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James P. Murphy
University of Bridgeport

THE EVOLUTION OF THE PRENATAL DUTY RULE: ANALYSIS BY INHERENT DETERMINANTS*

*James P. Murphy***

I. INTRODUCTION

Are there inherent determinants that govern basic factual situations and coalesce with them in the directed development of a rule of law? To put it another way, does a rule of law evolve? If a judge reads a number of cases with similar facts, a presently existing consciousness confronts the written material on the pages. By bringing together these cases, the reader has constellated them into an independent entity, an entity that can only be described as a kind of being. If this being is regarded, studied, perused for meaning, does it not likewise regard the reader? When the reader has completed his analysis, integrated the relevant principles of law, and announced in the form of an opinion his conclusions, does not this being or entity, in a subtle and quiet way, simultaneously make known its conclusions and judgments on the reader? Perhaps what has taken place is a momentary coming together of distinct beings, one timeless and pure idea, the other finite and material.

Every lawyer operates on the assumption that there is a significant element of predictiveness in the development of the law, and that there may be something approaching accurate knowledge as to the particular turn the law will take just up ahead. A primary function of the lawyer as a theorist is to do a thorough, efficient job of marshaling his data and materials, apply his mind like a fine tool to the problem before him, and posit the likely course of the law. But the immediacy of his task and its wholly utilitarian purpose give him no reason to go beyond the merest edge of the present, a penumbra in fact so fused with the present that authentic predictive positions may easily be attributed to hunches, a feel for the times, or common sense. When the lawyer is a practitioner, he wears near-sighted glasses; he must do so. Yet, in order to get at the question we pose, even in the most tentative way, we must be ready to treat the practitioner's methodology, with its concern for the period that stretches from the immediate present to the immediate future, to be no more than a special application of a larger general

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** Associate Professor of Law, University of Bridgeport School of Law; B.A. University of Maine (1964); LL.B. University of Maine (1969); M.L.S. University of Maine (1972).

principle. In the exposition of this larger principle, therefore, we ought to assume the existence of a different world, admittedly imaginary, in which the lawyer's role and his concern is to arrive at predictive inferences on matters that will culminate, not next week or next year, but, for example, in fifty years. The question, therefore, is whether the lawyer can, given a concerned interest in that distant time, posit the probable course of the law from presently existing determinants.

At this point there is a temptation to succumb to empiricist tendencies and reply that the probable course of the law over a long period of time depends mostly upon the trend of conditions during that time span. Because future conditions are largely unknowable, the question itself is arguably baseless. It is a truism, of course, that the distant future cannot be known with anything approaching certitude. Changing conditions, manners, morals, changing needs, real and perceived, play the central role in the life of the law as well as the life of a people. The force that conditions exert is ultimately expressed in the formation of positive, or legislative declaration. It is not so clear, however, that the path of law, absent positive declaration, would run a parallel course.

The following statement may be at best an unsatisfactory approximation: we do not wish to observe a phenomenon from an outside vantage point, we wish to get inside the phenomenon itself and look out: to convert external conditions from affective agents into passing images.

Finally, in asking and seeking an answer to the question of whether there are inherent determinants in the law, there must be a recognition that the response to that question, no matter how tentative and limited, is inextricably linked to the causes that shape the question and that motivate the questioner. Predictiveness in the law for the practitioner connotes effectiveness, capacity, and ability to perform his function. It is a kind of power. The idea of prediction, closely related to prognostication, forecasting, even prophecy, is too suggestive of dominance for our purposes. We do not wish to predict the future course of the law; what we want to do is construe its development by taking it out of the future and, with the help of language, imagining it.

An area peculiarly adapted for an investigation for hypothesized inherent determinants is that of prenatal torts. In 1940, a constellation of roughly a dozen reported cases, beginning in 1884, generally had denied recovery to the child born with an injury inflicted prior to birth.[1] Their rule was clear and unequivocal: a man owed no duty of care to an unborn child. Then, after a 1946 decision allowing recovery, there occurred what Prosser has called "the most spectacular and abrupt re-

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 335-36 (4th ed. 1971).

versal of a well settled rule in the whole history of the law of torts."[2] Within a few years the courts of dozens of states announced a new rule allowing recovery. By 1967 the reversal was complete: Texas, the last remaining state, had recanted. One is led to infer that *Bonbrest v. Kotz*,[3] the 1946 decision, must have been seminal indeed to have precipitated such a relatively rapid turnabout. Yet the opinion itself contained nothing new. It was not one of those occasional cases in tort law that, because of the brilliance and originality of thought of a Cardozo or a Traynor, become benchmarks. *Bonbrest* rather capped a process that had been progressing ever since Holmes' irked surprise in 1884 at the newfangled idea of prenatal torts.[4]

What were the determinants in this constellation of cases that made so easy a turnabout from a firm rule of no liability? Were there elements in this cycle of cases that, while the decisions were saying over and over again, "no liability," were nevertheless quietly preparing the way for the establishment of liability? One common aproach to this kind of question is to bypass it entirely. The approach reduces the question to the aphorism that liability for prenatal injuries was an idea whose time had come. It is the sociologist's approach; as far as it goes it is a good approach. But it cannot help the present inquiry unless we are ready to assume in principle that the law and sociology are opposite sides of the same coin.

Another problem must be kept in mind: the possibility that it is fundamentally a misuse of language to speak or even to think in terms of a rule of law that is enunciated in negatives. From 1890 to 1940 one might have said with some correctness that there was no recovery for prenatal injuries. Everyone will agree that all this means is that the cases had denied recovery. It seems pointless to ask whether the same rule of law existed in 1880, before its theoretical foundations had been thought of or even tested. It is, consequently, a minor paradox that a rule of law denying liability comes into existence as a positive force because a particular plaintiff sought compensation for what he perceived to be a wrong, and lost. That particular plaintiff is no worse off, except for his attorney's fee. Ironically, the next similarly situated plaintiff is worse off. An unfriendly precedent opposes him. It is the thesis of this article that the inherent determinants and their positive

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 336 (4th ed. 1971).

3. 65 F. Supp. 138 (D.D.C. 1946).

4. [N]o case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment.

Dietrich v. Northampton, 138 Mass. 14, 15 (1884).

force aid him.

II. THE PRIMAL DETERMINANT

In 1884, a pregnant woman slipped and fell on a public highway. Miscarriage resulted. The child died within a few minutes of its premature birth. In *Dietrich v. Northampton*,[5] the parents as next of kin took out administration papers and, under a Massachusetts statute providing a cause of action for negligent death on the highway, sued the municipality.

Justice Holmes thought it significant that the suit for prenatal injuries lacked the support of precedent. Accordingly, he suggested that a burden rested on plaintiffs. That burden required them to reconcile their suit with the previously unexplored state of this field of litigation.[6] In Holmes' position an obstacle is raised which has confronted innovating tort claimants from the earliest days down to the present. In a nutshell, the obstacle can be stated as follows: it cannot be done because it has never been done before. The position locates an inherent determinant in any cycle of cases because it invites refutation by action, similar suits in the future. Judged analytically, of course, the position is inconclusive; at best it is a standoff. What it boils down to is an absence of precedent either for or against the claimant. Logically, the burden of explaining why the field of litigation is uncharted—and unmarked by the beacons of precedent—properly belongs no more to plaintiff than to defendant. Plaintiff, in fact, simply by bringing suit meets the force of the argument head-on; not by words, but by action.[7]

The position is the primal determinant in the evolution of a tort duty. Though its expression indicates an unwillingness to come to grips with a factual situation on its own merits, the prejudgment of this or that judge or court is, in the long run, negligible in its influence on an evolving rule of law. This determinant is like the proverbial foot in the door. Although the unwillingness mentioned above may be no more than a culturally conditioned response, its precise origin is not material. For the time being, it prevents substantive consideration of a new issue.

III. THE POWER OF MYTH

Holmes, however, did skirt the problem on its merits. How, he asked, can a person recover for injuries which he received before he became a person, when he was "part of his mother"?[8] Today the proposition embedded in this argument seems tendentious in the extreme,

5. 138 Mass. 14 (1884).
6. See Note 4 *supra*.
7. For the logical reply to the primal determinant, *see* note 55 *infra*.
8. 138 Mass. at 17.

but it will not do to dismiss it out of hand. For, in nearly every case following *Dietrich*, this argument formed the chief stumbling block against which attempts to recover for prenatal injuries failed again and again. The proposition was not merely a transparent device designed and intended to close the subject peremptorily.

According to that proposition, one becomes a person only by altering that state of affairs in which he is a part of his mother. He does so by becoming separate or apart from his mother, actually departing from her. Birth is a name we give to the transition from this state of partness to wholeness. The role of the relational word "part" should be examined in order to stake out the critical points in the proposition utilized by Holmes. This use of "part" effectively equates the unborn with an arm, a leg, or a muscle. A leg cannot sue for injury. An arm cannot file a complaint. The belly does not bring suit to satisfy its hunger. The harm that these parts suffer is physically original, but their recovery and vindication for that harm is derivative. To the extent that the prenatal injury affected the mother, she could recover. A *part* of her had sustained injury. But to grant a cause of action to a child injured prior to birth made no more sense than to announce that an arm or leg had standing to sue. The proposition is epitomized by the symbolism of the Aesopian fable concerning the dispute between the belly and the other members of the body.[9]

If we push further into the realm of fantasy, interestingly we encounter points of contact between the *pars matris* proposition and mythic assumption. Take the case of Adam's rib. It would be absurd to suggest that Eve could have recovered for a "prenatal" injury negligently inflicted on Adam's rib.[10] Before its transformation into a human being, the rib was in the same situation as the Aesopian arm or leg. Or, take the case of the Greek sculptor Pygmalion who fell in love with his statuary creation.[11] The gods took pity on him and brought the statue to life. If an apprentice had carelessly chipped of a piece from the face of the statue, and the subsquently transformed woman was

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9. One fine day it occurred to the Members of the Body that they were doing all the work and the Belly was having all the food. So they held a meeting, and after a long discussion, decided to strike work till the Belly consented to take its proper share of the work. So for a day or two the Hands refused to take the food, the Mouth refused to receive it, and the Teeth had no work to do. But after a day or two the Members began to find that they themselves were not in a very active condition: the Hands could hardly move, and the Mouth was all parched and dry, while the Legs were unable to support the rest. So thus they found that even the Belly in its dull quiet way was doing necessary work for the Body, and that all must work together or the Body will go to pieces.

Joseph Jacobs, *The Fables of Aesop* 72 (London 1894).

10. *Genesis* 2:21-23.

11. BULFINCH'S MYTHOLOGY: THE AGE OF FABLE, chapter 8 (1855).

scarred for life, the proposition would snugly fit the case. Yet, the *pars matris* proposition makes unassailable sense only in these archetypal examples. It is just this exceedingly curious circumstance that suggests as a determinant the unconscious preference for symbolism and myth over reality, in the face of the novelty of new torts.[12] Holmes was not unaware of the biological reality of prenatal life; indeed, it had been known and recognized for centuries. The reality, however, was outshone by symbolism and myth.

IV. INTEGRATION INTO A PRE-EXISTING FRAMEWORK

A few years after Holmes' decision in *Dietrich*, an Irish case, *Walker v. Great Northern Railway Co.*,[13] came along. The plaintiff was born with a deformity due to the defendant railway's negligence in

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12. The formal origin of the *pars matris* proposition was Coke's statement in The Earl of Bedford's Case, 7 Co. Rep. 7b, 77 Eng. Rep. 421 (K.B. 1586): "And although *filius in utero matris, est pars viscerum matris*, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth." *Id.* at 9b. The application of the principle prior to *Dietrich* involved only questions of property and inheritance. Although Holmes in *Dietrich* did not mention The Earl of Bedford's Case, he did cite the same earlier Yearbook authorities that Coke had relied on. It became common practice in cases in which a prenatal duty was asserted to return to Coke's maxim. *See, e.g.*, Walker v. Great Northern Railway, 28 L.R.Ir. 69, 77, 84, 87 (1891); Allaire v. St. Luke's Hospital, 76 Ill. App. 441, 449 (1898), *aff'd.*, 184 Ill. 359, 56 N.E. 638 (1900); Drobner v. Peters, 232 N.Y. 220, 222, 133 N.E. 567 (1921). Compare Coke's quoted statement with the following from *Drobner*: "When justice or convenience requires, the child in the womb is dealt with as a human being, although physiologically it is a part of the mother." 232 N.Y. at 223, 133 N.E. at 568.

