ABORTION[1] - RIGHT OR CRIME[2]?

by H A Finlay*

> Family Planning is an element of the struggle for social change which calls for a deliberate effort by the community to upgrade the status of women. Legislation must be designed to see women not as instruments for bearing a larger or a smaller number of children but as free agents and responsible controllers of their biological functions. It is to the benefit of all men and women to decide themselves the number and spacing of their children and for this they must have access to the necessary information, means and medical help related to family planning. It is also to the benefit of children. It gives every child the right to be wanted.
>
> The late Justice Lionel Murphy[3]

INTRODUCTION

While this paper comments mainly on Australian laws and social conditions, we have already travelled far along the road to uniformity and standardisation as fellow-members of the Global Village. As the "benefits" of our civilisation, along with its detriments, have been disseminated to people all over the Globe, whether willing or unwilling, the problems of that civilisation are similarly being shared by the people of other countries.

Among these problems is that of over-population. In recent years famine has reached epidemic proportions in African countries such as Ethiopia and Somalia, and in the present problems in the Tigré Province of Eritrea. Although famine has usually been connected with the failure of agriculture, the inability to feed too great a number of mouths is always both its cause and its effect. In subsistence economies the number of mouths that can be fed cannot be increased indefinitely.

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1 In speaking about abortion, we are not concerned with spontaneous abortion in which the criminal law is not interested, but only with intentionally induced abortion.

2 A Paper delivered at the 59th Congress of the Australian and New Zealand Congress for the Advancement of Science at the University of Tasmania, Hobart 14-16 February 1990.

3 Opening Address to a Family Planning and Law Symposium held at Monash University 3 July 1976, published in H A Finlay and J E Sihombing, *Family Planning and the Law,* 2nd edition, Butterworths, Sydney, 1978.

Thus the relevance of family planning is especially great in less developed countries with a high birth rate. There is now, however, a new spectre which has raised its head and which affects all of us equally and on a long view threatens to be even more devastating than are the problems of famine. Paradoxically, it is perhaps those countries which are least afflicted by the threat of starvation that are most at risk. The most serious problems that have emerged in a world of post-industrial consumerism are those of pollution and the depletion of natural resources. The greenhouse effect and the damage to the ozone layer have raised fears, not of crop failures or famines in individual countries, but of possible damage to the overall world habitat that could threaten life on this planet. "Greens" are becoming influential in politics and being elected to Parliaments. The Greens Party which arose in West Germany is a well-known example. Increasingly there have been moves to protect the environment. The activities of the Greenpeace movement are foremost among these.

In Australia similar movements have more recently moved to positions of prominence. A notable victory for conservation was the Tasmanian *Franklin Dam* case in 1983[4] under a Federal Act implementing World Heritage legislation. The election in May 1989 of an influential minority of Green Independents, on whose support the new Labor Government in that State depends, was an event of profound significance, the moral effect of which has been felt throughout Australia and promises to become a prelude to the Green Decade of the 1990s.

The relevance of all this is that the problems of over-population and population control will not go away, and that they are directly linked with the continued habitability of this Planet and its available resources. The World's populations continue to increase at an alarming rate. The total increase between 1950 and 1986 was from 2,516 million to 4,917 million.[5] For the Continent of Africa as a whole, the corresponding figures are 224 million to 572 million, an annual rate of population increase of 2.9%, but in each of East and West Africa that figure increases to 3.1%. Many of the less developed countries also have very high infant mortality, but in all cases there is a considerable excess of births over deaths. Whereas the annual natural increase in the United Kingdom was 1.5 per mille and in Australia and New Zealand 7.7 and 8.0 respectively, it was 37.3 in Botswana, 35.1 in Tanzania, 41.5 in Burma and 37.8 in Syria in the 1980s. While it could be argued, cynically, that a high death rate may counteract, to some extent, a high birth rate, the cold figures bespeak an amount of human suffering which is quite frightening to contemplate. Recent famine in Somalia, the Sudan and the Tigré Province of Eritrea has been much in the news, as have disastrous floods in Bangladesh.

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4 *Commonwealth v Tasmania* (1983) 158 CLR 1.

