abortion is or is not performed.

A certain percentage of abortions performed as therapeutic are frankly admitted to be for fetal indications. The percentage varies in different hospitals, and also in different years, since the largest proportion of abortions for fetal indications is occasioned by the mother's having rubella ("German measles") early in pregnancy. This disease occurs in periodic epidemics, and it is easily overlooked if a case occurs during a non-epidemic year.

In the study of Dr. Gold and associates of therapeutic abortion in New York City, one abortion in every 19 performed (1951–1953) was for this reason. The proportion rose to one per 10–12 during 1954–1959, then fell to one per 14–15 during 1960–1962. In actual numbers there were as many abortions performed on this excuse in 1960–1962 as in 1951–1959, although abortion on all other indications fell by 50 percent.[105] In 1964, an epidemic year, 329 (57 percent) of the 579 therapeutic abortions in New York City were for rubella.[106] Almost every recent hospital study seems to indicate that where therapeutic abortions are performed, some are performed on fetal indications.

The effects of rubella on the unborn child are nothing new, but they were not noticed until recent times. We should not approach the question as if

epidemics of this disease were now adding defective children to the population. Rather, our growing knowledge of this disease has provided a new *understanding* of a portion of the congenital defects that have always occurred, but were accepted as unavoidable accidents until the relationship between them and German measles was learned.

What are the probabilities of defects? Early studies considered cases in which defects and rubella were found together, looking backward after the fact. The percentage of cases in which defects were found was naturally high. More recent studies have followed through cases in which rubella occurred, examining all the outcomes carefully. There is general agreement that the effect of the disease is slight if it is contracted after the twelfth week of pregnancy.[107] Various studies indicate diverse results if it is contracted before that time, with congenital malformations occurring as seldom as 10 percent of the time and as often as 66 percent of the time. The last was a French study involving only 30 infants. Studies that included large numbers showed a 10–20 percent incidence of defects.[108]

Within the critical twelve-week period, there is a considerable decline in the later weeks. The same large studies revealed an 11–33 percent incidence of defects if the mother contracted rubella in the first four weeks of pregnancy; 11–25 percent in the fifth to eighth weeks; and 8–13 percent in the ninth to twelfth weeks.[109]

A summary of several very small prospective studies showed a markedly higher rate in the first four weeks, but the same declining pattern: 14 of 23 born after rubella in the first four weeks suffered defects; 19 of 72, weeks 5–8; 10 of 127, weeks 9–12. Of 109 pregnancies in which rubella was contracted during weeks 1–8, 43 ended in spontaneous abortion or stillbirth (the infant was born dead), 39 resulted in a normal infant, 27 resulted in infants suffering from gross defects.[110]

Recent studies also reveal that the outlook for babies born with congenital rubella is not good. Of 64 infants studied up to 18 months of age, 44 showed some neurological impairment, although the impairment was minimal in 14 cases and improvement between 12 and 18 months was noted in 15 others. Twenty other infants originally under study had died before 18 months, and 16 mothers withdrew from the study.[111] While the method of selecting cases for this study precludes comparing its results to the prospective studies—that is, studies that follow a non-selected group from the beginning—it is clear that the damage from rubella is even more serious and prolonged than was believed in the early 1960s.

These percentages are frightening indeed. But there are many sides to the rubella story. Investigators studying fetuses that were aborted "therapeutically" after maternal rubella found no evidence of disease in 32 percent, including 20 percent of those whose mothers contracted rubella in the first four weeks.[112] Some of the children affected would have died of the disease, others would have recovered and been born normal, while still others would have

been born with defects. One cannot say how many would have fallen into each of these categories.

A survey of over 6,000 pregnancies during the 1954 epidemic revealed that less than 1 percent of the women had rubella in the first twelve weeks of pregnancy; to be exact, there were 54 cases. In 37 of these, the baby was normal; in 5, definitely defective; in 1, perhaps defective because of rubella. There was a stillbirth, a neonatal death, and a patient who could not be followed up. There were 8 "therapeutic" abortions; in one case, twins were aborted.[113]

A careful Australian study provides information concerning both the frequency and the types of defects that may occur. The incidence of major defects was found to be 60 percent in the first four weeks, about 33 percent in weeks 5–12, and 5.7 percent in weeks 13–16. The most common major defects were significant deafness in both ears (15.5 percent), heart defects (8.3 percent), and eye defects (4.8 percent). There were two cases (2.4 percent) of mental defect. The authors point out that the hearing and heart defects are amenable to treatment. They state: "In the present series, with only one exception (Case 54), it is expected that all the surviving children, including those with handicaps, will be able, with appropriate management, to lead useful lives."[114] Case 54 is a little girl who is retarded, perhaps partly due to a difficult birth.[115] An extensive British study also had very encouraging results, since the intelligence-distribution of affected children was found to be average despite handicaps.[116]

The rubella problem is a serious one, but it has been exaggerated. Lawrence Lader, in his book favoring the loosening of laws against abortion, stated:

> In the last available report of May 1965, Dr. Gilbert M. Schiff and his associates tested the first 300 babies of 1,549 born at the University of Cincinnati Hospital since the recent rubella epidemic. Of these 300, 276 had one or more defects, major or minor, associated with rubella. This staggeringly high percentage of defects forecasts "a major tragedy," warns Dr. Richard L. Masland, of the National Institute of Neurological Diseases and Blindness.[117]

What Dr. Masland may have been talking about is not clear, because he certainly could not have been referring to Dr. Schiff's study. In Lader's reporting of this study there *is* a tragedy, but it is not one of 276 defective babies out of 300. For in fact there were only 16 cases with apparent abnormalities; in only 9 of these was rubella virus recovered (though it could have been missed in others) and not all the abnormalities were related to rubella. In 8 other cases there was a history of rubella or intimate exposure to it, but no apparent abnormality. Where did the number "276" come from? That was the number of cases in which there was neither a maternal history *nor any detectable abnormality whatsoever.* In 33 of these babies, the rubella virus was found, and some abnormality may be discovered in later years. But obviously this is irrelevant to a discussion of abortion, since there was no reason to think the

mother had rubella until after the child was born. If all the mothers who had a history of rubella had been given "therapeutic" abortions, 5 deformed babies and 8 apparently normal ones would have been aborted.[118] The tragedy is that these 5 cases in effect become 276 in the minds of Lader's readers, who may be citizens thinking about loosening the laws or who may be women with rubella thinking about whether or not to have an abortion.

The whole problem will be considerably less serious very soon. An experimental live-rubella-virus vaccine already has been subjected to successful tests. The virus is weakened, but it creates immunity without causing the disease, or making the person vaccinated a carrier.[119] By September 1967, data prepared for publication showed 152 persons had been successfully immunized without infecting any of 142 persons with whom they were in constant contact. Several additional strains of virus were being checked to see if one even better than the original weakened virus could be found. An interesting sidelight of the research is the discovery that a rising level of rubella antibodies—which has sometimes been taken as sufficient to warrant therapeutic abortion—*does not* by itself show that a woman has rubella. In July 1969, this new vaccine was licensed for distribution.[120]

Some have suggested that other virus diseases may cause abnormalities. Only one, cytomegalovirus, is clearly implicated, however, and little is yet known about its frequency or the frequency and seriousness of its effects.[121] In a sense, it would be quite fortunate if virus diseases were shown to underlie many more birth defects, because we are so well on our way to controlling these diseases that we should be in a good position to eliminate more of the defects than the relatively small proportion due to German measles.

Second to rubella as an excuse for "therapeutic" abortion on "fetal indications" has been disease due to Rh-factor in the blood. The New York City study revealed this indication to account for more than one abortion of every fifty—one-third the rate for rubella during 1960–1962.[122]

Unlike rubella, Rh-factor does not lead to a complex of defects. The survival of the infant is the chief stake. Like rubella, the danger of the Rh-factor has always existed. However, when it became understood, some parents who had lost or nearly lost babies in late pregnancy or shortly after birth began seeking "therapeutic" abortion to forestall the unpleasantness and inconvenience of another such episode.

Dr. Hall, in a paper published in 1967, states: "If the husband is homozygous and repeated stillbirths have occurred under ideal care, the futility of further pregnancies may dictate consideration of this alternative."[123]

Now in this case, as in some others we will consider, there is a definite alternative to abortion, namely, the avoidance of further conceptions. Parents who lose a baby due to Rh-factor know immediately what the prospects are for later conceptions. Abortion in this case thus appears to be an expedient for

persons who reject "the futility of further pregnancies" as a matter of convenience, but at the same time refuse to take the trouble to avoid them.

More to the point is that further Rh-complicated pregnancies need not any longer be futile. In the very same volume which contains Dr. Hall's observation is an article reporting treatment of the child before birth by blood transfusions. Of thirty-nine cases that had a very poor outlook, eleven babies survived.[124] These results seem rather poor, but technique is continually improving. In one recent series, at Mount Sinai Hospital in New York, ten babies of a group of twenty-one treated by transfusion survived.[125] Moreover, attempts are being made to prevent the condition by treating the mother beforehand, and early results are promising.[126]

The thalidomide episode brought to the whole world's notice the possible effects of drugs taken during pregnancy. At least one woman who had taken thalidomide received worldwide attention when she traveled from America to Sweden to obtain an abortion; another mother who killed her thalidomide-damaged baby and was acquitted in a Belgian trial received wide publicity.

The only other drugs so far known to cause gross birth defects are some preparations used to produce abortion. Failing to do so, they may cause gross abnormalities. In one experiment, a drug given to twenty-four women caused sixteen to abort without surgical intervention. On surgical removal, half the remaining infants were seriously abnormal.[127] The ordinary birth control "pill" can sometimes cause a relatively minor deformity in baby girls if the mother mistakenly continues taking the drug during pregnancy. Other drugs also are known to have undesirable effects on the unborn but none that involve gross defects.[128]

The thalidomide episode is interesting, because it shows how little can be known at a moment of crisis about probable risks. After the fact, most investigations tend to conclude that only about 20 percent of the women who took thalidomide had abnormal babies.[129] Not all agree. Dr. W. Lenz, of West Germany, believes the risk was more than 50 percent during a two-week period during days 35–50 after the last menstruation. He contends that a 100 percent rate of damage at the precise time of sensitivity cannot be excluded, for it has been produced experimentally in monkeys.[130] However, no one could have known the odds or the critical days when thalidomide was first implicated as the cause of an epidemic of babies born with deformed limbs.

Not all thalidomide defects involve gross deformities of hands and feet. Dr. Lenz points out that "this condition is shown only by a small percentage of thalidomide babies." In some the ears and hearing are affected; in many cases only the thumbs are absent or deformed.[131]

What has happened to those severely deformed thalidomide babies who were not aborted or killed after birth? Their parents were severely shaken, but they have been helped by their communities and have banded together. An English physician working with the children reports that ingenious new devices permit them to exercise a wide range of activities; "problems are being

overcome and a remarkable degree of independence is being achieved." He concludes his report:

> Since the physicians and surgeons are going to retain their interest, the parents their patience and ingenuity, and the children their adaptability and sense of humor, these problems will be faced clearly and undoubtedly will be overcome.[132]

A similar story comes from Germany, where the vast majority of thalidomide babies were born. Children born with gross abnormalities have been found to be more adaptable than persons born normal and subsequently crippled. Children lacking upper limbs are learning to use an artificial arm powered by compressed carbon-dioxide gas. There are hopes that new electronically operated devices will widen their possibilities of action. This whole approach to the problem of the thalidomide children is best summed up by Dr. O. Hepp, Director of the Orthopedic University Clinic, Muenster, who refuses to regard them as abnormal, insists on their alertness and intelligence, and even states: "They are not crippled. They are normal children with another form of arms and legs."[133]

Dr. P.V. Doctor, of Gallaudet College, Washington, D.C., reported similar developments at Heidelberg, Germany. Impressed by the air of confidence and hope, and by the cheerfulness of children and hospital personnel, he titled his article: "The Most Beautiful Smile I Saw in Europe." It was the smile of a nurse, who offered her hand on behalf of one of the children with whom Dr. Doctor had tried to shake hands. Because the child, bidding the visitors goodbye, had such a happy, twinkling smile, the doctor had momentarily forgotten that there was no hand to shake.[134]

Of course, few of these children could have been aborted, because in most cases their parents were not aware in advance that a defect might appear. In any new episode involving drugs, parents would not know with any certainty what the risks might be; the widespread practice of abortion in such a case could easily lead to the destruction of thousands of normal and healthy babies, particularly if early reports proved false, as could easily happen. The solution to this problem seems to be the requirement for even greater care in the testing of drugs. Dr. Lenz blames some in the drug industry—"those who are more accustomed to think in terms of profit than of human suffering"—and some members of the medical profession for the thalidomide tragedy.[135] It seems fair to assume that neither the pharmaceutical firms nor the medical profession will become more responsible if the public at large adopts the attitude that the results of such mistakes can be scrapped like so many defective parts that fail to pass inspection at the end of a production line.

Probably very few abortions have been performed on genetic grounds—i.e., because the infant was expected to have an inheritable defect or disease. Generally the probability of an undesirable inheritable characteristic turning up in the child is much less than the 25–50 percent that many

people expect. These expectations arise from an over-simplified concept of inheritance; actually the odds may be much better, because simple inheritance is not at work in many rather common conditions. When a normal couple have a child with harelip, for example, the chances that another child will be similarly affected are not 50 percent or 25 percent but 4 percent. Inheritance is a factor in harelip, but evidently several hereditary factors, and perhaps environmental conditions as well, are required to generate the defect. A couple who lose one baby due to its being born anencephalic still have a good chance—about 95 percent—of having a normal baby next time. Even after two such experiences, the odds are still 90 percent in their favor. Considering that about 3 percent of births involve some serious developmental abnormality, an added risk of 4 percent or 5 percent is not very great.[136]

However, there are some very serious inheritable diseases that recur in a family with great frequency if the genetic conditions are present. A classic example is Huntington's chorea. This is a disease of the central nervous system which leads to progressive degeneration. It usually begins between ages 30 and 40, and there is until now no medical treatment. Half the children of victims are doomed to be afflicted, but since no one can tell which half until symptoms appear, many will have children and pass on the disease.[137]

Clearly this is a fearful disease, but one wonders what it has to do with abortion. Persons with a family history of this disease, or some other, may wish to avoid having children altogether. If a parent begins to show symptoms *during* a pregnancy, he could have known beforehand that his risk was 50 percent and that of his children 25 percent. These risks have simply doubled—he is a victim of what he feared and his children inherit his risk. Many people seem to be willing to accept this risk, and children of victims are not reported to condemn their parents for having given them life—even on such terms as these.

Another inheritable disease that has been mentioned in discussions of abortion is Tay-Sachs disease. Babies are born normal and healthy, but by their first birthday degeneration of the nervous system begins to show its effects, and the child is dead before it is four years old. There is no treatment for this disease.[138] There are a number of similar, fortunately rare, diseases of infancy that differ in the age of onset and the various symptoms, but that are alike in sharing the same dreadful prognosis. Because these diseases are inherited by a recessive gene in a strict genetic pattern, there is one chance in four that another baby in the same family will succumb.[139]

Conceivably a couple might learn that their first child was a victim of this disease while they were expecting their second. More often they will have had an opportunity to avoid pregnancy. If a pregnancy is in progress, the three to one chance in favor of a normal child is likely to lead most parents to transfer their hopes for the stricken infant to the one they are expecting.

Phenylketonuria (PKU) also is inherited by 25 percent of children whose parents are both carriers, and this disease also can cause severe mental retarda-

tion.[140] However, affected children can be treated effectively by a special diet if the disease is detected soon after birth; detection is possible by a simple test. At least one state (Illinois) now requires this test by law; parents thus are able to treat the affected child, and to avoid future pregnancies if they wish to do so.[141]

One could make a long list of other inheritable diseases. In many cases those who might transmit an inheritable disease know this before any pregnancy begins. In other cases, they will know their position before a *second* pregnancy is undertaken. In only a few cases will a couple first learn during pregnancy that they are likely to transmit a serious disease, and in these cases the odds favor the birth of a normal child.

Moreover, many such diseases are not so fearsome as they at first sound. For example, hemophilia (bleeding disease) is inherited only by men and transmitted only by women. The disease is serious, but many who suffer from it lead fairly normal and happy lives. Treatment is possible and the disease is often not severe.

A pregnant woman who finds that she already has a hemophiliac child can be assured that if the child is a girl, she will be normal, although perhaps able to transmit the disease. If the child is a boy, there is the same chance that he may suffer from the disease.[142] But even if he does, it is often not a great handicap to a good and useful life. A specialist says: "Both potential carriers and bleeders will continue to marry and have children." He believes the disease is "over-dramatized," he points out that "most hemophiliacs are gainfully employed," and concludes: "The outlook today is most encouraging."[143]

Another potential cause of defect in the child is exposure to large amounts of radiation in early pregnancy. Normal use of X-rays is not a problem, but radiation sometimes used in treating diseases—e.g., cancer of the cervix—can cause spontaneous abortion or abnormal development. The occurrence of such cancer during pregnancy is not common, since usually it appears in older women. Some authors advocate abortion by incision followed by radiation treatment. They regard this procedure as therapeutic abortion, and there are certainly no legal obstacles to it.[144] Others suggest that the pregnancy be ignored and radiation treatment instituted unless the infant is near viability, in which case some delay and a premature surgical delivery is regarded as justified.[145] If radiation therapy is carried out while the infant is in the womb, its death and spontaneous expulsion is to be expected, according to this point of view.[146]

Most reports of radiation damage to the unborn date from earlier decades, even before 1925, when accurate pregnancy tests and measures of radiation were unknown or not used. Today it appears that proper controls on the use of radiation treatment have practically eliminated this problem. Even in the older studies, two-thirds of the children were normal.[147] From an ethical viewpoint, necessary radiation treatment during pregnancy, even if it inciden-

tally causes the death of the unborn child, is not opposed by any author on morals and medicine.

The situation is quite different if "therapeutic" abortion is carried out following diagnostic X-rays—even extensive X-ray examinations early in pregnancy. Dr. Niswander has written: "In such cases abortion seems justified on both psychiatric and humanitarian grounds, in spite of the fact that there is little evidence to indicate how many of these children would be deformed."[148] In fact, an expert in the field of radiation has written that "no documented cases are on record where this misfortune could be attributed to diagnostic radiation."[149] If abortion in these cases is therapeutic, then so would it be in a case where a mother, having had a bad fall, thinks her child is likely to be deformed. Education, not abortion, would seem to be the treatment of choice in such cases.

Another category—and the final one—that must be considered under the heading, "Fetal Indications," is the group of babies who are abnormal because of chromosome abnormalities. The commonest of these are the mongol (Down's syndrome; trisomy 21) children.

At present, except in a small proportion of cases in which the abnormality is inherited, the generation of children with such defects cannot be avoided. However, chromosome studies could be made of samples of tissue collected from the early embryo, and certainly someone will soon devise a safe technique for gathering the samples. The argument has already been offered that, when this becomes possible, a "search and destroy operation" should be conducted.[150] In fact, one Illinois physician already has suggested that the possible cost to the state of life-time care would justify aborting any pregnancy subsequent to the birth of a mongol child.[151] Yet almost all such babies would be normal; the increased likelihood of mongolism would only occur in the comparatively few cases in which the abnormality is inherited. Even here, the probability of normality, which is not precisely known, is certainly much better than 75 percent.[152]

But if tests in the early weeks of pregnancy revealed a certainty that a mongol child was developing, the argument to abort it would be urged very forcefully. One would know in advance that the child would be severely retarded, and one could predict with some probability that there would be various other medical problems, including a possible heart defect.

As with other conditions, it is important to notice that mongolism does not necessarily remove all meaning and value from a child's life. One author formulates what is a commonplace in the literature about these children: "They are often fairly docile and good natured, playing contentedly with their toys and giving their parents very little trouble."[153] Such a child can give and receive affection; we expect little more from a pet in return for all the care we lavish upon it.

Moreover, mongol children are not all equally retarded and ineducable. One case—admittedly unusual—involved a girl of normal intelligence.[154]

Another, a retarded boy who learned to read and write, developed the verbal ability of a seventh-grade student, and certainly lived a meaningful life.[155]

Studies suggest that some method of prevention, or possibly even of treatment, may yet be discovered.[156] Of course, no such progress will ever be made either with this disease, or with any of the others so easily written off as hopeless, if abortion comes to be a regular method of "prevention."

In a strict sense, of course, it could not be called prevention. It is treatment of the most radical kind. One pediatrician observes of the already born mongol child:

> Once the diagnosis has been made with a fair degree of assurance, someone will almost surely suggest that the problem be solved by euthanasia. The suggestion may come from the obstetrician, from a nurse, from a member of the family who has been apprised of the situation, or it may occur to the pediatrician himself. Undeniably, euthanasia was resorted to, and not infrequently, in the past. It obviously presents an easy solution to what promises to be a long drawn-out, difficult situation. But the pediatrician must never allow himself to fall into this trap.[157]

He was speaking of euthanasia after birth, but the remark may be applied to "therapeutic" abortion on fetal indications. Dr. Herbert Ratner, Director of Public Health in Oak Park, Illinois, has referred to such abortion as "fetal euthanasia." He holds that it introduces a new principle into the practice of medicine: "To the perfective, preventive, and curative ends, we can now add exterminative medicine."[158]

The Abortion Board

Normally in the United States an abortion is not performed without the advice of two consultant physicians.[159] In many cases, the approval of the head of the obstetrical service or the chief of staff of the hospital is required.[160]

Dr. Alan Guttmacher provided a detailed account of one of the pioneering abortion board systems, that introduced at Mount Sinai Hospital in New York City in 1952. The committee was set up on a permanent basis, with the director of obstetrical and gynecological service as chairman, and members from medicine, surgery, neuropsychiatry, and pediatrics. The obstetrician-gynecologist presenting the case must provide letters from two consultants, one of whom must be available to answer questions. Other physicians may be asked for opinions. If the application is to be accepted, the five-member committee must approve unanimously.[161]

Dr. David C. Wilson reported in the Rosen symposium on the establishment of a board system at University of Virginia. It was occasioned by the increase of abortions on psychiatric grounds. The board, including an internist, an obstetrician, and a psychiatrist (other than the one making the recommendation) individually interviewed the patient and collectively met with her doctor. The result was a drop in the ratio of abortions to deliveries from 1:85 (1941–1945) to 1:337 (1951–1952). In the latter period there were no abortions

on psychiatric grounds.[162] The main reason for the decline, Dr. Wilson explains, was

> the attitude of the committee. This attitude has been that *if the woman wants to have a child, she can have it if all the forces of modern medicine are brought to her aid. If she does not want the child, then it is up to the committee to find out why and to do something about this factor.* [*italics his*][163]

Many other hospitals have reported establishing the committee system in one form or another, almost always with a reduced incidence of therapeutic abortion. Dr. Robert E. Hall reported that at New York's Sloane Hospital for Women, where a therapeutic abortion board was established September 1, 1955, therapeutic abortions fell from 1:69 deliveries (1950–1955) to 1:225 deliveries (1955-1960).[164] To achieve such a reduction was the aim of setting up the system in some cases. For example, at University of Pennsylvania Hospital, physicians, "alarmed by the increased incidence of therapeutic abortions in 1954," when the ratio reached 1:118 deliveries, set up a system of ad hoc three-man committees, working anonymously.[165]

Newark Beth Israel Hospital established a committee system to protect "the best interests of the patient and physician involved." A panel of ten obstetricians and gynecologists is available, but normally groups of four pass on each application. The procedure is anonymous and impersonal. Even the identity of all the members of the committee is known only to the chairman, who is the hospital's executive director. In his office, records are maintained; he notifies local authorities of every therapeutic abortion—a requirement of Newark law.[166]

Dr. Howard Hammond of Marin General Hospital in California reported in 1963 on a ten-year experience with an abortion committee. He considers the device a success, in that it protects physicians from pressure by patients or other physicians, educates patients and physicians to the actual medical indications, and eliminates the "personal element." Three other hospitals in the community refer all their cases to Marin General for evaluation.[167]

That the committee system may not be completely objective is suggested by the very frank examples of Dr. Lohner in his Salt Lake City study. Despite the very low incidence of abortion, one hospital's committee had approved it for a seventeen-year-old girl who was illegitimately pregnant, noting that she should understand that if it happened again she would not be allowed another abortion. Another hospital's committee reversed itself under pressure; the abortion was permitted although the committee maintained that the family was "unjustified in their demands."[168]

The institution of a committee system does not always reduce the incidence of abortion. In the study at Toronto General Hospital a definite increase in incidence was found to have followed the establishment of a committee in 1964. This was explained by an increased rate of referrals from hospitals in the surrounding area, where there is reluctance to permit abortion.[169]

Drs. Keith P. Russell and J. George Moore have stated the values of the committee system, recommended procedures, and reported results in some California hospitals. The values are deterrence of unnecessary abortions, protection of patients, medicolegal protection of the physician, and collection of data. The procedures suggested involve a seven-man board working on documented evidence. At three hospitals, various percentages of applications, ranging from 25 percent to more than 50 percent, were rejected, although the committee system by its mere existence is expected to eliminate the most questionable applications.[170]

The development of abortion boards is not a result of American inventiveness. Although differing in detail, a somewhat similar system has been established in the Scandinavian countries as part of their procedure in cases of legal abortion. In Denmark, for example, a woman applies to a Mothers Aid Center which investigates her case, explores alternatives to abortion, and collects relevant evidence. A Medicosocial Board linked to the center then passes on the application. The board has three members: a lawyer or social worker representing Mothers Aid, a psychiatrist, and a surgeon or gynecologist. The first member often is the one in charge of the Mothers Aid Center handling the case, the second often has been in charge of the medical examination, and the third often is in charge of the facility where the abortion will be performed if it is approved. The Board's approval must be by a unanimous vote. Hospital superintendents have the authority to by-pass this procedure entirely when the life or health of the woman is seriously at stake.[171]

Herbert L. Packer and Ralph J. Gampell, two attorneys, published in 1959 an interesting study of therapeutic abortion practices in California. Twenty-six hospitals answered a detailed questionnaire. Fifteen had some form of committee device. Eighteen hospitals said they had authorized "therapeutic" abortions which did not conform to their own interpretation of the strict requirement of law.[172]

The questionnaire included eleven hypothetical cases, concerning which the hospitals were asked whether they would approve a therapeutic abortion. Whether these cases were submitted to abortion committees is not stated, nor are the responses of hospitals having committees and those without them separately tabulated. The cases ranged from one involving strong medical indications to one involving a pure socioeconomic indication; all but one hospital would have approved the former and all but one would have rejected the latter. On less clear-cut cases opinions were divided; fifteen hospitals would have approved one case involving a psychiatric indication, though Packer and Gampell judged that it fell beyond the strict requirements of the law.[173]

Packer and Gampell seemed to consider the divergence between medical opinion and the law to be the least tolerable aspect of the situation. Accordingly, they proposed that the committee system, regulated by the State Health and Safety Code, be permitted to accomplish an effective relaxation of the criminal laws against abortion. The proposal was that a recognized hospital

committee should be legally empowered to render the performance of abortion immune from prosecution; the committee's approval, based on its own concept of medical advisability, would provide legal authority to operate.[174]

This proposal to institutionalize the abortion-board system has not won significant support. The committees, as we have seen, tend to reduce the incidence of abortion, and it has been pointed out that legislation of the sort proposed by Packer and Gampell would have little immediate effect. Physicians do not easily form a consensus in favor of abortion "because of their view of themselves as preservers of life," Professor B. James George, Jr., of University of Michigan Law School, points out. He adds:

> Abortion creates, although perhaps to a somewhat lesser degree than the related problem of euthanasia, a real tension between the physician's desire to preserve life and his awareness that by performing an abortion he is terminating life.[175]

Dr. Robert E. Hall has expressed dissatisfaction with the committee system:

> Abortion has become the only surgical procedure that usually requires the approval of a committee. In theory these boards serve to police the abortion practices of staff physicians, to prevent them from yielding to the pressure of undeserving patients, and to protect them from possible litigation. In fact these boards serve as medical tribunals which often serve merely to render moral judgments.[176]

Dr. Carl Goldmark, Jr., a member of the Board of Directors of the Association Dr. Hall heads, has been quoted as saying: "The abortion committee is just something for a hospital to hide behind. It's our greatest mistake."[177] He explains that the committees "evolved as a means to dividing the responsibility of the decision to abort," but the system turned out to be a conservative force.[178]

As a consequence, certain hospitals have done without abortion committees and have pursued a policy of permitting "a very liberal interpretation of the law." Two teaching hospitals in Buffalo, following this path, have more than doubled the incidence of "therapeutic" abortion during the period 1960–1964 compared with the period 1943–1949. A case given to exemplify those which account for many of the abortions on psychiatric indications: "A forty-year-old divorced woman with two young teenagers cannot have a child out of wedlock and maintain her social status." Interestingly, the incidence of abortion on private and clinic services was about the same (4 and 3.9 respectively) in the earlier period but became 32 times as common in the private service as in the clinic service (9.6 and .3 respectively) in the later period.[179]

Finally, Dr. Harold Rosen reported (1965) that Johns Hopkins Hospital neither had an abortion committee nor required certificates from two psychiatrists. He explained that no hospital requires two consultations for an appendectomy, while reserving the right to reject the application. "At the Johns Hopkins Hospital, it is felt that this analogy to an appendectomy is valid," Dr.

Rosen explains.[180] Dr. Rosen seems to have forgotten what the symposium he edited ten years earlier revealed about the psychological significance of abortion. Moreover, the very fact that he had occasion to edit such a book shows that abortion and appendectomy are in different categories. Who would think of conducting a symposium on the medical, psychiatric, legal, anthropological, and religious implications of appendectomy?

Techniques of Criminal Abortion

Although the practice of abortion in a primitive society is not always criminal by the norms of the society itself, the techniques used by such groups probably give a fair idea of what medically unsophisticated people will do if they set out to procure abortion.

George Devereux has compiled information on some 300 groups; he warns that the data are fragmentary and attempts to draw no statistical conclusions. But it may be interesting to notice that there are in his data definite mentions of 421 specific techniques—many reports indicating two or more methods. Most often mentioned was the use of drugs—170 reports. Thus more than one-third of all the reported methods involved drugs, and their use for abortion was reported in more than half the societies—for some of which there is no report concerning methods. Next most often reported was some kind of attempt to injure the fetus through the abdominal wall—for instance, by "pounding on the belly" with a stone. Such attempts were included in data on 124 societies. Only 14 reports indicated the use of instruments inside the pregnant uterus. Other methods mentioned more than four times were abdominal constriction by means of a tight belt or girdle (25), strain and effort (17), religious or magical means (17), application of heat (13), jumping or leaping (13), application of skin irritants (12).[181]

Many of the drugs are probably ineffective, some are frankly magical. But it is easy for an ineffective method to gain a false reputation for efficacy since there is a fair number of cases in which women who think they are pregnant are not, and another group of cases in which a spontaneous abortion occurs—when it would have occurred in any case.

Effective drugs perhaps work by causing so much gastrointestinal irritation that uterine contractions are induced, or by causing general organic weakness. In many cases these effects are supplemented by mechanical techniques.[182] A few groups developed rather refined techniques of manipulating and destroying the fetus through the abdominal wall.

The small number of reports (14) of the use of instruments is remarkable. Probably the explanation is that while the anthropological literature as a whole contains few reports of bad physical consequences—and most of these are reports of subsequent sterility—there is a single report of a group being deterred by experienced consequences from further efforts at abortion.[183] This unique case involved an Eskimo girl who nearly died after an abortion by means of instruments; her experience was such an object lesson to her group

that no further attempts at abortion were made during the next ten years.[184] As in this case, unsophisticated people probably learn by experience that crude surgery is dangerous, and they resort to other measures.

Dr. Taussig included in his book a chapter "Methods and Accidents of Illegal Abortion." He lists a number of drugs that are ineffective: ergot, quinine, tansy tea, and others. Other drugs, such as phosphorus, which may be effective abortifacients, are poisonous to the mother as well. Next are physical agencies, particularly direct trauma to the abdomen. Next instruments, including "goose feathers, crochet needles and penholders . . ." The professional, non-medical abortionist is reported to rely on intrauterine syringing with soap water or glycerine, or on the insertion of a rubber tube through the cervix. Either technique often stimulates uterine contractions and abortion.[185]

Dr. Taussig indicates that many victims of the abortionist are not pregnant. He also points out frequent accidents: perforation of the uterus with consequent hemorrhage, infection, and air embolism. The last condition occurs most often if a soapy solution is syringed into the uterus.[186]

Taussig's summary is interesting in itself, but also because it continues to be used by those who promote the cause of abortion law relaxation. Bates and Zawadzki, for example, include much of the same data in a chapter, "Self-induced Abortion."[187] With considerable detail they cite Dr. Guttmacher's story of a farm woman who successfully aborted herself twenty-eight times with a goose feather dipped in kerosene, but who required hospital care after she botched the twenty-ninth attempt.[188]

A catalogue of horrors can easily be compiled by referring to the medical literature. In the eight-year California study of 223 abortion deaths, of which 122 certainly resulted from criminal abortion, the causes of death were infection (54.7 percent), hemorrhage (7.2 percent), infection and hemorrhage together (5.4 percent), and blockage of blood circulation (26 percent), most often by an air bubble. Medication by mouth was reported in twelve cases, but may have occurred in others; it included castor oil, quinine, turpentine, and a type of pill called "Humphries No. 11 tablets." In five cases water, soap, lysol, or potassium permanganate solution were introduced into the vagina under pressure; in 32 cases these and other substances, including alcohol and hydrogen peroxide were introduced directly into the uterus. In a dozen cases air was forced into the vagina or uterus, in one case by the unusual device of a football pump and a plastic straw. In 56 cases solid objects were passed into the uterus; these included surgical instruments, rubber tubes, gauze packing, wires, rods, knitting needles, and even chopsticks. No goose feathers were reported.[189]

Since the California study was a report on abortion deaths, it omitted some techniques that are both ineffective and damaging but that seldom cause death. One of these is the use of potassium permanganate inserted into the vagina in tablet or crystal form. In 319 cases reported in the literature, only two patients died, very few more aborted than would naturally have done so,

but all suffered ulceration, bleeding, and burns in the vagina from this caustic substance. In 125 cases the patient was not even pregnant.[190]

In a 1963 survey, 77 cases of soap intoxication following criminal abortion were found to have been reported in the literature between 1917 and 1962. Of these, 43 patients died, while 34 survived. The soap is absorbed by the system and it causes damage to the kidneys, the liver, and other organs.[191]

It is important to remember that these are studies of unusual cases. We cannot generalize from two London hospitals, of course, but it is worth noticing that Dr. Davis' study of 2,665 cases of abortion (of all kinds) revealed many self abortions by douche with soapy water under pressure and many amateur abortionist's attempts with intrauterine syringing of soap water. Yet there were only six deaths in his series.[192]

The most serious threat, as we have seen, is infection. And the most serious development in case of infection is a condition of collapse called "septic shock." A great deal of attention has been given to this condition in recent years, and progress is being made in treating it. One interesting report indicated 130 cases of septic abortion including 10 cases with septic shock, which had been treated without a death.[193]

The wide variety of abortion techniques revealed in studies of abortion deaths must for the most part reveal the failures of those methods least often used. The greatest proportion of criminal abortions, we saw in the last chapter, is performed by medically trained personnel using standard medical methods. One gynaecologist stated at the British Family Planning Association's conference, *Abortion in Britain*: "The social cost of abortion done illegally is not as high as passion might suggest."[194]

Yet there can be no doubt that the cost of illegal abortion is high, and that every effort should be made to reduce it. For this reason, we must be extremely careful about alterations in the laws, since their relaxation, as we saw in chapter two, might well lead to an increase in criminal abortion. If abortion law relaxation can fail to decrease illegal abortions, even while legal abortions greatly increase, then the horrible facts about the methods and consequences of illegal abortions do not argue in favor of abortion law relaxation. Probably more would be gained by an aggressive campaign aimed at educating the public concerning specific dangers, such as those arising from the use of potassium permanganate.

Medical Techniques of Abortion

At the time Taussig wrote, some physicians were still giving drugs or injecting pastes or solutions into the uterus in an effort to induce labor. He pointed out the dangers of such procedures. Irradiation with X-ray had been used to kill the fetus, but expulsion was often delayed, and an inadequate amount of irradiation sometimes led to a live but malformed birth. Taussig himself favored surgical procedures similar to those still in common use.[195]

These methods are described in detail in standard obstetrical texts.[196] It is only necessary to indicate briefly what the various methods are, and why one or another is chosen.

The most frequently used method is the stretching (dilatation) of the opening (cervix) to the uterus and the scraping of its inner walls with an instrument (curette). The procedure is called "dilatation and curettage," or "*D. and C.*" for short. Not every *D. and C.* is performed as an abortion; the procedure also may be used, for example, to remove abnormal, non-malignant growths. Either general, local, or spinal anesthetic may be used. If the opening to the uterus is not easily dilated, it can be packed with gauze, which causes dilatation in a day or so. Hormones are sometimes given before surgery to improve the condition of the uterus.[197] Since the surgeon is working blind on a very delicate surface, there is some danger that he will break through the uterine wall (perforation), induce hemorrhage, or leave behind some of the tissue that belonged to the pregnancy.

Generally this procedure is not used beyond the twelfth week of pregnancy. The sixth and seventh weeks are thought to be the optimum time. As Dr. Guttmacher remarks: "In pregnancies beyond the seventh week, fetal parts are recognizable as they are removed piecemeal."[198]

After the twelfth week of pregnancy, the technique most commonly used until the last few years was a miniature cesarean section or *hysterotomy*—to be distinguished from *hysterectomy*, the removal of the uterus. The latter operation is not performed merely for abortion, but may be necessary if the uterus is seriously damaged or diseased. Hysterotomy, because it involves incision, is subject to serious complications; in recent years there has been an effort to find alternatives to it, except in those cases in which surgical sterilization is performed at the same time as the abortion.[199]

Attempts have been made to induce abortion by introducing oxytocin intravenously. Oxytocin is the hormone which normally stimulates labor and milk production. If it is used carelessly, the results can be disastrous; it can cause the uterus to rupture.[200] Used very carefully after mid-pregnancy, it can induce labor, similar to spontaneous abortion. The procedure is at least as difficult for the mother as childbirth.[201] Moreover, the possibility of serious complications has been reported.[202]

A simple technique has been used in recent years; it is amniotic fluid replacement. A large needle is inserted through the abdomen and uterus into the amniotic cavity. Some of the fluid is withdrawn and replaced with a glucose or saline solution. The hormones which prevent labor are apparently inhibited and a "spontaneous" abortion follows.[203]

An even newer technique is "vacuum aspiration." Developed in Mainland China, the U.S.S.R., and Eastern Europe, this method has already been adopted in Israel[204] and Britain.[205] A metal, glass, or plastic tube (cannula) is connected by rubber pressure tubing to a bottle, the pressure in which is reduced by means of a suction pump. Usually this technique has been used in

the first twelve weeks of pregnancy, although a Czechoslovakian abortionist reports success in 350 cases, 44 of whom were beyond the twelfth week.[206] The mouth of the uterus (cervix) is dilated less than would be required for a *D. and C.*, and in some cases dilatation is unnecessary. In Eastern Europe an electrical dilator, said to be able to do the job in one or two minutes, has been developed.[207] The aspiration procedure is reported to be very fast—fifteen seconds to three minutes. Moreover, the technique is not difficult to master. Although special equipment is required, it is not especially complex or expensive. The gadgetry involved in this technique is certain to help it gain acceptance in America. The prospect of five-minute operations will also have an appeal.

With the vacuum aspiration technique, less anesthesia is needed than would be required for a conventional *D. and C.*; in some cases the procedure can be performed without any anesthesia at all. The smaller fetuses are readily broken up and sucked out of the uterus. Sometimes the cannula becomes clogged, especially by the umbilical cord of a large fetus, and it must be withdrawn and freed. But usually even the fetal skeleton will pass through the tube.[208] One version of the apparatus includes a spinning, screw-shaped knife just inside the tip of the cannula; this equipment can handle larger fetuses because it grinds them up as it sucks them out of the uterus[209]

The commonly used medical techniques of abortion are not without their risks. Yet it is difficult to determine precisely how serious these risks are. Various studies probably use different criteria to measure complications, and studies in diverse countries are likely to refer to different sorts of patients. Clearly, the rates of mortality and complications following therapeutic abortions performed on strict medical indications are likely to be high, because the patients are already ill and the abortion may not be performed at the easiest time.

The dilatation involved in the *D. and C.* can cause tearing or rupture of the cervix.[210] Curettage may cause perforation of the uterus. The occurrence of this complication depends partly on the skill of the abortionist, and has been variously reported as occurring in .09 percent to 6 percent of cases.[211] At Toronto General Hospital, 1954–1965, with only 98 abortions by *D. and C.*, there were 4 perforations. In 3 cases a loop of bowel was brought down, and an immediate abdominal operation to remove the uterus was necessary.[212] Inflammatory complications also may follow; the rate reported depends very heavily on the extent of temperature-elevation required to indicate a complication, and varies from .87 percent to 55.6 percent.[213]

Considerable differences in death-rates also have been reported. A Danish study (1953–1957) indicated three deaths resulting from 9,429 abortions by *D. and C.* The death-rate from hysterotomy was more than four times as high—7 deaths in 5,320 patients.[214] By contrast, Dr. Mehlan reported that while Sweden and Finland had death-rates comparable to Denmark's, in Hungary (1957–1958) and Czechoslovakia (1958–1959) the death-rate from therapeutic abortions—most of which must have been by *D. and C.*—was 6 per 100,000,

and he stated there were no deaths resulting from 67,000 abortions in Bulgaria.[215]

In a later report, Mehlan presented even more optimistic figures. In Czechoslovakia and Bulgaria (1963–1964), no deaths among 207,000 cases of legal abortion; in Hungary (1963–1964) only two deaths among 358,000 legal abortions.[216] Still, delayed after-effects were noted in the form of difficulties with a later pregnancy. Spontaneous abortion, premature birth, and stillbirth were perhaps doubled.[217]

A report by Andras Klinger of the Hungarian Central Office of Statistics, published in the same volume with Mehlan's report, partly confirms and partly puts in doubt Mehlan's data. Klinger states that premature births increased (April 1964) after legal abortion. The rate was 10.1 percent with no prior abortion, 14.4 percent after one abortion, 16 percent after two, and 20.5 percent after three or more. Rehospitalization within four weeks after abortion was necessary in 1.49 percent of all cases. But Klinger states that Hungary has a death-rate from legal abortion of two or three annually.[218] Absolutely, two or three annually is not many more than Mehlan's two in two years, but the discrepancy makes one wonder whether either figure is at all reliable.

Assuming that the Eastern European statistics indicating such low death-rates are reliable, we are bound to wonder how to explain the difference between the Scandinavian and the Eastern European experiences. Part of the explanation could be that in Eastern Europe abortions are almost always performed early in pregnancy, while in Scandinavia they are permitted beyond the third month. Christopher Tietze has proposed this explanation.[219] But it does not account for the difference between 3 deaths per 9,429 Danish abortions by *D. and C.* and 2 or 3 deaths (or less) in over 184,000 legal abortions in Hungary (1964). Perhaps vacuum equipment already was rather widely used by that time, but this seems unlikely.

Part of the reason for the difference could be that in Denmark and other Scandinavian countries a surgeon, though well trained and equipped, is not so expert at abortion as is an Eastern European legal abortionist. The Scandinavian rate for deaths following abortion by *D. and C.*, is about equal to what may be projected as the American death-rate following *illegal* abortion–300 per 1,000,000–if one assumes that there are as many as 1,000,000 illegal abortions per year in the United States.

The method of abortion by amniotic fluid replacement was greeted with considerable enthusiasm precisely because it was hoped this technique would reduce the complications and death-rate following abortion after the twelfth week. However, a Japanese physician reported in 1965 that this method had been tried extensively in Japan, and that serious complications and deaths due to it had led to its practical abandonment.[220] The Council of the Royal College of Obstetricians and Gynaecologists also indicated that dangers were being observed in the British experience with this technique.[221]

The vacuum technique is rather new, and its proponents are claiming that it is much less subject to complications than the traditional *D. and C.* The Czechoslovakian, Vojta, claims that the most serious complication is "residues"—that is, unremoved tissues which could lead to infection. He reports these in 4–7 percent of the abortions performed by others, and admits to 2.5 percent initially (reduced to less than 1 percent by double-checking) in his own patients. "Later complications," he adds, "were no more frequent in our study than when the classic method was used."[222]

British reviewers of the literature point out that no perforations have been reported in over 14,000 abortions, and that inflammatory complications vary from .8 percent to 5 percent in different reports—a range about one-tenth that for the *D. and C.*[223]

From these reports, it would seem that vacuum aspiration is a very efficient method of abortion. However, abortifacient drugs that can be taken whether needed or not on a pill-a-month basis may be even simpler and more efficient. They seem likely to be more acceptable psychologically, since they need not interfere with the "normal" menstrual cycle.

Abortion in the Early Stages of Pregnancy

In recent years developments in the field of birth-prevention technology have centered upon drugs and upon devices inserted into the uterus—e.g., plastic loops. The various drugs so far marketed, though differing among themselves in many respects, have all been dubbed "the pill." Newer drugs that will be effective when taken some time after intercourse are under development; these are popularly "the morning-after pill," though some of them will allow considerably longer than one day for second thoughts.

Two different questions arise with regard to these techniques of birth prevention. First, do they prevent fertilization or do they interfere with the development and implantation of the zygote after fertilization? Second, if they have the latter effect, are they to be designated *contraceptives* or rather *abortifacients*? If both of these questions are answered in the affirmative, it will follow that many persons who think they are practicing contraception are in fact practicing birth-prevention by repeated early, induced abortions.

The devices inserted into the uterus at first were called "IUDs"—*intrauterine devices.* Lately, however, many authors refer to them as "IUCDs"—*intrauterine contraceptive devices.* The reason for this change in nomenclature is not altogether clear. It may be stimulated in part by a desire to avoid possible confusion, since "IUD" sometimes is used to signify the *intrauterine death* of a fetus, in contrast to death following live birth. Or perhaps adoption of the newer terminology is an attempt to settle by mere words the substantive question whether these devices do or do not cause abortion.

How do they work? The question received extensive treatment at a 1964 conference devoted to intrauterine contraception.[224] One pair of investigators reported on intrauterine foreign bodies in rodents; the results seemed to indicate that fertilization may occur, but implantation is prevented.[225] Other investigators reported on other experiments.

Most interesting were Luigi Mastroianni's experiments with monkeys. The results suggested that the IUD causes the ovum to move through the tube too quickly for normal development to proceed; whether fertilization occurs was not established.[226] In the discussion following the formal papers, evidence was presented and accepted that a fertilized human ovum had been recovered from a patient wearing an IUD; however, it was suggested that this could possibly have been a case in which the woman would have become pregnant—as occasionally happens with the IUD.[227]

Other material presented at the conference was consistent with the possibility that the IUD interferes after fertilization but before implantation. In an appendix, J.H. Marston and M.C. Chang, of the Worchester Foundation for Experimental Biology, summarized the situation as follows:

> Concerning the effect on fertilization, our observations on the rat, rabbit, and mouse (unpublished), and the reports from others, do not support the view that fertilization is inhibited. Even in the human, a newly penetrated pronuclear egg with fertilizing sperm tail has been presented at this conference by Bonney and Cooper. The monkey egg with corona radiata and cumulus, mentioned by Mastroianni, is probably a newly ovulated egg, either recently penetrated or with insufficient time to have been fertilized.

Adding that various studies do indicate interference with the transport of the ovum, they conclude: "The main effect of the intra-uterine device, however, is on implantation."[228]

Reporting recent experience, Christopher Tietze noted in December 1966, that in a group of 1,028 women who became pregnant while using IUDs, 588 did so with the device in place. Of these pregnancies, 26 (more than 4 percent) were ectopic—that is, the pregnancy was not in the uterus. Now this number was very great, relative to the whole group of pregnancies, but less than one-tenth the number of ectopic pregnancies Tietze calculates could normally be expected in so many women during the length of time considered. Tietze concludes that the effect of the IUD must be to "interfere with events in the tubes."[229]

Undoubtedly this is the case, but the extremely high rate of ectopic pregnancies seems to indicate that IUDs also interfere with implantation. The fact that, of established pregnancies whose outcome was known, abortion occurred more often if the device was in place than if it was not, also suggests that the IUD affects the uterus itself. Tietze points out that the true incidence of induced abortion cannot be determined.[230] However, scattered reports, some complete with illustrations of the IUD embedded in the early aborted

conceptus, provide evidence that these devices will cause abortion when they directly interfere with normal development.[231]

In many recent publications, the mode of action of the IUD is not even discussed or it is assumed that the research reported at the 1964 conference proved it to be contraceptive—i.e., to prevent fertilization. A 1966 survey of contraceptives in the *Acta Obstetricia et Gynecologica Scandinavica,* an internationally respected journal, concluded:

> These observations suggest that fertilization is prevented or that the ovum is fertilised but passes through the Fallopian tube so rapidly that it reaches the endometrium too early, that is before either the ovum or the endometrium is sufficiently prepared for nidation.[232]

Another 1966 study, by a World Health Organization scientific group, reached a similar conclusion:

> No single cause or mechanism of action of an IUD has so far come to light. The multiplicity of observed effects, in fact, suggests that these devices may act at several levels and in several ways, not only in different species, but possibly also in the same species.

Moreover, at the 1967 conference of the International Planned Parenthood Federation, two papers were presented that tended to support the view that the IUD owes at least part of its efficacy to interference with implantation. Dr. A. B. Kar of India, in a comprehensive survey of scientific inquiry into the mode of action of the IUD, summarized: "The most widely held view about the *modus operandi* of IUDs is that they somehow prevent implantation of the blastocyst." Dr. P. Eckstein, a British researcher, reported on his work paralleling Mastroianni's. But Eckstein summarized his results: "These findings are inconsistent with the ones obtained by Dr. Mastroianni in superovulated monkeys."[233]

To sum up. The IUD does not always prevent pregnancy; therefore it does not always prevent fertilization. Dr. Tietze's summary seems to show that *part* of the effectiveness of this technique of birth prevention is due to interference "with events in the tubes." But there appear to be other aspects of its effectiveness.

The fact that the most effective type of IUD, the spirals, also are most often expelled from the uterus and most often have to be removed for medical reasons (usually bleeding or pain)[234] suggests that fertilized ova would be expelled from a uterus containing an IUD more often than would normally happen. A recent study in Sweden demonstrated "prelabor-like" uterine activity, coinciding with the normal time of ovum transport into the uterus and implantation there. One case was reported in which a woman became pregnant with the IUD in place and maintained the pregnancy, apparently because the device was removed before implantation was due to occur.[235]

Thus, on the available evidence, at least part of the effectiveness of the IUD should be attributed to interference after fertilization, with the develop-

ment of the zygote or with implantation. The proportion may be as low as 10 percent, if Dr. Tietze's statistics concerning tubal pregnancies reflect the actual rate of fertilization. Or, perhaps, fertilization occurs with normal frequency, but increased activity of both the tubes and the uterus reduces the probability of implantation in either location, but more so in the uterus than in the tubes—which may be partially blocked by scar tissue, infection, or some other condition.

The oral contraceptives present a more complicated picture. There is very general agreement that those marketed as of mid-1967 usually inhibit ovulation. A publication of International Planned Parenthood Federation summed up the evidence in 1965:

> It appears most likely that they inhibit ovulation . . .. The effect of oral contraceptives on cervical mucus, and on the endometrium must also be taken into account in considering their mode of action . . .. A further possibility to be mentioned is that oral contraceptives could act on the secretion or motility of the Fallopian tube so that the fertilized ovum reaches the uterine cavity prematurely and fails to implant.[236]

The 1966 survey of contraceptives in *Acta Obstetricia et Gynecologica Scandinavica* arrives at similar conclusions. Although probably the oral contraceptives inhibit ovulation, with the estrogenic component of the pill playing the chief part in its effectiveness, other modes of action are not ruled out, since there is evidence that ovulation occurs in some cases although birth-prevention approaches 100 percent. Partly the mode of action may depend on levels of dosage in different pills. In some, the author explains, the effect may be to block sperm migration. He adds this significant paragraph:

> Another explanation of the mode of action of oral contraceptives is that they cause changes in the endometrium which make normal implantation of the ovum impossible. It may also be possible that the motility of the Fallopian tubes increases under their influence, the fertilised ovum thereby reaching the endometrium too early, i.e., before either the ovum or the endometrium is sufficiently prepared for nidation.[237]

Another 1966 review of the topic, by A. Fanard, J. Ferin, and R. Demol, noted that the combination type pill "could perhaps exclude the possibility of nidation should a zygote reach the uterine cavity." A more normal situation in the uterus is observed with the "sequential method."[238]

Experiments with variations of dosage of estrogen in sequential contraceptives seem to confirm that these are more dependent on ovulation inhibition for their effect than the combination-type pills,[239] though even with these, other modes of action seem to play some part. Four outstanding investigators have summed up recent studies: "Thus even in the absence of progestational agents, antifertility mechanisms other than ovulation inhibition appear to be at work."[240] This conclusion refers to pills used by the "sequential method."

Dr. M.C. Chang, the biologist who worked with Pincus in developing the original "pill," reported on recent research at the 1967 conference of the International Planned Parenthood Federation. Chang reported animal experiments which indicate that ovulation is not always inhibited, but that hormone contraception is nevertheless effective, in great part because *the fertilized ovum* degenerates. The point of this research was both to try to explain the "still obscure" mode of operation of "the pill," and to seek its improvement. Chang concludes:

> In the light of the facts mentioned above, continuous medication with progestational compounds as practised in recent years, besides the possibility of inhibiting ovulation, would disturb many physiological processes of normal reproduction (Table IV). Thus the effectiveness of these contraceptive pills is not surprising.

The table indicates that several tested compounds caused egg degeneration and possible expulsion of fertilized eggs from the uterus.[241]

As to the oral contraceptives, then, evidence seems to show that the combination types do not always prevent conception by inhibiting ovulation. The less completely effective sequential types probably also involve more than one mode of efficacy. In general, conception probably is usually prevented by "the pill," but interference with the development and implantation of the fertilized ovum cannot be excluded as a factor contributing to the effectiveness of every type of "pill," and very likely such interference is a factor, especially in the standard, combination-type pill.

In the future, many new types of pills will appear. Gregory Pincus, on whose work the first "pill" immediately depended, has organized research materials from his own studies and those of other investigators into a book-length summary, pointing to the links in the process of procreation that might be interfered with by drugs. He devotes a whole chapter to the stage between fertilization and implantation, and another chapter to the development of the blastocyst and implantation. Toward the end of the latter chapter he includes a paragraph on abortion which begins: "Many of the procedures which prevent ova from implanting will also cause resorption or abortion of implanted embryos."[242]

The possibilities are under active investigation. Supported by grants from the Population Council, a channel of funds for population limitation, and a grant from the U.S. Government's National Institute of Child Health and Human Development, researchers at Yale University Medical School have tested a number of compounds which interfere with implantation and development.[243] The "best" of these is a compound designated technically "ORF-3858"—popularly, "the morning-after pill." Tested in monkeys, ORF-3858 was found effective: "It is most effective prior to implantation, but in larger doses is effective later in pregnancy."[244] This compound works in the desired "all-or-nothing" mode—it is either effective or not, there are no monsters. It does not alter the "normal menstrual cycle" and it has what seems

to be a major desideratum of every modern birth-preventative: "If anything, it slightly enhanced the willingness of the female to accept the male in mating."

Research on another drug, F-6103, has reached the stage of testing on human subjects. Although detailed scientific reports do not seem to have appeared (mid-1967), news of this work has already been reported popularly in an American women's magazine.[245] Dr. Lars Engstrom of Karolinska Institute in Stockholm has been directing experiments—on pregnant women officially approved for abortion—with an anti-progestational agent. This has succeeded in inducing abortion in women pregnant as long as two months. The Swedish parliament passed a law (spring 1967) which will allow further experiments. The apparent objective of this development is a birth-prevention technique that will require only one pill a month. In this way, a woman would never know whether she had been pregnant or not.

Dr. Sheldon Segal of the Population Council has reacted with enthusiasm: "Once we have answered the questions about safety and effectiveness, there is no doubt in my mind that such a drug would be a great contribution to mankind."[246] There seems to be some disagreement whether to call this drug the "A-pill"—for abortion—or the "M-pill"—for menstruation. The latter will more likely be its eventual popular designation.

Setting aside these coming developments, we must return to the question whether techniques of birth prevention that interfere with events after fertilization should properly be called abortifacient, or should be allowed the name "contraceptive," as the "c" which some insert in "IUD" suggests.

British physiologist A.S. Parkes, for example, says of the IUD that, despite its disadvantages "for the immediate future it may well be the answer to population control in less sophisticated countries." He wishes to defend the device from the "smear" of being labeled abortifacient: "It is true that it possibly interferes with implantation rather than fertilization, but this is not abortion." Conception, he claims, means implantation, not fertilization, and one cannot cause abortion without conception. Besides, since in any particular cycle one cannot tell whether fertilization has occurred, Parkes says that the embryo is only hypothetical, and a hypothetical embryo cannot be aborted. (This part of the argument is fallacious. One might as well say that because no one ever knows whether an accident will occur at a given intersection, all accidents there are hypothetical, and hypothetical accidents never happen.) Parkes concludes: "Biologically, therefore, the IUCD is not an abortifacient; it is a legitimate contraceptive device."[247]

The unsuspecting reader coming across this argument might think that biologists, though prone to fallacy, have some special knowledge that conclusively shows that conception should not be equated with fertilization. However, at the 1964 Conference on the IUD, the following remarks concluded the discussion concerning mode of action.

Dr. Samuel Wishik suggested: "I do not think it necessary for us to change the traditional definition of conception as being the point of fertiliza-

tion." He wanted to work on the definition of "abortion" instead. Dr. Howard C. Taylor, Chairman of the Conference, said: "It has been suggested that we ought to set our definition that pregnancies start at implantation. I think it ought to occur to us that we are talking about a theological definition, not a biological definition, and this group can't possibly help in making this definition." Dr. Christopher Tietze warned, however, that people who might feel that the mode of action of the IUD is an issue of major importance should not be disturbed. And he concluded this discussion by answering Dr. Taylor: "I fully agree with you, sir, that the time at which a human life or any life begins is a philosophical question." However, "If a medical consensus develops and is maintained that pregnancy, and therefore life, begins at implantation, eventually our brethren from the other faculties will listen."[248]

Dr. Tietze was urging prudence on his colleagues, but at the price of consistency. After all, a whole scientific conference sponsored by CIBA, which we cited in chapter one, was devoted to "Preimplantation Stages of Pregnancy." It hardly makes sense to speak of "preimplantation stages" if pregnancy does not begin until implantation. Dr. Tietze was not even consistent with himself. In a conference on pregnancy wastage, he presented a paper: "Introduction to the Statistics of Abortion," in which he relied on Hertig's data to conclude that there is "an abortion ratio of at least 25 percent among all pregnancies."[249] The editor of this volume also states in introducing it: "The reproductive process begins with the fertilization of the egg . . .. Actually, students in this field are interested in any and all loss of products of conception at any stage after the union of the two pronuclei in the fertilized ovum . . .. With some diffidence, and after wide consultation, the term *Pregnancy Wastage* has been used to indicate the total post-conceptional reproductive deficit."[250]

At the conference on the IUD, Dr. Alan Guttmacher made the summation. He called attention to a statement in a pamphlet commissioned by the British Council of Churches. A distinction is drawn between "biological life and human life," and implantation is accepted as "the point at which the former becomes the latter. We agreed that abortion as a means of family limitation is to be condemned. But a woman cannot abort until the fertilized egg cell has nidated and thus becomes attached to her body."[251]

Dr. Guttmacher added that while he shared "Dr. Mastroianni's hope—perhaps his belief—that the IUCD prevents fertilization," the position of the British Council of Churches statement indicated "eminent theologians on our side" even if this were not the case.[252] Dr. Guttmacher did not quote the second page of the booklet which indicates that it "must not be held to carry the approval of the Council or its member Churches," nor the third where, among theologians and others (including the Chief Consulting Officer, Milk Marketing Board of England and Wales) one finds: "Dr. Eleanor Mears, Gynaecologist; Medical Secretary, Family Planning Association, and the Council for the Investigation of Fertility Control."

The distinction attempted in the British Council of Churches pamphlet between biological and human life seems scarcely coherent, since all life is biological but at the same time any life pertains to one or another species. One might as well say that automobiles are *mechanical* in the first stages of their construction and only become Fords or MG's at a certain stage—e.g., when the chassis is fully assembled.

A later pamphlet, published by the Anglican Church Assembly Board for Social Responsibility, therefore quietly ignored the earlier effort, and instead emphasized the *potential* character of nascent life:

> Granted that the living antecedents of life are present potentially in the *ovum* and the *spermatozoon* in their separate existences, a new potential is created at the moment of their conjunction in conception, in the fertilization of the ovum by the sperm. This potential is heightened by implantation or nidation, which may occur within a week of conception.[253]

This committee wished to deal with the entire matter of abortion; in effect its argument raises the question whether the living human individual existing at conception must be regarded as a human person, equal to others in rights and immunities. We shall deal with this issue in chapter six, and we shall consider other aspects of the argument of this pamphlet below.

The important point here is that the earlier pamphlet contained a peculiarly indefensible view omitted in the later one. Glanville Williams, attacking the later pamphlet for not advocating the extent of abortion-law relaxation he would like, noted the change: "The report of an earlier Church committee attached a somewhat different meaning to the notion of conception." After summarizing the change, he added: "The suggestion is of practical importance in relation to intra-uterine contraceptive devices (IUCDs). According to some opinions, these work not by preventing the formation of the zygote but by preventing attachment to the womb. If these devices are found to be safe and effective, it is of importance that they should be regarded as contraceptive and not as abortifacient in their operation."[254]

"It is of importance that they should be regarded . . ."—the issue is clearly one of public opinion rather than one of fact. And it was seen to be so long before this 1966 reflection of Glanville Williams or the 1964 warning of Christopher Tietze. In July 1959, a conference on conception was held, the proceedings of which were not prepared for publication until 1962, when the Population Council and the Planned Parenthood Federation of America joined in sponsoring publication. Bent G. Böving concluded a long chapter on implantation, and possibilities for interfering with it, by urging that "becoming pregnant" and "conception" should not be identified with *fertilization.* Conception is not instantaneous, he argued, and conception "is certainly no less applicable to the uterine reception of the ovum than to the ovular reception of the spermatozoon. Whether eventual control of implantation may be reserved[*sic*] the social advantage of being considered to prevent conception

rather than to destroy an established pregnancy could depend on something so simple as a prudent habit of speech."[255]

Böving himself, however, was not so prudent, because earlier in the same study he referred repeatedly to the result of fertilization as a "conceptus," and speaks of "the conceptus before, during, and after implantation."[256] And at the very beginning of the study, summarizing the work of Hertig which we discussed in chapter one, Böving states: "Thus, the greatest pregnancy wastage, in fact by far the highest death rate of the entire human life span, is during the week before and including the beginning of implantation, and the next greatest is in the week immediately following."[257] Those who sought to distinguish between biological life and human life would have been embarrassed by the imprudence of that statement!

Of course, some still argue that it is a philosophical or theological question when human life begins and when interference in the reproductive process may rightly be called abortion. We do not doubt that it is a philosophical question whether every human individual is a human person; we shall treat that question in chapter six. But we submit that the life of each human individual begins at fertilization, and that interference with it from the completion of fertilization onward certainly is abortion. From the time the biological facts about fertilization were discovered until the technology of birth prevention developed to the point that interference after fertilization became a possibility, no one ever doubted this.

Lest we be accused of one-sidedness, we call two witnesses for confirmation: Margaret Sanger and her British counterpart, Marie Stopes.

Mrs. Sanger describes the process "called fertilization, conception, or impregnation." Then she continues immediately:

> If no children are desired, the meeting of the male sperm and the ovum must be prevented. When scientific means are employed to prevent this meeting, one is said to practice birth control. The means used is known as a contraceptive.
>
> If, however, a contraceptive is not used and the sperm meets the ovule and development begins, any attempt at removing it or stopping its further growth is called abortion.[258]

Marie Stopes, in a speech, was defending birth control against charges made by "that dishonest type of pseudo-religious person who thinks more of his position as a religious person than he or she does of the truth." Dr. Stopes clarified:

> A large number of the opponents of birth control deliberately confuse birth control with abortion. I suppose it is all right for me to explain to you that abortion can only take place when an embryo is in existence. An embryo can only be produced after the sperm cell and the egg cell have actually united, after their nuclei have fused and after the first cell divisions have taken place. The moment that that has taken place you have there a minute, invisible, but actual embryo, and anything which destroys that is abortion, and we never in our clinic do anything which can in any way lead to that destruction. But *until* the sperm cell

> has united with the egg cell, no embryo exists or can exist, and anything which keeps the sperm away from the egg cell cannot lead to or be abortion because no embryo can then exist.[259]

These statements were made many years ago—in 1920 and 1921. But the same thing continued to be said until it became necessary to redefine *conception, pregnancy,* and *abortion* in order that the new technology of birth-prevention could be presented as contraceptive. For example, Dr. Alan Guttmacher, even in the 1964 revised edition of his popular birth-prevention guide, failed to make the adjustments prudent speech now requires. Thus, after explaining the process of fertilization he goes on: "Fertilization, then, has taken place; a baby has been conceived. After conception occurs, the egg attaches itself to the wall of the womb where it grows for nine months until the baby is ready to be born."[260]

Nor is this reference to the fact that at fertilization *a baby is conceived* a mere slip of the pen. The chapter on abortion begins: "Birth control and sterilization accomplish the control of family size by preventing union of sperm and egg, in this way not allowing conception to take place. Once a pregnancy has already begun, family limitation is still possible by employing a wholly different procedure—induced abortion."[261]

In speaking thus, Mrs. Sanger, Dr. Stopes, and Dr. Guttmacher were merely following established terminology. In the introduction to *A Survey of Research on Reproduction Related to Birth and Population Control* (as of January 1, 1963), which was compiled by the United States National Institutes of Health and published by the Public Health Service as an official document, we find the following clear statement and warning:

> All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion. Administration of compounds whose mechanism of action is of this character to man as either an investigative procedure or as a practical birth control technique poses legal questions that have not as yet been resolved.[262]

The problems—moral as well as legal—are more acute today than in 1963, and nothing is being done toward resolving them; a more prudent use of words has merely concealed the issue from public view.

In conclusion, then, it appears clear that new techniques of birth-prevention sometimes cause abortion. How often any particular device or pill has this effect no one knows. If a man and woman, of known fecundity, regularly have intercourse without trying to avoid conception, the woman probably will be pregnant in three months or less. If IUDs and pills cause the abortion of only 5 percent of these pregnancies, the number of abortions induced each year in the United States alone must run in the hundreds of thousands.[263]

Thus the new technology of birth prevention could at last make Dr. Rongy's guess come true. More important, the attitude toward life at its most

delicate stage induced in usually honest men by their need to obscure the truth with a "prudent habit of speech" seems to have prepared the way for ever-widening incursions upon nameless ones, no longer safe within their mothers' wombs but buried there as technology, like a child playing with alphabet blocks, becomes ever more adept at changing wombs to tombs.

CHAPTER IV
RELIGIOUS VIEWS OF ABORTION

Primitive Religion

Though it is impossible to discover what religious attitudes our prehistoric ancestors may have had toward abortion, we do have some evidence of religious attitudes of some contemporary primitive societies. A brief look at them suggests what may have been common attitudes in the ages prior to the development of western civilization.

In a few places abortion plays a part in what appears to be a religious or magical rite. Among the Achewa of Nyasaland, abortion was induced in order that the fetus might be incorporated into the foundation of a furnace to be used in making tools.[1] The natives of Formosa also aborted for religious reasons, not as part of ritual, but because it was considered sinful to bear children before a certain age. In the same culture, the child was not considered a full person until it was given a name at two or three years of age, and infanticide before that age was unpunished.[2]

Some tribes practice abortion for what seem to be religious reasons, but may in fact be religious rationalizations of purely pragmatic purposes. For instance, among the Jivaro tribe of Ecuador, a woman who bathes in a river is thought to become subject to impregnation by a demon, which results in a monster birth. Also the second of a pair of twins is considered the offspring of a demon, and is killed. Since abortion is practiced when there is danger of a monster birth, there seems to be a religious motive—the avoidance of children of demons.[3] But obviously, once the practice of abortion under such conditions is established, a woman need only be careless about bathing in order to have a socially approved ground for abortion.

Religious and magical practices also play a role in causing abortion. In most cases the magic is straightforward, and not especially interesting—charms, spells, magical acts. A couple among the Muria of Burma were reported to have sought abortion from a tribal god, with prayer, fasting, and sacrifice.[4] The underlying theory seems to have been that the god was responsible for maintaining tribal integrity, which would have been violated

by the particular birth. Religious practices to prevent undesired miscarriage are found in many places; only one place, Hawaii, had a god for causing abortion. The "idol" or image of the abortion-god apparently was an actual instrument of abortion.[5] Thus religion and surgery blended in a unique way!

In the fragmentary reports concerning primitive societies, only a few indicate religious or supernatural sanctions against abortion. In some groups—e.g., the Arapaho American Indians—it was feared that aborted babies would sooner or later get revenge on their mothers, by returning to kill or harm them.[6]

Animistic religion tends to regard abortion as a direct attack on the vital principles of nature. Among some of the Eskimo, for example, a woman who had a premature birth was believed to exude a vapour which would affect others, including seal hunters, thus driving the seals away. "A guilt is handed to" a seal that does not successfully avoid contamination. The seals are considered to be "fingers" of Sedna, the mother of sea mammals. Thus, a contaminated seal gives Sedna a sore finger.[7]

Various societies believed that abortion causes drought. A typical example was found among the Ba-Thonga, a Bantu tribe of South Africa, where a rite of purification was used. The rite included animal sacrifice, dancing and incantation, and a purification ceremony involving young girls pouring water. The searing heat was felt to emanate directly from the graves of infants, and so water was poured over these graves to "extinguish" them.[8]

Among the Lepchas, a Himalayan people, abortions and stillbirths were believed to be the work of the devil. They felt that an extension of his death-dealing activity to others had to be prevented, so thorny branches were waved over the parents and an animal, and the latter was offered as a sacrifice.[9]

The Rhadé Moi of Indochina believed that the ghosts of aborted children could communicate with Aé Dié, the Master of the Universe, who would, at their request, send misfortunes to mankind. The ghosts were addressed in prayer: "You, genii of the ghosts of aborted fetuses, you to whom rice has not been offered, to whom water has not been given, for whom the fire has not been stoked, you who were left in the orchid of the brăc tree, don't get angry."[10]

Most relevant reports from primitive societies seem to reveal in one form or another a sense that abortion is a dangerous violation of the sacred. Retribution by the aborted themselves, by nature, or by a god may be feared. Prayer, sacrifice, and rites of purification may be employed to repair the damage and forestall the danger arising from abortion.

Vedic Religion

It is unnecessary for our purposes to make a general survey of the attitudes of non-western religions toward abortion. But the ancient source books of Indian religion, the Vedas, are of interest for they may well represent an

early formulation of the attitudes from which western religious views of abortion developed. Not that these very writings, in their present form, necessarily influenced western thought. But common cultural traditions, recorded nowhere in the west, may be found in these ancient sacred books. The Vedic and other books considered here are not accurately dated. Perhaps the Atharva-veda is prior to 1500 B.C., the law codes are 500 B.C. or later, and other works fall between. But no two authorities seem to give even nearly similar sets of dates for the various works.

In the Atharva-veda the following passage appears: "On Trita the gods wiped off this sin,, Trita wiped it off on human beings; hence if Grâhi (attack of disease) has seized thee, may these gods remove her by means of their charm! Enter into the rays, into smoke, O sin; go into vapours and into the fog! Lose thyself on the foam of the river! Wipe off, O Pushân, the misdeeds on him that practiseth abortion!"[11]

This passage is explained by the translator in the following way. Trita was created as a scapegoat for the gods. But she did not carry the guilt which had been placed upon her; instead she unloaded it on someone else who, being already guilty, was a fit scapegoat. In later literature the story is elaborated with many variants, in each of which the details differ. Yet the general idea is that guilt is passed from one to another in an ascending order of wickedness. Pushân is a god of wayfaring, hence of those who are lost on their way.[12] Here he assumes a role derivative from his role of protecting lost travelers: protecting sinners, for they have lost their way in life. He takes away the disease which is a symbol of guilt, dissolves the guilt itself in vapour. But even a god has to put guilt somewhere, so he is asked to "wipe it off" on the person who practices abortion. The implication is that abortion is the greatest possible sin; guilt for it cannot be expiated.[13]

Why was abortion held in such horror?

One reason is that there existed in these early times an intense sense of the continuity of life from parents to children. The Aitareya-Âranyaka, a writing later than the Vedas but still very ancient, states that when the father "commits the seed to the woman, then he (the father) causes it to be born. That is his first birth." Emergence from the womb is a second birth; death is a third. The seed is gathered from the father's whole body and he bears it within him as self within his self. Deposited in the mother it becomes part of her self, and so does not harm her. The mother nourishes the self of her husband now within herself; the father, in caring for his wife and fulfilling his duties to the child, raises up his own self. Later the child, being the self of his father, can take his place and do all good works in his stead.[14]

Another reason for the horror of abortion is found in the Atharva-veda itself: "Within the womb Prajâpati is moving: he, though unseen, is born in sundry places. He with one half engendered all creation. What sign is there to tell us of the other?" Prajâpati is the creator, the lord-of-progeny, the principle of living things and of the order of nature.[15] The phrase, "with one

half," refers to daylight. Prajâpati engenders life in the light of day. But he also works in the mysterious darkness of night and of the womb.[16] Thus abortion is seen as a violation of the creative power.

The Aitareya-Âranyaka writer develops this idea by drawing an analogy between the person (*purusa* = "he who sleeps in the womb") and the cosmic Self, which is knowledge, for which the entire physical universe is a uterus from which Brahman (the ultimate principle) steps.[17]

Still another source throws further light upon the ancient vedic attitude toward abortion. In the Satapatha-Brâhmana an explanation is given of the reason why one should not eat the flesh of cow and ox. The cow and the ox "doubtless support everything here on earth"—they are symbols of mother earth, the nourisher. For this reason the gods have given cattle the vigor of all other animals. Eating the flesh of cattle, therefore, is symbolically "an eating of everything, or, as it were, a going on to the end"—the limit of destructiveness. A person who eats cattle meat would therefore very likely be punished by reincarnation "as a strange being" about whom there is "evil report, such as 'he has expelled an embryo from a woman,' 'he has committed a sin'. . . ."[18]

To arouse horror in regard to the eating of cattle, this practice is assimilated to abortion; the line of argument takes for granted the wicked reputation of the abortionist. The analogy between eating cattle and abortion also rests on the understanding that abortion destroys the fruit of the seed, gathered from the father's whole body, representing all that he has eaten. Both abortion and the eating of cattle violate a *source,* a principle in which all the potentialities of life are united symbolically or in concentrated form. Thus both acts tend toward "going on to the end," to the ultimate destruction of life.

This same attitude can be traced through later writings. The Anugîtâ presents a kind of mythical embryology. A man, being incarnated, takes a body of a type proportionate to his merits, in the womb of an appropriate mother. Because the man is an immaterial self,

> though he obtains a body appertaining to the Brahman, he is not attached anywhere; hence he is the eternal Brahman. That is the seed of all beings; by that all creatures exist. That soul, entering all the limbs of the foetus, part by part, and dwelling in the seat of the life-wind, supports (them) with the mind. Then the foetus, becoming possessed of consciousness, moves about its limbs. As liquefied iron being poured out assumes the form of the image, such you must know is the entrance of the soul into the foetus.[19]

We shall see that the ideas of ensoulment, formation of the body, and animation will also be linked in Christian thought. Most interesting here, however, is the relationship of this passage to abortion, which also in this book is regarded as a great sin: "One who drinks spiritous liquors, one who kills a Brâhmana, one who steals, one who destroys an embryo, one who violates the bed of his preceptor, is released from that sin only by penance well performed."[20] The sin can now be expiated by appropriate penance. Though this book still

tends to think of embryonic life as somehow "the seed of all things," a certain rationalism in the clear-cut doctrine of reincarnation has lessened the horror of abortion. The author has perhaps left behind the more primitive sense of sacredness of the vedas, and is close to the mentality of the Bhagavadgîtâ, for which the body is mere clothing of the self, which "is not killed when the body is killed," because the true self is impassible.[21]

The compilations of laws continue the condemnation of abortion in the later Hindu tradition. Vasishtha ranks abortion with the murder of a husband or a learned Brâhmana; only these acts make women outcasts, while adultery and other serious sins can be expiated by penances.[22]

Baudhâyana treats abortion as a cause for divorce, and ranks it among other sexual sins within marriage.[23] Perhaps the very fact that abortion is not set apart in this collection suggests that it is not regarded with the old horror. After all, a codifier of laws does not include among causes for divorce types of act that seldom happen.

In the Institutes of Vishnu, abortion as such is not considered to be one of the worst crimes. Certain types of incest have assumed this position. Next are killing or stealing gold from a Brâhmana, drinking liquor, and committing adultery with a guru's wife. Abortion is only subsequently ranked with these high crimes, and only then if the embryo is of unknown sex.[24] Girls no longer rank equally with boys, as was the case in earlier times, when no such distinctions were drawn.

The Laws of Manu considers abortion as a cause of impurity; libations shall not be offered to women who drink liquor, live with many men, kill their husbands, join a heretical sect, or cause abortion.[25] A penance for abortion is indicated only for "destroying the embryo (of a Brâhmana, the sex of which was) unknown."[26] Here only males of the highest caste are given protection, and the ancient horror of abortion as such seems to have faded in this legalistic code.

If the Laws of Manu was written around the time of Christ, Nârada was compiled several hundred years later. Abortion is still considered wrong, but now it is an injury that the woman commits against her husband. A wife who wastes all her husband's property, makes an attempt on his life, or induces abortion, is to be banished from the town.[27] Thus the rejection of abortion, once based upon ultimate religious attitudes, has become a mere legalism of domestic relations.

Zoroastrian and Egyptian Sources

One religious development outside the Hindu tradition deserves our close attention. It is the Zoroastrian legislation in the part of the Zend-avesta called "Vendîdâd." This religious movement was a reform of the Iranian religion that ultimately derived from the same cultural tradition as the Vedas. The Zoroastrian reform was in effect at the time of the Jewish exile; the thought of the

Zend-avesta influenced the west, even though the book in its present form may not have been edited until after the time of Alexander the Great.[28]

The paragraphs dealing with abortion are truly remarkable. All cases are systematically treated. Each begins: "If a man come near unto a damsel, either dependent on the chief of the family or not dependent, either delivered unto a husband or not delivered, and she conceives by him . . ." The alternatives include all possible marital conditions; it is as if we were to say: "If a man rapes a woman, seduces her, or gains her consent to intercourse, and whether she be single or married . . ."

The first case considered is if the woman, "from dread of the people" uses commonly available drinks to "produce in herself the menses, against the course of nature." The sin is on her. The second case is if the guilty couple, with the same motivation, "destroy the fruit in her womb." The text suggests mechanical or instrumental interference. In this case "the murder is on both the father and herself; both the father and herself shall pay the penalty for wilful murder." The third case is if the man sends the woman to an "old woman" for abortifacient drugs. Here a more advanced pregnancy seems to be under consideration. The man says: "'Cause thy fruit to perish!' and she causes her fruit to perish; the sin is on the head of all three, the man, the damsel, and the old woman."

A positive program is outlined to take the place of forbidden abortion. The man who is responsible should support the woman until the child is born; if he fails to do so, "it lies with the faithful . . ." But if the girl dies due to lack of help, the man "shall pay the penalty for wilful murder."[29]

These regulations seem remarkably sophisticated; it is startling to find them placed alongside similar laws protecting pregnant bitches. The penalties for violation were severe—two hundred stripes. The penalty for manslaughter was only ninety.[30]

To make sense of the outlook involved, one must understand that life and death as such were looked upon as dividing good and evil. Life came from the good principle, death from the evil. The dualism of matter and spirit found in Manichaeism was not present in its Zoroastrian source. In the Zend-avesta, sexual relationship and procreation are not condemned, but rather held in honor. However, killing is a concession to the evil principle, unless it be the killing of some deadly or disease-causing animals, such as snakes, that were considered to embody the wicked principle.[31] Abortion, therefore, is condemned with a conviction that is truly religious in its origin and significance. Here we seem not far separated from the ancient Vedic outlook, which regarded abortion as an interruption in the continuum of life and the work of Prajâpati, the lord of life.

Another possible remote source of the Judeo-Christian attitude toward abortion is to be found, surprisingly enough, in ancient Egyptian thought. A hymn to the sun-god Aton, attributed to Pharaoh Amen-hotep IV, dates from

the fourteenth century before Christ. That was around the time the Israelites left Egypt.

