

Surveying the Foundations of  
Medical Law: A Reassessment of  
Glanville Williams's  
*The Sanctity of Life and  
the Criminal Law*

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ABSTRACT

Much of the confusion in the current debate about embryonic stem-cell research is generated by the advocates of stem-cell research who use controversial and misleading terminology about what it involves and who evade or misrepresent the central moral argument against such research, namely, that it involves the destruction of innocent human beings. This essay points out that such failings are not new to bioethical debate and exposes them in one of the earliest and most influential books on the law and ethics of medicine: *The Sanctity of Life and the Criminal Law* by Professor Glanville Williams.

I. INTRODUCTION

Medical law is now an established and thriving academic discipline. Fifty years ago what is widely regarded as its foundation stone, *The Sanctity of Life and the Criminal Law*,<sup>1</sup> was laid by the late Professor Glanville Williams. The book dealt mainly with abortion, infanticide, suicide, and euthanasia, but also with contraception, sterilization, and artificial insemination. Its central theme was “the extent to which human life, actual or potential, is or ought to be protected under the criminal law of the

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<sup>1</sup> *The Sanctity of Life and the Criminal Law* (New York NY: Alfred A. Knopf, 1957; revised edition: London UK: Faber and Faber, 1958). References in this paper are to the latter edition (hereafter “The Sanctity of Life” in the text and SOL in footnotes).

English-speaking peoples.”<sup>2</sup> To the extent that the criminal law reflected the opposition to the above practices in Western medical ethics (the “inviolability of life” or the IOL ethic<sup>3</sup>), Williams subjected it to a wholesale assault.

The book was based on the Carpentier Lectures that Dr. Williams (as he then was) delivered in 1956 at Columbia Law School. His lectures sparked a debate within Anglo-American legal circles on abortion law reform, and their publication in book form also had a marked influence. The book prompted the American Law Institute to address abortion in its Model Penal Code.<sup>4</sup> Williams served as a consultant to the project, and the Code followed his proposals.<sup>5</sup> In 1967 the American Medical Association adopted the Code’s approach, and only six years later the Supreme Court went even further by creating a constitutional right to abortion.<sup>6</sup> Justice Blackmun, in his judgment for the majority, cited Williams’s book.<sup>7</sup> In England Williams, as President of the Abortion Law Reform Association, also influenced the enactment of the Abortion Act 1967.<sup>8</sup> His book’s continuing significance was reflected in its citation by L.J. Brooke in *Re A*, the case of the conjoined twins.<sup>9</sup>

*The Sanctity of Life* proved no less influential in the academic world. It attracted laudatory reviews in law journals on both sides of the

<sup>2</sup> SOL, p. 11.

<sup>3</sup> For an outline of the IOL ethic see, e.g., J. Keown, *Euthanasia, Ethics and Public Policy* (New York NY: Cambridge Univ. Press, 2002), ch. 4; H. Watt, *Life and Death in Healthcare Ethics: A Short Introduction* (London UK: Routledge, 2000).

<sup>4</sup> J.W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham NC: Carolina Academic Press, 2006), p. 587.

<sup>5</sup> Dellapenna, p. 595.

<sup>6</sup> *Roe v. Wade* 410 U.S. 113 (1973). On the Court’s misunderstanding of Anglo-American legal history, see generally Dellapenna; see also J. Keown, “Back to the Future of Abortion Law: *Roe*’s Rejection of America’s History and Traditions,” *Issues in Law & Medicine* 22 (2006): 3ff.

<sup>7</sup> *Roe v. Wade* 410 U.S.113 (1973) at nn. 9, 21.

<sup>8</sup> See generally M. Simms and K. Hindell, *Abortion Law Reformed* (London UK: Peter Owen, 1971); Dellapenna, pp. 576-89.

<sup>9</sup> *Re A (Children) (Conjoined twins: surgical separation)* [2001] Fam. 147 at 213.

Atlantic.<sup>10</sup> The book has exercised a profound influence on medical lawyers. The year after Williams's death in 1997,<sup>11</sup> the *Medical Law Review* devoted a commemorative issue to him.<sup>12</sup> It contained a fulsome "personal appreciation" by the then editor, Professor Andrew Grubb, attesting to the inspirational influence that Williams had upon him.<sup>13</sup>

Grubb commented that if the "fathers" of medical law in England were Ian Kennedy and Peter Skegg, then Williams was its "grandfather," which was why Kennedy and Grubb, as founding editors of the *Medical Law Review*, had invited him to contribute the journal's first article.<sup>14</sup> Grubb concluded: "Medical lawyers of my generation owe him a tremendous debt for founding a subject and through the force of his legal persona giving respectability to a new area of legal investigation..."<sup>15</sup> Of *The Sanctity of Life* Grubb opined: "It is full of erudition and combines painstaking archival research and scholarship with insight and vision on

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<sup>10</sup> B. Russell (1958) 10 *Stanford Law Review* 382; R.C. Donnelly (1958) 67 *Yale Law Journal* 753; J. L. Edwards ([1958] *Criminal Law Review* 413; H.A. Hammelmann (1959) 22 *Medical Law Review* 343; J.D. Morton (1959) 37 *Canadian Bar Review* 241; A.T.H. Smith (1998) 6 *Medical Law Review* 262. Sir Robert Megarry wrote: "The whole book is a triumphant demonstration of the extent to which the verbal accuracy and intellectual clarity of a lawyer make it possible to master a number of fields of knowledge outside the law and synthesise them into a lucid yet penetrating study." R.E. Megarry (1959) 75 *L.Q.R.* 111 at p. 112.

<sup>11</sup> There is an account of his life by Prof. J.R. Spencer in the *Oxford Dictionary of National Biography*. <http://www.oxforddnb.com/view/article/66017> (last accessed 16 October 2007). The account states that Williams's fame as a criminal lawyer rests on four books, of which the SOL is one.

<sup>12</sup> (1998) 6 *Medical Law Review*.

<sup>13</sup> A. Grubb, "Glanville Williams: A Personal Appreciation" (ibid., p. 134). The extent of the adulation is reflected by Grubb's comment that anyone who had read Williams's doctoral thesis "would immediately abstain from writing a Ph.D. thesis because of the sheer futility in attempting to match its depth and richness of research and analysis" (ibid., p. 133).

<sup>14</sup> G. Williams, "Controlling the Repetitive Dangerous Offender" (1993) 1 *Medical Law Review* 1.

<sup>15</sup> *Supra*, n13 at p. 137.

issues that continue to perplex medical lawyers.<sup>16</sup>

Given the book's perduring influence on the increasingly important discipline of medical law, a quinquagesimal re-assessment of the book's merits will not be of purely historical interest. Our re-assessment swims against the stream of opinion. We recognize Professor Williams's status as one of the leading British legal scholars of his time. But expertise in law does not imply expertise in other fields and *The Sanctity of Life* was not a law book. As its author noted in the preface, it included "moral, religious, medical, social, eugenic, demographic and penological"<sup>17</sup> dimensions. He realized that this involved "many risky trespasses outside the lawyer's proper sphere."<sup>18</sup> Perhaps he did not realize how risky. We respectfully disagree with those reviewers (almost all lawyers) who largely overlooked the book's deficiencies, particularly in moral philosophy and theology. In her review of the book, the late distinguished philosopher Elizabeth Anscombe was scathing about its academic quality<sup>19</sup> and theologian Dr. (now Cardinal) Cahal Daly observed, in his book-length response to *The Sanctity of Life*: "One feels driven to place it definitely outside the category of scholarly writing."<sup>20</sup> Although their criticisms do not lack force, we would not go so far as to claim that *The Sanctity of Life* is devoid of academic interest or scholarly merit. We consider the book a bold, original attempt at interdisciplinary analysis of

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<sup>16</sup> Ibid.

<sup>17</sup> SOL, p. 11.

<sup>18</sup> Ibid.

<sup>19</sup> "This is not a work of academic interest. Indeed it is mysterious how an academic lawyer came to write it." G.E.M. Anscombe, "Glanville Williams' *The Sanctity of Life and the Criminal Law*: A Review" in *Human Life, Action and Ethics: Essays by G.E.M. Anscombe*, ed. M. Geach and L. Gormally (Exeter UK: Imprint Academic, 2005), p. 243.

<sup>20</sup> C.B. Daly, *Morals, Law and Life* (London UK: Scepter Publications, 1966), p. 8. Sadly, the fates conspired to prevent the opinions of Anscombe and Daly from reaching a wider audience, not least in legal circles. Professor Anscombe's review, though commissioned by a law journal in 1958, was not published. Dr. Daly's critique appeared in the *Irish Theological Quarterly* (see *ibid.*, 3), hardly the staple reading of legal academics and practitioners, and his penetrating book never received the attention it deserved.

profoundly important questions of law and ethics. Ahead of its time, this groundbreaking volume explored many of the arguments relevant to the resolution of those questions. It exhibited, as one would expect in a book written by this author, an impressive depth and breadth of legal expertise. It was, in addition, written in his characteristically lively and accessible manner. Small wonder, in view of these not inconsiderable merits, that it succeeded in sparking vital debates and laying the foundation stone of a new academic discipline. We do maintain, however, that the book contains several major flaws, flaws that have hitherto been overlooked (with rare exceptions<sup>21</sup>) by lawyers. We do not here propose a comprehensive critique of the book and will confine ourselves to exposing what we consider its central flaw. This flaw (which reflects Glanville Williams's lack of expertise in philosophy and theology) is the book's misunderstanding of the position that it criticizes (the IOL ethic) and its tendency to assume rather than argue for the alternative position it advocates. The central flaw is fed by at least four tributary weaknesses:

- its mis-characterization of the IOL ethic as essentially theological.
- its misunderstanding of theology.
- its evasion of the philosophical basis of the IOL ethic.
- the vagueness of the author's own position and the fragility of the arguments he deployed in its defense.

The first three weaknesses, which establish the contours of a straw man Professor Williams set up, will be addressed in Part II; the fourth,

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<sup>21</sup> See, e.g., W.J. Curran, Professor of Legal Medicine at Boston University School of Law, who wrote that "the author does not himself offer any generalizations, any theory or philosophy of his own in regard to the total subject. There is not a single page of synthesis in the book." W.J. Curran (1958) 71 *Harvard Law Review* 585 at p. 586. Again, Professor Skegg expressed his "frustration" with the book. P.D.G. Skegg, "Criminal Prosecutions of Negligent Health Professionals: The New Zealand Experience," (1998) 6 *Medical Law Review* 220. For an interesting paper by Skegg drawing on the book on the thirtieth anniversary of its publication, see idem., "The Edges of Life" (1988) 6 *Otago Law Review* 517. For reasons which will become apparent, the SOL does not stand comparison with Skegg's *Law, Ethics and Medicine* (Oxford UK: Clarendon Press, 1984), a work of truly classic scholarship.

sketching a hollow man he erected in its place, in Part III.

## II. WILLIAMS'S STRAW MAN

### A. *Mis-characterization of the IOL Ethic*

*The Sanctity of Life* repeatedly characterized the IOL approach as essentially theological. As Professor Tony Smith aptly observed in his review: "It is a tactic throughout to show that, very frequently, our practices have their origins in a Judeo-Christian tradition to whose tenets not all subscribe."<sup>22</sup> The book's identification of the Judeo-Christian origins of the IOL ethic in Anglo-American law was, by and large, accurate. But the book went much further, implying that the law depended for its justification on theology and could not be independently supported on philosophical grounds.<sup>23</sup>

#### 1. *Baptism*

In his discussion of infanticide ("the killing of a new-born child committed by the parents or with their consent"<sup>24</sup>) Williams observed that it was condoned by both the Greeks and the Romans and that its condemnation was "very largely, if not entirely, the work of the church."<sup>25</sup> As for the basis of the Christian church's opposition Williams asserted: "The historical reason for the Catholic objection to abortion is the same as for the Christian church's historical opposition to infanticide: the horror of bringing about the death of an unbaptized child."<sup>26</sup> Indeed if it were not for the need for baptism in order to gain salvation, "infanticide might have been regarded as a positive benefit!"<sup>27</sup> Williams argued that such

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<sup>22</sup> *Supra*, n10 at p. 263.

<sup>23</sup> For example, Williams asserted in the preface that the legal prohibitions on abortion, infanticide and suicide could be justified, if at all, only on "ethico-religious or racial" grounds. SOL, p.12.

<sup>24</sup> SOL, p. 26.

<sup>25</sup> SOL, p. 27.

<sup>26</sup> SOL, p. 178. Dellapenna points out (p. 587 n133) that the argument was repeated in the American Law Institute's Model Penal Code.

<sup>27</sup> SOL, p. 27.

theological notions were “no longer regarded with the assurance that makes them an acceptable support for a rule of the criminal law” adding: “Criminal prohibitions cannot, at the present day, be founded upon supernaturalism of any kind.”<sup>28</sup> In Part II.B. we shall show that Williams’s assertion about the basis of the Christian church’s opposition to infanticide was only one of several theological errors that he committed.

