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ABORTION IN PERSPECTIVE

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"The right to life is one of the fundamental values on which Western society has been built." ST JOHN-STEVAS, THE RIGHT TO LIFE 115 (1963)

The abortion controversy is assuming national proportions. The Association for the Study of Abortion, a nationwide organization dedicated to a liberalization of the law, has enlisted a cadre of speakers "to educate the public to reform."[1] The Association seems to be politically as well as pedagogically oriented. One of its spokesmen recently hailed an abortion liberalization bill, introduced at the 1966 session of the New York State Legislature,[2] as a "rallying point for reform forces in the state."[3] The abortion debate is already in vigorous progress in several states, including Pennsylvania and New York, but these states are not unique. Before long, the entire country will be involved.

What are the issues in the abortion debate? To date, much of what we know has come from the mass media. Consequently, some of the issues, which lawyers might conceive to be vital, have been shunted aside in favor of more commercially exploitable material. Even the legal writing on the subject is frequently tinged with sensationalism and *ad religionem* distortions. As a result, if the Bar is to play a meaningful role in the expanding debate, the issues must be reframed within a legal context. I believe that the questions that follow are those which lawyers will particularly want answered. In each case, an answer has been suggested.

THE NATURE OF ABORTION

What Is an Abortion?

Abortion is the "expulsion of the fetus from the uterus before the developing human organism can lead an independent existence."[4] An inten-

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1. LADER, ABORTION 148 (1966) [hereinafter cited as LADER].

2. Sen. Intro. No. 2003, Pr. No. 2056, Ass. Intro. No. 3844, Pr. No. 3931, N. Y. Stat. Leg. 189th Sess. (1966).

3. LADER 146.

4. Rosen, *Abortion*, Today's Health p. 24 (April, 1965). Ordinarily, the fetus is capable

tional interruption of the pregnancy is kown as an "induced abortion." If the abortion has not been induced, it is known as a "spontaneous abortion," that which we commonly call a miscarriage.[5] In this article, the word abortion refers to an induced abortion.

An abortion kills something. The "developing human organism," which was alive and growing before the interruption of the pregnancy, is dead after it.

Does an Abortion Destroy a Human Life?

Medical science, clinical medicine, and the law now recognize that the fetus is a human being from the moment of conception.

The history of medical science is replete with theories which deny the independent humanity of the fetus, at least during the early stages of its existence in the womb. In Roman law, the fetus was treated as a part of the mother, "as the fruit is a part of the tree till it becomes ripe and falls down."[6] Hence, it was no more an independent human being than a tumor growing within the mother.

Aristotle hypothesized three successive states of the fetus. At conception, the fetus (or embryo) is a vegetable; later in the gestation period, it becomes animal, and finally, at a subsequent point in time during the pregnancy, it achieves humanity. The Aristotelean hypothesis found favor among early Christian theologians and scientists, and as modified by Thomas Aquinas, it provided the foundation for the original common law concept that human life begins with "quickening," that is, with an intrauterine movement by the fetus which is actually felt by the pregnant woman.[7]

During the nineteenth century, some embryologists speculated that the fetus *in utero* imitates the evolution of mankind. Until this evolutionary process is complete, the fetus remains in a sub-human state.[8]

Most recently, the fetus has been characterized as an "inchoate being" which, presumably, is something less than a human being.[9]

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of independent existence, that is, it becomes "viable," after twenty-four to twenty-eight weeks of pregnancy. MODEL PENAL CODE § 207.11, comment, p. 148 (Tent. Draft No. 9, 1959).

5. Rosen, *supra* note 4, at 24.

6. Davies, *The Law of Abortion and Necessity*, 2 MODERN L. REV. 126, 131 (1938).

7. For more extensive discussions tracing the history and influence of the Aristotelean theory, see Quay, *Justifiable Abortion: Medical and Legal Foundations—Part II*, 49 GEO. L.J. 395, 426-31 (1961); WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 148-52 (1957). Ordinarily, the fetus "quickens" between the fourteenth and twentieth weeks of pregnancy. MODE PENAL CODE, *op. cit. supra* note 4, at 148.

8. See Means, *Letter to the Editor*, N.Y. Times, April 16, 1965, p. 28, col. 4.

9. MODEL PENAL CODE, *op. cit. supra* note 4, at 149.

In view of all these theories, one might argue that an abortion does not kill a human being since that which dies is, alternatively, a part of the mother, a vegetable, a sub-human phenomenon, or an inchoate being. The argument must fail, however, because none of the supporting theories survives modern scientific scrutiny.

