



Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada

PROTECTION OF LIFE

# crimes against the foetus

Working Paper 58

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Crimes against the foetus

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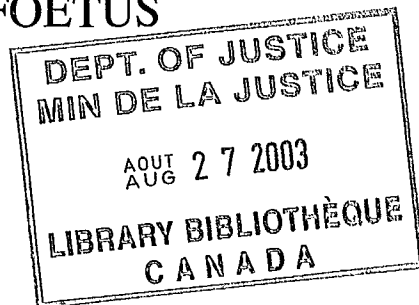
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Working Paper 58

CRIMES  
AGAINST  
THE FOETUS



1989

## Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament after the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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## Introduction

On its creation in 1971 the Law Reform Commission of Canada was asked to undertake a deep philosophical probe of our whole criminal law. In 1986 after years of study and collaboration with the Department of Justice, the Department of the Solicitor General and the provincial governments, it published in Report 30, *Recodifying Criminal Law*, the first part of a proposed new criminal code. In 1988 it followed this with Report 31, which is a revised and enlarged edition of Report 30 and contains most of the matters omitted from its predecessor.

A few items, however, involving special factors and requiring further study, were left for later consideration. These included trade and securities frauds, sex offences, prostitution and pornography. As well they included crimes against the foetus, i.e., "birth offences," foetal research offences and also abortion — all matters concerning the protection of life.

In 1975, the Commission had set up a specific project to study the protection of life in all its aspects. Comprising an interdisciplinary staff of lawyers, ethicists, sociologists and physicians, it conducted studies of a basically legal nature (e.g., on the general approach of criminal law to the protection of the person), medical-legal studies (e.g., on euthanasia) and sociological-ethical studies (e.g., on the interaction of ethics, society and law in protection of life issues). Based on this work the Commission published numerous study papers, seven working papers and three reports to Parliament.<sup>1</sup>

Meanwhile dissatisfaction with this whole area of law was surfacing. Lack of legal guidance on aspects of medical treatment, on foetal research and on euthanasia was causing concern. Unevenness in the decision-making of abortion committees, pointed out by the Badgley Commission, was a specially disturbing factor.<sup>2</sup> Lastly the compromise embodied in the Criminal Code's abortion section (section 251) was called in question by the *Canadian Charter of Rights and Freedoms*.<sup>3</sup>

---

1. Reports to Parliament: *Criteria for the Determination of Death*, no. 15, 1981; *Euthanasia, Aiding Suicide and Cessation of Treatment*, no. 20, 1983; and *Some Aspects of Medical Treatment and Criminal Law*, no. 28, 1986. Working Papers: *Criteria for the Determination of Death*, no. 23, 1979; *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons*, no. 24, 1979; *Medical Treatment and Criminal Law*, no. 26, 1980; *Euthanasia, Aiding Suicide and Cessation of Treatment*, no. 28, 1982; *Behaviour Alteration and the Criminal Law*, no. 43, 1980; *Crimes Against the Environment*, no. 44, 1985; *Workplace Pollution*, no. 53, 1987; Study Papers: E.W. Keyserlingk, *Sanctity of Life or Quality of Life*, 1979; M.A. Sommerville, *Consent to Medical Care*, 1980; T.F. Shrecker, *Political Economy of Environmental Hazards*, 1984; J. Swaigen and G. Bunt, *Sentencing in Environmental Cases*, 1985; J.F. Castrilli, and T. Vigod *Pesticides in Canada: An Examination of Federal Law and Policy*, 1987.

2. Canada. *Report of the Committee on the Operation of the Abortion Law*, (Badgley Report) (Ottawa: Minister of Supply and Services Canada, 1977) at 17.

3. Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Dissatisfaction appeared in various forms. Increased lobbying took place by pro-choice and pro-life groups across the country. A series of cases came before the courts involving Dr. Henry Morgentaler.<sup>4</sup> Finally in 1984 the Commission received a special request from the Canadian Bar Association to "undertake an in-depth study of the legal status of the unborn child in Canadian law and, if necessary, make recommendations."<sup>5</sup>

In response the Commission established, within the Protection of Life Project, a special working group on the legal status of the foetus. Comprised of leading scholars drawn from various disciplines such as biology, philosophy, sociology and law, it undertook research and consultation on various pertinent issues like new birth technologies, embryo and foetus research, genetic screening and counselling, and what have been called "birth offences" in the *Code*. The working group was co-ordinated by Edward Keyserlingk, with the assistance of Joseph Gilhooly, and consisted of Jean-Louis Baudouin, Benjamin Freedman, Bartha Knoppers, Robert Kouri, Abby Lippman, Ellen Picard, Sanda Rodgers and David Smith. The group is also indebted to a number of additional consultants, including Dr. Peter Gillett of the Department of Obstetrics and Gynaecology, Montreal General Hospital, and Professor Gail Sheehy of the Faculty of Law, University of Ottawa.

In 1986 this group released a *Consultation Document on Abortion Policy Options*, identifying the range of possible policy options and their implications. This document was distributed to numerous professional associations, interest groups and interested members of the general public. It also went through the usual consultations with our advisory panel of judges, representatives of deputy ministers of justice from the provinces, defence lawyers from the Canadian Bar Association, selected police chiefs and criminal law professors.<sup>6</sup> The Commission is grateful for the many helpful comments received in response.

Then, in January of 1988, the Supreme Court of Canada gave judgement in *R. v. Morgentaler*.<sup>7</sup> Allowing the accused's appeal, for reasons explained later in this paper, it held *Criminal Code* section 251 — the abortion section — inconsistent with the *Charter* and therefore void.

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4. *R. v. Morgentaler*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 30 C.R.N.S. 209, 20 C.C.C.(2d) 449, 4 N.R. 277; *R. v. Morgentaler* (#1) (1974), 14 C.C.C. (2d) 435; *R. v. Morgentaler* (#2) (1974), 14 C.C.C. (2d) 450; *R. v. Morgentaler* (#3) (1974), 14 C.C.C. (2d) 453; *R. v. Morgentaler* (#4) (1974), 14 C.C.C. (2d) 455; *R. v. Morgentaler* (#5) (1974), 14 C.C.C. (2d) 459.

5. Canadian Bar Association Resolution no. 4; the full text of the resolution appears in the *National*, march 1984, p. 3.

6. The advisory panel discussions are part of the formal consultation process for all Law Reform Commission papers. These consultations proceeded as follows: Government panel- Oct. 28, 1986; Judges- Oct. 30, 1986; and the Canadian Bar Association, Canadian Association of Chiefs of Police, and the Canadian Association of Law Teachers- Oct. 31, 1986.

7. [1988] 1 S.C.R. 30, reversing (1985), 22 D.L.R. (4th) 641 (Ont. C.A.).

Finally, the special group on the legal status of the foetus brought its work to a conclusion in May, 1988, and presented the Commission with its report.<sup>8</sup> The report dealt with the biological development of the foetus, principles of reform, foetal status and legal regulation, a proposed new offence of causing death or harm to the foetus, abortion, foetal research and treatment, and new reproductive technologies. The report represented a joint attempt on the group's part to propose a comprehensive policy regarding the foetus which would be ethically defensible, solidly rooted in legal principle, generally acceptable in our pluralist society and fairly balancing the rights and interests of all those implicated. As such it forms part of the basis of the present paper.

This working paper, therefore, is the fruit of much work by many different people. The groundwork comprised the general studies of the Protection of Life Project under the supervision of Commissioners Baudouin, Lemelin and Rivet and co-ordinated by Edward Keyserlingk. Next, the work of the special group and the responses this generated, assisted the Commission in its deliberations. In addition, members of the Commission have attended seminars, given lectures, media interviews, and participated in public forums, all with a view to gauging the range of opinion on these controversial matters.

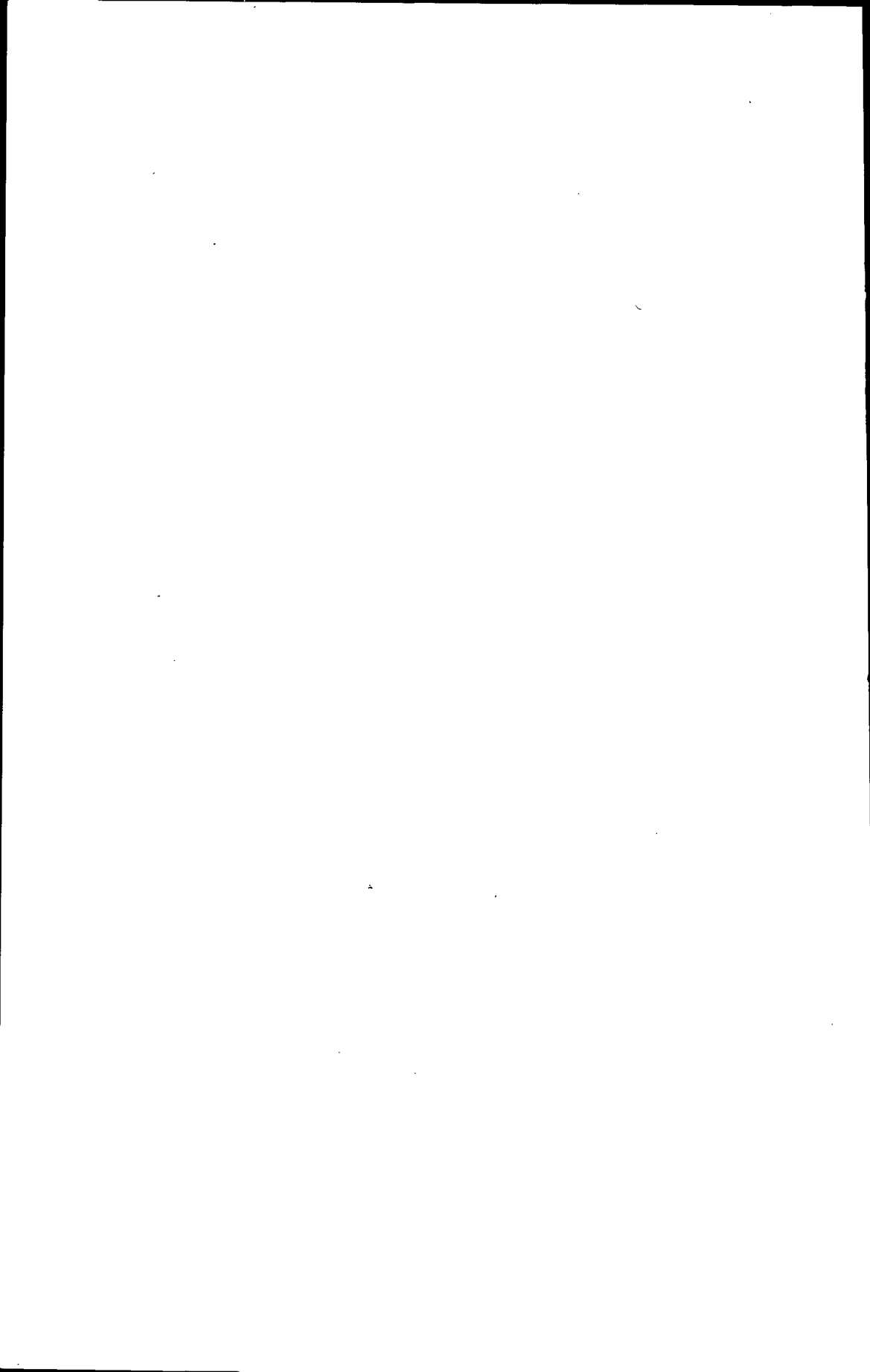
The Commission now comes forward with its own working paper on the criminal law relating to the foetus. This term is used here and defined in the paper to cover the product of a union in the womb of human sperm and egg cells at all stages of its life prior to becoming a person.<sup>9</sup> It doesn't, therefore, cover embryos fertilized outside the womb, entities which will accordingly be dealt with in our forthcoming paper on human experimentation. In essence it proposes a specific foetus crime on the lines suggested by the special group. To this crime it proposes two exceptions. These would relate to: (1) medical treatment, and (2) lawful abortion.

On the abortion issue the majority view put forward in the present working paper does not advance the commissioners' personal views about the morality or immorality of abortion itself but rather the Commission's view about the justifiability or otherwise of its criminalization. Proposals for decriminalization shouldn't necessarily be understood to recognize abortion itself as a rightful act but rather as one not necessarily fit for the attention of the criminal law. On this the paper attempts to fashion a position sensitive to the diversity of principles, needs and convictions of our pluralistic society.

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8. *Report of the Working Group on the Status of the Foetus* to the Law Reform Commission of Canada, May 9, 1988.

9. See recommended definition on p. 50.



# CHAPTER ONE

## The Foetus in Law and History

### I. Early Attitudes to Foetuses and Newborns

Legal attitudes towards foetuses and newborns have varied enormously over time. Some cultures severely proscribed abortion and infanticide: numerous early codes, for instance the Sumerian (2000 B.C.), the Assyrian (1500 B.C.), the Hammurabic (1300 B.C.), the Hittite (1300 B.C.) and the Persian (600 B.C.), prohibited striking a woman so as to cause the death of her unborn child, and thereby afforded the foetus at least indirect legal protection.<sup>10</sup> Other cultures saw both abortion and infanticide as acceptable solutions to problems of scarce resources, birth defects and sexual balance in society. Neither ancient Greek<sup>11</sup> nor, in its earlier stages, Roman law<sup>12</sup> forbade abortion. Indeed the latter saw the unborn child not as a living human being but as only a potential person still part of its mother. When it did forbid abortion, it did so as a danger to the mother's health, an infringement of the father's rights and a bad example to society rather than as a denial of the foetus' own rights.

On this subject, however, western legal development was profoundly influenced by the Judaeo-Christian tradition.<sup>13</sup> Jewish tradition in pre-Christian and early Christian times, while not penalizing abortion performed by the mother herself and not considering a foetus human in the full sense of the term, condemned abortion by third parties and allowed it only when necessary to save the mother's life. Later tradition seemed to consider the foetus a full human being from the time when it was formed, i.e., considerably before birth, and penalized abortion of the formed foetus with a capital sentence. Christian tradition for the first eleven hundred years condemned foetal destruction at whatever stage of formation. For the next six centuries it was regarded as homicide once the foetus was formed or animated. After 1869 this distinction was

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10. D. Granfield, *The Abortion Decision* (New York: Doubleday, 1969), at 44.

11. *Ibid.* at 49.

12. *Ibid.* at 51.

13. J.R. Connery, *The Development of the Roman Catholic Perspective* (Chicago: Loyola University Press, 1977); G. Grisez, *Abortion: The Myths, The Realities, and The Arguments* (New York, Corpus Books, 1970).



eliminated and every abortion was punished with excommunication — a tradition finding strong defenders in Protestant Christianity, ranging from Calvin to a committee of Anglican Bishops of the Lambeth Conference.<sup>14</sup>

## II. Common Law, English Law and the Foetus

Equally profound are the changes found in the common law tradition. In the thirteenth century Bracton considered all abortion homicide.<sup>15</sup> In the seventeenth century Coke considered it no crime prior to quickening, a serious crime after quickening and murder if the aborted child was born alive and died soon after.<sup>16</sup> In 1803 Lord Ellenborough's Act made all abortions criminal, punishing abortions after quickening with death and abortions prior to quickening with a lesser penalty.<sup>17</sup> In 1837 the distinction as to quickening was dropped and capital punishment for abortion was abandoned.<sup>18</sup> In 1939 case law recognized a limited defence of necessity to preserve the mother's life.<sup>19</sup> Finally, in 1967 the British Parliament allowed medical abortions where continued pregnancy would involve risk to the life or physical or mental health of the pregnant woman or her existing children or where there is a substantial risk that the child born would suffer from such physical or mental abnormalities as to be seriously handicapped.<sup>20</sup>

Meanwhile, some evidence of common law respect for the foetus can be found in the law relating to capital punishment. In the eighteenth century, executions of women in a state of pregnancy were suspended until the termination of the pregnancy, usually by birth of the child. Later it became the practice to order a permanent stay of execution. Later still, in 1931, Parliament passed the Sentence of Death (Expectant Mothers) Act to provide that where a woman convicted of a capital offence is found by the trial jury to be pregnant, she should be sentenced not to death but to imprisonment for life.<sup>21</sup> This was the position until the abolition, therefore, of the death penalty in 1965.<sup>22</sup>

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14. Connery, *ibid.*, at 72.

15. Grisez, *supra*, note 13, at 186-87.

16. Coke, *Institutes of the Laws of England* (London: E.&R. Brooke, 1797) part 3, c. 7.

17. (1803), 43 Geo. III, c. 58.

18. (1837), 1 Vict., c. 85, s.6.

19. *R. v. Bourne*, [1939] 1 K.B. 687, [1938] 3 All E.R. 615 (C.C.C.).

20. *The Abortion Act 1967*, (U.K.), 1967, c. 87.

21. *Kenny's Outlines of Criminal Law*, 17th ed., by J.W.C. Turner (Cambridge: Cambridge University Press, 1958) at 575.

22. *Murder (Abolition of Death Penalty) Act 1965*, (U.K.), 1965, c. 71.

### III. Canadian Law and the Foetus

Pre-confederation Canada largely followed England's example. In 1810 New Brunswick passed a law modelled on Lord Ellenborough's Act prohibiting abortion, though not by the pregnant woman herself.<sup>23</sup> In 1836 Prince Edward Island did the same.<sup>24</sup> In 1837 Newfoundland adopted English criminal law and with it English abortion law.<sup>25</sup> In 1841 Upper Canada in its *Offences against the Person Act* prohibited abortion without distinction as to quickening.<sup>26</sup> In 1842 New Brunswick too abolished the quickening distinction.<sup>27</sup>

Until this time criminalization only affected the abortionist. In 1849, however, New Brunswick criminalized abortion by the pregnant woman herself.<sup>28</sup> In 1851 Nova Scotia followed suit,<sup>29</sup> and provided in 1864 that the offence could be prosecuted whether the woman was pregnant<sup>30</sup> or not.

At Confederation, criminal law was brought under federal jurisdiction. Accordingly, in 1869 Parliament consolidated the criminal law applicable to all the provinces and adopted abortion provisions identical with those obtaining in New Brunswick, with a penalty of life imprisonment.<sup>31</sup> Finally in 1892 the first *Criminal Code* was enacted.<sup>32</sup> The 1892 *Code* contained various provisions concerning birth related offences. Among others were sections 271-272. Sub-section 271(1) made it an indictable offence subject to life imprisonment to cause the death of a child not yet a human being, in such manner that it would have been murder if such child had been born — a provision which was added possibly to clarify that late destruction of the foetus, while not technically procuring a miscarriage and therefore abortion, was nonetheless criminal. This provision was subject to a defence of acting in good faith to preserve the life of the mother (sub-section 271(2)). Section 272 made it a crime punishable with life imprisonment to attempt to procure a woman's miscarriage whether or not she was with child, and the good faith defence was not available.

In 1969 the abortion provisions were significantly amended. These changes occurred at a time when abortion reforms were taking place in England, the United

23. S.N.B. 1810, c. 2.

24. S.P.E.I. 1836, c. 22, s. 8.

25. S. Nfld. 1837, c. 4, s. 2.

26. *Provincial Statutes of Canada* 1841, c. 27, s. 13. Lower Canada abolished this distinction in 1859, *Consolidated Statutes of the Province of Canada*, c. 91, s.24.

27. S.N.B. 1842, c. 33, s. 2.

28. S.N.B. 1849, c. 29, s. 7.

29. R.S.N.S. 1851, c. 162, s. 11.

30. R.S.N.S. 1864, c. 164, s. 11.

31. S.C. 1869, c. 20, ss. 59, 60.

32. S.C. 1892 c. 29.

States and other western countries and when the thalidomide tragedy threw doubt in the minds of many on the appropriateness of forcing continuation of pregnancies in the face of anticipated gross foetal abnormalities. The amendment, contained in subsections 251(4-5), created a therapeutic exception to the general abortion provision and a committee structure to implement this exception. This amendment, and indeed the whole abortion section, section 251, was struck down by the Supreme Court of Canada in 1988.

#### IV. The Problem of the Foetus

Clearly, then, there is a great deal of social uncertainty about the status of the foetus. Part of that uncertainty results from the complexity of the whole biological process. Part results from the diversity of views past and present about that status. Part results from the lack of agreement as to how to reach consensus on the problem.

While from the genetic/biological perspective, life is continuous, certain accepted criteria have been superimposed on this continuum to distinguish between certain stages of development. Among these are the following:

*Gamete* (germ cell) — in males: sperm  
in females: egg (or oocyte)

*Zygote* (fertilized egg) — the single cell resulting from fusion of egg and sperm

*Conceptus* — either (a) the mass of cells resulting from the first few divisions of the zygote, or  
(b) the embryo (or foetus) plus the placenta (or membranes) throughout the first third of pregnancy.

*Morula* — the stage reached about 3-4 days after fertilization in which there is a grape-like cluster of 32-100 cells free in the uterine cavity.

*Blastocyst* — the stage in which there are 100+ cells arranged round a central cavity, only 3-4 of which will develop into the embryo proper.

*Implantation* — a process which begins about one week after fertilization and during which the conceptus (definition (a) above) attaches to the wall of the uterus. It is more or less completed 14 days after fertilization.

*Embryo* — the stage of development between fertilization and completion of basic organ development. At the end of this stage the organism is about 1" (2.5 cm.) long.

*Foetus* — the stage of development following the embryonic period and continuing until birth or abortion.

The transition from embryo to foetus occurs about 8 weeks after fertilization and 7 weeks after implantation.

Determination of the age of the embryo or foetus depends on whether one counts from the time of fertilization (usually unknown unless it occurs *in vitro*) or from the date of the first day of the last menstrual period before pregnancy occurred (usually referred to as LMP). The latter is the more common landmark for dating and means that the average full-term pregnancy lasts 40 weeks. In line with the methods used in clinical practice all references in this document to foetal age and stages of development are given in weeks from LMP.

It is not until about the 8th week (after the LMP) that the head and limbs are clearly identifiable although the heart has begun pumping somewhat earlier (by the end of the 5th week). The transition from embryo to foetus occurs about 10 weeks from the LMP (or 8 weeks after fertilization, 7 weeks after implantation) when most of the basic organs have taken shape.

Small wonder, then, at the wide diversity of views about the status of the foetus (used in the sense referred to on p. 8 above). In addition to uncertainty arising from the complexity of biological development just described, there are social disagreements over how to understand the significance of these stages in development. Some see the foetus as a miniature person alike in all respects but ease of visibility to a newborn baby and want the law to put it on the same footing as the latter without distinguishing between born and unborn children.<sup>33</sup> Others regard it as a non-person and want the law to reflect what they perceive as overwhelming differences between those merely undergoing biological development in the womb and those participating in social relations outside it, especially in cases of conflict between foetal and other human interests.<sup>34</sup> Yet others take a halfway position and look upon foetuses as potential persons, in some respects like, but in others unlike, persons, i.e., special cases which are more than just collections of human cells but for most of the time less than what ordinarily count as persons.<sup>35</sup>

Similar uncertainty regarding foetuses and newborns, as we observed above, appears in history. Some cultures used abortion and infanticide as common and acceptable methods of birth control. Others proscribed such acts with varying degrees of vigilance and severity.

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33. This position has been argued unsuccessfully by the plaintiffs in: *Dehler v. Ottawa Civic Hospital et al.* (1979), 25 O.R. (2d) 748, 101 D.L.R. (3d) 686 (H.C.J.); and *Borowski v. Attorney-General of Canada* (1983), 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15 (Sask. Q.B.) affd. [1987] 4 W.W.R. 385; (1987), 39 D.L.R. (4th) 731; 59 C.R. (3d) 223 (Sask. C.A.).

34. See M. Tooley, "Abortion and Infanticide" (1972) 2 *Philosophy and Public Affairs* 37 for the clearest statement of this position. Also M.A. Warren "On the Moral and Legal Status of Abortion", *The Monist*, Vol.57, No.1, Jan. 1973.

35. See R.M. Hare, "Abortion and the Golden Rule" (1975) 4 *Philosophy and Public Affairs* 212; D. Callahan, *Abortion: Law, Choice and Morality* (New York: Macmillan, 1970); and B. Brody, "On the Humanity of the Foetus" in R.L. Perkins, ed., *Abortion: Pro and Con* (Cambridge, Mass., Shenkman Pub., 1974).

The same diversity is evident today.<sup>36</sup> The latest Alan Guttmacher world review divides national approaches to abortion into roughly four categories. About 40% of the world's population lives in countries allowing abortion on request, especially during the first trimester (e.g., France, Italy, the United States, the Soviet Union and China). About 25% lives in countries providing it, in practice, virtually on request (e.g., Great Britain, India, Japan, most European socialist states and before *Morgentaler* some parts of Canada). Another 25% lives in countries permitting it either not at all or else only to save the mother's life (e.g., those countries heavily influenced by Roman Catholic or Muslim beliefs — Belgium, the Irish Republic and Malta, almost two-thirds of Latin America, half of Africa and most Muslim countries in Asia). The rest, about 10%, lives in countries providing it to women whose lives are not endangered by pregnancy, but only for narrowly defined health reasons or perhaps in cases of rape or incest.

Such differences are only to be expected among nations with widely varying origins and traditions. Less noted but equally profound are changes occurring over time within the same culture. In England, as we saw, abortion was first a misdemeanour<sup>37</sup> prior to quickening<sup>38</sup> and a felony thereafter, was next a felony whenever performed, was later subject to a judicially recognized but limited defence of necessity<sup>39</sup> and was recently qualified by wide-ranging statutory exceptions. In Canada there was first a *Criminal Code* prohibition of abortion similar to that in England, then a prohibition subject to therapeutic exceptions and finally, as a result of the *Morgentaler* decision, no prohibition whatever.

Part of the uncertainty, however, about the status of the foetus results from lack of consensus as to the principles necessary to underpin a coherent legal approach. Such principles should be, or else should follow from, principles widely accepted and commanding social respect. They should take into account the interests of all relevant parties — of pregnant women, of foetuses and of society in general.

Such principles cannot easily be determined by market research, religious doctrine or even by common sense morality. Market research cannot provide a solution. Its devices — opinion polls and referenda — don't themselves afford principles. They

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36. See appendix A entitled "Abortion in Selected Countries." See also C. Tietze and S.K. Henshaw, *Induced Abortion: A World Review* (New York: The Alan Guttmacher Institute, 1986) for a concise summary of legislation and statistics.

