

TRANSCRIPT

Rev. Todd Wilken, Host

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"Christians in the Public Square: Abortion and the Right to Life"

Guest:

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WILKEN: It is fundamental in our way of thinking about ourselves as citizens of the United States, even as human beings period. Rights that attach to us not by virtue of government fiat, but by virtue of who we are as human beings – and in the parlance of the United States – as creatures of a Creator who endows us with certain rights

that cannot be separated from us as people, beginning with life.

Greetings, and welcome to *Issues, Etc.* I'm Todd Wilken. Thanks for tuning us in. Dr. John Warwick Montgomery continues our 5part series on *Christians in the Public Square* today. Part 4 today: "Abortion and

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the Right to Life." That's the first hour of *Issues, Etc.*

Dr. John Warwick Montgomery is Professor Emeritus at the University of Bedfordshire in England. He's a French Advocate, a Barrister-at-Law in England and Wales, a member of the Bar of the Supreme Court of the United States, distinguished Research Professor of Apologetics and Christian Thought at Patrick Henry College in Purcellville, VA, and author and editor of more than fifty books, including *Christians in the Public Square: Law, Gospel, and Public Policy.*

Dr. Montgomery, welcome back.

MONTGOMERY: Thank you.

WILKEN: Before we begin our subject proper today, hearkening back to something we were discussing last time in our series on *Christians in the Public Square*, that is, the display of religious symbols, I understand you came across an interesting quote. What is it?

MONTGOMERY: Well, Patrick Henry College is located in Purcellville, VA, which is very close to the historic town of Leesburg, and Leesburg has always had a crèche on public property in front of the courthouse, and of course this has posed problems. So the board decided that they would still want to have displays, but they would need to create a compromise policy. And this compromise policy allows ten different displays on the courthouse grounds, one display per area, and the applications are reviewed on a first-come, first-served basis. Well, as a result of this, five submissions have already been made for the coming holiday season. In addition to the crèche, the requests are for a wooden winter wonderland scene, a banner proclaiming reason during the holiday season, a banner from the American Atheists stating, "Religion is not the business of government. This is not a church." And finally, a display of Jediism. This would include a mannequin of Luke Skywalker and other people in a six-foot poster depicting the tenants of Jediism. There's also another application which is pending for a rosary crusade. Now, I found this very amusing, because it shows what happens when we don't simply follow the First Amendment and not allow religious displays on public property. The result of this compromise in Leesburg is going to be absolute chaos - ideological chaos and bedlam. All we need is Luke Skywalker next to Mary and Joseph during the Christmas season. The answer to this kind of thing is simply to recognize that the presentation of the Gospel is the Church's responsibility, and the responsibility of each individual Christian. This is not the responsibility of the Leesburg Town Council, or of government in general.

WILKEN: Well, turning to our subject, Abortion and the Right to Life, we've lived in the United States for the last 35+ years with the legal decision of Roe v. Wade. I know that it didn't start in 1973, but how recent is the legal thinking – legal thinking reflected in that landmark abortion decision?

MONTGOMERY: Well, the decision is actually not reflective of the historic common law at all. What the court did was to engage in a kind of sociological decision. As it were, the justices went up on the roof of the courthouse and checked the wind direction to see how the public attitude was toward issues of abortion. And they came to the conclusion that there was a diversity of opinion in the United States, a conflict in those who wanted the traditional protection of the unborn and those who wanted a free and open abortion policy. And so in Roe v. Wade, Blackman, writing for the majority, said that the court really couldn't determine when life began, because this was a philosophical and religious issue, and therefore the court would deal with this in terms of the right to privacy. Now, the right to privacy is not in the US Constitution at all. You will not find the word "privacy" there anywhere. There is, of course, a right to privacy, but this is a very, very limited right and the justices, in doing Roe v. Wade, went back to a Harvard Law Review article done by Warren and Brandyce, toward the end of the 19^{th} – beginning of the 20^{th} century. And they argued that abortion had to be free and open and unrestricted during the first three months of pregnancy – during the first trimester of pregnancy, I should say - because if it were restricted in any way, this would mean that the pregnant woman's privacy would be violated. People would know about it. And this is a truly bizarre decision. It is really a strange decision. And it has been criticized from a jurisprudential standpoint very, very heavily. The common law never took an attitude like this, and never brought the right to privacy into the question of abortion at all.

