

THE FETUS AS A LEGAL ENTITY— FACING REALITY

“The life of the law has not been logic:
it has been experience.”

Mr. Justice Holmes*

Robert Keeler and his wife obtained an interlocutory decree of divorce in September 1968. In February 1969, after learning that his wife was pregnant by another man, Mr. Keeler intercepted her on a mountain road and, with the words, “I’m going to stomp it out of you,”¹ assaulted her, delivering blows to the face and abdomen. A Caesarean section and examination *in utero* revealed the fetus had died of a severely fractured skull and resultant hemorrhaging. Fetal movements had been observed prior to the assault. The fetus was judged to have been in approximately its thirty-fifth week of gestation.²

An information was filed charging Mr. Keeler with murder.³ A petition for a writ of prohibition to prevent his prosecution for that crime was denied by the California Court of Appeal for the Third District.⁴ On Appeal to the California Supreme Court, *held*, writ granted: a fetus neither born nor in the process of being born is not a “human being” within the meaning of those words as they appear in the homicide statute.⁵ *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 622, 87 Cal. Rptr. 481 (1970).

INTRODUCTION

Both the act in *Keeler* and the act in any abortion are directed

* HOLMES, THE COMMON LAW, Lecture 1, at 1 (1881).

1. *Keeler v. Superior Court*, 2 Cal. 3d 619, 623, 470 P.2d 617, 618, 87 Cal. Rptr. 481, 482 (1970).

2. The fetus was estimated to have a 75 to 96 percent chance of survival if it had been prematurely born at this time. *Id.* at 624, 470 P.2d at 619, 87 Cal. Rptr. at 483.

3. Two other counts were also filed against petitioner. Count two was for willful infliction of traumatic injury upon his wife which carries a maximum sentence of ten years in prison. CAL. PENAL CODE § 273(d) (West 1970). Count three was for assault by means of force likely to produce great bodily harm, which carries a maximum punishment of \$5,000 and/or ten years in prison. CAL. PENAL CODE § 245(a) (West 1970).

4. 276 Adv. Cal. App. 324, 80 Cal. Rptr. 865 (1969).

5. “Murder is the unlawful killing of a human being with malice aforethought.” CAL. PENAL CODE § 187 (West 1970).

toward the intentional destruction of a fetus. While the *Keeler* type act is morally reprehensible, abortion is being increasingly accepted as a routine, legal, procedure. It is the writer's contention that this dichotomy must be squarely faced before attempting a legislative remedy to the immediate *Keeler* problem. This comment will examine the basis for the *Keeler* decision, the abortion dilemma which must be recognized if legislative reaction to the case is to be successful, and some considerations for the future.

I. THE CASE

A. *The Court of Appeal*

The court of appeal unanimously denied the writ of prohibition. The court found that the "born alive"⁶ doctrine of England had never been crystallized into California law.⁷ The conditions of modern life, especially the progress of medical science, were seen as significant in the determination of the present state of the law.⁸ Two California cases, *Scott v. McPheeters*⁹ and *People v. Chavez*,¹⁰ formed the basis of that opinion.

McPheeters was a civil case which held that a child born alive could recover for pre-natal injuries. At issue was the construction of section 29 of the California Civil Code.¹¹ It was decided that the "interests" of an unborn child included the right to maintain an action in tort for pre-natal injuries. The court admitted that at common law the child had no legal existence distinguishable from that of its mother. However the court was not bound by this fact because section 29 represented a statutory abrogation of the former law. The concept that a viable fetus should be considered an existing human being was expounded upon.¹²

6. See text accompanying note 14, *infra*.

7. 276 Adv. Cal. App. at 327, 80 Cal. Rptr. at 867.

8. *Id.*

9. 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

10. 77 Cal. App. 2d 621, 176 P.2d 92 (1947).

11. "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of subsequent birth . . ." CAL. CIV. CODE § 29 (West 1954).

