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In Defense of the Right to Live: The Constitutionality of Therapeutic Abortion

N/A N/A
University of Georgia School of Law

IN DEFENSE OF THE RIGHT TO LIVE: THE CONSTITUTIONALITY OF THERAPEUTIC ABORTION[1]

In recent years public sentiment favoring a liberal modification of the legal position on abortion has been noticeably increasing. Particularly indicative of the public concern was the wide-spread publicity in 1962 given the *Finkbine* situation.[2] And, despite commentary that no change in the abortion laws of the respective states is likely to be forthcoming,[3] seventeen states are currently studying, or have recently studied, the possibility of more liberal abortion legislation.[4] In addition, two states, Colorado and North Carolina, have adopted liberalized statutes within the last few months.[5] Based upon the thesis, then, that pervasive reformation is imminent, this Comment purports to examine the underlying constitutional validity of such abortion legislation; for, if therapeutic abortion is legally objectionable at all, the grounds would necessarily be constitutional. Nothing but the importance given the rights of the individual fetus could outweigh the great public interest in alleviating the acknowledged butchery

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1 The following is essentially a legal discussion. In order to facilitate analysis, therefore, religious and ethical arguments have been scrupulously excluded. Social, economic, and psychological factors are treated only to the extent that they determine policy or impinge upon the legal issues involved. However, for an excellent short synopsis of the range of responsible arguments for and against abortion on the grounds not treated herein, see SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 11 (1965).

2 Mrs. Finkbine, a thirty-year-old mother of four and resident of Arizona, had been taking tranquilizers containing thalidomide during her pregnancy. At first reluctant to follow her doctor's advice to abort to avoid any undue hardship which might arise were the baby born deformed, Mrs. Finkbine and her husband finally decided to have the operation performed. However, medical authority was withdrawn at the last minute. A suit for declaratory judgment in the Arizona courts was unsuccessful. Mrs. Finkbine finally proceeded to Sweden, where the abortion was performed. The case was not reported by the lower court; the facts given were taken from SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 11-12 (1965). For discussion of the thalidomide problem and situations that have arisen because of it, see ST. JOHN-STEVAS, THE RIGHT TO LIFE 3-25 (1964).

3 See SCHUR, *op. cit. supra* note 2, at 58; Quay, *Justifiable Abortion-Medical and Legal Foundations*, 49 GEO. L.J. 173 (1960).

4 See Playboy, Aug., 1967, pp. 35-36; Playboy, May, 1967, pp. 149-50. The states which have considered revision are Arizona, California, Connecticut, Indiana, Georgia, Maine, Maryland, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island and Wisconsin. Playboy, Aug., 1967, pp. 35-36; Playboy, May, 1967, pp. 149-50. However, reform legislation has been rejected by the states of Arizona, Indiana, Maryland, Nebraska, Nevada, New Mexico and New York. Playboy, May, 1967, pp. 149-50; Playboy, Aug., 1967, pp. 35-36.

5 COLO. REV. STAT. §§ 40-2-50, 51 (1967), 52; GEN. STAT. N.C. § 14-45.1 (Adv. Pamphlet No. 3, 1967).

of 15,000 women annually by criminal abortionists,[6] and the anguish caused the parents of malformed or undesired children.

General Statistical Information and Enforceability of Present Abortion Statutes

Few, if any, offenses are less enforceable or enforced than criminal abortion.[7] It is estimated that a total of 1,300,000 miscarriages or abortions (spontaneous, therapeutic, and criminal) occur annually in the United States.[8] This figure represents only a fraction of the real number, since there is no practical way to determine the number of pregnancies terminated while the zygote is still very small. This unrealized figure would also undoubtedly include a large number of induced abortions occurring in the first few months of pregnancy.

Estimates of the ratio of total miscarriages of all types to the total number of pregnancies indicate that miscarriages occur in sixteen to forty-three per cent of all pregnancies.[9] For obvious reasons, no accurate determination can be made of the number of miscarriages criminally induced. However, suggested approximations range from thirty-four to sixty-nine per cent of all terminated pregnancies.[10] Numerical transposition of these estimates shows that there are between 300,000 to one million criminal abortions committed annually in the United States.[11] And, as indicated above, 15,000 women die yearly from the after-effects of such operations.[12]

Convictions under the various abortion statutes, on the other hand, number only 2,500, according to a 1951 estimate.[13] Moreover, one researcher expresses doubt that a woman has ever been convicted for her willing participation in such a felonious enterprise.[14] The desire for secrecy which motivates a woman to secure an illegal abortion obviously militates against successful prosecution of offenders.[15] The operations are usually conducted without prior or subsequent association of the parties involved; normally, only the woman and the abortionist are present, and both have reason to avoid publication of the event. Thus, even when the authorities are aware that abortions are being performed by a certain individual, it is extremely difficult to obtain the evidence necessary for a conviction. Where there is

6 3 GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 58.01 (3d ed. 1966).