WILKEN: So before that, before the right to privacy was injected into this legal reasoning, was there a consensus in law, going back to time immemorial, about rights for the unborn?

MONTGOMERY: Well, here we have to distinguish between the criminal law and the civil law. In the case of the criminal law. abortion was not allowed prior to what was called "quickening." Now, this goes back to the medieval period. And the idea was that after it was evident that there was a live child in the womb, if the mother were injured or the child were killed, then this was a criminal act. But prior to that, before quickening, there could be an abortion without any criminal penalties. But what we need to recognize about that is that the only criterion employed here was the criterion that they had at the time to distinguish between a live baby and one that was dead. "Quickening," alreadv aoina bumpedy-bump-bump in the womb, this was all, in the later Middle Ages, that they had in order to be able to show that there was a life there. And since the killing of a human being is homicide, it's either murder or involuntary/voluntary homicide with dreadful penalties, including the death penalty, of course they did not want to prosecute anybody unless it was certain that the child was alive in the womb. That's the reasoning for the quickening criterion. In the civil law, the rights of the unborn from the moment of conception have always been recognized. And they still are today. For example: if I draw up my will and I say, "I will my property to all of my children living at the time of my decease," and let us say the night before I am run over by a steamroller in front of my house, my wife and I conceive. And therefore, there is an unborn child in my wife's womb – just a day old, for goodness' sake – at the time I'm run over by the steamroller, my will will distribute my property to include that unborn child.

WILKEN: Well, let's take a break right here, and when we come back, fascinating point in civil law recognizing, at least in terms of inheritance, the rights of the unborn child, even only a day old.

Dr. John Warwick Montgomery is our guest. We're talking about Abortion and the Right to Life and the history of legal thinking. Part four of our five-part series on Christians in the Public Square. Stay tuned.

[BREAK]

WILKEN: Welcome back to *Issues, Etc.* on this Wednesday afternoon, September the 15th. Dr. John Warwick Montgomery is our guest, right in the middle of making a point, Dr. Montgomery, that in civil law – and your illustration had to do with inheritance rights – those rights attach to a child conceived in the womb, no matter how young. Pick up where you left off.

MONTGOMERY: Yes, that's absolutely right. And this isn't just inheritance rights. This is the civil law in general. So, for

example, if a mother, a pregnant woman, is injured and there is negligence, and as a result of this, the child is born deformed or the child is hurt in some way through the negligence that takes place while the child is in the womb, it doesn't make any difference how young the child is. If the child reaches term, if the baby reaches term, and then is born alive, it is possible to sue on the child's behalf for the injuries that the child incurred through the negligent act. That is to say, the child has exactly the same civil right to sue, even though the child is unborn at the time of the injury, as any adult has. So the civil law has always realized that human life begins at conception - that you have a human being there from the very beginning. And as I said earlier, the only reason that the criminal law has limited this to a "quickening" is that the penalties for violating the criminal law are so much greater and this is a notion that developed in a time when we didn't have the scientific means to be sure that there was any live human being in the womb before evidence of quickening.

WILKEN: All right. Let's come back to the quickening aspect. It sounds as though it was simply a limit on the penalties – criminal penalties that would be imposed in certain situations where a child in the womb might be harmed, because of the limited understanding of embryology, to put it in shorthand. Am I reading that situation correctly, Dr. Montgomery?

MONTGOMERY: Well, yes, certainly in terms of the limited knowledge of embryology, really this was an evidence principle. It was the principle that said, "We don't have any proof that there is a live human being in the womb prior to quickening, and since people are innocent until proven guilty, and the burden of proof rests with the state or with the crown in order to bring about a conviction, we simply can't take the chance that someone might be jailed or put to death for the killing of an

unborn child when we're not sure that the unborn child was alive at the time."

WILKEN: Now, as our understanding of embryology has advanced, did, at the same time, the understanding of even criminal penalties that could be imposed advance with the law?

