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Chapter 8

The Concept of Person in the Law

Charles H. Baron

The focus of the abortion debate in the United States tends to be on whether and at what stage a fetus is a person. I believe this tendency has been unfortunate and counterproductive. Instead of advancing dialogue between opposing sides, such a focus seems to have stunted it, leaving advocates in the sort of “I did not!” – “You did too!” impasse we remember from childhood. Also reminiscent of that childhood scene has been the vain attempt to break the impasse by appeal to a higher authority. Thus, the pro-choice forces hoped they had proved the pro-life forces “wrong” by having had the Supreme Court of the United States decide in Roe v. Wade\(^1\) that a fetus is not a person for purposes of the Fourteenth Amendment. Now the pro-life forces are trying to prove the pro-choice forces “wrong” by passing legislation or a Constitutional Amendment\(^2\) that declares a fetus to be a person after all! I believe that there is a better, more productive way to approach the abortion debate, and that is the way the law has historically approached the concept of person.

However, before I examine the law’s approach to personhood, I want to explore briefly some likely sources of the tendency to focus the abortion debate on the issue of whether the fetus is a person. One source, clearly, arises from the simple social-psychological fact that people – at least, people in today’s civilized society – tend to believe that personhood brings with it a certain basic entitlement to life. This is likely to be less true in societies whose members do not perceive a clear difference between human and nonhuman things. Tribes which confer souls – and therefore a kind of personhood – on animals, trees, streams, and so forth, must be very used to the notion that personhood does not protect such “persons” from being eaten, felled, or drunk from. Therefore, it may be an easy step for them to accept such exploitation of human persons as well. Both types of person may be entitled to respect, apology, and remorse, but both may be seen as naturally subject to exploitation when necessity dictates.\(^3\) However, in a modern, humanistic society such as ours, a clearer dichotomy is established. In one camp are objects or entities inferior to persons and subject to their exploitation without respect,

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

\(^2\) Examples are S.158, 97\(^\text{th}\) Cong., 1\(^\text{st}\) Sess. (1981); S.J. Res.110, 97\(^\text{th}\) Cong. 1\(^\text{st}\) Sess. (1981).

\(^3\) For evidence of a renaissance of such attitudes in our civilized society, see (T. Regan and P. Singer, eds.), ANIMAL RIGHTS AND HUMAN OBLIGATIONS (1976) and Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, SOUTHERN CALIFORNIA LAW REVIEW 45:450 (1972).
apology, or remorse. In the other are persons, superior beings entitled (at least in theory) to being treated as ends in themselves and not merely as means for achieving other ends.\textsuperscript{4} Against such a social-psychological background, it is easy to see why the abortion battle would seem to hinge on the issue of the fetus’ personhood. For one thing, natural predilection would lead people to think in personhood terms. For another, advocates for the opposed positions would assume that the debate could be won or lost in these terms, and they would present arguments and evidence designed to increase or diminish the degree of empathy felt for the fetus. Thus, some pro-choice activists attempt to win acceptance of the view that the fetus is merely “a clump of tissue” that may become inimical to the mother’s health or life and, under those circumstances, subject to removal without compunction like any other malignancy. In opposition, many pro-life activists refer to the fetus as an “infant” or “child” and draw attention to how human it begins to look and act at early stages of development.\textsuperscript{5} Of course, such efforts to win humane

\textsuperscript{4} The reference is, of course, to Kant’s second formulation of his categorical imperative: “So act to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means.” Of it, one commentator has said:

 Strictly speaking, this formula, like all others, should cover rational beings as such; but since the only rational beings with whom we are acquainted are men, we are bidden to respect men as men, or men as rational beings. This is implied in the use of the term ‘humanity’ – the essential human characteristic of possessing reason, and in particular of possessing a rational will. It is in virtue of this characteristic that we are bound to treat ourselves and others, never simply as a means, but always at the same time as ends.

H.J. PATON, THE CATEGORICAL IMPERATIVE; A STUDY IN KANT’S MORAL PHILOSOPHY (1947) at 165.

\textsuperscript{5} As two samples from this widespread genre of debate, consider the following:

 Is this human life? This is the question that must first be considered, pondered, discussed, and finally answered. It cannot be brushed aside or ignored. It must be faced and honestly met. Upon its answer hinges the entire abortion question, as all other considerations pale to insignificance when compared with it. In a sense nothing else really matters. If what is growing within the mother is not human life, is just a piece of meat, a glob of protoplasm, then it deserves no respect or consideration at all, and the only valid concern is the mother’s physical and mental health, her social wee-being, and at times even her convenience.

 But if this growing being is a human being, then we are in an entirely different situation. If human, he or she must be granted the same dignity and protection of life, health, and well-being that our western civilization has always granted to every other human person.

J.C. WILLKE, HANDBOOK ON ABORTION (1973) at 4.

In newspaper advertisements and direct-mail fund-raising appeals, [the pro-choice groups] stressed that the [human life] amendment (HLA) would affect not only a woman’s right to abortion, but to certain forms of birth control as well. The response of the National Right to Life Committee (NRLC) to these onslaughts was mildly schizophrenic.

In his eagerness to dispute the charge that the NRLC was anti-birth control, Bopp was clearly willing to sacrifice millions of fertilized eggs – Dr. Willke’s “tiny boys or girls.” Under Bopp’s interpretation of the HLA, an abortifacient drug or device would be acceptable as long as its action occurred before pregnancy could be detected. The deaths of millions of zygote-people would be acceptable as long as nobody knew when they were killed. Thus, in Bopp’s analysis, the notion that a fertilized egg deserves equal protection under the law breaks down completely.

Those who pledge allegiance to the wording of the human life amendment live in a surreal kingdom where the truths and everyday assumptions of life are harsh and demanding. In this kingdom, the life of a zygote produced in a mental institution by a paranoid schizophrenic man and a congenitally incompetent woman is sacred. So is the zygote inside the high school girl gang-raped by twelve college fraternity men, any one of whom could be the father. So is the zygote with Tay-Sachs disease, doomed to die after four years of suffering.

treatment through empathy do not begin with the abortion controversy. A classic example is Shylock’s speech in *The Merchant of Venice*:

[Antonio] hath disgraced me, and hindered me half a million, laughed at my losses, mocked at my gains, cooled my friends, heated mine enemies; and what’s his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? if you poison us, do we not die? And if you wrong us, shall we not revenge?6

As we know, this appeal for empathy gained Shylock no advantage,7 and history should teach us that such appeals have failed repeatedly to guarantee humane treatment even for human beings. As Sissela Bok has pointed out, “Slavery, witch-hunts, and wars have all been justified by their perpetrators on the ground that they thought their victims to be less than fully human.8 This is not to say that the argument from empathy is pointless. In close cases, the force of such empathy may carry the day and it ought always to have the virtue of making the perpetrators feel some limiting moral discomfort. However, it ought to be clear that we are perfectly capable of refusing to grant personhood on the basis of empathy where the status would seem to exact a result which we are unwilling to accept. Rather than serving as a criterion for decision making, the ascription of personhood may well be a way of announcing a decision, based on other grounds, to treat something the way we would a person.