12. *McPheeters* is of course clearly distinguishable from *Keeler*. It was a civil case and the child was born alive. It does, however, illustrate a way of thinking about the viable fetus as a human being. "It is common knowledge that when a child's lungs and organs are fully developed, even in a seven-months baby, it is frequently capable of living and that it ac-

In *Chavez*, a manslaughter conviction was upheld even though the child may have been killed before it was completely expelled from its mother's body, i.e., it was not necessary to prove complete separation.¹³ The court in *Chavez* also admitted that at common law a fetus could not be the subject of homicide until it had been completely separated from its mother and had an entirely independent life, with the umbilical cord cut and with its own breathing and heart action.¹⁴ However, common sense recognition of medical progress required that a child in the process of birth should be included in the definition of a human being.¹⁵

The court of appeal in *Keeler* saw *Chavez* as an "instrumentality in the evolutionary development of California homicide law."¹⁶ Thus, even though the common law was codified by the 1850 California homicide statute, the court of appeal felt it was still possible to adapt the law to modern times without legislative action. Furthermore, according to the court, the *Chavez* decision had not foreclosed the possibility that a fetus not yet in the process of birth could also be found to be human.

B. *The California Supreme Court*

Reversing the court of appeal, the supreme court's approach was to first determine the common law at the time of the enactment of the California homicide statute in 1850. Relying upon historical studies, the court concluded that an infant, at common law, could not be the subject of criminal homicide unless it was born alive.¹⁷ The court quoted the 17th century writings of Coke:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of dead childe, this is a

tually exists as a human being separate and distinct from its mother, even though it is prematurely born by artificial means or by accident. Who may say that such a viable child is not in fact a human being in actual existence?" 33 Cal. App. 2d at 634, 92 P.2d at 682 (dictum). Federal cases can also be found replete with language supporting the concept of the viable fetus as a human being. *E.g.*, *Panagopoulous v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969) (wrongful death); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946) (tort action for pre-natal injuries—overturned Holmes doctrine that the fetus was only a part of its mother). A state case of special interest is *Raleigh-Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964) (blood transfusion ordered to save life of fetus). But for the abortion phenomenon such cases indicate that the fetus might have emerged as a human being in the full sense of the words.

13. 77 Cal. App. 2d at 626, 176 P.2d at 94.

14. *Id.*

15. *See, id.* at 625-26, 176 P.2d at 94.

16. 276 Adv. Cal. App. at 327, 80 Cal. Rptr. at 867.

17. 2 Cal. 3d at 625, 470 P.2d at 620, 87 Cal. Rptr. at 484.

great misprison [i.e., misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder¹⁸

The supreme court also found that the requirement of complete separation of the child from its mother, before it could be the subject of murder, *had* been incorporated into American law.¹⁹

Having concluded that the nineteenth century law in California required a live birth, the court proceeded to answer the prosecution's contention that progress in medical science and the associated increase in the survivability of the fetus should result in a change to that law. Two basic obstacles to such a change were found by the court.

The first obstacle was jurisdictional.²⁰ Since there are no common law crimes in California,²¹ the legislature must define an act as criminal before the judicial system can act upon it. Under the doctrine of separation of powers, the court could not encroach upon the legislative function.

The second obstacle was the constitutional due process requirement of notice.²² It was found that petitioner could not have foreseen that his actions could have constituted criminal homicide against the fetus. Only one California case, *People v. Chavez*, dealt specifically with this area, *viz.*, the criminal aspects of the killing of a fetus not yet completely separate from its mother.²³ The supreme court in *Keeler* approved the *Chavez* concept that a fetus in the process of birth is a human being within the homicide statutes, but decided that it was not foreseeable to petitioner that a fetus which had not yet begun the birth process would also be found to be human.

18. *Id.*

19. *Id.* at 627, 470 P.2d at 621, 87 Cal. Rptr. at 485. However, as pointed out by the dissenting opinion, at common law the killing of a quickened fetus, though not murder or manslaughter, was severely punished. *Id.* at 640-41, 470 P.2d at 631, 87 Cal. Rptr. at 495.

20. *Id.* at 631, 470 P.2d at 624, 87 Cal. Rptr. at 488.

