Viability, Values, and the Vast Cosmos

Dennis J. Horan
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Centuries hence, when current social and political problems may seem as remote as the problems of the Thirty Years' War are to us, our age may be remembered chiefly for one fact: It was the time when the inhabitants of the earth first made contact with the vast cosmos in which their small planet is embedded.1

Without breaking through to absolute and unconditional values, culture inevitably ends by denying itself in what might be termed pseudo-or-anticulture, is something which has the external appurtenances of culture but is essentially false, worthless, and inhuman.2

INTRODUCTION

The vastness of the universe depends not only upon its size, but also upon the perception of its beholder. Its meaning for mankind is as variable as its vastness and, in our shrinking world culture, as frightening. A world culture is referred to because no human rights issued today can be discussed in the vacuum of a single nation. Any such issue must be regarded as one relevant portion of our small spaceship, affecting all nations alike.

Abortion is a human rights issue. It involves the most fundamental human right, the right to life, without which all other human rights are meaningless. The abortion issue focuses on the question: When does each individual’s right to life commence? Like the decision in Scott v. Sandford3 (the Dred Scott case), the self-inflicted wound of Roe v. Wade4 has answered the question in a fashion that will breed debate as long as it remains on the books. The essence of that debate will be whether the inhabitants

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3 60 U.S. (19 How.) 393 (1856).

of this planet will ever again see an objective ordering of values, free from
sociological cant, the apex of which will be the sanctity of human life.

This article is not intended to be a critique of Wade. Rather, its
primary intent is to shed light on the growing importance of the concept
of viability through a discussion of cases which have arisen since that
decision. First to be considered is an opinion of the West German Federal
Constitutional Court, followed by an opinion of the Canadian Supreme
Court. Thereafter, the decisions of four state supreme courts in the United
States concerning viability and the legal personhood of the unborn child
will be examined. The discussion will then focus on Commonwealth v. Edelin
and, finally, life and death issues in the special care nursery. A
potpourri, you say? Maybe so, but always involving a single issue: the
value of human life in our vast cosmos.

THE GERMAN OPINION

On February 25, 1975, the Federal Constitutional Court of West Ger-
many, in a six to two decision, declared section 218A of the Fifth Statute
for the Reform of the Penal Law unconstitutional. On June 21, 1974, the
court, upon application of the State of Baden-Württemberg, had issued a
provisional order staying the effect of section 218A until final judgment.
The case was ultimately heard on the application of 193 members of the
German Federal Parliament and 5 States: Baden-Württemberg, Bavaria,
Rhineland-Pfalz, Saarland, and Schleswig-Holstein.

Section 218 prohibited the interruption of pregnancy later than 13
days after conception and provided punishment for anyone, including the

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5 There has been a great deal of comment on Wade. E.g., Byrn, An American Tragedy: The
Supreme Court on Abortion, 41 FORDHAM L. REV. 807 (1973); Ely, The Wages of Crying Wolf:
7 Judgement of Feb. 25, 1975, 39 B Verf G1. The author is using an unpublished translation
of the court's opinion by Professor John Gorby and Robert Jonas. Due to the unavailability
of this translation, all footnotes to the opinion have been omitted. As this article went to
press, it was learned that this translation will be published in Volume 9 of the John Marshall
8 Fifth Statute for the Reform of the Penal Law, § 218 provides:
   (1) Anyone who interrupts a pregnancy later than on the 13th day after conception
       shall be punished by incarceration up to 3 years or fined.
   (2) The punishment shall be 6 months to 5 years if the actor
       (1) acts against the will of the pregnant woman, or,
       (2) wantonly causes the danger of death or serious impairment of health to the
           pregnant woman. The court can decree an inspection authority.
       (3) If the pregnant woman commits the act, the punishment is incarceration
           up to 1 year or a fine.
       (4) The attempt is punishable. The woman shall not be punished for an at-
           tempt.
pregnant woman, violating the section. Section 218A\textsuperscript{9} removed the punishment for an abortion performed by a physician with the consent of the mother within 12 weeks of conception. Pursuant to section 218B,\textsuperscript{10} an abortion performed by a physician with the consent of the pregnant woman between the 12th and the 22d week after conception was not punishable if interruption of the pregnancy was necessary to avert serious danger to the woman's life or health, or if it was apparent that the child would suffer an irremediable birth defect. In addition, section 218C\textsuperscript{11} required compulsory counselling of any woman who sought an abortion, and made it a crime for anyone to perform an abortion on a woman who had not been counselled.

Doctor Benda, writing for the majority, based his opinion in large part on the constitutional declaration that "everyone shall have the right to life."\textsuperscript{12} He declared: "The express incorporation into the basic law of the self-evident right to life, in contrast to the Weimar Constitution, may be explained principally as a reaction to the 'destruction of life unworthy of value,' to the 'final solution' and 'liquidations' which were carried out by the National Socialist Regime as measures of State." The court construed the word "everyone" in the German constitutional phrase to include every life in the sense of the historical existence of a human individual, i.e. as

\textsuperscript{9} Id. § 218A provides: "An interruption of Pregnancy performed by a physician with the consent of the pregnant woman is not punishable under Sec. 218 if no more than 12 weeks have elapsed since conception."

\textsuperscript{10} Id. § 218B provides:

An interruption of pregnancy performed by a physician with the consent of the pregnant woman after the expiration of 12 weeks from conception, is not punishable under Sec. 218 if, according to the judgment of medical science:

1. The interruption of pregnancy is indicated in order to avert from the pregnant woman a danger to her life or the danger of a serious impairment to her condition of health insofar as the danger cannot be averted in a manner that is otherwise exactable from her, or

2. Compelling reasons require the assumption that the child will suffer from an impairment of its health which cannot be remedied on account of an hereditary disposition or injurious prenatal influences which is so serious that a continuation of the pregnancy cannot be exacted of the pregnant woman; and not more than 22 weeks have elapsed since conception.

\textsuperscript{11} Id. § 218C provides:

1. He who interrupts a pregnancy without the pregnant woman:

2. having been counseled by a physician, shall be punished with up to 1 year incarceration or by a fine if the act is not punishable under Sec. 218.

(2) The woman, upon whom the operation is performed, is not subject to punishment under paragraph 1.

\textsuperscript{12} GRUNDEGESETZ art. 2(2) (1949) (W. Ger.).
he exists according to definite biological and physiological knowledge. In any event, it includes unborn children from the 14th day after conception. "The process of development which has begun at [this] point," the court explained, "is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of human life."\(^3\)

Rejecting the argument that the word "everyone" commonly denotes only a born or completed person, the court declared that "[the] security of human existence against encroachments by the State would be incomplete if it did not also embrace the prior step of 'completed' life, that is unborn life." In substantiating this position, Doctor Benda reviewed the legislative history of the Constitution and concluded that it was clearly intended, although not without some dissent, that the word "everyone" include unborn life.

Determining the ultimate effect of this provision of the German Constitution, the court declared that the state has a duty to protect every human life. Support for this conclusion was found in other sections of the Constitution which provide basic guarantees for the preservation of human dignity. As Doctor Benda stated: "Where human life exists, human dignity is present in it; it is not decisive that the bearer of this dignity himself be conscious of it and knows personally how to preserve it. The potential faculties present in a human being from the beginning suffice to establish human dignity."

Since the state is constitutionally obliged to protect unborn life, the court found it unnecessary to decide whether the unborn child is a bearer of the fundamental right to life. The court reasoned that the fundamental legal norms contained in the Constitution include not only subjective rights of protection and defense for the individual against the state, but also incorporate an objective ordering of values that provide direction and impetus for legislation, administration, and judicial opinions. Consequently, the extent to which the state is required by the Constitution to provide legal protection for developing life can be derived from the objective legal content of those fundamental norms.

No obligations can rest more heavily on the state than its obligation to protect life. The court explained this conclusion as follows:

The degree of seriousness with which the State must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents,

\(^{13}\) The court stated:

the right to life is guaranteed to everyone who lives; no distinction can be made here between various stages of the life developing itself before birth or between unborn and born life. Everyone in the sense of Article 2 P 2 S 1 of the basic law is "everyone living"; expressed in another way: every life possessing human individuality; "everyone" also includes the yet unborn human being.
within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights.

The obligation exists “even against the mother.”

In considering the arguments, the court indicated that if the embryo were considered only a part of the maternal organism, the interruption of pregnancy would belong in the private area of one’s life, where the legislature is forbidden to encroach. “Since, however, the one about to be born is an independent human being who stands under the protection of the Constitution, there is a social dimension to the termination of pregnancy which makes it amenable to and in need of regulation by the State.” Nonetheless, the court recognized the woman’s right to the free development of her personality or, as it is known in the United States, her right of privacy. This right is limited, however, by the rights of others, the constitutional order, and the moral law. “A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible, since the termination of pregnancy always means the destruction of the unborn life.” Applying the traditional method of reconciling a clash of constitutional obligations and rights, the court balanced the conflicting interests and concluded: “[P]recedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time.” The court found a duty to carry a pregnancy to term and therefore viewed the interruption of pregnancy as a manifest injustice. It further indicated that condemnation of the abortion must be clearly expressed in the legal order. The failure of the statute to clearly express this condemnation was the majority’s primary reason for finding it unconstitutional. They posited that the state may not abstain from the moral judgment that human life is a value to be protected. As a result, it is impermissible for the state to defer to an individual decision made on the basis of the mother’s personal responsibility.

The majority did not, however, require the use of penal sanctions in all circumstances. Declaring that it is the task of the state to affirmatively employ social, political, and welfare means to protect developing life, the court acknowledged that the legislature has the prerogative to decide how this duty will be discharged. Naturally, any legislative determination must comply with the fundamental legal norms provided in the Constitution. Among these norms, the court found that the state has a duty to “strengthen [the] readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child en ventre sa mere to full life.” The underlying rationale for this duty is the fact “that developing life itself is entrusted by nature . . . to the protection of the mother.” Furthermore, the court stated that identical penal measures need not be employed for the protection of born and unborn life. It carefully
pointed out, however, that "[t]he interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing . . . ."