For a survey of abortion legislation in the world's western nations see: M.A. Glendon, *Abortion and Divorce In Western Law* (Cambridge, Mass.: Harvard University Press, 1987).

For a detailed analysis of Spanish and West German abortion law see respectively: R. Stith, "New Constitutional and Penal Theory In Spanish Abortion Law" (1987) 35 *The American Journal of Comparative Law* 513 and "West German Abortion Decision: A contrast to *Roe v. Wade*" (1976) 9 *John Marshall Journal of Practice and Procedure* 605.

37. Coke's, *Institutes*, *supra*, note 16.

38. Defined as the first recognizable movements of the foetus. *Dorland's Illustrated Medical Dictionary*, 26th ed., (Philadelphia: W.B. Saunders, 1981).

39. *R. v. Bourne*, *supra*, note 19.

only serve to check the public acceptability of such principles as are referred to in the researchers' own questionnaires.

Nor is religious doctrine of any greater assistance.<sup>40</sup> For one thing, principles based solely on religious faith may only convince adherents to that faith. In countries like Canada, however, no one faith can claim majority support — many Canadians practise no religion. For another thing, the imposition of principles based on one particular religion would threaten not only the tolerance essential to our pluralist democracy but also our historical tradition of non-establishment of any religion and of respectful co-existence between church and state.

Meanwhile, even an approach in terms of common sense morality encounters formidable difficulties. Admittedly, there has been widespread agreement on two points. The first is that the foetus' humanity or personhood is a crucial moral question in connection with foetal protection and especially in connection with abortion.<sup>41</sup> The second is that such humanity or personhood must occur, for legal purposes at least, at some precisely defined point in gestational development.

This gives rise to two problems. First, there is no agreement upon which point in such development is decisive — conception, implantation, spontaneous brain activity, completion of organogenesis, quickening, viability, or birth. Some of these points are significant in themselves, others are significant because they demonstrate some human potential, and each is rooted in some concept of what is distinctively human and worth respect. One person may feel that conception is the critical point because the human genotype, or the possession of the potential to develop specifically human characteristics, is definitive of humanity. Another may choose commencement of

40. The positions of the leading Canadian churches vary widely. In August, 1988 the General Council of the United Church of Canada reaffirmed the the church's 1980 position on abortion. The church recommended the removal from the *Criminal Code* of all sections relating to abortion within the first twenty weeks. The text of this can be found in 'Contraception and Abortion: A Statement of the 28<sup>th</sup> General Council of the United Church of Canada', United Church Publishing House, August, 1980. The Anglican Church of Canada appointed a task force to make recommendations following the Supreme Court of Canada decision in *Morgentaler*. The church accepts abortion on therapeutic grounds and suggests legal measures requiring the approval of two physicians, counselling, a waiting period between the initial consultation and performance of the procedure and record keeping. The Anglican position can be found in the report of the task force to the Executive Council, 13 May, 1988. The Roman Catholic position is that the direct killing of the unborn is always wrong and that civil laws which admit the licity of abortion are immoral. The Catholic position appears in 'Declaration on Procured Abortion', Vatican City, 1974. The Baptist position was presented at the Assembly of the Baptist Union of Western Canada, Winnipeg, April, 1988. It urges the federal government to enshrine the rights of the unborn in the Charter and to enact legislation protecting the rights of the unborn as persons. Reference to a variety of theological literature will also illustrate this point: D.M. Feldman, "Abortion- Rabbinic Comment" (1984) 51 *Mount Sinai Journal of Medicine* 20; J.T. Noonan, "An Almost Absolute Value in History" (1985) 11 *Human Life Review* 125; G. Brenneman, "Abortion: Review of Mennonite Literature 1970-1977" (1979) 53 *Mennonite Quarterly Review* 160, L.J. Nelson, "The Churches and Abortion Law Reform" in L.J. Nelson, ed., *The Death Decision* (Ann Arbor, Michigan: Servant Books, 1984) at 29; A. Steinberg, "Induced Abortion According To Jewish Law" (1981) 1 *Journal of Halacha and Contemporary Society* 29; see also W. Goodman, "Troublesome Abortion Issue: Theological Roots Spread Wide and Deep", *New York Times*, Sept. 8, 1984, at 29.

41. For this debate see: J. English, "Abortion and the Concept of a Person" (1975) *Canadian Journal Of Philosophy* 233; B. Brody, *supra*, note 35; M.A. Warren, *supra*, note 34; see also the references contained in the above noted materials.

neurological activity out of a belief that humanity's normative distinctness rests on its intellectual achievements. A third may choose birth as the demarcation point out of the belief that humans are essentially social creatures, that personhood in itself could not be fully present when sequestered within the womb.

Secondly, we lack agreement about the way to reach agreement. Advancing biological knowledge about gestation and pre-natal development has not resolved the moral question of abortion, although proponents of different views and points of demarcation have variously claimed numerous discoveries as supporting their own positions. The proponents of any given theory are rarely prepared to concede that any scientific discovery might cause them to choose another point. After all, the major points of controversy are moral rather than scientific; they are disagreements not about the facts of foetal development but about their evaluation. As to the moral status of the foetus, then, we face not only first order uncertainty over which point of demarcation to choose but also second order uncertainty over how to resolve that first order uncertainty and choose one point over another.

Uncertainty over how to resolve the dispute, reveals how serious the infringement upon individual conscience would be were the law to impose one point of demarcation upon proponents of another. Because of this uncertainty, the law could not persuade but only command. One group of persons chooses one point, let us say, out of religious conviction, a second chooses another point grounded, in their view, in scientific understanding, and a third chooses yet another, out of concern for what they understand as uniquely human. All these positions are conscientiously held, logically coherent and consistent with our fundamental social principles, but are in large measure irreconcilable, being based on different concepts of personhood and its place in nature.

Such irreconcilable moral differences reveal the limits of law as a coercive instrument. By choosing one defensible moral position over another the state rejects the dissenting moral stance together with its religious underpinnings, if any. Societies like ours, which cherish freedom of conscience and individual autonomy, must obviously reject state imposition of one particular moral view, on others conscientiously holding opposing views equally defensible.

Here, then, as elsewhere, criminal law must be used with restraint. It shouldn't be used to prevent abortions in circumstances where it is widely regarded as morally defensible. This doesn't mean, however, that it can't be used to protect the foetus where there is no justification for its destruction, that abortion is the only or best response to the dilemma of women pregnant against their will, or that the state should not in its role of furthering the common good protect the unborn through non-coercive means.

After all, despite conflicting moral views about abortion, no one in our society regards foetal destruction as a good in itself. On the contrary, even the most ardent proponents of maternal choice regard it as only a necessary, though often heart-rending, means of resolving unwanted pregnancies. Meanwhile most people's preferred alternative is effective family planning in the first place and effective social support

later so as to afford a realistic option of sustaining a pregnancy and bearing a child without imposing an unbearable burden on its mother. Accordingly, instead of seeking to imprison women aborting their fetuses and doctors assisting them, we should strive by an adequate social support system to provide such women with realistic alternatives in terms of adequate child care facilities, protection of unwed mothers from discrimination, and effective protection of jobs and career advancement prospects for women with maternity leave.

At the same time, the criminal law may well serve to prevent unjustified destruction of the unborn. In the first place, the sort of moral uncertainty arising from conflicts between foetal and maternal interests does not arise from conflicts between foetal and third party interests; and here criminal law may well fulfil a useful function. In the second place, as to conflicts between foetal and maternal interests, the balance to be struck is crucially affected by the fact that the relationship between a pregnant woman and her foetus evolves and changes as the foetus comes closer to birth and to full legal personhood. Thus arguments for maternal autonomy become less sustainable in later stages of pregnancy. In the absence of justification for subordinating foetal life to maternal interests, criminal prohibition of and sanction for abortion may well be defensible.

In conclusion, the foetus merits at least some protection, not necessarily of the same order as that accorded to those already born, but of a kind increasing as it develops.<sup>42</sup>

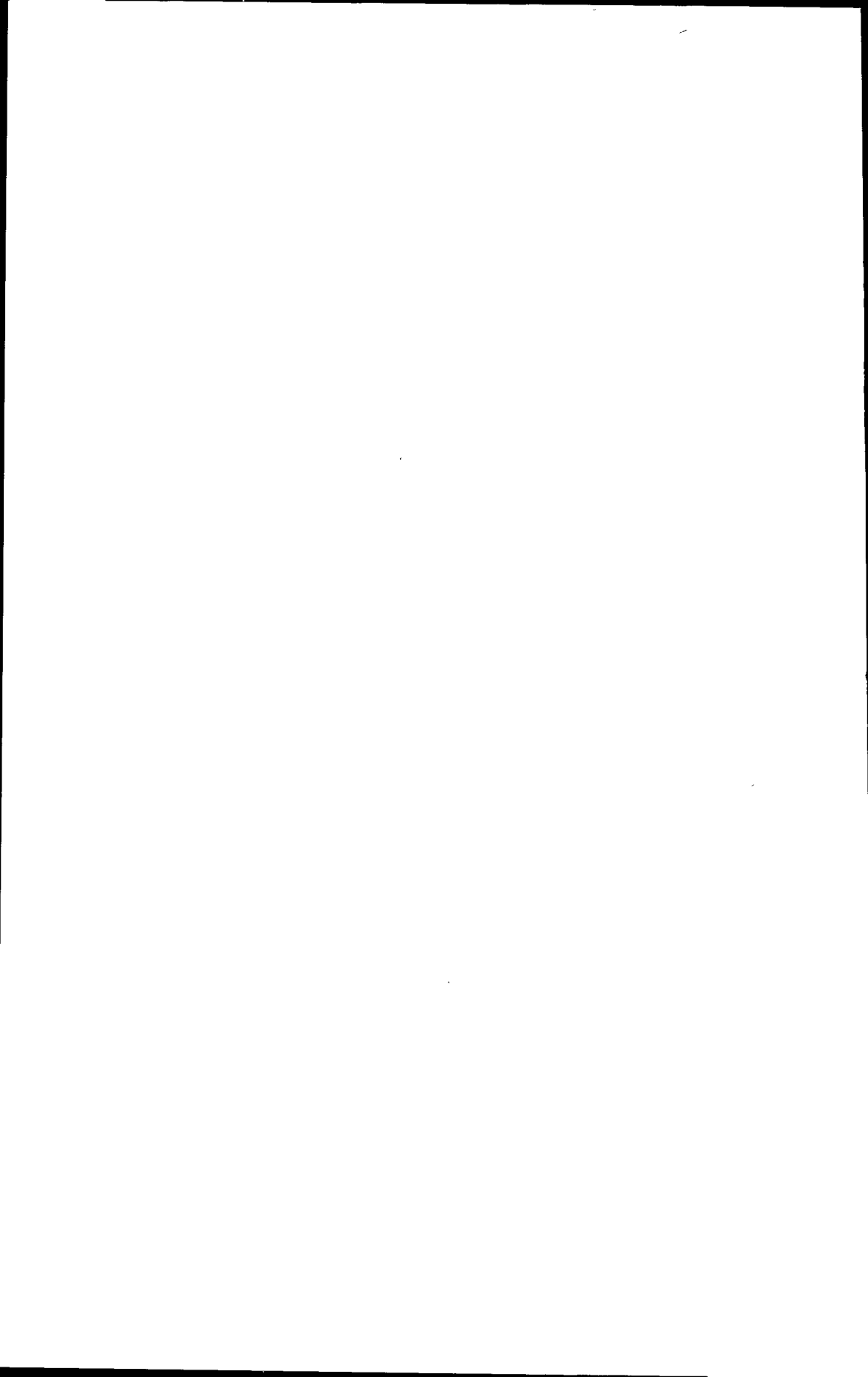
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42. An Angus Reid poll conducted February 17 and 23, 1988 indicates that 73% of respondents believe that there should be some form of legal protection extended to the unborn. 52% were opposed to abortion after the first 12 weeks, and 63% were opposed to it after 18 weeks.

In a Gallup poll conducted on 7 May, 1988 sixty percent of respondents agreed that there should be some restriction on abortion.

American polls reflect similar opinions: *Public Opinion*, April/May 1985, p. 25-28, 53-55; and J.A. Davis, *General Social Surveys 1972-1985* (Chicago: National Opinion Research Center, 1985).





## CHAPTER TWO

### The Present *Code* and its Shortcomings

#### I. The Present *Criminal Code*

Canadian criminal law relating to the foetus and newborns is contained in numerous provisions of the present *Criminal Code*, which are presented here. Our presentation includes for completeness' sake section 251 on abortion which has been, and section 252 which could well be, declared unconstitutional. It sets out the sections on causing death and harm by criminal negligence, on the definition of "human being" for the purposes of homicide, on infanticide, on killing during birth, on neglect to obtain assistance in childbirth, on concealment of birth, on abortion and on supplying noxious things. It does not set out in full, however, all the lengthy homicide provisions, though they are to an extent relevant and are therefore mentioned by title and section number. The pertinent portions of these sections read as follows:

**202.** (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

**203.** Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

**204.** Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years.

(205. Homicide)

**206.** (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not:

(a) it has breathed,

(b) it has an independent circulation, or

(c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

(207. Death which might have been prevented)

(208. Death from treatment of injury)

- (209. Acceleration of death)
- (210. Death within a year and a day)
- (211. Killing by influence on the mind)
- (212. Murder)
- (213. Murder in commission of offences)
- (214. Classification of murder)
- (215. Murder reduced to manslaughter)

**216.** A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

- (217. Manslaughter)
- (218. Punishment for murder)
- (219. Punishment for manslaughter)
- (220. Punishment for infanticide)

**221.** (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and is liable to imprisonment for life.

(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of such child.

- (222. Attempt to commit murder)
- (223. Accessory after the fact to murder)

**226.** A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery is, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof, guilty of an indictable offence and is liable to imprisonment for five years.

**227.** Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and is liable to imprisonment for two years.

**251.** (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

- (a) the administration of a drug or other noxious thing,
- (b) the use of an instrument, and
- (c) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for the accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(c) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(b) require a medical practitioner who, in the province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection "accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

- (a) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

- (a.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,
- (b) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,
- (c) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and
- (d) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

“qualified medical practitioner” means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

“therapeutic abortion committee” for any hospital means a committee, comprised of not less than three members, each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

252. Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years.

590. Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,

- (a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and
- (b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,

she may not be convicted unless the evidence establishes that the act or omission was not wilful.

## II. Shortcomings

A glance at the above provisions reveals numerous shortcomings. They are unduly complex in arrangement, unclear in expression, inconsistent with one another and incomplete in treatment of the foetus. They are also increasingly inadequate to respond to recent medical, social and constitutional developments.

## A. Undue Complexity in Arrangement

Clearly the most glaring formal defect of the current provisions is their volume and complexity. For this five factors are responsible. One is the way the present law categorizes the victims of these offences as born and unborn, sub-categorizes born victims as ordinary homicide victims and (for the purposes of infanticide) newly born victims, and sub-categorizes unborn victims into those killed during birth and those killed before birth. Matching these sub-categories are four different types of crime defined in numerous sections scattered throughout the *Code*: homicide, infanticide, killing during birth and abortion.

Another factor is that of overlap. First there is the overlap with homicide. As pointed out in Working Paper 33, *Homicide*,<sup>43</sup> there are two problems relevant to the present discussion. There is a complete overlap between involuntary manslaughter as defined by common law and section 217 and the crime of causing death by criminal negligence defined by section 203 of the *Code*. In addition, the meaning of criminal negligence in section 202 is quite unclear — though sections 202-204 are entitled “criminal negligence,” section 202 speaks in terms of “showing *wanton or reckless disregard* (italics added) for the lives or safety of other persons” i.e., recklessness.

Second, there is the overlap between causing death to another person by criminal negligence (s. 203) and killing an unborn child during birth (s. 221). For the purpose of section 203 a live, full-term foetus in the very process of being born had been held to qualify as a person,<sup>44</sup> although it wouldn't count as a human being for the purpose of the homicide provisions. Accordingly, to kill a foetus during birth now could possibly constitute two different offences at the same time, one of which — causing death by criminal negligence — is not directly affected by the *Morgentaler* decision.

Yet another reason for complexity is the tortuous arrangement of the homicide provisions themselves. This was fully discussed in Working Paper 33, *Homicide*,<sup>45</sup> and Report 31, *Recodifying Criminal Law* (revised and enlarged edition),<sup>46</sup> where suggestions for improvement were put forward. Here we focus only on infanticide which is particularly relevant to our discussion and on which the *Code* provisions are open to several criticisms. First, the offence is dealt with by two sections contained in totally different chapters of the *Code* — section 216 and section 590. Second, section 216 defines infanticide as the killing by a woman of her newborn child when her mind is disturbed from the effects of giving birth or the effects of lactation, while section 590 allows conviction for infanticide without proof of mental disturbance — the two

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43. Law Reform Commission of Canada, *Homicide*, Working Paper 33, (Ottawa: Supply and Services Canada, 1984) at 25.

44. *R. v. Marsh*, [1979] 2 C.C.C. (3d) 1 (B.C.Co.Ct.). This interpretation was held to be erroneous in *R. v. Sullivan* [1988] B.C.J. No. 1494 (B.C.C.A.). But the question is still open to the Supreme Court of Canada.

45. *Supra*, note 43.

46. Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31 (Ottawa: LRC, 1987).

sections speak in opposite directions. Third, as was pointed out in *Working Paper 33*,<sup>47</sup> current medical evidence establishes no conclusive connection between the effect of childbirth or lactation and mental disturbance.

A further cause of complication is the inclusion of ancillary offences. In addition to the main crimes of killing during birth and abortion, there are the three offences of neglecting to obtain assistance in childbirth (s. 226), concealing the body of a child (s. 227) and supplying noxious things (s. 252). The first of these, which is only committed if the child is permanently injured or dies shortly before or after birth, could be more straightforwardly subsumed under a general rule against killing and harming the foetus. The second, which relates to concealing the dead body of a child in order to conceal the fact that the mother was delivered of it, has to do in essence with being an accessory after the fact to homicide, abortion, or killing during birth, and should be dealt with as such. The third offence, supplying noxious things, supplements the primary offence created by section 251. Since this has now been declared unconstitutional, some doubt arises as to scope remaining for the supplementary offence defined in section 252.

Finally, complexity arises with provisions like those in sections 203, 204, 205, and 216 as far as concerns causing death or harm by omission. All such provisions must be read in the light of our complex general law about omissions. Much of this law is to be found in *Code* sections 197-202 prefacing the homicide provisions. Most of it, however, is to be found in judicial decisions and common law doctrine.<sup>48</sup>

## B. Lack of Clarity

The provisions discussed above are also notoriously unclear. Witness, for instance, the meaning given the terms "human being," "person" and "health" throughout this chapter of the *Code*. Witness also the meaning of "abortion" in section 251.

First, the term "human being." This term is used to describe the victim in a crime of homicide and is statutorily defined in section 206 to include a child that has completely proceeded in a living state from its mother's body whether or not it has breathed, has an independent circulation or has its navel string severed. So does it include a foetus temporarily removed for surgical purposes from its mother's body and later re-inserted? Does it include an embryo removed from its mother's womb and put into a petri dish? Does it include an embryo manufactured by *in vitro* fertilization of the ovum? While the answer to the last of these three questions may be doubtful, the

47. *Supra*, note 43 at p. 76.

48. See generally Law Reform Commission of Canada, *Omissions, Negligence and Endangering*, Working Paper 46 (Ottawa: LRC, 1985). See also: *R. v. McLoed* [1941] S.C.R. 228, 75 C.C.C. 305, [1941] 1 D.L.R. 773; *R. v. Colucci* [1965] 2 O.R. 665, [1965] 4 C.C.C. 56, 46 C.R. 256 (C.A.); *R. v. Kysant* [1932] 1 K.B. 442 (C.C.A.); J.C. Smith and B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983) at 43-47; G. Williams, *Textbook of Criminal Law*, 2nd ed. (London: Stevens and Sons, 1983) pp. 148-153; A.W. Mewett and M. Manning, *Criminal Law*, 2nd ed. (Toronto: Butterworths, 1985) at 78-85.

answers to the first two are inescapable — a live foetus removed at any stage from its mother's womb fits all the criteria of section 206 because "it has completely proceeded, in a living state, from the body of its mother." Does such a foetus, then, upon its removal become a human being irrevocably for the purpose of the homicide provisions or does it become a human being temporarily and cease being one on re-insertion? And should destruction of an embryo fertilized either *in vitro* or *in utero* and then placed in a dish count as homicide?

Next, the term "person." This is used in the definitions of numerous offences — causing death by criminal negligence (s. 203), causing bodily harm by criminal negligence (s. 204), assault (s. 245), causing bodily harm (s. 245.3), torture (s. 245.4) and kidnapping (s. 247), to mention but a few. As observed earlier, this term had been interpreted in the context of causing death by criminal negligence to cover a full-term live foetus.<sup>49</sup> Did this mean that the other crimes listed above could also be committed on a full-term live foetus? Could they also be committed on a less than full-term foetus?

Third, the word "health." The old abortion section, now invalidated by the Supreme Court of Canada in *Morgentaler* (1988), allowed abortion where continuation of the pregnancy constituted a threat to life or health.<sup>50</sup> But what is health? In the absence of a code definition, some view it as meaning only physical health, others see it as something broader, and yet others — including most of the medical profession — follow the definition adopted by the World Health Organization and regard it as "a state of physical, mental and social well-being and not merely the absence of disease or infirmity."

Finally, "abortion." Section 251 of the *Code* prohibits abortion except in certain circumstances. But what is abortion? Although the *Code* nowhere defines it, section 251(1) provides that "every one who, with intent to *procure the miscarriage* (italics added) of a female person, ...uses any means for the purpose of carrying out his intention is guilty of an indictable offence," while section 251(2) provides that "every female person, who, being pregnant, with intent to *procure her own miscarriage* (italics added) uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence." This wording shows the concern of section 251 to be the untimely expulsion of the foetus from the womb before it reaches a state of development sufficient for independent survival. But the term is often used to cover other methods of live-birth prevention. As Glanville Williams states:

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49. *Supra*, note 44.

50. Dickson, C.J.C., in ruling s. 251 unconstitutional, held that in practice the section clearly interferes with the bodily and psychological integrity of a woman and thus violates the *Charter* s. 7 right to security of the person (pp. 53-62). Beetz, J. held that security of the person includes a right of access to medical treatment, without fear of criminal sanction, for any condition which is a danger to life or health (pp. 89-91). Both *supra*, note 5.



"For legal purposes, abortion means foeticide: the intentional destruction of the foetus in the womb, or any untimely delivery brought about with intent to cause the death of the foetus."<sup>51</sup>

On this view abortion could cover not only acts referred to in section 251 but also acts falling more strictly under section 221 (killing at birth). It could also include more recent methods of pregnancy reduction which result in fetuses of up to four centimetres in length being killed and eventually absorbed by the mother's body and, therefore, never in fact delivered.<sup>52</sup>

### C. Inconsistency

This leads to certain inconsistencies in these provisions. Those on abortion are curiously inconsistent with those on homicide, especially by virtue of *Criminal Code* subsection 206(2) which provides that "a person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being."<sup>53</sup> As noted by Chief Justice Dickson in *Morgentaler*, after the sixteenth week of pregnancy the commonly used method of abortion in Canada is instillation, requiring "the intra-amniotic introduction of prostoglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so."<sup>54</sup> But if the foetus is born alive and then dies as a result of the instillation, isn't the doctor straightforwardly guilty of homicide regardless of therapeutic intent and of the unconstitutionality of the abortion section?

This involves inescapable inconsistency. If the doctor commits homicide, as argued above, doesn't this make homicide law inconsistent with the abortion section and the *Morgentaler* decision? If he doesn't commit homicide, isn't this inconsistent with the actual homicide provisions? So, notwithstanding *Morgentaler*, a person performing a therapeutic abortion could perhaps in some cases be convicted of a crime of homicide for causing the foetus to die after birth.

Possible inconsistency, and at least an element of doubt, arises, since the case of *Morgentaler*, with regard to section 221. Either abortion includes or excludes killing in the course of birth. If it includes it, then section 221 is arguably as unconstitutional and contrary to the *Charter* as section 251. If abortion excludes killing in the course of

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51. Williams, *supra*, note 48, p. 292.

52. See "Selective Termination in Quintuplet Pregnancy During First Trimester", *The Lancet*, 21 June, 1986, p. 1447 and "Assisted Reproduction and Selective Reduction of Pregnancy", *The Lancet*, 12 December, 1987, p. 1409.

53. See *R. v. Prince*, [1986] 2 S.C.R. 480, where an injury to a pregnant woman resulting in post-natal death of a foetus was held capable of amounting to two separate crimes: (1) causing bodily harm to the mother and (2) manslaughter of the child.

54. *Supra*, note 7 at 58; see The Badgley Report, *supra*, note 2, at 306-309; Canada, Statistics Canada, *Therapeutic Abortions 1985* (Ottawa: Minister of Supply and Services Canada, 1986) at 43; Ontario, Minister of Health, *Report on Therapeutic Abortion Services in Ontario*, (Toronto: The Ministry, 1987) (M. Powell, Commissioner).

birth, then section 221 doesn't necessarily contravene the *Charter* and *Morgentaler* hasn't achieved as much as pro-choice supporters have imagined.

Still further inconsistency may well arise concerning section 252. This section prohibits the unlawful supply or procuring of noxious things with knowledge that they are intended to be used to procure a miscarriage. One problem concerns the term "knowledge." Case law has held that it is no defence that the person to whom the thing is supplied had in fact no intention so to use it — in other words you can know something is going to be used for a certain purpose even though in fact it isn't.<sup>55</sup> Yet in ordinary parlance you can only be said to know that which is true — you can't know "what ain't so."

A more serious problem arises over the link between this section and the one before it, section 251, which was declared unconstitutional. How can it be no crime to procure a miscarriage but at the same time a crime to supply the means for its procurement? One answer might be that supplying is no longer a crime because section 252 depends on section 251 and ends up being itself contrary to the *Charter*. Another answer might be that it is as coherent to decriminalize abortion while retaining a crime of assisting abortion as to decriminalize suicide while retaining a crime of assisting suicide. But the crime of assisting suicide consists simply of counselling, aiding or abetting a person to commit suicide whereas the crime of supplying noxious things consists of *unlawfully* supplying them; yet how can supplying be unlawful if the primary act is not? To this it might be answered that "unlawful" in section 252 means contrary to any law including provincial law and that a province might quite possibly prohibit the supply of noxious things for procuring miscarriages. But this would mean that a person's criminal liability under section 252 could well vary from province to province whereas criminal law is meant to apply uniformly across Canada. Whatever the answer, the worst of it is that we don't know what the law really is.