5 The population statistics in this section are drawn from the UN Demographic Yearbook 1986, World Summary at 147.

POPULATION CONTROL

The Malthusian debate which first raised the spectre of over-population just under two hundred years ago[6] was of great concern to the Victorians. The gist of Malthus' doctrine was that the resources to feed and support the human population were being steadily outstripped by the rate of population increase. Malthus saw this tendency as being partly held in check by "natural" population limitation such as famine, natural disasters and wars, but not sufficiently to counteract the dangers of over-population. He therefore advocated the practice of preventive measures. These did not include contraception, let alone abortion, which would have been unacceptable to him on moral grounds. Instead, he would have had people marry late and practice celibacy before marriage, and sexual restraint within marriage.

It was left to others to propagate more radical and effective measures of population control. Publications on both sides of the Atlantic were disseminated which advocated methods of contraception. One of these was Dr Charles Knowlton's *The Fruits of Philosophy,* published in New York in 1832. This pamphlet on birth control crossed the Atlantic and led to the celebrated trial in 1877 of Charles Bradlaugh and Annie Besant who had been distributing it in England.[7]

Acceptance of birth control by the Establishment was slow to come. The well-known English birth control campaigner Marie Stopes was involved in legal proceedings as late as 1923-1924.[8] These were not criminal but lay in civil defamation. In the vanguard of vilification against Stopes stood a St Halliday Sutherland who occupied a senior position in the English Ministry of Pensions. To defend herself against his attacks and demands for her prosecution, Marie Stopes sued him for defamation. She lost in the High Court, won in the Court of Appeal but was finally reversed by the House of Lords.

It is significant that most of these advocates of birth control were motivated by a fervent desire to help people, particularly women among "the poorer classes". They were aware that these women and their families suffered considerable hardship, poverty and personal anguish because of the unrestrained production of a succession of children for whom they and their husbands were unable to provide. Against this stood

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6 Rev Thomas Malthus *Essay on the Principle of Population as it affects the future Improvement of Society*, 1798.

7 *R v Bradlaugh & Besant* (1877) 2 QBD 569, reversed on a technicality in *Bradlaugh & Besant v R* (1878) 3 QBD 607, CA. *See also Ex parte Bradlaugh* (1878) 3 QBD 509, *Re Besant* (1875) 11 Ch D 509, *Besant v Wood* (1879) 12 Ch D 605, and cf Walter L. Arnstein, *The Bradlaugh Case, A Study in Late Victorian Opinion and Politics*, Oxford 1965.

8 Cf Muriel Box *The Trial of Marie Stopes*, Femina Books London 1967. This work contains a detailed account of the three legal proceedings involved in *Stopes v. Sutherland.*

a hostile Establishment which had no personal experience of the environment in which this suffering section of the population lived.

This brief and dismal account of birth control describes events in developed Western countries. But it should be remembered that less developed people had their own way of coping with population problems. The practice among the Eskimos of exposing the weaker of twins to death, because the prospects of survival for both were slim, is well known. Glanville Williams quotes Himes[9] who reminds us that "primitive" peoples (in the parlance of his day):

> ... all over the world adopt positive measures to prevent human births exercising an undue pressure upon resources. These measures include not only infanticide, abortion, and various ways of controlling fertility (such as the prohibition of intercourse for a certain period after the woman has given birth), but also mechanical, chemical, surgical, and magical devices intended to prevent conception. One of the best is reported of the Negro women of Guiana or Martinique ... who were found to use diluted lemon juice as a douche solution; it turns out that this is medically approved as an effective spermicide.

Among the measures for the limitation of families, abortion has always played a role. The rest of this paper deals with abortion in the legal and social context of societies in a modern world.

ABORTION AND SOCIETY

If the advocacy of contraception thus attracted such severe condemnation and legal penalties, abortion has been, *a fortiori*, the subject of prohibition and severe punishment. Abortion is perhaps of even greater antiquity than contraception, having been practiced by the Greeks, the Romans and many less sophisticated people.