A second reason that the abortion controversy has focused on the issue of personhood is that some participants seem to believe that it is simply true that the fetus is a person and therefore entitled to a live birth. This is, of course, an article of faith of the Roman Catholic Church and, perhaps, of some other religious groups.9 However, in a pluralistic, democratic society such as ours, it is hard to justify imposing the revealed truths of a religious group upon the whole of that society. It is, therefore, to the credit of the pro-life movement that it has largely avoided basing its position on the ground of revealed religious truth. A great many Catholics have opposed recriminalizing abortion because they do not wish to impose their moral views on others,10 while proponents of

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7 Immediately after hearing the speech, Salanio says to Salerio of the entrance of Tubal: “Here comes another of the tribe: a third cannot be matched, unless the devil himself turn Jew.”Id. at lines 83-85. Perhaps a half dozen times in the play, Shylock is referred to by name. Otherwise he is always referred to and addressed as “Jew.” Incredibly, this holds true even for the man who placed the speech in Shylock’s mouth. Thus, Shakespeare begins Act II, Scene Five, for example, with the stage direction: “Enter Jew and his man that was the Clown.”
10 One recent public opinion poll revealed that, while 65 percent of the Catholic women polled believed that abortion was “morally wrong,” 61 percent of them believed that the law should not prohibit abortion.
recriminalizing abortion have attempted to substitute science for religion as the source of the truth that justifies their position. “Present-day scientific evidence indicates that a human being exists from conception,” reads one pro-life bill which has been proposed in the effort to undo Roe v. Wade.11 “The Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception,” reads another.12 Yet, many scientists modestly and, I believe, quite properly refuse to accept the responsibility to decide a question that is not one of objective science.13 Biologist John Biggers has said, “The abortion controversy does involve real and substantial moral issues, for which there seem to be no simple solutions, but by asking precisely when a human life begins, Congress is turning away from these profound and serious problems and raising instead a question that is fundamentally absurd – even meaningless.”14 Hence, science is likely to fare no better than religion as an acceptable basis of objectively deciding whether or not the fetus is a person.

A third and more immediate source of the focus upon personhood in discussing abortion is a legal one. Both the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution apply to, and only to, “persons.”15 As a result, when the Supreme Court decided Roe v. Wade, the Justices thought they had to grapple with the question of whether the fetus was a person for Fourteenth Amendment purposes. Justice Blackmun, in speaking for the Court, assumed that if the appellee’s “suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”16 In dealing with the question, the Court purported to avoid looking beyond the four corners of the Constitution itself. The Court explicitly rejected the appellee’s invitation to do this, saying; “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”17 The appellee had conceded that it could find no legal precedent holding that a fetus was a person within the meaning of the Fourteenth Amendment. The Court was presented with a momentous question of first impression, and incredibly, it chose to

14 Biggers, supra note 11.
15 Section 1 of the fourteenth amendment reads in its entirety:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
16 410 U.S. at 156-157.
17 Id. at 159.
answer by merely listing the various places where the word “person” appears in the Constitution, concluding:

[I]n nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.

All this, together with our observation, supra, that throughout the major portion of the nineteenth century prevailing legal abortion practices were far freer than they are today, persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.¹⁸

Happily, the Court’s seemingly wooden approach to the concept of personhood in Roe v. Wade does not typify the approach to that concept in the law generally. The more typical approach—which I want to recommend as a model for helping us out of the rut in which we find ourselves on the matter of abortion—is characterized by flexibility, pragmatism, and common sense.

CORPORATIONS AND SLAVES AS LEGAL PERSONS

Somewhat paradoxically, one of the best examples of the more typical approach of the law to the concept of personhood is provided by a series of earlier Supreme Court decisions. These are the cases in which the Court decided that, as least for some purposes, a corporation is to be considered a person. Of course, the Constitution does not explicitly speak of corporations any more than it does of fetuses. Nonetheless, in a series of decisions rendered in the late nineteenth century,¹⁹ the Supreme Court held that corporations were to be considered “persons” coming under the protection of various provisions of the Constitution—including the Fourteenth Amendment. Thus, by 1898, the Court could observe in one such case that it had become “well settled” that corporations are persons within the meaning of the equal protection clause of the Fourteenth Amendment.²⁰ And although it was not until the twentieth century that the Court granted due process protection to the liberty interest of corporations,²¹ it recognized corporations as persons under the due process clause of the Fourteenth Amendment for the purpose of protecting their property interests as early as 1886.²² Moreover, the Court has interpreted the word “person” to include corporations when it is used in a great variety of federal

¹⁸ Id. at 158-159 (footnotes omitted).
²² Santa Clara County v. Southern P.R. CO., supra note 19.
statutes, such as early bankruptcy laws, the federal criminal codes, the Federal Power Act, and the Internal Revenue Code.\textsuperscript{23}

Why has the Court done this? Is it because the members of the Court have adopted some theory that ensoulment occurs at the moment of incorporation? Is it because they were shown ultrasound images of a corporation that revealed a startlingly human form? Of course not. The real basis, even though the Court may not always be so clear about it, is in the social consequences foreseen as the result of a failure to apply the particular law to corporations. Where those consequences are judged untoward—perhaps because they seem inconsistent with the presumed intent of the law—the Court will interpret the word “person” to include corporations. Where they are not, the Court will not. Thus, a corporation may be a person for some purposes under the Constitution, and it may not be a person for others.

One can see why it would be sensible to accord personhood to corporations for purposes of the equal protection clause. Not all corporations are enormous, wealthy, and powerful, and even the most powerful may be subject to state regulation that we would think arbitrary, irrational or invidiously discriminatory\textsuperscript{24} if it were applied to an individual human being. But then, corporations comprise human beings; when you scratch a corporation, it is human beings who bleed. How are we to protect these human beings from being unconstitutionally injured through the treatment accorded their corporation? We could, of course, just grant each human being a separate claim against the state—refusing to recognize a claim brought by the corporation since the equal protection clause speaks only of “persons.” However, forcing each shareholder, officer, or employee to bring a separate lawsuit based upon a discrete interest in the corporation is manifestly inefficient and fraught with potential for producing incongruous and unfair results. Allowing the corporation to bring one suit seems to make much more sense, even though that may mean according it its own rights under the Constitution, and that, in turn, may mean calling it a “person,” at least for these narrow purposes.

