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ABORTION LAW - AN ENGLISH PERSPECTIVE*

ANDREW GRUBB**

Abortion is an issue that divides many societies—perhaps most societies.¹ It is certainly, in my experience in the United States, the most divisive issue in American society today.² Acrimonious debate has ensued in America. The pro-life and pro-choice groups postured while the nation awaited the *Webster*³ decision earlier in the year. In the result, of course, that case pleased no one—certainly not any of the Justices if you read any of the opinions.⁴ The pro-life group did not see the anticipated demise of *Roe v. Wade*⁵ in its totality, though it saw the gradual process of demolition practiced by a group of the court on the trimester scheme of *Roe v. Wade*.⁶ The pro-choice group, on the other hand, saw *Roe* survive at least in principle, but saw a majority of the Justices sanction yet more permissible state legislative restrictions on abortions. But as Justice Blackmun put it in that case—and he wrote the Court's opinion in *Roe v. Wade*—“[f]or today at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies.”⁷ The future may hold more fear, I think, for the pro-choice movement in the United States when the Court considers a number of abortion cases later this term.⁸ At least one of them involving an Illinois statute may lead a majority of the Court, I

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1. For a comparative law discussion see ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE (S. Frankowski & G. Cole eds. 1987); M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

2. *The Battle Over Abortion*, NEWSWEEK, May 1, 1989, at 28-32; *Whose Life Is It?*, TIME, May 1, 1989, at 20-24; *Save The Babies*, TIME, May 1, 1989, at 26-28.

3. *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989).

4. *Webster* is discussed in Baron, *Abortion and Legal Process in the United States: An Overview of the Post-Webster Legal Landscape*, 17 LAW, MED. & HEALTH CARE 368 (1989). See also Kolbert, *Introduction: Did the Amici Effort Make a Difference?* 15 AM. J.L. & MED. 153 (1989). Several of the amicus briefs submitted to the Supreme Court are reproduced at 15 AM. J.L. & MED. 169 (1989).

5. 410 U.S. 113 (1973). Only Justice Scalia would have overruled *Roe*. *Webster*, 109 S. Ct. at 3064. Chief Justice Rehnquist and Justices White and Kennedy would abandon the trimester framework of *Roe*. Justice O'Connor would retain the framework, though she reached the same conclusion to uphold the Missouri statute. Justices Brennan, Blackmun and Stevens would uphold *Roe*. See Baron, *supra* note 4.

6. For a discussion of the importance of *Roe*, see Note, *The Evolution of the Right to Privacy After Roe v. Wade*, 13 AM. J.L. & MED. 365, 365-466 (1987).

7. *Webster*, 109 S. Ct. at 3079.

8. See *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988); *Hodgson v. Minnesota*, 827 F.2d 1191 (8th Cir. 1987), *vacated* 835 F.2d 1545 (1987), *cert. granted*, 109 S. Ct. 3240 (1989).

think, including the procrastinating Justice O'Connor to demolish once and for all the trimester scheme of *Roe* and perhaps even the right of privacy in this context.⁹ And it may even consign the fundamental right recognized in *Roe* to the judicial garbage can, leaving the minority Justices, with Justice Blackmun carrying the banner, with only the rhetoric of a lost cause.¹⁰ Those skirmishes that we see in the United States could be the visible skirmishes of the abortion battle and the conflict over a woman's right to choose, or the existence of it, in any western jurisdiction. Perhaps only the intensity of the debate and the venue of battle would vary.

In the wake of *Roe v. Wade* the American battlefronts have been mainly in the courts. A plethora of cases in the federal courts have tested the constitutionality of legislation passed by state legislatures restricting the availability of abortion.¹¹ *Webster* is perhaps the most significant of these in the last few years, but even this is not the last. So central is the role of the American judiciary in dealing with abortion issues, that the litmus test for nominations to the Supreme Court, and indeed the lower federal courts under the Reagan administration, was the candidate's views on abortion and his or her attitude towards a woman's right to choose under the general constitutional umbrella of a right of privacy.¹²

In England, however, the controversy and battles rage with just as much vigor, but the battle sites are quite different. England lacks an American-style Bill of Rights, which endows your federal courts with the power to strike down legislation. Our courts do not have that power. As a consequence, the English courts have been much less involved in resolving the conflicts between the pro-life and the pro-choice points of view. In England today, the availability of abortion as a medical procedure is a matter of statutory law. Parliament has defined the limits of lawful abortions and it is there, in Parliament, that the showdowns between pro-life and pro-choice minded Members of Parliament have occurred when attempts have been made to amend the relatively liberal abortion law which we have dating back to the Abortion Act 1967.¹³ That is not to say that the English judges have not had anything to do with abortion. Because the pro-life point of view has been almost completely unsuccessful in bringing about Parliamentary change in the 1967 Act, a number of cases have been brought in the courts in the

9. As it transpires, the appeal in *Ragsdale* was withdrawn after an agreement between the parties. The oral hearing in *Hodgson* took place on December 4, 1989.

10. For a defense of *Roe*, see Robertson, *Gestational Burdens and Fetal Status: Justifying Roe v. Wade*, 13 AM. J.L. & MED. 189 (1987).

11. See Note, *supra* note 6.

12. See H. SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988). The most famous example is, of course, the failed nomination of Robert Bork to the Supreme Court in 1987. The Bork affair is discussed by E. BRONNER, *JUSTICE FOR AMERICA* (1989). See also the main protagonist's own account in R. BORK, *THE TEMPTING OF AMERICA* (1989).

13. See J. KEOWN, *ABORTION, DOCTORS AND THE LAW* (1988), at ch. 6.

hope that the courts would introduce restrictions on the availability of abortions.¹⁴ But because English courts lack the power to strike down the law, as expressed in legislation, because of our doctrine of Parliamentary sovereignty—quite the opposite of the American position under the Constitution—there have been no direct attacks on the Act, because it cannot be done.¹⁵

Instead, the judges can, indeed of course they should, interpret the legislation and in doing so they may make both liberal and conservative—if those are the two positions you would like to identify—interpretations of the legislation. Also, it is possible that they may graft on some common law principles which do not conflict with the Act, such as the issue of paternal rights in abortion decision-making, which is not dealt with in our legislation.

There is little indication that the English judiciary relish the prospect of resolving the issue—or any issue of profound social and moral importance)—the English judicial instinct is to consider such matters the proper role of elected representatives in Parliament.¹⁶ The English judiciary on the whole take a much narrower view of their role in society than do their American counterparts.

So, let us look at the development of English Law. As with any abortion law and in particular, the American law, the law has developed in the background of competing interests. The common themes of the primacy of maternal rights and paramountcy of fetal rights are part of the English debate on abortion. An inevitable conflict between these rights exists, whether the law permits abortion in some, or all circumstances, or prohibits them absolutely.¹⁷ Some might seek to strike a balance between the competing claims of mother and unborn child, while others might resolve the problem by giving unassailable priority to one set of claims. English law adopts the former and not the latter approach. It seeks to strike a compromise permitting abortions on certain specified grounds, up to a point where the fetus has matured sufficiently for its interests to take overriding priority. As I will show, this point in time seems to coincide with the point in time when the fetus becomes viable.

However, even prior to this stage in fetal development, maternal rights are not given absolute priority. Under the Abortion Act 1967, which is the governing legislation, an abortion may only be performed if one of the statutorily created grounds exists. On the face of it then, English law does not match precisely the surviving trimester regime imposed by

14. *Paton v. British Pregnancy Advisory Service Trustees* [1979] Q.B. 276; *C v. S* [1988] 1 Q.B. 135; *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] A.C. 800.

15. *Pickin v. British Railways Board* [1974] A.C. 765; *Manuel v. Attorney General* [1983] Ch. 77.

16. *Gillick v. West Norfolk and Wisbeck Area Health Authority* [1986] 1 A.C. 112, 194 per Lord Bridge.