## 2. *Ensloument*

Williams wrote that the laws against abortion owed their origins to “metaphysical notions concerning life and the soul, combined with the interpretation of the Sixth Commandment.”<sup>29</sup> Abortion was “in essence a religious offence.”<sup>30</sup> He observed that although we still clung to the religious belief in the soul, “we have given up asking when this soul begins, because the question has become evidently insoluble.”<sup>31</sup> Perhaps the soul was a miraculous addition to the conceptus but then what of spontaneous abortion? “It would seem, on this theory, that the naturally aborted embryo perishes possessed of a soul.”<sup>32</sup> He concluded:

There are other difficulties in the orthodox doctrine of the soul which need not detain us. For the legislator, it seems sufficient to say that theological speculations and controversies should have no place in the formation of rules of law, least of all rules of the criminal law which are imposed upon believers and non-believers

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<sup>28</sup> SOL, p. 29. He noted that even the “modern infidel” tended to agree that all human life was sacred and surmised that the basis for such secular thinking “may sometimes be in fact a legacy of their religious heritage” (SOL, pp. 30–31).

<sup>29</sup> SOL, p. 202. He mentioned three secular arguments against relaxation of the law. As we shall see (*infra*, n181), his consideration of these arguments was far from extensive.

<sup>30</sup> SOL, p. 204.

<sup>31</sup> SOL, p. 208. His assertion that we have given up asking the question was unsubstantiated. The closely related question of when an individual human being comes into existence continues to occupy a significant place in contemporary bioethical discussion, both secular and religious.

<sup>32</sup> *Ibid.* He did not consider the response: “Why is this morally significant? We all die sooner or later. And do the high rates of infant mortality which exist in certain parts of the world, and have existed in developed countries in times past, mean that newborn children are not human beings?”

alike. If we protect the foetus by law, it should be for reasons relating to the well-being of existing human beings. Can it be said, with any degree of reality, that the week-or month-old embryo is an existing human being?<sup>33</sup>

Part II. C. will illustrate, by offering an answer that Williams omitted to consider, how he failed to engage with the IOL's core moral philosophical argument against abortion and infanticide.

### *3. Suicide and Euthanasia*

Professor Williams asserted that there was little condemnation of suicide among the early Christians, that many Christians committed suicide out of fear of falling into temptation, and that although it was "especially good" for a believer to provoke unbelievers to martyr him "in the last resort he might do away with himself directly."<sup>34</sup> Members of one sect, he added, killed themselves in their hundreds by leaping from cliffs and it was by way of reaction to these excesses that St. Augustine was led to condemn suicide, thereby becoming the chief architect of the Christian position.<sup>35</sup> Williams wrote that, as Augustine held that if suicide were permissible to avoid sin it would be the logical course for all those freshly baptized, he could deny this logic only "by postulating a divine prohibition of suicide."<sup>36</sup> Williams concluded: "The interdiction of suicide, as an inflexible principle, is, then, part of a particular system of religious belief, and need not be accepted by the positivist, or indeed by anyone who does not accept the traditional eschatology."<sup>37</sup>

Turning to euthanasia (the intentional termination of a patient's life because it is thought that death benefits the patient), Williams's discussion of the ethics of voluntary euthanasia again suggested that the basis of moral opposition was theological. He concluded: "If it is true that euthanasia can be condemned only according to a religious opinion, this

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<sup>33</sup> Ibid.

<sup>34</sup> SOL, p. 229, footnote omitted.

<sup>35</sup> SOL, pp. 229-30.

<sup>36</sup> SOL, p. 231.

<sup>37</sup> Ibid. He considered three further arguments against suicide as posited by Aquinas, two of which were not theological (SOL, pp. 237-44).



should be sufficient at the present day to remove the prohibition from the criminal law.”<sup>38</sup>

The laws against killing that Professor Williams criticized were undoubtedly promoted by the Judeo-Christian tradition. However, his implication that those laws could not be defended by moral philosophy as well as by moral theology was (as we shall see in Part II.C) without foundation. Williams set up a straw man. He did so, moreover, in atypically unscholarly language. As Professor Smith noted, the book frequently subjected the Catholic Church to “scarcely disguised sarcasm.”<sup>39</sup> Williams described traditional Christian opposition to birth control as “irrational and obscurantist”<sup>40</sup> and Catholic opposition as “extremely primitive if not blasphemous.”<sup>41</sup> He even went so far as to allege, having discussed the incidence of maternal mortality from illegal abortion, that the Christian church was concerned about the “statistics of abortion and post-morbidity merely to the extent that these indicate the existence of a certain volume of feminine sin.”<sup>42</sup> Before illustrating how his preoccupation with theology distracted him from the philosophical basis of the IOL approach, we shall illustrate the extent of his theological misunderstanding.

### *B. Misunderstanding Theology*

Williams wrote expansively on theology. This was as risky as a theologian writing expansively about criminal law. It is not surprising, therefore, that Williams committed a litany of theological errors and that legal reviewers failed to notice.<sup>43</sup> A particularly grave error, given the reliance Williams placed on it, was his assertion that the main reason for the Christian

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<sup>38</sup> SOL, p. 278.

<sup>39</sup> *Supra*, n10 at p. 263.

<sup>40</sup> SOL, p. 57.

<sup>41</sup> SOL, p. 65; “morbid, guilt-ridden” (SOL, p. 58); “mischievous dogma” (SOL, p. 67); “fundamentalist” (SOL, p. 127); “dogmatic and authoritarian” (*ibid*).

<sup>42</sup> SOL, p. 197.

<sup>43</sup> One, for example, praised Williams’s “masterly” knowledge of the Bible. Smith, *supra*, n10 at p. 263.

church's opposition to abortion and infanticide was its teaching on baptism. The reality is that the church's primary reason for opposing infanticide has never been concern about the fate of unbaptized souls. As Williams recognized,<sup>44</sup> if this had been the case, the church would have had little objection to the killing of infants after baptism. Williams cited no theologians to support his proposition. He could not have, for there were none. The source that Williams cited was Finnish sociologist Edward Westermarck's *The Origin and Development of Moral Ideas*.<sup>45</sup> Westermarck in turn cited William Lecky's *History of European Morals*.<sup>46</sup> Lecky did indeed propose that concern for the fate of unbaptized infants "powerfully sustained" the church's opposition to infanticide. However, he was clear that the primary reason that Christians denounced infanticide was because they considered it "as definitely murder."<sup>47</sup>

As early as the first century church teaching on abortion and infanticide was unequivocal: "you shall not murder a child by abortion nor kill it after it is born."<sup>48</sup> This Christian opposition to infanticide was inherited from Judaism,<sup>49</sup> which had no doctrine requiring baptism for salvation. Jews and Christians alike were concerned first with the preciousness of the life of each child. Anxiety about the fate of unbaptized infants was a later phenomenon within Christianity, in part generated by the doctrine of original sin in the form expressed by Augustine in the early fifth century. This concern had moderated by the time of Aquinas and the

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<sup>44</sup> SOL, p. 27. He also cited contemporary Catholic moralists who wrote that abortion could not be performed even to baptize the child (SOL, p. 186).

<sup>45</sup> Edward Westermarck, *The Origin and Development of Moral Ideas* (London: Macmillan, 1906) cited in SOL, p. 26 n2.

<sup>46</sup> William Lecky, *History of European Morals* (London: Longmans, Green, & Co., 1869). Williams's citation of Lecky is confused. He referred (SOL, p. 28 n2) to the 1911 edition of Lecky but his page reference was incorrect. The reference seems to have been lifted from Westermarck, who cited the 1869 edition where the pagination is slightly different. It may therefore be doubted whether Williams read Lecky.

<sup>47</sup> *Supra*, n46 (1911 ed.) at p. 10.

<sup>48</sup> *Didache* 2.2.

<sup>49</sup> See, e.g., Philo, *Special Laws* 3.117-18; Josephus, *Against Apion* 2: 25 and various passages from the Talmud, including Babylonian Talmud *Sanhedrin* 72b.

subsequent tradition approximated the earlier attitude.<sup>50</sup> Speculation about the damnation of infants played no part in forming the early Christian attitude against infanticide and abortion. Furthermore, even when this concern was at its apogee in the post-fifth-century Latin West, it was a secondary consideration. The prohibition on killing the innocent<sup>51</sup> was always the core of church teaching. Williams was therefore closer to the mark when he identified as the basis of the Christian attitude the “belief that it is our duty to regard all human life as sacred, however disabled or worthless or even repellent the individual may be.”<sup>52</sup> Yet, as Williams acknowledged,<sup>53</sup> this moral doctrine tended to be held even by the “modern infidel” and could not easily be dismissed as “supernaturalism.” Certainly such respect for human life need have nothing to do with theological reflection about the eternal fate of unbaptized infants.

Williams’s discussion of the development of the church’s thinking on suicide was also flawed. First, many Christians prior to Augustine denounced suicide.<sup>54</sup> Furthermore, when Williams identified martyrdom with suicide (in a way reminiscent of Durkheim whose expansive definition he quoted<sup>55</sup>), he conflated categories that would have been regarded as distinct by early Christians.<sup>56</sup> Although there was a debate

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<sup>50</sup> P.J. Toner, “Limbo” in *The Catholic Encyclopedia* (Encyclopedia Press, 1913), vol. 9, p. 256.

<sup>51</sup> Exodus 20: 13.

<sup>52</sup> SOL, pp. 30-31.

<sup>53</sup> Ibid. See supra, n28.

<sup>54</sup> See Justin Martyr, *Apology* 2.4; Clement of Alexandria, *Stromata* 6.9; Lactantius, *Divine Institutes* 3.18; Basil, *Letters* 188.2; Jerome, *Letters* 39.3; Ambrose, *Concerning Virgins* 3.7.32; John Chrysostom, *Commentary on Galatians* 1:4.

<sup>55</sup> SOL, p. 242 n2: “any cause of death which results directly or indirectly from the positive or negative act of the victim who knew that it was bound to produce this result.” The definition presumably included those who persisted in an unhealthy lifestyle foreseeing it would cause earlier death; patients who refused life-prolonging treatments because they were unbearably painful, etc.

<sup>56</sup> See D.W. Amundsen, “Suicide and Early Christian Values” in *Suicide and Euthanasia*, ed. B.A. Brody (Dordrecht: Kluwer Academic Publishers, 1989), p. 77.

among early Christians about what conduct constituted suicide, which they understood to mean intentional self-destruction, and what conduct was martyrdom, which they understood to mean death foreseeably resulting from adherence to one's faith (a debate to which Augustine brought clarity), there were no early Christians who defended intentional self-destruction. What informed Augustine's account of suicide and his account of infanticide was an appreciation of the good of this life. Far from resting on "supernaturalism," as Williams had it, Augustine strenuously denied the Platonic teaching that the soul is better off without the body and that we are all, therefore, better off dead. Augustine argued that life is good, that physical death brings an end to life, and that killing is therefore wrong as an injustice to the victim and as an offense against God who gives life.

Williams committed other theological errors. For example, he claimed:

- that Augustine taught that "Adam's sin was sexual lust,"<sup>57</sup> a notion that was explicitly rejected by Augustine in *The City of God*.<sup>58</sup>
- that Augustine equated the embryo *informatus* with the embryo *inanimatus*.<sup>59</sup> Augustine in fact strenuously resisted this identification by claiming that the early embryo was animated but in an unformed<sup>60</sup> way.
- that "the immaculate conception" refers to conception without sexual intercourse.<sup>61</sup> Williams here confused the Immaculate Conception (the belief that Mary was sinless from her conception) with the Virgin Birth (the belief that Jesus was conceived without sexual intercourse).

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<sup>57</sup> SOL, p. 179.

<sup>58</sup> *City of God*, XIV, 13. Williams was aware of this book because he mentioned it—albeit, as was often the case in the SOL, without a supporting reference (SOL, p. 230).

<sup>59</sup> SOL, p. 142.

<sup>60</sup> *Questions on Exodus* 80. Williams also thought that the Latin for soul or life is *animus* (SOL, p. 143); in fact, it is *anima*.

<sup>61</sup> SOL, p. 132.

- that “the religious opinion illegitimately assumes that we should always legislate morality.”<sup>62</sup> The Christian church has never made such an assumption, as even a basic familiarity with Aquinas indicates.<sup>63</sup>
- that Catholics objected to the use of anaesthetics for surgery and childbirth and were indeed among the last to maintain this objection.<sup>64</sup> This claim was based on the fact that in 1956 Pope Pius XII declared that use of anaesthetics for surgery and childbirth was a positive good. Williams drew the illegitimate inference that before this pronouncement Catholics must have been opposed to it.

In sum, not only did Williams’s focus on the theological aspect of the IOL approach distract him from its philosophical aspect but his critique of its theological aspect was vitiated by error.<sup>65</sup> We now turn to consider the limited extent to which he engaged with the philosophical basis of the IOL approach.