On the other hand, a glance at the consequences may lead the courts to decide that, for other purposes, a corporation is not a person. This has, for example, been the position of the federal courts with respect to the Fifth Amendment guarantee that “[n]o person…shall be compelled in any criminal case to be a witness against himself.”\textsuperscript{25} In this context, it has been held that a corporation is not a person and that, therefore, it may be forced to provide information incriminating to itself.\textsuperscript{26} How can this be? Can it be consistent with the cases holding that a corporation is a person for purposes of the Fourteenth Amendment? It can be if one is less concerned with the words used by the framers of the Constitution than with the consequences one believes its various provision are supposed to protect against. Assuming that the right against self-incrimination was designed to avoid the disquieting spectacle of forcing a criminal case out of the mouth of the accused—to insulate our developing democracy from the devices of torture which had

\textsuperscript{23} See Annot., 56 L. Ed. 2d Ed. 2d 895, 899-900 (1979).

\textsuperscript{24} This is the language used to express the outside limits of the protections of the Fourteenth Amendment. As a minimum, all persons are entitled to such protection with respect to the exercise of any rights. Where “fundamental” rights are involved or special burdens are placed upon persons who belong to “suspect classification,” more strict limits are theoretically placed upon state action. See L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) at 1000-1002.

\textsuperscript{25} U.S. Const. amend.V.

been central to the armory of the government prosecutor in the old world—it may make sense not to extend that right to corporations as such.\textsuperscript{27} After all, it is not the corporation that is being forced to testify against itself. Some individual representing the corporation is being forced to give up papers or testify against the corporation, and that individual is frequently someone who is not subject to the burden of the criminal sanctions involved. It may be that only the corporation will be subject to criminal liability in the form of a fine. And even if some human being may ultimately have to pay a fine or be imprisoned, it may be a person other than the individual who is being forced to supply the evidence. However, in the case where the potential bearer of sanctions is the same person from whom evidence is sought, he or she can be amply protected by exercising his or her own right against self-incrimination. There is no need to protect this individual by extending the constitutional right to the corporation.\textsuperscript{28}

Justice Holmes once observed: “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”\textsuperscript{29} The enterprise of the law is dedicated to goals other than the compilation of a simple dictionary. In that enterprise, words serve as the imperfect medium through which our legal institutions attempt to carry on the business of ordering our society. Where the words employed in a given context and the meanings they may have from outside the law conflict with some important goal of social ordering, it is likely to be the words and those meanings that will be made to give way. Hence, a corporation—which seems very unlike what we would normally call a “person” outside the law—becomes a person, at least for some purposes. And for certain purposes the law is just as capable of treating as nonpersons classes of individuals we would intuitively regard as persons.

Perhaps the most stark example in American law of the latter phenomenon is the status accorded blacks during the Slavery era. Although the legal context of slavery did not require the Supreme Court to wrestle with the question of whether or not a slave was a person, the Court did find itself compelled to resolve the question of whether or not a slave could ever become a “citizen” capable of asserting a claim in federal court. In the notorious case of \textit{Dred Scott v. Sandford},\textsuperscript{30} Chief Justice Taney concluded that the answer was clearly no:

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and

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\begin{itemize}
\item[27] For support for this theory behind the privilege against self-incrimination, see E.GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).
\item[28] Individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.
United States v. White, 322 U.S. at 699.
\item[30] 60 U.S. 393 (1857).
\end{itemize}
a constituent member of this sovereignty. The question before us is, whether [negroes of African descent, whose ancestors were of pure African blood and brought into this country and sold as slaves] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.  

As the Chief Justice knew, “those who held the power and the Government” had not chosen to grant a good deal to their slaves by way of rights and privileges. And yet, state law had dealt with slaves in much the sort of flexible and pragmatic way in which the courts have dealt with corporations. Thus, although slaves were considered to be the property of their masters—sometimes real property and sometimes personal property— “[t]he master’s property in his slave was sui generis, the slave being considered in the law in many respects in the light of a human being entitled to the law’s protection.” Slaves were entitled to the protection of the criminal law, but not to the same extent as whites. And not surprisingly:

Slaves were treated as persons by the criminal law, and were legally punishable for their crimes. Slaves were punishable for assault and battery, larceny, mayhem, rape, and homicide…. [T]he slave undoubtedly had the natural right of self-preservation or self—defense, although certain facts which as between whites might excuse or mitigate the offense did not so operate in the case of slaves….

Dark and repulsive as the mirror may be, we here seem to have the mirror image of the phenomenon we saw with respect to corporations. Despite the prima facie entitlement of blacks to personhood, the law under a regime of slavery was capable of treating them as persons for some purposes and property for others.

THE UNBORN AND THE COMMON LAW

When we move to the issue of the status of the unborn, we find the law generally evidencing the same sort of flexibility and pragmatism in ascribing personhood. For some purposes, the fetus is a person. For some, it is not. The stage at which it is granted personhood varies from one area of the law to another. Thus, the common law of crimes did not recognize the killing of an unborn child as homicide, and the rule in the majority

31 Id. at 404-05.
33 Id. at 1320.
34 8- C.J.S. Slaves, § 8 (1953).
35 Id. at 1325-26.
of American jurisdictions continues to be “that there is no homicide of any grade unless
the deceased had been born alive.”36 Inducing an abortion was, at common law, a
separate crime of only misdemeanor status. It could be committed only upon a fetus
which was “quick,” that is, one that had already displayed independent movement within
the mother—a phenomenon which generally begins somewhere between the sixteenth
and eighteenth week of pregnancy.37 At the opposite extreme is the treatment accorded
the fetus by the law of property. For purposes of the law of inheritance of real property, a
child has been considered to be a person eligible to inherit at the moment he or she is
conceived, although this property interest has been held subject to defeasance if the child
has not subsequently been born alive.38 How can this apparent inconsistency in the law be
justified? The justification is a function of the different social policies being advanced by
different areas of the law. Prime among the goals of the laws of inheritance is fulfillment
of the presumed intentions of the testator. Thus, where a will or the laws of inheritance
specify that property shall be inherited by one’s child or children, it is presumed that the
deceased would have wanted any of his children born subsequent to his death to inherit,
even if he did not know of the child’s impending existence at the time that he died.39 In
order to assure this consequence, the law confers on the child at the time of conception a
type of personhood in which the inheritance can vest if the parent dies prior to birth. On
the other hand, the criminal law has different goals. Basic to these is preserving the
public peace by publicly punishing those who threaten that peace with acts that society
considers to be blameworthy.40 Clearly, treatment afforded the unborn by the common

36 R.M. PERKINS, CRIMINAL LAW (2d ed. 1969) at 29.
37 Id. at 140.
38 See Annot., 50 A.L.R. 619 (1927).
39 See Shaw, M., Damme, C., Legal Status of the Fetus in GENETICS AND THE LAW, (A. Milunsky and
40 Despite pious pronouncements to the contrary, blameworthiness (rather than deterrence or reform) still
seems to play the central role in the criminal law. As proof, consider the terms in which debate over the
insanity defense is conducted:

Joseph Weintraub, C.J.:….My thesis is that insanity should have nothing to do with the
adjudication of guilt but rather should bear upon the disposition of the offender after conviction….