17. See generally M. GLENDON, *supra* note 1; R. GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* (1988).

the Supreme Court in *Roe v. Wade*. While reaching the point of viability is significant in both America and England, prior to that time, English law restricts the availability of abortions. This contrasts with the American law most obviously during the first trimester. The existence of this restriction, however, in England, may, as I will show, be one more of form rather than substance, when the abortion is performed during the first trimester.

In seeking to reach a compromise between maternal and fetal interests, English law has moved through three phases of development. The first phase might be described as the criminalization of abortion; the second phase might be described as the acceptance of therapeutic abortion; and the last one is the introduction of state regulation of therapeutic abortion procedures. What can be seen in the development of the law is a gradual increase in the law's restriction of abortion through the medium of the criminal law, followed by a relaxation in that law when medical indications exist.

First, the early criminal law prohibited abortion of mature fetuses when, in the old language of the 18th century judges, 'quickening' had occurred.¹⁸ 'Quickening' was a notion associated with the first time a mother could feel her fetus move or stir within her womb.¹⁹ Secondly, in the 19th century, the law was extended to protect all fetuses, regardless of their stage of development. Abortion became illegal regardless of the stage of fetal development.²⁰ Thirdly, in the late 19th century and perhaps more accurately in the early 20th century, the judges evolved, as medicine progressed and became safer, the notion of the lawful

18. In 3 Co. Inst. 50, Sir Edward Coke stated abortion was "a great misprision, and no murder." See also W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, vol. 2, bk. 1, ch. 31, § 16 (1716); M. HALE, PLEAS OF THE CROWN 53 (1678); E. EAST, A TREATISE ON THE PLEAS OF THE CROWN, vol. 1, at 227-30 (1803); W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 485 (1857). But note the contrasting views in Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N.Y. L.F. 335 (1971); and Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. LEG. HIST. 20 (1984). The Supreme Court in *Roe v. Wade* was sufficiently persuaded, *inter alia*, by Means' argument that Justice Blackmun said "it now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. 113, 136.

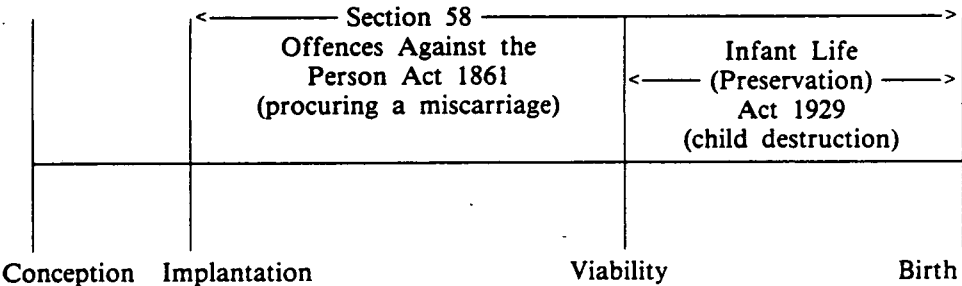
19. *R v. Phillips*, 3 Camp 76 (1811) (a case decided under Lord Ellenborough's Act of 1803) and *R v. Goldsmith*, 3 Camp 73 (1811). Cf. *R v. Wycheley*, 8 C.& P. 262 (1838). Baron Gurney directed a Jury of Matrons that a woman who had been convicted of murder would be "quick with child" and so was entitled to a stay of execution if she had conceived.

20. The changes were statutory. Chronologically, the legislation began in 1803 with Lord Ellenborough's Act. 43 Geo. III, ch. 58. Section 1 created an offense, *inter alia*, "unlawfully to cause and procure the miscarriage of any women then being quick with child." Section 2 extended the criminal prohibition of abortion to the fetus prior to quickening (an offense "to procure the miscarriage of any woman not being, or not being proved to be quick with child"). Section 1 created a capital offense, but offenses under section 2 were punishable by imprisonment, whipping or transportation! Further amendments occurred in Lord Lansdowne's Act, 1828, 9 Geo. IV, ch. 31. Finally, in the Offences Against the Person Act 1837, a single offense "to procure the miscarriage of any woman" was enacted removing the different offenses for the "quick" and "non-quick" fetus. For a discussion of the statutory history, see B. DICKENS, *ABORTION AND THE LAW* (1966) and J. KEOWN, *ABORTION, DOCTORS AND THE LAW* (1988).

therapeutic abortion.²¹ And finally, in 1967 we see the acceptance of therapeutic abortions by Parliament and the introduction of state regulation of abortions.²² English law gradually has accepted the medicalization of the abortion procedure.

Let us look at the framework of the law. We should start with the criminalization of abortion because the law of abortion in England has to be seen primarily in its criminal law context. The criminal law creates the crime and it is the extent to which a doctor would have a defense to that crime in carrying out a therapeutic abortion which defines the scope of lawful abortion.

The Crimes



(Figure 1)

If we look at Figure 1 we see that there are two criminal statutes which are relevant. The first statutory provision is section 58 of the Offences Against the Person Act 1861 which provides that it is an offense for a person “with intent to procure the miscarriage of any woman, whether she be or not with child . . . [to] . . . unlawfully administer to her . . . any poison or other noxious thing, or . . . [to] . . . unlawfully use any instrument or other mean whatsoever with the like intent.” This offense is the modern version of those created by the earlier nineteenth century statutes dating back to 1803.²³ Three features of the offense are worthy of note. First, section 58 does not, strictly speaking, prohibit and punish the performance of an abortion. Instead, it is an offense to do one of the prohibited activities “with intent to procure a miscarriage.” The prohibition, in other words, seeks to criminalize conduct which precedes the actual abortion or termination of the pregnancy. Of course, if the latter does take place, an offense under section 58 is still committed. Secondly, the prohibited act must be done with the intent to procure a *miscarriage*. What precisely does this statutory term mean? As figure 1 shows, probably the Act only

21. The leading case is *R v. Bourne* [1939] 1 K.B. 687. See generally DICKENS, *supra* note 20, at ch. 2 and J. KEOWN, *supra* note 20, at ch. 2.
22. Abortion Act 1967.
23. See *supra* note 20.

prohibits conduct intended to terminate a pregnancy if *implantation* has taken place. Only then can it be said that the woman is "carrying" and hence can a "miscarriage" be intended.²⁴ It follows that procedures or medical devices such as post-coital birth control which act to prevent implantation of a fertilized ovum or embryo are not prohibited by section 58.²⁵ Only if these also act to dislodge an implanted fertilized ovum or embryo, and this is intended, will any criminal liability arise.²⁶

Thirdly, it is irrelevant whether the woman is in fact pregnant or, as the Act rather quaintly puts it, "with child." Acting with the intent to procure a miscarriage is sufficient. If, however, it is the woman herself who is alleged to have acted to procure her own miscarriage, the Act specifically requires that she be pregnant, again "with child," in order to commit the offense. On the face of it the policy behind section 58 seems to be twofold: the protection of the mother from dangerous abortions and also the protection of the life of the fetus itself. When a third party is not involved, but only the mother, then the statute is not intended to protect her from herself, hence the need for her to be "with child."

That, then, is the first of the statutory provisions creating a criminal offense in relation to abortion. There is also another relevant offense, that of child destruction, which is created by the Infant Life (Preservation) Act 1929. Section 1(1) provides "any person who, with intent to destroy the life of a child capable of being born alive, by any unlawful act causes a child to die before it has an existence independent of its mother, shall be guilty of . . . child destruction." This section was actually designed by the people who originally introduced it into the Parliament to criminalize killing at the point of a birth because a child who was killed in the process of birth under the English law was not protected by the criminal law.²⁷ It was not murder because the child was not born,²⁸ and it was not procuring a miscarriage because the fetus was already in the process of being born and, therefore, no miscarriage was being procured. So, if prior to 1929 you were to crush the skull of a baby in the process of being born, no offense was committed. The 1929 Act was introduced to criminalize killing at that point in the fetus' development, but, as it eventually emerged from the legislative process, the crime was actually defined in a way that afforded protection earlier than that point in its development. Child destruction

24. See Kennedy, *The Legal and Ethical Implications of Postcoital Birth Control*, in *POSTCOITAL CONTRACEPTION: METHODS, SERVICES AND PROSPECTS* 62 (H. Grahame ed. 1983).

