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THE DIFFICULT QUEST FOR A TRULY HUMANE ABORTION LAW

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I. INTRODUCTION

THE CURRENT CONTROVERSY over liberalization of existing abortion laws in many states raises fundamental issues concerning the proper province and function of law in a democratic society committed to the freedom and equality of the individual. The root issue in the controversy can be stated thusly: at what point in the early part of the human organism's life cycle — starting from the moment of conception up through the prenatal and postnatal development necessary for the infant to acquire some consciousness of the world about him and to display the rudimentary elements of human personality on a social plane — should the law acknowledge the existence of a human being entitled to the most basic right recognized and sustained by the legal order, the right to survive on a basis of equality with human beings generally? Perhaps the most difficult aspect of this question is the determination of the proper criteria for resolving the issue.

Unfortunately, participants in the current controversy have not advanced arguments that illuminate this most challenging aspect of the basic issue. On the one hand, opponents of liberalized abortion tend to avoid rather than meet the challenge by resorting immediately to the principle that all human life, whatever its form, is sacred and therefore entitled to protection of the law. On the other hand, the most outspoken proponents of liberalization tend to avoid meeting explicitly the root issue itself. They frequently characterize the problem of abortion as one involving personal sexual morality and the right of the woman to determine for herself when her body will serve to give birth to children. From this point of departure it is small work to proceed to the conclusion that the question of terminating a pregnancy is basically a private matter that should be left to the individual mother.

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The most significant proposal for changing current abortion laws is that recommended by the American Law Institute in its Model Penal Code. This proposal does not recommend abortion on demand. It is limited to legalization of abortion when it would serve humanitarian ends in three types of cases: whenever two licensed physicians believe that (1) the continuance of the pregnancy would gravely impair the physical or mental health of the mother, or (2) the child would be born with grave physical or mental defect, or (3) the pregnancy resulted from rape or incest.¹

Approval of the Code by the distinguished members of the bar who constitute the American Law Institute has significantly enhanced the prestige of its provision concerning abortion. Statutory proposals recently enacted in three states are patterned after it. North Carolina has substantially adopted all of the Code's recommendations;² Colorado has adopted them with some modifications,³ but California has accepted

2. N.C. GEN. STAT. § 14-45.1 (1967 Advance Legislative Service No. 3) [hereinafter cited to code section only] provides in pertinent part:
   § 14-45.1 When abortion not lawful.
   Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that:
   There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or
   There is substantial risk that the child would be born with grave physical or mental defect, or
   The pregnancy resulted from rape or incest and the said alleged rape was reported to a law-enforcement agency or court official within seven days after the alleged rape...
3. COLO. REV. STAT. ANN. § 40-2-50 (enacted as House Bill No. 1426, 1967) [hereinafter cited to code section only] provides in pertinent part:
   (4) (a) "Justified medical termination" means the intentional ending of the pregnancy of a woman at the request of said woman or if said woman is under the age of 18 years, then at the request of said woman and her then living parent or guardian, or if the woman is married and living with her husband at the request of said woman and her husband, by a licensed physician using accepted medical procedures in a fully accredited hospital upon written certification by all of the members of a special hospital board that:
   (i) Continuation of the pregnancy, in their opinion, is likely to result in: the death of the woman; or the serious permanent impairment of the physical health of the woman; or the serious permanent impairment of the mental health of the woman as confirmed in writing under the signature of a licensed doctor of medicine specializing in psychiatry; or the birth of a child with grave and permanent physical deformity or mental retardation; or
   (ii) Less than sixteen weeks of gestation have passed and that the pregnancy resulted from rape, as defined in section 40-2-25 (1) (a), (c), (d) and (e), or rape as defined in 40-2-25 (1) (a), (b), or (j) if the female person has not reached her sixteenth birthday at the time of said rape; or incest, as defined in section 40-9-4, and that the district attorney of the judicial district in which the alleged rape or incest has occurred has informed the committee in writing under his signature, that there is probable cause to believe that the alleged violation did occur.

It is worth noting that the Colorado law is stricter than the Model Penal Code's proposal in two significant respects. First, a tighter standard is imposed in the case of therapeutic abortion. In Colorado the pregnancy must threaten "serious permanent impairment" of the pregnant woman's mental or physical health whereas the Model Penal Code refers simply to grave impairment. Second, an abortion in the
only two of the Code's three justifications. In the face of firm opposition from Governor Reagan the California legislature dropped the justification for eugenic abortion from the law. A number of other states are currently considering legislative proposals for broadening the legal justifications for abortion. Since these proposals also are derived from the Model Penal Code, I will focus my discussion on it.

The Code's formulations do not rest on the facile assumption that abortion is a private matter which touches only one personal interest, that of the pregnant woman. In presenting the Code to the American Law Institute for approval, one of its reporters pointed out that the problem of abortion was one involving the "sanctity of life." In addition, in the official commentary accompanying the initial formulation of the provision on abortion, the authors of the Code recognize that the public issue of protecting incipient human life has a prominent ethical aspect to it that turns on basic religious and ethical commitments. However, because of the range of moral opinion in our society, the authors conclude that the law "cannot undertake or pretend to draw the line where religion or morals would draw it." Nonetheless, they are too clear-minded not to realize that they are placing a comparative value on the fetus when they permit abortion in cases where infanticide would not be licit. They base their conclusion not on an explicit evaluation of fetal life but on a different ethical principle, presumably one that is part of our continuing societal consensus: "To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions." It is one of the purposes

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4. CAL. HEALTH & SAFETY CODE § 25951 (1967 California Legislative Service No. 3) [hereinafter cited to code section only] provides:

A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

(a) The abortion takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals.

(b) The abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unanimous consent of all committee members shall be required in order to approve the abortion.

(c) The Committee of the Medical Staff finds that one or more of the following conditions exist:

(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother;

(2) The pregnancy resulted from rape or incest.

5. 36 ALI PROCEEDINGS 252 (1959).

6. MODEL PENAL CODE § 207.11, Comment 1 at 148 (Tent. Draft No. 9, 1959).

7. Id. at 150.

8. Id. at 151.
of this paper to question the application of this principle, even as quali-
ified by the somewhat ambiguous word "decent," to the issue of abortion. The principle that the sanctions of criminal law should be limited is
acceptable in the area of abortion only if one carries the utilitarian
premises of the Model Penal Code and its thoroughgoing sociological
jurisprudence to the point of seeking to resolve conflicts of interests at
an intermediate level in all cases in order to avoid ideological conflicts
over ultimates. Although the principle of utility and the jurisprudence
of interests are usually the best tools for setting public policy in a
pluralistic society, it will be my contention that avoidance of the ultimate
issue is improper in the area of abortion, even though its resolution
may depend in large part on intuitive judgment. The nature of the
interests are such that the state must adopt an official view on the basic
ethical question of valuing the fetus, and the integrity of a free and
democratic society demands that the matter be resolved only after a
searching and full public exploration of the issue. This argument will
be made in Part II of this paper.

The third part of this paper will attempt to answer the root issue
of how to regard the fetus on the basis of widely recognized values in
our society. First, it will seek to define more clearly the comparative
value placed on the life of the fetus by the Model Penal Code and the
proposals patterned after it. It will then proceed to offer the outlines
of an argument for a different evaluation. The structure of the argu-
ment seeks to locate that value which is most consonant with general
community attitudes toward emergent and incipient human life before
birth and with the prevailing moral sense as to the value of such life
upon full development. Although the comparative valuation placed
on prenatal life by those who would liberalize abortion does not neces-
sarily contradict our traditional system of values, my argument will
simply be that the valuation here offered is more compatible with them.
Pursuant to this view, certain very limited changes in current laws
would be permissible, notably where the pregnancy itself threatens to
seriously impair the physical or mental health of the mother perma-
nently or for a substantially long period of time. My argument can also
be used to justify abortion in the case of rape, but on grounds which
will not satisfy a strict supporter of the sanctity of life — yet which are
largely consistent with the traditional values of our society. Because
of the strong public feeling in favor of this justification, a legislator
concerned about limiting the scope of liberalized abortion in the face
of strong contrary sentiment might be well advised to support it. Indeed,
such a legislator might find public sentiment so strongly favors the
justifications proposed by the Model Penal Code that he may properly
decide that some sort of compromise will be necessary to preserve as much of the sanctity of prenatal life as possible. An argument will be advanced that the essential respect for incipient human life will still be preserved if the Model Penal Code's recommendations are limited to abortions in the first trimester of gestation.

The abortion issue has also put into sharp focus the question of what is the appropriate role of religious considerations and communities in influencing public policy and law in our pluralistic society. In the concluding part of this paper I will discuss whether, and if so, how, religious considerations should enter into the resolution of this issue in a free society committed to the separation of church and state.

II. THE NECESSITY FOR AN EXPLICIT EVALUATION OF THE FETUS

Although the Model Penal Code is careful to take into account the diverse purposes of the criminal law, as well as certain postulated values in our society, its approach is heavily oriented toward a utilitarian analysis. This orientation is dominant with regard to the issue of abortion. Nonetheless, a utilitarian disposition does not eliminate the necessity for assigning some value to the fetus. Even a legislator devoted to the crudest and most unrelenting utilitarianism would have to face the issue because the felicific calculus must be dynamic and take the temporal dimension into account. Existing potentialities for deferred pleasure and pain must enter into his calculations. This becomes clear in the case of the newborn infant. His future pains and pleasures, discounted because of their contingency, must be weighed against the present pains and pleasures of fully developed adults. With regard to abortion, the problem for the utilitarian is whether the unborn child should be counted in the number of persons whose pleasures are to be maximized. This problem raises a metaphysical issue which cannot be readily disposed of by a utilitarian analysis. However, vigorous adherence to the utilitarian ethic leads one to regard any resolution of the issue of fetal value as arbitrary. The analytical disposition of the utilitarian favors deliberate disregard of such an imponderable and arbitrary element and counsels resort to presumably measurable factors in resolving the matter. This means that he invariably elects to maximize the happiness of those already born, a choice that inevitably favors

liberalized abortion. As my discussion of the rationale underlying the Code's provision on abortion in Part III will attempt to show, its authors have been inclined to follow a similar course of reasoning. They have elected to maximize human values and happiness for those already born at the cost of leaving unresolved the question of what is the human value of the fetus.

The need to value the fetus is particularly compelling in our society because we do not subscribe to a thoroughgoing utilitarianism. In many respects the individual is valued as an end in himself, and some of his personal interests will not be sacrificed for the total welfare of the community. The Bill of Rights to our Constitution extends legal guarantees to some of these interests. The recent tendency of the Supreme Court to apply the privilege against self-incrimination as an absolute bar to governmental interrogation of suspected criminals is an assertion of value contrary to the utilitarian disposition. Moreover, the requirement of an intelligent waiver of the privilege by the accused is grounded on a respect for the autonomy of the individual rather than on a judgment of utility.

Two values generally accorded a rank much higher in our society than can be justified by social utility are individual liberty and equality. These two values are most important in resolving the abortion problem. It is our commitment to equality that makes it impossible to avoid an explicit public determination of the human value of the fetus. Common sense indicates that there is sufficient similarity between the newly born infant and the fetus to raise the question of

10. Glanville Williams characterizes the problem of valuing the human fetus as one defying "rational inquiry and solution, since it pertains to metaphysics or emotion and not to empirical facts." G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 205 (1958). Accordingly, in determining where "to draw the line" in protecting living organisms Williams turns to factors amenable to a utilitarian analysis. He suggests: "If the line is to be drawn by reference to social considerations and human happiness, then pretty obviously the time of impregnation is the wrong one to take." Id. at 205-06. After calculating the net social benefits from permitting women to avoid unwanted pregnancies and weighting them with the net social losses arising from a criminal prohibition out of line with community mores, Williams concludes abortion on demand "seems to be the short and simple solution." Id. at 211.


12. Bentham, the supreme utilitarian, was of course opposed to the privilege against self-incrimination; finding in it only a refuge for the guilty rationalized by a mixture of illogical sentimentality and a sporting theory of justice. S. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 203-50 (1827).

13. Professor Henry Aiken makes a cogent case that the high valuation of liberty made by our society cannot be derived from utilitarian premises. Aiken, Mill and the Justification of Social Freedom, in LIBERTY, NOMOS IV 119 (C. Freidrich ed. 1962).