I think we all agree that society must be protected from hostile acts and when a forbidden act is
done, it must be adjudged that the accused committed it before he may be deprived of his liberty.
And so the issue is, shall we employ a criminal process or a civil process to determine that he did
the act and to determine society’s right to commit him, and as long as we have two processes
which may be employed to deal custodially with antisocial conduct, one criminal and the other
civil, the test for their application must be blameworthiness or the nonexistence of
blameworthiness in a very personal sense….No definition of criminal responsibility and hence of
legal insanity can be valid unless it truthfully separates the man who is personally blameworthy
for his makeup from the man who is not, and I submit to you that there is just no basis in
psychiatry to make a differentiation between the two.

Professor Herbert Wechsler….Chief Justice Weintraub has…ventured the suggestion that the
whole effort to develop a criterion for determining criminal responsibility as affected by mental
disease or defect is a misguided effort….I think it is not a misguided effort. It rests not only on the
universal experience of all modern legal systems but I’m tempted to say of all civilized legal
systems….

It is a very important thing for all of us to know that if we should be afflicted and the course of
affliction should be the physical agent of harm to others, that the legal system will conduct an
inquiry in which the nature of that affliction can be adduced for an estimate of its bearing on
blameworthiness in the ordinary sense
law of crimes reflects a judgment that the society of the time considered the killing of a fetus to be less blameworthy than the killing of a man, and the killing of a fetus that had not yet displayed a separate personality within the mother to be less blameworthy than the killing of one which had.

In the law of torts, we can see even more clearly the interrelationship between social engineering and ontology. Here, where the question is usually whether money damages are to be awarded a plaintiff for injuries caused by the fault of the defendant, the law was very slow to recognize a cause of action on behalf of an injured fetus. Prior to 1946, there were substantially no cases allowing damages to the child born deformed as a result of injuries sustained while en ventre sa mere.41 A fortiori, the courts denied recovery in wrongful death to the child that was stillborn or aborted as a result of such injuries.42 Among the grounds given for such decision by the courts was “that the defendant could owe no duty of conduct to a person who was not in existence at the time of his action.” 43 In 1946 with the District of Columbia decision of Bonbrest v. Kotz,44 the tide turned with stunning force. As Professor Prosser observed in 1969, that case and its sequel

brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts. The child, if he is born alive, is [now] permitted to maintain an action for the consequences of prenatal injuries, and if he dies of injuries after birth an action will lie for his wrongful death. So rapid has been the overturn that after the lapse of a scant 23 years from the beginning, it is now apparently literally true that there is no authority left still supporting the older rule. The last jurisdiction to overrule it was Texas, in 1967.45

The process of undoing the earlier rule continues to the present. Thus, as Prosser additionally noted, there was in 1969 still substantial resistance to allowing recovery for injuries sustained prior to viability or at least quickening.46 There was also resistance to allowing recovery in wrongful death for the child that was not initially born alive;47 however, since 1969, courts have increasingly recognized a right to sue in wrongful death on behalf of a stillborn.48 Courts have also recognized rights to sue for injuries sustained at any time after conception and, in some cases, before.49 Thus, in the 1977 case of Renslow v. Mennonite Hospital, the court allowed recovery to an infant for injuries it sustained from the mother’s Rh-negative blood having been sensitized many years before with negligently administered Rh-positive blood by way of transfusion. The court stated:

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41 W.L. PROSSER, LAW OF TORTS (4th ed. 1971) at 335.
42 Id. at n.14.
43 Id. at 335.
45 PROSSER, supra note 41, at 336.
46 Id. at 337.
47 Id. at 338.
The cases allowing relief to an infant for injuries incurred in its previable state make it clear that a defendant may be held liable to a person whose existence was not apparent at the time of his act. We therefore find it illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child unbeknownst to him, been conceived prior to his act. We believe that there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child’s mother.\(^{50}\)

We seem to have reached a point where personhood, for purposes of at least some torts, may be said to begin before conception!

What was the basis for this revolution in the law of torts? Once again, the reasons seem very practical. It was based upon changes of the last several decades in both the facts and values which related to this area of the law. The law of torts is characterized by a concern both for encouraging people to take due care not to harm others and for attempting to “make whole” (through money damages) people who do suffer harm at the hands of others. Because of the increasing availability and acceptance of insurance as a way of covering tort liability and as a regular “cost of doing business,” the courts have tended more and more to concentrate on the goal of compensating hapless victims of injury and have worried less and less about whether it could be said that the particular defendant was at fault.\(^{51}\) It seems clear that the early reluctance to recognize a cause of action on the part of the injured fetus was motivated by concern with the unfairness that might be done a particular defendant in an area where the question of whether the defendant’s acts caused the fetus’ injuries was not subject to solid scientific answer.\(^{52}\) But the last few decades have seen such spectacular improvements in the field of perinatology that questions of causation are no longer speculative in most cases.\(^{53}\) When this development is combined with the trend toward lessened concern for the blameworthiness of the defendant, the case for allowing recovery for the prenatally injured child becomes compelling.

Other examples, from more obscure areas of the law, could be drawn upon to illustrate and confirm the fact that the law has been largely willing to confer personhood upon the unborn when solid policy considerations have suggested that course. Like many other lawyers, I have represented, by court appointment, “unborn persons” whose interests in the disposition of the money in a trust might be adversely affected by a court’s approval of actions that have been taken by the trustee.\(^{54}\) In other situations as well,\(^{55}\) courts have not balked at appointing counsel for unborn clients when they

\(^{50}\) Renslow, supra note 49, at 1255.  
^{51} PROSSER, supra note 41, at 22.  
^{52} Id. at 335.  
^{54} See MASS.GEN.LAWS ANN. c.203, § 17 and c.206, § 24.  
^{55} For example, I was appointed counsel for a fetus in one case where a maternal grandmother sought authority to consent to an abortion for her daughter who was a long-term inmate of a mental institution. Out of an abundance of caution, the judge wanted the record to reflect advocacy for the fetus in addition to that which was provided for the mother. Ultimately, the court decided that, though mentally ill, the mother should be allowed to refuse an abortion since she was not proved to be incompetent to make that decision. In re Culcotta, Middlesex Probate No. 522761 (Mass., November 19, 1979).
believed that fair procedure required it. Additional instances are plentiful, and they are not all of recent vintage. As one English judge observed of the fetus in 1798:

Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.\(^{56}\)

THE UNBORN AND THE CONSTITUTION

In light of all this, what are we to make of the decision in \textit{Roe v. Wade} that a fetus is not to be considered a person for purposes of the United States Constitution? From all that has been said, it should now be clear that the key to the decision is in the following language from the Court’s opinion:

The detriment that the state would impose upon the pregnant woman by denying [the abortion] choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to dare for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.\(^{57}\)

Clearly, the Court decided to deny personhood to the fetus for purposes of the Fourteenth Amendment because it thought it had solid social policy grounds for doing so. In order to avoid denying to the mother altogether the right to take the life of the fetus through termination of pregnancy, it thought it had to refuse to confer upon the fetus any rights under the Constitution and, at the same time, to recognize in the mother a “right to privacy” that the state could regulate only to the extent that it could show a “compelling interest” for doing so.\(^{58}\) However, in my opinion, the Court was mistaken and misguided in so concluding.