It seems useful to point out that the translation from Latin may have worked a subtle and unintended denigration of the status of the unborn. First, the English cognates of *viscera* tend to relate to intestines. One judge rendered the *viscera* of the maxim, in fact, as "bowels," a word which by the late nineteenth century was becoming synonymous with "intestines." Allaire v. St. Luke's Hospital, 184 Ill. 359, 370, 56 N.Ea. 638, 641 (1900), *overruled*, Amann v. Faidy, 415 Ill. 422 (1953). The Latin *viscera* on the other hand had a more generalized, less specific meaning, probably best approximated in English by the archaic word "innards." Second, and more importantly, the use of the partitive genitive in Latin (*viscerum*) may well have been intended to convey an altogether different relational idea than that conveyed to English readers by a statement that the unborn is "part of its mother." In English "part" means "component." From this position it is a short step in thought to the proposition formulated by Holmes; vid., a leg cannot bring suit. The Latin partitive genitive was a grammatical device for showing objective physical relationship in terms of membership. For example, a *soldier* is *part* of an *army*. The greater whole here is denoted by a collective noun, and there is no insinuation, express or implied, concerning the relative value or importance of the single member. To say in Latin that an unborn is "part of the innards" of its mother describes an objective physical relationship, that of pregnancy. It says nothing about the relative value of the unborn. It is probable, in fact, that the *pars matris* proposition, as formulated in *Dietrich* and utilized in subsequent cases, was a legal idea that, even in the form of a maxim, could not have been intelligibly expressed in Latin without employing other, different words. The fact that it became convenient in English to drop out the collective noun, *viscerum*, might have been a signal of a fundamental misunderstanding of the maxim itself. The words *pars viscerum matris* did not contain any support for the value-based idea that Holmes and others purported to derive from them.

13. 28 L.R.Ir. 69 (1891).

carrying plaintiff's mother, who had been a passenger. The mother herself had no difficulty in recovering by way of settlement for her own physical injury. Like Holmes in America, the four judges, each of whom delivered a separate opinion, were disturbed by plaintiff's lack of precedent. They furthermore concurred that at the time of the injury the plaintiff was part of her mother and therefore had no existence as such.[14]

But *Walker* went beyond *Dietrich* in other respects. It abstracted support for the no-duty rule from the law of carriers. Viewed as a stage in the evolution of a tort duty, this is an event of some importance. No purely negative position can long maintain itself without integration into a solid structure.

According to the law of common carriers, the duty of the railway to exercise care for the safety of its passengers originates in the relationship of passenger and carrier which the purchase of a ticket initiates. The duty to exercise care for the safety of the passenger exists as a consequence of the relation defined by the purchase of the ticket. It arises from contract. Plaintiff's mother, therefore, as a passenger, enjoyed the protection of the law for any negligent injury she might suffer. Not so the unborn child, however. Because the unborn child had no contract with the railway, defendant owed no duty to the unborn to exercise care. The ticket was for the transportation of the plaintiff's mother. It was good for the carriage of one person, not two—or one and a half. To say nothing of the nicer metaphysical consequences which flowed from being or not being a part of her mother, the plaintiff was not a passenger on the train in which her mother sat. The unborn's existence, already made dangerously contingent by the *pars matris* proposition, ceased altogether when the mother boarded the train. Because

14. Despite the fact that only one of the four judges, Johnson, J., asserted as much directly: "[T]he plaintiff had no actual existence; was not a human being; and was not a passenger - in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris*. . . ." 28 L.R.Ir. at 88. Harrison, J., stated: "[T]he plaintiff was still unborn and had no existence apart from her mother." *Id.* at 80. O'Brien, C.J., discussed but did not resolve the *pars matris* problem; he chose instead to place his reason for denying a cause of action on a contractual ground which obviated consideration of *pars matris*: "[H]owever the child in the womb may be regarded, whether as part of the mother or having a distinct personality - whether an entity or a non-entity - it was, so far as any actual relation the company had with it, a non-entity." *Id.* at 79. The Chief Justice's reluctance to use the *pars matris* argument determinatively, as Holmes had done in *Dietrich*, probably resulted in large part from his recognition that the argument proved too much - a circumstance the force of which was largely lost on American courts for the next several decades. O'Brien recognized that a defendant who had wilfully inflicted injuries on a pregnant woman would probably be liable in tort to the child who was afterwards born crippled as a result of the injuries. 28 L.R.Ir. at 74. The *pars matris* proposition seemed blind to such a distinction. A part is a part is a part.

she was a non-passenger, she was a nonentity.[15]

The reasoning by which the unborn child is denominated a non-passenger and on that basis is found to be not entitled to protection is noteworthy in two respects. First, it provides a justification to any judge

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15. *See* Chief Justice O'Brien's remarks, note 14 *supra*; Justice Johnson's remarks, note 14 *supra* and 28 L.R.Ir. at 88. There was a certain upside-down quality in the mere statement of this position, as exemplified in the following fanciful dialogue:

Judge A: The question is, was the plaintiff *part* of her mother at the time of the injury?

Judge B: How could she be? She wasn't even a *passenger* on the train.

Judge C: Q.E.D.

Since the plaintiff was not a passenger on the train, she could not conceivably be a part of her mother. In fact, she probably had not been conceived at all. (The episode provides a poignant example of the dehumanization that accompanies the over-reliance on legal abstractions. But for every action there is a reaction, and for the unresponsible use of language that made the above syllogism possible there would be a dialectical price, whose payment would take form in the subliminal irruption of a stark metaphor. *See* Part IV *infra*.)

Such ludicrous pseudo-logic was nothing new; it was only a particular application of the old dogma (which even today has not been quite overthrown) that no duty of care can exist in the absence of some affirmative undertaking, a contractual relationship, or other special circumstances giving rise to what is sometimes called "a legally cognizable relation."

Similar applications are legion. Indermaur v. Dames, L.R. 1 C.P. 274 (1866), *aff'd.* L.R. 2 C.P. 311 (Exch. 1867), had established the rule that landowners were under a duty to exercise care in behalf of their business visitors, but in 1880 a four year old boy who accompanied his older sister on a business visit was not allowed to recover. The duty to his sister, the invitee, did not extend to him. Had both of them been injured simultaneously and on the same loose step, the result for the boy would have been the same. Burchell v. Hickisson, 50 L.J.C.P. 101, 13 Weekly Notes 166 (1880).

More recent examples of the application of the no-duty dogma are Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980) (no duty to exercise care in releasing sexual psychopath with known violent propensities towards young children, even though person released had indicated beforehand that he would take the life of a child residing in his neighborhood); Bradshaw v. Rallings, 612 F.2d 135 (3d Cir. 1979), *cert. denied, sub nom.* Borough of Doylestown v. Bradshaw, 446 U.S. 909 (1980) (no duty on university to exercise care by having advisor present at class picnic even though university was aware that large quantities of beer would be consumed illegally at this university-sponsored function).

An example directly in point to the subject matter of this paper concerns the thalidomide disaster. The German drug manufacturers maintained, apparently with some tactical success, that under German law the malformed plaintiffs had no cause of action because the unborn had no legal protection, i.e., no duty was owed to them. Even in England there was some considerable question whether a cause of action existed for the thalidomide babies. The Insight Team of the *Sunday Times*, untrained in the niceties of legal abstractionism and *pars matris*, naively characterized the no-duty defense as "unbelievable." *See Suffer the Children: The Story of Thalidomide*, by the Insight Team of the *Sunday Times of London* (1979), 123, 149.

Although no English decision has considered the question of the existence of a cause of action for prenatal injuries, and although *Walker*, coming from a common law court, has been treated respectfully by commentators in England, the problem has largely been made moot by legislation. *See* CHARLESWORTH ON NEGLIGENCE (6th ed. 1977) 126-27; CLERK AND LINDSELL ON TORTS (14th ed. 1975) 102-03.

It is interesting to note that, after the unfavorable decision in *Walker*, plaintiff took the case to the Appeals Court in England, where it was argued at length. The child died, however, before judgment was given. *See* BEVANS ON NEGLIGENCE (3rd ed. 1908); Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 132, 154 S.W. 71, 72 (1913), *overruled*, Steggall v. Morris, 363 Mo. 1235, 258 S.W.2d 579 (1953).

who, because of personal inclination, frowns on the innovative suit. Second, it produces a tension between the pristine dogma embodied in the no-duty rule and its extended application. This tension tends to lead to a movement of accommodation of the factual situation, not by the outright rejection of the logic which produced the tension in the first place, but through a process by which the formerly rejected action is eventually assented to on the basis of its adventitious relation to some primary action which is already recognized.[16] An example directly pertinent to the *Walker* court's use of logic in relation to the process suggested is found in *Austin v. Great Western Railway*,[17] where the defendant regularly carried free of charge children under the age of three. Carrying the infant in her arms, the mother bought a ticket for herself and boarded the train. It turned out of course that the child was over the age of three and therefore no longer eligible for free passage. Predictably enough, the defense was that no duty of care existed towards the child, since it was not legitimately present on the train. But here it was held that the duty of care to the child depended not on contracts or tickets, but instead on the child's presence on the train. Physically, he was a passenger.[18]

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16. For example, the tension produced by the logic utilized in Burchell v. Hickisson, 50 L.J.C.P. 101, 13 Weekly Notes 166 (1880), in which the four year old brother could not recover for his injury, cries out fundamentally for rejection of the categories, straight and simple. An accommodation within the dogma of the precise factual situation is a more likely and perhaps a more desirable result. The purposive argument is made that the status of the younger brother is tied to, or hooked together, with his sister's. The argument makes sense. After all, the two are physically in each other's company. Her primary right of protection, which is that of the invitee, is thus extended to him. In relation to the duty owed, the boy's status becomes pendant on his invitee-sister's status. *See, e.g.*, Custer v. Atlantic & Pacific Tea Co., 43 A.2d 716, 717 (D.C. 1945) ("by every consideration of custom and usage and common sense, such invitation extended to and included the mother's infant child"); Murphy v. Kelly, 15 N.J. 608, 612, 105 A.2d 841, 843 (1954) (six year old child who accompanied father to monumental works an invitee: "[i]t is a logical and equitable rule in this complex, rapidly moving, modern existence of ours"). *But see* Dunleavy v. Constant, 106 N.H. 64, 204 A.2d 236 (1964) (assuming that father was an invitee, his status did not extend to his six year old child accompanying him to private residence to help repair automobile). It was this process of extending protection by adventitious relationship that Cardozo, as judicial conservative, had cautioned against in H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928), when, finding for the defendant, he voiced the fear of the imposition of a whole series of duties "inescapably hooked together." (247 N.Y. at 168, 159 N.E. at 899). *Compare with* the earlier expressed fear of "an infinity of actions" in leading no-duty cases. Russell v. Men of Devon, 2 T.R. 667, 671, 100 Eng. Rep. 359, 362 (K.B. 1788); Winterbottom v. Wright, 10 M. & W. 109, 113, 152 Eng. Rep. 402, 404 (Ex. 1842).