25. See the written answer by the then Attorney General, Sir Michael Havers Q.C. at 42 Parl. Deb. H.C. 238, 239. See also Kennedy *supra* note 24.

26. Arguably, this is what occurs in the case of IUDs (intra-uterine devices) and the recently developed French "abortion pill," RU 486. See Cahill, "Abortion Pill" RU 486: *Ethics, Rhetoric and Social Practice*, 17 *HASTINGS CENTER REPORT* vol. 5, at 5 (1987).

27. See the statement of Lord Darling, who introduced the Bill, in the House of Lords at 71 Parl. Deb. H.L. 617-18 (1928).

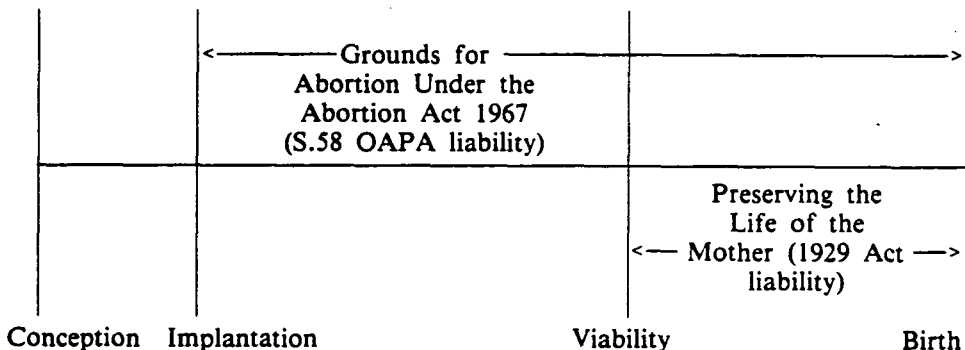
28. A child had to be "born alive" and have "an existence independent of its mother." See the case law cited by P. SKEGG, *LAW, ETHICS AND MEDICINE* 3 (1984).

requires (1) an intent to kill a child, (2) that is capable of being born alive, and (3) before it has an existence independent of its mother.

There is a significant overlap between the offenses of child destruction and procuring a miscarriage. Aborting a fetus "capable of being born alive" may amount to an offense under both sections because it is just as much a miscarriage later on in the pregnancy as it is early on. But, of course, it will not be child destruction unless the child has reached the point of "being capable of being born alive." So procuring an abortion of a mature fetus may amount to an offense under both statutes. Procuring the abortion of a young fetus, which is not "capable of being born alive," would only be an offense under section 58 of the 1861 Act.

Why is it important to distinguish between liability under section 58 of the OAPA 1861 and under the Infant Life (Preservation) Act 1929? The answer lies in the circumstances where an offense under these provisions is justified and hence determines the scope of a lawful abortion. The circumstances where a miscarriage may be procured and a child capable of being born alive may be killed are different. Figure 2 sets out the position.

The Defenses



(Figure 2)

As this shows, the grounds of abortion (which we will return to) set out in the Abortion Act 1967 only provide a defense to the crime of procuring a miscarriage under section 58. As we shall see, these grounds are liberal in their scope. But, they have no application to the crime of child destruction under the 1929 Act. Section 5(1) of the Abortion Act 1967 states that "[n]othing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929 (protecting the life of the viable fetus)." If we now look at the 1929 Act we see that the only justification for committing the offense of child destruction is if the child is killed "in good faith for the purpose only of preserving the life of the mother."²⁹

29. Infant Life (Preservation) Act 1929, proviso to § 1(1).

So it follows that except in the case where the abortion is performed to preserve the life of a mother, which is the defense to child destruction, it is only lawful to perform an abortion if one of the Abortion Act grounds is satisfied. In other words, the outer limits of lawful abortion, except in this exceptional case of preserving the life of a mother, turns on the point at which the 1929 Act and crime of child destruction applies, that is, when a child is capable of being born alive. So we have to ask ourselves the critical question, when is a child "capable of being born alive?"

A number of interpretations of the 1929 Act are possible.³⁰ First, it could be construed to criminalize the killing of an unborn child only *at the time of birth*. This, as we have seen,³¹ was the purpose behind the Act when it was introduced into Parliament. The plain wording of the Act makes this construction quite impossible.³² The second interpretation of the 1929 Act would provide protection to the fetus which is capable of surviving or, in other words, is *viable*. The third interpretation would protect the even less well developed fetus which was literally, in the words of the statute, "born alive" as opposed to still-born. Evidencing *discernible signs of life* would suffice. As must be clear, these three interpretations afford protection to a fetus at progressively earlier points in its development. Consequently, these interpretations progressively narrow the scope for therapeutic abortions unless done for life-saving reasons. Perhaps, not surprisingly, which of the latter interpretations is correct has been a matter of controversy and writers have argued for both interpretations.³³ The courts considered this issue for the first time in 1987 in the case of *C v. S*.³⁴

An Oxford University undergraduate became pregnant after an affair with another student. She decided that she was going to have an abortion after the relationship broke down. The male student (they were not married) sought to obtain an injunction from the court to prevent his girlfriend from having an abortion. The case raises the issue of whether there is any possibility of a paternal injunction in England to stop an

30. Keown, *The Scope of the Offence of Child Destruction*, 104 L.Q. REV. 120 (1988).

31. See *supra* note 27.

32. The long title of the 1929 Act states that the legislation is "[a]n Act to amend the law with regard to the destruction of children at *or before birth*." Also, the presumption created in section 1(2) that a 28 week old fetus is "capable of being born alive" does not sit easily with a law only intended to cover the killing of a fetus at such a late stage of pregnancy that it is in the process of delivery. Strangely, Macnaghten J. in *R v. Bourne* [1939] 1 K.B. 686, 691, accepted counsel's argument that the Act "provides for the case where a child is killed by a wilful act at the time when it is being *delivered in the ordinary course of nature* . . ." [emphasis added].

33. Tunkel, *Abortion: How early, how late, and how legal?*, 2 B.M.J. 253 (1979) (second interpretation); Wright, *The Legality of Abortion by Prostoglandin*, 1984 CRIM. L. REV. 347 (third interpretation); Wright, *Capable of Being Born Alive?*, 131 NEW L.J. 188 (1981) (third interpretation); Tunkel, *Late Abortions and the Crime of Child Destruction: A Reply*, 1985 CRIM. L. REV. 133 (second interpretation); Wright, *A Rejoinder*, 1985 CRIM. L. REV. 140 (third interpretation).

34. [1988] 1 Q.B. 135 (Heilbron, J. and Court of Appeal). See also *Rance v. Mid-Down HA*, 140 NEW L.J. 325 (1990).

abortion being performed.³⁵ But for our purposes, the interesting point in this case is that part of the father's argument to support his application was that since the fetus was about eighteen weeks old, it was a child "capable of being born alive" within the meaning of the 1929 Act. Hence, even if one of the Abortion Act grounds, which we'll see are quite liberal, was satisfied, this abortion was a criminal offense, because it was not being done to preserve the life of the mother.