The Romans were wrong in thinking that the fetus is part of the mother. Embryologists now know that the union of the male sperm and the female ovum "initiates the life of a new individual."[10] This new individual develops, not in the distinct stages envisioned by Aristotle, but in a gradual and purposeful manner which might be compared to the gradual growth of the child after birth. Accordingly, the pre-natal period is now regarded as a part of the total lifetime of the individual. "[B]irth is but a convenient landmark in a continuous process. . . ."[11]

This new individual, whose lifetime begins with conception, is neither an Aristotelean vegetable nor a pioneer embryologist's sub-human phenomenon; for not only does the fetus achieve individuality at conception, but it also becomes "a unique personality."[12] Conception generates such peculiarly human, and distinctively personal characteristics as, among others, ultimate intelligence, body height, blood group, and color of hair, skin, and eyes.[13] Some of these, such as blood group, remain absolutely fixed while others, such as ultimate height, may be modified to some degree, by environmental factors.[14] A similar modification may also occur after birth. For instance, just as the ultimate intelligence of the child may be affected by a disease contracted by his mother before his birth, so too may his intelligence be altered by an unfavorable social environment during his formative years.[15] The result in either case is recognized as a modification of a particular human and personal characteristic. It is *not* a transmutation from sub-humanity to humanity.[16]

Finally, this new individual, this unique personality, cannot be denied his status as a human being on the ground that he is "inchoate." In the words of the late Dr. A. C. Mietus, an eminent teacher of obstetrics and gynecology, "The embryo or fetus may be 'inchoate' but it is indisputably complete and integrated in terms of its essential elements; it requires

10. PATTEN, FOUNDATIONS OF EMBRYOLOGY 3 (2d ed. 1964); *accord*, MARSHALL, MEDICINE AND MORALS 20 (paperback ed. 1964).

11. PATTEN, *op cit. supra* note 10, at 3.

12. Ratner, *Is It a Person or a Thing?*, Report p. 20, 21 (April, 1966).

13. *Id.* at 21; MARSHALL, *op. cit. supra* note 10, at 20.

14. MARSHALL, *op. cit. supra* note 10, at 20.

15. Goldman, *5,600,000 of Us are Mentally Retarded*, N.Y. Times, Nov. 22, 1964, § 6 (Magazine), p. 31, 94.

16. For instance, one geneticist refers to the effect on "children before birth" of German measles contracted by the child's mother early in the pregnancy. ASHLEY MONTAGU, LIFE BEFORE BIRTH 135 (1964). The child remains a child even though one or more of the characteristics which make him a unique human being may have been modified.

nothing but food to grow. In terms of ultimate full development to maturity, the infant after birth is comparably an inchoate creature."[17]

As Dr. Mietus has indicated, "inchoate" in this context means nothing more than immature. During the continuous life process that begins at conception, passes through the convenient landmark of birth, and ends at death, all human beings remain inchoate until they reach full maturity. In this respect, the post-natal, pre-puberty child might also be called inchoate. Still, he is neither more nor less human than his pre-natal brother or his adult sister.

In the eyes of medical science, the lifetime of every human being begins at conception. Before death the individual encounters many landmarks—birth, puberty, and so forth—but none of these add qualitatively to the distinctive humanity that is achieved when the sperm fertilizes the ovum. An eminent scientist summed it up best when he described the fetus in this way: "In spite of his newness and his appearance, he is a living, striving human being from the very beginning."[18]

Certainly clinical medicine is alert to the findings of medical science. Doctor Herbert Ratner, the Director of Public Health of the Village of Oak Park, Illinois, and a teacher of preventive medicine, has observed, "[A] physician . . . relying solely on medical science, knows, when he performs an abortion, that he is killing another human being."[19] Lest a physician be tempted to treat human life lightly, the International Code of Medical Ethics, adopted in 1949 by the Third General Assembly of the World Medical Association (comprising thirty-nine national medical societies) reminds him that, "A doctor must always bear in mind the importance of preserving human life from the moment of conception until death."[20] Thus, the ethics of the medical profession require a physician, who attends a pregnancy, to care for the lives of *two* human beings—the mother and the unborn child.

With the exception of the abortion movement, the universal trend in the law is toward full recognition of the humanity of the unborn child.[21] This trend is particularly apparent in the law of torts. It has been held in both Pennsylvania and New York, that a child may maintain a tort action after birth to recover for pre-natal injuries, even though he suffered the injuries at a very early stage in his mother's pregnancy.[22] In

17. A. C. Mietus and Norbert J. Mietus, *Criminal Abortion: "A Failure of Law" or a Challenge to Society?*, 51 A.B.A.J. 924, 925 (1965).

18. ASHLEY MONTAGU, *op. cit. supra* note 16, at 2.

19. Ratner, *supra* note 12, at 21.

20. Taylor, *A Lawyer Reviews Plan for Legalized Abortion*, 26 LINACRE Q. 137 (1959).

21. See Byrne, *The Rights of the Unborn Child*, 41 L.A. BAR BULL. 24 (1965).

22. See respectively Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (injury suffered in the first month of pregnacy); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dept. 1953) (injury suffered in the third month of pregnancy). Neither Pennsylvania

arriving at this conclusion, the Pennsylvania court in *Sinkler v. Kneale*[23] quoted with approval this language from a New Jersey decision, "Medical authorities have long recognized that *a child is in existence from the moment of conception* . . . ."[24] (Emphasis supplied.) Also relying on medical science, the New York court in *Kelly v. Gregory*[25] held, "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 [of conception]." (Emphasis supplied.) In short, the fetus is a human being, a child, from the moment of conception.