17. L.R. 2 Q.B. 442 (1867).

18. His boarding the train, held ostentatiously in his mother's arms, was openly witnessed by the agents of the railway. The court was not so certain that the result would have been the same had the mother smuggled him aboard beneath her skirts or obtained his passage by some other fraudulent means. L.R. 2 Q.B. at 446. The court seems to spread its credulity thin by failing to reckon with the evident hint of fraud clearly present. Defendant's counsel argued that there was "a complete identity between [the child] and his mother, and the concealment practiced by her

The case looks like appropriate authority for plaintiff in *Walker*. Children under the age of three who travel on trains are universally in the custody, if not in the arms of, accompanying grownups. It would take no great leap in thought to find that a child who boards a train without a ticket is bound together with his parent or custodian for the purpose of determining the duty owed to him. If that is so, it is a small step to extend the analogy to include a pregnant woman and the fetus within her, who are undoubtedly bound together. Yet it is just at this point that the *Walker* court withdraws, for reasons whose roots descend straight into the philosophy of idealism. How can a duty be raised by the mere possibility that a woman boarding a train is pregnant? The judges thought that imposition of a duty on this mere possibility of pregnancy would amount to a liability too remote and speculative to be fairly cast upon the railway. Practically, it was what Holmes had previously described as a "conditional prospective liability."[19] The old adage, out of sight out of mind, was never truer.[20]

[affected his] claim." *Id.* at 444.

19. Dietrich v. Northampton, 138 Mass. 14, 16 (1884).

20. The turn of thought is revealing of the nineteenth century attitude toward pregnancy. The consequential parallel between the pregnant woman and the woman who sneaks the concealed infant onto the train without a ticket is unmistakable. In *Austin*, the court would remind us, the railway's agents knew of the child's presence. He was right before their eyes. The corollary of this position, of course, is that a woman whose pregnancy was obvious, or one who flaunted or announced her state, would thereby secure recognition by the law of a duty of care owed to her as yet unborn infant in its own right. Two of the *Walker* judges go so far as to acknowledge the validity of the corollary, had the pleadings asserted notice by the railway of the pregnant condition of the mother. (O'Brien, C.J.: 28 L.R.Ir. at 79; Harrison, J.: *Id.* at 80). On this head their decision would have eased the tension produced by the no-duty dogma. Their willingness to find a duty based on visual notice was of little value, practically. Any woman could be pregnant, in one stage or another, early or advanced. Appearances are deceptive. A woman might look pregnant and not be, and vice versa. In the real world, when she boards a train a woman's state is seldom noticed and rarely announced. The distinction suggested, while interesting as an attempt at easing tension within the developing rule, would hardly ever palliate the no-duty rule, at least with respect to public conveyances. *See also* Nugent v. Brooklyn Heights R. Co., 154 A.D. 667, 139 N.Y.S. 367 (1913), *aff'd. per curiam*, 209 N.Y. 515, 102 N.E. 1107 (1913):

> Had it, born, been carried in its mother's arms, it would have been a gratuitous passenger, but the carrier's duty towards it would not have been thereby lessened. The learned counsel for the plaintiff suggests that the duty would attach had the child been concealed in a garment. Such condition does not usually escape the observation of the carrier's servants exercising ordinary attention, and the case of the mothers concealing their infants from the expectable knowledge of carriers might, under some circumstances, excuse some act of the carrier whereby it was injured. But it is not the duty of a carrier to scrutinize its passengers for the detection of unborn children, to the end that they, although latent, may be regarded as passengers.

154 A.D. at 673, 139 N.Y.S. at 371. The association between the act of concealment and the state of pregnancy is so deep-rooted in these judges' minds that one has reason to suspect that they would have been shocked at the suggestion of simply attributing constructive knowledge to a railway that a certain number of women who board trains and streetcars must, in the nature of things, be pregnant in one stage or another. According to the legal reasoning of these judges, the

The principal use which the abstractions from the law of common carriers served was to integrate the evolving rule into a larger, pre-existing framework. If the integration produced tension, relief would occur when the specific factual situation tied on to a relatable situation in which some other person already enjoyed the protection of a rule of law. This development, in the course of events, would gradually lead to an accommodation of the prenatal duty. The development is suggested in *Walker*. It did not occur because of the part played by philosophical idealism. That route of development for the evolving new duty of care was blocked, at least temporarily.

V. The Real Common Carriers of Unborn Children

One of the *Walker* judges said something more revealing in its singularity of meaning than anything discussed in this analysis of the use of abstractions from the law of common carriers. In its succinctness and simplicity it tells us more about the attitude in 1890 toward pregnant women, and indeed toward women in general, than dozens of cases or volumes of sociological lore could do. Because of its imagery and rhetorical symmetry it hardly requires comment. It is the metaphorical truth of an age. Justice O'Brien concluded his opinion with this sentence:

> In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union, in the instinct of duty and solicitude, on which the continuance of the human race depends, a woman is the common carrier of her unborn child, and not a railway company.[21]

A woman is the common carrier of her unborn child. The implications are manifold. A common carrier is employed in the business of carrying goods or persons for hire; a common carrier carries all persons who apply for passage, so long as there is room and no reason for refusal. A woman is a common carrier. She carries for hire. She is employed in the business of carrying for hire. She carries all who may apply for passage so long as there is room to do so, and so long as there is no legal justification for her refusal, such as, presumably, rape. It follows that she herself is strictly liable, morally at least, to the unborn child for any injury it receives prior to its birth, whether the injury occurs

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railways and their agents must have been artless innocents to whom the very idea of pregnancy would have been a wonder. One *Walker* judge actually went so far as to suggest, in fact, that it would come as a "surprise" to the carrier that he was carrying two when he thought he was carrying one, and an even greater "surprise" when he was carrying three, as in the case of twins. 28 L.R.Ir. at 83.

21. 28 L.R.Ir. at 83.

through her fault or someone else's. The contract for carriage is with her, and the concomitant duty of care rests with her and no other.

A deliniation of the critical points of this figure thus unmasks a truth which, after each and every layer of legal abstraction has been peeled away, is left as the ultimate zeitgeist notion of woman.[22] It will not do to accuse Justice O'Brien of crassness or bigotry, though in modern ears his metaphor rings with insensitivity. O'Brien, in fact, came closer than his brethren to recognizing the sought after prenatal duty of care when he acknowledged that, in the abstract at least, he could think of no reason why the action should not be held to lie.[23] His opinion abounds with sympathy for the helpless victim.

VI. HUMANISM

O'Brien's opinion is remarkable for an additional reason. It offers a taste of that large, in-gathering humanism—traceable to Blackstone as an agent of change in the law—which has so often animated resentment for and helped by its purely emotional influence in the eventual overthrow of a rule that is perceived to be oppressive and unfair. Plaintiff's counsel had cited Blackstone for authority that life begins, in the contemplation of the law,[24] as soon as an infant is able to stir in its mother's womb. O'Brien sympathetically agreed that it seemed cruel and harsh to deny the crippled child a remedy.[25]

The problem with the juridical use of humanism is that, conceptually, the argument from humanism is inert. It has no logical force. This very circumstance, however, ensures its persistent effectiveness. Its emotional efficacy does not diminish but, on the contrary, increases with repetition. Nagging qualms about the rightness of the denial of

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22. See Cardozo, *The Nature of the Judicial Process* (1921) (Lecture IV. The Subconscious Element in the Judicial Process).

23. 28 L.R.Ir. at 81.

24. *Id.* at 71. "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law a[s] soon as an infant is able to stir in the mother's womb." 1 W. BLACKSTONE, COMMENTARIES 129. The statement would be frequently adverted to in the evolution of the prenatal duty rule. Allaire v. St. Luke's Hospital, 76 Ill. App. 441, 442 (1898), *aff'd.*, 184 Ill. 359, 371, 56 N.E. 638, 641 (1900), *overruled on other grounds*, Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Drobner v. Peters, 194 A.D. 696, 700, 186 N.Y.S. 278, 281, *rev'd*, 232 N.Y. 220, 133 N.E. 567 (1921); Cooper v. Blanck, 39 So. 2d 352, 356 (La. 1923); Kine v. Zuckerman, 4 Pa. D. & C. 227, 227-28 (1924); Scott v. McPheeters, 33 Cal. App. 2d 629, ___, 92 P.2d 678, 680 (1939); Bonbrest v. Kotz, 65 F. Supp. 138, 140, note 12 (D.D.C. 1946).

25. The pity of it is as novel as the case - that an innocent infant comes into the world with the cruel seal upon it of another's fault, and has to bear a burden of infirmity and ignominy throughout the whole passage of life. It is no wonder, therefore, that sympathy for helpless and undeserved misfortune has led to what is literally a kind of creative boldness in litigation.
28 L.R.Ir. at 81.

liability, associated as they often are with humanistic motives, generally result sooner or later in a conscience-based gesture, which is an intermediate determinant in an inchoate rule of law. The gesture usually takes the form of an observation that if new rights are to be created, it is a matter for the legislature and not for the courts. The expression of such thoughts is normally taken to be the classic mark of judicial conservatism. It is submitted, however, that the expression is rather a direct product of the judge's humanist bent of mind and his inability to make use of humanism as a mechanism to reach what he actually considers a just, if unprecedented, result. The true judicial conservative would never make such a statement. For him there could be nothing more self-evident. To him the expression that it is a matter for the legislature would amount to no more than an absurd redundancy.

What then is the significance of such a gesture, seemingly inviting legislative involvement? The verbal expression itself—and O'Brien's remarks constitute as edifying an instance as they do a treat to his eloquence[26]—is better understood, in relation to the decision in a case, as an effect rather than a cause. Its precise literal content is irrelevant. It is a verbal outcropping of a deeper dissatisfaction. Give a judge like O'Brien time enough, and he will find or invent the necessary legal fictions to skirt the rule, to soften it, or to overcome it entirely. The more judicial carping that this or that is a matter for the legislature not the courts, the more certain the judicial discovery—in one year, ten years, or fifty years—that legislative intervention is not, after all, required. The more frequent and forceful this making a point of deferring to the legislature, the clearer the indication of a speedy evolution.

VII. The Birth of the Viability Concept

So far I have attempted to isolate and identify elements, or matrices, that are the basic movant forces of an evolving rule of law. I have named these elements inherent determinants because they determine the course of the evolution. They do not, in any sense of the word, control; they merely define the ongoing development.

In the next case, *Allaire v. St. Luke's Hospital*,[27] in which we jump from Ireland in 1891 to Illinois in 1898, the mother was present in the hospital for the purpose of giving birth. Due to an elevator acci-

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26. The law is in some respects a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of decision.
Id. at 82.

27. 76 Ill. App. 441 (1898).

dent occasioned by defendant's negligence, the child was born with withered limbs on one side. As in *Walker*, the mother had no difficulty in getting a settlement for her own injury.

In the child's own suit, however, plaintiff's counsel went straight to Blackstone's "gift of God" comment for support.[28] The defendant's counsel understandably relied on the two best things he had going for him: *Dietrich* and *Walker*. Essentially, the humanism of Blackstone was going against the jurisprudential momentum of two unfavorable decisions. Echoing Holmes, the court thought that it was indisputable that, until it was "severed"[29] from its mother at birth, the child was a part of its mother, with no "distinct and independent" existence.[30] The

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28. *Id.* at 442. *See* note 24 *supra.*

29. *Id.* at 450. The use of this verb, meaning to part by violence, is suggestive. For another instance, *see* Walker v. Great N. Ry. Co., 28 L.R.Ir. 69, 83 ("unborn children were severed from the mother by fiction"). *See also* Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 357, 78 S.W. 2d 944, 948 (1935), *overruled*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W. 2d 820 (Tex. Sup. Ct. 1967) (child "expelled" from mother).