The trial judge, Heilbron J., dismissed C's application because of his inability to establish sufficient locus standi to seek an injunction. On appeal, the court did not address this issue.³⁶ Instead, the Court of Appeal considered whether it could be shown that the fetus was within the protection of the 1929 Act. If it could not, then C conceded that he was not entitled to an injunction. Counsel for C³⁷ argued that the proper interpretation of the 1929 Act was that it prevented the destruction of any fetus which showed "recognisable signs of life" even if the fetus was not yet viable. Literally, perhaps, this interpretation is plausible. The statute speaks of a fetus which if born would be "alive." Further, there is a considerable body of case law which suggests that once a fetus is delivered and is, in the words of the judges in those cases "born alive," killing such a fetus will be homicide even if it lacks the capacity to survive.³⁸

The Court of Appeal rejected this approach. First, the court noted that expert evidence had been produced by both sides on the interpretation of the phrase but, as one might expect, there was a difference of opinion. Sir John Donaldson, M.R. concluded that this did not matter since the proper interpretation of the phrase "capable of being born alive" was a legal issue for the court. Secondly, the court observed that the evidence supported the view that a fetus of eighteen to twenty-one weeks gestation would not have the capacity to survive, because its lungs would be insufficiently developed. Thirdly, Sir John Donaldson, M.R. stated:

we have no evidence of the state of the fetus being carried by [S], but if it has reached the normal stage of development and so is incapable ever of breathing, it is not in our judgment "a child capable of being born alive" within the meaning of the Act.³⁹

The Court of Appeal's conclusive rejection of the most far reaching interpretation of section 1(1) of the 1929 Act (and hence limiting effect

35. The answer provided by this case and the earlier case of *Paton v. BPAS* [1979] Q.B. 276, *supra* note 14, is that paternal injunctions will not be granted. See the Supreme Court of Canada decision in *Daigle v. Tremblay* [1989] 2 S.C.R. ____.

36. For a discussion of the locus standi issue, see Grubb and Pearl, *Protecting the Life of the Unborn Child*, 103 L.Q. Rev. 340 (1987). Even if it could be said that the father had locus standi, it is evident that English law generally does not allow a private citizen to enforce the criminal law by seeking an injunction in civil proceedings. This would have been a conclusive argument against C. See *Gouriet v. UPOW* [1978] A.C. 435.

37. Leading Counsel for C was Mr. Gerard Wright Q.C., the author of a number of the articles cited in note 33 *supra*.

38. See cases referred to by Atkinson, *Life, Birth and Live Birth*, 20 L.Q. Rev. 134 (1904) and Davies, *Child-Killing in English Law*, 1 Mod. L. Rev. 203, 269 (1937).

39. *C v. S* [1988] Q.B. at 151.

for therapeutic abortions) means that the ambit of the Act is restricted to the protection of a fetus which has the capacity to survive, whether naturally or by reasonable artificial means. In other words, only the viable fetus is protected.⁴⁰ At present it seems that a fetus reaches viability at around 24 weeks of gestation.⁴¹ Prior to this, proof of viability is difficult. As the evidence in *C v. S* showed, not until around twenty-one weeks does the fetus develop lungs, and hence the capacity to breathe. Nothing short of the development of an artificial womb seems likely to push back the frontier of viability before this point in fetal development. Between twenty-one and twenty-four weeks maturity, proof of viability may be difficult but is not, perhaps, impossible.

One final point on *C v. S*. It puts to rest the medical profession's often assumed position that legal abortion in England is permissible up to twenty-eight weeks development. The assumption is based upon section 1(2) of the 1929 Act, which creates a presumption that at twenty-eight weeks development a fetus is "capable of being born alive" i.e., viable. This is only a presumption which relieves the prosecution of the burden of proving viability at twenty-eight weeks. It does not, as the medical profession assumed, prevent proof that a particular fetus was viable at an earlier stage of its development.

Let me show you some of the figures about how many abortions, as a percentage of abortions performed, we are talking about.

**PERCENTAGE DISTRIBUTION OF ABORTIONS
BY WEEKS OF GESTATION**

<u>Year</u>	<u>8 Weeks or Less</u>	<u>9 - 12 Weeks</u>	<u>13 - 16 Weeks</u>	<u>17 Weeks or More</u>
[RESIDENTS]				
1980	24.7	57.4	13.1	4.8
1981	31.2	53.8	10.7	4.3
1982	32.5	53.2	09.9	4.4
1983	34.5	51.0	10.1	4.4
1984	35.1	51.0	09.4	4.5
[NON-RESIDENTS]				
1980	20.4	47.4	20.9	11.3
1981	26.4	43.8	17.1	12.7
1982	28.9	40.9	16.4	13.8
1983	28.9	41.3	16.3	13.5
1984	28.7	40.0	16.4	14.8

(Table 1)

(Based upon figures in The Guttmacher Institute Report, *INDUCED ABORTION, A WORLD REVIEW* 1986, 6th ed.)

40. Abortion Act 1967, § 5(1), refers to the 1929 Act parenthetically as "protecting the life of the viable foetus."

41. See ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS, BRITISH PAEDIATRIC ASSOCIATION, ROYAL COLLEGE OF GENERAL PRACTITIONERS, ROYAL COLLEGE OF MIDWIVES, BRITISH MEDICAL ASSOCIATION AND THE DEPARTMENT OF HEALTH AND SOCIAL SECURITY, *REPORT ON FOETAL VIABILITY AND CLINICAL PRACTICE* (1985).

This table is divided into weeks of gestation and residents and non-residents. Because of England's quite liberal abortion law, we have a lot of visitors from abroad seeking abortions; that is, the non-resident category—people from countries which have less liberal laws than we do. You will see, of course (and this is a percentage total), that very few abortions are performed beyond twelve weeks in England. 86.1% of abortions in 1984 and 85.5% in 1983 were performed prior to twelve weeks of pregnancy. So, the issue about when is an abortion lawful in England, is really determined by the law that applies to relatively immature fetuses, and not as we now know the mature, viable fetus, when the law would only allow abortions to preserve the life of the mother. Perhaps at this point another set of statistics will help to put the issue in perspective.

OFFENDERS FOUND GUILTY OR CAUTIONED

<u>Year</u>	<u>Child Destruction</u>	<u>Illegal Abortion</u>
1984	0	2
1983	0	4
1982	0	1
1981	0	3
1980	0	5
1979	1	0
1978	0	4
1977	0	3
1976	0	5
1975	0	1
1974	0	17
1973	0	11
1972	0	48
1971	0	54
1970	0	55
1969	0	72
1968	0	69
1967	0	71

(Table 2)

(Compiled from the Criminal Statistics for England and Wales)

If we look at Table 2 we see the number of individuals cautioned by the police or found guilty by a court of the offenses of child destruction and procuring a miscarriage during the years 1967-1984. Quite clearly the number of illegal abortions is greater than those of child destruction, the latter, of course, is virtually non-existent. Equally, we see a marked decrease in the number of cases of illegal abortions shortly after the Abortion Act came into force in 1968. By 1973, the figures had dropped from seventy-one in 1967 to eleven. The current trend is for the number of cases to be in single figures. It seems that looking at these figures and the earlier ones concerning gestational age

in Table 1 that in practical terms we are really concerned with abortions early in pregnancy and not later on approaching the point of viability.

If we have determined the outer limits of therapeutic abortion, remembering always that after viability only life threatening abortions are permissible, it is to the scope of therapeutic abortions before viability that we should turn our gaze. Two periods in the history of the English law will help us understand what our law is today. First of all, there is the law prior to the Act of 1967. That is helpful because the Act builds upon the prior law. Secondly, of course, the law that now governs England, Wales and Scotland is the 1967 legislation. At common law, the offense of procuring a miscarriage under the ancient statute, contained no defense. There was, on the face of it, no justification for performing an abortion. If you procured a miscarriage, you were guilty of an offense. However, the statute talks about "unlawfully" procuring a miscarriage. The reasonable deduction from that might be that some acts, done with the intent to procure a miscarriage, may not be unlawful. There may be lawful ones and there may be unlawful ones.