21. CAL. PENAL CODE § 6 (West 1970).

22. 2 Cal. 3d at 633, 470 P.2d at 626, 87 Cal. Rptr. at 490.

23. An example of the fetus being indirectly protected by the criminal law is the case of *People v. Sianes*, 134 Cal. App. 355, 25 P.2d 487 (1933), where it was held that a father could be found guilty of a misdemeanor for failure to support his unborn child.

C. Significance of the Case

On its face, *Keeler* is simply an exercise in statutory construction. On closer analysis, however, it is much more. It is a vehicle for the presentation to the California legislature of a difficult problem: How can the intentional destruction of a fetus (under certain circumstances) be discouraged by the penal law in an era of increasing acceptance of the practice of abortion? If the legislative reaction is to be successful, it must be realistic.

An unborn child is treated legally in various ways, depending on what "interest" is being protected.²⁴ If born alive, an individual may discover that during the fetal state he has taken and lost property,²⁵ been bound by a court decree,²⁶ and acquired the right to bring an action for pre-natal injuries.²⁷ If the individual subsequently dies, then a wrongful death suit may be brought on the basis of the pre-natal injuries.²⁸

To these examples of the "legal existence" of the fetus, can be added what may be a generally held belief that a *Keeler* type act, especially in the case of a viable child, is extremely serious.²⁹ Even before *Keeler*, the conflict was apparent between the civil law treatment (generally protective) of the unborn child and the abortion trend. *Keeler*, because it concerns the intentional destruction of a viable fetus under distressing circumstances, has brought the conflict to a point where it must be recognized.

24. For a general discussion of the rights of the fetus in property and tort see Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L.J. 51 (1969); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. 233 (1969).

25. *E.g.*, *In re Sankey's Estate*, 199 Cal. 391, 249 P. 517 (1926).

26. *Id.* See also CAL. PROB. CODE § 250 (West 1956), "A posthumous child is considered living at the death of the parent."; CAL. PROB. CODE § 123 (West 1956) provides, "A child conceived before but born after a testator's death . . . takes, if answering to the description of the class."

27. *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

28. CAL. CIV. PROC. CODE § 377 (West 1954), provides for the maintenance of an action for damages for the death of a "minor person" by his heirs or personal representatives. It was held in *Norman v. Murphy*, 124 Cal. App. 2d 95, 268 P.2d 178 (1954), that the child must be born alive, *i.e.*, a fetus is not a "minor person." Some states do not require a live birth as a prerequisite to a wrongful death action. *E.g.*, *Panagopolous v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969). Del Tufo, *Recovery for Pre-Natal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61 (1960).

29. See text accompanying note 44, *infra*. Also supporting the idea that there is a general consensus about the seriousness of the act is the rapid reaction of the legislature to the case. See note 43, *infra*. It should be remembered that the liberalization of the practice of abortion has not resulted directly from a lack of benevolent feelings toward the unborn child, but rather from the "discovery" of a barrier of privacy around the mother that prevents the interference with her choice to terminate the pregnancy. See text accompanying notes 33 and 37, *infra*.

II. THE ABORTION SITUATION

California abortion law,³⁰ substantially liberalized in 1967,³¹ permits an abortion during the first twenty weeks of pregnancy, upon approval of a hospital committee. The committee must find that the continuation of gestation would either gravely impair the physical or mental health of the mother or that the pregnancy is the result of rape or incest. California Health and Safety Code Section 25951 defines mental health as mental illness to the extent that the woman is dangerous to herself or property, or is in need of supervision or restraint. Evidently, to many persons desiring an abortion, even the diminished restrictions of the 1967 statute are unacceptable. As a result, in some areas abortions are available on demand.³²

30. CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1970).

31. Prior to 1967, abortion was permitted only when necessary to save the life of the mother. Ch. 99, § 45, 1850 Cal. Stats. 233. With the enactment of the 1967 statute § 274 of the penal code was amended to provide for the punishment of abortion only when the requirements of §§ 25950-54 were not complied with.