30. 76 Ill. App. at 477. The court was also bothered by the lack of precedent, especially since, as O'Brien had expressed it in *Walker*, "similar instances must have before occurred." *Id.* at 449-50 (quoting from 28 L.R.Ir. 69, 81). This concern, grounded in the common knowledge that deformed births, for whatever reason, had never been infrequent and that some of them must have been occasioned by someone's fault other than the mother's, was distinct from the argument based on the lack of precedent, but it provided what was seen as solid empirical support that the absence of precedent was significant. Holmes showed the same concern when he remarked with apparent astonishment that "a pretty large field of litigation [had] been left unexplored until [1884]." Dietrich v. Northampton, 138 Mass. 14, 16 (1884). It was an understandable concern, and courts often found justification in it for denying a cause of action: Buel v. United Rys. Co., 248 Mo. 126, 131, 154 S.W. 71, 72 (1913) ("there must have been many occasions in the progress of society when a basis existed for such a suit if it had been thought to be maintainable"); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916) ("But few cases of this kind are found in the reports, though there must have been many occasions for bringing them had it been generally considered by the legal profession that a cause of action accrues to a child for injuries received before birth."); Drobner v. Peters, 194 A.D. 696, 711, 186 N.Y.S. 278, 288 (1921) (Clarke, J., dissenting), *rev'd.*, 232 N.Y. 220, 133 N.E. 567 (1921) ("Through all the centuries of the common law no such action has been sustained. This is conclusive proof to my mind that such right of action never did and does not now exist."); Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (1933) ("cases similar to the present one must have arisen many times in the past, but that no decided case (or at most only one) has been found in which the child's right of action for prenatal injuries has been maintained"). The latter case, in holding for plaintiff, went on to connect the paucity phenomenon with the difficulty of proof, a problem which advances in medical science were rapidly easing in the early twentieth century. Though greater ability to prove cause and effect must necessarily have been a factor in the final establishment of the prenatal duty of care, it cannot by itself explain the dearth of cases in the eighteenth and nineteenth centuries.

No cases may be found prior to *Dietrich* in 1884 in which a prenatal duty of care is contended for. Why? In 1884 railroads had been common for a long time, both in the United States and in England. The industrial revolution had been in progress for decades. It is certainly worth noting that prior to the nineteenth century accidental injury was far less frequent than it was later to become, and this circumstance may provide a partial explanation for the dearth of cases on the prenatal injuries. But the infrequency of accidental injury cannot provide an explanation as to why there were no cases in 1850, 1860, 1870, times well subsequent to the inception of nineteenth century industrial life.

child was not a person, not a human being, and not a passenger in the elevator in which the accident had happened.[31]

The principal explanation must lie in the range of the popular notion of private injustice on which all tort law is based. Women blamed themselves for their crippled and sickly offspring, and the place of women in society reinforced their sense of guilt. Religion and society encouraged the victims of torts along with the downtrodden to find consolation for their plight in an expected better life to come rather than in unpredecented suits at law.

Such an explanation is supported by the voluminous popular mythic literature by which society held out to women the trancendental ideal of submitting to the fact of premature child death as the will of God. *See, e.g.*, HANS CHRISTIAN ANDERSEN, THE COMPLETE FAIRY TALES AND STORIES (Translated by E.C. Haugaard 1974): *The Story of a Mother* 360 (embittered mother learns to accept death of her child when Death explains to her it is God's will); *The Dead Child* 642 (mother who could not accept untimely death of her four year old discovers in dream that child's death was God's will); *The Cripple* 1049 (in discussing the unmet needs of their crippled child: "The minister said that we are all God's children, but then why do some get everything and so many almost nothing?" "It is all because of man's fall from grace," replied his wife.). *See also* GRIMM'S FAIRY TALES (Edited by Louis & Bryna Untermeyer 1962): *The Aged Mother* 762 (embittered old woman who lost both her sons in their infancy and who blamed God for the loss learns in dream that the children would have been hanged as felons had they lived to maturity; on awakening she falls to her knees and thanks God for taking them in their innocence); *The Shroud* 776 (mother embittered by death of six year old son learns to accept the loss after child appears in dream to explain that it is God's will); *Eve's Various Children* 786 (Eve, presenting her numerous children to God for the bestowal of his gifts, complains to Him on the unequal treatment He gives them, making her pretty, beautiful children knights, kings, noblemen, and merchants, and making her homely children ("a course dirty shabby sooty band") errand boys, scullions, peasants, and fishermen. God explains to her that "each shall have his own place, so that one shall support the other, and all shall be fed like the limbs of the body." Accepting this explanation, Eve asks for forgiveness and invites God to have His divine will with her children).

It might be argued that these fictional accounts must be amplifications of actual social life, and therefore not to be taken literally, or as providing any reliable evidence of the inculcation by society of a desired attitude. On the contrary, actual life provides even stronger evidence of the suggested explanation. Consider the following from NANCY F. COTT and ELIZABETH H. PLECK, A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN (1979):

> A virtuous women submitted to the will of God. Increase Mather told the story of a "Person of Quality" whose only son contracted smallpox. She called in the ministers to pray for him. When they prayed that if by God's will the child should die the mother would have the strength to submit, she interrupted, crying: "If He will *Take* him away; Nay, He shall *Tear* him away." The child died. Sometime later the mother became pregnant, but when the time for delivery arrived the child would not come and was consequently "Violently *Torn* from her; so she Died." For the godly woman rebellion was not worth the risks. She learned to submit to God, meekly acquiescing to the deaths of husband and children and ultimately to her own as well.

Id. at 63.

It is to the disconsolate Eves of the world, women and men both, that the law owes the prenatal duty rule. They made possible the evolution of that rule, and they make possible the continuous development and the never-ending humanization of the law, by rejecting the myth of divine will, by refusing to let society convert their despair into guilt, and by asserting instead in a court of law: "I have been wronged, and it *didn't have* to be."

31. Justice Adams reasoned that if the action could be maintained it followed that a child could sue its own mother for injuries caused by her negligence while pregnant. Allaire v. St. Luke's Hospital, 76 Ill. App. 441, 450 (1898). And *that* was a disturbing thought. The evolving rule was thus already beginning to reach out towards distant limits, anticipating an extension of liability which even today, in 1981, would appear radical to some. The same thought has disturbed

In *Allaire*, the first dissent appears. Using conventional legal analysis, the nature of which is to reconcile rather than to oppose, Justice Windes constructed an artificial distinction. He distinguished *Dietrich* by the adventitious circumstance that there the mother was only four or five months pregnant, "and the child too little advanced in fetal life to survive its premature birth."[32] He did not reject the *pars matris* proposition; instead, he moderated its rigor by the construction of a distinction which shortly came to be known, as it has been known since, as the viability concept. In *Allaire*, as distinguished from *Dietrich*, the pregnancy had nearly come to term; the mother's presence in the hospital was, in fact, for delivery. The injury occurred subsequent to that point when the child, if born prematurely, could survive on its own. As Windes expressed it:

> The child, when capable of being born alive, is, in my opinion, a distinct entity, under the common law, and although no decided civil case, so far as we know, has so held, humanity and enlightened civilization demand that the common law, as administered in Illinois in the nineteenth century, should so declare.[33]

One notices here, as evidenced by the words "humanity and enlightened civilization," a considerable reliance on humanism in the forma-

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courts that have been presented with the so-called "wrongful life" cause of action. *See* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, ___, 165 Cal. Rptr. 477, 488 (1980). The cognitive process enclosed in the disturbing thought goes like this:

If A, then B;
but B is absurd and impossible;
therefore A cannot be.

In all such cases, we ought to do some hard thinking about whether B is really absurd and impossible or merely sounds so because of its newness. In *Curlender*, for example, which held that the "wrongfully born" infant had a cause of action against the physician and laboratory that had negligently conducted eugenic tests on the infant's parents to determine the possibility of Tay-Sachs disease in their offspring, Justice Jefferson met the "if A then B" argument directly. In such a case, he said in dictum, there was "no sound public policy which should protect those parents from being answerable for the pain, suffering, and misery which they have wrought upon their offspring." *Id.* at ___, 165 Cal. Rptr. at 488. After the *Curlender* decision, the California Legislature, disturbed by the dictum of Justice Jefferson that Justice Adams's speculation in *Allaire* had foreshadowed in 1898, hurried to enact statutory immunity for parents:

> "(a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.
>
> (b) The failure or refusal of a parent to prevent the birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.
>
> (c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm." California Civil Code, § 43.6 (1981-82 Regular Session, c. 331: approved Sept. 3, 1981).

32. 76 Ill. App. at 451.

33. *Id.* at 454.

tion of Windes' position. That reliance is also evidenced in other sections of his opinion.

There is, however, a basic inconsistency in the Windes rationale. The viability concept, the artificial distinction by which the *pars matris* proposition is moderated and comprised, is fundamentally inconsistent with the position based in humanism. This is a circumstance of some importance. In demonstration, assume that a second pregnant woman, two months pregnant, is on an elevator with plaintiff's mother. The second woman is present in the hospital as an outpatient in relation to her pregnancy. The same accident occurs. Each woman in due time gives birth to a child with withered limbs, whose conditions may be traced to the accident involving the elevator. We have before us, to use the sympathetically toned language of the humanist position,[34] two human beings, stamped for life with the cruel product of another's fault. The consequence of the Windes position is that the second child may not recover, since the injury occurred prior to its viability, when, in other words, it was not a human being or a person but part of its mother.[35] Minds motivated by humanism cannot reserve their sympathy and compassion for the first child in our example and deny them to the second. One effect, then, of the moderation of the *pars matris* proposition by means of the viability concept is the introduction of a critical discontinuity. To the extent that humanism is a governing agent in *Allaire*, its use is unprincipled. This is not to suggest that its use is insincere. The selective application of unprincipled humanism has been, in fact, a prominent feature of twentieth century jurisprudence. By logical implication, Windes challenges the *pars matris* proposition in its en-

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34. [T]he law which says to the helpless infant, 'If your injuries were inflicted, however wrongful, while you were sleeping peacefully in your mother's womb, though pulsating with life and vigor, or while you were moving forward to the outer world in obedience to nature's law, with a power almost irresistable, though just beyond the light of day, still a part of your mother, there is no remedy for your wrongs, if you live through them, though crippled or deformed for life . . .' . . . is a reproach to civilization.

Id. at 452. *Cf.* note 25 *supra* (O'Brien's similarly sympathetically toned language in *Walker*).

35. There is an escape from this consequence, but it depends on the circular argument that survival in the face of an injury received at any given post-conception, pre-natal stage demonstrates viability. This argument, however, would empty the viability concept of its content; the word would become a hollow catchword, and the argument would result in a limitation of the proposed cause of action to those fortunate enough (or, tragically, in many cases, *unfortunate* enough) to survive the prenatal injury. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), the case that supposedly initiated the rapid turnabout of the prenatal rule, *see* text accompanying notes 2-3 *supra*, employed this circular argument as a limitation on liability, thus making more palatable the "new" rule: "Here, however, we have a viable child - one capable of living outside the womb - and which has demonstrated its capacity to survive by *surviving*." (emphasis in original) 65 F. Supp. at 140. A variant of the above argument persists as a basis for the denial of wrongful death actions for the negligent infliction of death on "non-viable" fetuses. *See* Wallace v. Wallace, ___ N.H. ___, 421 A.2d 134 (1980).

tirety; then, by means of the viability fiction, he salvages a good half of it. On appeal, the Illinois Supreme Court adopted the majority opinion in a *per curiam* decision.[36] Justice Boggs dissented, following the lines of the previous Windes dissent. His chief contribution was to provide a name for the compromise Windes had constructed.[37]

The Windes-Boggs viability concept must be appreciated in one respect as an early attempt to apply scientific knowledge, in both its technical and popular understanding,[38] to the rational development of a rule of law. Boggs, in fact, makes a point of referring knowledgeably to such medical terms as "gestation" and "parturition."[39] Yet, the Windes-Boggs concept of viability was a strange blend of myth and science. For there is evidence that the use of the word *viable* in nineteenth century medical circles related to the condition of just recently born children, irrespective of whether the birth was timely or premature. This evidence suggests that the word *viable* described the pres-

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36. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

37. Prosser identifies the Boggs' dissent as the start of the movement to liberalize the no-duty rule, W. PROSSER, THE LAW OF TORTS 336, n.23 (4th ed. 1971), but Bogg's chief contribution was to borrow the term *viability* from medical science and apply it to the concept Windes had fashioned.