7 See SCHUR, *op. cit. supra* note 2, at 35, 36, 38-40.

8 Fisher, *Criminal Abortion*, 42 J. CRIM. L., C & P.S. 242 (1951); see SCHUR, *op. cit. supra* note 2, at 12.

9 3 GRAY, *op. cit. supra* note 6.

10 Fisher, *supra* note 8. See also 3 GRAY, *op. cit. supra* note 6, at ¶ 58.02.

11 See Fisher, *supra* note 8; SCHUR, *op. cit. supra* note 2, at 12.

12 3 GRAY, *op. cit. supra* note 6. Hereinafter, any reference to a criminal operation will include any criminal abortion whether by operation or otherwise.

13 Fisher, *supra* note 8, at 244.

14 SCHUR, *op. cit. supra* note 2, at 36.

15 See generally Fisher; *supra* note 8, at 248-49; SCHUR, *op. cit. supra* note 2, at 36-38.

an early termination of the pregnancy, proof of pregnancy, except where the particular statute does not require it,[16] and proof of the more difficult element of causation are practically impossible to show from external evidence. In most cases, therefore, the police must actually interrupt the performance of the operation to obtain a conviction.[17]

The Current Legal Position

Statutes prohibiting abortion have been traced at least as far back as the Code of Hammurabi.[18] The American statutes, however, have their roots in the more recent English common law. Blackstone, whose understanding on this point paralleled Coke's,[19] wrote the following in his *Commentaries* concerning abortion:

> Life 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. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor.[20]

Although several aspects of the common law position will be treated more fully within, it is important to notice at the outset that the death of the fetus was a necessary element of the common law crime of abortion.[21] Moreover, if the child were not "quick", it was not alive in the contemplation of law and an induced miscarriage was therefore not a criminal abortion.[22]

The requirement that the child be quick—that is, at such a state of development that it moved within its mother's womb—was in all probability an abitrary line drawn in the reproduction cycle for evidentiary purposes. Medicine was by no means a refined science at early common law; on the other hand, the criminal law necessarily demanded a definite line of demarcation between actions criminal and non-criminal. Undoubtedly, by Blackstone's time there must have been a growing realization that the development of a child was a gradual thing and that embryonic life in some form existed before the child quickened. In any case, in 1803 the first

16 See, *e.g.*, KY. REV. STAT. ANN. § 436.020(1) (1955); People v. Gallardo, 41 Cal. 2d 57, 257 P.2d 29 (1953).

17 See note 15 *supra*.

18 See Quay, *supra* note 3, at 399-400.

19 3 COKE, THIRD INST. 50 (1797).

20 1 BLACKSTONE, COMMENTARIES 129-30 (4th ed. 1771).

21 PERKINS, CRIMINAL LAW 101 (1957).

22 *Ibid.*

of a series of reforming statutes[23] was passed in England which removed the requirement that the child be quick as an element of the crime.[24]

The first American statute making abortion a crime was passed in Connecticut in 1821,[25] and this example was eventually followed in all of the states.[26] The emphasis in these enactments, however, tends to be more upon the *action*, rather than the *result*.[27] Thus, some courts have held that the crime was committed even though the child was not in fact aborted.[28] Some statutes, moreover, provide for additional punishment in the event that the child die.[29] Indeed, a few courts have even held that the woman need not in fact be pregnant to establish the commission of the crime.[30] One writer has suggested that the apparent discrepancy in approach to abortion between the common law and the American statutes can be explained by the fact that an attempt at common law was punished in the same manner as the crime itself,[31] such that the death of the child determined only the nature of the crime, and not the degree of punishment.