This hymn attributes the creation of living things, and providence over them, to Aton. In regard to embryonic life, the hymn says:

> Creator of seed in women,
>
> Thou who makest fluid into man,
>
> Who maintainest the son in the womb of his mother,
>
> Who soothest him with that which stills his weeping,
>
> Thou nurse (even) in the womb,
>
> Who givest breath to sustain all that he has made!

Here we see expressed the belief that Aton prepares the male and female contributions to new life and then nurses and nourishes that life in the womb. The unborn is not only alive; it has feelings which must be soothed. The poem also makes clear the belief that although breathing begins only at birth, Aton somehow supplies the breath of life even before birth, just as he does to chicks in the egg.[32]

The Old Testament

Compared with the rich treatment of abortion in the Vedic and Zoroastrian writings, the Old Testament is poor in relevant materials.

Only one passage explicitly touches on abortion, and this passage concerns spontaneous abortion incidental to a quarrel:

> If, when men come to blows, they hurt a woman who is pregnant and she suffers a miscarriage, though she does not die of it, the man responsible must pay the compensation demanded of him by the woman's master; he shall hand it over, after arbitration. But should she die, you shall give life for life... (Ex 21:22-23).[33]

The context of this passage is a section of the law which expands upon the prohibition of homicide to deal with crimes involving blows and wounds that cause harm short of death or that lead to death only incidentally. The requirement that a man who negligently causes a spontaneous abortion pay compensation indicates that the act is considered harmful. The loss of the unborn child is a *loss*, a damage to the pregnant woman and hence a harm to the woman's "master." But the death of the unborn itself apparently was not regarded as unintentional homicide, for the penalty for that was laid down as "life for life." By implication, the unborn was not considered an individual having a life regarded as human.

But it would be rash to conclude from this passage and from the Old Testament's silence concerning the procuring of abortion that intentional abortion is approved or favored by it.

In the first place, the Old Testament, considering reality very concretely, tends to expand the conception of *life* to include all of the positive values of

living. Death, by contrast, is the paradigm and symbol of every disvalue. A striking example of this attitude is in Deuteronomy. After summarizing the entire code, the lawgiver calls attention to the choice which must be made—to accept the law or to reject it: "See, today I set before you life and prosperity, death and disaster" (Dt 30:15). To love God and to obey him is to choose life; to stray from God is to perish.

> Choose life, then, so that you and your descendants may live, in the love of Yahweh your God, obeying his voice, clinging to him; for in this your life consists, and on this depends your long stay in the land which Yahweh swore to your fathers . . . (Dt 30:19-20).

Life was regarded as the highest good; death as the worst evil. This outlook finds its expression in the account of the fall in Genesis. Eve, tempted by Satan to eat the forbidden fruit, cites a divine threat: "You must not eat it, nor touch it, under pain of death" (Gn 3:3). Satan reassures her on this score. But after the fall, Yahweh tells man he must now face the prospect of returning to the dust from which he came, and the fruit of the "tree of life" that would prevent this fate is denied to man (Gn 3:19-22).

Thus God, who creates life, is the lord of life and of death. In the "Song of Moses" Yahweh says: "See now that I, I am he, and beside me there is no other god. It is I who deal death and life" (Dt 32:39). The power over life is a chief sign of God's unique lordship. In creating, God not only fashions the cosmic order but each kind of living thing, including finally man, who is fashioned from the dust of the earth in the image and likeness of God, who, like the Egyptian Sun-god Aton, gives life by breathing: "Then he breathed into his nostrils a breath of life, and thus man became a living being" (Gn 2:7).

Following the fall of Adam, Genesis describes a course of degeneracy that terminates in the deluge. The first step in this downward course is Cain's killing of Abel (Gn 4:4-16). Abel's blood "cries out" to Yahweh from the ground on which Cain has spilled it (Gn 4:10-11).

After the deluge, God renews his covenant with mankind, giving Noah and his sons dominion over the earth. But two limitations are laid down. In using animals for food "you must not eat flesh with life, that is to say blood, in it" (Gn 9:4). Even the blood of animals is sacred, because that blood is identified with their life, which is a gift of God. From this conception there is only a short step to the practice of blood sacrifice, in which the life of animals is offered as sacrifice to him who is lord of life.

The second limitation on man's dominion is more important: "I will demand an account of every man's life from his fellow men. He who sheds man's blood, shall have his blood shed by man, for in the image of God man was made" (Gn 9:5-6). Cain's question, "Am I my brother's keeper?" receives an affirmative answer. The shedding of man's blood is absolutely forbidden, except when it is done as a punishment. The reason for this special protection of human life is the special status of man made in the image of God. For as

Yahweh is a "living God" (Jos 3:10; 1 S 17:26, 36; 2 K 19:4, 16), unlike the idols worshipped by heathens, with dignity and with power to defend his rights, so man has dignity and is given the authority to defend human life by punishing killing.

In this context, the commandments of the decalogue must be understood. In an expanded form, they inculcate reverence for God and respect for the rights of other men. The prohibition of killing (Ex 20.15; Dt 5.18) becomes one specific command, clearly intended in the context to protect innocent life. For life comes from God; long life is a promised reward for piety toward one's parents, who transmit the divine gift of life to their children. And out of respect for life flow the moral requirements concerning sexual activity, by which life is transmitted, and concerning property, by which life is nourished and protected.

In addition to this Old Testament attitude toward innocent life, another reason for not regarding its silence about intentional abortion as approval of the practice is to be found in the Old Testament attitude toward children.

Children are consistently regarded in the Old Testament, not as a nuisance nor as an epidemic, but as a blessing. The first blessing on man was: "Be fruitful, multiply, fill the earth and conquer it" (Gn 1:28). The original blessing is renewed in the covenant with Noah (Gn 9:7). This is not so much a duty as a gift, for the blessing of fecundity also is bestowed on the fish and the birds (Gn 1:22).

To the patriarchs God promised abundant seed. To Abraham: "Look up to heaven and count the stars if you can. Such will be your descendants" (Gn 15:5). Lacking any such concept as unending happiness in a life after death, the hope of the Old Testament is closely linked to the immortality achieved through descendants. Thus the promise to Abraham is renewed—to Isaac (Gn 26:4, 24), to Jacob (Gn 32:12), and to the Israelites who choose to obey the law (Dt 30:16).

On the other hand, sterility is shameful and is a great cause for sorrow. The wives of Abraham (Gn 11:30), Isaac (Gn 25:21), and Jacob (Gn 30:22-23) all suffered from the curse of sterility, and in each case divine favor overcame barrenness. In Deuteronomy, the promise that accompanies the law is explicit:

> Listen to these ordinances, be true to them and observe them, and in return Yahweh your God will be true to the covenant and the kindness he promised your fathers solemnly. He will love you and bless you and increase your numbers; he will bless the fruit of your body and the produce of your soil, your corn, your wine, your oil, the issue of your cattle, the young of your flock, in the land he swore to your fathers he would give you. You will be more blessed than all peoples. No man or woman among you shall be barren, no male or female of your beasts infertile. (Dt 7:12-14)

Thus children are looked upon as a gift of God and as a particular reward for faith in him. Sons are the reward for which the faithful man may hope. He who fears the Lord and follows his paths is promised a wife like a fruitful vine

in the courtyard of his house and sons like shoots round an olive tree (Ps 128:1-3). "Sons are a bounty from Yahweh, he rewards with descendants" (Ps 127:3). Hence, they cannot be regarded as a personal achievement; God gives them to "his beloved as they sleep" (Ps 127:2).

The suggestion that God is at work within the womb, while not explicit in the most ancient books of the Old Testament, nevertheless is compatible with their view of sterility and childbearing. And in the Psalm just cited, this conception seems to be present. It is certainly present explicitly in other books of the Old Testament.

Job, for example, says of slaves and maidservants: "They, no less than I, were created in the womb by the one same God who shaped us all within our mothers" (Jb 31:15). Isaiah, discoursing on the glory of God, begins by recalling the moment at which each of his hearers was personally touched by the finger of the creator: "Thus says Yahweh, your redeemer, he who formed you in the womb: I, myself, Yahweh, made all things . . ." (Is 44:24).

For Isaiah, this divine intervention even before birth implied more than mere general creative activity on God's part. Rather a personal relation was established between God and the person unborn: "Yahweh called me before I was born, from my mother's womb he pronounced my name" (Is 49:1). Even before his birth, Isaiah was prepared for his prophetic mission by God "who formed me in the womb to be his servant" (Is 49:5). Jeremiah expresses the same idea: "The word of Yahweh was addressed to me, saying, 'Before I formed you in the womb I knew you; before you came to birth I consecrated you . . ." (Jr 1:5).

In this concept God knows the person before he begins to be, God gives being by "forming in the womb," and God "calls" or "consecrates" the person before his birth. The explicit articulation of this set of ideas is not found before the prophets. Yet implicitly we find these ideas present already in Eve's exclamation upon the birth of Cain: "I have acquired a man with the help of Yahweh" (Gn 4:1).

One of the most striking biblical expressions of the conviction that the unborn child is formed by God is found in the second book of Macabees. Although this book is not in the Hebrew canon, it certainly represents the thought of some substantial part of the Jewish community not long before the time of Christ. In this book is a touching account of a mother who encouraged her seven sons to undergo martyrdom for their religious faith. Among her words of encouragement she says:

> I do not know how you appeared in my womb; it was not I who endowed you with breath and life, I had not the shaping of your every part. It is the creator of the world, ordaining the process of man's birth and presiding over the origin of all things, who in his mercy will most surely give you back both breath and life, seeing that you now despise your own existence for the sake of his laws. (2 Mac 7:22-23)

Thus the origin of man from God is linked to a destined new life which will overcome death itself.

Among a people who considered life the paradigm of value, who regarded it as a gift of God and entirely subject to his dominion, who considered all blood somehow sacred, who especially protected innocent life, who regarded children as a blessing and sterility as a shame, who accepted the concept of God's creative power at work within the womb forming the person, who even could believe in a personal relationship between God and the child yet to be born—among such people the practice of inducing abortion was extremely unlikely to find a foothold. Thus the silence of the Old Testament about induced abortion rather indicates that legislation against abortion was unnecessary than that abortion was tacitly approved.

This conclusion agrees with that of A. E. Crawley: "Foeticide is not referred to in the Mosaic law. The omission is one indication, among many, of the intense regard felt by the Jewish people for parenthood and the future of their race."[34]

Traditional Jewish View

Rabbi Immanuel Jakobovits, since 1966 the Chief Rabbi of Great Britain, who has made a thorough survey of traditional Jewish sources concerning abortion, has pointed out that the comparative silence of the scriptures continues in the codes and rabbinic responsa through the middle ages. The reason was not that abortion was unknown—the contrary is evidenced both by pagan literature and by medical writers—but that it never became a practice in Jewish society.[35]

The Talmud, an authoritative compilation of the Jewish law and of writings on it, contains only one reference to therapeutic abortion:

> If a woman is in hard travail, one cuts up the child within her womb and extracts it member by member, because her life has priority over its life; but if the greater part of it was already born, it may not be touched, since one does not set aside one life for [the sake of] another.[36]

This passage is from the mishnah, the basic text of the Talmud. The mishnah embodies an oral tradition that dates to pre-Christian times, though it was compiled only around the early centuries of the current era.

This passage obviously contains the seeds of controversy. On the one hand, it admits that a live child in the womb may be cut up; on the other, the general principle is laid down that one life may not be sacrificed for another. And the boundary set to delimit the operation of the two considerations is the mere fact that "the greater part of it" was or was not already born.

Some talmudic authorities (during ancient times) accordingly wondered why the child might not be killed even in the final stage of birth, on the ground that it can be regarded as if it were an aggressor in pursuit of its mother. One answer is that the mother is then "pursued by heaven"—i.e., the danger is an

act of God rather than the fault of the child. But before the child sees the light of day he is not yet a "soul"—i.e., a person with the inviolable right to life.[37] Discussion of this problem is complicated, however, by diverse interpretations. Another solution is that the principle of pursuit is not really applicable in this case since the distinction between pursuer and pursued is unverifiable.[38]

Yet Maimonides (medieval) appealed to the "pursuit" argument to justify even early abortion. Subsequent rabbinic discussion brings out the fact that although the unborn child is not regarded as a person with full rights, it is considered human enough to make its unjustified destruction a moral offense, even if not a strict violation of the law.[39]

This argument reveals an essential hidden assumption in the traditional Jewish view—the idea that nascent life is legally "more or less" inviolable. Before labor begins, the child is considered by most, though not by all, of the ancient talmudic sources to be part of the mother. At this stage the mishnah itself provides that a pregnant woman guilty of capital crime may be executed, merely in order to spare her the agony of suspense.[40]

Once labor begins, but before the "greater part" of the child has emerged, the child is no longer considered to be part of the mother, yet its life is not equally inviolable. The child may be sacrificed if it threatens the mother.

A further ramification was introduced by the view that an infant dying during the first thirty days of life is considered a stillbirth, on the theory that it was not viable or it would have survived. Working from this view, rabbinic responsa (authoritative answers to issues about the law) from the seventeenth century onward have tended generally to allow a certain preference to be given to the life of the mother even after the "greater part" of the child has emerged. But this is only in the exceptional case when otherwise both mother and child will die.[41] The direct killing of a child even in his very first day of life is considered murder and held liable to punishment as such.[42]

Finally, a child born after a pregnancy which has certainly extended for the full term, or else thirty days after birth, is considered to have proved its viability. Such a child has full human rights in every respect and its life is not to be sacrificed even for the preservation of many other lives. For just as with adults, the child's full right to life now implies a transcendent value.[43]

From this tradition there clearly follows a very receptive attitude toward any genuine therapeutic abortion. According to Rabbi Jakobovits, a genuine threat to the life of the mother must be present. Yet

> such a threat to the mother need not be either immediate or absolutely certain. Even a remote risk of life invokes all the life-saving concessions of Jewish law, provided the fear of such a risk is genuine and confirmed by the most competent medical opinions.[44]

Moreover, the threat may be psychological as well as physical.[45]

From this position one might infer that traditional Jewish views would also accept the abortion of probably defective children or of children conceived through illicit intercourse. However, this inference is not necessarily accurate.

Rabbi Jakobovits, whose scholarly study we have cited, argues in another place that abortion because of defect should not be permitted, for Jewish law does not recognize defect as a factor compromising the right to life. He reveals considerable concern that the principle employed here is not limitable to the unborn. Even the killing of unborn defectives is tantamount to murder, for where life is at stake, its preservation must always by given the benefit of the doubt.[46]

The same author, again concerned about ulterior implications of relaxed laws, rejects abortion as a solution to moral and social problems. He argues that laws which defend society must not be abolished because of hardship in particular cases. Moreover, arguments for abortion based on the consequences of forbidding it are not considered cogent—e.g., the child unwanted before its birth is often loved when it is four or five years old. Where social conditions create hardship for the innocent, Rabbi Jakobovits argues for liberal policies of public aid. But where individual irresponsibility is the cause of hardship, the disciplinary function of law requires that no easy way out be permitted.[47]

With regard to this last point, Rabbi Jakobovits concludes:

> The exercise of man's procreative faculties, making him (in the phrase of the Talmud) "a partner with God in creation," is man's greatest privilege and gravest responsibility. The rights and obligations implicit in the generation of human life must be evenly balanced if man is not to degenerate into an addict of lust and a moral parasite infesting the moral organism of society. Liberal abortion laws would upset that balance by facilitating sexual indulgences without insisting on corresponding responsibilities.[48]

In sum, a conservative and learned representative of the Jewish tradition regards therapeutic abortion as acceptable, for the life of the mother—including even indirect threats to her health until the final stage of pregnancy—is regarded as having rights prior to those of the child. On the other hand, where the mother's life is not at all at stake, this Rabbi remains faithful to traditional sources by taking a strong stand in favor of life, the amelioration of bad social conditions, and personal sexual self-control.

Another Jewish scholar, Rabbi Isaac Klein, has reviewed much the same material and come to fairly similar conclusions. Abortion is not murder, but the tradition allows only genuine therapeutic abortion because a potential life is destroyed.[49]

But the concept of "therapeutic abortion" may be more or less strictly interpreted. Rabbi Klein reports a responsum of Rabbi I. J. Unterman, present Chief Rabbi of the Ashkenazic community of Israel. Rabbi Unterman rejected abortion for a woman who contracted German measles in pregnancy; he accepted therapeutic abortion only if the life of the mother is *directly* threatened, as in the case dealt with in the mishnah.[50]

Rabbi Klein himself, however, follows a less strict school of thought. In the last stages of pregnancy, only a direct threat to the life of the mother can be accepted as justification for abortion. In earlier stages, however, any direct or indirect threat to her life or to her physical or psychological health would be sufficient reason. Abortion would be permitted in cases of thalidomide babies, rape, and the like not because the fetus is denied inviolability altogether, but because such a pregnancy threatens the mother's health. Recognizing the elasticity of this concept of therapeutic abortion, Rabbi Klein requires that the facts must be established by medical evidence—i.e., there must be some positive grounds for judging that there is a threat to health.[51]

Besides the authoritative expressions of the traditional Jewish view found in the Hebrew scriptures and rabbinic teaching, we must note one other historically important source of Jewish thought regarding abortion. It is the writing of Philo, a Greek-speaking Jew who lived at Alexandria at the time of Christ.

The Jewish people had been dispersed outside Palestine by the turmoil of previous centuries. A large community existed at Alexandria, a leading intellectual center of the time. This group had a Greek translation of the biblical scriptures—the "Septuagint." Philo was learned in Greek philosophy; his work is not an authority in Jewish law but is of theological and apologetic value, for he explained and defended the Jewish religion making use of the Greek language and forms of thought.

For Philo murder is not merely an injustice to one's fellow; it is primarily a sacrilege—that is, a violation of what pertains to God. For man, by his very rational nature, is godlike, being made in the image of God. For this reason, Philo concludes that every murderer must himself be put to death.[52] Here Philo echoes the covenant with Noah: "He who sheds man's blood, shall have his blood shed by man, for in the image of God man was made" (Gn 9:5-6).

Coming to the question of infanticide, Philo begins by paraphrasing the rule of Exodus (21:22-23) concerning abortion, but Philo's version is different in several important respects:

> If a man comes to blows with a pregnant woman and strikes her on the belly and she miscarries, then, if the result of the miscarriage is unshaped and undeveloped, he must be fined both for the assault and for obstructing the artist Nature in her creative work of bringing into life the fairest of living creatures, man. But, if the offspring is already shaped and all the limbs have their proper qualities and places in the system, he must die, for that which answers to this description is a human being, which he has destroyed in the laboratory of Nature who judges that the hour has not yet come for bringing it out into the light, like a statue lying in a studio requiring nothing more than to be conveyed outside and released from confinement.[53]

The most important difference between Philo's statement of the law and that found in the Hebrew scripture is that Philo makes the increase in penalty—from fine to capital punishment—depend upon the condition of the

fetus. If the fetus is unformed, the punishment is a fine; if it is sufficiently developed to be recognizably human, the punishment is death. Exodus, by contrast, made the increase of penalty depend on the effect on the mother, a factor Philo does not mention at all, just as Exodus does not mention the stage of fetal development.

The explanation of this discrepancy is to be found in part in the fact that the Greek ("Septuagint") translation of the scriptures, which was used by Philo, replaced Hebrew expressions signifying "no harm" and "harm" (implicitly, to the mother's life) with Greek expressions signifying "not fully formed" and "fully formed" (implicitly, referring to the condition of the child).[54]

We should notice that both the Hebrew and the Septuagint Greek versions of Exodus 21:22-23 had antecedents in ancient near-eastern codes of law. The Code of Hammurabi (about 1700 B.C.) includes six provisions to govern cases in which a seignor strikes another seignor's daughter, a commoner, or a slave causing a miscarriage. In all three sorts of cases the penalty is increased if the woman dies, and nothing is said about the stage of fetal development. In the first type of case, the guilty seignor's daughter must die in exchange—life for life—but in the other cases a sharply increased fine is due if the woman dies.[55]

By contrast, in the Hittite Laws (about 1500 B.C.) there is no mention of whether or not the woman dies, but a distinction is introduced on the basis of whether the woman was in the fifth or the tenth month of pregnancy. In either case the penalty was a fine, but the principle seems to have been to increase the fine one unit for each month of pregnancy.[56]

Neither version of the text from Exodus exactly reproduces the ancient near-eastern law that it resembles. However, this difference in remote legal sources does suggest that the Greek version of Exodus 21:22-23 did not come about by a mere error of translation. More likely, the Septuagint translators were grasping an opportunity to introduce a variant interpretation that agreed better with current practice in their community or their own conception of justice.

It is important to notice that Philo goes considerably beyond what even the Septuagint text of Exodus suggests. First, Philo gives as the reason for a fine not the loss to the woman's master but both the assault and the interference with the process of human generation. Second, Philo introduces a definite criterion for counting the unborn as human, namely the stage of development at which the embryo becomes *recognizably human.* Third, Philo thinks of the formed but not fully mature fetus as a work which nature has essentially completed—the fetus needs only maturing for life in the world, as a finished statue needs only the right conditions for display outside the studio. The point of this metaphor is not that the fetus is without life—Philo certainly knows that it is alive and growing—but that the fetus gains nothing essential to humanity once it is "fully formed."

From this rejection of abortion, Philo goes on to condemn infanticide in the strongest terms. This practice was prevalent in the pagan world but was certainly regarded as murder by religious Jews. Philo argues that since the law of Moses condemned the abortion of fully formed fetuses, it all the more certainly condemned the murder of infants.[57]

His arguments are interesting. First, killing the infant deprives him of his share in the gifts of nature—esthetic enjoyment, contemplative knowledge, and technical achievement. These Philo regards as the common human birthright in which everyone has a natural right to share.[58]

Second, those who commit infanticide are evidently slaves of lust, for otherwise they would not procreate children only to kill them. Parents committing this crime are especially guilty because they have special responsibility for the infants they kill. The killing is brutal—either done by the killers' own hands or by cruel abandonment. Those who commit such crimes are haters of mankind itself, because if one is merciless to his own flesh and blood, so much more to strangers.[59]

Finally, the killing of infants is particularly inexcusable because they are completely innocent—no quarrel or difference can supply any pretext for the crime: "Not even a false charge can be brought against such absolute innocence."[60]

These arguments of Philo refer immediately to infanticide, but since he has assimilated infanticide to abortion of a formed fetus, all of the arguments must be understood to refer to purposely induced abortions of that sort as well.

In the course of this argument, directed as it is chiefly against infanticide, Philo notes that the most competent theoretical scientists and medical researchers of his time believed that the child remained part of its future mother so long as it adhered to her within the womb. Philo accepts this view as adequate for medical purposes. But he points out that the opinion is irrelevant to infanticide.

No explanation is given of how the law's rejection of abortion is to be squared with the scientific-medical opinion, but Philo does explain that infanticide is murder despite the infant's lack of age—age implies a right to respect based on social status—"since the displeasure of the law is not concerned with ages but with a breach of faith to the race."[61]

In other words, the law rejects infanticide because of its inhumanity. Like all homicide, infanticide is an offense against man, the image of God, not simply a violation of the rights of individuals. Given Philo's conception of wrongful abortion and his criterion of humanity, it follows that his position is that however legitimate for medical purposes the identification of the fetus with its mother, from a legal—that is, ethical and religious—viewpoint, the fully formed fetus must be regarded as a distinct individual with the human right to life.

Philo thus reaches the position that abortion of the fully formed fetus is homicide, a capital offense, by introducing a new criterion for judging when

the life of the human individual begins. The criterion is the empirically discernible stage of fetal development to a recognizably human form. This criterion is not drawn from scientific and medical literature, and it is not in fact found in the Hebrew version of Exodus.

Rabbi Jakobovits, usually so acute, judges Philo "somewhat confused, if not plainly inconsistent." He believes Philo was simply misled by the Septuagint mistranslation, with its Hellenistic background, into accepting a position lacking any sound foundation in Jewish law.[62]

However, I believe Philo was neither inconsistent nor in the least confused. He was simply careful to distinguish between the scientific-medical frame of reference and the legal frame of reference. The latter he regards as controlling in the matter of abortion, because this is a religious and moral question.

Rabbi Jakobovits also refers to another passage in which Philo seems to accept the notion that the unborn child is part of the mother, and to deny that the life of the fetus is on a par with the life of a live-born individual.[63]

But an examination of this passage in its full context shows that Philo is not inconsistent. He is dealing with Mosaic law regarding animal sacrifice, and he extends the law forbidding the joint sacrifice of an animal and its mother to forbid also the sacrifice of a pregnant animal. In this context Philo's purpose is to demonstrate how humane Jewish law is. Hence he does not bother with his distinction between the perfectly formed and the not yet formed fetus. Rather he directly contrasts the Jewish ceremonial law with the pagan practice of human infanticide.

Then, forestalling an objection, he argues that even if the offspring is only living in virtue of vegetative functions, so that its life is not yet that of a new individual on a par with others of its kind, still the offspring is safeguarded because it is ordained to full life. Thus the law restrains the impulse of those who are inclined to wantonly disrupt order.[64]

To complete his argument Philo points out that legislators have accepted this principle implicitly by forbidding the execution of pregnant women in order to avoid the destruction "of the life within the womb."[65] One modern commentator on this passage cites evidence that Egyptian, Athenian, and Roman law included such a provision.[66] Thus Philo effectively proves his point that Jewish law is humane and is so on reasonable grounds—by standards a pagan reader would accept. The whole argument is not concerned with abortion and does not employ Philo's key distinction, which his pagan readers might not have accepted.

Professor Samuel Belkin's scholarly study of Philo's relation to the Jewish tradition supports my interpretation. He holds that the translation of Exodus in the Septuagint version is evidence of existing practice, not only in the Greek-speaking Jewish community of Egypt but also in Palestine.[67]

Moreover, Philo's interpretation has a foundation in authoritative rabbinic teaching of the period, for the unborn child was not simply considered

part of its mother. As I have explained in regard to Philo, Belkin sums up the rabbinic views: "All this shows that although in some respects the Rabbis considered the unborn child, because of its dependence on her for nourishment, a part of its mother, nevertheless it had the legal status of a human being by itself."[68]

Perhaps most important, Belkin shows how the talmudic materials, Rabbi Jakobovits' treatment of which we summarized above, can be interpreted in line with Philo's position. The passage of the mishnah which seems to forbid the execution of a pregnant woman already in labor may be interpreted to forbid execution during the whole latter part of pregnancy prior to actual labor. The argument that the child may be killed as if it "pursued" its mother would be unnecessary unless it were a human life that would otherwise be inviolable.[69]

Even the passage of Genesis (9.6) forbidding murder was interpreted by one Rabbi specifically to forbid abortion: "Whoso sheddeth the blood of a human being who is in a human being, his blood shall be shed."[70] We may doubt the validity of this interpretation of Genesis in the context, but the acceptance of it by Rabbi Ishmael, one of the leading authorities around Philo's time, refutes Rabbi Jakobovits' contention that no one in the orthodox Jewish tradition except Philo and Josephus ever thought abortion deserved a death penalty.

Josephus, a religious faithful Jew, who was something of a political stooge for Rome, living just after Philo's time, was from Palestine, but he also wrote in Greek. In one work he refers to accidental abortion in the same terms as the Hebrew version of Exodus.[71] In a later work, however, he says: "The law orders all the children to be brought up, and forbids women either to cause abortion or to make away with the fetus; a woman convicted of this is regarded as an infanticide because she destroys a soul and diminishes the race."[72] In these passages Rabbi Jakobovits sees inconsistency.[73]

However, a consideration of the context shows that Josephus is not inconsistent. In the earlier work he is compiling elements from the Mosaic law and— though Josephus collects and rearranges the material—he attributes the whole passage to Moses. True to the Mosaic law, purposely induced abortion is simply not dealt with.

In the later work, which was aimed at pagan readers, Josephus is explaining and defending current Jewish laws and customs. Many elements not found in scripture are included. The statement about abortion appears in a section concerned with marriage and the family.

Apparently, the early Israelites did not need a precept forbidding abortion, but by the time of Christ, changed social and cultural conditions led some Jews to practice abortion. Philo and Josephus reflect the reaction which met the new challenge by developing a more sophisticated concept of the beginning of life and by treating the life of the fully formed fetus as an inviolable human life. The main body of authoritative Jewish teaching appears to have developed

a casuistry which depends upon regarding the unborn as "more or less human."

Thus a Jewish thinker of our day can find in his tradition justification for an extremely elastic concept of therapeutic abortion. He can also find a basis for regarding any abortion not justified by a direct threat to the mother's life as infanticide.

We can be reasonably sure of one point. The earliest Christians, who were themselves Jews, did not need to introduce an altogether new outlook in order to see abortion as a form of murder. This view was already in circulation, and it had some claim to be regarded as the authentic Jewish tradition.

The New Testament

However, as the first Christians moved out into the pagan world they met a culture which accepted not only abortion but even infanticide. Under Roman law this acceptance was based on the absolute authority of a father over his children. In effect, children belonged to the father almost as if they were property. In the Greek philosophic tradition, individuals were strongly subordinated to the welfare of the community, so that abortion and infanticide could be accepted as a method of controlling population. Neither Roman law nor Greek philosophy recognized that each human being is a person in his own right, a bearer of immeasurable and inalienable dignity. Some humane pagans objected to abortion, especially when it was practiced for mere reasons of convenience and feminine vanity. Also the Hippocratic oath, which outlined the ideals of medical practice, included a rejection of abortion. However, abortion and infanticide were widespread, because there were many reasons parents considered adequate to warrant ending a life which they did not want. They felt no obligation to love a child they did not want since, after all, it was merely an accident of nature, not a child of God.[74]

Christianity did not abandon the concepts of the Hebrew scriptures, but many of these concepts were radically transformed.

Life is still as central in the New Testament as in the Old: "The thief comes only to steal and kill and destroy," Christ says. "I have come so that they may have life and have it to the full" (Jn 10:9-10).

However, the life in question is not primarily physical: "It is the spirit that gives life, the flesh has nothing to offer. The words I have spoken to you are spirit and they are life" (Jn 6:63). Radically this life is Christ himself, the spiritual life of the Word of God, in whom all things had life in the beginning. His life "was the light of men" that could not be overcome by darkness (Jn 1:4-5).

Through the course of the Old Testament the Israelite hope had evolved. In the New Testament this hope is certainly not fixed upon long life and plentiful children. On the contrary, Christian hope is for forgiveness of sins, reconciliation with God, and salvation (Ac 2:38-40). Put affirmatively, the

Christian hopes for God's glory (Rm 5:2) and everlasting life: "If anyone believes in me, even though he dies he will live, and whoever lives and believes in me will never die" (Jn 11:25-26; cf. Tt 1:2).

Lack of physical descendants is accordingly no longer a curse. Christ commends to those who receive the grace a life of sexual abstinence "for the sake of the kingdom of heaven" (Mt 19:12). Paul accordingly instructs the Corinthians that it is good to marry but even better not to do so (1 Co 7:7, 9, 25-28, 34, 38).

But it would be an error to suppose that these developments of Old Testament concepts have set Christians against the values which shaped the negative Israelite attitude toward abortion. Quite the contrary.

For Christians, the spiritual and everlasting life is not merely a thought or a ghostly existence. It is to be lived by men, that is by living bodies, bodies perfected and raised from death (Jn 11; 1 Co 15). The Christian not only hopes to triumph over death by playing for infinitely higher stakes than bodily survival; he also hopes to beat bodily death at its own game (Mt 10:28-31). All of the miraculous cures ascribed to Christ in the New Testament also show the Christian belief that physical life and health are themselves great goods as well as being signs of the everlasting life which is the principal object of hope.

Thus in the New Testament the prohibition of murder is recalled (Mt 15:19; 19:17-18; Rm 1:29; Rv 22:15). And the particularly horrible example of infanticide, Herod's slaughter of the innocents, was marked off by a poignant text from Jeremiah: "A voice was heard in Ramah, sobbing and loudly lamenting: it was Rachel weeping for her children, refusing to be comforted because they were no more" (Mt 2:18; Jr 31:15).

For Christians, God's lordship of life and death remains, but now it is especially vested in Christ. Jesus lays down his own life by his own choice, not simply because of the choice of those who would take it (Jn 10:17-18). Life is Jesus' to give, and his gift cannot be prevented: "I give them eternal life; they will never be lost and no one will ever steal them from me" (Jn 10:28). If this seems merely mystical, the belief that bodily life is included in this gift is stated and certified in the following chapter, where Lazarus is raised from the dead (Jn 11:43-44).

Moreover, for Christians God is more present in the world since the incarnation of the Word. Christ promised to remain with his followers even as he left them (Mt 28:20). This presence was to be accomplished by the sending of the Holy Spirit (Jn 14:26; Ac 2:4). As a result of his coming, Christ himself dwells in the Christian (Rm 8:9-11). Thus St. Paul argues against sexual wantonness that a Christian must have high regard for the dignity of his body, which is united to Christ: "Your body, you know, is the temple of the Holy Spirit, who is in you since you received him from God" (1 Co 6:19).

When Christians read that the kingdom of heaven belongs to little children and infants (Mt 19:13-15; Mk 10:13-16; Lk 18:15-17), that mysteries hidden from scholars and shrewd men are made known to children (Mt 11:25;

Lk 10:21), and that babes in arms are the most certain spokesmen of appropriate divine praise (Mt 21:16), they came to realize that the presence of the spirit is not a function of the maturity of human capacities. The conception of Jesus by the Holy Spirit was altogether unique (Mt 1:18), but the joy with which Elizabeth's infant leapt within her womb when Mary greeted her cousin (Lk 1:40-44) indicates that whether or not "the greater part of" the infant was born would no more inhibit the Spirit of Christ than it did the God of Job, Isaiah, and Jeremiah.

Another factor significantly influencing Christian morality so far as actions affecting others are concerned is the belief that not only the one acting but also the one acted upon must be regarded as a brother, as an (at least potentially) adopted son of God (Rm 8:14-17; Ga 4:1-7). Thus Paul's mode of address to his "brothers" and his effort to formulate Christian social ethics in terms of acting as Christ would act and as one would act toward Christ (Ep 5:21-6:9). The Christian standard set by Christ is a mutual love as self-emptying as his own love (Jn 15:13-14). Thus a Christian reflecting upon abortion could easily find himself thinking: "As you did this to one of the least of these brothers of mine, you did it to me" (Mt 25:40).

Moreover, the New Testament teaches the concept of a divine providence which cares for all things and forestalls any need for self-concern (Mt 6: 25-34; Lk 12:22-31). This providence is not only over the course of things generally, but even over such apparently insignificant matters as the fall of a sparrow and the number of hairs on each person's head (Mt 10:29-30). From such a concept it follows that even the smallest beginning of human life is subject to providence and that the meaning of that life is wrapped in a mystery beyond any mortal's comprehension.

Finally, we must notice that if the New Testament turns attention from natural to spiritual fruitfulness, the former is not left without commendation. St. Paul, perhaps in reaction to false teachings against marriage, asserted that a woman living a Christian life is saved by child-bearing (1 Tm 2:15; 4:3). And Christ himself, arguing by analogy, referred approvingly to the joy of a new mother "that a man has been born into the world" (Jn 16:21).

Common Christian Tradition

The earliest Christian moral instruction that we know about (apart from the books of the New Testament) is contained in a document which contrasts "the two ways"—the way of life and the way of death, or the way of light and the way of darkness. This document is incorporated in at least two extant works: *The Didache* (or *Teaching*) *of the (Twelve) Apostles* and *The Epistle of Barnabas.* Though these works may be of second century composition, "the two ways" is older and was much more widely circulated. "The two ways" was translated into many languages, was known to Church Fathers in the east and in the west, and was still in use centuries after its original composition. Very

likely the Christian document owed a great deal to instructional materials generally in use among Jews; those who became Christians simply adapted the old material.[75]

The *Didache*'s version of "the two ways" begins with a longer treatment of the way of life, which is followed by a more summary statement of the way of death. The former is well organized in four chapters. The first is the affirmative Christian ideal, drawn from sources such as the Sermon on the Mount. The second is negative precepts, in the style of the second table of the decalogue. The third is counsels for developing virtuous character and for avoiding dispositions toward vice. The fourth concerns relations to others in institutions such as family, church, and so forth.

Among the negative precepts, we find the following:

> You shall not kill. You shall not commit adultery. You shall not give yourself over to the corruption/destruction of boys, nor to fornication (sexual wantonness), nor to theft, nor to making magic, nor to making "potions." You shall not kill the child by corruption/destruction, nor kill it at birth. You shall not covet . . .[76]

The corruption/destruction by which killing a child is forbidden evidently refers to abortion, since infanticide is specifically mentioned next. The corruption/destruction of boys (children) previously forbidden evidently refers to homosexual practices.[77] The making of magic and the making of potions refer to a variety of practices which included sterilizing and abortifacient drugs.[78] St. Paul already had condemned "potions" (Ga 5:20) though the Greek word often is obscurely translated "sorcery" or "witchcraft." Thus, in effect, this very early Christian moral guide has expanded the explicit content of the decalogue to forbid a spectrum of practices ranging from sexual perversion through sterilizing and abortifacient drugs to killing the child before or after birth.

The last part of "the two ways," contains a list of sins which includes making magic and making potions, but omits the sins of corruption/destruction and infanticide. However, near the end of this part is a characterization in biting terms of those on "the way of death":

> Loving what is worthless, pursuing payment, merciless to the poor, not caring for the deprived; forgetful of him who made them, murderers of children, corrupters/destroyers of what God has formed, refusers of the needy, oppressors of the afflicted, defenders of the rich, wicked judges of those who have not; sinners without faith and law! My children, keep far from all that![79]

It is important to notice that in these evidences of very early Christian teaching there is no distinction between "fully developed" and "not fully developed" fetuses as in Philo. Rather, the spectrum of activities condemned is broad enough to include contraception, abortion at any stage, and infanticide. The reference in the last passage cited to "what God has formed" can hardly be taken as a limitation of the prohibition to abortion of fully formed

fetuses, for the expression is wide enough to include homosexual practices as well. Very likely all the sins were regarded as perversions of a divinely established order, and so there was no need to draw lines between one form of corruption/destruction and another.

It is also interesting to notice that in "the way of death" the sins of infanticide and corruption/destruction of what God has formed are included among a series of items castigating social injustices. The author apparently thinks of these practices as related to the selfishness and cupidity for ease and luxury that underlie the continuation of social injustices. Moreover, these sins follow forgetfulness "of him who made them"—the ultimate crimes of killing and corruption/destruction are perpetrated against the helpless and innocent by those who forget that they themselves depend upon the generosity of God.

The *Didache* might be called the first Christian catechism (after the New Testament). Similarly, the *Pedagogus* of Clement of Alexandria (second century) might be called the first systematic moral theology. Presenting Christ as the tutor who attends to the moral formation of his children, Clement organizes and integrates materials from sacred scripture and the living tradition. In his chapter on marital and sexual morality, Clement teaches:

> Marriage is the desire to procreate offspring, not the desire to ejaculate semen pointlessly; that is outside the laws and alien to reason. But our whole life would proceed in keeping with nature, if we would but control our desires at the outset and refrain from taking away by vile and vicious techniques the human progeny born by the providence of God. For those women who conceal sexual wantonness (fornication) by taking stimulating drugs to bring on an abortion wholly lose their own humanity along with the fetus.[80]

Clement has of course introduced certain Hellenistic philosophic conceptions—the rational and natural order is invoked. But it is invoked alongside, not as a foundation for, the Christian rejection of abortion as a violation of divine providence, as contrary to divine law, and as destructive of the abortionist's own humanity. Earlier in the same chapter Clement had pointed out that in his procreative role "man becomes like God, because he cooperates, in his human way, in the birth of another man."[81]

Clement introduces another important concept, that of actions absolutely evil:

> In a very clear fashion, not in a veiled fashion but straightforwardly, Moses also enunciated the prohibitions: "You shall not fornicate (engage in sexual wantonness), nor commit adultery, nor corrupt boys." This command of the Word we must observe with all our power. It is necessary not to transgress this law in any way; it is necessary not to soften these commandments.[82]

Only the prohibition of adultery is Mosaic; obviously Clement is relying on an expansion of the ten commandments such as the *Didache*'s. In referring to these commandments as those "of the Word," Clement distinguishes them clearly from many other counsels and bits of good advice he has gathered from

non-scriptural sources. Just before the passage cited above containing the condemnation of abortion, Clement had placed excesses within marriage in the same category as fornication.[83] Thus, Clement seems to consider such acts absolutely evil, for they are a form of killing, a form of fornication (sexual wantonness), and a form of disrespect for divine providence.

Next we may consider some samples from the early apologists—those who defended Christianity against pagan attacks.

Athenagoras, a second-century Christian philosopher from Athens, addressed a defense of his faith to Marcus Aurelius. Among other charges against Christians was that of cannibalism. Taking as a lever the widespread pagan approval of abortion and infanticide, the apologist argued:

> How could we kill a man—we who say that women who take drugs to procure abortion are guilty of homicide, and that they will have to answer to God for this abortion? One cannot at the same time believe that the fetus in the womb is a living being—as such in God's care—and kill one already brought forth into the light.[84]

The argument here again appeals to God's providence on behalf of the unborn to conclude that abortion is wrong. For Athenagoras, the wrong is directly reduced to that of homicide, and the continuity between abortion, infanticide, and the killing of older children and adults is strongly stressed. Of course, Athenagoras is defending Christians against the charge of homicide.

Among the Latin apologists, perhaps none had a clearer and more developed view of abortion than Tertullian. A lawyer who became Christian near the end of the second century, and who later became a heretic, Tertullian nevertheless reflected and developed the Christian attitude toward abortion in the west at the time.

Again answering the charge that Christians practice human sacrifice, Tertullian argues in his *Apology* (a work of his orthodox period):

> For us, since homicide is forbidden, it is not even permitted while the blood is being formed into a man to dissolve the conceptus in the uterus. For to prevent its being born is an acceleration of homicide, and there is no difference whether one snuffs out a life already born or disturbs one that is in the process of being born. For he also is a man who is about to be one, just as every fruit already exists in the seed.[85]

For Tertullian, abortion is homicide. He knows a distinction in stages of development, the earliest of which is a process of formation of the embryo by solidification of maternal blood under the influence of the semen. However, he rejects abortion at any stage of development because he regards the developing individual as alive with *human life*, even while it is in the process of coming to be a recognizable human being.

This analysis is confirmed by Tertullian's *Treatise on the Soul*, a work of his heretical period. Here he argues that the soul and body begin and develop together. The pagans themselves regarded the unborn as subject to the provi-

dence of the gods. And the Mosaic law, Tertullian notes following the Septuagint, provides a penalty for abortion:

> By this very fact that its form is complete, the fetus in the uterus is a man. For the law of Moses also judged abortion to warrant "life for life," since already it is a case involving a man, since already it is considered alive or dead, since already it has an inscribed destiny, even though it still lives in the mother and for the most part shares her fortune.[86]

Tertullian is not here withdrawing his general condemnation of abortion; in the same chapter he holds that, arising from the contributions of the parents—especially the father—the body and soul begin and develop together. He is merely clarifying the stage when developing human life is properly called "a man." The distinction is drawn in accord with his understanding of the Mosaic law. From a moral viewpoint, Tertullian has the wider principle that "he also is a man who is about to be one."

Minucius Felix, a contemporary of Tertullian, also answers the charge that Christians drink blood and turns to the attack by pointing to pagan infanticide and abortion. Without distinguishing stages of life, he indicates his horror of those who drink potions and thus "commit a parricide before they give birth."[87] In this passage we see once again the link between "making potions," condemned in the *Didache,* and abortion.

Minucius Felix, like Tertullian, was a Roman lawyer. He adopted the word "parricide," which in Roman law was homicide of certain near relatives, to signify infanticide and abortion. Of course, the law would not have taken so severe a view–parricide was one of the most serious crimes in Roman law.[88] However, as Christians, Tertullian and Minucius Felix are not so concerned about social status as they are about each life as a reality with a destiny ordained by God. Hence they regard all members of the family as equal in the fundamental right—the right to live.

Various writers of the third century could be cited to indicate the continuity of the tradition. Among them would be Hippolytus, Cyprian, and perhaps Lactantius. We might also cite the decrees of some local councils which by the early fourth century were beginning to legislate penances, in some cases even permanent excommunication, for abortion. In most of these sources the interest in abortion is rather specialized, however, since it deals with sins related to special cases—involving the clergy or involving adultery.[89]

Undoubtedly the local councils concerned themselves with cases involving adultery because it was only in such cases that the practice was common enough among Christians to legislate about. In this early legislation there is no reference to any distinction between "formed" and "not formed" stages of embryonic development.

In the east by the fourth century the suggestion had been made that the distinction between "formed" and "not formed" was important. An apocryphal work, *The Constitutions of the Apostles,* included an expanded version of

the *Didache,* which gave reasons for the prohibitions. It expanded, "You shall not kill your child by corruption/destruction, nor kill it at birth," the *Didache*'s prohibition of abortion and infanticide, by adding: "for everything formed, which receives a soul from God, will if it is done away with be vindicated as one killed unjustly."[90]

Here the appeal to the "formed" condition of the fetus was to provide an argument against abortion; the word for "formed" meant not only superficially shaped, but "endowed with the image of God," for the same word as in Genesis is used here and the text makes a specific appeal to the presence of a soul given by God. However, such an argument could easily be read as providing a limit within which abortion might not be considered as seriously sinful as homicide.

Thus we find St. Basil the Great, one of the greatest eastern Christian Fathers, writing a letter in 374 dealing with the Church discipline to be applied to various sorts of sinners. About abortion, he holds that both the person who gives abortifacient drugs and the woman who takes them are guilty of murder. Of the former he says:

> Whoever purposely destroys a fetus incurs the penalty of murder. We do not ask precisely whether it is formed or not formed. For here not only that which would have been born is vindicated, but also the woman herself who prepared her own destruction, since oftentimes women die in such attempts. But to this the fetus destroyed adds another killing, at least if the judgment of those who dare such things is correct.[91]

Here Basil clearly rejects abortion at any stage as murder. However, to make this categorization firm, he appeals to the risk to the mother's life. At the same time, he seems to consider this risk to justify the view that *penalty* for abortion should be that for murder. From a moral point of view, the person who commits abortion intends to kill, and is willing to kill a human being if one is there to be killed.

John Chrysostom, Patriarch of Constantinople (about the end of the fourth century), dealt with abortion not in a legal framework but in a context of exhortation against fathering illegitimate children. He does not distinguish stages of development of the embryo, but condemns as "something even worse than murder" the act which "does not take off the already born, but forestalls its being born." Those guilty of inducing the mothers of their illegitimate offspring to commit abortion are guilty of turning wanton women into murderesses.[92]

In the west, Ambrose, the celebrated Bishop of Milan and spiritual father of Augustine, prepared a series of sermons on the six days of creation (about 375). In speaking of the birds, he drew a moral lesson for his people, pointing out how the birds shelter and protect their young. By contrast, women nurse for only a short time and wealthy women omit nursing altogether. Poor women expose and disown their children—infanticide—Ambrose observes, and adds:

> Also the well-to-do, to prevent dividing the estate among many heirs, deny the fetus in the womb and snuff it out in the genital chamber of the womb by parricidal mixtures. So life is taken even before it is given.[93]

What is most significant is that Ambrose goes on to argue that human parents, unlike the birds, violate the equal rights of their offspring. By nature all are equal. The argument against abortion thus blends into an argument against repudiating some children for the benefit of others.

In another context, a commentary on St. Luke, Ambrose warns about the immodest passion which, he thinks, causes sterility. Again he contrasts human beings with animals which refrain from further intercourse once a pregnancy is established:

> Human beings spare neither those they have conceived nor God. They corrupt the former and frustrate the latter. It is written: "Before I formed you in the womb I knew you, and in the genitals of your mother I sanctified you" (Jr 1:5). To inhibit your rashness, you are made to notice that the hands of your maker are forming something in the womb into a man. He is at work—and you would violate by your passion the secret of that sacred womb? Either imitate brute animals or respect God![94]

Here Ambrose may not have in mind efforts intended to procure abortion, but his remarks would apply even more so to such efforts. What is interesting is his use of the passage from Jeremiah and his insistence upon the presence of God working within the womb. To violate the womb is to interfere with the supreme craftsman at his work.

Ambrose's contemporary, Jerome writes a small treatise to Eustochium, a young woman who had pledged herself to virginity, instructing her on the rules of her way of life. Mentioning that some faithless virgins become pregnant and claim they were married to men who had died, Jerome adds:

> Indeed others drink sterility beforehand and so perform homicide on what is not yet even a man. Some, when they notice they have illicitly conceived, take poisons of abortion. Frequently they even die themselves and then they are led to hell for the guilt of three crimes: for killing themselves, for infidelity to Christ, and for parricide of their child unborn. These are people who like to say: "To the clean, all things are clean"; my conscience is good enough for me; a heart that desires God is clean. They ask: "Why should I abstain from foods God created to be used."[95]

Here Jerome rejects contraception as well as abortion. The latter he clearly regards as a serious sin, for the virgin's unfaithfulness, her suicide, and the abortion (parricide of the unborn) are each mentioned as distinct reasons for a guilt that leads to hell. Moreover, Jerome has heard of an ethics of the good heart and the individual conscience, and he implicitly condemns such an ethics for the excesses to which it leads.

Jerome also believed that intercourse during pregnancy endangered the child, and he referred to those who disregarded this danger as "lovers" rather than husbands, for they behaved as adulterers would. It is difficult to tell if

the "danger" included miscarriage, for Jerome does not include it when he lists diseases and genital defects he thinks are caused by such untimely intercourse. Yet if intercourse is so strongly forbidden to safeguard the child unborn, clearly it is being regarded as an inviolable individual.[96]

Another passage from Jerome must be noticed, not because of what it actually says, but because of what is was subsequently misinterpreted as saying. Jerome is explaining in a figurative sense a passage of St. Matthew (24:19): "In those days, woe to those who are with child . . ." Jerome thinks the passage means that those whose faith has not "burst forth" in good works are in danger of losing it, "for just as the seeds of generation are gradually shaped in the uterus and are not considered a man until the elements mixed together take on their shapes and articulations," so is such faith, which is easily aborted under stress.[97]

Clearly Jerome is not here making any distinction between stages of development relevant to induced abortion. He is merely saying that a very early pregnancy, such as is easily lost, is not *considered* ("non reputatur") to be a man when there is no recognizable fetus. Moreover, this is in the context of an analogy to faith, a faith which Jerome himself certainly would not have denied to be such from its conception in the mind.[98]

However, we shall see that an amended form of this text played an important role in late medieval canon law and theology. That this should have happened is particularly ironic in view of the fact that Jerome's Latin translation of the Bible, which became the common one in the west, eliminated from Exodus 21:22-23 the reference the Septuagint had introduced to the formed or unformed condition of the fetus.

In fact, when Jerome discusses explicitly the question of the status of souls, he notes that some (including Tertullian, perhaps Lactantius, and some Greek fathers) hold that the soul is passed on and develops with the body. Others (including Origin and some other Greeks) think God created all the souls in the beginning and distributes them into bodies at his own discretion. Others hold that when a body is formed in the uterus, God simultaneously creates and infuses the soul. Jerome says he holds nothing definite on this matter, "but I leave it to God to know what is in fact the case—and to him to whom God chooses to reveal it." Jerome only asserts as certain what the tradition of the Church teaches: that God is the maker of both bodies and souls.[99]

In other words, Jerome does not claim to know enough to exclude the view that souls are passed on from parents to offspring. Whether or not the embryo is to be called "man" before it appears to be such is a question of usage, and this question is not very important for Jerome since he regards both contraception and abortion as serious sins. The distinction between the two was made in practice by the fact that sometimes women took drugs they thought would prevent conception, while sometimes they tried to end an existing pregnancy.

Jerome's younger contemporary, Augustine (354–430) is undoubtedly more important for our problem than any other single Christian author. Augustine touches on every aspect of the matter somewhere in his voluminous works, and his thinking greatly affected subsequent Christian thought and legal practice.

Probably the most important statement of Augustine concerning abortion occurs in a context where he is explaining his view that marriage is of itself good and that it uses sexual desire well—though such desire is not of itself good—for the procreation of children. If someone has intercourse merely to satsify desire, Augustine considers it a fault, but one pardonable for a married couple, provided they do nothing by evil intent or behavior to prevent procreation. If they do try to block procreation, Augustine considers that their transgression is not pardonable but damnable, and if they never intended any other sort of life together, Augustine holds they are literally living in adultery. In this context he sketches the lengths to which some people go to prevent children:

> Having advanced to this point, they are led on to expose the children that are born unwanted. For they hate to keep and bring up those they were anxious not to have. And so when they inflict cruelty on their own offspring, whom they begot against their wills, a shadowy wickedness advances into a wickedness evident in the light of day; by obvious cruelty the concealed is convicted of shamefulness. Sometimes this lustful cruelty—or cruel lust—progresses to the point that they even obtain poisons for sterility; if these do not work, they somehow snuff out and destroy within the viscera the fetus that has been conceived. They wish their offspring to be cut off before it lives, or if it was already living in the uterus they want it to be killed before it is born[100]

Here Augustine condemns the whole spectrum of acts from birth prevention (probably by withdrawal) through infanticide. He sees all of them as a continuum of acts motivated by a desire for sexual satisfaction without a commitment to the procreation of new life, a continuum which is terminated in the most evident form of violence—exposure of the already born. Short of this extreme are the closely linked procedures of sterilization and abortion—here unbridled desire and the impulse to violence reach a kind of balance. In some sense this behavior best illustrates the excesses to which impulses of lust and cruelty lead, probably because it is more dangerous for the woman than exposure of unwanted children.

However, Augustine contrasts the whole sterilization-abortion-infanticide spectrum—which he aligns with damnable transgressions—with the pardonable fault of seeking mere pleasure in marital intercourse while not rejecting new life. Augustine sees the distinctions between sterilization, abortion, and infanticide; he is aware that sometimes the new life may not have begun. But this point is not important for his moral judgment of the situation.

Apart from the link Augustine thinks he sees between these acts, there is the more direct point that abortion of the fetus already alive is killing a human being.

For Augustine, man is born in the uterus before he is born out of the uterus.[101] The unborn does not simply pertain to the mother, Augustine argues; what is conceived in her is not to be counted as a mere part of her.[102]

But when does human life begin? Augustine is cautious about committing himself on this question. Commenting on the Septuagint version of Exodus 21:22-23, he observes that the Mosaic law does not wish to treat the accidental abortion of an "unformed" fetus as homicide. For Augustine this is an attempt to limit the application of the talonic rule: "life for life." On his own account he speculates that the unformed conceptus might in some way be animated—i.e., that there might be a human life before there is a recognizably human fetus. But the law did not treat the early accidental abortion as homicide because one could not say for certain that there was a living soul in a body lacking in sense, and an unformed conceptus certainly lacked senses.[103]

In another context, Augustine takes up the question of the resurrection. He does not assert, but he is inclined to think, that all who have begun life will rise again, even if they were not developed to the point of being "formed." Here Augustine clearly assumes that life precedes form and that this life is human—and personal—from the beginning. In this same context he asserts that monster births will be raised up too, and both the undeveloped and monsters will receive perfectly developed bodies. Double monsters—Augustine knows of a case—will be two perfect individuals, as they would have been had the twinning process run its course.[104]

In fact, faced directly with the question how the soul arises and when life begins in the body, Augustine declares not only that he does not know but that he doubts the question is susceptible to a human solution. Empirical means of settling the question seem cut off, because no one remembers the beginning of life and the process has not been observed objectively any more than has been the process of nutrition. Augustine is certain each man is created by God, but he pretends to know the details no more than Jerome did.[105]

Augustine is not completely without information concerning embryonic development. He reports in one place the scientific data of his day: the formation of the embryo takes forty-five days. The first six days it is a mucous, then for nine days it changes to blood, which clots in twelve more days. Eighteen days of embryonic articulation follow. Thus at the end of six and one-half weeks, the embryo is formed, and it remains only to grow to viable maturity.[106] In this opinion Augustine apparently was influenced by ancient biological and medical writers including—at least indirectly—Aristotle.[107] From this it appears that Augustine believed the human conceptus to be a person, endowed with an immortal soul, from the very beginning of his life. This life began even before the embryo took on recognizable human form. The Mosaic law did not

regard the abortion of the unformed as homicide, however, because the presence of life and soul could not be proved. From a moral point of view, nevertheless, Augustine rejected all attempts against the unborn with equal severity.

Like his predecessors in the Christian tradition, Augustine believed that even more than human life is at stake when abortion is committed. Man inseminates and woman conceives, "but that a fetus is conceived and is born is a divine work, not a human one."[108] Against those who denied it, Augustine insisted that God is the cause of the birth of each man, and that the human nature each receives—so far as it depends upon God—is good.[109] God does what is good: He forms the body, He gives it life, and He provides it with nourishment.[110]

In speaking in this way, Augustine does not intend some mere myth of an original creation. He insists that God acts in the present, giving the body its reality, its shape, its articulation, and its senses. Nor does Augustine imagine God, in any naive and primitive sense, at work in the womb. God does all this by a transcendent causality which does not exclude but rather embraces the natural, biological process of generation.[111]

Augustine is consistent in maintaining the humanity, goodness, and divine origin of all—even those conceived in unfortunate circumstances. "He makes man in the uterus of a whore . . .and more wonderful still, he sometimes adopts as his own son him whom he forms in the most contaminated womb."[112] Children of adultery as well as of marriage are good, "inasmuch as they are the work of God by whom they are created."[113] Defective children also are good: "For he is born feebleminded by an accidental defect, but he is created as a man by the work of God." Thus the defective also have a place in providence and a destiny only God knows.[114]

Augustine never suggests that there are any circumstances under which abortion might be approved. In one passage he does describe the operation of embryotomy, but here he seems to be concerned with an already dead fetus, and in any case he does not approve the operation but merely mentions it in the course of an argument aimed at proving that the unborn truly live before birth.[115]

Augustine holds that the prohibition: "Thou shalt not kill," is limited in its meaning to the *unauthorized* killing of human beings. If God directly authorizes a killing—as in the cases of Abraham and Samson—this is treated not as an exception but as something outside the very meaning of the prohibition. Similarly, killing by public authority in warfare or in cases of capital punishment—provided these are in accord with just laws—are regarded as outside the meaning of the prohibition of killing.[116] In one place Augustine suggests that deadly force might be used in self-defense, but the case assumes that one is under immediate attack by a thief.[117] In these teachings it is obvious that Augustine's position was simply an acceptance of the teaching of the Old Testament.

In general, Augustine rejects the idea that circumstances can make an otherwise immoral act into a morally good one. For example, he denies that a laudable desire to raise children for God can justify extra-conjugal sexual relations. Similarly, he holds that the wrongness of a tyrannic party is not justified by the regal benevolence with which the tyrant rules.[118]

Killing is not only wrong when it is done maliciously, but also when it is undertaken through fear of some evil—e.g., when a slave kills a master who tortures him.[119]

Augustine excludes specifically the idea that a good intention, expected good consequences, or a good purpose can justify doing acts that are of themselves evil. One may not rob the rich to help the poor. One may not commit perjury to obtain money for the needy, even if no innocent person suffers. One may not deprive the unworthy of their inheritances by forging wills, even though one thereby gets the funds for urgent good works. One may not commit adultery to get money for the needy, nor to save an innocent man from death, nor to obtain the secrets of a heretical group. If these things were permitted, Augustine argues, all bad acts would become good if they were done for a good reason:

> Now, who would say such a thing, except someone intent on subverting every human institution—common morals, laws, and all? For in this way the most criminal deed, the wickedest crime, the most impious sacrilege could be said to be right and just. These things could be done not only with impunity but even with glory. Their perpetrators not only would fear no punishment, they might even expect a reward. That would be the case if once we agreed that what is important in sinful acts is not the *what* but the *why*, that whatever is found to be done for a good reason is not to be held guilty.[120]

In sum, Augustine condemns abortion as a damnable sin. There is certainly a distinct human life before birth, probably even before the fetus is "formed," which Augustine puts at about six and one-half weeks of pregnancy. The Mosaic law is explained as not having treated the abortion of the unformed as homicide, but Augustine believes moral guilt can extend beyond legal provisions. Certainly one reason for Augustine's strong rejection of abortion is that he considers it an interference with the work of God, who is active in endowing each person with life and the good of human nature. Augustine's moral theory does not allow exceptions, because of special circumstances, to moral prohibitions. He regards the authorized killing which was traditionally permitted as something outside the meaning of the prohibition, rather than as an exception to the general rule.

There is one text that was erroneously attributed to Augustine which had a great influence on subsequent thought. The pseudo-Augustinian text is an answer to a question about the soul. Is it passed on from parents to offspring? The author does not wish to admit that the soul is present from insemination, for then many would perish, since often intercourse does not lead to live birth. He therefore says Moses set down the law (Ex 21:22-23) "that he might prove

the soul is not present without the form. And so if it is given when the body is already formed, it is not born in the conception of the body with the derived seed."[121]

After the time of Augustine, perhaps only one other author contributed greatly to laying the foundations of the traditional Christian attitude toward abortion. This was Caesarius, who was Bishop of Arles (503–543), the most influential see in Gaul during a period critical in the solidification of the tradition received from the early Church and passed on to the later middle ages.

In several sermons Caesarius refers to abortion, always in terms of unqualified condemnation. Noting, for example, that some fail in their duty as Christian teachers, Caesarius asks who cannot teach: "No woman may take abortifacient potions, for she should not doubt in the least that she will be tried before the judgment seat of Christ on as many counts as she kills those newly born or just conceived."[122] And Caesarius adds that even if it is a matter of preventing conception, the taking of potions is wrong, because it violates divine providence. Unless the sin is remitted by suitable penance, such a person will be condemned to hell forever. The only proper course for a Christian couple who do not want to have a child, Caesarius concludes, is mutually accepted abstinence.

Again Caesarius raises the question why such practices exist, and he suggests that the motivation is economic. From this point of view the sin argues a lack of confidence in providence, for God can certainly feed and care for those whom he willed to be born.[123]

Summing up all the sources of early Christian teaching, we may note that two motives for abortion are explicitly mentioned: an economic motive and the elimination of illegitimate offspring. The chief method seems to have been abortifacient drugs. Because of this method abortion is closely related to contraception by sterilizing drugs. And because of the danger of the drugs in use, there was a possibility of mortal side effects to the mother.

In the writings of the Fathers of the Church can be found almost all the arguments against abortion subsequently proposed by Christians. Almost none of them argues that abortion is evil because it is dangerous to the mother. Rather, the Church Fathers reject abortion because it is a form of discrimination against some of one's children in favor of others; because it is an inhumane and dehumanizing act; because it is an act in the middle of a spectrum of forms of behavior that express dangerously undisciplined erotic and aggressive impulses; because it is a type of homicide that is especially cruel, since the parents should most especially love and care for the helpless life they have generated; and because it violates the work of God and ignores His providence.

This last point was fully developed in the writings of the Church Fathers. Abortion violates the divine in man, who is made in God's image; it violates the process by which human life is transmitted, a process that is godlike because man cooperates in it with God in a special way; it corrupts/destroys

what God has made, formed, molded; it follows from forgetfulness of God or, at least, from a lack of trust in His providence; it is incompatible with the belief that God cares for the child and will vindicate its life; and it ignores the fact that God has a special destiny appointed for each one He has made, including mental defectives and children born out of wedlock.

For these reasons abortion was considered a serious sin, a damnable crime, an act which, if not repented, would cause eternal damnation. The person who is guilty will have to answer to God and will be tried before the judgment seat of Christ.

We have failed to find any of the authors studied discussing the question of therapeutic abortion. Probably the dangers of abortion rendered therapeutic abortion uncommon. The general attitude toward moral prohibitions, such as the prohibition of abortion, seems to have been that they are not subject to circumstantial exceptions. Jerome has heard of a morality of the good conscience; he rejects it. Augustine asks whether an otherwise evil act can be rendered good by its good consequences—the question of *necessità*. He is emphatic in saying no to this idea, which he considers subversive of all institutions.

Many of the early authors do not mention any distinction between "formed" and "not formed" fetuses. Some mention it only to reject it as irrelevant. Others consider it to have legal validity, but they do not consider the matter very important because all abortion is still a serious sin. Augustine and Jerome do not commit themselves on the issue when the soul is present, and Augustine (as well as Tertullian and possibly others) thinks that life may *precede* the formation of the fetus.

The Later Christian Tradition

One might have imagined that in the thousand years after Augustine there would have been some important development in the Christian doctrine concerning abortion. As a matter of fact, there does not seem to have been much development. More theological attention was given to theoretical and dogmatic issues than to moral teachings. The received moral teaching was accepted, preached, and backed up with discipline. Not much seems to have been done to articulate and consolidate the variety of precepts. These norms of Christian life were analogous to the basic tenets of dogma; ecclesiastical practice assumed Christian morality and tried to articulate life in accord with it, just as theology assumed the received faith and tried to articulate a world-view in accord with it.

A careful study of the development of canon law with regard to abortion has been made by Rev. R. J. Huser. One must realize that canon law was not determinative of whether or not abortion was morally wrong and sinful. It always assumed this and proceeded to determine how the Church, as a community, would deal with members guilty of this sin. The continuous legal

tradition is evidence of an absolutely unbroken moral tradition that abortion is a serious sin; canon law never has prescribed penalties for those guilty of venial sins—prayer and good works have always been regarded as sufficient for their remission.

Until the tenth century, canon law tended to follow the common teaching we have seen. Abortion was to be treated as murder, but the penance required was set at ten years, rather than a longer period, probably because ordinary murder involves a greater social disruption. Distinctions between "formed" and "not formed" fetuses were not important. The penalties were expressed in the beginning with regard to women having abortions following adultery, but soon the explicit rules were generalized to all abortion and to cooperators, not only the women themselves.[124]

Meanwhile, outside the framework of canon law, there had developed a different system of penance, the private penance of the penitential books that began in north-western Europe. Monks and missionaries were making practical adaptations of Christian rules to the semi-barbarian peoples of these areas.

The "Irish Canons" (about 675) provide penances for abortion and distinguish between the destruction of the fluid material of a child (three and one-half years penance) and the destruction of flesh and spirit (seven and one-half years on bread and water, in continence.[125] In trying to mitigate the official discipline, the distinction between "formed" and "unformed" fetuses was being seized upon.

An Old Irish Penitential (around 800) indicates even more distinctions. Three and one-half years penance if a conceptus is aborted, seven if it is "formed," fourteen if the "soul" has entered. There is also a penance if the woman dies—which indicates that cooperators were considered guilty.[126] Here we probably see the notion that there is a significant difference between a fetus that looks human ("formed") and one that is felt to be alive by its movements ("soul" is present). It would be hard to make sense of the distinction in any other way, when we consider the state of physiological knowledge and the criteria that could have been used.

The Penitential of Theodore, Archbishop of Canterbury (668–690), provides that before forty days of fetal development, the penance will be one year or even less, but after that the penance increases to three years—"they shall do penance as murderesses." Yet the penance for killing an infant already born is fifteen years, except if the woman is poor, which reduces the penance to seven years.[127] Another penitential ascribed to Bede (around 800) is similar.[128]

By contrast a Burgundian penitential (about 700) provides a three-year penance for intentional abortion and no distinction of stages of development is indicated.[129] Similarly a penitential from Silos in Spain (about 800) treats abortion as homicide, and apparently maintains the ten-year penance of the older canons.[130] Another Spanish penitential of the same period holds that women who take potions shall consider themselves guilty of as many acts

of homicide as those they would have conceived and borne.[131] Here the distinction between stages of development is precluded. Even contraception seems to be treated as homicide.

Finally, there is a penitential (830) which Halitgar, Bishop of Cambrai (France) claimed he had drawn from a Roman source. Here the penance for abortion is the same as the layman's penance for homicide—three years. No distinction of stages of development is given. The older penance of ten years, and the still older penance of excommunication are mentioned, but are not invoked.[132]

What apparently happened is that two distinct directions were followed in the unauthorized improvising that led to the penitentials and the new discipline for remission of sin. In Britain and Ireland, and perhaps elsewhere, much reduced penances were given for very early abortion. It was still considered a serious sin, but it was not considered homicide. In Burgundy, Spain, and Cambrai, however, while the penance may have been softened, no such consideration played a part and the penitentials remained closer to earlier canonical legislation.

Beginning in the tenth century, collections of canon laws began to include some of the material drawn from unauthorized sources. Regino of Prüm (about 900) included a rule (called "si aliquis" from its opening words) which held as homicides all who did anything contrary to generation or conception. At the same time, Regino included a penitential rule that graded penances: one year's penance for killing a fetus less than forty days, three years for killing one over forty days but not "animated," and ten years penance (as for actual homicide) if the fetus was "animated." Burchard of Worms (about 1000) falsely attributes *si aliquis* to a Council of Worms (830). But he also includes the "Roman penitential." And then in an original penitential work he mitigates the three-year penance to one if the fetus is not "animated."[133]

Ivo, Bishop of Chartres (about 1100), does not include *si aliquis* in his *Decretum.* But he introduces Augustine's condemnation of abortion and Augustine's commentary on the Septuagint text of Exodus 21:22-23, which indicated that for legal purposes the killing of the unformed fetus would not be homicide. Ivo also includes the stronger pseudo-Augustinian assertion that the fetus had no soul before it was formed, and Jerome's remark that an unformed fetus is not considered ("reputatur") as *homicide.* The word "homicide" was not Jerome's but "homo" becomes "homicidium" fairly easily, and the slight change served Ivo's purposes.[134]

The next stage of development was the formation of canon law into a systematic discipline by Gratian (about 1140). Using the same texts as Ivo, Gratian is at pains to exclude the abortion of the non-animated (unformed) fetus from the category of murder. He also excludes accidental abortion. The *Glossa Ordinaria* (1215–1245), a commentary on the *Decretum* of Gratian, follows Gratian, and tends to equate "formed," "animated," and "vivified."

Gratian's work and its *Glossa* were very influential throughout the later middle ages.[135]

Pope Gregory IX, in his decretals (1234), which had the force of law for the entire church, included both *si aliquis,* which regarded even contraception as homicide, and a letter (1211) by Pope Innocent III which distinguished the "vivified" from the "non-vivified" fetus. Those commenting on Gregory IX's decretals interpreted this legislation in accord with Gratian and the *Glossa Ordinaria.* The result was that though *all* abortion continued to be regarded as a serious sin, only the abortion of the vivified (formed, animated) fetus was considered murder. The apparent inconsistency between *si aliquis* and this conclusion was dealt with by regarding early abortion (along with any form of contraception), as "quasi murder." No definite criterion of vivification was indicated in this legislation, so the distinction of classical biology came into use. By this, a male embryo receives a soul at forty days of development, a female at eighty.[136]

Meanwhile, Peter Lombard, who later became Bishop of Paris, compiled his *Books of Sentences* (about 1157), which summarized the whole of Christian theology by juxtaposing quotations from the Church Fathers, especially Augustine, and some other sources. Lombard's work was fantastically successful; it became the basic textbook for all the theologians of the later middle ages. By the time of Thomas Aquinas, a century later, everyone becoming a Doctor of Theology had to write a commentary on Lombard, and this remained true for several centuries.

Peter Lombard treated abortion in the context of marriage. He quoted Augustine's condemnation and then asked whether those who procure abortion are homicides or not. The question is settled by the same three texts used by Ivo of Chartres; the genuine text of Augustine, the pseudo-Augustinian text, and the altered text of Jerome.[137]

In this situation it is not surprising that we find no very important treatment of abortion in the great theologians—Albert, Aquinas, Bonaventure, and Scotus. Either the act becomes a homicide in the full sense, if the fetus is animated, or abortion is assimilated to contraceptive behavior, if the fetus is not animated. In any case abortion remains a grave sin.[138]

There is one question discussed by the theologians that throws some light on their attitude toward abortion. Thomas Aquinas' treatment of the question will serve as a sample. He puts the question: "Whether one existing in the maternal uterus can be baptized?"[139] He says no, because the rite cannot be carried out internally and because baptizing the mother does not affect the fetus. Its soul is distinct from its mother's, and the body of a fetus already ensouled ("animatus") is already formed—and so the body also is distinct. Thus Aquinas teaches two points: 1) that the unborn, as soon as it has a soul, is wholly distinct from its mother; 2) there is no spiritual soul in the "unformed" embryo.

In answering related arguments, Aquinas insists that any "interior organ of the mother belongs to her by continuation and material union of part to whole. But a child existing in its mother's uterus belongs to her by a kind of binding together of distinct bodies." At the same time, Aquinas emphasizes that the child in the womb is not subject to human ministrations not merely because of physical impossibility, but because "children existing in their mothers' wombs have not yet come forth into the light, so that they may lead their lives among men." But God may choose to sanctify the unborn, because they "live with him." Aquinas rejoins a long tradition which posits man's first personal relationship to be that with God. As Jeremiah, so all men, are living with God before they see the light of day.

Making the distinction in this way, Aquinas must set a dividing line after which the child may be considered born. He solves this question with a distinction reminiscent of that of the Rabbis. If there is danger of death, the baby's head may be baptized as soon as it emerges. If another part is born and baptized, then if the baby survives, it should be conditionally baptized. The difference between Aquinas' use of this distinction and what we find in the Rabbis is that Aquinas considered the unborn a person in the full sense, though not a member of the human community. The Rabbis, following a conception of personality in which the individual was completely immeshed in the social totality, made the beginning of personality depend upon the beginning of life among men.

Finally, Aquinas answers an objection to his view that the child may not be baptized in the uterus. If that is so, the argument goes, if the child may otherwise die unbaptized, a woman should be cut open, the child ripped out, and baptism administered. For one should choose the lesser of two evils, and the bodily death of the mother is certainly less evil than the eternal death of the child. Aquinas replies:

> "Evils are not to be done that goods may come about" (Rm 3:8). And therefore a man ought not to kill the mother in order that he might baptize the child. But if the mother is dead and the child is alive in the womb, then the body should be opened and the child baptized.[140]

Here Aquinas rejects killing the mother for what he believed to be the infinitely greater good of the child. It is reasonable to believe he would have consistently applied the principle in all cases where justification is argued for killing the unborn child, even for the welfare of the mother.

The Christian tradition on abortion arose as a reaction to the pagan world, a reaction determined by an evaluation of life in the light of the Gospel. In many respects this tradition was continuous with an authentic wing of the Jewish tradition, as we saw in considering Philo and the *Didache*. Abortion was considered by Christians in relation to homicide and to sexual sins. By a curious process, which was partly influenced by the Septuagint translation of Exodus and partly by the biology of the time, a sharp distinction came to be

made between the abortion of a "formed" or "animated" fetus and that of one not "formed" or "animated." If the fetus was formed, Christian thought considered abortion to be true homicide, although legal penalties might not be the same for such abortion as for killing a live-born individual. Laws have a social purpose, and the unborn are only potential members of human society, although they are true persons, "living with God." If the fetus was not "formed," Christian thought came to regard abortion as a serious sin but not as homicide, for it came to be thought that scripture and science seemed to join in certifying that the unformed embryo was in no sense a person. As we shall see later, this certitude was not to last in the Catholic tradition.

The Greek Orthodox Tradition

Because of language difficulties, I have not been able to investigate the modern development among Orthodox Christians of the Greek and other Eastern Churches of the Christian moral tradition concerning abortion. Although the number of American communicants in these Churches is not great, an inquiry into their convictions in this matter could be very valuable, since Orthodox Christians unquestionably bear witness to the modern world of Christian attitudes. Moreover, they bear this witness in complete independence from Rome, and from what many regard as the dogmatism and authoritarianism of the Roman Catholic Church.

In order not to omit altogether the valuable witness of Orthodox Christianity, I therefore sent a letter of inquiry to the administrative office of the Greek Orthodox Archdiocese of North and South America. In response I received (July 1968) a statement which provides the following current expression of the Orthodox Christian tradition:

> It has been the position of the Orthodox Church over the centuries that the taking of unborn life is morally wrong. This is based upon divine law which is the most difficult law for man to comprehend for it transcends the boundaries of human frailty due to its source of divine authority. No law is perfect, and man in his diverse interpretations of the law is continually reminded of his human limitations. Even in such basic law as "Thou Shalt Not Kill" we can take no pride in its exceptions which justify war and self-defense, for they serve only to becloud our unceasing efforts toward shaping man in the image of God. This same principle of exception also extends to the unborn child. When the unborn child places the life of its mother in jeopardy, then and only then can this life be sacrificed for the welfare of its mother. To move beyond this exception would be transgressing man's duty in the protection of human life as understood and interpreted by the Orthodox Church.
>
> We are profoundly aware that the discipline of divine law sometimes creates inequities that are difficult for human comprehension to accept, but the eternal values of divine law were not created for *a* man, but for mankind.
>
> The solution to our vexing problem of an increasing need for abortion does not lie in reinterpreting the law to meet the needs of our present-day morality,

but rather challenges us to find more effective means of living up to the high standards of divine law which is the eternal protector of human life.

We give glory to God for creating man in His image, and we offer humble thanksgiving that in his unending search for knowledge and truth man is proving worthy of this divine gift. With the great advances in human achievement, especially in the realm of medical science, we are fully confident that the welfare of both the born and unborn are being drawn closer to the day when complications of pregnancy and abnormal birth will go the way of many diseases which have been overcome and are now conspicuous by their absence.

In this Greek Orthodox statement we observe the echo of the common Christian tradition, which stresses the dignity of unborn life created in the image of God. We note a stress on the "transcendence" of the divine law—its incomprehensibility to man, because it is the law of God. This stress is somewhat different from what we shall note in the Protestant and Roman Catholic positions.

Finally, we note that the Greek Orthodox position concerning therapeutic abortion is in between most Protestant positions and that of the Roman Catholic Church. For the Orthodox statement regards therapeutic abortion *to save the mother's life* as a morally acceptable, though morally compromising, possibility. Many Protestant Churches appear to condone abortion on broader grounds than this, while the Roman Catholic Church unqualifiedly rejects direct abortion. The meaning of "direct abortion" will become clearer in the section dealing with the Catholic tradition.

The Protestant Tradition

Just as there is little specific treatment of abortion in the late scholastics, so we find hardly any reference to it among the great reformers. I have found no study of the topic of abortion in reformation moral teachings, and contemporary Protestants discussing abortion seldom refer to their tradition.

If we look into Martin Luther's works, we find little significant discussion of abortion. In commenting on the story of Onan in Genesis (about 1540), Luther does remark: "Surely at such a time the order of nature established by God in procreation should be followed."[141]

Luther also holds the traditional Christian attitude toward the child as a special work of God: "Even if all the world were to combine forces, they could not bring about the conception of a single child in any woman's womb nor cause it to be born; that is wholly the work of God alone."[142]

Nevertheless, Luther's theology did contribute a new theoretical element to form a distinctively Protestant tradition, but the contribution, so far as I have been able to discover, was never applied by Luther himself to abortion. Luther's doctrine of justification by faith removes the stress previously placed by Christianity on good works, and so perhaps lessens the significance of any absolute criterion of good and evil. Moreover, the attitude that apart from the mercy of God man would in every act be guilty of damnable sin also tends to

make moral evil relative or comparative. Among the possibilities of action there are lesser and greater evils but no unqualified goods. These factors, undoubtedly together with others, led Luther to justify some acts of killing and lying—without recourse to scholastic distinctions—simply by appeal to the greater good to be served.

For example, Luther considers lies which prevent sin and serve others to be virtuous and prudent; only lies that benefit oneself at the expense of others are really sinful lies.[143] This position may or may not be sound, but it is certainly different from the previous Christian view, which was that lying is an act wrong in itself. Similarly, Luther's justification of war does not deny its evil, but argues that warfare is "needful and useful to the world"; he believes that acts of war "are God's works and judgments" and that in the end the unjust "cannot escape God's judgment and sword."[144] Again, I do not argue here whether the position is sound. I only wish to point out that Luther's justification of warfare is quite different from the traditional Christian theories of "justifiable war."

Another aspect of Luther's new attitude toward moral norms is revealed by his tendency to regard law and conscience as antagonistic principles. In case of conflict, Luther says in discussing laws concerning marriage and divorce, "it is the law which must yield and give way, so that the conscience may be clear and free."[145]

If these new attitudes were applied to abortion, it is clear that if he were consistent Luther would not absolutely exclude abortion as immoral, for one would have to compare evils. Also, the existence of laws would not deter someone convinced that his reasons for procuring abortion were conscientious.

John Calvin refers to abortion explicitly but does not discuss it at length. In commenting on the story of Onan, Calvin condemns both contraception (at least, by withdrawal) and abortion. The former practice, he says is "to kill before he is born the child who should be hoped for." The general principle is laid down: "It is a monstrous thing to ejaculate semen voluntarily apart from the intercourse of man and woman." Calvin compares Onan's sin to a "violent abortion of his brother's offspring." He adds, "If some woman expels the fetus from her uterus with drugs, it is considered an inexpiable crime, and rightly so."[146] Thus Calvin considers abortion not only a serious matter, but in some sense "inexpiable." If he meant this literally, he was returning, whether or not he realized it, to the earliest Christian discipline which imposed permanent excommunication as the penalty for abortion.