14. As in the case of liberty, our present high order commitments to equality require a much firmer bedrock than the norm of the greatest good of the greatest number. Cf. Bedau, Justice and Classical Utilitarianism, in JUSTICE, NOMOS VI 284, 293-95 (C. Freidrich & J. Chapman ed. 1963). As Bedau points out, the utilitarian standard led Bentham to conclude that slavery should be abolished gradually so that its abrupt removal would not cause an excess of pain for those benefiting from the institution. Such notions of gradualism hardly comport with modern egalitarianism.
equal treatment. This is particularly true with regard to whatever claim the infant may make to liberty. Actually his claim is a deferred one because he cannot appreciate freedom in its most significant dimension, which is the absence of external constraints with regard to self-determination and self-development. However, the infant does assert a present claim recognized by society — the maintenance of the absolutely minimum conditions for the eventual development of his capacity for self-determination. Survival is the absolute minimum, and the law recognizes this right in the case of the infant even against the destructive impulses of its parents. The potential of the fetus to develop into a self-determining human being does not appear on preliminary consideration to be significantly different from the potential of an infant. Therefore, it is particularly important to demonstrate some rational justification for different treatment of the fetus and the infant with regard to the right of survival. To meet the test of rationality, any justification offered must rest either on a relevant distinction as to their respective natures, or on the delineation of some significant difference in their circumstances. In other words, to treat the fetus differently from the newly born infant one of three things must be shown: either that it is not a part of the family of human beings and can be disposed of by the mother in any way she sees fit, or that it is an essentially inferior human being whose most basic interests must give way to important but less basic interests of more fully developed humans, or finally that the condition of its dependence on the mother’s body is one that justifies different treatment.

The legislator cannot avoid this ethical decision of valuation by labeling it a private one to be resolved by each pregnant woman. This would involve a failure of governmental responsibility that amounts to a most fundamental failure of justice, one that transcends even a failure to grant equal treatment. Of course, as a matter of logical necessity, the state has the last word on who is subject to its protection. By sanctioning liberalized abortion it in effect decides that a certain class of fetuses are not entitled to its protection. But it must accept responsibility for that decision by articulating the reason why these particular beings are not extended the protection available to others. It cannot delegate to private persons its sovereign responsibility for identifying those persons who qualify for its most basic protection — not even when it seeks to do so by having parents decide for themselves at what point their children are to be considered members of the human family. Even the utilitarian, who might be tempted to avoid the metaphysical issue involved by deferring to parental sovereignty over the unborn child, cannot accept this avenue of escape gracefully. How
can the legislator rationally calculate the greatest good of the greatest number when the group whose happiness is to be maximized varies according to different personal judgments?

With regard to current proposals based on the Model Penal Code's formulations, the problem of equality becomes compounded because justifiable abortion is limited to cases where it serves either therapeutic or eugenic purposes. The legislator must now justify not only the extension of greater protection to the newly born child than to the prenatal organism, he must also justify the different treatment of various fetuses. Here again the legislator must face the issue directly insofar as it relates to the right of survival. The refusal to do so because "decent" opinion is divided on the point may bring about results that codify a species of double-think. The double-think hazard here is clear: we will regard the fetus as a human being when it suits us, and not do so when it suits us better.

The double-think charge can only be refuted by a principled analysis that explains why the fetus should prove as resistant to conflicting values as the newborn infant in some cases and not so in others. The commentary in support of the Code's provisions on abortion does not elaborate such a rationale, although four "principles" are advanced to justify abortion in some cases and not in others. First, the commentary refers to the inevitable hazards to maternal health from abortions performed even under optimum conditions. This is not a very convincing reason in light of two considerations to which the Code adverts. One is the high mortality rate of pregnant women who are aborted illegally under medically primitive conditions. Although estimates as to the number of illegal abortions vary widely and are necessarily based on conjecture, it is clear that a substantial number occur annually.

15. Statutes cited notes 1-4 supra.
17. Id. at 147. More informed recent estimates regard earlier estimates for the United States as highly exaggerated. Dr. Christopher Tietze — a statistician for the Population Council of New York — concludes that there are about 500 maternal deaths each year resulting from illegal abortions, rather than the 10,000 frequently mentioned. See also Hellegers, Law and the Common Good, 86 Commonweal 418 (1967).
18. See Fisher, Criminal Abortion, in Therapeutic Abortion: Medical, Psychiatric, Legal, Anthropological and Religious Considerations, at 3, 6 (Rosen ed. 1954) [hereinafter cited as Therapeutic Abortion]; Model Penal Code § 207.11, Comment 1 at 147 (Tent. Draft No. 9, 1959). This wide variance indicates how speculative these estimates must be because of the difficulty in accumulating reliable data in this area. See Sellin,
would result in a net saving of life. The Code seeks to avoid this inference by the judgment that the total number of abortions may increase to a very substantial extent after legalization of abortion on demand, and there is some empirical support for this opinion. On the basis of this anticipated increase the authors of the Code put forward the attenuated conjecture that maternal deaths resultant from the unavoidable hazards of abortion will also increase despite the safer medical procedures involved. Even if this speculation is accepted as weighty — despite contrary medical opinion — there is a second consideration which renders concern over the pregnant woman's health an insufficient reason for denying abortion on demand. It is the value of individual liberty and its corollary that an adult should have more or less complete autonomy in determining whether or not to undergo the risks of procedures considered appropriate by the medical profession. The Code adverts to this opposing consideration in a footnote, but seems to disregard it completely in its conclusion.

A second rationale offered to justify only a limited expansion of justified abortion is that the criminal law "must be reserved for behavior that falls below standards generally agreed to by substantially the entire community." This cannot be accepted as an authoritative principle where basic civil rights or questions of justice and equality are involved. It is unfortunately the case that many anti-social acts inspired by racism meet with the approval of substantial segments of our community, sometimes the majority. Unless the values that provide the enduring moral structure for our society are to be repudiated, these regrettable lapses do not provide a reason for withdrawing criminal sanctions from acts that substantially harm others, notwithstanding widespread approval or acceptance of them. Nor can the issue

The Significance of Records of Crime, 67 L.Q. Rev. 489, 496 (1951). Out of a sample of 5,258 women interviewed by associates of the Kinsey Institute for Sex Research, 531 had experienced at least one abortion and out of 4,248 pregnancies in the group, 1,067 had been terminated by induced abortions, only 68 of which are listed as therapeutic; the remainder presumably were illegal. P. GEBHARD, W. POMEROY, C. MARTIN & C. CHRISTENSON, PREGNANCY, BIRTH AND ABORTION 17, 29 (1958). On the basis of such evidence, although the exact dimensions of the abortion problem are uncertain, it is clear that it is of substantial magnitude.

19. The very large number of abortions performed in Japan and the Soviet Union after abortion was made available on demand could be taken as an indication that a socially more permissive attitude toward abortion increases its total incidence to a significantly large extent. Cf. P. GEBHARD, W. POMEROY, C. MARTIN & C. CHRISTENSON, supra note 18, at 215-21; G. WILLIAMS, supra note 10, at 214.


21. Model Penal Code § 207.11, Comment 1 at 150n.15 (Tent. Draft No. 9, 1959). The footnote quotes Glanville Williams to the effect that the law generally does not require a person to perform or avoid certain acts in order to preserve or achieve good health.
be avoided by suggesting that society establish its morality in these areas by means other than the criminal law. First, there are no other means of social control to limit, if not eliminate, such practices as abortion or destructive racist acts by those who refuse to abide by a morality that they cannot personally appreciate. Second, our sense of justice is outraged when two anti-social acts of the same caliber are treated differently and a particular class of human beings is singled out for lesser protection because of unprincipled community sentiment.

Moreover, since the Code continues to maintain criminal sanctions against most abortions, its justification for limited abortion on the ground of sparing use of criminal sanctions is particularly vulnerable. Generally, the Code refuses to apply criminal sanctions against acts raising questions of private sexual morality. Thus, it refuses to outlaw private acts of homosexuality between consenting adults, regardless of public opinion, “decent” or otherwise. It also makes a sharp distinction between abortion and contraception, expressly providing that the prohibition against indiscriminate abortion is not meant to outlaw contraceptive practices. The Code here is commendably advancing the value of individual liberty. It anticipates the ethico-legal development marked by *Griswold v. Connecticut* and its recognition of the right of privacy in marital relations. To be consistent, therefore, in the absence of convincing consequential reasons against indiscriminate abortion — and none are set forth in the commentary — the Code cannot accept punishment of any abortion without implicitly accepting the premise that abortion involves more than just a question of sexual morality. An implicit recognition of the humanity of the fetus appears to be involved. This recognition would seem to require the Code to treat the fetus as equal to the infant. Thus, the Code finds itself in a dilemma which can be avoided, if at all, only by a more precise and explicit valuation which places the fetus well above maternal tissue but somewhere below the infant.

There is another reason why the Code’s commitment to individual liberty makes an explicit valuation of the fetus necessary. In addition to the unborn child’s possible claim to freedom and equal treatment, there is a parallel claim by the pregnant woman who wishes to abort for

23. The Code only subjects deviate sexual intercourse to criminal sanctions when either force or imposition on an adult, or the corruption of a minor, is involved. *Model Penal Code* §§ 213.2, 213.3 (Proposed Official Draft, 1962). Its authors conclude that no harm to the secular interests of the community arises from private conduct between adult consenting partners. Regulation of private morals such as these is left to the spiritual forces in the community. *Model Penal Code* § 207.5, Comment 1 at 277-78 (Tent. Draft No. 4, 1955).

reasons of hardship not yet recognized by the Code, or even for reasons of personal convenience. This latter claim can only be convincingly refuted by demonstrating a comparative assessment of each of the different reasons for abortion vis-à-vis the value of fetal life. Only then can the refusal to permit abortion on demand be justified on principle.

A third reason listed by the Code for selective liberalization is the nullification of our currently unyielding abortion laws. But, since the Code recommends legalization of abortion in only limited cases, it thereby contradicts the asserted rationale of nullification if that term is taken in its ordinary meaning of public refusal to abide by the law. Current estimates of illegal abortion range as high as well over one million per year. The limited exceptions proposed by the Code are expected to justify a very modest increase in the number of therapeutic abortions performed in hospitals. The recommended changes are not designed to cope with general nullification nor with the social evils and threats to the integrity of the legal order usually associated with widespread disregard for the law.

The authors of the Code seem to have a more limited concept of nullification in mind. They seem to be more concerned with visible failures of the judicial process to conform to the substantive law in this area rather than with widespread disobedience by private persons. The commentary to the Code expresses dismay over prosecutors who refuse to prosecute and juries that refuse to convict. This pattern emerges most clearly in those cases where a respected physician, motivated by compassion, decides to abort for reasons of "health" not recognized by the current law, contrary to his usual practice. Lack of prosecutorial zeal or public indignation does not equally explain the failure to prosecute the "professional" abortionist who is in the business of aborting for any reason, as long as he is paid. Failure to prosecute in such cases is more likely due to lack of evidence. The authors of the Code, then, seem intent on making legal what is now respectable. This reason is frequently a conclusive one for withdrawing criminal sanctions from widely accepted behavior, but I do not believe that it is persuasive in the case of abortion. To begin with, the fact

26. MODEL PENAL CODE § 207.11, Comment 1 at 151 (Tent. Draft No. 9, 1959).
27. Statistics cited note 18 supra.
28. See J. ROBTSCHER, PURSUIT OF AGREEMENT, PSYCHIATRY & THE LAW 91-92 (1966); HELLEGERS, supra note 17, at 421.
29. MODEL PENAL CODE § 207.11, Comment 1 at 151 (Tent. Draft No. 9, 1959).
32. See id. at 83-89.
33. But see P. DEVLIN, THE ENFORCEMENT OF MORALS 23-24 (1965). Lord Devlin's position is that when the community as a whole loses its sense of sin concerning a particular act, the law becomes powerless to control it by the criminal
of judicial and administrative nullification in some cases involving reputable physicians does not mean that most doctors currently ignore the law. Indeed, the current agitation in favor of liberalizing the laws seems motivated more by the anticipated increase in so-called therapeutic abortions than by a desire to regularize ones already taking place in hospitals.