MONTGOMERY: Well, unfortunately no, The law is a very, very conservative operation. And this notion of quickening in the criminal law has remained on the books virtually everywhere. By statute now, usually in most jurisdictions, there is a time period placed on the books so that, for example, prior to 22 weeks, or prior to 26 weeks, it is presumed that the child has not reached the point where the child deserves legal protection. But the irony of that is that with advanced embryological studies and advanced medical knowledge, we know that there is indeed a living human being there. virtually from the moment of conception. That is to say, we have ultrasound that shows this sort of thing, and there are parents who are immensely curious as to whether it's going to be a boy or a girl, and that can be determined very, very young. So the criminal law has not kept up with modern medical knowledge in this regard. And certainly. the reason for this conservativism is, again, that we are so hesitant to condemn people who are innocent. We would rather have guilty people get off than innocent people condemned. The sad part about this is that that very excellent principle now allows for the destruction of unborn human life that certainly should never be destroyed.

WILKEN: So even without considering Roe v. Wade as a legal entity, it sounds like you're saying in other respects, the law really needs to catch up with what we know about the unborn.

MONTGOMERY: Yes, the criminal law certainly does. And therefore, the solution to this abortion tragedy in the United States is

not simply to reverse Roe v. Wade, which would throw the decision on abortion back to the individual states. If one does this, then the result is going to be that the liberal states, particularly those on the East and West Coasts, would undoubtedly continue with exactly the policy of Roe v. Wade, but even the conservative states inbetween the East and West Coasts, in general, they would still unhappily be operating with the approach of traditional medieval criminal law. What really is needed is to clean this thing up by bringing the criminal law up to the point of modern medical knowledge. And what does modern medical knowledge say? Well, in my books I've quoted Jules Carles of the National Centre for Scientific Research in France, who says, "There is no other point at which you can say a human being begins than the point of conception. Any point after this is entirely arbitrary."

WILKEN: Then there were some cases, if I'm not mistaken, several years ago, they were notorious murder cases out on the West Coast – and I cannot remember for the life of me the names of the individuals involved – but a husband was found to have murdered his wife. His wife, after the body was recovered, I believe, was discovered to have been pregnant. And the question was whether or not to charge this man with one or two murders. Where does the law presently stand on that?

MONTGOMERY: Well, the current state of the law would attempt to determine the age of the fetus. And if the fetus went beyond whatever the time limit in the local state law was, then it would be assumed – it would be presumed – that the child was capable of living outside of the womb, and therefore deserved legal protection, and two murders would be charged. But if the baby lived prior – if the baby was younger than that particular time limit, then the assumption would be, the presumption would be that there was no guarantee that the child would be able to live independently outside of the womb, and so only one murder would be charged. But as I say, these time limits are hopelessly out of step with modern medical knowledge. The fact of the matter is that if we are now talking about the ability to live independently outside of the mother, there are numerous instances where very, very young fetuses have been brought to term without any difficulty whatsoever.

WILKEN: Dr. John Warwick Montgomerv is Professor Emeritus at the University of Bedfordshire in England. He's a French Advocate, a Barrister-at-Law in England and Wales, member of the Bar of the Supreme Court of the United States. He's distinguished Research Professor of Apologetics and Christian Thought at Patrick Henry College in Purcellville, VA. author and editor of more than 50 books, including Christians in the Public Square: Law, Gospel, and Public Policy, and he is also the International Director of the International Academy of Apologetics, Evangelism, and Human Rights.

With about a minute here before we take our break, Dr. Montgomery, tell us a little bit about this Apologetic Academy.

MONTGOMERY: Well, it features the best apologists - the people who have had the greatest amount of experience in presenting the Gospel and giving the reasons for it. There are 20 people who are allowed to register for this each summer, and there are 4-5 lecturers. So this is a great studentteacher ratio, and during the 2 weeks in Strasbourg, France, the major objections to the truth of Christianity are dealt with across board in all various fields the of contemporary thought: philosophy, science, literature, history, law, and so forth. And the best answers are provided to show that the arguments of the unbeliever in these areas are hopelessly inadequate as compared with the solid reasons for the truth of the faith. There is plenty of time for discussion and the French Rhineland offers a grand cultural background for all of this. So any listener who wants to become a better presenter of the Gospel, a better evangelist, will realize in a secular society such as ours, objections to the faith are inevitable from all quarters. And it's necessary in order to present the Gospel effectively to be able to offer answers to these objections. So it's a 2-week opportunity to go to the only institute of advanced studies in this area anywhere. And it's not expensive, and there are a limited number of scholarships available. It's something that people ought to get at as soon as possible because of the limited number of people we can take each year.