The reason why people resorted to abortion was the desire to limit the population, particularly where there was insufficient food and sustenance available. In modern societies this is translated into the anticipated quality of life, both of the aborted infant, had it been born, and of its family. Moreover, increasingly in our society, women have gained the right to live their lives on terms of equality with men, even if that process is not yet complete. In the area of fertility this has meant that they have been able to give effect to a deeply felt desire to control their own bodies.

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[9] Dr Norman Himes, *Medical History of Contraception,* 1936, quoted by Glanville Williams, *The Sanctity of Life and the Criminal Law*, Faber and Faber, London 1958, 54.

THE CRIMINAL LAW

Against these modern trends is the somewhat anomalous position of the law in Australia today. Abortion today is still proscribed in Australia, with greater or lesser stringency. In this the law follows the English law before the coming of the *Abortion Act* 1967 when it was governed by the *Offences against the Person Act* 1861. Section 58 of that Act covered two situations: (a) where a pregnant woman uses any means with intent to procure her own abortion, and (b) where any other person unlawfully uses means with such an intent, whether the woman is pregnant or not.[10] All the Australian States have abortion laws in substantially similar terms.

However, modern attitudes have brought about modifications in the rigour of the law. It is due largely to them that the law has been administered with a certain degree of leniency towards women involved in aborting or attempting to abort themselves in genuine cases of hardship. To some degree it was also extended to their husbands or to others implicated not for gain but out of compassion. One reason for this leniency was the difficulty of securing a conviction against the mother from a jury.[11] The full rigour of the law was reserved in any case for the backyard abortionists, who were usually unqualified and put the lives of women at risk when they did not actually cause their death. Of course what helped them to flourish in the first place was that doctors could not legally perform abortions.

The leniency extended to the mother and sometimes also the father in compassionate cases was shown on a number of occasions, either in the recommendations or verdicts of juries, or in the outright exercise of judicial discretion in sentencing.[12] From these cases of compassionate leniency it was a long way to a reform of the law.

It was through the medium of therapeutic considerations that a relaxation in the strictness of the abortion laws came about. In 1939 it was recognised by Macnaghten J in the celebrated English case of Mr Alec Bourne, a renowned gynaecologist and obstetric surgeon[13] that there could be circumstances where an abortion might be justified, no matter what the law said. What happened was in fact a good example of judge-made law. The facts of the case are well known, certainly in legal circles, but perhaps a brief reference will recall them to mind. A 14 year old girl

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10 Section 134 of the Tasmanian *Criminal Code* of 1924 deals with the matter in substantially the same way.

11 Cf Glanville Williams, *op cit* 145.

12 *R v Tate*, reported in *The Times* (London) on 22 June 1949 and cited by Glanville Williams, *op cit*, 146-7. This was a case in which a husband had killed his wife in the course of trying to abort her. They had been living in appalling conditions and an extra child would have been a catastrophe. The Court of Criminal Appeal reduced the sentence of 5 years and ordered his release at the conclusion of the appeal.

13 *R v Bourne* [1939] 1 KB 687.

had been pack-raped by a number of soldiers. She became pregnant. Her doctors felt that the continuation of this pregnancy would do lasting damage to her health. They asked Mr Alec Bourne to operate.

Therapeutic abortions had been performed from time to time by some surgeons, but they had done so in secret and risked severe penalties if they were discovered. Alec Bourne, in a most courageous spirit, decided not only to operate, but to make this a test case to try and influence the law. As Glanville Williams tells the story:

> Mr. Bourne ... announced that he would make it a test case to secure the clarification of the law. "I have done this before", he declared, "and have not the slightest hesitation in doing it again. I have said that the next time I have such an opportunity I will write to the Attorney-General and invite him to take action." It was thus through his own deliberate choice that Mr Bourne found himself in the Dock at the Old Bailey, charged with a felony that in point of view of possible punishment must be reckoned one of the most serious known to the law.[14]

Mr. Bourne was acquitted by the jury at the direction of the judge, Macnaghten J. This was a clear example, not only of judge-made law, but of a value-judgment. The gist of his judgment was that "the unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother".