In any event, if we are dealing with human life when we deal with the fetus, even substantial nullification is no reason to sanction liberalization of laws that will lead to any increase in the number of abortions. However, it can be argued that a limited change in the abortion laws, in contrast to repeal of all restrictions, will not increase to any appreciable degree the total number of abortions; it will only permit some of the abortions now taking place under lawless, dangerous, and frequently sordid conditions to be performed under medically and legally sound circumstances. Even if this were true, it would not eliminate the need to value the life of the fetus. For if the fetus deserves to be valued as a human being, then we jeopardize the integrity of the law by accepting nullification as justification for repeal. Where the basic human rights of others are protected by a given law, even its most thoroughgoing nullification is no excuse for the withdrawal of the criminal sanctions that signalize the importance of those rights and offer the only available avenue for their enforcement. If a community evidences a growing inclination to ignore the most basic rights of a helpless minority, one should not regard the repeal of criminal laws enforcing those rights as the appropriate response of the leaders of the society. Instead they should seek to instill or revive an appreciation of and respect for the rights protected by the law.

Finally, the commentary obliquely refers to the notion that the fetus carries with it value as a human:

Abortion, at least in early pregnancy, and with consent of the persons affected, involves considerations so different from the killing of a living human being as to warrant consideration not only of the health of the mother but also of certain extremely adverse social consequences to her or the child, e.g., bastardy resulting from rape; prospective gross physical or mental defect in the child. 34

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34. Model Penal Code § 207.11, Comment 1 at 150 (Tent. Draft No. 9, 1959).
The “considerations” here referred to are undoubtedly the following:

As to the “homicidal” aspects of abortion, the answer of those who would favor liberalization would be as follows: most abortions — those which occur naturally as well as induced abortions — occur prior to the fourth month of pregnancy, before the fetus becomes firmly implanted in the womb, before it develops many of the characteristic and recognizable features of humanity, and well before it is capable of those movements which when felt by the mother are called “quickening.” There seems to be an obvious difference between terminating the development of such an inchoate being, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of its mother.35

On the basis of this observation one would expect the Code to adopt the rule that abortions during the first trimester of pregnancy should be allowed for a wide variety of reasons and be strictly forbidden thereafter. Instead, it recommends liberalization only for the limited purposes of protecting the health of the mother, preventing the birth of a defective child, and eliminating the end result of a rape or incest; moreover, it establishes no time limitation on when a pregnancy may be terminated for any of these reasons. It even seems to permit a craniotomy or a hysterectomy in the last trimester for any one of the indicated reasons.36

35. Id. at 149.
36. The Code does differentiate between the viable and the previable fetus for some purposes. The pregnant woman is only liable for destruction of the fetus after the twenty-sixth week of pregnancy. MODEL PENAL CODE § 230.3(4) (Proposed Official Draft, 1962). This has apparently led some commentators to conclude that the proponents of the Code do not intend to permit abortions after the twenty-sixth week. See Drinan, The Right to be Born, 17 W. Res. L. Rev. 465, 467 (1965). The language of the Code in proscribing indiscriminate abortion might be construed to arrive at this result. It provides: “A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.” MODEL PENAL CODE § 230.3(1) (Proposed Official Draft, 1962) (emphasis added). The italicized language could be read to prohibit all abortions after the twenty-sixth week. This is a somewhat strained, albeit desirable, interpretation of the Code's provision. The authors of the Code probably meant to qualify the prohibition against terminations of pregnancies even after the twenty-sixth week by the modifiers “purposely” and “unjustifiably.” In a penal statute, one would expect such a time limitation on a justification to be expressly spelled out. California did this in its recent acceptance of limited justifications; a justified abortion must take place within the first twenty weeks of pregnancy. CAL. HEALTH & SAFETY CODE § 25953 (1967). North Carolina and Colorado which have adopted the Code's recommendations more fully, do not contain any provision that might be construed as putting a time limitation on justified terminations of pregnancies.

Nonetheless, it is probably the case that the authors of the Code do not intend to encourage abortions after the twenty-sixth week. Their concern over the destruction of viable fetuses indicates that they probably view abortion after this period as an extreme procedure to be used only in cases of compelling need. Cf. pp. 289–90 infra. But the Code relies on the discretion of the medical profession for holding the line at
It is clear that the authors of the Code are aware of the apparent contradictions and equivocations in their approach. For instance, the commentary acknowledges merit in arguments for extending justifiable abortion to cover a number of cases not included within its concept of therapeutic abortion. At one point there is sympathetic mention of the alternative of abortion on demand. But the Code does not seek to achieve logical consistency at the cost of offending significant moral opinion in the community. Therefore, its proposals are limited to what it believes the community can readily accept without a traumatic dislocation of its values. In this regard its approach is conservative, following the lead of more advanced medical opinion and practice and permitting abortion only in those cases where it can be justified by referring to a “total health” concept of the pregnant woman. The contradictions which the Code’s authors accept are not of their own making. They reflect divisions and contradictions in popular opinion.

In contrast to this apparently balanced approach, insistence on a coherent resolution of the moral issue in the public forum may seem to be an unfeeling and doctrinaire demand for logical formalism. The Code may seem more humane in its sympathetic treatment of the pregnant woman and more liberal in its apparent willingness to tolerate a plurality of moral viewpoints. But the approach here offered simply will not accept a plurality of moral viewpoints in defining the basic value structure undergirding our public order. It is of course possible to achieve a high degree of civilization and progress, and even stability, in a society which equivocates on some ethical issue fundamental to the public moral order. For years this republic lived with conflicting sentiments concerning the morality of slavery, and various compromises of the highest order of statesmanship were worked out short of having

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37. The Code refrains from taking any position for or against extending the justifications for legal abortions to cover social and economic circumstances, such as the case of the deserted wife or the working mother supporting a dependent husband and other children. MODEL PENAL CODE § 207.11, Comment 6 at 156 (Tent. Draft No. 9, 1959). This reticence arises from deference to prevailing cultural norms. The Code leaves this question for a state by state determination. Yet it is clear that the authors of the Code personally approve of much wider justifications than they recommend officially: “We cannot regard with equanimity a legal pattern which condemns thousands of women to needless death at the hands of criminal abortionists.” Id.

38. Id.
northern abolitionist views imposed on an unwilling southern society. Nonetheless, because of the highly visible social consequences of this division of values, it is clear that as improved technology brought the country closer together it would have been impossible for it to exist "half slave and half free." Although advances in scientific understanding and technology do bring to public consciousness the human characteristics of the fetus with greater clarity and force, the impact of this awareness is very limited where abortion is concerned. The long drawn-out social problems caused by defective and unwanted children are highly visible whereas the brief moment of fetal destruction is highly invisible to the public and left only to the imagination. Even then, imaginative appreciation of the act tends to be filtered through the conceptualization of it as a medical procedure. Consequently, there is little danger that evasion or compromise on the issue of valuing the fetus cannot endure as a practical resolution of the matter.

Social stability is not the reason for rejecting equivocation and compromise on this issue. It is preservation of the moral integrity of the law. But this demand is not put forward simply to satisfy the demands of logical formalism; it is put forward to satisfy deep-seated human sentiments of justice.

The force of these demands perhaps can be best appreciated if we consider liberalization of abortion in the case of the possibly deformed fetus. Consider the psychological and moral implications of sanctioning the destruction of three and perhaps four healthy fetuses with the potential for full and productive lives in order to prevent a seriously defective infant from being born. What is the proper course for the doctor who for any reason has failed to diagnose the risk of deformity and is then importuned to destroy a seriously defective newborn infant by the mother and father? Must not society come forward with a compelling reason for permitting the former and condemning the latter as murder? Is "decent opinion" to be the determining factor? Not too long ago we were presented with an expression of such opinion in the case of the thalidomide tragedy of Lieges. Both the mother and father decided to do away with an infant suffering serious congenital defects caused by maternal ingestion of thalidomide during the early months of preg-

39. For photographs of the fetus at various stages of its intrauterine development see Life, April 30, 1965, at 54-69. For the first few weeks the fetus gives the appearance of an amorphous lump of tissue. Thereafter it begins to acquire distinguishable human features. At the beginning of the second trimester it is a tiny being, fully identifiable as human. This is indicated by the photographs of the fetus at twelve weeks and again at sixteen weeks. Id. at 66-67. The text accompanying the photographs states that from the twelfth to the sixteenth week the measurements of the fetus "have increased from barely over 3 inches to nearly 5 1/2 inches [and t]he body has filled out fantastically, quite recognizable now as a human baby." Id. at 66
nancy. They managed to persuade a doctor held in the highest local regard to assist in the killing of the child. When the mother and doctor were brought to trial they were both acquitted, along with other members of the family that assisted in the poisoning of the child. The verdict received not only the very pronounced approval of the citizens of Lieges but was hailed widely throughout the world. Should this example of nullification and of substantial public opinion contrary to the criminal prohibition against infanticide provide sufficient reason for its repeal? If not, then the valuation of the fetus becomes necessary to justify the retention of the prohibition against infanticide intact while abortion is liberalized under circumstances which are far less compelling in terms of the interests of the persons immediately involved. Undoubtedly most women would not resort to infanticide for eugenic reasons as readily as they would to abortion if both were legalized. But why deter the woman who would choose to do so? In all likelihood we will stay her hand in the few cases of such temptation if we retain the prohibition concerning infanticide even though we permit eugenic abortion. But we must explain why we do not blame or try to deter her sister who went about her business more expeditiously but with much less certainty as to need.

The most likely justification for such different legal treatment of eugenic infanticide, in contrast to eugenic abortion, rests on public outrage over the widely recognized brutality of the former. Despite the sympathy extended to the actors in the thalidomide tragedy of Lieges after the act had been consummated, it is unlikely that the public is ready to condone eugenic infanticide as a proper way of dealing with defective children. However, public indignation is a satisfactory explanation in this case only for those who are ready to concede that eugenic infanticide should be legalized when the public "is ready for it." Those who categorically reject such a course regardless of public opinion must look for some other explanation to justify eugenic feticide while refusing ever to allow eugenic infanticide.

III. VALUING PRENATAL LIFE

As already noted, the Model Penal Code proceeds in large part from utilitarian premises. When the greatest good of the greatest

40. A full account of the incident is found in N. St. John-Stevas, THE RIGHT TO LIFE 3-24 (1964).
41. Cf. P. Devlin, supra note 33, at 14-23. It should be recalled that although Lord Devlin makes public indignation a key element in determining what conduct should be outlawed, he suggests that the issue of abortion cannot be disposed of by simple application of this rule. See note 33 supra.
42. See note 9 supra.
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number serves as the keystone of a value system, it would seem to justify a very liberal law permitting abortion for a wide range of desirable ends. Indeed, one is tempted to conclude that a crass utilitarianism might even justify the elimination of all kinds of undesirable people who make life unreasonably difficult. An argument could be made for a "final solution" of a number of human problems on the ground that elimination of the weak and unfit will so increase the total pleasure experienced by the survivors as to exceed what could have been attained in the larger but less felicifically efficient group. It takes only slight reflection to reject this proposition out of hand, even on utilitarian grounds. The sense of personal security is one of the basic, incommensurable satisfactions of life. The thought that one might someday be liquidated in order to make things more pleasant for everyone else strikes such discomfort in every individual that it is difficult to find counterbalancing benefits flowing therefrom as would make it all worthwhile. As a general rule, therefore, destruction of life will be forbidden on utilitarian grounds except in very special circumstances where the public sense of security will not be seriously undermined. 43 One such case might arise where a larger number of humans will survive as a consequence of the action, as where some survivors on a lifeboat are thrown overboard so that all will not drown. 44 Another such case might arise where the destruction does not evoke public identification with the victim, as in the case of abortion. This is particularly true where the fetus is destroyed in the early months of pregnancy. A tough-minded utilitarian might even be tempted to stretch this exception to cases of seriously deformed infants and to the euthanasia of persons suffering irremediable physical or mental defects of such a serious character that they cannot conceive of their own destruction. 45 But here one is sure to encounter more determined opposition from the community. A large part of it may be due to the sense of insecurity inspired by a greater identification with the human organism after parturition than before that event. There may be other, more compassionate, reasons for this distaste. Whatever the reason, the killing of infants and incompetents is more painful to contemplate than the destruction of fetuses. For the utilitarian, then, there is good reason to distinguish between the fetus and the infant in that the destruction of the former does not inspire the same sense of insecurity and compassion generated by the killing of the latter.