Finally, inconsistency appears in the use of different terms to cover the same reality, i.e., causing death or harm to the foetus. Section 203 uses "person" both in French and English, section 204 "person" in English but "autrui" in French, section 205 "human being," section 206 "child," section 216 "newly born child" and section 221 "child."

#### D. Incompleteness

Despite their volume and complexity, the provisions set out in the previous section of this paper are too incomplete to form a comprehensive chapter on the criminal law relating to the foetus. By no means do they spell out explicitly what may and may not be done to foetuses. Instead they speak implicitly in vague terms like "human being," "person" and "health," and remain silent on numerous problems arising in current medical practice. They say nothing about foetal research, about storage and destruction

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55. *Irwin v. The Queen*, [1968] S.C.R. 462 [1968] 4 C.C.C. 119, 3 C.R.N.S. 377.

of human embryos, about liability for exposing the foetus to harm, about lawful intervention to promote foetal health, and about many other similar matters. And while such silence stems no doubt from enactment before the advent of much current technology, continued silence clearly cannot be justified today.

Another matter passed over in silence is the time-frame for abortions. If they are to be performed at all, the general consensus is that they should be done as early as possible — the later the abortion, the greater the health risk to the pregnant woman.<sup>56</sup> This being so, our abortion law is confused whatever its rationale — whether that rationale is to protect pregnant women's health or to promote the interests of the foetus.

Some opt for the first rationale. They see the law as aiming to protect the health of pregnant women and secure safe medical performance of operations otherwise done by back-street abortionists.<sup>57</sup> But how do they reconcile this notion with the actual means of implementation set out in section 251(4) and (5) — the cumbersome committee structures often causing significant delay? Resulting postponement of abortions to the later period of the pregnancy defeated the purpose assumed by the first rationale.

Others, however, opt for the second rationale. They see section 251 as aimed at maximum foetal protection.<sup>58</sup> But how do they square this with the overall context of that section, i.e., the general law about the foetus? That general law falls woefully short of maximizing foetal protection.

At common law there was originally no cause of action for wrongful death — from the liability standpoint it was better to kill than to injure. Although that rule has subsequently been modified to allow recovery for dependents and also for loss of expectation of life, no damages for lethal injury are recoverable by a foetus which is not born alive. The common law position is illustrated by the case of *Smith v. Fox*.<sup>59</sup> By contrast, where the foetus is wrongfully injured instead of being killed outright, it can, it was held, recover damages because “when it was subsequently born alive and viable, it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident.”<sup>60</sup> This civil law decision has been followed in

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56. Badgley Report, *supra*, note 2 at 307-313; In 1985 there were only 0.7 complications per 100 therapeutic abortions when the procedure took place before nine weeks of gestation. In contrast, when performed after twenty-one weeks the rate rises to 39.8 complications per 100 therapeutic abortions: Statistics Canada, *supra*, note 54, at 50.

57. See the reasons of Beetz, J. in *Morgentaler* (1988), *supra*, note 7, at at 80-131. Although Beetz does believe that the protection of the foetus is a compelling objective, “the interest in protecting the life and health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus” (at 81).

58. See the reasons of Wilson, J. in *Morgentaler*, [1988], *supra*, note 7 at 161-184. At 181 she states: “In my view the primary objective of the impugned legislation is the protection of the foetus.” She then qualifies this purpose by incorporating the “ancillary objective” of protecting the pregnant woman's life and health.

59. [1923] 3 D.L.R. 785.

60. *Montreal Tramways Co. v. Leveille*, [1933] S.C.R. 456, (1933), 4 D.L.R. 337.

Ontario by *Duval v. Seguin*.<sup>61</sup> Killing a foetus, then, is no civil wrong to it at common law, while injuring it is a wrong if it is born alive.

Likewise in civil law systems the foetus while *in utero* is not in principle entitled to legal protection. Such rights and privileges as it enjoys depend on its being born alive. This position has not been changed by the 1971 amendments to the Quebec *Civil Code*.<sup>62</sup>

Criminal law took the opposite view. Intentional killing of the foetus has long been recognized by common law and subsequently by statute as a crime. Injuring, however, and killing which is not intentional, fell and still fall, outside the criminal law, with the possible above mentioned exception of section 203. Unless the wider interpretation given to "person" in that section by a county court<sup>63</sup> were generally accepted, our criminal law in general could hardly be said to maximize foetal protection.

## E. Inadequate Response to Recent Developments

Much of the law in this whole area was written at a time when medical science was much less well developed. At that time rough and ready definitions of birth and death were perfectly adequate. Today, however, as we observed above, when embryos can be fertilized outside the womb and when foetuses can be temporarily removed from the womb and then replaced in it, the simple definition of "human being" in section 206 of the *Criminal Code* no longer suffices. In addition, the abortion provisions themselves reveal a disconcerting lack of nuance in their treatment of the unborn. While laws in other western countries<sup>64</sup> draw distinctions based on the gestational age of the foetus, focusing on trimesters, quickening, and viability to mark out different procedures and levels of culpability, Canadian law totally ignores the different stages in foetal biological development. It views all abortions, late or early, as the same — as either totally unlawful or as permissible on therapeutic grounds whatever the age of the foetus in question.

Medicine, however, is not the only field in which there has been development in thinking. In ethics, too, the views of our community on many issues are not what they were a hundred or even twenty years ago. Many things scarcely condemned at all in the last century, like environmental pollution and cruelty to animals, are meeting increasing social criticism in our time. Many things roundly condemned a hundred

61. (1973) 1 O.R. (2d) 482, 40 D.L.R. (3d) 666 (C.A.).

62. The maxim *infans conceptus pro natura habetur quoties de commodis ejus agitur* in civil law stands for the proposition that the foetus enjoys certain privileges provided that it is born alive and viable. [TRANSLATION] "The unborn child is not a person — nor is it a thing nor a part or an organ of its mother. In reality it does not fit into any legal category of person or property..." *Longois c. Meunier*, [1973] C.S. 301, p. 305.

63. See note 44.

64. See Appendix A.

years ago, like extra-marital intercourse and witchcraft, are viewed with much more tolerance today. Such changes in attitude call for reappraisal of much of our criminal law.

Such reappraisal was suggested in our report to Parliament in 1976, *Our Criminal Law*.<sup>65</sup> In that report we recommended restricting the ambit of the criminal law and limiting the *Criminal Code* to acts generally considered by the community to be wrongful enough to warrant the intervention of the criminal law. Acts no longer so considered, we suggested, should be removed from the Code and be decriminalized, and acts whose wrongfulness is controversial should be investigated so as to determine whether they should be abolished, redefined more restrictively or written in more stringent provisions.

Among this last category we put obscenity, incest, bigamy, indecency and abortion. Clearly our abortion provisions, even given the therapeutic compromise in section 251 and the necessity defence in section 221, in no way responded to many people's intense convictions at the present time. On the one hand the compromise itself ignored convictions strongly held by many to the effect that women are entitled to full control over their bodies and their physical destiny and should be free to obtain abortion on demand. On the other hand the operation of that compromise, in practice in certain hospitals, rode roughshod over convictions equally strongly held by many to the effect that the life of the unborn deserves the same protection as the life of those whom section 206 defines as human beings.

Finally, the abortion section did not comply with recent constitutional imperatives in the *Canadian Charter of Rights and Freedoms*. Conspicuous among them is the right, laid down in section 7, to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice. For lack of compliance with that section, in January 1988 the Supreme Court of Canada in *Morgentaler* held the abortion section unconstitutional.

The court reasoned as follows. First, because, in depriving a woman of general access, without fear of criminal sanction, to medical treatment for a condition representing danger to life or health, it infringed on her right to security of the person.<sup>66</sup> Second, because the procedures stipulated in section 251 for access to therapeutic abortions prevented that deprivation being in accordance with fundamental justice.<sup>67</sup> And third, because, although protection of the foetus is a valid governmental objective justifying reasonable limits under section 1 on the right to abortion, the means chosen in section 251 for achieving that objective were not so rationally connected with it as to save the section under section 1.<sup>68</sup>

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65. Law Reform Commission of Canada, *Our Criminal Law*, Report 3, (Ottawa: Information Canada, 1976) at 20.

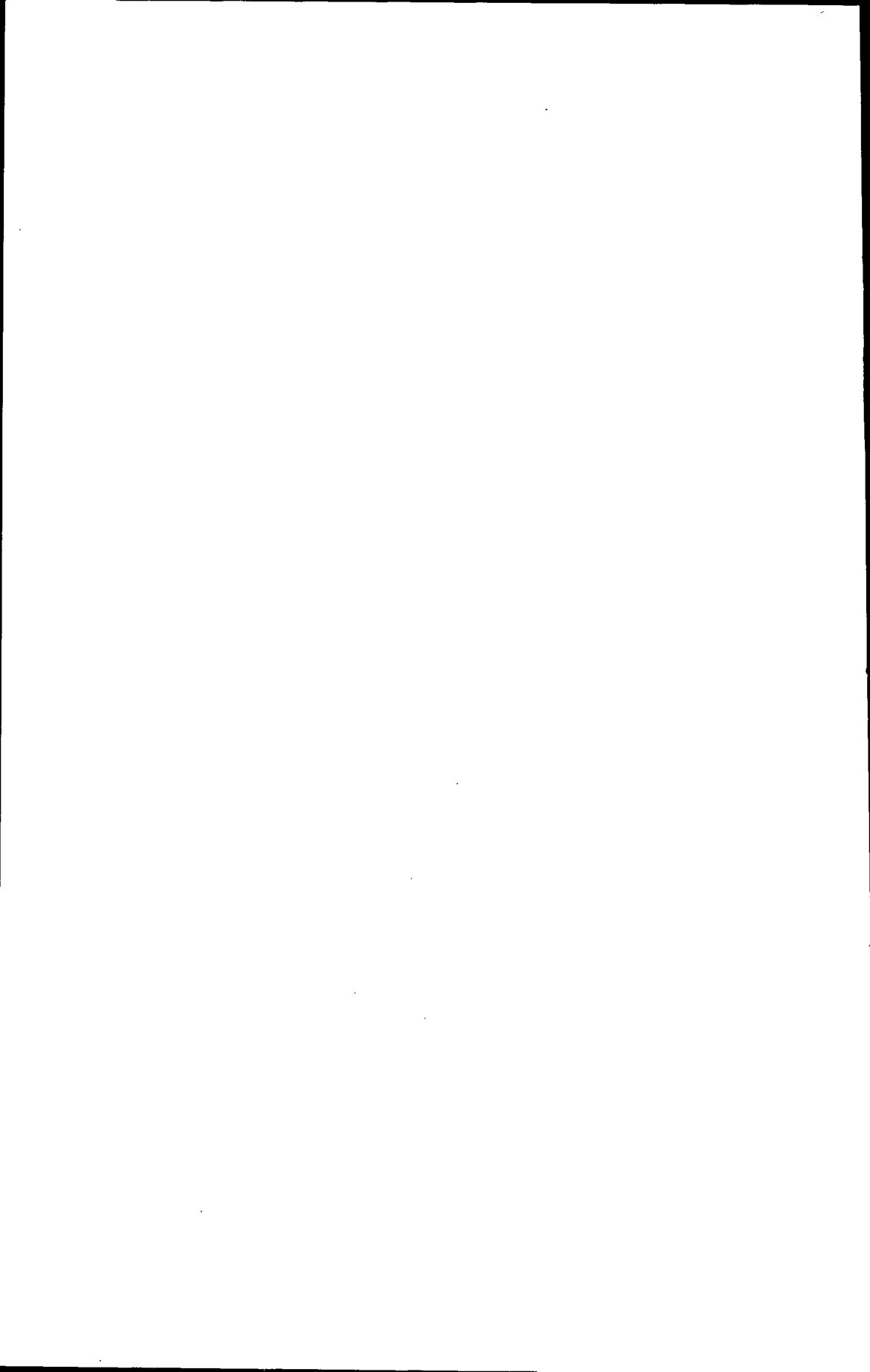
66. *Morgentaler* [1988], *supra*, note 7 at 53-63; per the majority reasons of Dickson, C.J.C.

67. *Ibid.*, at 63-73.

68. *Ibid.*, at 75-76.

## F. Conclusion

Clearly, therefore, our criminal law relating to the foetus needs overhaul whatever one's view about the issue of abortion. Those wishing to replace the present section 251 by something more consistent with the *Charter* will obviously want legislative action to this effect. Even those preferring to have no law about abortion will hardly want to leave the rest of this area of the law unaltered and may join with the former in demanding amendment to such things as the case law definition of "person," the statutory definition of "human being," the offences of killing during birth and supplying noxious things — in other words they will be concerned with re-examining sections 203, 205, 206, 221 and 252 of the present *Criminal Code*. All parties, therefore — pro-choice adherents, pro-life adherents and those preferring some sort of compromise — cannot but agree that the existing law must be reshaped.



## CHAPTER THREE

### Reshaping Present Law

Reshaping criminal law can take two forms. It can consist of "housekeeping," i.e., careful redraft of present provisions to rid them of detailed shortcomings. Or it can chart a new approach and radically rethink the whole thrust of those provisions.

#### I. A Redraft

"Housekeeping" could admittedly bring improvement to this area. It could remove the ambiguity arising from the case law definition of "person" for the purposes of section 203 and make clear how far that and the other sections listed apply to fetuses. It could tighten the definition of "human being" in section 206 and clarify the position of fetuses removed temporarily or permanently from the womb. It could sort out the inconsistency between sections 221 (killing during birth) and 251 (abortion). Lastly, it could set out the provisions on infanticide with more logic and coherence.

Some housekeeping improvements of this kind have already been suggested in our previous papers. In Report 31, *Recodifying Criminal Law*,<sup>69</sup> we restrict all crimes against the person, from murder down to simple assault, to acts done to "persons," and define "persons" as those already born by having completely proceeded in a living state from their mother's body. We also recommend repeal of the infanticide provisions since the diminished responsibility situations they cater to could be more easily dealt with in sentencing, given abolition, as we recommend, of the fixed penalty for second degree murder. As well we limit crimes to acts and omissions explicitly defined as such by the *Criminal Code* or by some other act of Parliament and avoid piggy-backing criminal liability on to non-compliance with provincial law.

Here too we make some housekeeping suggestions. First we recommend a revised definition of the term "person." In Report 31, *Recodifying Criminal Law* we define it as "a person already born by having completely proceeded in a living state from the mother's body, or a corporation."<sup>70</sup> Instead of this we now suggest rewording that definition as follows:

"person" means a corporation, or a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival.

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69. *Supra*, note 46.

70. *Ibid.*, at 171, Draft Legislation section 2.



This change will have several advantages. First, it will ensure that, though foetuses are the product of human conception and therefore human, criminal law still limits homicide to victims already born. Second, it will clarify that non-fatal crimes of violence are limited to the same kind of victims. Third, use of the word "permanently" excludes foetuses outside, or removed from, the womb but requiring re-implantation for continuation of gestation and achievement of live birth.<sup>71</sup> Fourth, the definition excludes fertilized cells and embryos *in vitro* in order to avoid stigmatizing their disposal as homicide.

Our second recommendation concerns section 221 (killing an unborn child in the act of birth). This provision, we suggest, should be jettisoned from the proposed new Code. The reason is that if, as we later recommend, there be a general crime of destroying or harming a foetus (subject to certain limitations as in the case of lawful abortion) this will also cover acts of destroying a foetus before it has completely and permanently proceeded from the mother's body.

Our third recommendation relates to section 226 (neglect to obtain assistance in childbirth). This provision too in our view should not be retained in a separate section but, if retained at all, should be incorporated in a general foetus offence.

Fourth, we recommend dropping the provision contained in section 227 (concealing body of child). This crime is modelled on that introduced by the English *Offences against the Person Act 1861* on account of the difficulty of proving unlawful homicide of new-born infants. On this Williams observes:

that statute is of doubtful justice, because a woman who has given birth to an illegitimate child, which dies soon after, may wish to conceal its birth for reasons that do not indicate her responsibility for its death. The statute is not required in order to secure the public notification of births, because this is provided for in other legislation.<sup>72</sup>

To this we only add that where there has been a homicide or crime of foetal destruction, concealment of the body will be covered under the new Code's clause 24(3)(b) on concealment of real evidence, and where there hasn't, there is no need to supplement statistics legislation by use of criminal law.

Finally, we recommend dropping the provision contained in section 252 concerning supply of noxious things. This section is unnecessary given a general foetus offence since the supplier would be liable under the proposed new *Code* for furthering the crime against the foetus where the noxious thing is supplied for an unlawful purpose.

## RECOMMENDATIONS

**1. "Person" in the new Code should be redefined as a corporation, or a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival.**

71. On this process see: H. Tuchmann-Duplessis, *et al.*, *Illustrated Human Embryology*, 3 vols., Trans. by L.S. Hurley (London: Springer-Verlag, 1972-73); and K.L. Moore, *The developing Human*, 2nd ed. (Philadelphia: Saunders, 1977).

72. *Supra*, note 48 at 292. See in Canada, the *Statistics Act*, R.S.C. 1970-71-72, c. 15, s. 29, and parallel provincial legislation.

2. There should be no separate provision in the new Code concerning killing in the act of birth.

3. There should be no separate provision in the new Code concerning neglect to obtain assistance during childbirth.

4. There should be no provision in the new Code concerning concealing the body of a child.

5. There should be no provision in the new Code concerning supply of noxious things.

## II. A New Approach

Mere housekeeping, however, is of limited value. While we can redefine "person" in more careful detail, we must still ask how far outside the context of abortion it should be criminal to destroy or harm fetuses and how far homicide law should apply to embryos and fetuses surgically removed from the womb. While we can amend or drop the "supply of noxious things" provision, we still must determine whether all procurements of miscarriage (e.g., by back-street abortionists) should be decriminalized.

All this calls for a re-thinking of the whole area so as to chart a more coherent legal approach. Should the fetus be protected by the law at all? If so, should it be protected by the criminal law? These questions call for answers underpinned by fundamental social principles.

### A. Search for Principles — The Four Tests in Our Criminal Law

As observed earlier, such principles cannot be found simply by reliance on market research or religious doctrine. In our view, they can only be discovered by reference to our fundamental social values. Such values, we contended in *Our Criminal Law*,<sup>73</sup> are of two kinds. Some are essential to the very existence of society, some to the existence of our own particular society in its present shape and form.

Essential values are those without which all social life would be impossible. Society being a co-operative enterprise, there must be among its members some give and take, some respect for each others' needs and vulnerabilities, some mutual trust, reliance and preference for order over anarchy, peace over violence and honesty over deceit. All social life commits its members to values like sanctity of human life and inviolability of the person.

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73. *Op. cit.*, note 65.

Values essential, not for the very existence of society, but for the existence of our own particular society include, for instance, the value set in Canada on justice, equality, dignity and individual liberty. These are by no means necessary for social life — many societies have survived without them. But such are not societies Canadians would ever want to live in.

These basic principles and values, we have argued, dictate the right shape for our criminal law. They suggest that it should play a limited role, operate with restraint, and function as an instrument of last resort. In line with this approach, given government approval, in *The Criminal Law in Canadian Society*,<sup>74</sup> we have urged that no act should be a crime unless it satisfies four tests set out as follows:

To determine whether any act should be a real crime within the *Criminal Code* we should inquire:

- does the act seriously harm other people?
- does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
- given that we can answer “yes” to the above three questions, are we satisfied that criminal law can make a significant contribution to dealing with the problem?<sup>75</sup>

The first two tests outlined above in fact answer the question whether an act merits attention from the law in general. Tests three and four help answer the question whether it merits the attention of the criminal law in particular. To put it another way, the first two tests deal with the question of whether the foetus deserves any legal protection, the other two with the question of whether it deserves criminal law protection.

## B. Applying the Principles — The Tests in Our Criminal Law

Do acts of foetal destruction and injury satisfy these tests? First, a preliminary point. Clearly such acts may be committed in two different situations, by three different categories of persons and at four different levels of culpability. They may be committed with or without the consent of those carrying the foetuses in question. They may be committed by those carrying, by their physicians or by third parties. And they may be committed intentionally, recklessly, negligently or by accident. Clearly, in many people's eyes, their criminality, if any, will vary accordingly — negligent acts will be less criminal than reckless ones, reckless ones less criminal than intentional ones, and

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74. Government of Canada, *The Criminal Law In Canadian Society*, Ottawa, 1982.

75. *Op. Cit.*, note 65 at 33-34.

acts done by pregnant women themselves, or with their consent, will be less criminal than those done by third parties against their objections.

But should there be criminality at all? Take the worst case: a third party deliberately destroys a foetus against its mother's will. Should this be criminal? How far does this act satisfy the four tests laid down in *Our Criminal Law*?

### Test One — Harm to Other People

First, does foetal destruction harm other people? Plainly there are two possible victims of such harm. One is the pregnant woman herself. The other is the foetus.

#### (a) *The Pregnant Woman*

The pregnant woman poses little problem. If a consenting party, she can't complain of harm unless the operation is done so negligently as to jeopardize her health and safety. If a non-consenting party, she unquestionably suffers harm. But this, like the harm resulting from any other act of violence, can be dealt with quite adequately by charges of assault, unlawful bodily harm and so on. No special foetal offences are needed.

#### (b) *The Foetus*

What of the foetus? First, two preliminary points. In this discussion we are concerned with foetuses either in the womb or only temporarily removed from it. We are not concerned with embryos completely and permanently outside the womb such as those resulting from *in vitro* fertilization programmes. In such programmes more embryos are produced than can be safely implanted. The resulting "spare" embryos not being destined for birth, fall into a unique category, to be protected, if at all, not by the ordinary criminal law relating to the person but rather by special regulations, which are discussed below. Accordingly, acts harming or destroying such embryos fall outside the present discussion.

The second preliminary point relates to medical treatment. With ordinary persons, i.e., those already born, the principle outlawing harm is subject, in law and in morality, to an exception for medical treatment.<sup>76</sup> In general, such treatment benefits rather than harms the patient, and even where it doesn't it is intended so to do. For that reason, medical procedures, which are discussed below, also fall outside the present discussion.

Apart from these two exceptions, can acts harming or destroying the foetus be said to cause harm to "other people?" Clearly there is real harm to the foetus, but

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76. Report 31, *supra*, note 46, Draft Legislation s.44(2)(a). Report 28, *supra*, note 1 at 6-7.

should it count as "other people?" Is it a person, and, if so, from what point in time — from conception, from quickening, or from some other moment?

As explained earlier, this question poses a twofold difficulty. First, despite widespread agreement that for legal purposes foetal personhood must occur at some precisely defined point in time, there is no consensus as to when that point is reached. Second, we don't know how to reach consensus because the controversy is less of a scientific than of a moral nature — the disagreement isn't over facts but over their evaluation. Not surprisingly, therefore, we find different approaches. Those stressing that life is a continuous process from conception to death, that a foetus on the point of birth differs little from one just born, and that either of them can show equal evidence of suffering pain will clearly see the foetus as a person.<sup>77</sup> Those focusing on the foetus' primitive nature in its early stages, on its utter dependence on its mother and on the unique relationship between them will see it as less than a person.<sup>78</sup>

Actually, however, for two reasons we suggest that there is no need to ask this question. First, although the first test in *Our Criminal Law* speaks in terms of "other people," this test was developed, not with foetal offences in mind, but rather as a general principle in reference to the ordinary standard crimes against the person and against property. It served, rather, to stress the need to focus criminal law chiefly on crimes of violence and to show restraint in other use of criminal law, especially in relation to crimes without victims.

Meanwhile, as our work on the criminal law proceeded, we widened the ambit of that first test. In two instances we proposed using criminal law against acts causing harm, not to other people, but rather to other categories of entities meriting protection: One comprised the environment, the other animals. In both cases we saw such acts as meriting criminalization, though not necessarily to the same extent as acts against the person. In our view, the foetus is yet another category.

Second, to decide whether to give the foetus criminal law protection we don't need to decide if it is a person.<sup>79</sup> Instead we can directly ask how far we should protect it. Indeed, the answer to this question — how to protect it, how to treat it, how to regard it from a moral standpoint — is itself part of the answer to the question whether morally it counts as a person.

Once we go straight to the question of how to treat the foetus, our ordinary intuitions can point the way. On the one hand, as observed earlier, a person destroying a woman's foetus against her will is looked on by many as committing a wrong not only to the woman herself but also to the foetus. Suppose, to take a rare but nonetheless illuminating example, an eight months pregnant woman with no next of kin lies in an irreversible coma and some third party for his own ends destroys her foetus. Would not

77. *Supra*, note 33.

78. *Supra*, notes 34 and 35.

79. There is nothing which limits criminal law protection to persons. Further, even those who deny that the foetus is a person might accept a measure of criminal law protection at some point in development.

most people view this as not only wrongful but also as a wrong to an entity meriting protection?

This view can find support from other factors. Countries permitting capital punishment typically exclude it for a pregnant woman so as to avoid killing the "child" she carries.<sup>80</sup> Western states generally provide pre-natal care not only for the sake of pregnant women and society but also presumably for the sake of the foetuses. Most societies are anxious at the prospect of scientists destroying foetuses simply for purposes of research, experiment or commerce — harvesting foetuses for use in the cosmetic industry,<sup>81</sup> for instance, strikes most people as wholly repulsive. Thus the foetus surely is not seen as wholly without intrinsic value.

On the other hand, it isn't necessarily seen as having the same value and as meriting the same protection as someone already born. Loss of a child isn't generally viewed as so traumatic before birth as after. Destroying a foetus, even against a woman's will, isn't generally regarded as quite on a par with murder. In fact most people see the foetus as having intrinsic value somewhere between that of a non-person and that of a person already born. They see it as being *sui generis* — a unique case. They also see it as having more value and meriting more protection as it develops. Loss of a foetus after eight months in the womb is more traumatic than loss of one after only one month.

We conclude, then, that foetal destruction and injury, on the face of it, results in harm to an entity deserving at least some protection and that the first test in *Our Criminal Law* is satisfied in this new extended sense.