In commenting upon Exodus 21:22-23, Calvin does not follow the Septuagint but he nevertheless holds that the text is ambiguous whether the penalty of death is imposed if the mother dies or if the child dies. In his judgment, the view that it was not a capital crime to snuff out a fetus "is not lacking great absurdity. For the fetus enclosed in its mother's womb already is a man," and it ought to be especially inviolable there. If it is worse to kill a man in his own house, because he should be safest there, "it ought to be

regarded as much more atrocious to kill a fetus who has never seen the light of day, in the womb."[147]

Calvin remains closer than Luther to the general Christian tradition that some acts are always immoral. In a sermon on the Book of Samuel, Calvin observes that all our acts suffer some stain of evil, and none of them is of itself worthy before God. Calvin believes that God will condone our human lapses because of the grace of Christ. However, this view does not lead Calvin to approve lies told for a good purpose:

> Every lie is a sin before God, even though its purpose is not evil. For it is an undoubted principle that God loves truth, and He Himself cannot reject it. And so we do not think we are unspotted by sin, even though we can say in all good faith that no one is harmed or injured by our lie. For, as I said, a lie of its very nature is vicious and to be condemned, because it is contrary to the nature of God. For we know God has taken the name of *Truth* for himself. . ."

Calvin concludes that to make lies right is to mix all contraries: heaven is earth, black is white, light is darkness.[148]

The reformation in England cannot be traced in the work of any single author. A modest inquiry has not revealed much concerning abortion. To the extent that "scholastic subtlety" and "Jesuitical casuistry" became objects of derision, detailed treatment of moral topics became less frequent. As private confession was abandoned, there was less and less reason for precision in moral teaching. Also, of course, scripture played a primary role in moral and doctrinal instruction, and there is little in scripture bearing directly on abortion.

Of course, the literature of the English reformation does reveal an occasional reference. For example, John Donne, in a sermon preached on Easter evening, 1625, referred to Augustine: "The sin of *Er,* and *Onan,* in maried men; the sin of procured abortions, in maried women, doe, in many cases equall, in some, exceed, the sin of Adultery."[149] Richard Baxter, in his *Christian Directory,* refers to abortion in the context of the shame of prostitution; he regards the act simply as murder.[150]

One important channel for the transmission into English of a strict view of abortion was the work of John Weemse (also spelled "Weemes" or "Weymss") of Lathocker, Scotland, who modestly styled himself: "Preacher of Christs Gospell." Born in 1579, Weemse was educated at St. Edward's. His work, *An Exposition of the Morall Law or Ten Commandments of Almightie God,* was published in London in 1632. Charles I created Weemse prebend of Durham in 1634, and though he died two years later, his work, which shows the influence of Calvin rather than of Luther, won considerable fame and was frequently cited.

Weemse begins his treatise on "murther in generall" with the traditional Christian concept: "It is a great barbarity to put out the life of man who is the workmanship of God." Like a master craftsman who does the important parts of the job himself, God is the cause of man:

> It is the Lord that made the mould, and the mothers belly is the shop wherein he moulded man below here; all that he made before he made man were but assaies, or trials, but when he commeth to make man, then he commeth to his consultation, *Let us make man to our image*, therefore he hath a great care that his life be not put out.

It follows that killing man is abusing the image of God. But Weemse interprets the text of Exodus 21:22-23 as protecting the life of a child even before it is "figuratum"—shaped in human form, and argues from this "how precious a thing is the life of man in the sight of God."[151]

Weemse comments at some length on the passage from Exodus, under the title: "De infanticido, of the killing of an infant in the mothers wombe." Weemse's embryology is similar to Augustine's; the fetus is fully formed in 35–50 days and begins to stir at 70–100 days. The rule of Exodus, according to Weemse, defends both the mother and the child, but reduces the penalty from death to a fine if the fetus is not formed. In a manner reminiscent of Philo, Weemse refers to the formed embryo as "virunculus" or "mannikin."

Weemse not only appeals to scripture, but formulates anew the touching appeal to a sense of decency:

> It is a great crueltie to kill the child in the mothers belly, to kill this innocent in his first mansion, which should have been the place of his refuge; the *tunicle*, in which hee is wrapped in his mothers belly, is called *Shilo*, because (as the Hebrewes say) the young infant should live peaceably in it, in his mothers wombe, as in a place of refuge.

Weemse recalls that scripture is particularly severe about killing people in their own beds, and he argues that the killing of suckling kids is forbidden as a protection of infants.[152]

Weemse's treatise is evidence that the traditional Christian position regarding abortion would find strong defenders in the Protestant branch of modern Christianity. Another aspect of the development of the Protestant tradition can be discerned in the work of Protestant philosophers. One example will suffice. Samuel von Pufendorf, perhaps the first occupant of a professorship in ethics in Germany, published (1672) a huge work *On the Law of Nature and of Nations.*

In this work I have found only two mentions of abortion, one a quotation with approval of a passage from Pliny condemning men for practicing unnatural vice "while the females have recourse to abortion."[153] The other is more important. Pufendorf argues that the basis of parental authority is the upbringing of children, and concludes: "It is patent from all this, that the power of the father does on no account extend so far that he can destroy the child while yet unborn, except in case both the mother and the child would otherwise perish." He also condemns infanticide and adds that though the child derives from its parents "upon conception it attains a like condition with them, at least to the extent that it is capable of suffering injury from a person." This argument is confirmed from Pliny, and hence primitives who practice abortion are

condemned and Aristotle's proposal of abortion as a method of population control (prior to "animation") is rejected.[154]

Here we see two important points. Conception is used as the point of demarcation; there is no appeal to any distinction between "formed" and "not formed." Second, Pufendorf alludes to the very important exception: for him, abortion is allowable if otherwise the mother and baby would both die. Systematically, his basis for this exception is the general position that in cases of necessity, where two will perish unless one of them does something that causes the other to die sooner than he otherwise would, that act will be justified if there is no desire to cause harm and a positive preference for a harmless way out if there were one.[155] Unfortunately, Pufendorf does not illustrate this by an example of abortion.

In solving this problem, Pufendorf refers back to Antonius Matthaeus (1601–1654), a commentator of Roman law. In Matthaeus, we find a rather well developed treatise on abortion. He discusses whether it is a licit method of controlling population and decides it is not, for if celibates are to be blamed for not giving children to society, how much more those who kill the conceptus before it sees the light. Colonization is proposed as a better solution to population problems.

Against the legal objection that the embryo is part of its mother's insides, Matthaeus invokes the argument of Tertullian and cites the biblical precedent of Onan. But there is a problem with treating abortion as a capital crime—it is very widespread and very frequent, so that every week there would have to be executions.

Finally Matthaeus asks: "What should be said if a mother cannot be saved unless an abortion is done? In that case is it to be allowed as immune from punishment?" The answer, based on Matthaeus' own arguments and classical authors, is a somewhat vacillating "yes." Arguing that when it comes to choosing which to save, people take priority over animals as a matter of humanity and wise over foolish men as a matter of utility, Matthaeus concludes the older takes priority over the younger as a matter of respect. Assuming from Cicero the general preference of parental interests, Matthaeus concludes: "And so if the mother is preferred even to an infant already born, how much more quickly should we assert that of one still to be born?" But then Matthaeus seems to hedge a bit, first by suggesting examples in which the abortion seems an incidental result of bleeding or drugs otherwise necessary, and then by indicating that both lives could be lost. Hence his acceptance of therapeutic abortion is somewhat qualified.[156]

It is important to know something about Matthaeus and his work. He himself, though he lived and worked in the Netherlands and adhered to the local form of Protestantism, was born in Herborn, Germany. He was from a family which included many jurisprudents. His grandfather, Konrad, born in 1519 in Marburg, was a doctor of civil and canon law, an Assessor of Hesse, and probably had become Lutheran when the nobility adopted the new evan-

gel. At any rate Konrad's brother Joachim, who died in 1573, was a churchman in Baden, and he was followed in his vocation by his two eldest sons.[157]

Matthaeus' work in Roman law, *On Crimes,* was so original in its organization and handling of the material that he has been called the "founder of the 'general treatise' of criminal law."[158] The work was printed at least seventeen times, beginning with the Utrecht edition of 1644 and ending with a Pavia edition in 1805.[159] While there are undoubtedly other sources, Matthaeus' treatise unquestionably is an important missing link in the development of the modern Protestant concept of legitimate therapeutic abortion.

From the materials drawn from the Protestant tradition that we have reviewed thus far, we might be tempted to conclude that the Lutheran side of this tradition tended to mitigate the ancient Christian teaching on abortion, while the Calvinist side tended to maintain the received morality in all its force. But the situation is more complicated than we might expect, for we find Lutheran moral theologians of the seventeenth century who took a more rigoristic view of the matter than that espoused even by Roman Catholic moralists of the same period.

The Lutheran theologians in question were academics, members of university faculties, who wrote in Latin and who borrowed freely from their Roman Catholic counterparts. A good example is Johann A. Osiander, whose *Theologia Casualis* was published in 1680.

Osiander develops his treatise on the fifth commandment along traditional lines, stressing that the Old Testament protection of the life of man, as an image of God, is still valid for Christians. The law of love, already promulgated in the Old Testament itself, does not void, but rather concurs with and takes specific shape in the commandment: "Thou shalt not kill."[160]

With regard to the specific question of abortion, Osiander asks: "Whether a pregnant woman can conscientiously take a medicine of which the fetus probably will perish?" The answer is negative, on the ground that this is killing forbidden by God under the fifth commandment. Tertullian's argument about "anticipated homicide" is cited, and it is argued that any doubt must be settled in favor of the unborn, since it is wrong to act with a doubtful conscience. God entrusts the child to the care of the mother; in difficulty, she should rather rely on God's care than to take a possibly deadly drug.

Osiander maintains this position even if the primary tendency of the drug itself and the main intention of the one taking it is the curing of the mother, with risk to the unborn only as an incidental effect that is reluctantly permitted. For a completely spotless conscience must wholly avoid contamination. The consequent death of the unborn is not completely accidental and wholly outside the intent of the one who knowingly takes a drug that might kill it. The norm must stand on the safe side, and that means the side of *not acting with danger of harm.*

Some contemporary Roman Catholic moralists—as we shall see in the next section—made use of a distinction between drugs that specially tended to the destruction of the fetus and those medical treatments that might have been prescribed even if the woman were not pregnant. The distinction between animated and non-animated fetuses also was significant. Osiander, however, rules out any drug or treatment that might cause harm, and he denies that there is any distinction between animated and non-animated fetuses "for there is no such thing as a non-animated fetus."[161] We shall see the sources from which Osiander most likely derived this last opinion when we consider early seventeenth-century developments in the Catholic tradition's understanding of embryology.

Osiander completes his treatise on abortion by raising two additional questions. If one doubts whether the fetus is dead, may a pregnant woman take drugs which might harm the unborn if it still is alive? The answer is negative. A doubtful conscience must be resolved in favor of the offspring. But what about cesarean operations? Osiander is not certain about the medical feasibility of the procedure, but his clear statement on the morality of the case is that one may proceed only if there is a solid hope of saving both mother and child.[162]

The Protestant tradition found expression in moral tractates printed in colonial America. An example is a brief reference in a treatise by Benjamin Wadsworth, where abortion is mentioned as an additional mode by which some violate, "Thou shalt not kill." Poisoners violate the divine command: "And so do those, who purposely indeavor to destroy the life of a *Child in the Womb,* whether the Woman *her self,* or *another,* does it."[163]

One could cite many other Protestant authors who transmitted the traditional teaching concerning abortion. Yet specific moral teaching was not so characteristic of Protestant Christianity as it was of Tridentine Catholicism. In countries such as Great Britain and the United States, where Protestantism provided the dominant element of social morality, the civil law rather than the treatise of moral theology was the primary mode by which traditional moral norms were communicated.

By the latter part of the nineteenth century, however, the civil law was not proving an effective barrier against the increasing practice of abortion. Concerned Protestants took the occasion to reiterate the traditional doctrine.

Dr. John Todd, D.D., a Protestant divine of Boston, wrote in 1867 that his coreligionists must make a more serious effort to teach the evil of abortion:

> There is nothing in Protestantism that encourages or connives at it, but there is vast ignorance as to the guilt of the thing. But in the Catholic church, human life is guarded, at all stages, by the confessional, by stern denouncements, and by fearful excommunications.

For Todd, abortion is "deliberate,cold murder" and incurs the full moral guilt of murder.[164]

In 1869, the Episcopal Bishop of Western New York published a pastoral letter recalling previous warnings "about the blood guiltiness of ante-natal infanticide." These warnings Bishop Cox reaffirmed in solemn terms: "Again I warn you, that they who do such things cannot inherit eternal life."[165]

In the same year, the Presbyterian Convention (Old School) meeting at New York passed a resolution: "that we regard the destruction by parents of their own offspring, before birth, with abhorrence, as a crime against God, and against nature . . .." The resolution goes on to refer to abortion as "murder," to say of those who commit it "except they repent they cannot inherit eternal life," to declare the continued communion of such persons with the church "vile hypocrisy," and to call on preachers and others "that they be no longer silent or tolerant of these things . . .."[166]

Apparently the feeling was spreading at this time that the churches had not been active enough in opposing abortion. We find evidences of this attitude among Protestant laymen practicing the professions of medicine and law.

The medical ethics of abortion had been succinctly stated for British and American physicians in the work of Thomas Percival, which was first published in 1803 and which was the standard work in its field throughout the nineteenth century. Percival regarded abortion permissible if the pelvis is "such as to render the birth of a full grown child impossible or inevitably fatal." But otherwise abortion is absolutely rejected. The argument that the fetus is part of the mother's viscera is false, since it "is now well known to constitute no part of them." Percival refers to Hippocrates, but a more significant source of his attitude toward abortion is revealed when he says:

> To extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man; these regular and successive stages of existence being the ordinances of God, subject alone to His divine will . . .[167]

Thus the Protestant tradition informed the attitudes of conscientious British and American physicians. It is therefore not surprising to find the medical profession urging the clergy to take the matter more seriously. For example, in an 1869 report to the Pennsylvania medical society, Dr. Andrew Nebinger pointed out that Protestant women sought abortion more frequently than Jewish or Catholic women. He urged the churches to instruct people on three points: that the unborn is human at all stages, that it has a right to life, and that killing it is murder in the biblical sense.[168]

On a larger scale, we find the American Medical Association approving a resolution at its 1871 meeting with a view to fighting criminal abortion and restricting therapeutic abortion within the strict confines of necessity. To aid in this fight, the medical profession called on teachers and professors, and urged state and local medical societies to instruct the clergy about abortion and prod them to actively oppose it.[169]

There was some response from the clergy, but not enough to satisfy other concerned laymen. A notable example of dissatisfaction was John Rogers Bolles, a lawyer and minor poet from an old New England family, who published (1894) a didactic poem of over one-hundred-fifty pages concerning abortion.

I lift my voice in the defense

Of helpless, speechless innocents . . .

Bolles writes, and he passionately castigates the clergy for dereliction of its duty:

What from the temple do we hear?

An awful stillness fills the air . . .

and he finds religion itself guilty of the crime. Of those in hell for it, Bolles imagines parents, lawyers, physicians and—deepest of all—preachers. They are silent for fear of popular reaction; they settle for an "experience" of salvation rather than urging the Christian asceticism for which they no longer have adequate faith.[170]

Bolles held a particular antipathy for the Lutheran doctrine of justification by faith alone, which he considered to be one source of the laxity he believed he saw in Protestant preaching regarding morality. In contrast, he credits Catholic teaching:

Honor to whom honor's due,

Church of Rome, I honor you,

In that you claim to hold a ban

Over this soul destroying clan.

And every church is struck with death

That suffers it to draw its breath.[171]

These words reflect the bitter disappointment felt by some Protestants as their tradition began to be stifled by a moral practice it had always condemned.

Yet the stifling of the Protestant tradition was a slow process, and only recently have the churches begun officially to approve what they had traditionally rejected. The Lambeth Conference (1930) of the Bishops of the Anglican Church gave cautious approval to contraception but recorded "its abhorrence of the sinful practice of abortion."[172]

As recently as 1958, a committee of the Lambeth Conference of that year reaffirmed the traditional teaching on abortion:

> In the strongest terms, Christians reject the practice of induced abortion, or infanticide, which involves the killing of a life already conceived (as well as a violation of the personality of the mother), save at the dictate of strict and undeniable medical necessity. The plight of families, or, indeed, of governments, trapped in hopeless poverty and over-population, may well help us understand why they think abortion more merciful than the slow starvation which looms

ahead. Still, the sacredness of life is, in Christian eyes, an absolute which should not be violated.[173]

Yet by 1967, the House of Bishops of the Episcopal Church of the United States declared themselves in favor of relaxation of existing laws against abortion. The sanctity of life, rather than being declared an absolute, is now "of paramount concern in Christian theology and teaching," sufficient to rule out "abortions of convenience" but now compatible with the declaration: "We do believe there are considerations that may indicate that a pregnancy should be terminated for the sake of the mother or the child or both."[174]

Going beyond the position taken by the Episcopal Church, the American Baptist Convention in May 1968, adopted a resolution embodying the most radical proposal thus far officially espoused by any large Protestant Church body. The resolution states:

> Because Christ calls us to affirm the freedom of persons and the sanctity of life, we recognize that abortion should be a matter of responsible personal decision. To this end we as American Baptists urge that legislation be enacted to provide:
>
> 1. That the termination of a pregnancy prior to the end of the 12th week (first trimester) be at the request of the individual(s) concerned and be regarded as an elective medical procedure governed by the laws regulating medical practice and licensure.

The second section of the resolution supports the relaxation of the law to permit abortion after the twelfth week for specified causes—life and health of mother, defect of child, conception by rape or incest—in medical practice. Local churches are encouraged "to provide sympathetic and realistic counseling on family planning and abortion."[175]

Although Baptist churches are congregational in structure and not bound by resolutions of their conventions, and although the American Baptist Convention does not include many of the more conservative independent and southern Baptist congregations, this resolution nevertheless reflected a growing consensus among a significant segment of the Protestant community that abortion is not always immoral, that it may even be acceptable as a method of family planning, and that laws against it should accordingly be relaxed.

This view, as we have seen, represents a reversal of the Protestant tradition. This reversal must be accounted for both by the impact of the social problem of criminal abortion and by the influence of the "new morality" with its emphasis on individual freedom and individual decision.

The Catholic Tradition

The Roman Catholic tradition is marked by clear, consistent, comprehensive, and firm teaching against abortion in general. At the same time, certain rather subtle distinctions have been made and used, and it is essential to

understand them. Otherwise it would falsely seem that the general condemnation of abortion has been subjected to "situational exceptions."

Antoninus (1389–1459), a Dominican moralist and Archbishop of Florence, wrote a widely reproduced and reprinted *Confessionale,* or manual for priests hearing confessions. In this work he repeats the traditional condemnation of abortion in a very comprehensive way: anyone who does anything by medication, exertion, or any other method is guilty of the sin, which is classified under homicide. All who cooperate are guilty. The sin is committed whether or not the procedure is effective and whether or not the fetus is animated. The case is reserved to the bishop if abortion occurs and an animated fetus is killed in the process.[176]

At the same time, Antoninus also considered therapeutic abortion in his scholarly treatise in moral theology. Referring to John of Naples, a fourteenth-century theologian, Antoninus reports with approval the opinion that physicians may procure the abortion of a non-animated fetus to save the woman from danger of death in childbirth. If the fetus is animated, Antoninus says there is no sin in withholding medication, for then neither mother nor child *is killed* by the physician. If the fetus is not animated, then though the physician "impedes the animation of such a fetus, he is not the cause of any human being's death, and this good would follow, that he would save the woman from death." In case of doubt about animation, Antoninus maintained one must not give the medication, for he who loves danger will perish in it—that is, the physician giving abortifacient drugs is then risking homicide and so is already morally guilty of it.[177]

Antoninus, in other words, rejects without qualification the killing of any human life. But he thinks that the fetus is not "animated" at the beginning of pregnancy. Only if it is absolutely certain that animation has not occurred does Antoninus permit therapeutic abortion.

One of the most influential works in moral theology was a compilation, in dictionary form, by a Dominican, Silvester Prieras (1456–1523). Under "Aborsu," Silvester presents the standard teaching, but makes an explicit distinction between abortion as homicide, which occurs only if the fetus is animated by a rational soul, and abortion as a sin continuous with contraception, if a merely vegetative or sentient soul is present (in accord with Aristotle's concept of the succession of souls in the embryo).[178] Silvester holds that in cases of doubt, morally one must assume the presence of the rational soul, but for purposes of punishment one may allow the penitent the benefit of the doubt.

Under "Medicus" Silvester accepts the teaching of John of Naples and Antoninus, here also setting the dividing line at the point where the fetus receives a rational soul. And under "Homicidium," Silvester explicitly accepts the old biological theory that the rational soul is present from the fortieth day in the male and from the eightieth day in the female embryo. All abortion after possible animation by a rational soul is again condemned.[179]

The teaching of Antoninus and Silvester was accepted by Martinus Azpilcueta, the "Doctor of Navarre" (1492–1586), a leading canonist of his day and an advisor to Popes on moral and canonical issues. In his widely used handbook for confessors, Martin stressed the guilt of purposely provoked abortion, but also insisted that the same guilt accrued to one who negligently did anything that might cause abortion. Only if abortion followed accidentally from behavior that would not normally be expected to cause it, was it free of guilt.[180] In treating of physicians Martin allows that a physician may give an abortifacient drug if it is necessary to save the mother's life and if after very careful inquiry "the physician does not believe or doubt that the fetus has a rational soul but confidently judges that it does not."[181]

In his advisory opinions, Martin indicates that in practice the Holy See assumed that a fetus had a rational soul after fifty days, and that canonical penalties on all concerned—e.g., a priest advising abortion—were incurred in cases of doubt.[182]

Although leading Dominican theologians of the sixteenth century—e.g., Cajetan, Soto, and Toletus—seem to have had nothing to say about abortion, leading Jesuit writers did devote a treatise to it. Luis de Molina (1535–1600), for instance, in his rather juridical work, states the traditional position, with special attention to legal sanctions, and suggests no exception in the case of therapeutic abortion.[183]

In all of these writers we see an absolute and complete rejection of the abortion of any fetus, unless the physician was confident it was not animated with a rational soul. And the permission of abortion at the very beginning of pregnancy was solely to save the mother's life. In the same period, there were, however, a few Catholic legal advisors proposing a different view. One of them was a doctor of laws, Marianus Socinus, Sr. (1482–1556), who is reported to have suggested that therapeutic abortion might be permitted, and who did not include the usual qualification in his position.[184] Unfortunately, I have not been able to examine Socinus' work itself. It does not appear that any Catholic theologian followed the suggestion of the legal scholars.

At this stage in the development of the Catholic tradition, there intervened two papal constitutions, "Effrenatam" of Sixtus V in 1588, and "Sedes apostolica pia mater" of Gregory XIV in 1591.

Sixtus V was a reform pope and he set out to restore to its full force the early Christian teaching on abortion and also on contraception, for these teachings were widely disregarded. The teaching of the Fathers of the Church and the early canon law are alluded to in the early sections of "Effrenatam," as Sixtus points up the absolute evil of sins against incipient human life.

In describing abortion Sixtus is all-inclusive. He mentions every method he knows, and adds "and other unknown" methods. He includes all who advise or cooperate in the act, directly or indirectly. The mother, regardless of her state or grade, is explicitly included. Sixtus' family had come to Italy from Dalmatia; he uses language reminiscent of Basil, the great eastern Church

Father, to reject as contrary to divine and human law the abortion of an immature fetus "animated and not animated as well, formed or not yet formed."

In all this, the decree of Gregory XIV in 1591 merely reaffirmed what Sixtus had said. The two Popes differed only with regard to canonical penalties. Sixtus hoped to wipe out attacks on incipient life, and so he invoked all the legal penalties of homicide against all abortion and even against contraception. Moreover, he reserved absolution from excommunication to the Holy See. A few years of experience showed that since the severe penalties were not effective, many people were incurring even more serious spiritual harm. Gregory accordingly removed the reservation of absolution to the Holy See, in order that sinners might get to confession. He also reduced to the penalties previously in force the canonical consequences of contraception and of the abortion of a fetus not yet animated.[185]

Neither Pope had mentioned therapeutic abortion. However, no exception had ever been recognized in official teaching, and the terms of "Effrenatam" were as inclusive and unqualified as possible. The evil of abortion had been reaffirmed in a most forceful way, and the traditional sources had been recalled. The papal teaching was certain to have an important effect.

However, one does not observe any particular effect in the work on the sacrament of matrimony published by the Jesuit Thomas Sanchez (1550-1610) in the first decade of the next century. Sanchez' work is a masterpiece of encyclopedic scholarship, and though it has often been considered too lax on some matters, it nevertheless has retained a respected place in Catholic theology.

Sanchez mentions only a few legal authors as unqualifiedly accepting therapeutic abortion; he rejects this position. He accepts the therapeutic abortion of the non-animated fetus on the ground that there is little chance the fetus ever will live if the mother dies. He cites nine authors who also accept this view.[186]

Sanchez does not consider therapeutic abortion acceptable if there is no imminent danger to the mother's life, "for then the fetus is not an aggressor and danger is not present." However, Sanchez (and apparently he alone in the Catholic tradition) does approve abortion if the fetus is not yet animated and if an unmarried girl is likely to be put to death by her family or if an engaged girl cannot otherwise avoid foisting someone else's bastard on her husband-to-be. A similar case allows measures that would be abortifacient when a woman who has been raped does not yet know whether or not she has conceived. All the arguments to the contrary, Sanchez sets aside as applying to abortion used to hide sin.[187]

In effect, Sanchez assimilates the abortion of the non-animated fetus to contraception. He sees no attack upon incipient life in contraception, but instead rejects it on the ground (peculiar to himself) that uninhibited sexual activity leads to a morally unhealthy fascination with sexual pleasure.[188] San-

chez, therefore, has no firm ground for rejecting abortion of a non-animated fetus, unless the act is accessory to some other sin.

An altogether distinct question, for Sanchez, is whether one may use medical treatments necessary to the safety of a pregnant woman when there is a danger of aborting an already animated fetus. The death of the fetus will be incidental and beside one's intention.

Here a distinction is necessary. Some treatments cure the mother by killing the fetus with poisons, wounding, or blows. This is a capital crime "since they cooperate directly to kill the innocent, which is intrinsically evil." Other treatments are ordered to restoring health by getting rid of infection—as bleeding, drugs for cleansing the uterus, and baths. Such treatments are justifiable on several grounds, the first of which is that the killing of the fetus is indirect. Here Sanchez invokes the authority of Thomas Aquinas, who permitted an act which tended both to defend oneself against an attacker and to result in the attacker's death. "And so why, when the medicine tends both to the safety of the mother and to the death of the aborted fetus" should it not be allowed? Sanchez notes that it should not in one unlikely case: if the mother could give her child a chance for baptism by sacrificing her own chance of medical help, then she should do so.[189]

Sanchez thus advanced a peculiarly lax view concerning the abortion of the non-animated fetus. But his theory of the indirect abortion of the animated fetus—a theory of the precise sort we have seen rejected by the Lutheran theologian Osiander later in the same century—was clear and well developed. One could abort in such a case if and only if four conditions were fulfilled: 1) the safety of the mother was truly at stake; 2) her safety, not the child's death, was the purpose sought by the act; 3) the means themselves tended to cure the mother *otherwise than by causing* abortion; 4) there was no reasonable hope that with delay the child might be baptized.

Most important are the second and third points; indirect abortion for Sanchez truly is a medical procedure that deserves to be called something other than "abortion," for both subjective intent and objective behavior have of themselves a direction other than that to the killing of the child. Clearly Sanchez' examples of the abortion of the non-animated fetus could not meet these strict criteria. What he does not explain is how he squares his peculiar views with the recently reaffirmed teaching of the church, which in Gregory XIV no less than in Sixtus V treated all abortion on a par so far as morality is concerned.

Paul Laymann (1574–1635), another Jesuit theologian, substantially adopts Sanchez' analysis while trying to strengthen the argument in favor of direct abortion of the unformed fetus. Laymann's supporting argument puts great stress on a point Sanchez had mentioned but not much developed: that a fetus that threatened the mother's life might be classed as an aggressor. While Thomas Aquinas had only permitted self-defense that might incidentally cause an attacker's death, Laymann adopted the view that one is justified in directly

killing an attacker who threatens one's life, honor, or liberty if no better method of defense is available.[190]

Leonard Lessius (1554–1623), also a Jesuit and a contemporary of Sanchez and Laymann, took up the question of therapeutic abortion and concluded that while he would not presume to condemn Sanchez' position, he held as "wholly true" the contrary with regard to the abortion of non-animated fetuses. Like Sixtus V, Lessius appealed to the tradition.

But what if both will die? Still one may not abort. Just as one may not hasten the death of the dying, one may not attack incipient life at its beginning. Even ejaculation apart from intercourse is wrong; the non-animated fetus is far nearer to human life. Lessius dismisses Sanchez' peculiar explanation of the evil of contraception: the act is not vitiated by the pleasure, but the pleasure becomes bad because the act is evil.

Lessius denies that the fetus is properly part of the mother at any stage; civil laws which suggest the contrary also refer to the animated fetus. The older authors—John of Naples, Antoninus, and Silvester—speak obscurely, and they seem only to allow indirect abortion. Lessius adheres to this position, unless the fetus itself has become morbid—e.g., when it becomes a mole or malignant tumor. If a woman has a history of difficult labor, then a treatment aimed at curing the condition may be continued even after she becomes pregnant, for though the fetus may abort, this is not directly intended.

Lessius accepts Sanchez' view with regard to the mother's duty to offer her life if there is hope the child may be baptized. In regard to the question concerning when the animation of the fetus occurs, he rejects the great distinction between male and female embryos, and accepts the view that animation occurs at thirty or forty-two days.[191]

Lessius, a Fleming, and much more a follower of Thomas Aquinas than was Sanchez, seems clearly to have accepted the implications of the papal teaching, although he does not explicitly refer to it. He may also have been influenced by the incipient bio-medical discussions concerning the time of animation.

In 1620, Thomas Fienus, a professor of medicine at Louvain, published a bio-medical treatise on the formation of the fetus. Parting company with the received idea that the embryo receives a rational soul only after forty or eighty days of development, Fienus argues that the soul must be infused on the third day. The semen coagulates the menstrual blood in three days; then the rational soul is infused and it organizes the body. Fienus has Galen, Avicenna, Alexander Aphrodisias, Themistius, and Marsilio Ficino as authorities that it is soul which organizes the body; in any case, argument shows that nothing else can do so and that soul is what distinguishes the living and developing from what is not alive.[192]

Everyone agrees, Fienus argues, that *some* soul is present prior to organization, and this is indeed a rational necessity.[193] But why must it be a *rational* soul at the outset? This is precisely what the tradition has denied. Fienus

develops nine lines of argument to this point. In general, he is impressed by the importance of maintaining the specific unity and individual continuity of the developing embryo, of excluding substantial multiplicity in the developed individual, and of avoiding an unnecessary multiplicity of explanatory factors.[194] If one wishes to argue from contrary authorities, Fienus' answer is that Aristotle only assumes a succession of *functions*, not of souls. Moreover, if one is to claim there is no rational soul until there is evident rational function, then the rational soul must be infused at two or three years of age, not at forty or eighty days of embryonic development.[195]

Fienus anticipates the objection that his position conflicts with Exodus 21:22-23, with the Fathers of the Church, and with canon law. He patiently explains the difference between the Greek and Latin versions of Exodus, but accepts the Septuagint as having "great authority in the church." It does not require one to believe that the unformed fetus has no rational soul, but only that it is an incomplete man, while the formed fetus is "perfect man." The Church Fathers are correctly interpreted as leaving the question unsettled.[196] Unfortunately Fienus does not enter into the question of canon law and abortion, but contents himself with obtaining an *imprimatur* declaring that there is nothing in his book contrary to ecclesiastical decrees.

Fienus' radical view stirred up a storm of criticism. A typical reply was a tract by a medical professor, Louis du Gardin, published three years after Fienus' book, attacking it mainly by authorities. Du Gardin appealed to canon law, to the Septuagint version of Exodus 21:22-23, to the Church Fathers, to the regulations concerning baptism, and to the argument that an embryo that did not have a human shape could hardly be made in God's image![197]

It is important to notice that Fienus (like Paolo Zacchia, whom we will consider next), was not at all influenced by the rationalist theory that the mature individual is preformed in the sperm or the ovum. Fienus, Zacchia, and others were developing against tradition certain possibilities of an essentially Aristotelian theory of embryonic development. This theory and the theories of preformation that developed later in the century were directly opposed to each other.[198] It is sheer accident that both lines of development tended to agree in undermining the old theory of delayed animation.

Beginning in 1620, Paolo Zacchia, a Roman medical writer, published a series: *Medical-Legal Questions*. Zacchia treats both abortion and the question of the time of animation. He realizes that some moral theologians have approved the direct abortion of the non-animated fetus. But Zacchia rejects this view, and expressly accepts the condemnation of Sixtus V as controlling in the matter. Only abortion caused incidentally to a medical treatment having other quite distinct and legitimate ends is acceptable to Zacchia.[199]

On the question of animation, Zacchia adopts a position remarkably similar to that of Fienus: the rational soul is created and infused at conception. Using a version of Aristotelian thought against the main body of tradition, Zacchia urges that the development of the fetus is a continuum, not a series

of stages, and that the soul always must organize the body if development is to be determined from within.[200]

Answering objections, Zacchia argues that the Septuagint version of Exodus is commentary, not inspired text. The dichotomy between animated and non-animated fetuses is maintained by lawyers, Zacchia observes, because they want to distinguish the punishments for abortion. But one can find other grounds for the distinction: early pregnancy is an uncertain fact; the law takes the less strict possibility; later abortion is more dangerous to the mother; and there is a greater destruction when the individual is more developed. The rule has been not to baptize the very early abortion, but that is because there is no sign of life at all.[201]

Zacchia's position apparently did not displease the Holy See, for he was honored in 1644 by Innocent X who conferred on him the title: "General Proto-Physician of the Entire Roman Ecclesiastical State."[202]

Arguments about the baptism of the embryo began almost immediately and reached their climax only after one hundred years, with the publication of Francisco Cangiamila's book, *Embryologia Sacra.* This author recapitulates the tradition concerning abortion, cites Sixtus V, explicitly rejects Sanchez' position with regard to direct abortion, and requires that even indirect abortion be permitted only if there is no hope of bringing the fetus to live birth and baptism.[203]

With regard to the question of animation, Cangiamila reviews the ancient writers and the "modern" preformationist biologists as well as Fienus and Zacchia and their opponents. Answering objections from scripture, the Church Fathers, canon law, and papal teaching, Cangiamila nevertheless remains sceptical of any claim that science has shown man to be present at conception. His conclusion is: "And so the truest judgment still remains that the time of animation is hidden, and knowledge of it is reserved to God the creator and to his spirit."[204] In this situation, both abortion and baptism must be ruled by the presumption that the fetus is animated by a rational soul from the beginning.[205]

While bio-medical writers and theologians were thus struggling to clarify the issue of the time of animation, other authors who held the old position on this issue nevertheless absolutely rejected direct abortion. Outside the theological ranks, an example is found in Alphonso Carranza, a Spanish jurisconsult, who wrote within a decade after Fienus and Zacchia. Carranza knows their works but he rejects the new position; the weight of authority against it is too great.[206]

When he comes to treat procured abortion, Carranza quotes at length from the moral teaching contained in "Effrenatam." With regard to therapeutic abortion, Carranza has heard the opinions of jurists who approve the medical advice of Arabian physicians. In addition to Socinus, he mentions Felinus and Antonius Thesaurus. But Carranza rejects this position and refuses to accept the argument that it is more humane to choose the lesser

evil—to kill the baby for the mother's benefit. Against Sanchez, only indirect abortion of any fetus is to be permitted.[207]

Another line of attack on Sanchez' position developed out of another interpretation of Thomas Aquinas that seems to have originated with Gabriel Vasquez (1569–1649), also a Spanish Jesuit. Vasquez' view, published in 1614, rejected all abortion, even indirect, when it resulted from any *positive* act. Thus one could treat the mother in ways that incidentally and only negatively affected the fetus, for example, by inhibiting its nutrition. But one could not, as Vasquez saw it, do anything that in a direct line of cause-effect relation led to the death of the fetus.[208]

Vasquez did not even mention Sanchez, but Basilius Pontius, an Augustinian at Salamanca who in 1620 published a treatise on marriage comparable to Sanchez', did mention him. In fact, Pontius made an all-out attack, arguing that Sanchez was inconsistent. A fetus that could be destroyed, according to Sanchez, before animation might equally be an aggressor afterward. Consequently, Pontius followed Vasquez in rejecting all direct abortion and in deeming wrong any positive act which by a direct causal chain resulted in the death of the fetus.[209]

The opinion of Vasquez and Pontius may have died a quiet death except that it was taken up by Juan de Lugo, another Spanish Jesuit, who published a work on *Justice and Right* in 1642. Lugo discusses the whole question with remarkable clarity and precision. He rejects Sanchez' peculiar arguments for direct abortion of the non-animated fetus; on Sanchez' own principles abortion is even more dangerous in human hands than the dominion over semen. Lugo clarifies the point that direct abortion includes not only abortion intended as an end, but also abortion as a chosen means. Only when the effect is truly incidental will Lugo consider abortion. Then, if the fetus is not animated, treatments that truly tend to cure the mother apart from the abortifacient effect may be employed if they are really necessary. If the fetus is animated, Lugo accepts the stricter position of Vasquez and Pontius, but even qualifies this with restrictions aimed at the spiritual good of the child, if delay can make its live birth and baptism possible.[210]

Lugo's position was probably the most restrictive any Catholic theologian had taken since the problem of therapeutic abortion first arose. When his work was published in 1642, it was dedicated to Pope Urban VIII, who was so delighted with it that he made Lugo a Cardinal the following year, and frequently consulted him on moral questions. In the next century, Alphonsus Liguori was to refer to Cardinal Lugo as the greatest moralist after Thomas Aquinas.

The same year Lugo became Cardinal, Juan Caramuel y Lobkowitz, a Spanish Cistercian, humanist, sometime warrior, and all-round character was publishing the first edition of his moral theology. For it he was cited to Rome, and later was dubbed by Alphonsus Liguori the "Prince of Laxists." However, Caramuel cleared his difficulties, became a bishop, and published his *Funda-*

mental Moral Theology in 1656, with a dedication to and a foreword by Pope Alexander VII.

Caramuel cites the book of Fienus and points out with humor that "the very learned du Gardin" offered against it "many lovely and erudite arguments but no demonstrations." Besides Fienus was published at Louvain, "a university most learned, most chaste, most pure which does not tolerate erroneous opinions."

Of course, against Fienus is Joannis Marcus, the Proto-physician of Bohemia. He holds that the fetus has no soul until it is born, and his book also has an *imprimatur*! What is Caramuel's solution? "I do not wish to upset moral theology," he answers, so the common opinion of successive animation is to be held. After poking fun at both extremes, he concludes that "whether the physicians like it or not, the common opinion of theologians stands." While one might push the date of animation a little later than it is usually given to be, since no one knows when it is anyway, various scripture texts from both the Old and the New Testaments prove the child is animated in the womb. The abortion of a not-yet-animated fetus, Caramuel concludes, is essentially the same as contraception, though the degree of wrong may be greater insofar as the life-to-be is nearer to its goal.[211]

At this point, the Holy See once again intervened. In a 1679 decree of the Holy Office, under the authority of Innocent XI, a group of sixty-five propositions was condemned. All of them expressed moral doctrines considered too lax. Among them were:

> 34. It is licit to procure abortion before the animation of the fetus so that a girl, caught pregnant, will not be killed or dishonored.
>
> 35. It seems probable that every fetus lacks a rational soul as long as it is in the uterus, and that it first begins to have one when it is born: and so one must deduce that homicide is not committed in any abortion.[212]

Also in this list were many propositions which suggested in various ways that the end justifies the means. Among these was a proposition of Thomas Sanchez approving the necessary lie.[213]

The censure on the whole list of propositions indicated they were all to be regarded as at least scandalous and practically pernicious. The Holy See forbade the teaching, preaching, or controversial discussion of the condemned propositions. In effect, Catholics were told that neither Sanchez' most extreme position on therapeutic abortion nor the thesis on animation of Joannis Marcus could be followed in practice. Theologians ignoring the ban on preaching, teaching, and controversial discussion would be, according to canonists of the time, subject to automatic excommunication, absolution from which was reserved to the Holy See.

Again the teaching of the Holy See had a definite effect. Claude La Croix (1652–1714), a Jesuit moralist, expanded a brief summary of teaching on abortion, beginning by citing the condemned propositions. Citing Lessius and

Lugo, he rejected all direct abortion, even of non-animated fetuses. But he also cited Fienus, and concluded that possibly there were no non-animated fetuses. At the same time, agreeing with Antoninus and the other early moralists, La Croix pointed up the obligation to refrain in cases of doubt. With regard to abortion then, La Croix takes a very conservative view—one may only use treatments that really help the mother otherwise than by aborting the fetus, and these may be used only if the safety of the mother is at stake. He also is at pains to exclude the notion that the end justifies the means: even if a whole city could be saved by one direct abortion it would be unjustifiable.[214]

More important than La Croix's work was the very influential moral theology published by the Discalced Carmelites at the College of Salamanca. This unusual work was a collective labor, produced during the fifty years between 1665 and 1715. The work is always clear, well organized, and well balanced. A full treatise on abortion is included under the point: "Whether it is ever allowable to kill the innocent?"

The Salamancans first argue that several common counter-examples—for instance, the sending of citizens to fight or the killing of innocent hostages in capturing a strong point—are not direct killing. Here the innocent die as an unintended side-effect of justifiable acts. On the other hand, against many others, the Salamancans argue that a state may not hand over an innocent citizen to a tyrant, even though the alternative risks the whole community. To give in would be direct cooperation with the intrinsically evil design of the tyrant. Some authors had argued that the state might order the innocent citizen to surrender himself for the common good, and then if he refuses hand him over as punishment. The Salamancans reject this as an effort to justify an evil means by a good end.

Moving to abortion, the Salamancans completely distinguish the legal problem from the moral problem. Each is handled systematically. One may never directly abort the animated fetus. Some say there is justification for directly aborting the non-animated fetus. Citing Innocent XI and reviewing the theological literature, the Salamancans conclude "hardly anything can be defined as certain" about the time of animation.

On the main issue, the Salamancans reject the aggressor argument, dismiss Sanchez' peculiar view of the evil of contraception, cite Innocent XI against Sanchez, and argue that direct abortion even of the non-animated fetus is intrinsically evil, because it attacks incipient human life. One may not prevent the beginning of life by contraception, still less by abortion. Here the Salamancans echo Lessius and Lugo, and cite Tertullian.

However, whatever the stage of pregnancy, a woman may use means directly ordered to her health even if abortion is likely to result. Here the death is indirect, and the Salamancans quietly ignore the even stricter requirements of Vasquez, Pontius, and Lugo. With regard to the mother's duty to avoid medications if there is a hope the child might survive her death and be baptized, the Salamancans refuse to press any strict obligation. In this matter one

is dealing in possibilities and probabilities, and there is no strict obligation for a mother to risk her life for the merely possible spiritual benefit of her child. "On the contrary, she is often obliged to take the medications, when they do not tend directly to the death of the fetus."

As to canon law, the Salamancans hold that the penalties for homicide apply only if the fetus is animated, and this must be presumed after forty days. The wording of Sixtus V's constitution did not indicate clearly whether the pregnant woman herself were excommunicated; she probably need not be absolved. The absolution from excommunication is to be given by bishops and by priests having special faculties for it.[215]

Perhaps the most influential of all Catholic moral theologians was Alphonsus Liguori (1696–1787). Unfortunately, he is more an encyclopedist than a first-rate thinker; his work resembled more the compilation of a canon lawyer than the theological synthesis of a penetrating mind—or community of minds, such as the Salamancans. But Alphonsus' work won fame and widespread use because it was clear, handy, practical, safe, and no more strict than necessary.

On abortion Alphonsus really has nothing new to say. He rejects Sanchez' more extreme positions as less probable and less safe than the contrary and—most important—as irrelevant to actual problems. Alphonsus quotes Hermann Busenbaum, the moralist on whom his own work is an expansion, with approval: "Why take a drug for directly expelling the fetus when one can, and it suffices, to expel it indirectly?" But whatever Busenbaum may have meant, Alphonsus did not mean that the limits of indirect abortion could be stretched to cover all cases. Rather, Sanchez himself, Alphonsus points out, does not allow direct abortion if the danger to the mother is not imminent. Medically, the danger is never imminent in very early pregnancy, unless it arises from a condition other than the pregnancy itself—which can be treated legitimately even if abortion indirectly follows. On the other hand, imminent non-medical danger has been excluded as an excuse by Innocent XI's condemnation.

Alphonsus deals with the problem of the time of animation in the same practical, legalistic fashion. It cannot be at birth, because that has been rejected by Innocent XI. Nor can it be at conception, for that seems to conflict with the Septuagint version of Exodus 21:22-23. For legal purposes, the established rule of forty days for the male and eighty for the female should be followed. Alphonsus does not say how one can tell the difference or what to do in case of doubt.[216]

Alphonsus' treatment still deals with abortion without considering the question of craniotomy and embryotomy—operations which destroyed the infant in order to expedite delivery. Undoubtedly such operations had been performed throughout the ages, but by the nineteenth century surgical technique had sufficiently advanced that many mothers who would otherwise die could be saved by such radical intervention. The cesarean section, while known, was a much more difficult procedure. Thus as early as 1826, Professor

Naegele of Heidelberg read a paper at a medical convention arguing that in childbirth a physician needed and could receive from the mother the right to kill either her or the infant, according to his discretion and the circumstances of the case.[217]

Catholic moralists soon responded to the new situation by extending the traditional ban on direct therapeutic abortion to explicitly include the newly effective operative procedures, so far as they directly destroyed either the mother or the child.

An early example of this reaction is found in the manual of moral theology published by Francis P. Kenrick, Bishop of Philadelphia, in 1841. Kenrick's book seems to have been the first American Catholic work of systematic moral theology; it is studded with references to peculiarly American conditions, laws, and writings.

Kenrick's treatment of abortion is fairly standard; he cites papal teaching and Tertullian. Assuming that some fetuses may not be animated, he nevertheless rejects all direct abortion as an attack upon incipient human life. In dealing with direct abortion Kenrick rejects drugs aimed at it and adds: "Nor is it allowable to cut up the living fetus with instruments so that its parts may be delivered. For this is to kill a human being, which of itself is evil, and so it cannot be allowed even for saving the mother's life."

Kenrick argues that the death of both, if it happens, is a result of natural causes, while the killing of either would incur guilt. However, he does not rest with the moralist's observation that two deaths are better than one murder. He adds a hopeful note on the cesarean section. A mother is not obliged to undergo the operation, but Kenrick believes it offers a hopeful way out if expert surgeons perform the operation in selected cases. Obviously favoring this solution, Kenrick recounts a case of a woman in Philadelphia who has had two cesarean sections, with the mother, a boy, and a girl surviving and well.[218]

In 1869 the Holy See once more acted in a manner that affected Catholic thinking. Reorganizing canon law with regard to censures, Pius IX included among those who incur automatic excommunication "those procuring abortion, if successful," without distinguishing whether the fetus was animated or not.[219] In effect this act endorsed the growing awareness that the old distinction between animated and non-animated fetuses was grounded neither in experimental evidence nor necessary reasons. While the distinction might still be maintained theoretically, the arguments of Fienus, Zacchia, and others finally had their practical effect.

Ten years later, an unsigned thesis appeared in *Nouvelle Revue Théologique* arguing for the immediate animation theory. By this time the human ovum and the phenomenon of fertilization were known. Thus, citing Gregory of Nyssa, the brother of Basil, the author was able to identify the undifferentiated primordial bodily principle, which Gregory clearly described not as a

preformed man but as a potentiality for embryonic formation, with the fertilized ovum.[220]

The anonymous author corrects the old misinterpretation of Jerome and Augustine, partly based on pseudo-Augustinian texts.[221] To the authority of Aristotle is opposed the authority of Fienus, Zacchia, and the professors who endorsed the implications of their position. Cangiamila and Pius IX are also brought into play.[222]

After showing that arguments for delayed animation from scripture and the tradition of the church are inconclusive—for none of the sources actually requires this position—the anonymous author proceeds in scholastic fashion to rebut scholastic arguments. At the same time he brings to bear arguments of modern biology—but of nineteenth century biology which is no longer preformationist. Finally, the author alludes for confirmation to the implications of scripture, dogma (the doctrine of Mary's immaculate conception), and the liturgy.[223]

Actually, none of these arguments *proves* that animation is immediate; all the premises were accepted, for instance, by Alphonsus Liguori. The ecclesiastical data now seem to show that animation with a human soul must occur at once only because modern biology had given a clearer meaning to "conception." Everyone now knew that each new individual is characterized by its species in its whole development, and that this development begins when sperm and ovum unite.

At this point, additional theological efforts were made to develop a rationale for therapeutic abortion. The controversy is interesting, but it already has been studied extensively, and so we shall give only a brief summary and refer to other sources for a more extensive treatment.

The theological arguments proposed included the following.

1) The fetus threatening the mother's life is an aggressor, who might be dealt with by the use of force sufficient to protect her life, just as if she were being attacked by any irresponsible (e.g., insane) attacker.

2) The operation, even craniotomy, might be regarded as *indirect* abortion, allowable under the principle of double effect. Some who did not defend craniotomy as indirect abortion, nevertheless held that either the expulsion or removal of a non-viable fetus without actually cutting it could be so regarded.

3) The fetus' right to life is in conflict with the mother's right, which for one reason or another deserves priority. For example, because of the mother's responsibilities, or because the fetus could not be saved in any case, while the mother could. Sometimes it was argued that the fetus' consent to his abortion might be presumed.

4) Such consent might at least be presumed in the case of an ectopic fetus, for unless it is surgically removed while still alive, it is almost certain to die without baptism, while timely surgery will be in the interest of the fetus as well as of the mother, for the only good it can possibly receive in life—baptism—will be provided for it.[224]

The arguments were strongly and plausibly defended in theological journals over a period of a generation. Some of the first of the new defenders of therapeutic abortion were Roman theologians; others were the most outstanding Catholic moralists of the nineteenth century. Af the same time, these theologians encountered able opposition from their colleagues.

However, the decisive factor in the controversy again was the intervention of the Holy See. Between 1884 and 1902, a series of replies from the Congregation of the Inquisition (later called, *Holy Office*; now, *Congregation for the Doctrine of the Faith*) clarified the application of traditional Catholic teaching to the new problems.

As late as 1872 the Sacred Penitentiary had not felt it necessary to issue a statement on craniotomy; a question whether such "direct killing" were permissible had only elicited the response: "One may consult accepted moralists, both older and more recent ones, and act with prudence."[225] Perhaps it was felt that the application of accepted principles was too simple to need explanation; moral treatises such as Bishop Kenrick's had settled the matter.

But in the midst of new theological debate, the Congregation of the Inquisition received questions from Bishops and others who wanted clarification, and answers were delivered, sometimes almost at once, but sometimes only after years of study.

In 1884, the Cardinal Archbishop of Lyons elicited a negative reply to the question: "Can it safely be taught in Catholic schools that the operation called 'craniotomy' is allowable, if without it both the mother and child will perish, while allowing it the mother can be saved though the infant will perish?"[226]

In 1889 the Archbishop of Cambrai sponsored a series of questions which proposed many types of cases, including viable and non-viable fetuses, and ranging from induced labor through embryotomy to surgical removal of extrauterine pregnancies. The Congregation did not reply in detail. Instead it referred to the earlier reply, and stated generally that it was to be read as excluding "any surgical procedure whatsoever that directly kills either the fetus or the pregnant mother."[227]

This reply, it should be noticed, rejects equally the subordination of either life to the other. The clear meaning of the reply is that both lives are inviolable from direct attack. Only confusion or dishonesty could distort this teaching, which has since been maintained consistently, into a preference of the child's life over the mother's.

In 1895 a further question submitted by the Archbishop of Cambrai dealt with the issue whether an immature fetus might be aborted, though it would inevitably soon die, provided it were not actually killed by the operative procedure itself. The Congregation again replied with a simple, "Negative," and a reference to the earlier decrees. This decree was personally approved by Pope Leo XIII, who thus in effect approved the previous decrees as well.[228]

It would be a mistake to try to draw a distinction between the previous decrees, which refer to what may not "safely be taught," and the decree of 1895, which refers to the moral safeness of performing the operations.[229] The Congregation itself incorporated the earlier decrees by reference in the later one.

A further series of questions, submitted by the Bishop of Sinaloa, Mexico, elicited a further response in 1898. The induction of labor to save the lives *both* of the mother and the child is allowable, but abortion is not. A cesarean section as an operation to remove an extra-uterine pregnancy is allowable if care is taken to safeguard the lives of both mother and child.[230]

Montreal theologians asked, finally, whether definitely immature extra-uterine pregnancies might be removed surgically. The reply, in 1902, was in the negative, with reference to the decree of 1898, which required that "serious and opportune provision must be made for the lives of both the fetus and the mother."[231]

None of these decrees dealt with the question of indirect abortion—that is, the killing of the fetus incidental to a medical or surgical procedure otherwise conducive to the mother's health. In effect, this was unquestionably permissible as the theologians had taught. When evidence accumulated that those extra-uterine pregnancies developing in the Fallopian tubes threaten the mother's life not only because of the pregnancy but also because of deterioration of the tube itself, most Catholic moralists came to agree that the removal of such a damaged tube is an allowable procedure. The coincident, though inevitable, death of the embryo is a typical *indirect* abortion. Because a pathology distinct from the pregnancy itself is effectively dealt with by the removal of the damaged tube, the choice to operate need not be a choice to kill the fetus for the mother's benefit.[232]

The Code of Canon Law (1917) contained in a new form the traditional legislative effort on the part of the church to discourage Catholics from becoming involved with abortion. Canon 985 decreed that no one can receive or exercise sacred orders if he participates in a successful abortion. Canon 2350 decreed that all who successfully procure abortion, specifically including the woman herself, are automatically excommunicated; clerics also are deprived of their positions. These provisions add nothing to Catholic moral teaching, for they are only concerned with the effects of the act on one's participation in the Church. However, such penalties do show that the traditional view of abortion was maintained, for canonical penalties are never provided for acts that are not considered seriously evil from a moral viewpoint.[233]

Some have thought that the Catholic *teaching* on the morality of abortion has altered with each change in canon law. This is altogether mistaken. The canon law always has assumed that all abortion is a serious sin. From this assumption it has proceeded variously in different periods to try to discourage Catholics from committing this sin. What the preceding history has shown clearly is that the abortion of the very young fetus was not consistently re-

garded as true homicide from the middle ages until the nineteenth century. But such abortion was still considered gravely wrong, also by canon law.

The speculation of Sanchez and a few other theologians concerning therapeutic abortion of the very young fetus never won the approval of the Church. Instead, under the guidance of the Holy See, such speculation was buried under the weight of opposing theological opinion, which was endorsed by the Church's official teaching. By the time the 1902 response to the Montreal theologians was given, the lines of future Catholic teaching concerning therapeutic abortion were completely drawn. No direct attack on the unborn would be sanctioned. "Indirect abortion" was understood quite strictly, along the lines originally laid down by Sanchez: both the intention or purpose of the one acting and the tendency of the procedure itself must be to some genuine benefit other than that to be gained through the abortion itself. The even stricter concept of Vasquez and others did not remain in twentieth-century Catholic thought, for it was conceded that one might permit the death of the unborn provided that it was a genuine side-effect of a necessary procedure not abortive in itself and not used as a hypocritical disguise for abortion.

The tradition has been embodied in several authoritative documents during the last forty years.

In his 1930 encyclical, *Casti connubii,* Pius XI pointed out that some people advocate abortion on demand, claiming it is a woman's right, while others consider abortion acceptable for a series of indications. Pius holds that the lives of both mother and child "are equally sacred and no one, not even public authority, can ever have the right to destroy them." The arguments some theologians had offered are dismissed, and medical efforts to save both are commended.

Pius XI recognizes the claim of society—population and eugenics—but asserts that "to try to meet the needs on which that claim is based by killing of the innocent is an irrational proceeding, and one contrary to divine law." The good ends sought by society cannot justify means condemned by God.

Governments and legislatures must defend the helpless, especially the unborn.

> If the state authorities not only fail to protect these little ones, but by their laws and decrees suffer them to be killed, and even deliver them into the hands of doctors and others for that purpose, let them remember that God is the judge and avenger of the innocent blood that cries from earth to heaven.[234]

Pius XII tirelessly repeated the traditional Catholic teaching. Speaking to physicians and biologists in 1944, he rejected direct killing: "Only God is Lord of the life of a man"—whether embryonic, mature, or senescent—who is innocent of crime.

"The physician has no right to dispose either of the life of the child or of that of the mother. And no one on earth, no individual, no human authority,

can give him the right to its destruction. His office is not to destroy life but to save it." Pius declared these principles to be "fundamental and immutable."[235]

Speaking to surgeons in 1948, Pius declared that human life may not even be risked except for a greater good, or for the saving of life itself. Never may innocent life be suppressed; specifically, direct abortion, even if it is for the life of the mother, is not allowed. The little life has its own high destiny, known but to God.[236]

Speaking to midwives in 1951, Pius XII used the occasion for a more solemn statement of the same traditional teaching. The child's right to life is directly from God; neither any authority nor any "indication" for abortion can abridge that right. The child may not be directly killed even as a means to a good end—e.g., saving the mother's life. Pius recalls the widespread practice "a few years ago" of destroying so-called "life without value"—the allusion is to the Nazi euthansia programs—and mentions that the Holy See formally condemned this practice in 1940.[237]

Pius adds that social stability depends upon the inviolability of human life. The professional person must therefore defend innocent life, when that is necessary. But even more important is to cultivate the right attitude toward the developing child: "The child, formed in the womb of the mother, is a gift from God, who confides it to the care of its parents."[238]

Less than a month later, the Pope again took up the question of abortion in an address to family-life associations. Innocent human life "from the very first moment of existence" is inviolable to direct attack. Here, formally expressed, is the point that abortion of any human life, however young, is wrong. This inviolability is "a fundamental right of the human person." Pius denies that any legal distinctions of civil or canon law are relevant to the moral issue: every innocent life is *equally* inviolable.

Again Pius restates the traditional teaching concerning direct abortion, and rejects "*either* mother *or* child" in favor of "*both . . . and.*" The implementation of this is for medical technique; where such technique fails, the recourse must be to divine providence, not to the human choice of one life in preference to another.

Pius rejects any attempt to weigh the value of one life against another. The child's life cannot be violated because of the importance, for instance, of the mother of a large family. For if this is done, Pius warns, all life considered to be without value is in danger. Again he alludes to the Nazi practice of euthanasia, and to the Holy See's condemnation of those practices.

Pius XII concludes this treatment of abortion with what is probably the clearest statement of the concept of *indirect* abortion to be found in the entire Catholic tradition:

> We have on purpose always used the expression '*direct* attack on the life of the innocent,' 'direct killing.' For if, for instance, the safety of the life of the

> mother-to-be, independently of her pregnant condition, should urgently require a surgical operation or other therapeutic treatment, which would have as a side effect, in no way willed or intended yet inevitable, the death of the fetus, then such an act could not any longer be called a *direct* attack on innocent life. With these conditions, the operation, like other similar medical interventions, can be allowable, always assuming that a good of great worth, such as life, is at stake, and that it is not possible to delay until after the baby is born or to make use of some other effective remedy.[239]

Here, Pius has made it very clear that the permissible acts which indirectly kill the unborn (and which we elsewhere called "indirect abortion") are not procedures that would be called "abortion" at all in medical or ordinary discourse. An "indirect abortion" is an act non-abortive in its purpose which only incidentally causes the death of the fetus. Pius also clarifies the condition that must be fulfilled if even such acts are to be considered morally acceptable: there must be grave necessity, no better alternative remedy, and no possibility of delay.

In 1952 Pius XII spoke explicitly concerning "the new morality" or "situation ethics." He interpreted it as an effort to subordinate objective norms of morality to individual conscience, and the value of acts to upright intention and sincere response. Among examples of "the new morality" he mentioned the view that it is sometimes allowable to "interrupt pregnancy." Against the "new morality" Pius argued that the actual deed, not merely the disposition, is morally important and that there are some absolute moral limits, since otherwise the end would justify the means and the deaths of the martyrs would be meaningless.[240]

John XXIII did not add significantly to the teaching of Pius XII. However, in the 1961 encyclical, *Mater et Magistra*, he spoke in the context of the population problem about the "inviolable and immutable laws of God" that govern marriage and the transmission of human life. Taking the dictates of the moral norms for granted, Pope John presented positive considerations against contraception and abortion: "Human life ought to be held by all as something sacred, since even from its origin it presupposes the action of God the creator." To violate this "sacred something" is an offense against God, a degradation of man, and an undermining of the state.[241]

The Second Vatican Council refers to abortion twice in its *Pastoral Constitution on the Church in the Modern World.* The first reference places abortion among crimes against the reverence due to the human person. These crimes include: "homicide, genocide, abortion, euthanasia, and also voluntary suicide," as well as torture, terror, prostitution, slavery, and so on.[242]

The other reference is in the context of a treatment of marriage. Married couples have serious problems, but immoral solutions are not to be offered, and they are really incompatible with genuine conjugal love:

> For God, the Lord of life, has committed to men the magnificent office, to be fulfilled in a manner worthy of man, of serving life. Therefore life from conception

> on is to be guarded most carefully; abortion and also infanticide are nefarious crimes.[243]

The Council does not make the precise distinctions of Pius XII; evidently it takes these for granted as had John XXIII. The distinction between direct and indirect attacks upon innocent life is not required, because the Council speaks specifically of abortion which, as such, always is a direct attack on innocent life. The only interesting feature of the Council's statements, apart from the contexts in which they occur, is the formal endorsement of the view that abortion *from conception on* is a single crime.

Finally, in July 1968, Paul VI repeated the traditional rejection of abortion. Speaking in the context of his treatment of contraception, the Pope emphasized the link between the love-giving and the life-giving aspects of marriage. He recalled the traditional view that God is Lord of life and that man must submit to, rather than seek to dominate, the divine design for its generation. For human life is sacred.

> Therefore, relying on these principles of the human and Christian view of marriage, we must declare once more: the direct interruption of generation already begun, and especially direct abortion, even if done for therapeutic reasons, must be entirely repudiated as a legitimate way of regulating the number of children.[244]

Thus in one overly compact sentence four points were affirmed. First, that any direct interference from conception onwards is forbidden. Second, that only *direct* acts are always forbidden. Third, that therapeutic direct abortion is excluded. Fourth, that any use of direct interference for birth regulation is excluded.

However, this new restatement of the Catholic tradition had hardly been issued when many theologians and some Catholic bishops took issue with the Pope, in virtue of their dissent from his teaching regarding contraception. In seeking grounds to evade this part of the encyclical's doctrine, a new theory of Church authority and of conscience was widely proposed, which opened the way for individual Catholics to set aside any traditional moral precept which they personally considered unsound. How this challenge to the Catholic tradition will be met remains to be seen. Obviously, if the new theory were accepted, not only contraception, but abortion as well, would become acceptable for Catholics who considered such actions legitimate, while remaining condemned by a vacuous official teaching. Such a development would put the Catholic church in about the same position that the Protestant churches were during the latter part of the nineteenth century, when the authority of the tradition lost its force among many members of the churches, and the voice of the tradition was gradually stifled.

CHAPTER V
THE STATE OF THE LEGAL QUESTION

Historical Background

In the previous chapter we have seen the development of religious attitudes toward abortion. The discussion was not completely detached from references to law, because ancient religion and law were closely related, and canon law reflected the moral teaching of the Christian church.

This chapter will not attempt a history of anti-abortion legislation nor even a complete survey of presently existing laws on this matter. Rather, it will review legal data to show what is the issue that is formulated confusedly in the question: "Is a relaxation of the laws against abortion desirable or not?" This question will not be *answered* in the present chapter, but the state of the question will be *clarified* for further consideration in chapter seven.

Roman law is not a simple code, but a development of a thousand years and more. In its early stages, there were few crimes recognized except those, such as treason, directly against the community. Even homicide was punished only in virtue of suit by the murdered persons's family.

Family life was regulated by the patriarch. Free women maintained their independence by a special type of marriage which left them subject only to the authority of their own *paterfamilias.* As late as the second century before Christ, only her own *paterfamilias* could punish a free woman even for the crime of murdering her husband. It is not surprising that abortion became common among women of this class.[1]

Yet the interests of the unborn were not wholly unrecognized by Roman law. The *Lex regia* of Numa Pompilius (715–673 B.C.) required that a cesarean section be performed at the death of a pregnant woman. The *Leges duodecim tabularum* (The "Twelve Tablets"—449 B.C.) provided that the unborn child could inherit on the same basis as one already born. By 443 B.C. the law provided that a husband who ordered or permitted his wife's abortion without good reason was subject to social and political censure. Those outside the family do not seem to have been subject to any penalty.[2] The *Lex Cornelia* (about 85 B.C.) provided penalties for dealing in all sorts of poison, including

abortifacients as such. Cicero (about 65 B.C.) reports the capital punishment for abortion of a Milesian woman, but apparently the offense consisted in the fact that she was not a free woman and did not have her husband's consent.[3]

Laws first proposed by Julius Caesar but passed only under Augustus (4 A.D.) sought to stabilize family life and to encourage the rearing of children. Still abortion was not as such forbidden.[4] One reason may have been the persistent influence of Stoic thought which did not consider the unborn as human beings. In fact, even Seneca defended infanticide as a reasonable method to sort out sound from weak babies; he compared the practice to killing mad dogs or diseased sheep.[5]

There were some advances made under the emperors before Christianity made its impact. Under Hadrian (117–138 A.D.) a stipulation was introduced to protect a pregnant woman from punishment by torture.[6] Septimus Severus (193–211 A.D.), a reform emperor, finally treated abortion itself as an "extraordinary crime" with no definite penalty, but decreed exile for the wife practicing abortion.[7]

We could trace the influence of Christian thought upon the laws of converted barbarians after the fall of Rome. As early as the sixth century, the law of the Visigoths provided a death penalty for anyone who gave a potion to cause abortion. The woman herself was beaten if she was a slave or degraded if she was a gentlewoman. In the seventh century, the *Chindasvinto* Visigoth law provided death or at least blinding both for the abortionist and for the woman's husband, if he ordered or permitted the crime. Anti-abortion legislation developed refinements following those in canon law as the Visigoths became Spaniards.[8]

The same pattern could be traced in France. Civil law followed canon law; abortion (at least of the animated fetus) was regarded as homicide until the French Revolution and was punished as such. French parliaments during the Bourbon period still condemned physicians, surgeons, and midwives to be hanged for this crime. However, under the impact of rationalism in the revolutionary period, the punishment under a French law of 1791 was reduced to twenty years in prison. The Napoleonic code of 1810 did not distinguish between the abortion of the animated and that of the non-animated fetus, but the term of punishment was an indefinite "limited time." Austria in 1787, under Joseph II, also ended the death penalty for abortion. Similar developments occurred in other continental European countries.[9]

Anglo-Saxon law before the Norman conquest (1066) provided for abortion both civil penalties, in the form of heavy fines, and ecclesiastical penalties, in the form of penances.[10] The earliest compilations of English law reflect the fact that abortion was regarded as homicide. Bracton, who actually administered the king's law in mid-thirteenth century, includes in his list of provisions concerning homicide: "If there be some one, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus

be already formed or animated, and particularly if it be animated, he commits homicide."[11]

Here we see the influence of the penitentials and of canon law. Abortion is homicide, but a dividing line is fixed at the formation or animation of the fetus. "Formed" probably means a recognizably human embryo; "animated" could mean one that shows signs of life after delivery. Bracton's formulation shows that the law in his time was no more consistent than were the penitentials about what criterion to use. For Bracton however, homicide was not viewed as a sin but as an offense against the crown. Homicide was the chief breach of the king's peace.

Fleta, an anonymous fourteenth-century commentator, also classifies abortion as homicide and at the same time shows the influence of the canon *Si aliquis,* by considering that those also are properly ("recte") guilty of homicide who deal in contraceptive potions. In the next sentence *Fleta* adds: "Again, a woman does homicide who by potion or something of the sort destroys an animated child in the womb."[12]

Sir Edward Coke (1552–1634), both a judicial defender and scholar of the common law, stated its provision regarding abortion as he understood and, perhaps, applied it. A new distinction is introduced, which hinges upon whether or not the child is born alive. If any method of inducing abortion leads to delivery of "a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive."[13]

Here we see Bracton's unclear rule clarified and developed in a practical way. The law needs evidence of homicide, and so it comes to require clear evidence that a living human being has been killed—namely, the evidence that it is born alive and subsequently dies. Of course, with the drugs and external physical methods of abortion then in use, the aborted fetus probably often was born alive. Lacking conclusive evidence, the law treated abortion not as homicide, a capital crime, but as a "great misprision." Coke adds: "And so horrible an offense should not go unpunished." For authority he cites Bracton, *Fleta,* and Genesis 6.6: "Whoever sheds man's blood . . ."

What was a "misprision?" Coke explains the word etymologically as "unlawful concealment," primarily connected with treason or another felony. From this he extends the term to include a number of serious offenses that are characterized by their close relationship to capital crimes. The concept of "misprision" did not refer to breaches of an insignificant character; punishments extended to life in prison. Drawing a weapon upon a judge or justice, even though no blow was struck, was also classed by Coke as a "great misprision" and the penalty was amputation of the hand used, confiscation of property, and life in prison.[14]

One of the most respected commentators on English law, and one who reflected common law practice just prior to the beginning of modern legislation

on abortion, was the eighteenth-century author William Blackstone. In treating the rights of persons, Blackstone distinguishes between absolute and relative rights. Absolute rights pertain to each single person prior to any established social relationship. Some believe the American Declaration of Independence, written the decade after Blackstone's work appeared, was influenced by his treatment of rights.

The absolute rights are those to personal security, to liberty, and to property. Primary under personal security is "a person's legal and uninterrupted enjoyment of his life." Blackstone explains:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in the contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter. But at present it is not looked upon in quite so atrocius a light, though it remains a very heinous misdemeanor. An infant *en ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes . . ..

And Blackstone goes on to mention matters of inheritance, guardianship, and the like.[15]

Here we see a clear distinction made between the law's view that life begins "as soon as an infant is able to stir in the mother's womb" and its fiction that the unborn is already born. The first underlies the prohibition of abortion, according to Blackstone, while the second is the basis of various provisions of civil law.

Treating the crime of homicide, Blackstone follows Coke very closely in regard to abortion. Murder requires as one of its conditions that the one killed be "*a reasonable creature in being, and under the king's peace.*" It follows: "To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Blackstone adds that a statute has provided that if a woman is delivered of a child that would have been a bastard and if she conceal its death, the presumption is she is guilty of murder.[16]

It is noteworthy that Blackstone classifies abortion in one place as a *misdemeanor* and in the other as a misprision. For him, "misdemeanor" is not contrasted with "crime"; both have the same technical meaning although popular use applied the former to less serious crimes. "Misprision" is defined as in Coke: "all such high offences as are under the degree of capital, but nearly bordering thereon."[17]

In 1803 the first British statute law against abortion condemned as felony attempts to procure abortion. The act had to be willful, malicious and unlawful, but not necessarily effective or harmful to the mother. If the attempt were made after quickening, the punishment could be death; if before, the punish-

ment could be whipping, pillory, imprisonment, or exile to a penal colony for up to fourteen years.

In 1828, a consolidated Offenses Against the Person Act set as penalties for aborting before quickening imprisonment for no more than three years and exile for seven. An 1837 amendment eliminated all reference to quickening (or even actual pregnancy), and increased the term of punishment to not less than fifteen years up to life, while eliminating the death penalty. In none of these early statutes was self-abortion expressly prohibited, but since no distinction was made in the general prohibition, self-abortion seemed to be implicitly condemned.[18]

These statutes were more and more inclusive in their prohibition, but even the first of them revealed a determination to end the laxity that had been introduced into the common law over the centuries. All abortion was held a felony. The earlier laws maintained as significant the old distinction between the fetus that had not quickened and the one that had. But by 1837 this distinction was eliminated. The purpose of all these laws clearly was to protect the life of the unborn. The earlier statutes were following the common law doctrine of Blackstone that life begins at quickening and that from then on there is an absolute, personal right to its "uninterrupted enjoyment." The statute of 1837 embodied a practical compromise between those who wished to get rid of the death penalty for as many crimes as possible and those who wished to strengthen the abortion law so far as it pertained to early pregnancy—when most abortions probably were done.[19]

In 1861 British statute law against abortion reached the form in which it remained until the abortion law of 1967. The 1861 act again was a consolidation of English and Irish criminal law concerning Offences Against the Person. Any act intended to cause abortion, whether induced by the woman herself or by others, by whatever method, and whether successful or not, was treated as a felony. The law did make the distinction that attempted self-abortion would not be a crime unless the woman was "with child"—that is, actually pregnant. The same law made traffic in abortifacients a misdemeanor, punishable by up to three years of penal servitude. The punishment for abortion itself was penal servitude up to life or prison for two years. A series of changes in this penalty occurred over the years; after 1948 the maximum penalty was simply life in prison.

The statute of 1861 was interpreted in such a way that non-pregnant women who believed themselves pregnant and sought abortion could be—and were—convicted of conspiring with others, though they were not guilty of self-abortion. When the defense was offered that such women could not be guilty of conspiracy against themselves, the court rejected the argument, thus showing that the person protected by British law was the unborn child, not the mother.

This point also was brought out by the fact that the 1929 Infant Life (Preservation) Act, which supplemented the abortion act, specifically prohib-

ited "child destruction." This act concerned the unborn who could have been born alive, and the law was written in such a way that, if it were decided by the jury that the child would not have been born alive, persons indicted for violating it could be convicted of abortion instead, and vice versa.

This 1929 law included a specific provision permitting the killing of the unborn if necessary to save the mother's life. The laws against abortion contained no such exception, though it was thought by some to be implicit in the word "unlawfully"—only an attempt "unlawfully" to procure miscarriage was considered a crime.[20]

We know that Thomas Percival, whose influential medical ethics appeared in 1803, and who could even have influenced the anti-abortion legislation, allowed for therapeutic abortion while sharply condemning abortion in general and insisting on the inviolability of even "the first spark of life."[21] The prosecutor of the 1938 Bourne case, which we shall consider later in relation to the abortion law relaxation movement, expressed his understanding that British law permitted abortion to save either the mother's or the child's life.[22] This may sound odd to us, but the words "abortion" and (the word actually used in the 1861 statute) "miscarriage" often were taken to include induced labor. A mother who might not be able to deliver safely at term may be stimulated to a premature delivery, precisely for the child's own safety.

It has been important to follow with some care the development of British law against abortion because American law developed in close relationship to it. In the United States, abortion is a matter for legislation at the state level, not at the national or local levels. Generally, even after independence, the old provisions of common law applied in the United States until the situation was clarified by the passing of statutes in each state.

The common law position on abortion was held in Massachusetts cases in 1812 and 1845 to require that the woman be "quick with child"—that is, that the child, as Blackstone had it, "is able to stir in the mother's womb."[23] On the other hand, a Pennsylvania judge in 1850 held that despite rulings in other states to the contrary abortion as a common law offense was possible "the moment the womb is instinct with embryo life." Citing Coke, the judge argued that "the civil rights of an infant *en ventre sa mere* are fully protected at all periods after conception."[24] But a Kentucky court in 1879 denied that abortion before quickening was a common law offense.[25] The following year a North Carolina court accepted the Pennsylvania precedent.[26]

Since common law was so unclear, and in many respects rather lax, the various states enacted statutes on abortion. The first of these was Connecticut's in 1821; it was similar to the British statute of 1803 in treating abortion by drug after quickening as a felony. But Connecticut did not deal in 1821 with abortion before quickening, nor with all methods of abortion, and the penalty was life in prison rather than death. The statute was several times amended; in 1860 it included all attempts at abortion by whatever means and by whom-

ever undertaken, unless necessary to preserve the life of mother or child.[27]

As the years passed, various states and territories legislated against abortion. There were certain general trends in this legislation. The earlier statutes were usually severe with abortion after quickening, but lenient or silent concerning abortion before that event. Amendments gradually eliminated the silence and even removed the distinction from the law of all but ten states, where in 1965 it still was used as a criterion for differentiation of punishment.[28]

The reason for this development of the statutes is not to be found in any religious doctrine but in the progress of scientific knowledge. As early as 1823, the standard American work on medical jurisprudence, the treatise of Theodoric and John Beck, presented a cogent argument against accepting animation as a significant dividing line. First the discordant opinions about animation were summarized; then the "no less absurd" error concerning quickening was treated.

The fetus surely is not dead before quickening; hence it must be alive. Its distinctness from the maternal organism is demonstrated by the fact that the fetus can die while she continues to live. The mother may not feel movement as soon as it is present, because of the amniotic fluid and the relatively small size of the fetus.

In any case, neither movement, nor completeness of anatomic development, nor full organic function is a necessary condition of genuine life. The conclusion:

> However objectionable such an opinion may be, yet the fact is certain, that *the foetus enjoys life long before the sensation of quickening is felt by the mother.* Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception.
>
> If physiology and reason justify the position just laid down, we must consider those laws which treat with less severity the crime of producing abortion at an early period of gestation, as immoral and unjust.[29]

Most earlier statutes, including all the British and the early Connecticut laws, omitted mention of therapeutic abortion. By 1965 only four states omitted it—Louisiana, Pennsylvania, New Jersey, and Massachusetts—although in New Jersey judicial decisions provided for therapeutic abortion to save the mother's life and similar decisions in Massachusetts allowed physicians to follow medical consensus in regard to the matter. New Hampshire, South Carolina, and North Carolina made no exception in cases of attempted abortion but did make one for effected therapeutic abortion to save the mother's life. Forty-six states and also the District of Columbia thus explicitly permitted abortion to save the mother's life in 1965, before the passage of the first relaxed laws. Seven explicitly permitted abortion to save the child's life. Colorado—even before its recent revision—and New Mexico allowed abortion

to prevent serious and permanent bodily injury to the mother. Alabama and the District of Columbia permitted it for the health of the mother, and Oregon's criminal law had been relaxed along the same lines by its licensing statute. Maryland's old law permitted abortion if the physician were satisfied "that no other method will secure the safety of the mother."[30]

Of course, the statutes were in practice interpreted all over the United States very much along the lines of the Massachusetts judicial interpretation. Abortions were done openly, in hospitals, by physicians for whatever reasons they and their colleagues considered sufficient. Probably in every state abortions were done not only for therapeutic reasons, but as our review of the medical literature suggested, if it was believed the child might be deformed, or if for any plausible reason it was thought possible the mother's "mental health" might be damaged by bearing and raising the child. As we saw, this elastic concept might include any such case as the pregnant victim of rape.

Another important trend in the development of American statute law must be noted. Most states began by allowing therapeutic abortion on the basis that the physician or he and a colleague *thought* it necessary. However, after some experience the laws were tightened so that by 1965 thirty statutes required an *objective necessity,* not merely the physician's declared *belief* of necessity, as justification. Yet five of these strict laws were judicially interpreted to allow good-faith belief in necessity as a defense. Ten states and the District of Columbia explicitly stated that a physician was exempted by good-faith belief in the need for abortion; New York demanded a "reasonable belief." Thirteen states in their abortion laws explicitly required consultation to support a claim of therapeutic abortion; the licensing statutes of three other states set the same requirement.[31]

In the state laws as in British law the tendency increasingly was to punish attempted crime whether or not it was successful. Even the question whether the woman was actually pregnant was excluded from consideration.[32] In this extension of the law may be seen two factors at play: one, a concern for the non-pregnant woman victimized by abortionists; the other, a practical concern to make the problem of prosecution more manageable. Generally the products of conception can be so easily disposed of that the requirement to prove actual effectiveness is a serious obstacle to successful prosecution.

Some have suggested that the abortion statutes were never intended to preserve the life of the unborn child. Their argument is that not the child's right to life but the mother's safety—in an era when abortion was often very dangerous—was the good in view. But this position is inconsistent with the common law out of which abortion statutes grew. Moreover, the statutes themselves frequently reflect in the clearest fashion a concept of human life at stake in the unborn. For example, in addition to the abortion statutes, eight states made it a separate crime of *manslaughter* to kill an unborn, quick child by an attack on the mother, provided that attack would have been murder had the mother died of it.[33]

Of course, most of the early abortion statutes distinguished between the quick child and that not yet quick, and this distinction implied an attempt to defend life from the moment it was certainly present. As the distinction of quickening was eliminated, the same basic concept was still present. The New York statute of 1869, for example, held that anyone who used any means to procure abortion, unless necessary to preserve the mother's life, "shall, in case the death of such child, or of such woman be thereby produced, be deemed guilty of manslaughter in the second degree."[34]

Here the life of the mother and that of the child—with no reference to quickening—are put on a par, except in regard to therapeutic abortion. To kill either in the process of attempting abortion is the very same crime: *manslaughter.* Later revisions of the New York law continued to treat attempted abortion at every stage of pregnancy as a crime, but limited the application of the category of manslaughter to cases in which a quick child or its mother is killed.[35] Florida, North Dakota and Oklahoma also have laws that equate the life of the quick child with that of the mother; to kill either in an attempt at abortion is *manslaughter.*[36]

A British government report on abortion published in 1939 included some information on the statutes of a number of countries.