38. For example, both judges noted that occasional oddity of a live birth from a mother whose life has recently been extinguished, that paradox of life out of death that appears to have exercised a peculiar fascination over the mind of man from ancient times to the present. 76 Ill. App. at 454; 184 Ill. at 370, 56 N.E. at 641. Windes had wondered whether an injury to one of the famous Siamese twins, Chang and Eng, would give rise to a cause of action in the other; whether the first would be prevented from maintaining an action since he was part of his brother. 76 Ill. App. at 453. Rejecting the idea that in these instances either Chang or Eng would be considered by the law to be "part of" the other, Windes likened the umbilical cord that connected the mother and her unborn to the ligament that connected the famous twins. *Id.*

Chang and Eng Bunker (1811-1874) exerted an unusually forceful influence on the American public imagination throughout the nineteenth century. *See* IRVING & AMY WALLACE, THE TWO: THE STORY OF THE ORIGINAL SIAMESE TWINS (1978). The questions that Windes posed regarding their predicament were less fanciful than might be supposed. The authors relate the story of Chang being charged with assault and battery when a spectator shook his hand a little too firmly and Chang reciprocated by knocking the offender down. The judge who heard the case agreed that Chang was guilty but saw no alternative to releasing him since to do otherwise would amount to a false arrest of Eng. *Id.* at 105. Another incident with interesting legal ramifications occurred when Chang and Eng bought a single ticket and boarded a train. When the conductor came around to collect tickets, Eng confessed he did not have one, and the conductor threatened him with expulsion. At this moment, Chang jumped up and said, "But I do have a ticket, and if you put me off I'll sue the railroad." The conductor, observing their connecting band, wisely decided not to eject Eng from the train. *Id.* at 118. If, before the taking of the ticket, an accident caused by the railroad's negligence had resulted in injury to both Chang, the "legitimate" passenger, and Eng, the "fraudulent" passenger, it seems that the latter would not be able to recover. *See* notes 17-20 and accompanying text *supra*. An appreciation of the abnormalities in life materially assisted Justice Windes in setting the posture that the law should take with respect to the normal things in life. Chang and Eng make a later appearance in Bonbrest v. Kotz, 65 F. Supp. 138, 141 n.13 (D.D.C. 1946).

39. 184 Ill. at 370, 56 N.E. at 641.

ently existing state of health of a child already born, in terms of the relative probability of its survival.[40] If this is so, it follows that there was not necessarily any medical support for the postulating of a contingent eventful point, a line of demarcation, located somewhere between conception and birth, as the point of origin of the duty of care. The serviceability of the viability concept would depend first on the recognition of such an eventful dividing line and, second, investing it with a transcendental value akin to that of birth or conception. One senses in the Windes-Boggs rule a longing to return to the methodology of contingencies and conditionality that had determined real property rights and inheritance interests in former ages. In an ironic way, the concept thus tended to vindicate Holmes' earlier expressed concern about the sheer speculativeness of a "conditional prospective liability."[41] Practically, Windes and Boggs had done more than simply make use of scientific knowledge in the development of a rule of law; they had subordinated law to science. Irrespective of its intellectual validity, viability was then, as it is now, a function of medical technique.[42] In effect, the viability concept would substitute medical abstraction—manifested by expert testimony—for what was becoming an unattractive legal abstraction.

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40. *See generally Morison, Foetal and Neonatal Pathology* (1952); *Potter & Adair, Fetal and Neonatal Death* (1949); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962). Even today medical use of the word *viable* is not uniform with respect to whether it is properly applied to the prenatal or neonatal period. *Compare* the definitions of *viable* found in *Black's Medical Dictionary* (31st ed. 1976) ("a term applied to a newly born child to signify that he or she is capable of living separately from the mother") and in *Dorland's Illustrated Medical Dictionary* (25th ed. 1974) ("capable of living; especially said of a fetus that has reached such a stage of development that it can live outside the uterus"). Yet, the latter dictionary also defines the noun *viability* simply as "ability to live after birth." *See also J.P. Greenhill, Obstetrics* 265 (13th ed. 1966): "Viability is the ability to live after birth." The definitional instability of the word *viability* was an important consideration in leading at least one court to discard the viability concept as a limitation preventing wrongful "prenatal" death actions. Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976). *See* note 42 *infra; See also H.W. Fowler, A Dictionary of Modern English Usage* (1926), where the following entry appears under "viable":

> A word apt to puzzle an Englishman. Formed in French from *vie* life, it means capable of living, and its special application is to newborn children (e.g. in contrast with *stillborn*), but there is some tendency to widen its use. . . .

41. 138 Mass. at 16.

42. *See, e.g.*, Wallace v. Wallace, 120 N.H. 675, 682, 421 A.2d 134, 139 (1980) (dissenting opinion of Douglas, J.):

> Viability . . . is what medical science in the last century established as the stage of life when an infant was said to be capable of existence apart from its mother. . . . The trouble with this as a guidepost is that it turns upon the ever-changing progress in the field of medical science.

See also Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976) ("viability" concept discarded as a limitation on prenatal wrongful death actions).

VIII. FROM STREETCARS TO THE DUTY CALCULUS

Neither Windes nor Boggs had had any trouble with the *Walker* case. In *Allaire*, questions about whether the defendant railway knew or should have known of the existence of the unborn were moot. The mother was in the hospital precisely with respect to her pregnancy. For Windes and Boggs, therefore, the mother's protected status automatically extended over her unborn. *Walker* in fact had, in a sense, pointed the way to the *Allaire* facts, as so often happens in the law. Nevertheless, the thinking of the *Walker* judges with regard to the duty of common carriers to the concealed unborn was alive and well in the early twentieth century.

In 1913, a New York court considered *Nugent v. Brooklyn Heights Railway Co.*,[43] in which a woman eight months pregnant had been thrown to the ground as she was alighting from a streetcar. Prenatal injuries resulted. *Nugent* applied the no-duty dogma just as stiffly as *Walker* had done.[44] If there was a tension between the no-duty rule and its extended application, this court did not apprehend it; or, if it did, was not disturbed by it. Simply put, there was no duty because the plaintiff stood "in no such relation" to the railway as to "earn" this obligation.[45] It is interesting that before he began his determinative duty analysis in *Nugent*, Justice Thomas had devoted the first and greater part of his opinion to attacking the *pars matris* nonentity argument. He did so, not on the humanistic and scientific grounds that had influenced Windes and Boggs in *Allaire*, but by analogy from the existence accorded to the unborn in the law of inheritance and in the criminal law. He differed with the view that the unborn were not entitled to a duty of care in tort law:

> In my view, justice should not be turned aside and wrongs go without remedies because of apprehension of what may happen in jurisprudence if it be decided that an unborn child has some rights of the person.[46]

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43. 154 A.D. 667, 139 N.Y.S. 367 (1913), *aff'd. per curiam*, 209 N.Y. 515, 102 N.E. 1107 (1913).

44. The court shuffled aside an attempt at accommodation, in the way that *Walker* had previously done, by linking the protected status of the mother to the unborn. *See* note 20 *supra*.

45. 154 A.D. at 672-73, 139 N.Y.S. at 371. Justice Thomas' duty analysis in *Nugent* is remarkable as an example of the crystallization of the duty concept into a wonderful methodology which jurists looked to with the same faith and confidence with which matematicians looked to their formulas. In *Nugent* the methodology disclosed a reflexive predisposition to fall back on tight legal syllogisms. Justice Thomas' use of the figure in which the plaintiff must "earn" a duty of care is also notable. Apparently the moralistic work-ethic of 1913, which of course applied equally to children and grown men and women, extended even into the womb. In order to "earn" a duty of care, the unborn must work his way free of the womb, or at least work to such a point in prenatal development that he has made himself conspicuous.

46. 154 A.D. at 672-73, 139 N.Y.S. at 371. *Compare with* Justice O'Brien's similar state-

Thomas' apparent willingness to rely on abstractions from the law of carriers thereby becomes all the more significant. Unlike Holmes, the Irish judges, and the *Allaire* majority, he was fully prepared to recognize the existence of a general tort duty to the unborn, so long as a relation existed giving rise to a duty. The association and development of these two obviously inimical positions is striking. The confidence with which Thomas reaches his result, therefore, can best be explained by his faith in the methodology that he employed. Despite a similarity in the approaches of the Irish judges and Thomas, there was a subtle difference. The former perceived themselves as applying specifics from the law of common carriers; when they used the term *duty*, it concerned the special duty derived from the carrier relationship. With Thomas, the idea itself of duty had grown into an independent calculus, whose application not only determined but also justified the outcome of the case. Even the Irish judges, had they been able overcome the primal determinant which confounded them like a boulder in a narrow path, gave indications of a willingness to attempt an accommodation. Justice Thomas intimated that it was not enough that reasons against recovery be exploded; a reason for recovery must be found.

Streetcars that came to jerky stops and lurched ahead before expectant mothers had the opportunity to disembark safely appear to have posed a major threat to prenatal life during this whole period. In another streetcar case, a few years later in 1916, *Lipps v. Milwaukee Electric Railway Co.*,[47] the woman was five months pregnant at the time of the accident "before [the child] could have been born viable."[48] In due time the child was born, with physical defects traceable to the accident. Proceeding along the lines foreshadowed by the Windes-Boggs approach, the court held that because the child at the time of the accident could not have been born "viable," and since a "non-viable" child cannot exist apart from its mother, the child was, therefore, part of its mother and not a person.[49] That ended the question of liability. It was a perfect syllogism. The court went on, however, to suggest that "very cogent reasons" existed for a contrary rule when the child was "viable" at the time of the accident. Following the *Allaire* dissent, the court implied that two infants sustaining similar injuries

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ment in *Walker*:

> I would not myself see any injustice in the abstract in such an action being held to lie, or in the risks of a carrier being extended to the necessary incidents of nature.

28 L.R.Ir. at 81.

47. 164 Wis. 272, 159 N.W. 916 (1916).

48. *Id.*

49. The court said: "Its [the child's] rights are merged in those of the mother of whom it forms a part." 164 Wis. at 272, 159 N.W. at 917; *see* footnote 9 and accompanying text *supra*.

from the same negligent act should be treated differently. One should be denied compensation because he was a few months younger than the other, because, at the time of the injuries, one had crossed the invisible viability line and the other had not. Yet, the *Lipps* court affirmed that it would have decided the *Nugent* case for the plaintiff, since the pregnancy there was well advanced, though it found no force at all in the arguments by way of analogy from other fields of law which had influenced Judge Thomas to discard the *pars matris* proposition. The *Lipps* case provided firm evidence that the magic dividing line of viability, whether artificial or not, was coming to be recognized as meaningful, by lawyers at least.[50]

IX. DROBNER V. PETERS: THE JUDICIARY BECOMES THE LEGISLATURE

Sooner or later a case would come along where the duty emanated not from the relation of carrier to passenger or from any other special relation. This would be a case in which, if there was a duty at all, the factual situation would sound in general negligence, pure and simple.

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50. It was not so clear, however, whether viability was a medical or legal concept, for the court ended on a hopelessly muddled note:

> Neither does the medical or scientific recognition of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical.

164 Wis. at 272, 159 N.W. at 917.

What is curious about this statement is that presumably the *Lipps* court had adopted the viability concept, as Windes and Boggs had done twenty years before, for the very reason that it *was* based on "correct" scientific and technical positions. Now the court said that medicine and science were of no help and seemed to imply that medicine and science recognized the unborn as a separate entity prior to its "viability."