Whether we look for guidance to (a) the discoveries of science, (b) the ethics of medicine, or (c) the trends in the law, we are led inevitably to the conclusion that an abortion at any stage of the pregnancy destroys the life of a human being.

Is Abortion Qualitatively Different From Contraception?

In late 1963, Doctor Robert Hall, who was later to become the president of the Association for the Study of Abortion,[26] wrote "[B]irth control in its broadest sense includes contraception, sterilization and abortion, none of which will suffice alone."[27]

Through 1963, the Planned Parenthood pamphlet, *Plan Your Children*, contained the statement, "An abortion requires an operation. It kills the life of a baby after it has begun . . . . Birth control merely postpones the beginning of life."[28] Inexplicably, this statement was deleted from the 1964 revision of the pamphlet.[29] Whatever the reason for the deletion may have been, the statement in the 1963 edition remains accurate. As explained in an article on child care in a national magazine, "The perinatal period can be considered the first year of life—the period from

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nor New York permits a wrongful death action in the case of a stillbirth. These holdings are not intended as a denial of the humanity of the unborn child; they merely reflect the impracticalities inherent in any such action. For instance, it would be almost impossible to compute damages with any reasonable degree of certainty. See Marko v. Philadelphia Trans. Co., 420 Pa. 124, 216 A.2d 502 (1966); In re Bradley's Estate, 50 Misc. 2d 72, 269 N.Y.S.2d 657 (Surr. Ct., Nassau County, 1966).

23. 401 Pa. 267, 164 A.2d 93 (1960).

24. Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960).

25. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dept. 1953).

26. LADER 148.

27. Hall, *Thalidomide and our Abortion Laws*, 6 COLUM. UNIV. FORUM 10, 13 (1963); but see Savel and Perlmutter, *Therapeutic Abortion and Sterilization Committee*, 80 AM. J. OBST. & GYNEC. 1192 (1960): "Since therapeutic abortion *results in the destruction of life* and sterilization *prevents the initiation of life*, both these procedures must be considered contrary to ideal medical practice . . . ." (Emphasis supplied.)

28. Ratner, *supra* note 12, at 22.

29. *Ibid.*

conception through the nine months of pregnancy to the end of the first three months of infancy."[30]

Contraception and abortion are qualitatively different. Contraception prevents a human life from coming into being; abortion destroys a human being during "the first year of life."

It seems, however, that Doctor Hall is correct in one respect. When abortion laws become permissive, contraception (the prevention of life) and abortion (the destruction of life) tend to become interchangeable as methods of birth control. Such has been the experience in Japan,[31] and in Hungary, abortion at one time was preferred to contraception simply because it was cheaper under the national health plan.[32] If one were to ignore all other considerations and restrict his judgment of abortion to its efficacy as a device for depopulation, one would have to admit that it does the job.

Is the Life Destroyed by an Abortion a Guilty Life?

The life destroyed by an abortion is a guilty life only if the unborn child can be considered an aggressor. But "the unborn child simply exists and grows, passively and without volition, in the womb of its mother. To say that it is an aggressor, by reason of its physical existence and natural growth in the place intended for its existence and growth, is to do violence to meaningful language."[33]

An abortion destroys the life of an innocent human being.

THE LAW OF ABORTION

What Is the Purpose of a Law Inhibiting Abortion?

Abortion was a crime at common law. Blackstone traced it as far back as Bracton, and attributed its origins to a recognition of the individual's right to life, "a right inherent by nature in every individual."[34] It seems, however, that from the earliest times until the enactment of legislation in the nineteenth century, the crime was restricted to an abortion which resulted in the death of a quick-child, since "quickening" was taken to signify the beginning of human life.[35] "Quickening" was also a significant factor in the original American statutes governing abortion.[36]

30. Newsweek, Oct. 25, 1965, p. 36.

31. See CALDERONE, ABORTION IN THE UNITED STATES 150-51 (1958).

32. See Konstek, *Observations on Artifically Induced Abortion* (1964), abstracted in 93 AM. J. OBST. & GYNEC. 592-93 (1965).

33. Kenealy, *Law and Morals*, 9 CATHOLIC LAW. 200, 209 (1963).

34. See 1 BLACKSTONE'S COMMENTARIES 129 (2d ed. 1766).

35. WILLIAMS, *op. cit. supra* note 7, at 151-52. *But see*, Mills v. Commonwealth, 13 Pa. 631 (1850) (holding that an abortion prior to quickening was a common law crime). Even in the early common law the crime was not denominated murder although it was a homicide. By Blackstone's time, abortion of a quick-child was a "heinous misdemeanor." BLACKSTONE, *op. cit. supra* note 34, at 129-30.