#### Test Two — Serious Contravention of Fundamental Values

The second test raises two questions. First, does foetal destruction seriously contravene fundamental values? Second, does it do so in such a way as to be harmful to society?

The first question is fairly easy. Foetal destruction and injury clearly contravene two values — (1) respect for life<sup>82</sup> and (2) bodily security, both fundamental in our society and both articulated in the *Charter*.

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80. As Great Britain did prior to the abolition of the death penalty in 19065: *Kenny's Outlines of the Criminal Law*, *supra*, note 21.

81. For an example of the purported use of foetuses for cosmetic production and the outrage caused by same see: (1985) #1477 *The New Scientist* 12.

82. See LRCC Study Paper, *Sanctity of Life or Quality of Life*, and references therein, *supra*, note 1. Keyserlingk suggests three essential elements of the sanctity of life principle. These are: human life is precious and deserves respect and protection; human life cannot be taken without adequate justification; and the principle is basic to our society. Because the term 'sanctity of life' suggests an absolute principle going beyond these three components, we prefer to use the term 'respect for life' in this paper.

The second question is harder. Done without the mother's consent, foetal destruction clearly threatens these values, weakens respect for them and therefore harms society. Done with her consent or at her request, e.g., in an abortion, it has less clear results. Some think that it nonetheless lessens general respect for human life and harms society. Others assert that because foetal destruction is justified, it doesn't lessen that respect and so doesn't harm society. Yet others argue that protection of the foetus at the expense of the mother itself shows lack of respect for life.

Accordingly, we conclude as follows: in extreme cases, i.e., those done against the mother's will, foetal harm and destruction clearly satisfy both tests. They cause harm to other people and they so seriously contravene fundamental values, i.e., respect for life and bodily security, as to be harmful to society. Thus a *prima facie* argument exists for criminalizing foetal harm and destruction committed without the consent of the mother.

In less extreme cases, e.g., in consensual abortions and especially those done to save the mother's life, the position is less clear. They satisfy the first but not necessarily the second test — they cause harm to other people but don't necessarily involve manifest disrespect for life.

### Test Three — Will Enforcement Contravene Fundamental Values?

All use of criminal law may itself threaten fundamental values. It may threaten those very values it is meant to uphold. It may well infringe our basic interests. All of us, being subject to its prohibitions, find our liberty restricted, while those against whom it is enforced may suffer encroachment on their privacy, liberty, bodily security and even lives. All this must obviously be weighed against the prospective protection against harm to other people and the contravention of fundamental values.

Would criminalizing foetal harm and destruction, therefore, itself contravene fundamental values and infringe people's basic interests? Would it threaten the life, liberty and security of the mother? Would it threaten the life, liberty and security of any others?

#### (a) *Interests of Other People*

Interests of people other than the mother pose little difficulty. Clearly destruction of a woman's foetus can't threaten another person's life or bodily security. Nor, subject to two possible exceptions, can it threaten his or her liberty — no third party is entitled to continuation of a woman's pregnancy. So, however wrongful it may be to terminate a pregnancy, it isn't a wrong to the third party.

One possible exception is the father of the foetus. Clearly his close connection with it may render him concerned by the continuation or termination of the mother's pregnancy — deliberate destruction of a woman's foetus against her will is not only

wrong but also, many would contend, a wrong to other people — a wrong to her, a wrong to the foetus itself and a wrong to the father.

Use of criminal law against abortion, however, hardly infringes the liberty of a father wanting to terminate the pregnancy.<sup>83</sup> Where for reasons of life and health the mother decides to terminate her pregnancy, any liberty restraints posed by criminal law prohibition of abortion are clearly more significant for the mother than the father. Where the mother wants to continue the pregnancy, the father's choice must surely yield to hers.

Another possible exception relates to scientific research and business practice. In some cases, e.g., use in the cosmetic industry, the end in view may seem so trivial as to display utter disrespect for human life. In others the end may have greater social utility, e.g., increase in scientific knowledge, discovery of new cures and so on, but here, too, respect for foetal life must be maintained. Special provisions, therefore, as discussed below, may be necessary to regulate all such activity.

In general, then, we conclude that criminal prohibitions against foetal destruction and harm do not contravene fundamental values as regards third parties. Consequently, subject to the answers to the two remaining tests, we recommend the following:

## RECOMMENDATION

### 6. There should be a general crime of causing foetal harm or destruction.

#### (b) *The Mother's Interests*

Where the interests affected are those of the mother, the question is less simple. Here the values of life, liberty and security may pull in opposite directions. The value of the foetus' life and security argues in favour of its protection, the value of the mother's life, liberty and security may argue in favour of its destruction.

#### (i) *Foetus' Life v. Mother's Life*

Here we consider the classic, textbook situation where continuation of the pregnancy would kill the mother and termination would destroy the foetus. Fortunately such situations are, today, extremely rare — in most cases the doctor tries to save both

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83. In the American decision of *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), 49 L. Ed. 2d 788, 96 S. Ct. 2831 Blackmun, J. ruled that a Missouri law requiring a woman's spouse to consent to the abortion was unconstitutional. This was also the result of *Coe v. Gerstein* (1975 CA5 Fla) 517 F.2d 787, affd 428 U.S. 901 (1976), 49 L. Ed. 2d 1205, 96 S. Ct. 3202.

The Canadian Courts have dealt with fathers rights in *Medhurst v. Medhurst et al.* (1984), 46 O.R. (2d) 263 and *Mock v. Brandenburg*, July 29, 1988, Alta. Q.B., (unreported at time of writing). Veit, J. denied the request by the father for an injunction to prevent the abortion but indicated that relief may be found elsewhere, perhaps in contract or tort.



lives. They are, however, a useful starting-point for a general examination of the problem of balancing foetal and maternal interests. In the hypothetical case, therefore, where survival is possible for either but not both, which life should prevail?

Now, weighing one life against another is both difficult and objectionable. For one thing, each person's life is all that person has — snuff that out and you obliterate (for him or her) a universe. For another, what possible grounds can justify preferring one person's life over another's? All lives are surely equal.

This difficulty is illustrated in the common law doctrine of necessity.<sup>84</sup> Under that doctrine, acts otherwise criminal may be committed if they are the least harmful way of avoiding greater evil. But acts done solely to preserve one's own life at the cost of another's aren't allowed — loss of one's own life is no greater evil than loss of the other person's. For this reason the celebrated English case of *R. v. Dudley and Stevens*<sup>85</sup> ruled out necessity as a defence to murder.

This suggests preference for neither life — neither the foetus' nor the mother's. On the one hand, it suggests that the foetus can't be sacrificed to save the mother's life. On the other hand, it suggests that the mother can't be sacrificed to save the foetus. Nature must be left to take its course.

To this there are various counter-arguments. First, are all lives really equal? As argued earlier, our ordinary intuitions see the foetus as falling in value somewhere between a non-person and a person in the full sense, i.e., a person already born. They also see it as meriting increased protection as it develops and conversely less protection in the earlier stages.

Secondly, another reason for seeing the foetus' life as less than equal to the mother's is its dependency. The foetus' life depends on the mother's metabolism whereas the mother's, which supports it, forms an independent life. For this reason, many would reject the notion that the independent supporting life should be called upon to sacrifice itself in the interest of the dependent life which it supports.

Thirdly, the foetus' life in this kind of situation threatens the mother's. Now, arguably no one is morally obliged to yield their life in response to such threats. No

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84. See for example: Williams, *supra*, note 48 at 295-296, 302, 603; Smith and Hogan, *supra*, note 48, p. 201-204; Mewett and Manning, *supra*, note 48 at 348-352; See also *Perka v. The Queen* [1984] 2 S.C.R. 232.

85. [1884] 14 Q.B.D. 273.

one is under any moral obligation to remain passive and allow their own life to be sacrificed to such a threat.<sup>86</sup>

We conclude, then, as follows. Where survival is possible for either the mother or the foetus but not for both, to destroy the foetus may be justified if there is no other way of terminating pregnancy. But even if it were not morally justified, we would still recommend that it shouldn't be subject to criminal penalty. For no woman should be compelled by threat of criminal sanction to lay down her life for her unborn child. Under "other way" we don't of course include forced treatment, e.g., caesarian section, which would constitute assault upon the mother if imposed without her consent.<sup>87</sup>

## RECOMMENDATION

**7. The general crime of destroying a foetus should not apply to acts done to save the mother's life.**

### (ii) *Foetus' Life v. Mother's Security*

What if continuation of the pregnancy will do serious but non-fatal harm to the mother? Suppose for instance it will result in loss of a kidney — a result not putting her in immediate danger of death but lessening her long-term chances of survival. Or yet again suppose it will make her a nervous wreck incapable of functioning as an independent person — the outcome accepted in *R. v. Bourne*<sup>88</sup> as justifying that particular abortion. In such cases can pregnancy be justifiably ended?

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86. Suppose, by way of analogy, two people are drowning. One is just about able to swim and therefore stay afloat until help comes. The other cannot swim but manages to climb on the first's back. Staying on his back he will be able to survive till he is rescued but the other one will drown. Here, no one would suggest that this other must morally allow the non-swimmer to ensure his survival in this way. Rather, most people would contend that he is fully entitled to get rid of this extra burden that would cost him his life. Of course there is nothing wrong in the non-swimmer's adopting this means to survival. There's equally nothing wrong in the swimmer's refusing to let him adopt it. Each is free to seek his own survival.

87. Equally unacceptable are court ordered caesarian sections. Court orders of this nature are premised on making the foetus a ward of the court pursuant to child care and protection legislation, but such legislation typically defines children subject to its provisions as children under a stated age, e.g., 16 years — a definition surely not encompassing the unborn. Moreover, while on the face of it the legislator may within its own jurisdiction authorize a court to issue any order whatsoever, an order requiring a caesarian section may well contravene s. 7 of the *Charter* and not be salvageable under s. 1. But finally, even if as a legal matter the *Charter* were held not contravened, we would still contend that on moral principle no one should be compelled to undergo surgical operations against their will. For two recent Canadian cases which raise these issues see: In the matter of the Family and Child Service Act S.B.C. 1980 and amendments and in the matter of baby boy Roininen, B.C. Prov. Ct., Doc # 876215, Vancouver registry, 3 Sept., 1987; and In the matter of the Child and Family Services Act, Statutes of Ontario, 1984, ch. 55 and in the matter of the Children's Aid Society of Belleville and the unborn child of L.T. and G.K., Doc # 105/87, Belleville registry, 2 April, 1987.

88. *Supra*, note 19.

Here three factors have relevance. First, there is a qualitative difference between an interest in life and an interest in bodily security.<sup>89</sup> Second, there is arguably also a difference between those with the interests. Third, an interest in life is surely an interest in a life worth living — not only quantity but also quality is of importance.

First, the qualitative difference between life and security. Life is clearly more fundamental than bodily security. So, other things being equal, one person's life takes precedence over another person's security. Take away the former's life and we take everything. Take away the latter's bodily security and life still remains.

As against this there is the second factor — the difference between those with the interests: the mother and the foetus. The mother is a fully independent person already born and functioning in society. The foetus isn't yet independent but is only a potential person. This being so, the general priority for life over security may not necessarily apply. How many would agree, for example, to save the foetus' life by subjecting the mother to a kidney removal? Is she to that extent her foetus' keeper?

In addition there is the third factor — right to life means right to a life worth living. Life here means more than mere survival; it means life as a human being with all that that connotes. Forced continuation of a pregnancy rendering a woman a physical or mental wreck can be seen as infringing not only her right to bodily security but also her right to life itself.

We conclude, therefore, that termination of a pregnancy is justified to protect the mother against serious though not necessarily life-threatening injury. Again, even if it were not, we would still see it as unfit for criminalization. No woman should be compelled by law to continue a pregnancy likely to rob life of most of its quality. Law's proper concern is with duty not with heroism.

## RECOMMENDATION

8. The general crime of destroying a foetus should not apply to acts done to protect the mother against serious physical injury.

### (iii) *Foetus' Life v. Mother's Liberty*

Most difficult is the conflict between foetal survival and maternal autonomy. Should the former take precedence and compel continuation of the pregnancy? Or should it yield to the mother's right of control over her own body?

Again three factors arise for consideration. First, life is more fundamental than autonomy. Second, there is again the qualitative difference between those with the

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89. In *Mills v. The Queen* [1986] 1 S.C.R. 863 Lamer, J. defined security of the person as including not only physical integrity but also the right to psychological integrity. This was followed by Dickson, C.J.C., in *Morgentaler* [1988].

interests. Third, autonomy is itself highly prized in our society — a community in which a woman had no say over her own physical development would be one most Canadians, male or female, wouldn't want to live in.

Priority of life over liberty obviously argues in favour of the foetus.<sup>90</sup> The notion that all human life has value argues against letting pure whim dictate termination of pregnancy. It opposes abortions done simply for capricious reasons.

The qualitative difference between those with the interests argues the other way. Increasing protection for the developing foetus suggests, as argued above, that the further back its development, the greater the subordination of its interests to those of its mother. Her lower interest in autonomy when taken in conjunction with her higher status may in the end take precedence over the foetus' higher interest in life when taken in conjunction with its lower status.

This brings us to the third factor — the mother's actual interest in autonomy. Central to our kind of society is the notion that people are ends in themselves and aren't to be used simply as means to the ends of others. Part of being an end in oneself is control over one's bodily destiny — our bodies are where we all primarily live and have our being. But part of such control includes for every woman the right to choose whether or not to start a pregnancy. Arguably, part of it too is the right to choose whether or not to end a pregnancy, especially one not chosen by her and even more especially one forced upon her. Hers, surely, is the right to control her physical destiny and to take such decisions so long as she does no harm to other people.

The foetus, however, is clearly affected by termination of the pregnancy and, as argued earlier, qualifies for protection under Test 1 in *Our Criminal Law*. How can we strike a balance, then, between its survival interest and its mother's autonomy interest? Two views emerged in the Commission — a two-stage and a three-stage approach.

### (c) *Three-Stage Approach*

One view of the Commission would favour a compromise position similar to that arrived at by our special working group. That position, which seems in line with Madam Justice Wilson's suggestion in *Morgentaler* and with the position adopted by the United States and certain other jurisdictions, divides foetal development into three

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90. Wilson, J. in *Morgentaler* supra note 7 at 182: "The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place between these two extremes and, in my opinion, this progression has a direct bearing on the value of a foetus as potential life...(I)n balancing the State's interest in the protection of the foetus as potential life under s.1 of the *Charter* against the right of the pregnant woman under s.7, greater weight should be given to the State's interest in the later stages of pregnancy than in the earlier.

stages or trimesters.<sup>91</sup> The first of these ends at the twelfth week of pregnancy (LMP), the second extends to about the twenty-second week and the third from the twenty-second week until the end of the pregnancy.<sup>92</sup>

The rationale for this division is as follows. First is the duration of the first of the three stages. At about the eighth week a woman usually knows she is pregnant. In the tenth week the embryo becomes a foetus in a technical sense and, in accordance with the view of increasing development meriting increased protection, by this time calls for closer restrictions on abortion. To extend the first stage, therefore, to the twelfth week is meant to afford the woman sufficient time for reflection and deliberation before deciding to continue or terminate the pregnancy. It also reflects current medical guidelines concerning the performance of abortion.

Next is the duration of the second stage — from the twelfth until about the twenty-second week. At some time near the twenty-second week the foetus becomes viable, i.e., able to survive outside its mother's womb. The time of viability varies but within the present day limits of medical science all we can say is that viability is unlikely before the twenty-second week LMP. Again, therefore, consistent with the view of increasing foetal protection, the point of viability calls for yet closer restrictions on abortion.

According to this compromise position foetal protection increases as follows. During the first trimester there should be no lawful restriction on abortion — in short, during those first twelve weeks abortion should be a private matter between a pregnant woman and her doctor. This would on the one hand prioritize the mother's autonomy and privacy and on the other hand acknowledge the difficulty of enforcement during these early weeks, especially if self-abortifacient drugs become available in the near future. During the second trimester there should be abortion only on medical grounds to protect the mother's physical or psychological health. Such grounds would need to be evidenced by a doctor. At this stage, however, the evidence of one doctor would suffice.

During the third trimester the abortion should be allowed only when necessary to save the mother's life or to protect her from serious injury. Such necessity would need to be evidenced at this stage by two doctors.

The minority view in the Commission was that this three-stage compromise, itself the recommendation of the special working group, had in its favour reasons of principle and practicability. As to principle, it emphasizes maternal autonomy during the first

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91. In *Morgentaler*, *ibid.* 182, Wilson, J. said in obiter: "[T]he value to be placed on the foetus as potential life is directly related to the stage of its development during gestation."

In the United States this position has been applied in: *Roe v. Wade*, 410 U.S. 113 (1973); *affd City of Akron v. Akron Center for Reproductive Health Ltd.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986).

92. In all cases the Commission bases its calculations on the time elapsed since LMP. See the discussions on pg.12 ff. of this paper and the references given *supra*, note 91.

stage, gives greater weight to foetal interests in the second stage and is therefore consistent with the notion that as it develops the foetus merits increased protection. As to practicability, it allows for the difficulty of enforceability of abortion laws during the first stage and harmonizes with current medical practice, according to which doctors generally prefer to perform abortions when it is safest to do so, i.e. up to about the twelfth week of pregnancy.

#### (d) *Two-Stage Approach*

On consideration, however, the majority of the Commission preferred a simpler two-stage approach and decided against this compromise for several reasons. First, difficulty of enforcement doesn't necessarily rule out some role for criminal law. Crimes committed in private by one person on another are often very hard to prove but law fulfils a function even by underlining the basic value at risk. Second, reference to any other point than viability, at which time foetal life becomes sustainable independently from its mother's life, weakens a principled approach to criminal lawmaking.<sup>93</sup> Third, in our view neither maternal autonomy nor foetal life should be allowed in the early trimester to completely outweigh each other — one may prevail in this case, another in that, but neither should ever be extinguished from consideration. The law should recognize the foetus as having at all stages some intrinsic value. So, while the termination of a woman's pregnancy should be primarily a matter between her and her doctor, it should never be a purely private matter — there is a public interest in the unborn at all stages.

The majority, then, opted for a two-stage approach. The second stage, consistent with principle, can be said to start at the twenty-second week. The first stage will therefore extend to that week.

This still leaves us, however, with the problem of balancing foetal life against maternal autonomy in the first stage. If both are always there to be called into play so that now one prevails and now the other, how can we decide in any given case which one is to be favoured?

Help may perhaps be gleaned from the civil law doctrine of abuse of rights.<sup>94</sup> This doctrine has it that a person's rights may not be abused by being exercised capriciously without regard to the effect on other people. A property owner, for instance, may not use his right to extract water flowing underneath his land simply in order to deprive his neighbour of it — he has to have sufficient reason.

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93. Both the Canadian Medical Association and The Society of Obstetricians and Gynaecologists of Canada consider viability possible in ordinary circumstances at twenty-two weeks LMP and/or a foetal weight of 500 grams.

94. On this see J.-L. Baudouin, *La Responsabilité Civile Délictuelle* (Cowansville, P.Q.: Editions Yvon Blais, 1985) at 71-90.

Such an approach can be illustrated as follows. In general every woman is entitled to make decisions about her physical welfare. In particular she is entitled to determine as a private matter between her and her physician whether or not to terminate her pregnancy. At the same time the foetus still has interests which may be overruled but never wholly extinguished. Accordingly, in any given case, a woman is entitled to terminate her pregnancy but only for some sufficient reason.

What counts, however, as sufficient reason? Clearly not something so exacting as to restrict abortions to life-threatening situations already covered and therefore to render her autonomy illusory. Equally clearly not something so slight as to cater simply to pure whim or caprice and deprive the foetus of all protection.

In our view a sufficient reason here should be the need to avoid detriment to the mother herself. Continued pregnancy would not need to endanger life or threaten very serious injury of the kind discussed above under the rubric of bodily security in order to be considered detrimental. But it would need to do more than create annoyance or inconvenience. It would need, we feel, to affect her general welfare in terms of physical, mental or psychological health. "Psychological" is used in the recommendation as the broader term encompassing what is often referred to as mental health.

Admittedly, "health" itself is not defined in the proposed chapter any more than it is under the present *Code*. The addition of the words "physical or psychological," however, brings more clarity. Whereas the present *Code* leaves it uncertain whether "health" covers physical health, psychological health and even (as according to WHO) social well-being, the proposed draft specifies that the term covers physical and psychological health but excludes social well-being. It does not detail the various kinds of detriment to health and the manifold causes thereof but leaves them for determination in the circumstances of each individual case.

Various other candidates for justifiable grounds for abortion have been put forward. Conspicuous among them is the fact that the pregnancy results from rape or incest. Though arguments can be made supporting these juridical grounds, in our opinion they focus on the wrong aspect — on the cause of pregnancy instead of the result. In our view what justifies ending a pregnancy is not that it results from rape or incest but that its effect, as well may happen in such cases, is to undermine the woman's physical, mental or psychological health.

Another suggested candidate relates to socio-economic reasons — the mother can't afford another child, the parents already have more children than they can cope with, and so on. Again, this puts the focus on the wrong place. Such economic and social reasons by themselves in our view fall below the threshold of justification unless they serve to undermine the mother's health.

Yet another possibility is that the foetus suffers from some serious though non-lethal defect. In our view, however, our society and our law, especially since enactment of the *Charter*, has no place for the notion that the handicapped, born or unborn, are a

lesser breed than their more fortunate able-bodied counterparts.<sup>95</sup> Again the only justification for abortion in such cases might be that continued pregnancy would produce such trauma as to undermine the mother's health. This, we would sincerely hope, is a problem to be approached rather with compassionate social concern, with supportive counselling and with meaningful social assistance.

In short, in the first stage the mother's autonomy concerning her health should be respected so long as its exercise in its turn manifests respect for the life of the foetus. This means neither that the latter must always take precedence nor that we lack confidence in the good faith of pregnant women to act responsibly in these matters and to terminate pregnancies only for sufficient reasons. On the contrary, it accords with our general confidence that women and doctors act and will continue to act with such responsibility.

## RECOMMENDATION

**9. The crime of destroying a foetus should not apply to acts done before the twenty-second week of pregnancy to protect the mother's physical or psychological health [or to acts done before the twelfth week of pregnancy (alternative)]**

### Test Four — Can Criminal Law Make a Significant Contribution?

The harmfulness of any act won't of itself warrant its criminalization. As pointed out in *Our Criminal Law*, all criminalization comes at various costs in terms of suffering, loss of liberty and enforcement expenses. Unless these costs are outweighed by benefits in terms of some social improvement, the use of criminal law is never justified. In short, the criminal law must be used with restraint and only where it can significantly contribute to the solution of a problem.

The problem here consists in wrongful destruction and injury of foetuses.<sup>96</sup> Is this a problem criminal law can help to solve? Is this sort of foetal destruction and injury something criminal law can wholly or partly prevent?

To some extent it is. Foetal destruction and injury without the mother's consent, and more especially against her will can surely be discouraged by criminal law denunciation backed by sanctions. Violent assaults on foetuses, therefore, and also gross negligence in medical treatment can, in our view, be discouraged by such denunciation. True, acts harming the mother as well as her foetus are already covered by the ordinary crime of bodily harm. But acts harming the foetus only are not; they are covered at most by the minor crime of assault by touching, as concerns the mother,

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95. S. 15 of the *Charter*, *supra*, note 3 states that "Every individual is equal before and under the law and has the right to equal protection and benefit of the law... without discrimination... based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability." (emphasis added)

96. See *infra* at 34-37; see also E.W.Keyserlingk, *The Unborn Child's Right to Prenatal Care* (Montreal: Quebec Research Center for Private and Comparative Law, 1984) at 41-59.



and by no crime, as concerns the foetus, because ordinary crimes of violence can only be committed against persons already born.

It is possible that criminal law could be of use with respect to various other acts conflicting with the principle of human dignity — commercial trade in foetuses, cloning of foetuses, inter-species fertilization, and other experiments manifesting complete disrespect for human life.<sup>97</sup> The Commission is presently studying these and other issues involved in human experimentation and will present its views in a separate working paper in the near future. Some of these may be fit subjects for the attention of the criminal law.

Clearly some special foetus provisions are essential. Such provisions, in so far as they relate to harm to foetuses, could take two forms. They could for the most part take the form of special aggravating factors serving to render assaults against the mother more serious. Or they could take the form of special foetus offences highlighting foetal protectability in its own right and the intrinsic wrongfulness of foetal harm and destruction.

Criminalization of foetal destruction at the mother's request is more problematic. Arguably even where maternal should yield to foetal interests, the criminal law is not the right solution. For one thing, it may prove ineffective. For another, it may represent too negative an approach.

First, it may prove ineffective. On the one hand, the stricter the criminal law about abortion, the softer the view perhaps of juries, and meanwhile the greater the temptation to resort to back-street abortionists with all the health dangers involved. On the other hand, the greater the availability of self-abortifacient drugs in the near future, the smaller the chance of monitoring what goes on and so affording an opportunity to criminal law to make a contribution.