The apparent inconsistency is explained, however, if one looks at it as the consequence of a reversal in momentum in the role of the viability concept in the directed development of a rule of law. In *Allaire*, Windes and Boggs had fashioned the viability concept as a simple means of allowing an initial limited liability where none at all had previously existed. For them, viability was a beginning. The *Lipps* court redefines viability as a limitation on liability. It grants that "very cogent reasons" exist for allowing recovery for "post-viability" prenatal injuries, though interestingly it does not specify these reasons; but it draws the line at viability. For *Lipps*, viability is an ending, a purely legal device to limit liability. A correspondence to medical and scientific knowledge, implicit in the Windes-Boggs formulation of viability, has become an incidental feature of the redefined viability of *Lipps*. Accordingly, it is a feature which must give way to the perceived necessity of the law to be "practical."

As a dialectical device, compare the *Lipps* statement with the ingenuous sounding words of Justice Blackmun in Roe v. Wade, 410 U.S. 113, 159 (1973), where he says,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

and then, in spite of which, he goes on a few pages later to do exactly that, to resolve the question of when life begins, when with an assured dogmatism he effectually notches the beginning of life at the onset of the second trimester by judicial fiat.

Such a case would provide a test for Judge Thomas' rejection of the *pars matris* proposition and would give some indication of the extent to which the Windes-Boggs viability-based compromise, applauded in *Lipps*, was taking hold. That case arrived in 1920-1921 in *Drobner v. Peters*[51] which, because of the prestige and influence of the New York Court of Appeals, was to have a settling effect on the status of the prenatal rule for the next few decades.

A pregnant woman was walking along a sidewalk in New York. Her pregnancy was well advanced, over eight months. She fell into a coal hole the iron doors of which had negligently been left open. Eleven days later she gave birth. Later her child, through a guardian, sued for prenatal injuries. The case was unlike *Walker, Nugent*, or *Lipps* because the duty could not derive from a carrier-passenger undertaking, or from a similar contractual undertaking such as the *Allaire* relation of hospital to patient. Viability, for what it was worth, was a given. So if there was a duty here, it came from the general relationship which circumscribes the tort of negligence.

Initially, in the supreme court, Judge Ford closely followed Thomas' *Nugent* reasoning in denying defendant's demurrer. Plaintiff accordingly was not *pars matris*. The decision in *Nugent* was distinguishable, Ford said, adopting Thomas' line of thought again, because it was based on the fact that the mother was a passenger, the railroad had had no knowledge of the plaintiff being aboard, and hence had not contracted for his passage.

And then Ford says:

> It seems to me that the harsh rule there applied should not be extended, but rather confined strictly to the limits set in that case.[52]

This is a surprising statement, and it marks an important point in the evolution of the prenatal duty rule. If the law of negligence excused from liability the carrier, which historically had been under the obligation of exercising the highest degree of care for its passengers, then *a fortiori* it excused those who had no relationship whatsoever with the injured. To talk of *extending* the harsh rule from carriers to non-relational situations exemplified by the coal hole affair was an inversion of language. The rule as it stood could be extended no more, because no relationship existed which demanded a greater degree of care than that of the carrier. One might speak of retracting the rule from this extended position; one might even speak of abolishing the rule entirely.

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51. 184 N.Y.S. 337 (1920), *aff'd.*, 194 A.D. 696, 186 N.Y.S. 278 (1921), *rev'd*, 232 N.Y. 220, 133 N.E. 567 (1921).

52. 184 N.Y.S. at 338.

But, the rule could not be extended backwards. Logically, if the rule applied to carriers, who were under the obligation to exercise the greatest degree of care for the passengers, it already comprehended the coal hole facts, if not by actual decision then by force of reason. If the carrier is not liable when negligently inflicted prenatal injury occurs to the fetus of one of its own passengers, then obviously the same carrier can be no more liable when its streetcar negligently collides with a bus, and this collision results in prenatal injury to the fetus of a passenger on the bus.

Judge Ford unconsciously accomplished an admirable reversal of symmetry. Such reversals are a chief means by which the system itself, with the imagination of a judge acting as catalyst, disposes of a bad rule. It does so by doing the impossible: turning an integrated, idealogically extended whole into a part, reducing it by reversing it. In the reversal of symmetry the end is pushed back to the beginning, and the former rule, what is left of it, now an anomaly, slowly withers. The process exemplifies the old truth that the universe disposes of its own evil. So too with the law perhaps.

The immediate consequence of the reversal of symmetry is the isolation of an unpleasant rule of law. An equally important though less immediately noticeable consequence is that a new principle begins to emerge, a purer liquor, a closer approximation to the truth. In time, it extends over the field formerly governed by implication by the now limited rule. Outwardly, Judge Ford's opinion says, evincing the humanism that has frequently been found in the development of the prenatal duty,[53] that the no-duty rule should be limited to the facts of the *Nugent* case, that is, to situations where the common carrier carries the mother and is unaware of her pregnant state. Inwardly, the opinion says something else. It suggests that there is a more fundamental principle at work which, properly understood, governs all cases, whether they involve common carriers, contracts, other various relations, or no relations at all. Could the more fundamental principle be uncovered and stated in words? Could *Drobner* find what *Nugent* affirmed to be non-existent? Judge Ford's reversal of symmetry posed a dilemma that, one way or the other, had to be faced.

In a 3-2 decision, the Appellate Division affirmed Judge Ford.[54]

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53. It is our boast that the common law is elastic enough to fit itself to new conditions and to progress pari passu with advancing civilization and our ever-growing humanitarianism; and it is but a manifestation of this spirit of the law to recognize responsibility of the defendant to this child, now doomed to go through life permanently injured in head, body, and limbs.

Id. Cf. Remarks of Justice Windes in *Allaire; see also*, notes 33-34 and acoompanying text *supra*.

54. 194 A.D. 696, 186 N.Y.S. 278 (1923).

The majority rejected the *pars matris* proposition for the same reasons that had led Judge Thomas to do the same: analogies from criminal law and the rights of inheritance. In effect, Judge Merrell, writing for the majority, seemed to be accepting Ford's holding which limited *Nugent* to carrier cases.[55]

Judge Clarke, writing for the dissenters, granted that Merrell's opinion was "persuasive" and his views "humanitarian," but he insisted that legislation was necessary.[56] While Judge Merrell had missed the implications of the dilemma posed by Judge Ford, Clarke jumped on them, as his dissection of the argument against "extending" *Nugent* shows. He could see no distinction between the obligation of a carrier and the obligation of an owner of property which abutted the street. If there was a breached duty in the present case, evidenced by the negligent maintenance of the coal hole into which the pregnant woman had fallen, there was also a breached duty in the *Nugent* case. His logic was unanswerable. Judge Ford had simply atomized the ensuing problem by a reversal of symmetry; Judge Merrell had sloughed awkwardly over it. Finally, in response to Merrell's comments on the absence of precedent, Judge Clarke agreed that the common law was flexible, adapting to life's changing conditions. The law of stagecoaches extended, with necessary changes, to railroads. The common law accommodated, by a like extension of principles, the automobile, the telephone, and the telegraph. These were all new conditions which the common law in its flexibility and progressiveness found no difficulty in recognizing.

> But the carriage of children en ventre sa mere is no new condition. It is as old as humanity itself, and to apply to that venerable and immutable fact the doctrine of adaptability to changed conditions does not appear to me to be logical.[57]

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55. The court rejected the argument that, in the absence of precedent, legislative intervention was necessary to secure redress:

> Most of the common law of negligence . . . is of comparatively recent origin. Acts which today . . . are held to constitute actionable negiglence, a hundred years ago would have received no serious consideration by courts of justice. If it be said that the common law furnishes no precedent for such an action . . ., it may also be said with equal force that by no principle of common law is such right of action denied.

194 A.D. at 703, 186 N.Y.S. at 283. It was a simple, pure, and dialectically correct response to the prior judicial adherence to the primal determinant. To Holmes' purported reluctance to strike out into what he characterized as "an unexplored field of litigation," *see* note 4 and accompanying text *supra*, to O'Brien's admonition not to venture beyond the "landmark of precedent", *see* note 26 *supra*, Judge Merrell in *Drobner* replied by using language as an agent to *dissolve* the primal determinant. This was real "creative boldness", *see* note 25 *supra*.

56. 194 A.D. at 708-11, 186 N.Y.S. at 287-88 (dissenting opinion).

57. *Id.* at 711, 186 N.Y.S. at 288.

And there it was, a recurrence of O'Brien's crusty metaphoric dictum of thirty years before. The carriage of passengers on a train or a streetcar or in an automobile: these were new conditions. But, as for the carriage of unborn children by their mothers, that went back to the beginning of time and, therefore, by definition, was not a new condition. The syllogism was convenient circularity, overlooking that Merrell had not justified the prenatal duty of care as an instance of the adaptability of the common law to changed conditions.[58] Merrell knew as well as Clarke that pregnancy was nothing new. Merrell merely thought that the absence of precedent was not determinative one way or the other, and he buttressed this assertion by emphasizing that, in the course of the last century, the law of negligence had extended to many factual situations not formerly comprehended by the law and, needless to say, not supported by the existence of any precedent one way or the other. His point was not that any extension of the law of negligence must occur under the guise of the doctrine of adaptability of the common law to changed conditions. The two matters were wholly distinct. Clarke accordingly misconstrued Merrell's position on that point, so greatly did the zeitgeist notion of woman influence his thinking.

By the time that *Drobner v. Peters* reached the Court of Appeals in 1921, the conceptual development of the prenatal duty rule was coming to a head. The evolution of the rule so far pointed to an imminent judicial climax. By any measure, however, the 6-1 decision reversing the lower courts and holding that there was no duty was less than climactic. It was disappointing, not for its contrary holding, but for its failure to grapple with the questions that previous judges had faced head-on. Cardozo dissented, unfortunately without opinion.[59]

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58. Beyond that, nevertheless, it is a matter of some interest that Clarke should connect the changed conditions doctrine, even as a straw man, with the prenatal duty of care. It was more than a straw man, for its use amounted almost to an evasion. The perception of industry and commerce and matters sexual in equivalent terms was of course a conspicuous feature of the industrial revolution and its accompanying mindset. *See also* note 45 *supra* (unborn must "earn" a duty of care). That perception parallels O'Brien's outrageous metaphor in *Walker* that women are common carriers. Clarke's reasoning is unabashedly circular, however, in that it makes as good sense in any case in which precedents are lacking to provide guidance. Even railroads and automobiles would not exemplify new conditions because, after all, the carriage of passengers in vehicles is no new condition. Nor is the transmission of messages a new condition. It would follow that the judiciary would be equally powerless to fashion remedies in cases involving railroads and automobiles as in the case of prenatal injuries. But that is just the difference, Clarke would remind us: a remedy already existed for a passenger injured on a stagecoach or chariot; no remedy existed for an unborn child, because, as he puts it, "through all the centuries of the common law no such action has been sustained." 194 A.D. at 711, 186 N.Y.S. at 288. In this way, Clarke brings us full circle back to his real starting point: it cannot be done now because it has never been done before: the primal determinant. The doctrine of the adaptability of the common law to changed conditions is, upon analysis, not central to Clarke's thinking.

59. Is there any ground for hazarding a conjecture as to the probable basis of Cardozo's

First, Justice Pound rejected the proposition, advanced by Judge Thomas in *Nugent* and followed by Judge Merrell, that the criminal law and the law of inheritance provided by analogy authority for the existence of the unborn as a legally cognizable entity. "When justice or convenience requires," Pound said, the unborn might be treated as if it were a human being.[60] But whatever the area of law concerned, it was a mere fiction that treated an unborn child as if he were alive. It was plain, therefore, that when "justice or convenience" did not so require, the contrary treatment was inevitable. The essential problem, then, from Pound's point of view, was to determine whether or not justice or convenience required the recognition of a prenatal duty of care.