36. See Quay, *supra* note 7, at 435-38.

Nineteenth century legislation proscribing abortion *prior to "quickening"* has been attributed by one author to a desire to promote population growth,[37] while two other writers appear to argue that such laws were intended for the protection of the mother.[38] Applying the theory of the common law crime (the protection of human life) to current embryology and genetics (human life begins at conception), we must now regard all abortion laws as primarily intended for the protection of the unborn child. In fact, this is the prevailing view.[39]

What Is the Present Law?

In 1959, a survey of abortion laws by the American Law Institute revealed that, "In the United States, England, and Canada, the prevailing pattern is absolute prohibition except for the purpose of saving the mother's *life*. Only half a dozen states go so far as to recognize *health* as an independent justification."[40]

In New York, an abortion is justified only if it is necessary to preserve the mother's life.[41] An unjustified abortion at any stage of the pregnancy is felonious but it is considered homicidal only if the unborn child has "quickened."[42] Although a Pennsylvania statute proscribes as a felony every unlawful attempt to abort, the word unlawful remains undefined.[43] It has been argued that this terminology permits of an abortion to protect the *health* of the mother even though her life may not be endangered.[44] However, Pennsylvania is not ordinarily listed among those jurisdictions which sanction an abortion for reasons of health alone.[45] An unlawful abortion which results in the death of a quick-child is punished more severely in Pennsylvania than other attempts at abortion.[46]

What Changes in the Law Have Been Proposed?

The American Law Institute has proposed the legalization of abortion if a licensed physician "believes there is a 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 a grave physical or mental defect or that the pregnancy resulted from rape, incest or

37. Moore, *Unrealistic Abortion Laws*, 1 CRIM. LAW. BULL. 3, 6 (1965).

38. Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 123, 134 (1962).

39. WILLIAMS, *op. cit. supra* note 7, at 149. "[R]espect for human life . . . underlies the social effort to control abortion. . . ." MODEL PENAL CODE, *op. cit. supra* note 4, at 158.

40. *Id.* at 146.

41. N. Y. PEN. LAW. §§ 80, 1050(2).

42. *Ibid.*

43. PA. STAT. ANN. tit. 18, § 4718. See Note, 34 TEMPLE L.Q. 146, 150 (1961).

44. Leavy and Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52, 54 (1964). On the other hand, the statute may proscribe *all* abortions. See Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMPLE L.Q. 172, 185 (1964).

45. See *e.g.* the list in Moore, *supra* note 37, at 3-4.

46. PA. STAT. ANN. tit. 18, § 4719.

other felonious intercourse [statutory rape]."[47] Most proposals to liberalize state abortion laws have been similarly structured.[48]

The American Law Institute has classified abortion as an offense against the family, thereby belittling the homicidal aspects of the crime. Actually, no evaluation of abortion legislation is meaningful if it ignores the fact that an abortion kills an innocent human being.

LIBERALIZATION OF THE LAW: AN EVALUATION IN GENERAL

Is the Unborn Child an Inferior Being?

For several reasons, the American Law Institute considers the fetus, at least in the early stages of its life, to be an inferior being:

> An attempt to terminate a pregnancy in the later stages probably calls for special repressive measures because of the greater danger to the mother and 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.[49]

> There seems to be an obvious difference between terminating the development of such an inchoate being [less than four months old], whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months. . . .[50]

The Institute's position on the natural inferiority of the fetus breaks down as follows:

(a) *The fetus is an "inchoate being."* The significance of this proposition has already been discussed.[51]

(b) *The fetus is not "recognizable" as a human being.* It may be true that in the very early part of the pregnancy the unborn child looks, as one geneticist put it, "more like a creature from another world than a human being."[52] Yet, as this same geneticist hastened to point out, "In spite of . . . his appearance, he is a living, striving human being from the very beginning."[53]

Like a person whose skin pigment is other than white, the unborn child is recognizable as a human being simply because he is a human being.

47. MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).
48. See LADER 146-47 (discussing proposed legislation in several states).
49. MODEL PENAL CODE, *op. cit. supra* note 4, at 158.
50. *Id.* at 149.
51. See text accompanying notes 17 and 18 *supra.*
52. ASHLEY MONTAGU, *op. cit. supra* note 16, at 2.
53. *Ibid.*

His status must be governed by this fact and not by the irrelevancies of size, shape, and color.

(c) *At the time when an abortion takes place, the fetus is not yet "viable," that is, it is not capable of existence apart from the mother.* Apparently, the unborn child's complete dependence upon his mother somehow relegates him to an inferior status and justifies a physical assault upon him by way of an abortion. But, "[T]here is no dependence by the [unborn] 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 . . . ."[54]

The pre-natal and post-natal child share in common a complete dependence upon others for sustenance. If this dependence justifies an abortion, it should also justify infanticide. Obviously infanticide is not a part of our public policy. On the other hand, solicitude for the welfare of children is a part of our public policy. The more dependent and helpless a person is, the more solicitous the law is of his welfare. *Vide* the War on Poverty. In order to insure that the child's helplessness and dependence will not be used as an excuse for a physical attack upon him, a number of state legislatures have enacted child-abuse statutes.[55] These statutes are the very antithesis of permissive abortion laws.