In 1938 in *R v. Bourne*,⁴² the court recognized for the first time that that word "unlawfully" did have a meaning and that a doctor might lawfully perform some abortions, notwithstanding the apparent absolute prohibition in the legislation. Bourne was an obstetric surgeon with a cause. He performed an abortion on a fourteen year-old girl who had been violently raped by a group of soldiers in London. And he was charged with procuring a miscarriage under section 58 of the 1861 statute. He brought the prosecution upon himself because he wrote to the Attorney General asking to be prosecuted so that he could test the law. Fortunately, for him, he was acquitted.⁴³ He was tried at the Old Bailey in London. The judge, Mr. Justice Macnaghten, directed the jury that the presence of the word "unlawful" in the legislation preventing the procurement of a miscarriage, was not meaningless and that the scope of a lawful abortion could be equated with the scope of a lawful act under the 1929 Act creating the offense of child destruction. The scope of a lawful act which results in death of a child "capable of being born alive," is where it is done for *preserving the life of the mother*. A doctor could act lawfully, he said, in performing an abortion, because it was nonsense to say it was lawful after the fetus was viable if it was not also lawful in the same circumstances when the fetus was less mature. If the doctor acted in good faith for the purposes of preserving the life of the mother, he committed no offense under either statute.

Thus far, of course, the scope of therapeutic abortion is narrow, since rarely, in the ordinary case of abortion, will it be done to preserve the *life* of the mother. But the judge in the *Bourne* case adopted a

42. [1939] 1 K.B. 687.

43. An account of the trial can be found in Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126 (1938).

much more expansive interpretation of what preserving the life of the mother meant. First he observed that he had great difficulty with the distinction between preserving the life of the mother, and preserving the health of the mother, which is the distinction the prosecution sought to make. As he put it, "life depends upon health, and it may be that health is so gravely impaired that death results."⁴⁴ Consequently, he interpreted the words as follows:⁴⁵

I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.

This exposition of the scope of a lawful therapeutic abortion is wider than the natural meaning of the statutory phrase "preserving the life of the mother," quite clearly. But not that wide, because he talks about it making the mother a physical wreck as a result of giving birth to the child. Nevertheless the judge's view was accepted generally as the law in England. Indeed, in the two cases that followed, the judges extended the scope of a lawful therapeutic abortion even more widely, explicitly recognizing that a doctor could perform an abortion to preserve the *physical or mental health* of the woman.⁴⁶ They expanded what Mr. Justice Macnaghten had said in the *Bourne* case. While therapeutic abortion was now part of English law, the English law itself provided no regulation of abortion, since the only regulation was the crude instrumentality of the criminal law, and the possibility of a defense to it. The regulation of abortion in England only came in the Abortion Act 1967.⁴⁷ That Act was introduced by a private member of Parliament. In other words, it was not a Government bill—it was sponsored by a private member, David Steel, who was later to become the leader of the Liberal Party. This legislation confirmed the medicalization of abortion in England and it remains unamended twenty-three years later, even though there have been a dozen or so attempts to change it.⁴⁸

44. [1939] 1 K.B. at 692.

45. *Id.* at 693-94.

46. In *R v. Bergmann and Ferguson* [1948] 1 B.M.J. 1008, Morris, J. rejected Macnaghten, J.'s view that the doctor's belief should be "reasonable" and, instead, required a jury to focus on the "honesty" of the doctor's belief. Consequently, as Morris, J. pointed out, the jury was not concerned with whether the doctor had made a mistake. In *R v. Newton and Stungo*, 1958 Crim L.R. 469, Ashworth, J. made it quite clear that a doctor could perform an abortion to preserve the *health* as well as the life of the mother. But he went further and added "When I say health I mean not only her physical health but also her mental health."

47. The Act came into force on April 27, 1968. For the background of the Act, see COMMITTEE ON THE WORKING OF THE ABORTION ACT, First Report, 1974, Cmnd No. 5579, at ¶¶ 16-28 (hereafter "Lane Report"). See also J. KEOWN, *supra* note 13, at ch. 4.

48. For a discussion of seven of the Bills introduced into Parliament between 1969 and 1979, see J. KEOWN, *supra* note 13, at ch. 6.

The Act replaces the common law.⁴⁹ When a therapeutic abortion is performed, the Act provides a defense only to the crime of procuring a miscarriage. The 1967 Act has the following effects: First, it imposes certain regulatory conditions on the performance of abortions. For example, it specifies who may perform them,⁵⁰ where they may be performed,⁵¹ and it imposes reporting requirements through regulations made under the Act by the Minister of Health.⁵² Second, it creates the circumstances—and this is perhaps more important—in which a lawful abortion may be performed.

The statute is quite complicated so I have tried to simplify it in this diagram.

GROUNDS FOR ABORTION UNDER 1967 ACT

1. *MATERNAL MEDICAL (HEALTH) GROUND* [s.1(1)(a)]

Risk to Mother's Life/

Physical Health/

Mental Health

>

If pregnancy continues
than if terminated

2. *FAMILIAL MEDICAL (HEALTH) GROUND* [s.1(1)(a)]

Risk to Existing Children

of Family's Physical Health/

Mental Health

>

If pregnancy continues
than if terminated

3. *FETAL ABNORMALITY GROUND* [s.1(1)(b)]

Substantial risk of (a) Physical or (b) Mental abnormality at birth = serious handicap.

(Figure 3)

As Figure 3 shows, there are three grounds for abortion in the United Kingdom (excluding Northern Ireland). In each case the pregnancy must be terminated by a doctor,⁵³ either in a National Health Service hospital, and, of course, that will be a free abortion, or in a private clinic which has been licensed by the government for that purpose.⁵⁴ The abortion can only be performed if two doctors certify that a ground for abortion exists.⁵⁵

49. Section 5(2) provides: "For the purposes of the law relating to abortion, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by section 1 of this Act."

50. Abortion Act 1967, § 1(1).

51. *Id.*

52. *Id.* § 1(3).

53. *Id.* § 3(1). In *Royal College of Nursing of the U.K. v. D.H.S.S.* [1981] 1 A.C. 800, a majority of the House of Lords held that a termination of pregnancy could be a team effort. The court held that a termination using prostoglandin to induce a miscarriage was lawful providing three conditions were satisfied: (i) the treatment was prescribed by a registered medical practitioner; (ii) the registered medical practitioner remained in charge; (iii) the procedure was carried out under his direction by qualified nursing staff and this was in accordance with accepted medical practice.

54. Abortion Act 1967, § 1(3).

55. *Id.* § 1(1).

Let us now turn to the grounds themselves. The first one is the one I have called the *maternal health ground*. That justifies the termination of the pregnancy if the risk to the mother's life or health (physical or mental) would be greater if the pregnancy continues than if it were terminated. I will return to this ground shortly and explain how that works in practice. The second one is perhaps a more remarkable ground. It is what I call the *familial health ground*, which justifies abortion if the risk to the physical or mental health of any existing children of the family would be greater if the mother's pregnancy were continued than if it were terminated. Finally, the third ground, the *fetal abnormality ground*, justifies abortion in the case where there is a substantial risk that the baby when born would suffer from physical or mental abnormalities amounting to a serious handicap.

In two respects the Act goes further than the common law. It permits an abortion even if there is no medical risk to the mother. That is the second of the grounds, where there is a risk to the existing children of the family. This must be seen as a significant liberalization of the grounds of abortion since it does not have its origins at all in the respect for the rights or interests of the mother, but of someone else. Consequently that second ground has been the target of the pro-life MPs when they have been trying to amend the Act by trying to abolish the ground completely.⁵⁶ Also, the Act goes further than the common law in the third ground—the fetal abnormality ground. It is the first explicit recognition of an abortion where you will have a handicapped child. Under the common law the courts had never recognized that, although if you think carefully, it is not too difficult to say that there may be some effect on the mental health of the woman if she knows she is going to have a severely handicapped baby. But, that had never been tested before the Act.⁵⁷

We should put aside, I think, the discussion of the fetal abnormality ground, it is relatively straightforward, and look at the other two. The other two are the grounds under which the vast majority of abortions are performed. The following table is compiled from data in the Lane Report of 1974⁵⁸ which reported on the working of the Act. It shows the total number of reported abortions performed under the three grounds during the years 1968-1971. It also represents the number of abortions under each ground as a percentage of the total number of abortions performed.