Abortion is almost universally and specifically excusable under the American statutes when the life of the mother is endangered by the pregnancy.[32] Earlier decisions had construed this exception literally, such that therapeutic abortion was permissible only when the life of the mother was in fact physically threatened.[33] However, in 1939 the English case of *Rex v. Bourne*[34] was decided under a statutory exception similar to that found in the American statutes. Bourne, an eminent London physician, disclosed to the authorities that he was going to perform an abortion upon a fifteen-

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23 For discussions of the development of English statutory law on abortion, see DICKENS, ABORTION AND THE LAW 23-38 (1966); WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 152-56 (1957); Quay, *supra* note 3, at 431-33.

24 Miscarriage of Women Act, 1803, 43 Geo. 3, c. 58; see Quay, *supra* note 3, at 431-32.

25 See Quay, *supra* note 3, at 435. The statute was modeled upon the English Miscarriage of Women Act. *Ibid.*

26 For a complete though slightly anachronistic collection of all the American state abortion statutes, see Quay, *supra* note 3, at 447-520 (Appendix I). See also WILLIAMS, *op. cit. supra* note 23, at 156-60.

27 PERKINS, *op. cit. supra* note 21, at 101-102.

28 See, *e.g.*, Crichton v. United States, 92 F.2d 224 (D.C. Cir.), *cert. denied*, 302 U.S. 702 (1937); *cf.* Urga v. State, 155 Fla. 86, 20 So. 2d 685 (1945).

29 *E.g.*, REV. LAWS OF HAWAII § 309-3 (1955); KY. REV. STAT. ANN. §§ 436.020(1), (2) (1955).

30 See, *e.g.*, People v. Gallardo, 41 Cal. 2d 57, 257 P.2d 29 (1953); Territory of Hawaii v. Young, 37 Hawaii 150, 159-60 (1945); Wilson v. Commonwealth, 22 KY. L. RPTR. 1251, 1252-53, 1255, 60 S.W. 400, 401-03 (1901).

31 PERKINS, *op. cit. supra* note 21, at 101.

32 See Quay, *supra* note 3, at 447-520; WILLIAMS, *op. cit. supra* note 23, at 160.

33 See, *e.g.*, State v. Brandenburg, 58 A.2d 709 (N.J. 1948). See generally WILLIAMS, *op. cit. supra* note 23, at 164-66.

34 Rex v. Bourne, [1939] 1 K.B. 687. A transcript of the jury charge in this case appears in Quay, *supra* note 3, at 521. See also DICKENS, *op. cit. supra* note 23, at 38; WILLIAMS, *op. cit. supra* note 23, at 160-63.

year-old girl who had conceived as the result of a brutal rape. Bourne performed the operation openly and was subsequently indicted. The defense entered was excusable homicide, based on the premise that the girl's mental stability was threatened by the pregnancy. The trial court instructed the jury that if it found that the girl's mental health was in fact threatened, the abortion was excusable.[35] On appeal, this construction of the statute was upheld by the King's Bench.[36]

Although this result has been influential in England and the United States,[37] it has marked, until recently, the outer limits of the permissible-abortion exception. In 1962, the American Law Institute, in its final draft of the *Model Penal Code*, urged adoption of legislation which would permit abortion in cases where the physical or mental health of the mother was endangered, where the child would be born with grave physical or mental defect, or where pregnancy resulted from felonious intercourse.[38] This position has been adopted in two states and apparently is under consideration in seventeen other states.[39]

The Right to Live and the Constitution

As indicated by the quotation from Blackstone above,[40] abortion as a crime at common law was predicated upon the religiously imbued sanctity of human life.[41] The fact that death of the fetus was not treated as murder,[42] albeit that such death was a necessary element of the crime,[43] perhaps indicates an unexpressed distinction between "degrees of being" that justified a concomitant distinction in legal consequences. Nonetheless, implicit in the common law, and underlying it, is the recognition that the embryonic state was in some sense human existence worthy of legal protection.