(d) *Most abortions occur at a time when the fetus' chance of maturing "is still somewhat problematical."* The statement is misleading. Eighty-five per cent of all those pregnancies, which are not deliberately aborted, proceed to the point of viability.[56] Even if we ignore this statistic, the Institute's position remains untenable. Our law has never recognized the uncertain health of a human being as justification for destroying him. For instance, it is no defense to a charge of an unlawful homicide, that the victim was in ill-health and that his chances of surviving for an appreciable period of time were problematical.[57]

The Institute's position seems as alien to medicine as it is to law.[58] At least, one hopes that the medical profession does not now regard death as acceptable therapy for uncertain health.

54. Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (quoting from the dissenting opinion in Stemmer v. Kline, 128 N.J.L. 455, 466, 26 A.2d 684, 687 (E. & A. 1942); *accord*, Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dept. 1953).

55. See Hansen, *Child Abuse Legislation and the Interdisciplinary Approach*, 52 A.B.A.J. 734 (1966).

56. A. C. Mietus and Norbert J. Mietus, *supra* note 17, at 925.

57. See MILLER, CRIMINAL LAW 85 (1934).

58. See Heffernan and Lynch, *What is the Status of Therapeutic Abortion in Modern Science?*, 66 AM. J. OBST. & GYNEC. 335 (1953), and see generally CLEMENT, THOU SHALT NOT KILL (1930).

None of the reasons given by the American Law Institute are sufficient for classifying unborn children as inferior human beings. Quite the contrary, the fallacies inherent in the Institute's position serve to demonstrate the equality of the unborn child with all other human beings.

Is the Unborn Child Entitled to the Equal Protection of the Law?

If the unborn child is not an inferior human being, ought he not possess the minimal rights guaranteed to his after-born counterpart? It would seem so.

The fourteenth amendment of the United States Constitution guarantees to every person the equal protection of the law. Of the universality of this provision, Professor Leonard Manning has written, "The fourteenth amendment is not limited to the proscription of racial discrimination. . . . *The due process and equal protection clauses . . . protect all persons of any class or race*, whether they be Arab, Japanese, or Chinese, Jews, Christians or atheists, aliens or citizens, residents or nonresidents, men or women, individuals or corporations."[59] (Emphasis supplied.)

The equal protection clause has its limitations. By its terms, it applies only to persons, but the unborn child is a human being and it is difficult to conceive of a human being who is not a person. Then too, the clause does not require that things that are different be treated the same. However, any classification of persons, which results in a difference of treatment, must be rationally conceived. As one constitutional authority has written of the equal protection clause, *vis-à-vis* legislative differentiation between white and non-white:

> It does not require the states to treat all persons identically; the states may base their laws upon reasonable legislative classifications, which differentiate between people or groups in different circumstances. Legislative classification based upon race or color is, however, lacking in the rational basis that is necessary for such classification to be sustained. Even if we concede that there may be differences between the races, can we say that we know enough, *scientifically speaking*, about racial differences to conclude that classification based on race is other than irrational? If we are frank, we must admit that racial classification reflects *not objective science*, but racial animosity. If the equal protection clause means what it says, such irrational classification cannot mount the hurdle of the fourteenth amendment.[60] (Emphasis added.)

As we have seen, there is no qualitative difference, *scientifically speak-*

59. Manning, *State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition*, 27 FORDHAM L. REV. 201, n.4 (1958).

60. SCHWARTZ, THE SUPREME COURT 265 (1957).

ing, between human life in the womb and human life after birth. Hence, legislation, which would remove the life of a person in the womb from the full and equal protection of the law, would be as discriminatory, as "irrational," and as inimical to the equal protection clause as the legislative classification of races. Therefore, to Professor Manning's enumeration of persons under the aegis of the equal protection clause, we may now add "born or in the womb."

The proposition is not novel. In 1949, an Ohio court found that an injury wrongfully inflicted upon an unborn child was an injury to his "person" within the meaning of the state constitution which guarantees to everyone a remedy by due course of law for an injury done him in his person.[61] In the context of constitutional guarantees, the court was unable to distinguish injuries to intrauterine and extrauterine persons. Yet on the ground that he is unborn, the American Law Institute would permit the ultimate injury, destruction, of a person whose continued existence threatens the life of no other person, and who is himself innocent of any wrongdoing. *Prima facie*, the Institute's proposal, if enacted into law, would violate the equal protection clause of the fourteenth amendment.

A Pennsylvania court arrived at essentially the same conclusion over one hundred years ago when it observed, in a decision arising out of an abortion prosecution, "[T]he civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception."[62]

Should We Devalue the Life of the Unborn Child?