56. For example, David Alton's Abortion (Amendment) Bill 1988.

57. The view has been expressed that such situations were covered by the common law. See [1956] 2 B.M.J. 821 (mother infected with rubella during pregnancy) and Lord Denning speaking in the House of Lords in the debate on Lord Silkin's Abortion Bill in 1965, 270 PARL. DEB. H.L. 1183 (mother who had taken the teratogenic drug, thalidomide, during pregnancy).

58. *Supra* note 47.

Ground	1968	1969	1970	1971
Maternal Health (1)	18,067 76.4%	41,806 76.3%	68,471 79.2%	99,376 78.4%
Familial Health (2)	957 4.0%	2,294 4.2%	3,524 4.1%	4,220 3.3%
Fetal Abnormality (3)	906 3.8%	1,118 2.0%	1,248 1.4%	1,375 1.1%
(1) and (3)	442 1.8%	828 1.5%	906 1.0%	1,108 0.9%
(2) and Another	3,228 13.7%	8,728 15.9%	12,370 14.3%	20,676 16.3%

(Table 3)

As these figures show, the maternal health ground accounted for over 75% of all abortions in the period 1968-1971. The familial health ground, whether alone or together with another ground, represented between 10 and 20% of the remaining 25% of abortions that were performed. The fetal abnormality ground, taken alone, was relied upon in a very small percentage of instances, between 3.8% at the highest in 1968 and 1.1% at the lowest in 1971.⁵⁹ Consequently, we can observe the following about abortion practice in England. First, most abortions are performed early in pregnancy and secondly, most abortions are justified on the maternal health ground or, but to a lesser extent, the familial health ground. The Act does not authorize an abortion merely on the basis of a risk to the mother or her children—the maternal or familial health grounds. Instead it requires a comparison of risks between the status quo of pregnancy and the situation if the pregnancy is terminated. There is a balancing of risks to be done.

On the face of it, the 1967 Act does not permit a doctor to perform an abortion whenever a consenting adult woman requests one and the doctor is willing to perform it. In this respect it could be argued that the English law is more restrictive than American law during the first trimester, as long, of course, as *Roe v. Wade* survives. There are, it could be argued, significant restrictions in England on abortions, even when performed early in pregnancy. First, there must be medical grounds for it. The social conditions of the mother alone appear not to suffice. There has to be a greater risk to her mental or physical health or to her children's mental or physical health by being pregnant than by having an abortion.

59. There is one further ground for abortion not discussed in the text and this is where it is carried out in an emergency to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health. See 1967 Act § 1(4). This emergency ground is not discussed because it rarely arises. The figures for 1968 to 1971 show that it was relied upon in 0.3% and 0.1% of cases in 1968 and 1969. In 1970 and 1971 the number of cases was less than 0.1%.

Secondly, the comparative exercise imposed upon the doctors is a limitation. A doctor can not simply act because he thinks there is a risk to her health. He has to ask, is the risk worse if I let this pregnancy continue than if I terminate it? In fact, neither of these imposes any real obstacle in the relationship between the doctor and his pregnant patient in England. Abortions, at least ones performed early in pregnancy, are available on request.⁶⁰ We can examine this in the light of some figures dealing with the numbers of abortions performed in England and Wales. Table 4 shows the figures between 1961 and 1984.

TOTAL NUMBER OF ABORTIONS IN ENGLAND AND WALES

1961	14,300	
1962	16,800	
1963	16,600	
1964	18,300	PRE-ABORTION ACT
1965	19,500	
1966	21,400	
1967	27,200	
1968	23,600	
1969	34,800	
1970	86,600	
1971	126,800	
1972	159,900	
1973	167,100	
1974	162,900	
1975	139,700	POST-ABORTION ACT
1976	129,700	
1977	133,000	
1978	141,600	
1979	149,700	
1980	160,900	
1981	162,500	
1982	163,000	
1983	162,200	
1984	170,000	

(Table 4)

(Based upon figures in The Guttmacher Institute Report, *INDUCED ABORTION, A WORLD REVIEW* 1986, 6th ed.)

If we look at these figures, we see that the number of abortions performed in England and Wales in 1984 was 170,000. Today's figures would be roughly the same being somewhere between 170,000 and 180,000 per year. The table shows the considerable increase in the number of abortions

60. Ormrod, *A Lawyer's Look at Medical Ethics*, 46 MED.-LEGAL J. 18, 21-22 (1978); Royal College of Nursing of the United Kingdom v. D.H.S.S. [1981] A.C. 800, 803 (Lord Denning M.R.).

performed after the 1967 Act came into force. We should not be misled by this. Clearly, the number of abortions performed did increase but undoubtedly, the pre-Act figures are depressed - for two reasons. Many back-street abortions took place before the Act and these, obviously, went unreported. Also, others which were performed were not necessarily reported since the requirement that performance of an abortion be reported to the central authorities was only introduced by the 1967 Act.

The significant rise from 23,600 to 34,000; 23,600 in the first year after the Act, going up to 126,000 in the fourth year, which is an increase of between five and six times in three years, may not be a true reflection of the increase. But, nevertheless, you can see that doctors appear to carry out abortions relatively more frequently now under the Act. We see a peak in the middle of 167,000 in 1973 and a gradual dropping off and then a gradual increase in the 1980s.

A number of reasons can be given why it appears that abortion "on request" (some would call it abortion "on demand," but I would rather it be described as "on request") exists in England. The first is that the two grounds, that is the maternal and familial health grounds, look to the risks to the health of the mother or her children. What we mean by health may be very wide indeed. The World Health Organization, for example, defines health as being the state of complete mental, physical and social well-being, and not merely an absence of disease or infirmity.⁶¹ Consequently a risk to health, particularly mental health, may often exist if a pregnancy is unwanted. Once health is not restricted to physical health, then the doctors are given considerable scope and discretion to be satisfied that the abortion is justified, either under the ground of maternal health interests or familial health interests. The Act is, I think, more liberal in its approach to abortion, than the common law was after *Bourne* in the sense that the doctors are allowed to look at familial health and they can interpret health wider than, I think, the judges would have allowed at common law.

While it is doubtful whether social factors alone, financial or otherwise, are sufficient to justify an abortion under the Act—and that was true at common law—their existence might support a doctor's conclusion that the mental health of the pregnant woman or an existing child would be put at risk by the continuance of the pregnancy. Indeed the Act permits a doctor to make this very deduction when it states that account may be taken of the pregnant woman's "actual or reasonably foreseeable environment."⁶² Hence the social circumstances of the mother and her already existing children may easily lead a doctor to conclude that there is a risk to her or their mental health. Would this, for example—I just pose the question—justify an abortion performed on a mother who, because of cultural pressures would prefer not to have a child of a

61. WORLD HEALTH ORGANIZATION, BASIC DOCUMENTS (26th ed. 1976).

62. Abortion Act 1967, § 1(2).

particular sex?⁶³ In the non-resident category, performed in private health clinics, that is quite a common situation apparently. There may be a very fine line between social and cultural pressure and consequential psychological impact that would bring such a case within the liberal terms of the Act, however abhorrent we might think it is to have an abortion on grounds of sex selection. Also, the mother whose financial circumstances are such that one more child would lead to hardship for her or her children, or the mother whose business or university career might be ruined by an unwanted child, indeed any mother whose social circumstances may significantly worsen with the birth of a child, may well establish the maternal or if appropriate, familial medical grounds under the Act. Even though the doctors have to certify under the Act that the risk is greater if the pregnancy is continued than if its terminated, that comparative exercise really presents no obstacle. Modern medical techniques make abortion a very safe procedure when performed early in pregnancy.⁶⁴ Consequently, the medical risks in performing an abortion are not very great when weighed on the scales against the risks that may exist if the pregnancy is continued, like the maternal death rate.⁶⁵ It seems likely that a doctor can conclude that it is more dangerous to be pregnant than to have a pregnancy terminated early on.⁶⁶ The risks involved in early abortions by vacuum aspiration,⁶⁷ for example, are lower than the risks that a mother necessarily undergoes by being pregnant.⁶⁸ It is statistically safer not to be pregnant, is the truth of the matter, when you are very early on in your pregnancy.