### *C. Evasion and Misrepresentation of the IOL Ethic*

As Lord Goff observed in the *Bland* case, a belief in the sanctity or inviolability of human life has long been recognized in most, if not all,

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<sup>62</sup> SOL, p. 211.

<sup>63</sup> “Human law is enacted for the community in general, and in the community the majority are not perfected in virtue. Therefore human law does not prohibit all the vices which those of special virtue avoid, but only the more serious vices, which the majority of people, with ordinary virtue, can avoid; and especially those vices which injure the common good and whose prohibition is necessary for the preservation of society.” *Summa theologiae* I-II, 92, 2. See also *ibid.*, ad. 2.

<sup>64</sup> SOL, pp. 66, 278-79.

<sup>65</sup> In the preface he referred to his “heavy indebtedness to the specialists in other disciplines from whom I have drawn” (SOL, p. 11) by which he evidently meant written sources. However, his citation of theological sources was sparse. Moreover, Williams appears not to have sought the benefit of theological expertise (which would hardly have been lacking in Cambridge) or even the advice of an educated Christian: there is certainly no acknowledgment of such in the book. He declared: “the pretension of the moral theologian, sitting in the calm of his study, to dictatorial powers of moral interpretation must be rejected.” SOL, p. 282. So, the moral theologian writing about morality was criticized by the lawyer pronouncing on theology.

civilized societies throughout the modern world, as is evidenced by the prohibition of intentional killing in Article 2 of the *European Convention on Human Rights*.<sup>66</sup> A philosophical notion of the inviolability of human life stretches back around two and a half millennia from the *Universal Declaration of Human Rights* (1948) through Immanuel Kant to the Hippocratic Oath (c. 400 BC). Yet Professor Williams somehow ignored this long philosophical tradition. The only philosophical approach that he considered was the natural law tradition, the philosophical tradition favored by the Catholic Church. Even then he tended either to evade it by characterizing it as theological or to misrepresent it. We shall illustrate the weakness of his philosophical analysis with reference to an issue that occupied much space in his book: abortion.

### 1. *Evasion of the Core Natural Law Argument against Abortion*

It will be recalled that Professor Williams asked whether the early embryo could be said to be a human being.<sup>67</sup> He posed this as a rhetorical question, but for the philosopher it is a question that must be answered. Williams failed to consider a common answer along the following lines:

Yes: it is entirely reasonable to regard the early embryo as a human being. The science of embryology shows that we each began when our father's sperm fertilized our mother's egg.<sup>68</sup> For example, "test tube baby" pioneers Dr. Robert Edwards and Mr. Patrick Steptoe described the embryo after in vitro fertilization as a "microscopic human being."<sup>69</sup>

Williams himself recognized, in the very paragraph before posing his question, that "The individual...has his origin in the fusion of two cells."<sup>70</sup> He seemed unaware of the significance of this admission to the question

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<sup>66</sup> *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 at 863-64.

<sup>67</sup> See *supra*, text at n33.

<sup>68</sup> With the possible exception of twins and clones.

<sup>69</sup> Robert Edwards and Patrick Steptoe, *A Matter of Life* (London UK: Sphere Books edition, 1981), p. 83.

<sup>70</sup> SOL, p. 208 (see also SOL, p. 17). He also, appropriately, used the words "human being" (SOL, p. 19), "infants" and "child" (SOL, p. 24); and "baby" (SOL, p. 145) in a prenatal context.

he posed. He gave no reason to question the teaching of embryological science, since the nineteenth century, that the life of each human being begins at fertilization. Moreover, he provided no answer to the philosophical argument that it is wrong intentionally to kill human embryos because doing so breaches the right to life (that is, essentially, the right not to be intentionally killed) that is enjoyed by all innocent human beings. He did note that this was the philosophical basis of the Catholic Church's objection to abortion<sup>71</sup> but his response was to embark on an irrelevant inquiry into theological reflection on the timing of ensoulment.<sup>72</sup> Had Williams mentioned the proscription of abortion in the Hippocratic Oath<sup>73</sup> he might have realized that opposition to abortion need have nothing to do with Christian reflection about ensoulment.

His failure squarely to confront the argument that abortion is wrong because it involves the killing of an innocent human being was a serious omission, not least because this was precisely the moral argument that explained the nineteenth-century anti-abortion legislation that he was criticizing. In the nineteenth-century, in both the U.S.A. and England, the common law's prohibition of abortion from quickening (the time when the mother first perceives fetal movement) was overtaken by the statutory prohibition of abortion from fertilization. Williams accurately noted that the purpose of the legislation was the protection of the unborn child from fertilization.<sup>74</sup>

At present English law and the law of the great majority of the United States regard any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The foetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized.<sup>75</sup>

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<sup>71</sup> SOL, pp. 180-81.

<sup>72</sup> SOL, p. 181.

<sup>73</sup> The only reference to Hippocrates in the book concerning his dating of ensoulment is found at SOL, p. 141. It is odd that Williams, who devoted so much space to ancient history and who cited Hippocrates, omitted to mention either the Oath's prohibition of abortion or its condemnation of physician-assisted suicide.

<sup>74</sup> See generally Dellapenna, chs. 3-5.

<sup>75</sup> SOL, p. 141.

Again, commenting on the first English statutory prohibition of abortion, by Lord Ellenborough's Act (1803), he wrote that Parliament "...made not merely a legal pronouncement but an ethical or metaphysical one, namely, that human life has a value from the moment of impregnation."<sup>76</sup>

The legislation did indeed adopt the ethical position that it is wrong to kill innocent human beings from conception. It is therefore surprising that Williams elected not to engage with that ethical position. Was this, perhaps, because he thought that the law's "ethical" position was "metaphysical" because it was rooted in belief about when human beings come into existence, or was it because he thought that "Every moral position is dogmatic and ultimately unprovable—if you will, a matter of faith."<sup>77</sup> And, if the latter, why did he think his faith should be preferred to the IOL approach? He also claimed that the extension of the law in 1803 was effected by both church and state.<sup>78</sup> He cited no evidence either that theological opinion about ensoulment or that the church as a political institution influenced the legislation. Remarkably, he did not explore the legislative history of the nineteenth-century legislation (an omission that was doubly strange given the substantial space that his book devoted to ancient history). Had he done so, he would have discovered that the engine behind that legislation, especially in the U.S.A., was not theologians preaching that ensoulment occurred at fertilization but physicians teaching that human life began at fertilization.

As Professor James Mohr relates in his study of the enactment of the U.S. anti-abortion statutes of the nineteenth century, in 1859 the American Medical Association launched a campaign to restrict the law to protect human life from conception.<sup>79</sup> State medical societies supported this

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<sup>76</sup> SOL, p. 206.

<sup>77</sup> SOL, p. 182.

<sup>78</sup> SOL, p. 196.

<sup>79</sup> J.C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (New York NY: Oxford Univ. Press, 1978), p. 157. For a more recent account of the restriction of the law, see Dellapenna, ch. 7. Dellapenna's account is more reliable than Mohr's. Both agree on the pivotal role of the medical profession in securing restriction of the law in the U.S. but Dellapenna persuasively criticizes Mohr's contention that the medical profession was largely motivated by a desire to suppress irregular practice. Dellapenna's book confirms the accuracy of



crusade. For example, in 1867 the New York Medical Society called for the state law to be tightened, noting that from “the first moment of conception” there was “a living creature in process of development to full maturity” whose destruction was “murder.”<sup>80</sup> The legislature, Mohr writes, “gave the physicians almost exactly what they wanted.”<sup>81</sup> He comments that it was apparent to physicians “that the only way to deal with this question of basic morality was to see that their position was embodied in explicit statutes of their own design”<sup>82</sup> and he adds that the “vigorous efforts of America’s regular physicians would prove in the long run to be the single most important factor in altering the legal policies toward abortion....”<sup>83</sup> Similarly, in England it was doctors rather than theologians who pressed for the restriction of the common law prohibition on abortion.<sup>84</sup> Like their American colleagues, English doctors condemned abortion from conception as “murder” and called for the law to prohibit it from that point.<sup>85</sup>

Williams appears to have been unaware not only of the crucial role of medical practitioners in tightening the law but also of the marginal influence of religious bodies. Mohr writes that in the U.S. doctors “bitterly resented the avoidance of their special issue by the nation’s religious spokesmen.”<sup>86</sup> Williams’s preoccupation with Catholic teaching was particularly inapt. As Dellapenna<sup>87</sup> observes in his monumental scholarly study of abortion law history in the U.S.A. and England, the Catholic

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Williams’s insight that the Anglo-American legislation was “passed for the protection of the unborn child and not as a form of control of unregistered medical practitioners” (SOL, p. 176).

<sup>80</sup> Mohr, p. 216; Dellapenna, p. 323.

<sup>81</sup> Mohr, p. 217.

<sup>82</sup> Mohr, p.166.

<sup>83</sup> Mohr, p. 157.

<sup>84</sup> See J. Keown, *Abortion, Doctors and the Law* (Cambridge UK: Cambridge Univ. Press, 1988), Ch. 2.

<sup>85</sup> See, e.g., C. Severn, *First Lines on the Practice of Midwifery* (London, 1831), p. 134.

<sup>86</sup> Mohr, p. 184.

<sup>87</sup> A pro-choice Unitarian. See Dellapenna, p. ix.

Church remained largely silent on abortion in the nineteenth century and Catholics generally were not involved in legislative efforts to tighten the abortion laws. For example, he points out that New Hampshire passed its first anti-abortion statute in 1848 but that Catholics were barred by the state's constitution from sitting in the legislature until 1877.<sup>88</sup> He could have added that in England Catholics were prohibited from sitting in Parliament when the first statutory prohibition of abortion was enacted in 1803 and when it was amended in 1828 by Lord Lansdowne's Act.<sup>89</sup> It was not until 1829 that the Catholic Relief Act largely put an end to centuries of legal oppression of Catholics. Dellapenna concludes:

While the Catholic Church as an institution was always opposed to abortion, it played at best a negligible role in tightening the laws against abortion in England or the United States in the later years of the nineteenth century.<sup>90</sup>

## *2. Misrepresentation of the Argument against Abortion*

To the extent that Williams addressed the philosophical basis of the IOL approach he exhibited muddled thinking. For example, of the natural law opposition to killing the unborn child to save the mother he wrote: "The Catholic preference of doing nothing to assist the mother amounts in fact to a preference for the foetus over its mother..."<sup>91</sup>

The allegation of a preference for "doing nothing" to assist the mother was doubly inaccurate. First, the Catholic Church strongly commended efforts to save the mother, even efforts that posed a serious and foreseen risk to the unborn child. Secondly, it forbade not only killing the unborn to save the mother but also killing the mother to save the child (as by caesarean section in the era when this was fatal to the mother). A refusal to kill A to save B, or vice versa, did not amount to a "preference" for either A or B but treated both equally. Williams continued: "The proposition that a sinful act cannot be justified by a good end is in itself tautologous, since to describe the act as sinful when its intention is good

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<sup>88</sup> Dellapenna, pp. 416-17.

<sup>89</sup> See Keown, *supra* n84 at pp. 26-29.

<sup>90</sup> Dellapenna, p. 419.

<sup>91</sup> SOL, p. 182.

begs the question.”<sup>92</sup>

Not so. The road to hell is, as the saying goes, paved with good intentions. There is nothing tautologous (in ethics or law) in holding that it is always wrong intentionally to perform certain acts (such as, say, rape), however good one’s motive may be. Williams even claimed that the Catholic philosophical tradition maintained “the absolute irrelevance of ends to means” while preserving a “verbal form of escape for difficult situations,” and he cited as examples killing in self-defense or in a just war.<sup>93</sup>

He was, again, on unsafe ground. The doctrine of the inviolability of life does not hold that it is wrong to kill subject to verbal escape clauses in “difficult situations.” It holds that it is wrong to kill unjustly and its core principle is that it is wrong intentionally to kill the innocent. Consequently, it permits the use of even deadly force with the intention of defending oneself (or another) against an unjust aggressor. Intending a good end (protecting the innocent from unjust attack) can justify what would, absent such an intention, be impermissible (the use of deadly force). Moreover, applying the principle of “double effect,” it can be right to act for a good end even if, as an unintended side-effect of one’s conduct, the life of an innocent person is shortened. Williams’s understanding of the principle of double effect was, however, scarcely more reliable than his understanding of the inviolability of life. He claimed, inaccurately, that “double effect” admitted “a choice of the lesser evil.”<sup>94</sup> The reality is that the principle never permits an agent to choose an evil, lesser or otherwise, but only a good, even though the good chosen may foreseeably be accompanied by a bad consequence. Conduct that intentionally brings about a bad consequence is wrong; conduct that

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid. Williams claimed that the church’s teaching on the just war was “a concession made by the church to procure partnership with the state” (ibid., n1). He cited no authority to support this proposition. Indeed, if partnership with the state had been the church’s motivation, why were the requirements for a just war so restrictive? On the criteria see J. Finnis, J. Boyle, and G. Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford UK: Clarendon Press, 1987), pp. 87-89, 233-36, 315-16.