43. Cf. G. Williams, supra note 10, at 310-12.
45. Cf. G. Williams, supra note 10, at 310-12.
Consequently, if the Code were guided solely by an unrefined utilitarianism, it probably would have ended up recommending abortion on demand. But few modern societies adopt a raw utilitarianism when it comes to the value of human life. For instance, infanticide is condemned without reliance on a utilitarian rationale. The killing of infants is considered an absolute evil, an essentially inhuman act.\textsuperscript{46} One expects that few supporters of the Model Penal Code would quarrel with such an ascription of absolute value to infant life. Supporters of the Code’s abortion provisions affirm a high reverence for life.\textsuperscript{47} They put forward their proposals as reforms designed to improve the quality of human existence through avoidance of the dislocation to family life caused by the unwanted child. They point out how an unwanted birth can engender hostility and hardship destructive of the finer human qualities and sentiments that family life is supposed to develop. This approach combines an enlightened utilitarianism with widely accepted humanist values. The preservation of these values is considered to be as important as maintaining the sense of personal security. There would be precious little support for the Code’s reforms if they were widely regarded as the first step down the road toward a diminishing respect for the life of the individual. It seems, therefore, that the value implicitly placed on the fetus by the Code and its supporters is a derivative one: the fetus is to be assigned such value as will permit resort to abortion in order to obtain maximum satisfaction of the needs and interests of those already born, but with the caveat that the practice be legally restricted at the appropriate point necessary to preserve society’s general respect for traditional humanist values.

This valuation of the Code can be challenged on two grounds. First, one can question the sociological judgment that the near absolute value we place on human life generally can be suspended in its prenatal manifestations without depreciating its value in more developed forms. Second, one can disagree with the pragmatic elevation of the highly visible interests of the mother and her family over the less

\textsuperscript{46} Even a consistently rational utilitarian like Glanville Williams is forced, for the time being anyway, to retreat from the high ground of social utility in deference to the obstinate cultural drag of a religiously inspired insistence on the sanctity of all human life after birth, even where deformed children are concerned. As he puts it: General opinion is certainly far from taking this position [of rightfully putting to death severely handicapped infants] \textit{at the present time}, and all religions with any pretense to an ethical content are firmly against it. Even the modern infidel tends to give his full support to the belief that it is our duty to regard all human life as sacred, however disabled or even repellent the individual may be. This feeling, among those who do not subscribe to any religious faith, may sometimes be in fact a legacy of their religious heritage. \textit{Id.} at 30-31 (emphasis added).

\textsuperscript{47} In reporting on the abortion provision of the proposed draft at the American Law Institute proceedings, Professor Schwartz characterized the problem of abortion as one involving the sanctity of life. \textit{36 ALI PROCEEDINGS 252} (1959).
visible interests of the fetus. As to the sociological judgment, many opponents of the Code are prophets of catastrophe who see the road to liberalized abortion as a downward incline leading to euthanasia and ending eventually in eugenic extermination camps. This argument presents an instance of the use of the *reductio ad absurdum* in an area of life where logic has very little to do with experience. Feticide has never been equated in the common imagination with infanticide or any other form of homicide. The experience with very liberal abortion laws in foreign countries, some of which have traditionally valued the individual and his liberties less dearly than we, does not reveal an erosion of respect for post-natal life because of widespread regularized abortion.48 It is a rather safe judgment that in our culture the line can be and probably would be held at abortion.

It is the Code's pragmatism which many will find unsatisfactory. They will insist that the value of the fetus must depend on whether that organism possesses essential human characteristics. They will reject the notion that its value can be viewed as a variable whose lower limit is fixed by the degree to which society can safely ignore it without causing a collapse of some of the other related, basic values of our culture. Despite the ubiquitous pragmatism of our society, its commitment to the preservation of individual rights does not emerge from a balancing of interests. If anything the process acts in reverse. Established individual rights reflect initial value judgments that set the weights in the balancing process. Perhaps the most fundamental value judgment of our societal consensus is the importance of the individual. This judgment embraces the idea that it is of incommensurable importance for each person to realize whatever potentialities he may possess. This is not to deny that diverse and unequal abilities may justify diverse and unequal claims. The gifted child may properly lay claim to a greater expenditure of resources than his more average brother in order to develop his capacities fully. But his brother's claim to the resources necessary for his own development, although perhaps more limited in scope, is equal in merit. From a utilitarian perspective, it may be more important for one Beethoven or one Einstein to attain his peak than for five or six men of average scope to develop fully their more modest powers. Although our society frequently engages in this kind of calculus in publicly allocating its resources—particularly where an Einstein is concerned—fundamentally it is committed

48. Abortion on demand is currently lawful in both the Soviet Union and Japan. No one has brought to light increased instances of infanticide or other acts indicating a lessened concern for human life generally, because respect for prenatal life has been substantially impaired.
to the development of the individual as an end in himself rather than as a means to social progress or enrichment. The hesitant sense of achievement of the retarded child who learns how to master a simple vocabulary is regarded as equal in human value to the accomplishments of the young genius. Acceptance of this value judgment implies at least the equal right of all humans to survival.

Acceptance of this value judgment also removes any basis for distinguishing between the fetus and the newborn child with regard to their essential humanity. No matter how one defines the human dimension — whether it be in terms of intellectual, emotional, aesthetic, or spiritual capacities, indeed, even if in terms of physical ones — the infant possesses none in significant degree. He possesses only the potential for the development of such capacities. Modern science makes clear that the fertilized ovum possesses the same potential. It is not too extravagant to say that the infant is further removed from the fully developed adult in its human capacities than the one month old fetus is from the infant.

These considerations indicate not only that the fetus is a member of the human family, they also serve to refute the notion that it is somehow an inferior human. The newborn infant is totally dependent

49. One proponent of a more liberal approach to abortion suggests that the fetus is "not a moral or personal being since it lacks freedom, self-determination, rationality, the ability to choose means or ends, and knowledge of its circumstances." J. FLETCHER, MORALS AND MEDICINE 152 (1954). This line of reasoning also establishes that the infant is not a "moral or personal being," thereby removing much of the moral opprobrium that surrounds the act of infanticide. However, only a very few appear to be convinced of the social desirability of infanticide where it is clear that the "child would be certain to suffer any social handicap." One of the convinced states: "Life in early infancy is very close to non-existence, and admitting a child into our society is almost like admitting one from potential to actual existence, and viewed in this way only normal life should be accepted." M. EVERETT, IDEALS OP LIFE 347 (1954) (emphasis added).

50. Cf. A. MONTAGUE, LIFE BEFORE BIRTH (1964). Montague points out: "[In spite of . . . the] appearance [of the fetus], he is a living, striving human being from the very beginning." Id. at 2. A biophysicist makes the point this way:

In fact, it appears that such a point [where the fetus takes on the form of an individual human being] does not exist. The attributes of form and function that designate the living system as a human individual are acquired at various times during development in a process that is relatively continuous. The fetus late in development is obviously a living human individual in form and function. The single cell stage, early in development, does not possess many of the attributes of biological form and function that are associated with the human individual. The transition occurs gradually, not at a single point in time.

Biological development does not stop at birth. The infant develops into the child, the child into the adult and even the adult continues to modify his form and function into old age and death. Each of these transitions also occurs in a continuous fashion, rather than all at once at a single time. To say when the embryo becomes a human individual may be as difficult biologically as determining when a child becomes an adult. Although the beginning and ending states are quite recognizably different, the transition occurs in an individual continuously, so that no one point in time can be designated as the line that separates the two states.

Hayes, Abortion: A Biological View, 85 COMMONWEAL 676, 678 (1967).

By eighteen weeks the fetus is "active and energetic and does a lot of muscle-flexing."
on others in order to develop into a more or less self-reliant human. In this respect, the fetus is no different from the infant except for its unique situation of dependence on the body of the mother for survival. Although this may affect the comparative value to be assigned to certain interests of the mother in opposition to those of the fetus, it does not reduce the humanity of the fetus in comparison to that of the immature infant. If the fetus is assigned an inferior value, this is only because society so wills it. Consequently, there is great risk of highly arbitrary value judgments once the idea of fetal inferiority is legislated. An example of such arbitrariness is the suggestion that a fetus be aborted where the probability of its deformity is less than its chance of developing into a reasonably sound person. In apparent seriousness, the argument is advanced that such a course is designed to spare from suffering those children destined to be deformed. If the interests of the child were truly paramount here, no potentially sound fetus would be destroyed. Instead, deformed infants would be eliminated after birth. But most would reject this suggestion out of hand as brutally inhuman, even though they might tolerate abortion to serve the same end. Here the notion that the fetus is “inchoate” serves to break the bond of identification with it and to remove from abortion the taint of brutality.

In addition to giving rise to such anomalies, an arbitrary valuation of the fetus as an inferior human will tend to be a shifting and unstable one. Once society becomes conditioned to the notion that abortion is a humane technique for solving pressing problems, the demand for it will increase. One cannot reasonably expect an arbitrary valuation to withstand highly vocal and visible opposing interests. Any proposed liberalizations that rest on such an arbitrary evaluation will be interpreted broadly. For instance, therapeutic abortions to preserve the mental health of the mother will probably prove to be an avenue through which abortions will be increasingly justified because of socio-economic values. Psychiatrists acknowledge that even under the more restrictive laws now prevailing these factors are taken into account, legitimately or not, in determining whether a pregnant woman will be able to overcome suicidal impulses generated by the experience of pregnancy or the prospect of another child in the family. In addition, one can expect increased pressures to expand the number and kinds of justifications for abortion recognized by the law once the current proposals for liberalization are accepted. Finally, the total number of

\[51\] In the case of German measles contracted in the first trimester of pregnancy, there is a 30% chance of deformed birth. Nonetheless this is now considered an eugenic indication of abortion. See J. Robitscher, supra note 28, at 86.

\[52\] See Rosen, supra note 20, at 448.
abortions performed as a means of birth control may well increase, even though most of them would still be illegal because of the limited scope of any liberalization that tends to ascribe some human value to the fetus. In the Scandinavian countries the total number of illegal abortions did not decline even after the grounds for abortion were expanded to include socio-economic considerations. This could well reflect a progressively lower appreciation of the humanity of the fetus by society generally due to the social conditioning of permissive abortion laws. It seems clear, then, that an intermediate valuation of the fetus is very difficult to justify in theory and will prove precarious to maintain in practice.

The only principled justification for abortion must rest on the right of the pregnant woman to determine her own body processes. Ordinarily, the individual is given very wide leeway in deciding for himself what medical risks and procedures he will subject himself to in order to alter a condition of his body, even if it be only for cosmetic purposes. But where abortion is concerned, we must also take into account the interests of the fetus, with its human potential more or less equal to that of the newly born infant. The issue becomes whether the interests of the fetus should impose on the pregnant mother the duty of providing an environment necessary for its survival and development. Once the issue is stated in this fashion, it can be resolved by identifying, analyzing, and evaluating the woman's interests in her rights to self-determination and bodily integrity, and then weighing them against the interest of the fetus to survive. In such a balancing process the interests of the mother should be of a substantial character in order to outweigh the interest of the fetal human organism to survival.

This judgment is reflected in the small body of law that bears on the comparative evaluation of fetal and maternal interests outside the area of criminal abortion. The New Jersey Supreme Court has had occasion to pass on this point in two significant cases. Perhaps the most noteworthy is Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, which upheld a court order requiring a pregnant Jehovah's Witness to submit to blood transfusions over her religious objections to such a procedure. The New Jersey Supreme Court did not rest its decision in this case on the principle that the state could impose such treatment in order to save the woman's life. Instead it held that such treatment was to be given in order to preserve the life of the fetus.

54. See B. Dickens, supra note 31, at 160–61; G. Williams, supra note 10, at 219.
55. See G. Williams, supra note 10, at 203.
This decision, in effect, held that the interest of the fetus to survive is of more importance than that of the woman's freedom to observe her religious obligations, the free exercise clause of the first amendment notwithstanding.

It should be remembered that the Anderson case was decided after the United States Supreme Court delivered its opinion in Sherbert v. Verner,\(^\text{57}\) which stated that "only the gravest abuses, endangering paramount interests" justify interference with religious liberty.\(^\text{58}\) Thus, the New Jersey Supreme Court, in effect, found the interest of the fetus to survive to be a "paramount" one. Although some commentators have been critical of recent court decisions compelling adult Jehovah's Witnesses to submit to blood transfusions over their religious objections,\(^\text{59}\) the Anderson decision appears to have been uniformly well received,\(^\text{60}\) thereby indicating wide recognition of the very great importance of the fetus's interest to survive despite contrary maternal desires.