The implicit sanctity of human life was therefore by incorporation a fundamental in the law of the newly created American states. Indeed, it was the cornerstone of the Declaration of Independence:[44] paralleling the common law, Jefferson's words indicate that the basis of this belief was primarily religious: "that all men are *endowed by their Creator* with cer-

35 Rex v. Bourne, [1938] 3 All. E.R. 615 (K.B.).

36 Rex v. Bourne, [1939] 1 K.B. 687.

37 See WILLIAMS, *op. cit. supra* note 23, at 163, 164-66; *cf.* SCHUR, *op. cit. supra* note 2, at 55-58.

38 MODEL PENAL CODE § 230.3 (Fin. Draft 1962).

39 See notes 4-5 *supra.*

40 See text accompanying note 20 *supra.*

41 See ST. JOHN-STEVAS, *op. cit. supra* note 2, at 12-13.

42 See notes 19-21 *supra.*

43 See note 21 *supra.*

44 See ST. JOHN-STEVAS, *op. cit. supra* note 2, at 13. It is interesting to note that two important political bodies, one being the United Nations, expressed post-World War II reaffirmation of the natural law right to life. See *Id.* at 13-14.

tain unalienable rights; that among these rights are life . . . ."[45] However, the political context in which this right was recognized was to a large degree also the product of the Enlightenment, with its emphasis on human rights derived from natural law.[46] The degree to which each of these influences contributed to the expression of the concepts of human rights in American political thought is, of course, impossible to determine.

But irrespective of the origin of the concept, the Constitution written for the United States likewise implicitly adopted the right to live as an inherent federal right.[47] Although the history of the Supreme Court's interpretation of the Constitution indicates that the Court does not feel bound by the visions of the founding fathers and that the Constitution must be adapted to the changing needs of society,[48] the right to live must be deemed to underlie the whole framework of the Constitution's guarantees; for without the implicit existence of that right, the other protections become hollow mockeries. The vitality and meaning given the Bill of Rights in criminal prosecutions in recent years by the Court[49] indicates that the tradition of individual rights has not been abrogated. Therefore, it must be said that the inherent individual right to personal existence is likewise recognized by the current and viable law.[50]

This right is not absolute; yet the Bill of Rights, with its corollary extension to the states through the fourteenth amendment, as construed by the Supreme Court, requires that due process be strictly observed before an individual can be deprived of his life or liberty by governmental authority.[51] The life of an individual cannot be otherwise taken unless in war (which is justifiable upon the theory that the societal and legal structure, which is *a priori* the basis for the right, is endangered),[52] or in defense of life,[53] or to prevent the commission of a dangerous felony.[54] In the latter instances, the wrongdoer's life is balanced against imminent danger to the lives of others.[55] When a wrongdoer's life is taken through govern-

45 Jefferson, *The Declaration of Independence of the American States* (1776). (Emphasis added.)

46 See note 41 *supra.*

47 It is admitted, however, that no express reference to the existence of such a right is made in the Constitution.

48 *Compare, e.g.*, Betts v. Brady, 316 U.S. 455 (1942), *with* Gideon v. Wainwright, 372 U.S. 335 (1963) *and* Miranda v. Arizona, 384 U.S. 436 (1966).

49 See, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Sheppard v. Maxwell, 384 U.S. 333 (1966); Douglas v. California, 372 U.S. 353 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). See also note 44 *supra.*

50 See note 44 *supra.*

51 See, *e.g.*, cases cited notes 48-49.

52 See PERKINS, CRIMINAL LAW 28 (1957); ST. JOHN-STEVAS, THE RIGHT TO LIFE 105 (1964).

53 See PERKINS, *op. cit. supra* note 52, at 883-912.

54 See PERKINS, *op. cit. supra* note 52, at 28, 880-82.

55 See notes 53-54 *supra.*

mental process, on the other hand, the justification for such a taking is the rationalization that by committing an offense so heinous as to be deemed capital, the wrongdoer has ostracized himself from society and has forfeited the rights which were inherent by reason of his membership therein.[56] But in no case is life forfeited without malfeasance on the part of the forfeiter.

It might be argued, however, that the constitutional guarantee of the right to live extends only as far as necessary to prevent deprivation of that right by governmental authority without due process. Thus, in an abortion context, assuming arguendo that constitutionally protected life is *in esse* during the fetal stage, the issue would become whether or not the state or federal government could devise a system that would give sufficient protection to the individual rights such that a resultant decision to abort would satisfy due process. Such a system would probably have to allow a hearing, at which the fetus would be represented by a guardian ad litem or similar agent.