In Belgium and France the statutes made no exceptions to permit therapeutic abortions but such acts simply were not prosecuted, very much as had been the case in England. In the Scandinavian countries—Denmark, Norway, Sweden and Iceland—the laws in effect up to the changes of the 1930s likewise made no exceptions explicitly, but administratively the official policy permitted abortion for the mother's life and health. Germany's situation was similar, except that judicial interpretation permitted therapeutic abortion. One nation having explicit exceptions in the statute was Argentina. Its law of 1921 permitted abortion if necessary for the protection of the mother's life or health, and also if the pregnancy resulted from rape, or if the mother was feeble-minded or insane.[37]

This Argentine law of 1921 was passed while the Radical party was in power. It may have represented an early attempt to find a compromise between the traditional prohibition and the unrestricted Soviet permission. The statute laws of Europe and America had rejected abortion without exception, or had explicitly included only the otherwise presumed exception in favor of therapeutic abortion. These laws certainly reflected the Judeo-Christian tradition of respect for the right of life, a right considered to belong to each person absolutely and unalienably. Since this right was thought to come from God, not from society, the beginning of the right to life was coincident with the beginning of life itself. Law had wavered in regard to the question when life began; it had hesitated before the conflict between the life of the mother and that of the child. But the intent of law had been clear: to safeguard life as soon as it was surely present and to permit the destruction of the child's life only when that was necessary to safeguard its mother.

Then the Russian revolution came, and everything changed.

Abortion Law in the U.S.S.R.

> No book on abortion written today can be complete without special consideration of the movement in Soviet Russia to legalize abortion. The true significance of this unique experiment must be left for future generations to decide. Certainly the present opinion of the majority in other countries is that this movement is in many ways detrimental to the human race. In all fairness, however, a brief review of the measures originally adopted and their modification in subsequent years should be given, with an analysis of the results thus far obtained. In any problem into which social doctrines and religious and anti-religious bias enter so largely, it will be difficult to separate truth from exaggeration.[38]

Thus Dr. Frederick Taussig opened his chapter on legalized abortion in the Soviet Union in his 1936 treatise on abortion. Writing under sponsorship of the National Committee on Maternal Health, which represented the more venturesome wing of the American birth control movement, Taussig was fascinated by the Soviet Union's "unique experiment." Guarding against the influence of "religious and anti-religious bias," Taussig had gone to Russia in 1930 "to see things at first hand."[39] Now Taussig was making sure that the benefit of Russia's example would not be lost to his readers.

Prior to the Communist revolution, abortion was legally forbidden, with no explicit exception even for therapeutic abortion. In the first years after 1917, social turmoil was general. Probably abortion became more widespread in this period. On November 18, 1920 a decree was issued by the Commissariats of Health and Justice legalizing abortion.[40]

The decree begins with a prologue that makes the following points:

—Abortion has been increasing for ten years in western Europe as well as in the Soviet Union. (The Commissars did not want to put their own people in an unfavorable light, and were seeking support in the argument: "Everyone has the problem.")

—Legislation punishes the woman and the physician, but this is ineffective, for it drives abortion into the basement and puts women at the mercy of greedy and unskilled abortionists. (This is the public health argument for abortion, with an appeal to sympathy for the woman's plight.)

—Nearly 50 percent of aborted women suffer infection, and about 4 percent die. (These figures obviously could not be proved.)

—By propaganda and welfare measures the government fights this evil. "But, since the moral survivals of the past and the difficult economic conditions of the present still compel many women to resort to this operation," the government decided to legalize it. (The "moral survivals" must refer to the reluctance of some women to bear illegitimate children. "Difficult economic conditions" is a very brief way of expressing an official, restrictive population policy. The government could not provide the required welfare programs. Industrializa-

tion was more urgent, and a limited increase of population would assist economic transformation.)

The decree itself was simple. Abortions were permitted without charge in Soviet hospitals. Only physicians might induce abortion. Others, and physicians inducing abortion in private practice, were subject to trial by a People's Court.

To understand fully the sense of this decree concerning abortion, it is important to know that the Soviet revolution also "emancipated women." Sex differences were so far as possible disregarded for social and economic purposes. The rule was equal pay for equal work, and women worked in occupations such as mining and seafaring hitherto reserved to men.

Women also received equal education and equality of status in marriage itself. Divorce and marriage were made into easy formalities, and either partner had equal rights to determine place of residence and to hold and dispose of property. Sexual inhibitions were eliminated and sex lost much of its romance. One observer noted: "Chastity is admirable; but a girl who 'slips,' and still more a boy, is regarded as merely foolish."[41]

Abortion legalization thus filled three functions. First, as a public health measure, it aimed at eliminating illegal abortion. Second, as a matter of economic policy, it was aimed at population control. Third, as a legal matter, removal of criminal penalties contributed to the "emancipation" of women.[42]

The legalization of abortion naturally led to a very rapid increase in the numbers of such operations in hospitals. In 1922 in Moscow there were 35,520 births and 7,769 abortions; by 1929 there were about eleven times as many abortions, 82,017, while births increased only to 51,059. Thus there were far more abortions than births, though the number of births actually increased.[43]

The rapid increase in abortions caused problems with hospital administration. Some efforts to curb abortion administratively were made as early as 1924; later, charges were levied on those who could afford to pay. Special units—abortoria—were set up to perform the operations on a mass production basis; Taussig reported fifty-seven abortions performed by four abortionists in two and one-half hours.[44] Government sources claimed that the experiment was very successful, that the death-rate was very near to zero and the morbidity-rate quite low. In Moscow in 1925 it was claimed there were no fatalities in 11,000 abortions; only about 4 percent of over 50,000 cases showed bad effects. Twelve years after legalization the government statistician claimed that the lives of 300,000 women had been saved by the legalizing of abortion.[45]

One of the authors of the legalization decree, Commissar of Health N. A. Semashenko, argued in a 1934 book that the Soviet way was far preferable to the German. In Germany post-partum deaths were far higher and, he claimed, the rate of abortions was twice as high. Thus the Soviet way meant *fewer* abortions and these done upstairs, not in the "basement" of illegality. The

abortions he said were mainly done because of housing shortage, poverty, illness, and large families.[46]

The Soviet statistician Genss pointed out to Dr. Taussig that the birth-rate had been maintained, and argued from this that the rapid increase in hospital abortion only indicated that hitherto criminal operations were now entering hospitals. As Taussig observes, Genss' own figures do not bear out the claim that the birth-rate had been maintained, although it had not fallen sharply and the population continued to grow during the first decade of legalized abortion.[47]

Taussig, who was not unsympathetic to the Soviet experiment, observed:

> In fact, the bulk of the evidence points to an actual as well as an apparent increase in the abortion rate, for in the past five years, during which the number of secret abortions has apparently been stationary, the total number has shown a steady increase.

Though illegal abortions were fewer under legalization than before, Taussig also noted:

> Even so, the evidence from various sources leads to the conclusion that there are still a considerable number of abortions being done outside the law. It would seem that the very legalization of abortion has led some women to regard more lightly the moral and religious scruples that in the past had restrained them from undertaking such measures.[48]

Beginning in the late twenties, Stalin's austerity program dislocated many segments of the population and made living conditions in general harder. One authority has speculated that in the early thirties the abortion-rate must have shot up even beyond that of the twenties, to the point where the population curve became alarming.[49]

Some restrictive efforts were made. In 1927 one Soviet authority called attention to the spread of abortion among the country people and to the danger of depopulation on the farms. He wanted the government to stimulate motherhood. Efforts were made to discourage women from having their first pregnancy aborted. Physicians and social workers tried to dissuade women who could afford a baby from having it aborted. Almost none of the women being aborted was allowed any anesthesia.[50] On the walls of *abortoria* signs were put up with slogans such as: "Let this abortion be the last one." And specimens of early embryos were displayed in glass jars so that women obtaining abortions would see how quickly development progresses in the early months of pregnancy.[51]

Already in 1927 a meeting of Ukranian gynecologists reflected hostility toward abortion among the medical profession; one observer regarded this meeting as a demonstration against legal abortion.[52] In the early 1930s Russian medical sources began to report a multitude of serious side-effects—for example, sterility, loss of sexual desire, "pelvic disturbances," ectopic pregnancies, and "hormone imbalance."[53]

In 1936 a draft decree was formulated forbidding abortion and "combating light-hearted attitudes toward the family and family obligations." In an extraordinary procedure, this decree was submitted to the people for discussion before it was officially promulgated; some changes were made on the basis of the discussion and the decree appeared June 27, 1936, as a "Decision of the Central Executive Committee of the U.S.S.R. and of the Council of People's Commissars of the U.S.S.R." over the signatures of Kalinin, Molotov, and Unschlicht.

The decree began with a prologue which neatly balanced references to Soviet woman's "emancipation" with references to her "great and responsible duty of giving birth to and bringing up citizens." A significant paragraph stated:

> Back in 1913, Lenin wrote that class-conscious workers are "unquestionable enemies of neo-Malthusianism, this tendency for the philistine couple, pigeon-brained and selfish, who murmur fearfully: 'May God help us to keep our own bodies and souls together; as for children, it is best to be without them.'"

Yet pragmatically abortion had to be legalized to avoid worse evils while the last vestiges of exploitation and its consequences were being overcome. Now, the prologue continues, socialism has succeeded so well that welfare measures and provisions for

> combating a light-minded attitude toward family and family obligations—such are the roads which must be followed in order to solve this important problem affecting the entire population. In this respect, the Soviet Government responds to numerous statements made by toiling women.

Thus by popular consent and feminine demand, the law went on to lay out its program. Abortion was forbidden unless the pregnancy threatened the life or seriously threatened the health of the pregnant woman, or when a serious disease of the parents could be inherited. The permitted abortions had to be performed in hospitals or maternity homes by physicians. In other circumstances, both the abortionist and the woman herself were subject to criminal penalty; also anyone compelling a woman to undergo an abortion was to be penalized.

The decree increased state aid to mothers and provided special allowances for large families. Pregnant working women were given special job and income security (an exception to the equal-pay-for-equal-work rule). The network of maternity homes, nurseries, and kindergartens was extended. Authority over kindergartens was somewhat decentralized; they became adjuncts to factories or other places where the mothers would be employed.

Stricter administrative provisions were set down concerning divorce; how restrictive they would be in practice clearly would depend on administrative policy. The father of the children was held to contribute for their support from one-fourth (for one child) up to one-half (for three or more children) of his wages.

An official directive also was published listing medical indications and contra-indications for therapeutic abortion.[54]

The decree prohibiting abortion introduced the prohibition proper with the phrase: "In view of the proven harm of abortions . . ." This suggests that the medical arguments had been a decisive factor. However, the Ukranian gynecologists in 1927 had urged the substitution of contraception for abortion, and such a step would have solved many of the medical objections.[55] However, when Margaret Sanger visited Russia in 1934, though she was pleased to see the emancipation of women, she was disappointed to discover that the paper plans for contraception were not resulting in practical programs. Mrs. Sanger asked the Secretary of the Comissariat of Public Health, "Has Russia a population policy, Dr. Kaminsky?" She felt that a country with five-year plans for agriculture and manufacturing should certainly have a birth control program. But the official rejected the idea: "There is no policy as to the question of biological restriction. For six years, we have had a great shortage, not only of skilled workers but of labor in general. Now the only question is the increase of population."[56]

Thus we see the explanation of the 1936 decree's reference to Lenin's remark about neo-Malthusianism. The Soviet policy was not aimed at feminine emancipation nearly so much as at the national interest. The birth control movement took an essentially individualistic and libertarian approach. The Soviet policy was more in the nature of controlling the production of an important economic factor—workers. Legalized abortion in 1920 turned off the population stream to aid industrialization. The prohibition of abortion in 1936, together with the other measures in that decree, turned the stream of population on again.

There are several confirmations that this, in fact, is what happened. As the Kinsey study observes, several sympathetic non-Russian observers suggested "that economic and political motives demanded a cut in abortions so that a higher birth rate could produce a larger labor force and more manpower for a future possible war."[57] A Russian refugee physician explained that "the government's intention to increase the birth rate backfired." Provisions had been made for handling more maternity cases, but many women had illegal abortions instead.[58]

Most important, in 1939 the Soviet ambassador to the United Kingdom answered inquiries from the British medical profession with an official memorandum explaining the Soviet Union's 1936 decree prohibiting abortions. Most of the memorandum summarizes the explanation given in the decree itself. But two added points concern population. The first notes that the birth-rate has increased since July 27, 1936, but asserts this was mainly due to prosperity and improved health. The final point in the memorandum is this sentence:

> Subsidiary reasons for the abolition of the law of 1920 on abortion were to inculcate in the young a greater sense of responsibility both in regard to marriage, the bearing of children, etc., and to raise the birth-rate.[59]

It is difficult to say how effective the 1936 decree was. We have noticed already the refugee testimony that it "backfired" and the ambassador's observation that the birth-rate had increased—not, of course, mainly because of the prohibition of abortion. Certainly at the time the draft decree was under public discussion, many who wrote letters published in *Izvestia* showed that they had adopted the view that abortion was one of an emancipated woman's rights.

A girl who was a medical student complained of the housing situation and added: "In five years' time when I am a doctor and have a job and a room I shall have children. But at present I do not want and cannot undertake such a responsibility." A group of women on a collective farm wrote that conditions under which abortion was permitted should be stated so that physicians could not refuse a patient.

An engineer wrote:

> The prohibition of abortion means the compulsory birth of a child to a woman who does not want children .... Where the parents produce a child of their own free will, all is well. But where a child comes into the family against the will of the parents, a grim personal drama will be enacted which will undoubtedly lower the social value of the parents and leave its mark on the child .... To my mind any prohibition of abortion is bound to mutilate many a young life.

A research worker wrote: "[W]e all want to be 'working women.' The tribe of 'housewives' is dying out and should, I think, become extinct."[60]

Despite these attitudes, the 1936 degree was passed and criminal prosecutions of abortionists were carried on under its terms. The continuance of abortion was explained as a residue among the unenlightened of bourgeois consciousness. The Soviet Encyclopedia held that in other countries the poor had abortions through misery, the rich through selfishness. Governments outside the Soviet Union could not fight abortion by improving social conditions, and greedy physicians practicing non-socialized medicine performed abortions as a lucrative part of their practices.[61]

However successful the 1936 decree may have been, a new decree was required. It was issued July 8, 1944, and began as follows:

> The Praesidium of the Supreme Soviet of the U.S.S.R. has issued an edict on increasing state aid to expectant mothers, mothers of large families and unmarried mothers; the protection of motherhood and childhood; and institution of the honorary title of Mother Heroine, the Order of Glory of Motherhood and the Motherhood Medal. The welfare of children and mothers and the consolidation of the family has always been one of the major tasks of the Soviet State.

The decree explains that war conditions require the extension of state aid. A "Mother Heroine" title goes to women who have had and *raised* ten or more children; the other honors can be earned in various grades by mothers of

somewhat fewer children. The decree also ends the parity between legitimate marriage and *de facto* unions, makes divorce more difficult, taxes single persons and couples with small families, and orders that certain existing laws—including that prohibiting abortions—be enforced.[62]

In effect, this decree was a measure to step-up population growth in order to make up for war losses and to provide the population input needed for postwar expansion.

But another decisive shift was made November 23, 1955, when the Praesidium of the Supreme Soviet passed another decree: "The Repeal of the Prohibition of Abortions." The prologue to the decree argues that social and economic progress is so great that a law prohibiting abortion is no longer necessary; the encouragement of motherhood and educational measures are sufficient. Also, the repeal of the law will limit the harm done to women by abortions done outside hospitals. The final reason given was "in order to give women the possibility of deciding by themselves the question of motherhood."[63]

Thus, as the population input was to be slowed, the old appeal to individual freedom was used as a reason for a shift in public policy. Very little publicity was permitted for the new order, but reports indicated that in many cities abortions outnumbered live births. Some experts estimated that by 1959 the total annual rate of abortions in the U.S.S.R. ran over 5,000,000. In addition, one survey showed 21 percent of all abortions taking place outside hospitals. Many of these were illegal.[64] A report indicated that 40 percent of women students at Moscow University had undergone abortions; a coed told an American visitor the true figure was nearer 80 percent. Promiscuity was officially frowned upon—but economically desirable for female students, who supplemented small stipends. Abortions at the University clinic cost five rubles—one dollar at the U. S. rate of exchange.[65]

In the population at large, lack of housing, inadequate care facilities, and too many or too close births were the chief reasons given by a sample of 26,000 women having abortions; about one-third of this group, however, simply did not want to have a baby.[66]

We have considered the history of the Soviet Union's legal provisions concerning abortion at some length. This history is significant because the 1920 law was unique in its time and as we shall see the Soviet experience was a model and inspiration for other efforts to relax the old laws against abortion. The old laws had been based on the inviolability of the life of the unborn child. The Soviet decrees were based on the requirements of society, although individual liberty and medical considerations also were given as reasons, and the latter undoubtedly played some role.[67] The Soviet government's style of policy-making in disregard of the right of the unborn to life has been perfectly consistent with its style of policy making in disregard of other human rights, including the right to life of persons already born.

Compromise Legislation

Between 1920 and 1936 the Soviet experiment was followed with interest by observers in other countries. The legalization of abortion in many places became a political issue; radical legislators now saw this measure as an integral part of socialization. In some places new laws were passed, but none of them were as radical as the Soviet decree of 1920. All embodied a compromise: abortion became legal in certain kinds of cases and in accord with other definite requirements.

Latvia, then an independent republic bordering on the U.S.S.R., apparently was the first nation to pass such a compromise abortion law. The act, passed December 30, 1932, provided that any attempt to procure abortion against the pregnant woman's wish remained illegal. But a physician inducing abortion to prevent loss of life or serious damage to health of the prospective mother was not regarded as criminal. These two provisions incorporated the principle of the woman's wish—in a negative way, by requiring her consent—and the principle of therapeutic abortion, which in almost every country was accepted in practice.

But then the law went on to provide that abortion would not be illegal if:

1)–It were performed during the first three months of pregnancy;

2)–With the woman's consent;

3)–By a physician;

4)–To prevent one of the following:

a) The birth of a child having a physical or mental defect (the "eugenic" indication);

b) The birth of a child conceived in virtue of certain proscribed acts–seduction, rape, incest, and criminal assault (the "humanitarian" indication);

c) The birth of a child that would cause privation to the pregnant woman or her family (the "social" indication).[68]

In these provisions the Latvian law accepted the principle of abortion as a method of birth prevention where there were serious indications of a "eugenic," "humanitarian," or "social" kind.

We shall see much discussion of these indications in subsequent debates. The essential point is to notice that they represent a principle distinct from therapeutic abortion. In therapeutic abortion the objective is not to prevent the birth of the child, although in fact the child is aborted for the mother's benefit. In the compromise legislation of which we see a model in the Latvian act of 1932, the purpose of the indicated and permitted non-therapeutic abortion precisely is to prevent the birth of children falling into certain classes. Insofar as abortion is admitted as a method of birth prevention the principle of the Soviet law is accepted. However, insofar as specific indications are required,

a new principle, derived neither from the traditional view nor from Soviet theory, is operative.

Information about the success of the Latvian compromise is not easily had. The original law was amended by an act of March 22, 1935, which eliminated the "social" indication and tightened up conditions under which most physicians could induce abortion. Under the 1935 amendment only gynecologists and physicians especially appointed by the state were allowed to perform the operation outside a hospital or clinic.[69]

One of the bitterest battles concerning abortion law relaxation was fought in Germany between 1920–1933. Proponents of a relaxed law did not succeed in winning official acceptance for their position until the Nazis came to power. Then the Law for the Prevention of Hereditary Diseases in Posterity, 1933, was passed (amended 1935).

Under this law, a pregnant woman selected for sterilization might also be aborted provided she consented, if there were no medical contraindications and if the fetus were not already *viable.*

Also under this law, a physician might induce abortion (as well as sterilize a woman) to avert serious danger to a woman's life or health. In this case also the woman's consent was required. Except in emergency cases, each operation had to be reviewed in advance by a court of referees, which consisted of medical practitioners. The abortionist and the review court of referees were supposed to be independent of one another both in judgment and in action. All induced and spontaneous abortions were to be reported to the Medical Officer of Health.[70]

At first glance it might seem that the Nazi legalization of abortion was minimal. To begin with, the law required the woman's consent—abortion was voluntary, not imposed. However, William Russell, a member of the American diplomatic corps in Berlin prior to World War II, wrote:

> The Nazis laid great stress on the fact that everything the nation did at their command was "voluntary." Even the compulsory two-year period of service in the army is "voluntary." Every boy is required by law to serve, so the Nazis call it volunteering. I have no doubt but that even those unfortunates who were slaughtered in the 1934 purge died "voluntarily."[71]

The essence of the Nazi law was not, then, that it required the woman's consent. One distinctive feature of this law was the fact that it used the viability of the fetus as a significant dividing line. So far as I know, this was the first law to use this criterion, and thus many current proponents of abortion law relaxation follow in the Nazis' footsteps at least to this extent.

The Nazi law fit into the National Socialist outlook just as the Soviet law fit into the Communist outlook. The Soviets liberated woman from traditional morality in order to use her in the work of the triumphant social-economic revolution. But the Nazis aimed at quality—the reign of the supermen—the purified master race. Thus their program depended upon get-

ting rid of weak and inferior specimens, while keeping the stronger and purer ones. Of course, the Soviet decree of 1936 adopted a position on abortion not far different from that which the Nazis had put into effect in 1933.

So far as we know, however, the Soviet program never led to the consequences that developed in Germany. There the program of selective sterilization and abortion was developed by the medical men themselves into a large-scale program of "euthanasia"—that is, murder of mental patients and others, even German soldiers mutilated in the war. The euthanasia program blazed the trail for the even more extensive mass murders of Jews, gypsies, and other so-called "contaminants of Aryan purity."[72]

Thousands of German, non-Jewish children were disposed of in the euthanasia program, many for a social reason rather than because of any inherent defect. This murderous project was not initiated by Nazi officials but by the medical profession itself; in fact, no law ever gave it formal sanction. Killings were done under the supervision and by the direct acts of psychiatrists and pediatricians. Euthanasia murders were passed upon by independent medical consulting boards, similar to those required in the 1933 act to approve abortion. The murders of the children were accomplished mainly by starvation or by overdoses of drugs. In the early stages only infants suffering serious defects were murdered. But this project did not end until the allied troops overran the institutions concerned, and as time passed the infants became older and the indications slimmer—for example, "badly modeled ears," bed wetters, and children "difficult to educate."[73]

Certainly one cannot say that the Nazi sterilization and abortion law would have led to these consequences if the Nazi regime had not been what it was as a whole. On the other hand, one cannot dismiss the whole affair as mere Nazi insanity. The vast majority of participants in the affair were no less sane and no less upright than the members of any modern nation's medical profession.

The roots of the euthanasia program actually antedate the rise of Hitler. In 1920, a physician and a lawyer—Alfred Hoche and Karl Binding, both prominent men in their fields—published a very influential little book: *The Release of the Destruction of Life Without Value.* The principle of their position was that some human beings are worthless and must be killed for the sake of quality of life.[74]

Thus leading members of the medical profession were quite prepared by 1933 to put into effect the Nazi program of selective sterilization and abortion, and this same medical profession itself organized and pushed ahead the euthanasia program of the late 1930s which merged into the genocide program of 1941-1945. Some physicians did refuse to cooperate in the "euthanasia" murders and they were not punished for their refusal.[75]

Iceland was the first of the Scandinavian countries to relax its former strict prohibition of abortion. On January 28, 1935, an act was passed which permitted a physician to induce abortion for the protection of the pregnant

woman's life or health. The law also made provision for birth control; the abortion provisions were explicitly and accurately characterized as "feticide."

Under Iceland's 1935 law, abortion might be induced only during the first eight weeks of pregnancy except in cases of grave danger, that could not be prevented otherwise. The operation had to be carried out in an approved hospital and two physicians—one the senior surgeon of the hospital and the other normally the referring physician—had to submit to the country's Chief Medical Officer a signed statement setting out the reasons for abortion.

The law of 1935 was a compromise between those who wanted abortion permitted only on strict "medical" indications and those who wished a "social" indication included. The form of the compromise was to require that *some* medical indication be present, but that in judging probable danger to the woman's health there should also be considered

> whether the woman has already borne many children at short intervals and a short time has passed since her last confinement, also whether her domestic conditions are difficult, either on account of a large flock of children, poverty or serious ill-health of other members of the family.

On January 13, 1938, the Icelandic law was broadened to permit abortion to prevent the birth of a child to whom hereditary disease might be transmitted and to terminate pregnancies initiated by rape. On these "eugenic" and "humanitarian" indications, abortion required the approval of the Chief Medical Officer and a special public advisory committee.[76]

The peculiar contribution of the Icelandic law was its merging of social factors—large family, poverty, and health of *other* family members—into the "medical" indication: the permission of abortion to protect the mother's own life and health. Where the Latvian law had clearly distinguished between therapeutic abortion on the strict "medical" indication and permitted abortion to prevent births in certain difficult cases, the Icelandic law, being a compromise, blurred the two categories. In this way a "socio-medical" indication was created.

The importance of this indication is that it reacts upon the concept of health, tending to broaden it to include not only the internal conditions of good individual physiological and psychological function, but also the environmental and cultural conditions of good social and economic function and adjustment. *Health*, in short, comes to embrace all the aspects of human welfare that are valued by those holding a strictly humanistic outlook.

In Denmark there were movements toward legalization of abortion in the 1920s. In the early 1930s a government commission to investigate the matter was established. Meanwhile, a Copenhagen physician, J. H. Leunbach, began performing abortions in defiance of the law. His 1935 trial was a rallying-point for promoters of abortion, as political and economic class distinctions were injected into the argument by Leunbach who argued he was merely supplying to working-class women what wealthier women could already obtain. Criti-

cism of Leunbach's criminal acts was then brushed aside on the ground that the real resentment against him arose from the fact that he had violated the privileged status of the upper classes.[77]

In this situation, the Danish legislature passed a law on May 18, 1937. The aim of this law was to provide aid for women with unwanted pregnancies. One of the unique provisions of the law was the establishment of Mothers' Aid Centers. Since it took time to establish these, the law was not put into effect until October 1, 1939.

The Danish law included the familiar "medical," "humanitarian," and "eugenic" indications. The last of these explicitly included obvious danger that the child might inherit insanity, mental deficiency, other serious mental disturbances, epilepsy, or serious and incurable physical disease.[78]

The Danish "medical" indication, like the Icelandic one, was a compromise. It permitted abortion to avert danger to a woman's life and health; the draft added "on account of disease." But these words were removed at the insistence of those who favored a "social" indication. The Mothers' Aid Centers were projected, and the law included a provision that when the danger was *not* due to disease the woman was required to produce a certificate that the dangers of abortion had been explained and the available economic and medical help had been made known to her. Reasons officially suggested as justifications under the expanded "medical" indication included chronic malnutrition, exhaustion due to many confinements, suicide attempts, and depression—the last not necessarily psychopathological in kind or degree.

The Danish law of 1937 provided that the operation should be performed in a hospital receiving public funds, only after agreement of two physicians, and not normally after three months of pregnancy, except in cases of a strict "medical" indication.[79]

Denmark had been the first country in Europe to pass a law permitting eugenic sterilization. The law, passed in 1929, was not widely invoked in the early years; there were only 108 sterilizations under the law 1929–1934. In 1934, following the German example, the Danish law was broadened to include feeble-minded persons when there were social reasons against their having offspring. Under the new law there were 1,380 sterilizations, 1935–1939, and 2,120 during the Nazi years, 1940–1945. The Danish sterilization and abortion laws were not closely related as was the case in Germany. In Denmark the two laws mainly reflect different concerns, though they share the "eugenic" intent.[80]

As a result of the political and cultural factors underlying the Danish abortion law, its provisions were administered rather strictly. Still, by 1956 legal abortions ended about five percent of known Danish pregnancies—that would be the equivalent of an annual rate of about 200,000 in the United States. Yet writing with Magna Nørgaard, Vera Skalts (director of Mothers' Aid and a defender of the legal procedure) admitted that illegal abortions actually increased in the first decade of the relaxed law.[81]

Practically, the Mothers' Aid was administering the abortion law in the post-war period. Pressure was felt both from applicants, half of whom were refused, and from hospitals and surgeons, some of whom felt too many applicants were approved. After much struggle the 1937 law was relaxed somewhat by administrative interpretation in 1950 and still more by a completely new law in 1956.

In the 1956 law the "medical" indication is spelled out so that all circumstances, including the woman's and prospective child's living conditions, are weighed in the balance. Also a new indication is added: "When, in very special cases, it is presumed that the woman will be unfit to take proper care of her child due to serious mental or physical defects or other medically indicated conditions."[82] This is clearly a "social" indication, but one that concerns the welfare of society rather more than that of the mother or the child. It might be called the "tax-burden" indication.

Even with these provisions, a study published in 1964, and cited by Skalts and Nørgaard with approval, indicates a rate of illegal abortions three to four times greater than the legal rate.[83] At the same time, the Danish have originated some novel and rather vaguely defined "medical" conditions—such as "convention conflicts" (a woman depressed by her pregnancy because of unconventional circumstances), "insufficiency" (chronic, sometimes minor disease with psychic or psychosomatic symptoms such as fatigue and irritability), and "the stress syndrome of housewives" (socioeconomic problems or fear of a lowered living standard). There is argument whether it might not be better to allow unrestricted legal abortion; some feel increased mothers' aid, more contraception, and sex education might help.[84]

Sweden's law concerning abortion has followed a course only slightly different from Denmark's. The new Swedish law was passed June 17, 1938, and it went into effect January 1, 1939. The "medical" indication allowed for "weakness" in the woman, but did not clearly allow for environmental conditions. Abortions done on the "eugenic" indication were normally to be accompanied by sterilization. The procedure for this indication demanded an inquiry in each case by the Royal Medical Board, and reference to the Board became the ordinary procedure except when abortions were performed by advice of two physicians on a strict medical indication. The Swedish law was peculiar in permitting abortion up to twenty weeks—or even twenty-four weeks—of pregnancy.[85]

In 1946 the Swedish law was amended by the addition of a new "socio-medical" indication:

> Abortion is also permitted when, in view of the woman's living conditions and other circumstances, it can be assumed that the birth and care of the expected child will seriously undermine her mental or physical health.[86]

Here purely social grounds are not admitted and the revised Swedish law perhaps remains a bit more restrictive than that of Denmark. In 1963 the law

was further amended to specifically allow abortion in cases where the fetus is damaged before birth—for example, by German measles or by drugs.

One of the main purposes of the Swedish law of 1938 was to try to limit the number of illegal abortions—to bring abortion under social control. However, facilities comparable to the Danish Mothers' Aid Centers were not provided for in Sweden's 1938 law, and ten advice centers provided for after the 1946 broadening of the law did not come into immediate operation.[87] The official Swedish position is that the reduction by half of deaths due to illegal abortion between the early 1930s and 1946 showed the law's success.[88]

However, this argument takes no account of the introduction of antibiotics and other drugs which reduced death rates due to all infection in this period. A number of Swedish investigators in the early 1950s argued that illegal abortions had increased along with legal abortions, and that the women having legal abortions constituted a "new clientèle"—a group who would otherwise have borne their children.[89]

It is certain that Scandinavian legislation concerning abortion was influenced by the Soviet example. The first discussion of amending the law to permit broadened indications occurred in the Swedish Riksdag in 1921.[90] More important, the Scandinavian countries were embarked on an effort of liberal or democratic socialism which shared many ends—while avoiding many of the objectionable means—of the Soviet experiment. Thus, although the Swedish committee considering abortion in 1935 recommended that it be allowed on a purely "social" indication, the Population Commission rejected the proposal:

> To allow abortion on social grounds will signify that the community expressly introduces into our laws a declaration that we do not know how to deal with certain obvious and commonly admitted grave social evils.[91]

Similarly, the Danish Pregnancy Commission that prepared the 1937 law suggested a "social" or "welfare" indication, but this provision was not adopted by Parliament, where it was held the community should supply for the social needs that would prompt such abortions.[92]

Another factor that undoubtedly influenced the Scandinavian legislation, making it more moderate than that of the Soviet Union, was the residue of Christian culture in Scandinavia. It is an interesting fact that Latvia, Iceland, Sweden, and Denmark were all countries in which Lutheran Christianity was the predominant (nominally majority) religion during the 1930s when all four passed similar compromise abortion laws.

There was an interesting address at a 1929 meeting of the World League for Sexual Reform—an organization that included eugenicists, promotors of birth control and abortion, sex educators, and others urging a new sexual morality and legislation. Svend Ranulf of Denmark explained the relationship between democracy and morals in his country. Many sociologists believed that severity in sex and democracy were linked to one another. Explaining why this

was not so in Denmark, Ranulf referred to Luther's view that sexual desire is a natural urge and that enforced abstinence for the ordinary person is an unnatural restraint. He also related the Lutheran Church to monarchical government and the Calvinistic churches to democracy of the American type. In this way he hoped to explain why Denmark was more receptive to sexual reform than America.[93]

Perhaps more significant of a Lutheran influence than the relation of Church to state were some other features of the compromise abortion bills. All attempted to provide a method for making decisions subject to a duly constituted government authority. All of the laws implied a recognition of the right of the unborn to life, but at the same time tried in difficult cases to balance that right against other factors.

The committee which proposed the first Swedish law, for example, argued that the accepted therapeutic indication for abortion already went beyond balancing life against life. This was because it was already agreed that genuine medical indications would permit abortion to safeguard the mother's health. From this, the committee argued that other serious threats to the mother's welfare deserved equal consideration. Thus the committee's proposal was an effort to balance the right to life of the unborn against the welfare of the mother. In an effort at resolving some difficult situations, the Swedish law tried to establish public authority for choosing the lesser evil and also, it was hoped, for reducing the bad effects of criminal abortion.[94]

In effect, therefore, while the Soviet Union legislated its morality, which was Marxist Communism; Germany under the Nazis legislated its morality, which was Fascism; and the predominantly Lutheran countries of northern Europe legislated their morality, which was a form of situation ethics influenced by the Lutheran tradition.

The Origins of the British Abortion Movement

The origin of the current efforts to relax anti-abortion legislation is to be found mainly in a British movement in the 1920s and 1930s. This movement derived from the birth control movement and was closely related to it.

The earliest proponents of birth control did not in general favor abortion or infanticide. William Godwin, a British writer and social reformer, did suggest as early as 1801 that personally he would consider infanticide preferable to permitting a child to live a miserable life, but he thought Englishmen would find the practice too repulsive. An anonymous writer using the name "Marcus" also suggested in an 1838 pamphlet that three-quarters of all third-born children of poor families and all children after the third should be gassed.[95] This proposal did not find supporters.

However, serious advocacy of free abortion received inspiration from the treatment given the subject by Havelock Ellis in the sixth volume of his *Studies in the Psychology of Sex* (1910). Ellis, a pioneer sexologist, was a strong

supporter of eugenics and birth control. Of the latter he said: "It is no longer permissible to discuss the validity of this control, for it is an accomplished fact and has become a part of our modern morality."[96] Abortion, Ellis noted, was not yet accepted in this way, though he believed it to be accepted without a "twinge of conscience" by the majority of women who find themselves unwillingly pregnant.[97]

Ellis begins by presenting purported evidence that illegal abortion was widespread and increasing in America, Britain, France, and Germany. He then mistakenly asserts: "Its unqualified condemnation is only found in Christendom, and is due to theoretical notions," ignoring the Vedic, Hindu, and Jewish attitudes.[98]

Ellis is disappointed that the medical profession is not ready to accept eugenic abortion, but he is pleased that the profession accepts the killing of the fetus "whenever the interests of the mother demand such a sacrifice." In support he cites an 1899 article which mistakenly asserted that the fetus is a mere "parasite performing no function whatever." From this the author and Ellis conclude that the fetus has only potential, not actual life. The fetus has only possible value because of what it may become.[99]

It is important to notice that this biology is not only out of date today, when it is still cited by advocates of abortion law relaxation, but it already was out of date as early as 1803, when Thomas Percival published his work in medical ethics that was the forerunner of modern British and American codes. Percival noted that the "false opinion" that the fetus is part of the mother influenced attitudes toward abortion. He rejected the argument:

> This false opinion may have its influence in modern, as well as in ancient, times, and false it must be deemed, since no female can be privileged to injure her own bowels, much less the foetus, which is now well known to constitute no part of them.[100]

Ellis ridicules a French writer who has referred to the unborn's right to life as "an imprescriptible and sacred right, which no power can take from him." With capital punishment and war, society terminates the lives of adults, "amid general applause and enthusiasm." The unborn are not yet part of human society, and therefore we have a right to kill them, Ellis argues, and the contrary position is "a vestige of ancient theological dogma." Doubtless, "the 'imprescriptible right' of the embryo will go the same way as the 'imprescriptible right' of the spermatozöon."[101] With this argument Ellis shows that in principle he regards abortion as a logical extension of birth control.

Ellis next considers the views of the German feminists. "At the Women's Congress held in the autumn of 1905, a resolution was passed demanding that abortion should only be punishable when effected by another person against the wish of the pregnant woman herself." The German feminists Ellis quotes were indeed proponents of abortion on demand. One argues that a woman has as much right "to destroy the results of her action" as she has to decide to

whom whe will yield her virginity. A woman practicing eugenic abortion, the same writer urges, is entitled to public reward. Another feminist argued that by the fact that a woman wanted abortion it was clear nature should have made her sterile. "These, when they abort, are simply correcting a failure of Nature." This author also advocated a "new morality" on eugenic grounds.[102]

Ellis notes some suggestions of compromise legislation that would permit abortion in the early months of pregnancy. The medical profession in general is unwilling to go even to eugenic abortion because physicians are dedicated to preserving "worthless and worse than worthless lives." A German professor is cited who advocates legalization of abortion when the pregnancy is due to rape, the girl has been abandoned, or eugenic indications are present. And a French physician is referred to for the view that a woman has a right to abortion.[103]

Ellis' own conclusion is paradoxical:

> The blind and aimless anxiety to cherish the most hopeless and degraded forms of life, even of unborn life, may well be a weakness, and since it often leads to incalculable suffering, even a crime. But as yet there is an impenetrable barrier against progress in this direction. Before we are entitled to take life deliberately for the sake of purifying life, we must learn how to preserve it by abolishing such destructive influences—war, disease, bad industrial conditions—as are easily within our social power as civilized nations.[104]

For Ellis, then, abortion, and especially eugenic abortion, appeared to be a matter open to great progress. He had no respect for unborn life, and in principle he thought of abortion as a woman's right. Still he hesitated because he saw a link between the disrespect for life implied by abortion and the destructive influences, such as war, which society could deal with, but had not yet mastered. Ellis wrote in 1910, before two world wars, before Nazism, and before the "balance of terror." One wonders what he would say today.

We have cited Havelock Ellis' treatment of abortion at some length because even today it serves as a kind of bible for pro-abortionists. Ellis' remarks are often repeated as grounds for the argument that nineteenth-century laws against abortion should be relaxed in view of modern (1910) psychological and medical insights. But whatever Ellis' status as a prophet of "reform," he did not himself initiate an effective movement. That honor went to the ladies, especially to Miss F. W. Stella Browne.

Miss Browne was an advocate of birth control on several grounds, as she explained at the 1922 International Neo-Malthusian and Birth Control Conference in London: "In my opinion, as a Feminist and a Communist, the fundamental importance and value of birth control lies in its widening of the scope of human freedom and choice, its *self-determining* significance for women." She proceeded to commend the Soviet Union's "unique experiment in constructive civilisation" including the legalization of abortion. On the continent, agitation "led by Feminists of the Left Wing and by several prominent Socialists" was working toward legalization on the Soviet model. Yet

Miss Browne insisted she was "*not* concerned here to vindicate the moral right to abortion, though I am profoundly convinced that it is a woman's primary right." Some objected to abortion on medical grounds; Miss Browne doubted that the bad effects were due to abortion as such, but argued that even if they were, this was all the more reason to make effective contraception available to exploited women of the working classes. She concluded her paper with a triumphant epitaph for the "ancient codes, the decaying superstitions and prejudices of an old theoretical morality" which were rapidly losing "all the sanctity they ever had."[105]

In 1923 Miss Browne broke with the Communist Party because of its officially negative attitude toward birth control—tied to Lenin's rejection of neo-Malthusianism.[106] But in later years, as we shall see, Miss Browne remained an admirer of the Soviet Union's legalization of abortion.

An important milestone in the abortion movement was the 1929 International Congress in London of the World League for Sexual Reform. This organization began in Germany and met for the first time in Berlin in 1921. Its objectives were not merely inquiry but a "reform" of sexual morality and of relevant legislation. It aimed at "establishing sexual ethics and sociology on a scientific biological and psychological basis, instead of (as at present) on a theological basis." The League aimed not to supplant but to embrace movements such as those devoted to birth control, eugenics, sex education, marriage reform, and homosexuality.[107] Among its members the League claimed pioneers such as Sigmund Freud, Havelock Ellis, and Edward Westermarck; leaders of the birth control movement such as Margaret Sanger, Marie Stopes, C. V. Drysdale, Norman Haire, and Abraham and Hannah Stone; and several later founding members of Britain's Abortion Law Reform Association—namely, Miss Stella Browne, Mrs. Janet Chance, Dr. Joan Malleson, and Dora Russell.[108]

The Soviet experience dominated discussion of abortion. Dr. Norman Haire showed that the British birth control movement was not so shy of abortion as it had been when Stella Browne spoke out seven years before. Haire stated:

> In Soviet Russia, whose whole sexual code is a fascinating experiment which we sexologists in other countries are watching with great interest, every woman is permitted to have her pregnancy interrupted if she wishes it.

And after mentioning other countries' moves to imitate the Soviet example, he added: "Many of us in England are in agreement with this point of view."[109]

Miss Browne argued an absolute right to abortion. Fundamental to "sexual reform on a scientific and humanist basis is the power to separate the fulfillment of the sexual impulse from the procreation of children." Since contraceptives do not always work, and some find them an obstable to otherwise highly enjoyable sexual experiences, abortion is necessary. To forbid

abortion is to enforce the illegal performance of the operation, with consequent bad effects, or the birth of unwanted children, who are sure to be damaged psychically. The effort to set conditions as in compromise legislation is mistaken; boundaries will be unworkable and will lead to abuses. Miss Browne concluded: "Not abortion, but forced motherhood, is the crime."[110]

The keynote address at this Congress was a lecture by British philosopher C. E. M. Joad. Professor Joad explained the religious basis of existing sexual morality and argued that science was replacing religion as a basis for life. Yet there is a lag in the change of morals and laws. The object of sexual reformers must be to abolish the lag. "To achieve this end they must seek to diminish by any means in their power the influence of the religion which is largely responsible for the maintenance of the present moral code." In the future, Joad predicted, religion and sex life would be dissociated and both would be purely private, "as private and personal as the toothache.[111]

Thus Professor Joad thought it necessary to subvert religion as a means to the end of sexual reform. Miles Malleson presented a similar argument under the title: "The Need for a New Positive Morality." Malleson stressed the inevitability of moral change and made the keystone "the responsible individual."[112]

Others at the Congress, for example Dr. Johannes Werthauer, thought that not only religion but capitalism must be destroyed to make way for sexual reform. The great war lords and captains of industry fight contraception and abortion. But sex is

> . . .an impulse which does not permit of regulation. The complete abolition of all Church and State interference in sexual relations can alone give freedom to this natural impulse and release it from its unnatural servitude. But the removal of these restrictions is merely part of the general task of the abolition of capitalism altogether.[113]

Dr. J. Leunbach of Copenhagen, whose 1935 abortion trial we mentioned in relation to the Danish legislation, also blamed "the existing capitalistic social order" for maintaining laws against abortion. Working women, the exploited classes, should have the benefit of abortion, which was already available to the wealthy. "This is the line that has been taken in Soviet Russia," and though lack of facilities has prevented complete success "they can point to undeniably excellent results." Even in a capitalist society it might be possible to get a majority to repeal anti-abortion laws. In this the good results of the Soviet Union can be used as an argument. Dr. Leunbach explained how the Danish chapter of the League had acted in 1929 to promote a petition by several women's unions requesting Parliament to grant abortion on request.[114]

Most who spoke at the Congress on the subject of abortion clearly considered only completely free abortion satisfactory. Dr. Helene Stöcker, for example, considered anything short of the Soviet legalization as only partial pro-

gress.[115] A Frenchwoman, Dr. Pelletier, considered that women were treated unjustly with regard to abortion everywhere but in the Soviet Union. The punishment of abortion, she argued, results from man-made laws, laws aimed at reducing women to the status of "machines for producing children."

Dr. Pelletier encountered some difficulty in her argument, however. First she asserted: "Abortion is not a crime. One cannot be said to be taking life since life does not yet exist. Far from being bad, abortion is often a commendable step. Abortion is moral." But then she asked "up to what date should it be allowed?"

> The difference between the fertilized ovum and the foetus at nine months is only a matter of development. But while it may be a light matter to destroy an embryo at the age of six weeks, an abortion at seven months amounts almost to infanticide. Abortion at such a time is only justified if the mother's life is in danger. The law might fix a definite limit: say three months.[116]

No reason is given why three months is to divide the "light matter" of abortion from infanticide on a continuum of unbroken development.

A German physician, Dr. Hertha Riese, argued that physicians could not consistently refuse abortion on social grounds if they allowed it on medical indications, since the life of the child would be the same in either case. Why is the life of the mother ever given preference?

> The fundamental reason for this general attitude is probably that we recognize that a human being who is conscious and capable of feeling, represents a form of life which is to be preferred to one which merely exists unconsciously.[117]

From this argument follows the sub-humanity and violability of the non-conscious fetus. Dr. Riese does not explain how her argument affects the valuation of other "forms of life"—e.g., the mentally ill or the retarded.

Dr. A. Genss journeyed from Moscow to this 1929 London conference to give a detailed account of the Soviet abortion program in which everyone was so interested. He explained the great success of the Soviet law and commended the principles behind it:

> In Soviet Russia abortions are due to the same causes as in Western Europe, with the one difference that we are trying to master our social diseases not by means of formal measures of soulless legislation but solely by means of a radical and sure remedy—by reconstructing the whole country on socialist lines, by building the whole economic structure of the U.S.S.R. on a communist foundation.[118]

The arrangers of the Congress also included the showing of a Russian film about abortion. It was one of the special features of the program.[119]

The League had not previously endorsed a change in abortion laws. However, among the resolutions voted at this London conference was the following:

> This Congress of the World League for Sexual Reform declares that since contraceptive methods are at present not sufficiently perfect nor widespread, many women are compelled to resort to artificial termination of pregnancy.

> In all countries except Soviet Russia this act involves severe legal penalties. These, in fact, fall mainly upon women of the poorest classes, and do not prevent the practice of abortion, but ensure that it is done secretly, incompetently, and with danger to life and health.
>
> We therefore call for the abolition of penalties for the mother and a revision of laws relating to abortion, so as to make it possible for a woman to obtain a termination of pregnancy by a qualified medical practitioner on economic, social, and eugenic grounds as well as the medical indications permitted at present.[120]

This resolution marked a milestone in the international abortion law relaxation movement. It undoubtedly influenced some of the Scandinavian and other developments we already have reviewed, although there the scope of the revision was limited by excluding purely "social" and "economic" grounds. Less than the Soviet ideal, the resolution represented an objective for practical efforts in most countries. The euphemism "termination of pregnancy" which has reappeared in many proposals for legislative revision as a substitute for "abortion" also showed a practical desire to effect attainable results.

The 1930 Congress of the World League for Sexual Reform met at Vienna. Many of the themes of the previous year reappeared. Wilhelm Reich, later famous for his philosophy of orgasm, said: "The Soviet system in Russia solved the problem of abortion and of marriage without much difficulty." He urged the League to fight abortion laws and he attacked the practice of sexual abstinence on religious grounds.[121]

Dr. P. Vachet of Paris affirmed: "Soviet Russia is the only country in all times, where sexual ethics and institutions have been rationally rebuilt." Christianity, by contrast, degrades sex and makes it shameful.[122] Havelock Ellis pictured Soviet Russia as an inspiring "social laboratory," though he conceded its political and economic system might not be exemplary.[123]

Dr. Batkis of Moscow was present to extol his country's system: "Perfect freedom of abortion and the establishment of clinics and hospitals for birth-control and abortion."[124] Prof. J. Wolf of Berlin appealed to the Soviet example in his medical-legal argument for abortion. He referred to the "epidemic" of abortion, the ineffectiveness of punitive legislation, and the harm caused by illegal abortions.[125] Bertie Albrecht of London spoke of the imprescriptible feminine right to abortion, so far recognized only in Soviet Russia.[126]

Dr. Victor Margueritte of Paris was not satisfied with the resolution the League had passed the previous year in London. He began his paper by requesting the Congress to pass this resolution: "We demand that the new legislation concerning abortion, as adopted by the Soviet States of Russia, should be introduced into the penal codes of all countries."[127] The Congress apparently did not agree; this resolution is not recorded in the volume of its proceedings.

Dr. Leunbach of Copenhagen was at the Vienna Congress, repeating his argument of the previous year.[128] Others also spoke for the first time or

repeated previous arguments in favor of abortion.[129] Adelheid Popp of Vienna outlined compromise legislation allowing abortion on "medical," "eugenic," and "social" indications.

Two papers at Vienna were especially revealing. Dr. Herbert Steiner of Vienna, in an unusually frank survey, stated that illegal abortions had actually increased in Russia, but he believed a more intensive program of birth control clinics would help. He also asserted that all intrauterine methods of "prevention," such as the paste used by Leunbach and the ring-type IUD used by Gräfenberg, were actually abortifacients. But Steiner commended such methods for use in birth control clinics.[130]

The other interesting paper was a report of the American Birth Control League by F. Robertson-Jones. She indicted Christian belief in providence as a special obstacle to the movement, but pointed out that Protestant sects were not so well organized for political action as the Catholic Church. She bemoaned the lack of limitation among the "lowest economic classes," "the incompetent—the physically, mentally or morally subnormal," for these people are a burden: "The burden of dependence bears heavily upon the taxpayers." Racial deterioration would be the inevitable consequence of the "differential birth rate." For this reason: "It is all-important for the future of the country that the incompetent classes—those of the worst stock—should limit their children." The report ended with an acknowledgment of the inspiration received by America from "Europe and the East; and the other officers of the American Birth Control League join me in sending hearty greetings and congratulations to our fellow workers gathered together in this great Congress."[131]

The significance of the Sexual Reform Congresses can hardly be overestimated. Of course, the various movements which united in these meetings maintained their independence. One does not find the entire program of the World League adopted by limited movements such as the American Birth Control League. But the World League's Congresses, and especially the London meeting of 1929, certainly proposed the Soviet abortion law as an ideal, indicated the outline of possible attainable compromise legislation, integrated the abortion question into the new sexual morality, and drew the lines of opposition between "theology" and "science"—that is, between a traditional outlook and the new, non-religious ideology. If this new ideology was not in every case "scientific socialism" (Marxism) it was always humanistic, unfriendly to all traditional religion, and particularly hostile to the Catholic Church.

In 1930, Dr. R. Forgan, a British physician and former Member of Parliament, spoke on maternal mortality at an Independent Labour Party Congress:

> What if birth control utterly failed? Are we to insist on the birth of an unwanted child? The logical conclusion is that abortion, carried out by skilled

> persons, should be legalized. That is the conclusion to which our point of view is tending.[132]

In 1931, Mr. Justice McCardie tried a case in which a woman had died at an amateur abortionist's hands. Instead of limiting himself to the impartial performance of his legal office, the Judge attacked the law against abortion, characterized the charge of "wilful murder" against the abortionist as "brutal," and proclaimed the one absolute norm of birth control and pro-abortion groups: "I cannot think it is right that a woman should be forced to bear a child against her will."[133]

Mrs. Janet Chance, who was listed on the roster of the 1929 Sexual Reform Congress, published two books, one in 1931 and the second in 1933. The first embodied the program of sexual reform. Mrs. Chance argued in favor of abortion law relaxation: "And all medically-endorsed abortion should be legalised if only, as it has done in Russia, to compel Ministries of Health, doctors and legislators to face the true condition of the working-class mother." The agreement of the woman and her doctor should be sufficient. Mrs. Chance claimed that politicians failed to act "for fear of the Catholic and Church of England vote."[134]

Mrs. Chance's second book attacked "intellectual crime" and especially all forms of religious faith: "Religious creeds do not merely contain, here and there, some intellectual error. No. *Religious creeds are intellectual crimes,*" she asserted emphatically in her chapter entitled: "Religious Belief: An Intellectual Crime."[135] Mrs. Chance excoriates those who teach religion to small children with "romantic views of life such as the existence of a Divine Father."[136] Mrs. Chance tells with approval how Lord Buckmaster, lecturing on divorce law reform, refused even to answer the objections of Roman Catholics in his audience. She agreed with and wished to surpass his attitude of scorn for Catholic thought which she condemns bitterly, concluding: "Tinsel ideas for their tinsel shrines."[137]

By 1932 the cause of abortion law relaxation was being advocated in meetings of the British Medical Association. At a 1933 meeting, it was unsuccessfully proposed to establish a committee:

> First, because the legalization of abortion in some countries, notably Russia, had created a demand for abortion in this country; secondly, because, owing to the economic crisis, and possibly as an offshoot of birth control teaching, women were having more recourse to abortionists than they had done in the past; and thirdly, because the law was uncertain on this point and juries hesitated to commit themselves upon it.[138]

In 1934 the Association did establish a committee to consider the medical aspects of abortion.[139]

Meanwhile, the ladies went to work. Madame Bertha Lorsignol, an Englishwoman whose husband was a French banker, worked energetically to

persuade the Women's Co-operative Guilds to pass a resolution (by 1,320 votes to 20) asking the government to allow abortion "under the same conditions as any other operation." Dr. Joan Malleson, who was on the roster of the 1929 Sexual Reform Congress, wrote a popular article in the *New Statesman.*[140]

In 1935 Miss F. W. Stella Browne organized a symposium on abortion in the form of a small book. She called for legalization of abortion so that it could be performed like any other operation. Despite her departure from the Communist Party, she lauded the "sexual statesmanship" of Soviet Russia in its handling of the abortion issue.[141] Miss Browne asserted: "The woman's right to abortion is an absolute right, as I see it, up to the viability of her child."[142] She rejected any proposed indications, "for our bodies are our own."[143] In this argument, by using viability as a dividing line she assumed, as did the Nazis, that the incapacity of an individual to survive by itself left it without any right to life.

Miss Browne urged that people using contraceptives were plagued with anxiety lest an unwanted conception occur. The availability of abortion "would save the racked nerves of thousands of sensitive women and men, and prevent the shipwreck of much mutual joy and affection."[144] Abortion is not only good and necessary "but also erotically preferable to any current and available form of contraception, because any available contraceptive disturbs the essential rhythm, the crescendo, climax, and diminuendo of the communion of sex."[145] Miss Browne assured religious believers that they "must regard human parental responsibility as an important factor in the sifting of souls, and for really effective responsibility, abortion is as necessary an instrument as contraception."[146]

The Abortion Law Reform Association was founded February 17, 1936. Mrs. Janet Chance was elected Chairman; Miss Browne, Vice-Chairman; Dr. Joan Malleson was a medical advisor; Madame Lorsignol and Dora Russell also were involved. Lord Horder, who was very active in sponsoring the birth control movement, was also an advisor. Mrs. Alice Jenkins became Secretary.[147]

By the time the new organization held its first public meeting in May 1936, Mrs. Chance was able to report that the British Medical Association's committee favored revision of the law to explicitly permit therapeutic abortion, because "in the law as it stands no specific authority is given for terminating pregnancy." The Association did not advise legalization on non-medical grounds, because that issue was considered beyond its competence, although the committee did observe "that the legalization of abortion for social and economic reasons would go far to solve the problem of the secret operation."[148]

The public meeting, encouraged by this report, after lively discussion, agreed unanimously to a very strong resolution:

> This Meeting advocates the amendment of the abortion laws so that it shall be legal for abortion to be performed by a medical practitioner subject only to restrictions imposed by medical and humanitarian considerations.[149]

Lord Horder proposed a somewhat less blunt statement of objectives, stressing the dangers of illegal abortion and urging amendment of the abortion laws to permit "help from the patient's doctor." A version of this more veiled statement was adopted, with an added clause urging better contraception.[150]

That the leadership of the Abortion Law Reform Association dissimulated its actual objectives is proved by the testimony of Alice Jenkins herself. Noting that Stella Browne always insisted on the absolute right to abortion, Mrs. Jenkins explains her own attitude and that of Mrs. Chance: "Janet and I shared her opinion, but, mistakenly or not, believed that we could further our views better by a less forthright declaration."[151]

The movement to relax the abortion laws gathered support among the public and in Parliament. In June 1937, an Inter-Departmental Committee was appointed jointly by the Ministry of Health and the Home Office

> to enquire into the prevalence of abortion, and the law relating thereto, and to consider what steps can be taken by more effective enforcement of the law or otherwise to secure the reduction of maternal mortality and morbidity arising from this cause.[152]

The terms of reference were narrow; moreover, material and testimony presented to the Committee would not be published as such—as would have been the case if a Royal Commission had been set up. Nevertheless, the hearings of this Committee provided a focus for effort and an opportunity for the promoters of a relaxation of the law to make their case. Among the witnesses were Miss Browne, Mrs. Chance, Dr. Joan Malleson, and Mr. Thesiger for the Abortion Law Reform Association; Dr. C. P. Blacker, Lord Horder, and two others for the Eugenics Society; two spokesmen for the National Birth Control Association; and many individuals favorable to the cause who spoke on their own behalf. Considering the proportion of the Roman Catholic population in Great Britain, the size of the Catholic contingent was large—many Catholic individuals and associations appeared, presumably against relaxation of the law.

This forming of the lines of opposition was altogether beneficial to the movement for change. At the 1922 International Neo-Malthusian and Birth Control Conference at which Stella Browne first spoke up for abortion, Mrs. Annie Porritt, who managed the *Birth Control Review* for Margaret Sanger, explained in some detail the proper strategy of "publicity in the birth control movement." She explained that reformers err if they "devote their whole strength to appeals to the intelligence of the people." Persecution is much better, she pointed out, referring to the 1879 British birth control trial of Charles Bradlaugh and Annie Besant, the "martyr publicity" gained in 1917

by Margaret Sanger, and the great advantage gained in 1921 by the new American Birth Control League when New York police closed one of its sessions. "The Churches, especially the Roman Catholic Church, came to the aid of the movement by vigorous attacks on it," Mrs. Porritt explained. Her conclusion was that good publicity should arouse intense emotion, force the indifferent to take a stand, and also be capable of withstanding criticism.[153]

Mrs. Porritt may have inspired a brilliant publicity campaign the following year. Marie Stopes, unable to get herself arrested for promoting birth control in a London clinic, sued for slander Dr. Halliday Sutherland, a Catholic, who had criticized her in passing in his popular anti-birth-control book. The trial began February 21, 1923, and dragged on through two appeals, the verdict finally going to Dr. Sutherland on the ground that the original jury found his comments "true in substance and in fact."[154] A decade later, in a book devoted to an attack upon Roman Catholic resistance to the birth control movement, Miss Stopes characterized Dr. Sutherland's opposition as "Roman Catholic interference in this Protestant country."[155] When this particular book failed to sell well, Miss Stopes chained a copy of it to the font in London's Catholic cathedral, carefully arranging that a newspaperman should be present![156]

In February 1938, a well attended debate on abortion was arranged by the Fellowship of Medicine.[157] The chairman was Mr. Justice Humphreys and the main speakers were moderate physicians. The proponent argued only for legalization of therapeutic abortion, maintaining that a procedure requiring an abortion committee and reporting to the government would actually limit the number of "therapeutic" abortions then performed. The opponent accepted therapeutic abortion but considered the law adequate. He mentioned the Soviet experiment, but believed unrestricted abortion would never be permitted. He also held that new restrictions would be impractical.

Mr. Justice Humphreys stated the current law and explained that it certainly permitted abortion when necessary to save the mother's life. He would not say it also was legal to protect her health, but he hesitated only because of the unlimited meaning that statement could be given. He left no doubt that if the medical profession accepted a case as one in which abortion was indicated, the law would not treat its performance as criminal.[158]

Two more extreme advocates of abortion law relaxation were present. Dr. Binnie Dunlop argued

> this law has really no right to exist at all. If you say, "Oh, yes, it is a law against murder," then you have no right to interfere even on therapeutic grounds with a pregnancy. You are in that dilemma. Either it is a religious law and should be left alone, or it is not a religious law and should be got rid of.

As a compromise, the speaker urged that abortion be permitted any woman who had undergone one or two pregnancies.[159]

Dr. Joan Malleson also spoke out against requiring physicians to report "therapeutic" abortions performed. She argued that the "generous" practitioner spared many women self-inflicted criminal abortion. Her conclusion was: "It seems to be shortsighted to knock the 'generous' practitioner out by notification in favour of increasing criminal abortion."[160]

On April 27, 1938, a fourteen-year-old girl was raped by some soldiers in London. The case was a sensation, and the attackers were promptly convicted. The child missed a period and was referred to Dr. Joan Malleson, a member of the medico-legal council of the Abortion Law Reform Association. She wrote Dr. Alec Bourne, also a member of the council and he answered:

> I shall be delighted to take her in at St. Mary's and curette her. I have done that before and shall have not the slightest hesitation in doing it again. I have said that the next time I have the opportunity I will write to the Attorney-General and invite him to take action.[161]

The girl's father wished the matter kept secret. Dr. Bourne agreed, and the operation was performed on June 14. The same day at the hospital Bourne related the facts to a police inspector and said: "I want you to arrest me." When he was charged at the police court on July 1, the prosecutor explained the facts and pointed out that Bourne had openly defied the law to ventilate the opinion that the abortion law ought to be relaxed: "He had been exceptionally fortunate in being able to find what from his point of view was an absolutely perfect case.[162]

Mr. G. A. Thesiger's defense at the preliminary hearing stressed the youth and innocence of the girl, the brutality of the rape, the expertise of Dr. Bourne, and the excellent conditions under which the abortion was performed. As to the charge, Thesiger argued that Bourne was not guilty, because the law stated that the abortion-causing deed must be done "unlawfully" for the crime to be committed.[163]

The magistrate presiding at the preliminary hearing did not accept the submission of the defense, but observed that the accused and his advisers wanted a trial, and decided that the case should be presented to a judge and jury in High Court.[164]

It is interesting to note in passing that Mr. Justice Humphreys at the February debate had explained that the case for the legality of therapeutic abortion depended on a reasonable understanding of legislative intent, not on the presence of the word "unlawfuly." That word, the learned Justice explained, appeared in many other sections to which there was no conceivable exception. The word "unlawfully" was included only for technical legal reasons, not to suggest an alternative.[165]

Thus the argument based on the word "unlawfully" was perhaps bad law, but it was excellent publicity. Meanwhile, the Inter-Departmental government committee finished hearing evidence by July 7 and began considering what its report should be.[166]

July 18 and 19 Dr. Bourne stood trial. The word "unlawfully" did not appear in the original indictment; it was inserted on a motion by the defense. Also, any member of the jury who might believe on religious grounds that abortion is always wrong was asked to withdraw.

Dr. Malleson's letter to Bourne was entered in evidence. Besides outlining the case, Malleson had urged the value of a "cause célèbre" and had suggested the view

> that the best way of correcting the present abortion laws is to let the medical profession gradually extend the grounds for therapeutic abortion in suitable cases, until the laws become obsolete, so far as practice goes.

Malleson also deduced that the first physician who attended the girl "must be Catholic. He took the conventional standpoint that he would not interfere with life . . ."[167]

The child who already had suffered rape and abortion now was made to give evidence in court. She, and most of the other witnesses, simply recounted the facts of the case. However, Dr. Joan Malleson also discussed divergent medical views of therapeutic abortion. She claimed that health as well as life was a legitimate ground, especially if conception occurred in such circumstances as in the present case. Many physicians favored the "humanitarian" indication, though it was not considered adequate *by itself* for legal termination. The "eugenic" indication was accepted by some according to Malleson.[168]

After presentation of the case against Bourne, the defense asked the judge, Mr. Justice Macnaghten, to rule on the meaning of "unlawfully" in the statute. The defense argued that this implied that abortion should be considered lawful not only to save the mother's life, but also to protect her health; a physician should be free to perform the operation for the mother's health on the same basis that he could remove an appendix to preserve health without being guilty of mayhem. Macnaghten ruled that the prosecution had to prove that the physician had *not acted in good faith* to preserve the life of the mother. This formula was introduced from the 1929 Infant Life (Preservation) Act, which probably had envisaged difficulties at the time of delivery. However, the defense elicited from the Justice agreement that one "cannot altogether separate the questions of what is necessary to preserve life and what is necessary to preserve health." The jury must decide in each case.[169]

The defense argued that Bourne took a moderate view among physicians on indications for abortion. He thought the operation should be done when the risk of the operation was overbalanced by risk to health in the widest sense. The eminent surgeon was prepared to be a martyr in order to get the law clarified. His act was gallant and "he had acted from a motive of purest charity."[170]

Dr. Bourne himself refused to distinguish sharply between safeguarding life and safeguarding health. He recalled an earlier case in which a colleague

had refused, on religious grounds, to assist in abortion, and said this incident had led him to consider the question carefully. In this present case, the circumstances of the impregnation, the child's age (her pelvic bones not fully united), and the probable emotional consequences were factors. The decisive moment came when the child cried while being examined. No consultant had been called in to confirm the diagnosis, because Bourne himself often acted in that capacity and considered himself his own consultant.[171]

Expert testimony for the defense confirmed Dr. Bourne's opinion that the abortion was necessary for the girl's health. One physician said that the rape had caused the child "shell-shock" and that abortion spared her from being "buried." Lord Horder agreed with Bourne's diagnosis, so far as he could judge without seeing the patient.[172]

The defense argued in summation that given the exception permitting abortion "to save the patient's life," a wide and liberal view of that phrase should be taken. To say the physician "must not operate even if he were faced with a practical certainty that she would have a complete nervous and mental breakdown revolted one's sense of justice and every other sense." The prosecution argued that there is a fundamental difference between preserving life and preserving health. "The destruction of an unborn child was the destruction of a potential human life," the Attorney-General maintained. The law was based on the sacredness of life, and it was quite a different matter to kill for something less than life and to kill to preserve life itself.[173]

Mr. Justice Macnaghten's instruction to the jury is a remarkable document. He rejected any definite distinction between danger to life and danger to health, arguing that the former was only proved by death: "Life depends on health, and it may be that health is so gravely impaired that death results." He endorsed the defense's medical testimony regarding danger to the girl's health. He dwelt upon the difference between the respectable Dr. Bourne and the disrespectable "criminal abortionist." The Justice also asserted that anyone who objected to abortion on religious grounds should not be a doctor, or not practice obstetrics, because if he failed to perform abortion and the mother's death resulted he would be guilty of manslaughter. Macnaghten charged the jury that if the doctor believed continuance of the pregnancy would "make the woman a physical wreck or a mental wreck," then he operated "for the purpose only of preserving the life of the mother." The jury must decide whether the prosecution had proved beyond a reasonable doubt that Bourne *did not believe* the operation necessary to preserve the life of the mother—defined in this way.[174]

The *British Medical Journal* joined in general rejoicing at Bourne's acquittal, which was seen as an endorsement of existing practice. At the same time, the editor observed with remarkable frankness: "It was less a criminal trial than a co-operative effort by judge, jury, counsel, and witnesses to create law out of strong but ill-defined feeling."[175]

In March 1939, the British government's Inter-Departmental Committee on Abortion delivered its report. The recommendations of the majority of the Committee were generally on the conservative side. The major relaxation proposed was that the law

> be amended to make it unmistakably clear that a medical practitioner is acting legally, when in good faith he procures the abortion of a pregnant woman in circumstances which satisfy him that continuance of the pregnancy is likely to endanger her life or seriously to impair her health.

This would have reduced the law of the Bourne case to the form of a statute; the Committee added proposals for compulsory consultation and compulsory reporting of all therapeutic abortions.[176] These provisions, had they been enacted, probably would have restricted the borderline of "therapeutic" abortion, which enlarged into a vast domain in subsequent decades.

The Committee also explicitly referred to the proposal of the Abortion Law Reform Association that abortion be legalized generally. This, and more modest proposals for legalization on non-medical grounds, were not accepted. The main reason for rejecting such proposals was stated in these terms:

> The teaching of Christian religion and ethics that the individual life is sacred is one of the main principles upon which social life rests. As we understand it, this principle means that life must not be deliberately taken, save in very exceptional circumstances, and any measure which would tend to detract seriously from the sanctity of life must, in our view, be regarded as fundamentally unacceptable. The argument of some witnesses that, since the foetus is part of, and depends for its continued existence upon, the mother, she should be entitled to dispose of it as she thinks fit, appears to us to be a complete negation of the principle.[177]

The Committee in effect endorsed the principle of inviolability of innocent human life and accepted the fact that the developing embryo is a living human individual. However, the Committee was willing to admit exceptions in some cases and to allow some difference between the inviolability of the unborn and of those already born. On this basis therapeutic abortion was endorsed. Also the arguments against "eugenic" and "humanitarian" indications were mainly pragmatic—difficulty of diagnosis in the one case and procedural difficulty in establishing the crime in the other. Even with regard to the wider "social" and "economic" indications the Committee felt it necessary to point to the dangers of declining population, of sexual looseness, and of bad consequences of the operation itself.[178]

Several members of the Committee had relatively minor reservations to its report. One, Mrs. Dorothy Thurtle, disagreed sharply both in a minority report, published with the Committee document, and in an expanded treatment of the question published in 1940. Mrs. Thurtle rested her case in part on mistaken biology—the claim that the fertilized ovum develops by simple division without differentiation for some time. Using this misconception as one

premise, she pointed to the life of the sperm which is frustrated by birth control and concluded that contraception and abortion do not essentially differ.[179]

Mrs. Thurtle also referred to the Soviet experience, but now to explain that its apparent failure was due to Communist bungling and economic deficiency. As Russia had become Britain's enemy in 1939, the Soviet's 1936 reversal of abortion policy now appeared as a prelude to imperialism.[180]

Perhaps the most significant contribution of Mrs. Thurtle's work, however, was her suggestion of a strategy for "liberalization" of the law. Realistically accepting the general unwillingness to permit abortion on demand, she urged the plight of women in all sorts of difficult circumstances. Her list of indications included rape or pregnancy initiated by incest, pregnancy in a girl under sixteen, "eugenic" reasons, and an excess of pregnancies beyond four. The underlying idea was that abortion should be available to back up contraception whenever birth *prevention* rather than mere *spacing* was desired. But the public might accept the objective more easily if each reason for *prevention* were argued separately than if all were joined under the general claim of an absolute right to abortion.[181]

With the beginning of World War II, the movement to relax abortion laws lost momentum. Probably the general disruption caused by the war and the press of war business played a large role in this hiatus. However, the horror felt in the face of atrocious violations of innocent life probably played an important role. As awareness of Nazi violence spread, the claim by anyone of a right to dispose of the lives of others—weak, dependent, and "without value" as they might be—seemed empty and decadent.

The British movement in the prewar years had laid a foundation for later efforts. The objectives, the program, the strategy, the arguments to be used—all were developed fully. We must glance at the modest effort begun in America before World War II, and then consider the vigorous development of the postwar period.

Abortion in the United States before World War II

From its inception, the American Birth Control League distinguished sharply between contraception and abortion. A striking instance of this position is to be found in the very first paper delivered before the first American Birth Control Conference, which was held in New York in 1921. Dr. John C. Vaughan declared:

> Any means used to keep the male and female elements from uniting is a preventative or contraceptive. But when once fertilization has taken place, then all the possibilities of a new soul, a new individual, are opened up, and an individual life is started that should be covered by the same protective laws that cover all human beings. The same laws that protect adults protect children. It is no less a crime to kill a baby than it is to kill an adult. Why should it be any less a crime, why should it be more moral or legal to destroy a life in its intra-uterine stages than it is after these stages are over and the baby has been born? And I

say again that from the time the ovum is fertilized until the infant passes out of the uterus any destructive interference with it must be considered abortion, and that abortion should never be necessary, can never be moral, and must rarely be legal.

It can readily be seen that the definition we have adopted brings within the classification of abortion the many cases of so-called delayed menstruation that are brought about by manipulation, medication or some one of the common devices so well known to those in the medical profession.[182]

Yet there was a certain ambiguity in the birth control movement's attitude toward abortion. In 1928, Margaret Sanger, writing in favor of birth control, discussed abortion as a "desperate remedy" that greater knowledge of birth control could forestall. The argument was often used, but in this case Mrs. Sanger expands upon it for a few pages. She asserts there is no evidence that legal penalties are effective. She contrasts "scientific abortion" available to the few with the desperate "remedy of utter hopelessness." Referring to the aborted fetus as an "immature fruit," Mrs. Sanger mentions with obvious disbelief the position that abortion is sinful. From her viewpoint, "the revolting aspect of the practice is exposed in the vast number of midwives and abortionists who fatten upon the never-ending misery of mothers in bondage . . .." Women who practice self-abortion are referred to respectfully, even with a certain admiration, though contraception is seen as a better way.[183]

The 1930 International Birth Control Conference had a panel on abortion. One discussant pointed out that the only strategy for legalization that was likely to be successful had to begin by broadening medical indications: "One must start with the attainable, if one is to reach the unattainable."[184]

The Chairman, Dr. T. H. Van de Velde, remarked at the end of the discussion that the intention had been "to discuss primarily the means of *avoiding* abortion, but the discussion has apparently tended to deal only or mainly with the question of technique." He felt the two questions should not be mixed, since the birth control movement would be reproached for really favoring abortion.[185] The official policy was against regarding abortion as a method of birth control, but the movement had a dynamism of its own as this panel showed.

Some who were involved in the discussion were in Vienna a few days later for the 1930 Sexual Reform Congress. We have already discussed this meeting, but it may be interesting here to note that a sympathetic report on it was published in the *Birth Control Review* (American). The report states:

Birth control and illegal abortion were the subjects most stressed. Practically every speaker referred to them, and the demand for repeal of the law against abortion was general. Physicians, sociologists, poets were unanimous on this point. The physicians spoke of the danger to women of abortions performed by unskilled quacks, who are encouraged under the present law.

The sociologists defended the right of parents to determine the number of their children according to their desire. They pointed out that the desire of

> employers for cheap laborer leads to a disregard of individual and eugenic right. Victor Margueritte entered a plea for voluntary parenthood. Russia was frequently mentioned as having attained high ideals in regard to sexual rights.

The report of Mrs. F. Robertson-Jones, summarized above, is only mentioned.[186] The interesting news was not what the League's own representative had reported, but the drift of the Congress as a whole.

In the following year the *Birth Control Review* published an article by a Russian on the Soviet experience. Of course, it was only 1931, and the argument was how successfully "Soviet Russia fights abortion."[187]

In the 1930s the National Committee on Maternal Health, a private group which organized the more venturesome wing of the American birth control movement, began to take an interest in abortion. Dr. Robert L. Dickinson was the dedicated full-time volunteer secretary of this organization for eleven years.[188]

This Committee sponsored the 1936 volume on abortion by Dr. Frederick J. Taussig. This work, despite its defects and its age, is still something of a bible for the American abortion movement. As early as 1934 Dr. Taussig had advocated broader indications—including "social-economic" ones—for "therapeutic" abortion as a way of reducing abortion deaths. His plea was presented at a Washington conference on "Birth Control and National Recovery," sponsored by a committee of which Mrs. Sanger was President.[189]

Dr. Dickinson was the one who persuaded Dr. Taussig to elaborate on abortion in his 1936 book.[190] Later but still in the pre-World War II period both men were Vice-Presidents of the British Abortion Law Reform Association.[191] In this way contact was established between the more advanced British movement and its fledgling cousin in America.

In his book, Dr. Taussig sets out the requirements for a proposed relaxed abortion law. The law must agree with "mass opinion" as of 1935, he notes. The primary requirement is "consideration for the health of the mother, and secondarily, respect for the unborn fetus as a living organism, capable, if protected, of developing into an individual of value to the community." Other requirements are the good of the family as a whole, "freedom from religious bias," and punishment of professional non-medical abortionists. Dr. Taussig was anxious to put the physician and the hospital administration into positions of great discretion and responsibility. To achieve this he proposed that any condition that might produce a predisposition to disease as well as any condition of irresponsibility on the part of the mother (rape, under sixteen, etc.) be made indications for abortion. The check on wholesale abortion was to be simply that two physicians would be required to agree and to make the matter one of hospital record. Then, Dr. Taussig thought, "unnecessary" abortion could be curbed administratively just as other unnecessary surgery had been.[192]

Like the German law of 1933, Dr. Taussig's proposal accepted "viability" as a significant dividing line. After that line he would allow the physician to "produce premature birth and thus procure the death of the child" only to preserve the mother's life or health, or in case of "serious deformity of the child." He proposed that abortion should be subsidized for the needy. He also noted: "Some may criticize the proposed statute as a halfway measure, claiming that any attempt to limit by law the indications for abortion is futile, and will lead to a persistence of the practice of secret interruptions of pregnancy. I do not deny this difficulty." But he felt the proposal would satisfy immediate needs and that it could be modified in the light of experience.[193]

Dr. Taussig's proposal indicated that his respect for fetal life was contingent upon the potential value of the individual to the community. So far did he subordinate the individual to society that he was willing to allow the killing of deformed individuals even *after* viability. Dr. Taussig also showed blindness to the peculiarity of abortion in comparison with other forms of surgery. In suggesting that administrative controls would limit "unnecessary" abortion as they had limited other unnecessary surgery, he ignored the fact that appendectomy is necessary for health and is not normally an elective operation while most abortions are sought and performed without medical necessity, simply to prevent unwanted births.

To be fair to Dr. Taussig, we must also notice that he supported measures such as better maternity care, education, and welfare programs to decrease both spontaneous and induced abortion. He did not favor abortion on request, and he seems honestly to have believed that a relaxed abortion law could and would be enforced.[194]

Dr. Taussig's book has had an immense influence on the subsequent pro-abortion movement, though it did not immediately lead to the formation of an American abortion league. The book is still widely cited and its misinformation (examples of which we analyzed in previous chapters) and misinterpretation keep turning up in pro-abortion literature. An example of misinterpretation is Dr. Taussig's theory that the Christian attitude toward abortion heavily depended upon fear for the fate of the unbaptized child.[195] In fact, as we saw in the previous chapter, that factor had almost no role in the traditional Christian view. Abortion was never viewed as justifiable, even if the fetus could thereby be baptized.

In 1942 the National Committee on Maternal Health sponsored a two-day conference on abortion at the New York Academy of Medicine. Drs. Taussig and Dickinson took prominent part in this meeting.

For Dr. Taussig, "the purpose of this meeting should be primarily directed to drafting a model abortion law which could be accepted by all the states of this country." He cited the diversity of existing laws and their "illogical" wording as reasons against them, failing to note that the American system reserves criminal matters to the states precisely to allow diversity and that the

apparently illogical legal wording generally is perfectly sensible if it is once understood.[196]

Dr. Dickinson made a remarkable impromptu pro-abortion speech. He admitted friendly acquaintance with professional abortionists and urged that their superior technique should be available to the whole medical profession. He attacked restrictions on abortion as "formulated largely by theological dogma." He urged the law to catch up with public opinion, mentioning "multi-motherhood" and illegitimacy in this connection. He urged that the medical profession see to it that abortions should be done in good conditions, not in present "deplorable conditions, and halt the forcing of many pregnancy interruptions by unskilled hands . . ." (The competitors of Dr. Dickinson's friends?) He urged that doctors, who do not undergo the "serious condition" of pregnancy should only advise the woman, "but the ultimate decision should be hers finally." He noted that professional abortionists had supplied "specimens" to an embryologist, and observed: "With all that research material available we talk statistics, speculate on theology and morals, and do not get down to brass tacks." Dr. Dickinson's speech was applauded by the assembly.[197]

Others expressed more or less similar sentiments. Mr. Algernon Black of the Ethical Culture Society, who was the only person to present a paper on the religious or moral aspects of the subject, claimed great respect for "the Church," but added: "I cannot, however, accept the teaching that abortion is the destruction of a human being, in the same sense that murder is, and hence a crime." He said *all* life should be respected, but he compared the unborn human individual to a syphilis bug.

> So we promote the mother's life in preference to the unborn child because she is a human being in fact. The embryo, however, especially in the early months, has not the selfhood, the relationships, or the consciousness of human personality—save potentially. In our laws and our education we have to deal with the problem of abortion with that sense of values.

His conclusion was that the indications for abortion should be broadened as had been done with birth control.[198]

Mr. Black did not seem to realize that in expressing his peculiar "sense of values" he was taking as partisan a position as that of any other form of belief (or unbelief). For the biological facts do not support the view that the unborn are any less living human individuals than are those already born. His criteria of "personality" are not based on fact, but on a preference for those more like ourselves, with whom we can have social relationships.