Discussing the appropriate penal sanctions, the court noted that punishment is not an end in itself. The utilization of punishment is subject to the discretion of the legislature, and the standard to be used by the court in reviewing legislation is whether the totality of measures serving to protect unborn life correspond to the importance of its legal value. Consequently, "[t]he seriousness of the sanction . . . is to correspond to the worth of the legal value threatened for destruction. The elementary value of human life requires criminal law punishment for its destruction." Having decided that criminal sanctions are appropriate to safeguard prenatal life, the unique problem of punishing the pregnant woman presents itself for solution. This leads to a difficult question of exactability: "May the state compel the bearing of the child to term within the means of the penal law?"

Here, the court found a conflict between respect for the unborn life and the right of the woman not to be compelled to sacrifice her own values beyond that point which the state has a right to demand. The majority agreed that a decision for an interruption of pregnancy may, in certain circumstances, be a decision of conscience worthy of consideration, and the legislature is obligated to exercise special restraint when dealing with such a decision. "If, in these cases, it views the conduct of the pregnant woman as not deserving punishment and foregoes the use of penal sanctions, the result, at any rate, is to be constitutionally accepted as a balancing incumbent upon the legislature."

The first and most obvious mitigating circumstance arises when termination of the pregnancy is necessary to prevent the woman's death. In addition, the court indicated that the legislature has a free hand in other extraordinary cases. Included in this category were eugenic cases, as well as ethical (rape) and social or emergency situations. These are commonly called the four cases of indication, and as to these the court stated that "the bearing of the child to term does not appear to be exactable." That is, in these circumstances the woman cannot be compelled to complete the pregnancy by means of penal sanctions. Finally, the court suggested an indication arising from social conditions which might produce "conflicts of such difficulty" that the woman, in this situation, could not be compelled by the criminal law to complete the pregnancy. The court stated, however, that the legislature must clearly delineate these indications and, having done so, "'[i]f the legislature removes genuine cases of conflict of this kind from the protection of the penal law, it does not violate its duty to protect life."

In all other circumstances, abortion remains a wrong deserving of punishment. If the legislature decides that the penal sanctions may be removed from the statute, it must provide an equally effective sanction "which would clearly bring out the unjust character of the act" and "pre-
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vent [abortions] as effectively as a penal provision." The majority concluded that the legislature had violated its duty to protect human life by allowing unlimited abortions in the first trimester. In essence, killing at the mother's request had been legalized.

Perhaps the most unique aspect of the decision is the court's discussion of counselling. Many legislatures have adopted statutes similar to the American Law Institute proposals, but none have approached the problem from the point of view of the German court. Doctor Benda stated that "[t]he state will also be expected to offer counselling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to a continuation of the pregnancy and—especially in cases of social need—to support her through practical measures of assistance." The court was highly critical of the statutory sections that required counselling since the required counselling was not sufficiently pro-life. It declared that counselling must clearly reflect the constitutional mandate directing the legislature to affirmatively protect life and instruct its people, particularly mothers, concerning the gravity of this duty and the necessity that it be fulfilled.

The court recognized that the previous statute was insufficient because it threatened punishment, without distinction, in nearly all cases. This may have represented a neglect on the part of the state to "employ other adequate measures for the protection of developing life." As long as the government's condemnation of abortion clearly appears in the legal order, the legislature may select other means to combat the evil. Counseling is a means which may be selected if such counselling is designed to instill a desire for continuation of the pregnancy. The counselling must specifically be directed at motivating "the pregnant woman to carry the pregnancy to term." The court quoted from views that were expressed before the Special Committee for the Reform of the Penal Law and described the requisite type of counselling:

Therefore, what is meant is counselling regarding the nature of the operation and its possible consequences for health . . . . Rather the counselling as far as possible and appropriate must speak to the present and future total situation of the pregnant woman to the extent that she can be affected by the interruption of pregnancy and, at the same time, correspond to the other task of the physician, which is to work for the protection of the unborn life. The physician must, therefore, make it clear to the pregnant woman that human life is destroyed by the operation and explain its stage of development. Experience shows . . . that in this respect many women do not have clear ideas and that this circumstance, if they later learn it, is frequently the occasion for burdening doubts and questionings of conscience.

The court then stated its reasons for finding the counselling statute both

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ineffective and constitutionally inept. The statute permitted the doctor performing the abortion to be the counsellor as well. Under such circumstances, "an influence by the physician on the pregnant woman for the continuation of the pregnancy is highly improbable." In addition, the prospects for success were poor "since the interruption of pregnancy can immediately follow the instruction and counselling."

In its summation the court showed concern for the law as a teaching instrument. This concept played an important role in the decision. Indeed, this aspect of the law seems to have had the most profound influence on the manner in which the decision was written. For example, the court reasoned that allowing abortion on request during the first trimester would negate the law's teaching concerning the sanctity of human life. Therefore, the legislature violated its constitutional duty to protect life by authorizing abortion on request. However, if the legislature, in its wisdom, sanctions abortions only in particularly compelling cases in which the woman cannot be forced to complete the pregnancy because of serious threats to her life and health, the legislature does not abandon its duty under the constitution. Moreover, by developing a system of counselling and aid for women in such situations, the state better fulfills its obligation to all life.

By way of rebutting an argument raised in the minority opinion, the majority declared that this obligation refers to each individual, not to a fungible group of quantities to be added on a scoreboard. The dissent argued that the legislature could completely abandon the penal law in its effort to protect human life if a greater number of unborn children would be saved by this action. The majority replied that the state's, and consequently the legislature's, duty is to every individual life and not to groups of lives which could be weighed in a balance.

On the basis of these considerations the court found section 218A unconstitutional, in that it excepted abortion in the first trimester from penal sanction without requiring any reason for the operation. Stating that "it is a matter for the legislature to distinguish in greater detail the cases of indicated interruption of pregnancy from those not indicated," the court held section 218A null and void. Additionally, it was ordered that sections 218B and 219 be applied during the first trimester, thereby sanctioning abortion in this period only where it is necessary to protect the life of the mother or prevent births in which grievous irremediable defects are anticipated.

15 FIFTH STATUTE FOR THE REFORM OF THE PENAL LAW § 219 provides:

(1) Anyone who interrupts a pregnancy after the expiration of 12 weeks after conception without a competent counseling center having confirmed that the prerequisites of 218B 1 or 2 are satisfied shall be punished with incarceration up to 1 year or by fine if the act is not punishable under 218.

(2) The woman upon whom the operation is performed is not subject to punishment under Paragraph 1.
Like the dissenting justices in *Wade,* Judge Rupp von Brünnecke and Doctor Simon, writing the dissent in the German case, argued that the court was invading the province of the legislature when it held the existing statute unconstitutional. Contending that the Constitution itself does not require penal sanctions, the dissent urged the majority to exercise restraint and forego reaching the type of decision that would shift legislative functions onto the court. The dissent’s concern was spurred by its belief that the holding represented a precedent in which the Federal Constitutional Court (or at least the majority) imposed its value judgment on a duty upon the legislature to decree punishment. “This,” the minority argued, “converts the function of the fundamental laws into its contrary.” If the duty to punish can be derived from the constitution, then this fundamental law, on the pretext of insuring freedom, becomes the basis for restricting freedom. Nonetheless, in discussing *Wade,* which it described as holding that punishment for termination of pregnancy in the first trimester violates a woman’s constitutional rights, the minority stated: “This would, to be sure, according to German constitutional rights, go too far.”

The dissent also found objectionable the majority’s reference to Nazi abuses. The minority pointed out that the Nazis had sharpened the punishment for abortion in 1943 and had added confinement in the penitentiary as punishment for self-abortion. Furthermore, the minority argued that turning the fundamental law away from the norms of the Nazi state required restraint when dealing with criminal punishment, the “mistaken use [of which] in the history of humanity already has caused endless harm.”

Agreeing that no distinctions could be drawn between prenatal and postnatal stages of development, the dissenting opinion stated that “[t]he embryo is, insofar as it is a potential bearer of fundamental rights, continually to be protected in the same way as each born human life.” The dissenters contended, however, that the legally equal treatment was limited to fetal injury caused by a third party against the will of the woman. Judge Rupp von Brünnecke and Doctor Simon explained that protection of the fetus is most effectively achieved by the mother herself, whose readiness to bear the fetus can be strengthened through various measures. No prescription of punishment under the penal law can add to this situation. Due to the peculiarities in the relationship of the unborn life to the mother, it is necessary for the legislature to “react otherwise than as [it] would in the case of the killing of human life by a third party.” The dissent reasoned that the destruction of life which is incapable of independent existence is essentially different from the destruction of life that is capable of independent existence, and, therefore, abortion cannot be equated with

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*18 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221-23 (1973) (White, J., dissenting to both decisions).*
murder. As support for this distinction, the minority focused upon the change in the woman's attitude as the pregnancy progresses. A growing motherly tie "corresponds to the different development stages of the embryo," and, thus, there is a different legal consciousness in the pregnant woman when the abortion is performed in the first, as opposed to later, stages of pregnancy. The relevance of this attitude to the determination of appropriate legal sanctions is evidenced by the different punitive measures traditionally assessed for abortion at the the varying stages of pregnancy.\footnote{Illustrating the importance of the different stages of pregnancy, the dissent discusses the Roman Catholic Church's position on abortion. Prior to the end of the 19th century, canon law did not punish an abortion if it was performed before the 80th day following conception.}

Turning to the social ramifications inherent in penalizing most abortions, the minority argued that the large number of illegal abortions and the comparatively low number of prosecutions create disrespect for the law. In addition, it was noted that "illegal terminations of pregnancy lead even today to injuries to health." The problems of unwed mothers and the difficulties that families may have due to the birth of additional children were also discussed. The dissenters concluded that the decision to undergo an abortion is not solely the choice of the woman, "but reflects at the same time the widespread materialistic child-hating attitude of the 'affluent society.'"

In essence, although the minority found unmotivated terminations of pregnancy to be ethically objectionable, their essential objection to the majority opinion was that the court had found an independent constitutional duty on the part of the legislature to punish as a legal wrong an act which the minority perceived to be essentially a personal matter. In a pluralistic, ideologically neutral, and free democratic community, the state must practice restraint and not pass statutes concerning matters which should be left to individual choice. The minority then referred to the abortion reform laws of numerous other nations in support of its position that the statute held unconstitutional by the majority was not the product of a fundamental moral or legal attitude disapproved by many nations. Citing laws of Austria, France, Denmark, Sweden, and the Netherlands, the dissenters argued that "[t]hese states can boast of an impressive constitutional tradition and are certainly not inferior to the Federal Republic in unconditional respect for each individual life." The minority also cited the Austrian Supreme Court's determination that the "term solution" of that nation is compatible with the Human Rights Convention, which enjoys constitutional status in Austria.