First, the Court was in error in assuming that the mother would be denied the abortion choice altogether if it held that a fetus was a person for the purposes of the Fourteenth Amendment. The Fourteenth Amendment regulates only “state action”; it does not regulate the action of individuals unless their activity can be linked with that of a state in one or more well-recognized ways.\(^{59}\) Therefore, a woman who poisons her five-year-old child does not violate the Fourteenth Amendment—although she is most likely to have violated the homicide laws of her state. How, then, did the Court think the

\(^{56}\) Thellusson v. Woodford, 31 Eng.Rep. 177, 163 (1798) (Buller, J).
\(^{57}\) 410 U.S. at 153.
\(^{58}\) \textit{Id.} at 156-69.
\(^{59}\) See TRIBE, \textit{supra} note 24, at 1147-74.
Fourteenth Amendment might protect fetuses (considered as persons) from mothers who wished an abortion? The thought must have been⁶⁰ that the state would have to treat fetuses the same way it treated five-year-olds. If the state did not prosecute mothers for homicide of fetuses under the same circumstances and to the same extent as it did for homicide of five-year-olds, the state would be found to have violated the Fourteenth Amendment. Thus, mothers securing abortions would have to be treated as murderers under state law.

But the Court’s implicit reasoning is simplistic. Not considered, among other things, is the fact that the Fourteenth Amendment permits the state to treat different classes of persons differently if a sufficiently rational and legitimate state ground can be given for so doing.⁶¹ Even if the Court felt compelled to accord fetus-persons a specially protected “suspect classification” status, differing treatment could be justified by a state ground found to be (as protection of the life or health of the mother might) a “compelling state interest.”⁶² Moreover, the state might protect the mother’s interests without even resorting to treating the fetus differently from other person. The defense of self-defense is available in prosecutions for homicide generally. Of course such a defense to an abortion would cover only the case where the mother’s bodily safety was at stake, and self-defense is usually available only where the deceased is thought responsible for some act that threatens that safety.⁶³ However, it does not seem to me intuitively obvious that it would be unconstitutional for a state to extend the availability of self-defense beyond traditional bounds. Moreover, the state need not do so. A better, though somewhat less established,⁶⁴ defense to homicide is already available—the defense of “necessity” or “choice of evils”:

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils; either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is justified in violating it. Under such circumstances he is said to have the defense of necessity, and he is not guilty of the crime in question—unless, perhaps, he was at fault in bringing

⁶⁰ The Court never makes its reasoning in this regard explicit, but it is suggested in the following: When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other state are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art.1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother’s condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment’s command? Roe v. Wade, supra note 1, at 157-158, n.54.

⁶¹ NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW (1978) at 519-522.

⁶² Id. at 522-27.

⁶³ See LAFAVE & SCOTT, CRIMINAL LAW (1972) § 53.

⁶⁴ “While the point has not been free from controversy, it seems clear that necessity has standing as a common-law defense; such issue as there is relates to its definition and extent. The decisions, however, have been rare and legislative formulations most infrequent....”
about the emergency situation, in which case he may be guilty of a crime of which that fault is an element.\textsuperscript{65}

If such a defense can constitutionally justify homicide of the born, it ought constitutionally to justify homicide of the unborn as well. And it does not seem obvious to me that the state would act unconstitutionally if it were to eliminate or dilute the "emergency" requirement\textsuperscript{66} or make specific provision for the weighing of evils involved in an abortion.\textsuperscript{67}

Second, the Court cannot seriously mean that it is unwilling to treat the fetus as a person for all purposes under the Fourteenth Amendment. Suppose a state statute provided that damages were recoverable in tort to compensate for death or injury caused by prenatal injury to a fetus, except where that fetus was nonwhite. Could the Supreme Court hold other than that such a statute was flagrantly in violation of the Fourteenth Amendment’s equal protection clause? If you are tempted to resort to the ploy of suggesting that it is the right of the nonwhite parents of the fetus to recover damages that the court would be protecting, consider another case. Suppose a state program paid fees to mothers planning an abortion who agreed to allow experimentation on the fetus prior to and after the abortion—but only if the fetus is nonwhite. Should not such a statute be held violative of the Fourteenth Amendment? Would it be because mothers of white fetuses were being cheated of similar benefits? Or would it be because we believed nonwhite fetuses were being treated in a fashion which smacked of “invidious discrimination?”

Unfortunately, cases not unlike my hypotheticals have already come before the lower federal courts, and anomalous results have been produced by the Court’s overbroad holding in \textit{Roe v. Wade}. Several times since \textit{Roe}, the question has been raised of whether

\textsuperscript{65} LAFAVE & SCOTT, \textit{supra} note 63, at 381..
\textsuperscript{66} Indeed, the Model Penal Code eliminates the “emergency” requirement altogether:

Section 3.02 \textit{Justification Generally: Choice of Evils} (1) Conduct which the actor believes to be necessary to avoid harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harm or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE \textsection{} 3.02 (Proposed Official Draft 1962).
\textsuperscript{67} LaFave and Scott see the abortion laws prior to \textit{Roe} v. Wade as having made just such specific provision:

The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs. Thus the legislature might, in its abortion state, expressly provide that the crime is not committed if the abortion is performed to save the mother’s life; under such a statute there would be no need for courts to speculate about the relative value of preserving the fetus and safeguarding the mother’s life.