32. See Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237 (1970).

Advocates of the unrestricted practice of abortion characteristically display a casual attitude about the rights of the fetus. The head in the sand device of emphasizing that most abortions are performed early in the pregnancy is evidently expected to soothe opponents of their views who are particularly disturbed about late terminations. *E.g.*, *People v. Belous*, 71 Adv. Cal. at 1010, 458 P.2d at 202, 80 Cal. Rptr. at 362 ("during first trimester"); see Clark, *supra* note 36; Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968) ("early post-conception, entity not unlike separate male spermatozoon and female ovum").

Advocates of the rights of the unborn child often emphasize the characteristics of the fetus toward the end of the gestation period. *E.g.*, *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969); *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. (1969).

These polar points of emphasis might have been, in a more stable era, the basis for a compromise, *i.e.*, abortion would be legal at the earliest stages of the pregnancy, but absolutely prohibited at the later stages. The 1967 California statute (see text accompanying note 31, *infra*) permitting abortions through the twentieth week is typical of such attempted compromise. However *Babbitz v. McCann* (see text accompanying note 37, *infra*) indicates that there can be no restriction on abortion at least until the fetus has quickened. Furthermore, the language in *Babbitz* is strong enough to indicate that the post-quickened child may also be unprotected.

Because of the vagueness of its wording, the pre-1967 California abortion statute was held in violation of the federal constitution in *People v. Belous*.³³ The *Belous* court decided that a woman has a constitutional right to decide, without interference from the state, whether to carry her child until birth. The vagueness of the words "necessary to preserve"³⁴ and the derivative reluctance of doctors to perform abortions because of their fear of prosecution resulted in an effective denial to the woman of the enjoyment of her right. The court found no compelling interest in protecting the life of the fetus that could justify an interference with the mother's right to privacy. Great emphasis was placed on medical progress, but the effect of that progress was to make abortion a safe practice for the mother (thereby eliminating an obstacle to its practice) rather than to elevate the "humanness" of the fetus (by increasing its survivability). The "rights" of the fetus were dispatched in a few short paragraphs.

The *Belous* court drew support for its decision from *Griswold v. Connecticut*³⁵ wherein a state statute prohibiting the use of contraceptives between married persons was held unconstitutional as an infringement upon the right to marital privacy, a right found within the penumbra of the specific guarantees of the Bill of Rights.³⁶

Indications are that federal courts will follow *Belous* and thereby eliminate any chance for reversal of the trend toward unrestricted abortion. In *Babbitz v. McCann*,³⁷ a federal district court issued a declaratory judgment that the Wisconsin abortion statute³⁸ was unconstitutional because it interfered with a woman's ninth amend-

33. 71 Adv. Cal. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). The *Belous* decision was handed down on September 5, 1969. The words in *Belous* to the effect that the destruction of a fetus was never murder were considered dicta.

34. See note 31, *supra*.

35. 381 U.S. 479 (1965).

36. *Id.* at 484-85. The view of the *Belous* court that the marital privacy right to practice contraception must lead to the right to practice abortion is shared by Retired Supreme Court Justice Tom C. Clark. See Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA OF L.A. L. REV. 1 (1969).

37. 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed per curiam* *McMann v. Babbitz* (U.S. Oct. 12, 1970) (No. 297). See also *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 38 U.S.L.W. 3373 (U.S. Feb. 5, 1970) (No. 1155).

38. WIS. CRIM. CODE § 940.04 (West 1958). The statute distinguished between abortion of a fetus before and after quickening. The court was concerned only with application of the pre-quickened section. The statute declared that an unborn child is a "human being" from the time of conception.

ment³⁹ right to privacy. The court said:

An examination of recent Supreme Court pronouncements regarding the ninth amendment compels our conclusion that the state . . . may not . . . deprive a woman of her private decision whether to bear her unquickened child.⁴⁰

. . . .
When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.