The lines of the confrontation, which have existed for many years, were clearly drawn and well stated by both the majority and the minority judges in this decision. On the one hand, the majority insisted upon the inviolable right to life of the unborn child, while the minority viewed the
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problem from the woman’s perspective. It is obvious that because the court
has accepted an indications solution, similar to that promulgated by the
American Law Institute, the opinion will not be accepted by the rank-and-
file pro-lifers as the pro-life statement which it may, at first blush, seem
to be. One wonders whether an indications solution is really a solution in
a society which is so lax in its support of moral norms. Will this not really
mean abortion on request even as it so meant in the District of Columbia
after the United States Supreme Court’s decision in United States v.
Vuitch?18

THE CANADIAN OPINION

On March 26, 1975, the Supreme Court of Canada announced its
controversial decision in Morgentaler v. The Queen,19 a criminal abortion
case. In an extraordinary yet plausible holding, a divided court affirmed
the setting aside of the jury’s not guilty verdict and the entry of a guilty
verdict against Dr. Morgentaler by the Court of Appeal for Quebec. In the
judicial system of the United States, reversal of a jury verdict of acquittal
and entry of a guilty verdict by an appellate court would be impossible.20
Canadian law, however, permits such appellate action in a case involving
a clear error of law absent which conviction would have been certain.21

The Canadian criminal abortion statute provides: “Everyone 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 inten-
tion is guilty of an indictable offense and is liable to imprisonment for
life.”22 Certain abortions are, however, specifically exempted from the op-

20 In the United States, it is well settled that review of a verdict of acquittal would violate a
defendant’s fifth amendment rights by placing him in “jeopardy” twice. United States v.
Sisson, 399 U.S. 267, 289 (1970). Furthermore, an appellate court’s reversal and substitution
of a guilty verdict would be analogous to a directed verdict of guilty by the trial court, which
may constitute a denial of a criminal defendant’s right to trial by jury. See People v. Walker,
198 N.Y. 329, 91 N.E. 806 (1910).
21 CAN. CRIM. CODE c. C-34, § 613(4) (1970) provides that the court of appeal may set aside
a verdict of acquittal and “enter a verdict of guilty with respect to the offence of which, in
its opinion, the accused should have been found guilty but for the error in law . . . .”
22 The relevant provisions of CAN. CRIM. CODE c. C-34, § 251 (1970) provide:

(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.

(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
eration of the statute. In order to avoid criminal sanctions, an abortion must first be approved by an accredited hospital’s therapeutic abortion committee, which must certify that continuation of the pregnancy would endanger the life or health of the woman. The abortion must be performed in an accredited hospital by a qualified physician who is not a member of a therapeutic abortion committee.\textsuperscript{23}

Dr. Morgentaler did not deny that he had performed the abortion. Indeed, he admitted having “helped” large numbers of pregnant women by performing abortions on them without the required consultation with a therapeutic abortion committee. He argued, however, that the abortion underlying his indictment was justified by section 45 of the Criminal Code,\textsuperscript{24} which protects a surgeon from criminal responsibility for the performance, with reasonable care and skill, of an operation that was reasonable in light of all the circumstances. In addition, Dr. Morgentaler advanced the common law defense of necessity. The trial judge approved the use of these defenses, and allowed the jury to decide whether the accused had raised a reasonable doubt as to his guilt. The jury returned a verdict of acquittal.\textsuperscript{25} Setting aside the jury finding and entering a guilty verdict,\textsuperscript{26} the appellate court held that the trial judge had erred in law by

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\begin{itemize}
\item[(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, \ldots
\item[(b)] if, before the use of those means, the therapeutic abortion committee for that 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,
\item[(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
\item[(d)] has caused a copy of such certificate to be given to the qualified medical practitioner.
\end{itemize}
\end{quote}

\textsuperscript{23} CAN. CRIM. CODE c. C-34, § 251(4) (1970). For the relevant text of this statute, see note 22 supra.

\textsuperscript{24} CAN. CRIM. CODE c. C-34, § 45 (1970) provides:

\begin{quote}
Every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if
\begin{itemize}
\item[(a)] the operation is performed with reasonable care and skill, and
\item[(b)] it is reasonable to perform the operation having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.
\end{itemize}
\end{quote}

\textsuperscript{25} 53 D.L.R.3d at 192-93.\textsuperscript{26} Id. The entry of a guilty verdict by an appellate court is pursuant to \textit{CAN. CRIM. CODE c.}
permitting the jury to determine the applicability of these defenses.\textsuperscript{27}

On appeal to the supreme court, the appellant contended that: (1) section 251 is unconstitutional; (2) it is inoperative because of the Canadian Bill of Rights; (3) the indictment was void; (4) he was entitled to have the defenses of necessity and section 45 of the Criminal Code submitted to the jury; (5) the abortion was not within the intent of the statute; (6) an appellate court cannot replace a jury acquittal with a verdict of conviction.\textsuperscript{28}

The Supreme Court of Canada allowed several interested organizations to intervene on both sides of the case, particularly on the constitutional issues. After hearing oral argument from the appellant, the Canadian Civil Liberties Association, and the Foundation for Women in Crisis, the court unanimously decreed that no case had been “made out” on the challenge to the statute’s constitutionality, on the effect of the Bill of Rights, or on the invalidity of the indictment, and it was therefore unnecessary to hear counsel for the Crown or the other intervenors.\textsuperscript{29} Consequently, the two majority opinions\textsuperscript{30} refer only to the last three issues listed above, although the dissenting opinion of Chief Justice Laskin discusses all the issues.\textsuperscript{31}

Justice Pigeon, in an opinion concurred in by a majority of the court, concluded that there was no evidence in this case of the urgent necessity which may justify a violation of the criminal law in certain very exceptional circumstances. He agreed that “the Court of Appeal was correct in holding that the trial Judge erred in putting the defence of necessity before the jury as there was no evidence to support it.”\textsuperscript{32}

Justice Pigeon also agreed with the opinion of the majority of the appellate court that section 45 of the Criminal Code which protects from criminal responsibility anyone who performs a surgical operation in good faith, is not available as a defense to a prosecution under section 251 of the Criminal Code.\textsuperscript{33} The latter section requires that the necessity for the operation be determined by a therapeutic abortion committee not including the practitioner performing the abortion. The statute further requires

\begin{footnotesize}
\textsuperscript{27} C-34, § 613(4) (1970). See note 21 and accompanying text supra.
\textsuperscript{28} 53 D.L.R.3d at 192-93.
\textsuperscript{29} Id. at 193.
\textsuperscript{30} Id.
\textsuperscript{31} Although two opinions were written supporting the holding of the court, the same six justices concurred in both opinions. See id. at 191-203 (Pigeon, J.); id. at 203-15 (Dickson, J.).
\textsuperscript{32} See id. at 164-91 (Laskin, C.J., dissenting).
\textsuperscript{33} Id. at 194 (Pigeon, J.).
\textsuperscript{34} Id. at 195. The appellate court was not unanimous as to the rationale for ruling section 45 of the Criminal Code inapplicable. Three justices ruled that it was simply not available in a section 251 prosecution, and two justices limited their holding to the issue of its availability under the facts of the case. Id.
\end{footnotesize}
that the abortion be performed in an approved hospital. As Justice Pigeon noted, "[a]ll those elaborate provisions would be meaningless if they could be ignored by virtue of s. 45."

In a single paragraph, Justice Pigeon disposed of the appellant's contention that a surgical abortion does not fall within the intentment of section 251. Treating the argument as mere semantics, the jurist found that through this section, the legislature had clearly intended to prohibit the operation involved in this case.

The justice then undertook a long analysis of the procedural question, i.e. whether the court of appeal could substitute a verdict of guilty for an acquittal by a jury. After considering the applicable statutes and prior case law, he affirmed with some misgivings the decision of the appellate court. Emphasizing the unorthodox character of this procedure, he stated:

It cannot be denied that to authorize a Court of Appeal to enter a verdict of guilty on an appeal from an acquittal by a jury is a major departure from the traditional principles of English criminal law under which where an accused has been given in charge to a jury, none but the jury can find him guilty.

Justice Pigeon was convinced, however, that the clear and unambiguous language of the statute required a finding that the court of appeal has the authority to reverse an acquittal. Noting that "the situation is clear that, under our Criminal Code in what is clearly a fundamental departure from common law principles, Parliament has not only provided for appeals against acquittals, but has also spelled out the powers which can be exercised on such appeals," Justice Pigeon concluded that "[t]he Code expressly provides . . . that the Court of Appeal may 'enter a verdict of guilty.'"