LAFAVE & SCOTT, \textit{supra} note 63, at 382.
A fetus is a person for purposes of an action in tort under the federal Civil Rights Act.\(^{68}\) In every case but one, \(^{69}\) the answer has been no. Thus, in the recent case of *Harman v. Daniels*,\(^{70}\) a mother and her infant child brought suit against a police officer who had allegedly injured them both in violation of the Civil Rights Act. The infant claimed that she was assaulted by the defendant officer when he allegedly struck her mother in the stomach. Sarah Beth Harman was *in utero* at the time of the alleged assault. Allegedly, she received major injuries as a result of the attack and suffered severe complications at birth which required substantial medical treatment and which will require continued medical care. It is claimed that the defendant knew that Ms. Harman was pregnant when he struck her and that he failed to seek immediate medical assistance for Ms. Harman once she developed severe stomach pains from the alleged blow to her abdomen.\(^{71}\)

As we have seen, and as the court noted,\(^{72}\) such a claim could be brought on behalf of a prenatally injured child under modern state law. However, while recognizing a federal Civil Rights Act claim for Ms. Harman, the court refused to recognize such a claim for Sarah Beth. As its reason, the court cited an earlier federal decision where it was state:

> Roe v. Wade, supra, persuades this court that an unborn child is not included among persons who are entitled to relief under this Act. The Supreme Court states at page 158: All this...persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn....”

> It necessarily follows that if an unborn is not a person under the Fourteenth Amendment an unborn has no right of action under [the Civil Rights Act] and this claim must fall.\(^{73}\)

“In effect,” the *Harman* court concluded, “fetal life has no constitutional rights or protection.”\(^{74}\)

Third, in dealing with the abortion controversy by means of a holding that the fetus is not a person under the Fourteenth Amendment, the Supreme Court masked the real and substantial choice-of-evils problem with which abortion confronts our society and forced the controversy into an all-or-nothing posture that rigidifies positions and blocks the normal legal processes for reaching accommodation between conflicting interests. Whether or not the fetus is called a “person,” one cannot escape the sense that its potential for a future life as a person creates problems for the abortion decision that any society ignores at its peril. After all, if any one of us is killed, what is the loss to us?

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\(^{71}\) *Id.* at 799.

\(^{72}\) *Id.* at 802.

\(^{73}\) Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D.Fla. 1974), *aff’d in part and remanded*, 516 F.2d 898 (5th Cir.1975)

\(^{74}\) Harman v. Daniels, *supra* note 70, at 800.
Assume that someone has determined to away with you in a quick and humane fashion, for example, by means of some instantly effective poison gas under circumstances where you experience not even a moment’s anxiety or agony. All you would suffer under such circumstances is the loss of your future life as a person. If this is a loss that our society feels it can visit on fetuses without compunction, what prevents if from being visited on you without compunction? Indeed, why is it not more justifiable in your case than it would be in the case of the fetus? Presumably the average fetus has more future life as a person to lose than you do. But this “slippery slope” rests on a seesaw. It is capable of carrying us backward as well as forward—and producing a *reductio ad absurdum*. For if potential future life as a person is the critical loss incurred, the zygote that is never brought into being suffers that damage as well. Let us call such a potential zygote a “spegg” (that is, a possible combination of sperm and egg). If we may not without compunction deny future life as a person to the born and to the unborn-but-conceived, how can we deny it without compunction to the unconceived spegg? Do we, then, have a duty to realize the conception potential of as many speggs as possible? Of course we could not accept such a duty since it would mean species suicide. Even if we restricted ourselves to old fashioned methods of *in vivo* conception and gestation, we would light the fuse on a population bomb that would devastate our planet.

One way off this seesaw is to recognize that more weighs in the balance here than just the stage of development of the potential life involved. On the same side of the balance, there is the matter of how long a potential life is at stake. The anencephalic fetus can expect no future life outside its mother. The fetus with Tay-Sachs disease can expect only a few years. There is also the matter of what the potential life is likely to be worth to the fetus. Is the short life of sickness and gradual decline of the Tay-Sachs child better than no life at all? On the other side of the balance are the interests of the mother, the other members of her family, the other fetuses she might conceive if this one were aborted, and society as a whole. Is the mother likely to die in childbirth or has she just decided that the child would be born at an inopportune time? Is the family threatened with being sapped of emotional, physical, and financial strength by the addition of a severely disabled child or have the parents just decided that they would prefer a child of a sex different than that of the fetus/ Do the parents plan other children that they will not have if they are forced to devote all of their resources to raising a severely disabled child? And, perhaps most important, what stake do the rest of us in society have in the outcome of the particular decision? In most cases, the benefit or detriment to society of the particular birth will be insignificant. But patterns and principles that may be produced by many such decisions hold the potential for societal impact of great significance. From the point of view of economics and eugenics, we may not only want to permit therapeutic abortion, we may want to encourage it. From the point of view of preserving a societal attitude of respect for human life, we may want not only to discourage abortion, we may want to forbid it. From the point of view of preserving personal autonomy, we may want not only to leave the choice to the mother, but to provide her with support and protection in exercising that choice.

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75 If the notion of according personhood to the spegg for these purposes seems outlandish, recall the fact that the law has done just this for other purposes in preconception tort cases such as Renslow V. Mennonite Hospital and Jorgensen v. Meade-Johnson Laboratories, *supra* note 49.
FINDING A CONSENSUS

If anything should be clear from all of this, it is that there is no one abortion problem. There are as many abortion problems as there are possible combinations of all of the elements that might make a difference in our thinking about whether an abortion would be justified. It is part of the genius of Judith Thomson’s fine article on abortion that the author lifts us out of the personhood rut to give us a glimpse of what dialogue on abortion could look like if we began to grapple with the issues raised by a rich range of cases—hypothetical and real. This sort of grappling with particular cases and the principles that they implicate is a process for which the institutions of the law are ready-made. But the prospects for employment of such institutions, with flexibility, pragmatism, and common sense, were cut short by the Supreme Court’s precipitate decision in Roe v. Wade.

In Roe, the Court took note of a few of the many competing elements involved in abortion decisions, worked out its own rough compromise between them, and cast the result in constitutional concrete. It refused to recognize any rights under the Constitution on behalf of the fetus, but it did recognize an interest in the state in protecting “potential life.” It then decided that the state’s interest does not become sufficiently compelling to override the mother’s right to privacy until the fetus reaches the stage of “viability”—that is, the point when it has developed the “capability of meaningful life outside the mother’s womb.” Only after that stage has begun may the state, if it chooses to do so, protect the fetus from abortion—and then only if no doctor decides that an abortion is necessary “for the preservation of the life or health of the mother.” As an attempt at a