<sup>94</sup> SOL, p. 184.

foreseeably brings about a bad consequence may not be. Williams went on: “To the eye of common sense, a result that is foreseen as certain, as a consequence of what is done, is in exactly the same position as a result that is intended.”<sup>95</sup>

Let us test this assertion (not one of his most precisely expressed) against a couple of everyday scenarios. A doctor administers morphine to ease a dying patient’s pain knowing that, as an unintended side-effect, the drug will hasten the patient’s death. Is this “exactly the same” as administering arsenic in order to kill the patient? Again, an oncologist administers powerful drugs to cure a little girl’s leukemia, foreseeing that the drugs will have serious side-effects. Is this “exactly the same” as the administering the drugs while intending that the little girl should suffer the side-effects? How many parents would entrust their daughter to a doctor who intended, rather than merely foresaw, the harmful side-effects? The moral difference in such everyday situations between trying to produce a bad consequence and merely foreseeing a bad consequence is obvious to the person in the street. The difference was elided by Williams, whose utilitarian lens shifted his focus from the agent’s state of mind to the consequence that the agent produced.<sup>96</sup> Williams’s analysis of the philosophical arguments informing the IOL position was, then, unsatisfactory. What of the arguments he advanced in support of his own position?

### III. WILLIAM’S HOLLOW MAN

Professor Williams’s focus on theology served to distract not only from the moral arguments informing the IOL position, but also from the weaknesses of his own. Having set up a straw man to knock down, he

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<sup>95</sup> SOL, p. 186.

<sup>96</sup> For a defense of the distinction between intention and foresight by a doctor-philosopher (and former editor of the *Journal of Medical Ethics*), see Raanan Gillon, “Foresight is Not Necessarily the Same as Intending,” *British Medical Journal* 318 (1999): 1431ff. Though our palliative care scenario is familiar in the legal and philosophical literature, it appears that even increasing doses of morphine at the end of life, if properly titrated, do not in fact shorten life. See R.G. Twycross, “Where There Is Hope, There Is Life: A View from the Hospice” in *Euthanasia Examined*, ed. J. Keown (Cambridge UK: Cambridge Univ. Press, 1995), pp. 161-162.

replaced it with a hollow man of his own creation. His position on the value of life, which approximated a fairly crude utilitarianism, was largely undeveloped and undefended. Nowhere did he recount, let alone respond to, the standard objections to utilitarianism.<sup>97</sup> Moreover, his application of utilitarianism to the issues that he addressed was generally cursory and question-begging. He regularly overlooked even utilitarian counter-arguments.

To illustrate the inchoate exposition of his own approach, the nearest that Williams got to a sustained account of the wrongness of murder was a short passage in the preface:

Much of the law of murder rests upon pragmatic considerations of the most obvious kind. Law has been called the cement of society and certainly society would fall to pieces if men could murder with impunity. Yet there are forms of murder or near-murder, the prohibition of which is rather the expression of a philosophical attitude than the outcome of social necessity. These are infanticide, abortion, and suicide.<sup>98</sup>

However, if “social necessity” was the criterion for the intervention of the criminal law, what would be wrong with allowing a strong majority to oppress a weak minority? The experience of the ancient world, which Williams was so wont to cite, shows that a society can survive not only with abortion and infanticide but also with racism, sexism, and slavery (so too, sadly, does the experience of parts of the modern world), and even with gladiatorial games. Would Professor Williams have objected to the intervention of the criminal law to prohibit these practices because such laws would be “the expression of a philosophical attitude”? And if he had responded that there were utilitarian reasons for prohibiting such practices (because prohibition would produce “the greatest happiness for the greatest number”), would he not have been expressing a “philosophical attitude”? The central question is not whether the law should express a

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<sup>97</sup> See, e.g., J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge UK: Cambridge University Press, 1973); J. Finnis, *Fundamentals of Ethics* (Oxford UK: Clarendon Press, 1983); *Human Lives: Critical Essays on Consequentialist Bioethics*, ed. D.S. Oderberg and J.A. Laing (New York NY: St. Martin’s Press, 1997).

<sup>98</sup> SOL, pp. 11-12.

philosophical attitude but which philosophical attitude it should express and why. It would have been valuable to have had the benefit of his thoughts on these important issues, issues central to the subject-matter of his book. Unfortunately, he chose not to share them.

Moreover, without a concept of justice it is difficult to see how he could even begin to give an account of the right to equal protection of all members of society, especially the most vulnerable. Remarkably for a work on the value of life, particularly one written by one of the most eminent jurists of the twentieth century, the concept of justice and the related concept of human rights were notable by their absence. In particular, as we have seen, Williams simply ignored the core moral argument informing the IOL approach, that because all human beings share a fundamental worth in virtue of their common humanity, it is unjust to kill anyone on the pretext that their life is not worth living.

We shall illustrate the fragility of Williams's own position with reference to his discussion of four of the major issues that he addressed (and in the order in which he addressed them): infanticide, sterilization, abortion, and euthanasia.

#### *A. Infanticide*

Professor Williams's views on the ethics of infanticide were far from clear. Here, as elsewhere, he tended to cite various opinions without identifying which, if any, represented his own.<sup>99</sup> This obscurity did not, however, eclipse his support for infanticide in certain cases. He referred, in expressing his sympathy for infanticide, to the "supreme good" of producing the greatest happiness for the greatest number of human beings.<sup>100</sup> He cited one "courageously expressed" opinion that killing infants caused a minimum of harm because the victim could not feel fear or suffer pain "in appreciable degree" and because the killing of an infant left "no gap in any family circle," deprived no-one of a breadwinner and no-one of a friend, and caused no sense of social insecurity.<sup>101</sup> Leaving

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<sup>99</sup> See, e.g., SOL, p. 30.

<sup>100</sup> *Ibid.*

<sup>101</sup> SOL, p. 29.

aside the contestable nature of some of these claims (how many mothers would agree that their baby's death left "no gap" in the family circle?) the underlying argument would appear to justify the killing not only of babies but also of older human beings. Imagine the (not fanciful) scenario where a small group of homeless, socially-isolated people were a significant drain on public spending and a social nuisance to the affluent majority. Would the "supreme good" not permit, indeed require, their elimination (particularly if effected painlessly while they slept)?

Although Williams did not point out that a utilitarian ethic might be used to justify killing on a much more extensive scale than he appeared to envisage, he did realize that the principle could be interpreted to oppose abortion and infanticide on the ground that children, born and unborn, are human beings. He refrained from explaining why he did not favor this interpretation.<sup>102</sup> Further, when commenting on an interpretation that would focus not on the child but on the prospect of happiness that the child might enjoy, he observed that on this interpretation "severely handicapped infants may rightfully be put to death."<sup>103</sup>

He evidently assumed that people with serious disabilities were doomed to lives of such misery that it was right to suppress them at birth. One wonders whether, in later years, he ever consulted his Cambridge colleague, Professor Stephen Hawking, about this assumption. The assumption was open to the objection of exhibiting the merest prejudice against those with disabilities.

Williams observed that he was "not clear in [his] own mind" whether the view that all human life was inviolable, "however disabled or worthless or even repellent the individual may be," justified the punishment of a mother who killed her "idiot child" at birth.<sup>104</sup> Toleration was a virtue, and even a moral person could be "flexible in his morality," not looking exclusively to the "rules of a legalistic ethic."<sup>105</sup> He concluded: "Regarded in this spirit, an eugenic killing by a mother, exactly paralleled by the bitch that kills her mis-shapen puppies, cannot confidently be

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<sup>102</sup> SOL, p. 30.

<sup>103</sup> Ibid.

<sup>104</sup> SOL, p. 31.

<sup>105</sup> Ibid.

pronounced immoral.”<sup>106</sup>

This was at the heart of his defense of infanticide: a question-begging analogy delivered in emotive rhetoric. He assumed the aptness of his analogy between moral agents (mothers) and non-moral agents (dogs). Moreover, he framed the ethical question in the emotive terms of whether it was right to punish the mother rather than whether it was right to kill the child. One may well (depending on the circumstances) sympathize with mothers who kill their children (born or unborn) without thereby condoning their actions. His references to “tolerance” and “flexibility” begged the question whether killing babies was something that should be tolerated. And why was an ethic that prohibited the intentional killing of innocent children “legalistic”? Was it because the principle was absolute? If so, why was William’s (truly inflexible) utilitarian principle requiring the promotion of the “supreme good” of human happiness any the less “legalistic,” not least when utilitarianism imposes a stringent duty always to promote the supreme good of human happiness as opposed to a much more limited duty to avoid wrongful conduct? Finally, if Williams really thought that his analogy was exact, why did he write that he was “not clear” about whether it was right to punish women? Was it perhaps because an open admission that his views justified infanticide—and, it appears, infanticide in a much wider range of cases than he canvassed—would have alienated his audience?

His analogy was revealing. Leaving aside the offense that women would reasonably take in being compared to bitches, his equation of puppies and infants disclosed the scant moral worth that he attached to the latter. A parent killing an infant because he or she was an “idiot” or “misshapen” was no more objectionable than a bitch killing its deformed puppy. And what could be morally objectionable about a bitch killing its deformed puppy? Williams also appeared to entertain little moral objection to infanticide for financial reasons. He cited the hypothetical case where a mother<sup>107</sup> killed her children to save them from “desperate poverty, perhaps after trying in vain to have them taken off her hands by

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<sup>106</sup> Ibid.

<sup>107</sup> Or, presumably, a father or a person acting with the consent of the parents; see the definition *supra*, at n24.



a children's home."<sup>108</sup> He cited a real case where a Scottish mother of six beat her two year-old child to death with a broken chair leg. Williams commented that her punishment—six years imprisonment—was a “terrible” sentence, pointing out that the child, Thomas, was “delicate and sickly, often crying and moaning” and that the “mother’s record as to the other children, in care and treatment, was good beyond the average.”<sup>109</sup> He complained: “Her husband, who had presented the overburdened woman with the six children, was exonerated from complicity!”<sup>110</sup>

Applying the utilitarian calculus advocated by Professor Williams, it is difficult to see what principled objection he might have had to infanticide for reasons other than disability or poverty.<sup>111</sup> But it was disability that commanded his attention and he made little attempt to disguise his disdain for disability. We have already noted his description of some disabled people as “worthless or even repellent.”<sup>112</sup> Such pejorative epithets were not uncommon. Children with disabilities were, for example, “defective”<sup>113</sup> and “degenerate.”<sup>114</sup> Some were even “monsters.” By this he did not mean fictional creatures or pathological results of conception such as hydatidiform moles, but newborn children with disabilities. The medieval language of “monsters,” rooted in a mistaken belief that such children were a result of bestiality, was taken up by Williams with gusto. He used the word approvingly on a score of

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<sup>108</sup> SOL, p. 39. Or perhaps not?

<sup>109</sup> SOL, pp. 39–40.

<sup>110</sup> *Ibid.* (footnote omitted). Complicity in what offense? Paternity?

<sup>111</sup> He observed that there would be difficulties in providing by law for the euthanasia of “severely handicapped babies”: such a proposal would provoke acute religious conflict and the medical profession might not co-operate. The most practicable course was, therefore, to recognize that the condition of a child killed by the parent may be the strongest mitigation (SOL, p. 31). However, as his discussion of baby Thomas, the “delicate and sickly” two year-old illustrated, Williams’s sympathy for infanticide was by no means limited to “severely handicapped babies.”

<sup>112</sup> See *supra*, text at n103.

<sup>113</sup> SOL, p. 34.

<sup>114</sup> SOL, p. 35.

occasions within three pages of text.<sup>115</sup> He even asserted that a monster was not a child, a he or a she, but a thing. He wrote:

On rare occasions such a monster will live. It may belong to the fish stage of development, with vestigial gills, webbed arms and feet, and sightless eyes. The thing is presented to its mother, who struggles to nurture it for a few months, after which she sends it to a home.<sup>116</sup>

This description made no more sense in scientific than it did in moral terms. A syndrome exists in which an excess of fibroblast growth factor during development can prevent the digits from separating and lead to webbed hands and feet,<sup>117</sup> but this has nothing to do with a “fish stage of development.” At no stage of development do human beings have “vestigial gills”: this is an invention by those who would force fetal development to track human evolution.<sup>118</sup> Williams’s “fishbaby” was a product of his own imagination, derived from a medieval bestiary or a Victorian freak show. Its rhetorical function was surely simply to obscure the humanity of the disabled child whom he regarded as a mere object. Williams concluded that it was probably lawful to kill a “monster.”<sup>119</sup> He claimed that while the ancient opinion to this effect by Bracton and others was based on the mistaken belief about bestiality “the same rule might be approved for a better reason.”<sup>120</sup> He did not vouchsafe what this reason might be. He went on to claim that the only objection, apart from the “extreme view” that a “monster” had an immortal spirit, was the difficulty of drawing a line.<sup>121</sup> Williams did not confront the objection that the “monster” is a human being and that human beings enjoy the right not to

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<sup>115</sup> SOL, pp. 31-33.