Justice Dickson also wrote a majority opinion. Initially, he delineated the scope of the decision: "The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion." Justice Dickson also stated that there was no doubt but that the appellant had committed the forbidden act, since he "openly admits using an instrument for the purpose of procur-
VIABILITY AND VALUES

...ing [a] miscarriage . . ."\(^a\)

As was noted above, the entire court had no difficulty in upholding the constitutionality of section 251 of the Criminal Code. Indeed, Justice Dickson, discussing the provisions of this section, seemed perturbed by the appellant's suggestion that the court construe the abortion statute in a manner which would weaken or change the legislative intent. Furthermore, Justice Dickson underscored the dissimilarity between section 251 of the Criminal Code and the English abortion statute, which permits an individual physician to perform an abortion after making a good faith determination that the abortion "is immediately necessary . . . to prevent grave permanent injury to the physical or mental health of the pregnant woman."\(^b\) As he stated:

Counsel for the appellant would have us write into s. 251 a like dispensing provision though Parliament has not chosen to legislate it. Whether one agrees with the Canadian legislation or not is quite beside the point. Parliament has spoken unmistakably in clear and unambiguous language. The starting point for proper judicial analysis of the legal position of appellant is the statute. Justice must be done within the framework of, and according to, the rules set out in the Criminal Code.\(^c\)

Turning next to the argument based on section 45 of the Criminal Code, Justice Dickson declared that if the appellant's contention were correct, the section would protect any surgical abortion, but not an abortion performed by other means.\(^d\) He therefore concluded that the court "must give the sections a reasonable construction and try to make sense and not nonsense, of the words."\(^e\)

Justice Dickson also discussed at some length the "ill-defined and elusive concept sometimes referred to as the defence of necessity."\(^f\) He noted that "[s]ave in the exceptional case of The King v. Bourne . . . the defence has never been raised successfully, so far as one can ascertain, in a criminal case in this country or in England."\(^g\) After expressing some doubt as to the very existence of the defense of necessity, the justice declared that even should it exist, it is applicable only in situations of extreme urgency wherein a criminal action is the only possible means of preventing an evil result. Observing that the Canadian statutory scheme does provide means of obtaining a therapeutic abortion, he concluded that the requisite urgency was lacking in the case at bar.\(^h\) The defendant had

\(^{a}\) Id. at 205.
\(^{b}\) Abortion Act 1967, c. 87, § 1(4).
\(^{c}\) 53 D.L.R.3d at 206 (Dickson, J.).
\(^{d}\) Id. at 207.
\(^{e}\) Id.
\(^{f}\) Id. at 208.
\(^{g}\) Id., discussing The King v. Bourne, [1939] 1 K.B. 687 (1938).
\(^{h}\) 53 D.L.R.3d at 211-14 (Dickson, J.). As Justice Dickson stated, "[t]he defence of necessity, whatever that vague phrase may import, does not entitle a medical practitioner, in
conceded that in the 2 hours prior to the abortion which led to his prosecution, he had performed six such operations. Moreover, the patient, at the time of the abortion, was only 6 to 8 weeks' pregnant and had already made an appointment for consultation at Montreal General Hospital in another 2 weeks.\footnote{Id. at 211.}

In his dissent, concurred in by two other justices, Chief Justice Laskin noted that the five judges on the court of appeal were unanimous in their holding, but not in their reasoning.\footnote{Id. at 164 (Laskin, C.J., dissenting).} He agreed with the majority of the supreme court that no case had been made on either the challenge to the constitutionality of the criminal abortion statute or the claim that it was invalid under the Canadian Bill of Rights.\footnote{Id. at 167-77.} The opinion discussed at some length the arguments made by the appellant on these issues.

Noting that the federal criminal law power is extremely broad, and the court's power to interfere with a legislative decision to exercise that power is correspondingly narrow, Chief Justice Laskin stated that section 251 of the Criminal Code fits "well within the scope of the test by which . . . a valid exercise of the federal criminal law power [is measured]."\footnote{Id. at 168.} The appellant attempted to show that the abortion statute did not protect the woman's health, and, therefore, its presence in the Criminal Code was unjustified. As support for the argument that health was not a valid purpose of this statute, the appellant cited Roe v. Wade\footnote{410 U.S. 113 (1973).} and Doe v. Bolton.\footnote{410 U.S. 179 (1973).} The chief justice rejected the implication that health was the sole purpose of the legislation, declaring that

Parliament has in its judgment decreed that the interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial.\footnote{53 D.L.R.3d at 169 (Laskin, C.J., dissenting).}

Considering the asserted conflict between the Canadian Bill of Rights and section 251 of the Criminal Code, Chief Justice Laskin analyzed each of the seven arguments presented and disposed of them with incisive reasoning.\footnote{Id. at 170-77.} In response to the appellant's right-of-privacy argument, which was based on Wade and Bolton, the chief justice emphasized the differ-
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ences between the governmental systems of Canada and the United States.⁵⁹ Relying on an earlier Canadian decision, which had indicated "how foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review was any interference by a Court with the substantive content of legislation,"¹⁶⁰ he refused to apply the Wade and Bolton rationale. Since Canada has "an exclusive national federal criminal law power, and no constitutionally entrenched Bill of Rights," Chief Justice Laskin was "unable to agree that [the court] would be warranted in dividing the normal gestation period into zones of interest, one or more to be protected against State interference and another or others not."¹⁶¹ Thus, even the dissent rejected the appellant's constitutional arguments.⁶²

The dissent reasoned, however, that the guilty verdict directed by the court of appeal should have been reversed and the jury verdict reinstated or the case remanded for a new trial, since section 45 of the Criminal Code should be available as a defense for a medical practitioner who performs an abortion otherwise punishable under the criminal abortion statute.⁶³ The chief justice declared that he was convinced not only "that [section] 45 remains available as a defence but also that there was evidence upon which the trial Judge could lead that defence to the jury."¹⁶² The defendant's testimony "that he feared . . . the pregnant woman would do something foolish unless she was given immediate professional medical attention to relieve her condition and her anxiety"⁶⁵ was viewed as sufficient evidence to support the defense of necessity. Consequently, Chief Justice Laskin agreed with the trial judge "that the jury was entitled, if it so chose, to consider this evidence as raising an emergency situation . . . ."¹⁶⁶ The dissent concluded that the appeal should be allowed, the conviction set aside, and the jury's verdict of acquittal restored.¹ The chief justice also noted that if only one of the two defenses should properly have been left to the jury, the correct order would have been to direct a new trial.⁶⁸

Compared to standards of judicial review in the United States, the Supreme Court of Canada and the Court of Appeal of Quebec showed remarkable restraint in dealing with the issues involved in this case. None

⁵⁹ Id. at 171. The constitutional nature of the Bill of Rights in the United States and the statutory nature of the Canadian Bill of Rights provides an example of the differences between the two systems. Id.
⁶⁰ Id. at 173, discussing Curr v. The Queen, 26 D.L.R.3d 603 (1972).
⁶¹ 53 D.L.R.3d at 174 (Laskin, C.J., dissenting).
⁶² Id.
⁶³ Id. at 188-91.
⁶⁴ Id. at 188.
⁶⁵ Id. at 190.
⁶⁶ Id.
⁶⁷ Id. at 191.
⁶⁸ Id.
of the justices found any merit in the constitutional attack on the statute, and only three considered the asserted defenses appropriate. Dr. Morgentaler's case was reviewed by a total of 14 Canadian jurists on the appellate and supreme courts, and apparently only 3 opted for an outright reversal. None regarded the statute as being in any way unconstitutional or legislatively overbroad.

It will be interesting to see the effect of Morgentaler on the performance of abortions in Canada. One has frequently heard the argument that if the medical profession were honest in its assessment of the medical problems involved, one could live with a statute which allows abortions in cases of danger to the woman's life or health. The reality, however, is that allowing abortions for reasons of health usually opens the door to abortions for any reason the physician is willing to certify. Nonetheless, it is clear that the Canadian statute does not authorize abortions on request, as is the current practice in the United States. In Canada, medical reasons are still required, and certification of these reasons by a therapeutic abortion board is necessary. These requirements, combined with the obvious legislative intent to allow abortion for medical reasons only, would ordinarily preclude most abortions, except in this era of politicized medicine.

VIABILITY

Well into the 20th century most American decisions denied recovery in tort to human offspring injured while in the womb. While denial was based in part on the danger of fraudulent claims and the difficulty of proving causation, the principal ground was that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action." Since 1946, however, "a rapid series of cases, many of them expressly overruling prior holdings," dramatically reversed this well-settled rule. Consequently, many courts now permit a child who has been born alive to bring an action for injuries suffered while in the womb. Similarly, most states soon recognized an action for the wrongful death of a child who is born alive but subsequently dies as a result of prenatal injuries. If, however, the child was stillborn as a result of such injuries, the situation as to an action for wrongful death was complicated by the varying provisions of state wrongful death statutes. Nonetheless, at the time of the Wade decision, there was a distinct majority of state court rulings allowing such an action.23

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24 Id.
25 Id. at 336. Dean Prosser has characterized the imposition of liability for injuries to unborn children as "the most spectacular abrupt reversal [up to that time] of a well-settled rule in the whole history of the law of torts." Id.
The Wade Court paid scant attention to these authorities, dismissing them as representing a vindication only of the parents' rights.\footnote{410 U.S. at 162, wherein Justice Blackmun stated: "Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." If this is true, what difference does viability make? If we are vindicating the parents and not the unborn child, then what difference does it make that the child was 1 or 2 weeks short of viability? Is not the whole point of the viability doctrine aimed at the development of the child and the child's own capabilities rather than an interest in the parents?} However, as Professor John Hart Ely has noted: "To the extent that they are not entirely inconclusive, the bodies of doctrine to which the court adverts respecting the protection of fetuses under legal doctrines tend to undercut rather than support its conclusion."\footnote{Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 925 (1973).} As though in agreement with Professor Ely's conclusion, four state supreme courts, subsequent to Wade, have specifically created a cause of action for the wrongful death of a viable unborn child in their respective jurisdictions. Although these states had allowed a cause of action for prenatal injuries when the child was born alive, they had previously denied any recovery if the fetus was stillborn.

On October 1, 1973, the Supreme Court of Illinois, in Chrisafogeorgis v. Brandenberg,\footnote{55 Ill. 2d 368, 304 N.E.2d 88 (1973) (4-3 decision).} held that an unborn child is a "person" within the meaning of that word in the wrongful death statute. Consequently, a suit brought on behalf of the stillborn child's estate to recover from the alleged tortfeasor was permitted.\footnote{Id. at 369, 304 N.E.2d at 89.} The court had previously recognized a cause of action for wrongful death due to prenatal injuries inflicted on a viable fetus only if the child was born alive.\footnote{See Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).} The factual difference between the earlier case and the one under consideration, the court reasoned, was merely the time of death and not the character of the injury. Though it did not define viability, the Illinois supreme court followed other jurisdictions in which viability had been defined as the capability of sustaining life outside the womb.\footnote{See, e.g., Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). The court declared that an infant "who is born alive and survives can maintain an action . . . for prenatal injuries . . . even if it had not reached the state of a viable fetus at the time of the injury." Id. at 224, 178 N.E.2d at 694.}

Initially, Illinois, like most states, required viability at the time of injury as a prerequisite to the maintenance of a cause of action for personal injuries. Later decisions, however, eliminated this threshold requirement and held that the time of injury is irrelevant.\footnote{55 Ill. 2d at 370-71, 304 N.E.2d at 89-90, citing, e.g., Gorke v. LeClere, 23 Conn. Supp. 256, 181 A.2d 448 (Super. Ct. 1962); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971).} Whether such a development occurs in the wrongful death cases remains to be seen.