Second, resort to criminal law may represent too negative an approach to the problem. That problem is surely not so much the woman's pregnancy as its unwantedness. But its unwantedness may well result from a variety of factors — from the lack of adequate birth control counselling and facilities for teenagers, from the traditional stigma imposed on birth outside wedlock, from the insufficiency of social support for parents and especially for single parents, from the inadequacy of present assistance, in terms of day care for example, for working mothers and finally from our

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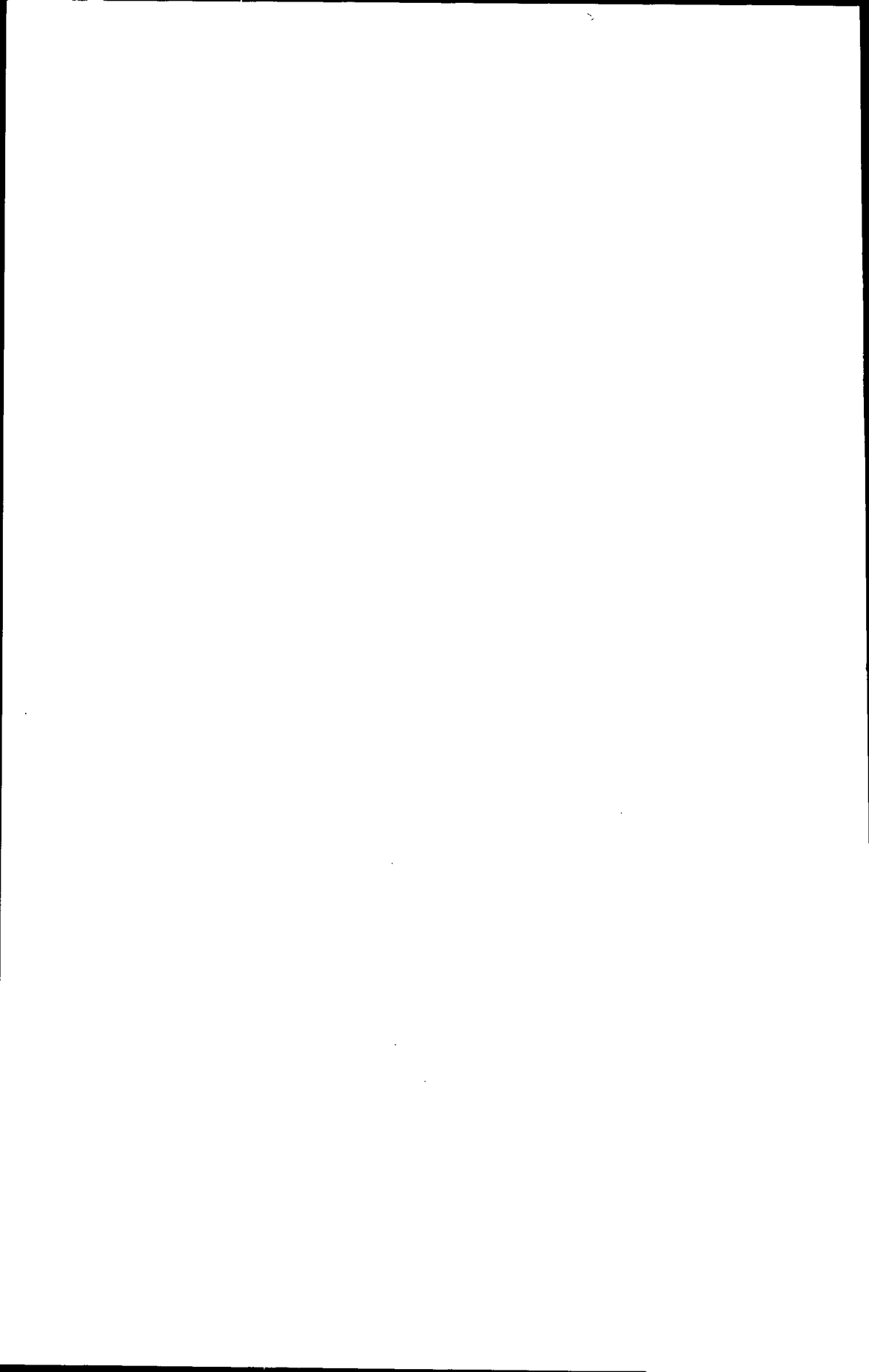
97. The Medical Research Council of Canada has addressed the issues of foetal and embryo experimentation in their *Guidelines on Research Involving Human Subjects* (Ottawa: Minister of Supply and Services Canada, 1987) at 34-35. While the MRC does not speak to the the question of the proper role of criminal law in these areas, it suggests that the primary element to be considered in assessing the acceptability of embryo/foetal research should be the intended purpose of the research. The nature of the tests for acceptability is not clearly specified. At the international level many reports have been prepared on these issues in recent years. For a listing of these see L. Walters, "Ethics and New Reproductive Technologies: An International Review of Committee Statements (1987) 17:3 *Hastings Center Reports* (Special Supplement) 3; for the most recent comprehensive study of these questions see the report of the French Conseil d'État, la documentation française, notes et études de commentaires, Sciences de la vie, *De l'éthique au droit*, March, 1988.

own society's insufficiently positive attitude in general to pregnancy and parenthood. These factors must be coped with by positive measures, i.e., by improved social programmes of education and assistance, rather than by ever sterner anti-abortion laws whose enactment may only substitute activity for action and lull us into the security of believing we have really solved the problem.

Criminal law, however, can still contribute symbolically by upholding respect for human life, stressing the value of the unborn human life and emphasizing that pregnancy termination has to be — not least for the sake of the mother's own health — a medical matter. In short the prohibition itself may well achieve as much as its enforcement.

## C Conclusion

Our over all conclusion, therefore, is the following. First, any act of destruction or serious harm to the foetus qualifies as harm to an entity deserving of protection and so satisfies the first test, in its extended sense, in *Our Criminal Law*. Second, it also seriously contravenes the fundamental value of life so as to be harmful to society and thereby satisfies the second test. Third, in some situations, i.e., in those affecting the life, health and safety of the mother, use of criminal law against such an act may itself seriously contravene fundamental values of life, liberty and security of the person and therefore prevent the act in question from satisfying the third test. Fourth, in other situations criminal law can make a contribution to solving the problem. For these reasons we conclude that the law can properly criminalize foetal harm and destruction, subject to exceptions discussed above as arising under the third test, and operating on the lines explained below.



## CHAPTER FOUR

### Reform

The scheme that we suggest is geared to our proposed new Code set out in Report 31, *Recodifying Criminal Law*.<sup>98</sup> It involves various changes to the definition section and addition of a new Title on Crimes Against the Foetus to be located immediately after the Title on Crimes against the Person.

### Proposed New Legislation

#### RECOMMENDATION 10

##### DEFINITIONS

###### Person

The first change to the definition section relates to the term "person." Draft section 2(1) provides as follows:

"person" means a corporate body or a physical person and in the latter case means a person already born by having completely proceeded in a living state from the mother's body.

Two problems arise with this definition. It covers fetuses temporarily removed by surgery from the uterus and later re-inserted, with the odd result that one fetus in the womb may be a homicide victim because it was temporarily removed whereas another may not because it wasn't. It also covers fertilized cells removed permanently from the womb and placed *in vitro*, with the odd result that their disposal after serving their purpose may count as homicide. We propose the following replacement:

**"person" means a corporation, or a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival.**

The words "capable of independent survival" exclude fetuses born alive prior to viability. To allow destruction of a non-viable fetus in the womb as an exception to abortion but to categorize destruction of a non-viable fetus outside the womb, by an act done before or after birth, as homicide of a person is inconsistent. Both fetuses will qualify under the proposed definition as fetuses, not persons. Destruction of either fetus, therefore, will qualify, where not protected by exceptions to this Title, as foetal destruction.

98. *Supra*, note 46.

The word “permanently” excludes foetuses removed from the womb only temporarily and later re-inserted. Destruction of these too will qualify at most as an offence against the foetus and not as homicide.

The words “from its mother’s *body*” are used to rule out foetuses removed from the uterus but still within the mother’s body. These will not count as having been born and so as possible victims of homicide.

“Human being” is left undefined. For one thing everyone knows what it means. For another all definition must end somewhere.

### Foetus

The term “foetus” is nowhere defined in the present *Criminal Code*. Nor is it defined in Report 31. In order to include a Title, therefore, on Crimes against the Foetus we propose to add to the definition section the following provision:

**for the purpose of this Title “foetus” means the product of a union in the womb of human sperm cells and egg cells at all stages of its life prior to becoming a person.**

The term “foetus” under this definition will cover both embryos (foetuses between fertilization and completion of basic organ development) and post-embryonic foetuses. Destroying or harming either may amount to a crime against the foetus. The term “human” is left undefined. True, the present *Code* has a curious provision in section 206 to the effect that a child doesn’t become a human being until it has proceeded completely from its mother’s body. This, far from being a proper definition of the term, runs counter to the general consensus that the product of human conception, in the womb or outside, is a human being.

The word “life” is used in its usual sense in medical contexts to mean life from conception till death. “Life” rather than “gestational life” is used to avoid the existence of a gap between foetushood and personhood — a foetus removed from the womb prior to viability, e.g. a pre-embryonic foetus, would otherwise qualify neither as a foetus nor as a person. Under the proposed definitions every foetus (including embryos and fertilized cells) counts as a foetus prior to viability.

### A NEW FOETUS TITLE

In essence we propose four sections. The first creates a new general foetus offence. The second and third provide exceptions for medical treatment and lawful abortion. The fourth fixes the time of foetal viability.

## 1. Foetal Destruction or Harm

### (1) Everyone commits a crime who

- (a) purposely, recklessly or negligently causes destruction or serious harm to a foetus; or
- (b) being a pregnant woman, purposely causes destruction or serious harm to her foetus by any act or by failing to make reasonable provision for assistance in respect of her delivery.

### (2) Section 1 applies even though the destruction or harm results after the foetus becomes a person.

This general provision would deal with all wrongful harm to foetuses. It would, therefore, replace the present *Code* sections on abortion (s. 251), killing during the act of birth (s. 221), neglect to obtain assistance in childbirth (s. 226), causing death and bodily harm by criminal negligence (ss. 203-4) in so far as applicable, and killing a child by a pre-natal injury (s. 206(2)).

The advantages of such a general approach are several. First, it articulates clearly and unambiguously that the foetus merits criminal protection. Second, it provides a more logical and coherent approach than that of the present *Code* which directs our researches to various different places in the text. Third, it keeps crimes against the foetus separate from ordinary crimes against the person. This measure is desirable on account of the particular problems arising in such crimes, particularly with regard to medical and other scientific evidence. Our approach is in line with what we take to be a general consensus that the foetus' intrinsic value, nonetheless, takes second place to that of persons already born.

This kind of comprehensive approach, we note, has already been adopted by four American states. Illinois,<sup>99</sup> Indiana,<sup>100</sup> Iowa,<sup>101</sup> and Minnesota,<sup>102</sup> have all passed legislation prohibiting what is usually referred to as foeticide and, except for that of Minnesota, restricting the offence to the unlawful *killing* of the foetus.

The conduct required is causing destruction or serious harm. We have not thought to separate the two in order to allow for different maximum penalties. Rather, we think the line so fine between them that we prefer to leave the outcome to the court passing sentence. Nor do we go beyond causing actual serious harm. Leaving trivial harm and risk of harm below the threshold of criminality mirrors in our view the lesser value imputed generally to the foetus than to the person already born.

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99. Ill. Ann. Stat. c. 38, §. 9-1, 2 (Smith-Hurd Supp. 1987).

100. Ind. Code, §. 35-42-1-6 (1982).

101. Iowa Code Ann. §. 707.7 (West Supp. 1985).

102. Minn. Stat. Ann. §. 607.266 ff (1987 Supp.).

Both destruction and harm, of course, can be caused by omissions as well as by acts. Under the new proposed Code, however, no omission is criminal unless it is an omission to perform a duty laid down in the general part or else is an omission specifically prohibited (Report 31 Recommendation 2(3)(b) and clause 6(1)). Since the duties referred to are owed only to persons already born, section 1 above includes the words "or by failing etc." in order to create a specific crime of omission.

The requisite culpability differs depending on whether destruction or harm is caused by the mother herself or by a third party. Where it is caused by a third party, we see no reason to exclude recklessness and negligence. Note that, in accordance with Recommendation 2(4)(b) of Report 31 and draft section 11(d), negligence means criminal negligence — "a marked departure from the ordinary standard of reasonable care."

Where, however, destruction or harm to the foetus is caused by the mother herself, we feel that the requisite culpability should be limited to purpose. While few perhaps would deny that pregnant women have a moral obligation to avoid reckless or negligent conduct affecting their foetuses, we hesitate to bring in criminal law at this point. In the first place, because of the unique relationship between mother and foetus, use here of criminal law would — unfairly in our view — impose special burdens on her over and above those falling on all other parties. Second, criminal law enforcement would involve intolerable restrictions, on the mother's own autonomy, e.g., monitoring the way she eats, drinks, smokes and so on. Third, such monitoring and restrictions could well cause marital and familial disruption. Finally, at a time when pregnant women's civil liability for foetal injuries is far from resolved, it would be premature to impose on them the still more onerous burden of criminal liability.

The requirement of purpose in the case of a woman's failing to make reasonable provision for assistance during childbirth is roughly in line with section 226 in the present *Criminal Code*. That section only penalizes neglect to obtain assistance with intent "that the child shall not live or with intent to conceal the birth of the child." The new foetus offence will only penalize failing to make reasonable provision for assistance if the purpose of such failure is to cause destruction or harm to the foetus.

Finally, subsection (2) provides that acts or omissions directed against a foetus and resulting in destruction or serious harm fall under the foetus crime whether such destruction or harm results before or after birth. Under present law such acts or omissions are treated differently according to the time the destruction ensues — they constitute homicide if it occurs after birth but either no crime at all or else the crime of killing an unborn child during birth if it occurs before birth (*Criminal Code* section 221) — a totally unsatisfactory inconsistency. Under the new proposal both would constitute at most a crime against the foetus and criminal liability would depend not on a fortuitous time-factor but rather on the nature of the act or omission itself. Criminal Code sub-section 206(2), therefore, as applied in *R. v. Prince*, is dropped.

## Exceptions

### 2. Medical Treatment

Except in the case of procedures carried out negligently or for the purpose of terminating pregnancy, no criminal liability attaches in respect of destruction or harm caused to a foetus in the course of medical procedures which do not involve risk of destruction or harm disproportionate to the expected benefits and which are applied with the mother's informed consent, to herself or to her foetus for therapeutic or diagnostic purposes.

This exception parallels a similar exception regarding ordinary persons contained in Recommendation 7(3)(a) and clause 44(2)(a) of our proposed new Code and relating to medical treatment understood in a broad sense as including surgery, diagnostic procedures, drug therapy and so on. Without the consent of the patient such treatment clearly qualifies as an assault.

Accordingly, the provision in the proposed new Code allows such treatment as an exception to the rules on crimes of violence, given two conditions. First, the risk of harm must not be disproportionate to the benefits expected. Second, in line with Recommendations 2(3)(d) and 7(3)(a) of Report 31, the provision requires that the patient give informed consent the exact meaning of which is left to be determined by the courts.<sup>103</sup>

As argued earlier, the rules on crimes of violence are inapplicable to the foetus prior to it becoming a person. So too, therefore, is the provision on medical treatment. The foetus will be protected by its own foetus offence provision and will accordingly need its own special exception for medical treatment.

This exception, therefore, is provided by section 2. This section parallels Recommendation 7(3)(a) in its reference to the risk involved. It requires the consent of the mother as well. Of course if she doesn't consent, the treatment involves an assault upon her. That assault, however, may be only trivial as far as concerns her, while the harm done to the foetus may well call for a heavier penalty. The words "no criminal liability attaches" provide an exception to crimes against the foetus where the foetus dies before becoming a person.

### 3. Lawful Abortion

No criminal liability attaches to a pregnant woman, a qualified medical practitioner or a person acting under such practitioner's supervision, who with the woman's informed consent causes destruction or serious harm to a foetus by terminating her pregnancy as medically authorized:

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103. This is in line with Recommendation 5 of Report 28, *supra*, note 1, though the Commission may reconsider the definition of informed consent later.



- (a) before the foetus is capable of independent survival, to protect her physical or psychological health;
- (b) to save the woman's life or to protect her against serious physical injury;  
or
- (c) because the foetus is suffering from a malformation or disability of such severity that medical treatment could be legally withheld upon its birth.

Medical authorization must be given by a qualified medical practitioner. Medical authorization after the foetus has become capable of independent survival must, where practicable, be given by two such practitioners.

*[Alternative*

*No criminal liability attaches to a pregnant woman, a qualified medical practitioner or a person acting under such practitioner's supervision, who with the woman's informed consent causes destruction or serious harm to a foetus by terminating her pregnancy as medically authorized*

- (a) at any time before the foetus is twelve weeks old;*
- (b) before the foetus is capable of independent survival, to protect her physical or psychological health;*
- (c) to save the woman's life or to protect her against serious injury;*
- (d) because the foetus is suffering from a malformation or disability of such severity that medical treatment could be legally withheld upon its birth.]*

This is the lawful abortion section proposed by the majority of the commissioners. It covers destruction and serious harm caused by termination of pregnancy. Such termination will be lawful and will therefore fall outside the foetus offence provision and outside homicide and other crimes of violence if it satisfies three conditions. It must be performed by permitted persons, must be carried out for certain permitted grounds and must be properly authorized.

First, the harm must be caused by one of the three persons referred to in the section. It must be caused by the mother herself, by a doctor or by someone acting under the doctor's supervision. Such a person would include for example a nurse assisting the practitioner.

Second, in line with Recommendations 2(3)(d) and 7(3)(a) of Report 31 (on which see p. 53 above) the woman must give her informed consent to the procedure. In this respect lawful abortions performed to protect the woman's physical or psychological health are in the same category as other surgical operations. The requirement for consent parallels Recommendation 7(3)(a) of *Recodifying Criminal Law* which sets out the general conditions governing lawful medical treatment.

Our reason for this hope is that abortion should in no way be regarded as an easy clinical 'fix' for unwanted pregnancies — a view both ethically unsound and socially undesirable. While arguably a foetus is not entitled to the same legal protection as a live-born person, the process of human procreation is trivialized by equating the foetus with a tumour and abortion with other surgical procedures. Like it or not, abortion destroys a being with the full potential to become a living, breathing person. This distinguishes abortions from other surgical procedures, raises ethical and moral considerations not at issue in other clinical contexts and results in potential psychological complications quite different from those present in most other operations. For these reasons different considerations as to informed consent apply to abortions than to, for instance, appendectomies or hysterectomies.

Next, the section sets out three different grounds. The first relates only to abortions done before viability, the second and third to those done at any time.

The first ground applies only to abortions done before foetal viability, the time of which is defined in the following section. Since this ground applies in the first stage, during which, in line with the arguments set out in the previous chapter, the foetus is accorded less protection than in the second stage, a lesser maternal interest than that required in the second ground is permitted to outweigh foetal interest in survival. That lesser ground is protection of the mother's physical or psychological health. The danger to her health need not be of the order required by the second ground but must on the other hand have some reality. At the same time, in contrast to section 251 which speaks only in terms of "health," our proposal specifies that the object of protection can be the mother's psychological as well as physical health.

The second ground is termination of the pregnancy to save the woman's life or to protect her against serious physical injury. This is the ground that incorporates the balancing of interest in foetal life and interest in maternal life and comes down, in line with our argument in the previous chapter, in favour of the latter. In line also with the argument advanced there, preference for maternal interests has been extended beyond life itself to cover security of the person.

The third and final ground is that the foetus suffers from a lethal defect or defects. This subsection is included to make explicit provision for lawful abortion by reason of lethal foetal defect, here described as a malformation or disability of such severity that medical treatment could be legally withheld upon its birth. By virtue of our Recommendation 2(3)(d) in Report 31, no one has a legal duty to provide or continue medical treatment which is medically useless. Clearly a foetus subject to a lethal defect like anencephaly (absence of major sections of the brain), for example, will not survive more than a few days after birth yet may not threaten women's lives, safety or health. The existence of these malformations is often not confirmed until late in pregnancy, that is, after the foetus is capable of independent survival. For the law to oblige women to carry such fetuses to term would be cruel as well as pointless. Note that the medical practitioner (or practitioners) authorizing an abortion on this ground would have to affirm that the foetus was suffering from such a defect.

The termination must be duly authorized. It must be authorized by one or two qualified medical practitioners. Before the foetus is capable of independent survival, one practitioner will suffice. After it becomes so capable, two practitioners are required. Note that the practitioner authorizing and the practitioner performing the abortion can be one and the same.

A minority within the majority feels that the proposal does not go far enough and that it should place no restrictions on abortion during the first twelve weeks other than the requirement of medical supervision and that it should therefore include another ground or condition to this effect. This would mean that during this early stage, termination of her pregnancy would be a matter for the woman in question and her doctor only. The period of twelve weeks reflects the fact that a woman will not know that she is pregnant until usually eight weeks after fertilization, that the embryo does not usually become a full foetus until two weeks thereafter and that the woman may well need two further weeks deliberation before deciding whether to continue or to terminate the pregnancy. This minority proposal is contained in the alternative.

#### *Health Care Workers Exempt from Liability on Conscience Grounds*

Finally, it should be noted that the proposed section 3 operates only by way of exculpation. It provides an exception to the provisions on crimes of homicide, crimes of violence and the crime of foetal destruction or harm, and ensures that no criminal liability attaches under any of these provisions to performance of lawful abortions. It does not impose liability on doctors, nurses or other health care workers refusing or omitting, on account of moral or religious beliefs, to perform such abortions.

Under the proposed new Code liability for omissions arises only if one of two conditions is fulfilled. By virtue of Recommendation 2(3)(b) such liability arises only if the omission in question is specifically defined as a crime in the Code or in some other federal statute or if it consists in failure to perform a duty specified in 2(3)(c). The only relevant omission defined as a crime in the Code is that of failure to rescue contained in Recommendation 10(2), which in paragraph (a) provides that "everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him" but then provides in paragraph (b) that "clause 10(2) does not apply where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another or where he has some other valid reason for not doing so." A doctor refusing on moral grounds to perform an abortion would clearly be able to argue that he had some valid reason under paragraph (b).

The only relevant duty specified in Recommendation 2(3)(c) is that of taking "reasonable steps, where failure to do so endangers life, to:

- (i) provide necessities to  
[...]
- (D) anyone under his care."

A doctor refusing on moral or religious grounds to perform an abortion when a woman's life is endangered would avoid liability under this section by taking the reasonable step of referring her to another physician.

#### **4. Independent Survival**

**For the purposes of section 3 a foetus is capable of independent survival after it reaches an age of twenty-two weeks as determined by the usual clinical indicators used by the medical profession.**

The term 'viable' as used in medicine is defined as capable of living; especially said of a foetus that has reached such a stage of development that it can live outside the uterus.<sup>104</sup> Whether a prematurely delivered foetus will survive depends greatly on available technology — specialized neo-natal intensive care units offer a far greater chance for survival than a doctor's office, for example. The choice of a twenty-two week standard is justified by the fact that typically the foetus doesn't presently survive such an early delivery.

#### **Effect on Present Law**

#### **RECOMMENDATION 11**

**The effect of our suggested scheme would be to replace all the present *Code* provisions relating to the foetus by the above short Title. The *Code* sections dropped are:**

- section 206 — definition of human being**
- section 221 — killing during the act of birth**
- section 226 — neglecting to obtain assistance in childbirth**
- section 227 — concealing body of child**
- section 251 — abortion**
- section 252 — supply of noxious thing.**

The reasons for dropping these six sections are as follows:

#### **Section 206 — Definition of Human Being**

The present *Code*'s artificial definition of 'human being' in section 206(1), restricting the term to persons already born instead of applying it in line with ordinary intuitions to the product of human conception, becomes unnecessary given the proposed definition of 'person' in the definition section. Arguably this latter definition also smacks of artificiality. In reply it could be pointed out that common law has long defined "person" in an artificial sense to include corporations. This being so, the

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104. Definition of 'viable': *Dorland's Illustrated Medical Dictionary*, *supra*, note 38.

proposed definition restricting the term to humans already born does less violence to ordinary language.

The provision in *Criminal Code* sub-section 206(2), preserving the common law position that it is homicide to do an injury to a foetus causing it to die after being born alive, is replaced by the proposal in section 1(2). This alters the law applied in *R. v. Prince* and replaces liability for homicide by liability for destruction of the foetus.

#### Section 226 — Neglecting to Obtain Assistance during Childbirth

Originally we considered dropping this section entirely. On further reflection we decided that neglect to obtain proper assistance during childbirth merited criminalisation if that neglect were designed to destroy or harm the foetus. Because, by virtue of Report 31 Recommendation 2(3)(b) and clause 6(1), the only criminal omissions are either omissions to perform duties laid down in that recommendation and clause or omissions specifically criminalized, and because the duties referred to above are owed only to persons already born, we created a specific omission crime by adding to the foetus offence the words “or by failing etc.”

#### Sections 221 and 251 — Killing During Birth and Abortion

These two separate provisions become unnecessary given a general foetus offence. Both actions are covered under the new offence unless specifically falling under one of the exceptions to the new proposal. In our view this comprehensive approach better achieves the law’s objectives by creating a general foetus offence subject to exceptions rather than proliferating specific crimes with no general underlying thrust.

#### Section 227 — Concealing Body of Child

This provision also becomes unnecessary. Concealing the dead body of a child will either be for the purpose of concealing the commission of a homicide or crime against the foetus or for some other purpose. If the former, it may be done by the person committing that crime or homicide or by some third party.

Where the purpose is to conceal the commission of a crime and the concealment is effected by the perpetrator of that crime, the latter will in general be charged not with concealment but with the crime in question. Where the concealment is effected by a third party, but for the same purpose, it will be covered under the proposed new code by one of two different sections. It will either be covered by the crime of concealing real evidence (Recommendation 24(3)(b) and draft s.110(b)) or that of obstructing the course of justice (Recommendation 25(11) and draft s. 125).

Where, however, the concealment is not meant to conceal a homicide or foetus crime, then it is best left to laws regulating burial, vital statistics and so forth.

## Section 252 — Supply of Noxious Things

This section also is unnecessary given the introduction of a global foetus offence. As observed earlier, if the thing is supplied to help carry out an unlawful abortion, then the supplier is liable under the proposed new code of furthering the crime against the foetus (Recommendation 4(2) and Draft s.28). If the thing is not supplied for an unlawful purpose, then supply should not incur criminal liability.

## Issues Respecting Foetus and Embryo Research

The above completes the recommendations for the reform of criminal law as it affects the foetus. Since these recommendations limit themselves to the foetus, defined above on p. 50 as the product of fertilization in the womb, there remain significant questions concerning what the law should say about embryos outside the womb resulting from *in vitro* fertilization. These entities, though technically neither foetuses nor persons according to the definitions accepted here, are nevertheless a form of human life and in most respects similar to a newly conceived foetus. While detailed consideration of the legal and ethical issues regarding the *ex utero* embryo will be given in the Commission's forthcoming working paper on human experimentation, a preliminary discussion of these questions is useful here.

Be it noted that the following discussion applies only to the embryo *ex utero* and not to the foetus *in utero*. The reason is that research on the latter is already adequately dealt with by the proposed foetus provisions. If the research causes no foetal harm, no crime under section 1 is committed. If it causes foetal harm but not harm that is foreseen as probable or seriously possible, then no harm has been committed purposely, recklessly or negligently and again no crime under section 1 is committed. If it constitutes medical treatment, it falls under section 2 and outside the ambit of section 1 and again no crime is committed. Finally, if it causes harm foreseen as probable or seriously possible and does not constitute medical treatment under section 2, then a crime under section 1 has been committed.