The validity of such a proposed system could be challenged on the ground that to deprive an individual of such a fundamental right as the right to live by a hearing at which he was not intelligently present, but represented only by proxy, would not satisfy due process. However, a more basic objection to circumscription of the right to live, that is, limiting the extent of the right to unauthorized governmental deprivation, can be found in the recent Congressional extension of constitutional protections. The Civil Rights Act[57] represents, in part, a codification of the constitutional guarantees which had formerly been designed to protect the individual from governmental infringement, in such a manner as to protect the individual from infringement of those guarantees by other individuals.[58] It can be said that this statute represents a basic change in attitude toward certain rights guaranteed by the Constitution. These rights are no longer a matter of relation between the citizen and the governing body, but rather have been made inherent by virtue of the individual's existence and his federal citizenship.[59] The recently decided case of *United States v. Guest*,[60] in which the Supreme Court found the existence of an inherent, constitutionally guaranteed federal right to travel in interstate commerce, thereby bringing an infringement of that right by individuals within the

56 See ST. JOHN-STEVAS, *op. cit. supra* note 52, at 85.

57 Civil Rights Act, 18 U.S.C. §§ 241, 242 (1964).

58 *Ibid.*

59 The writer is indebted to a lecture by Professor D. Meade Feild of the University of Georgia Law School for this insight. According to Professor Feild, the *Guest* case represents an important step in the Supreme Court's battle to protect individual rights. By use of the "inherent federal right" doctrine, the Court can extend its jurisdiction to individual infringements upon personal liberty, possibly even to the extent the fourteenth amendment protects the individual from state infringement.

60 United States v. Guest, 383 U.S. 745 (1966).

criminal prohibitions of the Civil Rights Act, supports this analysis.[61] It follows, then, that since no right could be more inherent or basic than the right to live, protection only against infringement by governmental authority is inadequate, when the pervasive nature of the right and the modern attitude toward such a right are considered.

It is fundamental that at the point human life is recognized as being *in esse,* the constitutional protections of that life become vested rights.[62] And although these rights may be limited because of minority or other conditions, they may not be abrogated.[63] It therefore becomes crucial when considering the constitutionality of a statute that extends the permissible bounds of therapeutic abortion to determine at what point human—and therefore constitutionally protected—life is *in esse*; for once the inherent right to live vests, an innocent being cannot be justifiably or logically deprived of this life unless an equally compelling social detriment is alleviated by such taking.

The Inception of Human Existence

Although the fetal stage is recognized as human life in some sense of the word, both at common law and by majority rule today,[64] the full protection of that life as human did not and does not rise until the child is born.[65] The legal test of separate human existence is the ability of the child's circulatory system to operate independent of the mother's.[66] But, in legal recognition, the lesser protection given the fetus by laws prohibiting abortion extends, depending on the jurisdiction, from either conception[67] or the point at which the child "quickens"[68] till the time of birth. In medical and statistical usage, however, abortion means expulsion from the uterus before the child is "viable," that is, "capable of being reared."[69]

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61 *Ibid.*

62 It might be said that a right such as the fifth amendment guarantee against self-incrimination will not vest until, in the case of a child, the individual is competent to commit a crime. Though the point at which rights other than the right to live vest is not of immediate concern here, and though a decision that criminal protections do not vest until the age of competency is reached would not be determinative of the issue instant, it would seem better to hold that, though the criminal constitutional protections vest at the time human life—and, hence, federal citizenship—is recognized, they do not become operative until brought into issue by the culpable conduct of the individual.

63 See, *e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

64 See WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 149 (1957); notes 19-21 *supra*. See also Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923).

65 See PERKINS, *op. cit. supra* note 52, at 27.

66 WILLIAMS, *op. cit. supra* note 64, at 5-7.

67 *E.g.*, KY. REV. STAT. ANN. §§ 436.020(1), (2) (1955); N.M. STAT. ANN. § 40A-5-3 (1964).

68 *E.g.*, NEV. REV. STAT. §§ 200.210 (1963).

69 WILLIAMS, *op. cit. supra* note 64, at 146-47.

A child is regarded as viable from somewhere between the twenty-fourth and twenty-eighth week of pregnancy.[70]

Considering the factual reality of the child's development, the legal test of independent circulation is archaic. Consider two children at equal stages of physiological development, one viable but prematurely born, the other viable but unborn: a person who would kill the child born would be punished for murder, whereas the killer of the unborn child would be guilty only of abortion in most states.[71] From the other point of view, the first child is fully vested with constitutional guarantees and protections, whereas the second has none. To classify the respective rights and liabilities upon such a physiological accident seems as specious as to classify sets of rights on the basis of the physiological accident of color. Since abortion statutes must by their nature recognize implicitly some interest of the fetus in the continuance of its existence, such discrimination in the levels of protection granted those born and those unborn seems particularly inconsistent.