Judge Ryan, dissenting in Chrisafogeorgis, discussed the interaction...
between the majority's holding that an unborn child is a person within the meaning of the Illinois wrongful death statute and the \textit{Wade} Court's decision that the word "person" as used in the fourteenth amendment does not include the unborn.\footnote{55 Ill. 2d at 380, 304 N.E.2d at 94 (Ryan, J., dissenting), discussing \textit{Roe v. Wade}, 410 U.S. 113, 157 (1973).} Focusing on the incongruities inherent in the two decisions, Judge Ryan inquired: "What are the rights of a father of a viable fetus who does not consent to an abortion? May a cause of action for the wrongful death of the fetus be maintained for his benefit?\footnote{55 Ill. 2d at 381, 304 N.E.2d at 95.} As a result of these and other possible inconsistencies, the dissent concluded that recognition of a cause of action for the wrongful death of an unborn child is properly a legislative and not a judicial task.\footnote{Id.}

In \textit{Libbee v. Permanente Clinic},\footnote{268 Ore. 258, 518 P.2d 636 (1974) (4-3 decision).} the Supreme Court of Oregon found the \textit{Wade} decision consistent with its determination that a viable unborn child is a person within the meaning of the state constitution for the purpose of maintaining a wrongful death action.\footnote{The court in \textit{Libbee} relied on its prior determination in \textit{Mallison v. Pomeroy}, 205 Ore. 690, 697, 291 P.2d 225, 228 (1955), that the word “person” in the state constitution includes a viable fetus for the purpose of maintaining a personal injury action, if the child is subsequently born alive.} Noting that the \textit{Wade} Court had explicitly “recognized . . . that ‘State regulation protective of fetal life after viability . . . has both logical and biological justifications,’ ”\footnote{55 Ore. at 267, 518 P.2d at 640, quoting \textit{Roe v. Wade}, 410 U.S. 113, 163 (1973).} The Oregon court stressed that its decision was predicated upon the viability of the fetus.\footnote{268 Ore. at 267, 518 P.2d at 640.} In reaching the further conclusion that an action for the death of a viable unborn child is maintainable, the \textit{Libbee} court examined the arguments for prohibiting such actions, \textit{viz.} that precedent favors non-recovery, that an unborn child has no judicial existence apart from its mother, and that pecuniary damages are too speculative.

In reference to precedent, the court indicated that since 1949 the courts of 19 jurisdictions have expressly permitted such actions, whereas only 12 expressly prohibit them.\footnote{Id. at 262, 518 P.2d at 637-38.} Clearly, the weight of authority now favors recovery. The Oregon court discredited the second argument that an unborn child has no judicial existence apart from its mother by noting the accepted belief “that there is no medical or scientific basis for such a proposition and it was expressly rejected by this Court . . ., at least with respect to a viable unborn child.”\footnote{Id. at 263, 518 P.2d at 638, discussing \textit{Mallison v. Pomeroy}, 205 Ore. 690, 291 P.2d 225 (1955).} Noting the suggestion that the viability requirement be eliminated, the \textit{Libbee} court observed that this question was not presented by the case since this unborn child was clearly viable
at the time of injury. The court disposed of the final argument by stating that "the ultimate issue in an action for wrongful death is 'the 'value of a life lost,'" and that the speculative nature of proof of pecuniary damage in wrongful death actions is no reason to deny the right of a plaintiff ...

On September 12, 1974, the Supreme Court of Alabama, in *Eich v. Town of Gulf Shores*, held that a cause of action may be maintained for the wrongful death of an 81/2-month old fetus killed in an automobile accident. Rejecting live birth as a prerequisite for liability, the court emphasized the "deeply engrained principle of Alabama jurisprudence that the paramount purpose of [the] wrongful death statutes . . . is the preservation of human life." The court further observed that this principle is the primary reason for allowing recovery of wrongful death damages, which under this statute are entirely punitive and determined by the enormity of the wrong.

The Alabama supreme court, in the course of its opinion, reasoned that the decision to allow recovery did not "judicially [amend] a legislative enactment." Rather, the court, referring to previous decisions which had ultimately recognized a cause of action for the wrongful death, due to prenatal injuries, of a child who was born alive, viewed its decision in *Eich* as merely an extension of its prior holdings. In addition, the *Eich* court explicitly reconciled its opinion with the United States Supreme Court's decision in *Wade*. Finally, disposing of an argument not raised in either *Chrisafogeorgis* or *Libbee*, the Alabama court found that the wrongful death action would not lead to double recovery for the plaintiff mother "since there has been, in the situation before us, an injury to two different persons . . . ."


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*8* 268 Ore. at 263, 518 P.2d at 638.
*10* 293 Ala. 95, 300 So. 2d 354 (1974) (5-4 decision).
*11* Id. at 98, 300 So. 2d at 356 (footnote omitted).
*12* Id., 300 So. 2d at 356.
*13* Id., 300 So. 2d at 357.
*14* The *Eich* court discussed two recent Alabama cases which affected the propriety of maintaining a cause of action for the wrongful death of a child who had sustained the fatal injuries as a fetus, *Id., discussing* Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972) (cause of action available for wrongful death of child who was viable at time of injury and born alive); Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973) (viability at time of injury irrelevant if child born alive).
*15* 293 Ala. at 99, 300 So. 2d at 357.
*16* Id. at 100, 300 So. 2d at 358.
*17* 331 N.E.2d 916 (Mass. 1975) (4-3 decision).
McDonough and held that "a fetus is a person for purposes of our wrongful death statute where, as here, the parties agree that it is viable, or in the absence of such an agreement, the fact finding tribunal finds that it is viable."

The plaintiff in this case was the administrator of the estate of a viable 8½-month old fetus which was killed in a collision between the car in which his mother was riding and a Greyhound bus. In permitting an action for wrongful death, the Massachusetts court introduced its opinion by surveying the current status of wrongful death actions in other states. The court declared:

"It can no longer be said with any degree of accuracy that the majority view allows a right of action only where injury is followed by live birth. In fact, a clear majority of jurisdictions having considered the question have chosen viability over live birth as the determinative factor for deciding whether a right of action for wrongful death will be allowed. A careful examination of the cases from other jurisdictions reveals that substantial precedent exists to support the viability rule."

The court pointed out the incongruity of a rule which would allow recovery if the injury was not severe enough to kill the child, but would disallow recovery if the trauma resulted in the death of the child before it could be removed from the womb. Additionally, the Massachusetts court noted that the "live birth" rule would result in other inconsistencies, citing, in particular, an example given in Chrisafogeorgis. In the latter case, the Illinois court constructed a hypothetical accident involving twins, one of whom was killed and the other only injured. Denying recovery to the still-born twin seemed totally unfair to the Chrisafogeorgis court as well as other courts that have reviewed the situation. The majority in Mone concluded that:

"in view of our present analysis . . . , we can find neither reason nor logic in choosing live birth over viability for the purposes of interpreting our wrongful death statute. We agree with the majority of jurisdictions that conditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well."

It is frequently argued that these cases do not acknowledge a legal

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100 361 Mass. 64, 279 N.E.2d 339 (1972).
101 331 N.E.2d at 917.
102 Id.
103 Id. at 918 (footnote omitted).
104 Id. at 920, citing Todd v. Sandidge Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964).
107 331 N.E.2d at 919-20.
right in the child itself, but rather are only a vindication of the right of the parents or of the survivor.\footnote{See note 74 and accompanying text supra.} This argument is clearly erroneous since in order for the action to exist the unborn child must be found to be a person within the meaning of that word as used in the wrongful death statute. Once a court has so found, the right which then accrues to the unborn child is identical to the right which accrues to any adult for whom the same cause of action might exist. Labeling that cause of action a vindication of the rights of survivors merely indicates the position which the viewer is taking on the abortion issue. The correct conclusion is inescapable: the unborn viable child is a bearer in its own right of legal personhood for purposes of the wrongful death cause of action. This proposition, although clearly the majority viewpoint in America, is contrary to the wishes of Justice Blackmun, for it indicates that legal personhood and probably, someday again, constitutional personhood will begin \textit{en ventre sa mere}, as it does in Oregon.\footnote{See note 85 and accompanying text supra.}

The “right of the survivor” argument is also erroneous in that viability is a concept which concerns the developmental qualities of the unborn child itself in terms of its capacity to sustain life outside the womb. Not only would it be totally unnecessary to consider viability if the action was merely to vindicate the parent, but it would actually be contradictory to do so, since the parent presumably wants the child, loves the child, one week before viability as much as one week after.

The recognition of viability as a significant factor in the legal rights of the unborn engenders a fundamental definitional question, \textit{i.e.} when does viability occur? An answer to this question and a better understanding of the concept may be developed from a discussion of the medical aspect of viability. Generally, the term “viability” may be understood in one of three ways: (1) alive; (2) capable of living outside of the womb with or without artificial aid; and (3) able to survive the neonatal period (28 days after birth).

There are several references to viability in the \textit{Wade} decision.\footnote{In its first mention of viability, the \textit{Wade} Court declared that the fetus becomes viable when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.” 410 U.S. at 160 (footnote omitted).} Of primary importance is the reference to viability included within the Court’s summary of its holding:

\begin{itemize}
  \item[(a)] For the stage prior to approximately the end of the \textit{first} trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.
  \item[(b)] For the stage subsequent to approximately the end of the \textit{first} trimester; the State, in promoting its interest in the health of the mother, may, if it
chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interests in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Although many people have misread Wade as dividing pregnancy into neat categories of trimesters with a significant point of legal demarcation at the end of the second trimester, it is clear that the Court has not indicated when viability occurs, but only that at the point of viability the state's interest in protecting fetal life changes dramatically. The factual question as to when a child en ventre sa mere becomes viable was properly left unanswered in both Wade and Bolton. These cases were inappropriate for resolution of such an issue since viability can depend on a multitude of factual variables and the record in Wade and Bolton contained no evidence on this point.