We come back to the embryo *ex utero*. In the course of *in vitro* fertilization programmes more embryos are regularly produced than can safely be implanted. The extra embryos can either be simply disposed of or be used for scientific research.

Both alternatives are justifiable. Disposal is clearly acceptable since the embryos are in fact doomed — they can't be safely implanted at present. Experimentation is also surely acceptable on utilitarian grounds — increased knowledge of human life, benefit to childless couples, development of therapy for other afflicted foetuses and embryos. Hence without necessarily accepting as beyond criticism all of the present methods of *in vitro* fertilization programmes, the law should permit embryo disposal and limited research.

We would suggest the following limitations to any research involving the embryo. First, experiments should only be permissible when done with parental consent. With embryos resulting from donor gametes, consent should be given at the time of donation, all relevant information as to the nature and purpose of the research should be given to those required to consent, and such consent ought to be given in writing. Second, research should be limited to embryos up to fourteen days of age measured from conception, there being no L.M.P. in these cases as the embryo was created *in vitro*. This limit is admittedly arbitrary but is in line with a growing international consensus on the time period in which such research should be permitted. Finally, experiments should only be allowed if performed in connection with medical research and not, for example, for commercial purposes.

In addition, certain types of research are so profoundly disrespectful of human life as to suggest a need for prohibition by criminal law. Into this category falls research involving: inter-species fertilization; the creation of identical human beings by cloning; implantation of human embryos in animals or the reverse; ectogenesis (maintaining embryos outside the womb); parthenogenesis (producing embryos without the union of egg and sperm); embryo fusion (combining two or more embryos to create one entity); and attempts to create chimeras. The threat to fundamental social values involved in these experiments seems so self-evident as to call for criminal sanction.

Criminal law, however, can only give a partial response — it is appropriate only for the most serious violations of fundamental values. Research outside that category nevertheless needs further regulation, either in the form of national research guidelines or a statute governing embryo and foetus research. Though the harm involved in failure to comply with such regulations is less serious than the sort of harm sanctioned by criminal law, the conditions under which experiments involving the foetus are performed are clearly of national importance.

In our view all proposals for foetal research *ex utero* should be subject to a process of evaluation and approval before being carried out. The value of the research should be determined by a scientific committee. This judgement should be made by the researcher's peers. It should take into account not only the scientific value of the protocol but also its ethical implications. Such decisions should not be taken by scientists alone but by widely multi-disciplinary research committees with a clear and unambiguous supervisory role to see that both the scientific and ethical characteristics of research are present at all stages and that the rules governing respect for the foetus are strictly followed. The investigation proposed should be scientifically worthwhile (a criterion really forming part of the valid scientific character of the protocol) and impossible to conduct by such other means as research on animals or adult human beings so as to ensure that embryos are not simply used at large for general research.

The research in question should be carried out only in designated research centres and hospitals in the public interest of securing greater ease of supervision and the assurance of high standards of experimental procedures.

As a matter of general principle, participation in research on the embryo should not give rise to financial remuneration. Payment covering reasonable expenses, such as transportation costs are acceptable but any other remuneration could well be coercive and should therefore be excluded.

Freezing embryos for future use for scientific and ethical research should be legitimate.<sup>105</sup> Such storage should be limited to a maximum period of five years. After this delay has expired, frozen embryos could either be implanted, destroyed, or used for research (within the limits suggested in this paper) provided all other necessary conditions are present. Consistent with the general prohibition of post-mortem insemination, no embryo should be stored beyond the death of the donors. Meanwhile a national register should be maintained to monitor births and keep adequate records on donor usage while respecting confidentiality, as recommended by a national Canadian committee in 1981.<sup>106</sup>

### Suggestions for Further Study

As mentioned previously the Commission is preparing a working paper on human experimentation which will make further recommendations on foetal and embryo research. As a final matter we would like to indicate several other related issues which merit further research:

#### *Surrogate motherhood:*

Considering the recent position of the Ontario Law Reform Commission<sup>107</sup> which advocated regulation rather than prohibition the Commission considers this issue to be one requiring further study.

#### *National standards for new reproductive technologies:*

Regulation of medical practice falls under provincial jurisdiction. In the absence of uniform, national accreditation procedures and limits of practice for institutions, the possibility of interprovincial "procreative tourism" cannot be ignored and should be seriously examined.

#### *Penalty for supplying false information:*

Finally, the sanction for donor concealment or misrepresentation, particularly with regard to familial, medical or genetic disorders requires further study.

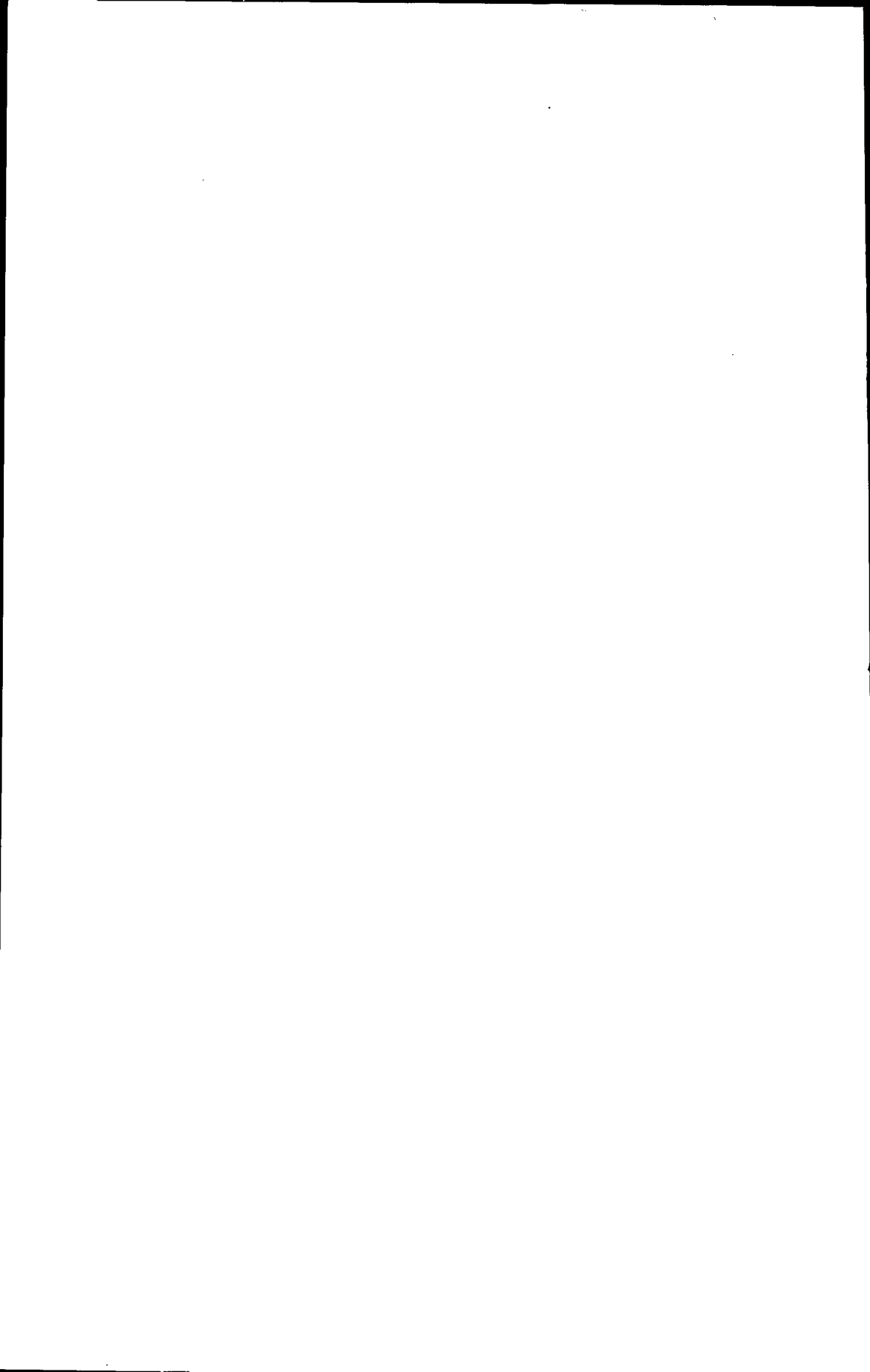
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105. See Canada. Advisory Committee on the Storage and Utilization of Human Sperm, *Report of the Advisory Committee on the Storage and Utilization of Human Sperm to the Minister of National Health and Welfare*, (Ottawa: Health and Welfare Canada, 1981).

106. *Ibid.*

107. Law Reform Commission of Ontario, *Report on Human Artificial Reproduction and Related Matters* (Toronto, 1985).





## CHAPTER FIVE

### Summary of Recommendations

#### Reshaping Present Law

1. "Person" in the new Code should be redefined as a corporation, or a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival.
2. There should be no separate provision in the new Code concerning killing in the act of birth.
3. There should be no separate provision in the new Code concerning neglect to obtain assistance during childbirth.
4. There should be no provision in the new Code concerning concealing the body of a child.
5. There should be no provision in the new Code concerning supply of noxious things.
6. There should be a general crime of causing foetal harm or destruction.
7. The general crime of destroying a foetus should not apply to acts done to save the mother's life.
8. The general crime of destroying a foetus should not apply to acts done to protect the mother against serious physical injury.
9. The crime of destroying a foetus should not apply to acts done before the twenty-second week of pregnancy to protect the mother's physical or psychological health *[or to acts done before the twelfth week of pregnancy (alternative)]*.

#### Proposed New Legislation

10. The following provisions should be enacted:

#### Definitions

"person" means a corporation, or a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival.

For the purpose of this Title "foetus" means the product of a union in the womb of human sperm cells and egg cells at all stages of its life prior to becoming a person.

## **A New Foetus Title**

### **1. Foetal Destruction or Harm**

(1) Everyone commits a crime who

(a) purposely, recklessly or negligently causes destruction or serious harm to a foetus; or

(b) being a pregnant woman, purposely causes destruction or serious harm to her foetus by any act or by failing to make reasonable provision for assistance in respect of her delivery.

(2) Section 1 applies even though the destruction or harm results after the foetus becomes a person.

## **Exceptions**

### **2. Medical Treatment**

Except in the case of procedures carried out negligently or for the purpose of terminating pregnancy, no criminal liability attaches in respect of destruction or harm caused to a foetus in the course of medical procedures which do not involve risk of destruction or harm disproportionate to the expected benefits and which are applied with the mother's informed consent to herself or to her foetus for therapeutic or diagnostic purposes.

### **3. Lawful Abortion**

No criminal liability attaches to a pregnant woman, a qualified medical practitioner or a person acting under such practitioner's supervision, who with the woman's informed consent causes destruction or serious harm to a foetus by terminating her pregnancy as medically authorized

(a) before the foetus is capable of independent survival, to protect her physical or psychological health;

(b) to save the woman's life or to protect her against serious physical injury; or

(c) because the foetus is suffering from a malformation or disability of such severity that medical treatment could be legally withheld upon its birth.

Medical authorization must be given by a qualified medical practitioner. Medical authorization after the foetus has become capable of independent survival must, where practicable, be given by two such practitioners.

[Alternative

*No criminal liability attaches to a pregnant woman, a qualified medical practitioner or a person acting under such practitioner's supervision, who with the woman's informed consent causes destruction or serious harm to a foetus by terminating her pregnancy as medically authorized*

- (a) at any time before the foetus is twelve weeks old;*
- (b) before the foetus is capable of independent survival, to protect the woman's physical or psychological health;*
- (c) to save the woman's life or to protect her against serious injury;*
- (d) because the foetus is suffering from a malformation or disability of such severity that medical treatment could be legally withheld upon its birth.]*

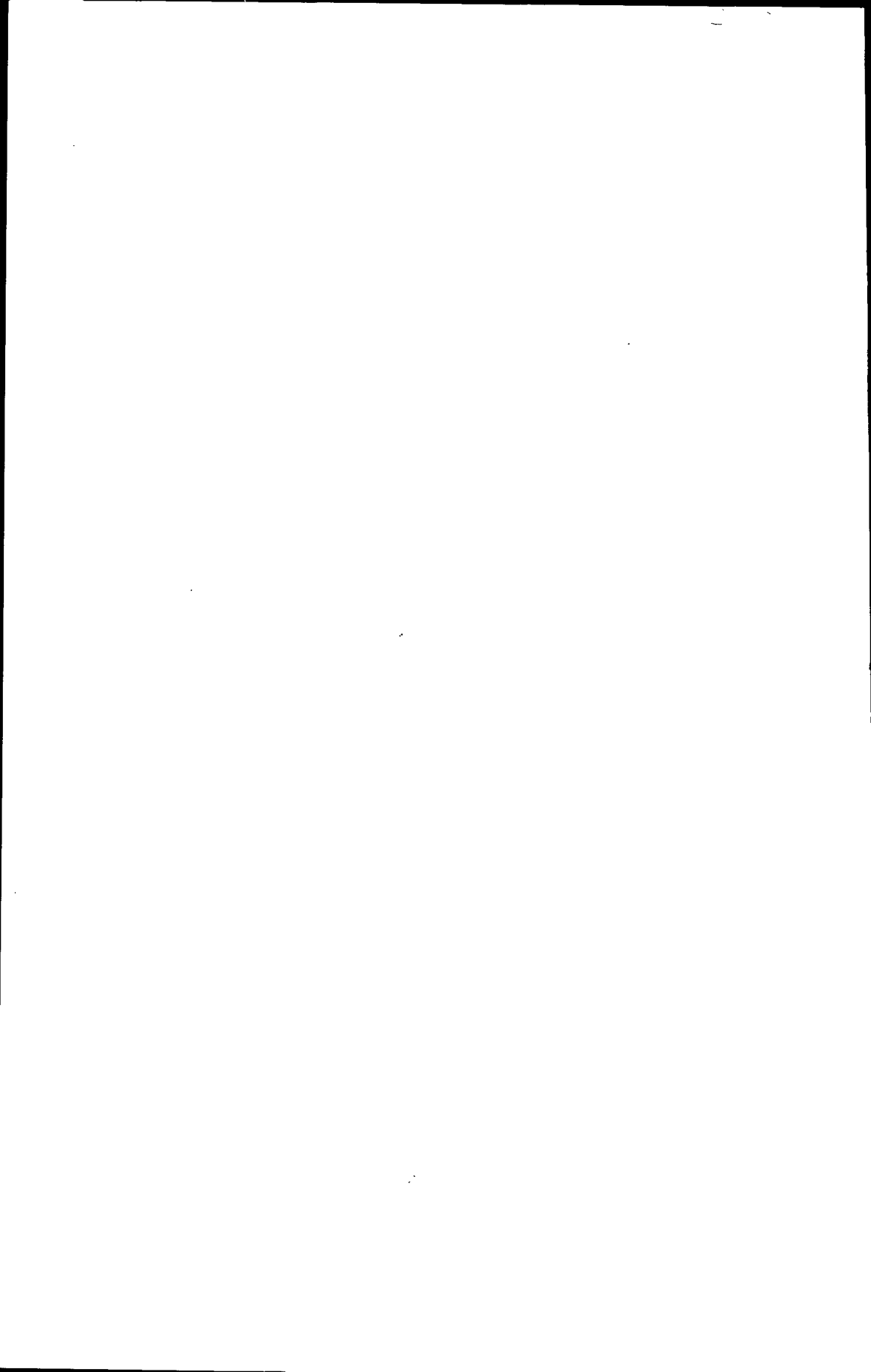
#### **4. Independent Survival**

**For the purposes of section 3 a foetus is capable of independent survival after it reaches an age of twenty-two weeks as determined by the usual clinical indicators used by the medical profession.**

#### **Effect on Present Law**

**11. The effect of our suggested scheme would be to replace all the present Code provisions relating to the foetus by the above short Title. The Code sections dropped:**

- section 206 — definition of human being**
- section 221 — killing during the act of birth**
- section 226 — neglecting to obtain assistance in childbirth**
- section 227 — concealing body of child**
- section 251 — abortion**
- section 252 — supply of noxious thing.**



## APPENDIX A

### Abortion in Selected Countries

The following two tables give the indications and procedures for obtaining abortions in a number of Westernized countries. These countries were selected to illustrate a range of jurisdictional difference regarding availability, conditions and time limitations.

The trend over the past decades has been the gradual liberalization of abortion laws. However, many countries may limit the indications for abortion depending on the stage of pregnancy. The authorization procedure may also vary according to the stage of pregnancy or the grounds for the abortion.

Indications for abortion have expanded beyond the traditional categories of physical or mental health or foetal abnormality in several countries. Age (under 17 or over 40) is a specific indication for abortion in Finland. Italy recognizes family circumstances, while France and the Netherlands permit a woman's distress over her pregnancy to be an indication for an abortion (noted in the "mental health" category).

One indication for abortion listed in Table 1 is "socio-economic grounds." This column refers to legislation which takes into account a woman's social or economic situation in assessing a request for abortion. The precise definition of this term varies from country to country. Denmark's legislation, for example, assesses the impact of the pregnancy and care of the child on the interest of the woman, the management of her household and the care of her other children. Finland's legislation examines the strain on the woman in view of her living conditions and that of her family. Norway's legislation considers the woman's assessment of her own situation.

In most of the countries canvassed, the woman's consent alone is sufficient, but Turkey requires spousal consent as well. Finland may permit the father to express an opinion. If the woman is a minor, she may need the consent of her parent or guardian. Italy and Denmark qualify parental/guardian consent by permitting this requirement to be waived in certain circumstances. Counselling may also be required or suggested.

Since 1983, the abortion debate in the United States has centred around the landmark decision of *Roe v. Wade*<sup>1</sup>. The Supreme Court held that the Fourteenth Amendment guaranteed the right of privacy, which included a woman's right to terminate her pregnancy. During the first trimester, the decision to terminate a

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1. 410 U.S. 113 (1973).

pregnancy rests with the woman and the medical judgement of her physician. The state may only regulate abortion procedures in the second trimester in ways that are reasonably related to maternal health. Abortion may be regulated or proscribed during the stage subsequent to viability to promote the state's "compelling interest" in preserving the potentiality of human life, except if the woman's life or health is endangered.

Several state regulations regarding abortion have been ruled unconstitutional. These include: requirements that all second trimester abortions must be performed in hospitals<sup>2</sup>, detailed informed consent provisions<sup>3</sup>, spousal vetoes<sup>4</sup> and a twenty-four hour waiting period<sup>5</sup>, because they infringe upon a woman's right of privacy by attempting to harass or influence a woman's choice, or to inhibit access to abortion. A requirement that a second physician be present during an abortion performed after viability<sup>6</sup> was held to be unconstitutional because it could not provide for the necessities of emergency situations. This implies that a provision which included an emergency clause may be constitutional as furthering the state's interest of preserving life during the last trimester.

Note: Pregnancy is usually calculated from the first day of the woman's menstrual cycle, but in rare instances, such as in France, pregnancy is calculated from the date of conception.

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2. *City of Akron v. Akron Center for Reproductive Health Inc.* 103 5. Ct. 2481 (1983).

3. *Thornburgh v. American College of Obstetricians and Gynecologists et al.* 106 S.Ct. 2169 (1986).

4. *Planned Parenthood of Central Missouri v. Danforth* 428 U.S. 52 (1976).

5. *City of Akron*, *supra*, note 2.

6. *Thornburgh*, *supra*, note 3.

TABLE I: GROUNDS ON WHICH ABORTION IS LEGAL

COUNTRY	RISK TO LIFE	HEALTH	MENTAL HEALTH	EUGENIC (foetal deformity)	JURIDICAL rape/incest	SOCIO- ECONOMIC	ON REQUEST
AUSTRIA	X	X	X	X			X (up to 12 weeks)
BELGIUM	X						
DENMARK	X	X	X	X	X	X	X (up to 12 weeks)
FINLAND	X	X	X (up to 12 weeks)	X (up to 24 weeks)	X (up to 12 weeks)	X (up to 12 weeks)	
FRANCE	X	X	X (up to 10 weeks)	X			
GERMAN FEDERAL REPUBLIC	X	X	X (up to 12 weeks)	X (up to 22 weeks)	X (up to 12 weeks)	X (up to 12 weeks)	
ITALY	X	X	X	X	X (up to 90 days)	X (up to 90 days)	
THE NETHERLANDS	X		X (prior to viability of foetus)				
NEW ZEALAND	X	X	X	X (up to 20 weeks)	X (up to 20 weeks)		

X = Grounds permissible throughout pregnancy, unless otherwise indicated.



TABLE I: GROUNDS ON WHICH ABORTION IS LEGAL (Cont'd)

COUNTRY	RISK TO LIFE	HEALTH	MENTAL HEALTH	EUGENIC (foetal deformity)	JURIDICAL rape/incest	SOCIO- ECONOMIC	ON REQUEST
NORWAY	X	X (up to 18 weeks)	X (up to 18 weeks)	X (Permissible any time if the foetus will not be viable at birth)	X (up to 18 weeks)	X (up to 18 weeks)	X (up to 12 weeks)
NORTHERN IRELAND	X	X	X				
PORTUGAL	X	X (up to 12 weeks)	X (up to 12 weeks)	X (up to 16 weeks)	X (up to 12 weeks)		
SPAIN	X	X	X	X (up to 22 weeks)	X (up to 22 weeks)		
SWEDEN	X	X	X				X (up to 18 weeks)
SWITZERLAND	X	X					
TURKEY	X			X			X (up to 10 weeks)
UK (except Northern Ireland)	X	X (up to 28 weeks)	X (up to 28 weeks)	X (up to 28 weeks)		X (up to 28 weeks)	

X = Grounds permissible throughout pregnancy, unless otherwise indicated.

TABLE II: PROVISIONS FOR PERFORMANCE OF ABORTION

COUNTRY	SPECIFIED INSTITUTIONS	CONSENT	COUNSELLING PROVISIONS	REFLECTION PERIOD	APPROVAL PROCEDURES	PROVISIONS FOR WRITTEN RECORDS
AUSTRIA		<ul style="list-style-type: none"> <li>• Pregnant woman</li> </ul>	First trimester abortion not punishable if counselling provided by physician.			
DENMARK	State or communal hospital, or clinic attached to hospital	<ul style="list-style-type: none"> <li>• Pregnant woman</li> <li>• Under 18 or incompetent: person exercising parental authority or guardian (may be waived by Commission)</li> </ul>	Informed of possibility of counselling		<ul style="list-style-type: none"> <li>• No authorization during first 12 weeks</li> <li>• No authorization after 12 weeks if woman's life threatened or deterioration of physical/mental health</li> <li>• Committee authorization after 12 weeks in cases of rape, incest or foetal deformity</li> <li>• Committee composed of 3 people: staff member of social welfare centre trained in law or social work and 2 physicians</li> </ul>	
FINLAND	Hospital approved for purpose by state medical board (except in emergency cases)	<ul style="list-style-type: none"> <li>• Pregnant woman</li> <li>• Father can state opinion</li> </ul>			<ul style="list-style-type: none"> <li>• Authorization of 2 physicians in cases of: danger to life, physical or mental health of woman, socio-economic reasons or rape</li> <li>• Authorization of performing physician if woman over 40 or under 17 years of age</li> <li>• Authorization of State Medical Board if foetal defect</li> </ul>	Written opinion of physicians authorizing procedure required stating grounds

TABLE II: PROVISIONS FOR PERFORMANCE OF ABORTION (*Continued*)

COUNTRY	SPECIFIED INSTITUTIONS	CONSENT	COUNSELLING PROVISIONS	REFLECTION PERIOD	APPROVAL PROCEDURES	PROVISIONS FOR WRITTEN RECORDS
FRANCE	Public or private Hospital Establishments	<ul style="list-style-type: none"> <li>• Pregnant woman</li> <li>• Unmarried minor: person exercising parental authority</li> </ul>	<ul style="list-style-type: none"> <li>• Physician must inform woman of medical risks, and provide a list of counselling centres</li> <li>• Woman needs written certificate that she received counselling</li> </ul>	7 days	<ul style="list-style-type: none"> <li>• Before 10 weeks of pregnancy, a woman in a situation of distress must consult a physician, receive counselling, and may have the abortion 7 days after consultation</li> <li>• 2 physicians must certify that the woman's health is seriously endangered, or that there is a foetal abnormality for an abortion to be performed at any stage of pregnancy. One of the physicians must practice at a public or private hospital establishment</li> </ul>	Notification of abortion sent to regional medical inspector of health by physician. No mention of woman's name
GERMAN FEDERAL REPUBLIC	Hospital or establishment authorized for such purpose	<ul style="list-style-type: none"> <li>• Pregnant woman</li> </ul>	Physician advises; woman consults counsellor at least 32 days before operation			Written confirmation of grounds by a physician not performing the abortion
ITALY	<ul style="list-style-type: none"> <li>• Department of Obstetrics and Gynaecology of a general hospital, or specialized hospital</li> <li>• Nursing homes can perform abortions during the first 90 days of pregnancy</li> </ul>	<ul style="list-style-type: none"> <li>• Pregnant woman</li> <li>• Under 18: parent/guardian unless impossible or inadvisable to obtain consent during the first 90 days of pregnancy</li> </ul>	<ul style="list-style-type: none"> <li>• Counselling especially if grounds for abortion are socio-economic or familial</li> <li>• Father present if woman consents</li> </ul>	7 days	<ul style="list-style-type: none"> <li>• Woman applies for abortion to public counselling centre, medicosocial agency or physician of her choice</li> <li>• After 7 days woman reports to authorized establishment for abortion</li> </ul>	<ul style="list-style-type: none"> <li>• Hospital/nursing home must report to provincial medical officer</li> <li>• Woman's name not mentioned</li> </ul>

TABLE II: PROVISIONS FOR PERFORMANCE OF ABORTION (Continued)