<sup>116</sup> SOL, p. 33.

<sup>117</sup> A.M. Leroi, *Mutants: On the Form, Varieties and Errors of the Human Body* (London UK: Harper Perennial, 2005), p. 117.

<sup>118</sup> D.A. Jones, *The Soul of the Embryo* (London UK: Continuum Publications, 2004), pp. 170-71.

<sup>119</sup> SOL, p. 33.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

be intentionally killed even if they are seriously disabled. He concluded his chapter on infanticide with the comment that “a legal inquisition into conduct is not justified on moral or religious grounds if no sufficient social purpose is to be served.”<sup>122</sup> He appeared not to consider the purpose of child protection.

### *B. Sterilization*

The less than generous attitude to the vulnerable that Williams exhibited in relation to infants, particularly those with disabilities, was also evident in his enthusiastic advocacy of eugenic sterilization. He endorsed the sterilization, both voluntary and compulsory, of potential parents he regarded as “unfit”:

The obvious social importance of preventing the birth of children who are congenitally deaf, blind, paralysed, deformed, feeble minded, mentally diseased, or subject to other serious hereditary afflictions, and the inadequacy of contraception for this purpose, has naturally given rise to the proposal to use sterilization of the unfit as a means of racial improvement.<sup>123</sup>

He wrote:

We have evolved by natural selection, but, by keeping alive mentally and physically ill-equipped children, we are opposing natural selection. The logical deduction seems to be that, unless steps are taken to counteract the tendency, we shall as a race become progressively less fit.<sup>124</sup>

Whether or not “genetic decline” had begun, “the fact remains that the community is burdened with an enormous number of unfit members....”<sup>125</sup> There was a striking contrast between “human fecklessness” in our own reproduction and the “careful scientific improvement” of other forms of life under man’s control: no cattle-breeder would behave as men did in

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<sup>122</sup> SOL, p. 42.

<sup>123</sup> SOL, p. 82.

<sup>124</sup> SOL, p. 83.

<sup>125</sup> *Ibid.*

their own breeding habits.<sup>126</sup> Indeed, if a “human stud farm” produced a “sufficient overplus of good,” it could be justified on utilitarian grounds.<sup>127</sup> He quoted Bertrand Russell’s lament that the ideas of eugenics are based on the assumption that men are unequal, while democracy is based on the assumption that they are equal.<sup>128</sup>

The moral of the quotation was not, as the reader might innocently have supposed, that there was something morally problematic about eugenics but rather that eugenicists (like Russell and Williams) should strive to overcome the baleful influence of egalitarian ideas. Williams noted<sup>129</sup> that the U.S.A. was the pioneer of sterilization statutes, statutes whose constitutionality had been upheld by Supreme Court in *Buck v Bell*. This was the case in which Justice Holmes’s judgment for the majority contained the (in)famous passage:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.... Three generations of imbeciles are enough.<sup>130</sup>

Williams noted that all of the statutes designated the “feeble-minded,” all

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<sup>126</sup> Ibid.

<sup>127</sup> SOL, p. 134.

<sup>128</sup> SOL, p. 76. Not surprisingly, Russell thought the SOL a “wholly admirable” book (supra, n10 at p. 382) that was “wise, temperate, learned and kindly” (ibid., p. 385).

<sup>129</sup> SOL, p. 84.

<sup>130</sup> *Buck v. Bell* 274 U.S. 200 at 207 (1927). Cf. the later decision of the Canadian Supreme Court that non-therapeutic sterilization of an incompetent person should never be authorized under the *parens patriae* jurisdiction. Delivering the judgment of the Court, Judge La Forest noted the need to proceed with the utmost caution because of “now discredited eugenic theories” that had encouraged many to regard the mentally handicapped as “somewhat less than human” in *Re Eve* (1986) 31 D.L.R. 4th 1 at [78]. He concluded (at [86]): “The grave intrusion on a person’s rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person.”

but one the “insane,” and that most included epileptics.<sup>131</sup> Some were voluntary, others compulsory, and around 50,000 sterilizations had been performed by 1949.<sup>132</sup> It was right, he thought, that female “defectives” should submit to sterilization as a condition of leaving an institution. To the criticism that a woman’s consent in such circumstances could hardly be said to be free and voluntary, Williams replied: “...few if any choices in life are voluntary, for every choice involves the acceptance of a course that is more preferred in place of one that is less preferred.”<sup>133</sup>

To allow such a woman to “run the risk of producing a family” might produce consequences “too tragic for enlightened opinion to tolerate.”<sup>134</sup> He commented that states that had given their sterilization laws a fair trial regarded them as “beyond the experimental stage and as a proven means of social betterment.”<sup>135</sup> Compulsion had, moreover, been “rarely exercised” and then only in mental institutions.<sup>136</sup> The American experience had shown, he claimed, how remote from reality was the fear that voluntary sterilization laws might be the thin end of the wedge to widespread violation of human rights as had occurred in Nazi Germany. In the U.S.A. the opposite had happened: compulsory sterilization had given way to voluntary sterilization.<sup>137</sup> There was no case for compulsion, in his view, “unless milder methods are inadequate.”<sup>138</sup> Finally, the sterilization of habitual criminals and homosexuals had been “restrained and cautious.”<sup>139</sup>

Williams’s “enlightened” views spoke for themselves. He evidently had no objection to the compulsory sterilization of gays, “habitual”

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<sup>131</sup> SOL, p. 84.

<sup>132</sup> Ibid.

<sup>133</sup> SOL, p. 88.

<sup>134</sup> Ibid.

<sup>135</sup> SOL, p. 89.

<sup>136</sup> SOL, p. 90.

<sup>137</sup> SOL, p. 91.

<sup>138</sup> SOL, p. 95.

<sup>139</sup> SOL, p. 91.

criminals, and people with epilepsy.<sup>140</sup> Nor did he question the validity of consent to sterilization as a condition of release from an institution, regarding it as a choice like any other because all choices involved the preference of one course over another. On this approach there is no difference between one's choice to donate money to Oxfam rather than the Red Cross, and one's choice to hand over money to an armed robber. At no point did Williams suggest that any additional burdens in raising a child faced by a woman with mental disabilities should be addressed by providing her with social support, or by offering adoption, rather than surgical sterilization. Was Williams genuinely concerned to help those with disabilities or merely to ensure they did not procreate?

It is extraordinary that Williams could, without embarrassment, use the language of "racial improvement" of "the unfit" less than ten years after the Nuremberg trials of doctors complicit in Nazi atrocities, acts that stemmed in large part from the decision of some within the medical and legal professions, years before Hitler came to power, to embrace a philosophy according to which certain groups of men, women, and children were adjudged to have a "life unworthy of life."<sup>141</sup> The ideology of racial improvement had not been an accidental feature of Nazism but one of its defining principles. Just as Williams omitted the inconvenient fact of the Hippocratic Oath in his treatment of abortion, the no less inconvenient experience of Nazi eugenics was accorded only a fleeting mention, which suggested that his main concern was that the Nazis had brought eugenics into disrepute.<sup>142</sup>

Furthermore, other accounts of the U.S. experience of eugenic sterilization differ from the sanguine picture painted by Professor Williams. These accounts indicate that he was silent about three relevant

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<sup>140</sup> He proposed that no person with epilepsy should be allowed to marry unless they had first been sterilized (SOL, p. 94). He also thought that there was a "very strong eugenic reason" for abortion if the child would be diabetic (SOL, pp. 161-62).

<sup>141</sup> A. Hoche and K. Binding, *Die Freigabe der Vernichtung Lebensunwertem Lebens* (Hamburg: Felix Meiner Verlag, 1920). See M. Burleigh, *Death and Deliverance: "Euthanasia" in Germany c.1900-1945* (Cambridge UK: Cambridge Univ. Press, 1995).

<sup>142</sup> SOL, p. 85.

facts: first, that the Nazis modeled their laws on the U.S. precedent; secondly, that the U.S. laws were also based on the principle of racial improvement; and thirdly, that compulsory sterilization in the U.S.A. was not performed only “rarely.” One recent account, commenting on the first six decades of the twentieth century, reads:

Employing a hazy amalgam of guesswork, gossip, falsified information and polysyllabic academic arrogance, the eugenics movement slowly constructed a national bureaucratic and juridical infrastructure to cleanse America of its “unfit.” Specious intelligence tests, colloquially known as IQ tests, were invented to justify incarceration of a group labeled “feebleminded.” Often the so-called feebleminded were just shy, too good-natured to be taken seriously, or simply spoke the wrong language or were the wrong color. Mandatory sterilization laws were enacted in twenty-seven states to prevent targeted individuals from reproducing more of their kind. Marriage prohibition laws proliferated throughout the country to stop race mixing. Collusive litigation [*Buck v. Bell*] was taken to the U.S. Supreme Court, which sanctified eugenics and its tactics.<sup>143</sup>

The account continues:

The goal was immediately to sterilize fourteen million people in the United States and millions more worldwide—the “lower tenth”—and then continuously eradicate the remaining lowest tenth until only a pure Nordic super race remained. Ultimately, some 60,000 Americans were coercively sterilized and the total is probably much higher. No one knows how many marriages were thwarted by state felony statutes. Although much of the persecution was simply racism, ethnic hatred and academic elitism, eugenics wore the mantle of respectable science to mask its true character.<sup>144</sup>

### C. *Abortion*

It will be recalled that instead of answering the question that he posed whether the early embryo could be described as a human being, Professor Williams preferred to embark on a theological discussion about the timing

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<sup>143</sup> E. Black, *War Against the Weak* (London UK: Four Walls Eight Windows, 2003), p. xv.

<sup>144</sup> *Ibid.*, at xvi. See also D.J. Kevles, *In the Name of Eugenics* (Cambridge MA: Harvard Univ. Press, 1995), p. ix; S. Kuhl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford UK: Oxford Univ. Press, 1994); Donnelly, *supra*, n10 at p. 756.

of ensoulment.<sup>145</sup> It will also be recalled that, to the extent that he did engage with the philosophical basis of the IOL approach, he demonstrated an unimpressive grasp of it.<sup>146</sup> These shortcomings inevitably detracted from the case that he constructed for relaxation of the law. How cogent could such a case be when it failed to confront the core moral argument that abortion involved the intentional killing of an innocent human being?

Williams preferred to focus on alleged “social facts.”<sup>147</sup> He sought to show that the law against abortion was a failure; that the effect of the law was “not to eliminate abortion but to drive it into the most undesirable channels.”<sup>148</sup> The “social facts” that he prayed in aid, chiefly the alleged incidence of illegal abortion, were, however, far from proven. He wrote that in England in 1955 there were 52 prosecutions resulting in 49 convictions out of, as was “agreed by all,” some “tens of thousands” of illegal abortions.<sup>149</sup> Williams’s assertion that “tens of thousands” was an “agreed” figure was unsubstantiated.<sup>150</sup> He cited estimates ranging from 44,000 to 250,000 per year before admitting: “Unfortunately these writers do not state the way in which they arrived at their conclusion.”<sup>151</sup>

Williams concluded that there were 52,000 cases.<sup>152</sup> Unfortunately,

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<sup>145</sup> See *supra*, text at n72.

<sup>146</sup> See *supra*, text at nn91–95.

<sup>147</sup> Ch. 6, in which he advances his case for abortion law reform, is entitled “The Problem of Abortion: Morality and the Social Facts.”

<sup>148</sup> SOL, p. 193.

<sup>149</sup> SOL, p. 192.

<sup>150</sup> Dr. C.B. Goodhart, Cambridge zoologist and member of the Eugenics Society, concluded on the basis of (the low) maternal mortality statistics that “the true figure could not have exceeded 20,000 and was probably nearer 15,000 criminal abortions a year in Britain before 1967”—see C.B. Goodhart, “Abortion Freedom” accessible at: [http://www.galtoninstitute.org.uk/Newsletters/GINL9406/abortion\\_freedom.htm](http://www.galtoninstitute.org.uk/Newsletters/GINL9406/abortion_freedom.htm) (last accessed 29 March 2007).

<sup>151</sup> SOL, p. 192. As Professor Ken Mason has commented of such estimates: “the breadth of the bracket testifies to its lack of authority.” J.K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood*, 2<sup>nd</sup> ed. (London UK: Ashgate, 1998), p. 115.