Blackstone placed the innocent person's right to life among the absolute rights of individuals.[63] Few would dispute him. Indeed, the sanctity and inalienability of innocent human life is one of the basic values upon which our society is structured. To destroy the value is to imperil the structure.

To illustrate: one writer recently complained that a woman, who is denied an abortion of a predictably deformed child is "forced to bear a child against her will, a child whose life may be physically and emotionally blighted, and who may require a lifetime of costly medical care."[64] But the same is true of a woman who gives birth to a defective infant. She is forced to rear a child whose life *is* "blighted" and who *does* require costly medical care. Is infanticide the next step after abor-

61. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949). It is true that the plaintiff was viable when the injury occurred but viability is irrelevant in determining the status and, therefore, the rights of the unborn child. See text accompanying notes 21-25, 54, and 55 *supra*.

62. Mills v. Commonwealth, 13 Pa. 631, 633 (1850).

63. BLACKSTONE, *op. cit. supra* note 34, at 129.

64. LADER 171-72.

tion? The prospect does not seem quite so improbable when one recalls that our Judeo-Christian culture is unique in its absolute rejection of infanticide,[65] and that within the lifetime of most of us, the leader of a purportedly civilized Western nation warned his people "to produce images of the Lord and not monstrosities halfway between man and ape."[66] Few of us have forgotten the way in which he enforced this dictum.

Perhaps a society, founded upon a different tradition than our own, might survive the devaluation of innocent human life. It is doubtful that we would. At least, we are justified in inquiring of the abortion advocates: if you would have us dispense with the sanctity of life, what would you offer us in its stead?

LIBERALIZATION OF THE LAW: AN EVALUATION OF THE SPECIFIC PROPOSALS

Is Abortion Necessary to Protect the Health of the Mother?

Following World War II, the medical profession's outlook on therapeutic abortion (*i.e.*, to protect the life of the mother) altered so drastically that today genuine medical indications for abortion have all but disappeared.[67] Of course, therapeutic abortions are still performed, but one suspects that many of these are based not on objective medical judgment, but on the "liberal" social tendencies of the hospital involved.[68] These tendencies have found a euphemistic haven in the concept of social medicine which transforms social and economic disadvantage into a medical (usually psychiatric) disease.[69] As a result, poverty becomes an illness and an abortion of a disadvantaged woman becomes therapeutic.

Doctor Joseph A. Ryan, Acting Chief of Staff of the District Hospital, Avenal, California, is one who disagrees that abortion is proper therapy for socio-economic deprivation:

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65. See BATES, THE PREVALENCE OF PEOPLE 102-03 (paperback ed. 1962).

66. Adolph Hitler, quoted in SHIRES, THE RISE AND FALL OF THE THIRD REICH 89 (1960).

67. See SHAW, ABORTION AND PUBLIC POLICY 17-18 (1966); Cosgrove, *Therapeutic Abortion*, 55 J. MICH. STATE MED. SOC. 795 (1956); Donnelly, *Are There Medical Indications for Abortion?*, 52 J. MED. SOC. OF N.J. 112 (1955); Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 LINACRE Q. 11 (1952).

68. See the exchange between Dr. K. Schaupp and Dr. W. B. Thompson at the 1963 meeting of the Pacific Coast Obstetrical and Gynecological Society, as recorded in 89 AM. J. OBST. & GYNEC. 353-54 (1964). About 8000 hospital abortions are performed annually in the United States. LADER 17.

69. Mandy, *Reflections of a Gynecologist*, in ROSEN, THERAPEUTIC ABORTION 284, 295 (1954). For a critical analysis in depth of "psychosocial" medicine, see SZASZ, LAW, LIBERTY AND PSYCHIATRY 13-17 (1963).

> Psychiatrists are essentially doctors of medicine, not socio-economic prophets . . . .
>
> Injustices, delinquency, vandalism and slums do exist. Physicians are helping to solve these problems, but an extension of laws permitting therapeutic abortion will not eradicate them. Rather increased energy spent on public housing, good health care, higher minimum wages, family allowances, the general raising of the standards of American life—these are legislative ventures that will help mitigate the nation's deficiencies.[70]

In Sweden, abortions on socio-economic grounds are legal. In 1958, interviews with 100 Swedish women, who had undergone a legal abortion prior to giving birth to a child, revealed that *none* of the later pregnancies had been injurious to either health or the ability to function in society—even though the socio-economic circumstances of half the women had not changed in the interval between the two pregnancies.[71]

Such statistics do not deter the proponents of permissive abortion. One of them recently advocated a test case "possibly supported by the Association for the Study of Abortion" to establish the legality of socio-economic abortion *within the existing New York law*,[72] which, of course, permits an abortion only when necessary to preserve the life of the mother.