Viability has been influenced by, and to some extent confused with, the concept of quickening, which was the point of origin for legal rights in the view of Blackstone and most common law commentators. In point of fact, to many judges there is no difference. Quickening is a concept of maternal sensitivity indicating when the mother perceives, through physical activity such as movement or kicking, the presence of the developing child in her womb. Quickening was an important evidentiary concept. For example, in England after 1803, an abortion after quickening was punishable by death, whereas prior to that stage the punishment was less severe.

Justice Blackmun, in dicta, did refer to viability as "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." He supported this statement by reference to a standard medical text, Williams Obstetrics, and to Dorland's Illustrated Medical Dictionary. Dorland's, however, does not refer to age, and the exact quotation from Williams Obstetrics places the lower end of the viability scale at 20 weeks (not 24 weeks) based on a single case:

\[ \text{Id. at 164-65 (emphasis added).} \]

\[ \text{For a discussion of the various factors which influence the time of viability, see Erhardt, Joshi, Nelson, Kroll & Werner, Influence of Weight and Gestation on Perinatal and Neonatal Mortality by Ethnic Group, 54 AM. J. PUB. HEALTH 1841 (1964).} \]

\[ \text{In the words of Blackstone, "[l]ife is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 W. BLACKSTONE, COMMENTARIES 129 (6th ed. 1774).} \]

\[ \text{Byrn, An American Tragedy: The Supreme Court on Abortion, 41 FORDHAM L. REV. 807, 824 (1973).} \]

\[ \text{410 U.S. at 160 (footnote omitted).} \]

\[ \text{L. HELLMAN & J. Pritchard, WILLIAMS OBSTETRICS 493 (14th ed. 1971). Justice Blackmun also cited this work for support of his position that modern medical technology focused on "viability" rather than "quickening." 410 U.S. at 160, n.59.} \]

\[ \text{DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1713-14 (25th ed. 1974).} \]
Interpretations of the word “viability” have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation). Since an infant reported by Monro that was said to weigh only 397 g survived, on the basis of this single precedent, an infant weighing 400 g or more may be regarded as capable of living. Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual. Attainment of a weight of 1,000 g is therefore widely used as the criterion of viability. Infants below this weight have little chance of survival, whereas those over 1,000 g have a substantial chance. . . . Expert neonatal care, furthermore, has permitted survival of increasingly small infants.118

Another standard medical dictionary defines viability as usually connoting “a fetus that has reached 500 grams in weight and 20 gestational weeks.”119 Williams Obstetrics posits that

[t]his lower limit might logically be set at 400 g, because no fetus weighing less at birth has ever been known to survive. . . . A fetus weighing approximately 400 g has a gestational age of about 20 weeks. Convenience is another reason for adopting this figure, since nearly all state departments of vital statistics require the reporting of all births in which the period of gestation is in excess of 20 weeks . . . . A premature infant might therefore be defined as weighing between 400 and 2,500 g at birth. The round figure of 500 g, however, has certain advantages as the definition of the limit between abortion and prematurity . . . .120

Another standard reference, the study by Schlesinger and Allaway based on the records of the New York State Department of Health, reports 622 live births between 20 and 23 weeks gestation.121 This report of the survival of a significant number of tiny birthweight babies is not unusual.122
The authors of *Principles and Management of Human Reproduction*, a book "dedicated to those who work toward achievement of the initial right of man to be born without handicap and the privilege of woman to bear without injury," further comment:

At this age the normal fetus weighs approximately 500 grams, ... and, at least occasionally, is capable of extrauterine survival—it is then said to be "viable." Viability, though, is a changing concept. Medical advances in the treatment of the premature make it possible to anticipate that even these very small abortuses of 20 weeks’ gestation may soon have a greater chance of survival and one surely does not then wish to describe a surviving fetus as an abortus.121

Although the term “viability” implies some inherent capability of life on the part of the child, the present state of the medical art is equally relevant in determining its meaning. Immature and premature babies today, if cared for, have a greater chance of survival than ever before. Illustratively, one study shows that more and more children under 500 grams are being admitted to neonatal and perinatal hospital centers in order to receive life-preserving treatment.125

Viability can also mean alive even if only for the few moments proximate to the abortion. It is worth noting that another study has reported live births after abortions in 27 cases. Fourteen of these abortions were

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**TABLE 5-2. Fetal dimensions at the most significant periods of fetal development**

<table>
<thead>
<tr>
<th>Gestational age (weeks)</th>
<th>Less than 20</th>
<th>21 to 28</th>
<th>24 to 36</th>
<th>37 to 40 or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>Classification</td>
<td>Nonviable</td>
<td>Immature</td>
<td>Premature</td>
<td>Full Term</td>
</tr>
<tr>
<td>Length (cm.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Crown-rump</td>
<td>16</td>
<td>16-24</td>
<td>24-31</td>
<td>31-35</td>
</tr>
<tr>
<td>Crown-heel</td>
<td>25</td>
<td>25-37</td>
<td>37-47</td>
<td>47-50</td>
</tr>
<tr>
<td>Weight (gm.)</td>
<td>500</td>
<td>500-999</td>
<td>1,000-2,499</td>
<td>2,500 or more</td>
</tr>
<tr>
<td>Biparietal head diameter (cm.)</td>
<td>4.5</td>
<td>4.5-6.8</td>
<td>6.8-8.8</td>
<td>8.8-9.7</td>
</tr>
<tr>
<td>Length of extremity (cm.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Upper</td>
<td>8.7</td>
<td>8.7-13.6</td>
<td>13.6-17.8</td>
<td>17.8-19.7</td>
</tr>
<tr>
<td>Lower</td>
<td>9.1</td>
<td>9.1-14.4</td>
<td>14.4-18.9</td>
<td>18.9-20.9</td>
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<tr>
<td>Foot</td>
<td>3.0</td>
<td>3.0-5.0</td>
<td>5.0-6.8</td>
<td>6.6-7.4</td>
</tr>
</tbody>
</table>

* The figures are not applicable for “small-for-dates” babies.

Id. at 73. It should be noted that this chart lists the child of less than 20 weeks gestation as nonviable, and the child at 21 to 28 weeks as immature.

performed between the 17th and 20th weeks of gestation, six were between the 21st and 24th weeks and, the remaining seven were performed after the 24th week. These children were born alive, but subsequently died as a result of the abortion.

Even considering the most severe definition, i.e. surviving the neonatal period, certain studies have shown survival at remarkably early ages with apparently little or no sequelae. One such study reports cases of fetuses born at gestational ages of 21 and 22 weeks which survived and are still living. The literature on this subject contains numerous other reports of children born alive during the second half of the gestation period who have survived and are living today. For example, one study, using a weight of 400 grams (20 weeks) as the low end of the viability spectrum, indicated:

Born alive were 101,398 over 2,500 grams with a survival of 99.5 per cent, 6,617,100 to 2,500 grams with a survival of 86.3 per cent, and 463,400 to 1,000 grams with a survival of 6.4 per cent, a total of 98.4 per cent survival of all live-born infants over 400 grams.

Clearly, as was stated by William J. Curran, Professor of Legal Medicine at Harvard University, the Supreme Court may be mistaken in assuming that viability can be precisely defined “as a scientifically and philosophically accepted point of demarcation in fetal development.”

It is apparent from a review of this material that the medical literature, using survival of the neonatal period as the definition of viability, accepts 20 weeks as the lower end of the viability spectrum. Moreover, it is also apparent that further research in the area of neonatal intensive care will fix viability at an earlier point. The whole area of perinatal medicine is only 10 years old. Research on the artificial placenta is in its embryonic state, and research on that chronic killer of the premature, underdevelopment of the lung structure, has had significant results in recent years. It can be expected that the further development of research on the artificial placenta will radically change our notions of the meaning of viability. Medical research on the unborn has only just begun.

While it remains to be seen how the Supreme Court will handle this issue, the opponents of the 20-week definition of viability are vigorously attempting to persuade the courts to push viability as far forward as possi-
ble, even as far as 28 to 32 weeks. For example, in *Hodgson v. Anderson*,\(^{138}\) Dr. Louis Hillman filed an affidavit explaining an anecdotal the Canadian Medical Journal case on which he had relied when he published this book.\(^{131}\) Although he admitted personal knowledge of one 530 gram fetus that survived, he, as did others, urged the court to consider 28 weeks (1,000 grams) as the point of viability. In actuality, they consider viability as a socializing or definitional term and argue that it should be limited to the point where all fetuses are actually viable and not, as they would say, be based on “medical oddities” that have survived in the range of 20 to 30 weeks.

**The Edelin Case**

In *Commonwealth v. Edelin*,\(^{132}\) a Boston physician was convicted of manslaughter for the death of a fetus approximately 20 to 24 gestational weeks old.\(^{133}\) The case only peripherally involved the issue of abortion, for the abortion itself was legal under the *Wade* doctrine.\(^{134}\) The legality of the abortion, however, does not necessarily imply that the death of the fetus is permissible.\(^{135}\) At issue in *Edelin* were the duties and responsibilities of a physician who performs a legal abortion which produces a viable fetus.


\(^{133}\) For a general discussion of *Edelin* see *N.Y. Times*, Feb. 19, 1975, at 1, col. 1.

\(^{134}\) Record at 29-54, Commonwealth v. Edelin, No. 81823 (Mass. Super. Crim. Ct. Suffolk County, Feb. 18, 1975), *appeal granted*, No. SJC-393, Mass. Sup. Jud. Ct., Sept. 15, 1975. In *Wade*, the Supreme Court held that until viability the state’s interest is insufficient to justify a complete prohibition of abortions. Once the fetus is viable the state may, if it chooses, prohibit abortions unless necessary for the preservation of the woman’s health. See notes 111-12 and accompanying text *supra*. The postviability prohibition of abortions may be expressed through case law, statutes, or both. *See e.g., Ill. Ann. Stat. ch. 38, § 81-14(c)* (Smith-Hurd Supp. 1975), which provides:

> During the third trimester, an abortion shall only be performed to preserve the physical or mental health of the mother by a physician after consultation with at least two other physicians not related to or engaged in practice with the attending physician.

**In Edelin**, however, the abortion itself was not challenged as illegal.

\(^{135}\) It is often forgotten that prior to *Wade* abortion was permitted by some statutes in order to save the life of the child. *See e.g., 40A Minn. Stat. Ann.* § 617.19 (1964) (repealed 1974), which provided:

> A pregnant woman who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, shall be punished by imprisonment in the state prison for not less than one year nor more than four years.