In a subsequent case, Gleitman v. Cosgrove,\(^\text{61}\) the parents of a child born with serious sight, hearing, and speech defects brought suit against the attending obstetrician for failure to advise them adequately of the substantial risk of birth defects and the availability of a therapeutic abortion where the mother had contracted German measles early in the pregnancy. The mother alleged the emotional distress arising from the care and rearing of a defective child as a basis for recovery, and the father sought to recover for the extra financial burden caused by the defects. The court rejected both claims on the ground that the right of the unborn child to life is greater than the interests of the parents to avoid emotional and financial injuries.

In most jurisdictions, at the present time, only the interest of the mother to survive overrides the fetal interest to survive, and justifies an abortion.\(^\text{62}\) This exception is related to the legal justification of

58. Id. at 406 (emphasis added).
60. See 33 FORDHAM L. REV. 80 (1964); 40 NOTRE DAME LAW. 126 (1964); 10 VILL. L. REV. 140 (1964).
homicide in cases of self-defense. However, the doctrine of self-defense assumes an aggressor and justifies killing when necessary to ward off a deadly attack. There is some question whether the rationale of necessity should be extended to legitimize the killing of an innocent bystander whose death may be necessary for the killer to survive. The prevailing exception to our abortion laws justifying the termination of a pregnancy when necessary to preserve the mother's life might be viewed as leaning in the direction of a broader defense of necessity. It need not be so regarded if one concludes that the fetus may be likened to an aggressor. But such rhetoric of self-defense seems to draw more on poetic than legal analogy. Where a pregnant cardiac patient, for instance, might not survive the physical strain of bearing and giving birth to a child, it is somewhat fanciful to speak of the fetus as an aggressor.

However, there is no need either to accept the questionable analogy of self-defense or to broaden the doctrine of necessity in order to justify the exception. The fetus is both an incipient human being and an integral part of the mother's body. This dualism renders the act of abortion sui generis when it comes to valuing the interests affected by such a procedure. Our traditional respect for the autonomy of the individual over his own body readily permits him to remove tissue threatening his life. When a society holds in great respect, not only the human life of both the mother and the fetus, but also the autonomy of the individual, these two principles, on balance, relieve a pregnant woman of any duty to maintain a condition of her body perilous to its very survival. Destruction of the fetus under such circumstances is a necessary side effect of a genuinely therapeutic act.

The pregnant woman's interest in maintaining her bodily integrity could also justify relieving her of the duty to continue a pregnancy that will immediately and directly jeopardize her health to a substantial degree. Here again, fetal destruction is a necessary side effect of a therapeutic act directed at correcting a condition gravely injurious to the woman's bodily integrity. When we consider that the law has not imposed on a stranger, or even a close friend, the duty to rescue a man in peril of his life — even when the stranger or friend could act effectively yet with complete safety to himself — it is highly question-

65. With regard to the severity of the possible damage to the woman's health it is interesting to note that the Colorado law only permits an abortion on this ground when "serious permanent impairment" of either the physical or mental health of the woman is likely. Colo. Rev. Stat. Ann. § 40-2-50(4)(a)(i) (1967).
66. Cf., e.g., Bradley v. State, 79 Fla. 651, 84 So. 677 (1920); People v. Beardsley, 150 Mich. 296, 114 N.W. 1128 (1907).
able that it should impose on a pregnant woman the duty to refrain from greatly needed medical therapy. However, justification premised on the woman's interest in maintaining her bodily integrity should be limited to those cases where the child's survival immediately and directly threatens the well-being of the mother. In such a case we would not be saying that the right to life of the fetus is less important than the health of a grown woman. We would only be saying that the right of the mother to preserve her body functions excuses her from the duty of having her body serve as the incubator for her child. This justification is a very limited one. It does not recognize the legitimacy of abortion where the mother's well-being is threatened by the need to care for an extra member in the family after birth. In this case the situation of the pregnant woman who would find one more child "too much" is no different from that of the mother of a large family who finds that her health will break down from caring for all its members. In both cases, the threat to the mother's health can be removed by making special provision for the care of the children. There is always the option of giving up the burdensome child, no matter how painful this might be. However, where the pregnancy itself threatens the health of the mother, abortion is the only means to eliminate the threat to the mother's health. This justification would go far enough to permit an abortion to preserve the mental health of the woman, but only when the experience of pregnancy or childbirth directly threatens to cause mental disturbance — not when prospective domestic difficulties might do so. Also, the mental disturbance would have to be of such a severe and prolonged nature as to disable the woman from functioning as a reasonably self-reliant individual. The California justification for abortion to preserve mental health requires that the threat of impairment be so serious that the woman would be either "dangerous to herself [or] others [or] in need of supervision or restraint."

The above analysis would exclude from the concept of therapeutic abortion any medical procedure designed to eliminate a future problem by eliminating the fetus who will foreseeably give rise to it subsequent to birth. Such abortions, no matter how humanitarian their ultimate objectives, are essentially destructive acts which are amenable to a balancing process only to the same extent as are other deadly acts, such as
jettisoning human cargo. They are not genuinely therapeutic acts. This can be seen if we consider abortions designed to prevent the live birth of a possibly deformed child. An eugenic abortion, by definition, only accomplishes its purpose by destroying the fetus, even after it has reached that stage of development where it might survive outside the maternal womb if given requisite care. Those who advocate eugenic abortion elevate the woman's right to determine her own body processes over the right of other living organisms to survive. Our society has never weighted the right to self-determination so strongly that it permits one to exercise such power over the lives of others. It is true that in the case of abortion there is the unique fact that the organism destroyed is totally dependent on the mother for survival. But the fact of such dependence should give rise to a legal duty toward the organism rather than the assertion of unlimited legal power over it. It is true, of course, that the woman who contemplates the birth of an unwanted child suffers extreme mental distress, especially if faced with the prospect of a seriously defective child. But is it any greater than that of the woman who gives birth to a defective infant? Yet we do not give this latter woman the power to alleviate her own suffering and that of her child by destroying it.

In short, the justification here offered in no way suggests that the woman's right to self-determination gives her such an absolute interest as to determine the right to survival of whatever her body carries. She can do no more than reject the human organism which threatens her; destruction of such an organism is only sanctioned when necessary for a successful rejection. Thus, in a case where the fetus threatening the mother's health could be removed to an artificial womb without endangering the pregnant woman's health, this would be the proper course to follow in order to preserve the bodily integrity of both the woman and the fetus.

If we recognize validity in the above line of analysis, we will in effect be refining the overly broad idea of a woman's duty to carry a child to term. In its place we would be substituting the concept of a duty to refrain from acts destructive of the fetal organism except when necessary to preserve the bodily integrity of the maternal organism. In this kind of balancing analysis, however, there is one factor in the equation that we have ignored up to now; that is the unique anguish that the woman must undergo in giving birth to an unwanted child. This argument, particularly when advanced by a woman, tends to disarm male opposition. For it is a bit presumptuous of the male to categorically posit that the right of the fetus to survive is more important than an interest whose depth is beyond his appreciation. This
argument proceeds to the conclusion that abortion is a uniquely personal problem of the woman, and therefore, must be within the realm of her private decision. It is an argument in favor of abortion on demand. There are two fallacies in this argument. First, an abortion involves living persons other than the pregnant woman, notably those who perform the operation. Second, it is questionable that the woman exercises a truly significant degree of self-reliance in making this decision in many instances. Although no decision is made in a vacuum, the pregnant woman frequently requires very special and extensive support from others in making and adhering to the decision to abort.70

At the very least, doctors are going to be involved in the decision. Even if the law allowed abortion on demand, the physician would frequently play a critical role in influencing the woman's decision. Others may be involved, including members of her family, her friends, her clergyman, and possibly even social workers. The woman will look for support from these sources, whatever her decision. The question then becomes whether the law should attempt to structure the social context in which the woman's decision is made in order to favor the survival of the fetus in all cases where the integrity of the woman's body is not at stake. If we are truly committed to the equal value of all human lives, no matter how handicapped or impoverished they may be, the law should seek always to mobilize social resources on the side of life. When abortion is presented by the law as an acceptable alternative, it removes an important social support for the decision in favor of life. It leads to the legitimation of social structures that support the destructive option of abortion and, therefore, invariably encourages this practice and its proliferation.

The above analysis, proceeding as it does on a balancing of interests, bears some similarity to a sociological jurisprudence of interests. It is consequential and seeks to maximize certain values that are accorded comparative rankings. Built into the analysis is the judgment that the fetus is essentially similar to the newborn infant because of

70. There is disagreement as to whether an abortion is apt to produce subsequent feelings of guilt and psychological harm. See B. Dickens, supra note 31, at 157–59. There has been little scientific investigation of this point, and what there is seems to indicate that such consequences are neither extensive nor very serious. Nonetheless, in their practices, psychiatrists encounter a number of women with emotional disturbances caused by guilt over some previously induced abortion. Cf., e.g., Lidz, Reflections of a Psychiatrist, in Therapeutic Abortion 276, 279; Romm, Psychoanalytic Considerations, in Therapeutic Abortion 209; Rosen, The Emotionally Sick Pregnant Patient, in Therapeutic Abortion 219. As one psychiatrist puts it: "[T]he willful loss of the fetus remains a potential major trauma to a woman because of its emotional significance." Lidz, Reflections of a Psychiatrist, in Therapeutic Abortion 279. What does emerge clearly from the literature is that if many women are to go through an abortion with minimum emotional damage, they are going to need sympathetic guidance and counseling.
their equivalent potentials for human development. One way to test the validity of this judgment is to examine the act of abortion as a technique for preventing unwanted births and to ask ourselves whether it lacks human qualities to such a degree that our society should outlaw such a practice, placing it beyond the pale of civilized society, as with infanticide.

On this question the opinions and attitudes of physicians, those most directly involved in the procedure, would appear to carry much weight. They are the ones who must confront the unpleasant facts of an abortion. They — or more precisely, those doctors who have performed abortions — are in the best position to give testimony as to the character of this procedure. But their opinions on this precise question must be discounted to some extent. The tradition and orientation of the medical profession readily lead doctors who decide to perform an abortion to prevent the birth of unwanted children to view it as the removal of pathologic tissue.71 Those who perform such acts must deliberately assume such an attitude if they are to operate efficiently, free from taxing emotional burdens. Nonetheless, there are psychological as well as moral limits on the cultivation of such professional attitudes. For instance, the doctors will find themselves in an equivocal position if indiscriminate abortion becomes a legally sanctioned procedure. In one case a doctor may be treating a fetus as if it were a patient, devoting his complete efforts to its development and survival. In his next case he might find himself committed to destroying an equally healthy and benign fetus at a similar stage of development. Because of this inherent equivocation, we should inquire more deeply of the profession to determine precisely the attitudes of doctors toward abortion.

It is clear that the large majority of doctors favor added legal justifications beyond that of preserving the life of the mother.72 But what of the gynecologists and obstetricians who will be called upon to perform abortions? Would most of them oppose abortion on demand?73 If so,

72. A large majority of physicians who have responded to various polls on this subject have come out favoring a more liberalized abortion law. For example, a report by a group of professors from ten New York medical schools in 1965 indicated that 87.6% of New York obstetricians who were polled and answered favored a change. N.Y. Times, Jan. 31, 1965, at 73, col. 6. Out of 40,089 physicians answering a poll by Modern Medicine on this question, 87% also favored liberalization. Time, Oct. 13, 1967, at 33.
73. As might be expected, most physicians have a natural aversion to the destruction of a living organism. Thus, one gynecologist, who speaks sympathetically of abortion on demand from a social point of view, nonetheless argues for more careful assessments of the need for eugenic abortions. He says, "How many of us could be comfortable in discarding every fetus with a cleft palate?" Mandy, Reflections of a Gynecologist, in Therapeutic Abortion 284, 293. It is reported that doctors in the
would this be for the reason that they find such a procedure highly offensive? Would they limit such procedures to cases where the total well-being of the woman or her family are put in serious jeopardy and the operation can with some merit be called therapeutic? Apart from questions of safety, would they have greater objection to abortions in the second trimester than in the first? Again, questions of safety apart, would they have greater objections to hysterectomies, craniotomies and similar procedures of feticide in the third trimester than abortion in the first trimester? It would be of great interest to have a sociological survey in depth concerning these attitudes, for it would reveal the circumstances under which the physician in fact finds himself recognizing and identifying with the humanity of the fetus.