The law of England was subsequently amended to give effect to the *Bourne* decision by the enactment of the *Abortion Act* 1967. The essence of that short Act appears from its very first section:

> 1. - (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered practitioner if two registered practitioners are of the opinion, formed in good faith -
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> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
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> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

[14] Glanville Williams, *op cit*, 152-3.

> (2) In determining whether the continuance of a pregnancy would involve such a risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

This provision was remarkable at the time, in that it went beyond what could be strictly called therapeutic abortion, but extended the exception from purely medical or psychiatric grounds to social considerations as well. The debate about these extensions still rages.

The relevant Australian legislation follows, to a greater or lesser extent, the law of England before the 1967 Act. There have been modifications and a partial acceptance of the exceptions in *Bourne's* case, except in South Australia which has adopted substantially the provisions of section 1 of the English Act.[15] In Victoria *Bourne's* case was followed in *R v Davidson*[16] to the extent of safeguarding the mother's life or physical or mental health. The terms of the judgment do not go any further but there is reference to the medical action being "in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health ... ". This latter clause lends itself to a very wide interpretation.

In New South Wales the decision in *R v Wald*[17] goes further. Levine J said that it would in each case be for the jury to decide "whether there existed in the case of each woman any economic, social or medical ground or reason which in their view would constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health".[18]

What the law says and what people do and are tacitly permitted to do is, however, not always one and the same thing. The Crown has a discretion as to whether to prosecute any particular alleged offence and exercises that discretion in accordance with certain guidelines. These are concerned with such matters as the strength of a case, the availability and credibility of witnesses and so on. But the question of public policy is certainly one of these. This latter consideration applies also to the police, who may have certain directions and guidelines given to it by the Government of the day. If, for example, an offence is on the statute book but a large proportion of public opinion would be prepared to condone the offence, perhaps on compassionate grounds, the prosecuting authorities may prefer not to proceed with a given case or line of cases. This is a more discreet way of dealing with a matter on which a section of the public has strong views and opposes outright changes in the law.

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15 *Criminal Law Consolidation Act* 1935 -

16 [1969] VR 667.

17 [1972] 3 DRC 25, a decision of the District Court.

18 *Ibid* 28.

Thus the Tasmanian Police Statistics show that in 1962-63 there were 25 offences of abortions or attempted abortions recorded. As a result, one male was committed to trial, presumably the accused in *R v Luttrell.*[19] The accused had pleaded guilty to 25 counts of using means to procure abortion. When passing sentence, Gibson J reviewed similar cases in England, Queensland and New Zealand and the sentences passed in those jurisdictions. The Judge remarked that 'the sentences passed in this State seem to have been rather less severe than those to which I have referred and I think I should give some effect to that consideration'. In consequence, the accused was sentenced to four years imprisonment.

It appears from the Tasmania Police statistics that since *Luttrell's* case there were two committals in the period 1967-1968, but it does not appear whether these two cases proceeded to trial. In 1969 11 females were investigated and in 1972-73 four males likewise, but these apparently did not proceed to committal. Since 1973 no investigations have appeared in the statistics.

There is another source of control of some potential offences of this kind apart from the criminal justice apparatus. Insofar as abortions are performed by medical, para-medical or nursing practitioners they are subject to the control of their respective professional bodies. Medical malpractice may carry penalties imposed by such a regulatory body. Hospitals, again, have their own ethics committees which may regulate or proscribe practices that are not approved. Guidelines exist within the Tasmanian Department of Health Services which envisage the termination of pregnancy in order to prevent a 'substantial detriment to the bodily and mental health of the mother or where there is a substantial risk that if the child were born it would suffer such physical or mental abnormalities as to be seriously handicapped'.[20]

This kind of internal regulation does not, of course, apply to unqualified persons, or 'backyard abortionists', nor does it apply to a woman or her husband who attempt to perform the abortion themselves. Abortion is thus a crime under the criminal law and where an offence is brought to trial and successfully prosecuted, penalties may be imposed. These penalties in modern times are, however, not comparable to penalties for murder or other forms of homicide.

Historically, a distinction was made between the period before the foetus had quickened and after that event. The rule of the common law that life begins at the moment of quickening goes back to Bracton, who wrote his treatise on the Laws of England between 1250 and 1260. Blackstone said that 'life begins in contemplation of law as soon as the

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19 Unreported, 1963 Tasmanian Judgments 326.