COUNTRY	SPECIFIED INSTITUTIONS	CONSENT	COUNSELLING PROVISIONS	REFLECTION PERIOD	APPROVAL PROCEDURES	PROVISIONS FOR WRITTEN RECORDS
THE NETHERLANDS	Hospital or clinic licensed by the Minister of Health and Environmental Protection	• Pregnant woman		6 days	Woman consults physician and must reflect for a further 6 day period	Once a month the physician informs the chief physician of number of abortions and age of the women
NEW ZEALAND	Licensed Institution	• Pregnant woman			2 certifying consultants, one must be an obstetrician/gynaecologist	
NORWAY	<ul style="list-style-type: none"> <li>• Hospital or approved institution</li> <li>• Before 12 weeks of pregnancy: nursing home or health center</li> </ul>	<ul style="list-style-type: none"> <li>• Pregnant woman</li> <li>• Under 16 or mentally retarded: parent/guardian can express opinion</li> </ul>	Entitled to counselling		<ul style="list-style-type: none"> <li>• Before 12 weeks: woman decides herself. Application submitted to physician</li> <li>• After 12 weeks: application submitted to physician or committee composed of 2 physicians</li> <li>• Woman can appear before Committee and express views</li> </ul>	Physician, in consultation with the woman, writes grounds for abortion. Hospitals must submit quarterly reports to county medical officer.
PORTUGAL	Official or officially approved health establishment	<ul style="list-style-type: none"> <li>• Woman must sign consent form at least 3 days before surgery;</li> <li>• Under 16 or incompetent: (order of priority): husband, legal representative ascendant or descendant, collateral relative</li> </ul>			Second opinion required from another doctor regarding valid grounds for abortion	Written medical certificate required listing grounds for abortion

TABLE II: PROVISIONS FOR PERFORMANCE OF ABORTION (*Continued*)

COUNTRY	SPECIFIED INSTITUTIONS	CONSENT	COUNSELLING PROVISIONS	REFLECTION PERIOD	APPROVAL PROCEDURES	PROVISIONS FOR WRITTEN RECORDS
SPAIN	Accredited private health centres or public health centres	• Pregnant woman	Woman informed of medical, psychological and social consequences of continuing or terminating pregnancy		<ul style="list-style-type: none"> <li>• Threat to woman's life, physical or mental health: physician in corresponding speciality can approve</li> <li>• Foetal abnormality: 2 medical specialists of accredited public or private health centre</li> </ul>	Public or private centres required to keep case history, assessment and consent forms
SWEDEN	General hospital or institution approved by National Board of Health & Welfare	• Pregnant woman	Consultation with social worker after 12 weeks		<ul style="list-style-type: none"> <li>• During first 12 weeks: woman consults a physician;</li> <li>• After 18 weeks: approval needed from National Board of Health and Welfare</li> </ul>	
SWITZERLAND		• Pregnant woman			Second medical opinion required	Physician must advise competent authority of the canton within twenty-four hours of the abortion
TURKEY		<ul style="list-style-type: none"> <li>• Pregnant woman</li> <li>• if married: spouse</li> <li>• minor: parent</li> <li>• under legal guardianship: legal guardian and justice of the peace</li> </ul>			<ul style="list-style-type: none"> <li>• No authorization needed under 10 weeks</li> <li>• After 10 weeks: in case of foetal abnormality an obstetrician/ gynaecologist and a specialist in a related field must confirm in writing</li> <li>• In emergency, physician can decide alone, but must report to Directorate of Health and Welfare</li> </ul>	

TABLE II: PROVISIONS FOR PERFORMANCE OF ABORTION (Continued)

COUNTRY	SPECIFIED INSTITUTIONS	CONSENT	COUNSELLING PROVISIONS	REFLECTION PERIOD	APPROVAL PROCEDURES	PROVISIONS FOR WRITTEN RECORDS
UNITED KINGDOM	Government hospital or institution approved by Secretary of State	• Pregnant woman			• Second medical opinion except in emergencies	

**The information for the preceding tables was compiled from a variety of sources:**

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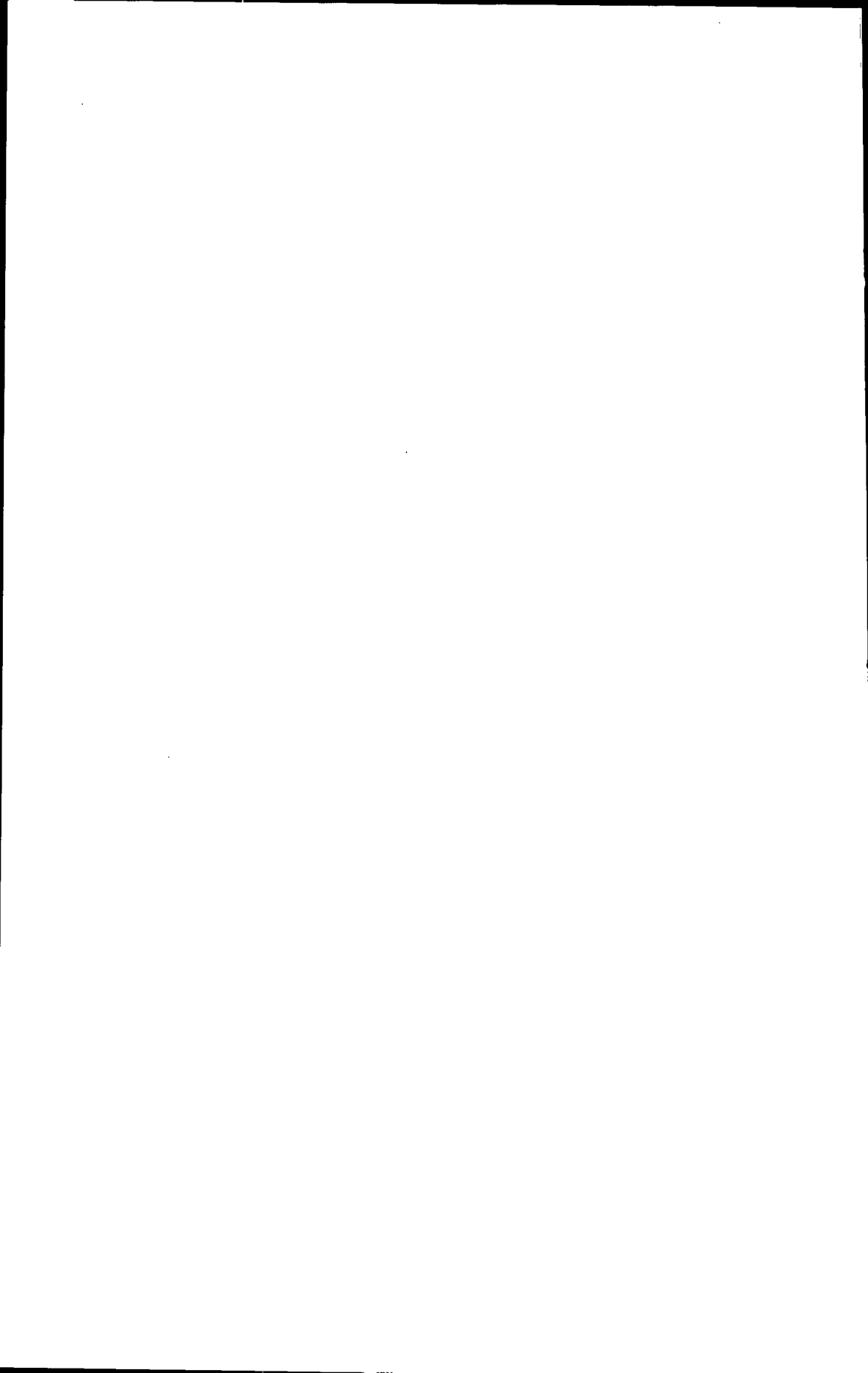
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## APPENDIX B

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## DISSENT

by Joseph Maingot, Q.C., Commissioner

According to my colleagues, present criminal law regarding the human foetus is unsatisfactory and needs reform. Such reform should comprise creation of a new general crime of causing death or serious harm to the human foetus. This general crime, however, should allow exceptions for medical treatment and lawful abortion.

With this view I am partly in agreement. I agree that present law is unsatisfactory, that there should be a general foetus crime and that it should admit of certain exceptions. I regret, however, that I cannot agree fully with the exceptions they propose.<sup>1</sup>

With the first exception, that relating to medical treatment, I agree. With the second, that concerning lawful abortion, I largely disagree. In my opinion abortion should be much more narrowly restricted than they propose.

Many today regard the legalization of abortion as the obvious solution to a pressing social problem. They see that problem as consisting of the fact that many pregnancies are unwanted, that many pregnant women want to terminate them and that the criminal law used to, and might well again prevent them doing so. Accordingly, they wish to keep abortion out of criminal law.

Many would therefore agree with my colleagues' proposal for abortion in three situations. These are where it is performed before the unborn child is capable of survival outside the womb (20 weeks after conception) to protect the mother's physical or psychological 'health' (health is not defined); where it is performed to save the woman's life or to protect her against serious physical harm; and where her unborn child suffers from a 'lethal' defect.

In my view, however, the problem is not the pregnancies themselves but rather their unwantedness. The solution to this problem should be sought not by making abortion more readily available legally and practically speaking. Rather it should be sought by social action to reduce the unwantedness of pregnancies by increasing social

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1. I am grateful to Associate Dean Gerard A. Ferguson, Faculty of Law, University of Victoria, B.C. for the helpful material he graciously provided and upon which I considerably relied. Dean Ferguson is a former full time consultant with the Law Reform Commission of Canada and is a frequent part time consultant. I have also relied on *The Meaning of Morgentaler*, by Professor Alvin Esau, University of Manitoba, Visiting Scholar, Regent College; *Reflections on Morgentaler*, by Professor H.R.S. Ryan, Faculty of Law, Queen's University, Kingston, Ontario; *A Response to 'Options for Abortion Policy Reform: A Consultation Document'* by Colleen M. Kovacs; and *A Law Against Abortion is not Enough*, by Professor Bela Somfai, Compass, May 1988, 31.

support for parents and especially for single parents, more assistance to day-care programmes for working mothers, and more effective solutions to problems faced by pregnant women in the work-force. Furthermore we need to encourage a change in attitude about pregnancy, parenthood and abortion. In effect we need to change the way the unborn are perceived.

For this reason I agree only partly with my colleagues on these matters. Briefly, I agree that abortion should be available where necessary to save the mother's life or to protect her against serious and substantial danger to her health where there is no other commonly accepted medical procedure for effectively treating this health risk. I would point out, first, that 'health' must be carefully defined and second, that with the current state of medical science and practice such situations arise rarely today. In most cases doctors, true to the spirit of the Hippocratic oath, try to save both of their patients, the mother and her unborn child.

I do not agree that abortion should be lawful in the other two situations. I do not agree that it should be lawful, even before the foetus is capable of survival outside the womb, to perform an abortion simply to protect the mother's physical or psychological health in less than life-threatening situations, particularly where 'health' is not defined. Nor do I agree that it should be lawful to perform abortions because the foetus suffers from a 'lethal' defect which will cause it to die some time after birth.

My disagreement with my colleagues as to the above two situations rests on several grounds. These relate to the nature of the human foetus as we understand it, to the legal context of the problem and to the justification for reform.

## I. The Nature of the Human Foetus — The Unborn Child

When we speak of abortion, whether the procedure is called abortion or procuring miscarriage, we are talking about the intentional destruction of the human embryo or the human foetus in the womb, or, any untimely delivery brought about with intent to cause the death of the human foetus. Central, therefore to the present issue is the question: what is the nature of this human embryo or human foetus whose death will be caused by abortion?

Dr. Jerome Lejeune, one of the world's foremost human geneticists tells us that the fusion of a single ovum and a single spermatozoon results in the creation of the first single human cell of a separate and distinct individual. At that moment of conception everything is set: the colour of the eyes, the hair and the skin, the form of the nose and ears, and the strength of the person. "Every quality which makes an individual recognizable, as he will later be called Peter or Margaret or Mary ... are entirely spelled out in its own personal genetic constitution."<sup>2</sup>

2. See M.C. Shumiatcher, "I Set Before You Life and Death," (1987) 24:2 *U.W.O.L.J.* 1 at 7. [Dr. Lejeune discovered the cause of Down's Syndrome was due to an extra chromosome. His research signalled the beginning of the science of human genetics. He is its acknowledged founder.]

Some say the development of personal abilities and capacities can't be found in a specific human cell like the cell containing a person's blue eyes. Yet these capacities are part of the embryo. The development of personal abilities (e.g., self-awareness, choice, creativity) does not come about independently of our organic development. There is no basis in reality to affirm that those capacities are something added at any particular point. Dr. Lejeune states: "If a fertilized egg is not by itself a full human being, it could never become a man, because something would have to be added to it, and we know that does not happen."<sup>3</sup>

Over the last decade, pre-natal medicine has pushed back the point at which a human foetus becomes viable outside the uterus by more than forty days to the twentieth week after conception or earlier. Ultrasound technology gives an image and foetoscopy makes it possible to perceive the human face at an even earlier time in pregnancy. *In vitro* fertilization technology also provides another indication of the essential humanity of foetal life, and the popular tendency to refer to its sensational results as 'test-tube babies' is suggestive. All these facts point to the continuity of intra-uterine life from its beginning.

This continuity of life in the womb becomes more striking when we look at the findings of medicine in scientific and in ordinary terms. Cell division begins within hours of conception, blood cell formation has started after 17 days. Early neural development seems to appear that same day. The heart begins beating about 24 or 25 days following conception. After 33 days the cerebral cortex is recognizable. Forty-five days after conception you can pick up electro-encephalographic waves from the baby's developing brain.

At 45 days the child's body is complete. All the internal organs of the adult are present.<sup>4</sup> The arms, legs, fingers, toes and head are entirely formed and the child is seen to be distinctly human. An ultrasound examination will show the heartbeat and the major parts of the body. The child can be seen moving gracefully within the amniotic sac.

At 56 days or 8 weeks (about the earliest time abortions are performed) the child is a fully functioning human being. All of his or her organs and body systems are in place. They only require maturation, a process that will continue for 13 or 14 years. At eight weeks the child's features are so clear that one can see the creases on the child's open hand. The fingerprints are visible under a microscope. In fact these fingerprints that may later place that person at the scene of a crime are already permanently engraved on the skin. Forever after these may be used to identify the individual. By 11 to 12 weeks nerves and muscles are synchronizing with the young bones so that the arms and legs can make their first movements. From studies at this stage doctors know that the baby is already extremely sensitive to touch, heat, sound, discomfort and pain.

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3. Dr. Jerome Lejeune before U.S. Senate Committee, 97th Congress, 1st Session 1983, Vol. 1, p. 8.

4. The woman is not even aware that she is pregnant at this time. For a fuller description of early human development see Appeal Books I and II of appellant in *Borowski v. A.G. Canada*, 1988.

In my view a human foetus does not become a person, a human being, an individual at some magical point in time like when its heart begins beating, when you can see its fingerprints, quickening, viability or birth, but rather is already a person, a human being and an individual with potential. Genetics and embryology prove the essential humanity of life from its embryonic stage — a humanity that parallels biological growth and needs protection and respect from his or her fellow humans right from the beginning.

## II. The Effect of the *Morgentaler* Ruling

Until January 28, 1988, the law of Canada provided that abortion was unlawful unless the continuation of the pregnancy would be likely to endanger the mother's life or health and set out certain procedures that were to be followed. In the *Morgentaler*<sup>5</sup> decision of that day, the Supreme Court of Canada, by a 5-2 majority, found the provisions of that law, section 251 of the *Criminal Code*, to infringe on the right to life, liberty and the security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice — rights guaranteed to all, including pregnant women by section 7 of the *Charter*. It refused to find section 251 a reasonable limitation on the infringed right that could be demonstrably justified under section 1 of the *Charter*.

Sections 1 and 7 of the *Charter* read as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The purpose of the old law in protecting the human foetus and allowing abortions to be obtained only for 'therapeutic' purposes to protect the health and life of pregnant women has not been declared unconstitutional. What has been declared unconstitutional is most of the procedure used in the old law to attain that purpose.

The case does not tell us what kind of new law as a matter of substantive policy would be constitutionally acceptable. Only the judgement of Justice Wilson contains the opinion that a new law would have to grant full liberty for women during the early stages of pregnancy to choose an abortion without state interference. She suggests, however, that state restrictions on abortion would be permissible in the later stages of the pregnancy. The only other substantive view of what a new law might require is that of Justice Beetz, who, with Estey J., suggests that any new law, as a minimum, cannot be more restrictive than the old one, because women have the constitutional right to

5. [1988] 1 S.C.R. 30.

abortion if life or health is endangered by pregnancy. Neither pronouncement amounts to acceptance of the view that decisions to have abortions must at all stages of pregnancy be left to the pregnant woman and her physician.

The judges in the majority have agreed that protection of the human foetus is a valid purpose of legislation by Parliament under the criminal law power. This finding is a clear invitation to Parliament to legislate on the subject. Such legislation would have to be balanced against the rights of pregnant women under section 7 of the *Charter*. What is not clear, however, is what provisions of the *Charter*, if any, protect the rights of the human foetus.

The main argument regarding abortion relates to section 7 of the *Charter*. Only one of the judges, Justice Wilson, focused on women's alleged right to liberty to choose to end their pregnancy without state interference with that decision. The others in the majority, finding that the abortion law violated this section, focused on the right to security of the person.

The right to security of the person is obviously a limited right and not an absolute one. It can be taken away but only in accordance with the principles of fundamental justice. Even where it is not in accordance with such principles, reasonable limitation of this right can be justified under section 1 of the *Charter*.

That the right to security of the person is breached by a law is thus actually a trivial point in the sense that all criminal law does so. The real issue is whether the law is fundamentally just in doing so. Consider the much quoted statement (often taken out of context) of Chief Justice Dickson: "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."<sup>6</sup> This statement merely establishes circumstances in which the right to security of the person is breached. It does *not* mean that Chief Justice Dickson is stating that the law is therefore fundamentally unjust in doing so or that we must have abortion on demand. You could just as easily say, "Forcing someone to stay in jail as a result of a determination of guilt for murder is a profound violation of security of the person." This just means that we must make sure that the whole substance and process of arriving at this penalty therefore is in accordance with fundamental justice, not that we must necessarily abolish the crime of murder.

The application of the *Charter* to legislation always involves a two-step process of seeing if a right has been violated and then moving on to the issue of whether the limitation is just and reasonable or not. That a right has been violated is often easy to assert. It is really the analysis of the limitation that is important. Only unjust and unreasonable limitations can be declared unconstitutional under the *Charter*.

The old abortion law contained a set of standards which exempted women and doctors from criminal liability for undergoing or performing what was defined as

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6. *Ibid.*, at 56.

'therapeutic' abortions. It was the complex and restrictive procedures in the law to meet that standard which were held to violate the security of the person. These procedures were found so manifestly unfair as to violate principles of fundamental justice. The violation could not be salvaged by section 1 of the *Charter*.

### *What may Parliament do?*

One claim is that the *Morgentaler* decision prevents Parliament from enacting a law prohibiting abortions for any reason in the early stages of pregnancy. In other words, it is claimed that all that Parliament can do is to take a gestational approach (i.e. no prohibition against abortion for the first third or half of a pregnancy). That is not what the decision says. If Parliament takes a gestational approach, it will be because it wants to; it will not be because the *Morgentaler* decision requires it to.

The balancing of the pregnant woman's interest in her own life or health with the continued life of her unborn child is permissible under the *Charter* provided the means chosen to implement that balancing of interests are fair and non-arbitrary. The creation of unreasonable delays which increase medical risks is clearly unconstitutional; providing for a maximum of protection for the unborn child compatible with maternal security of the person is arguably not so. My conclusion is that:

- (1) the *Morgentaler* decision does not decide, one way or the other, whether a gestational or developmental approach is a sound or constitutionally valid way to regulate abortion;
- (2) the decision does not prevent Parliament from enacting criminal law which only allows abortions where the continuation of the pregnancy would be likely to seriously endanger the woman's life or health;
- (3) the decision does not prevent the enactment of criminal law on abortion requiring that danger to life or health be confirmed by a reliable, independent and medically sound opinion.

### *A Gestational Approach*

Would a gestational approach where abortions would be available without restriction during some part of the gestation period (e.g., for the first trimester) be contrary to the *Charter*?

The answer to that question is uncertain. Several of the opinions in *Morgentaler* refer to a balancing of competing interests between mother and foetus. In my opinion, an acceptable balance cannot be achieved where the interests of the mother totally extinguish those of her unborn child. If there is to be a genuine balancing of interests, then the interests of the unborn child must be accounted for throughout pregnancy and not merely at some arbitrary point within it.

The uncertainty over *Charter* protection for the unborn is complicated by the fact that the Supreme Court expressly said that it did not consider "the entirely separate

question whether a foetus is covered by the word 'everyone' in section 7 so as to have an independent right to life under that section." (per Wilson J. at p. 184) (per Beetz and Estey JJ. at p. 128). That issue will be decided later in the Borowski case.

### *Can Parliament Enact a 'Life and Health' Standard?*

The *Morgentaler* decision does not prevent Parliament from enacting a criminal law which prohibits abortions at any gestational stage unless the continuation of the pregnancy would likely endanger the mother's life or health.

In the *Morgentaler* decision, a majority (Beetz, Estey, McIntyre and La Forest JJ.) make it abundantly clear that a *life and health* standard does not violate the right to security of the person under the *Charter*. Two other judges (Dickson C.J. and Lamer J.) say they do not have to decide that issue and expressly refrain from doing so. They do say, however, if a health standard is a constitutionally valid standard, the word 'health' must not be left undefined. Only one judge (Wilson J.) says that it would be contrary to the *Charter* for Parliament to prohibit abortions for any reason in the early stages of pregnancy.

Would any other provision in the *Charter* prevent Parliament from enacting a *life and health* standard? The *Morgentaler* decision does not answer that question.

Justice Wilson, whose reasons for judgement were not endorsed by the other six justices, was the only judge to focus on the right to 'liberty.' If we define liberty as the right to make our own choices about matters of personal importance to us, then virtually all of law breaches this right. Who would deny that forcing a woman to give birth against her own wishes is a profound breach of her personal liberty? The real issue has to be, given the reality that pre-born life is also at stake, whether such a violation of the right to liberty by prohibiting some abortions is nevertheless fundamentally just or not. Justice Wilson argues that it is not fundamentally just because the principles of fundamental justice include other *Charter* rights like the right of freedom of conscience found in section 2. But freedom of conscience is just as wide open as the right to liberty. Freedom of conscience in the abstract could be used to strike all of law down as unconstitutional, since there is always someone who sincerely disagrees with the content of a law. Thus, instead of formulating the conditions of fundamental justice for the proper limitation of a right, Justice Wilson has simply placed a new right as a limitation that is as unlimited as the one that is supposed to be limited.

Justice Beetz said that the standard of *life and health* stands up against the *Charter* right of security of the person but he wasn't certain what he would do when the majority of the court looks at the right to liberty to have abortions and the substantive question of whether the law would be fundamentally just in limiting that right.

However, he did point out that there was a substantial difference of opinion as to the state's interest in the protection of the foetus as against the pregnant woman's right to liberty.



Wilson, J. said she would leave it to the informed judgement of the legislature, and volunteered that the state's interest in the foetus became compelling somewhere in the second trimester. Beetz J. said this view may be compared with that of O'Connor J. of the United States Supreme Court in her dissenting opinion in *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>7</sup>

In *Roe v. Wade*, 410 U.S. 113 (1973)], the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the foetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," *id.*, at 159, the Court chose the point of viability — when the foetus is *capable* of life independent of its mother — to permit the complete proscription of abortion. The choice of viability as the point at which state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.<sup>8</sup>

### *Requiring a Second Medical Opinion*

Can Parliament enact a requirement for a reliable, independent and medically sound opinion (in addition to the opinion of the woman's physician) in order to ascertain that the life or health of the woman is in danger?

Once again, a majority of the Supreme Court judges in *Morgentaler* said "Yes." The rest did not answer this question. McIntyre and LaForest JJ. dissenting, held that the requirement for two or more independent medical opinions does not violate the *Charter*. Beetz and Estey JJ. held that:

- (1) "Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus" (p. 110).
- (2) "I do not believe it to be unreasonable to seek independent medical confirmation of the threat to the woman's life or health when such an important and distinct interest hangs in the balance" (p. 112).
- (3) "Some delay is inevitable ... It is only insofar as the administrative structure creates delays which are unnecessary that the structure can be considered to violate the principles of fundamental justice" (p. 114).

To conclude, the *Morgentaler* decision does not require or recommend that Parliament take a gestational approach; does not prevent Parliament from enacting a *life and health* standard; and there is a strong legal argument that a *life and health* standard (confirmed by a second, independent medical opinion) would not offend other provisions in the *Charter*.

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7. 462 U.S. 416 at 460-61 (1983).

8. *R. v. Morgentaler*, *supra*, note 5 at 113.

### III. Historical Context and Other Legal Issues

Regulation and prohibition of abortion is not a new nor unique phenomenon to the 20th century. A brief account of the legal history of abortion regulation set out by my colleagues in the majority provides some perspective and enlightenment on the current controversy.

From time immemorial the state has always had an interest in the unborn, even without knowing when life began. Although abortion was widely accepted, there was still a wide difference of opinion amongst intellectuals as to the legitimacy of abortion. For example, the Oath of Hippocrates required a physician to pledge, amongst other things that "he would not give to a woman an abortifacient pessary."<sup>9</sup> Hippocrates symbolized the new respect for life which was to join forces with philosophy and religion in implementing a protective custody for the unborn.<sup>10</sup>

This fundamental principle is as true today as it was in Greek times. For example, the Supreme Judicial Court of Massachusetts<sup>11</sup> recently held that a human foetus was a person for purposes of the motor vehicular homicide statute and thus a potential homicide victim. A number of other American states have adopted legislation imposing criminal sanctions for the destruction of a human foetus that are identical to those imposed for the murder of a person. California provides that "murder is the unlawful killing of a human being, or a foetus, with malice aforethought."<sup>12</sup>

It is evident that the traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage of development or condition. This ethic has had the blessing of the Judaeo-Christian heritage and has been the basis for most of our laws and much of our social policy. Indeed our own *Criminal Code* has always been concerned first and foremost with the protection of human life.

Furthermore, in recent years there has been a clear and perceptible trend towards increasing respect for the human foetus. The common law has progressively expanded its protection of the unborn as it recognized their nature and personality. It is therefore essential and instructive to examine, albeit not exhaustively, developments in other areas of the law regarding the unborn and to relate these findings to the justifiability of protecting the unborn.