<sup>152</sup> SOL, p. 193.



he did not state the way in which he arrived at his conclusion.<sup>153</sup> Dellapenna has concluded, after analysing estimates for the U.S.A. and the U.K.: “Any estimate of the incidence of illegal abortion must remain largely a guess.”<sup>154</sup> So much, then, for Professor Williams’s vanguard “social fact.” As for the number of maternal deaths from illegal abortion, Williams admitted that it was “not precisely known.”<sup>155</sup> Dellapenna points out that in the U.S. the figure of 10,000 deaths per year claimed by pro-choice organisations was mere propaganda. He quoted Dr Bernard Nathanson, formerly a leading abortionist, who admitted that his use of the figure had been a deliberate lie aimed at repealing the anti-abortion law.<sup>156</sup> Dellapenna also quotes Professor John Hart Ely’s comment: “it is a strange argument for the unconstitutionality of a law that those who evade it

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<sup>153</sup> Williams mentioned two sources. The first was second-hand and un-referenced, being a passing mention by one doctor in 1932 of an estimate by another (SOL, p. 193 n2), citing L.A. Parry, *Criminal Abortion* (London UK: John Bale, Sons & Danielsson, 1932), p. 88. The second source was the Interdepartmental Committee on Abortion (1939), which accepted the suggestion that there were between 110,000 and 150,000 abortions per year, of which two-fifths were criminal. But Williams had already included this among those estimates whose basis was unexplained (SOL, p. 192).

<sup>154</sup> Dellapenna, p. 557.

<sup>155</sup> SOL, p. 194. In 1970 John Finnis pointed out that deaths notified as due to abortions induced for reasons other than medical or legal indications numbered no more than 30 per year from 1961 to 1967; that the number of maternal deaths was minute compared to deaths from other avoidable causes such as speeding or smoking, and that no woman whose life was threatened by continuation of her pregnancy need fear that her doctor would decline to terminate her pregnancy for fear of prosecution. He quoted a report by the Royal College of Obstetricians and Gynaecologists, which stated that the law “commends itself to most gynaecologists in that it leaves them free to act in what they consider to be the best interests of each individual patient...We are unaware of any case in which a gynaecologist has refused to terminate pregnancy, when he considered it to be indicated on medical grounds, for fear of legal consequences.” J. Finnis, “Abortion and Legal Rationality” (1970) 3 *Adelaide Law Review* 431 at 441; 462 Table B.

<sup>156</sup> Dellapenna, p. 553.

suffer.”<sup>157</sup>

By no means all who accepted high estimates of illegal abortion drew the conclusion that the law was ineffective and should therefore be relaxed. To support his own estimate of 52,000 illegal abortions per year Williams cited the estimate accepted by the Interdepartmental Committee on Abortion (1939), chaired by Norman Birkett K.C. (as he then was).<sup>158</sup> However, the Committee did not recommend a loosening of the criminal prohibition. It concluded:

The induction of abortion is on ethical, social, and medical grounds essentially an undesirable operation, justifiable only in exceptional circumstances, and the Committee is strongly opposed to any broad relaxation of the law designed to make social, economic, and personal reasons a justification for the operation....<sup>159</sup>

The Committee’s conclusion did not, however, prompt Williams to appreciate that there might be a persuasive secular case against abortion. Moreover, he accepted that the law was effective in preventing registered medical practitioners from performing abortion.<sup>160</sup>

Williams also argued that in practice there was no risk of the woman herself being prosecuted and that the “logical next step” would be to exempt doctors.<sup>161</sup> This did not follow. It was one thing for the prosecut

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<sup>157</sup> Dellapenna, p. 557. Dellapenna observes that the U.S. data suggest that there may have been as many maternal deaths from the 30 million legal abortions since *Roe v. Wade* as from illegal abortions in the years immediately preceding that decision (Dellapenna, p. 702).

<sup>158</sup> See *supra*, n152.

<sup>159</sup> Report of the Interdepartmental Committee on Abortion (H.M.S.O., 1939) at 123 para.14. It recommended that the law relating to therapeutic abortion be amended to make it unmistakably clear that a doctor was acting legally when he terminated a pregnancy in the honest belief that continuance of the pregnancy was likely to endanger the woman’s life or seriously impair her health (*ibid.*, at 122 para.13).

<sup>160</sup> SOL, p. 193.

<sup>161</sup> SOL, p. 146. He cited a case in 1932 in which a court held that a woman who had undergone an abortion could not refuse to testify for fear of self-incrimination because there was no substantial risk of her being prosecuted (SOL, p. 146). Later, however, when illustrating the social problem of illegal abortion, he

ing authorities to show sympathy to the pregnant woman (not least as they might need her testimony); it would have been quite another for them to have exempted doctors, which would largely have emasculated the statute. Williams added that if moral rules were to be enforced, they should be:

...those that human beings in the mass are able to comply with, without excessive repression and frustration and without overmuch need for the actual working of the legal machine. It is evident that this cannot be said of the present law of abortion.<sup>162</sup>

He argued that even if his figure of 52,000 was wrong by a factor of ten it showed “beyond all argument” that the law was ineffective.<sup>163</sup> However, given the difficulties inherent in detecting and prosecuting this crime, a prosecution rate of one per hundred might be thought not unreasonable. If 5,200 men each year had beaten their wives, would this have shown that the great mass of people were unable to comply with the law against assault without “excessive repression and frustration” (whatever that meant) or without “over-much need for the actual working of the legal machine” (whatever that meant)? Again, if 5,200 people each year had injected themselves with heroin for recreational purposes (conduct that, like abortion, risks mortality and morbidity but that, unlike abortion, may be entirely “victimless”), would that have been a convincing argument for its decriminalization? Further, Williams did not consider the criminal law’s educative and symbolic role. As Finnis has observed in his consideration of the effectiveness of the law against abortion, while a main aim of the criminal law is to eliminate undesired conduct, “the criminal law is not futile if it succeeds in doing little more than manifesting society’s continuing commitment to its preferred values....”<sup>164</sup>

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mentioned the prosecution of a woman in 1952 for attempted self-abortion (SOL, p. 196). Williams was not always above tailoring the facts to fit the argument he was making.

<sup>162</sup> SOL, p. 211.

<sup>163</sup> SOL, p. 193.

<sup>164</sup> *Supra*, n54 at p. 436. As examples of laws manifesting such commitment he cited laws against speeding and perjury, and contrasted such laws with laws (such as Prohibition) that not only failed to eliminate the undesired conduct but that

Williams rejected better enforcement of the law as a solution to the misery caused by illegal abortion.<sup>165</sup> The law against infanticide had succeeded, he wrote, but the law against abortion had failed. This was because the infant after birth, but not the embryo, was felt to be a human being and protective feelings were easy to arouse.<sup>166</sup> Miscarriage could happen spontaneously and did not engage our sentiments to any marked degree.<sup>167</sup> The question therefore arose whether the law should fix some lesser measure of protection for the embryo that was “more in accordance with human needs, public opinion, and the possibilities of enforcement.”<sup>168</sup> He observed that the line to be drawn should be dictated by “social considerations and human happiness.”<sup>169</sup> He rejected quickening because it rested on “a rather obvious superstition” and caused evidential difficulties.<sup>170</sup> He thought viability, which was “conveniently fixed at the twenty-eighth week of pregnancy,” was socially satisfactory because illegal abortions did not occur after that time.<sup>171</sup> He made the novel suggestion that in between these two points “one might take the time at which the foetal brain begins to function,” which he placed at the seventh month, shortly before viability.<sup>172</sup> If, he added, one were to “compromise” by taking the start of the seventh month, that would virtually eliminate the

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were “so widely and publicly flouted” by respectable members of society that they “lose even the character of symbolizing a real societal commitment to the values they purport to uphold” (*ibid.*). He concluded that the law against abortion was effective in suppressing, if not eliminating, the practice (see *ibid.*, pp. 437-39). Williams, in his argument to the contrary, seemed to want it both ways: the law should be relaxed if there were few prosecutions or if there were many.

<sup>165</sup> SOL, p. 196.

<sup>166</sup> SOL, pp. 196-97.

<sup>167</sup> SOL, p. 206.

<sup>168</sup> SOL, p. 197.

<sup>169</sup> SOL, p. 206.

<sup>170</sup> SOL, p. 209.

<sup>171</sup> *Ibid.*

<sup>172</sup> SOL, p. 210. Dellapenna points out that shortly after Williams wrote it was established that a fetal electroencephalogram could detect activity from the eighth week of pregnancy; see Dellapenna, p. 587.

problem of illegal abortion.<sup>173</sup> He proposed no restriction on abortion until that time.<sup>174</sup>

Williams's arguments were not immune to objection. He did not identify the "human needs" that abortion would meet, let alone those that could not otherwise be met. He had little to say about the state of public opinion nor did he explain its significance to the question whether the law should be amended. He claimed that laws against abortion had been made by men and implied that there was more support for reform among women. His generalization that women supported repeal rested on a single tabloid poll.<sup>175</sup> Having reviewed more polls, Dellapenna has concluded: "Women consistently are less approving than men regardless of the reason for the abortion..."<sup>176</sup> We may add that the Parliament that passed the Abortion Act 1967 was overwhelmingly male and the U.S. Supreme Court that decided *Roe v. Wade* was exclusively so.<sup>177</sup>

Williams seemed to assume that the significant question was whether the unborn child was felt to be a human being rather than whether it was one. As history has all too often shown, however, human sentiment can obscure recognition of our common humanity. Infants have been treated as disposable, women as second-class citizens and black people as chattels. Should not human feelings conform to, rather than cloud, recognition of our common humanity? Williams's point that grief may not be pronounced over an early miscarriage is also unpersuasive. Death, whether of children or adults, may elicit no grief, perhaps because the deceased have no-one to grieve for them, or because (like Myra Hindley) their passing is widely welcomed. This has little bearing on the question whether it is right to kill them. Moreover, the fact that some embryos miscarry naturally gives no warrant for induced abortion.

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<sup>173</sup> SOL, p. 210.

<sup>174</sup> He had written earlier, by contrast, that abortion should be "a last-ditch measure where the birth of a child is particularly undesirable" (SOL, p. 201).

<sup>175</sup> He wrote that a Sunday Mirror poll of 2,000 women found that 51% of women respondents favored abortion on request and that a substantial proportion favored abortion for health reasons only (SOL, p. 203 n2).

<sup>176</sup> Dellapenna, p. 956.

<sup>177</sup> *Roe v. Wade* 410 U.S. 113 (1973).

Nature is not a moral agent: we are. Further, it will be recalled that Williams asked whether it could be said that a “week-or month-old embryo” was an “existing human being.”<sup>178</sup> But he advocated the decriminalization of abortion up to the 24th if not the 28th week. He did not ask whether a child of that age could be said to be a human being. It does not follow that someone who replied negatively to the first question would have replied negatively to the second.

Williams’s argument for reform purported to be driven by “social considerations and human happiness,” but if this was his criterion, his calculations were incomplete. He omitted to consider the promotion of better education about the humanity of the unborn in order to foster “protective feelings.” Moreover, although he instanced being an overburdened mother as a justification for abortion,<sup>179</sup> he failed to consider the option of offering the mother social assistance. This failure was surprising, not least because the Interdepartmental Committee on Abortion had concluded: “To attempt by social and economic measures to relieve the financial difficulties associated with childbirth and parenthood is fundamentally a sound approach to the problem of criminal abortion.”<sup>180</sup>

Such measures would surely provide the overburdened mother with an alternative to abortion. And what of the further alternative of adoption? Either way, there would be the happiness of the parents (biological and/or adoptive) and of the child-teenager-adult to consider. Why did the interests of the “tens of thousands” of unborn children, or at least the adults whom they would become if allowed to live, not figure in Williams’s calculus?<sup>181</sup> By ignoring these relevant factors, he seemed to

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<sup>178</sup> See *supra*, text at n33.

<sup>179</sup> SOL, pp. 196-98.

<sup>180</sup> Williams did mention that if the state denied abortion to the mother of a “considerable family” deserted by her husband, it should at least assume responsibility for the unwanted child (SOL, p. 213). This was, however, a passing comment in relation to a specific ground for abortion rather than a serious evaluation of an alternative to relaxing the law.

<sup>181</sup> He subsequently mentioned the risk of emotional disturbance to a woman if an unwanted child was born and the fact of cruelty toward unwanted children (SOL, p. 199). He produced no evidence relating to the risk of emotional disturbance from giving birth to an unwanted child, and he acknowledged the risk of

assume what he needed to prove. Did he genuinely apply the utilitarian ethic that he advocated or did he have his elbow on one balance-pan?<sup>182</sup>

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emotional disturbance from abortion (see *infra*, n181). Moreover, he implied that an unwanted child resulted from an unwanted pregnancy, which is not necessarily so: a child unwanted during pregnancy may be wanted after birth. Finally, has the incidence of cruelty toward children diminished since the passage of the Abortion Act 1967?