Although the act of abortion is one that only the doctor will face recurrently, society cannot fob off on the profession the moral evaluation of it. Society as a whole must be ready to acknowledge and accept the necessary existential implications of an expansive abortion policy. Not just doctors, but legislators as well, should consider a possibility that has been known to occur on some occasions where an abortion is induced in the second trimester: the fetus emerges giving evident signs of life. It is highly unlikely that such a premature infant would be able to survive despite the use of extraordinary procedures. Even if such efforts were successful, there would be risks of some permanent damage to health. Finally, even if the child were able to grow into a normal, healthy adult, one must consider the psychological impact on the mother of the abortion that went aborning. It takes little imagination to conclude that invariably the physician will act so as to bring his operation to a successful conclusion. The child will be laid aside to expire in the natural course of events.

The reason for considering this case is not to present it as one of the risks of abortion. If abortion were liberalized, hopefully this case would arise with such infrequency as not to present a substantial issue. It does, however, serve to throw light on the character of an abortion deferred until the second trimester, or a hysterectomy or craniotomy performed in the third trimester, as well as on the mind-set and attitudes it necessarily engenders in those involved. The kind of attitude necessarily implied by abortion presents a sharp contrast to the medical profession’s views on infanticide. The deliberate destruction of newborn infants — even though seriously deformed — is strongly opposed

Soviet Union regarded the abortions they had to perform on demand as a “necessary evil,” and they apparently tried to dissuade many of the applicants from carrying out their original intentions. P. Gebhard, W. Pomeroy, C. Martin & C. Christenson, supra note 18, at 217.

Doctors see themselves in the business of healing rather than destroying human life. Yet, it is impossible to distinguish in principle between infanticide on the one hand and abortion in the second trimester of pregnancy on the other, an abstract point that is made distressingly concrete by pondering the above case.

The above arguments concerning the nature of the abortive act do not carry much force when applied to the use of the intrauterine coil or chemical agents which similarly cause the ovum, perhaps even after fertilization, to be prematurely expelled before it is capable of implanting itself in the uterine wall. Such agents either so structure the internal organs of the woman or so affect her body processes as to prevent the maintenance of a suitable environment for development of the ovum. Although such techniques have the same effect as a dilation and curettage where they in fact cause expulsion of a fertilized ovum, they do not involve a direct attack on the prenatal organism. In short, they are not immediately destructive acts. Here the moral force of the distinction must rest on the intrinsic human quality of the act rather than on its consequences. To appreciate the distinction one must accept the premise that an act of destruction is a greater wrong than an act creating a situation in which an organism is set loose into the world necessarily to perish. If this distinction is not found weighty, there are still conclusive reasons why society should not interfere with a woman’s resort to these birth control techniques. Enforcement of a ban on such techniques would seriously interfere with the individual’s privacy in an area within the scope of the Griswold decision, which invalidated legislation prohibiting the use of contraceptives.

It must be recognized, however, that our commitment to human life as a social fact has always rested in large part on the process of identification. Abortion in the first few weeks of pregnancy has never been seriously viewed as the destruction of human life. At the common law, the crime of abortion required destruction of the fetus after quickening. Quickening is still of some legal significance in some states. However, in the nineteenth century there was a tendency to move protection

75. E.g., In introducing a bill to legalize euthanasia in New York in 1941, the Euthanasia Society of America gave up its original intention to include compulsory euthanasia for monstrosities and imbeciles in its programme as a result of unfavorable reactions from physicians. See N. St. John-Stevas, Life, Death and the Law 266 (1961).
76. There is some question whether current abortion laws in most states would render the prescription, sale or taking of these agents unlawful. See, e.g., 46 Oregon L. Rev. 211 (1967).
77. See B. Dickens, supra note 31, at 23–24.
of the fetus back to the moment of conception. This is sometimes explained as a development designed to protect the mother from the hazards of abortion.\textsuperscript{79} In light of the moralistic predilections of that era, this is not a convincing explanation. More in keeping with the tenor of the times is the explanation offered by the Pennsylvania Supreme Court: "[Abortion] interferes with and violates the mysteries of nature, in that process by which the human race is propagated and continued."\textsuperscript{80}

In view of modern biological knowledge concerning the development of the fetus,\textsuperscript{81} the position of the Pennsylvania court is not really outmoded even though its rhetoric may be. There is no discrete point in fetal development which can be marked as the initial stage of humanity. There is a continuous evolutionary process in which the humanization of the fetus emerges as something of a mystery. A legislator sensitive to this mystery would not be adhering to an archaic ethic. For example, appeals to the compassion of legislators in order to persuade them to do away with the barbarity of capital punishment or to treat with greater sympathy the deranged, albeit morbid, killer are taken as signs of moral progress. In this context indifference to the destruction of incipient fetal life seems somewhat retrogressive. However, it must be admitted that our total cultural orientation and value structure does not consistently reveal a high respect for life regardless of its circumstances and potential. Military decisions that are implicitly justified on the ground that it is desirable to sacrifice four or five innocent young Asians with a life expectancy of limited duration and quality in order to save the potentially far richer life of one American soldier have certain affinities with the morality, by statistics, implicit in the decisions to destroy three or four healthy human organisms of embryonic form in order to save a family from the wearing economic and emotional drain of an unwanted, deformed child. Consequently, even though it may be the ideal course to legislate against all abortions except those designed to preserve the physical and mental health of the pregnant woman, the legislator may come to realize that he can only muster support and respect for a law which is more permissive. If this should prove to be the case after full and fair exploration of the issue, the legislator should seek to structure compromise legislation which meets the most insistent demands of the public without a flat repudiation of the human value of the fetus and its right to equal treatment.

\textsuperscript{79} E.g., Gleitman v. Cosgrove, 49 N.J. 22, 60, 227 A.2d 689, 709 (1967) (dissenting opinion) (Weintraub, J.).

\textsuperscript{80} Mills v. Commonwealth, 13 Pa. 630, 632 (1850).

\textsuperscript{81} 522 n.o. 50 infra.
An exception should be made in the case of pregnancy caused by forcible rape, if possible, because it generates much public sympathy for the cause of abortion even though it may not be a statistically urgent problem. Abortion in such a case could be readily justified on the ground that a woman should not be required to submit her body to birth under these circumstances. Since the woman has not freely performed any act which gives rise to the relationship with the fetus, it can be urged that she should not be burdened with a duty of such a uniquely personal nature toward it under circumstances of such an extremely trying character. There is some concern that recognition of justification in the case of rape will too often give rise to fraudulent claims that an unwanted pregnancy was the result of such a criminal assault. The three states that have adopted this justification specify certain procedures designed to reduce this danger.  

A second exception could be made in the case of abortions performed in the first trimester of pregnancy. It is very difficult to develop widespread respect for the mystery inherent in the emergence of the individual's humanity in the very early stages of the life process. I suspect that a poll of most doctors would reveal very little identification with the fertilized ovum until it develops human features and characteristics. Once we are in the second trimester of pregnancy, one would expect the situation to change. There is some evidence that even in the case of the pregnant woman with suicidal tendencies, who insists on an abortion, her whole mental attitude changes after experiencing quickening and the realization that she is dealing with a human life. However, even in the case of these early abortions the legislator should go no further than to permit liberalization in those cases indicated under the Model Penal Code. Such a change in the law would go farther than to permit liberalization in those cases indicated under the Model Penal Code. Such a change in the law would go farther than the justifications hereinabove considered acceptable by legalizing early abortions for eugenic purposes. It would also tend to expand significantly the scope of the previously described justification for therapeutic purposes, because the Model Penal Code's formulation...

82. North Carolina requires the victim to report the assault to a law enforcement agency or court official within seven days of the alleged rape. N.C. GEN. STAT. § 14.45-1 (1967). Colorado requires the district attorney for the district in which the alleged assault occurred to certify that there is probable cause to believe the alleged rape did occur; moreover, the abortion is limited to the first sixteen weeks of gestation. Colo. Rev. Stat. Ann. § 40-2-50(4)(a)(ii) (1967). In California the hospital abortion committee must forward the application for abortion on the ground of rape, with supporting affidavit by the applicant, to the district attorney for the district in which the alleged assault occurred. The abortion can be performed thereafter if the district attorney fails to notify the committee of a lack of probable cause. Cal. HEALTH & SAFETY CODE § 2592(a) (1967). An appeal may be taken in the courts from the district attorney's finding of no probable cause. Cal. HEALTH & SAFETY CODE § 2592(b) (1967).

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permitting an abortion where "continuance of the pregnancy would gravely impair the physical or mental health of the mother" lends itself to an interpretation justifying abortion in a case where caring for the child after birth might prove to be a serious threat to the woman's physical or mental health.

The legislator who agrees to this compromise must meet the objection previously raised that limited justifications for abortion imply an intermediate valuation of the fetus, a valuation which is difficult to justify in principle or to maintain in practice. However, this point can be met in two ways. First, the intermediate valuation can be supported on basic morphological differences. The fertilized ovum cannot be identified as a human being, whereas in the second trimester, the fetus is fully recognizable as a separable human being. The use of photographs of the fetus at these two stages of development could serve to illustrate the line for legislative purposes. Second, even those who affirm such a basic reverence for life that they find delayed protection of the fetus arbitrary and philosophically unjustifiable must remember that such a proposal is intended as a compromise which saves the essential point that humanity does not depend on the fact of birth. An intransigent stand on abortion in the most appealing cases might tend to solidify opposition to any restrictive laws concerning abortion. Besides, the compromise does rest on a principled justification. It places a stringent ban on abortions in the second and third trimesters to preserve respect for identifiable human life whereas the more liberal attitude in the first trimester would arise from the somewhat lesser value ascribed to the mysterious origins of the process of morphological, physiological, and psychological humanization, a process which nevertheless still merits enough value as to resist abortion on demand even at this stage.

In putting forward his proposal for removing most restrictions on abortion, Glanville Williams suggested a comparable compromise to take into account public sentiment for the sanctity of life. He suggests that the line be drawn at the twenty-eighth week, the point at which the fetus is viable. The newly enacted California legislation, which rejects entirely the eugenic justification, also limits therapeutic abortions and those to terminate pregnancy caused by rape to the first twenty weeks of gestation. But the Code and the recent legislative

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86. One need only examine a photograph of an eighteen week old fetus sucking its thumb to acknowledge that a campaign to maintain the abortion line at the end of the first trimester stands some chance of success. Life, April 30, 1965, at 68.
87. G. Williams, supra note 10, at 209.
changes in Colorado and North Carolina, patterned on it, do not impose such a time limitation;\textsuperscript{89} they prefer instead to rely on the discretion of the medical profession, leaving the physician to make his decision on the basis of medical considerations alone. By leaving the medical decision open-ended as to time, the Code hedges against medical developments that would render a more conservative approach based on viability unduly restrictive in light of the values adopted by the Code.\textsuperscript{90} As medical techniques improve, for instance, fetal defects can be determined with greater accuracy and certainty, while pregnancies can be terminated more safely, at later stages of the pregnancy. Besides, improved medical techniques could prove embarrassing by undermining the philosophical rationale that chooses viability as the reason for cutting off abortions at twenty-six or twenty-eight weeks. These developments are apt, in time, to permit transfer of a fetus from the womb to an artificial environment in which it can develop into an infant. Viability would thus be moved back to the end of the first trimester. Since the fetus is easily identified as a tiny human being by the fourth month,\textsuperscript{91} its destruction becomes indistinguishable from destruction of the viable eight-month-old fetus.

The above discussion is not meant to suggest that the essential difference between those favoring and those opposing liberalized abortion turns primarily on their respective abilities to appreciate the human characteristics of the fetus. This is not so. It would be obviously inadequate and grossly unfair to suggest that proponents of liberalized abortion — who include many doctors — lack the imagination necessary to recognize the basic similarities between the fetus and the newborn infant. The differences between them are more philosophically profound. I suspect there are at least two important differences. First, these two groups probably differ with regard to the proper basis for human compassion and sympathy. I would expect most of the proponents of liberalized abortion to find that true compassion can only arise in the realm of intersubjectivity; accordingly they find it more meaningful to project themselves into the position of the troubled adult, pregnant woman than that of the unconscious fetus. Those who oppose liberalized abortion take a more objective view of the essence of humanity and their commitments to compassion are based more on a categorical imperative than sympathetic reactions.