. . . .
We . . . conclude . . . that the mother's interests are superior to those of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contended, or a human being, as the Wisconsin statute declared.⁴¹

III. THE LEGISLATIVE RESPONSE

The supreme court in *Keeler* primarily based its decision on the fact that under the common law a fetus could not be the subject of criminal homicide, a doctrine incorporated into California law by the 1850 enactment of the homicide statute.⁴² The legislature has responded to the case by simply amending sections 187 (murder) and 192 (manslaughter) of the penal code to provide that the words "human being" include a fetus. The sections are not to apply if the killing of the fetus is done in compliance with the Therapeutic Abortion Act, by a doctor when necessary to preserve the life of the mother, or *with the consent of the mother*.⁴³ Thus the legislature has failed to face the dilemma posed by the contemporaneous liberalization of abortion.

A. *The dilemma*

Keeler requires a determination of the way in which an unborn child is to be treated legally. A dilemma arises if one attempts to formulate a statute that would make the killing of a fetus, under certain circumstances, a crime against *it* (as distinguished from a

39. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. AMEND. IX.

40. 310 F. Supp. at 299.

41. *Id.* at 301.

42. See text accompanying note 19, *supra*.

43. The amendments have been signed by the governor, and will become effective November 25, 1970.

crime against the mother). The supreme court in *Keeler* said that the killing of a viable fetus under such circumstances would be deemed by some to be of a similar nature and gravity to murder.⁴⁴ But what difference can it make to the fetus whether the knife be that of a madman or a surgeon? How can it be a serious crime, let alone murder, for one person to kill a fetus and yet completely acceptable for a woman and her doctor to do the same act, with perhaps an identical motive?⁴⁵

The pre-1967 abortion statute,⁴⁶ which required the mother's life to be in real danger, at least made the killing of the fetus analogous to justifiable homicide. The current "standards" of good health and comfort as justification for the destruction of the fetus lead to the conclusion that the unborn child is not legally "human" at all. Since the interest of the fetus in life cannot compete with its mother's interest in comfort, and since the right to live must be the greatest right of all, it follows that the fetus is in reality a legal non-entity. The civil law treatment⁴⁷ must merely represent a legislative conferment of benefits to children for pre-natal injuries and property transactions. The question is, disregarding the mother, can the killing of a fetus, per se, be a criminal act? The answer is no. The legally sanctioned, unrestricted practice of abortion is irreconcilable with a statute that would permit a fetus to be the subject of criminal homicide.

B. A Realistic Statute

By failing to face the reality of current events concerning abortion, the legislative response of amendment to the criminal homicide statute is unsatisfactory for two reasons. The first reason, as previously discussed, is that it is logically unsound to approach the problem from the standpoint of the fetus, to approve the action of the mother in killing it, and yet label the similar action of another the most heinous of crimes—murder.

The second reason is that the amendment may be unconstitutional. Recall the discussion of *Belous*.⁴⁸ The abortion statute was unconstitutional because the fear by doctors of prosecution under it resulted in an interference with the woman's right to exercise a free

44. 2 Cal. 3d at 632, 470 P.2d at 625, 87 Cal. Rptr. at 489.

45. Since a posthumous child has certain property rights (see note 26, *supra*) an abortion could be profitable for the mother, e.g., the case of intestate succession where there are no living children at the time of the father's death.

46. See note 31, *supra*.

47. See notes 11, 12, 24, 26, and 28, *supra*.

48. See text accompanying note 33, *supra*.

choice regarding whether she should bear a child. The chilling effect of facing the possibility of prosecution for murder need not be elaborated upon.⁴⁹

Since it is not logical and may be unconstitutional to attempt a solution to the immediate *Keeler* problem (preventing similar acts) by direct legal protection of the fetus, a more appropriate response by the California legislature would be the enactment of a statute providing greater protection for a woman known to be pregnant. There are at least two elements of her condition that justify such a special assault and battery provision:⁵⁰ (1) her greater vulnerability to serious physical harm; and (2) the possession by her of a parental expectation. The vulnerability element is of course dependent on the stage of the pregnancy, and this particular aspect of the problem could be handled by provision for greater punishment for an attack upon the woman after a certain period of gestation.