77 I have argued elsewhere the value of the common law courts in seeking answers to these questions. SEE Baron, C., Medical Paternalism and the Rule of Law: A Reply to Dr. Relman, AMERICAN JOURNAL OF LAW & MEDICINE 4: 337 (1979); Baron, C., Euthanasia Decisions in the Courts: The Post-Saikewicz Experience, in GENETICS AND THE LAW II (A. Milunsky & G.J. Annas, eds.) (1980) at 141.
78 410 U.S. at 163.
79 Id.
80 Because some states have not enacted abortion laws to replace those which were struck down as unconstitutional by Roe v. Wade, “abortion on demand” is available in those states through the entire period of pregnancy. The occasional abortion of a viable fetus which takes place in such states can produce very discomfiting results. For example, a storm of controversy developed in June, 1982, over a 26 week old fetus which had died 27.5 hours after it was aborted in a Wisconsin hospital. Suggestions were made that the civil rights of the fetus had been violated by performing the abortion in a facility which did not have facilities for the care of premature infants. See U.S. Pledges Probe of UW Abortions, Madison Capital-Times, June 2, 1982, at 4, col.1.
81 410 U.S. at 165. This is only one of several places where the Court shows a distressing tendency to delegate governmental power to physicians. Here the doctor is given discretion to decide whether an abortion in the third trimester is “necessary” for the preservation of the “health” of the mother. But what degree of diminution of health of the mother will outweigh the life of a healthy, third trimester fetus? Will indications of the necessity for a caesarean section be enough? See Jefferson v. Griffin Spalding Cty. Hosp.Auth., 274 S.E.2d 457 (Ga.1981). What about threatened impairment of mental health where changed circumstances make the mother no longer want the child? Roe seems to leave these “choice of evils” determinations entirely to the medical community. In a later case, Colautti v. Franklin, 439 U.S.379 (1979), the Court delegates to the individual physician the poser to decide whether or not a particular fetus is “viable”—not only for determining the medical facts regarding probability of survival outside the mother, but also for determining the governmental question of what degree of probability of survival brings in to play the state’s “compelling interest” in protecting fetal life.
Too often overlooked by pro-choice advocates is the fact that Roe does not recognize a woman’s right to an abortion; it recognizes power in the physician to prescribe an abortion for his patient. As the Court says of its holding in Roe:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to these points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intraprofessional, are available.

Roe v. Wade, 410 U.S. at 166. This is true even for the period of the first trimester:

...For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician. Id. at 164. This deference to doctors on the part of Justice Blackmun, who wrote the Court’s opinions in both Roe and Colautti, has not escaped the notice of other members of the Court:

Blackmun’s 1973 abortion opinion had subjected the Court to a great deal of ridicule. It was as if Blackmun had developed a special constitutional rule for handling medical questions. [Justice] White dubbed it Blackmun’s “medical question doctrine.” It seemed to hold that, under the Constitution, doctors, rather than the Court, had the final authority on certain medical-legal questions. White found that notion ludicrous. Blackmun had created another “political questions” doctrine. The notion that the Court couldn’t meddle in the affairs of the other branches of government had been broadened to include the medical profession.

B. Woodward & S. Armstrong, The Brethren (1976) at 146. Equally patent was the source of Blackmun’s willingness to defer to doctors. Before coming to the Court, he had been for ten years general counsel to Minnesota’s Famous Mayo Clinic.

At Mayo, he had watched as Doctors Edward C. Kendall and Philip S. Hench won the Nobel Prize for research in arthritis. He rejoiced with other doctors after their first successful heart bypass operation, then suffered with them after they lost their next four patients. . . . He grew to respect what dedicated physicians could accomplish. These had been terribly exciting years for Blackmun. He labeled them the best ten years of his life.

If a state licensed a physician to practice medicine, it was entrusting him with the right to make medical decisions. . . . To completely restrict an operation like abortion, normally no more dangerous than minor surgery, or to permit it onl y with the approval of a hospital committee or the concurrence of other doctors, was a needless infringement of the discretion of the medical profession.

Blackmun would do anything he could to reduce the anxiety of his colleagues except spurn the assignment (to write the opinion in Roe v. Wade). The case was not so much a legal task as an opportunity for the Court to ratify the best possible medical opinion.

Id. at 174-75. In essence, the doctors whom Blackmun respected so highly were to take over from the state governments the job of making the “choice of evils” decision inherent in abortion. This role they would perform on a case-by-case basis by influencing and, perhaps in some cases, blocking the mother’s decision. Thus, after the Court recognizes a right of privacy covering the mother’s decision and lists the cost factors the state would impose on the mother if it denied the abortion choice altogether, the Court concludes: “All these are factors the woman and her responsible physician necessarily will consider in consultation.” Roe v. Wade, 410 U.S. at 153.

This distressing tendency to want to leave to physician philosopher-kings tough ethical questions which the courts find “too hot to handle” is not restricted to the U.S. Supreme Court or the issue of abortion. In regard to the issue of euthanasia for terminally ill patients, some courts have expressed a willingness to delegate to doctors the power to decide what circumstances justify cessation of life-prolonging treatment. The trial judge in the famous Karen Quinlan case, for example, acceded to medical judgment on the question of whether Karen’s respirator was to be turned off, saying: “The morality and conscience of our society places this responsibility in the hands of the physician. What justification is there to remove it from the control of the medical profession and place it in the hands of the Court?” In re Quinlan, 137 N.J.Super 227, 259, 348, A.2d 801, 818 (Ch. Div. 1975). For their part, most doctors have seemed eager to have such matters labelled “medical questions” so that involvement of courts in medical practice can be kept to a minimum. See Relman, A., The Saikewicz Decision: A Medical Viewpoint,
compromise of interests, the Court’s decision is not without virtues. Had I been a legislator asked in 1973 to vote on such a compromise as legislation, I might well have voted for it. But the Supreme Court of the United States is not a legislature and its decisions do not have the force only of legislation Courts are supposed to render decisions based upon principles drawn from shared values and interests; compromises worked out on the basis of arbitrary dividing lines (like “viability”) are supposed to be left to the legislature.82 But, more important, court decisions based on constitutional

82 See H.HART & A.SACKS, THE LEGAL PROCESS; BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tent. Ed. 1958) at 665-67. Because the focus of this paper has been on the question of personhood, I have not directly criticized the Court’s argument that the Roe decision was mandated by the Court’s “discovery” that the Constitution protects a woman’s choice of an abortion as part of her “right to privacy.” For criticism of that argument in terms that I would embrace, see Ely, J., The Wages of Crying Wolf: A Comment on Roe v. Wade, YALE LAW JOURNAL 82:920 (1973). Dean Ely does not oppose abortion but does oppose the Court’s anti-majoritarian imposition of its own abortion “statute” on the fifty state legislatures: Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman’s life. And at the bottom Roe signals the Court’s judgment that this result cannot be justified by any good that anti-abortion legislation accomplishes. This surely is an understandable conclusion—indeed it is one with which I agree—but ordinarily the Court claims no mandate to second-guess legislative balances, at least not when the Constitution has designated neither of the values in conflict as entitled to special protection. But even assuming it would be a good idea for the Court to assume this function, Roe seems a curious place to have begun. Laws prohibiting the use of “soft” drugs or, even more obviously, homosexual acts between consenting adults can stunt the “preferred life styles” of those against whom enforcement is threatened in very serious ways. It is clear such acts harm no one besides the participants, and indeed the case that the participants are harmed is a rather shaky one. Yet such laws survive, on the theory that there exists a societal consensus that the behavior involved is revolting or at any rate immoral. Of course the consensus is not universal but it is sufficient, and this is what is counted as crucial to get the laws passed and keep them on the books. Whether anti-abortion legislation cramps the life style of an unwilling mother more significantly than anti-homosexuality legislation cramps the life style of a homosexual is a close question. But even granting that it does, the other side of the balance looks very different. For there is more than simple societal revulsion to support legislation restricting abortion: Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice.