WILKEN: Folks, you'll find information about the International Academy of Apologetics, Evangelism, and Human Rights at our website, issuesetc.org. Click "Listen on Demand."

When we come back, another half hour with Dr. John Warwick Montgomery. Part 4 of our 5-part series on *Christians in the Public Square*. We're talking about abortion and the right to life. When we come back, did Roe v. Wade speak at all, or totally ignore the rights of the unborn?

[BREAK]

WILKEN: Welcome back to *Issues, Etc.* Dr. John Warwick Montgomery is our guest. 25 more minutes with him as we talk about abortion and the right to life on this Wednesday afternoon, September the 15th.

Dr. Montgomery, back to Roe v. Wade. Did, in this decision – and I know it's not just one decision, but it's actually kind of a cluster of Supreme Court decisions here that we need to consider – were the rights of the unborn spoken to, taken into consideration, described or dismissed? What role did they play?

MONTGOMERY: Well, the decision created abortion-on-demand during the first trimester of pregnancy. That means it

eliminated any possible legal protection for the unborn during that period of time. That means that no state can prevent, limit, reduce, do anything that would take away the untrammeled right of the pregnant woman to abort the fetus during that first trimester. Now, after that, the Court said there could be limited protections during the second trimester and there could be verv extensive protections during the third So trimester of pregnancy. what's happened? The states that are more conservative and traditional, those in the Midwest, for example, have done a great deal to offer protections during the second and third trimesters. And the liberal states have done as little as they can possibly do to offer this protection. But the real point has to do with the first trimester. Unlike most civilized countries in the world today, the United States offers zero protection for the unborn during that first trimester. In England, for example, the law is that an abortion, no matter whether it's during the first, second, or third trimester - those distinctions are not made. No matter what the situation is, as far as pregnancy is concerned, an abortion cannot take place unless it has the approval of two licensed physicians; unless there's an emergency situation, in which one licensed physician is required to make this decision, and abortions can only take place in registered medical facilities. Now, that certainly has not eliminated abortions. But it is a protection, after all, for the unborn. In the United States, during the first trimester of pregnancy. not even those limited protections are available.

WILKEN: Why offer protections in second and third? Why did the Roe Court decide to do that? It seems rather arbitrary. If there are no protections afforded in the first trimester, for what possible reason would, suddenly, protections begin to kick in as the child begins to develop? **MONTGOMERY:** Well, this is a very excellent question, because it shows the arbitrariness of trying to draw any lines during pregnancy. Clearly, the Supreme Court realized that as one moves through the nine months of pregnancy, it becomes less and less possible to ignore the fact that you're dealing with a human being. And so they grudgingly provide some degree of protection, and the degree of protection increases with the length of time that the pregnancy is going on. But this is utterly arbitrary. There is no possible rationale to divide up this period as they do. What some people, who want to solve this problem by compromise, have tried to do is to distinguish between the time when the fetus, or the unborn child, would be able to survive outside of the womb independently. And they have said, "Well, when the child reaches that point, the child deserves protection. When the child has not reached that point, the child doesn't deserve protection." But this also is silly. Why? Because no human being, even after birth. can possibly survive without any kind of dependency on other people. The fact of the matter is that we are all interlocked in society. None of us operates in complete independence and is able to survive on his own. Even Robinson Crusoe needed his Friday. And as John Donne said, "You ask for whom the bell tolls? It tolls for thee." All life is interlocked. So the distinction between the child in the womb who could. theoretically, operate outside of the womb without the umbilical cord and the child inside is a completely arbitrary notion as well. We all have our umbilical cords, whether we're in the womb or outside of the womb.

WILKEN: Dr. Montgomery, we've had as a guest on this program the author of the Born Alive Infants Protection Act, Hadley Arkes, who wrote a book called *Natural Rights and the Right to Choose,* wherein he argued – and I thought it was very insightful – he simply asked the question, "When does the

right to choose begin?" Asking if a woman has this as a natural right, that is, something to which she is born, or to which she is entitled because she's a human being, do other rights attach to women early in the womb? Simply asking, does it come from government, does it come from cultural fiat? And kind of painting the pro-choicers into a corner, unable to answer the question as to when might a little female fetus gain her right to choose. What do you think?