Pound explains that it could no longer be rationally asserted that the injury is to the mother alone. Look here, he says in effect, the child stands before us with the injuries "he carried out into the world with him."[61] Apparently, then, Pound was a realist: he would not deny that

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opinionless dissent? The question has obvious importance. The majority in *Drobner* brings the prenantal rule full circle back to the Holmes position via the judicial legislation route. Coming as it did from the most prestigious tort court in the United States, the decision effectually set back the evolution of the prenatal duty of care by a time equal to that which had elapsed since *Dietrich*, because it was to take another thirty-five years to undo the *Drobner* damage. A Cardozo dissent might have had the effect of largely negating the force of the majority opinion. It is known that Cardozo generally preferred to integrate his legal thought within already existing legal structures. That circumstance provides good reason to believe that Cardozo may very well have accepted the Thomas-Merrell analogy, rejected by the majority, that since the unborn is considered in existence for inheritance and criminal law purposes, he ought to be considered in existence for tort purposes. It would have been a natural extension, if not one actually dictated by logic. The general duty question, which had confounded Ford, Merrell, and Clarke in the lower courts would have remained. Duty analysis was Cardozo's stock in trade; it is unlikely that he would have sloughed over the duty problem, as Merrell had done in writing for the Appellate Division majority. Unlikely, too, that he would have missed the inconsistency in Ford's approach that Clarke had pointed out. Cardozo might well have reasoned that there was a general duty of care owed to the plaintiff, that it derived from negligence principles alone, and therefore applied equally in contractual and non-contractual settings, thus repudiating the holding of *Nugent* and freeing the prenatal duty of care from the abstractions from the law of common carriers that had hindered its growth since *Walker* in 1891. Even as a dissent such an opinion would have been a *tour de force*; and it would have certainly guided and influenced future courts as Cardozo's stature grew. We have no indications of whether Cardozo would have subscribed to the Windes-Boggs viability concept as a limitation on liability. Neither *Nugent* nor the various *Drobner* opinions mention viability; in both of these New York cases the injuries had been sustained about one month prior to the time for normal birth. Consequently, even if he was attracted to it, there would have been no need to superimpose the viability concept on the facts of *Drobner*. Any thoughts on viability would therefore have been dicta. On the other hand, viability, despite the implicit subordination of legal to medical processes that it entailed, worked as an attractive compromise, and at least one court had already adopted the Windes-Boggs idea. *See* notes 47-50 and accompanying text *supra*. A subsequent decision which was handed down a few years later from a Pennsylvania county court may well approximate the thinking behind Cardozo's opinionless dissent. Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924). *See* notes 75-77 and acompanying text *infra*.

60. 232 N.Y. at 223, 133 N.E. at 568 (1921).

which so obviously sat before him. The language seems to signal that the approach dictated by "justice and convenience" will be refreshingly realistic. In his next sentence, Pound reinforces the signal when he points out that the modern judicial tendency is "to ignore fictions and deal with things as they are." The unfolding of Pound's opinion up to this point indicated that the court was on the verge of proclaiming the demise of at least the *pars matris* proposition and perhaps the viability compromise as well. Pound even goes so far as to affirm that "sympathy and natural justice point the way" to a cause of action for prenatal injuries.

Then came the reversal. "The injuries, when inflicted, were injuries to the mother." There was no duty of care to the unborn child; the duty was to the mother. This is *pars matris*, vintage 1884. Yet, what makes it astonishing is that Pound just finished telling us that, to use his own words, "no longer may it be urged that the mother alone is injured." Moreover, he told us that the modern tendency is to ignore fictions and deal with things "as they are." To deal with things as they are would seem to require emptying the *pars matris* proposition of the fictitious myth, which the presence of the injured child so clearly refutes, and to deal with the injury as an independent existential.

Pound acknowledges that strong reasons of public policy may be urged on either side of the question. The reasons favoring the prenatal duty, whatever they are, apparently do not rise to the acceptable level of requirements of justice and convenience, in which concept sympathy and natural justice are evidently not active ingredients:

> The conditions of negligence law at the present time do not suggest that the reasons in favor of recovery so far outweigh those which may be advanced against it as to call for judicial legislation.[62]

The assertion has implications. Many of the earlier courts that denied recovery mentioned that the establishment of a prenatal duty was a matter for the legislature. Ostensibly, they doubted their own power to rule for the plaintiff. If we place in contradistinction to such positions Pound's remark about judicial legislation, we find a break of some consequence. Unlike his predecessors, Justice Pound did not doubt in the slightest the power of the court to establish the duty of care argued for, but he called that power exactly what he perceived it to be: judicial legislation. In its orientation it was a fundamentally different power than the power that previous courts had had in mind when it was argued that they should hold in favor of a prenatal duty. For instance, though their critics might have said that Judges Ford, Merrell, Windes,

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62. *Id.* at 224, 135 N.E. at 568 (1922).

and Justice Boggs were delving into matters properly reserved to the legislature, these judges perceived themselves to be building upwards from below, extending rules of law by conventional judicial processes, hardly attempting to legislate. Pound's "judicial legislation," on the other hand, makes no pretense of building upwards from below; it ordains from above in much the same way as the legislative branch. Judicial legislation is thus a kind of *fiat lux*. It naturally followed that judges must engage in the same kind of thinking that legislators engaged in.[63] The cognitive unitarianism that had previously characterized the judicial process, as seen for example in Thomas' *Nugent* opinion, in the *Drobner* opinions by Ford, Merrell, and Clarke, and in the development of the Windes-Boggs viability concept, would be replaced by the policy judgment, the product of that finely tuned, delicate mechanism over which the judges stood guard like an elect priesthood, and which enabled them to "balance" or "weigh" various considerations denominated as "equities," "factors," or "interests."

Judicial legislation was a legislative rather than a judicial process. In the consideration by the court of the various reasons for and against a proposed rule of law no single reason could be controlling because, by definition, there was no one determinative reason. It would be pointless, therefore, to regret the absence of analysis in Justice Pound's statement that the defendant owed the unborn no duty of care. Dialectically, it was a conclusion without premises.

If Pound had attempted to carry out a duty analysis, in its most preliminary stages, he must have realized the inconsistencies in his own position: first recognizing a separate injury, then denying it; first affirming that the law should deal with reality and not with fictions, then resolving the case by the *pars matris* proposition in its classic form. Positive statements from Pound were rhetorical and inert. What epitomizes this jurisprudence of judicial legislation is its capacity for duality. It is rich in contradictions.

Pound tells us that the "reasons" against recovery were:

(1) lack of authority;
(2) practical inconvenience and possible injustice;

63. Real, legislative legislators are shrewd enought to intuit a circumstance the significance of which is probably missed by judicial legislators: when you don't legislate, you legislate.

The idea of judicial legislation for some reason connotes progress and enlightenment, and this in turn suggests a new willingness to fashion remedies for those who have been negligently injured. Yet the consequence in *Drobner* was to make it even more difficult for the negligently injured to prevail than it was under the former conceptualistic jurisprudence which was slowly heading in his direction. Concealed in the guise of judicial legislation is an uncompromising oracular pronouncement that harks back to Holmes' lawgiving in *Dietrich*. The enjoyment of unbounded judicial power goes hand in hand with a robot-like adherence to precedent; and no contradiction is noticed by the associate

(3) no separate entity apart from mother, and therefore no duty of care; and

(4) no person or human being in esse at the time of the accident.[64]

The third and fourth reasons are differently worded formulations of the *pars matris* proposition. What is meant by the second reason is difficult to know with certainty. Later courts assumed that this reason concerned the problem of proof.[65] The first reason is clear, the primal determinant. Plaintiff's "reasons," assuming that they were something other than negatives of the above, do not appear, but the conclusion of the court makes plain that whatever plaintiff's reasons were, they did not outweigh the reasons against recovery, listed above.

Not only must the reasons favoring recovery outweigh those against, Pound intimates that they must do so by some definite incremental quantum in order to justify the intercession of judicial legislation. If we treat plaintiff's task as a hypothetical appellate burden of confutation, he must do more than prevail by a simple preponderance of the variously weighted reasons. He must win his argument by a margin that suggests the implementation of a clear and convincing measure of persuasion. The weight of his reasons must be such as to induce a firm belief and conviction by the judges that his position comports with "justice and convenience."

An unusual appellate burden thus rested on the plaintiff in *Drobner*. Defendant, on the other hand, could sit back comfortably, enjoying a measure of protection afforded by what amounted to, practically speaking, a presumption against the unprecedented cause of action. Holmes had imposed the same kind of burden on plaintiff in the *Dietrich* case in 1884; now Pound revitalized the appellate burden obstacle by skillfully working it into the judicial weighing process.[66] The

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64. 232 N.Y. at 222, 133 N.E. at 567 (1921).

65. Kine v. Zuckerman, 4 Pa. D. & C. 227, 229 (1924). ("The second reason for denying the right of recovery - the practical inconvenience and possible injustice - seems to us to be beside the point. Are we to deny a remedy for the invasion of a right merely because possible fraud or perjury might be committed in a particular case, and thus confess the inability of our judicial machinery to ascertain the truth in the trial of issues of fact? If the right exists, the rules of evidence are adequate to require satisfactory proof."); Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (1933) ("The other matter to which we are asked to give serious consideration was the practical inconvenience and possible injustice to which the company might be exposed if it could be maintained. . . . I feel quite confident that the rules of evidence are adequate to require satisfactory proof of responsibility and that the determination of the relation of cause and effect will not involve the Court in any greater difficulty than now exists in many of our cases.").

This second reason against recovery should not be confused with the similarly worded "justice and convenience" requirement which determines, in Pound's analysis, when the unborn is to be accorded the rights of a human being. *See* note 60 and accompanying text *supra*.

66. *See* note 4 *supra*.

primal determinant had new clothes.[67]

Drobner v. Peters brings to an end a particular phase of development characterized by not one directed progression, but by the progression of many smaller movements in combination, sometimes interrelated and interacting, sometimes not. The halt in ordered development was caused by the apparent re-orientation in judicial approach that *Drobner v. Peters* signals. Seemingly, prenatal duty was on the verge of a breakthrough which was prevented only by the intrusion of a wholly new explanation of the judicial role in the establishment of duties of care. Under the surface, as the lower *Drobner* opinions illustrate, the evolutionary process had weakened dialectical support for the no-duty position to the point of crumbling. But it is at just this point that a new jurisprudence—in the form of judicial legislation—comes to the rescue of the no-duty rule and suppresses the slow development of the past thirty-seven years. An illiberal position is acceptable if reached by a route that is viewed as progressive.

X. THE POST-DROBNER PERIOD

Yet if one views *Drobner v. Peters* not as a suppression of the evolving rule but rather as a necessary step in the evolutionary process, then the actual decision of the case becomes unimportant. It is true that the intrusion of the judicial legislation approach facilitated in 1921 an easy denial of the prenatal duty, a denial that was disappointing because of the deficient analysis and the equivocality found in the *Drobner* decision. Moreover, from 1921 up to the time of *Bonbrest v. Kotz* in 1946, it might have been said that *Drobner*, coming as it did from the prestigious New York Court of Appeals, had resolved the prenatal duty question. But the greater significance of *Drobner v. Peters*

67. Pound's formulation of the judicial function has an interesting jurisprudential impact. It creates a gap in the field of judicial reasoning just below the threshold of what has been called judicial legislation. Picture a plaintiff who says: "But I'm not asking you to engage in judicial legislation. I admit that I cannot marshal reasons in favor of my position that outweigh those against it. Don't judicially legislate; just decide the case on the law." Under the terms of the formulation that Pound presents, and it is a formulation that has carried the day in tort jurisprudence for the last several decades, such a response makes no sense - it is a contradiction in terms. Yet, for the sake of demonstrating a point, if we impose on Pound to do what plaintiff asks, what will he in fact do? The answer is that he will resort to the primal determinant. He will rule that there is no precedent, that it has never been done before. For him the primal determinant would settle the matter. What deserves emphasis is that in the jurisprudence in which judges aspire to be legislators, in their wisdom balancing equities, weighing factors, making policy judgments - sometimes with admirable results - there is a void that stretches all the way from the deadest adherence to stale precedent (or lack of precedent) to the threshold of judicial legislation. Whatever lay formerly in that area has been erased, forgotten. Twentieth century judges have forgotten this land that lies between. It is fertile, and it is the task of a responsible jurisprudence to remember it, to find it again.

was the very intrusion of the juridical approach which, in relation to the preceding development of the prenatal duty rule, seemed to be a step backward. The cases that had preceded *Drobner*, and in particular the lower *Drobner* opinions, had demonstrated that the legal entropy of the inchoate rule had effectually been exhausted. The *pars matris* proposition had run its course. The viability concept, product of an unprincipled union of law and humanism, was still ambulatory, but it would totter under the weight of criticism, even humanistically based criticism. Integration of the no-duty dogma into the law of common carriers had brought considerable vitality to the negative position, but by the time of the *Drobner* case, as the analysis of Judges Ford and Clarke about "extending" *Nugent* indicated, conceptual assistance from the law of carriers was deteriorating. If Justice Pound's opinion in *Drobner* seems irresolute and equivocal, that circumstance itself is suggestive. He was irresolute and equivocal because the arguments had been exhausted. Analytically, there was no place for Pound to go.