IV. FUTURE PROSPECTS

The dissent in *Keeler*, criticizing the majority decision which left the viable fetus without the protection of the homicide statute, commented upon the great effort currently made to extend life.⁵¹ This criticism serves well to illustrate the choice we have made. Certainly it is not logical to preserve life near its end when there is no hope for regained health, and yet to allow indiscriminate destruction of life at its earliest and most promising stages. In addition, the elderly are sometimes kept alive against their own wishes while in the case of abortion the child cannot, and the father will not,⁵² be heard.

49. The provisions in the amendments to the criminal homicide statutes that they are not to apply if the woman consented to the killing of the fetus, mitigate this effect somewhat. This codification of the woman's power to determine whether the same act is murder, manslaughter, or merely the exercise of a right to privacy, indicates a recognition of (but hardly a solution of) the inherent problem in protecting the unborn child in a society that has legally accepted abortion.

50. Similar special assault provisions have already been enacted in another area. CAL. PENAL CODE § 245(a) (West 1970), provides a maximum punishment of ten years in prison and/or a \$5000.00 fine for assault likely to produce great bodily harm. § 245(b) increases the punishment for assault on a peace officer or fireman to fifteen years in prison or five years to life if there has been a prior felony conviction.

51. 2 Cal. 3d at 642-43, 470 P.2d at 633, 87 Cal. Rptr. at 496.

52. In California (and most other states) the husband's consent is not

The remarkably rapid acceptance of abortion suggests that the very concept of life needs re-examination. The fetus cannot be protected because the barrier of privacy of the mother cannot be penetrated. Why then can it be protected once it has begun the process of birth? Why is the interest of the state suddenly sufficient to overcome the woman's right to privacy? Why is the viable fetus *not* protected when, as a result of an abortion, it is removed alive?⁵³ In that situation, the mother's rights are no longer relevant.

Is it too distasteful to consider a more practical time, such as one year after conception, to give legal definition to the child? At least this would allow a more informed selection. Many of the arguments in support of unrestricted abortion apply equally well to a child (or any other helpless person) of any age.⁵⁴ It is true that after birth there is not the obstacle of the woman's privacy to prevent the protection of the living child. But it is foreseeable that in the future the fetus will be removed from its mother to complete its development in a (perhaps) superior environment. Certainly when this operation becomes commonplace there will not be a sudden throwing back of the point at which one becomes legally human to the time of removal. On the contrary, the current point of defining humanness at time of (or process of) birth will become completely meaningless. The problem will then be that of deciding at what point this living thing can no longer legally be destroyed.⁵⁵

required by the abortion statute. In the one case on the subject, the Supreme Court of California affirmed (without comment) a superior court's rejection of a father's claim that an abortion without his consent was a denial without due process of *his* right to have his child born. *O'Beirne v. Superior Court of Santa Clara County*, 1 Civil 25174 (Sup. Ct. of Cal., Dec. 7, 1967). Case discussed in Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 430 (1968).

53. Whatever the percentage of abortions that result in a live delivery, the occurrence of even a small number of such births presents a serious legal and moral problem. Of course the problem is realistically not distinguishable from that of abortion of a viable fetus while it is still within its mother. But the physical and legal absence of the mother demands that the problem be faced.

Bureaucratic procedures may be a cause for abortions occurring late in the pregnancy. In Sweden, twenty-four week old babies sometimes "cry for hours before dying." *TIME MAGAZINE*, Oct. 13, 1967 at 32. The moral dilemma is illustrated by the report that at the George Washington University clinic some nurses have been baptizing fetuses. And the parents are given a choice; they may have the fetus buried in the conventional manner or incinerated as waste. *NATIONAL REVIEW*, June 30, 1970, at 659.

54. It should be noted, however, that these arguments (such as personal comfort, economic convenience, etc.) were not the basis for the legalization of abortion. See text accompanying notes 33 and 37, *supra*.

55. That problem is, to a degree, existant today. See note 52, *supra*.

The constitutional rights of the mother will not aid in that decision.

LOUIS E. BOYLE

It has been reported that a London abortion clinic was experimenting in keeping fetuses alive and was also selling them for research. *NEWSWEEK MAGAZINE*, June 1, 1970 at 86.