MONTGOMERY: Yes, well, that's very clever. It's certainly hoisting the pro-choice person on his own petard, as they say. The fundamental question here is, how do you define a human being? Do you define a human being in terms of the genetic chromosomal pattern, or do you define a human being in terms of the degree of development of the person, or the functionality of the person – what the person is able to do? The pro-choice people invariably take the latter approach. Their approach is that one is really only a human being when one can function as a human being, and that leaves the definition of functioning, of course, up to the individual pro-choicer, or if that occurs societally, it's usually left up to government, which is a truly frightening situation. There is the incident – and I cite this in my writings – of a particular philosopher, a liberal philosopher by the name of Tooley, who has said, "We really ought to be able, legally, to kill even the early-born up to about six months, because there isn't evidence that the child, up to about six months, understands relationships or engages in thinking." Now, Tooley is a philosopher, you see, and so Tooley is defining humanity in terms of his definition of functioning, which is thinking, relating, as philosophers presumably do. But my goodness, this is just awful, because it leaves the definition of functioning to whoever the person is in charge of this – to the doctors, or as I say, to government. The only rational and legitimate way of defining humanity is to say, "If it has the genetic chromosomal patterns of a human being, it's a human being." It will ultimately function, but the functioning is not the way by which you take care of this. Next week when we talk about euthanasia, we'll see that the same people that use this functional approach are the ones who say, "Well, when a human being gets to the point where he or she is vegetative or is no longer able to operate productively in society, then we should have the right to snuff the person." This shows the horrible dangers of defining the human being on a functional basis instead of on a genetic chromosomal basis.

WILKEN: We've only got about a minute here before we take our next break, Dr. Montgomery, but it seems to me that, at least legally, we've walked this ground earlier in US history on the issue of whether or not then-slaves, or perhaps afterward freed slaves, were, what, "as human" as the white citizens of the United States? Your thoughts, with about a minute.

MONTGOMERY: Oh, quite right. And after the break, you may ask me about a little encounter I had with one of the most celebrated philosophers of law of our time, Ronald Dworkin, who has just retired as Professor of Jurisprudence at Oxford, who tried to solve the right to life/pro-choice issue by a peculiar compromise. And I got onto this publicly with him, because the slavery analogy is right on the money where the abortion issue is concerned.

WILKEN: Dr. John Warwick Montgomery is our guest. We've got 10 more minutes with him on this Wednesday afternoon, the 15th of September. On the other side of this break, talking about abortion and the right to life, part 4 of our 5-part series on *Christians in the Public Square*. I invite your questions or your comments – time to take them on the other side. 1-877-623-6943, 877-623-6943. talkback@issuesetc.org is our instudio email address, or send us a tweet @issuesetc.

Dr. Montgomery is author and editor of more than 50 books, including *Christians in the Public Square: Law, Gospel, and Public Policy*. You can find out more about his books under the "Listen on Demand" page at issuesetc.org.

[BREAK]

WILKEN: Welcome back to *Issues, Etc.* I'm Todd Wilken. We're talking about abortion and the right to life with Dr. John Warwick Montgomery.

Okay, Dr. Montgomery, pick up where you left off on your story. You were talking about a legal scholar, Ronald Dworkin, and his – what you called his peculiar compromise that you felt the need to respond to.

MONTGOMERY: Well, a few years ago, Dworkin did a book entitled Life's Dominion. And in this, he argued that really, this right to life/pro-choice thing is a religious issue. It's a religious issue because people on both sides are dealing with ultimate values. The pro-choice people are saying the life of the pregnant woman is the highest value and she should not have to be subjected to any kind of legal regulations that would cause her harm, and of course the pro-life people are saying that the unborn child is a value which is of such tremendous consequence that one must not permit abortion. So said Dworkin, "This is clearly a religious conflict, and government should stay out of this kind of thing. Government should not regulate this area." And he was thinking, of course, in terms of First Amendment separation of church and state. Well, after the book was published, he gave a public lecture in London on the subject. And a lot of people attended this. I was one of those who attended, and there was an open question period immediately following. And I jumped up – I think mine was the first question. And I said, "Professor Dworkin,