\textsuperscript{90} See, \textit{e.g.}, Mandy, supra note 73, at 292-93.

\textsuperscript{91} See note 86 supra.
Second, there are apt to be important differences in how these two groups view what makes life worthwhile and truly human. Proponents of liberalized abortion are more likely to focus on some ideal society in which human happiness is maximized and human suffering minimized. In utilitarian fashion they are prone to grade actions according to their relative effectiveness in achieving this ideal order in which health, wealth, wisdom, and the hopefully creative personal freedom that accompanies them are clear goals. Opponents of abortion are more likely to accept the conditions of the present, including its irreducible suffering and inadequacy; they try to transform them by humanizing them through concern and compassion. Both groups are committed to alleviating human suffering. Both, for instance, extend loving care to the retarded child, but the former would consider it better to have removed this inefficient expenditure of human energy and emotion by having aborted the child initially. In sharp contrast, the latter group finds in these acts of care and concern perhaps some of the most profound meaning and value in life. For the former group, human suffering is an absolute evil that must be avoided at all costs, except of course the cost of even greater suffering. For the latter group, such suffering is a test and challenge to our humanity, something to be transcended at all costs.

These philosophical differences involve more than questions of private morality. They are relevant in structuring the kind of society we are to live in; they go to the means and style with which we treat questions of social justice, civil rights, and even foreign relations. Yet, it is equally clear that these philosophical differences frequently will mirror religious differences. Because of the social relevance of these differences, however, it is somewhat disingenuous to suggest, as is frequently done, that such religious differences relate to private concerns and, therefore, should not enter the public forum. At the same time, in a pluralistic society, religious differences should be minimized to the greatest extent possible to achieve civic harmony. The next section will endeavor briefly to explore the question of when religiously determined views can be appropriately interjected into the public forum on questions of social policy and whether abortion is an issue on which it is appropriate to advance such views when considering public policy.

IV. PUBLIC POLICY AND THE RELIGIOUS DIMENSION

One element of the current controversy that has served to blur the underlying moral issue has been the way resistance to liberalization of abortion has crystallized along religious lines. The strongest and
most organized opposition to any change comes from the Roman Catholic community. Its canon law forbids any medical procedure with the immediate object of destroying the fetus, even when the latter might cause the death of the woman should it proceed to term and attempted delivery.92 This rigorous attitude, which treats the lives of the pregnant woman and the unborn child as equally sacred, is unique to the Roman Catholic community. It is not in accord with the comparative valuation of prenatal life found in the prevailing criminal law, which uniformly permits abortion to preserve the life of the mother.93 Consequently, when Roman Catholic opposition appears to be the critical factor in preventing further liberalization of abortion laws, it is interpreted as an attempt to impose a peculiar religious ethic on the entire community. It is often argued that such an imposition is improper in a free pluralistic society. Catholics are expected to concede to other members of the community the same degree of self-determination in matters of pregnancy as the latter are ready to concede to them.94 Appeals are made to the individual legislator to vote for freer abortion in cases where prevailing community mores would accept such a practice, regardless of his own religious opinions.

One of my conclusions is that such an appeal is misconceived. The legislator cannot divorce his judgments concerning public policy and the attainment of justice from his religious views any more than he can separate them from his ethical commitments. But it is equally clear that in a free society the legislator should not try to impose on others all his religiously formed notions as to the good life, requiring the personal conduct of others to conform to some ideal norm so that a general culture will emerge consistent with his religious views. Therefore, I will suggest certain guidelines in determining how far religious concerns should enter into the formulation of public policy generally before turning to whether they should be taken into account with regard to our criminal abortion laws.

In analyzing and evaluating the role of religious considerations and organizations in influencing public policy in a pluralistic society such as ours, my frame of reference will be secular. It will consist of the political theory of separation of church and state implied by the free exercise and establishment clauses of the first amendment. My choice of perspective is not based on the judgment that secular values should take precedence over religious ones in the moral order. It is dictated

92. Canon 2350. See generally F. Good & O. Kelley, Marriage, Morals and Medical Ethics ch. 2 (1951).
93. For a compilation of the relevant statutes see George, Current Abortion Law: Proposals and Movements for Reform, 17 W. Res. L. Rev. 371, 376n.31 (1965).
94. E.g., B. Dickens, supra note 31, at 155.
instead by the general agreement in our pluralistic society that political peace and individual religious liberty are best secured when church and state operate independently of one another to the largest extent practicable. Such separation implies some degree of insulation of politics from religion, but it cannot be a complete divorce. To the extent that public policy depends on ethics and to the extent that ethical judgments depend on religious considerations, either in fact or in theory, to that extent there will be legitimate interaction between religion and the law. Starting then with the recognition that at some point there will be interaction of religion and the law, the issue which I propose to discuss is: to what extent can religious considerations appropriately enter into public resolution of the abortion issue without conflicting with the prevailing theory of separation?

It is possible that a religion will conceive its prophetic mission in a way that is inconsistent with the ethical consensus of a particular society. For instance, a religion might preach theocracy or racial superiority; in either case its ethical tenets would come into conflict with the provisions of the United States Constitution. If the religious group holding such a doctrine were numerically small, its beliefs would pose difficulty only for its own members. If the group were numerically large, it would pose problems for the entire community as well. No society contemplates the latter situation with equanimity. Viewing the matter from either a secular or religious perspective, each of its members has an interest in avoiding or minimizing such conflict. The theory of separation of church and state is directed to this end. All major religions on the American scene approve of this principle, thereby expressing confidence that their fundamental dogmas do not create an irreconcilable conflict in the social order. Although the understanding of the principle of separation varies among the major religious bodies when it comes to certain concrete applications, there is general agreement among them that churches are not expected to remain silent on issues of social concern.

The suggestion is sometimes made that since religion deals with the sacred and the supernatural it should be treated as essentially a private matter in our pluralistic society. This is a correct approach with regard to matters of religious belief, worship and expression in ceremonial forms, and devotions; it cannot, however, apply to matters

96. Currently, the issue which brings out the greatest divisions between the various religious communities in the United States in applying the concept of separation of church and state is the question of state aid to church-connected elementary and secondary schools.
97. See, e.g., S. HOOK, RELIGION IN A FREE SOCIETY 27-41 (1967).
of ethical opinion grounded in religious beliefs. Secularists may be correct when they claim that a system of social ethics can be developed without theological presuppositions. They are undoubtedly correct in maintaining that a man can adhere to a system of morality in practice without the sanction of religious beliefs. But neither of these claims denies the social fact that a man's religious beliefs influence his ethical commitments and practices. Central to most religious systems of practice and belief are bodies of ethical opinion. This fact leads to the commonplace observation that the world's great religions come closest to one another in their moral teachings of love, compassion, and altruism. Even when the theologian concedes that the moral order does not depend on religious beliefs or commitments, he is apt to claim that a man's religious understanding of existence will profoundly affect his conception of the good life and illuminate his "moral life in a very significant way" and "in new depth."

For many men, therefore, religion represents a most important force sustaining ethics in society. Indeed, secularists, as well as religionists, will criticize the churches most severely for shirking their obligations to function as moral teachers and leaders on issues of public policy, notably those involving social justice. For these critics the social fact of the church's potential moral leadership is regarded as a social value. The pluralistic character of our society does not deny this value. Since it is a free society, as well as a pluralistic one, churches are entitled to equal status with other private organizations and institutions in shaping moral opinion and influencing public policy. The activities of the National Council of Churches, the National Catholic Conference, and a number of Jewish agencies attest to both the fact and the value of religious influences on public policy.

The theory of separation and the needs of our pluralistic society do give rise, however, to certain obligations on the part of religious bodies to refrain from certain activities, even though these activities may be legally protected. For instance, churches should not seek to use the state's powers, and the criminal law in particular, to implement all of their moral precepts. Similarly, legislators should not, in certain cases, vote for laws contrary to contemporary community standards even though their own private ethics are at odds with such standards.

98. Id. at 32-33.
99. This fact has even been given judicial recognition. In determining whether a particular organization is entitled to tax exemption as a religious organization, a California court has adopted the following definition of religion: "Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult." Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 693, 315 P.2d 394, 406 (1957) (emphasis added). 100. J. MACQUARRIE, PRINCIPLES OF CHRISTIAN THEOLOGY 445 (1966).
The establishment clause places some legal limitations on the state’s power to act in this regard, but for the most part that prohibition relates to action that touches on religious interests and institutions directly. A law may regulate various aspects of personal and social behavior in strictly secular terms yet be inspired and sustained only because of a certain religious ethic. Such a law very often would withstand challenge under the establishment clause. An example of such a law would be one banning all sales of contraceptives because of Roman Catholic opposition; another would be the equally strict ban on the sale of all alcoholic beverages because of opposition of certain Protestant denominations to intoxicating drink.

Quite often a simple test is put forward in public discussion to determine whether a particular public policy derives its main support from religious motives in a manner contrary to the political theory of separation. If support for the policy is limited to a particular religious community, especially a minority one, then it is suggested that the imposition of that policy on the entire community violates the theory of separation. This proposition cannot withstand close analysis. Adherence to it necessarily implies that on all issues the legislator should abide by prevailing community mores rather than his own ethic, whether it be secular or religious. For instance, if prevailing sentiments in the community favor private property rights over claims of racial justice, this interpretation of the theory of separation of church and state would allow a legislator to vote for open housing laws if he were an atheist or agnostic but would forbid him to do so if his views depended on his religious beliefs. This would be a clear violation of freedom of conscience. It is not the source of the legislator’s ethics, but the nature of the public issue that should determine whether the legislator should follow his personal moral predilections. As far as the criminal law is concerned, the legislator should resort to its severe sanctions in a free society only where the public interest clearly requires it. Basically, the question is one of determining the appropriate limits on individual freedom, and the theory of separation does not really alter this fundamental issue. It only confirms the conclusion that the state is not to impose an ideal pattern of behavior on the individual, even when religion is the motivating force for the proposed restraints.

The suggestion has been made that churches should feel free to propose public policies in opposition to current majority opinion only
when their views are consistent with the values of our enduring societal consensus.¹⁰² This approach assumes the general superiority of a given society's traditional values. Otherwise, it places the avoidance of ideological conflict as the highest good in the community. However, the individual legislator cannot compromise his conception of fundamental justice, even though he should stand ready to compromise certain interests for the common good. For instance, if a majority of society values the life of a cow equally with that of the human, it is questionable whether a dissenting legislator is under the obligation to adopt the prevailing system of values in making his legislative judgments. By the same token, if it is the minority that adheres to such reverence of the cow, a legislator sharing this viewpoint can hardly put it aside in considering legislation. A group painfully aware of the social conflict that its unique values cause in the society in which it is located may decide that the best or only viable alternative is for it to engage in some sort of withdrawal. Fortunately, the controversy over abortion does not involve such a divergence of basic values. All participants generally accept the supreme importance of individual human life. The area of difference is limited to fixing the point at which the individual — any individual — has acquired the standard characteristics that entitle him to protection before the law as a human person.

The most fruitful line of demarcation between the legislator's official obligations and his personal conscience is based on the distinction between issues of public and private concern. A parallel distinction is sometimes made between sin and social ethics.¹⁰³ These formulations, however, do not provide conclusive guides. The determination of what is a public concern or a private one is in the first instance a public issue. For example, arguments could be made that all kinds of behavior, ranging from gambling and the use of hallucinogenic agents to homosexual practices and the use of contraceptives, tend to have certain harmful consequences on the quality of our social life and the stability of some of our established institutions, notably the family. However, in a free and open society the secular value of freedom suggests limits in defining the realm of the public, not only to protect the interests of the individual, but also to permit progressive change in society. In securing both the personal and social benefits of liberty, the state can interfere only where the individual's conduct threatens specific, immediate, and tangible harm to others or to the integrity and viability


¹⁰³. E.g., S. Hook, supra note 97, at 38.
of important social institutions. Where the harm is remote and speculative, the state should not interfere with the individual.