A medically unnecessary liberalization of the law to include the health of the mother would open a Pandora's box of social engineering, having little to do with medical health. We must ask ourselves, therefore, whether we are prepared to abandon human beings to the moral and social predilictions of individual doctors, or whether we shall continue to extend to these persons the equal protection of the law regardless of their socio-economic status.

Is Eugenic Abortion Justifiable?

Eugenic abortion is the destruction of an unborn child on a prognosis that the child will be born with a grave physical or mental defect. Those who favor eugenic abortion argue that a woman ought not be burdened with a defective child,[73] and that such a child is "neither an image nor likeness of God, but only a grotesque caricature of man."[74] Rabbi

70. Ryan, *Liberalized Abortion Laws—Immoral and Dangerous*, N.Y.L.J., April 19, 1966, p. 4, col. 1. Other doctors have expressed the same thought. See *e.g.*, Donnelly in CALDERONE, *op. cit. supra* note 31, at 104; Cavanagh, quoted in SHAW, *op. cit. supra* note 67, at 33.

71. Aren, *Legal Abortion in Sweden* (1958), 80 AM. J. OBST. & GYNEC. 615 (1960).

72. LADER 153-54.

73. See text accompanying note 64 *supra*.

74. Means, *Letter to the Editor*, N.Y. Times, April 16, 1965, p. 28, col. 4.

Immanuel Jakobovits made a most effective case against both these positions not long ago when he wrote, "Human life being infinite in value, its sanctity is bound to be entirely unaffected by the absence of any or all mental faculties or by any bodily defects: any fraction of infinity still remains infinite."[75]

The most frequent cause of pre-natal defects is rubella (German measles) contracted by the mother during the first three months of pregnancy.[76] An effective vaccine against rubella has already been developed and is in the testing stage.[77]

Is Abortion of a Rape-Induced Pregnancy Justifiable?

The liberalizers make their strongest case when they point to the woman impregnated by a rapist. Must she suffer the anguish of carrying the rapist's child? Does not her right of self-defense against the rapist also apply to "an embryo which becomes part of the same criminal aggression?"[78] Moreover the English case of *R. v. Bourne*[79] is authority for termination of a rape-induced pregnancy.

All of these arguments are appealing until we remember that the thing in the womb is a child in the first year of his life; that he is more helpless at the hands of an abortionist than his mother was at the hands of the rapist, and that by no stretch of semantics can this innocent, passive human being be called an aggressor.[80]

We have a choice in cases of rape-induced pregnancies. We can either kill the child or we can direct all our ingenuity toward smoothing the way for both the mother and the child. The latter is the truly humane choice.

ABORTION IN THE UNITED STATES

Is Illegal Abortion a Serious Problem in the United States?

Whether the annual number of illegal abortions in the United States approaches the frequently quoted figure of 1,200,000 is to be doubted.

75. Jakobovits, *Jewish Views on Abortion*, 17 W. RES. L. REV. 480, 487 (1965). For a further discussion of eugenic abortion, see text accompanying notes 64-66 *supra*.

76. See Quay, *Justifiable Abortion: Medical and Legal Foundations—Part I*, 49 GEO. L.J. 173, 238-41 (1960).

77. N.Y. Times, April 28, 1966, p. 45, col. 6. The initial tests have been successful. N.Y. World Journal Tribune, Sept. 30, 1966, p. 15, col. 1.

78. LADER 172.

79. [1938] 3 All E.R. 615 (K.B.).

80. One must not underestimate the anguish of a woman who has been forcibly impregnated by a rapist. But *R. v. Bourne* notwithstanding, the law has in the past valued innocent human life over peace of mind. For instance, in Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964), a pregnant woman was compelled to submit to a blood transfusion, which was necessary to save the life of her unborn child, despite her sincere, religiously-rooted abhorrence of transfusions.

Certainly the popular estimate of 10,000 maternal deaths a year from illegal abortions bears no relationship to reality.[81] Nevertheless, the incidence is high and the problem must be regarded as serious, especially when one considers that the criminal abortionist, in many cases, is not a skilled medical practitioner.

The problem is aggravated, as a Grand Jury investigation in New York revealed,[82] by the difficulty in obtaining evidence for an indictment. The victim, the unborn child, is dead and in many instances, only those who were parties to the crime are aware that he ever existed. If the mother dies at the hands of an abortionist, who is also a doctor, a false death certificate may be issued. If the mother does not die, but is hospitalized, there still exists the problem of determining whether the miscarriage was spontaneous or induced. Even then, the doctor-patient privilege may prevent disclosure.[83]

All this is not to say that an abortion law is unenforceable. Between 1946 and 1953, a concerted effort to obtain convictions by the District Attorney of New York County resulted in a substantial decline in the number of criminal abortionists operating in New York City.[84]

Another aspect of the illegal abortion problem is presented by the charge that our present laws discriminate against the poor. After all, the rich are able to fly off to a foreign country where the law is permissive, while the poor are driven into the clutches of the domestic criminal abortionist. Dr. Andre Hellegers of The Johns Hopkins University Medical School has said of this allegation, "I find this argument extraordinary since it so clearly implies that the wealthy are getting too many abortions. It is somewhat like saying that if a man is wealthy enough to move to a Moslem country and marry four wives, we must change the bigamy law here because the poor are being discriminated against."[85]

It is also charged that in many hospitals, private patients obtain abortions more easily than ward patients. One reformer attributes this apparent discrimination to "a system that interprets the law one way for the rich, another for the poor."[86] Should we conclude from this that the

81. For a detailed analysis of the origins and reliability of these statistics, see Hellegers, *A Doctor Looks at Abortion* 19-25 (Edward Douglas White Lecture, Georgetown University, March 16, 1966).