Dr. Sophia Kleegman, still active in the pro-abortion movement a quarter-century later, argued at the 1942 Conference that indications for abortion should be broadened. Adopting without change, despite its irrelevance to the problem of abortion, a slogan of the birth control movement, Dr. Kleegman asked: "Is it right for one particular Church to enforce its tenets on members of other churches?"[199]

Dr. Anna Kross, a judge, argued for competent, legal abortion in contrast to incompetent or secret operations.[200] Mr. Raymond Squier took the same view and cited the fact that the majority of physicians "who are really deeply interested in this problem, want liberalization of sanctions for the performance of abortion by skilled and accredited surgeons.[201] He did not note that naturally more abortionists than other physicians are deeply interested in abortion.

Three physicians at the 1942 Conference expressed a higher valuation of unborn human individuals. Dr. Fred L. Adair, a leading obstetrician, noted: "As far as the fetus is concerned, of course, it is a total loss in abortion."[202] Dr. Herman N. Bundesen, a leader in public health, stated that officials in his area had done little, and added: "Yet abortions do account for needless destruction of fetal lives and for unnecessary maternal deaths."[203] Dr. Howard C. Taylor, Jr., the Conference Chairman, rejected the idea that physicians could

> . . .arrogantly claim for ourselves the right to deny the existence of such [religious and philosophical] factors in the problem. Nor am I convinced that it would be either right or wise not to recognize something peculiar, something in some measure sacred, in human life even in the two weeks old embryo. Belief in the destiny of the human race, as well as revealed religion, requires that even fetal life has a special significance that neither individual materialism nor biologic detachment should ever be allowed to obscure.[204]

Faced with such resistance, Dr. Dickinson proposed and the Conference passed two mild resolutions. The first called for "free and open public discussion of human reproduction and the problems of abortion." The other called for another meeting in the future.[205]

Thus, before the end of World War II there was no significant American pro-abortion movement. The American Birth Control League remained diffident about abortion. Perhaps this diffidence was only for the sake of public relations; perhaps it was a stand on principle, at least the public health principle that even under good conditions abortion is undesirable and that promoting any easier access to abortion would lessen the force behind the contraception movement. Unlike Britain, America during the 1930s was not exposed to the strong and dedicated ideological views of social reformers like Stella Browne and Janet Chance. Thus in America the direct influence of the Soviet experiment was slight, and even the theology underlying the Scandinavian compromise legislation made little impact in America until after Hiroshima.

Major Developments before 1959

The Abortion Law Reform Association again met October 10, 1945. Mrs. Jenkins relates that Janet Chance "once more explained our principles and advised a realistic attitude to the present state of public opinion, necessitating a slow approach to full legalization, accompanied by education and gradual

formation of a wise attitude to all that is involved."[206] This policy seems to have governed the post-war abortion movement at least until 1967.

By 1952 the British movement gained considerable respectability and strength. Conferences involving physicians and lawyers were organized. Additional cases went to court—and were ended in acquittals. The communications media began to give the movement their powerful support. As early as 1949 a physician stated at an A.L.R.A. Conference that he had certified an abortion "which in his opinion had saved a marriage"—and the police merely questioned him.[207]

The 1939 British Government report had been too conservative for the pro-abortion movement; the Bourne case had been its great victory. In 1952 an opportunity arose for a sympathetic member of parliament to introduce a bill. Professor Glanville Williams, had been enlisted into the A.L.R.A.; he drafted an apparently modest restatement of the Bourne decision which was then proposed as an amendment to the existing law. Though this bill did not make headway in Parliament, it may be of interest to look at it closely:

> For the removal of doubt there shall be added the following proviso to section 58 of the Offences Against the Person Act, 1861—
>
> Provided that (a) no person shall be found guilty of an offence under this section unless it is proved that the act charged was not done in good faith for the purpose of preserving the life of the mother; (b) no registered medical practitioner who acts with the concurring opinion of a second registered medical practitioner shall be found guilty of an offence under this section unless it is proved that the act charged was not done in good faith for the purpose of preventing injury to the mother in body or health.[208]

A number of questions come to mind as one studies this bill. First, the proponent of the bill in debate suggested that "person" in the first clause could be restricted to "medical practitioner." Was the word "person" used by design to allow for self abortion and amateur abortionists, or was this simply careless drafting? Again, why two clauses, when the Bourne case and many others already made clear the elasticity of "preserving the life of the mother"? Was this to introduce new terms with additional possibilities of elasticity? Again, was the word "sole" omitted from "for the *sole* purpose of preserving" in order to relax the law by allowing any least element of the mentioned purposes to justify abortion, regardless of the major motive of the abortionist? Again, was the expression "body and health" selected as one that would be interpreted much more broadly than appeared at first glance. Clearly it means more than *physical* health, and the courts would have been forced to give the greatest leeway to other meanings of "health" since "body" appears explicitly.

If the suspicions suggested in these questions are at all justified, Mr. Williams showed himself to be an ingenious draftsman. His greatest skill might be to drastically relax a law while apparently only formulating current practice.

In debate, a promoter of the Bill stated:

> I must make it clear from the outset that it is not the object of the promoters of this Bill to extend the practice of abortion. On the contrary, it is to confine it to cases where, in the view of competent medical practitioners, it is in the interests of the mother's health and for the prevention of injury to her body.[209]

If so, the promoters seem to have overshot their purpose, in the several ways suggested by the above questions.

Two general observations. The bill and its promoter in the debate both referred—quite naturally—to the pregnant woman as "mother." This habit of speech is hard to break, for it rests on a deep conviction that the unborn individual is in fact a *child,* a human person already really related to those who generated him not merely as to a biological source, but as to *mother* and *father.*

In many subsequent proposals for relaxation the argument was made that the proposal merely codified an existing and universally accepted state of affairs. But if the proposal extends abortion, the argument is fallacious; if the proposal really is as limited as claimed, it is unnecessary.

The uncertainty of existing law and the indignity to physicians of not having an explicit license in the statutes to induce abortion on given indications are the reasons offered for needing "a codification of existing practice." But the new proposals do not eliminate uncertainty, they merely displace it to the perimeter of an ever-widening circle within which abortion is called justifiable. As to the physicians' dignity—one wonders whether the concern to have legal justification does not betray a sense of guilt. Oftentimes we seek to assuage our merited guilt-feelings by enlisting collaborators or seeking approval for our guilty deeds.

By the early 1950s a definite movement began to take shape in America. A 1951 Maryland meeting of psychiatrists included among its participants Dr. Alan Guttmacher, a leading figure in the Planned Parenthood Association. In 1952 the American Psychiatric Association's annual meeting included a panel on abortion. One of the physicians on this panel was Dr. Harold Rosen, a psychiatrist at Maryland's Johns Hopkins Hospital. Derivative from these discussions was an ambitious symposium volume edited by Dr. Rosen and published in 1954.[210]

This was the first major American publication on abortion since 1944 when the report of the 1942 National Committee on Maternal Health Conference appeared. The book contains valuable material. However, as a whole the volume must surely be seen as an exploration toward the promotion of freer abortion. The first paper of the book opens by citing as if they were facts projections based on Dr. Taussig's unsubstantial statistics of criminal abortion.[211]

The section on "Mores, Laws, Ethics, and Religion" includes an excellent fifty-six page paper on abortion in primitive, ancient, and pre-industrial societies. Only twenty-two pages are devoted to the whole Judeo-Christian tradition, and the essays are not outstanding.[212] By presenting statements of reli-

gious positions without any analysis of their reasons, it is made to appear that all religious positions are mere taboos. Nowhere in the book is there any ethical or philosophic inquiry into key issues—e.g., "Is the fetus a person?" and: "Under what conditions would it be justifiable to kill *any person*?"

Even at the 1942 Conference the key issues had been mentioned. But the tendency of developments during the 1950s became more and more clear, as a movement took shape and thrust more and more intensely at the goal of relaxing anti-abortion laws.

Part of this movement was a simple ignoring or easy begging of fundamental issues. In 1954, Rev. Joseph Fletcher published his book, *Morals and Medicine.* Fletcher later became famous for his book: *Situation Ethics, the New Morality* (1966). An Episcopalian minister and professor of Christian Ethics at the Episcopal Theological School in Cambridge, Massachusetts, Fletcher has been active in the Planned Parenthood Federation, the Association for the Study of Abortion, and the Euthanasia Society of America.

Fletcher holds that there is no personality in the absence of freedom and knowledge. No argument is given for this position, but it is laid down as an unquestionable assumption from which he draws justification both for euthanasia and for abortion.[213] Responding to those who reject abortion, Fletcher says: "The basic difficulty in the position arises, of course, from the soul-and-life idea which attributes personal status to a pre-personal organism and assigns it human rights, including the right to rites of salvation."[214]

The last reference, to "rites of salvation," alludes to the Catholic practice of baptizing any living fetus that may be delivered. Fletcher considers the practice ridiculous, and traces it to a sixth-century author, Fulgentius, who taught that infants dying without baptism are condemned to hell in virtue of original sin.[215]

In fact, Fulgentius was not concerned with abortion.[216] Conversely, we have failed to find any argument against abortion in the whole Christian tradition that rests on the view that the aborted individual's soul would suffer eternally.

In 1956, Glanville Williams, the British professor of law who had long been active in promoting the relaxation of anti-abortion legislation, was invited to give a series of lectures at Columbia University School of Law. The following year these lectures were published as a book: *The Sanctity of Life and the Criminal Law.* The general premise of this study is that the laws against murder are justified by pragmatic and utilitarian considerations, because society would be impossible if adults could murder one another with impunity. But Williams sees no clear social necessity for laws regarding contraception, sterilization, artificial insemination, abortion, infanticide, euthanasia, and suicide.[217]

In dealing with infanticide, Williams argues that the former horror in which this crime was held was not so much that the child was deprived of life as that it was deprived of an opportunity for baptism. On utilitarian grounds,

he suggests that one may take a dim view of the killing of infants that have a prospect of a happy life, but proposes a tolerant and permissive view of the killing of defective infants.[218]

Williams devotes over one hundred pages, well over one-quarter of his entire book, to two long chapters on abortion. In explaining the historical basis of the anti-abortion laws, Williams correctly observes that "the historical intention underlying the abortion legislation, which was passed for the protection of the unborn child and not as a form of control of unregistered medical practitioners," is perverted if the legislation is used for the latter purpose rather than the former.[219]

But Williams, like Fletcher (whom he cites), accepts an altogether unfounded historical explanation of the Christian defense of the life of the unborn: "The historical reason for the Catholic objection to abortion is the same as for the Christian Church's historical opposition to infanticide: the horror of bringing about the death of an unbaptized child." To sustain this theory, Williams refers to the doctrine of original sin and cites Fulgentius, but fails to note the actual lines of argument used by Christians throughout the ages.[220]

At the same time, Williams realizes that present Catholic theological arguments against abortion do not involve any reference to baptism. In order to make the position appear to be a matter of religious dogma, Williams therefore discusses at length the question of the time of ensoulment.[221] In the course of this discussion, Williams confuses Christian moral teaching regarding abortion, which clearly did not rest on any supposition regarding the time of ensoulment, with the provisions of canon law, which took into account such suppositions and varied accordingly.

With this foundation, Williams observes that if soul is present from conception, the naturally aborted embryo also has a soul—a point no believer in soul would find difficulty in accepting. Then Williams concludes:

> There are other difficulties in the orthodox doctrine of the soul which need not detain us. For the legislator, it seems sufficient to say that theological speculations and controversies should have no place in the formation of rules of law, least of all rules of the criminal law which are imposed upon believers and non-believers alike. If we protect the fetus by law, it should be for reasons relating to the well-being of existing human beings. Can it be said, with any degree of reality, that the week-or-month-old embryo is an existing human being?[222]

Thus Williams neatly begs the issue by means of a rhetorical question. Clearly, many legislators have considered the embryo an existing human being, in the sense that it is a living individual organism of the human species—a view we have seen in chapter one is amply supported by biology. At the same time, this view requires no support by any religious concept of the soul, as Williams mistakenly believes. Many who do not believe in the soul regard the killing of infants or senile persons as murder, and one can equally regard the killing of

an infant in the uterus as a form of homicide without assuming anything regarding the soul.

Having set aside conception as an appropriate point to draw the line, Williams seeks some other time after which the law may begin to protect the individual's life. In this consideration he gives no thought to the possibility of drawing it at one week or one month—the ages he mentioned in the rhetorical question which rejected conception. Instead he suggests quickening, which is set aside as too vague. Then he suggests "viability," which he arbitrarily sets at twenty-eight weeks. This possibility is supported by the "feeling of the plain man" and by the fact that illegal abortions do not occur after this time anyway. Finally he suggests the time when the brain begins to function, which he erroneously sets at a few weeks before viability. Linking soul with mind and mind with brain, Williams concludes: "If one were to compromise by taking, say, the beginning of the seventh month as the beginning of legal protection of the fetus, it would practically eliminate the present social problem of abortion."[223]

Williams' own conclusion is that abortion prior to some such arbitrarily determined date should not be regarded as a crime.[224] It ought to be permitted on the same basis as any other operation. Yet he realizes that this is a "radical solution" and proposes limited legalization as a partial solution. The clearest case he considers to be for eugenic causes, for he does not believe that it should be permissible to breed defectives. He also believes there is a clear case for abortion resulting from rape. Other cases suggested concern incest, women having more than four children, and women deserted during pregnancy.[225]

Williams reviews the experience of limited legalization, especially in Sweden and Denmark, and notes that this approach does not solve the social problem of abortion, that illegal abortion may actually be increased, and that considerable administrative complexity is involved. Why, then, does Williams propose limited legalization as a partial solution? Perhaps because he considers that by aggravating the problem and increasing popular sympathy for abortion, the radical solution will become politically feasible. Williams does not state this, but seems to imply it when near the end of his treatment of abortion he quotes a Danish physician who credits the limited legalization with increasing desire for abortions as a method of eliminating unwanted pregnancies.[226]

Williams' book has become a chief source of ammunition for those arguing in favor of the legalization of abortion. Thus he argues that existing laws cause doubts among physicians, that they work special hardship on the poor, that they are widely violated with a huge toll of maternal deaths, that their enforcement is impossible, that their repeal would not have serious medical consequences, that repeal of these laws made by males is favored by women, that a half-conscious reason for maintaining these laws is a desire to punish incontinence, that anti-abortion laws try to "legislate morality," and that the laws themselves lead to great social evils.[227] All these arguments are set in a

context of argument which falsely treats Roman Catholicism as the sole serious obstacle to humane reform and which criticizes Catholic moral theology without ever understanding its principles. For example, in attacking Catholic casuistry, Williams takes for granted his own utilitarian ethics, according to which moral goodness depends on consequences, and utterly ignores the fact that traditional Catholic moral teaching locates moral goodness in the orientation of the person toward the good rather than in the consequences of his act as such.[228]

Spanning the period when Williams' book was written and published was the production of the volume, *Abortion in the United States,* edited by Mary Steichen Calderone. The Planned Parenthood Federation of America sponsored the conference in the spring of 1955 from which this volume developed; considerable post-conference work and editing led to its publication in 1958.[229] An introduction was written for this volume by M. F. Ashley Montagu, an anthropologist who was not a participant in the original conference. Montagu sets the tone for the volume by making a straightforward plea for relaxation of the laws against abortion: "The laws need to be brought up to date," he argues, and then points out:

> No matter how efficient the contraceptive devices we develop become, a certain number of unwanted pregnancies will always occur, and the well-ordered society will then be called upon to determine whether such pregnancies should be permitted to continue.

As criteria for decisions concerning abortion as a method of birth control, Montagu proposes that economic and emotional factors be given great weight.[230]

The organization of conference material in the volume proceeded from a consideration of abortion in the Scandinavian countries, through legal aspects of abortion in the U.S., to the medical and social aspects of illegal and of therapeutic abortion, and concluded with material on other (especially psychiatric) aspects and the relation between abortion and contraception. At a number of points in the recorded proceedings there are direct appeals for relaxation of existing laws, and a large part of the concluding discussion was devoted to the question of how far to go in urging such changes.[231] Participants in that conference apparently generally favored legalization of abortion on socioeconomic and other narrower grounds, and those taking this view are not seriously criticized. In fact, the most negative reactions recorded were to one physician who took a dim view even of therapeutic abortion.[232]

The post-conference statement, included in this volume, was supported by thirty-one of the thirty-four participants who considered it appropriate to take a position; the Scandinavians and the Planned Parenthood officials who organized the conference abstained from signing the statement. The document is a strong recommendation for relaxed laws. Illegal abortion is treated as a problem that cannot be solved with existing laws. Several suggestions are made, but

the key one is that legal commissions, including the American Law Institute "should study the abortion laws in the various states and frame a model law that could, perhaps jointly, be presented to the states for their consideration to replace existing statutes." It is suggested that the model law might include provisions permitting physicians to legally induce abortion on psychiatric, humanitarian, and eugenic indications.[233]

In effect, a somewhat inconsistent compromise had been reached, quite similar to that of Glanville Williams. The goal was the solution of the illegal abortion problem, which would be impossible unless abortion were allowed to any woman who wanted one, as Dr. Howard Taylor, Jr., a leading obstetrician and gynecologist, pointed out in the course of the discussion.[234] But the practicable immediate objective was some relaxation of existing laws, as a step in the direction of the acceptance and legalization of abortion as a means of birth control. The vast majority of conference participants accepted the inconsistency of urging limited relaxation to help solve the much larger problem. Significantly, Dr. Taylor, though a member of the post-conference statement committee, did not sign the statement.

Dr. Alfred Kinsey, who participated in the conference, subsequently undertook the editing, from his already gathered research materials, of a volume that would provide data on the outcome of pregnancies. Though Kinsey died in the interim, his associates published the volume, *Pregnancy, Birth and Abortion* in 1958. This volume supplemented that edited by Calderone, both by presenting a detailed analysis of the Kinsey materials, and by highlighting the possibility of diverse legal approaches through an appendix surveying abortion problems and legal developments in some foreign countries.[235]

The Kinsey materials cannot be projected to the population as a whole, as the post-conference committee of the Planned Parenthood conference on abortion noted. But this same committee considered that these materials had some validity as indicators of the facts concerning abortion in the parts of the population similar to those interviewed by Kinsey in education and socioeconomic status. Still, the committee concluded with regard to the Kinsey materials:

> We are, therefore, forced to conclude that the data collected by the Institute for Sex Research do not provide an adequate basis for reliable estimates of the incidence of induced abortion in the urban white population of the United States, much less in the total population.[236]

Two Proposals for Limited Legalization

The year 1959 marks a turning point in the movement toward relaxation of anti-abortion legislation in the United States. In that year the American Law Institute published a tentative draft of a revised statute on abortion to be included in this organization's "Model Penal Code." The American Law

Institute is not an official organization, but is a private voluntary society of certain jurists, lawyers, and legal scholars. The "Model Penal Code" has the force only of a considered suggestion to state legislators by a body of persons having legal competence.

The provision on abortion was drafted with explanations and supporting arguments, and presented to Institute members for discussion at their May 1959 meeting. Argument at that meeting and subsequently led to a few relatively minor changes, and the provision was finally approved in May 1962.

The proposal of the American Law Institute removes abortion from the area of homicide and includes it among "offenses against the family." The final version of the proposal begins as follows:

> Section 230.3. Abortion.
>
> (1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
>
> (2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.

Other provisions of the A.L.I. proposal require that abortion be performed in a licensed hospital, but permit exceptions to this requirement; require certificates by two physicians, one of whom may be the abortionist, but enforce this requirement only by making the absence of certification cause a presumption of unjustifiability; make a third-degree felony of self-abortion, but only if the pregnancy has proceeded beyond the twenty-sixth week; make inducing or assisting self-abortion a third-degree felony, but do not increase the penalty for abortion after the twenty-sixth week; make a third-degree felony of performing an abortive-type act upon a woman not pregnant or not believed to be so; make the merchandising of abortifacients a misdemeanor, but exempt physicians, druggists, and their suppliers; and exclude from the category of abortion those methods which "avoid pregnancy" by preventing implantation or otherwise interfering with the reproductive process before, at or immediately after implantation.[237]

We shall consider arguments for and against this proposal in chapter seven, but here it is appropriate to notice some points which clarify the magnitude of the change in previous abortion laws suggested by the A.L.I. proposal.

In the first place, the proposal would introduce into the law a positive declaration of justifiability of abortion in specified categories of cases. These categories are defined with very vague or elastic terms: e.g., "*gravely* impair the physical or *mental health*," "*grave* physical or mental *defect*," and, in the

context, "*rape.*" Unlike the existing legal situation in about half the states, the A.L.I. proposal does not require that the ground for exception be in fact present, but only that the physician believe it to be so. It would be incumbent upon the prosecution to prove beyond reasonable doubt that the physician *did not believe* any of the justifying conditions to be fulfilled. As the conditions are stated, such proof would be almost impossible, for a physician could always be supposed to have believed—even if erroneously—that there was a risk to the mental health of the mother or defect in the child that in his judgment would have been "grave." If the patient merely asserted rape, the physician could be sincere in believing her.

The requirements of performance in hospital and for certification would tend to support the justification clause in making abortion a monopoly of licensed physicians, and the provisions regarding self-abortion, the assistance of self-abortion, and the merchandising of abortifacients would have the same effect. None of these provisions would inhibit the activities of licensed physicians who practiced openly and performed abortions in accord with standards acceptable to their colleagues in any particular hospital. In other words, a law which might appear rather restrictive at first glance, in effect allows a very broad area for arbitrary judgment by licensed physicians.

Moreover, the proposal's positive declaration of justifiability would tend to make the practice of abortion in many cases an integral element of medical practice, with the results that abortion would tend to be included in programs of public health care and that physicians conscientiously opposed to abortion would become subject to legal sanctions, such as civil liability, for not performing an abortion which other physicians considered justifiable.

The provision regarding girls under sixteen years of age is obviously intended to end the social problem of illegitimate births among younger girls. The sub-section exempting methods which operate before, at or immediately after fertilization is clearly an invitation to develop pharmacological abortifacients, such as the "morning-after pill," as well as an explicit exemption of probably abortifacient techniques of birth control such as the IUD.

Many arguments have been offered for and against the A.L.I. proposal, but few alternatives have developed short of complete legalization of abortion. One interesting alternative was offered by two Stanford University law professors, Herbert L. Packer and Ralph J. Gampell, at the same time the A.L.I. proposal was published.

Packer and Gampell criticized the attempt in the A.L.I. proposal to specify conditions for justifiable abortion. Instead, they proposed to amend the law in order to eliminate criminal sanctions against physicians performing abortions in accord with certain procedural safeguards. These safeguards would be approval by the majority of a registered, five-member, hospital abortion committee; recommendation with explanation of cause by two physicians not on the board itself; signed approval by the patient and by her husband or (if a minor) by her parent or guardian; and the keeping of records by the

hospital and reporting to the State Department of Public Health. Hospitals would be eligible to register an abortion committee only if they maintained a regular obstetrical service. The five members of the committee would have to be in specified, appropriate fields of medical practice, and the same would be true of the two recommending physicians. The committee would be required to consider the *medical* advisability of the abortion, but there would be no control upon its definition of that term.[238]

This proposal would not require any hospital or physician to cooperate in abortion. It would accomplish in a more straightforward and orderly fashion the same result that the A.L.I. proposal would bring about—namely, the establishment and protection of a medical monopoly in the lucrative field of abortion. The procedural controls would inhibit the activities of physicians who are less ethical (or more greedy) than the average member of the profession. While apparently less restrictive than the A.L.I. proposal, Packer and Gampell's procedure would in fact limit legalization to hospitals having sufficient staff to organize a committee, would safeguard the rights of husband and parents of the patient, and would subject the practice in each hospital to professional scrutiny. In the short run, a proposal such as this might lead to rather slight relaxation of present practice, but as public and professional opinion came to support a more aggressive pro-abortion policy the unaltered legal regulations could support a public policy involving strong inducements to mothers—e.g., those on public welfare—to undergo "voluntary" abortion.

It is neither possible nor necessary to review in detail the movement which grew in support of limited abortion law relaxation between 1959 and 1967. In general, the existence of specific, limited objectives enabled pro-abortion forces to organize and campaign on the issues which could generate the greatest sympathy, horror, and anxiety. At the same time, support for abortion in limited cases breached the principle of the fetus' right to life, which alone is a serious obstacle to the acceptance of abortion as an individual right and as an instrument of public health and welfare policy.

The pro-abortion movement both in Britain and in America was greatly aided by the thalidomide tragedy of the early 1960s. One of the most dramatic events of that affair was the 1962 trial in Liège, Belgium, of Suzanne van de Put and others for the killing of Corinne, an infant born to the van de Puts afflicted with limb deformities due to thalidomide. The issue was squarely put by Madame van de Put who admitted killing Corrine but claimed to have acted in order to save the baby from a miserable life. The jury acquitted all defendants, thus accepting the justification offered. The general public reaction was one of satisfaction. However, a few days later another Belgian mother was taken in custody for the killing of her mentally retarded child, aged three. And the society which was moved to accept the violation of the right to life of a child already born, was even more strongly moved to doubt the right to life of children unborn.[239]

In Britain, the quiescent Abortion Law Reform Association was given new life in 1963 and 1964 in the wake of the thalidomide tragedy. In March 1964, Mrs. Vera Houghton, wife of a member of parliament who soon became Labour Minister responsible for coordinating social policy, was elected Chairman. She had been Executive Director of the International Planned Parenthood Federation for ten years, and under her competent direction the A.L.R.A. pressed toward enactment of new legislation in Great Britain. A particular element of technique became the use of carefully worded, pre-tested public opinion polls, which showed popular support for abortion in certain specific cases. The members of the Association also bombarded the public media of communication with articles and letters in support of their program.

The Association's membership was hardly a representative cross-section of the British people, since among members of the A.L.R.A. two-thirds had higher education, two-thirds were women (of whom one-quarter had undergone at least one abortion), 74 percent were atheists or agnostics, 39 percent belonged to the Family Planning Association and 57 percent were unsatisfied with the limited legalization of abortion in Britain's 1967 Abortion Act. Yet this efficient pressure group managed to create the appearance of a nearly universal public demand for limited legalization.[240]

In the United States, 1964 marked the founding of the Association for the Study of Abortion. By republishing materials favorable to abortion, supplying speakers, holding an annual forum, aiding state groups organizing to work for abortion law relaxation, and by many techniques of cooperation this organization has done much to encourage and coordinate the American pro-abortion movement. It provided a means for Dr. Alan F. Guttmacher and other leaders of the Planned Parenthood Federation to promote legalization of abortion without committing the birth control movement as a whole to abortion until there was little danger in taking this step.

During the middle 1960s, the work of the pro-abortion movement was largely one of popularization of the positions reached in the conferences and studies of the previous decade. Thus, *CBS Reports* broadcast an hour-long program, "Abortion and the Law," on April 5, 1965. Presenting some opinions against abortion, this program nevertheless was so effective in promoting the pro-abortion cause that it was subsequently widely used on film by groups favoring relaxation of the laws.

Similarly, the book *Abortion* (1966), by Lawrence Lader, a biographer of Margaret Sanger, showed in its notes and acknowledgements the help and cooperation of many of the leaders in the pro-abortion movement. Lader reduced to a smooth journalistic argument much of the mass of material favorable to abortion that had been generated by physicians and lawyers in the previous fifteen years. At the same time, Lader went beyond the generally declared position at the time he published his book by declaring that the right of every woman to legalized abortion was the final freedom implied by feminism and the birth control movement.[241]

Support developed for relaxation of the abortion laws along the lines of the limited proposal of the A.L.I. This support was evidenced both by public opinion polls and by the resolutions of important professional groups. Samples of each of these types of support may usefully be examined here, before we proceed to a review of some of the new legislation that has been passed in Britain and the United States.

One interesting public opinion survey, never published in its entirety, was conducted by the National Opinion Research Center in December 1965. A representative sample of 1484 adult Americans was asked six questions, each of which began: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion . . . " followed by one of six conditions. The conditions and resultant percentages of various responses were:

1. If the woman's own health is seriously endangered by the pregnancy. Yes, 71 percent; no, 26 percent; don't know, 3 percent.

2. If she became pregnant as a result of rape. Yes, 56 percent; no, 38 percent; don't know, 6 percent.

3. If there is a strong chance of serious defect in the baby. Yes, 55 percent; no, 41 percent; don't know, 4 percent.

4. If the family has a very low income and cannot afford any more children. Yes, 21 percent; no, 77 percent; don't know, 2 percent.

5. If she is not married and does not want to marry the man. Yes, 18 percent; no, 80 percent; don't know, 2 percent.

6. If she is married and does not want any more children. Yes, 15 percent; no, 83 percent; don't know, 2 percent.[242]

These results, if accurate, show several interesting facts. In the first place, at the time of the survey the overwhelming majority of Americans rejected legalization of the use of abortion simply as a method of birth control. In the second place, despite the emotional appeal of the rape case and the impact of the thalidomide disaster, a substantial minority rejected legalization of abortion on so-called humanitarian and fetal indications. In the third place, only the first condition received an overwhelming affirmative response, and even here there was a significant minority (26 percent) who rejected abortion.

It is also important to realize that there is a difference between the questions asked and the legal implications of the A.L.I. proposal. Expressions in the questions such as "seriously endangered," "as a result of rape," and "strong chance of serious defect" would be understood by respondents in their ordinary meaning. But the A.L.I. proposal's references to *mental* health, to statutory rape, and to substantial risk of defect in the baby open considerably wider grounds for abortion. Moreover, as we have seen, the A.L.I. proposal would legalize abortion in any case in which it cannot be proved that the abortionist does not think the specified condition is fulfilled, while the respondent is considering an imaginary or remembered case in which the condition is certainly fulfilled.

This same poll also revealed certain other interesting facts. It is often argued that abortion laws are made by men and would not exist if women legislated. Also that the issue on abortion is one that sharply divides Catholics and Protestants, the latter overwhelmingly favoring law relaxation obstructed by the former. And again, that the law favors women who are well-to-do—that poorer women want legal abortion as often as their better-off sisters, but cannot obtain it.

Now, none of these arguments turns out to be supported by the N.O.R.C. survey. A smaller percentage of women than of men approved abortion in each of the circumstances about which questions were asked. Fewer persons who attended church regularly approved abortion, whether they were Catholics or Protestants. More Catholics attend regularly, however. Poorer women are less favorable to a relaxation of abortion laws; this is shown by a correspondence between approval and increasing education, which goes with higher economic status.[243]

In the analysis accompanying her original presentation of the N.O.R.C. survey, Dr. Alice Rossi stressed that the A.L.I. proposal would not go far enough to legalize the vast majority of abortions, which are simply post-conception birth control. Though the survey showed the opposition of public opinion to legalization of abortion as a method of birth control, Dr. Rossi herself strongly defended this concept and urged those seeking abortion law relaxation to campaign for it: "The only criterion should be whether such an induced abortion is consistent with the individual woman's personal set of moral and religious values, and that is something only she can judge."[244]

In 1967 another public opinion survey was taken by the Gallup organization on behalf of the Population Council, a private organization oriented toward the promotion of birth control as an aspect of public policy. This more recent survey confirmed the general structure of information in the N.O.R.C. survey. The majority accepted abortion in difficult cases, but not as a backstop to contraception. The views of Catholics and Protestants are close, but Jews and other religious groupings are more favorable to abortion. The overall percentage approving abortion in various circumstances (the actual question was not reported) was as follows: endangered woman's health, 86 percent; rape, 72 percent; incest, 69 percent; child deformed, 62 percent; not married, 28 percent; can't afford child, 25 percent; don't want child, 21 percent.[245] The interest of the Population Council in public opinion regarding abortion was one more sign that the birth control movement was proceeding rapidly toward acceptance of abortion as a method of birth regulation. The increased percentages of those approving abortion is noted in the Population Council report as a gratifying sign of progress although the majority still rejected abortion as an elective method of birth regulation.

Perhaps the greatest impetus given to the relaxation of abortion laws along the lines of the A.L.I. proposals was the marshalling of support by the

American Medical Association and the American College of Obstetricians and Gynecologists.

The American Medical Association acted first, in June 1967, when the Association's House of Delegates passed a resolution containing a policy statement on therapeutic abortion. While acknowledging a lack of consensus in the profession and recognizing the dangers to bodily and mental health which may arise from the procedure, the A.M.A. policy accepts the desirability of broadened medical and eugenic indications. The core of the resolution is contained in the statement that the A.M.A. opposes induced abortion except when:

> (l) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother, or
>
> (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or
>
> (3) There is documented medical evidence that continuance of a pregnancy, resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient;
>
> (4) Two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing; and
>
> (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.[246]

This resolution suggests a policy stricter in several respects than that implied by the A.L.I. proposal. The A.M.A. resolution asks for "documented medical evidence" rather than mere belief. The A.M.A. supports eugenic abortion only if an "incapacitating" rather than merely a "grave" defect may occur. The A.M.A. does not accept the "humanitarian" indication as such; abortion is accepted in cases of rape and incest only if the physical or mental health of the patient is threatened. The A.M.A. suggests two consultations instead of the one accepted by the A.L.I. proposal. Finally, the A.M.A. would permit abortion only in *accredited* hospitals rather than allowing it in any *licensed* hospital, as does the A.L.I. proposal.

The statement of the American College of Obstetricians and Gynecologists was approved in May 1968. This statement requires performance in an accredited hospital, requires consent of the patient's husband or the parent or guardian of an unmarried minor, recognizes the physician's right of conscience not to perform abortions, and requires two consultations by qualified specialists. The conditions under which abortion is approved are stated as follows:

> 1. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable.
>
> 2. When pregnancy has resulted from rape or incest: in this case the same medical criteria should be employed in the evaluation of the patient.

3. When continuation of the pregnancy is likely to result in the birth of a child with grave physical deformities or mental retardation.[247]

Obviously, these conditions are less restrictive than those outlined in the A.M.A. policy; these approximate the practical force of the A.L.I. proposal. Of particular importance is the College's statement that the determination of risk to health may take into account the patient's *total environment in the present and the future.* In effect, this phrase opens the way to abortion on social and economic grounds when future hardship may effect a mother's health.

Perhaps because this phrasing approaches an approval of abortion for any good reason whatsoever, the College's Executive Board approved a separate statement issued at the same time rejecting the idea that abortion should be approved in all cases of unwanted pregnancy or as a method of population control. Special agencies are suggested that would encourage women to complete an unwanted pregnancy already in progress and provide counseling to prevent another. The medical dangers of unlimited abortion are stressed. Thus the American College of Obstetricians and Gynecologists gave strong support to the A.L.I. proposal.

The First New Laws in America

By the end of the 1968 legislative sessions, five states had passed new, relaxed laws regarding abortion. Many other states were moving toward the approval of such laws, and some of the first relaxed laws were already being criticized as too restrictive. In this fluid situation, it is impossible to give a full account here of legal developments. However, examination and comparison of the laws passed in 1967 by Colorado, California, and North Carolina, and those passed in 1968 by Maryland and Georgia, reveal a number of interesting points about the state of the legal question.

The Colorado act of 1967 is a considerably modified version of the A.L.I. proposals.[248] The most important differences are the following:

1) The Colorado act defines "accredited hospital" more strictly (following the lines of the A.M.A.) and does not admit exceptions to the requirement of performance in hospital. This restriction makes it more difficult for medical practitioners working at the borderline of legal requirements to set up an abortion mill.

2) The Colorado act requires the consent of the parent or guardian of a girl under eighteen and of the husband of a married woman. The A.L.I. does not recognize the rights of other members of the family in this way.

3) The Colorado act uses the device of a three-member board of physicians on the staff of the hospital where the abortion will be performed. An abortion is "justified" only if such a board unanimously certifies in writing that one of the conditions similar to those mentioned in the A.L.I. proposal is fulfilled. Thus the prosecution is relieved of the impossible task of trying to

demonstrate that the one performing abortion did not *believe* what he and a colleague certify.

4) The Colorado act defines the justifying conditions more strictly than the A.L.I. proposal. Colorado requires not only a substantial risk of grave impairment to the mother's health or of grave defect in the child, but a likelihood of grave and *permanent* impairment or defect. Colorado also requires the certification of a psychiatric specialist in cases of abortion on the ground of mental health and a district attorney's certificate of probable cause to believe rape or incest in cases of abortion on those grounds.

5) The Colorado act contains a conscience clause, whereas the A.L.I. proposal makes no provision for conscientious objection to abortion. Colorado hospitals are not required to establish an abortion board, and if they do not, then no abortions may be performed in them. Moreover, individual physicians associated with a hospital and hospital employees are protected from any disciplinary or recriminatory action for refusing to participate in abortions provided they state in writing their conscientious objection to abortion on moral or religious grounds.

Colorado does not require reporting of legal abortions, and so various conflicting figures were published about the effect of the new law. A survey of *reported* abortions conducted one year after the law went into effect showed a 798 percent increase over the previous year—from 51 to 407. Only 24 of Colorado's 52 eligible hospitals had set up abortion boards, and 3 of these received no applications. The women were residents of Colorado in 68 percent of the cases. In 291 cases the reason given was mental health, in 47 cases fetal indications, in 32 cases statutory rape, in 23 cases the mother's physical health, and in 14 cases "forcible" rape. More than half the women, 226, had never been married; 43 had been divorced; only 138 were married at the time they were aborted.[249]

If these figures were typical of all the legal abortions performed in Colorado under the new law, the conclusion would be that "mental health" was the chief excuse but pregnancy among unmarried women the chief reason for the legal abortions encouraged under the new law. Although the state had not become an abortion center, as some opposed to the new law had feared, nearly a third of the operations were performed on non-residents. More non-residents would have been aborted if some hospitals had not turned them away. Also, because of complications in late abortion, one of the physicians who conducted the survey after one year's experience strongly urged that legal abortion should be limited to the first twenty weeks of pregnancy.[250]

The new abortion act passed by California in 1967 culminated more than six years of efforts. In 1961, the Assembly's Committee on Criminal Procedure held hearings on, but did not report, a proposal to relax the law which consisted in a merger of Packer and Gampell's proposal and that of the A.L.I. The Committee's staff then held hearings in San Diego in December 1962, and subsequently published a lengthy report highly favorable to the proposed

relaxation.[251] In fact, the report was an *ex parte* brief for abortion, using uncritically materials as old as Taussig's 1936 study and criticizing anti-abortion arguments. Similar bills were promoted in subsequent years, the chief proponent being State Senator Anthony C. Beilenson, who is from the Beverly Hills area.

The California act of 1967 is similar to the Colorado act in basing authority to abort on the findings of a hospital staff committee in a fully accredited hospital.[252] The California act, however, does not require consent by a parent or husband, does not permit abortion on the ground of defect in the child, and has no conscience clause. Moreover, the provisions of the California act in cases based on rape or incest are quite detailed; while certification by a district attorney is generally required, a board may approve abortion without such a certificate if the district attorney does not respond within five days or if the superior court, on appeal, overrules the district attorney's judgment. Another peculiar provision of the California act is that the abortion committee must have at least two members if the abortion will occur in the first thirteen weeks of pregnancy, at least three members if it will occur between the thirteenth and twentieth weeks, and that boards with only two or three members cannot approve abortions without unanimous consent. No abortion is to be approved after the twentieth week of pregnancy, which is approximately the half-way point.

The California act is not a model of clarity. A memorandum of the California Hospital Association, issued for the guidance of its members, noted:

> Terms such as 'substantial risk' and 'gravely impair the physical or mental health' are not adequately defined, and the decision as to the proper interpretation to be placed upon such is left to the sound judgment of the medical staff and the hospital administration.[253]

The California act itself does not require reporting, but a separate resolution of the legislature requires quarterly reports of abortion data (not including identification of the mother) to the State Department of Public Health. In the first six months of 1968 there were 2,117 applications for abortion approved and 207 rejected. Of those approved 92 were not performed; of those performed 1,777 (83 percent) were on the grounds of mental health.[254] Unofficial reports suggest that the mental health excuse is being abused. A year after the new law went into effect, medical and hospital costs for an abortion averaged between six hundred and seven hundred dollsrs. Some physicians were charging five hundred dollars for the operation, with a guarantee of getting abortion committee approval; some psychiatrists were reportedly charging one hundred dollars for a single visit and a letter certifying "mental health" grounds under the law. The attempt to define "mental health" in the law would seem to indicate that candidates for abortion would also be candidates for commitment to a mental hospital, but few aborted women were in mental hospitals. Reports indicated that "mental health" was being used as an excuse for abortions really

desired because of a prospective defect in the child—a ground the new law purposely did not include.[255]

The act passed by North Carolina in 1967 accepts the grounds stated in the A.L.I. proposal as reasons why abortion "shall not be unlawful.[256] In cases involving rape, a report must have been made to police within a week after the alleged rape. However, like Colorado and California, North Carolina does not accept the physician's *belief* as a sufficient defense; rather, the excusing conditions are effective only if the physician "can reasonably establish" them. North Carolina also requires the consent of a parent or guardian of a minor or incompetent woman, or the husband of a married woman. Three physicians, not necessarily an abortion committee, must certify the fulfillment of the conditions they believe to justify abortion. North Carolina's law is peculiar in forbidding abortion to non-residents except in emergencies endangering life. On the whole, the North Carolina enactment probably is the closest of the laws passed in 1967 and 1968 to the spirit and the letter of the A.L.I. proposals.

The Maryland act of 1968 is peculiar in several important respects.[257] After efforts to change the law had failed in 1967, the Maryland legislative council, which meets between regular sessions, took up the question and proposed to repeal the criminal law against abortion, so far as physicians would be concerned, which would have left the medical practice of abortion subject to regulation only under the medical practice act. In other words, abortion would have been regarded as any other operation. A bill to this effect was introduced. However, amendments in the House of Delegates restored to the medical practice act a reference to termination of pregnancy in violation of a special, new section—based on the A.L.I. proposals—as one of the grounds on which the Board of Medical Examiners might suspend or revoke a medical license. As drafted in the House of Delegates, the special section was entirely permissive; it presented the conditions as ones under which a physician might perform abortion, but did not exclude abortion under any conditions. Thus the section could not have been violated. The State Senate amended the bill, however, so that in its final form a licensed physician, while immune from criminal penalties so long as he performs abortions only in fully accredited hospitals, is subject to possible suspension or revocation of his license unless he complies with the law's terms.

In its application to physicians, the Maryland act provides for maternal and fetal indications in language close to the A.L.I. proposal, except that the condition is supposed to exist, rather than merely being believed by the physician to exist. The clause relating to pregnancy resulting from rape and incest has been modified to exclude incest and statutory rape, and the State's Attorney's certificate of probable cause to believe that the alleged rape did occur is required. In its application to licensed physicians, the Maryland act also limits abortion to the first twenty-six weeks of pregnancy unless the mother's life is at stake or the fetus is dead. Authorization by a hospital abortion review authority is required and no provision is made for extra-hospital abortion in

emergency cases, but the structure of the hospital review authority is completely unspecified. Annual reports of relevant data are required both to the State Board of Health and to the Joint Commission on the Accreditation of Hospitals. These reports, which do not include the patients' names, are public information.

The performance of abortion otherwise than by a physician in a fully accredited hospital as well as all forms of cooperation in such an act are still forbidden under Maryland law. The offense is a misdemeanor, rather than a felony, carrying a maximum penalty of three years in prison and a five-thousand-dollar fine.

The most remarkable feature of the Maryland law is its conscience clause—or, rather, section containing three clauses:

> No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.
>
> No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the state or any person.
>
> The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits.

The purpose of this rather complex clause is to try to insure that no one will feel compelled to perform or approve any abortion. No moral or religious ground is needed, and in this sense it is not a matter of "conscientious exception," but rather a question of "insurance of full voluntariness." The exclusion of civil liability was included especially because medical abortion was legitimatized—so far as criminal law is concerned—and placed under professional regulation alone. If abortion is acceptable medical practice, physicians are in danger of being held in default of their duty if they refuse to perform it, hospitals are in danger of being compelled to allow it, and clients of public welfare as well as inmates of state institutions are in danger of being pressured into consenting to it.

The Georgia act of 1968 permits an exception to the criminal law forbidding abortion in cases where a licensed physician performs it "based upon his best clinical judgment that an abortion is necessary" for reasons somewhat narrower than those stated in the A.L.I. proposal.[258] The ground of maternal health is limited by the phrase "would seriously and permanently injure." The ground of fetal defect is limited by the phrase "grave, permanent, and irremediable." Incest as a cause of the pregnancy is omitted from the list of grounds.

The procedural safeguards in the Georgia act also are somewhat stricter than in the A.L.I. proposal. The woman and physician must certify she is a resident of the state. The physician's judgment of grounds must be supported by that of two consultants, and all three must examine the woman separately. The majority of a hospital abortion board of at least three members, not including the physician who performs the abortion, must approve in advance, and the operation must be performed in a fully accredited hospital. Abortion on the ground of rape requires certification by a legal officer that there is probable cause to believe it occurred. The Georgia law requires full disclosure to the Director of the State Department of Public Health, who is to keep all records confidential.

The "conscience clause" in the Georgia act is similar to Colorado's: hospitals need not set up abortion boards and physicians or employees in hospitals allowing abortions can refuse to participate with protection from civil liability as well as from recriminatory and disciplinary action.

A peculiar provision of Georgia's act permits a solicitor general or anyone who would be related to the unborn child within the second degree of consanguinity to petition the Superior Court of the county where the abortion would be performed for a judgment declaring that the abortion would violate a consitutional or other legal right of the fetus. In a case of this sort, the pregnant woman and the physician who would perform the abortion will be respondents, and a judgment in the fetus' favor would include a court order forbidding abortion. This clause appears to be an interesting effort to meet the argument that abortion law relaxation violates the rights of the unborn.

Compared with the five new abortion acts of 1967 and 1968, Mississippi's revision of its law in 1966 was a minor amendment.[259] Abortion is permitted if the pregnancy is caused by rape as well as by necessity to preserve the mother's life. Maternal health and fetal defects were not added as distinct grounds for excusing abortion.

Comparing the new abortion laws, we may note that they are hardly uniform and that they are considerably less clear than the laws they replaced. Generally the A.L.I. proposal that legality be based on the physician's *belief* that there is a justifying condition has not been accepted; state legislators have sought a more objective criterion. Most of the laws also incorporate some form of abortion board and provide a procedure for certifying by a law officer in cases involving rape. None of the laws can be expected to make any significant inroad into criminal abortion; rather, the medical profession's monopoly on legal abortion is confirmed, and the size of this lucrative part of medical practice somewhat enlarged.

Maryland's law, which removes the medical abortionist who works in hospital from the scope of criminal law, probably is the most radical. It is hard to believe that the State Board of Medical Examiners will suspend or revoke a license for the performance of an act in itself not criminal unless the medical abortionist ignores procedural requirements or makes a regular practice of

abortion without any apparent reference to the conditions specified in the law. In other words, in practice the Maryland law will be as lax as the consensus of medical opinion permits.

The New Law in the United Kingdom

The 1967 abortion act, passed by Parliament for England, Wales, and Scotland, culminated concerted efforts extending over many years. Mr. Kenneth Robinson had made the first serious effort in 1961, when he promoted a bill rather similar to the A.L.I. proposal. The effort to relax the law was not repeated for several years. However, in the fall of 1964 a Labour Government came to power, and at that time Mr. Robinson became Minister of Health while Mr. Douglas Houghton, whose wife was to be active in the Abortion Law Reform Association, became coordinator of social services.

In November 1965, a bill was promoted in the House of Lords by Lord Silkin, which contained a social clause permitting abortion if the physician believed a patient's health or social environment made her unsuitable to take on the responsibilities of caring for the child. This clause was deleted before the bill was passed by the Lords in March 1966. The bill did not come under consideration in Commons because Parliament was dissolved. Meanwhile, a bill had been promoted in Commons that was rather similar to the American A.L.I. proposal, but it did not make significant headway.[260]

About the same time, in October 1965, the Board for Social Responsibility of the Church of England published its booklet: *Abortion: an Ethical Discussion.* The conclusions of this discussion were based on the concept that the unborn is neither wholly excluded nor wholly included in the area of human life. It is "potential life," to be protected in general but not in exceptional cases where the life or well-being of the mother is seriously threatened. On this principle, a law permitting abortion to protect the mother's life, and present and future health in view of all actual and probable future circumstances was considered acceptable. Abortion precisely for eugenic or humanitarian (rape) reasons was excluded, and the practice of abortion for socioeconomic reasons or on demand was also ruled out.[261] In the House of Lords sit Bishops of the Church of England who tried to defend this compromise position in later debates. It is interesting to compare the abortion act passed in 1967 with it, and to note how little influence the Church of England's position had on the outcome.

In July 1966, Mr. David Steel, a liberal (third party) member of Commons promoted a bill somewhat similar to that which Lord Silkin had previously piloted through Lords. Mr. Steel could not have proceeded far except that his effort was unofficially supported by the Labour Party Government, which provided the time needed to overcome a filibuster and which apparently provided the political pressure on the Lords that prevented moderating amend-

ments from being incorporated in the bill after it finally passed Commons in July 1967.

From the first, Mr. Steel's bill contained a social clause justifying abortion if a woman's capacity as a mother would be severely overstrained if she had a child (or another child). The provisional debate on the bill in 1966 lasted nearly five hours and ended with a vote of 223 to 29 in favor of sending the bill to committee for reworking with a view to approval.

Encouraged by the extent of support, promoters of the bill made few compromises in the committee stage. One of the few was the addition of an extremely weak "conscience clause." When the bill was taken up again in June and July 1967, the opponents' effort to obstruct it by filibuster was defeated by the scheduling of night sessions, the last of which was open-ended and lasted more than thirteen hours.

After passage by Commons, consideration in Lords at first led to some significant and moderating amendments, the most significant of which was omission of the social clause as it then stood. However, under threat of retaliatory action by Commons, the Lords backed off. When the bill was taken up again in October, after their summer recess, the Lords restored the social clause. What was more significant, perhaps, is that with almost no discussion the Lords inserted a formula making explicit the degree of risk required to justify abortion: risk in continuing the pregnancy "greater than if the pregnancy were terminated." The proponents of the bill in Commons had no difficulty accepting this terminology, which makes the justification of abortion depend on the same sort of medical evaluation that controls any other surgical procedure, since no surgical operation is justified unless the risk of performing it is less than the risk of omitting it.[262]

The final text of the abortion act of 1967 became law with the Royal assent on October 27, 1967.[263] It went into effect six months later. Formulated as an amendment to the existing anti-abortion law, the main provisions are expressed as follows:

> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or,
>
> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> (2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Other provisions require that the abortion be performed in a government approved hospital, except in medical emergencies, when the requirement of a second opinion also is waived. Reporting to a government agency is required. The law also applies to U.S. military hospitals, to physicians with the American forces, and to pregnant women who would normally be eligible for treatment by such physicians or in such hospitals. By keeping in force the Infant Life (Preservation) Act of 1929, the 1967 Abortion Act limits abortion to the first twenty-eight weeks of pregnancy.

The "conscience clause" frees anyone who conscientiously objects from legal duty to participate in abortion, but under two conditions. First, in any legal proceedings the burden of proving conscientious objection rests on the person claiming it. Second, the exemption does not apply if the abortion is "necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman."

The central provisions, quoted above, do not include the origin of pregnancy in rape as a separate ground. That is because the proponents of the bill agreed this ground was covered by the broad provision referring to the woman's health. This provision is so broad that one might argue that every pregnancy meets the test provided abortion is expertly performed in the early weeks, since such abortion has been claimed to have less inherent risk than natural childbirth.[264] In any case, two physicians should always be available to give the opinion that the medical risks favor abortion, and that is all the law requires.

The additional ground allowing the health of existing children to be taken into account is the final form of the "social clause." Actually this clause and the separate "eugenic clause" need hardly be invoked, for they would only come into play when the danger of abortion to the mother was significant—e.g., if probable defect in the child were learned of late in the pregnancy. The "social clause" does, however, provide an impetus to the use of abortion to restrict the size of families living in poverty or in marginal economic circumstances. The social problems unsolved by the welfare state's economic planners will be nipped in the bud by its national health service. The added provision indicating that the woman's "actual and reasonably foreseeable environment" may be considered in determining risk also lends impetus to abortion on social grounds.

The "conscience clause" obviously rests on the assumption that abortion is to be considered equivalent to any other operation as part of regular, medical practice—which, as we have seen, is nearly the practical effect of the act. For although consultation and reporting are required in cases of abortion, and not for all operations, the criterion of weighed risk is made the same for abortion as it would be for any surgery. In this situation, participation in abortion becomes the normal duty of medical personnel. Although conscientious objection is allowed for, it is treated as a merely tolerable exception to duty, and the burden of proof is therefore placed on the one claiming a conscientious

objection. Instead of physicians facing a threat of criminal law for performing abortions, the new act places them in jeopardy of civil suit for refusing to perform them. And while the erstwhile criminal abortionist was at least given the benefit of the law's presumption that he was innocent until proven guilty, the present conscientious objector to abortion, who may well regard it as the moral equivalent of murder, is assumed to be guilty of dereliction of duty unless he can prove his excuse. And no excuse is permitted in the type of abortion that the consensus of the medical profession regards as truly warranted on strict medical grounds.

The Abortion Act of 1967 went into effect April 27, 1968. Early reports indicated that abortions might be expected to total 30,000 to 35,000 in the new law's first year, and that about 40 percent were being carried out in private nursing homes rather than in National Health Service Hospitals. Public facilities were over-crowded; private physicians were receiving many foreign candidates for abortion as well as some of the overflow from the Health Service in addition to their normal practice.[265]

The *New York Times* reported the consequences after the law was in effect for only four months. The Abortion Law Reform Association was promoting the establishment of abortion clinics to handle the mounting demand. At the same time, one London specialist was taking forty cases per week and charging a standard fee equivalent to 360 dollars per case. Allowing two weeks each year for vacation, that would amount to 720,000 dollars annual income, although the physician in question said he did some abortions for nothing and charged a minimum fee in other cases. As in California and Colorado, the commonest excuse in London was the mother's mental health, and the controversial social clause was, as expected, little used.[266]

Abortion on Demand—Japan's Experience

Faced with the problems of criminal abortion and population control, Japan's Diet in 1948 passed the Eugenic Protection Law. Setting aside the previous criminal law on abortion, this new law as amended in 1952 permits designated physicians to perform abortion at discretion without consultation when they believe the mother's health might be affected seriously by pregnancy or delivery from either the physical or the economic viewpoint. The operation need not take place in hospital, but the consent of the woman and spouse is required. Operations are supposed to be reported to the government.[267]

More than 19,000 physicians were designated by local medical associations to perform abortions.[268] The number of live births declined from 2,696,638 in 1949 to 1,730,692 in 1955—a decrease of 965,946. At the same time reported abortions increased from 246,104 in 1949 to 1,170,143 in 1955—an increase of 924,039. By 1965 live births had rebounded slightly to 1,818,429 while reported abortions had dropped off from the 1955 peak to 843,248.[269]

The correspondence between the reported decline in births and increase in reported abortions is a matter of objective statistics. But this correspondence in reported figures suggests—without demonstrating—that the rate of illegal, and hence unreported, abortions may not have been altered by the extreme relaxation of the law. For since the birth-rate is not affected whether an abortion is performed *legally* or not, the rapid drop in the birth-rate suggests that the increase in legal abortions was really an increase in abortions as such—that the rate of illegal abortions may have remained about what it had been.

Thus Gebhard and his colleagues, who were hardly unsympathetic to legalized abortion, report with apparent acceptance the estimate that there remain 1,000,000 illegal abortions per year in Japan.[270] Dr. Wesley T. Pommerenke, who had recently visited Japan, reported to the 1955 Planned Parenthood Conference on abortion that the man who licenses abortionists in Yokohama told him between one-half and two-thirds of the abortions performed there were unreported.[271] A statistical study of reported figures from various prefectures also supported the view that there remained as many illegal as legal abortions under the relaxed law.[272]

A 1965 survey conducted by the Japanese association for maternal welfare revealed something about the grounds on which legal abortions were performed. According to the reports of physicians, 632 per thousand were for socioeconomic reasons, 265 per thousand were for medical reasons, 95 per thousand were because the pregnancy resulted from illicit relations, only 5 per thousand were because of "eugenic" reasons (fear of fetal abnormality); and only 3 per thousand because of rape.[273] The stated rate of "medically" induced abortions probably should not be taken seriously. Dr. Pommerenke reported that if a medical indication were asked for, it was sufficient that the woman say she had been vomiting, and this was regarded as a toxemia.[274] These statistics on the grounds for which abortions are performed therefore actually reveal the extent to which abortion is simply an alternate method of birth control, a point further borne out by the studies of those who have tried, with only limited success, to introduce contraception to Japanese families as a substitute for abortion.[275]

It is very difficult to tell how great are the unfavorable medical consequences of abortion in Japan. Gebhard and his colleagues report a variety of studies showing rates of "slight or severe complications" ranging from 8 percent to 47 percent.[276] Dr. G. Nozue, speaking at the 1967 Conference of the International Planned Parenthood Federation, cited four studies to show that the physical effects of legal abortion were declining. However, the two most recent of the studies he cited were from 1954. One of them showed a mortality rate of 87 per 100,000; the other, only 7 per 100,000. However, the latter study also showed a rate for direct injuries—e.g., perforation of the uterus, laceration of the cervix—of 3,800 per 100,000; the former study showed the much lower rate of 120 per 100,000.[277]

Given such variations, one wonders if any of the figures are of real value. One thing is certain, however, and that is that Japan's 1965 maternal mortality rate of 3.2 per 100,000 females of all ages compares unfavorably with the U.S. mortality rate of 1 per 100,000. At the same time, while the Japanese male suicide rate was only slightly higher than that in the U.S. (17.3 compared to 16.1), the female suicide rate was more than twice as high in Japan (12.2 in Japan; 5.9 in the U.S.). Of course, there are many factors involved in the suicide rate, but it may be significant that the peak years for American women to commit suicide are 40–49 years old while for Japanese women the highest numbers of suicides are in the 20–29 age group.[278]

Perhaps the largest segment of bad effects are accounted for by illegal abortion, which—we we have seen—still flourishes despite the introduction of abortion practically on demand. But that only raises the question why the Eugenic Protection Law has not succeeded in wiping out illegal abortion. That was, after all, the primary excuse for passing it. The answer seems to lie in the economics of the medical profession. On the one hand, physicians themselves may find it more profitable to engage in illegal abortion, because of income taxes. On the other hand, non-designated physicians, midwives, and simple amateurs still find it profitable to try to undercut the qualified practitioner.[279]

It has often been said that abortion succeeded in cutting population in Japan because the Shinto and Buddhist religions do not reject it; indeed, in the past infanticide (*mabiki,* literally "thinning") was an old accepted means of limiting family size.[280] Nevertheless, a 1965 survey, reported at the 1967 Conference of the International Planned Parenthood Federation, indicated that 35.2 percent of those who had an abortion were sorry for the aborted baby; 28.1 percent said they felt guilty; only 18 percent were completely indifferent. A small survey among college girls, reported at the same meeting, showed that 25 percent expressed no view on the law permitting abortion and 25 percent expressed a view in line with the existing law, but 50 percent felt the law should be changed to forbid abortion except for medical reasons.[281]

By the mid-1960s, an organized effort to tighten the abortion laws had developed. Led by Mr. Shinozaki, Chief of the Section on Quality of Population of the Japanese Welfare Ministry, the Movement to Treat Life Respectfully was uniting the efforts of Buddhists, Shintoists, Christians, and others who were dissatisfied with the lax abortion law. The members of one religious group, the Seicho no Ie, were especially active; in 1964 they collected 1,800,000 signatures on a petition condemning abortion and seeking a change in the law, and members of this group prodded the relatively insignificant Catholic Church in Japan to join the fight against abortion.[282]

While the law has not been tightened, reported statements by government officials indicate that the attitude toward abortion has shifted toward the negative. For example, the Minister of Welfare has been reported as calling abortion an "evil practice" that is "eroding the physical and moral health of

our nation." The Chief of the Children's Bureau of the same ministry has alleged that in an "abortion age" children who do manage to get born experience a lack of parental love, with bad psychological and social effects.[283]

Perhaps behind the concern of government officials has been long-term implications of the drop in birth-rate following legalization of abortion on demand. The net reproduction rate is a gauge of the extent to which a woman is providing her own replacement in the next generation. In the pre-war years, Japanese women were more than replacing themselves, and the population was growing. The same was true immediately after the war. But with the legalization of abortion the net reproduction rate began to fall, and in 1956 it fell below unity—that is, below the level of replacement in the next generation. And the rate continued to fall during the late 1950s and into the 1960s. Although the population was still increasing, this was a result of a higher birth-rate in the previous generation together with a declining death-rate. As a result, the entire population was growing older and projection of the effect of the depressed reproduction rate indicated the population would dwindle away in three to four centuries.[284]

Of course, such a projection is no more valid than the oversimplifications that try to lend substance to the "population explosion" by projecting upward trends for several generations. However, the Japanese themselves were sufficiently disillusioned that Dr. Yoshio Koya, Chairman of the Western Pacific Division of the International Planned Parenthood Federation, presented a paper before the 1965 World Population Congress as a warning to those who "would legalize abortion, or enlarge the conditions under which the operation may be permissible." He pointed to the persistence of the abortion habit. The report of the Church of England's committee, while it did not reject abortion absolutely, remarked in the light of Japan's experience:

> To build up a habit of mind which regards abortion lightly as an easy remedy for an adverse situation, personal or social, might be, in fact, to do people and society a grave disservice by addicting them to another social disease.[285]

Considering the great differences between Japanese and English-speaking societies, we cannot judge the extent to which the Japanese experience can provide a forecast of what we might expect if abortion on demand were legalized here. However, the possibility that a very large number of legal abortions might be added to the present quantity of illegal abortions should not be simply brushed aside. The English-speaking countries have no tradition of infanticide or socially accepted abortion as methods of population limitation, as Japan did. Moreover, contraceptive methods of birth control, especially the newer methods, are much more established in the English-speaking countries. However, our present illegal abortions arise most heavily from the same social groups that practice contraception most enthusiastically. And in arguing that abortion should be socially acceptable, the new morality is undermining the western traditions that previously rendered both abortion and infanticide unacceptable as means of family limitation.

Abortion on Demand as the Legal Goal

Undoubtedly there are proponents of relaxation of the abortion laws who aim at nothing more than legalization of abortion in a few difficult cases that have gained widespread sympathy. In general, however, the goal of the campaign to relax abortion laws is the elimination of these laws. Limited relaxation is a step toward the final goal.

Even if unlimited abortion were not the objective reformers had consciously in view, the partial relaxation of the laws would strongly tend toward the ending of all restrictions. On the subjective side, once abortion is accepted psychologically as a common, if unpleasant, medical practice and accepted socially as a decent and conventional solution to certain problems, there is little difficulty in extending the grounds on which abortion is permitted legally. On the objective side, once the principle by which limited abortion is justified is accepted, there is no barrier to unlimited abortions that a libertarian society will accept. For the justification of relaxed laws permitting limited abortion is based on the negation of the right of the unborn to life, and if there is no such right, then there is no substantial public interest in limiting abortion, unless that interest be in medical safety or population maintenance. But a libertarian society will provide for these factors by regulating medical practice and by incentives to have sufficient children rather than by prohibiting abortion.

The fact is, however, that most who advocate relaxation of abortion laws are actually aiming at unlimited abortion—that is, they wish abortion to be regarded as any other elective surgery, to be performed at the woman's request by any competent physician with no requirements about grounds, consultation, reporting, nor any other restrictive requirement.

This position has been promoted most vigorously for the longest time by the Society for Humane Abortion, Inc., a San Francisco based organization founded in 1965 by Patricia M. Maginnis. Newsletters of this organization tell of its activities in support of elective abortion. The new California law was bitterly attacked under the headline: "Bielenson Bill passes—Public Is Deceived." Since only a small percentage of all abortions would meet the law's standards, the Society for Humane Abortion regarded it as highly unsatisfactory. Fearing that this limited relaxation of the law would lessen pressure for total permissiveness in the abortion field, the Society condemned the new law as deceitful and dangerous.

Miss Maginnis herself has gone even further than her first organization, for she has distributed lists of abortionists (mostly in Mexico) and has taught groups of women how to perform self-abortion. She and a co-worker set up a second organization, Association to Repeal the Abortion Laws, which opposed the Bielenson bill and which raised funds to pay legal expenses arising from the trial of Miss Maginnis on criminal charges.

Another California organization, Legalize Abortion, is based in Los Angeles. This group also opposes any limited relaxation. Elaborate directions for setting up a local committee to legalize abortion have been distributed; a voter initiative is the proposed method for repealing the abortion laws. This organization makes a very blunt request for contributions, and asks contributors to designate which of several dozen alternative projects is to be supported. In this way contributors are said to make the organization's policy decisions.

Such organizations may seem far removed from the American Law Institute, but the differences are more with regard to strategy than with regard to ultimate aim. In the commentary to the A.L.I. proposal, the arguments given in favor of abortion extend far enough to justify all illegal abortions if any are justified. The only argument given against indiscriminate abortion is physical and psychic health hazards, but this argument is negated in a footnote by a quotation from Glanville Williams.[286] Prof. Louis B. Schwartz, a co-reporter of the A.L.I. proposal, stated: "In recommending a moderate liberalization, the American Law Institute simply took realistic account of the intensity of feeling on this issue. The results of experience with the new law can shape later legislative action."[287]

Mrs. Alice Rossi, in reporting the 1965 survey of the National Opinion Research Center, took a dim view of the A.L.I. proposal as a goal, but a more favorable view of it as a step toward full permissiveness. She pointed out that while abortion is generally simply a birth control measure, neither the A.L.I. proposal nor public opinion was ready to approve abortion except for limited conditions that involve something more in the way of an excuse than mere birth control. Yet restrictive legislation, as Scandinavian experience proves, does not solve the problem of illegal abortion. Mrs. Rossi's position is that abortion should be done at the woman's request, regulated only to the extent that other surgery is regulated by medical practice laws. She also believes that taking this position, even though it is contrary to public opinion, is the best way to win first-step legislation as a compromise, while holding to the goal of abortion as a feminine right necessary to backstop contraceptive failures.[288]

Mrs. Harriet Pilpel, an attorney who has served as legal counsel for the Association for the Study of Abortion and as a director of the American Civil Liberties Union, takes a very tolerant attitude toward all proposals to relax abortion laws. She has testified on behalf of limited relaxation before hearings of the New York State Assembly. She favors regarding abortion as any other surgery. Her peculiar contribution has been to urge that an effort be made to relax the laws without legislative action by medical practice and judicial interpretation. Arguing by analogy with Britain's Bourne case and with various American cases that ended barriers to contraception, Mrs. Pilpel points out that physicians who operate openly with the support of medical colleagues have not been prosecuted, though they often violate the letter of the law. If this practice were pressed far enough, prosecutions might result, but the laws

might then be greatly relaxed by interpretation or even nullified by a judicial declaration that they are not constitutional.[289]

The year 1968 marked a turning point in the pro-abortion movement, for during this year a number of powerful, nationwide organizations spoke out in favor of completely free abortion. The American Civil Liberties Union, obviously partly influenced by Mrs. Pilpel's advocacy of the position, argued that existing laws violate constitutional rights. The A.C.L.U. statement (March 25, 1968) asserts that the woman and any licensed physician have a right to make the abortion decision up to the time the fetus becomes viable. On this basis the A.C.L.U. asks that all laws forbidding a licensed physician to perform an abortion be abolished.[290]

Before the year's end, such varied organizations as the Unitarian Universalist Association, Planned Parenthood–World Population, and the American Public Health Association had fallen into line with the A.C.L.U. position.

For Planned Parenthood–World Population, the endorsement of abortion "as a back-up medical technique to omitted or failed contraception" marked a reversal of the traditional declared attitude of the organized birth control movement. Basing itself on the premise that "it is the right and responsibility of every woman to decide whether and when to have a child," the Planned Parenthood–World Population statement concludes by recommending "the abolition of existing statutes and criminal laws regarding abortion, and the recognition that advice, counseling, and referral with regard to abortion is an integral part of medical care."[291]

The American Public Health Association statement is similar in arguing from the acceptance of birth control to the need for abortion. However, the A.P.H.A. statement also alludes to "adverse health effects of illegal abortion." Moreover, the assertion is made with regard to birth control: "This personal right has been supported and enhanced through governmental action at all levels."[292] Though not explicitly applied to abortion, the reference to governmental action in this context is a portent of what to expect if abortion is completely legalized.

Also during 1967 and 1968 there were several large conferences on abortion and at each of them there were proponents of abortion on demand.

The conference in Washington, D. C., in the fall of 1967 sponsored by the Harvard Divinity School and the Joseph P. Kennedy, Jr. Foundation was not on the whole oriented toward elimination of abortion laws. If anything, this conference tended toward some sort of compromise, for it brought together a good deal of factual information and diverse viewpoints in an irenic atmosphere.

However, the Rev. Robert F. Drinan, S.J., Dean of the Law School at the Jesuit operated Boston College, presented a paper at the Harvard-Kennedy Conference in which he espoused the position that legalization of abortion on request during the first twenty-six weeks of pregnancy would be preferable to legalization along the lines of the A.L.I.'s proposals. In taking this position

Drinan reversed his views of less than a year before when he had urged a strategic compromise permitting limited legalization as preferable to general legalization.[293]

The reason given for the reversal was that Drinan had come to believe that the law's purity in respect for life would be more seriously tainted by conniving with the decisions of parents and physicians in a procedure of "justified" abortion than by withdrawing all protection from the unborn (until the end of twenty-six weeks of pregnancy).[294]

At an April 1968 conference at University of Chicago, a number of speakers favored repeal of all abortion laws. One presentation along these lines was made by Rev. Don C. Shaw, an Episcopal Canon and director of Episcopal Charities in Chicago. Canon Shaw admitted that the A.L.I. proposal served a purpose in opening public discussion and debate, but he pointed out the fallacy of the position: "Those espousing the legalizing of 'therapeutic' abortions apparently *assume* that abortion is *bad,* but they fail to explain the nature of the evil." He explained that this position is really a matter of strategy and that most of its proponents "privately espouse the repeal position." Canon Shaw also argued that the medical profession is inconsistent in approving abortifacient devices such as the IUD while advocating legalization of abortion only on limited grounds.[295]

At the Colloquium on Abortion held at Louvain University, Belgium, in May 1968, few who declared a position on the legal issues favored abortion on request. However, a lawyer, André Perreault of Montreal did argue in favor of laws that would permit women to defend their bodily integrity and exercise responsible parenthood even to the extent of allowing abortion of non-viable fetuses, which M. Perreault considered only potentially human. Though not favoring abortion as such, he considered it necessary that the law adapt to the conditions of the time.[296]

Another international conference was held at Hot Springs, Virginia under the sponsorship of the Association for the Study of Abortion in November 1968. A number of participants, perhaps the majority, favored complete legalization. John D. Rockefeller, 3rd, long a supporter of a public policy of contraception, was keynote speaker at this conference. Mr. Rockefeller urged the morality of abortion as a lesser evil—particularly as a lesser evil than the unwanted child.

With regard to the law, he outlined two approaches. One, modification, he deemed acceptable only if the mental health provision is broad enough to allow abortion whenever the pregnancy causes serious mental distress. Among factors that cause such distress he listed "the prospect of illegitimacy, the size of the family, the health of existing children, the economic condition of the family." The other approach, outright elimination of abortion laws, is the one Mr. Rockefeller favored, because "it would give us a true basis for eliminating the social evils I have discussed."[297]

In February 1969 another conference was held in Chicago to organize a new National Association for Repeal of Abortion Laws, to be headquartered in New York. Planned Parenthood–World Population, American Civil Liberties Union, American Public Health Association, American Baptist Convention, and the Unitarian Universalist Association were among the approximately forty organizations that sent over three hundred representatives to this meeting. The conference resolution argued from the premise "that to compel a woman to bear a child against her will violates her basic human rights" to the conclusion that abortion should be regarded by the law as any other medical procedure.[298]

Abortion and Public Policy

A number of signs have appeared which indicate that repeal of abortion laws would be quickly followed by the use of voluntary—and perhaps even compulsory—abortion to fulfill the goals of public policies of population control and selection.

For example, an entire issue of a periodical published by the Population Council, of whose Board of Trustees John D. Rockefeller, 3rd is Chairman, was devoted in February 1969 to the topic, "Beyond Family Planning." The question treated was what is to be done to limit population "beyond present programs of voluntary family planning." Among proposals considered are liberalization of induced abortion and non-voluntary abortion of all illegitimate pregnancies. In the evaluation of the proposals, it is concluded: "Legalization of abortion would almost certainly have a measurable effect, but acceptability is problematic." However, it is also pointed out that moral tolerance of proposals is relative to the view people take of the seriousness of the situation. Moreover, there is a special value in proposing extreme measures, since less extreme ones then seem moderate: "Finally, it is also worth noting that more extreme or controversial proposals tend to legitimate more moderate advances, by shifting the boundaries of discourse."[299]

A political-action-oriented propaganda organization, Campaign to Check the Population Explosion, has made extensive use of newspaper advertisements with the slogan: "Famine stalks the earth." In a pamphlet sent to those who write for further information, this organization includes abortion as a method of population limitation. Its effectiveness in Japan and the Communist countries is pointed out, and Dr. Tietze's opinion that legalized medical abortion is safer than childbirth is balanced against the dangers of secret abortions.

Interest in the possibilities of abortion as a birth control technique is not limited to private organizations. A 1966 advisory report prepared for the Children's Bureau of the U.S. Department of Health, Education and Welfare by researchers of the Hudson Institute called attention to abortion: "It should also be mentioned that abortion and sterilization are also means of birth control. Therefore, any liberalization of abortion or sterilization laws or prac-

tice might have an appreciable effect on the unwanted birth rate."[300] The report is optimistic that with expanded government birth control programs "a large segment of the ineffective planning group among the poor may soon be reached."[301] Although no definition of "unwanted birth" is given, the report estimates that in 1960 seventeen percent of white births and thirty percent of non-white births were "unwanted." But with more effective birth control, by 1975 "a further reduction in the proportion of children of uneducated mothers, and in the proportion of nonwhites in the population, can be expected."[302] The report points out that an anti-implantation (abortifacient) pill probably will be the most significant new birth control method of use in the reduction of illegitimacy.[303]

The Hudson Institute report did not *advocate* abortion as a method of government sponsored birth control; the report merely pointed to this possibility. By the fall of 1966 the Department of Health, Education and Welfare was ready to begin sponsoring a series of regional meetings on planning. The first such meeting was a Conference of Appalachian States at Roanoke, Virginia. Dr. Robert W. Jessee, Director of the Division of Local Health Services of Virginia's State Department of Public Health, spoke at this meeting. He advocated legalization of abortion as "a logical and necessary expansion of the thriving program of population control."[304]

By 1968 there were increasing signs of government interest in abortion as a method of birth control. A striking example was a paper on abortion written by Dr. Alice Rossi for the U.S. Department of Labor's Citizens' Advisory Council on the Status of Women. This paper reached a conclusion, publicized as the recommendation of the Council's task force on family law and policy, which predictably coincided with Dr. Rossi's private view—that laws making abortion a crime should be repealed. The basis of this conclusion is that abortion is an alternative method of contraception or at least a necessary backstop to other contraceptive devices. Legalized abortion is promoted as a desirable public policy on the grounds that it will help limit population, that legalization will prevent the bad medical consequences of illegal abortion, and that uninhibited abortion is needed to fulfill a woman's right to control her own reproductive behavior. The political strategy urged by Mrs. Rossi would depend entirely on the claim that abortion is a "fundamental human and constitutional right" and that there should therefore be "no pressure or control from government to either have or not to have an abortion."[305]

There is some reason to doubt that if abortion were legalized there would be no pressure to use it. Mrs. Rossi herself cites the opinion of demographers who hold that it is *wanted* children, not only unwanted ones, who constitute "excess" population. When government sponsored contraception programs were going into effect, many assurances were given that the service would be strictly voluntary on the recipient's part. Yet during a few months in 1967 one newspaper, *The Washington Post*, which is very sympathetic to such programs, reported abuses on three distinct occasions. A feature story on District of

Columbia birth control programs warned that "some well-meaning poverty program and welfare workers are most guilty of" pressuring people "to get birth control devices rather than let them make their own decision."[306] A few months later, a talk by Mrs. Ruby Evans, a local U.P.O. official, was reported under the headline: "UPO Official Raps Forced Use of Pill by Teen-Age Girls."[307] Within a week there was another story about Mrs. Evans: "UPO Official Is Fired for Birth Control Talk."[308] A few months later, Judge Perry G. Bowen of Prince George's County, Maryland, a Washington suburb, was reported as ruling that mothers of two or more illegitimate children are guilty of neglect solely because the children were illegitimate. The Judge threatened that women who do not learn and practice methods of birth control would risk losing their children.[309]

The interest of the United States government in abortion as a method of birth control is not limited to the domestic scene. A spokesman of the Agency for International Development explained this governmental agency's strategy in a brief statement published early in 1969. Repeal or liberalization of abortion laws is an integral part of a comprehensive family planning program, for population has been effectively limited in countries where women have access to abortion as well as to contraception. Hopefully, with freely available abortion coercive measures will not be needed, although the possibility of compulsion in the future is not ruled out.[310]

Of course, many would argue that A.I.D.'s strategy for reducing births will not work, because legalization of abortion does not—so they say—increase the numbers of abortions. Mrs. Rossi, for example, argues that "it has been found that the number of abortions remains relatively constant no matter what the law provides."[311] However, Mrs. Rossi's view seems at odds with the Japanese experience; the evidence we reviewed above surely indicated that the total number of abortions increased with legalization, for although illegal abortion may not have been decreased, the large increase of legal abortions corresponded to a reduced birth-rate. The effect of laws against abortion is also shown by the result of Rumania's switch from a very free abortion policy (which brought with it a dangerously low birth-rate) to a restrictive policy. The Communist government's change of policy, paralleling that by the Soviet Union in 1936, was certainly effective, for the Rumanian birth-rate rose from fourteen per thousand in the third quarter of 1966 to thirty-eight per thousand in the third quarter of 1967.[312] Legal abortion can be an effective method of birth control and anti-abortion laws are an effective restraint upon the practice of abortion.

Conclusion

In this chapter we have examined the history of anti-abortion laws and the movement for change to the extent that these data illuminate the state of the present legal question. Each of the various alternatives has its own context,

and we have seen enough of the context to see more clearly what is meant by any proposal for change.

The statutory laws forbidding abortion except to save the life of the mother originated in the nineteenth century. They represented the consensus of opinion at the time; this consensus had roots in the religious tradition but it was secular public opinion rather than theology that shaped these laws.

We can see the roots in religious tradition in the fact that the anti-abortion laws, along with laws against infanticide, were based on a concept of the inviolability of innocent human life that is part of a western liberal conception of human dignity. This conception is the secular residue of the Judeo-Christian religious tradition. If the U.S. Constitution and Declaration of Independence are not religious documents—and they surely are not—they are nevertheless rooted in the same religious tradition.

The immediate origin of the anti-abortion laws in secular public opinion rather than in theology is shown by the fact that these laws were a reflection of ethical medical practice at the time. Christian moral teaching was not clear on whether fetal life in the early months should be regarded as "ensouled"; abortion was seriously immoral, as was contraception, even if no person were killed. But secular public opinion, basing itself on increasing biological knowledge, embraced the view that each individual life develops continuously from conception onward. At the same time, in cases where physicians believed abortion necessary to save the mother's life they resorted to it, and the laws sanctioned this practice without regard to theological opinions about it.

The chief alternative to the restrictive laws is the radical possibility of permitting abortion on the same basis as any other method of birth control. The only restrictions are those imposed by medical safety—that the operation be done competently and not done if it would be too dangerous. This alternative was first adopted in the U.S.S.R. under Lenin. The rationale for this policy was that it furthered socialist equality and feminine emancipation. Atheistic humanism brought its own ideology of human dignity and freedom to bear upon marriage and the family, sex, and innocent life. The result was to subordinate all of these to the needs of the larger society. Thus restrictive divorce and anti-abortion laws were reinstated, then reversed again, as conditions changed and the planners set different quotas for the production of human beings.

The new socialist morality was propagated between 1921 and 1936 through such organizations as the Sexual Reform League. The anti-religious basis of the Communist ideology carried over into bitter attacks upon traditional humanistic morality. Because western secular morality had roots in a religious tradition, those who sought to destroy the liberal humanism of the west took every opportunity to ridicule the "theological morality" of sex and innocent life.

To point this out is by no means to make some paranoid, McCarthy-like allegation that the movement to permit abortion on demand is a Communist plot to subvert the morals of the "free world." Countries such as Great Britain

and the United States seem to be quite self-sufficient in carrying out the "liberalization" of popular attitudes and public policies in these areas. However, it is true to say that the historical roots of the new morality's attitude toward abortion are to be found in the anti-religious humanism which first gained political domination in Soviet Russia. Just as true as to say that the roots of the older morality's attitude toward abortion are to be found in the religious humanism which was still politically effective, though in a secularized form, in the pre-new-morality world of Europe and America. Moreover, it is just as false to say that those who reject abortion on request are trying to impose a theological ethics on our pluralistic society as it is to say that those who promote abortion on request are trying to impose a socialist ethics on our pluralistic society.