20 Cf Henry Finlay, Lesley Vick and Mary Edquist, 'The Legal Aspects of Family Planning' in John F. Porter, *The Control of Human Fertility*, Blackwell, 1987, Ch 21 at 274.

infant is able to stir in the mother's womb'.[21] The significance of this distinction between the time before and after quickening was that before 1803 abortion before quickening was not a crime. It became a crime after that date, but was subject to a lesser penalty.

A similar distinction in gestational time periods was recognised in the important 1973 US Supreme Court decision in *Roe v Wade*.[22] The Court there, in a 7 to 2 majority, laid down the following propositions:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.

Central to the judgment was the recognition that 'the fetus, at most, represents only the potentiality of life. ... In short, the unborn have never been recognised in the law as persons in the whole sense'.

The difference between paragraphs (b) and (c) is that (b) focuses on the life and health of the mother, while (c) is directed to 'the potentiality of human life'.

Roe v Wade stood, substantially, for 16 years, from 1973 to 1989. In that year, a new Supreme Court decision was delivered by a Court from which several of the original members had departed: *Webster v Reproductive Health Services*[23] which imposed certain modifications on *Roe v Wade*. In 1973 the Court had consisted of Burger CJ, Blackmun,

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[21] *Commentaries on the Laws of England*, Oxford 1765, I, 129. At this point, when giving this quotation, Glanville Williams recites an amusing entry from Pepys' Diary for January 1 1662/3: 'Lady Castlemaine quickened at my Lord Gerard's dinner' - *op cit*, 144.

[22] 410 US 113 (1973).

[23] Published in *US Law Week*, 57 LW 5023 (1989).

Douglas, Brennan, Stewart, Marshall and Powell JJ who had constituted the majority, and White and Rehnquist JJ who had dissented. These two former dissentients, of whom Rehnquist was now the Chief Justice were joined in *Webster's* case by Kennedy, Scalia and O'Connor JJ with whom they constituted the majority. Three of the former majority, Blackmun, Brennan and Marshall JJ were joined by Stevens J and constituted the minority.

At issue in *Webster* was a Missouri statute regulating abortions which was challenged by the appellants. The provisions which were under attack:

(1) Provided 'findings' in the preamble that the life of each human being begins at conception, unborn children have protectable interests in life, health, and well-being;

(2) Specified that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant must ascertain whether the fetus is 'viable' by performing 'such medical examinations and tests as are necessary to make a finding of gestational age, weight and lung maturity';

(3) Prohibited the use of public employees and facilities to perform or assist in abortions not necessary to save the mother's life;

(4) Made it unlawful to use public funds, employees or facilities for the purpose of 'encouraging or counselling' a woman to have an abortion not necessary to save her life.

Without going into more detail, the end result was that *Roe v Wade* was not explicitly overruled, but modified and narrowed considerably. The majority said that the rigid framework in *Roe* should be abandoned. It was entirely constitutional for a State to declare an interest in human life at all stages of a pregnancy. While foetus viability, in accordance with medical evidence, did not commence until 23½ to 24 weeks at the earliest, the evidence also showed that there might be up to 4 weeks error in estimating gestational age. These factors supported the testing procedures prescribed in the Missouri statute.

Speaking for the minority, Blackmun J launched out into a strong reaffirmation of *Roe v Wade* and rejection of the majority's view. He said:

> Today, *Roe v Wade* and the fundamental constitutional right of women to decide whether to terminate a pregnancy survive but are not secure. ... Although today, no less than yesterday, the Constitution and the decisions of this Court prohibit a State from enacting laws that inhibit women from the meaningful exercise of that right, a plurality of this Court

> implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before [*Roe v Wade*].

The Justice continued with this impassioned declaration:

> I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and the public esteem of this Court.