(emphasis added).
VIABILITY AND VALUES

Must he employ all reasonable means to preserve that life? If he does not, has he committed a crime?

A three-judge district court in Minnesota recently discussed this question and declared that a fetus who is “born alive . . . becomes a person—protected by the usual constitutional rights.” In the Illinois, Oregon, Alabama, and Massachusetts cases considered previously, a viable fetus was held to be a person despite the fact that death occurred while still in the womb. Each of these courts was struggling with one of the myriad of complex issues implicitly left open by Wade.

The abortion performed by Dr. Edelin was a hysterotomy, which is a minicaesarean generally performed after the failure of two or three saline attempts. The abdomen and uterus are incised, and the fetus is removed through the incisions as in any caesarean operation. This operation almost invariably produces a live birth. Indeed, that is often its very purpose and, prior to the late 1960’s, its primary, if not sole, purpose. The defendant, after opening the uterus and separating the placenta, allegedly held the fetus in the uterus, thus eliminating oxygen and nutritional sources and causing the fetus to die before removal from the womb.

Reasonable legal minds in this post-Wade era might differ on whether such conduct constitutes a crime. An Illinois statute prohibits such action and mandates that life-saving equipment be available and used under such circumstances. Other post-Wade statutes provide similar safeguards.

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138 Hodgson v. Anderson, 378 F. Supp. 1008, 1017 (D. Minn. 1974) (three-judge court), appeal dismissed on other grounds sub nom. Spannaus v. Hodgson, 420 U.S. 903 (1975), wherein the district court, despite its recognition of the constitutional personhood of a fetus born alive, declared the Minnesota abortion statute unconstitutional. This statute prohibited abortion during the final 20 weeks of the pregnancy unless necessary to preserve the life or health of the mother. Furthermore, the statute also required that the abortion be performed under circumstances reasonably assuring the live birth and survival of the fetus. The court found that these provisions placed restrictions on physicians which were not reasonably necessary for maternal health during the second stage of the pregnancy.

137 See text accompanying notes 76-107 supra.

134 N.Y. Times, Jan. 12, 1975, at 34, col. 5.

139 ILL. ANN. STAT. ch. 38, § 81-14(b)(Smith-Hurd Supp. 1976) which provides that “[d]uring the second trimester or thereafter, an abortion shall be performed by a physician, in a hospital, on an inpatient basis, with measures for life support which must be available and utilized if there is any clearly visible evidence of viability.”

140 In Missouri, abortions not necessary to preserve the life or health of the mother may not be performed “unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.” MO. ANN. STAT. § 188.030 (Vernon Supp. 1976). In any abortion, the person performing the abortion must exercise the same care to preserve the life and health of the fetus as he would for an intended live birth. Physicians or persons assisting who fail to take such measures “shall be deemed guilty of manslaughter.” Id. § 188.035(1). The Pennsylvania statute provides that “if there is sufficient reason to believe that the fetus may be viable” the person performing must exercise the same care as for a live birth, “and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive.” PA. STAT. ANN. tit. 35, § 6605(a) (Supp. 1976). Failure to exercise such care or to provide for the proper technique subjects the actor “to such civil or criminal
Since Massachusetts, however, had not enacted a post-\textit{Wade} abortion statute, any criminal liability attaching to the defendant's conduct had to flow from either criminal statutes or the common law.\textsuperscript{111} This criminal responsibility, in turn, depended upon resolution of the factual dispute concerning the viability of the fetus at the time of the abortion.

The court's instructions in \textit{Edelin}\textsuperscript{112} would have permitted the jury to liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." \textit{Id.} § 6605(d).

\textsuperscript{111} The trial judge in \textit{Edelin} carefully noted that the Massachusetts Legislature had not enacted an abortion statute which was in accord with \textit{Wade}. As a result, he concluded that the law of manslaughter was applicable. N.Y. Times, Feb. 16, 1975, at 59, col. 4.

\textsuperscript{112} The court's charge to the jury fills 92 pages of transcript. Doctor Edelin had been indicted under MASS. ANN. LAWS ch. 265, § 13 (1970), which provides:

\begin{quote}
Whoever commits manslaughter shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.
\end{quote}

The court instructed the jury, in part, as follows:

\begin{quote}
THE COURT: Just before the recess, Mr. Foreman and ladies and gentlemen, I had referred to the fact that this indictment was brought under Chapter 265. It is Section 13 of that chapter of the general laws of Massachusetts. Now, many years ago in the famous \textit{Webster} murder case, Lemuel Shaw, one of the great Chief Justices of our Supreme Court, of the Supreme Judicial Court, laid down a definition of manslaughter in this language in part:

"Manslaughter is the unlawful killing of another without malice. It is termed involuntary manslaughter when the death of another is caused by some unlawful act not accompanied by any intention to take life."

Manslaughter may arise in cases where there was no intention to cause death or bodily injury by an allegation that the conduct of a defendant is so wanton or reckless in his act or the omission to act that it causes a death.

In order to understand what constitutes reckless or wanton conduct you must, perhaps, first understand what constitutes negligence or gross negligence on the one hand and wanton or reckless conduct on the other.

Negligence is the failure of a responsible person either by omission or by action to exercise the care, vigilence (sic) and forethought which in the discharge of the duty then resting on him a person of ordinary caution and prudence (sic) are to exercise under the particular circumstances. The idea of negligence involves a duty toward the person injured or killed to use as much care for this safety as a man of ordinary prudence would have used under all those circumstances. The failure to perform that duty is called negligence. It is sometimes, if indeed it is aggravated, called gross negligence.

But negligence or carelessness or gross negligence is not sufficient to prove the crime of manslaughter. Negligence is different from wanton or reckless conduct. The essence of wanton or reckless conduct is the doing of an act or the omission to act where there is a duty to act, which commission or omission involves a high degree of likelihood that substantial harm will result to another.

Wanton or reckless conduct amounts to what has been described as \textit{indifference to or a disregard of the probable consequences to the rights of others}. Wanton or reckless conduct is the legal equivalent of intentional conduct. If by wanton or reckless conduct the death is caused to another, the person guilty of such conduct may be guilty of manslaughter.

\textit{Id.} at 29-42 to 29-44 (emphasis added).
acquit the defendant on the theory that the fetus was dead before it left the womb. If legal personhood is predicated upon live birth, this finding of death before birth would preclude criminal liability, despite the fact that the defendant affirmatively prohibited the removal of the fetus. A verdict of acquittal could also have been based on a finding that the fetus either was not alive or was not a person at the time of the abortion. On the other hand, the conclusion that the defendant's conduct exhibited a reckless disregard for the life of a viable fetus, would have justified a conviction. The clear conclusion to be drawn from the guilty verdict is that, in the jury's judgment, this fetus was a living person and criminal liability could not be avoided merely because the defendant refused to remove the fetus from the opened uterus until after he had blocked its chances of survival.

Was the jury correct in so deciding? Can the live birth problem in late abortions be avoided by merely allowing the viable fetus to die before removal from the womb? Where but in the polarized area of abortion would such a flimsy legal distinction be entertained for even a moment? The decision has been appealed, and the Supreme Judicial Court of Massachusetts will be confronted with these questions. Of even more interest was the emotional reaction of the press, which denounced the jury in highly charged editorials evidencing the intensity of the issue.

It is a common event for commentators to assess the status of the law from the jury's verdict rather than the court's instructions. For example, the occasional acquittals in euthanasia prosecutions are often cited as evidence of a moribund law or moral disagreement within the community. Similarly, it is submitted that the Edelin jury voiced the community's reaction to the conduct involved. Notably, neither Wade, nor the cases that led to it, involved juries. Thus, the Edelin trial and verdict is of considerable significance since this was the first opportunity for an American jury to examine and judge the legal problems engendered by Wade and to render a judgment on the conduct of the parties involved. Criticizing the jury as predominantly Roman Catholic, the press reaction to this first encounter by lay people with these legal issues was hostile.

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144 E.g., D. Macubre, Death by Choice 23-26 (1974), wherein the author discusses a number of mercy-killing trials where the juries brought in verdicts of not guilty. In several of these cases, the defendants were acquitted on grounds of temporary insanity, and then released because found no longer insane. The author concludes that "[w]hat is happening in these instances is that there is a flight to psychiatry when there is no help from the law." Id. at 24.
145 Ten of the 12 Edelin jurors were Roman Catholic. N.Y. Times, Feb. 18, 1975, at 27, col. 7.
146 See, e.g., Chicago Tribune, Jan. 22, 1975, at 44, col. 5. A Roman Catholic Church spokesman, Russell Shaw, expressed dismay over the religious connotations and unfounded accusations which he found in the press coverage of the Edelin trial. N.Y. Times, Feb. 19, 1975, at 69, col. 2.
Nonetheless, it is apparent that the defendant and his counsel were very happy with the makeup of the jury\(^\text{11}\) until the verdict was in—a phenomena not unknown to trial lawyers. How many peremptory challenges did the defense have? How many did they use? Did the defense challenge the array? Is not the truth of the matter that there was no such concern until after the verdict?

The Edelin case highlights the problem of the future. Midtrimester abortions frequently lead to live births. With the increased use of prostaglandins this problem will become even more acute. What is the duty of the physician who has performed a legal abortion and thereby causes a live birth? What is his responsibility if he omits to and allows the fetus to die? What is his responsibility if he actively intervenes to terminate the life of the fetus? In an age of technological advances, is it meaningful to use viability as a criterion for anything, since artificial aids will rapidly change that criterion?

Does viability have any significance as a legal point of demarcation for some sort of rights in the unborn child \textit{qua} unborn child? As a matter of fact, is not viability merely the point at which the consciences of even the most avidly pro-abortion persons finally begin to twinge as they realize that they are consigning to death children who could survive? Is not viability the point at which infanticide becomes real in our society? Further, is not the only significance of viability the unspoken premise that we are not ready for legalized infanticide?

These are the questions raised by Edelin; they demand further rational debate and consideration. Some states have already answered these questions by enacting statutes which impose an affirmative duty on the physician and hospital to use all means necessary to save life where signs of viability are present.\(^\text{14}\) The Edelin case makes one thing clear—the legalization of abortion by the Supreme Court has created some of the most profound legal, social, and moral problems ever faced by a society.