Because of this extended medical knowledge, some courts have recognized the legal standing of the fetus to sue in tort. At least eight states recognize the right of an unborn child to have suit brought for damages for prenatal injury in his own behalf,[72] though the right to recover is in some jurisdictions conditioned upon the fetus' survival to birth.[73] This latter qualification is apparently predicated upon the theory that no injury has been realized by the child unless it survives, and upon the inherent difficulty of proving before birth the elements of causation and damages. Nonetheless, other courts have recognized a suit by the administrator of the estate of an unborn child or the parents thereof, suing in the child's name, for the wrongful death of the fetus.[74]

If the "independent circulation" test is unrealistic, where then should the line be drawn to separate fetuses whose right to a continued existence will be constitutionally protected and those in whom the right has not yet vested? At first glance, the point at which the fetus becomes viable

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70 Fisher, *Criminal Abortion*, 42 J. OF CRIM. L., C. & P.S. 242 (1951); see 3 GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 58.02, at 596 (3d ed. 1966); WILLIAMS, *op. cit. supra* note 64, at 146-47.

71 See Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 395, 447-520 (1961).

72 Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589-90 (1965). In those states, legal personality exists from conception. *Ibid.*

73 *Ibid.*; see, *e.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956). The requirement of survival has been criticized, however. See, *e.g.*, Todd v. Sandidge Construction Co., 341 F.2d 75, 76-77 (4th Cir. 1964).

74 *E.g.*, Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964); Hatala v. Markiewicz, 26 Conn. Sup. 358, 224 A.2d 406 (1966). *But see, e.g.*, Estate of Powers v. City of Troy, 4 Mich. App. 572, 145 N.W.2d 418 (1966). It would seem that the child must be viable at the time of death, however, for the action to be maintained. See Gullborg v. Rizzo, *supra*; Hatala v. Markiewicz, *supra*.

would seem the most logical demarcation line. However, the period during which a fetus becomes viable ranges approximately from the twenty-fourth to the twenty-eighth week of pregnancy.[75] In the case of any particular child, the exact point may differ from that at which another child becomes viable. Even in respect to a given child, this point may not be definitely determinable.[76] Therefore, to attempt to specify any particular day (the first day of the twenty-fourth week, for example) as determinative of the vesting of the right is of questionable validity. Moreover, when the fundamental nature of the right in question is considered, the difficulty of ascertaining a reasonable basis for such a classification is increased. A pregnancy which has lasted twenty-two weeks and six days may produce a child as viable as one which has endured for twenty-three weeks. The line drawn is merely arbitrary, and would probably not satisfy due process. Moreover, it is not always possible to determine the exact date on which conception occurred,[77] and measurements from an indeterminate point are also necessarily indeterminate.

However, although the exact point at which the child becomes viable may be impossible to ascertain, some stage in the fetal development can be arbitrarily selected at which every physician would agree that the child is not viable—for example, when the head first becomes distinct from the rest of the body.[78] Such a classification would avoid the risk of excluding viable children encountered in the first-suggested alternative. Moreover, whereas in the former alternative the classification line would have to be as rigid as possible to accord adequate weight to the importance of the right involved, the "physiological development" standard selected could be far enough removed from the period of viability to allow the burden of proof on the biological issue to be a more nebulous thing. In a close case, whether the child was aborted or not would not be logically of much import, since a degree of flexibility would have been intentionally provided for. In this manner viability could be indirectly established as the actual, though not legal, point of demarcation.

The fact that the individual's right to life would not vest until whatever point in his physiological development is selected would not preclude the state from defining the induction of miscarriage before that point as a crime. The preservation of the race or the attendant risk to the mother's life in operating would seem to be of sufficient public concern to warrant legislative prohibition. On the other hand, the legislature would not neces-

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75 See note 70 *supra*.

76 See 3 GRAY, *op. cit. supra* note 70, at 609-10. The author traces in general terms the week to week development of the fetus.

77 See 3 GRAY, *op. cit. supra* note 70, at 606-09.

78 This occurs in the third or fourth week of pregnancy. 3 GRAY, *op. cit. supra* note 70, at 609.

sarily have to define the killing of a fetus after it had reached the demarcation stage as murder. As long as the right of the individual is protected, the legislature should have the right to determine the nature and degree of the punishment to be exacted upon the offender. The public and private interests would seem to be distinct to that degree at least.