The only countries that have so far fully and openly followed the Soviet example have been Communist nations of Eastern Europe and Japan. Japan, of course, did not have the western ideal of respect for individual human life; abortion and infanticide were traditional methods of birth regulation. In all of these countries, complete permissiveness concerning abortion was much more a matter of economic expediency than of libertarian principle.

Where the most extreme policy has been followed, there always has been as excuse that legalization would eliminate illegal abortion and its bad public health consequences. But even the most unrestricted policies have not eliminated illegal abortion, and many reports suggest that the conditions of legalized abortion have seldom been as perfect as proponents said they were. Thus there was some opposition to abortion among responsible medical men in the Soviet Union in the early 1930s and there has been a similar movement in recent years in Japan.

The various reversals of policy have demonstrated that drastic changes in the law do alter the total number of abortions and so affect the birth-rate. The fact that a reimposition of restrictive laws after a period of very free abortion has led to a drastic change in birth-rate certainly shows that laws against abortion are not without effect.

Underlying the abortion policies of the Communist countries and Japan is the assumption that the state need protect and foster individual lives only insofar as those lives are valuable to the purpose of the community. This premise certainly can be formulated in more or less absolute fashion. In its widest formulation, it would lead to the compulsory extermination of all useless individuals. In a narrower formulation, it may lead to withholding the care and protection of the society from those who cannot be dealt with by society as separate individuals. Since the fetus, prior to viability, is beyond the reach of bureaucratic management (except by dealing with its mother), public policy can permit abortion at the mother's request unless population must be increased.

It is surely not unrealistic to notice that current promotion of a radical policy in favor of abortion in the United States manifests the classic ambiva-

lence. On the one hand, the policy is promoted as a libertarian measure. A woman must be free of "compulsory pregnancy." But on the other hand there is some evidence that if abortion were legalized it would become an important element of population control. Its greatest impact would not be on the upper classes, which already use contraception effectively and obtain abortion when desired, but on the lower classes, where illegitimacy could be limited, the differential birth-rate lessened, and welfare rolls shortened.

Between the very restrictive policy and the very permissive policy is the possibility of a compromise plan. Abortion is declared illegal in general but exceptions are made for "justifying reasons" or "indications."

The earliest compromise legislation was in Latvia, Iceland, Denmark, and Sweden. All of these countries had accepted a limited version of socialism. All had experienced the influence of Lutheran moral thought, which made it easier to accept the idea that one might be obliged to do an evil, providing the evil is necessary, without subverting the principle by which the evil is condemned. The importance of *authorization* derived from the Christian requirements for justifiable killing—e.g., capital punishment. Thus these policies assumed that abortion did kill a nascent human life, but sanctioned that killing for good and sufficient reasons accepted under public authority.

The evident dependence of this sort of compromise on a particular outlook renders it notably unstable where that outlook is not present. The compromise does not eliminate illegal abortion and may even increase the problem. The libertarian demand is not satisfied and abortion cannot be used for controlling births among the lower social and economic classes.

Thus the proposal in the English debate of a compromise did not win wide support. Instead, the compromise was forced in the parliamentary debates far in the direction of complete permissiveness. Partly the outcome may have been determined by the Church of England's less compelling rationale for the compromise position; partly by the widespread acceptance of a form of utilitarianism which has practical implications very like those of the atheistic humanism which led to the Soviet experiment of 1921.

In America, the compromise position appears to have little basis in principle. It is simply a matter of practical politics, reflecting the responses to available public opinion polls. Many of those supporting legislation actually hope to achieve abortion on request. The medical supporters of compromise legislation apparently wish to maintain the law as a reflection of developing medical consensus. Certainly, Americans are more likely to concede abortion in the emotionally appealing cases—such as the young girl impregnated by a lecherous relative or the loving mother happily pregnant who finds that her baby may be deformed. However, unless some special theory is developed to justify abortion in such cases, the relaxation of the law implicitly means an abandonment of the principle that the right to life of the unborn should be protected. Thus relaxation implicitly points toward complete legalization, a position not accepted by a majority of Americans.

CHAPTER VI
ETHICAL ARGUMENTS

The Limits of This Chapter

In previous chapters we have examined a number of factual and historical aspects of abortion. The facts of biology, the medical and sociological data concerning abortion itself, and the histories of religious attitudes and the development of various types of abortion laws and proposed laws—these have engaged our attention to the extent that they enter into current ethical or legal arguments. But such arguments also have a theoretical dimension. When all the facts are in—even if all agreed about them—there still remain different judgments on the morality of abortion and on how the law should regard it.

I propose to examine and criticize some arguments leading to these various judgments and to set forth and defend my own position. The ethical question and the legal question should be distinguished, because not every immoral act can be forbidden by law, nor is every illegal act also immoral, except insofar as the citizen ought to obey just laws. Therefore, this chapter will consider ethical arguments, and chapter seven will treat those pertaining to law.

My approach in both of these chapters, even when considering arguments proposed by theologians, will be that of a philosopher, rather than that of a man of faith. Although I personally have religiously grounded convictions in this matter, I would not expect those who do not share my basic commitment of Roman Catholic religious faith to share the moral convictions flowing from that faith. For those inclined to credit the authority of the Judeo-Christian religious tradition, the exposition of that tradition—its breadth, its coherence, its constancy—may by itself settle the moral question. But others may find rational arguments more helpful in reaching a sound ethical judgment on abortion, and religious believers, too, may wish to examine the reasonableness of their moral convictions and to test alternative views by critical argument.

As a philosopher, I undertake an essay rather than a demonstration. Philosophy seeks to refine argument by criticism; it pursues the definitive truth through an ever-expanding process of argument. The answers to one set of

objections do not conclude a matter so that no further argument is possible, but rather give rise to a new set of objections of a more subtle and remote kind. The terrain of battle changes but the war of words never ends. Yet genuine progress can be made, since the final inadequacy of some positions can be seen, and more reasonable, less inadequate positions can be developed.

Though no one enjoys having his own view rejected, the philosopher in his professional capacity must be ready for the counter-arguments sure to be offered even—or especially—against the most competently reasoned philosophic position. Yet the philosopher has good reason to be dissatisfied if his originality elicits merely the reiteration of arguments which he has considered and answered. Those who do not meet a new argument with new objections are not doing philosophy, but merely using reason in the service of convictions maintained on other grounds.

In some societies those other grounds, impervious to the light of reason, have been religious and other cultural traditions received without reflection and maintained by the psychological and social pressures of taboo and conformity. In our contemporary society, the source of irrational convictions is more likely to be "experience."

Genuine experience cannot be set aside, but neither can it settle ethical issues, for our experience itself is shaped by our commitments and our viewpoints. Moreover, much that goes by the name of "experience" is not truly so, for the edited and contrived contents of communications through the mass media probably provide more of the concrete basis of unreflective moral attitudes than does lived experience in the real social and physical environments with which we are in direct touch.

Yet in every moral disagreement we find more and more persons who attempt to support their diverse and incompatible views by a simple appeal to experience, as if such an appeal were a final and unanswerable argument. In fact, experience is no argument at all. Our convictions may in fact arise out of our experience, but this fact is not itself a reason why we ourselves—much less anyone else—should regard these convictions as sound. The validity of our moral judgments must be examined by reasonable arguments; only in this way can we commend to others the convictions we have confidence in. For not all of us share the same experiences or derive from our experiences the same attitudes. If we did, there would not be ethical disagreement in the first place. An effort to settle such disagreement must rise above experience. The adoption of a moral judgment in the light of reason also leads to an effort actively to alter experience by adjusting one's viewpoint and establishing new ways of acting and reacting.

One attempt to invoke experience as an argument has been made by James M. Gustafson, Professor of Christian Ethics at Yale University. He criticizes past rational arguments against abortion as abstract and juridical efforts by those not involved to pass judgment on the actions of others. He proposes instead to show how a judgment may be made in a particular case by someone

actually involved as a moral counselor. After providing a rather detailed description of a case and listing principles he accepts, Gustafson then concludes: "My own decision is: a. If I were in the woman's human predicament I believe I could morally justify an abortion, and thus: b. I would affirm its moral propriety in this instance."[1]

We must notice that in setting out a limited set of facts about the case he discusses, Gustafson himself has actually presented us with an abstraction which might occur in an indefinitely repeated set of cases. Moreover, in stating his belief that he could justify abortion in this instance, he is making a judgment the validity of which is independent of whether one is involved or not. Whoever makes an ethical judgment affirms that if he or anyone else were in the position of agent, that ethical judgment would be a sound guide for acting. As a matter of fact, it is not the apparatus of description and the perspective of involvement that determine Gustafson's conclusion; rather that conclusion is a product of a general ethical-theological theory akin to that of Helmut Thielecke, which we shall consider later in this chapter.

Gustafson and others are quite right in pointing out, however, that the ethical aspect of abortion is not limited to the simple question of whether it is morally right to have or perform abortions, either in general or in various kinds of cases. The factors which lead to abortion, the real difficulties of women in trouble, the social injustices which make life difficult, the conflicting pressures felt by morally sensitive physicians—all these are factors which deserve ethical examination. It would indeed be tragic if we were to conclude that the sum total of relevant ethical wisdom consisted in the mere prohibition of abortion, and that all the relevant demands of morality would be fulfilled if only abortion were not practiced. Even if abortion is judged never to be morally justified, still an affirmative attitude toward nascent life and the promotion of conditions in which new persons will be received with love and joy will be more fundamental than the mere avoidance of abortion.

Yet nothing is more relevant to one who suffers it than his own death. And nothing affirmative can remain unless the ethical boundaries of the inviolability of life—wherever those boundaries should be drawn—are recognized and respected. The other important ethical issues related to abortion are not nearly so complex theoretically or so deeply disputed in current argument as the single question: Is it ever right to have or perform an abortion, and if so, under what conditions? Therefore, we shall limit our ethical inquiry to this question.

The suffering of persons of sensitive conscience who are in anguish because they wish to do what is right but do not see clearly what the right course would be, is at least as deserving of our compassion as any other form of human misery. Hence the effort to clarify difficult ethical problems need not be a matter of cold logic, lacking in compassion, even if ethical reflection leads to a judgment at odds with that which would be endorsed by sentiment unshaped by ethical concern.

The assumption, so often unthinkingly made today, that firm moral standards are inimical to sensitive love is based upon a twofold misunderstanding. First, moral standards are imagined as a kind of strait-jacket, inhibiting the normal exercise of human abilities. In reality, sound morality, even in its strictest prohibitions, marks the way to a fuller and richer human life, rather than the narrow and anemic existence we are tempted to settle for. Second, the assumption about love and moral standards assumes that the center of the person is more to be found in the satisfaction of spontaneous impulses than in the fulfillment to be gained by fidelity to others, to one's ideals, and to the possibilities of human progress which can be fulfilled only by self discipline, patience, and careful thought.

Subjectivism and Relativism

An attitude not supported by ethical argument but frequently expressed in popular discussion is that there is a simple answer: Abortion is right for those who think it is right, and wrong for those who think it is wrong.

This attitude takes two different forms. Some feel that the moral issue is settled by the opinion of each individual judging his own case. Others suggest that morality is relative to the particular culture to which one belongs, so that abortion is right where and when a society views it as such, and wrong when that is the view taken of it.

When we say that abortion is right or wrong, however, we seem to claim more than merely to express a wholly relative or subjective opinion. We think that those whose moral attitude is different from our own really disagree with us, and yet disagreement would be impossible if complete subjectivism or relativism were correct. In fact, it is difficult to see why anyone would ever try to argue the ethical issue if this attitude were correct.

Moreover, if this attitude were correct in regard to abortion, it is difficult to see why it should not also be correct with regard to any other kind of act. But when someone does something to us that we believe to be unfair, we do not say that if he believes it was right, that made it right for him. If Hitler was quite sincere about his ideas of racial purification, that has not convinced the world that genocide was right for him.

Similarly, a thorough-going social or cultural relativism renders ethical criticism impossible. If abortion is right for those who live in a society where it is accepted and wrong for those who live in a society where it is forbidden, then the same must be true of other kinds of act. But we do want to be able to criticize some existing social norms, at least in our own society. We want to be able to advocate changes as *progressive*—that is, as moves toward a more reasonable and better order. Clearly, if all is relative no progress is possible. Differences would make no humanly significant difference. No one could advocate any social change; he could only defy existing norms and perhaps by instigating a movement of defiance change the status quo. But such a revolu-

tionary movement would not promote anything *better*, only something *different*. Even today's radicals would despair in such a directionless moral universe!

Unsound as the subjectivist and relativist positions are, they are often implicit in popular arguments about the morality of abortion. For example, the Gallup Poll or similar surveys are often cited as an argument to show that the traditional religious prohibition is surpassed and no longer valid. To the extent that the surveys show the growing approval of abortion under conditions which traditional norms would not have sanctioned, they do prove that the traditional norms have lost their force. People no longer feel themselves bound by the moral standards their parents accepted without question.

But the sociological fact that a change of attitudes is occurring by no means settles the question as to which attitudes are in fact the sounder. If the ethical question were settled by the mere fact that attitudes are changing, then subjectivism or relativism would be correct. It would follow that the new attitudes would be no better than the old ones, but only different, and that no reasonable grounds could be given for preferring the new morality to the old.

But if subjectivism and relativism are untenable positions, why do they seem plausible to many people? What truth underlies such an obviously mistaken attitude? Surely if there were not something supporting this attitude it would not have the appeal it obviously has.

One reason for the appeal of subjectivism and relativism undoubtedly is the promise they hold out that one's own moral judgment will be automatically validated. A subjectivist can always bring himself to think that what he wishes to do is right. A relativist need only conform to opinion in his own society, and if that opinion should be divided he can console himself with the thought that his action agrees with the standards accepted by most people (as evidenced by the Gallup poll or the Kinsey reports) or, at least, with the standards that will be accepted by the subculture with which he feels the strongest identification.

Another reason for the appeal of these attitudes undoubtedly is the despair felt by those who had accepted some traditional moral outlook uncritically and who now discover that others hold quite different opinions. If morality is what we have always believed right, then if different persons or societies have different received beliefs, there must be different and irreconcilable moralities, all equally worthy of respect. Once the first shock of the discovery of ethical diversity has passed, such uncritical relativism yields to a more critical and reflective attitude toward ethical issues and moral values.

Another, and more important reason, for the appeal of subjectivism and relativism is a confusion between the objective and the subjective aspects of morality. We notice that men of sincere good will can disagree irreconcilably in regard to ethical questions and can feel themselves morally obliged to courses of action that lead them into tragic conflicts with one another. In such cases we cannot find it in our hearts to condemn either side as vicious; we wish to tolerate the sincere views of persons and cultures different from our own.

This desire for tolerance surely is worthy. But it does not presuppose subjectivism or relativism. Rather it requires a distinction between the viciousness or guilt of those who act and the wrongness or evil of what is done, between the virtue or good will of those who act and the rightness or goodness of what is done. It is surely possible for men of good will to do what is evil by mistake or through human weakness, and it is also possible for vicious men to do good despite their worst efforts.

Everyone must always follow his own conscience, for one's conscience is nothing else than his best judgment as to what he ought to do. No one is guilty who does his best to find what is right and then acts according to the best judgment he can make. But such a judgment, for all its sincerity, need not be correct. We do not think that they were right who tortured heretics in the sincere conviction that such torture might save them from eternal damnation. But it would be intolerant and self righteous of us to believe that every inquisitor was an insincere sadist who put heretics on the rack merely for selfish enjoyment. If men in years to come find a better way than nuclear deterrence to keep peace, we might hope that while they condemn the policy most Americans now approve they will understand the sincerity with which we have acted.

In our discussions in the remainder of this chapter, we shall be concerned solely with the objective aspect of the morality of abortion. If we find the practice ethically indefensible, this does not mean that we pass judgment upon those who engage in it or defend it. Tolerance of those who disagree with us, compassion for those who do what we judge evil (often acting in circumstances where we might do worse ourselves) are not incompatible with a firm judgment on the ethical character of the practice of abortion itself.

A final reason for the appeal of the attitude of subjectivism and relativism is found in a widespread confusion between moral judgment and moral choice. Morality, obviously, is not a matter of given facts. In the moral domain, man is not a mere patient of natural forces. Rather he determines himself; he writes his own autobiography; he creates his own history. Man can say "No" to the world that presents itself; with that "No" he can set out to make a world more nearly in accord with his own ideals.

Thus morality is the sphere of man's freedom, of his superiority to what is given in advance, ready made. How, then, can man submit to moral standards which do not reflect his own decisions? If he cannot, then must not man's own decision settle what will be right and wrong for him?

The argument is plausible but invalid. The moral decision is actually twofold. One is the choice what one *will* do; the other is the judgment what one *should* do. Due to this ambiguity it makes perfectly good sense to say: "She decided she ought not to have an abortion, but she decided to go ahead and have one nevertheless." The first "decided" refers to judgment, the second to choice.

In neither sense is *decision* given to us as a fact of nature. But decision as judgment has an objectivity that decision as choice lacks. If this were not so, there would be no morally wrong acts, for whatever we decided to do by that very fact would become right.

Yet the objectivity of moral decisions is not to be found in a factual state of affairs. When we judge that a certain kind of action is wrong, we are not making a statement about *what is*, but about *what ought to be*. A moral judgment has truth, but this truth is established not in experience but through reasons that lead us to the values which make our human life of freedom possible.

I suspect that far fewer people would espouse a subjectivist and relativist attitude toward torture or murder than toward abortion. The number that is confused on one matter or another undoubtedly varies depending upon the extent to which the intuition of common sense reveals that an act affects not only the agent himself but also another person who might be seriously hurt by it. Thus we do not tend to say that torture or murder are right for those who think them so, for we can imagine ourselves in the position of a victim who vigorously rejects any such "tolerant" judgment. If we are less certain concerning abortion, this may be because we do not easily put ourselves in the place of the fetus. Indeed, the question is raised whether the aborted are human beings at all. To this question we must next turn our attention.

Is the Aborted Embryo or Fetus a Human Being?

This question is perhaps the most important single question in the whole ethical controversy concerning abortion. Unfortunately, neither proponents nor opponents of abortion have treated the question with the care it deserves. For in fact there are two questions which should not be confused. One is a factual question that is settled by biology. The other is a philosophical or theological question, and one's answer to it depends on his whole world-view and sense of values.

The factual question is: In the reproductive process, at what point does the human individual originate? In other words, as human life is passed on in a continuous process, where do the individual lives of the parents end and where does the individual life of the offspring begin?

Although it presupposes an answer to the factual question, the metaphysical or theological question is quite distinct. This further question is: Should we treat all living human individuals as persons, or should we accept a concept of person that will exclude some who are in fact human, alive, and individuals, but who do not meet certain additional criteria we incorporate in the idea of "person." Generally the person is considered to be the subject of rights, and so once it is admitted that a person exists, there will be a very broad consensus that he has at least a prima facie right to continued life, since this right is more fundamental than any other.

Now, it should be admitted by opponents of abortion that the question of the fetus' right to life is not settled merely by the biological facts, although these facts certainly are relevant. It should be recognized, on the other hand, by proponents of abortion that any case for restricting the concept of *person* must be argued philosophically or theologically. In such an argument, facts are relevant but never decisive, and a mere declaration of a restrictive definition of *person* is not an argument but a begging of the question.

The factual question which pertains to biology is naturally the easier of the two questions to answer. We have considered at length in chapter one the manner in which new human individuals originate. Life proceeds from life, and human life from human life, in a continuous process. New individuals emerge from existing individuals.

Relative to parents, the individuality of the offspring must be admitted to begin at conception.

The sperm and the ovum, prior to fertilization, obviously can be considered as belonging to those from whom they derive. But once conception occurs, a cell exists which cannot be identified with either parent. The fertilized ovum is something *one* derived from two sources. As the facts of genetics reviewed in chapter one make clear, the unity of the fertilized ovum is continuous with that which develops from it, while the duality of the sperm and ovum are continuous with the duality of the two parents. Thus, the proper demarcation between parents and offspring is conception, and so the new individual begins with conception. From this point of view, then, it is certain that the embryo from conception until birth is a living, human individual.

As we also saw in chapter one, the fact of twins and the possibilities of parthenogenesis and mosaics do not argue against conception as the correct demarcation between the life of the parents and the new individual. The biological concept of individuality is not defined solely in terms of the uniqueness of a "genetic package," although such uniqueness helps to make clear the discontinuity between parent and offspring. Individuality is relative; it implies inner unity with division from others. The individuality of twins in relation to their parents clearly is established at conception, although their individuation in relation to one another may occur somewhat later, and in the case of double monsters can even remain problematic at birth. The individuality of the components of a mosaic in relation to one another is terminated sometime after conception but their individuality established at conception in reference to progenitors is not altered when the mosaic is formed. The individual that develops parthenogenetically is established as distinct from its single progenitor when the ovum is somehow activated to develop without fertilization.

The assurance of modern biology that new individuals begin at conception was already taken for granted by the medical ethics and jurisprudence of the early nineteenth century, as we saw in chapter five. The additional information we have gained about reproductive physiology and genetics has refined and confirmed what Thomas Percival and the Beck brothers took as common

knowledge. Nineteenth-century legislation, as we have seen, presupposed this modern biology.[2] Ancient theological convictions did not demand that conception be regarded as the beginning of a new individual, but when modern biology showed the necessity of this view, secular humanism actually preceded theology in drawing the conclusion that abortion from conception onward involved an attack on the human right to life. But the secular humanism of the nineteenth century, of course, was moved by a residue of the traditional religious outlook to the extent that it assumed that living human individuals should *ipso facto* be regarded as persons.

Only where and when the movement to approve abortion has taken hold do we find the answer to the biological question rejected or concealed in half-truths. Mainly such distortion is found in popular arguments. For example, the facts that the sperm is unique and alive before conception, that the fetus cannot live apart from its mother until late in pregnancy, and that many fertilized ova do not develop to birth are used in popular discussions to suggest that the individual's life does not begin at conception. We have seen in chapter one why such inferences are unsound. We also saw why it is misleading to say that the embryo at any stage is "merely a blob of protoplasm," or that it is "a parasite," or that it goes through a "fish stage" of development.

However, we have seen how the distinction between contraception and abortion, which was always clearly understood and taught by proponents of birth control until they also became proponents of abortion, has recently been purposely blurred to make room for methods which are possibly or probably abortifacient.[3] Even a few biologists have presented arguments in the context of defending abortion which they would never have proposed in a scientific context.

For example, Garrett Hardin, an ardent proponent of abortion, has argued that nothing of great value is destroyed when a fetus is destroyed. In this argument he has to assume that whether or not the fetus is a human being is a matter of arbitrary definition. He then compares the genetic information contained in the fertilized ovum to a set of blueprints for a structure. By analogy he argues that the destruction of the zygote is no more destruction of a human being than the destruction of blueprints for a fifty-thousand-dollar house would be destruction of the house. He admits only two deficiencies in the analogy. One, that the DNA of the first cell is replicated in every cell of the body. But this seems to him an insignificant fact, since hundreds of sets of DNA are destroyed every time we brush our teeth. The other difference Hardin admits is that the fertilized ovum is an unrepeatable set of blueprints, but he brushes this fact aside with the observations that the resultant individual could be a Hitler as well as a Beethoven, and that the unfertilized egg also is unique.[4]

Apart from other questionable aspects of this reasoning, I am surprised at its confusion about the most obvious failure of the analogy. The fertilized ovum is *alive*; the blueprints of a house are *not alive*. The fertilized ovum is

in active interchange with its environment in the developmental process; the blueprints have no such dynamism. The fertilized ovum does not contain a model of the articulated structure, as if there were in it two-dimensional prototypes of all the parts and organs of the body. Blueprints do contain such a model. For this reason the blueprints in no sense become part of the house; they remain outside it. The fertilized ovum, however, is in vital continuity with the developed individual. A human being grows, while a house is built.

One would expect a biologist to observe this difference. If he does observe it, then the analogy breaks down. On the other hand, if he does not observe it, there is no reason to draw conclusions about the fetus from observations about the DNA of the fertilized ovum. After all, what is aborted—even by the prevention of implantation—is not a fertilized ovum, but an already developing individual. If the stages of his development are not to be included in an individual's human life, then life really will have to be said to begin at forty! Until then, I suppose, Hardin's biology will file everyone away like so many sets of blueprints.

The conclusion Hardin is really interested in is that the fertilized ovum should not be regarded as a person with a right to life. But he gives no argument to this point, instead relying on a confusing analogy and a bare assertion that we can define "human being" however we like.

Another, and more important, example of this sort of confusion is found in the comments presented with the American Law Institute's proposed model abortion law. The comment argues that most abortions

> . . .occur prior to the fourth month of pregnancy, before the fetus becomes firmly implanted in the womb, before it develops many of the characteristic and recognizable features of humanity, and well before it is capable of those movements which when felt by the mother are called "quickening." There seems to be an obvious difference between terminating the development of such an inchoate being, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of its mother.[5]

As we have seen in chapter one, this set of assertions is at best misleading. The fetus is well implanted long before four months. It is recognizably human before eight weeks of development. It responds to stimulation long before the mother feels it; "quickening" is only the mother's awareness of the child's life within her. More than seventy percent of the embryos that cause a missed menstrual period (at two weeks or so of development!) will go to term if they are not artifically aborted. Thus the chances of survival are quite good.

In fact, of course, the A.L.I. proposal does not restrict abortion to the first four months of pregnancy, but proposes justified abortion under stated conditions regardless of the age of the fetus. Twenty-six weeks is used as the point of demarcation for increasing penalties on unjustified abortion and for imposing a penalty for self-abortion. At this age, many fetuses would be viable, if

given proper care. And the fetus of less than four months is not so obviously different from what it will be a few months later.

The British abortion law, which is similar to the A.L.I. proposal in having no cut-off date for justifiable abortion, has led to unexpected consequences. For example, a twenty-year-old girl had an abortion at Stobhill Hospital in Glasgow; the pregnancy was believed to have proceeded a bare twenty-six weeks, the point at which the A.L.I. proposal considers the fetus first viable. The baby was found by a workman still alive after it had been dumped in a bag to be thrown in the incinerator. At this point an unsuccessful effort was made to save the baby. An inquiry determined that death was due to lack of care after birth, exposure to cold, and prematurity.[6]

One suspects that the commentators on the A.L.I. proposal would have made their view clearer if they had frankly admitted the biological facts, according to which abortion certainly involves the destruction of a living human individual. Then they could have undertaken some philosophical or theological argument in favor of restricting the notion of *person*, with its implications for the right to life, so as to exclude human lives in their embryonic stages from the circle of protection accorded to persons.

This brings us to the second question.

If it is granted that in fact new human individuals begin at conception, still it may be asked whether the fetus should be regarded as a person. Is the zygote or the morula—incipient life even before implantation in the uterus—to be regarded as a person with a right to life? Is the embryo a person before it looks human? Is it a person only after it could survive if separated from the mother? Or does it become a person only sometime after birth?

Perhaps the clearest and most extreme position which denies personality to some individuals is that which treats the person as a function of society. This view takes various forms.

Ashley Montagu, for example, published a book for pregnant women. In it he asserted:

> The basic fact is simple: life begins, not at birth, but at conception.
>
> This means that a developing child is alive not only in the sense that he is composed of living tissues, but also in the sense that from the moment of his conception, *things happen to him.* Furthermore, when things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being, and his birth date is eight and a half months in the future, *he reacts.* In spite of his newness and his appearance, he is a living, striving human being from the very beginning.

However when an opponent of abortion cited this book, Montagu responded that

> the embryo, fetus and newborn of the human species, in point of fact, do not really become functionally human until humanized in the human socialization process. Humanity is an achievement, not an endowment.[7]

And Montagu went on to declare that he favored abortion whenever the child's "fulfillment as a healthy human being" would be in any way "menaced" or would in any way "menace" the mother's health or society at large.

Obviously, this criterion of personality opens the door to infanticide as well as to abortion. What is more, it implies that those who regard themselves as humanized and socialized would be justified in doing away with any group they did not consider "functionally human" if the existence of that group "menaced" society or if its own "fulfillment" were menaced.

Now, this criterion is dangerously elastic. Apart from the possible abuse of it to solve such difficulties as the race question—an abuse Montagu himself surely would not approve—we must note the relative character of the standard in cases Montagu does not discuss. Helen Keller, for example, was not socialized and her healthy fulfillment as a human being surely was menaced. By Miss Sullivan's standards the child was nevertheless a person to be reached; by Montagu's standards Helen Keller surely ought to have been exterminated.

Of course, Helen Keller was not completely lacking in humanization before Miss Sullivan undertook her education. As an infant, Helen had been bright and normal; even after her illness, her "anti-social" behavior was a form of human socialization. But if any degree of humanization whatever is to be counted as sufficient to constitute a person, then the fetus already is a person, for as Montagu himself shows in his book such factors as the pregnant mother's emotional states and her work schedule do influence the temperament and behavior patterns of the child.[8]

Even before birth a human being is never an individual isolated from the patterns of culture. Because the mind and the body are not distinct entities, but only aspects of a unified human being, socialization is a psychosomatic process. Because the embryo develops by interaction with the maternal organism, socialization has its beginnings in the most fundamental modes of biological communication.

Some might argue that although socialization is begun before birth, the process is not completed until subtler forms of communication, such as language, can have their effect. Undoubtedly it is true that "functional humanity" is not completely attained before birth. But in referring to it as an "achievement, not an endowment," Montagu suggests what is in fact false—namely, that at some point socialization is complete. In truth, functional humanity is always more or less unachieved. We go through life trying to become what we may be, yet even one's whole life together falls short of what it might have been. Moreover, since human life is a process rather than a product, the "functional humanity" of earlier stages is as inaccessible to later ones as the reverse.

To talk as Montagu does implies that human development is like the construction of an automobile. It becomes an automobile only at the end of the production line when someone can actually drive it. But a human being has a variety of abilities, some of which are lost as life passes. We need not

romanticize childhood to the extent of supposing that the best years of our lives are the earliest ones, but we should not romanticize the "functional humanity" which is "achieved" by "socialization" so much as to deprive infancy and even life before birth of all human quality.

Montagu fails to take into account that the "achievement" of "functional humanity" is not a matter of passive reception by inert material of the shaping forces of "socialization." The individual himself is an active participant in the process, and although the ratio of passivity to activity is greater the younger one is, it is hard to see how socialization could ever begin at all if the one being socialized did not somehow actively participate even at the outset.

In effect, Montagu, who is an anthropologist, makes the same error as Hardin, the biologist, who with his analogy of blueprints overlooked the peculiarity of life. The potentiality of *life* is not fulfilled by an extrinsic agent bringing together already existing components, but by self-actuation. And humanization does not occur by the imposition of social personality on subhuman raw material, but by a process of give and take which has already begun when the embryo's effect upon the mother causes her to miss her menstrual period and learn of her new status.

Both Montagu and Hardin look upon the unborn as non-persons, and so as mere objects. To justify the physical act of depriving the unborn of life it is necessary first to evade by one's conceptualization the fact of life. Thus it can seem that the killing of the unborn only prevents life from beginning.

A more blatant example of such conceptual juggling was in a question raised by Canon Pierre de Locht, a Belgian Catholic theologian:

> Does not the fact that the parents *perceive* the fetus as a human person make any difference in its constitution as a human being, as a spiritual being? Is it not necessary that there be established a relation of person to person, a relation of generators with the fetus, for it to become a human person? In other words: a fetus not perceived as living, not perceived as a human being—can it become that?[9]

A convenient idea for those who want an abortion—simply be careful not to "perceive" the fetus as a person!

Canon de Locht's question is obviously absurd, but it is instructive to consider how he could have raised it. I think the reason was that he was thinking of the fetus by analogy with objects which are constituted by human meaning-giving. Nothing is language unless we perceive it as intelligible communication; nothing is food unless we perceive it as edible; nothing is a house unless we perceive it as a place to live in. A certain form of phenomenological philosophy extends a similar account to the "constitution" of nature itself, by showing how man puts meaning into the world. Canon de Locht proposes to do the same thing with the coming to be of the person. In this way the unborn are reduced to mere objects whose meaning and value depend on what their parents think of them.

But clearly if the fetus is a person, it cannot be merely an object. A person is himself a subject—one who gives meaning to objects, but has some meaning apart from what others think. If this were not so, there would be nothing behind the faces in the lonely crowd!

This observation brings us to another line of argument for the non-personhood of the unborn. Joseph Fletcher, An Episcopalian moralist, states it when he suggests that the sound solution to questions about abortion

> . . .would be to deny that the right to life claimed for a fetus is valid, because a fetus is not a moral or personal being since it lacks freedom, self-determination, rationality, the ability to choose either means or ends, and knowledge of its circumstances.[10]

For Fletcher, personality consists *exclusively* in these factors; the human body is not included in the person:

> Physical nature—the body and its members, our organs and their functions—all of these *things* are a part of "what is over against us," and if we live by the rules and conditions set in physiology or any other *it* we are not men, we are not *thou*.[11]

Fletcher, who quotes Martin Buber—although Buber's attitude toward the body was quite different—goes on to compare the relation between "man" and his own "physical frame" to a partnership. But he admits this analogy fails, and suggests instead that the body is like an artist's materials.

The dualism of Fletcher's view is clearly extreme. But a less obvious dualism of the same sort infects much pro-abortion argument. Philosophers have labored long and hard to refute such dualism, and today very few would defend it. The trouble with dualism is that it makes our processes of thought and action inexplicable, for these processes involve the body not merely as a tool nor as material, but as the aspect of our self in virtue of which we can treat anything as a tool or as material. If our bodies are not really part of ourselves, of our personalities, we are literally *out of touch* with the real world.[12]

The implications of Fletcher's dualism clearly extend beyond abortion. An infant just after birth, someone very gravely retarded, an insane person, or a person in a coma also seem to lack "freedom, self-determination, rationality, the ability to choose either means or ends, and knowledge of its circumstances." Fletcher himself has drawn the implication that euthanasia should be permitted. He holds "that a patient who has completely lost the power to communicate has passed into a submoral state, outside the forum of conscience and beyond moral being."[13] There is a rule against medical homicide, but Fletcher asserts it admits of exception, adding: "If one can be made at the beginning of life (abortion) why not also at the end of life (euthanasia)?"[14] Fletcher has not only approved medical homicide in these two forms, but also infanticide of children suffering from Down's syndrome (mongolism). He states that such a child "is not a person."[15]

Fletcher accepts the broadest possible justification for abortion. Speaking of proponents of the "new morality," with whom he agrees, Fletcher asserts:

> It is even likely they would favor abortion for the sake of the victim's self-respect or reputation or happiness or simply on the ground that *no unwanted and unintended* baby should ever be born.[16]

The italics are Fletcher's own, and though he does not apply the force of this criterion to babies already born, there is no obvious reason why he should not. Many unintended babies do get born and often babies become unwanted only after their parents have a few sleepless nights with them. Why shouldn't such parents smother their squalling infants? After all, they lack "freedom, self-determination" and so forth; thus on Fletcher's principles they are non-persons, mere "its," part of the physical nature which is "over against us."

Of course, Fletcher might argue that the infant seems to have some sort of consciousness, and that it will in due course come to exercise the capacities he mentions. For it must be the capacities rather than the acts of "freedom, self-determination" and so forth that constitute the person, since otherwise we would become non-persons every time we go to sleep. But if he argues that the infant is a person in virtue of its capacities which will in due course develop, there is no reason to exclude the fetus. It too has some sort of consciousness, as is evidenced by its reaction to sensory stimuli, which we noted in chapter one.

He could say that such elemental reactions do not evidence personal capacities, since simple responses undoubtedly also occur in animals. But it must be noticed that "freedom, self-determination, rationality, the ability to choose either means or ends, and knowledge of its circumstances" are not discrete entities, like solid blocks, that are either given or not. These capacities appear in different persons in varying forms and degrees. As far back as our memories extend, we find something of these abilities in ourselves, though doubtless in a simpler form and in a lesser degree than we now enjoy. Should we assume that this progression began suddenly at some point? Or would it not make better sense to think that it continues backward beyond the memory barrier and even to the very beginning of our existence?

If we take the second alternative, we need not assume that the appearance in the embryo of the neural fold, around the time the woman is missing her first menstrual period, is a primordial manifestation of reflection. No, we need only recognize that our mental capacities, like our bodily organs, came about by a continuous process of development from a dynamic starting point. As we look backward toward our origin, there is less and less differentiation the nearer we approach the starting point. But as our vital source already has the implicit dynamism to develop our bodies, which are human bodies, not any other kind, must the same source not also be admitted (particularly by those who do not regard the soul as a spiritual entity) to have what is necessary to develop the highest human capacities? This development, of course, is not

merely growth but differentiation; the development is not the application of blueprints to material, but a vital process involving constant interplay between the activity of the developing organism and the many influences of its total environment.

In short, Fletcher, like Hardin and Montagu, seems to ignore the peculiar character of the living individual. But Fletcher differs from the others in opting strongly for a dualism which separates moral personality from the body. Perhaps he is influenced in this by the soul-body dualism that was once influential in Christian theology; perhaps he is influenced by the mind-body dualism of seventeenth-century and eighteenth-century philosophy; perhaps the psyche-soma dualism of nineteenth-century psychology is the main influence. In any case, all of these forms of dualism are now generally discredited in the various fields where they once held sway, because any theory that splits man in two renders inexplicable the obvious facts about the unity of man in thought and in action.

It should be noticed that not every version of the Christian doctrine of the soul involved soul-body dualism. Thomas Aquinas, for example, did not regard the soul as an entity separate from but conjoined to the body; rather he viewed the soul of a living human being as an aspect of his unitary being—but an aspect able to continue to exist upon the death of the man.[17] Whether this complex theory is tenable or not we need not consider for our present purpose.

However, we must notice that Rev. J. Donceel, S.J. has recently urged that early abortion should not be considered the killing of a human being, because the old argument that the human soul is not created until forty days after conception (in the case of males) or eighty days after conception (in the case of females) was substantially sound. Donceel takes this position, though setting aside the distinction between male and female, on the basis of his interpretation of Thomas Aquinas' theory of the soul and of human development. According to Donceel, the theory that the human soul is present immediately at conception grew out of Descartes' dualism. Descartes, unlike Aquinas, considered the soul not as an aspect of the living human body, but as a separate entity, which worked upon the body rather as an artist works upon his material or uses his tools. For Aquinas, however, the soul required an organized body, since it is a constituent aspect of such a body, and cannot exist prior to the presence of that which it intrinsically constitutes.[18]

There is a good deal wrong with Donceel's thesis. Historically, we traced the rise and decline of the mediate animation theory in chapter four.[19] Fienus and Zacchia, who initiated the movement away from the theory Donceel still espouses, were Aristotelians; they wrote too soon to have been influenced by Descartes. Increasing biological knowledge may have affected their outlook, but they also wrote long before the false preformationist theories of the eighteenth century.

Even more serious, Donceel fails to take account of the impact on Aquinas' views of a combination of ignorance of biological fact and consequent error of biological theory. Donceel says, for example: "St. Thomas Aquinas did not hold that the ovum was a human being from the first moment of fertilization."

One cannot disagree, for Aquinas neither knew of the ovum, nor of the cell, nor of fertilization! Following Aristotle, he held that the semen—which appeared to him an obviously non-living substance—activated a series of transformations. Generation, he believed, was not a continuous process, but a series of discrete stages. The formation of the body is due to a "vital spirit which the semen contains as a kind of froth."[20]

Now, Donceel does not accept this biology, but he does not notice the difference it makes when one holds that life is transmitted by living cells, that development is a continuous process, that there is no vital spirit in the semen which could serve as agent of development, but that semen does contain spermatozoa which can fertilize the ovum, and that the fertilized ovum is biologically a living organism of the human species. Taking account of these facts, others have argued plausibly on Aquinas' philosophical principles that if he had known what we know about human physiology, including what we know about the specific and individual genetic definiteness of the zygote, he would not have held the Aristotelian theory of delayed animation.[21]

Moreover, Donceel does not manage to evade the implications of the fact of the continuity of human development. Arguing that the soul is not an agent of development but a form of the body, he compares the soul's relationship with the body to the relationship between sphericity and a ball. The analogy, again, like Hardin's blueprints, is to the non-living. But Donceel's point is that the body must be actually human to have a human soul, and he repeatedly denies that the fertilized ovum is a human body.

Of course, the embryo is not at first a developed human body, but it is an embryonic one. Donceel explores the possibility of saying that the human soul cannot be present until the brain is developed, perhaps until it can function, or even until the child can talk. But he recoils from going so far, and settles for saying that the human soul is not present during the first few weeks of pregnancy, without explaining why the living individual he thinks cannot be a human body at conception can be one after a few weeks. One suspects the real criterion is that if one looks at specimens in bottles, an eight-week embryo definitely *looks* human. But that is merely a matter of appearance, and can hardly be offered as a criterion for settling a metaphysical question.

The Church of England committee which produced the booklet, *Abortion: an Ethical Discussion,* noted and avoided a number of the difficulties these other authors did not succeed in overcoming. The Anglicans begin by setting aside the theory Donceel espouses as unverifiable and by insisting on the continuity of human development. But they wish to avoid declaring "the foetus

to be in all circumstances inviolable," because they feel such a position would imply an absolute moral and legal exclusion of abortion, which they quite frankly want to permit in certain cases. One's judgment whether the fetus is a human being "will inevitably be influenced by the evaluative conclusions that we want to come to."[22]

Now, I would not wish to deny that those who intend to kill often find it helpful to define their intended victims as non-human. Such conceptual juggling has been pointed out above, and one could verify the general practice of the device by a study of the history of the treatment of Negro slaves or American Indians. We would find examples of argument that such victims were not human, did not have souls, were not full persons.

But I do not think that such conceptual juggling is unavoidable. In the first place, the Anglican committee was simply mistaken in saying that acceptance of the humanity of the fetus absolutely precludes further consideration of the possible morality—much less the possible legality—of abortion under certain exceptional conditions. We shall see that while those who accept the full humanity of the fetus are not open to abortion on demand, they often do propose a rationale for approving some abortions.

Moreover, the arguments I have already proposed seem to me to show that at least the factual question has long since been settled by biology: a new human individual begins at conception. What the Anglican committee does in a somewhat confused way, is to answer the metaphysical question whether this human individual is a person. They answer in the negative. The defense of this negation is that for many purposes we define "human being" by the traits we consider most valuable, that on this basis the paradigm case is the typical adult, and that the fetus is only potentially an adult. This procedure is question-begging, of course, but the committee does not deny that.

Rather, they propose that to talk in terms of potentiality to adulthood is "less pliable" than to talk in terms of "soul," "life," or "person."

> Thus, we may say that the foetus will, if it develops in the usual way, turn into a typical adult human being; that it is not *now* a typical adult human being; that, nevertheless, it is, in most cases, an object of hope, on the part of its parents, because of its potential future as a child of theirs (as in evidenced by the distress usually caused by miscarriages). We may then go on to argue that, because of its potential future, there is a *presumption* that we ought to do what we can to preserve the foetus. This argument is based on the premise that it is a good thing, *ceteris paribus*, for there to be another human being.[23]

There are many difficulties with this argument. For one thing, it would justify infanticide as well as abortion, for birth is not a morally significant dividing line, as the committee itself notes a few pages previously.[24] Again, if the whole weight of the presumption against abortion rests on the presumption that it is a good thing, *ceteris paribus*, for there to be another human being and that the fetus has a potential future as a human being, then there is no moral difference between contraception and abortion. The committee itself also con-

firms this when it states, without argument, that conception is no morally significant dividing line.[25]

Now, an ethical position that cannot clearly distinguish contraception from infanticide seems to be in difficulty. But there is the further difficulty that no reason is given to show why the potential future of the fetus as a typical adult human being—if that is all that is at stake in abortion—should establish any presumption that we ought to do what we can to preserve the mere potentiality represented by the fetus. The committee says we may argue from potential future to presumption, but they give no argument beyond the assertion, and the assertion is hardly self-evident.

Perhaps the reason for this gap in the argument is that the Anglican committee was proceeding from a situation in which all abortions had been excluded toward a justification of some abortions. They therefore made what is a common mistake in moral arguments. They abandoned the principles underlying the *status quo ante* in order to admit desired change, and neglected to note that there remained no barrier to undesired, radical change.

In effect, the Anglican committee was still of half a mind to think of the fetus as a person, but as a less equal person than an adult. They do not say this, but they do say the fetus has a "right to live and develop," but that there may be cases in which "this right may be offset by other conflicting rights." [26] Since only persons have rights, the committee here implies that the fetus is a person; but since they wish to subordinate the fetus' right to life to some less basic rights, including a rather broadly conceived right of maternal health, the committee could not employ the concept of person. For "person" suggests equality of basic rights—the ones Blackstone called "absolute." To maintain the desired inequality, the fetus therefore has to be classified as a potential adult.

But this solution does not really seem to differ much from another possible way out that the committee considered and rejected: namely, to imagine

> ...that between the moment of conception and the full maturing of the personality—whenever that may be assumed to have been attained—there is a long period of development, and that the degree of protection which is this person's due develops *pari passu* with it.[27]

The committee rejects this as too complicated to apply in morals and especially in law. But it is hard to see that the concept of potential adulthood is less difficult to apply, and certainly the concept of potentiality has enough ambiguities of its own.

If the committee actually did think of the rights of the fetus as proportioned to its stage of development, we are back with Montagu's concept of "functional humanity" which is not an endowment but an achievement. We are also back with the false concept of the development of the living by analogy to production. What is worse, a mytho-poetic conception of developing person-

ality and rights is implied, so that one could almost solve conflicting claims of rights by placing opponents on an ordinary balance scale.

On the other hand, if the Anglican committee were altogether serious about the rejection of this proposal, they ought to have noticed that the potential future of the fetus will ground no rights for it at all unless it also has some present, actual character that grounds those rights. The human embryo at first does nothing but grow and develop, but it performs these vital functions in a specific way—not as a vegetable, not even as any other species of mammal would do, although the similarities are close. The potentiality of the human embryo is not simply for what it will become, but also for what it is. Human life is complete in its whole biography, and the whole meaning of what is earlier cannot be reduced to what comes later. The typical human adult is different from the baby, but not necessarily better, and the fullness of human life cannot be found in either the one condition or the other, but only in all the potentialities and fulfillments that constitute the process from the womb to the tomb.

The Anglican committee has done a real service, in any case, in frankly admitting the arbitrariness which underlies so much conceptual juggling in discussions of the question whether the aborted are human beings. If the discussion need not be as arbitrary as they suggest, it nevertheless is the case, as Herbert Richardson, a Protestant theologian and professor at Harvard Divinity School, points out, that we revere life more in ourselves and in those with whom we are closely identified than we do in

> . . .many of the weak: the mentally retarded, the physically disabled, the genetically defective, the seriously ill, primitive and aboriginal peoples, and even our enemies. These all seem to lack some of the characteristics we feel are essential to ourselves . . .. And what of the human fetus? Should we not care for it as weaker human life, accepting the fact that such choosing in its behalf always must involve an imbalance of advantage in its favor?[28]

For Richardson it is ironic that "we seem to want to push the fetus and the terminally ill outside the circle of humanity" just when we are making progress in bringing some others into it.

Throughout this section I have referred to the expectant woman as a mother and to the fetus as a child—at least I have not been careful to avoid doing so. I could have been more careful in this matter, and perhaps thereby gained something in the appearance of neutrality. But to have done so would not only be less honest, it would even be unnatural. For this habit of thought and speech is so ingrained that even proponents of abortion fall into it, and we have met it in some of the relaxed abortion laws. However, those really strongly for abortion can overcome the habit.

Lawrence Lader, in recounting the story of Sherri Finkbine, the Arizona mother who went to Sweden to have her thalidomide baby aborted, reported:

> When she came out of anesthesia, Bob was standing by her bed. "Did you hear what the doctor said?" he asked. "The baby was deformed." He repeated it over and over again to make sure that she understood.
>
> "It was not a baby," the doctor told her. "You must think of it as an abnormal growth within you."[29]

Both men favored the abortion, certainly, but Mr. Finkbine said "the baby" while the doctor, having overcome that habit, said "not a baby."

Utilitarianism—the New Morality

If we set aside the personhood of the unborn, arguments against abortion are arguments against contraception. Since I have treated this point at length elsewhere,[30] I will not deal with it here.

However, if we accept the position that the aborted *are* persons, the ethical issues are far from settled. What is excluded is any extreme position that would in effect equate abortion with contraception.

Thus the view that abortion is justified whenever the woman wants it, because she has a right to control her own reproductive capacity, is ruled out as soon as one grants that the fetus also is a person with rights. For if this is true, the fetus' right to life obviously is more important than the woman's right to dispose of her own reproductive capacity. Clearly, an obligation on a pregnant woman to forego abortion no more infringes on her rights than an obligation to forego infanticide infringes on parental rights.

We have responsibilities to those who are dependent on us, and we can hardly claim a right to kill merely to free ourselves of the burden of putting up with and caring for our dependents. If they are *ours*, they are not ours to dispose of as we will; that is the difference between our property and our relatives. The former is an extension of ourselves, but the latter, being other persons, have some importance in themselves.

Arguments that no unwanted child should be permitted to be born and that we must value quality of life more than mere quantity of life also have been introduced into the abortion controversy after having been used to defend the morality of contraception. However, a utilitarian theory of morality can use these arguments even on the supposition that the unborn are persons. And a utilitarian theory would be even more likely to argue the justifiability of abortion in particularly difficult cases—for example, when the mother's health is seriously endangered, when the child will be seriously defective, when the circumstances of the child's conception render its prospects very dim, or when the birth of the child would seriously lessen the chances of several brothers and sisters for a good life.

How would a utilitarian ethics defend abortion in such cases?

Utilitarianism holds that the moral good or evil of human acts is determined by the results of the acts. If an act has good consequences then that act will be good; if it has bad consequences, it will be bad. Of course, most acts have consequences that are partly good and partly bad. Therefore, utilitarian-

ism holds that the morally good act will be the one that on the whole gives the best results. Whenever we act there are alternatives, including not acting or delaying action. If we can add up the good results expected from each alternative and subtract in each case the expected bad results from the good, then according to utilitarian ethics we should choose the act that carries the prospect of the *greatest net good.* Only that act will be a morally good and right one to choose. Other possibilities will be more or less immoral depending upon how far their net value falls short of the single morally good act.[31]

Of course, this theory of morality immediately raises two questions. One question is whether the person acting must consider the good of others, or only his own good, or both. The other question is what will count as good consequences.

The answer of classical utilitarianism to the first of these questions is that one should consider the good of all indiscriminately when counting up good and bad results. We should seek "the greatest good of the greatest number"—so the maxim goes. Thus the agent himself, his friends and family, his enemies and those he has never met would all deserve equal consideration. This position is somewhat unclear, since it does not settle what to do if greater total good can be done to fewer persons by one act and a somewhat lesser total good to a much larger number of persons by the alternative. I think that this and other like ambiguities must be settled on the side of greatest net value, if the simple theory is to be maintained.

The other question—what will count as good consequences?—also has a classic answer. The good is pleasure and the absence of pain. Utilitarians have been criticized for the narrowness of this conception of good, but what they mean by "pleasure" includes every sort of enjoyment, felt satisfaction, and desirable experience. On this theory, the only thing good for its own sake is that conscious experience be as one would wish: rich, intense, and without pain, anguish, or boredom.

An issue often debated among those who espouse utilitarianism is whether each individual act must be judged immediately by the standard of good consequences or whether particular acts should be judged by moral norms which, in turn, would be submitted to the utilitarian test. The first position is called "act-utilitarianism" and the second "rule-utilitarianism." Rule-utilitarianism may seem more plausible, because it leaves room for the ordinary belief that there are some moral norms that should be respected.

However, the two positions actually amount to the same thing. For act-utilitarianism admits that the judgment that is right in any given case should be followed by anyone who faces a similar set of alternatives having a like balance of good and bad consequences. Thus the judgment of the individual act really is universal, and amounts to a rule. And rule-utilitarians, for their part, do not hold that the rules should be maintained even if on the whole and in the long run a change would be for the better. Thus the rules are subject

to revisions which admit all reasonable exceptions, and reasonableness is judged by the criterion of utility.

Rule-utilitarians often argue that their position takes account of situations in which it is harmless to the community and advantageous for each individual to act in a certain way but disastrous for all if everyone acts in that way—e.g., the contamination of a public waterway by private sewage systems. However, act-utilitarianism can justify making and enforcing rules to restrain everyone from contributing to a situation when cumulative action would result in common disadvantage. Among the bad consequences of an individual act are the implications it has for the action of others and together with the action of others. Thus if utilitarianism were a usable method of moral judgment, act and rule utilitarianism would yield the same results.

Utilitarianism is a secular ethic in the sense that it has developed as a "new morality" in conscious reaction to traditional religious ethics. The origins of the theory are in modern humanism, which especially in the nineteenth century sought to reform society and to change established customs, many of which rationalized grievous inequalities on the ground that the advantages of the upper classes were theirs by rights founded in "traditional" morality. Since religious morality had been perverted to defend social injustices, humanistic reformers sought a non-religious ethics to serve as the ideology of needed reform. The utilitarian theory was one candidate for this function; Marxism was another. But utilitarianism was compatible with the political outlook of Britain and America, while Marxism was not.

Utilitarianism and Marxism are both this-worldly. Both locate the good in people themselves. Both consider any act good if it has sufficiently good consequences. But Marxism locates the good in an ideal society—a kind of Kingdom of God without God—while utilitarianism locates the good in the experience of individuals—a kind of heavenly bliss without heaven.

Not surprisingly, therefore, utilitarian and Marxist ethics agree in justifying the killing of some people when such killing has sufficiently good consequences. The Marxist will justify killing if it promotes the revolution and the coming into being of the communist society. The utilitarian does not expect any such ideal society and he does not subordinate individual happiness to the community. But the utilitarian can justify killing some to save more, killing those whose lives are more miserable than satisfying, and the like.

Thus we can understand most common arguments in favor of abortion, for most of these arguments simply assume without proof (or even question) a utilitarian type of ethics. Surely, the argument will begin, it is right to induce abortion if it is necessary to save the mother's life, since otherwise both she and the baby would die together, and it is better to save one than to lose both lives. Then, of course, even if it is a case of *either/or,* it usually will be better to kill the baby, since the mother's life will normally mean more to herself and others than the unborn's life means to it and to others. Next, the lack of advanced awareness and susceptibility to mental anguish in the unborn (or

even in the young child) will justify killing it if its continued existence will spoil someone else's life (the mother's health; the well being of existing children; the protection of society from the population explosion). Then too, if the child's own life will likely be more a misery than a joy, it may be killed (defects of a serious sort; perhaps the burden of being illegitimate; perhaps even the sad condition of being unwanted).

Everyone is familiar by now with the utilitarian sort of argument. It is usually, and most effectively, presented by detailing some actual, horrible case which appeals strongly to humane sensibility. We identify with the mother and feel acutely the weight of net value for and in her on the side of abortion. We neglect the embryo, even if we admit it to be human, because we have no memory of being in its condition, because it looks odd (perhaps, even, repulsive), because we do not know it, because it has no role in our society.

Those who argue for abortion on utilitarian grounds have adopted an effective rhetoric that does little justice to their opponents. The two chief elements in this rhetoric are an appeal to contemporary prejudice against the authority of traditional religion and an appeal to humane sympathy for the plight of persons in the face of objective, "impersonal" moral standards. Proponents of abortion may be fully sincere in this rhetoric. The prevailing rejection of abortion as immoral undoubtedly arose from the religious tradition, and many opponents argue on the basis of religious faith rather than develop a rational alternative to utilitarianism. Also the depersonalization of modern life in technological and bureaucratic society often pits the person against cold, "objective" requirements, and opponents of utilitarianism have not shown sufficiently that utilitarianism itself reflects modern depersonalization. Most important of all, opponents of utilitarianism have not effectively shown why mere good consequences cannot be an adequate criterion of moral goodness.

The first point that must be understood if the utilitarian theory is to be properly appreciated is that for utilitarians there is nothing inherently wrong or undesirable in killing human beings. As William Kopit and Harriet Pilpel wrote in a working paper for the New York Civil Liberties Union Board of Directors:

> It is thought that most people do not consider a fetus of twenty-six or less weeks as a living child. Moreover, acceptance of a utilitarian philosophy requires that we recognize that no person has an absolute right to life. In certain situations, the taking of life is necessary to prevent the occurrence of a greater evil. The enormous social costs that the present abortion law create [*sic*] is clearly an evil that far outweighs any right to life that a fetus may be thought to possess.[32]

Kopit and Pilpel cite the A.L.I. commentary as evidence for the first statement. But they give no account of the "weighing" procedure that is supposed to support the second. In their calculation human life apparently weighs little as against "social cost."

Yet most people still tend to think that in general human life is precious and is to be respected and safeguarded regardless of the condition in which it is found. As Glanville Williams, himself a utilitarian, points out:

> Even the modern infidel tends to give his full support to the belief that it is our duty to regard all human life as sacred, however disabled or worthless or even repellent the individual may be. This feeling, among those who do not subscribe to any religious faith, may sometimes be in fact a legacy of their religious heritage.[33]

Williams, being a consistent utilitarian, explicitly regards not only abortion but also infanticide and euthanasia as morally right in appropriate cases. He does not inquire whether all individuals who are either disabled or worthless or repellent ought to be dispatched, but he offers no argument against a democratically approved, carefully selective and well managed social program for weeding such undesirable elements out of the population. Williams does not see that there might be non-theological, humanitarian grounds for holding human life as such to be "sacred"—that is, worthy of respect and protection regardless of circumstances.

Williams also holds that a sense of the "sanctity" of life, present even in unbelievers, may be a legacy of religious tradition. He is insensitive to the humane character of this attitude. Paradoxically, Joseph Fletcher, who is an Episcopalian cleric and Professor of Ethics at the Episcopal Theological School, Cambridge, Massachusetts, shares Williams' view and claims that it is essentially Christian.

According to Fletcher, no act is intrinsically wrong; moral quality arises from the consequences. Fletcher explicitly declares that his theory takes over from utilitarianism the strategic principle of "the greatest good for the greatest number." However, for Fletcher, not pleasure but love—that is, the pursuit of the good of others on the widest possible scale—is the goal.[34] Yet Fletcher never explains what is to count as the "good of others"; he offers no general theory of values, but instead insists that an intuitive appraisal be made in each situation. This procedure leaves the problem of values to "common sense"—that is, to unexamined predilection. Fletcher illustrates the procedure with many "cases," his pronouncements on which would often seem unloving to anyone not a utilitarian.

Fletcher's system seems to me to differ from classical utilitarianism in only three ways. First, his emphasis on love and service to others seems to imply that a morally upright person should leave his own interest altogether out of account, except to the extent that the good of others requires self-concern.[35] This would differ from classical utilitarianism which counts the self equally and directly along with all others. Second, by setting aside classical utilitarianism's restriction of the good to pleasure, Fletcher is able to allow a more natural assessment of human values, without the need to reduce life-saving, friendship, and other goods to their effects upon states of conscious-

ness. Third, Fletcher claims that Christianity, by faith in God's love toward man, provides a new motive for love, but otherwise love functions in setting moral standards exactly the same for believers as for unbelievers.[36] This is why Fletcher can accept a completely secular view of abortion, yet claim his position to be the only truly Christian one.

Thus Fletcher approves abortion in the Finkbine thalidomide baby case:

> God be thanked, since the embryo was hideously deformed. But nobody could know for sure. It was a brave and responsible and right decision, even if the embryo had been all right.[37]

Again, he approves the abortion of three thousand babies in a concentration camp where pregnant women were put to death:

> Even accepting the view that the embryos were "human lives" (which many of us do not), by "killing" three thousand the doctor saved three thousand and prevented the murder of *six thousand*![38] [calculation and emphasis his]

Fletcher is even willing to grant that sometimes abortion should be *preferred* to contraception: "*In most situations* birth control by prevention, for example, is better than abortion."[39]

In discussing a case of abortion following rape, Fletcher makes his most extreme statement on the subject:

> They [those who share Fletcher's view] would in all likelihood favor abortion for the sake of the patient's physical and mental health, not only if it were needed to save her life. It is even likely they would favor abortion for the sake of the victim's self respect or reputation or happiness or simply on the ground that *no unwanted and unintended* baby should ever be born.[40]

Paul Ramsey, a Methodist, who is a Professor of Religion at Princeton, has observed that Fletcher here embraces one absolute standard: "No unwanted and unintended baby should ever be born," although this absolute is incompatible with Fletcher's basic position that nothing is intrinsically evil.[41]

Utilitarianism does not justify spasmodic, senseless violence. No, violence must be expedient and calculated to yield the greatest net good. Thus, the rule excluding the birth of unwanted children is not to be taken as an application of a general outlook favoring the killing of anyone who happens to get in the way of what one wants. Rather the argument is that unwanted babies, their parents, and society at large are on the whole better off if the unwanted babies are aborted.

Of course, the classification of babies as "unwanted" may not turn out to be as simple as it seems. Many babies are unwanted at the beginning of pregnancy but lovingly expected before birth. Indeed, women seeking abortion have been reported to be anxious to have it over with before they feel life, because then they could not go through with it. Where infanticide is practiced, something similar often occurs. Mothers must hurry to get rid of unwanted babies before feeding and caring for them, since they could not part with babies they had once nursed.

The change, unfortunately, is not altogether in the direction from unwanted to wanted. Many parents want their babies until they face real unforeseen difficulties and disadvantages. Then they ardently wish the babies had never been. Proponents of abortion often cite statistics on parental abuse—the "battered child syndrome"—to support the view that unwanted children should not be born. The assumption is that if permissive abortion eliminated unwanted babies before birth, all children would receive a full measure of tender, loving care. This assumption is not supported by any evidence, and it is at least as plausible to think that recent increases in child abuse are a *consequence* of more permissive attitudes toward abortion. Surely parents filled with frustration and hostility may reason that if it is not wrong to kill children that are unwanted before birth, it cannot be wrong to batter children that become unwanted afterwards—for example, when their constant crying becomes unbearable. And I do not see how a utilitarianism which justifies abortion can fault such logic.

Proponents of abortion often argue that in a period of population excess the abortion of unwanted children is not damaging to society. Professor Ralph Potter of Harvard Divinity School has argued to the contrary that the only adequate stimulus for the sensitivity and sacrifice needed to surmount the multiple social crises facing us is a respect for life of a sort that excludes abortion:

> A utilitarian argument may be advanced to the effect that the total response to the population crisis will be most effective if respect for life is affirmed in the matter of abortion and is then used as a point of leverage and a goad moving men toward the realization of its imperatives in all human activities and relationships. It is only when institutions of society are considered to be rigidly fixed and predetermined that abortion can be portrayed as "the only way out." "Respect for life," the same value that generates hostility to abortion, should be made to generate openness to change and social inventiveness.[42]

In other words, in the argument about population, the utilitarian proponents of abortion both oversimplify the problem and ignore important but subtle consequences of the alternative courses of action.

We should notice that oversimplification and ignoring of data is not incidental to utilitarianism but is a necessary aspect of the method. There simply is no way to determine the "greatest net good" if we take into account *all* the probable good and bad consequences of all the alternatives concretely possible. For the possible alternatives open to us at any given moment are unlimited until we assume a certain definite good. And the humanly significant consequences of any act can be endlessly pursued into the ever more complex and remote and uncertain future. Moreover, diverse goods—even diverse forms of classical utilitarianism's pleasure—are incommensurable with one another. There is no least common denominator, and so there can be no scale for weighing goods against one another.

Many a couple has decided to have another car rather than another child, but such a choice has never been made merely by rational calculation. The two are not commensurable. A decision was reached only when the good of having another car was accepted as the standard by which to judge the merits of having another baby. It is precisely because goods are incommensurable that we are able to determine our course of action freely; if utilitarian calculation were possible, the conclusions of such calculations would impose themselves on us just as unavoidably as do the conclusions of arithmetic problems.

This may explain why Fletcher, who claims to support an ethics of judgment in each concrete situation, argues for his position by using "cases" which are not concrete at all, but carefully abstracted and simplified models. Each "case" is presented in such a way that the objective considered desirable is brought into sharp focus, the alternatives are limited to two, and the significance of remote consequences is excluded.

Actual moral decisions are never so simple. But there are judgments that can be made in this way. In technology, engineering, industry, crafts, and arts judgments about how to proceed are necessary. In making such judgments, it is taken for granted that the desired result is good. The only relevant alternatives are the various ways of producing it. These alternatives are judged by their efficiency. The manner of proceeding that is decided on will be considered a good one if it succeeds—that is, if it gets the results one wants.

Moral judgment is not like this because it is not concerned with some particular, limited, definite goal that is produced by an action that has a meaning only from that goal. No. Moral judgment is concerned with the good of the person acting himself and with the good of other persons. This good is not achieved by any particular action, but rather *in* as well as *through* the whole of human life. Man is not a product; what he is to be, is not fixed, but constantly expanding.

The peculiarity of persons, in comparison with things, is that persons are not limited by what they are. For a person is a capacity to reflect, and reflection allows the self to stand back from itself and so to go beyond itself. Utilitarianism, far from being an antidote to modern depersonalization, is a consequence of it. If human life itself has to be judged good or bad by its utility, then man is no better than a machine. And this is precisely the outcome of utilitarianism, for it seeks to judge the moral value of human action by its consequences. But in truth human action is considered from a moral point of view precisely to the extent that it is seen not as leading to particular ends but as going to make up the whole which is a person's life itself.

The reduction of persons to the status of objects is most obvious in a utilitarian approach to the question of birth defects. For a utilitarian, there must be a kind of checklist for a human being just as there is for an automobile that is inspected at the end of a production line. The quality of the person will be determined by the extent to which he meets the pre-set list of requirements. If he falls short too seriously, it is only reasonable to consign him to the scrap

heap. This may explain why Fletcher can so confidently praise God for the abortion of a baby deformed by thalidomide and can assert so blandly that babies suffering from mongolism are non-persons. He assumes that to be a proper person one should meet some perfectly clear standards of quality control on the human production line.

What the example of Helen Keller and innumerable other defective children, including many thalidomide babies and mongolian idiots, shows is that the value of a human life cannot be measured by any such pat set of standards laid down a priori. In creating one's own life, a person can establish new standards of value, can go beyond his own limitations and even a little beyond the previous limitations of mankind as a whole. For this reason we all thrill to examples of human greatness, for those who have been great inspire us with hope that we may yet not only do what they did, but also do what they did not—that as they became what man before them had not been, so we too may become what man before us has not been. Our heroes inspire us not to relive their lives but to live our lives with a touch of their heroism.

Utilitarianism logically precludes the heroic. Only the greatest net good makes an act good; all alternative acts are evil. There is no going above and beyond the demands of duty. As on the assembly line, so in utilitarianism, everything is either up to standard or substandard. The abnormal is always less good; perfect conformity to the standard design is ideal.

The demand for quality rather than quantity is a utilitarian argument. One has to have standards of quality to make the demand intelligible. Those who popularized the slogan "the right to be well born" in connection with the eugenics movement had the same mentality. Doubtless they suffered from a certain snobbery as they looked down on the large families of their social inferiors. But there was more than snobbery involved, just as there is more than snobbery today when foundations, based on fortunes gathered by "private enterprise," apply their resources to population control. The eugenicists knew as a matter of scientific fact that it is possible to breed a better race horse or a better type of chicken. Therefore, why not breed better people? The answer, which also answers the utilitarian argument for abortion to promote quality, is that a better race horse is faster and a better chicken lays more eggs—because that is all that we are interested in—but a better person contributes something new to our understanding of what it is to be human and broadens a little our capacity for interest and appreciation.

Even the kinds of cases that seem the most suitable illustrations of the utilitarian view lose some of their force if they are examined in light of a more liberal and personalistic conception of man.

A woman who has been raped can simply reject any possible child by viewing it as the extension of the attacker and his brutal deed. But she might also consider the child as an opportunity to extend her own selfhood in a unique way; by forgiveness, generosity, and gentleness she can overcome vio-

lence, whereas abortion would only compound the violence done to her by a violence to another who also has sprung—although unwillingly—from herself.

Pregnancy that is a serious threat to the mother's life is seldom if ever a clear and present danger to which there is no alternative. Is a woman wicked who chooses to take the risk involved, preferring danger for herself to certain death for her child? If utilitarianism were correct in justifying abortion, then the alternative chosen by such a mother would be wicked, for her commitment would be to something less than the greatest net good. But who can say that the attitude of such a mother may not be a good greater than life itself?

Even Fletcher's case of a doctor who aborted three thousand inmates of a concentration camp is less clear cut than he suggests. Compassionate as we must be toward the physician and the mothers who chose abortion in that horrible situation, might we not view their act as a failure—understandable in view of the weakness of human nature—to resist the dehumanizing effects of the degrading inhumanity of their oppressors? If all the victims had resisted to their utmost, might not the Nazi persecution have been less devastating? And what of the millions of ordinary, non-Nazi citizens who participated only by omitting to oppose the terror? Was their inaction justified by their utilitarian concern for their families and their realistic awareness that no one person's resistance would alter the course of the Nazi leadership?

Again, we must ask whether a woman was wicked who refused abortion, preferring that she and her child suffer death than that she kill her child to save herself? If such a choice would not have been immoral, then Fletcher should have to admit that the greatest net good was not necessarily achieved by aborting the three thousand women. Of course, those who are not utilitarians might solve the problem by holding that neither course would have been evil, or by admitting that six thousand murders were prevented at the cost of three thousand murders. A utilitarian must say it is better that there be more participants in murder provided that there be fewer victims. But if the attitudes of persons are more important, morally speaking, than good consequences, perhaps limiting the number of murderers is more important than limiting the number of victims.

Utilitarianism always has been attacked because judgments made according to it do not seen to jibe well with many intuitive judgments about justice. When the stakes are sufficiently high, utilitarianism can justify the use of torture and the terrorization of the innocent. Many who support abortion on utilitarian grounds inconsistently apply non-utilitarian standards of justice by absolutely condemning the use of torture and terror in a situation such as the Vietnam war.

A common counterexample used to challenge utilitarianism is a situation in which a judge can save a dozen innocent men from a lynch mob by condemning two of them to death—though he knows they are not guilty. For the judge to give victims to the mob seems patently unjust, yet utilitarianism seems to require judicial murder in this case.

Of course, a utilitarian can defend himself by rejecting the judicial murder on the ground that its consequences would include not only the death of the two victims and the saving of ten others but also the perversion of a system of law on which the whole social order depends. But one can equally argue that abortion alters for the worse the attitude toward life of everyone involved, that abortion lessens the confidence of everyone in his own security, and that it introduces into the family an element of violence that can hardly be contained in this single situation.

Even if the unborn are admitted to be persons, utilitarianism can offer some justification for abortion. But the justification will not be very plausible, because utilitarianism is not a very plausible ethical theory. A humanism that permits the end to justify the means is hardly likely to promote social stability unless the end is itself the community's welfare—as is the case in Marxism—rather than the individual's.

Our present crisis of law and disorder is rather telling evidence—and utilitarian evidence at that—against the acceptability in our society of a theory that the end justifies the means, for with us every individual and group is free to decide for himself and itself what the justifying end is to be. The social order that is essential to personal security can be reconciled with liberty as extensive as we enjoy only if we all agree in recognizing that there are some kinds of act that are never justified, regardless of the prospective net good someone might think would follow from their performance in his situation. I will discuss this point at length in chapter seven.

Situationism—Modern Protestant Ethics

Fletcher entitled one of his books: *Situation Ethics: the New Morality.* His contention is that his position is akin to the situation ethics (or situationism) which during the past forty years has become the dominant approach to moral problems among Protestant theologians. Actually, however, Fletcher's position is akin to utilitarianism, as we have seen. Fletcher himself sharply criticizes the leading figures in the situationist movement.

For example, Fletcher writes concerning Karl Barth, who is probably the greatest Protestant theologian of our times:

> Karl Barth puts himself in an untenable corner with the intrinsic fallacy. On the subject of abortion he first says that an unformed, unborn embryo is a child and that to stop it is murder. Then he declares, uncomfortably, that although abortion is "absolutely" wrong, it can sometimes be excused and forgiven. Therefore he is in the intrinsic camp but merciful about it. Finally he blurts out: "Let us be quite frank and say that there are situations in which the killing of germinating life does not constitute murder *but is in fact commanded*" (italics added). This puts Barth in the anomalous position of saying that to obey God's command (to act lovingly) is to do something absolutely wrong. Clearly this is theological-ethical nonsense.[43]

Again, having condemned as "nightmare legalism" the Catholic position that in hopeless cases it is wrong to kill the baby even if that means allowing the mother to die, Fletcher attacks Dietrich Bonhoeffer, a Lutheran who was executed by the Nazis for fighting their regime and whose writings have greatly influenced recent theology:

> Inexplicably, shockingly, Dietrich Bonhoeffer says the same thing: "The life of the mother is in the hand of God, but the life of the child is arbitrarily extinguished. The question whether the life of the mother or the life of the child is of greater value can hardly be a matter for a human decision."[44]

Fletcher could have accused Bonhoeffer of inconsistency as he did Barth by applying to the topic of abortion a general statement by Bonhoeffer that is worth noting:

> For the sake of God and of our neighbor, and that means for the sake of Christ, there is a freedom from the keeping holy of the Sabbath, from the honouring of our parents, and indeed from the whole of the divine law, a freedom which breaks this law, but only in order to give effect to it anew. The suspension of the law can only serve the true fulfillment of it . . .. Whether an action arises from responsibility or from cynicism is shown only by whether or not the objective guilt of the violation of the law is recognized and acknowledged, and by whether or not, precisely in this violation, the law is hallowed.[45]

Thus Bonhoeffer also rejects Fletcher's view that acts become morally good if they have good consequences.

These passages show clearly enough that situation ethics is somehow different from Fletcher's "new morality." But if we are to do more than reject this approach as "theological-ethical nonsense," we have to try to understand its paradoxical view of moral issues.

It will help us to understand Protestant situation ethics if we look back to the ethical theory of Immanuel Kant, who wrote around the beginning of the nineteenth century. Kant's ethics is strictly philosophical, not theological. However, Kant tried to transpose into philosophical terms the traditional Protestant moral outlook, rather than reacting to it as the utilitarians did. Kant, in turn, has strongly influenced subsequent Protestant moral thought.

Kant completely rejects the utilitarian idea that human acts get their moral quality from their consequences. He realizes fully that such a theory reduces morality to technique and that it depersonalizes man. He particularly notices that if utilitarianism could be true, then human freedom (and hence morality itself) would be impossible.

In order to insure that the determinism of the natural world will not obstruct morality, Kant completely separates the moral self from the physical world of experience, including the body and outward behavior. The whole essence of moral life for Kant is therefore found in the inner acts of thought and intent. Goodness, Kant believes, is centered wholly in a good will—that is, in the uprightness of the attitude with which one acts.

But what constitutes an upright attitude? Kant cannot answer this question except in terms of the inner standards of the life of the mind itself, for to go outside would mean that something else is imposed on the moral self. Such an imposition would be not a moral "ought" but a freedom-destroying "must." Therefore, Kant says that uprightness of moral attitude, good will, consists in acting for the purpose of doing what is morally right. In other words, our action is morally good if it springs from a will bent on doing what we ought to do.

What ought we to do? Kant explains that whenever we act, our action implies a general rule. Human action is meaningful with a meaning that our own intelligence puts into it. In the back of our minds as we act, there is always the thought: "Since such-and-such is what I want to accomplish and the factors in the situation I am up against are so-and-so, such-and-such an act is the appropriate sort of thing for me to do." Now, Kant says, if the rule we have in mind is consistent with itself and if it could consistently fit into a system of universal laws that we would really want everyone to follow consistently, then actions shaped by that rule ought to be done. If our rule is inconsistent with itself or could not fit in a system of universal laws that we would really want everyone to follow consistently, then the rule cannot be adopted. If man were only his reason, Kant believes, he would never be unreasonable and so could not ever do anything immoral. But since we also exist as objects in the natural world, our natural inclinations can get the better of our reason. In that case we slip in a private rule of action which reason could not approve, and our action is immoral.[46]

Now, what Kant has done preserves much of what Christians have meant by morality, but does so without giving God the central place He traditionally held. Man's goodness still depends on a free commitment for Kant, but instead of a commitment to accept God's revelation it is a commitment to hold to man's own reason. Instead of the universal harmony Christians hope will be achieved by God's providence, which orders all things well for those who love Him, Kant hopes for a universal harmony based on the consistent system of moral laws which men make for themselves. Instead of original sin, which Christians believed disrupted man's integrity by separating him from God, Kant thought that man's condition as a being in nature as well as a rational, moral agent explained man's lack of integrity—his ability to do evil.

Clearly, no one who has Christian faith can *agree* with Kant. Contemporary Protestant situation ethics does not agree with him.[47] Yet it is profoundly influenced by Kant because it tends to disagree with him on his own terms. In other words, the situationists take much of their understanding of what morality is all about from Kant's explanation of it. In doing so, they are at least considerably nearer the truth of the matter than someone like Fletcher with his borrowing from utilitarianism.

For the situationists, as for Kant, nature, including (and especially) human nature, is a source of moral ambiguity (fallen nature) rather than a source

of moral guidance. Moral goodness is located by the situationists, as by Kant, in the upright attitude of the person acting—that is, in his good will. But his will is good by responding to God's love with a commitment of faith rather than by a commitment to reason itself.

The tendency of Protestantism to set freedom and faith against law and reason combines in the situationists with a Kantian conception of law and reason to bring about their strong reaction against absolute, universal moral principles. Since faith, not reason, is to be the moral guide, the conscience of the believer (which is the Protestant principle for deciding issues of faith) must not be bound by universal moral laws. Such general principles can convey at best an approximate articulation of God's will. His actual will can be discerned only with the aid of the Spirit enlightening the conscience at the moment of decision in each unique, concrete situation.

Moreover, because Kant emphasized so exclusively the moral significance of one's inner attitude toward moral law and neglected the significance of behavior itself, his system does not provide a clear basis for distinguishing between the morality of an action and that of an omission having the same effect and intent. For example, it is difficult to understand in Kant's framework why it could be permissible to allow a terminally ill patient to die (e.g., by not stimulating his heart action) but immoral to kill the same patient (e.g., by purposely giving an overdose of drugs). Some later philosophers who reacted to Kant by insisting on the importance of specific values did not help to clear up this point when they insisted that values directly demand to be realized or embodied through human action.[48] Obviously, on this view, the demand is frustrated equally by action and by omission.

These rather abstract, theoretical points become urgently important in conflict situations. If one violates the moral law (or the demands of values) equally by action and by omission, how can one avoid immorality in situations where there is no completely satisfactory solution—e.g., where the mother may die unless the fetus is aborted? Kant himself recognized that such borderline cases arise and must be considered, but he did not see any theoretical way of settling them, and turned the matter over to "morally-practical reason"—an estimate in the concrete situation.[49] The situationists follow Kant on this point (though often expressing themselves in the later terminology of conflicts of values) and it is from this that *situationism* gets its name.

The general structure of situationism which we have outlined will make situationist treatments of the moral problem of abortion intelligible. We shall look at Barth, Thielicke, and Ramsey.

Barth begins his discussion of abortion by explaining that murder is arbitrary killing, the killing of another on the basis of one's private opinion and the desiderata of one's personal situation. Yet Barth believes that there are exceptional cases in which killing is not arbitrary, because it is done in obedience to the commandment rather than on one's own authority.[50]

Barth declares without qualification that the unborn child is a human being from conception onward, and that its life must be respected. That life has been redeemed by Christ; that life is a gift of God. As a gift, Barth insists, life is not an imposition and the "No" to its destruction is not a mere negation restricting freedom. Rather, that "No" is in harmony with freedom, for it evokes a willing respect for life which includes the impermissibility of arbitrary killing.[51]

But if abortion is a sin, it is not simply the personal sin of the one who performs or seeks it, but an aspect of the sinful world which already is redeemed. Here the question of the exception arises. The preservation of life is not itself an absolute, but only so far as God commands it. May He not sometimes also exercise His sovereignty in taking life by requiring men to serve Him in this way? Barth says yes. At times the killing of the unborn is commanded. These are situations in which abortion is a last resort—in general, situations where the life of the child is balanced against the life or health of the mother. But by "commanded" Barth does not mean "made obligatory"; rather, he means "authorized." Since there is an irresolvable conflict, the respect required for life as a gift of God is compatible with either abortion or a heroic risk by the self-sacrificing mother.[52]

Finally, Barth considers the relation of morality to law. Law which permits an exception in conflict cases is in general agreement with morality and is a useful guide. Still, he refuses to admit that conscientious decision will necessarily fall within the limits of any human law. Perhaps a socio-medical indication may be valid in some cases. What is required is careful reflection, an attitude of obedience toward God, and "faith that God will forgive the elements of human sin involved."[53]

Barth's perspective clearly is altogether different from Fletcher's. Barth's ethics is really theological. He presupposes a traditional Christian evaluation of nascent life. The justification of abortion in difficult cases is based on a conception of conscientious discernment of divine authorization as one reflects on the conflicting elements of a situation that, in our sinful world, is unsolvable. Fletcher justifies abortion and makes it good precisely in a way that for Barth would make it arbitrary killing—murder. For Barth, even the exception involves elements of human sin that require forgiveness. This position was taken up by Bonhoeffer, who did not apply it to abortion, however. But it is developed at great length by Helmut Thielicke.