Blackmun J goes on to quote from what Stevens J said in a 1986 case:

> I should think it obvious that the State's interest in the protection of an embryo - even if that interest is defined as "protecting those who will be citizens" ... increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive and to react to its surroundings increases day by day. The development of a fetus - and pregnancy itself - are not static conditions, and the assertion that the government's interest is static simply ignores this reality ... [U]nless the religious view that a fetus is a "person" is adopted ... there is a fundamental and well-recognised difference between a fetus and a human being, indeed, if there is no such difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection - even though the fetus represents one of "those who will be citizens" - it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilised egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported, not only by logic but also by history and by our shared experiences.

Stevens J, as has been said, also disagreed with the majority view in his separate judgment. His brilliant argument refers to the teachings of the Roman Catholic Church and of St. Thomas Aquinas which for many years were the endorsed views of that Church. That view made a clear distinction between the unformed or 'inanimate' (from *anima*, soul) foetus and the formed foetus. The details of Aquinas' view whereby the time of animation was 40 days after conception in the case of males and 80 days in the case of females would not commend itself to any modern mind as

being quite unscientific, but the doctrine became the general belief of Christendom and was endorsed by the Council of Trent in 1545-1563. Stevens J quotes from a summary on the 'Catholic Teaching on Abortion' prepared by the Congressional Research Service of the Library of Congress that 'abortion of the "unformed" or "inanimate" fetus was something less than true homicide, rather a form of anticipatory or quasi-homicide'.

The modern criminal law in England and Australia derives from the *Offences against the Person Act* 1861 (Eng)[24], which dropped the distinction between viability and non-viability in the case of abortion.[25] Previously the distinction lay in the concept of 'quickening' of the foetus; before quickening no offence of abortion existed. Since 1803 abortion has been a crime from the commencement of a pregnancy.[26] The offence could be committed by a woman against herself or by some other person or persons. In the latter case a crime was committed even where the woman was not in fact pregnant but only believed that she was.[27]

In England, the maximum penalty until 1948[28] was penal servitude for life. No doubt, illegal abortions were being committed and often remained undiscovered, but the law remained harsh and unbending. The rigour of the law, when strictly enforced, caused considerable hardship. It was in order to call attention to this harshness of the law that Mr. Bourne carried out his courageous act of defiance which has been referred to above.[29] Macnaghten J relied on the legal argument that the statute creating the crime defined it by using the word 'unlawfully'. He therefore assumed that the word was meant to have meaning and he sought this meaning by declaring the use of abortion in certain therapeutic circumstances outside the section, and therefore legal.

Macnaghten J found this legality by referring to another statute, which contained a clause saying: '... no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother'.[30]

The sophistication of legal argument, which to the layman often borders on sophistry, is not part of this paper. The importance of it is that *Bourne* is a milestone in the law of abortion. The notion that the life

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24 24 & 25 Vict Ch 100.

25 For an excellent account of the legal and historical position of abortion see Bernard Dickens: *Abortion and the Law*, Great Britain, McGibbon & Kee 1966.

26 Lord Ellenborough's Act, 43 Geo III Ch 58.

27 Cf now the Tasmanian *Criminal Code* 1924, s 134.

28 *Criminal Justice Act* 1948 (Eng).

29 Cf fn 14, above.

30 *Infant Life (Preservation) Act* 1919 (Eng), s 1(1).

of the mother takes precedence over that of the unborn child has since then become entrenched in Anglo-Australian law.

Nor did it stop simply at life against death. Macnaghten J himself extended the concept of protecting the life of the mother by saying:

> ... 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 or nervous 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.

The criminal law in the several Australian States has already been commented on.[31] It is now necessary to look at the civil law and how it views abortion and the unborn child.