A church, then, which claims to recognize the values of a free society should not support laws imposing certain behavior patterns on individuals where the impact on the interests of others or on fundamental institutions is remote and speculative. This distinction between the public and the private is not a well-defined categorical one, but one based on judgment. Moreover, this judgment is one that might legitimately change because of changing social circumstances. Family limitation must surely be a matter for private judgment in an affluent society not pressed by population problems. But in a heavily populated, highly impoverished society, it becomes a matter of serious public concern.

The recent *Griswold* case, which struck down Connecticut’s statute prohibiting the use of contraceptives, is an example of individual freedom prevailing over a regulation which had only a remote and speculative impact on social institutions. This anachronistic legislation was maintained on the books largely because of Roman Catholic opposition to the use of contraceptives. The legislation was struck down not because it violated the establishment clause, but because it violated the right to privacy protected by the due process clause of the Constitution. As Justices Black and Stewart observed in dissent, the constitutional recognition of the right of privacy was a creation of the current members of the Court. It could not be located in any of the specific guarantees of the Bill of Rights. A Court inclined to a more literal and positivist interpretation of written law would not have invalidated the legislation, even though it involved a highly undesirable restriction on individual freedom. If the Court had followed such a conservative course in the *Griswold* case, it would still have behooved churchmen to withdraw their support from these laws.

104. The current controversy taking place in English jurisprudence over the legal enforcement of morals is relevant to this point. In the controversy Professor H.L.A. Hart has taken the position that the state should only enforce criminal sanctions against conduct which harms others in an immediate, tangible, and specific fashion. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963). In opposition, Lord Devlin would apply the state’s coercive powers to maintain society’s basic morality. P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). The position here taken falls somewhere midway between the two, but perhaps leaning more toward Lord Devlin’s approach. An important difference between Devlin’s approach and that suggested here rests on how the legislator should determine what is the “basic” morality to be sustained by the state. Lord Devlin’s test of what is basic depends on public indignation. *Id.* at 22-23. The test here proposed does not turn on how offensive the conduct is to the public, but instead, on how corrosive it is of social institutions that maintain the social fabric and overall ethical direction of a society. Also, the guideline here suggested would be applicable to all governmental action that might be influenced by religious groups, not just the passage and maintenance of criminal sanctions.


106. *Id.* at 527-31 (dissenting opinion).
Despite their own moral judgments on the issue of contraception, their endorsement of the theory of separation of church and state in a free society would have called for such a stance.  

To a large degree, therefore, the matter of drawing lines in this area calls for self-restraint on the part of churches. It requires an honest examination by church leaders of the reasons truly motivating their support of certain public policies. Where conduct is condemned only because it is contrary to religious standards concerning individual perfection and self-fulfillment, churches should refrain from attempting to translate their moral views into law. Thus, an absolute opposition to divorce because God has enjoined that no man shall put the marriage bond asunder should not be a sufficient reason to impose that ethic on non-believers or believers who interpret the biblical injunction differently. Nor should limited grounds for divorce be opposed simply because arguments can be advanced that either the well-being of the children or the continued vitality of marriage as an institution require indissolubility of the marital bond. When the church advancing these arguments also stands firmly against divorce in the case of childless couples and simultaneously recognizes permanent separation between married couples with children, it is clear that its opposition transcends public concerns as here defined. Its opposition to divorce is based on an attempt either to legislate a code of religious morality into law or to protect the institution of marriage in its societal aspects from remote and speculative stresses. 

This is not to say that divorce is solely a matter of private morality. Churches surely are entitled to be heard and to enlist opposition to legislation that would in effect undermine the institution of marriage. But past experience indicates that the institution can survive a fairly liberal divorce law. Thus, many persons who support the institution of a permanent marriage contract for religious and other reasons are ready to recognize divorce in cases where certain social and human values can best be achieved by this means. In light of past experience and

107. Cardinal Cushing of Boston took such a position with regard to efforts to liberalize a Massachusetts statute that prohibited the dissemination of contraceptive devices and information. Although he expressed his personal opinion that contraception was immoral, he pointed out that Catholic legislators need not vote against the proposed changes as a matter of conscience because it would be inappropriate to impose Catholic morality on the entire community. He did indicate that legislators might vote against contraception as a secular evil by stating that he personally might vote against the bill if he were a legislator. Giannella, The Year in Review, in 1965 Religion and the Public Order 362 (D. Giannella ed. 1966).

108. The proposal that marriage be contracted for a specified term of years is one that can appropriately be challenged as destructive of the institution as traditionally known.

the widespread demand for changes in the divorce law to lessen individual hardship without transforming the structure of our society, intransigent opposition to liberalized divorce laws can only be interpreted as an attempt to write a particular theology into law.

What about abortion? Does it involve only a question of private morality? Or does it raise an ethical issue of public concern? In view of our prior discussion, the root issue concerning the value of the human fetus raises on its face an issue of public concern. The determination of this issue is highly important to the resolution of a fundamental question of social justice — the extension of equal protection of the law to the fetus.\footnote{Cf. Miller, supra note 102, at 201.} Only by assuming the resolution of this issue contrary to the claims of the fetus does the problem of abortion become a private one of family morality.

Nor can a religious man be expected to set aside his theological beliefs in approaching this issue. His commitment to equal justice may be based on his religious beliefs in the brotherhood of man. This belief, in turn, may rest on the proposition that man's possession of a soul made in the image of God is the essential bond of brotherhood. For such a person, the key question in fixing the time when the fetus becomes human depends on when it becomes infused with a soul, an issue on which his theological beliefs will be conclusive. It is unrealistic to expect a legislator who holds such beliefs to put them aside because they are contrary to majority sentiment. It is unfair to criticize him for acting on such beliefs while condemning public officials in Nazi Germany or present day South Africa for acquiescing to prevailing racist opinion contrary to the Christian principles they supposedly espouse.

However, the demands of civility in a pluralistic society require that serious efforts be made toward achieving a consensus without compromise of fundamental religious beliefs. Another obligation of civility is that of attempting to relate one's theological presuppositions to the values and attitudes that make up the societal consensus. It is too much to expect a man to leave behind his conscience when he enters public life. It is not too much to expect him to make every attempt to explain and justify his position in norms understandable to his entire constituency. In doing so, he may be forced to restate for himself his theological presuppositions with greater precision as he seeks to relate them to socially established values. As a consequence, he may discern more room for socially desirable compromise than first appeared.

This will be more apt to happen if he considers it his duty to seek accommodations of conflicting viewpoints. Mahatma Gandhi declared
himself to be "a worshipper of the cow," which he regarded "with the same veneration" as he did his mother. Yet he was willing to grant Muslims in India full freedom to slaughter cattle because this would be "indispensable for communal harmony." At first, this seems to be a questionable compromise in which public peace is achieved at the cost of sacrificing the highest human values. Many of the Hindus who continue to insist on governmental bans against the slaughtering of cattle undoubtedly view the matter in this light. But in view of some scholarly interpretations of Hindu writings, Gandhi's position does not appear to involve such a great sacrifice of human and social values. The cow's religious importance for Hindus is primarily symbolic. One commentator has concluded that in the Vedas "there is never . . . a hint that the animal as a species or the cow for its own sake was held sacred and inviolable."

It seems doubtful that a similar compromise is possible on the matter of abortion, although one avenue is perhaps worth further exploration. The religionist's theological beliefs may not fix the time of infusion of the soul. Where this is so, the absolute prohibition against abortion at any time after fertilization may be based upon a conservative prudential judgment. It may reflect the opinion that where the human quality of life is uncertain, one should follow the path of caution and adopt a presumption in favor of the existence of humanity, or that organic life capable of ensoulment is as sacred as fully developed human life. This too appears to be the case with Roman Catholic canon law.

It is possible, therefore, for a religiously committed legislator to feel compelled to follow a rigorous ethic in his private life as far as abortion in the first trimester of pregnancy is concerned but not feel compelled to impose this view on others because he cannot be sure on theological grounds of the humanity of the fetus in this early period.

However, tendencies in modern theological thought are such that the question of the time of ensoulment may not be the critical issue in determining the morality of abortion for the religionist. Instead of trying to place the early fetus in its appropriate rank in the natural and supernatural orders of the theological cosmos, as the mediaevalist would be prone to do, the modern theologian is more apt to ask whether an act destructive of incipient human life so lacks humanity that it is to be always condemned, or restricted to such cases where it serves some very important end. Such a theological approach to abortion is not

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111. Quoted in D. Smith, India as a Secular State 484 (1963).
112. See id. at 483-89.
basically different from the one that we might expect a legislator to take who decides to resolve the question according to our traditional humanitarian ethic, an approach that would not be at all inconsistent with the character of our pluralistic society. A legislator who refuses to budge from his conscientious interpretation of the humanitarian ethic in the area of abortion can hardly be faulted because his views have been nurtured by religious influences and are supported by officials of his church.

V. Conclusion

The problem of abortion is one of those areas of public policy which brings to the surface questions of ultimate concern. Its proper resolution requires a careful definition and explication of the ultimate values of a society. Consequently, in this area, the individual's ethical and religious commitments are clearly germane to the basic commitments he will urge society to undertake. It is both unfair and unrealistic to expect the individual, including the individual legislator, to yield to majority sentiment on such a question or to criticize religious groups for attempting to direct public policy according to what they believe a genuinely humanitarian ethic requires.

At the same time, whenever it is possible to do so, it is most desirable — indeed necessary — to discuss and resolve such basic issues in terms of related fundamental values which lie at the core of our societal consensus rather than in terms of theological beliefs or categories, such as ensoulment, which are not generally shared or appreciated. This paper has attempted to resolve the abortion question in light of our society's commitment to freedom and equality.

I have suggested that a truly humane abortion act would be drawn along the lines of the recently enacted California legislation. Under it the woman would be free to preserve the integrity of her body by securing an abortion necessary to preserve her health or to relieve her from the continuing imposition resulting from a rape. To conform to the rationale herein offered, however, the California therapeutic justification should be interpreted strictly to permit abortion only when the pregnancy or birth threatens the mother's health and not when the prospective burden of caring for the child constitutes the threat.

The California legislation is more restrictive than that which can be properly justified under the rationale here suggested because of that

115. Dr. Jaroslav Pelikan, a Protestant theologian, has taken the position that resort to abortion to solve social problems is contrary to the humanitarian ethic. N.Y. Law Journal, Sept. 8, 1967, at 1, col. 6; cf. Wassmer, Questions about Questions, 86 COMMONWEAL 416 (1967).
state's twenty-week limitation on performance of justifiable abortions. It would appear that this difference is of greater theoretical than practical significance. One would expect that most abortions justified because of rape would be performed in the early months of pregnancy. One would also expect the same to be true of therapeutic abortions since the medical risks of an abortion on a sickly woman at a late stage of pregnancy would tend to negate its benefits. However, this need not always be so, especially if the threatened impairment relates to the woman's mental health, which may become seriously imperilled by continued pregnancy or the experience of giving birth. Similarly, it might be possible that because of excusable ignorance or delay the victim of rape will not seek or will not be able to obtain an abortion prior to the twentieth week. As long as the woman's body suffers from the hostile condition, it would seem appropriate under the analysis here offered that her interest in her bodily integrity should permit her to correct the condition at any stage of the pregnancy. However, termination of a pregnancy by other than a live birth in the case of the viable fetus is very difficult to distinguish from child destruction. Therefore, it would be preferable to place an absolute prohibition on justified abortions after the twenty-sixth week except to protect the life of the mother. Strict adherence to such a standard would severely restrict terminations of late pregnancies for reasons of mental health to those cases where there was clear evidence of suicidal tendencies on the part of the woman.

Finally, I have considered the possibility that in some states public sympathy for liberalized abortion will be so strong that it will be impossible to limit the justifications to the two appropriate categories, as was done in California. I have suggested a compromise which seeks to preserve the essential value of the human fetus while meeting to a very large extent the public demands for a wider concept of therapeutic abortion and the legitimization of eugenic abortion. It would only permit such abortions in the first thirteen weeks on the ground that the abortive act takes on a different quality after that point. Prior to that time abortion can be regarded as the destruction of an organism which is striving to develop the form of a human being; after that time abortion should be regarded as the destruction of an identifiable human organism striving to realize its potential as a human being, just as infants — and the rest of us — strive to do.