But to attempt to limit so important a right as the right to live in such an arbitrary manner seems somewhat specious. It is known from the physical sciences that from the moment of conception the zygote assumes a basic chromatic structure that makes it a unique physical entity. According to the statistics available for the United States, the zygote has thereafter between sixty and ninety per cent probability of survival to birth[79]—perhaps a higher probability if induced abortions are eliminated from consideration. Whether the time of vesting of the right to live should be extended back to conception depends upon weighing the private interest in the probable survival to birth against the quasi-public interest in avoiding (1) pain and anguish for the child's mother and family in the case of rape where there is imminent danger to the mother's health; and (2) the familial, maternal and the child's potential suffering in the cases of incest or fetal deformity.[80] The public is also interested to the extent that so many women die needlessly at the hands of abortionists. Unquestionably, therapeutic abortion under sanitary hospital conditions could greatly decrease the mortality rate among expectant mothers. In addition, unwanted children in such cases may become a financial burden to the state by becoming its wards.

It must be remembered, however, that the fetus whose survival is being decided is in no way responsible for the circumstances which resulted in his conception. Thus, although a rape victim has the right to resist with even deadly force the onslaught of her assailant,[81] the act once completed terminates the crime. The fact that bearing the child resulting from the rape is distasteful or even traumatic to the woman should not outweigh the child's interest in probable survival. So, too, in the case of the child resulting from incestuous intercourse.

In a similar manner the arguments for probable injury to the mother's physical or mental well-being can be met. Unless the mother is to lose her life if the pregnancy continues, how can her personal suffering prevail over the potential life of another? It should be added, however, that where the mother has demonstrated a clear intention to commit suicide unless the child is aborted, this would probably be sufficient indication of a mental

79 See Fisher, *supra* note 70.

80 See generally SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 11-60 (1965); WILLIAMS, *op. cit. supra* note 64, at 206-20, 233-47; *Symposium*, 17 W. RES. L. REV. 369 (1965).

81 PERKINS, CRIMINAL LAW 880-83 (1957).

disposition very likely to result in the death of the mother.[82] In a clear case of this sort, as in a situation where the mother's life is physically endangered by the presence of the child, abortion may be justifiable. It is obvious in such circumstances that either or both lives will be lost if no action is taken. It would be an absurd law that required that nothing be done to avoid such an undesirable consequence. Here, a life is balanced for a life, as in a case of self-defense, although the mother, as well as the child, might not be culpable. The interests, however, are equal, and the law has long recognized that such a case should be expected from the definition of criminal abortion.[83]

That the likelihood of physical or mental deformity of the fetus should justify abortion is the least comprehensible of all the proposed exceptions. To permit abortion on this ground is to say that one or more persons can decide that the interest of another yet unborn in the fulfillment of his probable term and subsequent existence in the world is outweighed by the fact that he might spend that life in a deformed state. This position is without merit on two grounds: First, it assumes that life is meaningless unless some unspecified degree of physical and mental normalcy is obtainable. Second, this rationale presupposes that one or more persons have the right to decide whether another shall or shall not live. The first assumption is absurd on its face. The second is diametrically inconsistent with the current legal notion of individual rights developed at the outset of this note. Furthermore, it raises the suspicion that it is the desire to avoid personal suffering of the group that would abort, rather than the best interests of the fetus, which is the primary motivation for the operation.

That many women die annually of careless and unskillful abortions is a tragic and lamentable fact of reality. However, the women involved did have the choice to avoid the operation; the fetus has not ability to avoid any of the causative or resultant circumstances. To say that if you retain the law prohibiting abortion, women will still resort to illegal operations, and that some will die consequently, adds nothing to the argument. If the principle which justifies retention of laws prohibiting abortions is valid, the fact that disobedience of the law results in tragic consequences does not invalidate the principle upon which the law rests. Moreover, it is doubtful whether many of these deaths resulted from operations that could be legally performed under the new abortion laws.

The expense that the state might incur by being forced to support children, an expense which might have been avoided by aborting the children in the first place, is utterly without merit as a consideration in the instant

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82 *But see* Hatchard v. State, 79 Wisc. 357, 48 N.W. 380 (1891), holding that a threat of suicide would not make an abortion a therapeutic one. See also WILLIAMS, *op. cit. supra* note 64, at 169-70.