If a process of weighing competing reasons, here in the guise of the judicial legislation concept, is a necessary step in the evolution of a rule of law, then the *Drobner* decision could only be right, not because it denied liability, but because it took the crucial step. Judicial legislation would galvanize the evolutionary process by shifting development of the rule to a different plane, characterized by insight rather than conceptualism. After *Drobner*, courts considering the prenatal duty question would have two choices and only two choices. Weaker courts would revert to the primal determinant. Stronger courts would engage in the weighing process. Some of these latter courts would necessarily find a duty, for the simple reason that the use of the weighing process, in and of itself, was a clear sign of the absence of accord. After rejecting the reasons offered against a duty, one of these courts might see things as they were by uncovering and stating the one, all-important reason *for* a duty.

The post-*Drobner* period is characterized by the dichotomy suggested. The cases divide into two types. First, there were the recrudescent *Dietrichs*. As one would expect, these opinions were short and contained no analysis. These weaker courts summarily denied liability. They gave as their reasons, variously, the *pars matris* proposition,[68] the unwisdom of judicial legislation,[69] or the necessity for real legislation.[70]

68. Stanford v. St. Louis-San Francisco Ry. Co., 14 Ala. 611, 108 So. 566 (1926); Ryan v. Pub. Serv. Co-Ordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (1940); Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940).

69. 18 N.J. Misc. 429, 14 A.2d 52; Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937).

70. Berlin v. J.C. Penney, 339 Pa. 547, 16 A.2d 28 (1940).

Following Pound's minor lead, they reverted to the primal determinant.

A second group of cases came from stronger courts. Following Pound's major lead, they engaged in the weighing process. A Texas decision in 1935, *Magnolia Coca-Cola Bottling Co. v. Jordan*,[71] reviewed most of the cases in the prenatal duty cycle and purported to set out and weigh the reasons in favor of recovery. This attempt was an advancement beyond *Drobner*, because the weighing process of the latter case had considered, in its language at least, only reasons against recovery. One of the reasons advanced in favor of recovery in *Jordan* was the legal serviceability of the viability concept, which Windes and Boggs had devised thirty-five years before. In finding the viability compromise lacking weight, and denying liability, the Texas court managed an interesting though not unpredictable reversal of direction for the Windes-Boggs creation:

> But how is the exact time for this change of status of being to be determined? There is no suddenly acquired new mode of existence during the course of development. . . . The partition between life and death is thin even after birth. How can even the most expert mark a line between the viability and the nonviability of an unborn child?[72]

The eventful dividing line simply was not there. The selective application of unprincipled humanism may bring desirable results, but results that are always precarious. Straw men look whichever way they are pointed.

Yet, during the post-*Drobner* period, from 1921 to 1946, the year in which *Bonbrest v. Kotz* started the "spectacular and abrupt reversal" of the no-duty rule, a few courts in the legal hinterlands were holding that a prenatal duty did exist. In 1933 a Canadian case, *Mon-*

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71. 124 Tex. 347, 78 S.W.2d 944 (Comm'n of Appeals 1935), *rev'g*, 47 S.W.2d 901 (Tex. Civ. App. 1932).

72. *Id.* at 358-59, 78 S.W.2d at 949. The search never ends for an eventful dividing line, somewhere between conception and birth, to serve as the point of origin of rights. Medical knowledge has progressed to the point where the viability concept has been recognized as unsatisfactory and, consequently, has been largely abandoned as a line-drawing mechanism. *See* notes 40-42 and accompanying text *supra*. When old tools no longer work, new tools must be found. *See* e.g., Charles E. Kolb, "Proposed Human Life Statute: Abortion As Murder?" 67 A.B.A.J. 1122 (1981), where the author reasons:

(1) there exists somewhere between conception and birth a "point of psychophysical unity" at which point "personhood" is attained [perhaps "earned" would be a better verb: *see* note 45, *supra*];

(2) but it is "difficult" to locate this "point of psychophysical unity" ("[T]here probably never will be a definite answer. . ." *Id.* at 1125);

(3) and due process rights should not be accorded to those unborn who have not crossed the line of "psychophysical unity."

Underneath the words, the argument is the same that the Texas court used in 1935 to deny a cause of action for a negligently inflicted prenatal injury. It is equally circular.

treal Tramways v. Leveille,[73] considered the reasons against recovery that Pound had enumerated in *Drobner* and found them wanting. Largely on the authority of the civil code, it rejected the *pars matris* proposition. It handled the lack of authority argument with the observation that modern science appeared to be facilitating what was formerly an insuperable burden of proof. Pound's other reason, "practical inconvenience and possible injustice," was similarly given short shrift: the rules of evidence were up to the task of requiring proof of the elements of a claim. The argument that the liability of the railway should be determined in relation to the mother's ticket was likewise brushed aside. In disposing of an argument that had confounded earlier courts, the Canadian court said that contract was irrelevant; plaintiff was suing not because defendant had breached its contract with his mother, but because it had committed an independent tort against him.[74] *Leveille* thus rejected all of the reasons *Drobner* had given against recovery. The one thing lacking was a positive assertion of the reason *for* recovery—one reason whose singleness and unity would demonstrate it to be an axiom, not an argument. The principle, whatever it was, needed elucidation.

Elucidation, as an event, had already taken place. In 1924, a Pennsylvania county court had engaged in the *Drobner* weighing process and, like *Leveille*, found a duty. Judge Gordon's opinion in *Kine v. Zuckerman*[75] sparkles; it might have been Cardozo's dissent in *Drobner*. Unlike the court in *Leveille*, Judge Gordon's opinion adumbrated a principle, the significance of which we have difficulty fully appreciating today for the very reason that, ironically, since we have already assimilated the principle, it does not astonish us. It would have astonished Holmes in *Dietrich*, or the Irish judges in *Walker*, or certainly Justice Thomas in *Nugent*. It is the literal apotheosis of Justice Pound's resolution to "deal with things as they are":[76]

> [T]he injury which accompanied [the child] into the world it suffers now, when it has become a being capable of receiving injury. . . . Conceding the non-existence of the child before birth, we are forced to the conclusion that the natural consequence of the defendant's alleged

73. 4 D.L.R. 337 (1933).

74. Two other cases found for plaintiffs during this period, though they did so largely on the basis of civil statutes. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939), *aff'd per curiam*, 93 P.2d 562 (1939); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923). The second of these, interestingly, remained unpublished until 1949, well after Bonbrest v. Kotz had initiated the abrupt reversal of the well settled rule of no liability. The facts in *Cooper*, in which a negligently maintained ceiling fell on a pregnant tenant, were identical to these in an earlier, otherwise unremarkable case, Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901).

75. 4 Pa. D. & C. 227 (1924).

76. *See* text accompanying note 63 *supra*.

> negligence was the deprivation to the existing child of . . . a fully equipped body. This is the injury which the infant plaintiff is now suffering. . . .[77]

The "*nowness*" of the injury was the existential which the law had finally comprehended. Judge Gordon's statement is a positive enunciation of the realization which is at the core of the prenatal duty rule. Philosophical questions about when life began were better left to philosophers. The injury was now.[78] It was the final determinant. Man's expanding consciousness had discerned the injury.

XI. CONCLUSION

Analysis by inherent determinants is a method of setting out and investigating the critical points in the development of a rule of law.

The evolution of the prenatal duty rule occurred in two distinct stages. First was the period from 1884, when Holmes forcefully laid down the primal determinant, to 1921. During this period judges tended to fall back on innate prejudice and myth, in particular the *pars matris* proposition, in repeatedly denying recovery for prenatal injuries. The law of common carriers was probably the single most effective mechanism which perpetuated the no-duty rule because abstractions from that branch of the law jelled conveniently with the *pars matris* proposition. Yet, concern at a human level was plain, as shown by the words of sympathy for the injured and the frequently expressed wish

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77. 4 Pa. D. & C. at 230-31. Compare Judge Gordon's elucidation of the prenatal duty rule and Justice McGuire's elaboration of the same (Note 78, *infra*) with Justice Flaherty's concurring opinion in Speck v. Finegold, ___ Pa. ___, 439 A.2d 110, 115 (1981) (equally divided court affirms that child afflicted with hereditary disease does not have "wrongful life" action against negligent physicians):

> "The view that we cannot calculate the value of existence as compared to nonexistence is only one such hyper-scholastic rationale used to deny a cause of action in these cases. *Those holding such views are apparently able to overlook what is plain to see: that—in cases such as this—a diseased plaintiff exists* and, taking the allegations of the complaint as true, would not exist at all but for the negligence of the defendants." (Emphasis supplied).

78. Justice McGuire, who wrote the opinion in Bonbrest v. Kotz, likewise thought it important to emphasize the injury as an independent existential: "Here, however, we have a viable child - one capable of living outside the womb - and which has demonstrated its capacity to survive by *surviving* - are we to say *now* it has no *locus standi* in court or elsewhere?" 65 F. Supp. at 140 (emphasis in original). And, "It has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable *now* of being ushered into the visible world." 65 F. Supp. at 141 (emphasis in the original).

Aside from the momentous insight into the existential nowness of the injury, the argument was a demonstrably circular. The neonate had demonstrated its capacity to survive by surviving. (*see* note 35 *supra*). But it was also an answer to the illusory viability compromise which Justice Windes had created a half century earlier and which even today, in other sectors of the law, continues to exercise a strange influence over the minds of men and judges.

for legislative action. The viability compromise was a humanistically based attempt to maintain the no-duty rule and, at the same time, to lessen its statistical harshness. What went on during this stage of evolution was a conceptualistic exploration which gradually exhausted the legal entropy of the no-duty position. The culmination came in *Drobner v. Peters*, in which Justice Pound stressed the importance of dealing with things "as they are," but was unable to make the law comprehend the existential "*nowness*" of the injury.

The second stage of evolution was the period from 1921 to 1946. Courts either peremptorily reverted to the primal determinant or weighed reasons and voted accordingly. The use of the weighing process, however, eventually leads to acceptance of the emerging rule. This is so because, in a literal sense, in tort law there are no categorical reasons *against* allowing recovery for a negligently inflicted injury. There is only the injury and plenty of time for human perception and awareness to grow to the point of recognizing and verbalizing the one axiomatic reason *for* recovery. In the end, it is the only reason that counts.

The period after 1946 was the bandwagon era. The "spectacular and abrupt reversal" had already occurred, not in the pages of law reports, but in the mind, in the capacity of judges not merely to be objectively aware of an injury, as every judge was from Holmes to Pound, but to make room for it in the language of the law.