THE SPECIAL CARE NURSERY

The question of allowing children to die in the special care nursery was presented in one study as a medical-moral problem.\(^\text{15}\) Although this work discusses 299 deaths, only 43 were related to withheld medical treatment, and of these only 9 or 10 involved what should be classified as a medical-moral problem.\(^\text{16}\) This observation is useful since the work itself fails to

\(^{11}\) It is interesting to note that Dr. Edelin chose a jury trial. The basis for this decision was a $10,000 survey which reported that 85% of the prospective jurors in Suffolk County favored abortion in some circumstances. N.Y. Times, Feb. 19, 1975, at 69, col. 2.

\(^{14}\) See notes 139-40 supra.

\(^{15}\) Duff & Campbell, \textit{Moral and Ethical Dilemmas in the Special-Care Nursery}, 289 NEW ENG. J. MED. 890 (1973).

\(^{16}\) Id. at 891-92.
make the very necessary distinction between treatable and nontreatable cases, i.e., between cases where the available treatment would have or could not have led to a good medical prognosis.

When medical treatment is not available, as in the case of short bowel syndrome, the withholding of unavailable treatment hardly amounts to the creation of a medical-moral problem. So, too, when the anomalies are multiple and result in a hopeless condition, our moral sense is not aroused by allowing "death as a management option." If the treatment is available and the prognosis ordinarily good, however, the withholding of that treatment for social reasons raises a concern that death is no longer being utilized as a management option in the medical sense, but as an alternative choice in the social sense. The similarity to the abortion problem is stunning. For example, "[a]n infant with Down's syndrome and intestinal atresia . . . was not treated because his parents thought that surgery was wrong for their baby and themselves. He died seven days after birth." It has also been alleged that in similar cases not only treatment, but also all sustenance, was withheld until the children died. In short, the decision not to repair the atresia resulted in a determination that death would be allowed.

The withholding of extraordinary treatment is a medical decision which does not expose the hospital personnel or parents to legal liability. A refusal to provide nourishment or ordinary health measures, however, is a social decision which generally entails either criminal or civil liability. Since society, today, regards this social decision with less hostility than before, the elimination of adverse legal consequences has been suggested.

The participants in a recent conference, convened to consider the ethical problems of neonatal care, advocated the legalization of a social approach to the determination whether to prolong the existence of an infant capable of only a low quality of life. An essay submitted to the conference compared the dilemma of whether to continue the existence of a severely defective child to the decision of the Supreme Court in the abortion controversy. Both were seen as primarily societal determinations based on medical estimates. The analogy to the abortion situation was clearly stated:

151 Id. at 893.
152 Id. at 891.
155 Id. at 83-84. See also Robertson, Involuntary Euthanasia of Defective Newborns: A Legal Analysis, 27 STAN. L. REV. 213 (1975).
157 Id. at 758.
[An argument has been advanced] for a social policy that would withhold legal personhood from certain carefully defined categories of high-risk infants until a clear diagnosis and prognosis can be made concerning them and until their parents have made an informed decision whether or not they want to keep and nurture these infants.158

The participants faced the moral dilemmas directly and responded to a questionnaire on the basic issues involved. Of the 20, 17 endorsed active euthanasia in some circumstances, 2 rejected this solution, and 1 was uncertain.159

The conference paper concluded with the following statement of nine ethical propositions to be applied as a public moral policy in the neonatal intensive care unit:

1. Every baby born possesses a moral value which entitles it to the medical and social care necessary to effect its well-being.
2. Parents bear the principal moral responsibility for the well-being of their newborn infant.
3. Physicians have the duty to take medical measures conducive to the well-being of the baby in proportion to their fiduciary relationships to the parents.
4. The State has an interest in the proper fulfillment of responsibilities and duties regarding the well-being of the infant, as well as an interest in ensuring an equitable apportionment of limited resources among its citizens.
5. The responsibility of the parents, the duty of the physician, and the interests of the State are conditioned by the medicomoral principle, “do no harm, without expecting compensating benefit for the patients.”
6. Life-preserving intervention should be understood as doing harm to an infant who cannot survive infancy, or will live in intractable pain, or cannot participate even minimally in human experience.
7. If the court is called upon to resolve disagreement between parents and physicians about medical care, prognosis about quality of life for the infant should weigh heavily on the decision as to whether or not to order life-saving intervention.
8. If an infant is judged beyond medical intervention, and if it is judged that its continued brief life will be marked by pain or discomfort, it is permissible to hasten death by means consonant with the moral value of the infant and the duty of the physician.
9. In cases of limited availability of neonatal intensive care, it is ethical to terminate therapy for an infant with poor prognosis in order to provide care for an infant with a much better prognosis.160

Obviously, the sixth and eighth propositions are of the greatest concern to this discussion. The first, however, contains the germ of the prob-

158 Id.
159 Id. at 759-60. The appendix of the paper, however, offers a different response: 12 yes, 2 no, 2 uncertain. Id. at 767, App. B, Table III.
160 Id. at 760-61 (emphasis in original).
lem, for it finds moral value in the baby, but is entirely silent on legal values. The proponents of a completely permissive abortion policy also find moral value in the fetus—but moral value only—which value is counterbalanced by moral problems of the woman. More significantly, this moral value is completely outweighed by the legal value of the woman’s right to privacy vis-à-vis the nonlegal personhood of the unborn. These nine propositions require that the child be treated as a nonlegal person, a “something” with no intrinsic legal value in its own right unless it has attained the required quality of life. In the creation of these principles, was any thought given to the constitutional rights of the child involved? The child, regardless of his state of health, is a constitutional person. Consequently, he is entitled to treatment as such not only by the courts but also by his parents and his physician.

That, however, is not the basic problem with this approach. One cannot quarrel with the thoughtfulness, the moral sensitivity, and the concern shown by the participants in the conference. Any child entrusted to them would undoubtedly receive as much consideration as possible in the difficult area of the neonatal intensive care unit. Nonetheless, the nine proposed criteria must be recognized for what they represent: as much a nonlegal life and death screening program as a sensitive moral answer to a difficult moral question. These criteria do not merely set the standard for letting life in; they also provide for excluding certain lives. If this life-terminating decision is a medical conclusion, it is justified. If it is a societal conclusion, very grave concerns exist.

An examination of the results of the conference ultimately leads to questions concerning the very purpose of the meeting. The argument is usually advanced that such conferences are held because of recent medical progress that is responsible for creating a medical-moral dilemma. It is submitted, however, that the present is very similar to the past, but now, since Wade, a new method of solving the problem is apparent. True, technology has brought these difficulties to the special care nursery, but are not these difficulties the same problems that always existed in other wards of the hospital? As medicine and technology advance, some old problems are left behind, but is not this problem really one of life and death, and, therefore, the same problem medicine has always faced? And is not the axiom, “I should do no harm,” the same axiom that has always been applied to every person under a physician’s care? Why does the problem receive special consideration now? The answer, of course, is that now there is another option: death as a treatment of choice, the profound paradigm of the abortion solution.

How does one translate the principles of the conference into law? Apparently, this can only be done by excluding the prosecutor from the

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1 See Roe v. Wade, 410 U.S. 113, 152-56 (1973) (right to abortion, though not absolute, prevails before viability).
nursery. This exclusion, in turn, requires that the child be viewed as something other than a legal person with constitutional rights. The parents and the doctor will decide. How is the eighth proposition, permitting active euthanasia, sustained? Its proponents might well argue that it is no different than abortion. The logic seems inescapable, but it is, nonetheless, very troublesome. The fact that euthanasia constitutes murder under present law is no great obstacle: at one time abortion was also illegal.

In a recent paper on this subject, Paul Ramsey stated: "Ethically, the benign neglect of defective infants should be called by its proper name: involuntary euthanasia." Professor Ramsey concluded that with rare exceptions the operative principle in the special care nursery should be "to always treat the defective newborn as we would treat the normal child." He found Lesch-Nyhan disease to be such an exception, primarily because it cannot be treated. As to the inclusion of societal indicators when confronting the medical problems, he concluded:

One can understand—even appreciate—the motives of a physician who factors in an unhappy marriage or family poverty when weighing the tragedy facing one child against that facing another; and rations his help accordingly. Nevertheless, that surely is a species of injustice. Physicians are not appointed to remove all life's tragedy, least of all by lessening medical care now and letting infants die who for social reasons seem fated to have less care in the future than others. That's one way to remove every evening the human debris that has accumulated since morning.

CONCLUSION

Our discussion of viability has really been a space flight through a very small portion of the vast cosmos in search of values. We discovered that viability, whenever it occurs, seems to be the point at which the value we

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164 Id.
165 Id.

Lesch-Nyhan disease is a genetic defect, identified and described in a series of cases in 1964, which is passed on only to male children. Its victims are unable to walk or sit up unassisted; they suffer uncontrollable spasms; and suffer mental retardation. So far, . . . care can and should always be conveyed to such victims, though as yet no cure. When, however, the babies’ teeth appear they will gnaw through their lips, gnaw their hands and shoulders, they often bite off a finger, and mutilate any part of their own bodies they can reach. There they sit, bloody and unremediable. Is this not a close approximation to the case of undefeatable pain which in the terminal adult patient places him beyond human caring action and abolishes the moral significance of the distinction between always continuing to care and direct dispatch? When care cannot be conveyed, it need not be extended.

Id. (footnote omitted).
166 Id.
once called "the sacredness of human life" has alighted. However, we quickly found a developing exception to that principle in the special care nursery, where medicine is seeking the legalization of infanticide for the severely defective child. That exception may destroy the principle; if so, the unwanted born may become no better than the unwanted unborn: nonpersons.*

* Editor’s Note: As this article goes to print, the Supreme Court, in Planned Parenthood v. Danforth, 44 U.S.L.W. 5197 (U.S. July 1, 1976), considered some of the questions discussed herein. The Court held, inter alia, that determining the time of viablility is basically a medical rather than a legal question, and thus a statutory definition of viability should allow a responsible attending physician to make the ultimate decision. The Court also declared unconstitutional a statutory provision requiring that a physician performing an abortion act to preserve the life of the fetus, regardless of viability, and establishing penal sanctions for a failure to so act.