<sup>182</sup> We noted above (see *supra*, n29) that Williams considered three secular arguments against relaxation of the law but that his analysis of these arguments was not extensive. The first argument was that abortion was medically contraindicated; the second that it might lead to a decline in population; the third that it might result in a breakdown of sexual restraint (SOL, p. 202). He rejected the first argument on the ground that even if the operation were medically undesirable, “it is not for the legislature to pronounce upon this” (SOL, p. 203). In no other branch of medicine, even the performance of lobotomies, did the legislature prescribe what was good for the patient. However, he himself proposed time-limits for legal abortion, thereby inviting the legislature to “pronounce” on the permissibility of a medical procedure (SOL, pp. 208-10). Indeed, he cited “a leading English authority” who wrote in 1957 that “The hazards of therapeutic abortion in the second trimester are very real: long-term effects such as sterility, habitual abortion, and endocrine shock are as important as the operative risks involved...” (SOL, p. 209-10 n2). Williams noted that a psychiatric study of women who had been legally aborted in Sweden showed that at follow-up 14% expressed mild self-reproach and 11% serious self-reproach (SOL, pp. 220-21; see also p. 222 n1). Moreover, legislation enacted after he wrote would, reasonably, place restrictions on psychosurgery and electro-convulsive therapy (Mental Health Act 1983 ss.57&58). Similarly, outside the medical context, the criminal law restricts behavior that may be potentially harmful to life and health, such as driving without seatbelts. The question whether to restrict or regulate medical interventions is surely one within the proper ambit of the moral and prudential judgment of the legislature.

The second argument, Williams thought, scarcely merited serious attention “for if valid it should lead us to penalize not only abortion but celibacy, contraception and emigration.” The argument “can hardly apply to unmarried women,” he added, and there were administrative means of stimulating fertility such as decreasing the financial cost of raising children (SOL, p. 204). His response involved a *non sequitur*. Depending on the circumstances, a prohibition on abortion might (whether or not allied with other measures) be a feasible means of promoting sufficient population growth. (It has, indeed, been used, as Williams noted, for precisely this purpose, particularly in totalitarian countries such as the former Soviet Union; see SOL, p. 200.) His reference to the non-application of the argument to unmarried women was unexplained. It is noteworthy that Europe,

Finally, his suggested time-limit seemed to make little sense, even on his own terms. He rejected quickening as based on an “obvious superstition” as to when life began but suggested others—viability and the start of fetal brain function—that equally bore no relation to the beginning of life. It is not easy to see why, given his apparently utilitarian approach, he did not propose abortion until birth. He gave no principled reason against abortion until birth, which is unsurprising given his sympathy for infanticide.<sup>183</sup> Perhaps, again, he did not wish to alienate his audience. Was his apparently arbitrary line-drawing anything more than window-

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which generally has permissive abortion laws, has a below-replacement birth-rate. See “Ageing Europe Confronts Demographic Time Bomb,” *The Times* (23 June 2007), p. 71.

Williams rejected the third argument because “It seems an odd idea that a woman is to be punished for the sin of sexual intercourse by being forced to bring an unwanted life into the world—odder still when the mother is feeble-minded or psychopathic, so that the child, if only because of the upbringing it will get, is likely to be no asset to the community” (SOL, p. 204). He added that if the argument were valid, it would seem to require a prohibition on contraception and even a ban on curing venereal disease, and it would not justify the whole of the law against abortion because the law was not limited to illegitimate pregnancies (ibid.). His response to this third argument was open to the objection of being emotive and superficial. The argument need involve no intention to “punish” any woman for “sin” or to “force” her to bear a child, but need only discourage one form of conduct (sexual promiscuity, whether by the married or unmarried) by denying a means of negating one of its main unwanted effects. If this did help to discourage sexual promiscuity, with its attendant diseases (which are sometimes fatal or incurable) and threats to stable relationships, it is difficult to see why the legislature should be barred from taking these beneficial considerations into account. In relation to sexually transmitted diseases, Dellapenna comments: “there does seem to have been some increase in sexually transmitted diseases as a result of the legalization of abortion.” He adds: “The increase seems simply to reflect the greater willingness of persons to engage in sexual relations with multiple partners because of decreased fear of pregnancy” (Dellapenna, p. 706, footnote omitted). Absent research indicating that the legalization of abortion would not produce adverse consequences to health and/or population, or would not promote sexual promiscuity, it is odd that a professed utilitarian like Williams appears not to have kept an open mind. His conclusion that these three arguments were “fanciful or logically irrelevant...or both” (SOL, p. 202) seems wide of the mark.

<sup>183</sup> See *supra*, Part III. A.



dressing?

For those who could not accept abortion on request until the seventh month he proposed abortion on a number of specified grounds up to that time. He thought that the strongest case (not surprisingly given his strong eugenic views) was where the child would have a serious disability. He wrote: "To allow the breeding of defectives is a horrible evil, far worse than any that may be found in abortion...";<sup>184</sup> it was an "offence to society."<sup>185</sup> Another ground was rape and other "suggested cases" included incest and women with four children.<sup>186</sup> Strangely, Williams proposed this course of more limited reform even though the "social facts" he cited from countries with experience of such legislation indicated that it did not reduce the number of illegal abortions. He noted the "convincing evidence" that its effect abroad had not been to reduce illegal abortion but to increase the number of legal abortions by creating an "entirely new clientele": women who would not otherwise have sought an abortion.<sup>187</sup> The social result had been "to add the total of legal abortions to the total of illegal abortions rather than to reduce the number of illegal abortions..."<sup>188</sup>

#### D. *Physician-assisted Suicide and Euthanasia*

Professor Williams made out an uncontroversial case against the criminal prohibition of suicide. He argued that the prohibition could serve to hinder medical treatment and that even if some powers of official restraint were necessary, they need not involve the use of the criminal law.<sup>189</sup> But he then proceeded to argue, controversially, that acceptance of this case equally required acceptance of the decriminalization of both assisted suicide and homicide on request.

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<sup>184</sup> SOL, p. 212.

<sup>185</sup> Ibid.

<sup>186</sup> SOL, pp. 212-13. He considered none of the standard counter-arguments to abortion in these cases.

<sup>187</sup> SOL, p. 219.

<sup>188</sup> Ibid.

<sup>189</sup> SOL, pp. 259-60.

He began by asserting that the basis of the legal prohibition of suicide was Christian theology.<sup>190</sup> As with his treatment of abortion, Williams omitted to confront the moral philosophical case against suicide. The natural law criticism of suicide was caricatured as an argument from natural instinct.<sup>191</sup> Williams had the argument the wrong way round: human life is not a good because of our instinct to preserve it; it is because it is a basic good that we ought to feel strongly against taking it. It was Williams who committed the naturalistic fallacy when, it will be recalled, he claimed that because nature favored natural selection we ought to prevent the “unfit” from reproducing, and when he implied that because nature aborted embryos so might we.<sup>192</sup>

He argued that according to “common sense” the rightfulness of suicide depended on the circumstances.<sup>193</sup> He cited approvingly one writer who observed that the greatest happiness of the greatest number may sometimes be attained by personal sacrifice, as the annals of heroism and martyrdom suggested.<sup>194</sup> It does not, however, follow that because heroes or martyrs foresee death, they therefore intend death. Williams’s conflation of foresight and intention led him to think otherwise. In his world, both Judas and Jesus were suicides.<sup>195</sup>

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<sup>190</sup> See supra, text at nn37-38. We noted above his misunderstanding of that theology: supra, text at nn54-57ff. He also wrote that Thomas More endorsed assisted suicide in his *Utopia* (SOL, p. 277), but here More appears to have been satirical. See L. Gormally, “Walton, Davies, Boyd and the Legalization of Euthanasia” in Keown (supra, n95 at p. 134). Williams also claimed that suicide was made a felony by the courts in order to enrich the royal coffers with property forfeited by suicides (SOL, pp. 245, 248, 234-36). He provided no substantiation for this claim. Nor did he consider whether, if it were true, it accounted for the creation of felonies other than suicide.

<sup>191</sup> SOL, p. 237. For a classic contemporary exposition of natural law theory see J.M. Finnis, *Natural Law and Natural Rights* (Oxford UK: Clarendon Press, 1980). A valuable introduction is A. Gomez-Lobo, *Morality and the Human Goods* (Washington, D.C.: Georgetown Univ. Press, 2002).

<sup>192</sup> See supra, text at nn123, 166.

<sup>193</sup> SOL, p. 241.

<sup>194</sup> Ibid.

<sup>195</sup> SOL, p. 242.

Williams's argument for decriminalizing suicide was persuasive. He was, however, largely pushing at an open door. He noted that, since the First World War, policy had in general shifted to one of non-prosecution of attempted suicides.<sup>196</sup> The decriminalization of suicide by the Suicide Act 1961, only a few years after the publication of his book, can be seen as the culmination of a change in attitude that had dawned long before. Williams did not, however, confine himself to the decriminalization of suicide. The tail of his chapter on suicide contained a sting.

Although the bulk of the fifty-page chapter was devoted to making an uncontroversial case for the decriminalization of suicide, its final five pages argued, almost as an afterthought, for something much more controversial: the decriminalization of assisting suicide and of homicide on request.

His argument ran that if it were no longer illegal to commit suicide, then it should no longer be illegal to assist someone to commit suicide.<sup>197</sup> He claimed that it was "universally conceded" that one who incited a young person to suicide was "properly punishable" but that a physician who assisted his dying patient in suicide might well be regarded as beyond "any intelligently conceived prohibition."<sup>198</sup> These "sensible" results could be achieved by punishing only those who acted from "selfish motives."<sup>199</sup> This move, in turn, logically required the endorsement of unselfish homicide by consent, for it would be absurd to distinguish between the doctor who supplied a lethal poison to the patient and the doctor who poured it down the patient's throat.<sup>200</sup> Williams submitted, therefore, "that the law might well exempt from punishment the unselfish abetment of suicide and the unselfish homicide upon request."<sup>201</sup>

First, his proposal was far from modest. He urged that the law permit

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<sup>196</sup> SOL, p. 249.

<sup>197</sup> SOL, p. 274, footnote omitted.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> SOL, p. 275.

<sup>201</sup> SOL, p. 276.

anyone to kill anyone from “unselfish” motives on request.<sup>202</sup> Motive is, of course, generally irrelevant to criminal liability in the criminal law of English-speaking peoples, and for good reason. What limits would be placed on killing by the notion of “unselfishness”? And if a killer were to claim that his motives had been “unselfish,” how could the prosecution prove otherwise? We should also recall the elastic notion of “consent” advocated by Professor Williams: he regarded consent to sterilization as a condition of discharge from a mental institution as akin to consent to give a penny for the Guy.<sup>203</sup>

Secondly, it does not follow that the decriminalization of suicide requires the decriminalization of assisted suicide, let alone consensual murder. The decriminalization of suicide need involve no moral condonation of suicide and can be justified on other, prudential, grounds. Indeed, such grounds were at the heart of the case Williams himself advanced for decriminalization.<sup>204</sup> Further, he noted, but did not respond to, the argument that the threat of punishment might not work against a potential suicide but might be effective against a potential abettor.<sup>205</sup> This argument helps to explain the existence of the offense of assisting suicide in the Suicide Act 1961. It is clear from the Parliamentary debate leading up to the passage of the Act that the government did not intend decriminalization to signal condonation of suicide<sup>206</sup> and in the *Pretty* case Lord

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<sup>202</sup> It seems clear that Williams, who used “request” and “consent” interchangeably, was proposing that an “unselfish” killing be protected provided the victim consented, even if the victim did not request it. This is indicated by a passage in which he stated that his proposal would protect a person who suggested suicide (SOL, p. 274).

<sup>203</sup> See *supra*, text at nn132-40.

<sup>204</sup> See *supra*, text at n188.

<sup>205</sup> SOL, p. 274.

<sup>206</sup> Addressing concerns that decriminalization might give the impression that suicide was no longer regarded as wrong, the Joint Under-Secretary of State for the Home Department said: “I should like to state as solemnly as I can that that is certainly not the view of the Government.... I hope that nothing I have said will give the impression that the act of self-murder, or self-destruction, is regarded at all lightly by the Home Office or the Government.” (1960–1) 645 Parl. Deb. H.C. 822-23.

Bingham confirmed that suicide was decriminalized for reasons other than condonation of suicide.<sup>207</sup>

Thirdly, even if one thought that suicide were not immoral there would be sound prudential reasons for not following Williams's proposal for decriminalizing "unselfish" assistance in suicide and consensual homicide. Oddly for an ostensible utilitarian Williams did not explain why his proposal would produce a surplus of human happiness. He had earlier approvingly cited evidence that seemed to undermine his proposal, including one study that indicated that four fifths of students had said they had sometimes wished for death. Williams had commented: "Common sense suggests the un wisdom of having an institutionalized means of gratifying such a passing fancy promptly and painlessly."<sup>208</sup>

Yet would his proposal not have permitted rendering assistance in suicide even though the request was merely a passing fancy? He also seemed to have forgotten his earlier statement that it was "universally conceded" that one who incited a young person to commit suicide was "properly punishable"?<sup>209</sup> He noted that besides resulting in the loss of a young life "the suicide of an only son or daughter will almost infallibly destroy the mother's happiness for the rest of her life."<sup>210</sup> Yet his proposal would have permitted "unselfishly" assisting a young person in suicide and thereby helping to destroy not only a young life but also parental

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<sup>207</sup> "Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were prosecuted, in effect, for their lack of success. But while the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit (or attempt to commit) suicide, it conferred no right on anyone to do so. Had that been its object there would have been no justification for penalising by a potentially very long term of imprisonment one who aided, abetted, counselled or procured the exercise or attempted exercise by another of that right. The policy of the law remained firmly adverse to suicide, as section 2(1) makes clear." *Regina (Pretty) v. Director of Public Prosecutions* (Secretary of State for the Home Department intervening) [2001] 2 A.C. 532 [35].