Id. at 923-24. Other constitutional scholars have taken similar positions with respect to Roe. As one text has noted:

The Supreme Court abortion rulings provoked immediate criticism. Some of the most severe indictments of those decisions came from unexpected sources—pro-abortion writers. Criticism
grounds cannot be repealed as legislation can. As a result, the compromise announced by the Court in *Roe* is not one that invites continuing dialogue, experimentation, and fine tuning. It smacks of humiliating fiat. And, not surprisingly, it calls forth from those who are humiliated efforts at counter-fiat, such as the Human Life Amendment.

If only we could find a means for fragmenting the abortion problem into the many different particular abortion problems with which life really presents us, I think we would find a surprising amount of consensus over what ought to be allowed and what ought not. Current public opinion polls indicate a good deal of agreement over cases at the extremes. For example, a poll commissioned by *Life* magazine in 1981 revealed that

[s]eventy-seven percent of the women who disagree with the statement that “any woman who wants an abortion should be permitted to obtain it legally” state that abortion should be legal for “a woman whose health is at risk,” 62 percent, for “a woman who has been raped,” and 60 percent, for “a woman who is carrying a fetus with a sever genetic defect.” For the sample as a whole [including the 70 percent who agreed that “a pregnant woman should have the right to decide whether she wants to terminate a pregnancy or have the child”] 92, 88, and 87 percent, respectively, say that abortion should be legal for those reasons. . . .Thus, almost all women surveyed believe that abortion should be legal under certain circumstances.83

The poll, like others before it, also showed very little difference on these questions between Catholic and Protestant women.84 On the other hand, there are indications of consensus that abortion should be considered immoral, and perhaps illegal, where it is opted for in the last trimester for reasons that are considered “frivolous.”85

Of course, it would be naïve to assume that widespread consensus could be reached on whether abortion should be legal with respect to every particular choice situation. Thus, if the question of legality were to be returned to state legislatures and courts,86 the result would likely be varying sets of state laws that represented the varying compromises negotiated in each state. There is patent unfairness in such a situation. But it is remediable, and it is a price we often pay for the benefits of a majoritarian democracy and the rule of law. Where we dislike a law, we are goaded into continuing dialogue for the purpose of winning a majority to support change. Such a dialogue has the potential for broadening understanding on both sides. Even where it fails to create a new

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84 *Id.* at 54.
85 *Id.* at 55-56; R. ADAMER, *ABORTION AND PUBLIC OPINION IN THE UNITED STATES* (1982) at 3-5. The latter publication reports that a Gallup Poll in 1981 showed 52 percent of respondents thought that abortions should be legal only under “certain circumstances” and that a National Opinion Research Center poll in 1980 showed only 39 percent of respondents believed that a legal abortion should be available “[i]f the woman wants it for any reason.” *Id.* at 4.
86 For creative suggestions as to ways in which courts could interact with legislatures over such issues, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).
consensus, it may at least create better appreciation for the good faith of the other side. Moreover, although failure to win one’s own position in one’s home state may seem an intolerable injustice, it is one which is simply not seen as such by a majority of the other citizens of the state. And things can change. Consider, for example the injustice to the disabled infant, until the middle of this century, that resulted from denying him or her recovery in tort for injuries which had been caused before birth.

At this juncture, I feel I ought to share with you the fact that the issue of abortion is not one of only theoretical import for me. Several years ago, I participated with my wife in making a decision in favor of an abortion in the second month of pregnancy for reasons of maternal health and family planning. It was not an easy decision. We have only occasionally and fleetingly since felt that we might have made the decision differently. But we did not make it without compunction. Neither of us can see how such a decision can be made without remorse. I don’t think it would have helped us in the long run to have pretended that the decision was easy by telling ourselves that the fetus involved was not a person. I don’t think it would have helped us in the long run to have pretended that we had no decision to make by convincing ourselves that the fetus was a person with a right to life that outweighed all other considerations. The result was tragic, but we believed the alternative to be even less acceptable. Life does not always present us with choices between good and bad. Frequently we have to decide which of two options is less unacceptable.

CONCLUSION

As members of a society, we are frequently confronted with similar sorts of choices between unpleasant alternatives. We are by nature social animals, and few of us are willing to turn our back on the benefits of society to live the isolated life of a hermit. But those benefits come at a price. Other people may not always want to do things our way, and they may not always be willing to even let us do our own thing our own way. In such conflict situations, it is tempting to think that we can win all that we want—even against a majority—by proving that our own position is “right” and that the opposed position is “wrong.” But frequently such proofs are unavailing. Where a majority cannot be brought around to agreement that our position is “right,” the best course open may only be that of asking others to understand our predicament and grant us the favor of freedom to do as we wish. Granting us a favor does not exact from them the price of admitting that we were “right” and they were “wrong.” Thus, they may be ready to grant us a favor where they would not recognize a right. Of course, accepting a favor does exact a price from us. We will be expected to show appreciation and willingness to grant favors in return. We will have entered into a process of negotiating favor for favor and freedom for freedom.

In their wonderful, small book on negotiation, 87 Fisher and Ury conclude with the following:

In 1964 an American father and his twelve-year-old son were enjoying a beautiful Saturday in Hyde Park, London, playing catch with a Frisbee. Few in England had seen a Frisbee at that time and a small group of strollers gathered to watch this strange sport.

Finally, one Homburg-clad Britisher came over to the father: “Sorry to bother you. Been watching you a quarter of an hour. Who’s winning?”

In most instances to ask a negotiator, “Who’s winning?” is as inappropriate as to ask who’s winning a marriage. By focusing argument on issues like personhood, each side has tried to win what it wanted from the other by proving the other side “wrong.” Harsh words have been exchanged. But by now we may be ready to see the poverty of this approach. Some of us may be willing to apologize for the harsh words, to retreat from “right” and “wrong,” and to ask for and grant accommodations through an ongoing process of negotiation. The marriage is worth saving. If only for the sake of the children—born and unborn—we should do our best to make it work.