83 See note 26 *supra*.

context. The government, as has been indicated, is prohibited from taking life without due process.[84] The state should not be allowed to avoid the due process requirement by postponing the vesting of the right which gives rise to the requirement.

In essence, then, no adequate ground appears for the postponement of the vesting of the right to live. The zygote will in all probability develop in the natural course of things to whichever point has been otherwise arbitrarily selected for the vesting of the right. It would seem that the postponed vesting is merely a device to further unjustified social expediency. But the fact remains that to deny the fetus the right to exist is as real a deprivation at an earlier stage in its development as at a later stage. On the other hand, our law does not lightly permit the taking of life in other circumstances.[85] It would seem that in the instant context the only sufficient counter-weight to the fetal interest would be the probable loss of the mother's life. The vesting at conception of the right to live would necessarily, then, make any attempts to deprive the fetus of life (except in the situation indicated) unconstitutional.

It might be argued that if the right is extended back to the time of conception, it could as easily be extended to the pre-conception stage. However, a logical as well as a biological distinction can be made between the conception and pre-conception stages. Human life in any cognizable form cannot exist prior to conception. Until that time the male and female elements are distinct; until the joining of the separate cells, no unique human form is *in esse*. Moreover, biologically the chromatic structure which distinguishes the zygote is self-contained. Sustenance is all that is necessary for the evolution of the original cell into final human form. The sperm and ovum, however, are and remain single-cell organisms, which can evolve only through the formation of the zygote.[86] Furthermore, it is arguable that the Supreme Court's decision in *Griswold v. Connecticut*,[87] which held that a state statute prohibiting birth control was an unconstitutional invasion of privacy,[88] impliedly rejected any recognition of protectible human life in the sex cells. Had the contrary been true, the state would surely have had a justifiable interest in protection of that life.

Enforcing the Right to Live

To fully protect the right to live vis-à-vis the state therapeutic abortion statutes would probably take a special Congressional enactment defining interference with that right as a crime. In the absence of such a statute, two

84 See notes 48-49 *supra*.
85 See notes 53-54 *supra*.
86 See 3 GRAY, *op. cit. supra* note 70, at 595-96.
87 381 U.S. 479 (1965).
88 *Ibid.*

possible routes of enforcement might be taken. The first is civil in nature. A suit for an injunction against the doctor and the child's parents could be brought in federal court either directly upon the basis of the constitutional right or under the Civil Rights Act.[89] The argument in the latter case would be that the child would be deprived of his constitutional right to live by persons acting under color of the state law which permitted therapeutic abortion if the injunction were not granted. The administrator of the child's estate should be able to maintain an action for damages on the same grounds for wrongful death if the abortion had already taken place, in states permitting the survival of such actions. Since the parents normally would be in favor of the abortion, the only logical person to enforce the right would be someone deriving his standing from the child. Theoretically, even a complete stranger should be able to act for the child, with the court's permission. A petition to the court for appointment as guardian ad litem would be a feasible procedure.

The second means of protection is more theoretical. It is conceivable that a United States Attorney could indict the doctor and parents for violation of section 242 of the Civil Rights Act.[90] The argument would be that the persons involved were acting under color of the state law to wilfully deprive another of his constitutional right to live; that the state statute permitting therapeutic abortion stood in the face of the Civil Rights Act, which had preempted the field; and, by virtue of the supremacy clause, the federal legislation must necessarily prevail. It is unlikely, however, that a court would countenance conviction on such an argument, unless by prospective application of the theory. The doctor and parents were probably acting in good faith under what they believed to be a just statute. It would be inequitable to hold them criminally responsible under such circumstances.

Conclusion

The foregoing discussion attempts to present a cogent legal argument against the exceptions from criminal prosecution provided in the therapeutic abortion statutes. As a legal argument, of course, it would yield to changes in the law: an amendment to the federal constitution would render it moot. However, since an amendment authorizing therapeutic abortion would seemingly be predicated upon policy of rights-denial, a position inconsistent, in this writer's view, with the spirit of the Constitution and its guarantees to the individual, such a change in the Constitution is not likely in the near future. This fact itself should, hopefully, cause courts to pause and, if in doubt, to err on the side of the child.

J. T. S.

89 18 U.S.C. § 242 (1964).

90 *Ibid.*