82. See NEW YORK STATE SUPREME COURT KINGS COUNTY: A PRESENTMENT ON THE SUPPRESSION OF CRIMINAL ABORTION BY THE GRAND JURY FOR THE EXTRAORDINARY SPECIAL AND TRIAL TERM 5-7 (Hamilton Press, 1941).

83. See People v. McAlpin, 270 N.Y.S.2d 899 (1966).

84. See discussion in CALDERONE, ABORTION IN THE UNITED STATES 36-37 (1958).

85. Hellegers, *supra* note 81, at 17.

86. LADER 29-30. Dr. Hellegers disputes the charge of discrimination. He points out that private patients typically come under a doctor's care at an early stage in the pregnancy when most abortions are performed. Ward patients often do not consult a doctor until it is

law itself is discriminatory? Or do these statistics merely indicate that for one reason or another, some doctors are particularly solicitous of the rich? Problems created by those who abuse the law for personal gain are not solved by acquiescing in the abuse.

If one were searching for discrimination, he would most certainly find it in a proposal to permit abortion on socio-economic grounds. Whether an unborn child were to enjoy the protection of the law would depend on the wealth of his parents.

Will Any Law Short of Abortion-at-Will Effect a Decrease in the Number of Illegal Abortions?

Liberalizers sometimes point to Sweden's abortion law as a middle ground for liberalization.[87] Although the Swedish law is more permissive than that proposed by the American Law Institute, one liberalizer admits that it has failed in its purpose of reducing the number of illegal abortions,[88] and another asserts that to expect such a law sharply to reduce criminal abortion is "highly illogical."[89] Actually, there is evidence that illegal abortion increased in Sweden after the law was liberalized.[90]

Students of the subject have discovered the reason for the Swedish debacle. It is simply that liberalization of the law makes abortion more culturally acceptable.[91] Women, who might never have thought of an abortion, now believe that they have a right to one—even though their reasons for seeking it may be legally insufficient. The result is an entirely new (and perhaps larger) clientele for the criminal abortionist.

If the problem of illegal abortion is to be attacked by liberalizing the law, then as one advocate of permissive abortion has pointed out, we must be prepared to go all the way—to legalize all abortions.[92]

Is There an Alternative to Abortion-at-Will?

There is another way to attack the problem of illegal abortion. We, as lawyers, may choose to become the advocates of the cause of the unborn child. In this role, we shall argue to the American people, as we have done before, that differences in size, shape, and color are not valid

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too late for an abortion to be performed safely. Moreover, the mental stress of pregnancy is more severe in the earlier stages and hence, the private patient is liable to be in a much worse state of mind when she sees a psychiatrist than the ward patient who may have passed the most difficult period. Hellegers, *supra* note 81, at 17-18.

87. LADER 117.

88. Hall, *Thalidomide and our Abortion Laws*, 6 COLUM. UNIV. FORUM 10, 12 (1963).

89. LADER 120.

90. GEBHARD, POMEROY, MARTIN AND CHRISTENSON, PREGNANCY, BIRTH & ABORTION 224 (1958).

91. See authorities quoted in SHAW, *op. cit. supra* note 67, at 38-40.

92. ROSSI, PUBLIC VIEWS ON ABORTION 4-6 (1966).

grounds for taking the life of an innocent human being. We know, of course, how arduous and uphill such a civil rights battle can be, and particularly will it be so here because the minority, whose rights are at stake, is both voiceless and voteless. But in pondering the alternatives, we might bear in mind what was said in another context by a leader of the abortion movement in California:

> Achieving stability in law is a painfully long-term process of gradually increasing usage and acceptance. . . . But law in the modern age must go further than its traditional role of following the mores of the people it serves. It must undertake the role of leadership and its jurists must continually stress and teach the rules of conduct to which . . . all men must bind themselves for the survival of mankind.[93]

Respect for the sanctity of innocent human life may very well be one of those rules of conduct upon which the survival of mankind depends. And permissive abortion seems to go a long way toward abrogating the rule. Perhaps, when all is said and done, respect for the innocent person's right to life will turn out to be the crucial issue in the abortion controversy, and perhaps, it will be lawyers who have made it so.

93. Leavy, *The Eichman Trial and the Role of Law*, 48 A.B.A.J. 820, 824 (1962).