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9. See D. Granfield, *The Abortion Decision* (New York: Doubleday: 1969) at 50.

10. *Ibid.* at 50-51.

11. *Commonwealth of Massachusetts v. Cass*, 467 N.E. 2d 1324 at 1328 (1984).

12. Extract from the California Penal Code, s. 187. For a discussion of this and other state criminal law on the unborn see *The Creation of Fetal Rights: Conflicts with Women's Constitutional Right to Liberty, Privacy, and Equal Protection*, Dawn E. Johnston (1986) 95 *Yale L.J.* 899 at 602.

## 1. Property Rights of the Unborn are Protected by Law

For centuries the English common law of property has recognized the unborn child from the moment of conception for all purposes which affected the property rights of that child on its eventual birth. As early as 1795, an English court interpreted the ordinary meaning of children in a will to include an unborn child: 'an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of children living at the time of his decease.'<sup>13</sup>

Thereafter another court stated: 'Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons.'<sup>14</sup>

It is now a well established rule of Canadian law that a child is in being from the time of conception for the purpose of taking any estate which is for its benefit, provided it be born alive. Upon these foundations, the path of the common law has also been followed by statutory law. For example, the unborn child has status under such Manitoba enactments as *The Trustee Act*<sup>15</sup> and *The Testators Family Maintenance Act*.<sup>16</sup>

## 2. Tort Law; Negligently Inflicted Injuries

In the area of tort law, dramatic changes have occurred in the status of the unborn. It had been the common law belief that the unborn child was part of the mother having no independent existence. An unborn child who had been harmed by negligent injury to the mother could not recover in its own right since the mother was the only 'person' who had been injured. However, as a result of medical discovery that the conceived but unborn was a separate biological being, the law began to acknowledge that it may be a separate legal being as well.<sup>17</sup>

Not only did the property of the unborn require protection but also the physical integrity of the unborn. The Supreme Court of Canada, in *Montreal Tramways Co. v. Leveille*<sup>18</sup> became the first common law court in the world to allow a right of action for pre-natal injuries to unborn children who are subsequently born alive.

For a time there was hesitation in the United States as to whether this right of recovery was limited to those who were born alive and *viable when injured*. This

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13. *Doe v. Clarke* (1795), 2 H.B.L. 399, 126 E. R. 617 at 618.

14. *Thellusson v. Woodford*, (1798) 4 Ves. Jun. 227; 31 E. R. 117 at 164.

15. R.S.M. 1987, c. T160, subs. 87(6).

16. R.S.M. 1988, c. T50.

17. See E.W. Keyserlingk, "The Unborn Child's Right to Prenatal Care" (Part 1) (1982) 3:1 *Health Law in Canada* 10 at 13.

18. [1933] S.C.R. 456.

restriction has since been rejected by many courts as unjust and artificial. Of particular importance is what caused the court to move away from the *viable when injured* rule, namely, direct consideration of medical and biological evidence about the unborn. The 1959 case, *Phul v. Milwaukee Auto Ins. Co.*<sup>19</sup> is an example. The court observed that to draw a line between viability and non-viability would be arbitrary, and would be to ignore the biological facts indicating both that there is a living human being before viability and that the unborn is not a part of its mother either before or after viability. What the courts were saying is that there is no valid medical basis for a distinction based on viability. Biologically and medically it has a separate existence.

This branch of tort law gives explicit recognition to the unborn child as a person and in so doing acknowledges that the law must keep pace with current medical knowledge to ensure justice does not become arbitrarily based upon fiction.

### 3. Wrongful Death

A further development has been the recognition by some courts of the right to maintain an action for the wrongful death of a child who dies as a result of injuries *in utero*, whether the child dies after live and viable birth or *in utero*. The cause of action for wrongful death is purely statutory and most wrongful death statutes require that the wrongful act which causes death be such that the decedent person could have brought an action against the wrongdoer if death had not resulted. The central issue confronted by the courts was whether the unborn child is a 'person' within the meaning of the controlling statute.

This important development in the evolution of the respect towards the unborn child's rights is clearly illustrated in those decisions which allow parents or survivors to maintain a wrongful death action where the child is stillborn (that is, a child who is injured *in utero* and dies *in utero* as a result of the injury). In these cases, the unborn child to whom live birth never comes is held to be a 'person' who may be the subject of an action for damages arising after death.<sup>20</sup>

The reasons for allowing such actions are compelling: it would be anomalous for a jurisdiction to permit recovery for pre-natal injuries to the child born alive but to deny recovery to a child whose pre-natal injuries are severe enough to cause still birth. "If there be no recovery for the unborn's wrongful death, then it follows that it would be cheaper for the defendant to inflict injury sufficient to cause the death of the unborn rather than simply to harm him."<sup>21</sup>

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19. (1959) 99 N.W. 2d 163.

20. The '*viable when injured*' rule would appear to be applicable in some jurisdictions for wrongful death actions.

21. See K.M. Weiler and K. Catton, "The Unborn Child in Canadian Law" (1976) 14 *Osgoode Hall L.J.* 643 at 656.

The law, in recognizing a cause of action for injury inflicted before birth, has recognized the legal interests and personality of the unborn child. A majority of states in the United States now consider unborn children that have died *in utero* to be 'persons' under wrongful death statutes. In cases where the child has died *in utero* and the courts have awarded compensation to survivors, the courts have implicitly and inescapably acknowledged the juridical personality of those children. The courts have waived the traditional suspensive condition of live and viable birth for juridical personality.<sup>22</sup>

It is sometimes argued that recognition of property and tort rights requires that the child be born alive and therefore the cases prove nothing concerning the child's prior legal existence. This is clearly not the case when the courts have allowed a wrongful death action where the child is stillborn; but apart from that, it is a questionable argument. If 'nothing' existed at the time prior to birth when the injury occurred or the property interest arose, how then could there be any rights which suddenly came into existence at birth? The fact that some of these rights, in some jurisdictions, have no remedies unless the child is born alive does not negate the child's legal existence when the rights arose. There can be no right to enforce at birth if the person was not in legal existence at the time of the injury or the time the property right first arose.<sup>23</sup>

#### 4. Child Protection Statutes and Proceedings

Other important developments recognizing the unborn's rights are involved in decisions and mechanisms to protect children before birth. Examples of these are attempts to ensure the provision of necessary acts of health care or maintenance while the child is still unborn. These decisions and statutory mechanisms clearly illustrate that for purposes of pre-natal health care and protection there is an essential continuity between child and unborn child. Both are equally in need of and deserving of legal mechanisms to protect and promote their health.

A recent Ontario Provincial Court ruling highlights this emerging development.<sup>24</sup> In 1987, the Belleville Children's Aid Society sought a protection order under Ontario's *Child and Family Services Act* after concern was raised that a 38 week-old unborn child was at serious risk of fatal pneumonia. The mother refused all appeals that she obtain medical treatment and it appeared that she planned to give birth in the underground parking garage where she had made her home. Provincial Court Judge D.K. Kirkland held that an unborn child is a child in need of protection and made the child a ward of the state.

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22. See E.W. Keyserlingk, *The Unborn Child's Right to Prenatal Care — A Comparative Law Perspective*, (Montreal: Quebec Research Centre of Private & Comparative Law, 1984) at 43.

23. See "Abortion and Social Justice," in T.W. Hilgers and D. Horan, *The Legal Case for the Unborn Child* at 105, Sheard and Ward Inc., 1972.

24. *Re Children's Aid Society of City of Belleville, Hastings County and T et al.* (1987), 59 O.R. (2d) 204.

Again in 1987 a British Columbia Provincial Court Judge held that where the mother's conduct before birth is such that the life of the child is in jeopardy, the child is in need of protection before birth.<sup>25</sup>

It has also been held that an unborn child can be the victim of abuse by acts of a mother and hence in need of protection.<sup>26</sup> The Yukon Territory's *Children's Act*<sup>27</sup> provides for supervision or counselling when there are reasonable and probable grounds for suspecting that an unborn child is being subjected to risk arising from the mother's use of addictive or intoxicating substances.

The New Jersey Supreme Court<sup>28</sup> was asked to decide whether a pregnant Jehovah's Witness could be compelled to submit to a blood transfusion when such transfusions were contrary to her religious beliefs. The court unanimously decided that the unborn child was entitled to the law's protection, and ordered the transfusions. This dramatic invasion of a woman's right to inviolability did not rest on the principle that the state could compel the transfusions in order to save the life of the woman and her unborn child. Rather the court held that the transfusions were to be given to save the life of her unborn child. The unborn child's right to live could not be negated by the mother's asserted constitutional rights of religious expression or personal inviolability — the child's right to life was paramount.

In New Brunswick, there has been a fundamental reform of their child welfare statute. *The Family Service Act*<sup>29</sup> expressly provides that a child includes an unborn child. Accordingly, in New Brunswick an unborn child may be found to be 'in need of protection' and care according to objective standards.

The continually growing respect for and the evolving legal personality of the unborn means the community recognizes in the unborn child an underlying human personality. Liberal access to abortion tears this legal personality from the human foetus and deprives it of the natural benefits acquired through statute and case law. In my opinion this ignores the already vested legal rights of the unborn.

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25. *Re R.* (1987), 9 R.F.L. (3d) 415. However it was held on appeal that the provincial government does not have the right to take custody of a baby before it is born.

26. See *Re Children's Aid Society of Kenora v. J.L.* (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct.) (a child born with foetal alcohol syndrome); and *Superintendent of Family and Child Service v. M. (B) and O. (D)*, [1982] 4 W.W.R. 272 (B.C.S.C.) (A child born with severe drug addiction acquired by the mother).

27. R.S.Y. 1986, c. 22, s. 133.

28. *Raleigh Fitkin — Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421; 201 A 2d 537 (1964).

29. S.N.B. 1980, c. C-2.1 (S.N.B., c. F2.2).

## IV. Conclusion

### *Why Abortion Should Be A Crime*

I agree with the majority that abortion passes the four tests of criminality, but without any of their reservation. Upon reflection, it is apparent that these four tests are easily satisfied. Abortion clearly *seriously harms another*, namely an unborn child at its earliest and most vulnerable stage of development. The act affects a life other than just the mother's. Her decision does not merely involve her own person; it harms a separate human life jointly produced by her and the father. The life of each individual human being is self-evidently a central value of the legal order and as such it can be argued forcefully that abortion so *contravenes our fundamental values as to be harmful to society itself*. Provided any new law does not incorporate complete prohibition of actions directed against the foetus, *enforcement measures themselves will not seriously contravene our fundamental values*.

The *criminal law can make a significant contribution in addressing the issue of abortion*. Criminal prohibitions on abortions are desirable for both functional and symbolic reasons. Functional, because criminal prohibitions will reduce, although not eliminate, abortions. Since foetal life deserves legal protection, it follows that a reduction in abortions is a net social benefit. The symbolic function of the criminal law is no less important. The criminal law is our nation's fundamental statement of public policy. It is the instrument by which the community draws a line between the tolerable and the intolerable. Criminal law defines those whose interests are worthy of respect and protection, and in my view this should include all members of the human family. Ultimately, the criminal law is a mirror of what we are; it reflects our commitment, or lack of commitment, to human dignity and equality.<sup>30</sup>

The law does not exist for the sole or primary purpose of punishing illicit acts. It exists, as an expression, in a broad sense, of the kind of people we are. It does not merely regulate our behaviour, it articulates and symbolizes our values and beliefs. It is true that the criminal law is sometimes ineffective, difficult to enforce, costly and arbitrary; but this is a failing of criminal law generally, not peculiar to abortion laws. Should enforcement problems lead us, for example, to repeal our laws against theft when 95% of goods taken by breaking and entering are never recovered? Difficulty of enforcement by itself is not a sufficient reason for repealing a criminal law. Our criminal law sets out the consequences of engaging in prohibited behaviour; it cannot entirely prevent that behaviour.<sup>31</sup>

For Canada to demonstrate its continued respect for human life, the taking of human life by abortion should therefore once again become a crime and be included in the *Criminal Code*.

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30. See I. Hunter, "The Controversy Over Abortions" (1985) No. 6 *The Idler* 15 at 22.

31. *Ibid.* at 21.

### *About Imposing One's Morality*

This, some will argue, is to impose my moral views on others — something 'off limits' in our pluralistic society. While it is true that law and morality are not co-extensive, law is concerned with morality. And while one cannot impose one's morals on others and one can't be absolutist in today's pluralistic society, most of our criminal law (e.g. the law on violence and theft) is based on moral notions of what is 'right' and 'wrong.' These laws should apply regardless of the views or the cultural background of individual citizens. In fact by introducing a 'good samaritan law' in its draft Criminal Code of 1987, the Commission in Report 31 has in effect recommended turning a moral obligation into a legal one, because "in such cases, if not in others, we think we are our brother's keeper."<sup>32</sup>

I am prepared to have the state impose a moral obligation of protecting the life, liberty and security of both the mother and her unborn child.

### *Matters for Parliament's Consideration*

The state will not be able to resolve the abortion dilemma by merely providing for a legislative balance between the 'rights' of the unborn child and the 'rights' of pregnant women. The battle of 'rights' does not resolve anything but rather falls into the trap of accepting the cultural and legal pre-suppositions of our liberal society. In this way the issue is decided not because of the factual weight of legal and religious sanctions against killing and earlier legislative recognition of the rights of the unborn, but because 'freedom of choice' fits best with the ideals of our individualistic culture. But these ideals recognize no equitable social arrangement except the protection of the individual's right to pursue his or her interests without undue interference from others.

The abortion conflict has haunted our society since the end of the Second World War. In order to eliminate this conflict, we have to revise our attitudes about pregnancy, parenthood and abortion. In other words, what is needed is a social, political and cultural transformation.

There is concern that society does not adequately support members of the family. There is an erosion of support to the family by the state e.g., income support programmes have been reduced.<sup>33</sup> Society is not hospitable to parents. Fertility has declined dramatically and there has been an immense increase in abortion since the law

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32. Law Reform Commission of Canada, *Omissions, Negligence and Endangering*, Working Paper 46, Ottawa, LRC, 1985, p. 17 and *Recodifying Criminal Law — Revised and Enlarged Edition*, Report 31, Ottawa, LRC, 1987, s. 10(2).

33. Vanier Institute of the Family, memorandum submitted February 25, 1986 to Senate Standing Committee on Social Affairs, Science and Technology; with respect to Bill C-70, and Act to amend the *Family Allowance Act*, 1973.



was amended in 1969.<sup>34</sup> The relationship between pregnant women and their unborn children has been de-humanized: semantic gymnastics are used to rationalize abortion as anything but taking human life. It is the 'pregnant woman and her foetus' that are talked about rather than 'the mother and her unborn child.' Similarly it is a crime to 'destroy' a foetus rather than to cause the death 'of the unborn child.' In my view legislation can provide some assistance but it is really a social and cultural task in which the community has a decisive role to play.

For recent (and less contentious) examples of successful reconditioning of attitudes, we need but look at the successes of Participaction, of reducing smoking, and of reducing drinking and driving. In most of these instances it was a combination of legislation and programmes to raise public consciousness that resulted in changes in attitude and habit. It is no longer socially acceptable to drink and drive. Health programmes are popular and flourishing in Canada and produce healthier Canadians. The use of tobacco has been drastically reduced.

Wider access to abortion suggests that the procedure is the *one* available solution to a variety of difficulties associated with pregnancy. However, this would not eliminate the constraining forces — social, economic and psychological — that underlie the decision to seek an abortion in the vast majority of cases. Examples of these forces include a lack of adequate financial and social support during pregnancy, various forms of discrimination and social pressure against unwed mothers, a lack of adequate housing for mothers with dependent children, a scarcity of part-time job opportunities, a scarcity of community centres and agencies to assist pregnant women and mothers with psychological, economic and social problems, and the difficulties 'unplanned' pregnancy creates in the lives of professional women. All these factors create enormous pressures when a woman suddenly faces the burdens and responsibilities of pregnancy. It is no exaggeration to say that many abortion decisions lack the degree of freedom necessary for full responsibility.

Thus, a legislative balancing act aiming only to secure legally controlled access to abortion will continue to create victims among both women and their unborn. Because of the way pregnant women and the unborn are related, they have comparable — hardly ever 'competing' — interests in the 'right to life, liberty and security of the person.' To make unimpeded reproductive choices, women must have the cultural and socio-economic freedom to embrace pregnancy and the opportunity of motherhood that at least equals access to abortion.

Truly equitable legislative measures have to extend equal protection to the unborn not merely by restricting access to abortion but also, and primarily, by increasing the

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34. The Dominion Bureau of Statistics news bulletin reported in autumn 1970 that there were 4395 abortions between Aug. 26, 1969 and Aug. 25, 1970. In all of 1970, DBS reported 11,200 abortions. Statistics Canada notes that there were 30,949 abortions in 1971 and 60,956 in 1985. About 2480 women who had an abortion in 1985 reported that they had two (2) or more previous abortions, Statistics Canada, *Therapeutic Abortions 1985* (Ottawa: Supply and Services Canada, 1986), at 29 and 40 respectively. In 1982, 400 women reported that they had 4 or more previous abortions (House of Commons Debates, June 7, 1988, at 16229).

protection of pregnant women. Even if regulated access to abortion remains a regrettable necessity, new legislation must go beyond this and try to reduce the factors in women's lives that force them to reject pregnancy, and lead them to choose abortion as a deceptively simple escape from economic, social and cultural dilemmas.

To offer easy access to abortion shows a callous failure of responsibility to protect life. To outlaw it without proposing positive measures to remedy the situations encountered by pregnant women would also amount to a failure of responsibility. A coherent and effective family policy requires a co-ordinated effort from all levels of the state. Measures have to be taken in various fields, such as labour, revenue, family life, housing and education. There is a need to improve the condition of pregnant women and give effective recognition to the socio-economic importance of motherhood. New legislation cannot incorporate these desired objectives without a massive operation of education and persuasion on the level of people's consciousness.

Human laws are shaped by human politics, and neither is ever perfect. Law and life are always uneasy partners. Undoubtedly, there will be compromises and shortfalls in the painful process of cultural-political progress. But while the Commission has compromised in criminal law matters to obtain consensus and to be pragmatic, it has, until now, rallied to the support of the most valued principle in its recommendations to reform the criminal law. That principle is the respect for human life. However, my colleagues provide fuller respect for the human foetus only after viability. During the first 20 weeks after conception the recommendations provide virtually no protection, a consequence in my opinion, of the failure to offer a proper definition of 'health.'

The use of 'health' under the old law required that doctors often had to adduce a false ground for abortion — namely that failing to end a pregnancy would impair a woman's physical or mental 'health,' directly or indirectly. Yet it is clear that in the large majority of cases such claims were entirely spurious. Furthermore, the lack of definition eased the burden of a defendant prosecuted for proceeding outside the old law, in that he could offer the jury evidence to support his personal interpretation of danger to physical or mental health.<sup>35</sup> An arbitrary, subjective 'health' definition subverts and makes the statutory scheme purely formalistic and unworkable in practice. By neglecting to put forward a clear definition of health, my colleagues perpetuate these ambiguities.

It can no longer be suggested that a woman denied an abortion might endure poor mental health as a result, for that myth has been dispelled.<sup>36</sup> The American Psychiatric Association, on the other hand, recently said that abortion itself is a stressor event that triggers post-traumatic stress disorder.<sup>37</sup>

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35. See B. Dickens, "The *Morgentaler* Case" (1986) *Osgoode Hall L.J.* 229 at 270.

36. See C.R. Bagley, "Helping Women and Protecting the Foetus" (1988) 9:4 *Policy Options* 31.

37. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder*, Revised, 1987, p. 250.

It is not incorrect to say that, generally speaking, there is no problem concerning the life of the pregnant woman and there are few problems concerning her physical health that can't be resolved without terminating her pregnancy: adrenal tumours may be safely removed from pregnant women, open heart surgery can be performed during pregnancy. However, where the continuation of the pregnancy would be likely to endanger her life or seriously and substantially endanger her health and there is no other accepted medical procedure for effectively treating this health risk, an abortion could be performed.

The Commission has said in the past that 'all human misfortunes and disorders are not forms of illness from which one must be saved under the rubric of health in criminal law' .... [A] state of well-being, in law, ought first to be notionally sufficient to cope with the ordinary living in modern society, but does not carry a guarantee of stress-free, non-responsible lifestyle, because stress as well as responsibility for one's behaviour are incidents of living in society.'<sup>38</sup>

The Law Reform Commission of Canada has, since its inception seventeen years ago been a champion of human life, a protector of the weak and the vulnerable, and a respector of human dignity. This protection was proclaimed by establishing the Protection of Life Project in 1977. The recommendations of this working paper are completely at odds with this laudable history.

In 1979 in its Working Paper 24: *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons*, the Commission concluded:

The stigma imposed on such persons by their characterization as 'persons in need of protection' is emphasized by the implication that such persons lack some quality of humanity that precludes them from the general rules of treatment usually accorded other members of society. As a group they are warranted protection. Self-respect, dignity, and self-determination must be guaranteed for each individual, including those with limitations. (P. 121)

In Report 20, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1983) the Commission said:

In the medical context the presumption in favour of life should always be recognized. Our law regards the protection of human life as a fundamental value. Any law reform must be based on that value. The proposed system of rules should never depart from the principle that in the absence of reasons to the contrary the patient should always be presumed to want to live, and that the patient would prefer life to death even when unable to express that preference. (P. 11)

In Report 28: *Some Aspects of Medical Treatment and Criminal Law*, published in 1986, the Commission continued to maintain the principle of protection of life by once again specifically and strongly rejecting euthanasia. By compromising the principle of protection for the vulnerable the Commission reduces the credibility of its past recommendations. Permitting abortions during the first 20 weeks after conception and thereby removing protection for this vulnerable group will lessen the protection for the

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38. Law Reform Commission of Canada, *Medical Treatment and the Criminal Law*, Working Paper 26, Ottawa, Supply and Services Canada, 1980, at 7.

senile and other candidates for euthanasia that the Commission had intended to protect. Commenting on the effect of the *Morgentaler* decision, University of Toronto Law Professor Bernard Dickens said: "The legalization of euthanasia for the terminally ill — and perhaps the non-terminally ill — may not be far."<sup>39</sup>

Yet the Commission has in its proposed Criminal Code (Report 31) provided protection for certain other forms of life. It recommends that it be a crime for anyone who unnecessarily causes injury or serious physical *pain* to animals, i.e., living non-human vertebrates, which include fish. To provide legal protection from unnecessarily causing serious pain to fish while failing to protect the *life* of the unborn child is in my opinion not only inconsistent but also unconscionable.

The advances in our knowledge of life in the womb and the advances over the past decade in pre-natal medicine that have pushed back the point at which a human foetus becomes viable outside the uterus cannot be disregarded.

Furthermore the independent existence of the unborn child has to be considered when viewing the pregnant woman's right of autonomy to act and to reproduce. Individual freedom must be preserved but only to the extent that it does not constitute a clear and present danger to society.<sup>40</sup> But the Commission has found that the act of abortion fulfils the criteria of whether it should be a crime, one of which is whether the act so seriously contravenes our fundamental values as *to be harmful to society*.

"Reforming laws means more than changing them, it means improving them."<sup>41</sup> More or less unregulated abortion for the first 20 weeks after conception does not accomplish this. Ninety-nine percent of all abortions are done by then.

To many, what matters in the abortion debate is the battle for women's rights. The battle is being won, but many say unwanted pregnancies threaten these new-found freedoms by forcing women to temporarily stop working. They also say, that to be truly equal and take advantage of other equality rights they might win, women must have the right to decide when they want to start a family.

But is it equality if women have to have abortions just to keep a position in the work-force and in society? Isn't abortion an imperfect response to society's failure to make room for the birth and upbringing of children? Should women not concentrate on working to increase their options, by demanding not only better maternity and unemployment benefits but also parental leave rights that would allow either parent to look after a young child?<sup>42</sup>

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39. See B. Campion, "Women's Legal Victory Looks More Like a Defeat," *Globe and Mail*, February 22, 1988, at A7.

40. See *supra*, note 38, at 6.

41. Law Reform Commission of Canada, *Third Annual Report, 1973-74*, Ottawa, Information Canada, p. 3.

42. See "Irreconcilable Differences", *Saturday Night*, August 88 at 23.

By removing constraining forces and providing women with a welcoming environment, and by reconditioning attitudes towards motherhood, pregnancy and abortion, the state and the community could enable pregnant women to make unimpeded reproductive choices.

With respect to unborn children who have 'lethal' defects, the most powerful testimony against the policy of abortion of the handicapped comes from handicapped people themselves. What is a 'lethal defect'? While my colleagues define it, many babies who are 'supposed to die' don't. The large majority of handicapped people are glad and joyful at their existence, and are grateful that they were not aborted. Unborn children who are diagnosed as having (or possibly having) serious physical or mental impairments (such as Down's syndrome or spina bifida) and even 'lethal defects' are entitled to protection against abortions performed because of those impairments, just as newborn children are entitled to protection against intentional infliction of death because of similar impairments. Or, do we accept that an anencephalic baby is a 'non-person human derivative,' as such a baby is considered to be by Dr. Leonard Barley, Chairman of the Department of Cardiothoracic Surgery, Loma Linda University Medical Centre, California?<sup>43</sup>

Finally, by agreeing that abortion is not "right," by being against abortion without trying to change attitudes about it, and by permitting access to it for little or no reason, we assume a position of despair, not hope. Yet we teach our children that 'Hope springs eternal in the human breast.'

In the words of Professor Emeritus, George H. Williams, of Harvard:

"Those who oppose abortion are fighting for the very frontier of what constitutes the mystery of our being. Unless those frontiers are defended, the future is grim with all the prospects of man's cunning and contrived manipulation of himself and others."<sup>44</sup>

Parliament now has the opportunity to provide Canada with legislation that indicates a new trend in the western world, a trend in which the constraining socio-economic forces that determine decisions to seek abortions will, for the first time, receive due attention. Parliament can fulfil its responsibility by affirming the fundamental social value of respect for life while at the same time making much needed reforms to social support programmes that help families.

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43. See L. Surtees, "Transplant Program Using Infant Organs is Halted as Failure, *Globe and Mail*, September 26, 1988, A1 at A2.

44. *Boston Pilot*, March 25, 1967 (reproduced in *America*, April 1, 1967).