If you recall, the vast majority of these abortions are performed very early on, within the first twelve weeks of the pregnancy. Hence, this is where the notion of abortion "on request" comes from, because the doctor can almost always statistically say it is safer for a woman not to be pregnant at that stage of the pregnancy.

Once it is accepted that the 1967 Act gives the medical profession wide discretion in determining when an abortion may be performed, the remaining question is to what extent will the courts subject to review the exercise of that discretion by the doctors certifying that the grounds for an abortion are satisfied? Since the grounds of abortion require only

63. Morgan, *Fetal Identification, Abortion and the Law*, 18 FAM. L. 355 (1988).

64. See Lane Report, *supra* note 47, at ¶¶ 94-159 and ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATION (R. Porter & M. O'Connor, eds. 1985) especially pp. 67-101.

65. Between 1970-1978 there were 59 deaths from legal abortions, a rate of 48.2 deaths per million abortions. DEPARTMENT OF HEALTH AND SOCIAL SECURITY, REPORT ON CONFIDENTIAL ENQUIRIES INTO MATERNAL DEATH IN ENGLAND AND WALES 1976-78 (1982) (hereinafter DHSS 1982 Report).

66. For a discussion of the so-called "statistical argument," see G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW (2d ed. 1983) 299.

67. After 12 weeks gestation a variety of methods of abortion are utilized, in descending order of use they are: dilation and curettage, induced abortion (usually with prostaglandins), and hysterectomy.

68. Vacuum aspiration is the method of choice for abortions up to 12 weeks. The DHSS 1982 Report, *supra* note 65, noted nine deaths in the years 1970-1978, which is a rate of 13.2 deaths per million.

that the doctor form, in good faith, a belief that one of those three grounds exists, the limits on the court's role must be to determine the honesty of the doctor, because good faith is all that is necessary.⁶⁹ It is not necessary under the Act for the risk to be greater in continuing the pregnancy than terminating it, just that the doctors in good faith believe that. Hence, doctors are not subject to any judicial control outside of cases of patent dishonesty by them in forming that conclusion.⁷⁰ The judicial attitude can be seen in *Paton v. British Pregnancy Advisory Service*.⁷¹ A husband sought an injunction to prevent his wife from obtaining an abortion without his consent. The provisions of the 1967 Act were complied with and the necessary certificate was given by two doctors. Sir George Baker P. refused the husband's application for an injunction on the grounds that he lacked locus standi either on his own behalf or on behalf of the unborn child. It was not argued that the abortion did not comply with the terms of the 1967 Act. However Baker P. observed that "it would be quite impossible for the courts to supervise the operation of the Abortion Act 1967. . . . [A] great social responsibility is firmly placed by the law on the shoulders of the medical profession."⁷² The judicial reluctance to become involved in challenges to a doctor's discretion under the Act was reiterated by the judge later in his judgment:⁷³

This certificate is clear, and not only would it be a bold and brave judge . . . who would seek to interfere with the discretion of doctors acting under the [Abortion Act 1967], but I think he would be a really foolish judge who would try to do any such thing, unless possibly, where there is clear and bad faith and an obvious attempt to perpetrate a criminal offence.

These remarks were subsequently approved in the Court of Appeal by Sir John Donaldson M.R. in *C v. S*, decided in 1987.⁷⁴ There can be little doubt that the English judiciary has no desire to challenge, except in the most exceptional circumstances, the medical decision-making power conferred upon doctors by the Abortion Act 1967.

Outside of jury trial for a criminal offense based upon the dishonesty of the doctor that one of these grounds exists, the decision-making process is handed to the doctor by the English abortion law. Hence I think I can generalize by saying we have a very liberal abortion law—certainly early on in pregnancy—which differs little from the situation under the *Roe v. Wade* trimester scheme during the first trimester.

69. *E.g.*, *R v. Smith* [1974] 1 All E.R. 376.

70. Another possibility would be if one of the pre-conditions under the Act are not satisfied. *See, e.g., id.*

71. [1979] 1 Q.B. 276. *See Kennedy, Husband Denied A Say in Abortion Decision*, 42 Mod. L.R. 324 (1979).

72. *Id.* at 281.

73. *Id.* at 282.

74. [1988] 1 QB 135.

Let me conclude by asking a few questions about the future. At a time when state legislatures in the U.S. are going to be confronted, I think, for the first time in fifteen years with the challenge of legislating meaningfully on abortion, our situation in the U.K. may be similar. First, pro-life groups will continue to seek to support members of Parliament and will seek to continue to see bills introduced, either attempting to restrict the upper limits of abortions and/or the grounds of abortion. The lack of any success in achieving an amendment to the 1967 Act may encourage some pro-choice groups that the change will not come in this way. I think it is unlikely—there are no votes to be won by legislating on abortion in England. The Government is unlikely to introduce any legislation which will fundamentally alter the 1967 Act. The only way it can be amended and the way it has been attempted is by an individual MP chancing his luck in the lottery of individual MP's opportunities to introduce bills and get them through Parliament without Government support. But, because they are not government sponsored, there is a limited time for them to be discussed and so each of these bills at some point or other has been talked out by the other side.⁷⁵

One change that may come, is the reduction of the upper time limit in the 1929 Act to twenty-four weeks. Interestingly, the Act presumes a child to be capable of being born alive at twenty eight weeks,⁷⁶ so that is sometimes taken by the medical profession to be the point of viability. There has been a debate suggesting that the time should be brought down to the medical reality of twenty-four weeks.⁷⁷ And it is likely that the government will do that,⁷⁸ but of course, that changes nothing, since the Court of Appeal has already interpreted "capable of being born alive," which is the point at which the 1929 Act makes it criminal to destroy an unborn child, as arising before the presumption of twenty-eight weeks, at an earlier point, somewhere around twenty-four or maybe a week or two earlier.⁷⁹ Even if the law changes, it would not alter the situation.

A more significant risk of change may come from Europe. England does not have any constitutional law of the sort that is all too familiar

75. This was the fate of the Corrie Bill in 1979 and the Alton Bill in 1988. The latter, which commanded a majority of 45 at its Second Reading stage, see 1 *Lancet* 251 (1988), fell on May 6, 1988 because of filibustering tactics of its opponents at the committee stage. See 1 *Lancet* 1118 (1988). Further ploys, this time by Mr. Alton, to amend a Government Bill to add to abortion provisions also subsequently failed. 1 *Lancet* 1175 (1988). The Bill introduced by Ann Widdecombe MP in December of 1988 was co-sponsored by the defeated Mr. Alton and represents in form his Bill which fell earlier in the year.

76. Infant Life (Preservation) Act 1929, § 1(1) proviso.

77. The Lane Report, *supra* note 47, at ¶¶ 274-83 recommended this change in 1974. It also seems to have the universal support of the medical profession. See ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS, BRITISH PAEDIATRIC ASSOCIATION, ROYAL COLLEGE OF GENERAL PRACTITIONERS, ROYAL COLLEGE OF MIDWIVES, BRITISH MEDICAL ASSOCIATION AND THE DEPARTMENT OF HEALTH AND SOCIAL SECURITY, REPORT ON FOETAL VIABILITY AND CLINICAL PRACTICE (1985).