Thielicke, like Barth, begins with insistence on the humanity of the unborn child and the seriousness of killing it. Parenthood, a God-given responsibility, begins with conception. A worth not merely human but based on the grace of Christ attaches even—or especially—to those who seem least in human dignity. Thielicke firmly rules out a "social" indication for abortion, because the conflict in such cases can be solved without killing. He also mentions, but seems to disapprove without discussion, the "eugenic" indication.[54]

In much more detail than Barth, Thielicke proposes a theological account of the conflict between life and life. The order of nature as we find it is not as it should be; it has been distorted by sin, which introduces conflict. One cannot read God's will in the given state of things. Nothing we can do in a conflict situation will correspond to what we really ought to do—that is, to what would be right in a world unspoiled by sin. In this sense, any solution contravenes God's will and contributes to the extension and perpetuation of sin. For this reason, the killing of the unborn child, even to save its mother's life, is truly a sin. But it also is forgiven, and somehow will be overcome in the providence of God, who already has saved the world from sin and who will in due course make that salvation manifest.[55]

Finally, Thielicke suggests that because the unborn child is less developed than the mother, there is a quantitative although not a qualitative basis for approving abortion in cases of conflict. Abortion still kills a human being, but a lesser one, and so abortion is to be viewed as an evil, but as a lesser evil.[56]

Paul Ramsey carefully considers the biological data regarding nascent life. He adopts much of Barth's theological view of the problem, and firmly rejects the utilitarian justification of abortion accepted by Fletcher. Like Thielicke, Ramsey only considers abortion possibly justified when there is a conflict of life with life.

But Ramsey does not accept the analysis of the conflict situation as one arising from and inevitably leading to sin. Instead, he takes an approach much nearer to the Catholic theological tradition which we reviewed in chapter four. Indirect abortion—i.e., abortion incidentally consequent on another necessary medical procedure—is justified as indirect. In other cases of conflict, Ramsey holds that the fetus may be aborted to save the life of the mother because it is a materially unjust aggressor. (This view has been proposed by some Catholic theologians too but never approved by the Church itself.)[57]

Clearly Ramsey does not share the Kantian background of other Protestant situationists, and there are important theological differences as well that derive from the fact that Ramsey is a Methodist rather than a Calvinist or Lutheran. However, Ramsey is like Barth, Thielicke, and many other Protestant moralists in substantially maintaining the Christian tradition while finding grounds for approving abortion only in very restricted cases. Against the "new morality" of utilitarianism, Protestant situationism defends the sanctity of life and looks to an upright attitude rather than to good consequences as the measure of the moral goodness of our acts.

In general, Protestant situationism does not seek to solve ethical problems by a purely rational, philosophic approach. Therefore, it is not a devastating criticism to notice that the theory is not rationally defensible. Still, it is true that from a philosophic point of view, the explanation of conflict situations is scarcely coherent. Moreover, it is as impossible to argue *against* as it is to argue *for* the moral judgment of someone who believes he is required and guided by

God to do something both sinful and forgiven. On the other hand, when Ramsey treats the fetus that endangers its mother's life as a materially unjust aggressor, he is stretching a category that was designed for an altogether different situation. The conclusion may be sound, but the analogy seems far-fetched.

Perhaps the greatest weakness of Protestant situation ethics is that it presupposes and takes for granted—rather than tries to establish—the principle of the sanctity of life and the moral obligation to respect it regardless of consequences. Since these authors do not see clearly why this principle should hold true (except on theological grounds), there is always the danger that the exceptions permitted by them will subvert the principle itself. Yet their reflections do offer suggestions that it is possible to admit exceptions in the very extreme cases of conflict without introducing a justification that relativizes the value of human life as utilitarianism does. If Protestant situation ethics is not philosophically satisfying, it at least powerfully calls philosophic attention to the problem of conflict situations, and this problem will have to be faced by any ethics.

Before proceeding to a constructive effort to deal with the ethical questions raised by this problem, a few words are in order about the approach of the Anglican pamphlet, previously cited for the position that the fetus is *potentially* human.[58] The committee judges various proposed kinds of cases on the basis of an apparently utilitarian analysis. This analysis is much subtler than that of Fletcher, and does not lead to any unrestricted approval of abortion. Basically, the position is that the alternative leading to the lesser evil is right. Where the alternative to abortion is any real threat to the physical or mental health of the mother (her psycho-physical well-being) considered in integral connection with the well-being of her family, then abortion is judged to be right. The risk of deformity does not itself justify abortion, although the effect on the mother of anticipated risk may. The committee considers eugenic abortion in the interests of the fetus unjustified, especially because the principle involved would also support killing the unfit after their birth. Pregnancy resulting from rape and incest does not automatically justify abortion, but the great dependence of the fetus on the mother is here used as a ground for justifying abortion if she has an invincible aversion to going through with the pregnancy.[59]

In short, the Anglican committee does not regard abortion as an alternative method of birth control. However, since the fetus is viewed as inherently inferior in rights to the mother, it may be killed whenever she will be significantly aided in her over-all well-being. This approach frankly balances net goods, and in the balancing the unborn weigh little. The Anglican committee thus does not wrestle with the issues as Protestant situation ethics does; the Anglicans seem to accept the depersonalizing model of utilitarian ethics rather than to maintain the more personalistic conception of man assumed by those in the Kantian tradition.

A Reformulation of the Ethical Issue

In denying that there is any kind of act so evil that good consequences might not sometimes justify it, utilitarianism excluded the notion that we have any duties that we must always fulfill, regardless of consequences. But if we have no such duties, then neither do we have any unexceptionable rights. Rights and duties are correlative. If I have an unalienable right to life, then it is always wrong for others to kill me. If it is sometimes justified for them to kill me, then my right to life is not unalienable—rather, it all depends on circumstances.

In general, we tend to believe that all men are equal in their right to life and that all men have an equal duty to respect the lives of others. We make exceptions in regard to capital punishment and justified killing in war. But in such cases we think that the criminal or the enemy has somehow surrendered the common, equal right to respect for life.

Obviously, our belief in equality in the right to life is incompatible with utilitarianism. Also, though less obviously, any approach that tries to justify any killing of one human being by another on the basis of factual differences between the two is slipping into a utilitarian attitude toward the good of human life. For, in fact, it is of course true that all of us differ from one another in many ways and all of us are unequal on the basis of each and every difference. No one is superior in every respect; there is some way in which each of us is definitely inferior to others.

To decide that some of these differences, some of these inequalities, some of these ways of being inferior can so detract from the basic worth of a person as to warrant his destruction by another is essentially to decide that all persons have a certain definite and limited worth and that certain facts characterizing persons can lessen that worth in a definite and calculable way. Now, this is precisely the mistake of utilitarianism. It understands human worth not in terms of what is intrinsic to the person and his life—dignity—but in terms of what is extrinsic—value *for something.* Human goods can then be appraised and weighed, and the right to kill will depend upon computation.

In effect, utilitarianism puts a price on every man's head. Every person is transformed into an object. On the model of technological reasoning, the price of one is compared with the price of another. Those whose lives, if continued, would detract from rather than add to the sum total of human value must be eliminated, just as an employer gets rid of an unproductive employee by firing him.

We may feel safe enough, personally, in using the factual inequality and inferiority of the embryo as a ground for treating its life as expendable. After all, we are not now and never again will be unequal and inferior in just the way that the embryo is. But in reasoning thus we are being arbitrary, for we are selecting as decisive the characteristics we prefer among all the differences

of human beings. And we must always remember that there is no common denominator of the importance of these differences.

Thus, we may suppose that the embryo's right to life must give way because it is undeveloped, because its specifically human abilities are latent in potentiality. If the embryo could argue with us, however, he might contend that the life of an adult is of less worth than his. After all, the adult has less time left to live, and all that he has gained in actualization he has lost in possibility. Most of what he could have been has been sacrificed in his becoming what he is, and much that he has been can never be recaptured.

"Isn't it part of the *wonder* you feel when you hold an infant," the embryo might ask us, "that he can still be anything, that all of life lies open before him? And isn't it part of the *sadness* you feel as you grow older that possibilities are closing off for you, like so many gates slamming shut in the maze of life, until there remains only one gate open—the one that leads into the darkness of death? If death is not better than life," the embryo might conclude his case against the mature adult, "then my life is far better than yours, for my life is a process of development and ever increasing vitality, while yours is a process of deterioration and waning vitality as you decline toward death."

I do not suggest that the embryo's argument would be sound; obviously it is fallacious to suppose that the dignity of a person is measured by his degree of vitality. But the embryo's argument would be no more fallacious than ours, if we measure his worth by his degree of development. And our argument would certainly sound fallacious to him, if he were able to hear and comprehend it.

The ethical issue regarding abortion, therefore, is not precisely stated when it is put in terms of whether it is ever morally right to kill the unborn and, if so, under what conditions. Rather, the question is whether it is ever morally right for any human person to kill another one and, if so, under what conditions. To question the absoluteness of the right to life of the unborn is to question the absoluteness of everyone's right to life. Since, as persons, we are incomparable with one another in dignity and equal in our right to life, the principle that protects the lives of all of us also protects the lives of those unborn, while any reasonable ground for morally approving the killing of those unborn also is a reasonable ground for morally approving the killing of persons in any other period or condition of their lives.

Since, in fact, we do believe that on the whole it is wrong to kill human beings but that in certain cases such killing is justifiable, our problem is reduced to investigating whether this belief is correct and, if so, why. Then we must apply to the special case of the unborn any ground that justifies killing, to see which justifications for abortion, if any, are valid.

It might be objected that our examination of the question whether the aborted are human beings did not demonstrate absolutely that they are, in fact, persons. But this objection would miss the point of that consideration in two ways.

In the first place, we saw that beyond doubt the *facts* show the embryo at every stage to be a *living, human individual.* To go beyond this is not a question of fact but a question of metaphysics. We should not expect and will never get a factual answer to the ulterior question. What our arguments revealed is that there is no compelling reason to deny that the embryo is a person. As the Anglican committee frankly stated, to deny personality to the embryo is merely a postulate necessary to leave room for killing it. If ethics is to be anything better than rationalization, such an approach will not do. We must admit, at the very least, that the embryo can as well be considered a person as not.

And therefore, in the second place, ethics must proceed on the supposition that abortion does kill a person. For ethics is concerned with moral responsibility for doing what is right and wrong, and right and wrong are in one's willingness, not in what is beyond our knowledge, actual or even possible. We do not consider ourselves immoral if we discover that some action of ours seriously harmed another, though we did not know and could not have known it would have that effect. Similarly, we cannot consider ourselves blameless if we are willing to kill what may or may not be a person, even if it is not.

In being willing to kill the embryo, we accept responsibility for killing what we must admit *may* be a person. There is some reason to believe it is—namely the *fact* that it is a living, human individual and the inconclusiveness of arguments that try to exclude it from the protected circle of personhood.

To be willing to kill what for all we know could be a person is to be willing to kill it if it is a person. And since we cannot absolutely settle if it is a person except by a metaphysical postulate, for all practical purposes we must hold that to be willing to kill the embryo is to be willing to kill a person.

Consequently, we may not evade moral responsibility for killing a person if we take responsibility for an abortion. This is not yet to say that the responsibility is always *guilt*; that will be true only if killing such persons is always *wrong.*

The important point to realize is that ethical consideration of abortion must not treat it as an isolated case, as if it had nothing to do with the whole question of the ethics of killing human beings. Certainly, the literature we have reviewed also shows that abortion is connected with other forms of killing such as infanticide, and euthanasia. If a utilitarian theory is accepted, not only the personhood of the unborn, but the personhood of all of us is put in jeopardy. Anyone with sufficient ingenuity in metaphysical argument should be able to construct some sort of plausible theory of personality according to which any one of us will turn out to be a non-person.

It is also important to notice that in locating the ethical issue in the way I do, the following discussion does not become completely separated from serious ethical reflection with which I do not wholly agree. The Protestant situationists (as distinguished from those who hold a form of utilitarianism)

examine the issue of abortion in the context of a firm conviction that the real issue is the justifiability of taking the lives of persons. Moreover, not only theological moral reflection but also secular medical and jurisprudential consideration, until the last few years, proceeded generally on the same basis, as we have seen in many places in the literature reviewed in earlier chapters.[60]

Beyond the New Morality and Situationism

Contemporary events have made all of us acutely aware that the fundamental political problem is how to reconcile law and order on the one hand with liberty and social transformation on the other. This political problem has certain dimensions that go beyond the consideration of ethics, but at the heart of the political question is the central issue of ethical theory: how to reconcile the freedom characteristic of the morally responsible person with objective standards of right and wrong.

The problem of reconciling these two aspects of moral action is not primarily a question of balancing one against the other. Moral freedom and moral standards are not values to be pursued but necessary conditions without which moral life would not be possible at all. It would not make sense to discuss what we ought to do, to argue what is right and wrong, unless we could do as we ought and also could do as we ought not. On the other hand, our freedom would be meaningless if nothing we did made any significant difference, and that would be the case if there were no objective standards at all. Ethics begins with some simple assumptions:

1) Not every human act is right; sometimes someone does something wrong.

2) It is one thing to know what is right and another to do it. Sometimes, at least, it is possible for us to choose whether or not we will do what we think we ought to do.

Thus any ethics must try to reconcile moral freedom with moral standards. The reconciliation should be made not by dividing spheres of influence, as if the two were separate and self-contained entities. No, both pervade the *whole* of moral life; ethics must show how they imply one another, even how—in a certain sense—they coincide in morally responsible action.

The subjectivism and relativism we considered early in this chapter fall short of being ethical theories because they exclude moral standards and so make moral argument impossible. Though widespread as a popular attitude, the confusion involved in total subjectivism and relativism too obviously implies a denial of the basic facts of moral life to win support from those who consider the matter reflectively.

There are those who hold the extreme opposite position from subjectivism and relativism. Some philosophers and others, including certain theologians

and psychiatrists, have claimed that moral freedom and responsibility is a complete illusion. This illusion along with moral standards and the entire apparatus of "morality" are facts that must be explained by a philosophical or theological or psychological theory, but the theory will show that everything happens by metaphysical or divine or subconscious causes, so that man never really *does* anything.

Such theories are illuminating to the extent that they reveal many ways in which our freedom and responsibility are much more restricted than we might suppose. Moreover, they remind us that there are some objective conditions of human life—whether these are expressed in terms of a structure of reality, an order of providence, or human nature itself. However, theories of this sort conflict with the obvious facts of human life. Those who propose them frequently outline at least a minimal ethics, consisting in the obligation to get rid of the illusion of morality and to bring about enhanced human well-being by philosophic enlightenment or religious faith or psychological insight. Even if it is possible to think theoretically that we are not free, we go right on thinking practically as if we were.

Utilitarianism, Kantianism, and Protestant situationism do not take an extreme position with regard to freedom and moral standards. Rather than to exclude either altogether, these theories try to include both and to reconcile them. But none succeeds very well.

Utilitarianism, as we have seen, provides no standards at all for settling what our purposes will be. Therefore, the most important decisions are left to subjective whim, unless it is claimed that natural necessity (or the "dialectic of history") determines the goals of life for us. Once our purposes are settled, the theory would imprison life within them. If it were really possible to reason as utilitarianism says we should, calculation would exclude freedom.

Kant's theory seems to provide some moral standards, but unless one takes traditional morality for granted (as Kant himself did) it is hard to tell that a rule of action fails to meet the consistency requirement Kant sets. Anything one does might pass the test provided that what is being done is specified in sufficient detail. For example, if we cannot make a consistent rule that anyone who wants information from another may use torture to get it, we do not see clearly that Kant's criterion excludes torture altogether, for no one would try to justify its use by so broad a principle as that.

At the same time as we encounter difficulties in determining moral standards by Kant's theory, we also find it hard to see how he has room for freedom. He is acutely aware of freedom, but he identifies morally good will with practical reason itself, which is simply what man's moral selfhood is. The possibility of one being other than purely rational, therefore, does not depend upon his moral freedom, but on the fact that man also belongs to the natural world where his behavior is determined by empirical causes. How moral man either resists or does not resist these causes Kant never explains.

Protestant situationism is acutely aware of the difficulty of reconciling freedom with moral standards. But the theologians do not offer any *philosophic* solution to the problem. Rather, they maintain that man cannot achieve a reconciliation of the two principles. Their reconciliation is only in God, who somehow communicates it to man (grace). But the reality of the solution remains in the realm of mystery—so much so that most of the situationists believe that in some situations there is no alternative to doing something morally evil.

A more satisfactory ethical theory must begin from the recognition that freedom is a principle of every moral act without exception. But the word "freedom" has several meanings, and we must notice in what sense freedom is a principle of moral action.

In one sense, "freedom" means liberty to do as we choose without external constraint or internal inhibition. Obviously, life is impossible without some degree of liberty, and complete liberty is equally impossible. But liberty of this sort is not a principle of all moral action, since moral responsibility already is accepted when we make a choice, even if we lack the liberty to execute it.

In a second sense, "freedom" means autonomy to judge what we should choose independently of the judgments of others. Such freedom is the opposite of obedience to authority. Again, it is obvious that one cannot live an adult life without a measure of autonomy, since an adult must somehow share in authority to which he submits, at least by judging for himself the rightfulness of the authority's claim to jurisdiction. But autonomy is not a principle of all moral action, since much of our action involves others and hence must be guided by authority responsible for the common good. Even in the most democratic society, individual judgment normally must yield to the conclusions of legitimately conducted common deliberation, or social order will give way to anarchy with a consequent drastic reduction in the liberty of all.

In a third sense "freedom" means self-determination—the ability to act or not act, to act this way or that. Self-determination is not the ability to do as we choose (liberty), nor is it independence in judging what we should do (autonomy). Rather, self-determination is the capacity to determine our own life by our own power of choice.

If we seek within our experience for the cause of the fact that we have actually done something for which we feel moral responsibility, we always come back to the point at which we ourselves made a choice. Prior to the choice itself, we were aware of two or more incompatible possibilities lying in the future before us. It seemed to us that none of these possibilities was bound to occur; we felt that only we ourselves could settle whether or not the possible would become real.

We therefore considered each possibility in turn, noting the pros and cons of each. These pros and cons were not altogether comparable; although we noted some common factors, we did not find that one alternative included all the pros and excluded all the cons of the other (or else they would not have

appeared to be genuine alternatives). With some perplexity at the lack of any common measure of pros and cons, any least common denominator of goods, we acutely felt the need to settle the indeterminacy ourselves. Considering each of the alternatives from the point of view of the value peculiar to that alternative, other possibilities seem clearly inferior. But since every possibility seems better after its own fashion, the quest for the altogether better is frustrated. The possibilities are incomparable; there is no way to measure one better against a better of a diverse sort.

It is worth noticing, in passing, that utilitarianism goes wrong by ignoring this fact: that there is no "greatest net good," since goods are incomparable. Utilitarianism logically must presuppose that the choice is already made, the value-perspective already settled, that there is no self-determination. But in this assumption utilitarianism violates the facts of everyday experience, for we constantly find ourselves having to determine ourselves to realize one possibility rather than another. And we do this not by weighing one against another, as if there were comparable goods and a common measure, but by accepting one way of being good rather than the other as the standard by which we shall proceed in this case.

Our problem in choosing is like that of a person who is asked which is worth more, a dollar bill or a copper cent. So long as the credit of the government is good, the bill will be worth more *as money.* But if one desperately needs a bit of copper to bridge a gap in an electrical circuit, the penny would be worth something and the paper bill worth nothing. So it is whenever we choose: we must settle which of two or more possible "betters" will be realized by us.

Thus we determine ourselves by taking as a measure of good the standard by which one alternative will appear decisively better. And once we have chosen, the rejected alternatives seem to pale in attractiveness; no longer impartially considering all possibilities from the perspective of each in turn, we view the whole set of possibilities from the single viewpoint of the good proper to the one to which we have committed ourselves.

Looking back upon a choice already made, we always seem to have chosen the greater good—the alternative that appeared better. Some argue from this that we do not really determine ourselves, but rather are compelled to choose the greater good. They forget that before self-determination, each alternative seemed the better in its own way, and that our perplexity in seeking the greater good was terminated only when we ourselves selected the single measure of good that we would apply to all possibilities—a measure according to which one possibility became unambiguously better.

Of course, it can be argued that our experience of self-determination, of making a real difference, of initiating action of ourselves is illusory. It can be argued that the facts of experience must be explained by hidden causes: by heredity and environment, by God, by absolute spirit, by the world-soul. We

need not enter into such metaphysical and theological speculations here. If our choices have such causes, we do not experience their action upon us.

We do experience ourselves determining ourselves to act, to realize one possibility rather than another. This experience is what we mean by self-determination, and self-determination is all we require to recognize our own responsibility. Thus, it seems to us that heredity and environment, for example, determine our character and our life only insofar as we endorse and appropriate by our own choices the individual identity shaped for us by our origins. We feel that by our power of choice we could to some extent struggle against heredity and environment, and that to the extent we could not, we are free of moral responsibility.

Therefore, it is in this sense, as self-determination, that freedom is a necessary principle of morality. Freedom is the beginning of every moral act, for whether or not we act to realize any particular possibility is a matter of our own choice. And where there is no choice, there is no morality, no question of right and wrong. We do not hold animals and infants responsible in the moral sense, because we do not see evidence of deliberation and self-determination. They may be good or bad by instinct or by training, but though we call a dog "vicious" by analogy, we do not call a good dog "virtuous." If we punish and reward animals, it is not that we consider their acts right or wrong, but that we believe our treatment can determine their behavior as we wish.

Still, even though we find the source of the fact of moral action in our self-determination, this freedom does not explain the meaning or purpose of what we do. *That* we act depends on our choice alone; *what* our act is, depends on our understanding of what we are doing, of what good gives meaning to our action.

Moreover, the moral question—what we ought to do—is merely one factor we consider in deliberating about diverse goods and making choices. We can conceive intelligible alternatives to what we ought to do and we can choose an alternative contrary to our own moral judgment against it. If this were not so, we could never experience moral guilt, for we would never knowingly do what we believe wrong. In fact, we do. We are free to act against morality, but we are not free to make our immorality right, as everyone knows whenever he suffers from a bad conscience.

The source of the meaning or purpose of what we do is revealed when we ask: "Why did I choose *that*?" The answer must be given in terms of the good we saw in the possibility we chose. Although that good was not compelling to the exclusion of alternative possibilities which carried their own incommensurable goods, the good proper to the alternative we chose was a necessary condition for our choice of it and was a sufficient reason to make that choice intelligible (even if immoral). Thus the freedom of self-determination is not irrational, as if we could act with no reason at all. Rather, freedom is possible because each alternative that is open to us presents itself with a reason adequate to render its selection intelligible.

The immediate reason why we choose in a particular case often is subordinate to an ulterior motive. If we ask a laborer why he is working, he may answer: "To make money." If we ask why he wants to make money, he may reply: "To feed myself and my family, because we get hungry, and to get other necessaries to stay alive." If we try to press the inquiry beyond this point, we may find ourselves none too gently rebuffed, not because the person we are questioning is ignorant of a motive beyond the one stated, but because there is no further purpose. To attempt to question the self-sufficiency of a purpose that is in fact ultimate will seem to a simple person evidence that we are ridiculing him.

Considering the ultimate motives for which we act from a psychological point of view, we discern various categories of basic human needs. These are broader than the specific objects of physiological drives which in other animals are satisfied by instinctive behavior. We are interested, for example, not only in satisfying hunger and thirst, in avoiding immediate physical threats, and so on, but in preserving our lives, maintaining physical and mental health, and attaining a condition of safety and security.[61]

If we consider the basic human needs in this broad fashion, we will find the categories of good for which we can act. For we can act only for that which engages our interest, and nothing engages our interest unless it corresponds to some fundamental inclination within ourselves or to an interest derived from such an inclination. The objects of such inclinations are what we mean by basic human needs, understood broadly as explained above.

The technique of questioning, both by reflection on our own purposes and by discussion with others, can be joined to a survey of psychological literature and a comparison with the categories of human activity found by anthropologists to be useful to interpret the facts of life in any culture.

Each of these approaches has its own limitations. The question technique sometimes terminates not in any objective basic need, but rather in an emotional motivation that reflects an unarticulated need only in its impact on feeling. For example, a child may say he plays ball "for fun"; he does not articulate his interest in terms of the value he achieves in the performance itself. The psychologists emphasize physiology and hence they distinguish drives—e.g., hunger and thirst—which subserve a unified intelligible motive—e.g., the preservation of life and health.[62] The anthropologists sometimes include categories of activity which correspond not to basic needs, but to intermediate goods which are only means to more basic needs—e.g., warfare, property, and the form of economy.[63]

A thorough, critical study of all of these approaches would be desirable; however, it would be a major undertaking in itself. I think that such a study would lend empirical support to the following list of fundamental human goods:

1) Life itself, including physical and mental health and safety.

2) Activities engaged in for their own sake (e.g., games and hobbies) including those which *also* serve an ulterior purpose (e.g., work performed as self-expression and self-fulfillment, which also has a useful and economically significant result).

3) Experiences sought for their own sake (e.g., esthetic experiences and watching professional athletic competitions).

4) Knowledge pursued for its own sake (e.g., theoretical science and speculative philosophy).

5) Interior integrity—harmony or peace among the various components of the self.

6) Genuineness—conformity between one's inner self and his outward behavior.

7) Justice and friendship—peace and cooperation among men.

8) Worship and holiness—the reconciliation of mankind to God.

The first four of these groups of goods are understandable without introducing the notion of self-determination in their very meanings. Their achievement depends on human action but their meaning does not. The latter four, by contrast, cannot be understood without including the idea of self-determination. The first four embrace the perfections of a human being according to his specific nature: the exercise of natural functions, physical activity, psychic receptivity, and cognitive reflection. The latter four embrace the perfections of human beings according to their capacity to reflect and to live self-conscious lives: unity achieved by reflection and self-determination at each level on which alienation is experienced or believed to exist.

These categories of goods easily can be defined in such a way that the division is logically exhaustive. However, that procedure would only raise a question concerning the adequacy of the description of each member of the division. A more convincing test of the adequacy of this classification is to try to find basic human goods that cannot be located in it. I think that if the considerations mentioned above in respect to the limitations of various approaches are borne in mind, no purpose of human action that is really final will be found in addition to those listed.

In any case, it will be sufficient for our present purpose to note that any list of basic human goods would have to include life itself. Many people spend the greatest part of their time and effort for no other purpose, and simply staying alive generally is regarded as a good even when other goods cannot be achieved.

We are conscious of these basic goods in two distinct ways. By experience, we are aware of our own inclinations and of what satisfies them; our own longings and delights are facts of our conscious life that we discover as we discover other facts. At the same time, by understanding we interpret these facts in a special way; our intelligence is not merely a spectator of the dynamics of our own action, but becomes involved as a molder and director. Understanding grasps in our inclinations the possibilities toward which they point and

understanding becomes practical by proposing these possibilities as goals toward which we might act.

Thus we understand, prior to any choice or reasoning effort, that the basic human goods are possible purposes for our action. To the extent that any action requires some purpose, the basic goods present themselves as purposes-to-be-realized, not merely as objective possibilities. We understand the preservation of our own lives, the pursuit of knowledge, the cultivation of friendship, and the rest as goods-to-be-sought by us.

Their appeal to us for realization is not conditioned upon some prior wish, but rather is the basis for the possibility of all our rational desires. In this respect, the goods are non-hypothetical principles of practical reason such as Kant wished to discover. But they differ from Kant's basic principles in having a content derived from inclination. Kant mistakenly believed that rational principles could be unconditional only by being purely rational. He overlooked the possibility that intelligence can form principles for practical reason by insight into the possibilities opened to our interest by our basic needs.

The practical principles thus express not what *is* so, but what is-to-be through our own action. Practical reason is "ought" thinking just as theoretical reason is "*is*" thinking.[64] But "ought" here does not necessarily express moral obligation; that is a special form of "ought." Not only are we inclined by appetite to eat when we are hungry, but we know we *ought* to do so. This "ought" expresses the judgment of practical reason ("common sense"), but it need not have the force of moral obligation.

One important point to notice is that practical reason controls the whole area of free action by shaping it from within, rather than by imposing rules from without. If moral obligation is a special form of "ought," it too is an inner requirement of practical reason, not a demand imposed, as if by some external authority. The basic human goods are to be pursued in our actions not because God imposes pursuit of them on us, but because we must pursue some good if rationally guided action—which alone is caused by self-determination—is to be possible at all.

As expressions of what is-to-be, the practical principles present basic human needs as fundamental goods, as ideals. But the ideal character of these goods does not mean that they are wholly apart from man and his real life. The ideals are human ideals, realized in human persons and in human community. They do not transcend man by subordinating his good to any non-human purpose, but only by going beyond what man already is toward that which he is not yet but still may be. It will always be possible for us to discern more clearly in what such goods as health, knowledge, and friendship concretely consist; it will always be possible for us to seek to realize new dimensions of such inexhaustible possibilities.

Protestant situationists who have adopted a theory of objective values as an explanation of the source of moral obligation presuppose principles similar to those just described, although they do not explain the genesis of these

principles by reference to basic needs. More important than this defect of analysis is their too hasty leap from the appeal of the values for realization—that is, from the modality of "is-to-be" in which practical intelligence formulates ideals—to moral obligation. They overlook the fact that if the immediate appeal of each value is translated directly into a moral obligation to respond, then every choice will violate moral requirements. For the very nature of choice is to respond to the appeal of some good at the cost of not responding to some other. If we could have both simultaneously, no choice would ever be needed.

But it is clear that choice is necessary and it is absurd to say that every choice is necessarily evil simply because it is a choice. Clearly, then, the appeal of the goods cannot be taken as the direct determinant of moral obligation. Everything we can do becomes possible only in virtue of these goods; no human act, good or evil, fails to respond to one or more of them, or succeeds in responding in every possible way to all of them. If the basic human goods, which are principles of practical reason, clarify the possibility of every choice, they cannot of themselves determine why some choices are morally good and others morally evil.

What does make this difference? What divides moral good from moral evil? The answer is that moral goodness and evil depend upon the attitude with which we choose. Not that any and every choice would be good if only it were made with the proper attitude, for some choices cannot be made with the right attitude. But if we have the right attitude, we make good choices; if we have the wrong attitude, we make evil ones.

But what is the right attitude? It is realistic, in the sense that it conforms fully with reality. To choose a particular good with an appreciation of its genuine but limited possibility and its objectively human character is to choose it with an attitude of realism. Such choice does not attempt to transform and belittle the goodness of what is not chosen, but only to realize what is chosen.

The attitude which leads to immoral choices, by contrast, narrows the good to the possibilities one chooses to realize. The good is not appreciated in its objectively human character, simply as a good, but as *this* good of *such* a sort to be achieved *by me.* Instead of conforming to the real amplitude of human possibility, such an attitude transforms that possibility by restriction. Immoral choice forecloses possibilities merely because they are not chosen; rather than merely realizing some goods while leaving others unrealized, such choice presumes to negate what it does not embrace in order to exalt what it chooses. Goods equally ultimate are reduced to the status of mere means for maximizing preferred possibilities; principles of practical reason as fundamental as those that make the choice possible are brushed aside as if they wholly lacked validity.

No single good, nothing that can be embraced in the object of any single choice, is sufficient to exhaust human good, to fulfill all of the possibilities open before man. If we choose with an attitude of openness to goods not chosen,

the good is not restricted. We respect the possibility we cannot realize through this choice. But if we restrict our perspective by redefining what is good according to our particular choice, we are attempting to negate the meaningfulness of what we reject and to absolutize what we prefer.

A proper attitude respects equally all of the basic goods and listens equally to all of the appeals they express through principles of practical reason. Because of the incompatibility of actual alternatives, a choice is necessary. But a right attitude does not seek to subvert some principles of practical reason by an appeal to others. An immoral attitude involves such irrationality, for while the evil choice depends upon the principles of practical reason, it seeks to invalidate the claims of those principles which would have grounded an alternate choice.

If the principle that distinguishes moral good from evil is an attitude such as we have just described, still two serious questions must be considered. First, is not moral evil something more interpersonal than the unrealistic and narrow attitude just described? Does not moral evil involve the violation of the good of others? From a religious viewpoint, must it not be seen as alienation from God—a rejection of his love? Second, how does an open attitude such as we have described shape itself into concrete moral obligations to do or avoid specific acts?

The answer to the first question is easy. The principle of moral evil can be located in the unrealistic attitude described, but the impact or significance of such evil is by no means limited to oneself.

If I choose with the attitude that my commitment defines and delimits the good, I shall lack the detachment to appreciate the possibilities of others' lives, which could complement my own by realizing the values I cannot. Their good, which I do not choose, will become for me at best a non-good, something to which I shall remain indifferent. Egoism can decrease only to the extent that I am open to the embrace of all goods, those as well as these, yours as well as mine. The attitude of immorality is an irrational attempt to reorganize the moral universe, so that the center is not the whole range of human possibilities in which we can all share, but the goods I can actually pursue through my actions. Instead of community, immorality generates alienation, and the conflict of competing immoralities is reflected by incompatible personal rationalizations and social ideologies, each of which seeks to remake the entire moral universe in conformity with its own fundamental bias.

Those who understand immorality in religious terms of course cannot be expected to find any merely philosophic account entirely satisfactory. But the philosophic account proposed here might coincide with a religious view. It certainly is impossible to maintain a fully open attitude toward all human goods, irreducibly diverse and incommensurable as they are, unless we accept the reference of our conception of goodness to a reality we do not yet understand.

For if the goods we do know—which constitute a *unified* field for our choices—are not diverse participations in a unity beyond all of them, they must be unified by reference to one another. In that case, what we choose will appropriate the priority of an absolute to which what we reject will be subordinated—if it is regarded as good in any sense at all. However, if we accept the reference of our conception of goodness to a reality we do not yet understand, our openness to that goodness may count as love of it, although it is not an intelligible objective of any particular action.

Such love of the good can be interpreted in a religious context as at least compatible with a response of love to God's love. And if the goodness in question is identified with God, respect and openness to all human goods may be interpreted as man's fulfillment by participation in a good which first belongs to God. An immoral attitude, by contrast, would exclude a real goodness beyond the goods we know and choose; immorality would refuse to seek human fulfillment as a realization by participation in God's own goodness. From a religious viewpoint, any morally evil act, in which the good chosen is made to define goodness itself, really is an instance of covert idolatry.

The second question—how a morally right attitude can shape itself into specific obligations—is extremely important for ethical theory.

The solution almost automatically taken for granted in most contemporary discussions is that openness to all human goods requires a moral judgment in accord with the utilitarian maxim: the greatest good for the greatest number. However, as we have seen, utilitarianism is incoherent, because the goods are many and incommensurable, and there is no single standard or least common denominator by which the "greatest good" could be measured. In fact, self-determination is possible only because the "greatest good" cannot be determined by calculation; utilitarianism is actually incompatible with freedom.

Of course, once a definite goal has been determined, it is possible for us to calculate the efficient means to it. If we take an immoral attitude toward the goods we choose, utilitarianism may seem a suitable method for rationalizing our prejudice. (Not everyone who theorizes as if utilitarianism were a moral system practices what he teaches.)

Ideally, the discernment of specific moral obligations would require neither calculation nor even reflection. If one's moral attitude were right and his whole personality were perfectly integrated with that moral attitude, then his own sense of appropriateness, his own spontaneous judgments, would be the surest index of moral good and evil. This is what St. Augustine meant when he said (in religious terms): "Love God, and then do what you wish."

However, when we have a moral question, obviously our moral sensibility has failed us. At this point it is useless to say: "Act by your own right will," because the question would never have arisen but for the conflict within ourselves. "What we wish" is not decisive because we wish one thing with one part of ourself and another thing with another part.

Then too, when it comes to explaining our moral evaluation to others, our moral sensibility is not helpful, because it is incommunicable. At such a juncture, articulate reasons are essential. We must ask what our moral judgments would be if we were perfectly integrated in accord with a right moral attitude.

First, if we were open to all of the goods, we would at least take them into account in our deliberations. We would never make a choice by which one of the goods was seriously affected without considering our action in that light. Thus, we would never choose to act in a way that caused anyone's death without being aware of the impact of what we were doing. In this respect, Protestant situationism reveals moral sensitivity that seems missing from some utilitarian theories.

Second, if we had a right moral attitude we would avoid ways of acting that inhibit the realization of any one of the goods and prefer ways of acting that contribute to each one, other things being equal. One who has a positive attitude toward human life certainly makes a presumption in its favor and does not gratuitously negate this good (or any other).

Third, if we had a truly realistic appreciation of the entire ambit of human goods, we would not hesitate to contribute our effort to their realization in others, when our help is needed urgently, merely because no particular benefit accrued to ourselves. True enough, we have primary obligations to realize human goods in ourselves and in those near us, for we can do in ourselves what no one else can. But we should be more interested in *the good* than in *our* good. Therefore, we reveal an immoral attitude if we prefer our own good merely because it is ours, when our help is urgently needed by others. For this reason, one who had a morally right attitude certainly would prefer another's life to his own comfort, or to other goods to which he would prefer his own life.

Fourth, if we had a right moral attitude, we would fulfill our role in any cooperative venture into which we enter not only to the extent necessary to get out of it what we seek for ourselves but to the full extent needed to achieve the good whose concrete possibility depends on the common effort. This principle does not preclude the criticism of institutions or the reformation of structures, but it does rule out attempts to revise social relationships simply to make them more favorable to ourselves, even at the expense of the common good. Thus we cannot rightly seek to preserve and protect our own lives by institutions, such as criminal law, which we refuse to apply equally to the rights of others. Equality before the law is a moral principle as well as a legal one.

Fifth, if we were fully integrated toward the goods, we would carry out our engagements with them. As our life progresses, we make commitments, such as choice of career, which preclude the pursuit of many other possibilities. If these commitments are made in view of the real good we can achieve, we will not set them aside merely because we encounter difficulties. A genuine

respect for the goods we do not choose to pursue will make us doubly dedicated to the realization of those on which we concentrate our efforts.

The teacher who is cynical about education, the corrupt politician, the careless physician, the slipshod craftsman—all show a lack of faithful dedication to what they have chosen as their own share of man's effort to achieve the goods open to us. Parents and physicians both are especially engaged in the good of human life in the helpless and dependent. Therefore, failure on their part to protect and promote this good is an abdication of responsibility that reveals an improper moral attitude.

All of the preceding ways in which concrete moral obligations take shape reveal something about the reason why human life, which is one of the basic goods, must be respected. Yet none of these forms of obligation would require an unexceptionable respect for life. Not even the parent and physician need always act to preserve and promote life, for sometimes other goods also are very pressing. A proper moral attitude is compatible with the omission of action that would realize a good, provided that omission itself is essential to realize another good (or the same generic good in another instance).

However, there is still another mode of moral obligation which binds us with greater strictness. If we had a right moral attitude, which means a truly realistic appreciation of each human good, we would never act directly against the realization of any basic good and we would never act in a way directly destructive of a realization of any of the basic goods. To act directly against a good is to subordinate that good to whatever leads us to choose such a course of action. We treat an end as if it were a mere means; we treat an aspect of the person as if it were an object of measurable and calculable worth. Yet each of the principles of practical reason is as basic as the others and each of them must be respected by us equally if we are not to narrow and foreshorten human goodness to conform to our choices.

Of course, each of the basic human goods may be inhibited or interfered with when we act for any good. But it is one thing for inhibition or interference with other goods to occur as unsought but unavoidable side-effects of an effort to pursue a good, and it is quite another thing directly to choose to inhibit or destroy a realization of a basic human good. To reluctantly accept the adverse aspects of one's action is one thing; to purposely determine ourselves to an action that is of its very character against a basic good is quite another matter.

It is only possible for us to do this insofar as a direct attack on a good can be useful to some ulterior good consequence—the end rationalizes the means. But, against utilitarian theories, I think we must maintain that the end which rationalizes the means cannot justify the means when the means in question involves turning against a good equally basic, equally an end, equally a principle of rational action as the good consequence sought to be achieved.

Here, I believe, we arrive at the reason why we consider actions which kill human beings to be generally immoral. Human life is a basic good and it is intrinsic to the person, not extrinsic as property is. To choose directly to

destroy a human life is to turn against this fundamental human good. We can make such a choice only by regarding life as a measurable value, one that can be compared to other values and calculated to be of less worth. To attempt such a rationalization is to reduce an end to the status of mere means. Whatever good is achieved by such a means could not have been chosen except by a pretense that the good of the life which is destroyed is not really an irreplaceable human possibility. Undoubtedly, it is for this reason that those who seek to justify direct abortion and other direct attacks on human life strive to deny the humanity and/or personality of the intended victims.

Two sorts of objections are likely to be raised against this conclusion. First, it will be argued that a single act of killing—for example, the single choice to abort an infant—should not be isolated from the whole context of a person's life. Second, it will be objected that almost every moral system has recognized some cases in which killing is justifiable: for example, in self defense, as capital punishment, in warfare, and, in the case of abortion, to save the mother's life. This second objection demands a careful treatment, and the next section will be devoted to it. But the first objection can be disposed of at once.

Each single act is an engagement of one's freedom, a determination of one's self by one's self. A particular choice against human life therefore has a moral significance in itself, for that choice either squares or not with a right moral orientation. Of course, one who performs an isolated immoral act is not damaged in moral character so badly as one who habitually chooses or approves such acts. But a little immorality is still immorality.

Actually, I think, those who ask us to consider the act of killing within the whole context of a person's life are assuming that "circumstances" or "other values" that are present "in the situation" will offset the disvalue of the act and so justify it. Such an argument really amounts to a covert form of utilitarianism.

Situations do not present themselves to us ready made. They take their shape and find their limits because of our interests. Once we have chosen, a situation has been finally settled. Before choice we always are able to extend our reflection so as to enlarge the situation and even to transform it by taking into account what our initial interest did not require us to notice. Moral judgments, good or bad, delimit human situations; potentially our human situation is unlimited. For this reason it is a mistake to look to the situation for the meaning of the act.

Nevertheless, Protestant situation ethics is not pointless. There are cases in which there seems to be a genuine conflict of obligations, so that one would appear unable to avoid falling into some moral evil. Undoubtedly, the number of such apparent conflict cases would be greatly reduced if all the possible courses of action were considered instead of some being excluded in advance because they would involve difficulty or hardship which we all too easily decide is "impossibility." Again, apparent conflict cases would be lessened if

we kept clearly in mind that there is no moral obligation to choose all possible goods, including incompatible ones. It is not immoral to leave some good undone providing that good is appreciated and respected and some other good is done.

Yet there remain conflict cases such as those in which most moral systems have admitted the justifiability of killing human beings. To such cases we must now turn our attention.

The Justifiable Doing of the Deadly Deed

We have noted that Protestant situation ethics embodies as a primary orientation respect for human life, also in the unborn. My position is the same, but I have tried to explain why we must respect human life. Life is a basic good of the human person, and a primary starting point of our practical thinking is that human life is to be preserved. A right attitude depends on openness and respect for all such goods and starting points. Directly to choose to inhibit or destroy life is incompatible with such a right attitude.

Of course, the moral principle that safeguards human life derives much of its effective force from the sentiment of sympathy which most normal people feel toward others and from the fear we all experience when we consider that others might actually do to us as we at times feel like doing to them.

However, if such considerations go far to explain the force of the moral principle in many situations—and its corresponding ineffectiveness in certain cases, such as abortion—neither sympathy nor fear accounts for the logical and even the grammatical *form* of the moral norm. In form, the moral principle indicates what *ought to be* in our actions, not what *is* in our emotions. Moreover, most people recognize that the obligation to respect the lives of others extends to cases in which neither fear nor sympathy is felt as a motive; only on such a basis can we condemn as immoral the crimes of those who suffer no such humane sentiments.

We also have noticed that Protestant situation ethics, while calling for respect for human life, also agrees with the common opinion that at times it is justifiable to do the deadly deed—that is, to act in such a way that one knowingly kills another human being. But the position of situation ethics provides no satisfactory philosophic account of such cases. The Protestant moralists do offer a theological account, as we have seen, and that explanation will be plausible or not depending upon one's own religious convictions. Since we approach the whole question philosophically, we cannot and need not pass judgment on any properly theological issue.

To the extent that situation ethics rests its specific judgments on a theory of conflict of values in concrete situations, our philosophic approach might reduce this theory to covert utilitarianism, on the one hand, or to subjectivism on the other. If conflicting values are to be weighed one against another by some sort of rational calculus, then situation ethics will end in

utilitarianism—as it does for instance in Fletcher. However, if proponents of situation ethics try to avoid such weighing of values, they appeal to individual judgment itself—to conscience.

Now, it is of course true that everyone must follow his conscience in ethical questions, for "conscience" means nothing else than one's final and best judgment as to where his true obligation lies. But conscientious judgment is notoriously fallible; some of the most horrible deeds have been done by persons who gave every evidence that they were acting in sincere good faith. For this reason one must be open minded about the correctness of his own conscientious judgment; one must try to form one's conscience correctly—that is, in agreement with the truth.

Often, as we saw in discussing subjectivism, the need for objective moral standards is concealed by the ambiguous use of the word "decision." Thus many proponents of situation ethics who are sensitive to the dangers and incoherence of utilitarianism mistakenly believe that they solve the problem of moral judgment by saying that conscience must responsibly decide what is right in the situation.

But if "decide" means *choose,* what is right is settled by freedom itself, and then subjectivism would be correct. If "decide" means *judge,* then either it makes no difference how one judges, or the judgment is subjective, or it requires standards which the situationists have not articulated. Their whole effort shows that they do not grant that judgment in borderline situations is a matter of moral indifference, and their ethical seriousness is completely alien to a subjectivist position. Thus objective standards seem to be essential to resolve the problem to which situation ethics has addressed its efforts.

Some of the theologians have sought to escape from this dilemma by implying or suggesting that each particular judgment is made with divine inspiration. Bonhoeffer, for example, goes so far as to say:

> The man who acts in the freedom of his own most personal responsibility is precisely the man who sees his action finally committed to the guidance of God. The free deed knows itself in the end as the deed of God; the decision knows itself as guidance; the free venture knows itself as divine necessity.[65]

Even from a purely philosophic point of view, I believe one can argue that if God exists and if one receives direct instructions from Him concerning what ought to be done, then it would be right to follow those instructions as a matter of religious obedience, for if man cannot know "the greatest net good," presumably God can. However, most of us, including many sincere religious believers, never have the experience of receiving direct instructions from God and would be inclined to question our own sanity if we seemed to have such an experience. For the greater part of mankind, therefore, some other solution to the problem is necessary if subjectivism is to be avoided.

Apart from Protestant situation ethics, it would appear that the only sustained effort to explain why the deadly deed is sometimes morally justified,

granted that human life is always a good to be respected, is to be found in Catholic moral theology. A classic source is Thomas Aquinas' *Summa theologiae.* I therefore turn to it to see how he justified the killing of human beings in any instances whatsoever. My interest is not in the theological aspect of Aquinas' arguments, however, but in the rational solutions he proposes to the question before us.

One kind of case in which Aquinas considers killing justifiable is in the capital punishment of those criminals who hurt others and threaten the common welfare. The argument proposed has three aspects, but it constitutes a unified whole. The incomplete is ordained to the complete, Aquinas observes, and so the part is ordained to the whole. For this reason a diseased limb may be cut off for the good of the whole. Similarly, since individuals are related to the community as part to whole, "if someone is a threat to the community and a corruption in it because of a certain offense, it is praiseworthy and healthy to kill him, that the common good be preserved."[66]

This argument as it stands is weak, both because individuals are not simply parts of the community and because the analogy, if pressed, might justify killing the insane, mental defectives, and other socially undesirable characters. But there are two other aspects to Aquinas' position.

In response to the argument that capital punishment should be excluded because a good end does not justify an evil means, and killing human beings is evil in itself, Aquinas further argues:

> When a man sins, he alienates himself from the order of reason, and so he loses his human dignity, by which he is free and exists for his own sake, and descends, as it were, to the servile condition of brute animals, so that he is disposed of in a way useful to others . . .. And so, though it is intrinsically evil to kill a man who maintains his own dignity, still it can be good to kill an offender, just as to kill a beast, for a bad man is worse and more harmful than a beast . . ..[67]

Thus Aquinas neither holds that the end justifies the means nor that killing a man who "maintains his own dignity" can ever be good. But he thinks that evildoers in some sense abdicate their humanity.

This concept, while it has a certain plausibility, is unsatisfactory, partly because we are always unsure to what extent the offender is subjectively responsible for his acts, and thus to what extent he has abdicated his humanity. But Aquinas' argument in this aspect also is unsatisfactory insofar as it suggests that human dignity is somehow alienable, so that it is only wrong to kill a man so long as he "maintains his own dignity." If human life is really a basic good, as I argued in the previous section, I do not see how its inherent dignity can be altered by the wickedness of him whose life it is. One might as well say that an athletic achievement or an aesthetic experience or a scientific discovery loses inherent worth because the person who achieves it is immoral.

Yet Aquinas' position has one further aspect. Capital punishment of offenders, he maintains, may not be done by private persons, but only by public

authority, since only proper public officials have the responsibility for the common good.[68] In fulfilling their responsibility, public officials share in divine providence, and by ordering the punishment of offenders they restore the balance of justice which crime upsets.[69]

The trouble with this aspect of the argument is that even if we concede divine providence, we need not concede that public officials exercise their share in it properly by executing criminals. Moreover, even if we concede that the balance of justice is upset by crime, it is not evident that man is responsible for restoring the balance.

The demands of the public welfare, the restoration of justice, and the evildoer's quasi-renunciation of his right to life—these are certainly three aspects of the civilized attitude toward capital punishment. To the extent that Aquinas articulates that common attitude, the elements of his argument cohere to form a plausible whole. Yet on close examination, none of these elements is strong enough to withstand critical objections. In this matter, the increasingly prevalent conviction that capital punishment of even the worst offenders is inhumane seems more reasonable than Aquinas' defense of the institution.

For his argument is, in fact, the defense of an institution. As theological ground he cites a text from scripture: "You shall not suffer evildoers to live" (Ex 22.18). The text cited is not as important as another one *omitted*: "He who sheds man's blood, shall have his blood shed by man, for in the image of God man was made" (Gn 9.6). This text offers powerful theological support for capital punishment, but only as a penalty for murder, and thus it does not serve in Aquinas' defense of the *institution* of capital punishment, which in his day extended to a list of offenses far longer than it does in our time.

I am not saying, of course, that Aquinas accepted the current opinion uncritically. The difficulty he faced was that the principles of theological criticism—sacred scripture and tradition—seemed to support the institution of capital punishment. Therefore, he sought to draw together the intelligible aspects of the institution into an argument in defense of it.

Aquinas does not ignore elements which might have united to form a contrary position on capital punishment. He urges that clerics should not execute criminals for two reasons. First, rather than take the role of those who cause death, they should imitate Christ who suffered death. Second, the New Testament, of which clerics are ministers, does not set penalties of death and bodily mutilation.[70]

These considerations, if pressed further, might have led Aquinas to conclude that capital punishment, like divorce (as he views it), was a concession to man's wickedness which the law of Christ abrogated. Since Aquinas' time, that has become the almost universal Christian attitude toward the institution of slavery which, like capital punishment, was tolerated in sacred scripture although abuses connected with the basic institution were condemned.

Aquinas would have been able to defend capital punishment more plausibly had he not been keenly aware of the basic goodness of human life and the evil of its destruction. In explaining why it is wrong to kill the innocent—that is, those who are not offenders—Aquinas argues:

> Any man can be considered twice: once, in himself; again, in relation to something else. Viewing man in himself, no man may rightly be killed. In everyone, even the evildoer, we ought to cherish the nature God made, which is destroyed by killing. But as I argued before, the killing of the evildoer becomes legitimate by reference to the common good, which is destroyed by the offense. But the life of the upright maintains and promotes the common good, because they are the majority of the people. Therefore, it is never allowed to kill the innocent.[71]

Aquinas' primary attitude toward human life, even in the evildoer, is a healthy respect. Yet he thinks that the social relationship can, as it were, transform the individual's innate dignity. Thus the argument against killing the innocent becomes somewhat utilitarian in tone. One wonders what would happen if the same conclusion were applied in a society in which the majority of people were vicious.

An incidental benefit of examining Aquinas' arguments is the light they throw on the traditional sense of "innocent"—namely, one not guilty of an offense against the common good punishable by death. The clarification apparently is needed, for even the learned members of the Anglican study-committee on abortion made the following muddled observation:

> It has been argued that a choice in favour of the child—that is, to save the child at the expense of the mother's life—could be justified on the ground that the child is morally 'innocent' whereas the mother may be presumed at some time to have committed actual sin; therefore the 'innocent' life should be preferred to the 'guilty.' Such an argument would rest on a theory of morality, desert and retribution which we should not wish to maintain, and it imparts to the word 'innocent' a meaning which does not belong to it in this context.[72]

Again the authors declare that "words like 'innocent,' which are normally matched with other words like 'guilty' in a fully-fledged moral discourse, are questionably meaningful when used of the 'life' of the foetus."[73]

The principles laid down in Aquinas' defense of capital punishment are little amplified by his famous discussion of the justification of warfare. Of course, the issue here is not directly concerning killing, but concerning the conditions under which war can possibly be just. The conditions mentioned are three: first, that the war be waged by public authority (and here the domestic institution of capital punishment is mentioned); second, that the cause be just, the enemy having done a wrong deserving battle; third, that the intention of those fighting be right.[74]

The third condition is not mentioned in the discussion of capital punishment, but is perhaps taken for granted. Judges and executioners might be presumed to have the right intention if they execute criminals according to due legal process. Soldiers, on the other hand, at least in Aquinas' day, might easily

fight even an otherwise justifiable war out of personal motives of revenge or greed for booty.

Besides capital punishment and war, Aquinas discusses only one other type of case in which he regards the deadly deed as justifiable. This is the case of legitimate self-defense of one's own life against a present and otherwise unavoidable attack. The agent's intention, mentioned by Aquinas in his discussion of war and omitted in his treatment of capital punishment, becomes central in his response to the question: "Whether one may kill another in self-defense?"

> Nothing keeps one act from having two effects, one of which is in the scope of the agent's intention while the other falls outside that scope. Now, moral actions are characterized by what is intended, not by what falls outside the scope of intention, for that is only incidental, as I explained previously.
>
> Thus from the act of one defending himself there can be two effects: self-preservation and the killing of the attacker. Therefore, this kind of act does not have the aspect of "wrong" on the basis that one intends to save his own life, because it is only natural to everything to preserve itself in existence as best it can. Still an action beginning from a good intention can become wrong if it is not appropriate to the end intended.
>
> Consequently, if someone uses greater force than necessary to defend his own life, that will be wrong. But if he repels the attack with measured force, the defense will not be wrong. The law permits force to be repelled with measured force by one who is attacked without offering provocation. It is not necessary to salvation that a man forego this act of measured defense in order to avoid the killing of another, since each person is more strongly bound to safeguard his own life than that of another.
>
> But since it is wrong to take human life except for the common good by public authority, as I already explained, it is wrong for a man to *intend* to kill another man in order to defend himself. The only exception is when a person having public authority intends in the line of duty to kill another in self-defense, as when a soldier fights the enemy or a lawman fights robbers. However, even these would sin if they acted out of a private lust to kill.[75]

Thus Aquinas lays down the doctrine which post-reformation Catholic moralists developed into the famous principle of twofold effect.

What Aquinas is saying here really is quite simple. It would be wrong for a private person to *intend* to kill another for the sake of self-defense, because private persons never are permitted to intend to take human life. However, appropriate force may be used to repel an unprovoked attack when such a response is necessary to stave off an immediate threat to one's own life. The degree of force needed may mean that the self-defensive deed is deadly to the attacker, and Aquinas does not exclude that the deadly effect may be foreseen with practical certainty. Even so, the killing of another need not fall within the scope of the intention of one thus defending himself, and in such a case the intended measures of self-defense would not be wrong.

Those who seek to deal with moral issues by a utilitarian method are bound to have difficulty seeing Aquinas' point here. For them, only the consequences count, and so it seems perverse (and perhaps even dishonestly evasive) to make distinctions on the basis of what falls within the scope of one's intention. Of course, even from this point of view the attacker will be more likely to survive in many cases if his death is excluded from the scope of the defender's intent, since force must be applied only in a way appropriate to repel the attack, and may not be used to needlessly harm the attacker. Yet in many cases the exact same behavior would be appropriate—that is, proportioned to the attack—regardless of intent, and then to a utilitarian the distinction would seem to be a subtlety of no moral significance.

However, if, as we have concluded previously, utilitarianism is mistaken and a sounder principle of morals is the rightness of the attitude with which choices are made, then the distinction between including and excluding another's death from the scope of one's intention can be most important. For an act which of set purpose aims to be death-dealing can be related to one's moral attitude in a way quite different from an act that shapes behavior (that is in fact death-dealing) according to some other and legitimate intent.

To this distinction it often has been objected that all the foreseen effects of an intentional act are themselves intended, whether or not they are sought by the agent as his primary purpose or merely accepted by him, however reluctantly, as the necessary concomitants of the behavior by which his primary purpose is realized. However, this position is at odds with many ordinary uses of the word "intend"; moreover, it ignores the manner in which human action is formed by the unity of purpose and behavior.[76]

One may know that speaking will cause vibrations in the air without intending the vibrations. I realize that the drapery will fade if I close it against the sun, but I do not intend its fading. One expects pain, but normally does not intend to suffer pain, when he goes to the dentist. Those who are highly susceptible to motion sickness may foresee, without intending, a bout of illness if they take a ferry across a stormy passage. A woman who uses the "pill" as a contraceptive may be fully informed of its side effects and still take it without intending any of them.

"Intend" means more than "foresee," more even than "willingly cause." To intend something is either to aim at it as at one's precise purpose in acting or to embrace it for its positive contribution to the achievement of that purpose. A human act is not merely a performance acted out upon the stage of a pre-existing situation. No, one's interests and commitments define and organize his situation, which is more like an atmosphere carried along by the self than it is like a series of settings into and out of which the self successively moves.

The particular intentions of each of one's acts select and organize the behavior which is the embodiment by which purpose is realized and the situation progressively transformed. Many facts of our physical and biological

environments never enter into our human situations, even if we happen to know of these facts, for they can be irrelevant to our interests and commitments, or even irrelevant to any basic human good other than the intellectual curiosity that seeks them out.

Likewise, real aspects of our behavior as it ingresses upon the physical world may be only incidental to our acts, for even if the behavior is shaped by our intentions to achieve some definite transformation of our lived world—our human situation—not every aspect of the behavior will be integrated in our action. Thus we foresee effects of what we do that fall outside the scope of our intentions. When such effects are only accepted by us as incidental consequences and never ordained by us to any purpose, they seem to incur upon our world of human meaning, if they concern us at all, almost as if they arose from causes completely outside us.

That is the case, for instance, with the pain we suffer in the dentist's office, with the seasickness of a ferry-crossing, and with the side-effects of a drug. We foresee these, we even willingly cause them, at least in the sense that we bring them upon ourselves or upon others. But we "bring them upon"; we do not intend them.

It would be quite another matter if we sought or inflicted pain for the sake of masochistic or sadistic satisfaction, or if we took the ferry boat to create an alibi by our sea-sickness, or if a physician induced sea-sickness by drugs in order to increase his fees, or if an industrial saboteur included ingredients in his employer's drugs in order to bring about side-effects that would discredit the company's products.

In such cases, what previously lay outside the scope of intention has been assumed into its center. Perverse intentions shape (or better, misshape) the behavior of perverse agents whose actions fulfill and transform situations that most of us, fortunately, feel could occur only in some unreal world. Our feeling is not false. The worlds of such dehumanized persons are unreal in comparison with most imperfect, but relatively human, worlds.

Unlike Protestant situation ethics, the theory of double effect proposed by Aquinas does not depend essentially on a theological theory of a human world broken by sin. True, many acts which have double effects would never have occasion to be done in a world at peace with God and with itself. But the imperfection of creation, simply because it is finite, necessitates that the most intelligent and upright pursuit of the good entails some effects that can be brought about only incidentally, never intended for their own sake. God Himself, Aquinas believes, not only wills penalties by willing justice, to which penalties are inseparably conjoined in this broken world, but He also wills the destruction of things by willing a natural order, an unfolding of goods which—even without sin—could not come to be without the passing away of goods realized in preparatory stages but surpassed in the final order.[77]

Thomas Aquinas did not apply his understanding of double effect to the problem of abortion; in fact, he never stated it as a general doctrine. However,

as we have seen in tracing the history of the Catholic tradition regarding abortion in chapter four, later Catholic theologians took up Aquinas' remarks and developed them into the principle of double effect as it is now understood.[78] The history of the development of this principle, which has interesting applications in many problems besides those involving human life, has been traced in more detail by others.[79] Here it will suffice to recapitulate the principle as it is currently understood.

One may perform an act having two effects, one good and the other bad, if four conditions are fulfilled simultaneously.

1) The act must not be wrong in itself, even apart from consideration of the bad effects. (Thus one does not use the principle to deal with the good and bad effects of an act that is admittedly murder.)

2) The agent's intention must be right. (Thus if one aims precisely at death, the deadly deed cannot be justified by the principle.)

3) The evil effect must not be the means to the good effect, for then evil will fall within the scope of one's intention, and evil may not be intended even for the sake of an ulterior good purpose. (Thus it is certainly wrong to kill someone in order to inherit his wealth.)

4) There must be a proportionately grave reason for doing such an act, since there is a general obligation to avoid evil so far as possible. (Thus one may not use poison deadly to children to kill rodents in a public park.)

The last condition can easily become a field for a covert, although limited, utilitarianism. However, that is not necessary. Though human good is not calculable and though diverse modes of human good are incommensurable, the basic human goods do require protection when possible. Human life may not be destroyed frivolously or gratuitously, as in the example cited, where safer methods of achieving desirable objectives are readily available.

The four conditions of the principle of double effect can be illustrated by a relevant example in the area of our concern. If a woman suffering from invasive carcinoma of the cervix also is pregnant, treatment of the disease is likely to result in the fetus' death. Yet such treatment can be justified. For (1) the treatment would not be wrong apart from its deadly effect on the fetus; (2) neither the mother nor the physician need include the fetus' death within the scope of intention—which might be indicated by the fact that they would proceed in the same way if there were a similar problem without pregnancy and, on the other hand, would use a treatment that would save the fetus if such a method were available; (3) the fetus' death does not produce the desired cure, but is truly incidental to the procedure; and (4) the mother's life and health are of fundamental importance, and may not be able to be safeguarded in a way harmless to the fetus. If the four conditions are actually fulfilled, the deadly deed is compatible with a right moral attitude; it will not involve turning directly against the basic good of human life.

I think that the principle of double effect in this formulation is compatible with the theory of moral good and evil outlined above. That is, I do not think

that it permits what ought not to be permitted, provided it is properly understood and applied. My question is whether the principle is more restrictive than it needs to be. The third condition generally is interpreted in a way that excludes the justification of any action in which in the order of objective causality the good effect depends on the evil one. The other three conditions could be fulfilled in cases where abortion seems genuinely necessary to save the mother's life, but the third condition obviously is usually violated in such cases.

One effort to expand this condition is a reinterpretation of the principle of double effect by Peter Knauer, S.J. Knauer maintains that the good effect may objectively depend upon the evil one, which may psychologically be intended as a means, provided that the act has a *commensurate reason.* Given such a reason, the evil from a moral viewpoint is only indirectly intended, Knauer insists, and no matter what the means used may be, it cannot be intrinsically evil.

What does Knauer mean by "commensurate reason." He does not mean any serious reason whatever, nor does he mean proportionate reason in the sense explained in connection with the principle of double effect. One might suppose that Knauer is slipping into utilitarianism, but that would be to misunderstand him, for he correctly appreciates the impossibility of weighing and comparing incomparable values.

Instead, by "commensurate reason" Knauer means a value that is achieved by the act as effectively as possible. An act is evil if it is motivated by desire that unintelligently settles for a short-run, partial, or more limited realization of a value that could more effectively be attained by more rationally ordered action. Evil action, Knauer explains under Kantian influence, involves an internal inconsistency, a sort of existential contradiction. One wants a value but does not act for it in a truly realistic way.

How does Knauer distinguish ethics from any other art or technique? The difference is that other techniques have a limited domain; ethics attempts the all-inclusive rationalization of life. Negatively, any particular technique would criticize efforts to achieve specific objectives. The task of moral theology, by contrast, is to show that behavior condemned as immoral is inconsistent with the most effective realization of the value toward which it is ultimately directed.[80]

Knauer's effort to broaden the principle of double effect without falling into utilitarianism is interesting. He rightly points out that the "effects" in Aquinas' example of self-defense are actually distinct aspects of the act rather than effects consequent upon it. He also is sound in his insistence that the meaningful behavior which comprises a human act should not be separated into purely mental meaning and purely physical behavior. He assumes, although he does not adequately explain, a realistic theory of values such as I outlined in the previous section. Finally, his requirement for consistency in

action is a genuine moral requirement; it could be expressed as one of the modes of obligation.

However, Knauer overlooks other modes of obligation that are just as important as the one he mentions. He in particular ignores the obligation that we not turn directly against the good. This omission opens the way for his redefinition of "directly intended" in a way that bears no relation to any previous use of the expression. To support his position, Knauer also finds it necessary to claim that moral intent is completely distinct from psychological intent.

The inadequacy of Knauer's position appears most clearly if we consider that it cannot exclude a fanatical dedication to any particular genuine value. A mad scientist would find support in Knauer's theory, so long as he was an intelligent and efficient investigator, for he could defend any sort of human experimentation, no matter how horrible its effects on the subjects, provided the experimental plan promoted the attainment of truth—on the whole and in the long run—in the most effective way.

Of course, Knauer might reject this application of his theory by maintaining that the fanatical investigator would really damage the cause of scientific inquiry by giving it a bad name. Thus, on the one hand, Knauer approves abortion in some cases not permitted by the usual application of the principle of double effect, and he thinks that contraception often is only indirectly willed:

> To prove that a particular act is contraceptive in the moral sense it must be shown that the act in the last analysis does not serve the end of preservation and deepening marital love, but in the long run subverts it.[81]

On the other hand, faced with the question of whether a woman may not rescue her children from a concentration camp by committing adultery, Knauer answers with the question:

> Does life or freedom have any value if in the end one is forced to give up all human rights and in principle be exposed to every extortion?[82]

The answer, of course, is evasive, since the question is not regarding extortion in general, but only about a commensurate reason for adultery—not life and freedom, but the recovery of one's children from the clutches of an implacable enemy.

Knauer, interestingly enough, justifies capital punishment, not as Aquinas does, but by claiming that the death of the criminal in such a case is only indirectly intended, since there is no better way to protect the common good.[83] In this argument Knauer clearly goes beyond Aquinas' conception of the unintended effect, according to which the psychological meaning of intention was not made into a separate entity over against an arbitrary definition of "intention" for moral purposes. Clearly, Knauer is carrying through a revolution in principle while pretending only a clarification of traditional ideas.

Another effort to transcend the usual formulation of the principle of double effect is found in the writings of William H. Van der Marck, O.P. For Van der Marck, the behavioral aspect of human action is merely physical; its entire meaning as human arises from its "intersubjective" significance. Thus, according to this author, removing a fetus from the womb before viability "can be abortion or murder, the removal of the effects of rape, saving the life of the mother, and so on."[84] The intersubjective meaning is the "end"; the behavioral performance becomes mere "means." An act that is in its intersubjective meaning a form of "community" is morally good, but if it is "destructive of community" it is morally evil. To argue that a good end does not justify evil means, Van der Marck thinks, merely is a sign that cultural prejudices about the meaning of behavior are being taken for granted.[85]

In effect, Van der Marck's view is a form of utilitarianism, although instead of the classical hedonism, "community" is assumed as the sole end of human pursuit. Less cautiously than Knauer, Van der Marck permits any purpose of the agent to determine the moral significance of the act, the implications of the physical behavior being ignored entirely. Thus, the operation normally called "abortion" in medical circles is nonchalantly characterized by Van der Marck as that, or as "removal of the effects of rape," or as "saving the life of the mother," or as "and so on." The last characterization, since it is open-ended, seems to indicate that *any purpose* might define and justify the deadly deed, though Van der Marck does not say how far he would be willing to go.

Cornelius J. Van der Poel draws on both Knauer and Van der Marck for his essay attacking the traditional formulation of the principle of double effect. Van der Poel explicitly attacks the view that means should be distinguished from ends in a moral analysis. He holds that the means are only significant in view of the end and that it is dishonest and unfair to attribute distinct moral significance to the means elected.[86] Explicitly rejecting any distinction between direct and indirect killing, Van der Poel erects as an absolute "the community building or destroying aspect of the action."[87]

Drawing explicit conclusions about abortion, Van der Poel states:

> For example, when the life of the mother certainly is threatened by the fetus, the moralist (following the community building criterion) can conclude to the taking of the life of the fetus in these circumstances. In fact, the moralist employing such a criterion cannot *a priori* exclude the possibility of taking the life of the fetus in other circumstances. I would strongly oppose abortion just for the convenience of the mother, but there might be some circumstances in which the moralist just does not know what is the community building alternative.[88]

Van der Poel's moralist might well find himself in a quandary, for he will be trying to carry out the calculations required by a utilitarian method while making use of an extremely fuzzy and ambiguous conception of good: community building. Classical utilitarianism, with its hedonism, sought a less high sounding but at least a more definite end in pleasure.

In sum, these recent attempts to overcome the strict limits of the principle of double effect either imply an inadequate criterion of moral good and evil—as in Knauer, who recognizes only one of the many modes of moral obligation—or they lapse into a variant of utilitarian methodology. Uniformly, it seems to me, their difficulties begin at the point at which they attempt to transcend the determinate character of a human act as means to a good sought in and through the act.

One need neither confuse the moral reality of the act with its behavioral aspect nor divide the *meaningfulness* of the behavior from the *enactment* of the purpose to observe that human acts sometimes are means to ends extrinsic to themselves: for example, the work of a person who is only interested in pay. If the work is that of a gunman who will kill anyone for a price, then the psychological intention by which he sets himself directly against human life is morally significant, for this intention orients the self in a manner that is incompatible with openness to the basic good of human life and respect for it. Whatever his ulterior purpose might be, his acts are morally evil, for one basic human good is treated as expendable for the sake of another (or of the same in another realization). Knauer is mistaken in permitting each value to become an absolute; Van der Marck and Van der Poel are more seriously mistaken in regarding the actual effects on community—which are only partly knowable and are immeasurable in principle—as a moral criterion.

Nevertheless, it seems to me that the principle of double effect in its modern formulation is too restrictive insofar as it demands that even in the order of physical causality the evil aspect of the act not precede the good. The critics are right, I believe, in their insistence that the behavioral aspect of the act is not morally determinate apart from the meaning that shapes the human act. In this respect, Aquinas' formulation seems to me to have been more accurate, for he did not make an issue of which effect (aspect of the act) is prior in physical causality, but he did insist that when a single human act has a good and a bad aspect the latter could not rightly fall within the scope of intention, even as a means to a good end.

From the point of view of human moral activity, the initiation of an indivisible process through one's own causality renders all that is involved in that process equally immediate. So long as no other human act intervenes or could intervene, the meaning (intention) of the behavior which initiates such a process is no less immediate to what is, from the point of view of physical causality, a proximate effect or a secondary or remote consequence. For on the hypothesis that no other human act intervenes or could intervene, the moral agent who posits a natural cause *simultaneously* (morally speaking) posits its foreseen effects. The fact that not everything in the behavior which is relevant to basic human goods equally affects the agent's moral standing arises not from the diverse physical dispositions of the elements of the behavioral aspect of the act, but from the diverse dispositions of the agent's intention with regard to the intelligible aspects of the act.

But it is the intelligible aspects of the indivisible human act that count, not purposes sought and values hoped for in ulterior human acts, whether of the agent himself or of another. For otherwise the end will justify the means, and some sort of utilitarianism or inadequate consistency-criterion will replace the true standard of moral value.

Moreover, even if the particular process initiated by one's behavior is in fact indivisible, he obviously does not escape full moral responsibility for significant aspects of it that could have been avoided by the choice of an alternative behavior having the same determining intention but a diverse mode of accomplishment. Then too, if the unity of the process is merely *de facto,* arising from the agent's failure to divide and limit his behavior, then the act is not truly indivisible and the determining intention will not exclude moral responsibility for aspects of the act that could have been excluded, but were not.

This theoretical formulation will be considerably clarified by application to some examples. Obviously, cases generally approved by application of the principle of double effect as it is conventionally formulated also will be approved if the modification I am suggesting is correct, since the modification broadens the strict condition about the order of the effects as it is usually expressed. For this reason, we need not review many examples usually used to illustrate the principle, but we must consider some where the proposed modification leads to a result different from the usual formulation. Also, it will be worth noting how the proposed modification would deal more restrictively with some of the types of cases mentioned by critics of the traditional principle.

Applications of the Principle

The modified principle of double effect would not justify committing adultery to save one's children from a concentration camp, because the saving effect would not be present in the adulterous act, but in a subsequent human act—that of the person who releases them. Therefore, adultery is intended as a means to an ulterior good end. On the other hand, a mother who saves her child by purposely interposing her body as a shield against an attacking animal is justified, since the very performance which is self-destructive also is protective.

Transplantation of organs which deprives the donor of life or health cannot be justified, because the good effect to the recipient is in a subsequent human act, at least potentially. That is, although the surgical procedures form a continuous whole and can be chosen in a single human act, the two phases of the operation are not necessarily united and the first can be chosen without the second—as is evident since the surgeon may decide not to carry out the implant after the organ has been removed from the donor. If transplantation of organs does not deprive the donor of life and health, it is not contrary to

this basic good and so may be justified as an act of giving, just as is the case in blood donations.

I have argued elsewhere that contraception is wrong because it involves an attack upon human life in its beginning.[89] Without rearguing that position here, I want to point out that if it is correct, the contraceptive act cannot be justified by marital love. For the choice of contraception and the choice of intercourse constitute two quite distinct human acts—as is evident in the case of those who use the pill—and the processes remain distinguishable even for those who use a method connected with the sex act and habitually choose both together. Clearly the contraceptive act itself is not directly conducive to anything except the prevention of the beginning of life. Marital love, on the other hand, may be fostered by intercourse, but the good effect which the contraceptive act makes possible cannot be the sole determining intention of an act in which it is itself not present.

A case that Catholic moral theologians who have attacked the restrictive principle of double effect never seem to consider is why it would be wrong to deny one's faith in time of persecution. On utilitarian grounds, of course, one could not rule this out, and I do not see how those who take views like Knauer's or Van der Marck's could exclude it either. Assuming, however, that the denial of one's faith violates basic human goods, such as religion and theoretical truth, martyrdom is a moral obligation that may not be avoided for the good effect—saving life—since that is only accomplished by preventing another, distinct human act. In other words, the persecutor's act, not the martyr's, takes life or does not take it; therefore, the victim of persecution cannot avoid intending the denial of faith precisely as such.

Aquinas' discussion of self-defense clearly fits under the principle of double effect according to my understanding of it. The common formulation of the requirement that the evil effect may not be a means to the good one led to difficulty in understanding Aquinas' argument. For often the person who kills in self-defense does a deed which from a physical point of view is directly deadly and only succeeds as a self-defense by its effectiveness in killing the attacker. For example, a storekeeper attacked by an armed hold-up man does not defend himself adequately by aiming at a limb, but at the head or heart, for only a death-dealing shot will certainly prevent the robber from shooting back.

Thus many Catholic moralists came to accept the view that in self-defense direct killing is permissible; they denied the applicability of the principle of double effect in the precise case for which it was first articulated. If the other requirements of the principle of double effect are met, the position I am proposing is compatible with viewing the storekeeper's act as a killing not intended by him, because the various aspects of the outward act are indivisible (assuming, of course, that the storekeeper cannot otherwise defend himself).

In examining Aquinas' arguments regarding capital punishment and warfare, I have argued that his attempt to justify killing for the common good is

not sound. I do not see how it can be right ever to set oneself directly against any human being's life, whatever the ulterior good, even if it be the good of the entire community. Can the deadly deeds involved in capital punishment and warfare to some extent be justified as unintended killing? This is a large question, and I can only make a few provisional remarks in response to it here.

Capital punishment, at least as it presently exists in countries such as the United States, seems to me unjustifiable. The argument that it prevents the criminal from committing future crimes and that it deters others from crime—even if correct in fact—is ethically invalid, because the good is achieved in other human acts, not in the execution itself. Banishment and imprisonment, by which offenders against the social good are prevented from sharing in it and restrained from harming it further, are justifiable incursions upon the criminal's liberty. A form of capital punishment sometimes used in the past, by which a criminal was banished and his life declared forfeit if he returned, could have been justified on the supposition that the return of someone subjected to such a sentence expressed his renewed involvement in wrong-doing, against the immediate threat of which only a death-dealing act would be effective protection.

One might argue that capital punishment is justified by virtue of the fact that in the execution itself not only is a man killed but the basic good of justice also is vindicated. Certainly, this view of the matter has influenced thinking in the past, as is evidenced by such phrases as "paying for his crime with his life," "life for life," "paid his debt to society," and "evening the score" (which was made uneven by the "cheating" involved in the crime). However, I think this argument involves a basic confusion.

The demand for restitution, to the extent possible, is a sound requirement of justice. But killing the criminal in no way compensates for the real evil he has done. A murderer's victim does not rise from the dead when the execution is carried out. Harming, hurting and killing offenders does not restore the goods of which they have unjustly deprived their victims. It would be far more just if a murderer were forced to spend his life working as productively as possible, the fruit of his effort being given to the dependents of the victim or to society at large, if there are no dependents.

Warfare, also, I think, can be justified only to the very limited extent to which the killing involved can be done without directly turning against the good of human life, a good no less basic and inviolable when the lives destroyed happen to be those of enemies who are really engaged in unjust activities. When force is used unjustly, and if there is no other way to stop the injustice, proportionate force to limit the injustice and exact reasonable restitution may be justified.

In saying "when force is used unjustly" I mean not only an active exercise of power to do or to obtain something unjustly, but also the use of power maintained in readiness to support an unjust status quo. In saying "used" I mean to include all of the steps of preparation for use—e.g., the construction

of weapons or military installations that are surely directed to unjust use. By the condition, "there is no other way to stop the injustice," I mean that there is no method of reason or persuasion and no commonly recognized higher authority to which to appeal. Obviously the requirements of the principle of double effect regarding intention, proportionality, and the avoidance of acts already wrong apart from a consideration of the bad effect must be maintained.

To indicate briefly some of the implications of my theory for contemporary military policy, I will deal with a limited group of issues. I will not try to take into account problems raised by the bearing of acts of war on goods other than human life—e.g., truth, property, and personal integration. Nor will I attempt to discuss fully the objections to my theory that will be raised by its political implications. Suffice to say that if modern war cannot be fought morally, it cannot be justified by the horrible consequences to the just of the acts of those who are willing to proceed immorally. The acceptance of the incoherent ethics of utilitarianism in this matter, I am convinced, more than anything else has undermined contemporary moral attitudes and given foundation for youthful cynicism about the moral sincerity of public authority.

To begin with, then, justifiable acts of war may be directed only against the means of unjust force. War cannot justly be fought if unconditional surrender is demanded, or if the purpose is to overcome erroneous ideas and evil practices that are not implemented by unjust force, or if the enemy society becomes the target of total warfare and noncombatants are attacked.

Acts of torture, terror, and reprisal cannot be justified, because these intentionally attack the lives or well being of persons in order to achieve good effects only in distinct, ulterior human acts—namely acts of the enemy. The use of power to "break the will of the enemy" is unjustified unless that phrase means nothing more than destroying his military capability.

Actions in which violence is done to enemy military personnel are justifiable only to the extent that they are participating or about to participate in the unjust application of force (the military operation) and only if the violence done to them will contribute to impeding the enemy's military operation. One can shoot straight at an enemy soldier on a battlefield (assuming all other requirements of a just war are met) intending to lessen the enemy force by one gun and only indirectly killing a man (just as in self-defense). A military camp, also a training camp, or a factory contributing materially to the war effort could be bombed. But a hospital may not be bombed. Enemy soldiers may not be killed if they can be inactivated without killing them, for instance by wounding or capturing them. Once captured, a prisoner's life must be respected.

Applying this approach to World War II, I think one can say it could have been fought justly by the allies. The demand for unconditional surrender should not have been made. Strategic bombing, which was in actuality a reprisal and terror tactic often indiscriminate about military targets, should never have been carried on. Many particular acts of terror, torture, attacks on

noncombatants, mistreatment of prisoners, and wanton property destruction in occupied areas should have been avoided. Such limitations would not necessarily have hindered allied military effectiveness.

The war in Vietnam poses many problems from an ethical point of view. Is the enemy, in the first place, really engaged in an unjust use of force? Is the American objective limited to countering this unjust force? Is there any hope of success (without which the war is pointless and therefore the evil effects of acts of war lacking proportionate reason)? Were all other solutions tried and found ineffective?