THE CIVIL LAW

In civil law, the child has never been regarded as a person until it passed from the womb alive. An unborn child, or a child *en ventre sa mère,* as lawyers still so quaintly say in their Norman-French, was not recognised as a legal person. A recent case in the Family Court contains a statement to that effect.[32]

The legal position of an unborn child is perhaps best seen in *Watt v Rama*[33], a case decided by the Full Court of Victoria in 1971. A pregnant woman sustained certain injuries in a motor accident through the negligence of the defendant. As a result, her child was born severely injured. The question that arose was whether the child could sue in respect of injuries sustained while *en ventre sa mère.*

The Court examined the authorities and came to the conclusion that it could do so. Winneke CJ, who gave the leading judgment, held that the possibility of such injury to an unborn child was reasonably foreseeable. In accordance with the principles of the law of negligence, this constituted a cause of action. He said, specifically:

> On the birth the relationship crystallised and out of it arose a duty on the defendant in relation to the child. On the facts ... the child was born with injuries caused by the act of neglect of the defendant in the driving of his car. But as the

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31 Cf fnn 16, 17 and 18; see also *Family Planning and Law* cited at fn 3 above, and Finlay, Vick and Edquist *loc cit* at 271-280.

32 *In the Marriage of Diessel* (1980) 6 Fam L R 1.

33 [1972] VR 353

> child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person, it was ... at that stage that the duty arising out of the relationship was attached to the defendant, and it was at that stage that the defendant was ... in breach of the duty to take reasonable care to avoid injury to the child.[34]

What this case shows is that an unborn child cannot sue or assert any rights which it may have. If, moreover, the child were to be stillborn, any rights of action would die with it. In the same way, if a foetus is injured in the course of a bungled attempted abortion it could take legal action against the person who attempted the abortion, - perhaps the mother, for example, - in respect of the injury. If the abortion is successful, then of course there is no person who could sue. *Watt v Rama* demonstrates quite clearly the process by which legal rights and duties mature as a foetus is born and and becomes a person.

Perhaps we should finally look at one or two recent Family Law cases involving attempts to prevent an abortion. In *Attorney-General (Qld) (Ex rel Kerr) v T (No 2)* the Chief Justice of the High Court, Gibbs CJ held that 'a foetus has no right of its own until it is born and has a separate existence from its mother'.[35] The case had arisen out of an attempt by the father of an unborn child to prevent the child's mother from proceeding with a proposed abortion. In the result, that attempt failed. That decision was followed last year in the Family Court by Lindenmayer J in *F and F.*[36]

CONCLUSION

It can now be postulated, in reliance on the law as it has been summarised above, that the unborn child has no legal rights which it can assert. Yet, it may have inchoate rights which only vest when it is born. It also cannot be said that it has any legal right to be born. If the above line of reasoning is followed, any such assertion would be nonsense.

The law does, nevertheless, accord to the unborn child certain protection. There is, for one thing, the law of abortion. There is also an offence of 'causing death of child before birth'.[37] These offences are expressly not described as 'murder', 'manslaughter' or 'homicide'. They clearly imply that, although serious, they are less so than are those worst crimes in the legal calendar.

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[34] *Ibid*, 360.

[35] (1983) 46 ALR 275, 277, upholding a decision by the Queensland Full Court reported at 8 Fam LR 873.

[36] (1989) FLC 92-031.

[37] *Criminal Code* 1924 (Tas), s 165.

They are, above all, limited in a very important respect. The life of the mother carrying the child, by clear implication, takes precedence over the life of the child if circumstances make it necessary to make a choice, both in the law of abortion and of child destruction. And that is so even without taking into account the further modifications made in the law by such developments as the English *Abortion Act* 1967 and the decisions in *R v Bourne* and *R v Davidson*.

The reasoning in *Roe v Wade* was based on the same sense of legal priorities. The US decision introduced a graduated scale of values which clearly demonstrated that the rights of the unborn child increase from next to nothing to something just short of full human rights, according to the stage of gestation which it has reached. While *Webster's* case has made this scale of rights less clear, it still postpones the rights of the unborn child to those of the mother. It would probably not be too fanciful to describe the rights of the unborn as rights on a sliding scale, which ripen into fully enforceable legal rights only with the ripening into life of the child when it becomes a person in the eyes of the law.

If an unborn child is not a legal person, it cannot have any legal rights. It also follows that there cannot be, in the strict sense, any legal right to be born. There are laws which protect a foetus within limits. Where there is a conflict between the continued life of a foetus and that of its mother, or, in some cases, a twin, it is the foetus that must give way. Any reference to a 'right to life' must therefore be understood to be at best only metaphorical: it must always be understood to be subject to the qualifications discussed above.