you are an American, even though your professorship is here in England, and that's exactly my situation. And as Americans, I wonder if your position would therefore be that the Amendments passed after the Emancipation Proclamation, and after the Civil War, outlawing slavery, should really never have been passed at all because, of course, the slavery issue was a religious issue. The people on both sides tried to defend their position Biblically and much of the abolition activities on both sides were presented in a religious context." I said, "I suppose, therefore, your position would be that there shouldn't be any laws that would have protected people against slavery, right? You would have allowed slavery simply to continue because what you're saying is that you would not want to have any kind of government regulation that would prohibit abortion." Well, there was a long pause and he said, "I don't accept the analogy." Well, he should have accepted the analogy because the analogy is absolutely tight. The problem during slavery was that people who had the full genetic chromosomal evidence of being human were treated in a non-human fashion. They were treated as chattels and the law in the southern states is very interesting. I have in my library the complete slave cases during the period when slavery was allowed before the Civil War. And in these cases, human beings are treated exactly as you would treat a farm horse, or whatever - in spite of the fact that they had all the evidence of being human. Now, this is exactly what is taking place today in the right to abort – the unlimited right to abort - during that first trimester of pregnancy. Human beings who have a complete genetic chromosomal proof of being human are being treated as objects. They are able to be killed, and this is not homicide at all. It's just as if you were stamping on a fly, or killing a mouse. And therefore what we've done is to lower the value that we place on human life, and whenever that takes place in a society, it hurts the society immensely. Look what happened to German society when they were willing to maltreat Jews and political prisoners and those who objected to the regime. In spite of the fact that they were human, they were treated in an inhuman manner. And what this did was to create an inhuman society.

WILKEN: Dr. Montgomery, we've got about a minute or so before we've got to wrap up. Make the case, if you would, with respect to Roe v. Wade, that it was and remains bad law. Let us count the ways that the case can be made.

MONTGOMERY: Well, the case, first of all, did not take into account the historic protection of the unborn in Anglo-American law. And that in itself is a dreadful condemnation of a Supreme Court decision. A Supreme Court decision needs to take into account the grand principles of the legal tradition. And Roe v. Wade did not do this. The case is really a piece of sociology, not an example of proper jurisprudence. And the terrible thing about it is that it lowers the understanding in American law of the value of the human being. You don't see this instantly, because, of course, the fetus at the beginning doesn't look a whole lot like a human being. But the issue is not what a looks like. We're against person discrimination, aren't we, on the basis of the fact that someone doesn't look the way we'd like them to look. We'd feel terrible if the Elephant Man was treated as he was simply because he didn't look like anybody else. Roe v. Wade makes it possible to eliminate human beings without any compunction, and without any kind of legal protection for them. Therefore, it is probably the most tragic Supreme Court decision in American history, after the decision prior to the Civil War that justified slavery.

WILKEN: We'll conclude our series on *Christians in the Public Square* next week with Dr. John Warwick Montgomery. We'll

be talking about euthanasia and the right to die movement.

Dr. John Warwick Montgomery is Professor Emeritus at the University of Bedfordshire in England, French Advocate, a Barrister-at-Law in England and Wales, a member of the Bar of the Supreme Court of the United States. He serves as distinguished Research Professor of Apologetics and Christian Thought at Patrick Henry College in Purcellville, VA. He's authored and edited more than 50 books, including *Christians in the Public Square: Law, Gospel, and Public Policy.*

Dr. Montgomery, thank you.

MONTGOMERY: You're most welcome.

WILKEN: The unborn are simply that: unborn. They exist. They are not subhuman, unhuman, inhuman. They are simply unborn human beings. If we believe that these rights that, at the very beginning

of our conversation, we said are inalienable - that is, they cannot be separated from us as human beings; they attach to us by virtue of the fact that we are human beings. If we believe that they are ours today, ask yourself this question if you're one of those who doesn't believe the unborn deserves full protection. Just ask yourself: When didn't you deserve full protection? You were once unborn, too, weren't you? Now, somebody protected you, even though you may – if you were after 1973, even though the law didn't protect you, someone must have protected you. You wouldn't be here today if they didn't - your mother, your father, everyone around. But when did you suddenly become deserving of the law's protection? It must be; it can only be logically, scientifically, philosophically when you came into existence at your conception, and even while you were unborn.

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