However, more clear than all these questions, which have been debated endlessly in recent years, is the central cause of American frustration. Legitimate military targets to which force can be applied are hard to find and the elusive enemy power seems practically inexhaustible. Therefore, military power has been directed against other objectives, with the hope of gaining indirect military advantages. Thus there have been all sorts of reported acts of terror, torture, reprisal, indiscriminate bombing, mistreatment of prisoners, attacks on civilians suspected of conspiracy, and so forth. Announcements of body counts and briefings about kill-rates suggest that the maximum destruction of enemy life is intended as a means to the ulterior good of gaining a better negotiating position.

In contrast to the Vietnam war, the Cuban missile crisis exemplifies a situation in which military force was applied proportionately, by means of the blocade, to obstruct what America considered unjust military force in preparation (the missile sites). If a ship reasonably believed to be contributing to the enemy military preparation had tried to run the blocade, it could justly have been sunk with the attendant loss of life as an unintended side effect. Similarly, if work on the missile sites had not been halted, those sites could morally have been bombed in as precise and life-sparing a manner as possible. On the other hand, it would have been unjustifiable to use the missile crisis as an occasion to invade Cuba in an effort to "liberate" it, for that purpose would have gone beyond the unjust force that was to be countered.

Perhaps the most important example of the application of ethics to modern warfare regards the nuclear deterrent strategy—the "balance of terror." I do not think it is correct to raise this question in terms of the morality of the nuclear weapons, for it is acts, not objects, that are morally good or bad. Conceivably nuclear weapons might have some legitimate use—e.g., to destroy a deeply buried enemy military headquarters.

However, the deterrent strategy precisely involves the threat to destroy without discrimination, and even to destroy declaredly non-military targets. The *last stage* of a nuclear exchange would be entirely without militarily advantageous effects. Yet it is only the willingness, readiness, and serious intent to do the last act that makes the threat effective.[90] Such an act, when it is done, clearly will be immoral. We attempt to justify our present readiness to do it by the effect of this readiness in a quite different act, the choice of a

potential enemy. Therefore, our present readiness to do what is immoral cannot find justification as if the destruction of life were beyond the scope of our intention. For this reason, I believe, the deterrent strategy is immoral and should be abandoned by both sides.

There might be an alternative, purely counter-force deterrent, that could be morally justified. The immorality of the present deterrent is not that it deters potential unjust uses of force, but that it does so by readiness to obliterate non-military objectives. Yet I doubt that a purely counter-force strategy could be militarily effective.

This conclusion, of course, raises the objection that renunciation of the deterrent by one nation would mean surrender to those willing to proceed immorally. If the United States were to renounce the deterrent, the Soviet Union presumably would hold worldwide political dominance, backed by its military power, which would be used without regard for morality. Now, I am not sanguine about Communist ideology and what its global political triumph would mean for mankind. Very likely its success would radically alter the Communist system, but the alteration would not occur immediately, and the western democratic effort toward freedom and justice would suffer a considerable setback.

Still, nuclear weapons, now in existence, will never go away. As decades pass, more and more countries will acquire significant nuclear forces. Eventual world political unity is obviously necessary. It is unlikely to be achieved in the near future by common consent. Those who apply to the deterrent a utilitarian argument from "necessity" should consider the likelihood that a large-scale nuclear war will be fought sooner or later, with vast destruction and loss of life, and with an extremely unsatisfactory post-war political situation and moral environment.

If it is hard for us to accept the immorality of the deterrent strategy, perhaps the point will be clearer to the survivors of nuclear war that it was unreasonable to risk mutual annihilation decade after decade while hoping for an eventual global political organization with sufficient authority to make national military forces unnecessary. The risk of nuclear war in any given year, even in any given decade, may not be great;. the cumulative risk certainly is substantial. Moreover, tremendous wealth that could be applied to other urgent needs is used to maintain the deterrent force, which will only "succeed" if it is never used.

It is worth noting that many who would wish to treat capital punishment and warfare in a manner more traditional than I propose would agree that the nuclear deterrent strategy cannot be justified.[91] The argument for deterrence is utilitarian; many utilitarians and others reject it. All who reject it should grapple with the political implications of their ethical position; to fail to face these implications seems to evidence a lack of seriousness about the moral issues.

My purpose in discussing self-defense, capital punishment, and war has not been to treat these problems fully and adequately as they deserve. Rather, I needed to show that the principle of double effect, reformed as I have suggested, can accommodate certain morally accepted deadly deeds (while rejecting others that can be rejected plausibly) without yielding the principle that it is never morally right to act directly against the basic good of human life. When I come to apply these ethical principles to abortion, the theory will apply consistently. Thus the objection that human life is not absolute, that its inviolability admits of exceptions, will be adequately met. For the inviolability of life against any *directly intended* attack remains absolute according to the present theory.

According to the present theory, then, in which cases would it be permissible to do the deadly deed involving the unborn? We must bear in mind from the previous argument that they must be treated as persons whose lives are inviolable to any direct attack. The question therefore becomes a matter of trying to apply the revised version of the principle of double effect to these cases.

In the chapter on medical aspects, we saw that there are relatively few cases in which the life or physical health of the mother seems to require abortion. Two types of cases of this sort are those involving ectopic pregnancy (implantation of the embryo outside the uterus) and certain cases involving impaired heart and/or kidney function.[92]

Ectopic pregnancy, we have seen in dealing with religious aspects, has been dealt with by Catholic moralists by the argument that the condition itself is pathological, and that the pathology, even apart from the developing embryo, presents a threat to the mother. It must be removed, and in the process the embryo is incidentally removed.[93]

Assuming the soundness of the position, I think a simpler justification is possible. This justification will also apply to abortions previously considered direct having strict medical indications such as those mentioned involving impaired heart and/or kidney function.

The justification is simply that the very same act, indivisible as to its behavioral process, has both the good effect of protecting human life and the bad effect of destroying it. The fact that the good effect is subsequent in time and in physical process to the evil one is irrelevant, because the entire process is indivisible by human choice and hence all aspects of it are equally present to the agent at the moment he makes his choice.

It will be helpful, perhaps, in gaining acceptance for this view—although it is not theoretically essential to the argument—if we note that it is not precisely the infant's death that benefits the mother but its removal from her. From this point of view, even if the abortion were intended (which I do not think it has to be), the killing of the infant would not have to be intended. The distinction is clearly illustrated if we imagine a probable future development—an artificial womb. Embryos aborted in such cases could

conceivably be saved and brought to birth by such a device. Thus, the very meaning of *abortion* need not be *feticide,* for even if the two cannot now be separated in fact, they could be, and what could be separate in fact obviously cannot be identical in meaning.

If the threat to the mother's life or health can be obviated without the removal of the unborn child, then the aspects of the human act which involves abortion are, in fact, separable. In such a case one cannot argue that the alternative to abortion is difficult, inconvenient, and costly. For that is to make these factors of cost equal in value to the dignity of human life. If one does not take an alternative in which the good effect is achieved without the deadly deed, then killing falls within the scope of one's intention.

What if there is no alternative to abortion, in some sort of case, if the mother's health is to be protected, although the risk to her does not involve the probability of accelerated death? In principle, if the good effect is attained in and through the same indivisible process which is initiated by the abortifacient procedure, then the abortion need not be intended. However, one does not sacrifice life for health, since the latter is only a partial aspect of the former.

To subordinate life to health is something I could not do in my own case —I would never be healthier dead. Nor can one reasonably prefer health to life, the part of life (health) to the whole of life. To act on such a preference involving another's life and my health indicates that it is not the basic human good itself, but a particular realization of it, that concerns me. This is a limiting attitude, not compatible with moral uprightness.

This conclusion that abortion is not morally permitted when only health is at stake also applies to the entire area of the psychiatric indication. Moreover, the good effects presumably justifying such cases of abortion are not achieved through a physical process that is unified and morally indivisible, but rather in ulterior effects of distinct human acts.

For this reason, even if a threat of suicide is serious and abortion would prevent it (something hardly likely as we saw in chapter three),[94] abortion would not be justified in such a case. The good effect would be achieved only by preventing another act, and the abortion itself would be a means, intentionally chosen, to this ulterior end.

In times past complications of delivery raised serious problems. Now where medical facilities are available such difficulties are rare, most difficult cases being prevented by timely surgery. However, if it were impossible to prevent the mother's death (or, worse, the death of both) except by cutting up and removing the child piecemeal, it seems to me that this death-dealing deed could be done without the killing itself coming within the scope of intention. The very deed which deals death also (by hypothesis) initiates a unified and humanly indivisible physical process which saves life. But if it is possible to save the mother without the death-dealing deed, then the intent to kill would enter the agent's act as its determining meaning.

The attempt to justify abortion in cases involving prospective birth defects obviously is unsatisfactory. If the goods sought are in others, then the deadly deed does not itself achieve them, and it becomes an intended means to an ulterior end. On the other hand, if life is a human good, even a defective life is better than no life at all—some value is better than no value. In any case, defects cannot touch many central values of the human person, as we saw earlier in this chapter. The real reasons underlying this "indication" are utilitarian—the supposition that an infant is like a product, and that imperfect specimens should be scrapped.

A sound appraisal of the moral significance of abortion as a method of eliminating the defective was given by Martin Ginsberg, a New York state Assemblyman, in the 1969 New York legislative debate. The proposed bill would have permitted abortion

> when there is medical evidence of a substantial risk that the foetus, if born, would be so grossly malformed, or would have such serious physical or mental abnormalities, as to be permanently incapable of caring for himself.

Mr. Ginsberg, a thirty-eight-year-old lawyer who was crippled by polio at the age of thirteen months, walks only with difficulty, using metal crutches and leg braces.

He began his speech by mentioning a number of persons who achieved greatness despite handicaps—Toulouse Lautrec, Alec Templeton, Charles Steinmetz, Lord Byron, and Helen Keller. Then he went on:

> What this bill says is that those who are malformed or abnormal have no reason to be part of our society. If we are prepared to say that a life should not come into this world malformed or abnormal, then tomorrow we should be prepared to say that a life already in this world which becomes malformed or abnormal should not be permitted to live.

Ginsberg, who did not oppose abortion law relaxation in general, was given a standing ovation by the Assembly.

The bill's sponsor, Albert H. Blumenthal, attacked Ginsberg, accusing him of telling women they could not protect themselves from harm:

> That's what you're telling my wife, Marty. You're telling her she has no right to protect herself from harm. You don't have that right, Marty. Nobody gave you that right. Not God. Not man.

However, Blumenthal did not explain how eliminating possible defective children would protect mothers from harm. Although before the debate there were six votes more than the number needed for passage pledged in favor of the bill, the *New York Times*, which has promoted abortion law relaxation for years, was forced to headline: "Assembly Blocks Abortion Reform in Sudden Switch—14 Legislators Pledged to Bill Defect After Polio Victim Urges Defeat."[95]

Abortion used as a form of birth prevention—whether in cases of illegitimate children, or in cases of economic hardship, or in cases of simple reluc-

tance to have a child—clearly cannot be justified. Here the whole point of the operation is to get rid of the baby, to end its life, because its continued existence is simply rejected. This is not to say that in some such cases there is not a genuinely good ulterior motive—e.g., avoiding future hardship for already existing children in an impoverished family. However, these good motives—while they may well win our sympathy and deserve our compassion—do not ethically justify the abortifacient procedure, for it achieves none of these goods. They are present only in future human actions.

Moreover, the goods sought in all such cases are achievable otherwise. The unmarried girl should be helped and arrangements made for the child's care, whether or not she wishes to bring it up. The problems of poverty and social stress would yield to our compassion if it were real and active enough, not merely a weak sympathy. Those who do not want children need not conceive them; they do so by their own free acts.

But what about the rare case in which a woman is raped and conceives a child of her attacker? She has not had a choice; the child has come to be through no act of hers. Moreover, it is not clear that her precise concern is to kill the child. She simply does not wish to bear it. If the artificial uterus were available, she might be happy to have the baby removed and placed in such a device, later to be born and cared for as any infant that becomes a social charge. Now, clearly, one could not object if that were done. May the death of the child that is in fact brought about by aborting it actually be unintended in this case? I believe that the answer must be yes.

But this answer does not mean that abortion in such a case would be ethically right. I fail to see what basic human good is achieved if the developing baby is aborted. The victim of rape has been violated and has a good reason to resent it. Yet the unborn infant is not the attacker. It is hers as much as his. She does not wish to bear it—an understandable emotional reaction. But really at stake is only such trouble, risk and inconvenience as is attendant on any pregnancy. To kill the baby for the sake of such goods reveals an attitude toward human life that is not in keeping with its inherently immeasurable dignity. One of the simpler modes of obligation is violated—that which requires us to do good to another when we can and there is no serious reason not to do it.

Even psychologically, I doubt the wisdom of a woman who has been raped disposing of a child conceived of the attack. Her problem is largely to accept herself, to realize that she is not inherently tainted and damaged by her unfortunate experience. The unborn child is partly hers, and she must accept herself in it if she is really to overcome her sense of self-rejection. To get rid of the child is to evade this issue, not to solve it. A woman who uses such an evasion may feel temporary relief but may be permanently blocked from achieving the peace with herself she seeks.

Incest presents no special problem. Clearly here abortion is a method of disposing of an unwanted baby. I see no reason why incest often is coupled

with rape in discussions of abortion, except for the fact that both arouse in most people an emotion of revulsion which proponents of abortion seek to divert from parties who are guilty to individuals who are innocent—the nameless unborn.

If abortion is justified, then it should be performed in a way that gives the child a chance of survival, if there is any chance at all. The effort to save the aborted child and to find ways of saving all who are justifiably aborted would be a token of sincerity that the death of the child really was not in the scope of the intention.

If abortion is intended, how it is done is ethically irrelevant except to the extent that some methods might unnecessarily endanger the mother as well. Certainly, abortion is no less immoral if it is done with an abortion pill near the beginning of pregnancy than if it is done with a curette later on, or by delivering the child at or after viability and putting it down an incincerator, as has happened in England under the new abortion law.

One might wonder about the moral status of birth control methods that are probably or possibly abortifacient, as we saw in the latter part of chapter three is the case with the IUD and the "pill."[96] If one recognizes that human life is at stake if these methods do indeed work in an abortifacient manner, then it is clear that the willingness to use them is a willingness to kill human beings directly. The effect of killing the already conceived individual, if it occurs, is no accident, but the precise thing sought in committing oneself to birth prevention. *If one is willing to get a desired result by killing, and does not know whether he is killing or not, he might as well know that he is killing,* for he is willing to accept that as the meaning of his act. Everyone who knows the facts and who prescribes or uses birth control methods that might be abortifacient is an abortionist at heart.

The judgment may be seen more clearly by considering it from the point of view of someone who sincerely believes conception-prevention to be legitimate and any interference after conception to be unjustifiably killing a person. On these assumptions, it clearly is insufficient to know that a given method prevents *births*; such a person would be willing to prevent conception but absolutely unwilling to interfere once conception had occurred. The abortifacient character of a technique, even if certainly known to occur in only a small percentage of cases, could not be viewed as incidental to the intended conception prevention, since in those cases there would be no conception prevention. Nor could the abortions which might occur be outside the scope of the intention defined as *birth prevention,* since if conception were not prevented, the only meaning of "birth prevention" would be *abortion.* Uncertainty about a method's mode of action would perhaps be tolerable if the uncertainty regarded side effects. However, here the uncertainty is concerned with the very meaning of the *intended* birth prevention: whether it is conception prevention or abortion.

It is often said that one should not becloud the ethical issues regarding abortion by referring to it as *murder.* Certainly the word has a legal sense, and it would prejudice the jurisprudential discussion of abortion in the next chapter to classify abortion with the crime of murder. On the other hand, "murder" also has an ethical sense: it is the wrongful and purposeful taking of human life. It would be question-begging to call abortion "murder" before examining its morality. Now that we have completed such an examination, however, it is accurate and appropriate to say that abortion, whenever it involves the direct attack on human life (which is almost always) is *murder.* To reject this classification of the act is itself a merely emotional reaction, an attempt to sanctify evil by removing its bad name.

To say this, however, is not to assert that everyone who has an abortion or who performs an abortion incurs the full moral responsibility for murder. Many who do the evil deed do not know, or do not fully appreciate, what they do—this is true of all murder, not only of abortion. Some act through fear, through anxiety, through shame. They are less guilty than those who act through cool and brutal calculation, such as a utilitarian, if he were true to his principles, should applaud. Still, if one's lack of appreciation of what the deadly deed really means or if one's weakness to resist is a product of one's own habit of treating the good of life lightly or of one's unwillingness to see and feel the wrong one does, then responsibility is not lessened, but increased.

Granting that someone has done his best to see what is right and to be ready to do the right as he sees it, he is of course free of moral guilt. In this sense, one who follows steadfastly the direction of a firm and honest conscience is doing as he ought. Still, conscience must be shaped according to ethical truth. A sincere conscience can be mistaken, and such a mistake does not make the deed good, although it does not make the doer guilty.

Roman Catholic readers may notice that my conclusions about abortion diverge from common theological teachings, and also diverge from the official teaching of the Church as it was laid down by the Holy Office in the nineteenth century. I am aware of the divergence, but would point out that my theory is consonant with the more important and more formally definite teaching that direct killing of the unborn is wrong. I reach conclusions that are not traditional by broadening the meaning of "unintended" in a revision of the principle of double effect, not by accepting the rightness of direct killing or the violability of unborn life because of any ulterior purpose or indication.

Most important, I cannot as a philosopher limit my conclusions by theological principles. However, I can as a Catholic propose my philosophic conclusions as suggestions for consideration in the light of faith, while not proposing anything contrary to the Church's teaching as a practical norm of conduct for my fellow believers. Those who really believe that there exists on this earth a community whose leaders are appointed and continuously assisted by God to guide those who accept their authority safely through time to eternity would be foolish to direct their lives by some frail fabrication of mere reason instead

of by conforming to a guidance system designed and maintained by divine wisdom.

I do not doubt that the survivors of a nuclear holocaust, when they look back upon our time, will clearly discern a common thread uniting our deterrent strategy, our increasing resort to violence in place of orderly civil process, and our relaxed attitude toward the killing of the unborn. If we want freedom and progress together with law and order, we must begin by recommitting ourselves to the basic good of human life, a good that is fundamental to all the others. If we do not respect human life, what human good will we any longer respect?

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.[1]

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.[2] [*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.[3]

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.[4]

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.[5]

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.[6] 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.[7]

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.[8]

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.[9]

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

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*.[11]

Of course, this position cannot be taken as representative of Episcopalian opinion.[12] 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.[13]

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.[14]

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.[15]

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.[16]

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.[17]

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.[18] 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.[19]

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.[20]

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.[21] 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.[22]

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.[23]

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.[24]

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.[25] 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.[26]

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."[27]

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.[28] 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[29] 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.[30]

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.[31] 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.[32]

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 Constituion 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.[33]

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.[34]

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.[35] 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."[36] 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.[37]

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 [38] [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.[39] 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.[40]

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,[41] 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.[42] 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.[43] 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.[44] 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.[45]

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."[46] 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 stepfather. 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.[47]

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 . . ."[48]

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.[49]

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.[50] A 1938 Alabama decision applied the old rule not to the child's benefit, but to the benefit of a third party.[51] 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.[52]

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 . . .."[53] 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.[54]

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.[55] 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.[56]

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.*,[57] 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.[58] 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.[59]

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*.[60] 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.[61] 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.*[62] 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,[63] 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 nonviable 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.[64] 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."[65]

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.[66]

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.[67]

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."[68]

An example is a 1953 New York case, *Kelly v. Gregory*.[69] 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.[70] 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.[71]

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,[72] otherwise known as Lord Campbell's Act. Many American states imitated this model.[73]

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.[74]

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.[75] In Michigan, a stillborn child was held not to be a "person" within the sense of the Wrongful Death Act.[76]

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*.[77] 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.[78]

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 then 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.[79] 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.[80] 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.[81] Evidence of the underlying rationale in many of these cases is found in *Mitchell v. Couch*, a Kentucky case decided in 1955.[82] 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 . . ..[83]

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.[84]

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.*,[85] 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 nonviable 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,[86] 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.[87] 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.[88]

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.[89] 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.[90] The unborn child also has been classified as an "existing person"[91] and as a "surviving child"[92] 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.[93]

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 . . ..[94]

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,[95] 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.[96] 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*,[97] 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.[98] 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 abortional 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.[99] 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.[100]

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.[101] 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,[102] 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.[103]

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.[104]

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."[105] 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 . . .."[106] 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."[107]

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 abortional attempts on "any woman pregnant with a child" that resulted in the death of either the mother or the child.[108] 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.[109] 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."[110] 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."[111]

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 abortional 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.[112]

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.[113] 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.[114]

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.[115]

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.[116]

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).[117]

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.[118] 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.[119] 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 abortional 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.[120] 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.[121] 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.[122]

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 *any* surgical 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.[123]

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."[124] 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.[125]

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.[126] 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.[127] 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."[128] 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).[129] 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.[130]

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.[131] 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."[132] 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 abortional 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.[133] 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.[134] 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.[135]

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.[136]

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.[137]

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 abortional 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.[138]

Means thinks that the legislature of 1872 did not intend to include pre-quickening 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.[139] 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 "quickening" 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.[140] 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.'"[141]

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.[142] 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.[143] But he claims that these provisions are dead letters, "that no such woman ever has been, or is ever likely to be, prosecuted."[144] 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).[145]

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.[146]

I do not know what to make of the legal position resulting from these provisions,[147] 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.[148]

Before 1860, Massachusetts (1845), Vermont (1846), and New Hampshire (1848) were the only states that had a law like that of New Jersey (1849),[149] 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.[150]

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.)[151]

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 abortional 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 abortional 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 abortional 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.[152]

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.[153] 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.[154] 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.[155] 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.[156] 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.[157] 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).[158]

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.[159] 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.[160]

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.[161] Nebraska in 1873 adopted two statutes, one of which penalized abortional 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."[162] 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.[163] 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.[164]

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.[165]

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.[166]

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.[167]

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.[168]

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.[169]

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.[170]

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.[171] 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.[172]

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.[173]

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.[174] 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.[175]

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."[176] Some modern state codes of criminal procedure have abolished the quickening distinction from the provision for reprieve of a pregnant woman.[177]

"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.[178] 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.'"[179]

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."[180]

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.[181]

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.[182]

Shortly after *Williams* finally failed (December 1966), *Gleitman v. Cosgrove* was decided by the Supreme Court of New Jersey.[183] 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).[184]

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.[185] 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."[186]

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*][187]

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?"[188] 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.[189]

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.[190] 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.[191]

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?[192]

Among the decisions that followed *Dietrich* was that of *Magnolia Coca Cola Bottling Co. v. Jordan,* a Texas case decided in 1935.[193] 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.[194]

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.[195]

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.[196] 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.[197]

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.[198]

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 abortional act that caused the death of either mother or child was treated as assault with intent to murder.[199]

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,*[200] 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 Constituion 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.[201]

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.[202]

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 . . ."[203]

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."[204] The case of *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* was decided by the New Jersey Supreme Court shortly afterwards.[205] 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.[206] 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.[207] 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 abortional 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.[208] 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.[209]

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 cay 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."[210] 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 consignment 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.[211]

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.[212]

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.[213]

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.[214]

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.[215]

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.[216]

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."[217]

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.[218] 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.[219] 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.[220] 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.[221]

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.[222]

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.[223]

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.[224] 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.[225]

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.[226] I have quoted and criticized that same passage in chapter six.[227]

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.[228] 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."[229] 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 abortional 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."[230] 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,"[231] 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."[232]

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.[233] 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.[234]

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.[235] 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.[236] 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.[237] 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.[238] 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.[239] 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.[240] 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.[241]

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*.[242] 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."[243]

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.[244]

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.[245]

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."[246]

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.[247]

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 injuction 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.[248] 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."[249] 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.[250] 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.[251]

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 poeple 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.[252] 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.[253]

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.[254] 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.[255] 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.[256]

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.[257]

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."[258] 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.[259]

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.[260]

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.[261]

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.[262]

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.[263]

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.[264] 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.[265]

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.[266]

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 . . .[267]

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.*[268]

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.[269]

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.[270]

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.[271]

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*.[272] 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."[273]

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.[274]

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.[275] 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.[276]

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.[277] 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 noncooperation, along the lines of that included in the Maryland law.[278] 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.[279]

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 abortional 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.[280]

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 provison, 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 legitimatize 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.[281]

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.[1]

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.[2]

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.

NOTES

Notes for Introduction

1. "Drama of Life Before Birth," *Life*, April 30, 1966; pages unnumbered, cited passage appears under the heading, "Fertilization."

2. J. A. F. Roberts, *An Introduction to Medical Genetics*, 3d ed. (London: Oxford University Press, 1965), 1.

Notes For Chapter One

1. This chapter depends greatly on two standard texts. One in human embryology: W. J. Hamilton, J. D. Boyd, and H. W. Mossman, *Human Embryology*, 3d ed. (Cambridge: W. Heffer & Sons, Ltd., 1962); the other in histology: Arthur W. Ham, *Histology*, 5th ed. (Philadelphia and Montreal: J. B. Lippincott Co., 1965). Another useful text is: Leslie B. Arey, *Developmental Anatomy: a Textbook and Laboratory Manual of Embryology*, 7th ed. (Philadelphia and London: W. B. Saunders Co., 1965). Lennart Nilsson, Axel Ingelman-Sundberg, and Claes Wirsén, *A Child Is Born* (New York: Delacorte Press, 1966), is a remarkable popular book on human embryology, distinguished especially by Nilsson's photographs.

2. The essentials of human genetics are well presented in: Victor A. McKusick, *Human Genetics* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), chs. 2-5.

3. Ham, *op. cit.*, 100, points out that the genetic difference causes all human protein to differ specifically from that of any other species.

4. *Ibid.*, 152-155.

5. For a full discussion of the setting aside of future sex cells see: Emil Witschi, "Migration of the Germ Cells from the Yolk Sac to the Primitive Gonadal Folds," *Contributions to Embryology* (Carnegie), 32, No. 209 (March 30, 1948), 67-80. The youngest individual studied was a 13 somite embryo, about 24 days old, but Witschi suggests (69) there are even earlier, less differentiated stages of the germ cells.

6. The deck is very large indeed. Curt Stern, *Principles of Human Genetics* (San Francisco and London: Freeman, 1960), 78, tries to estimate the number of different possible sex cells and comes up with the figure 8,388,608 followed by 23 zeros! The immense total number of sperm produced by a man would be only one billion billionth of this figure according to Stern—not much chance of two being identical. (Of course, the two produced from the same meiosis in its last division would be identical.)

7. The concept of individuality is treated in the latter part of this chapter, under the heading "Twins."

8. Witschi, *op. cit.*, 78-79, argues very effectively the specialized, functional character of even the early sex cells.

9. For the essential information on fertilization see: C. R. Austin, *Fertilization* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965).

10. Landrum B. Shettles, *Ovum Humanum* (New York: Hafner Publishing Co., 1960), 56-58, shows experimental evidence that many sperms enter the ovum, though only one accomplishes nuclear fusion. Of course, this is *in vitro.*

11. A good treatment of activation is found in: B. I. Balinski, *An Introduction to Embryology,* 2d ed. (Philadelphia and London: W. B. Saunders Co., 1965), 117-122.

12. Hamilton *et al., op. cit.*, 43, points out that "ovum" theoretically should not be used after cell division begins, but it is used loosely to refer to the early stages of development.

13. Arthur T. Hertig, John Rock, Eleanor C. Adams, and William J. Mulligan, "On the Preimplantation Stages of the Human Ovum: A Description of Four Normal and Four Abnormal Specimens Ranging from the Second to the Fifth Day of Development," *Contributions to Embryology* (Carnegie), 35, No. 240 (Oct. 5, 1954), 199-220.

14. Balinski, *op. cit.*, 40-171 and 498-537, considers the problem mostly with reference to lower forms of life. James Bonner, *The Molecular Biology of Development* (New York: Oxford University Press, 1965), treats the question and provides extensive bibliography. Ham, *op. cit.*, 152-155, gives a brief and clear introduction to the question; bibliography, 160-161.

15. Hamilton *et al., op. cit.*, 69-71.

16. See R. F. White, A. T. Hertig, J. Rock, and E. Adams, "Histological and Histochemical Observations on the Corpus Luteum of Human Pregnancy with Special Reference to Corpora Lutea Associated with Early Normal and Abnormal Ova," *Contributions to Embryology* (Carnegie), 34, No. 224 (Sept. 5, 1951), 55-73; conclusions on 73.

17. Frank E. Hytten and Isabella Leitch, *The Physiology of Human Pregnancy* (Oxford: Blackwell, 1964), 146-147 and 159-163, provide a summary.

18. Jack Davies, *Human Developmental Anatomy* (New York: Ronald Press Co., 1963), 269-281, presents in convenient form a "timetable of human development" with references to primary sources for each stage.

19. Thus the distinction of stages and Streeter horizons summarized *ibid.*

20. *Ibid.*, 270, gives the size of the chorionic sac of an embryo estimated to be 13-15 days as 1-2 mm.

21. Ham, *op. cit.*, 911-927.

22. Davies, *op. cit.*, 271, states that embryos estimated to be 20-21 days are 5-15 mm. (chorionic sac) with embryo proper 1–1-1/2 mm.—1/25–1/16 inch.

23. *Ibid.*, 281, provides a graph (from Streeter) of development in size. A 28-day embryo ranges from 4–6 mm; at 6 weeks (43 days, give or take one), 19–26.4 mm. (25.4 mm. = 1 inch). One often sees the size of the 6-week embryo given as 1/2 inch; there are different ways of measuring the embryo (either full length or crown-rump length) as well as of dating it (either from menstruation or from conception) that explain these differences.

24. Species differ in germ cells, fertilization, cell cleavage, implantation, and the precise steps of development of the embryo and associated structures. Using the electron microscope, observers have described marked differences among diverse species of embryos before implantation: A. C. Enders and S. J. Schlarfke, "The Fine Structure of the Blastocyst: Some Comparative Studies," *Ciba Foundation Symposium: Preimplantation Stages of Pregnancy,* ed. G. E. W. Wolstenholme and Maeve O'Connor (Boston: Little, Brown, and Co., 1965), 29-59, at 45. Any study of comparative embryology makes differences clear; Hamilton *et al., op. cit.*, 435-468, concludes with a synoptic chapter of this topic including (454-457) schemes comparing stages of implantation and membrane formation of six other mammals with those of man.

25. Gavin de Beer, *Embryos and Ancestors*, 3d ed. (Oxford: Clarendon Press, 1958), presents the evidence which demolished Haeckel's theory and outlines the more complex situation that actually obtains; see, especially, 52-62, on "deviation." Nilsson, Ingelman-Sundberg, and Wirsén, *op. cit.*, shows photographically (70-71) how obviously human the embryo is at 8 weeks; the text clearly explains (50-51) how and why the embryo has been a human being since conception.

26. Some neurologists have thought that the cerebral cortex is not functional at birth, but recent research tends to prove them wrong; for a useful summary, see Roger Robinson, "Cerebral Function in the Newborn," *Developmental Medicine and Child Neurology*, 8 (October 1966) 561-567.

27. Arey, *op. cit.*, between 106-107, provides in tabular form an outline useful for the later stages.

28. Hamilton *et al.*, *op. cit.*, 367-368, state the problem in summary form.

29. *Ibid.*, 322-323.

30. See M. C. H. Dodgson, *The Growing Brain: an Essay in Developmental Neurology* (Bristol: John Wright and Sons, Ltd., 1962), 207-211.

31. Robinson, *loc cit.*, also provides references to more formal evidence.

32. The following is from Davenport Hooker, "Early Human Fetal Behavior, with a Preliminary Note on Double Simultaneous Fetal Stimulation," *Research Publications: Association for Research in Nervous and Mental Disease*, vol. 33, *Genetics and the Inheritance of Integrated Neurological and Psychiatric Patterns*, ed. Davenport Hooker and Clarence C. Hare (Baltimore: Williams and Wilkins Co., 1954), 98-113. Hooker uses menstrual ages; we translate to ovulation (approximate fertilization) ages.

33. Hamilton *et al.*, *op. cit.*, 367.

34. Hooker, *op. cit.*, 112.

35. See Charles R. Noback and Robert J. Demarest, *The Human Nervous System: Basic Elements of Structure and Function* (New York: McGraw-Hill Book Co., 1967), 198.

36. *Ibid.*, 44.

37. For a detailed treatment of the whole topic see W. Noordenbos, *Pain: Problems Pertaining to the Transmission of Nerve Impulses which Give Rise to Pain* (Amsterdam, London, New York, and Princeton: Elsevier Publishing Co., 1959), 49-67. That unmyelinated fibers conduct impulses that give rise to pain: 66.

38. That the modality of pain develops is suggested by several participants in *Pain: Henry Ford Hospital International Symposium*, ed. Robert S. Knighton and Paul R. Dumke (Boston: Little, Brown and Co., 1966), 4 (Graham Weddell) and 33-37 (William F. Collins, Frank E. Nielsen, and C. Norman Shealy). The latter is particularly interesting, because it indicates that unbearable pain can arise from unmyelinated fiber.

39. Austin, *op. cit.*, 19-22. For a fuller treatment see R. A. Beatty, *Parthenogenesis and Mammalian Development* (Cambridge: Cambridge University Press, 1957).

40. Beatty, *op. cit.*, 20, 110; Balinski, *op. cit.*, 119-122. Both authors treat the report of a fully developed parthenogenetic rabbit with reserve; Austin, *loc cit.*, also states there is no sure evidence of natural parthenogenetic development to maturity in any mammal.

41. Beatty, *op. cit.*, 20-28, casts considerable doubt on whether this mode of parthenogenesis goes beyond the earliest stages in any mammal. We might ask whether such development, predestined from the beginning to be abortive, can really be considered the development of a new individual of the given species at all. Perhaps we should say that it is only if the normal process of differentiation characteristic of the species begins.

42. *Ibid.*, 101.

43. Hamilton *et al.*, *op. cit.*, 151-152; A. A. Zimmerman, "Embryologic and Anatomic Considerations of Conjoined Twins," in *Conjoined Twins*, ed. Daniel Bergsma, *Birth Defects Original Article Series*, 3 (April, 1967), 18-21.

44. Hamilton *et al.*, *op. cit.*, 152.

45. *Ibid.*

46. Luigi Gedda, *Twins in History and Science* (Springfield, Ill.: Charles C. Thomas, 1961), 125, outlines this supposition without providing any references to the sources in which it is originally presented.

47. Leo Loeb, *The Biological Basis of Individuality* (Springfield, Ill.: Charles C. Thomas, 1945), 3-26.

48. Hamilton *et al., op. cit.*, 152-156; Gedda, *op. cit.*, 100-118.

49. Beatrice Mintz, "Experimental Genetic Mosaicism in the Mouse," *Ciba Foundation Symposium: Preimplantation Stages of Pregnancy*, 194-207; Andrzej K. Tarkowski, "Embryonic and Postnatal Development of Mouse Chimeras," *idem*, 183-193.

50. Tarkowski, *op. cit.*, 190.

51. R. A. Willis, *The Borderland of Embryology and Pathology* (Washington: Butterworth, 1962), 442-462, at 458-460; Arey, *op. cit.*, 180. Arey's book is especially helpful for seeing the relations between monsters and normal development.

52. K. M. Laurence, "Abnormalities of the Central Nervous System" in *Congenital Abnormalities in Infancy*, ed. A. P. Norman (Oxford: Blackwell, 1963), 22-24.

53. C. O. Carter, "Incidence and Aetiology," in *Congenital Abnormalities in Infancy*, 8-9.

54. *Ibid.*, 9-16.

55. Austin, *op. cit.*, 109-123.

56. David H. Carr, "Chromosome Anomalies as a Cause of Spontaneous Abortion," *American Journal of Obstetrics and Gynecology*, 97 (Feb. 1, 1967) 283-293, at 291.

57. *Ibid.*, 290-291.

58. Carl L. Erhardt, "Pregnancy Losses in New York City, 1960," *American Journal of Public Health*, 53 (Sept., 1963) 1337-1352, at 1351.

59. Sam Shapiro, Ellen W. Jones, and Paul M. Densen, "A Life Table of Pregnancy Terminations and Correlations of Fetal Loss," *The Milbank Memorial Fund Quarterly*, 40 (Jan., 1962) 7-45.

60. *Ibid.*, 13.

61. The popular treatise was: George W. Corner, *Ourselves Unborn: an Embryologist's Essay on Man* (New Haven: Yale University Press, 1944), 121. The conclusion is presented in the context of ridicule of religious beliefs about the soul. The original article was: "The Problem of Embryonic Pathology in Mammals, with Observations upon Intrauterine Mortality in the Pig," *American Journal of Anatomy*, 31 (May, 1923) 523-545.

62. Hertig, Rock, Adams, and Mulligan, *op. cit.*, 219-220, comment on the proportion of abnormal specimens.

63. Earl T. Engle, ed., *Pregnancy Wastage* (Springfield, Ill.: Charles C. Thomas, 1953), Arthur T. Hertig, "Discussion," 18-26.

64. *Ibid.*, 18 and 23.

65. *Idem*, Christopher Tietze, "Introduction to the Statistics of Abortion," 141; Vasilos G. Valoras, "Discussion," 143.

66. United Nations, Department of Social Affairs, Population Division, *Foetal, Infant and Early Childhood Mortality*, vol. 1, *The Statistics* (New York: United Nations, 1954), 15. This section was written by Dr. Tietze (see p. iii).

67. *Ibid.*, 51; individual author not stated.

68. Arthur T. Hertig, John Rock, and Eleanor C. Adams, "A Description of 34 Human Ova within the First 17 Days of Development," *American Journal of Anatomy*, 98 (May, 1956) 435-459.

69. Arthur T. Hertig, "The Overall Problem in Man," *Comparative Aspects of Reproductive Failure*, ed. Kurt Benirschke (New York: Springer-Verlag, 1967), 27.

70. *Ibid.*

71. A. T. Hertig, John Rock, E. C. Adams, and M. C. Menkin, "Thirty-four Human Ova, Good, Bad, and Indifferent, Recovered from 210 Women of Known Fertility," *Pediatrics*, 23 (Jan., 1959) 202-211, present the same material a little more clearly than in Hertig's latest treatment. The diverse conclusions Hertig has drawn from the same material make one doubt the logic. In this 1959 treatment, it is stated (207) that the rate of fertilization is an estimate, based on comparison with other species; the rate could be as low as 58 percent. It is also stated that 75 percent of fertilized sows' ova proceed to viable birth. The assumed abortion-rate after the first two weeks is theoretical, high, and only a possible limit (211). Shapiro, Jones, and Densen, *op. cit.*, 7-45, found evidence of only 14.2 percent fetal mortality; Hertig's figure asks us to assume that in their careful study almost as many more pregnancies *that caused a delayed or missed menstruation* nevertheless went unnoticed.

72. Hertig, "The Overall Problem in Man," 30-32.

73. Assuming Hertig's figures (*ibid.*, 27) which consign about 15 percent of the ova to nonfertilization and 35 percent to birth, 50 percent would die. Of those that die, then, 20–30 percent would die before implantation; 56–66 percent between implantation and menstruation; 14 percent

during the remainder of pregnancy. (These percentages are double those Hertig gives for the *total* number of ova, which includes those not fertilized and those that survive.)

74. Carl L. Erhardt, Govind B. Joshi, Frieda G. Nelson, Bernard H. Kroll, and Louis Weiner, "Influence of Weight and Gestation on Perinatal and Neonatal Mortality by Ethnic Group," *American Journal of Public Health*, 54 (1964) 1841-1855. The better survival rates of the non-white infants are an unsolved puzzle.

75. Though not yet undertaken seriously, the project of an artificial womb to which an infant's umbilical cord could be hooked up is discussed among experts. Though considered technically feasible, the project would be expensive and not very practical, since the infant would have to be removed surgically from the natural uterus. Research tending toward the project has been reported: Geoffrey Chamberlain, "An Artificial Placenta," *American Journal of Obstetrics and Gynecology*, 100 (1968) 615-626.

Notes for Chapter Two

1. A. J. Rongy, *Abortion: Legal or Illegal?* (New York: Vanguard Press, 1933), 103.

2. Frederick J. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* (St. Louis: C. V. Mosby, 1936), 24-26.

3. *Ibid.*, 388.

4. *Ibid.*, 366-367.

5. Jerome E. Bates and Edward Zawadzki, *Criminal Abortion: a Study in Medical Sociology* (Springfield, Ill.: Charles C. Thomas, 1964), 3 and 10. Alan F. Guttmacher, Executive Director of Planned-Parenthood Federation of America, gives this book his executive blessing by supplying a Foreword in which he says that illegal abortions are estimated at anywhere from 200,000 to 2,000,000 per year (p. vii). Shades of Rongy!

6. Bates and Zawadzki refer to Regine K. Stix, "A Study of Pregnancy Wastage," *Milbank Memorial Fund Quarterly*, 13 (1935), 347-365; the later article is Regine K. Stix and Dorothy G. Wiehl, "Abortion and the Public Health," *American Journal of Public Health*, 28 (1938) 623.

7. Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), 209.

8. *Ibid.*, 207-208.

9. Russell S. Fisher, "Criminal Abortion," in Harold Rosen, ed., *Therapeutic Abortion: Medical, Psychiatric, Legal, Anthropological, and Religious Considerations* (New York: Julian Press, 1954), 3-6.

10. John Harlan Amen, "Obstacles to Legal Control of Criminal Abortions," in *The Abortion Problem, Proceedings of the Conference Held Under the Auspices of the National Committee on Maternal Health, Inc., June 19th-20th, 1942* (Baltimore: Williams and Wilkins, 1944), 139.

11. Halbert L. Dunn, "Frequency of Abortion, Its Effects on Maternal Mortality Rates," in *idem*, 10.

12. P. K. Whelpton, "Frequency of Abortion, Its Effects on the Birth Rates and Future Population of America," in *idem*, 18-19.

13. *Op. cit.*, 5.

14. "Discussion," in *idem*, 28-29.

15. *Ibid.*, 29-30.

16. Dorothy G. Wiehl, "A Summary of Data on Reported Incidence of Abortion," *Milbank Memorial Fund Quarterly*, 16 (1938) 80-88.

17. Dr. Tietze is a member of the Board of Directors of the Association for the Study of Abortion, Inc., the leading organization promoting revision of anti-abortion laws in the U.S.

18. Department of Social Affairs, Population Division, *Foetal, Infant and Early Childhood Mortality*, vol. 1: *The Statistics* (New York: United Nations, 1954), 20-21. This publication is catalogued under "United Nations"; Christopher Tietze is credited in the Foreword (p. iii) with authorship of the section in question.

19. *Ibid.*, 22-23.

20. Paul H. Gebhard, Wardell B. Pomeroy, Clyde E. Martin, and Cornelia V. Christenson, *Pregnancy, Birth and Abortion* (New York: John Wiley & Sons, Inc., 1958).

21. *Ibid.*, xii.

22. *Ibid.*, 14.

23. *Ibid.*, 29, table 13.

24. David C. Wilson, "The Abortion Problem in the General Hospital," in Rosen, ed., *op. cit.*, 190.

25. Gebhard *et al.*, *op. cit.*, 196. Note that abortions due to ectopic pregnancy were excluded to arrive at the ratio of 1:50.

26. Mary Steichen Calderone, ed., *Abortion in the United States: a Conference Sponsored by the Planned Parenthood Federation of America, Inc.* (New York: Hoeber-Harper, 1958), 178-180. The committee included Gebhard, who replaced Kinsey after the latter's death, Alan Guttmacher, P. K. Whelpton, Carl Erhardt, and Irene Taeuber.

27. P. K. Whelpton and Clyde V. Kiser, "Social and Psychological Factors Affecting Fertility," *Milbank Memorial Fund Quarterly*, 26 (1948) 182. The committee cites 3.1 percent terminated in *induced* abortion, but the article states only 2.2 percent ended by *criminal* abortion.

28. Dorothy G. Wiehl and Katherine Berry, "Pregnancy Wastage in New York City," *Milbank Memorial Fund Quarterly*, 15 (1937) 236. The percentage of therapeutic abortions is not stated.

29. Calderone, ed., *op. cit.*, 211-217.

30. Robert G. Potter, Jr., "Abortion in the United States," *Milbank Memorial Fund Quarterly*, 37 (1959) 94.

31. Calderone, ed., *op. cit.*, 181-184.

32. Alan F. Guttmacher, "Discussion," in *Population Dynamics: International Action and Training Programs*, Minoru Muramatsu and Paul A. Harper, eds. (Baltimore: Johns Hopkins Press, 1965), 171.

33. Gebhard *et al.*, *op. cit.*, 29, table 13.

34. Calderone, ed., *op. cit.*, 179.

35. Williams, *op. cit.*, 210.

36. Bernard M. Dickens, *Abortion and the Law* (Bristol: Macgibbon & Kee, Ltd., 1966), 83.

37. Williams, *loc. cit.*

38. Dickens, *op. cit.*, 81.

39. Williams, *loc. cit.*

40. Keith Simpson, *Forensic Medicine*, 2 ed. (London: Edward Arnold & Co., 1952), 166.

41. Williams, *loc. cit.*

42. Eustace Chesser, "The Law of Abortion," *Medical World*, 72 (1950) 495.

43. Alice Jenkins, *Law for the Rich* (London: Victor Gollancz, Ltd., 1960) tells (21-29) about the development of A.L.R.A. and (68) about recruiting Dr. Chesser. The introduction for this book was written by Williams; he refers (11) to A.L.R.A. as a "pressure group."

44. Williams, *loc. cit.*

45. Albert Davis, "2,665 Cases of Abortion," *British Medical Journal*, 2 (1950) 124.

46. Williams, *loc. cit.*

47. C. B. Goodhart, "The Frequency of Illegal Abortion," *Eugenics Review*, 55 (1963-64) 200.

48. Council of the Royal College of Obstetricians and Gynaecologists, "Legalized Abortion: Report," *British Medical Journal*, 1 (1966) 850-851.

49. Dickens, *op. cit.*, 83.

50. Leopold and Rudiger Breitenecker, "Abortion in the German-Speaking Countries of Europe," *Western Reserve Law Review*, 17 (1965) 555.

51. Calderone, ed., *op. cit.*, 210.

52. Anne-Marie Dourlen-Rollier, *La vérité sur l'avortement* (Paris: Librairie Maloine, S.A., 1963), 75. The conclusion reached concerning the number of abortions overall—that it equals live births—is derived from hospital statistics and surveys, but the conclusion does not seem to follow arithmetically.

53. Rolando Armijo and Tegualda Monreal, "Epidemology of Provoked Abortion in Santiago, Chile," in Minoru Muramatsu and Paul A. Harper, eds., *op. cit.*, 147-148.

54. Vera Skalts and Magna Norgaard, "Abortion Legislation in Denmark," *Western Reserve Law Review*, 17 (1965) 505. Tietze, in the United Nations report *(Foetal, Infant and Early Childhood Mortality, 20)* accepted the evidence of the increase of illegal abortions in Denmark.

55. Skalts and Norgaard, *op. cit.*, 519. The apparent decline in the last decade of course may only show that miracle drugs are cutting the rate of hospitalization after illegal abortion.

56. Gebhard *et al.*, *op. cit.*, 228.

57. *Ibid.*, 224. Tietze, *loc. cit.*, accepted evidence that the proportion of illegal abortion was in the same range in 1944 as in 1930. For later years see: Per Aren, "On Legal Abortion in Sweden: Tentative Evaluation of Justification of Frequency during the Last Decade," *Acta Obstetricia et Gynecologica Scandinavica*, 37, Supp. 1 (1958) 13.

58. Council of the Royal College of Obstetricians and Gynaecologists, *op. cit.*, 851. Williams, *op. cit.*, 241-243, notes the evidence concerning Sweden, but seems not to be concerned about the inconsistency between the facts and his argument in favor of legislation similar to Sweden's on the ground that there are large numbers of criminal abortions.

59. Alan F. Guttmacher, "The Legal and Moral Status of Therapeutic Abortion," *Progress in Gynecology*, 4 (1963), 296.

60. K.-H. Mehlan, "The Socialist Countries of Europe," in Bernard Berelson *et al.*, eds., *Family Planning and Population Programs* (Chicago and London: University of Chicago Press, 1966), 207-210.

61. *Ibid.*, 209.

62. *Ibid.*, 211.

63. Christopher Tietze, "Some Facts about Legal Abortion," in Roy O. Greep, ed., *Human Fertility and Population Problems* (Cambridge, Mass.: Schenkman Publishing Co., 1963), 232. In a paper, "Abortion in Europe," presented at the Annual Meeting of the American Public Health Association, Oct. 31, 1966, Dr. Tietze said with reference to Eastern Europe: "There can be no doubt that the number of illegal abortions has been dramatically reduced, but they have not entirely disappeared even in countries, such as Hungary, where abortion is available on request."

64. Council of the Royal College . . ., *loc. cit.*

65. K.-H. Mehlan, "The Effects of Legalization of Abortion," in I.P.P.F., *Proceedings of the Third Conference for Europe, Near East, and Africa, Warsaw, Poland, June 5-8, 1962*, Inter. Cong. Ser. No. 71 (Amsterdam: Excerpta Medica Foundation, 1963), 212-214.

66. J. Herak-Szabo, "Legal and Illegal Abortion in the People's Republic of Croatia," I.P.P.F., *op. cit.*, 222.

67. E. Laudanska, "The Effects of Legalization of Abortions," I.P.P.F., *op. cit.*, 226.

68. Gebhard *et al.*, *op. cit.*, 197-198; especially 197, note 30.

69. *Ibid.*, 198-199.

70. *Ibid.*, 199-203.

71. Bates and Zawadzki, *op. cit.*, 202.

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73. *Ibid.*, 61.

74. *Ibid.*, 51-77.

75. Calderone, ed., *op. cit.*, 59-63.

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77. Paul Ferris, *The Nameless: Abortion in Britain Today* (London: Hutchinson, 1966), 93-110.

78. Lader, *op. cit.*, 56-57; *CBS Reports*, "Abortion and the Law," April 5, 1965.

79. Lader, *op. cit.*, 57-59.

80. Bates and Zawadzki, *op. cit.*, 42-43.

81. Leon Parrish Fox, "Abortion Deaths in California," *American Journal of Obstetrics and Gynecology*, 98 (1967) 649. Abortions listed as spontaneous, or for which the agent is not stated, must be omitted.

82. Williams, *op. cit.*, 153-154.

83. Moya Woodside, "The Woman Abortionist," in *Abortion in Britain: Proceedings of a Conference held by the Family Planning Association at University of London Union on 22 April 1966* (London: Pitman Medical Pub. Co., Ltd., 1966), 35-38.

84. Lader, *op. cit.*, 44-46.

85. Margaret Witte Moore, *Abortion: Murder or Mercy?* (Greenwich, Conn.: Fawcett Publications, Inc., 1962), 8-20.

86. Gebhard *et al., op. cit.*, 198-199.
87. Bates and Zawadzki, *op. cit.*, 37.
88. *Ibid.*, 35-38.
89. *Ibid.*, 126-127.
90. *Ibid.*, 95.
91. *Ibid.*, 80.
92. Carl Müller, "The Dangers of Abortion," *World Medical Journal*, 13 (1966) 78-80.
93. Fredric Wertham, *A Sign for Cain: an Exploration of Human Violence* (New York and London: The Macmillan Co., 1966), 153-191.
94. Gebhard *et al., op. cit.*, 166, with references to other studies.
95. Calderone, ed., *op. cit.*, 55.
96. Gebhard *et al., op. cit.*, 164-165.
97. Dunn, *op. cit.*, 10.
98. Gebhard *et al., op. cit.*, 180-181.
99. *Ibid.*, 78, table 28; 76, table 24.
100. *Ibid.*, 146-148.
101. *Ibid.*, 130.
102. *Ibid.*, 180.
103. *Ibid.*, 213.
104. *Ibid.*, 118-119.
105. *Ibid.*, 55.
106. *Ibid.*, 147-148.
107. *Ibid.*, 115-116.
108. *Ibid.*, 77, 78, 132 and 141.
109. Roberto Bachi and Judah Matras, "Contraception and Induced Abortion among Jewish Maternity Cases in Israel," *Milbank Memorial Fund Quarterly*, 40 (1962) 229.
110. Gebhard *et al., op. cit.*, 112 and 140.
111. *Ibid.*, 136.
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113. Margaret Sanger, *Woman and the New Race* (New York: Eugenics Pub. Co., 1920), 128.
114. Marie E. Kopp, *Birth Control in Practice* (New York: Robert M. McBride & Co., 1934), 184.
115. Regine K. Stix, "A Study of Pregnancy Wastage," *Milbank Memorial Fund Quarterly*, 13 (1935) 356-357.
116. See Mark H. Haller, *Eugenics: Hereditarian Attitudes in American Thought* (New Brunswick, N.J.: Rutgers University Press, 1963), 73, 92.
117. *Ibid.* It should be noted that Pearl's earlier work reveals his personal, longstanding interest in demography as such.
118. Raymond Pearl, *The Natural History of Population* (New York: Oxford University Press, 1939), 239-241.
119. Calderone, ed., *op. cit.*, 157.
120. G. R. Venning, "The Abortion Problem," *Family Planning*, 13 (April 1964) 8.
121. Thomas McKeown, "Medicine and World Population," in *Public Health and Population Change: Current Research Issues* (Pittsburgh: University of Pittsburgh Press, 1965), 25-40.
122. Vital Statistics of the U.S., 1964, shows that the fertility rate (births per 1,000 women 15-44) reached a low of 75.8 in 1936, jumped from 85.9 in 1945 to 101.9 in 1946, peaked at 122.9 in 1957, and had fallen to 104.8 by 1964.
123. Venning, *op. cit.*, 11.
124. Yoshio Koya, "Why Induced Abortions in Japan Remain High," in Clyde V. Kiser, ed., *Research in Family Planning* (Princeton, N.J.: Princeton University Press, 1962), 105.
125. *Ibid.*, 109.
126. *Op. cit. supra*, note 83.
127. Alice Jenkins, *op. cit.*, 11-12, 46-72; Margaret Pyke, "Pimlico to Knightsbridge," *Family Planning*, 4 (Jan. 1956) 4-7; "Family Planning: an Assessment," *Eugenics Review*, 55 (July 1963), 78-79.

128. Guttmacher, "Discussion," in Minoru Muramatsu and Paul A. Harper, eds., *op. cit.*, 175.

129. Norman E. Himes, *Medical History of Contraception* (New York: Gamut Press, 1963), 318.

130. Carl G. Hartman, "Acceptance Speech on Receiving the Margaret Sanger Award in Medicine," *Advances in Planned Parenthood*, Inter. Cong. Ser. No. 138 (Amsterdam: Excerpta Medica Foundation, 1967), 19.

131. E.g., Dr. Guttmacher's popular magazine article was one of the first contributions to the intense magazine propaganda: "The Law that Doctors Often Break," *Redbook Magazine*, August 1959, 24-25, 95-96.

132. The most recent Conference of the International Planned Parenthood Federation devoted an entire morning session to five papers under the general theme: "The World-Wide Problem of Abortion," I.P.P.F., *Proceedings of the Eighth International Conference, Santiago, Chile, April 9-15, 1967* (London: I.P.P.F., 1967) 129-153. The "Rapporteur's Summary" (152) stated the session was not concerned with the merits of any system of legal or illegal abortion, yet the summary favored legalization in view of the fact that abortion is a widely used method of birth control although one that "cannot be recommended as a method of family planning" (153).

133. B. L. Raina, "Address," in I.P.P.F., *Proceedings, Seventh Conference, Singapore, February 10-16, 1962*, Inter. Cong. Ser. No. 72 (Amsterdam: Excerpta Medica Foundation, 1964), 746.

134. W. E. D. Stokes, *The Right to Be Well-Born or Horse Breeding in Its Relation to Eugenics* (New York: C. J. O'Brien, 1917), 101.

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136. *Ibid.*, 256.

137. "Resolutions Passed at First American Birth Control Conference," *Birth Control Review*, 6 (Jan. 1922) 18.

138. Margaret Sanger, "The Morality of Birth Control: Address of November 18, 1921 at the Park Theater," *Birth Control Review*, 6 (Feb. 1922) 12.

139. Margaret Sanger, *The Pivot of Civilization* (New York: Brentano's Publishers, 1922), 25.

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Notes for Chapter Three

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15. Lee Stevenson and Alex Barno, "Discussion," *loc. cit.*, 365-367. Dr. Barno apparently took Stevenson's figures to refer to *criminal* abortions, though Stevenson stated they applied to abortion of all kinds.
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302. *Ibid.*, 93.
303. *Ibid.*, 109.
304. *Richmond News Leader*, Sept. 8, 1966.
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306. *Washington Post, Parade Magazine*, March 5, 1967.
307. *Washington Post*, July 23, 1967.
308. *Idem*, July 29, 1967.
309. *Idem*, Sept. 22, 23, 24, 25, 1967.
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312. Roland Pressat, "La suppression de l'avortment légal en Roumanie: premiers effects," *Population*, 22 (1967) 1116-1118.

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2. *Supra,* pp. 163, 170-172, 186 and 190.
3. *Supra,* pp. 111-115.
4. Garrett Hardin, "Abortion—or Compulsory Pregnancy?" *Journal of Marriage and the Family,* 30 (May 1968) 250.
5. American Law Institute, *Model Penal Code, Tentative Draft No. 9* (Philadelphia: May 8, 1959), 149.
6. N.C. News Service (foreign), May 28, 1969.
7. Ashley Montagu, *Life Before Birth* (New York: Signet Books, 1965), 12; letter to *New York Times,* March 3, 1967.
8. *Life Before Birth,* 156-176.
9. Pierre de Locht, "Discussion," *L'Avortement: Actes du Xème Colloque International de Sexologie* (Louvain: Centre International Cardinal Suenens, 1968), 155.
10. Joseph Fletcher, *Morals and Medicine* (Boston: Beacon Press, 1954), 152.
11. *Ibid.,* 211.
12. See P. F. Strawson, "Persons," in *Body and Mind,* ed. G. N. A. Vesey (London: George Allen & Unwin, Ltd., 1964), 403-424; Gabriel Marcel, *The Mystery of Being,* vol. 1, *Reflection and Mystery* (Chicago: Henry Regnery Co., 1960), 127-153.
13. *Morals and Medicine,* 201.
14. *Ibid.,* 205.
15. "The Right to Die," *Atlantic Monthly,* April 1968, 62-64.
16. *Situation Ethics: the New Morality* (Philadelphia: Westminster Press, 1966), 39.
17. Thomas Aquinas, *Summa contra gentiles,* II, chs. 57-89.
18. J. Donceel, S.J., "Abortion: Mediate or Immediate Animation," *Continuum,* Spring, 1967, 167-171.
19. *Supra,* pp. 141-142, 144, 148-149, 150, 152-153, 170-172, 177-178.
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21. See, for example, Rudolph Joseph Gerber, "When Is the Human Soul Infused?" *Laval Théologique et Philosophique,* 22 (1966) 234-247.
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23. *Ibid.,* 31.
24. *Ibid.,* 26.
25. *Ibid.*
26. *Ibid.,* 32.
27. *Ibid.,* 29.
28. Herbert W. Richardson, "The Values of Life," *Trends,* 1 (March 1969) 20.
29. Lawrence Lader, *Abortion* (Indianapolis: Bobbs-Merrill Co., Inc., 1966), 16.
30. *Contraception and the Natural Law* (Milwaukee: Bruce Publishing Co., 1964), 46-170.
31. The classic statement of utilitarianism is John Stuart Mill, *Utilitarianism* (Indianapolis-New York: Bobbs-Merrill Co., Inc., 1965).
32. William Kopit and Harriet Pilpel, "Abortion and the New York Penal Laws," mimeograph presented to the New York Civil Liberties Union, April 20, 1965 (mimeograph dated December 7, 1966), 7.
33. Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), 19.

34. *Situation Ethics: the New Morality*, 95-96.
35. *Ibid.*, 110-114.
36. *Ibid.*, 155-156.
37. *Ibid.*, 136.
38. *Ibid.*, 133.
39. *Ibid.*, 122.
40. *Ibid.*, 39.
41. Paul Ramsey, *Deeds and Rules in Christian Ethics* (New York: Charles Scribner's Sons, 1967), 168.
42. Ralph Potter, "Reflections on Abortion and the Population Crisis," mimeograph distributed at the Harvard-Kennedy Conference, Washington, D.C., September 1967, 11-12.
43. *Situation Ethics: the New Morality*, 62.
44. *Ibid.*, 38.
45. Dietrich Bonhoeffer, *Ethics* (New York: Macmillan, 1965), 261-262.
46. Immanuel Kant, *Foundations of the Metaphysics of Morals*, ed. Lewis White Beck (Indianapolis: Liberal Arts Press, Inc., 1959), 45-59.
47. In this discussion, I am attempting to generalize about a number of authors—e.g., Brunner, Barth, and Bonhoeffer—without denying the important differences among them, but also without noting these differences.
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49. Immanuel Kant, *The Metaphysical Principles of Virtue, Part II of the Metaphysics of Morals* (Indianapolis: Liberal Arts Press, Inc., 1964), 70-72.
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51. *Ibid.*, 415-419.
52. *Ibid.*, 419-422.
53. *Ibid.*, 423.
54. Helmut Thielicke, *The Ethics of Sex*, trans. J. W. Doberstein (New York: Harper & Row, 1964), 226-232.
55. *Ibid.*, 232-242. Cf. Helmut Thielicke, *Theological Ethics*, vol. 1, *Foundations*, ed. William Lazereth (Philadelphia: Fortress Press, 1966), 578-667.
56. *The Ethics of Sex*, 245-246.
57. Paul Ramsey, "The Sanctity of Life in the First of It," *Dublin Review*, Spring, 1967, 1-21.
58. *Op. cit.* note 22 *supra.*
59. *Ibid.*, 34, 43, 47-48, 61-62.
60. *Supra*, pp. 114-115, 163, 185-193, 225.
61. Morris Ginsburg, *On the Diversity of Morals* (London: Mercury Books, 1962), 134.
62. Ernest R. Hilgard, *Introduction to Psychology*, 3 ed. (New York and Burlingame; Harcourt, Brace, and World, Inc., 1962), 124-146 is a typical, standard introduction.
63. Robert H. Lowie, *An Introduction to Cultural Anthropology*, new and enl. ed. (New York: Rinehart and Co., Inc., 1960), has typical chapter headings that correspond quite well with the basic needs. Alexander MacBeath, *Experiments in Living: a Study of the Nature and Foundations of Ethics or Morals in the Light of Recent Work in Social Anthropology* (London: Macmillan, 1952), shows how basic needs are satisfied in diverse ways in various cultures.
64. See my "First Principle of Practical Reason: a Commentary on the *Summa theologiae*, 1-2, question 94, article 2," *Natural Law Forum*, 10 (1965) 168-201.

65. Bonhoeffer, *op. cit.*, 249.
66. *Summa theologiae*, 2-2, 64, 2, c.
67. *Ibid.*, ad 3.
68. *Ibid.*, art. 3.
69. *Summa contra gentiles*, III, ch. 146.
70. *Summa theologiae*, 2-2, 64, 4, c.
71. *Ibid.*, art. 6.
72. *Op. cit.* note 22 *supra*, 33.
73. *Ibid.*, 61.
74. *Summa theologiae*, 2-2, 40, 1, c.
75. *Ibid.*, 64, 7, c.
76. Anthony Kenny, "Intention and Purpose," *Journal of Philosophy*, 63 (October 27, 1966) 642-651.
77. *Summa theologiae*, 1, 19, 9, c.
78. *Supra*, pp. 169, 173, 175, 180, 181, 182-183.
79. Joseph T. Mangan, S.J., "An Historical Analysis of the Principle of Double Effect," *Theological Studies*, 10 (1949) 40-61; J. Ghoos, "L'Acte a Double Effet: Ètude de Théologie Positive," *Ephemerides Theologicae Lovaniensis*, 27 (1951) 30-52.
80. Peter Knauer, S.J., "The Hermeneutic Function of the Principle of Double Effect," *Natural Law Forum*, 12 (1967) 132-162.
81. *Ibid.*, 161.
82. *Ibid.*, 162.
83. *Ibid.*, 152.
84. William H. Van der Marck, O.P., *Toward a Christian Ethic: a Renewal in Moral Theology* (Westminster, Md.: Newman Press, 1967), 55.
85. *Ibid.*, 61-67; see also *Love and Fertility: Contemporary Questions about Birth Regulation* (London: Sheed and Ward, 1965), 35-63.
86. Cornelius J. Van der Poel, "The Principle of Double Effect," in *Absolutes in Moral Theology*, ed. Charles Curran (Washington, Cleveland: Corpus Books, 1968), 199-200.
87. *Ibid.*, 207.
88. *Ibid.*, 207-208.
89. *Loc. cit.* note 30 *supra*.
90. William V. O'Brien, *Nuclear War, Deterrence and Morality* (Westminster, Md.: Newman Press, 1967), 8-16, 84-86. He bases his analysis in part (10-11) on testimony by Secretary of Defense Robert McNamara before the House subcommittee of Defense Appropriations; such testimony, repeated each year in the published columns of the *Congressional Record* and in various committee reports is the means by which the deterrent is communicated to those who are deterred by it.
91. G. E. M. Anscombe, ed., *Nuclear Weapons: a Catholic Response* (New York: Sheed and Ward, 1962); O'Brien, *op. cit.*, 80-90, does not wish to give up retaliation in kind but admits its incompatibility with the traditional principle of non-combatant immunity.
92. *Supra*, p. 73.
93. *Supra*, p. 180.
94. *Supra*, pp. 78-79.
95. *New York Times*, April 18, 1969.
96. *Supra*, pp. 107-115.

Notes for Chapter Seven

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2 Immanuel Jakobovits, "Jewish Views on Abortion," *Western Reserve Law Review*, 17 (1965) 496.

3. *Ibid.*, 482-483.

4. Herman Schwartz, "Abortion and the Law," (New York: Association for the Study of Abortion), leaflet, 4.

5. "The No. 2 Moral Issue of Today," *America*, March 25, 1967, 452-453.

6. "German Church Centers Fight Abortion Rise," Religious News Service, Sept. 12, 1963.

7. "Danish Lutheran Says Abortion Is Murder," N.C. News Service (foreign), July 8, 1965.

8. State of New York, *Report of the Governor's Commission Appointed to Review New York State's Abortion Law* (March 1968) 61.

9. G.H.M., "Let's Talk It Over," *The Lutheran Standard*, June 11, 1968, 15.

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11. "Let's Talk Sense About Abortion," mimeograph distributed by the National Commission on Human Life, Reproduction and Rhythm, 1967.

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13. "The Churches Speak," *Trends*, 1 (1967) 16.

14. *New York Times*, Feb. 23, 1967.

15. Quoted by Robert F. Drinan, "Contemporary Protestant Thinking," *America*, December 9, 1967, 713.

16. *Ibid.*, 714.

17. Louis Henkin, "Morals and the Constitution: the Sin of Obscenity," *Columbia Law Review*, 63 (1963) 408-411.

18. 367 U.S. 488 (1961) at 495 n. 11.

19. Paul Ramsey, "Some Terms of Reference for the Abortion Debate," manuscript based on paper delivered at the Harvard-Kennedy Conference (Washington, D.C.: September 6-8, 1967), 7.

20. *Ibid.*

21. *Supra*, pp. 241-242.

22. Charles F. Westoff, Emily C. Moore, and Norman B. Ryder, "The Structure of Attitudes Toward Abortion," *Milbank Memorial Fund Quarterly*, 47 (1969) 16.

23. Felix S. Cohen, *Ethical Systems and Legal Ideals* (Ithaca, N.Y.: Great Seal Books, 1959), 261.

24. Alice S. Rossi, "Public Views on Abortion," mimeograph (Chicago: Committee on Human Development, 1966), 11 and 26.

25. *Supra*, pp. 237-238, 241.

26. Letter to the Editor, *New York Times*, March 23, 1966.

27. *Supra*, pp. 237, 245-246.

28. Lord Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1959).

29. Roy Lucas, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," *North Carolina Law Review*, 46 (1968) 732, 736.

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31. Charles E. Rice, *The Vanishing Right to Live* (Garden City, N.Y.: Doubleday & Co., Inc., 1969), 134, 167.

32. Cf. Donald A. Giannella, "The Difficult Quest for a Truly Humane Abortion Law," *Villanova Law Review*, 13 (1968) 291-302.

33. Lucas, *op. cit.*, 737.

34. Lawrence Lader, *Abortion* (Indianapolis: Bobbs-Merrill Co., Inc., 1966), 165.

35. Giannella, *op. cit.*, 298.

36. *C.B.S. Reports*, "Abortion and the Law," broadcast on C.B.S. television, April 5, 1965, mimeograph, 25.

37. Address reported in *New York Times*, Feb. 14, 1967 at 32c.

38. Glanville Williams, "Euthanasia and Abortion," *University of Colorado Law Review*, 38 (1966) 196. I have omitted a footnote in which Williams refers to wrongful death actions and brushes them aside.

39. I. Augusti, *Corpus Iuris Civilis: Digesta*, Lib. I, tit. 5, s. 26.

40. The Earl of Bedford's Case, Michaelmas Term, 28 and 29 Eliz., 4 Coke 7 f. 7 (1586); Wilson ed., 77 Eng. Rep. 421 (1777).

41. Trower v. Butts, 1 Sim. & Stu. 181, 57 Eng. Rep. 72, 73 (Ch. 1823).
42. Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834).
43. M'Knight v. Read, 1 Whart. 213 (Pa. 1835).
44. In Re Well's Will, 129 Misc. 447, 221 N.Y.S. 714 (Sur. Ct. 1927).
45. The Matter of Peabody, 5 N.Y. 2d 541, 158 N.E. 2d 841, 186 N.Y.S. 2d 265 (1959).
46. Gore v. Gore, 2 P. Wims. 28 (1722) cited by Cyril C. Means, Jr., "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: a Case of Cessation of Constitutionality," *New York Law Forum*, 14 (1968) 421-422.
47. Wallis v. Hodson, 2 Atk 114 at 117, 26 Eng. Rep. 472 at 473 (Ch. 1740); decision in case cited note 42 *supra* refers to this one and cites passage.
48. Doe *idem* Clarke v. Clarke, 2 H. Bl. 399, 126 Eng. Rep. 617 (C.P. 1795).
49. Thellusson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (Ch. 1798).
50. 61 R.I. 169, 200 A. 467 (1938).
51. Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939).
52. 199 Cal. 391, 249 P. 517 (1926).
53. 144 N.C. 110, at 110-111, 56 S.E. 691 at 692 (1907).
54. William L. Prosser, *Handbook of the Law of Torts*, 2d ed. (St. Paul, Minn.: West Publishing Co., 1955), 705-711.
55. John L. Hay, "The Law of Prenatal Injuries," *University of Colorado Law Review*, 37 (1965) 274.
56. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).
57. Walker v. Railway Co., 28 L. R. Ir. 69 (1891).
58. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900).
59. *Ibid.*, N. E. at 641.
60. 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), *hearing denied* 93 P. 2d 562 (1939).
61. Stemmer v. Kline, 128 N.J.L. 455, 26 A 2d at 687 489 (Ct. Err. & App., 1942).
62. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).
63. Montreal Tramways v. Leveille, 4 Dom. L. R. 337 (1933).
64. Lipps v. Milwaukee Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).
65. Williams v. Marion Rapid Transit, Inc., 152 Ohio 114, 87 N.E. 2d 334 (1949).
66. Smith v. Brennan, 31 N.J. 353, 157 A. 2d 497 (1960).
67. Sylvia v. Gobeille, 220 A. 2d 222 (R.I. 1966).
68. David A. Gordon, "The Unborn Plaintiff," *Michigan Law Review*, 63 (1964-65) 590; note 67 lists citations of cases in eight states.
69. 282 App. Div. 542, 125 N.Y.S. 2d 696 (1953).
70. David W. Louisell, "Abortion, the Practice of Medicine and Due Process of Law," *UCLA Law Review*, 16 (1969) 241.
71. Gordon, *op. cit.*, 589.
72. 9 & 10 Vict. c.93.
73. Prosser, *op. cit.*, 709-710.
74. Gordon, *op. cit.*, 594-595.
75. Stokes v. Liberty Mutual Life Ins. Co., 213 So. 2d 695 (Fla. 1968).
76. Goodrich v. Moore, 155 N.W. 2d 247 (Mich. 1967).
77. Norman v. Murphy, 124 Cal App. 2d 95, 268 P. 2d 178 (1954).
78. Gay v. Thompson, 266 N. C. 394, 146 S. E. 2d 425 (1966); Graf v. Taggert, 43 N.J. 303, 204 A. 2d 140 (1964).
79. *Loc. cit.* note 45 *supra.*
80. Verkennes v. Corniea *et al.*, 229 Minn. 365, 38 N.W. 2d 838 (1949).
81. Thomas F. Lambert, Jr., "The Legal Rights of the Fetus," in *Birth Control and the Christian*, ed. Walter O. Spitzer and Carlyle L. Saylor (Wheaton, Illinois: Tyndale House Publishers, 1969), 390.

82. Mitchell v. Couch, 285 S.W. 2d 901 (Ky. 1955).
83. Kentucky Rev. Stats., Sec. 411.130.
84. Hatala v. Markiewicz, 26 Conn. Sup. 358, 224 A. 2d 406 (1966).
85. 352 Mass. 446, 225 N.E. 2d 926 (1967).
86. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E. 2d 100 (1955).
87. Georgia Code, 105-1307 (1952).
88. Cf. Gordon, *op. cit.*, 594-595.
89. Morgan v. Susino Const. Co., 130 N.J.L. 418, 33A. 2d 607 (1943).
90. La Blue v. Specker, 358 Mich. 558, 100 N.W. 2d 445 (1960).
91. Herndon v. St. Louis & S.F. R.R., 37 Okla. 256, 128 P. 727 (1912).
92. Texas & P. Ry. v. Robertson, 82 Tex. 657, 17 S.W. 1041 (1891).
93. Nelson v. G. H. & S. A. Ry. Co., 78 Tex. 621, 14 S.W. 1021 (1890).
94. Metzger v. People, 98 Colo. 133, 53 P. 2d 1189 (1936).
95. Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P. 2d 806.
96. Hoener v. Bertinato, 67 N.J. Supp. 517, 171 A. 2d 140 (1961).
97. 42 N.J. 421, 201 A. 2d 537, *cert. denied*, 377 U.S. 985 (1964).
98. *Supra*, pp. 186-193.
99. Cordes v. State, 54 Tex. Crim. 204, 112 S.W. 943 (1908).
100. Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).
101. Means, *op. cit.* note 46 *supra*, 443 ff.; cf. William Diller, "The Unborn Child: Consistency in the Law?" *Suffolk University Law Review*, 2 (1968) 231 note 22.
102. Means, *op. cit.*, 445-446, realizes that this phrase does not limit, and properly criticizes George's interpretation, but Means does not see the full significance of including the phrase, although it is non-limiting.
103. B. James George, Jr., "Current Abortion Laws: Proposals and Movements for Reform," *Western Reserve Law Review*, 17 (1965) 380.
104. Smith v. State, 33 Me. 48, 55 (1851).
105. State v. Murphy, 27 N.J.L. Rep. 112 (Sup.Ct. 1858).
106. Lamb v. Maryland, 67 Md. 524, 533, 10 A. 298, 300 (1887).
107. State v. Cooper, 22 N.J.L. 52 (Sup.Ct. 1849).
108. Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923).
109. State v. Ausplund, 86 Ore. 121, 167 P. 1019 (1917), *error dismissed*, 251 U.S. 563 (1919).
110. Wisconsin Stat. Ann., Sec. 940.04-6 (1958).
111. Association for the Study of Abortion, *Newsletter*, (1969) 1.
112. In this connection it may be noted that the classic definition of abortion in Roman Catholic canon law defined the crime (not *sin*) of abortion as the expulsion of a pre-viable, animated fetus, with death subsequent to live birth; the Code of Canon Law (cf. n. 2350) retains this idea except that "animated" was removed in the 19th century.
113. NC News Service (foreign), May 28, 1969.
114. An Address at Free Trade Hall, Manchester, England, Dec. 5, 1966.
115. Lucas, *op. cit.* note 29 *supra*, 732.
116. *Ibid.*, 731-732.
117. The statutes in question may be found in Eugene Quay, "Justified Abortion: Medical and Legal Foundations," *Georgetown Law Journal*, 40 (1960-1961) 447-519.

118. *Supra*, p. 188.
119. Quay, *op. cit.*, 478.
120. *Ibid.*, 514.
121. Means, *op. cit.* note 46 *supra*, 443-449.
122. *Ibid.*, 449.
123. *Ibid.*, 451-453.
124. *Ibid.*, 506.
125. *Ibid.*, 451.
126. *Supra*, pp. 163 and 190.
127. *Supra*, pp. 186 and 191.
128. Means, *op. cit.*, 452.
129. See Quay, *op. cit.*, 496.
130. State v. Murphy, 27 N.J.L. 112 (Sup.Ct. 1858).
131. State v. Cooper, 22 N.J.L. 52 (Sup.Ct. 1849).
132. Quay, *op. cit.*, 497.
133. Means, *op. cit.*, 461.
134. *Ibid.*, 454-459.
135. *Ibid.*, 463.
136. Evans v. the People, 49 N.Y. 86 (1872); Means, *op. cit.*, 465-487.
137. *Ibid.* at 90.
138. N.Y. Gen. Stats., ch. 181, secs. 1-4 at 71 (1872).
139. Means, *op. cit.*, 487-488.
140. *Ibid.*, 490-491 in notes 201-202.
141. *Ibid.*, 490.
142. *Supra*. p. 163.
143. Means, *op. cit.*, 500.
144. *Ibid.*, 492.
145. Quay, *op. cit.*, 504, 483-484, 517, 519, 507, 457, 462; Kansas (474), Missouri (490), and New Hampshire (493) had somewhat similar statutes, but not equal penalties.
146. Means, *op. cit.*, 448.
147. George, *op. cit.* note 103 *supra*, 380-381, suggests that the abortionist could be indicted for second degree murder or manslaughter if there is no special provision in the abortion statute.
148. See notes 129-131 *supra* and accompanying text.
149. According to Quay's compilation, *op. cit.*, 481, 494 and 515.
150. George, *op. cit.*, 381; texts of statutes may be found in Quay.
151. Evans v. the People, 49 N.Y. 86 at 89-90 (1872).
152. Means, *op. cit.*, 509; Lucas, *op. cit.* note 29 *supra*, 731-735.
153. Mills v. Commonwealth, 13 Pa (1 Harris) 631, 633 (1850).
154. Means, *op. cit.*, 509.
155. Cited note 151 *supra*.
156. *Supra*, pp. 186 and 191.
157. Mitchell v. Commonwealth, 78 Ky. 204, 39 Am Rep 227 (1879).
158. Quay, *op. cit.*, 474-476.
159. *Ibid.*, 467.
160. *Ibid.*, 513.
161. *Ibid.*, 487-488.
162. *Ibid.*, 491-492.
163. La Blue v. Specker, 358 Mich. 558, 100 N.W. 2d 445, 450 (1960); Miller v. Bennett, 190 Va. 112, 56 S.E. 2d 217 (1949); 21 N.J. 249, 121 A. 2d 490 (1956).
164. Gleitman v. Cosgrove, 49 N.J. 22, 41, 227 A. 2d 689 (1967).
165. *Ibid.* at 35-36, 227 A. 2d at 696.
166. George, *op. cit.*, 579.
167. 3 All E.R. 615 (K.B., 1938); Quay, *op. cit.*, 525.
168. Ministry of Health and Home Office, *Report of the Inter-Departmental Committee on Abortion* (London: 1939), 27.
169. Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), 149.

170. American Law Institute, *Model Penal Code, Tentative Draft No. 9* (Philadelphia: May 8, 1959), 148.
171. People v. Chevez, 77 Cal. App. 2d 621, 176 P. 2d 92 (1947).
172. O'Beirne v. Superior Court, 1 Civ. 25174 (Sup. Ct. of Cal., Dec. 6, 1967).
173. Rice, *op. cit.* note 31 *supra*, 35-36.
174. Means, *op, cit.*, 441-443.
175. *Op. cit.* note 8 *supra*, 57.
176. Cited by Gordon, *op. cit.*, 582.
177. California Penal Code, secs. 3705-06 (West 1954).
178. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).
179. Williams v. State, 46 Misc. 2d 824, 260 N.Y.S. 2d 953 at 959.
180. New York *Times*, June 26, 1965.
181. 25 A.D. 2d 908, 269 N.Y.S. 2d 787.
182. 276 N.Y.S. 2d 885 at 887.
183. Gleitman v. Cosgrove, 49 N.J. 22, 227 A. 2d 689 (1967).
184. *Ibid.*, at 693.
185. *A.M.A. News*, January 13, 1969.
186. *Op. cit.* note 55 *supra*, 276.
187. *Ibid.*, 277; quotation cited to Cook, *The Logical and Legal Basis of Conflict of Laws*, 159 (1942).
188. *Op. cit.* note 101 *supra*, 228.
189. See notes 153 and 157 *supra* and accompanying text.
190. See note 56 *supra* and accompanying text.
191. New York Law Revision Commission, "Communication to the Legislature Relative to Prenatal Injuries," January 23, 1935 at 6, note 4.
192. 56 N.E. 641.
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