<sup>208</sup> SOL, p. 240.

<sup>209</sup> See *supra*, text at n197.

<sup>210</sup> SOL, p. 243. And the father's?

happiness. Further, he recognized that suicide was frequently the outcome of a “passing impulse or temporary depression”<sup>211</sup> and that there was an association between committing suicide and being lonely, divorced or an immigrant.<sup>212</sup> Rather than advocating improved social support and psychiatric help for such vulnerable people, Williams’s only proposal was to make it easier to kill them or help them kill themselves. One might have expected that he would at least have required medical evidence that their request was not the result of a “passing impulse or temporary depression” and that their request was free and well-considered,<sup>213</sup> but he did not do so.

We may illustrate the laxity of Williams’s proposal with reference to two hypothetical cases mentioned in the Law Commission’s discussion of suicide pacts in its recent consultation paper on the law of homicide. In the first:

D and V are involved in a shoot-out with the police. Eventually, they realise that capture is inevitable. D and V agree that D will kill V and then turn the gun on himself. D kills V but is arrested before he can turn the gun on himself as

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<sup>211</sup> SOL, p. 261. On the clear association between suicide, requests for assistance in suicide, and depression see the Statement from the Royal College of Psychiatrists on Physician Assisted Suicide (2006), <http://www.rcpsych.ac.uk/pressparliament/collegeresponses/physicianassistedsuicide.aspx> (last accessed 15 October 2007). The Royal College expressed its opposition to the decriminalization of physician-assisted suicide.

<sup>212</sup> SOL, p. 264.

<sup>213</sup> Earlier he had argued that society should make sure that a determination to commit suicide was “fixed and unalterable” (SOL, p. 262). How his proposal for decriminalization would have ensured this he did not explain. In its recent consultation paper on the law of homicide the Law Commission notes that “Suicide pacts are strongly linked with illness, both mental and physical, in one or both of the participants,” that depression is the most frequent mental illness, and that this finding tied in with studies of individual suicide among the elderly in which 50–60% were physically ill and 79% suffered mental disturbance from depression. *A New Homicide Act for England and Wales?* (Law Commission Consultation Paper No. 177 (2006)) (hereafter “L.C.”), L.C. Para 8.63. The Commission quotes another study that observes: “Homicide-suicides in older people are not acts of love or altruism. They are acts of depression and desperation” (ibid., para. 8.80).

agreed.<sup>214</sup>

In the second case:

D is the leader of a fringe religious cult. He persuades his followers to meet to commit suicide together. At the meeting, with his followers' consent, he pours a lethal poison down their throats but finds he cannot summon the courage to do the same to himself when the moment comes.<sup>215</sup>

The Law Commission observes that in relation to such cases it is "hard to see a reason" for reducing the crime in these cases below first-degree murder.<sup>216</sup> Under the proposal advanced by Professor Williams, however, D would commit no offense whatever. This would be so even if D never intended to commit suicide. Indeed, William's proposed reform appears to have been so lax that it would have allowed anyone to tour the country persuading the elderly and disabled to have a plastic bag held over their head to reduce government expenditure on pensions and healthcare.<sup>217</sup>

Finally, what of the danger of abuse from purely selfish killing, such as the killing by husbands of wives whom they wanted to replace as quickly and cheaply as possible, or of children killing elderly parents to accelerate an inheritance? Williams recognized that his proposal might allow relatives to dispatch "invalids" and then plead their consent, safe in the knowledge that their victims could not testify.<sup>218</sup> Not all will find his response to this risk reassuring: "...the danger of false evidence is one that the law has to meet in almost all situations, and it is not in itself a sufficient reason for opposing a change that is otherwise desirable."<sup>219</sup>

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<sup>214</sup> L.C. 8.21.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> He had observed earlier that society would "fall to pieces if men could murder with impunity" (SOL, pp. 11–12). Would his proposal not have facilitated such killing?

<sup>218</sup> SOL, p. 275.

<sup>219</sup> *Ibid.* He added that the killer would, for his own protection, call witnesses to hear the victim's request (SOL, pp. 275-76). But if the killer did not, how could the Crown prove beyond reasonable doubt that the request had not been made?

In arguing that the risk (of murder) was one the law had to meet and that the change in the law was “otherwise desirable” Williams surely begged the question. The highest purpose of the criminal law is to protect the lives of innocent people. Why was it desirable to expose members of society, not least its most vulnerable members like the “elderly, lonely, sick, or distressed,”<sup>220</sup> those with disabilities, and women,<sup>221</sup> to the risk of being killed with impunity? Because, it appears, Williams thought that it followed logically from the case for decriminalizing suicide.

Williams recognized that his proposal was probably too radical for public opinion and he therefore fashioned a more limited proposal which would have permitted doctors to perform voluntary euthanasia to end severe pain in terminal illness.<sup>222</sup> He rejected the vulnerability of his proposal to the “slippery slope” argument.<sup>223</sup> In fact his proposal made an inviting target for the argument, not least as he admitted that the limiting conditions in his proposal were dictated solely by political expediency. It

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It is noteworthy that since voluntary euthanasia and physician-assisted suicide were permitted in the Netherlands in 1984, thousands of cases have been covered up by doctors, despite a legal requirement to report. See Keown, *supra*, n3 at Part III.

<sup>220</sup> *Report of the House of Lords Select Committee on Medical Ethics* (1994) H.L. Paper 21-I of 1993-94, at para. 239. The Select Committee unanimously rejected the case for legalizing voluntary euthanasia and physician-assisted suicide, in no small measure because it would give rise to “more, and more grave problems than those it sought to address” (*ibid.*, at para. 238).

<sup>221</sup> The Law Commission: “Gender differences are at work in both suicide pact and homicide-suicide cases” (L.C. at para 8.68). It added: “in many cases men remain ‘in control’ of decision-making within the relationship, which explains the suspicion that, in many suicide pacts cases, men are taking the lead or even using coercion” (L.C. at para. 8.78). There is evidence that even ostensibly voluntary requests by women for hastened death may not in fact be so. George writes of “a risk that the decisions of some women for assisted death are rooted in oppressive influences inimical to genuine autonomy, such as structural factors, for instance, social and economic disadvantage, and stereotypes that idealise feminine self-sacrifice, passivity and compliance.” K. George, “A Woman’s Choice? The Gendered Risks of Voluntary Euthanasia and Physician-Assisted Suicide” (2007) 15 *Medical Law Review* 1 at 33.

<sup>222</sup> SOL, p. 303.

<sup>223</sup> SOL, pp. 280-81.



is not necessary to repeat here Professor Yale Kamisar's classic utilitarian critique of the case Williams advanced.<sup>224</sup> Suffice it to say that Williams indicated that he had no objection in principle to euthanasia for those unable to consent, whether adults or children.<sup>225</sup> The only reservations that he mentioned to non-voluntary euthanasia were pragmatic. These included a concern about trauma to the code of behavior built up by two thousand years of the Christian religion.<sup>226</sup> Given that he had devoted much of his book to trashing traditional Christian attitudes, this concern was somewhat peculiar. He concluded his book by quoting without disapproval a writer who advanced the following proposal:

...no child shall be admitted into the society of the living who would be certain to suffer any social handicap—for example, any physical or mental defect that would prevent marriage or would make others tolerate his company from a sense of mercy....<sup>227</sup>

#### IV. CONCLUSION

Glanville Williams's *The Sanctity of Life and the Criminal Law* was a groundbreaking attempt to grapple with some of the most profound issues at the interface of law, ethics, and medicine. The book, written with typical flair, stimulated widespread debate and formed the foundation stone of the new discipline of medical law. Half a century after its publication, it is still highly regarded by academic and practicing lawyers around the world. Our survey of this foundation stone has, however, detected a serious crack. The book's core critique of the moral tradition that has historically informed Anglo-American criminal law, the inviolability of life ethic, turns out to have been defective. This is largely

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<sup>224</sup> Y. Kamisar, "Some Non-Religious Views Against Proposed 'Mercy-Killing' Legislation" (1958) 42 *Minnesota Law Review* 969. For Williams's reply see "'Mercy-Killing' Legislation—A Rejoinder" (1958) 43 *Minnesota Law Review* 1.

<sup>225</sup> SOL, pp. 310-12. Any such objection would, moreover, have been difficult to square with his equation of intention and foresight. If he had no objection to palliative treatment of the unconscious that had the foreseeable effect of shortening their lives, how could he object to the purposeful ending of their lives?

<sup>226</sup> *Ibid.*

<sup>227</sup> SOL, p. 312 n1.

because of the author's misunderstanding of that tradition. What the author tore down was a straw man of his own making. Further, the ethical alternative he offered was little more than a hollow man, largely a composite of inchoate argument and flimsy assertion.

We identified four flaws contributing to this central crack. First, Professor Williams misrepresented the inviolability of life ethic approach as essentially theological. He seemed unaware of the long philosophical tradition against intentional killing of the innocent stretching from the Hippocratic Oath through Kant to the Universal Declaration of Human Rights.<sup>228</sup> Even had the origin of the idea of the inviolability of life been exclusively theological, criticizing laws reflecting that ethic because of the ethic's religious origin was akin to criticizing the statute abolishing the slave trade because William Wilberforce was a Christian.<sup>229</sup> Secondly,

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<sup>228</sup> There is a bare mention of Kant, in a quotation by another writer (SOL, p. 240). Williams's failure to engage with that ethic is doubly odd if his conscientious objection in the Second World War (see supra, n11) was based on that ethic or something like it.

<sup>229</sup> Williams's argument exhibited the genetic fallacy: focusing on the historical origins of a theory at the expense of contemporary arguments in its favor. On this approach, modern Western democracy and modern science could equally be discredited for these are distinctive features of Western society that are heavily indebted to its Judeo-Christian culture. The historical origins of an idea neither validate nor invalidate it. Williams's mistake is still commonly made by critics of the IOL ethic. For example, in the debate over Lord Joffe's Bill to permit physician-assisted suicide, a *Times* journalist described the struggle as "the medieval forces of religion against the modern forces of freedom." C. Cavendish, "I'd Like to Die with Dignity. And I Don't Want the Medieval Brigade Interfering," *The Times* (11 May 2006). The Anglican and Catholic Churches, and other religious groups, did oppose the Bill. But secular groups, notably the Medical Royal Colleges, the Royal College of Nursing, and many disability groups also declined to support the Bill (see [www.carenokilling.org](http://www.carenokilling.org), last accessed 15 October 2007). To suggest that the arguments against the Bill were essentially theological was to part company with reality. Indeed, theological arguments were notable by their rarity. In his speech in the House of Lords debate the Archbishop of Canterbury said: "whether or not you believe that God enters into consideration, it remains true that to specify...conditions under which it would be both reasonable and legal to end your life, is to say that certain kinds of human life are not worth living." He added: "As soon as this is publicly granted, we put at risk the security of all who experience such conditions." (2006) 681

Williams's analysis of theology was no stranger to error. Thirdly, to the limited extent that he engaged with the natural law philosophical tradition informing the inviolability of life ethic he demonstrated that he did not understand it. Fourthly, the arguments that he advanced to support his own position, whether based on ethics or social science, tended toward the tenuous and tendentious. Although he purported to adopt a utilitarian approach his book was light on utilitarian calculus. His positions were often more asserted than argued and the promotion of human happiness seemed to serve more as rationalization than reason. The book did not even offer a sustained analysis of its central theme: the value of human life and the proper role of the criminal law in protecting it.<sup>230</sup>

The discipline of medical law is not based on the thinking of a single jurist, let alone a single book. But Glanville Williams's *The Sanctity of Life and the Criminal Law* has not unreasonably been described as the foundation stone of that discipline. To the extent that the discipline has been based upon it, and continues to rest upon it, the discipline stands on a shaky foundation.<sup>231</sup>

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Parl. Deb., H.L., at 1197.

<sup>230</sup> One reason for at least some of the book's uncharacteristic deficiencies may well have been its origin in a series of lectures, and in hastily prepared lectures at that. Professor Williams mentioned to Professor Skegg that he largely wrote the lectures in the space of five weeks before he delivered them at Columbia. We are grateful to Professor Skegg for this information.

<sup>231</sup> We are grateful to the two referees of *Medical Law Review*, and to Luke Gormally and John Finnis, for their valuable comments. We are solely responsible for the paper's argument and accuracy.