78. It is likely that an attempt will be made to achieve (at least) this change in the law during the passage of the Human Fertilisation and Embryology Bill 1989.

79. *C v. S* [1988] 1 QB 135.

to the American lawyer. But Europe does, and we are a part of it. While the focus of English abortion law is properly directed towards Parliament and not the judiciary, the scope for judicial review of abortion law in England as a signatory to the European Convention on Human Rights exists. The Convention is a European Bill of Rights. It explicitly recognizes many of the rights, indeed more of the rights, than you have explicit in your Bill of Rights. While it is not directly enforceable in England, the English courts cannot overturn legislation on the strength of it; the European Court of Human Rights sitting in Strasbourg has the power to declare that the law of the United Kingdom, whether the Common Law or the statutory law, infringes one of the rights spelt out in the Convention. Such a declaration has no direct effect on the law of England, but it requires the United Kingdom government to change the law to conform with the ruling. There are some arguments that the constitutional questions that you address in your constitutional law cases on abortion, and Canada has done so under their Charter of Rights and Freedoms,⁸⁰ could equally lead to even our liberal abortion law being struck down because of some of its limitations.

In *Paton v. United Kingdom*,⁸¹ a claim was brought against the United Kingdom government arguing that English abortion law infringed the Convention. Paton applied for an injunction in the English courts to prevent his wife seeking and undergoing an abortion. His application was refused. Before the European Commission of Human Rights, which functions as a preliminary screening body for cases to go to the European Court of Human Rights, Paton made a much larger claim than arguing that a denial of an injunction infringed the "right to respect for his . . . family life" protected under Article 8.⁸² He claimed that a law permitting abortion at all infringed the Convention. He relied on several articles of the Convention but principally on Article 2 which provide that "[e]veryone's right to life shall be protected by law." This, he claimed, applied to the unborn child and hence the fetus' "right to life" would be infringed if an abortion was performed.

The Commission refused to decide whether the unborn child could be brought within the term "everyone" in Article 2. However, the Commission gave a reasonably clear indication that it could not. The Commission was influenced by the context in which the term "everyone" is used in the Convention. Specifically, looking at Article 2 itself, the right in Article 2 is taken away in four situations: first, in the case of the death penalty; secondly, on grounds of self-defense; thirdly, where a lawful arrest is effected or an escaping prisoner is detained and fourthly,

80. *Morgentaler v. R* [1988] S.C.R. 30, discussed by Ziff, *Abortion and the Canadian Charter of Rights and Freedoms* [1989] C.L.J. 165.

81. [1980] 3 E.H.R.R. 408.

82. This argument was dismissed because the Commission held that Paton's rights under Article 8 had to be considered limited by his wife's rights as a pregnant woman carrying the fetus. Therefore, interference with them was justified "as being necessary for the protection of the rights of another person." *Id.* at 416.

where a riot or insurrection is quelled. Each of these is clearly applicable to individuals who had been born. Consequently, the Commission reasoned, this "tend[ed] to support the view that [Article 2] does not include the unborn."⁸³

In any event the Commission determined that even if Article 2 applied, an unborn child's "right to life" is limited by the rights of the pregnant woman when an abortion is performed to protect her life or health. Since this had been the ground for the abortion, Paton's claim was denied by the Commission.

The *Paton* case cannot be the final word on the compatibility of English abortion law with the Convention. The Commission's decision is very narrowly expressed. First, Paton's wife had sought an abortion when she was eight weeks pregnant. The Commission made it quite clear that it was not concerned with balancing the rights of a mature fetus with those of the mother for this was a case where the abortion arose at the "initial stage of the pregnancy." If an unborn child did have rights under Article 2, might a different balance be struck if the fetus was twenty weeks old? Secondly, the Commission restricted its decision to cases where there is a "medical indication" for the abortion in the interests of the mother's life or health. The Commission specifically excluded from its consideration abortions performed on, for example, eugenic or social grounds. English law contemplates abortions being lawfully performed in both these situations.

These caveats should not lead to the conclusion that English abortion law is necessarily unlawfully wide in its scope. When pressed the Commission and the European Court of Human Rights may decide Article 2 does not apply to the unborn child. Canadian courts have consistently held that this is the position under similar provisions in Canadian law.⁸⁴

Also, there are provisions in the European Convention which support an argument that a woman has a right to an abortion, at least, in some circumstances. Article 5 provides that "[e]veryone has the right to liberty and security of person." This may protect the right of a woman to seek an abortion in all, or some, situations. It certainly looks like an effective foil to any assertion that an unborn child's rights are absolute. A similar provision in section 7 of the Canadian Charter of Rights and Freedoms led the Canadian Supreme Court in the *Morgentaler*⁸⁵ case to strike down a restrictive abortion law because it did not give the pregnant woman sufficient opportunity to obtain an abortion. Equally, a woman's right to an abortion may be supported under Article 8 which protects the "right to respect for [her] private and family life."

83. *Id.* at 413.

84. *Dehler v. Ottawa Civic Hospital*, 101 D.L.R.3d 686 (1979); *Borowski v. The Attorney General for Canada*, 4 D.L.R.4th 112 (1987) (appeal to the Supreme Court of Canada dismissed on procedural grounds [1989] 1 S.C.R. 342). See also *Daigle v. Tremblay* [1989] 2 S.C.R. ____.

85. [1988] S.C.R. 30.

It is perhaps something of an irony that the United Kingdom has had legislative battles over abortion for over twenty years but the courts have not been greatly involved. On the other hand, the history of the last fifteen years in this country has been the converse, it has been the courts and not the legislature which has seen the battles. Just at the time when the U.S. battles may be returned to the elected legislatures, the greatest threat to the compromise legislation that we have in the 1967 Act may indeed come from a court, not from our legislature—not this time the court of national jurisdiction, but a court from abroad, from Strasbourg, the European Court of Human Rights. Little seems to be different on both sides of the Atlantic—just, it seems, reversed in time.

POSTSCRIPT

As I indicated in my lecture (see footnote 78), it was likely that some amendment to the abortion legislation would occur during the passage of the Human Fertilisation and Embryology Bill through Parliament. The Bill creates a regulatory framework for the new reproductive techniques, but the Government introduced (and encouraged other) amendments to it dealing with abortion. On Monday, April 23, 1990, an amendment to the abortion law was approved by the House of Commons. Although the parliamentary process is not concluded, it is likely that the substance of this amendment will survive and become law. The amendment achieves the following.

First, it restricts reliance upon the familial health ground to pregnancies which do not exceed twenty-four weeks. Secondly, it similarly restricts reliance upon the maternal health ground *unless* the doctors consider the risk to the mother's *life* is greater if the pregnancy continues than if it is terminated or if the termination is necessary to prevent grave permanent injury to her physical or mental health. In such cases, there is no upper time limit.

In themselves, these amendments would not change the law significantly. Few abortions are performed after twenty-four weeks in any event and, further, the courts' interpretation of the Infant Life (Preservation) Act 1929 probably results in post-twenty-four week abortions being illegal under that Act. Consequently, it is the third change to the law which is the most significant because the Abortion Act (section 5(1)) is amended to state that if a pregnancy is terminated in compliance with the Abortion Act then no offense under the 1929 Act is committed. Thus, there is no upper time limit restricting termination of pregnancy on the fetal abnormality ground or the maternal health ground if there is a risk to the mother's life or if it is necessary to prevent grave permanent injury to her physical or mental health. In addition, an abortion performed under the remainder of the maternal health ground or the familial health ground before the end of the twenty-fourth week of pregnancy will not be illegal under the 1861 Act or, importantly, the 1929 Act; even if the unborn child is "capable of being born alive" or

viable. This undoubtedly literalises the law as stated by the Court of Appeal in *C. v. S.*

The intention of the Government in permitting amendments to the abortion law was, on the surface, to restrict the availability of abortions. In fact, quite the opposite has occurred and the law is now even more liberal than it was before.